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Minkkinen, Panu

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PANU MINKKINEN

WHY IS LAW A NORMATIVE DISCIPLINE? ON HANS KELSEN'S 'NORMOLOGY'

ABSTRACT. What does it mean to claim of law that it is a normative discipline? Can the answer be so simple that one need merely refer to law's normative object of study and the conclusions that the legal participant must allegedly draw from this? What, in any case, *is* a 'normative discipline'? The essay attempts to address these questions by analysing Hans Kelsen's 'normological' theory of law through his work on sovereignty and especially by focusing on the normative character of Kelsen's epistemological claims regarding law. A theoretical critique of Kelsen is offered through Edmund Husserl's phenomenological account of logic as a normative discipline.

KEY WORDS: epistemology, law, logic, norms, phenomenology, pure theory of law

A PARTICIPANT'S PERSPECTIVE

In the interdisciplinary settings of contemporary research-intensive university environments, legal scholars are often required to explicate the claim that law, unlike the other disciplines that examine human society, is by nature *normative*. A standard reply will take the following form. Law is a normative discipline simply because it studies legal norms, and, the argument continues, this gives the discipline a specific character that might best be described in terms of a *participant's* perspective. Like someone playing a game with established rules, the lawyer ruling from the bench, along with her academic colleague, are said to be involved in law as participants – observing it from the inside as a collection of norms that must, at least in principle, be acknowledged as legitimate. Otherwise, so the argument concludes, the work of the lawyer would become senseless, as would a game with a player insisting on playing but without recognising the rules of the game. As legal academics, this is the

disciplinary creed that we are by default expected to follow and the ethos that we are supposed to relay to our students.

There is a certain conformism, even conservatism, built into the participant's perspective and this, no doubt, is one of the reasons why the emergence of a 'law and society' type of approach has proved so productive. While the very 'internality' of the participant's perspective seems to restrict the critique of law to an internal or immanent logic, a 'law and society' approach makes possible an *external* criticism of law, through which we might question the justifiability of even its most fundamental principles. The player, caught up in the logic of the game, can make improvements and adjustments as to how the game is played – but she cannot question the overall legitimacy of the game itself without being redefined as an 'outsider'. But for the socio-legal scholar, law is not merely deficient or imperfect, with its critical scope confined to calling for improvements and reform. Law might now also be shown to be 'unacceptable' and 'wrong' in a more fundamental way, and the criteria that are used to evaluate law can in such an approach be generated from outside the field of law itself, be they political, ethical, moral, and so forth.

But whatever the fruits of such a move, a certain question remains intact, and important: what does it actually *mean*, in the first place, to claim that law is a normative discipline? What are the wider implications of such a claim? Can the answer be so simple that one need merely refer to law's normative object of study and the conclusions that the legal participant must allegedly draw from this? Why is law a "normative discipline"?

In order to illuminate these questions and their relevance to the discipline of law, I wish to begin with a well-known standpoint that is often regarded as both external to that discipline, and extreme in its implications: what we might call Michel Foucault's 'antilegalism'. In developing his genealogical project in the first part of the *History of Sexuality*, Foucault depicts his position in the following enigmatic way:

One remains attached to a certain image of power-law, of power-sovereignty, which was traced out by the theoreticians of right and the monarchic institution. It is this image we must break free of, that is, of the theoretical privilege of law and sovereignty, if we wish to analyse power within the concrete and historical

framework of its operations. We must construct an analytics of power that no longer takes law as a model and a code.¹

In legal scholarship, Foucault's outspoken reservations regarding law have all too often been understood as a critique of law as a social institution. Foucault's commentaries would, then, be interpreted as a critical assessment of the prison system, of forensic psychiatry, of criminology – in short, as a political criticism of the legal instruments of power. Without wanting to deny the social or political merits of such an approach, I would like to suggest the possibility of an alternative interpretation. If we situate this 'antilegal' position within the context of Foucault's other work from the same period, law would rather have something to do with the way in which knowledge is produced.² So when Foucault talks about a 'theoretical privilege' and about law as 'model and code', he is, if I am right, referring to the normative matrices that regulate the production of knowledge in modern societies.³

The aim of this article is to demonstrate how law, understood as a normative discipline, also regulates the production of legal knowledge. I wish to argue that the normative character of law is displayed on two different levels: firstly, that of the legal norms themselves, as the objects studied; and, secondly, the various conceptual, epistemological and methodological rules that regulate the way in which the discipline is carried out. I would like to contest the conventional understanding that it is the normative object that binds the discipline of law to the rather restricted perspective of the participant and argue that, on the contrary, it is the disciplinary framework of law understood as a science that introduces these restrictions as norms. And further, the two levels of normative

¹ M. Foucault, *La volonté de savoir. Histoire de la sexualité 1* (Paris: Gallimard, 1976), pp. 118–9. In English, M. Foucault, *The History of Sexuality. Volume 1: An Introduction* (New York, NY: Vintage Books, 1980), p. 90.

² Foucault's chair at the *Collège de France* that he inherited from the Hegelian philosopher Jean Hyppolite in 1970 was renamed from 'the history of philosophical thinking' to 'the history of systems of thought'. On the appointment, see e.g. D. Eribon, *Michel Foucault* [so.], trans. B. Wing (London: Faber and Faber, 1992), pp. 212–23.

³ On the critique of 'sociological' interpretations of Foucault, see e.g. V. Tadros, 'Between Governance and Discipline: The Law and Michel Foucault', *Oxford Journal of Legal Studies* 18/1 (1998), 75–103 and V. Voruz, 'The Politics of the Culture of Control: Undoing Genealogy', *Economy and Society* 34/1 (2005), 154–72.

object and disciplinary rules seem to be curiously bound together in a particular understanding of positive law.

LAW AND 'NORMOLOGY'

In order to illustrate the way in which the discipline of law regulates the production of legal knowledge, I wish to turn to an example from the heart of the legal tradition, namely Hans Kelsen's pure theory of law.⁴ An important, albeit often neglected, contribution to Kelsen's theory is his relatively unknown treatise on law and sovereignty – originally published in 1920 but, unfortunately, never translated into English.⁵ The book is divided into two parts. The second part articulates perhaps for the first time Kelsen's well-known "pacifistic" solution to the antinomy of multiple national jurisdictions: although there are no theoretical grounds for the primacy of international law over sovereign national legal systems, it is a practical necessity if war is to be avoided.⁶ But much less has been written about the book's first part. Here Kelsen attempts to formulate a theory of sovereignty as, following the book's general subtitle, a "contribution to a pure theory of law". During his 'classical period', extending roughly from the turn of the century to the publication of the first edition of *The Pure Theory of Law* in 1934,⁷ Kelsen's project was to redefine the requirements of a normative discipline from a variety of angles involving the relationship

⁴ An excellent analysis of Kelsen's pure theory of law, also sensitive to the theoretical concerns of this article, can be found in I. Stewart, 'The Critical Legal Science of Hans Kelsen', *Journal of Law and Society* 17/3 (1990), 273–308. See also S. Papaefthymiou, 'The House that Kelsen Built: On Some "Antinomies" in Kelsen's Thought', *Archiv für Rechts- und Sozialphilosophie*, Beiheft Nr. 98 (2004), 101–10.

⁵ H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*. 2. Neudruck der 2. Auflage, Tübingen 1928 (Aalen: Scientia, 1981). See however H. Kelsen, 'Sovereignty and International Law', *The Georgetown Law Journal* 48/2 (1960), 627–40.

⁶ As later stated in e.g. H. Kelsen, *General Theory of Law and State*. Translated by Anders Wedberg (New York, NY: (Russell & Russell) 1961), p. 388.

⁷ H. Kelsen, *Reine Rechtslehre. Einleitung in die Rechtswissenschaftliche Problematik*. 1. Auflage (Aalen: Scientia, 1994). Published in English as H. Kelsen, *Introduction to the Problems of Legal Theory*. Translated by Bonnie Litschewski Paulson and Stanley L. Paulson. With an introduction by Stanley L. Paulson (Oxford: Clarendon Press, 1992).

between state and law.⁸ I will try to recapitulate the theoretical arguments of the first part of Kelsen's book with the help of seven propositions on sovereignty that should, at least as far as Kelsen is concerned, follow one another logically. With these propositions I hope to be able to show the rather complex way in which the pure theory of law constitutes a normative discipline. I hope also, in the process, to clarify a few widely held misconceptions about Kelsen's particular brand of legal positivism.

Firstly, like most of the German tradition in law in general, for Kelsen sovereignty is always state sovereignty. Sovereignty is an essential attribute of the state, and it should be studied as such. And because Kelsen holds that the state can be *normatively* examined only in relation to its legal structure, a theory of state sovereignty must consequently also be a legal theory.⁹ Kelsen is here making an intentional distinction between a factual and a normative discipline, i.e. between what he understands as a sociological approach to the state – as represented in the work of e.g. Max Weber and Georg Jellinek – and a purely normative approach that one might call “law proper”.¹⁰ Of course, Kelsen's choice of this distinction might be criticised – there are other choosable perspectives on offer. But if we grant the plausibility, at least, of this initial step, and take in earnest Kelsen's attempts at defining the parameters of law as a specifically *normative* discipline, the claims that follow seem to adhere to a remarkably consistent accuracy and logic.

Secondly, because the theory of state sovereignty is a *legal* and normative theory, the state itself cannot be understood as a factual entity, i.e. as a set of empirical regularities that apply to the ‘real world’. Instead the state must be conceived as a personification of

⁸ On the early Kelsen in general, see C. Jabloner, ‘Kelsen and His Circle: The Viennese Years’, *European Journal of International Law* 9(2) (1998), 368–87. Even though these early years make up theoretically the most consistent elaborations of the pure theory of law, central texts (e.g. the *Hauptprobleme* and the *Allgemeine Staatslehre*) remain unavailable in English. On the problems of ‘periodising’ Kelsen's work, see S.L. Paulson, ‘Four Phases in Hans Kelsen's Legal Theory – Reflections on a Periodization’, *Oxford Journal of Legal Studies* 18(1) (1998), 153–66.

⁹ Kelsen, *Das Problem der Souveränität*, pp. 11–2.

¹⁰ Cf. H. Kelsen, *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht*. 2. photomechanisch gedruckte Aufl. (Tübingen: Mohr, 1928) and H. Kelsen, *Über Grenzen zwischen juristischer und soziologischer Methode*. Neudr. d. Ausg. Tübingen 1911 (Aalen: Scientia, 1970). See also Kelsen, *General Theory of Law and State*, pp. 162–78.

its legal structure, i.e. as a legal person. In other words, if the state is understood as an expression of its legal structure, then state sovereignty must by necessity also be the sovereignty of law. A legal theory of state sovereignty is, then, a theory of the sovereignty of law.¹¹ With his second claim, then, Kelsen is insisting that a legal or a normative theory of state sovereignty is ultimately equivalent to a theory of the sovereignty of the state's legal structure, i.e. of law. A state is normatively speaking sovereign only to the extent that the law that it personifies is sovereign.¹²

Thirdly, a legal theory of sovereignty must be, using Kelsen's own neologism, 'normological' (*normlogisch*). This normological requirement encompasses two claims. On the one hand, the object of any legal theory must be normative. Law belongs to the normative world of the 'ought', where all possible objects of scientific study must be normative entities such as laws, norms and rules. On the other hand, these normative entities must also be in a logical relationship to one another. Like all other advocates of such a normative approach, Kelsen claims that one cannot infer a norm from factual circumstances: an 'ought' from an 'is'. A norm is a norm only if it is valid, and the validity of any given norm can only be inferred from the validity of a higher norm. If this were not the case, we could not talk about legal knowledge as Kelsen understands it.¹³ A normative theory of state sovereignty is, then, a theory about legal norms and their logical interrelations.¹⁴

Fourthly, then, the logical system of legal norms that a normative theory constructs is a layered hierarchical structure including norms of varying normative force: there are higher norms and lower norms, and the validity of the latter is always inferred from the former. But because the validity of even the highest norm must logically be inferred from something higher, we must hypothesise something that Kelsen at this point still calls the original norm, i.e. a logical precondition for the layered pyramid-like structure of higher and lower norms that will later develop into the infamous "transcendental-logical" basic norm of the pure theory of law.¹⁵ The

¹¹ Kelsen, *Das Problem der Souveränität*, pp. 22–7.

¹² See also Kelsen, *General Theory of Law and State*, pp. 188–9.

¹³ Kelsen, *Das Problem der Souveränität*, pp. 8–9.

¹⁴ See also H. Kelsen, 'On the Basis of Legal Validity', *American Journal of Jurisprudence* 26 (1981), 178–89.

¹⁵ Kelsen, *Das Problem der Souveränität*, pp. 92–3.

logical system that these norms form is called the legal order which is, then, the outcome of legal knowledge rather than its object.¹⁶

Fifthly, the sovereignty of law which, in Kelsen's terms, is the same thing as the sovereignty of the legal order is depicted with the help of three attributes. A sovereign legal order is 'highest' because no other normative order can be superimposed above it. From Kelsen's point of view, this would primarily refer to theories of natural law that subject the legal order to one ethical order or another. The legal order is also 'unified' because, as the outcome of legal knowledge, it must be logically constructed into a single entity. This is an indication of the Kantian epistemological 'architectonics' behind Kelsen's theoretical reasoning. Lastly, the 'uniqueness' of the legal order implies that it is distinct from all other normative orders, from ethical orders and other such extra-legal systems as well as from other legal orders.¹⁷

As his sixth argument, Kelsen insists that if we acknowledge the foregoing five claims about law and sovereignty, then the sovereignty of the legal order is only another way of articulating its positivity. To speak of the legal order as 'highest', 'unified' and 'unique' is to claim that it is 'positive' as Kelsen understands the term.¹⁸ Positive law is, then, neither factual nor empirical law in

¹⁶ About the basic norm as a "transcendental-logical" requirement, see Kelsen, *Reine Rechtslehre*, pp. 66–7. In English, Kelsen, *Introduction to the Problems of Legal Theory*, p. 58. See also H. Kelsen, 'On the Basic Norm', *California Law Review* 47 (1 March) (1959), 107–10. The fictive nature of the basic norm has caused much confusion in Anglo-American readings of Kelsen. See e.g. J. Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd edn. (Oxford: Clarendon Press, 1980), pp. 64–6 and J. Raz, 'Kelsen's Theory of the Basic Norm', *American Journal of Jurisprudence* 19 (1974), 94–111. Cf. A. Wilson, 'Joseph Raz on Kelsen's Basic Norm', *American Journal of Jurisprudence* 27 (1982), 46–63. On the philosophy of theoretical fictions in general, see H. Vaihinger, *Die Philosophie des Als Ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschheit auf Grund einer idealistischen Positivismus* (Aalen: Scientia, 1986). In English, OH. Vaihinger, *The Philosophy of 'As If': A System of the Theoretical, Practical and Religious Fictions of Mankind*. Translated by C.K. Ogden (London: Routledge & Kegan Paul, 1934). On the development of Kelsen's take on fictions, see P. Minkinen, *Thinking Without Desire. A First Philosophy of Law* (Oxford: Hart, 1999), p. 38. On Kelsen and the Anglo-American analytical tradition of jurisprudence, see H. Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', *Harvard Law Review* 55/1 (1941), 44–70.

¹⁷ H. Kelsen, *Allgemeine Staatslehre* (Berlin: Julius Springer, 1925), p. 109. See also Kelsen, *General Theory of Law and State*, pp. 383–6.

¹⁸ Kelsen, *Allgemeine Staatslehre*, p. 105.

the sense that most followers and critics of the pure theory of law would understand those terms. As positive law, the legal order is made of legal norms, i.e. of *theoretical* propositions that are inferred from legislation. Legal norms are, then, not the source of a positivistic approach to law but already the outcome of a theoretical operation that has transformed existing factual law into the objects of a normative discipline.¹⁹

And as his final and seventh argument Kelsen claims that if the sovereignty of law is only a synonym for its positivity, then the sovereignty of the legal order is also merely another way of expressing the purity of legal knowledge. A 'highest', 'unified' and 'unique' legal order is also the only possible object of a scientific perspective to law which, according to Kelsen, can only be a 'pure' normative discipline.²⁰

So in other words, Kelsen's initial agenda has less to do with ontological or phenomenological issues relating to legal norms ('What is law?') than with the epistemological preconditions of law as a normative discipline and a science ('How can we know about law?'). In fact, one could even argue that, with reference to his Kantian and neo-Kantian sources of inspiration, Kelsen is attempting to conceptualise legal norms in a way that would make a scientific theory of law possible.²¹ And by doing so, Kelsen turns the familiar claim concerning the participant's perspective on its head. That is to say, it is not the specific characteristics of legal norms that would give the discipline of law its particular perspective, whether the participant's perspective or another, but rather *vice versa*: a particular perspective, namely a *scientific* perspective, requires that legal norms are defined and conceptualised in a particular way.

This would mean that Kelsen's 'normological' account of law and sovereignty includes within itself two normative orders instead of merely one. The pure theory of law is, then, plagued by a sort of

¹⁹ On the difference between Kelsen's understanding of positive law and what one could call 'vulgar' positivism, see Kelsen, *Das Problem der Souveränität*, pp. 87–8, footnote 1 and K. Bergbohm, *Jurisprudenz und Rechtsphilosophie: Kritische Abhandlungen. Erster Band* (Glashütten im Taunus: Detlev Auvermann, 1973), pp. 52–3, footnote.

²⁰ Kelsen, *Allgemeine Staatslehre*, pp. 105–6.

²¹ On Kelsen's neo-Kantian affinities in general, see S.L. Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', *Oxford Journal of Legal Studies* 12/3 (1992), 311–32.

double-normativity. The first order represents the normative object of the pure theory of law, namely legal norms, whereas the second order consists of the implied norms that regulate the way in which knowledge of legal norms must be produced – a ‘logic’ of sorts that lies behind legal thinking itself. If legal norms proper are to be found in the first order, then the latter would include such basic principles of a legal science as the division of the factual and the normative (the ‘is’ and the ‘ought’), the particular relationships between normative propositions, the postulated basic norm, and so on.

But how should we understand this second ‘logical’ order? How does it relate to law being a normative discipline?

NORMATIVE LOGIC

Kelsen’s pure theory of law is, of course, much richer and more complex than a rather hasty reading of a single text can suggest. But for the sake of argument, let us condense his second normative order – that is, all the different conceptual, epistemological and methodological claims that Kelsen makes about law as a normative discipline – into a single normative proposition: ‘law ought to be a pure theory of norms’. Using this condensed proposition as an example, I will next try to illustrate how Kelsen’s normative ‘logic’ operates and why it falls short of a genuine theoretical approach to law.

Logic is normative to the extent that its laws are prescriptive. According to Gottlob Frege, the word ‘law’ is used in two distinct ways. Moral and state laws refer to prescriptions that ‘ought’ to be followed but with which actual occurrences do not always conform: one ‘ought’ to abide by the law, but this, of course, does not always happen. The laws of nature, on the other hand, are not prescriptive as such. They refer to natural occurrences that are always in accordance with these laws. There is, for example, nothing prescriptive as such in a law of nature that depicts the way in which a given cause by necessity leads to a certain effect. Frege understands the laws of logic mainly in this latter sense. But even if the laws of logic are not directly prescriptive in their content, the normativity of logic follows indirectly from the truth-seeking task of all science: ‘From the laws of truth there follow prescriptions for asserting,

thinking, judging, inferring. And so we also speak of the laws of thinking'.²² It is, then, truth itself – or in Kelsen's case more precisely 'scientific knowledge' – that obliges.

The phenomenologist philosopher Edmund Husserl claims that scientific logic is normative because its aim is to assess to what extent a given discipline – law or otherwise – measures up to its own idea. Logic, then, both evaluates a discipline in relation to its ideal form and conducts it into that direction.²³ In, for example, Kelsen's case, the condensed proposition that 'law ought to be a pure theory of norms' presupposes that one approach to law may be 'purer' than another, and that there may even be approaches that do not live up to even the minimum requirements of a 'pure theory'. In addition, the measuring of different approaches to law implies that, to stick with our example, a 'purer' approach is in some way 'better' than an approach that is 'less pure': it is, perhaps, 'more accurate', 'more acceptable', 'more scientific', and so on. All in all, these evaluations and judgements are normative in so far as they all suggest what the discipline of law 'ought' to be.²⁴

For Husserl, these evaluations and judgements form together a normative hierarchy of sorts very much like Kelsen's pyramid of legal norms where the validity of a lower norm is inferred from a higher one. For example, evaluating the purity of a particular approach to law is always done in a comparative mode, in relation to an approach that is 'purer' than the approach being evaluated.

²² G. Frege, 'Der Gedanke. Eine logische Untersuchung', *Beiträge zur Philosophie des deutschen Idealismus I* (1918–1919), 58–77, p. 58. In English, G. Frege, 'Thoughts', pp. 351–72, in *Collected Papers on Mathematics, Logic and Philosophy*. Translated by Max Black et al. (Oxford: Blackwell, 1984), p. 351. Frege's 'normative' notion of logic is essentially Kantian: 'Logic is not only a formal but also a material science of reason, an *a priori* science of the necessary laws of thinking [...] a science of the correct use of understanding and reason, not, however, in a subjective sense, i.e. the empirical (psychological) principles according to which understanding thinks, but objective, i.e. the *a priori* principles according to which it ought to think'. I. Kant, *Logik*, pp. 1–150, in *Gesammelte Schriften. Erste Abtheilung: Werke. Band IX*. Herausgegeben von der Königlich Preussischen Akademie der Wissenschaften (Berlin/Leipzig: de Gruyter, 1923), p. 16.

²³ E. Husserl, *Logische Untersuchungen. Erster Band. Prolegomena zur reinen Logik*. 6. Auflage (Tübingen: Max Niemeyer, 1980), pp. 26–8. In English, E. Husserl, *Logical Investigations. Volume 1. Prolegomena to Pure Logic*. Translated by J.N. Findlay (London: Routledge & Kegan Paul, 1970), pp. 70–2.

²⁴ Husserl, *Logische Untersuchungen*, pp. 40–5. In English, Husserl, *Logical Investigations*, pp. 81–5.

And just like Kelsen, Husserl also claims that in order to remain consistent – ‘logical’, if you will – we must presuppose a basic norm, a hypothetical and even fictive highest norm at the top of the hierarchy. This norm will be the origin and the source of all normative validity within the structure. The basic norm is, then, not an ‘existing’ norm but, once again, a presupposition required in any normative discipline.²⁵

But this is where the similarities end. For unlike Kelsen, Husserl designates his basic norm two distinct functions. Firstly, the basic norm has what Husserl understands as a ‘regulative’ function. In the case of logic, the basic norm establishes the validity with which the various normative evaluations and judgements within the hierarchy can perform their measuring function and direct a given approach towards the ideal form of the discipline. By doing so, the basic norm produces unity and cohesion within the discipline, and as such, it contributes to the development of a disciplinary tradition. But secondly and more importantly, the basic norm also includes within itself something that Husserl calls a ‘constitutive content’:

The basic norm (or basic value, or ultimate end) determines, we saw, the unity of the discipline: it also is what imports the thought of normativity into all its normative propositions. But alongside of this general thought of measurement in terms of a basic norm, these propositions have their own theoretical content, which differs from one case to another. Each expresses the thought of a measuring relation between norm and what it is a norm for [...] Every normative proposition of, e.g., the form ‘An *A* should be *B*’ implies the theoretical proposition ‘Only an *A* which is *B* has the properties *C*’, in which ‘*C*’ serves to indicate the constitutive content of the standard-setting predicate ‘good’ (e.g. pleasure, knowledge, whatever, in short, is marked down as good by the valuation fundamental to our given sphere).²⁶

So if we claim that, to stick once again with the example I have chosen, ‘law ought to be a pure theory of norms’ because it is ‘good’, ‘scientific’ or whatever, we are simultaneously implying that such an approach, namely a ‘pure theory of norms’, has something unique about it. It must by necessity somehow include within itself the ‘properties *C*’ and, as such, stand out from all other approaches.²⁷ And Husserl’s important point here is that this

²⁵ Husserl, *Logische Untersuchungen*, pp. 45–6. In English, Husserl, *Logical Investigations*, pp. 85–6.

²⁶ Husserl, *Logische Untersuchungen*, p. 48; *Logical Investigations*, pp. 87–8.

²⁷ Husserl, *Logische Untersuchungen*, p. 27; *Logical Investigations*, p. 71.

uniqueness, whatever it may substantially be, cannot be normatively determined through the regulative function of the basic norm, through rules and propositions that tell us what we 'ought' to do if we wish our approach to be recognised as, for example, a 'pure theory of norms'. In order to say something significant about its normative object, all normative disciplines – be it law, logic or their 'normological' fusion – require a theoretical elaboration of their own 'uniqueness', their 'idea':

If a normative science is to deserve its name, if it wants to do scientific work on the relations of the facts to be normatively considered and their basic norms, it must study the content of the theoretical nucleus of these relations, and this means entering the spheres of the relevant theoretical sciences. In other words: Every normative discipline demands that we know certain non-normative truths [...]²⁸

I argued earlier that Kelsen's 'normology' implied the existence of two normative orders, namely the legal norms themselves and the normative requirements regulating legal knowledge. But he does not seem to be explicitly conscious of the second normative order and how it affects the first. Instead Kelsen seems to merge the two orders together in his concept of sovereignty. With two distinct normative orders we should, in fact, be talking about two original or basic norms with two distinct constitutive contents: namely the idea of normativity and the idea of conceptual purity. And following Husserl's lead we should, perhaps, be studying both in a truly theoretical way.

But Kelsen seems to restrict his observations to the ways in which the second 'logical' order normatively regulates the first order of 'norms' through sovereignty. And as such, Kelsen's pure theory of law can never be a theoretical enterprise but only a normative discipline in the same mode as Husserl's notion of logic. For Kelsen, sovereignty operates mainly as the epistemological guarantee of the purity of legal knowledge. He never elaborates 'purity' in any theoretical way; 'purity' is but a normative demand that the discipline of law must comply with by following the individual dictates that the pure theory of law determines. But because purity itself is never addressed as a scientific concept, one must somehow try to avoid the overwhelming questions that would otherwise follow. In both the issues of legal norms and of purity,

²⁸ Husserl, *Logische Untersuchungen*, p. 49; *Logical Investigations*, p. 88.

Kelsen's sovereignty closes access to the constitutive contents of the basic norms that would permit the theoretical elaboration of the most fundamental questions: 'What is a legal norm?' 'What is pure knowledge?'

Although the affinities between the two contemporaries have been recognised often enough, much less has been said about the differences in the ways in which Kelsen and Husserl understand the notion of a normative discipline and the role of the basic norm in it.²⁹ But whatever the epistemological merits of the 'transcendental-logical' fiction may be in Kelsen's science, Husserl's phenomenological understanding of the basic norm seems to indicate a fundamental dilemma: the pure theory of law is not and cannot be a theoretical discipline to begin with, but merely a technology (*Kunstlehre*).³⁰

LAW AND KNOWLEDGE

So when Foucault talks about the 'theoretical privilege of law and sovereignty' or law as 'model and code', he is, to my mind, referring mainly to the second 'logical' order and how it regulates the production of knowledge in various disciplines. It is a reference to the epistemological rules and requirements that are expressed as norms and are consequently responsible for the normative regulation of a given discipline. And Foucault seems to be implying that it is specifically 'law' that plays a special role in the way in which knowledge and truth are produced as, e.g., one of the "general rules" guiding the investigations of *Discipline and Punish* indicates:

²⁹ Kelsen is not unaware of Husserl's work. He specifically mentions the 'general distinction between "logism" and "psychologism" that has been presented in a classical way in Husserl's *Logische Untersuchungen*'. H. Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*. 2. Neudruck der zweiten, um eine Vorrede vermehrten Auflage, Tübingen 1923 (Aalen: Scientia, 1984), p. ix. In his posthumously published 'general theory', Kelsen attempts to address Husserl's point on normative disciplines and the basic norm but, in my mind, misses the mark not seeming to understand the theoretical idea of the constitutive content of the basic norm. H. Kelsen, *Allgemeine Theorie der Normen*. Im Auftrag des Hans-Kelsen-Instituts aus dem Nachlaß herausgegeben von Kurt Ringhofer und Robert Walter (Wien: Manz, 1979), pp. 158–60. A classic study on Kelsen and Husserl is F. Kaufmann, *Logik und Rechtswissenschaft. Grundriß eines Systems der reinen Rechtslehre* (Tübingen: Mohr, 1922).

³⁰ Husserl, *Logische Untersuchungen*, p. 47. In English, Husserl, *Logical Investigations*, pp. 86–7.

Instead of treating the history of penal law and the history of the human sciences as two separate series [... we should] see whether there is not some common matrix or whether they do not both derive from a single process of 'epistemologico-juridical' formation³¹

The 'antilegal' position that I referred to earlier would in this case be directed less towards law understood as a social institution, as towards a normative matrix that is responsible for the regulation of knowledge and the control of scientific discourses. It is not too difficult to conceive of law as a process in which a particular type of knowledge is produced, but then we would be referring to the structural characteristics of the process. One of Foucault's lesser-known texts even attempts to construct a comprehensive history of normative knowledge-production through such procedural matrices of law.³²

My attempt has been to clarify the way in which such processes operate in legal knowledge through its double-normativity. Law is a normative discipline in two distinct ways. Firstly: in the sense that its object of study is legal norms – though the restricted perspective of the participant is not determined or regulated by that object of study, but through a normative epistemology. The doctrinal lawyer's attempts to monopolise the study of law into a normative discipline cannot, then, be grounded in the object studied, i.e. in legal norms. Her socio-legal counterpart studies the same object but, just like Kelsen in his first proposition on sovereignty, has decisively chosen a particular approach to guide her investigations. Both adhere to normative epistemologies in the sense that even a socio-legal approach is built on a participatory model determining an 'inside' and an 'outside': the socio-legal participant must also recognise the rules of her particular game. The argument, then, is not about an object of study and what it implies but about normative claims to truth. And because these claims are normative, they can always be contested. For Foucault, the normativity of such claims to truth is

³¹ M. Foucault, *Surveiller et punir. Naissance de la prison* (Paris: Gallimard, 1975), p. 28. In English, M. Foucault, *Discipline and Punish. The Birth of the Prison*. Translated by Alan Sheridan (Hammondsworth: Penguin, 1977), p. 23.

³² M. Foucault, 'La vérité et les formes juridiques', pp. 1406–514, in *Dits et écrits I, 1954–1975* (Paris: Quarto/Gallimard, 2001). In English, M. Foucault, 'Truth and Juridical Forms', pp. 1–89, in ed. J.D. Faubion, *Power. Essential Works of Foucault 1954–1984. Volume 3* (London: Penguin, 2002). See also P. Minkinen, 'The Juridical Matrix', *Social & Legal Studies* 6/3 (1997), 425–43.

apparent in the way in which Kantian critique marks the threshold to modernity by defining the “legal limits” of knowledge,³³ in the way in which the legal logic of family is the “hinge” that makes disciplinary systems possible to begin with,³⁴ in the way in which a particular governmental technology is “juridically indexed” to the economy in governmentality,³⁵ and so on.

I don’t believe that Foucault would have retreated to any ‘theoretical’ vision, phenomenological or other, in order to explain the power structures of modern society. In contrast to the “totalitarian” theories that operate with law as their model and code, Foucault’s genealogical project was an attempt to liberate deviant discourses from any such theoretical control.³⁶ But even if the power struggles were defined simply through the existence of conflicting discourses, Foucault’s analytics of power was never merely descriptive. Because it was always more or less easy to predict which deviant discourses were worthy of the genealogist’s analytical consideration, we may, perhaps, also be in a position to assume that, despite numerous self-professed claims to the contrary, Foucault’s vocabulary of liberation somehow betrays a meta-ethics of sorts that, at the end of the day, directs the course of the analysis. This would make even Foucault’s analytics of power a normative discipline, but this time in a very different way.

Faculty of Law
University of Leicester,
University Road,
Leicester, LE1 7RH,
UK
E-mail: panu.minkkinen@leicester.ac.uk

³³ M. Foucault, *Les mots et les choses. Une archéologie des sciences humaines* (Paris: Gallimard, 1966), p. 255. In English, M. Foucault, *The Order of Things. An Archaeology of the Human Sciences* (London: Tavistock, 1970), p. 242.

³⁴ M. Foucault, *Le pouvoir psychiatrique. Cours au Collège de France (1973–1974)* (Paris: Seuil/Gallimard, 2003), p. 82.

³⁵ M. Foucault, *Naissance de la biopolitique. Cours au Collège de France (1978–1979)* (Paris: Seuil/Gallimard, 2004), pp. 299–300.

³⁶ M. Foucault, *‘Il faut défendre la société’. Cours au Collège de France (1975–1976)* (Paris: Seuil/Gallimard, 1997), pp. 7–10. In English, M. Foucault, *‘Society Must Be Defended’: Lectures at the College de France, 1975–1976*. Translated by David Macey (London: Penguin, 2003), pp. 6–10.