KELSEN AND METAPHYSICS: AN IMMANENT CRITIQUE OF THE PURE THEORY OF LAW

Kelsen e a Metafísica: Uma Crítica Imanente da Teoria Pura do Direito

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ABSTRACT

The current paper, placed on the domain of legal philosophy, intends to analyze Hans Kelsen's pure theory of law in its relation with metaphysics, presenting a contrast between a strong anti-metaphysical rhetoric and a typically metaphysical line of reasoning about the final standard of legal validity in a positive legal order. By the immanent critique of Kelsen's speech, specially with the aid of some theoretical clues which were provided by Evgeny Pasukanis, it is possible to realize that the so called pure theory of law, despite its ostensive rejection against the kantian idea of a practical reason, of a kind of thinking which could result in legal obligations, ends up, in a similar way, finding support in last instance on a merely rational category, devoid of positivity. Kelsen's basic norm, as the highest conceivable norm in mind, follows the metaphysical logic of Anselm's ontological argument about the existence of God

Keywords: Kelsen; law; metaphysics; Kant; basic norm

RESUMO

O presente artigo, situado no domínio da filosofia do direito, pretende analisar a teoria pura do direito de Hans Kelsen em sua relação com a metafísica, apresentando um contraste entre uma forte retórica antimetafísica e uma linha de argumentação tipicamente metafísica sobre o padrão final de validade jurídica numa ordem jurídica positiva. Pela crítica imanente do discurso de Kelsen, especialmente com a ajuda de algumas pistas teóricas fornecidas por Evgeni Pachukanis, pode-se perceber que a assim chamada teoria pura do direito, apesar de sua ostensiva rejeição contra a ideia kantiana de uma razão prática, de um tipo de pensamento que poderia resultar em obrigações jurídicas, acaba, de maneira similar, encontrando suporte em última instância numa categoria meramente racional, destituída de positividade. A norma fundamental de Kelsen, como a norma mais elevada que se pode conceber mentalmente, segue a lógica metafísica do argumento ontológico de Anselmo sobre a existência de Deus

Palavras-chave: Kelsen; direito; metafísica; Kant; norma fundamental

INTRODUCTION

Hans Kelsen established himself as one of the most influential authors of legal dogmatics and as one of the main names in legal positivism, although his positions are not fully accepted in contemporary legal thought. Its influence on the hegemonic understanding of law is undeniable, so it is still relevant to discuss Kelsen's theory.

One of the most prominent aspects of Kelsen's elaboration is his decidedly anti-metaphysical discourse, which, in the name of a given understanding of science in a more general sense, extols the positivity of law (considered as a coercive normative order) as the only possible object for the scientific analysis of the legal phenomenon. As is well known, this results in the intransigent rejection of natural law and the effort to methodologically purify legal theory.

We intend, however, to problematize Kelsen's relationship with metaphysics. Despite remaining largely consistent with its methodological premises, the proposal of a "pure theory of law" faces serious difficulties in the way it intends to explain the validity of the legal order in the last instance. In fact, the category of the fundamental norm is one of the most controversial in relation to Kelsen's work, and this concept opens the way for an immanent critique of the conception sustained by the author.

It should be noted that, in immanent criticism, the standard of measurement of criticism is set by the object itself, so that the determination of the integrity of knowledge takes the form of a comparison of the thing to be known with itself, so to speak. In the adequate synthesis of Luiz Repa (2019, p. 282-283), "immanent criticism is a comparison of the object with itself: a comparison between what the truth is for him and its effectiveness as knowing something at a time". As far as our subject is concerned, it is therefore a matter of confronting the pure theory of law with its own reflection in the mirror, so that it, in its movement of presentation, exposes its own inconsistencies.

Under the prism of immanent criticism, Kelsen's fight against metaphysical residues in legal theory will prove to be a failure. In a surprising twist, it is clear that, in order to maintain the methodological rigor of its approach, pure theory of law was forced to support its positivist theoretical edifice with foundations that distanced itself from the positivity frameworks that were so emphatically affirmed in Kelsen's work. .

We will try to demonstrate that Kelsen incurred in the metaphysics that he so wanted to extirpate from the field of legal knowledge, and that this happened, particularly, in his effort to final validation of the legal system through the infamous fundamental norm. Therefore, it will be essential not only to explain the premises of the pure theory of law, but also to highlight the unique way in which Kelsen relates to Kantian philosophy. That done, and after following some clues left

by Evgeni Pachukanis, we will be able to understand the unusual metaphysical outcome of the enterprise known as “pure theory of law”.

Finally, it should be noted, for methodological purposes, that the proposal of an immanent critique of Kelsen's thought could only lead to Pachukanis, an author who adopted the same type of critique in relation to legal dogmatics. Just as Pachukanis takes legal categories as they present themselves[1], just to lay them bare according to the dialectical movement of concepts, we also intend to deal with the kelsenian theory as it stands, demonstrating, from the development of its internal elements, how it incurs in the denial of what it proposes. It is a matter of measuring the pure theory of law with the ruler it establishes itself.

1. THE POSITIVIST PREMISES OF PURE THEORY OF LAW

As Simone Goyard-Fabre (2002, p. 73-74) observes, legal positivism is driven by a “will to scientificity” that rebels against the metaphysics of natural law, and which is expressed in the postulate of the self-sufficiency of positive law[2]. All transcendence in the face of positive law, in this perspective, must be eliminated from the field of legal science, admitting as an object of study only the normativity that arises from a positivization on the part of the authority or that is expressly recognized by the bodies of that authority[3].

[1] “One can agree with Karner that the science of law begins where jurisprudence ends, but it does not follow that the science of law should purely and simply throw out the fundamental abstractions that express the essence of the legal form” (PACHUKANIS, 2017, p. 71). With this observation, Pachukanis rejects the idea that the fundamental legal concepts would be mere doctrinal conventions, that is, purely artificial intellectual constructions. The recurrence and generalization of these concepts points to an objectivity to be investigated. For the same reason, Marx did not arbitrarily discard the concepts of classical political economy, but rather took them as an appearance to be, in the same act, recognized and doubted.

[2] The anti-metaphysical impulse of the contemporary era meant that even the persistent Dworkinian critique of juspositivism had to “pay as tribute”, so to speak, the presentation of a program of natural rights that took refuge in an alternative nomenclature. When referring to fundamental moral rights that would function as political assets, Ronald Dworkin (2002, p. xv) conveniently asserted that such categories would be devoid of any particular metaphysical characteristics. In a somewhat defensive tone, he justified himself: “There must be a theory based on concepts of rights that are natural, in the sense that they are not the product of any legislation, convention or hypothetical contract. I have avoided this expression because it has, for many people, metaphysical associations that disqualify it. They think that natural rights are spectral attributes that primitive man used as amulets, and that they introduced into civilization to ward off tyranny” (DWORKIN, 2002, p. 273).

[3] Positive law extends beyond the norm that is set by an act of authority. Arthur Kaufmann (2007, p. 282) observes that the positivity of law is not limited to the norm that is set by an empowered will, since it is also applicable to the most spontaneous expressions of the legal phenomenon, as is the case of jurisprudence and mores. Even without being “posted”, therefore, customary law is consolidated by virtue of a repeated and lasting practice that makes it positive, that is, that transforms it into a regular and empirically observable phenomenon (a positive datum).

The juspositivist refutation of metaphysics within the scope of legal theory, in fact, finds in Kelsen one of its main spokespersons. By intending to expel from the science of law the elements reputed as "metajuridical", the Kelsenian elaboration reinforced the aspect of the positivity of legal norms, doing it in the name of a scientific ideal. For Kelsen (2003, p. xi), the pure theory of law fights the dissociated notions of positive data under the banners of objectivity and accuracy, considered the ideal standard of all science.

Kelsen celebrated his own conception by postulating that the pure theory of law finally achieved the feat of separating legal science from the field of politics, which took place through an approximation between legal thought and what he called the "general theory of science". " (KELSEN, 2003, p. xii). According to the Prague-born jurist, the great scientific merit of his theory was due to the direct contact it promoted between legal theory and the more general criteria of scientific rigor, that is, the references claimed as definitive for all sciences.

The project of methodological purity in law, as supported by Kelsen, adopts a rhetoric of axiological exemption, that is, of detachment from political, moral and cultural values, something that is seen not only as possible, but also as necessary, under penalty of compromising the scientific nature of legal research. In this reading, "the scientific jurist does not identify with any value, not even with the legal value described by him" (KELSEN, 2003, p. 77). In any case, it is known that Kelsen's "purity" "refers to doctrine and not to law", since law, "Kelsen well knows, is a field of political dispute and the affirmation of values" (SGARBI , 2009, p. 33).

The valuation of law as a theoretical object implies, in the perspective in question, a renunciation of the scientific attitude, a posture that would be reduced to a legal policy or, worse, to a metaphysics. In the understanding of Kelsen (2003, p. 87), an opposition must be made between a metaphysical-religious worldview, which leads to a metaphysical theory of law, based on natural law, and a scientific worldview, whose matter of interest could only be the positive law. In "General Theory of Law and the State", the author invokes the positivity of law in opposition to the very idea of justice, in order to rigorously delimit the scientific object of the pure theory of law:

> Justice is an irrational idea. However indispensable it may be to the volition and action of men, it is not subject to cognition. (...) Such cognition can understand only a positive order evidenced by objectively determinable acts. This order is positive law. Only this can be the object of science; that alone is the object of a pure theory of law, which is a science, not a metaphysics of law. It presents the law as it is, without defending it by calling it just. Or condemn it by calling it unjust. It seeks a real and possible right, not the correct one. It is, in this sense, a radically realistic and empirical theory. She declines to evaluate positive law (KELSEN, 2000, p. 19).

In the correct observation of Carlos Santiago Nino (2010, p. 35), thinkers such as Kelsen and Ross consider that the only judgments that can be evaluated as true or false are judgments with empirical content (analytical judgments would be an exception to this rule, because they are true or false depending on their logical structure). This criterion excludes moral statements from the scope of scientific investigation. Hence the Kelsenian condemnation of natural law, which would suffer from an undue promiscuity between moral evaluation and identification of positive law, between valuation and knowledge. This is because natural law, as a suprapositive normative order, could only be seen as an evaluative idealization that, as such, does not find support in experience, in the sensible world, which would convert it into an irremediably metaphysical category. And the purpose of metaphysical theories, in Kelsen's understanding (2000, p. 18), is not to rationally explain reality, but to emotionally accept or reject them based on the agreement or divorce between empirical reality and ideas. transcendental. This transcendentalism, in turn, is seen as a factor that prevents the objective cognition of law, even to the point of allowing freedom of choice, from an evaluative point of view, between a conservative standard and a revolutionary standard[4].

In its critique of natural law doctrine, Kelsen's theory rejects the dualism between natural law and positive law, something that refers to the metaphysical dualism between reality and the Platonic idea, between the sensible world of imperfect copies and the world of original ideas, which would be the invisible archetype of real things (KELSEN, 2000, p. 17). With this attitude, there is a refusal of any and all jusnaturalist attempts to indicate a “right in itself”, or even an original and authentic right that appears as a normative reference for positive law. In this order of considerations, positivism sticks to positive law as a human product that, in Kelsen (2000, p. 622-623), shows itself to be devoid of any absolute value. Its validity is always hypothetical-relative, correlated with a must-be that is typical of the positivized norm, and not of nature, which emphasizes Kelsen's fidelity to the so-called "law of Hume", by which one cannot infer prescriptions (deontic statements).) of a simple act of description (indicative utterance).

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[4] This Kelsenian objection to natural law thinking is very similar to the well-known criticism that Alf Ross formulated against doctrines of natural law, particularly in his blunt anti-metaphysical speech: “Like a prostitute, natural law is available to all. There is no ideology that cannot be defended by resorting to natural law. And, indeed, how could it be otherwise, considering that the main foundation of all natural law lies in a direct particular apprehension, an evident contemplation, an intuition? Why won't my intuition be as good as someone else's? Evidence as a criterion of truth explains the totally arbitrary character of metaphysical assertions. It places itself above every force of intersubjective control and leaves the door open to unlimited imagination and dogmatism” (ROSS, 2000, p. 304-305).

Law in Kelsen (2000, p. 166), therefore, is always positive law, and its positivity is based on the factual element of creation or annulment through human acts, regardless of the morality that can be attributed to such acts. from any subjective judgment. Unlike natural law, which presupposes a normatively derived directly from a state of affairs or a natural order, legal positivism conceives only the law that is produced by human conduct, and which thus assumes the profile of an artifact[5], of a creation of the spirit that results from the fact of authority, a thesis that, by the way, was already defended by John Austin. According to Austinian thought, the theory of law does not comprise all kinds of positive rules, but only those that are instituted by a sovereign authority to a body of subjects that habitually obeys them (AUSTIN, 1998, p. 11).

The methodological attitude of Kelsen's positivism, it should be noted, reveals remarkable affinities with the Vienna Circle, especially with regard to the anti-metaphysical ideals contained in the manifesto "The scientific conception of the world[6]". Apparently, the "general theory of science" that is extolled in the preface to "The pure theory of law" corresponds, at least in what is essential, to the proposal that was presented in the text by Hahn, Neurath and Carnap. After all, what can be seen in the so-called "scientific conception of the world" is a discourse that celebrates the "anti-metaphysical research of facts", considered as "the way of thinking grounded in experience and averse to speculation" (HAHN; NEURATH; CARNAP, 1986, p. 6).

It is worth adding to the reasons for this characterization the totalizing and unifying character that the manifesto in favor of the "scientific conception of the world" gives to its notion of science. The document extols the empiricist and positivist character of scientific knowledge ("there is only empirical knowledge, based on given knowledge") and claims the application of logical analysis as a method, from which it follows that "the effort of scientific work aims to achieve the unified science, through the application of such logical analysis to empirical material" (HAHN; NEURATH; CARNAP, 1986, p. 12). This unification of science, in turn, would be given through a

[5] According to Kenneth Himma's understanding, the perception of law as an artifact is the common ground that brings together positivists of all stripes. Whether the socially relevant fact is the sovereign's coercive capacity or the practical convergence of legal officials, in both cases there is a presumption of an authority as a function of a contingent event that, however, is always a creation, an artificial product of community instances (HIMMA, 2019, p. 68). In Kelsen, this conception appears in the basic idea of the variability of positive law according to the arbitrary will of the legislator, according to which law can be constructed as any artifact, without being constrained by maxims that are attributed to nature or that express a valuation. absolute (KELSEN, 2003, p. 19).

[6] "Although the Austrian jurist was not directly involved with names such as the mathematician Hans Hahn or the physicist Phillip Frank, and, at the limit, did not share all the principles that fed the engine of that project, the Vienna Circle defended – from the years 1930 – ideas that proved to be important in the making of the pure theory of law (the work of the same name was made in 1934). In the 1929 manifesto, signed by the philosopher Rudolf Carnap, Hans Hahn and the economist and sociologist Otto Neurath, it was pointed out that, at the root of the group's work, there was not the assumption of a free attitude of metaphysics, but rather a posture radically antimetaphysical" (AKAMINE JR., 2017, p. 16-17).

neutral system of formulas and concepts, impregnated with a symbolism that would be free from the impurities present in historical languages.

It can be said that Kelsen drew from the Vienna Circle the appreciation for logical analysis, even if his theory is not entirely consistent with analytic philosophy. This method, in any case, "is what essentially distinguishes recent positivism and empiricism from the older one, more biological and psychological in its orientation" (HAHN; NEURATH; CARNAP, 1986, p. 10). This is why pure theory of law is closer to the positivist science of the 20th century, based not on the naturalistic concept of causality (very suitable for a "social physics" in the Comtian style), but rather on the category of imputation.

Kelsen postulates that, as far as the description of a normative order of conduct is concerned, the principle of imputation applies instead of the principle of causality. What is verified in legal propositions is the use of imputation, a use that, at first, seems analogous to that of causality, as it involves reasoning of consequence: under the conditions provided by the legal order, a given coercion must be carried out. However, the difference between causality and imputation can be found in the general formula of the principles and in their determining factors. In the principle of causality, it is postulated that "if A is, then B will be the result"; in the imputation principle, it is said that "if A is, then B must be". Thus, there is a spontaneous factor in the first, while, in the second, it depends on a volitional act of authority (KELSEN, 2003, p. 86-87).

As we will see later, the legacy of logical analysis will be of great importance for Kelsen's theory of legal validity, and in particular in the role that the fundamental norm will play. In any case, this premise is already manifested in the first pages of "The Pure Theory of Law", either with regard to the rhetoric of scientific neutrality, or in the understanding of the legal norm as a scheme of objective attribution of meaning to behaviors, that is, , as an interpretation scheme:

> The external fact that, in accordance with its objective meaning, constitutes a legal act (lawful or unlawful), taking place in space and time, is, for that very reason, a sensorially perceptible event, a part of nature, determined, as such, by the law of causality. Simply, this event as such, as an element of the system of nature, is not an object of specifically legal knowledge – it is not, purely and simply, something legal. What transforms this fact into a legal act (lawful or unlawful) is not its facticity, it is not its natural being, that is, its being as determined by the law of causality and enclosed in the system of nature, but its objective meaning. that is linked to that act, the meaning it has. The specific legal meaning, its particular legal significance, receives the fact in question through a norm that refers to it with its content, which gives it legal significance, so that the act can be interpreted according to this standard (KELSEN, 2003, p. 4).

Legal normativity in Kelsen, therefore, is not intelligible solely on the basis of empirical (sensitive) facts, although it cannot do without them. It is essential to seek the meaning of these facts from a logical method of observation that takes the norm itself as a reference for the legal rationalization of conducts that, in themselves, are devoid of any a priori meaning. And it will be thanks to this logical perspective provided by legal norms that the fact of authority will be able, in Kelsen's thought, to impose itself in a way that is legally significant on the facticity of conduct[7].

2. KELSEN AND HIS RELATIONSHIP WITH KANTIAN PHILOSOPHY

The figure of imputation that is used by Kelsen consists of a concept of a Kantian matrix. Kant (2017, p. 38) calls imputation the judgment by which a person is qualified as the author of a certain act, something that, in terms of law, will be accompanied by legal consequences that must be instituted with legal force. However, Kantian theory presupposes a necessary rational foundation for the law, that is, a universal standard of correctness and legitimacy for the content to be legally imputed, and which could even be contrasted with positive legislation that proves to be irrational. In this aspect, Kelsen moved away from Kant, even proposing to "correct" the Kantian approach in the name of an anti-metaphysical scientific ideal, as we will see in this topic.

Kant's legal thought is inseparable from the project of a practical reason, that is, from the proposal of a normative reference valid for all rational beings. This universal reference to human action means a rupture with the "cosmological-ethical" perspective of the ancients, the "theological-ethical" perspective of the medievals and the utilitarian perspective (FERRY, 2009, p. 74). In its practical dimension, Kantian philosophy introduced a rationality centered on man as an abstract individual, as a person in a sense that disregards natural and divine determinations, as well as the contingencies of interests.

[7] Kelsen completes his reasoning by stating that "the norm that gives the act the meaning of a legal (or anti-legal) act is itself produced by a legal act, which, in turn, receives its legal significance from another norm. What makes a fact constitute a legal execution of a sentence of condemnation to capital punishment and not a homicide, this quality - which cannot be captured by the senses - only emerges through this mental operation: confrontation with the penal code and with the criminal procedure code" (KELSEN, 2003, p. 4).

Kant's use of reason could not be merely speculative. The critical procedure, when posed as a method, requires a practical use in morals, politics and law (GOYARD-FABRE, 2002, p. 320). Nothing can be exempt from criticism[8], nothing can escape inquiry by reason, since such a procedure, as a transcendent method, is always similar to itself, whatever the object on which its application is carried out.

Understanding the theory of law as part of a practical reason to be formulated in terms of a more general metaphysics of morals, Kant explicitly assumes the task of developing a metaphysics of behavior with regard to its heteronomous regulation, which would lead to a doctrine of law that could only be constructed as a “system emanating from reason” (KANT, 2017, p. 5). It is about seeking a rational criterion that allows the coexistence between the different wills, something that could not be achieved only through the generalization of empirical data.

Already in his time, Kant resented the suspicions that were raised against metaphysics. Instead of opposing it to science, the author esteemed it as the only science from which a perfect finish could be expected, since this knowledge “is nothing but the inventory of everything we possess through pure reason, systematically organized” (KANT, 2015, p. 23). The real enemy of scientific knowledge was not metaphysics, but dogmatism, thus considered as the pretension to advance knowledge only on the basis of concepts and principles, that is, without resorting to an investigation of the way in which reason can reach them[9]. Now, the remedy for this evil could only be the critique of the faculty of knowledge through categories that could transcend the empirical world.

As Jean-Cassien Billier (1998, p. 28) rightly observes, the movement of criticism of pure reason in Immanuel Kant aims to combat the dogmatic tendencies of reason, something that was seen in thinkers like Leibniz and Wolff, but without that would bring philosophy back to the skepticism of David Hume, who would have gone too far in refuting the excesses of dogmatism. The Kantian challenge, therefore, was the construction of an anti-dogmatic metaphysics, able to inquire about its own limits and to open itself to the data of the sensible world, but without renouncing the transcendent, purely rational categories, as a guide for thought.

[8] “Our epoch is the true epoch of criticism to which everything has to submit. Religion, through its sacredness, and legislation, through its majesty, generally want to escape it. In this way, however, they raise a legitimate suspicion against themselves and cannot aspire to the sincere respect that reason pays only to that which has been able to withstand its free and public test” (KANT, 2015, p. 19, nota de rodapé).

[9] Kant (1985, p. 19) even cited dogmatism as a primary stage of metaphysics, followed by a skeptical attitude and, finally, rehabilitation under the criticism of pure reason.

With regard to law, this position led Kant to oppose the elementary premise of juspositivism. Kantian reflection, now taking place as practical reason, refuses to reduce law to its empirical aspect, that is, to the positive laws of a given country at a given moment; it embodies justice as a necessary claim to correctness, to use a more current expression, since this object would be unknowable through empirical principles. Only the transcendence of reason could, in its metaphysical adventures, guarantee a legitimate theoretical treatment of a subject of this nature[10]. It follows, as a conclusion, that “a merely empirical doctrine of law is (like the wooden head of Phaedrus’ fable) a head that may be beautiful, but which, unfortunately, has no brain” (KANT, 2017, p. 42).

Therefore, as much as Kelsen praises Kantian philosophy, even under the revisionist lens of the neo-Kantianism of the Marburg School, he could not assimilate the aspect of practical reason that is expressed in the proposal of a metaphysics of customs, whose result would be the formulation of an indeclinable moral parameter for positive law, typical of a natural-law vision. Hence the Kelsenian attempt to criticize metaphysics through a deepening of the transcendental method that was elaborated by Kant himself, as we read in a letter from the famous jurist to Renato Treves:

> Precisely because the Pure Theory of Law was the first to attempt to develop Kant's philosophy into a theory of positive law (and did not get bogged down in a theory of natural law, as Stammler did), it marks in a sense a step beyond Kant, whose own legal theory rejected the transcendental method. Nevertheless, Pure Theory of Law has been a more faithful curator of Kant's intellectual legacy than any of the other legal philosophies that draw on Kant. The Pure Theory of Law made Kantian philosophy productive for law for the first time by developing it further rather than relying on the literalness of Kant's own legal philosophy[11] (KELSEN, 1998, p. 172).

In Kelsen's view, therefore, Kant was not "Kantian" enough in his own theory of law, he did not have the courage to make the same move in the philosophy of law that he made in the philosophy of knowledge, a problem that would also be verifiable in the philosophy of law work by neo-Kantian Hermann Cohen[12]. They lacked the willingness to assume an ethical relativism peculiar

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[10] “In the first place, as regards the sources of metaphysical knowledge, they cannot, according to your concept, be empirical. Its principles (to which not only its axioms belong, but also its fundamental concepts) must therefore never be taken from experience: it must be knowledge, not physical, but metaphysical, that is, knowledge that goes beyond experience. Therefore, neither external experience, which is the source of physics proper, nor internal experience, which constitutes the foundation of empirical psychology, serves as its foundation. It is therefore a priori knowledge or knowledge of pure understanding and pure reason” (KANT, 1988, p. 23-24).
[11] We inform you that all quotations from works in a foreign language were freely translated by us.
[12] Despite criticizing Cohen for his inability to “ascend” to positivism in the field of law, Kelsen was strongly influenced by the Marburg School in the field of philosophy of knowledge. It was under the inspiration of this school that the Kelsenian theory embarked on the proposal of what it qualified as methodological purity (MÉTALL, 1976, p. 22-23).

to an approach to law that considered it only in its formal validity, leaving aside certain demands of moral content in the process of identifying the legality of norms.

By proposing a right arising from reason, Kant gives vent to the thesis of a practical reason, a reason that not only clarifies, but also obliges; a reason that, in addition to knowledge, produces duties, thus assuming a normative feature - which will not be admitted by the Kelsenian reading, which firmly clings to a distinction between the will of normative acts and the knowledge of cognitive acts. “The Kantian concept of practical reason”, postulates Kelsen (1986, p. 101), “is, thus, the result of an inadmissible confusion of two faculties of man, essentially different from each other and also differentiated by Kant”.

One notices in Kelsen an intransigent opposition to the thesis of a legislating reason. Practical reason is denounced as a contradictory knowledge, a knowledge that brings together knowing and willing, which would be inconceivable. The norms of the “law of reason” assumed by Kant could not be positively fixed, since they emanate from a faculty of knowledge. According to the Kelsenian understanding, knowledge allows the verification of really existing norms from acts of will of an authority, as well as allowing the production of concepts about such acts. Norms, however, cannot be created by a cognitive faculty (KELSEN, 1986, p. 10).

With this position, Kelsen condemns as metaphysics all theories that intend to demonstrate the existence of a right based on reason, and not on a human will that is empowered by positive authority. This is what makes the Kantian elaboration on law, totally embedded in the spirit of practical reason, unacceptable.

Despite Kelsen's pronounced anti-metaphysical speech, there were those who accused him of incurring in what he fought so hard. We refer to the Russian jurist Evgeni Pachukanis, especially regarding his critique of normativism.

3. THE PACHUKANIAN CRITIQUE OF KELSEN'S THEORY

The Marxist theory of law formulated by Evgeni Pachukanis aims to determine the material substratum of the categories that make law a socially specific form, and the legal element of societies, in this conception, revolves around the subject of law and the legal relationships that subjects establish in their daily practice. And what underlies this subjectivity is the universal exchange of goods, this expedient in which individuals behave materially as agents with rights and duties, constituting the mold of social exchange in capitalist modernity.

It is in the constancy of mercantile exchanges that individuals are socially abstracted as subjects of law. By entering into acts of exchange, agents consecrate themselves as free, equal and proprietary beings: free to dispose of goods and services through formal consent, equal as operators leveled by the market and owners of the merchandise they offer, even if that merchandise is, in the case of wage earners, their own workforce – so that capitalist exploitation itself is carried out through an act of commercialization that inevitably assumes the legal form of the contract (PACHUKANIS, 2017, p. 138). The attributes of legal subjectivity, therefore, arise from the formal aspects of market relations.

In Pachukanis' understanding, law must be examined not at the formal level of enacted norms, not as a mere product of the legal will of the State, but rather at the material level at which the weaving of relations between the subjects of law takes place. The author brings the example of credit to illustrate his position: "it cannot be said that the relationship between creditor and debtor is generated by a coercive order for debt collection existing in a given State", given that credit is materially fixed in the market, so that the existing normative order "ensures, guarantees, but in no way generates the relationship" (PACHUKANIS, 2017, p. 115). What is premised on this type of assertion is the idea that "the law does not create the individual bearer of goods who acts as a subject endowed with freedom, equality and property", since it "already finds him socially constituted in this way", providing for accidental aspects in relation to the main substance" (BIONDI, 2020, p. 232).

In Pachukanis, therefore, there is a primacy of legal relations over norms, a scheme that completely inverts the Kelsenian logic[13]. Prioritizing norms would be to adopt an overly immediate and empiricist point of view, given that the legal norm, by serving as a basis for the legal demands of the parties, can function as a practical starting point for the jurist, but not necessarily as a scientific starting point. This corresponds to the simplest category of law, the most indecomposable concept, in which the specificity of the legal form is contained. It is the subject of law, without which there are no properly legal norms:

> The legal order is distinguished from any other social order precisely because it is based on isolated private subjects. The norm of law acquires its differentia specifica, which sets it apart from the general mass of regulatory norms – moral, aesthetic, utilitarian, etc. – precisely because it presupposes the person endowed

[13] In pure theory of law, the legal relationship is a mere complex of legal duties, a trivial consequence of the rules of law. Marriage, illustratively, is seen not as a complex of sexual and economic relations between two individuals, but rather as a legal institute resulting from a certain normative arrangement. It can only be conceived as the product of a relationship between legal norms or between facts determined by these norms, and without this determination, it would not exist, just as the reasons for conduct would not exist (KELSEN, 2003, p. 187-188).

> with rights and who, moreover, actively exercises a claim (PACHUKANIS, 2017, p. 128-129).

Pachukanis completely opposes the pure theory of law. The Marxist jurist not only rejects the centrality of norms in the examination of law, but also vehemently opposes the emptying of the social content of norms for the purpose of methodological "purification". In terms of the Pachukanian critique, Kelsen took the neo-Kantian methodology to the absurd when he placed the pure normative must-be as the authentic object of legal research. This would seriously compromise the scientific character of the Kelsenian enterprise, which casts out the historical and social aspects of law in favor of a logical and hierarchical scale of norms[14].

In this order of considerations, Pachukanis (2017, p. 94) concludes that "the extreme formalism of the normative school (Kelsen) undoubtedly expresses the general decadent tendency of recent bourgeois scientific thought", even going so far as to flirt with a complete rupture with the reality of fact. Such criticism is aimed at reducing the existence of norms to their validity, which, in turn, is centrally based on normative means of validation, so that social practice itself appears in this scheme only as a limit-situation, under the form of a minimum of effectiveness that conditions the validity of legal norms.

The issue of legal validity in Kelsen, due to its formal and inter-normative approach, also aroused the criticism of legal realism, especially with regard to the fundamental norm. On this particular point, one can mention the objection of Alf Ross (2000, p. 96-97), for whom the appeal to such an artificial category demonstrates that, at a given moment in the analysis, the relationship of the norm with reality can no longer be postponed or abstracted from. Knowledge of positive law could not ignore social effectiveness, and Kelsen undermined his analysis from the start by adopting a merely logical criterion of validity. However, Pachukanis' criticism is even more corrosive: if Ross promotes a shift from valid norms to current norms, that is, from the perspective of the abstract legislator to the perspective of jurisprudential tendencies, the Pachukanian theory claims an immersion of law in social relations, exposing all the vacuity of the Kelsenian methodology.

As it could not be otherwise, Pachukanis touches on the delicate point of the fundamental norm, the category that, for Kelsen, explains the common foundation of validity of the norms of the legal order, giving it a sense of unity beyond the positivized constitution itself:

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[14] "A general theory of law that does not set out to explain anything, which in advance turns its back on the facts of reality, that is, on social life, and deals with norms without even being interested in their origin (a meta-legal question!), nor because of its connection with any material interests, it can, of course, claim the title of theory only in the sense in which, for example, the theory of the game of chess is spoken of. Such a theory has nothing in common with science. In fact, it does not propose to investigate the legal form as a historical form, because it does not have in mind the investigation of what exists. That is why, to use a vulgar expression, "'nothing is expected' of her" (PACHUKANIS, 2017, p. 74).

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> But what – one might ask – is the infamous internal legality of the normative, that is, legal order? It consists, answers Kelsen, in which each isolated legal norm is deduced from a more general one, and this in turn from an even more general one, until we arrive at that fundamental one or, as Kelsen says, an original legal norm or hypothesis. This fundamental norm constitutes the highest norm-setting authority of a given society. Kelsen is quick to warn that the must-be that ends in this norm, like any legal must-be, bears a relative and conditional character, but the jurist cannot go beyond the norm, because it is only with it that the domain of the law begins right (PACHUKANIS, 2017, p. 230).

The fundamental norm, then, is "the highest norm-setting authority" in a society, elevated to the point of becoming mysterious, knowable only through a logical hypothesis. It is the sublimated expression, that is, "purified" in the methodological plane, of the obligation of law in its full sense, regardless of the categories that confer materiality and historicity to the legal phenomenon (as the subject of law in its intimate connection with the practices merchants). "By ridding dogmatic jurisprudence of these 'substantial' concepts and transforming it into the logic of what is legally due", concludes Pachukanis (2017, p. 233), "Kelsen extracted the vital meaning from it and transformed it into a peculiar scholasticism, extremely close to medieval theology".

Is the comparison between pure legal theory and medieval theology just a rhetorical exaggeration on the part of Pachukanis? We think not. A more rigorous appreciation of the so-called "fundamental norm" may indicate a typically metaphysical argumentative structure in Kelsen's work, which will find a surprising parallel in medieval philosophy.

4. THE PURE THEORY OF LAW AND ITS METAPHYSICAL OUTCOME

Kelsen (2003, p. 215) very clearly postulates that "the basis of validity of a norm can only be the validity of another norm", adding that "a norm that represents the basis of validity of another norm is figuratively designated as a superior norm, by comparison with a norm that is, in relation to it, an inferior norm". This leads, on the logical plane, to the problem of an endless chain of validity and the need to overcome it, which could only happen, in pure theory of law, by appealing to the category of the fundamental norm.

The fundamental norm is the device that closes the chain of validation, it is the norm "which is assumed to be the last and highest", and which, as such, "has to be presupposed, since it cannot be set by an authority", whose competence would have to be based on an even higher standard" (KELSEN, 2003, p. 217). This norm, therefore, is the original ought-to-be from which the other

normative duties of a given legal order derive. And so it is because Kelsen, in a reasoning inspired by "Hume's law", claims that one cannot extract duties from mere factual reality. Sociological, political, economic and cultural facts, in this sense, are always external to legal creation.

Therefore, the fundamental norm is an indispensable tool for Kelsen's methodological "purity". As a pure original must-be, this norm constitutes itself as an empty reference of validity, guaranteeing that any and all content can be right. What is inferred from the pure theory of law, therefore, is that the only necessary substance in law is authority, which manifests itself as an equally necessary hierarchical ordering of norms. Everything else is contingent, since it is only important to consider the fundamental norm as the source of all legality:

> In this sense, the fundamental norm is the establishment of the fundamental fact of legal creation and can, in these terms, be designated as a constitution in the logical-legal sense, to distinguish it from the Constitution in the legal-positive sense. It is the starting point of a process: the process of creating positive law. It is not an established norm, established by custom or by the act of a juridical body, it is not a positive norm, but a presupposed norm, insofar as the constituent body is considered to be the highest authority and therefore cannot be regarded as receiving constituent power through another norm, set by a higher authority (KELSEN, 2003, p. 222).

It should not be forgotten that the fundamental norm is not totally detached from the factual world. Kelsen (2003, p.224) clarifies that it "refers immediately to a determined Constitution, effectively established", and for that very reason presupposes a global effectiveness of the legal order that validates[15] – a "concession" to reality, so to speak. In any case, the conceptual meaning of the fundamental norm is to ensure the closure of legal thought, being a guarantor category of a fully endogenous nature of law, at least for "scientific" purposes, as if science demanded the emptying of phenomena instead of the search for substantial connections.

Kelsen's consistency with the premises of his pure theory, however, cost him the consistency of his theory on the validity of legal norms. The disquieting and embarrassing image of a positive legal order based on a merely thought-out norm is, in fact, an overly burdensome blemish for an author who insisted so obstinately on the positivity of law - which is as true of the thesis of the objectivity of law vis-à-vis the moral values that circulate in society as for the thesis of the differentiation between legal propositions (theoretical judgments about the legal phenomenon) and legal norms (the legal phenomenon itself).

[15] Aulis Aarnio (1987, p. 35) points out that, regarding the fundamental norm, an issue belonging to the world of being (efficacy) becomes a necessary condition for the binding character (validity) of the legal system. This is, however, only a concession made grudgingly and without any theoretical development. No wonder, Kelsen does not present any measurement criterion on the effectiveness of legal norms. It is unclear whether effectiveness means compliance by duty-holders or enforcement by legal bodies of authorized sanctions (RAZ, 2012, p. 125).

Now, when Kelsen resorts to the fundamental norm, he refers to a “logical-transcendental presupposition” that conditions the interpretation of norms as legal acts, but a presupposition that, at the same time, would be shared by the community of jurists, representing what everyone legal practitioners think about the validity of the legal order[16]. From this a sharp contradiction arises for the pure theory of law. The initial rigid distinction between knowledge and will, between knowing and willing, a claim that Kelsen had launched to discredit Kantian practical reason, falls to the ground. As Cláudio Michelon Junior (2004, p. 106-107) observes, the postulation of the fundamental norm appears in the pure theory of law as a subjective event, as a kind of will, on the part of the jurist, to interpret physical facts as legal facts. There is a prescriptive stance according to which whoever intends to understand the law must assume the logical postulate of a presupposed norm.

In Kelsen, the fundamental norm as a category of legal knowledge also has a creative role, defining the objectivity of this knowledge - which in Kant would not be possible, since the Kantian independence of reality from the subject who knows it does not admit this type of intervention. Thus, Kelsen breaks with Kant also from the epistemological point of view, as he subordinates the condition of objective knowledge about the law (the fundamental norm) to a subjective decision of the researcher, in such a way that the object becomes dependent on the subject (MICHELON JR., p. 108). Therefore, the self-portrait of Kelsen's work is not supported as a more consequential Kantian approach to legal thought.

Still on the fundamental norm, its validity is taken as an unquestionable objective datum, which enables it to function as a major premise of validity in syllogistic reasoning. The example of this reasoning that appears in Kelsen, not by chance, comes from theology:

> Indeed, a theological ethic that considers God as the highest legislative authority cannot affirm the fact that anyone else has commanded us to obey God's will. This would actually be an authority superordinated to God. And if the rule: we must obey God's orders is accepted as set by God, it cannot be the basis for the validity of the rules set by God, since it too is a rule set by God. Nor can theological ethics as such have a legislating authority. The norm: we must obey God's orders cannot, therefore, as a fundamental norm, be the subjective meaning of any person's act of will. If, however, the fundamental norm cannot be the subjective meaning of an act of will, then it can only be the content of an act of thought (KELSEN, 2003, p. 226-227).

[16] To alleviate the contradiction of a positive legal order that would be based on a fictitious, merely thought-out norm, Kelsen (2003, p. 228) seeks to give an air of triviality to the fundamental norm, arguing that it “only raises awareness of what all jurists do (...) when they conceive Law exclusively as positive law”, so that the category in question would be “only the result of an analysis of the process that positivist legal knowledge has always used”.

The ultimate level of authority, therefore, must be logically presupposed. No agent could be given the function of substantiating this last instance, as this would de-constitute it as such insofar as it would become subordinate to the will of that agent. It only remains, then, to assume that there is no normative sphere higher than what is considered the maximum level of normativity. Otherwise, the analysis goes beyond the limits of positive law, reaching a "metajuridical" theme such as power[17].

It is important to note that Kelsen resolutely abstracts from the uncomfortable issue of state power. Thanks to the fundamental norm, that is, to the unitary foundation of validity of the normative order, the law presents the peculiarity of regulating its own creation. The principle that generates legal unity is the establishment of a legal rule by means of another legal rule, which also applies to the State as a sovereign order. The line of reasoning used for law is the same for the state[18]: "if the state is sovereign", reflects Kelsen (1938, p. 43), "it is because the validity and, therefore, the unity of this system of rules that we call state order, derives, in the last analysis, from a rule that it is supposed to be the first of the fundamental norms", that is, of a norm "which it is no longer necessary to justify or deduce".

The fundamental norm appears in Kelsen's theory, therefore, as a plaster applicable to any type of normative hierarchy that one wants to represent through a logical structure. More than that, the use of theological ethics as an example sounds like a peculiar faulty act, since it is precisely in the concept of God, especially in the way in which medieval metaphysics developed it, that the basis of Kelsen's reasoning can be found, if not.

When Kelsen refers to God, in his theologically-inspired illustration, as the "highest legislating instance", drawing a parallel with the fundamental norm as the highest normative instance of law and the state, he indicates levels of normativity that, conceptually speaking, they do not admit norms that are hierarchically superior to them. What is seen in the author of the pure

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[17] "With the problem of the foundation of the fundamental norm, we leave the theory of positive law and enter the secular discussion around the foundation, or rather, the justification, in an absolute sense, of power" (BOBBIO, 1995, p. 63). Although he is also a positivist, Norberto Bobbio (1995, p. 66) does not treat power as a taboo in his theory of law: "If law is a set of rules with reinforced effectiveness, this means that a legal system is unthinkable without the exercise of force, that is, without a power. Placing power as the ultimate foundation of a positive legal order does not mean reducing law to force, but simply recognizing that force is necessary for the realization of law".

[18] The concept of State in Kelsen's thought is subsumed under its normativist concept of law. In the words of the Austrian jurist himself, "the apparatus of coercion, in which it is generally intended to see the characteristic of the State, is identical to the legal order. The rules that constitute the state order are the rules of law. The legal norm is the rule by virtue of which the imputation to the State takes place, which, as subjects of state acts, is the personification of the legal order" (KELSEN, 1938, p. 25).

theory of law, therefore, is a thesis whose reasoning is similar to the famous "ontological argument", whose origin goes back to the metaphysics of Anselm of Canterbury.

According to Anselmo's metaphysical thesis (1998, p. 87-88), God is the highest being that can be imagined. In this conception, God is so grandiose and true conceptually that it would not even be possible to consider his inexistence. Even more: no human intelligence could think of something or someone that was superior to God, because the creature could not suppose the existence of a being superior to its own creator. Well then: in secular, elegantly logical language and with all the trappings of the scientism that marked the end of the 19th century and the beginning of the 20th century, Kelsen builds his theory on the culmination of the chain of legal validation in a similar way to the ontological argument. of Anselm[19]. Legal creation here imitates creation in a biblical sense. It is enough to substitute, mutatis mutandis, God for the fundamental norm and the same rhetorical device is used. If God, creator of all things, is the highest entity that human thought can conceive, the fundamental norm is also the source of all legal creation, the highest norm that the jurist can imagine – and he does so. , according to Kelsen, albeit unconsciously, as there seems to be no room for skepticism or agnosticism in the practical life of jurists.

CONCLUSION

Kelsen's theory of legal validity, based on the concept of a fundamental norm, not only contradicts the discourse of the necessary positivity of law for the purpose of scientific appreciation, but also uses a metaphysical expedient in its way of reasoning. The absolute superiority of the fundamental norm expresses a structure of thought very similar to that used by Anselm of Canterbury to argue the existence of God.

We do not postulate in any way that Kelsen is directly inspired by medieval philosophy, because that would be to mischaracterize him as a positivist. We only found that the proposal of a fundamental norm, in its argumentative structure, contains a strong analogy with the type of metaphysical reasoning present in Saint Anselm, something that, according to the Kelsenian project for legal theory, implies a serious commitment.

[19] Interestingly, the ontological argument was refuted by Kant, that philosopher so celebrated by Kelsen, to the point of concluding that Kant himself was not Kantian enough for his liking. Luc Ferry (2009, p. 30-31) points out that "Kant's main objection is substantially the following: the logical possibility, that is, the non-contradictory character of a concept in no way guarantees its objectivity, nor does the fact that a reality corresponds to it", for the existence of a category or a being in thought does not necessarily prove its real existence.

The fundamental norm must be considered as a metaphysical concept insofar as such a category does not require an empirical demonstration, asserting itself as a self-sufficient ideality. Of course, a minimum (even if not explained) of effectiveness is required for this norm (as for all norms in Kelsen's view), but this fact in itself is not to be confused with the thesis of a norm that is explained so only because of its logical superiority over the others. Its supreme position in the hierarchy of the order asserts itself only as a rational imposition, devoid of positivity. A norm of this type, therefore, is not so different from a Leibnizian axiom, from a device applicable to a more geometrico system that, in terms of a Kantian critique, would sin for dogmatism.

Kelsen qualifies moral systems and theories of natural law as static systems, as they would be based on self-evident norms, given in reason, from which a whole normative series could be deduced, which could only be admitted under the canon of a legislating reason that the author himself rejects it (KELSEN, 2003, p. 218). Now, the fundamental norm, as a logical hypothesis to be consciously or unconsciously embraced by jurists, as a thought norm, aspires to the same legislative position, since its content is the pure obligation of law, it is the validity of the legal order as a presumption absolute and unavoidable – as a true rational postulate. In this way, the Kelsenian theory expels metaphysics through the front door with much pomp and haughtiness, but without noticing its sneaky return through the window.

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