

The Ontology of Legal Science: Hans Kelsen's Proposal of the 'Pure Theory of Law'

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Abstract

Through the pure legal theory, within the thesis of normativity (without the thesis of morality) and the thesis of separation (without the thesis of reductive), Hans Kelsen proposes an object of legal science that is different from the one proposed by the philosophy schools of natural law and empirical-positivistic law. The idea transforms the legal science into a unique and distinctive science. Based on the philosophical research method, a legal norm, according to Hans Kelsen, must have two characters: the meaning of actions that want legal norm; and the relative moral norms with normative characteristics.

Keywords: Kelsen, legal norm, ontology.

Ontologi Ilmu Hukum: Tawaran Hans Kelsen dalam 'Pure Theory of Law'

Abstrak

Di dalam pure theory of law, melalui tesis normativitas (tanpa tesis moralitas) dan tesis keterpisahan (tanpa tesis reduktif), Hans kelsen menawarkan objek ilmu hukum yang berbeda dengan madzhab filsafat hukum alam, dan madzhab filsafat hukum empiris-positivistik, sehingga ilmu hukum memiliki objek ilmu yang khas. Berdasarkan metode penelitian filsafat, dapat diketahui bahwa norma yang dapat menjadi norma hukum menurut Hans Kelsen, harus memiliki dua karakter yaitu norma hukum sebagai makna tindakan berkehendak norma hukum, sebagai norma moral relatif yang berkarakter normatif.

Kata kunci: hukum norma, Kelsen, ontologi.

A. Introduction

The presence of Pure Theory of Law in the treasury of theory and philosophy of law reminds scientists and law philosophers that the science of law has not yet had a distinctive scientific character that can distinguish it from other scientific disciplines. This is mainly due to the inclusion of "alien" elements in legal theory, as seen in the

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two dominant “traditional” legal theories: natural law theory and empiric-positivist theory of law. For this reason, as stated by Utomo, the pure theory of law proposed by Hans Kelsen emerged after and was a criticism of schools of natural law, legal history, legal utilitarianism, law sociology, legal realism, and analytical-jurisprudence of Austin.¹

For Kelsen, legal science must be protected from two directions: (1) statements originating from sociological perspectives that use causal science methods to assume law as a part of nature; and from statements of natural law theory that incorporate legal science into the postulate field of political ethics.² The two directions, according to Kelsen, have caused legal science to become involved with “alien” elements that misleads. Therefore, a “new” legal theory, which is completely different from the two “traditional” legal theories, is needed. The “new” legal theory should be able to purify law from foreign elements. This can be seen, among others, from Kelsen’s offer: the ontology aspect of the legal science. To construct the building of law ontology, Kelsen bases the idea on (a combination of) the thesis of normativity (without the thesis of morality) and the thesis of separateness (without thesis of reductive) and refers to the Heidelberg neo-Kantian arguments³, as well as the thesis of normative disguisedly⁴, to support constitutive functions of cognitive legal science.⁵ The thesis of morality expresses the idea that the nature of law is finally explained by moral terms: the inseparability of legal and moral. The separation thesis, although assuming there is indeed a relationship between law and morality, rejects the idea that the relationship is conceptual or that the character is assumed true. The validity of law does not depend on the compatibility between the provisions with the moral rules that reject it but depends on fulfilling the conditions that relate to the process of law making. Therefore, the nature of the law, which is explained by moral terms, has no foundation.⁶ Based on the description above, the following paragraph explains the philosophical arguments of Hans Kelsen in compiling the ontology of the pure theory of law.

B. Ontological Arguments of Legal Science According to Hans Kelsen

Similar to scientists and other legal philosophers, Hans Kelsen argues that the object of legal science is norms. It is just that as the philosophers of the schools of natural law and empirical-positivistic law putting forward the requirements for a norm to be an object of legal science, Hans Kelsen, in the pure theory of law, states only norm with certain characteristics that can be an object. To establish these characteristics,

¹ Bambang Setia Merpati Utomo, “Pemikiran Hans kelsen dalam Teori Hukum Murni (Suatu Telaah Filsafat Hukum)”, *Philosophy Studies Thesis for Postgraduate Program Faculty of Culture and Society Universitas Indonesia*, 2004, p. 7.

² Stanley L. Paulson, “The Neo-Kantian Dimension of Kelsen's Pure Theory of Law”, *Oxford Journal of Legal Studies*, Vol. 12, No. 3, 1992, p. 313.

³ Robert Hanna, “Kant In The Twentieth Century” in Dermon Moran (ed.), *The Routledge Companion to Twentieth Century Philosophy*, London: Routledge, 2008, p. 157.

⁴ Stanley L. Paulson, *op.cit.*, p. 324.

⁵ *Ibid.*, p. 323.

⁶ Kendra Frew, “Hans Kelsen’s Theory and The Key to His Normativist Dimension”, *The Western Australian Jurist*, Vol. 4, Australia: School of Law - Murdoch University, 2013, p. 287.

Hans Kelsen refers his idea to the thesis of normativity without the thesis of morality. It is to distinguish the characteristics of legal norms according to the pure theory of law with the characteristics of legal norms according to the natural law. He also mentions the thesis of separation without the thesis of reductive to distinguish the characteristics of legal norms according to the pure theory of law (the philosophy of positivistic law) with the characteristics of legal norms according to the schools of empirical-positivist law philosophy.

Kelsen, in his pure theory of law, seeks to overcome the problem of antinomy jurisprudence. Antinomy is the existence of pairs of values, which are contradictory philosophically, in order to find a harmony between them. From every tension that exists, it aims to achieve harmony in it. The tension does not result in the death of one of the conflicting values. Both still exist and both must exist because it is expected that a kind of improvement in the concept of values will occur. Arguing values are complementary. Both of them finally like achieving an improvement process. From that situation, it is expected to create a harmony of values that accommodates subjectively and objectively from each individual.⁷ Prior to the existence of the pure theory of law, there was a generally accepted understanding that, historically, the development of law was based on two schools of philosophy (theory) of mainstream law. They are the school of natural law philosophy (theory), which was subject to moral boundaries; and the empirical-positivists philosophy (theory) that regards law as a part of the world of facts or nature. Both of these philosophical schools stood independently. They cannot be integrated. Both are considered complete. Such circumstances cause some law theorists faced the impossibility of presenting a "new" theory beyond the two mainstream theories. They seem to have collided with the fact that both theories (because they are equally 'complete') have jointly ruled out the third possibility (*tertium non-datur*/for the third is impossible). With such conditions, Kelsen faced two choices as follows.

1. If Kelsen follows existing opinions and understandings, then inevitably the Kelsen's theory would have to refer to one of the two legal theories and appear as just one of the variants.
2. If Kelsen rejects the possibility (rejecting the two "traditional" legal theories as theories that are already complete), it closes the possibility for the presence of new legal theories. Thus, Kelsen will face antinomy of jurisprudence.

Based on these two conditions, Kelsen then choose to resolve the issue of antinomy of jurisprudence to build his legal theory. Therefore, the next step carried out by Hans Kelsen was to try to build arguments that make it possible to present a theory as a third alternative or a middle ground in legal theory.⁸ The Pure Theory of Law came with this setting.

⁷ E. Fernando M. Manullang, *Menggapai Hukum Berkeadilan : Tinjauan Hukum Kodrat dan Antinomi Nilai*, Jakarta: Buku Kompas, 2007, p. 25.

⁸ Christoph Kletzer, "Absolute Positivism", *Netherlands Journal of Legal Philosophy*, 2013, <http://www.bjutiidschriften.nl/tijdschrift/rechtsfilosofieentheorie/>, accessed on August 2018; see also Heather Leawoods, "Gustav Radbruch: An Extraordinary Legal Philosopher", *Washington University Journal of Law & Policy*, Vol. 2, 2000, p. 491.

Through the thesis of normativity (without the thesis of morality) and the thesis of separateness (without the thesis of reductive), which became the basis of his theory, Kelsen claimed to have succeeded in solving the antinomy of jurisprudence. The emergence of antinomy of jurisprudence is derived from several assumptions. First, the thesis of morality is in favor of the theory of natural law and the thesis of separateness is in favor of empirical-positivistic theory. Second, the juxtaposition reveals the conformity of the juxtaposition of traditional theories themselves. If these assumptions are correct, traditional theories do not only stand alone, but also may be equally complete. Third, the natural law and empirical-positivistic theory cannot be maintained. Kelsen refused both and, because of this refusal, he really faced antinomy of jurisprudence.⁹ Besides antinomy of jurisprudence comes from traditional understanding of juxtaposition (placement of two objects side by side) of natural law and empirical-positivistic theory of law, the Pure Theory of Law is seen as a middle ground in the philosophy of law.¹⁰

For this reason, Kelsen composes philosophical arguments, which are ontologically capable of displaying legal science as a science with its own objects, which is different from other objects of sciences, and, at the same time, different from other legal paradigms (scientism and moral paradigms).

To distinguish legal from other sciences, Kelsen explicitly states that the object of legal science is the norm. This opinion is the same as the school of philosophy (theory) of natural law and the school of empirical-positivist philosophy (theory). For this reason, in order to distinguish his idea from empirical-positivist philosophy (theory) schools, Kelsen states that the object of legal science is a legal norm as a means of intention. Law is not directed to facts (acts of will that mean legal norms, namely empirical natural-dimensional actions), but to legal norms as the meaning of volitional actions (i.e. actions that have normative meaning dimensions).¹¹ Thus, the main focus of law is legal norms, which function as interpretive schemes to categorize material facts as one of the norms specified in the norm. Through this process of giving normative meaning to the observed material facts, legal norms become existing/valid (or Hans Kelsen calls them effective/valid norms). Legal norms are created (effective/valid) and therefore these norms have objective validity not the result of mental actions (an act of will, which requires people to behave in a certain way), but of a norm, which authorizes/delegates that action, namely norms with “ought” quality.

An act of will that is subjective will have an objective meaning because the action’s will basically carry out the content (obtaining permission or obtaining authority) from a norm. The norms that delegate their authority also obtain delegation of authority from a higher norm and so on until it can be referred to the constitution and will end in the first constitution made. For the first constitution made, the basis of this delegation is only possible if it is assumed that a person

⁹ Stanley L. Paulson, “The Neo-Kantian Dimension of Kelsen's Pure Theory of Law”, *loc.cit.*, p. 315.

¹⁰ Kendra Frew, *op.cit.*, p. 287.

¹¹ Hans Kelsen, *Teori Hukum Murni: Dasar-dasar Ilmu Hukum Normatif*, translated by Raisul Muttaqien, Bandung: Penerbit Nusa Media, 2013, p. 116.

should behave in accordance with the subjective meaning of the action. These norms are the basic norms of the national legal order. Realizing this presupposition is the main task of legal science, because this presupposition is the main (but conditional and hypothetical) reason for the validity of the legal order. This is what Kelsen meant by the thesis of separateness (without the thesis of reductive).

In another part, to distinguish the idea from the philosophy (theory) of natural law, Kelsen states that the object of legal science is a legal norm, as a relative moral norm that has a normative character. Law will only be meaningful if it contains general moral values. The values should allow for the enactment of all moral systems, which (may) exist in society. Law as one of the social orders will lose its existence, if it only contains absolute moral order, which then will negate the possibility of applying another moral order that actually exists and is applied empirically.

The morality of law, the good of law, the fairness of law, are not due to the transcendent absolute moral values of law, but because the legal substance is of "ought" quality/command. Thus, the law is not declared moral because it has certain contents, but it is because of "moral" –that is a social norm, which states that humans must behave in a certain way. Legal norms as a moral system (orders) are not intended to realize moral values, but they embody legal values, which then must be seen as moral (relative) values. Therefore, the rationality/validity of a positive legal order does not depend on an absolutely valid moral order, nor to conform to certain moral systems.

To break the relationship between law and its source, namely moral and empirical facts, then (1) law must be understood as a hypothetical decision that describes a special relationship between conditioning material facts (legal conditions) and conditioned consequences (legal consequences); (2) the relationship between legal conditions and legal consequences is not based on a causal relationship but on the principle of imputation, where legal conditions are related to legal consequences based on legal responsibility.

Legal conditions are a-priori categories that are relative (because they do not include moral values or political interests); to understand empirical data that has several characteristics. First, this legal category has a fully formal character. Second, the legal category can still be applied regardless of the factual content of the material connected. Third, there is no social reality that can be excluded, based on its content. On the other hand, the legal consequences placed in reconstructed legal norms are coercive actions of the state because of illegal actions.

Thus, in legal norms, the cause of certain behaviors to be invalid is not because they conflict with various types of inherent qualities, or contrary to meta-law norms, which contain moral values, but "only" because these behaviors are defined specific conditions in reconstructed legal norms. Then, a positive legal system responds to this behavior with coercive action.

Viewing law as an internal coercive system means placing law only as a specific social technique¹² with the aim of persuading people to behave in the desired way. The Pure Theory of Law does not consider the objectives to be achieved with the legal system, but only considers the legal system as a normative autonomous meaning. This is what Kelsen meant by the thesis of normativity (without the thesis of morality)

Based on the description above, it can be seen that Kelsen constructed the ontological aspects of legal science. In order to distinguish his idea from empirical-positivist philosophy (theory) school, Kelsen functions legal norm as a scheme of interpretation of acts of will. In addition, to distinguish his idea from the philosophy (theory) of natural law, Kelsen functions legal norm as a social technique, which reconstructs actions as specific conditions in reconstructed legal norms, which are connected with legal consequences based on the principle of responsibility. Although they contain ontological arguments, Kelsen offers two different things. First, through arguments about law as a scheme of interpretation, basically Kelsen wants to show that legal conditions are part of "reality exists". It is the object of law, legal norms as the meaning of the act of will. Second, Kelsen speaks of legal arguments as social techniques that reconstruct acts of will as legal conditions relating to legal consequences based on the principle of responsibility. Basically, Kelsen wants to show that what is meant by legal consequences is a part of "reality exists", as an object of legal science. Legal norm, as a relative moral norm, has a normative character. The former emphasizes the meaning of "there is a law as a norm that regulates human behavior"; the second one emphasizes the meaning "there is a law as an aspect of legal sanctions, which will be imposed on human behavior that is not in accordance with legal norms". These two aspects, namely legal norms as the meaning of intention and legal norms as relative moral norms with normative characteristics, are substances that must exist so that a norm "exists" and becomes an object of legal science.

The assumptions and ethos used by Kelsen in explaining the ontological aspects of legal science, especially law as the meaning of the intention of action, are as follows. Ontologically, the object of law is not an object that has existed as a reality so that it is just described and understood objectively. However, it is a reality that manifests itself as something that "exists" because it is assumed to exist. This is a consequence of Kelsen's choice to build law as a cognitive law so that he has constitutive functions.

The assumption used by Kelsen is based on the opinion of Immanuel Kant, who states that understanding of objects is obtained because objects reveal themselves to subject, not because subject with a certain set of consciousness comes to object to gain an understanding of the object. In this case, Kant states

"...Hitherto it has been assumed that all our knowledge must conform to objects', but since this assumption has conspicuously failed to yield any metaphysical knowledge, we 'must therefore make trial whether

¹² Iain Stewart, "The Critical Legal Science of Hans Kelsen", *Journal of Law and Society*, Vol. 17, No. 3, 1990, p. 285.

*we may not have more success in the tasks of metaphysics, if we suppose that objects must conform to our knowledge...we should than proceeding on the lines Copernicus primary hypothesis', this being the hypothesis of heliocentrism...."*¹³

In another section, Kant states

*"Hence let us once try whether we do not get farther with the problems of metaphysics by assuming that the object must conform to our cognition, which would agree better with the requested possibility of an a priori cognition of them, which is to establish something about objects before they are given to us ... Now in metaphysics we can try in a similar way regarding the intuition of objects. If intuition has to conform to the constitution of objects, then I do not see how we can know anything of them a priori; but if the object (as an object of the senses) conforms to the constitution of our faculty of intuition, then I can very well represent this possibility to myself"*¹⁴

For this reason, Kelsen has created a presupposed and hypothetical source, a hypothetical basic norm.¹⁵ Basic norm is a formulation of presuppositions of all legal cognitions. According to Kelsen, these basic norms play a role in giving awareness, directing, and clarifying scientists who recognize legal material so that they understand the given data not as empirical facts that are subject to the law of causality or as part of moral norms derived from natural law, but as a legal norm.¹⁶ Thus, Kelsen equates basic norms with the concept of unconditional transcendental self-consciousness (transcendental subject) in transcendental philosophy of Immanuel Kant. Transcendental self-awareness is not an object of a priori intuition. Self-awareness is not also an absolute subject (absolute subject), but rather is "a reference to internal phenomena to understand unknown subjects. "Transcendental self-awareness", according to Kant, "functions as a condition that accompanies all thoughts, not as objects of experience, but only as formal conditions, that is, logical unity of all thoughts, where I abstract from all objects."¹⁷ These are representation of the agnostic values that Hans Kelsen adheres to. Although Kelsen acknowledges the existence of transcendent world but humans with five senses and their ratios, according to Kelsen, has a limited ability to know what the nature of things is behind this reality.¹⁸ Thus, it can be known, even though Kelsen does not expressly state that God does not exist, however, he has doubts about the existence of gods. According to him, human cannot and will not obtain knowledge about God. At least,

¹³ Immanuel Kant, *Critique of Pure Reason*, translated by Paul Guyer and Allen Wood, Cambridge: Cambridge University Press, 2000, p. xvi.

¹⁴ *Ibid.*, p. 110.

¹⁵ Bonnie Litschewski and Stanley L. Paulson, *An Introduction to the Problem of Legal Theory*, Oxford: Clarendon Press, 2002, pp. xxxv-xxxvi.

¹⁶ Hans Kelsen, *Pure Theory of Law*, Cambridge: University of California Press, 1967, pp. 204-245 and p. 218.

¹⁷ Reza A.A Wattimena, *Filsafat Kritis Immanuel Kant: Mempertimbangkan Kritik Karl Ameriks terhadap Kritik Immanuel Kant atas Metafisika*, Jakarta: PT Evolitera, 2010, p. 49.

¹⁸ Juhaya S Praja, *Aliran Filsafat dan Etika*, Jakarta: Kencana, 2008, p. 44.

Kelsen has not been able to find a way to get to know and to explain, thus he denies the existence of an absolute fact that is transcendent.¹⁹

In addition, according to Kelsen, this basic norm is the highest peak of authority in establishing the existence of legal norms as well as ensuring that norms derived from the highest authority are made in a prescribed manner.²⁰ Basic norms do not only provide a basis for formal unity (i.e. as a single criterion where membership of legal norms [and therefore the identity of the legal system as a whole] can be established). They also provide a basis for material unity.²¹ In this case, the basic norms, in addition to ensuring that the law is something that is determined by an authority, also ensures that what is determined by the authority is in accordance with a meaningful entity.²² This is what causes the science of law, as a cognitive legal science, can unite its objects so that it becomes a unity of objects of legal knowledge cognition.

Thus, it can be seen how Hans Kelsen analogizes basic norms with the concept of "body-on-self" in transcendental philosophy of Immanuel Kant. As "self-thing", Hans Kelsen states that basic norms cannot be objects of knowledge for a-priori intuition of human being. This basic norm cannot be known but it is considered. Basic norms (as objects-on-themselves) are a transcendental condition for objects of knowledge so that human being can know the objects.²³ This is relatively important because, according to Karl Ameriks, "empirical data requires something that conditions the data, something that is thought of as itself, it is not empirically conditioned and hence that in this sense it is not conditioned." To make an object be existed and be known by humans, the object requires certain conditions that enable it to exist and be known. However, human sensory perception can never form a full understanding of what does condition the empirical phenomenon. Therefore, the existence of 'unconditioned' in the form of the concept of an object-on-self must be logically assumed. The 'unconditioned' entity does not always have to be understood in a theistic sense, namely as God. "The unconditioned" must be understood as a logical supposition of everything that is empirical, which is conditioned. "What is not conditioned", according to Kant, is the logical supposition of empirical phenomena, not as a basis for everything that is in reality.²⁴

It is this basic norm that is placed as a transcendental and object-on-itself subject, which then delegates the authority it has to the legal norms that Kelsen

¹⁹ Ahmad Tafsir, *Filsafat Umum*, Bandung: Rosdakarya, 2002, p. 29; see also Amsal Bachtiar, *Filsafat Ilmu*, Jakarta: PT Raja Grafindo Persada, 2006, pp. 134-135.

²⁰ Reza A.A Wattimena, *op.cit.*, p. 56.

²¹ Hans Kelsen, *Philosophical Foundations of Natural Law Theory and Legal Positivism*, translated by Wolfgang H. Kraus, Massachusetts: Harvard University Press, 1945, pp. 391-446.

²² Bindreiter, *Why Grundnorm?: A Treatise on the Implications of Kelsen's Doctrine*, Netherlands: Kluwer Academic Publisher, 2002, p. 79. The basic norm states that under certain X condition, an A consequence must occur. The basic norm is stated that under the same X condition, non-A must not occur at the same time. The principle of non-contradiction must be established in legal ideas because, without that principle, the concept of legality will be destroyed", See also Hans Kelsen, *General Theory of Law and State*, Massachusetts: Harvard University Press, 1945, p. 406.

²³ Reza A.A Wattimena, *op.cit.*, pp. 47-48.

²⁴ *Ibid.*, pp. 43-44.

functions as a “necessity”, as a norm of quality ought. It shows the a-priori category relative to understand empirical legal data. The term “ought” –as a marker of the category of law– contains a special definition that incorporates legal conditions and legal consequences in reconstructed legal norms with the following characteristics.

1. The category of law has a full formal character, which distinguishes it from the idea of transcendental law. A formal category of norms –categories that are indicated by “necessity” – only produce the genus (the type), not the *differentia specifica*²⁵ of law.
2. The category of law can still be applied regardless of the content of material facts connected and whatever type of law is understood as law.
3. There is no social reality that can be excluded based on its content of this category of law, which is transcendental cognitively and metaphysically, according to Kantian philosophy.
4. The transcendental character actually maintains a radical anti-ideological angle.

In this context, it is once again seen how Kelsen refers to the transcendental philosophy of Immanuel Kant by analogizing legal norms as understanding categories. According to Kant, categories are forms, where objects of experiences can be organized and structured. In his book *Prolegomena*, he writes, “categories are a formal constitution. What is clear is that categories of reason function as structures that do not originate from experience, so they are a-priori, at the same time transcendental and unconditioned, namely as the conditions for the possibility of knowledge formation.”²⁶

Through this concept of basic and legal norms, Kelsen built the science of law as a cognitive legal science. By functioning of legal norms as an interpretation scheme, Kelsen wants to emphasize that legal norms are not created because of mental actions (acts of will) but as a result of interpretation by categories within legal norms. Therefore, factual volitional actions have normative meaning. Through giving normative meaning to action of factual will, a legal norm becomes existing/valid (effective/valid) because the actual content in the behavior/event is in accordance with the norm's charge. Legal norms will be created when all specific expressions of the norms attached to a behavior/event are interpreted and given normative meanings. Giving normative meaning to this will is also called by Kelsen as delegation of authority to action of factual will by a quality norm “ought”. Consequently, act of factual will has the quality of ought, and can be part of existing legal norms and simultaneously causes a norm to exist.

These can happen because Kelsen assumes, on one side, norm (as part of the *sollen* world) and acts of factual will (as part of the *sein* world), is an equal world.

²⁵ *Genus* is a relatively larger class and species (group) is a sub-class that is relatively smaller than genus. *Differentia specifica* is distinctive characteristics that distinguish various species in a genus.

A definition will be well formulated, if it contains genus and *differentia specifica* because it will determine the meaning of a word by identifying the genus term and one or more distinguishing words –the *differentia specifica*, which the combination can convey the meaning of the word. Definitions based on genus and *differentia specifica* are generally more applicable and achieve results that are more adequate than any other type of intentional definition. See Rafael Raga Maran, *Pengantar Logika*, Jakarta: Grasindo, 2007, pp. 47-48.

²⁶ Reza A.A Wattimena, *op.cit.*, pp. 48-49.

Sollen world is not higher than, and cannot function to assess, sein world. On the other hand, although sollen, including the normative (defined) world, Sollen's normativity, includes the transcendent realm that comes from supernatural power, there will be more features related to something that "exists" is assumed to exist as a presupposition of one "logico-transcendental" condition for cognition in science, supposed to be "highest" and "last". Thus, Kelsen has created a new world, the "third world" outside the transcendent sollen world and the sein world, namely the sollen world, which is given a-priori by ratio, or also called the normative (interaction) world. In addition, like the transcendent sollen world and the sein, which is located as the ultimate categories that are fundamental to the explanation of everything else, then the world of sollen, which is given the a-priori by this ratio also according to Kelsen stands as the ultimate categories, which are fundamental to the explanation of all things.

The ability of legal norms to cause an empirical reality exists and is known to humans is mainly caused by the delegation of the meaning of 'ought', which was originally the content of basic norms to all norms that are at the lower levels. Therefore, all norms are arranged as a unified system²⁷ can be used as a basis for giving legal meaning to various existing empirical data. Through the meaning of ought, which becomes the substance of this norm, the legal conditions are related to the consequences in the reconstructed legal norms. Consequently, the various empirical data have legal meaning (normativity) where the overall legal meaning that is formed in the end can be returned to its original source, namely the basic norm. Various legal materials that obtain the quality of ought (and formed as positive law) can be understood as meaningful as a whole because of the application of the principle of non-contradiction²⁸ in the domain of sollen (i.e. directly towards the norm).²⁹ The whole process can occur because basic norms are considered as norms of authority –juridico-logical constitution³⁰, which underlies the validity of positive law that is "assumed" as legitimate.³¹

The placement of ought quality, which is so important in the building of cognitive law offered by Kelsen, refers to the results of Kelsen's interpretation of religious teachings. According to Kelsen, the reason for the application of a norm is not because God or His Son issued certain norms at a certain time but because of

²⁷ Hans Kelsen, *Philosophical Foundations of Natural Law Theory and Legal Positivism*, translated by Wolfgang H. Kraus, *op.cit.*, p. 58.

²⁸ Alida Wilson, "Joseph Raz On Kelsen's Basic Norm", *American Journal of Jurisprudence*, Vol. 27, Issue 1, 1982, p. 56.

²⁹ Hans Kelsen, *Philosophical Foundations of Natural Law Theory and Legal Positivism*, translated by Wolfgang H. Kraus, *op.cit.*, pp. 402-406. Basic norms have basic forms and patterns of legal rules. Since the hypothesis of each positive legal order has a legal rule, the idea of legality, which is conformity with the law, is inherent in it. The basic norm states that under X condition, certain A consequences should occur. Thus, it means that under conditions like X, non-A should not occur at the same time. The principle of non-contradiction must be established in the idea of law, because, without it, the concept of legality would be destroyed.

³⁰ Kelsen points out that the term "juridical-logical constitution" at a certain stage is a counterweight to the term natural/normal law, *Urvertrag (Grundvertrag)*, which is the first social contract in forming a "state". As far as the positive law is concerned, Kelsen says, there are the same theoretical needs as the need for presuppositions in natural law. See Bindreiter, *Why Grundnorm?*, *op.cit.*, p. 78.

³¹ *Ibid.*, p. 77.

the quality of what they say, namely norms that subtly assume that: we "ought" to obey God's, or His Son's commands. Thus, the enactment of a norm is not based on the presence or absence of authority (both human and God), but the statement "ought", which affirms the higher enforceability of norms, while at the same time affirming lower norms.³² Norms that the statement "ought" states the validity include a presumption that the norm comes from an authority of someone who is competent to create valid norms. This norm gives "authority" of norm creation to the person who creates the norm. The fact that someone orders something is not an excuse to regard the command as a valid norm, which binds the person to whom the norm is intended. Only competent authorities can create legitimate norms and that competence can only be based on norms that authorize the adoption of the norm. Authorities who are given the power to make norms submit to the norm as well as individuals also submit to the norms made by that authority.

In other conditions, Kelsen's view above can be explained by state practices in Europe and England, which come from teachings on the general clause (*generalklausen*) of the Roman Empire. It was formed because the Roman emperor or king of England ruled as a case breaker. The judiciary by the king then developed into a more established judicial system so that the judges were delegates of the king but did not carry out the will of the king since a judge had to decide on the case based on the general English practice, which was actually carried out by the king himself. This Roman system is motivated by the behavior of the king who makes regulations in the form of decrees, which are then delegated to administrative officials so that the official makes written instructions for the judge on how to decide on a dispute. The role of state administration is so great that it is not surprising that in the continental system, a new branch of law is called the *droit administratif*, which is essentially the relationship between the state administration and the people.³³ This issue proves that the validity of *grundnorm* has historical social significance.

Kelsen uses several assumptions and ethos to explain the ontological aspects of legal science, especially law as a relative moral norm with normative character. Legal norms as a moral system (orders) are not intended to realize certain moral values but they embody legal values, which then must be seen as a moral value (relative). In this case, the law is placed as a hypothetical decision that describes a

³² In this case, Kelsen illustrates the statement "the reason for the enactment of the ten commandments of God is because God revealed him on Mount Sinai"; or "humans should love their enemies, because Jesus, Son of God, says this commandment in the sermon on the hill".

The statement "we should obey the ten commandments of God" is an affirmation that God has revealed ten commands and a "statement is", as a minor premise, a fundamental connection. Major and minor premises are conditions or situations for drawing conclusions. However, only the major premise, which is a "supposed" statement is a *conditio per quam*, in relation to conclusions, which is also a "supposed" statement. That is, the norm whose validity is expressed in the major premise is the reason for the validity of the norm that the validity is stated in the conclusion. The statement "is" which functions as a minor premise is only a *conditio sine qua non*, in relation to conclusions. This means that the fact that its existence is stated in a minor premise is not the reason for the validity of the norm that the validity is confirmed in the conclusion. See Hans Kelsen, *Pure Theory of Law*, *op.cit.*, p. 194. Compared it with Hans Kelsen, *Teori Hukum Murni: Dasar-dasar Ilmu Hukum Normatif*, translated by Raisul Muttaqien, *op.cit.*, p. 217.

³³ Johan Yasin, *Hukum Tata Negara Suatu Pengantar*, Yogyakarta: Deepublish, 2014, p. 31.

special relationship between conditioning material facts (legal conditions) and conditioned consequences (legal consequences). Kelsen chooses the method to realize that value in law imposes legal consequences, if the actions of factual will are not in accordance with legal conditions.

Kelsen only wants to release the basic relationship of legal conditions and legal consequences based on a causal relationship. For Kelsen, this causes legal norms to be part of absolute moral norms. For this reason, Kelsen looks for another basis to connect it and the choice fell on the principle of imputation. If a causal relationship connects directly between certain material facts as causes and other material facts as results, then the legal norms connects legal conditions and legal consequences through legal responsibility. The legal condition is only a cause for legal consequences as a result, if it has a direct relationship with legal responsibility.

By functioning legal norms as a social technique, which reconstructs volitional actions as a legal condition connected to legal consequences based on the principle of responsibility, Kelsen emphasizes that even though legal norms include the *sollen* world, legal norms are not substance absolute moral values originating from reality absolute transcendence outside of human being. Legal norms include the *sollen* world because it includes a system that is “supposed” (ought/command), which has a normative character. Legal norms as a moral system of ‘ought’ quality contain a special meaning that incorporates legal conditions and legal consequences in reconstructed legal norms.

Reconstructed legal norms (*Rechtssatz*), are legal norms that are formulated hypothetically, a construction of legal science, which is understood as an assessment (supposition) that is contrasted with the law of causality that is a typical of sociology. Constructed legal norms, which are understood as expressions of typical legal nature (lawfulness), in the sense of autonomy of law, are opposed to natural law (*Naturlgesetz*). Law, which is the subject of legal science, is emerged as a system of reconstructed legal norms, namely as a series of judgments. Similarly, nature (the subject of natural science) also symbolizes a series of judgments for transcendental philosophy, which express causal characteristics that are specific to the natural context. Therefore, legal autonomy is a norm that is also reconstructed to express specific legal relationships. This is mainly seen by the existence of a different liaison principle, which is intended to replace the causal element, that relates the consequences to conditions in natural law (natural reality). The reconstructed legal norms are able to unite one material fact as a condition with another fact as a legal consequence through an expression of *ought*. In this case, Kelsen has made an analogy, if natural law (natural reality) is based on the principle of causality intends to connect cause and effect, then the law of normativity, through *ought*, connects conditioning and conditioned facts. According to Kelsen, the relationship between legal reality³⁴ and sanctions has similarities to the relation between cause and effect in natural reality.

³⁴ *Ibid.*, p. 3.

The use of the principle of imputation in cognitive law, according to Hans Kelsen, relates to the interpretation of primitive societies over nature. If an event occurs that in the consciousness of primitive society requires explanation –and this is only an event that directly affects their interests– they will not ask the question “what caused this”, but “who is responsible for this”. Their interpretation is not a causal interpretation but a normative interpretation of nature. Because the norm of retribution underlying this interpretation is a social principle that specifically regulates mutual reciprocity of human beings, then this type of fusion of nature can be characterized as socio-normative interpretation.

The principle of imputation can be referred to as the root in the animist understanding of primitive humans, who view all objects in the universe as having souls, being *persona*, who will respond to each other based on the principle of retribution or compensation (including penalties and rewards). Generally, the principle is formulated “if we do right, we will get rewards”. In other words, we will get good if we do good things; if we do wrong, we will be punished, namely that crime is brought to us. In this principle, conditions and consequences are not related to one another based on the principle of causality but based on the principle of imputation.

The question in the principle of imputation is not “who has done good deeds” or “who has committed sin or evil”. The question of fact, moral, or legal regarding imputation is “who is responsible for that action”. This question means “who should be rewarded” or “who should make amends or be punished”. The focus is on appreciation for virtue, penance for sin, and punishment for acts of evil.

Based on the description above, it can be understood that by functioning law as a system of referrals, the legal norms as a unit of a legal system will exist. In addition, by functioning of law as a constructive social technique, the existence of the legal norms as a unified legal system can be maintained.

C. Conclusion

Hans Kelsen in the *pure theory of law* states that ontology of science is a norm. To distinguish his idea from empirical-positivist philosophy (theory) school, through the thesis of separateness (without the thesis of reductive), Hans Kelsen gives the character of legal norms as the meaning of intention and functioning as a scheme of interpretation of acts of will. To distinguish his idea from natural law philosophy (theory), through the thesis of normativity (without the thesis of morality), he gives the character of legal norms as a relative moral norm that has normative characteristics and functioning as a social technique. It reconstructs volitional actions as specific conditions in reconstructed legal norms, which is connected to legal consequences based on the principle of responsibility.

In constructing its ontological building, Kelsen based his idea on Immanuel Kant's transcendental philosophy. In this case, a *grundnorm* as a source of existence is analogous to the concept of unconditional transcendental self-awareness (transcendental subject) and the concept of “body-on-self” in Immanuel Kant's

transcendental philosophy. Therefore, law appears as cognitive science of law, which has constitutive functions.

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