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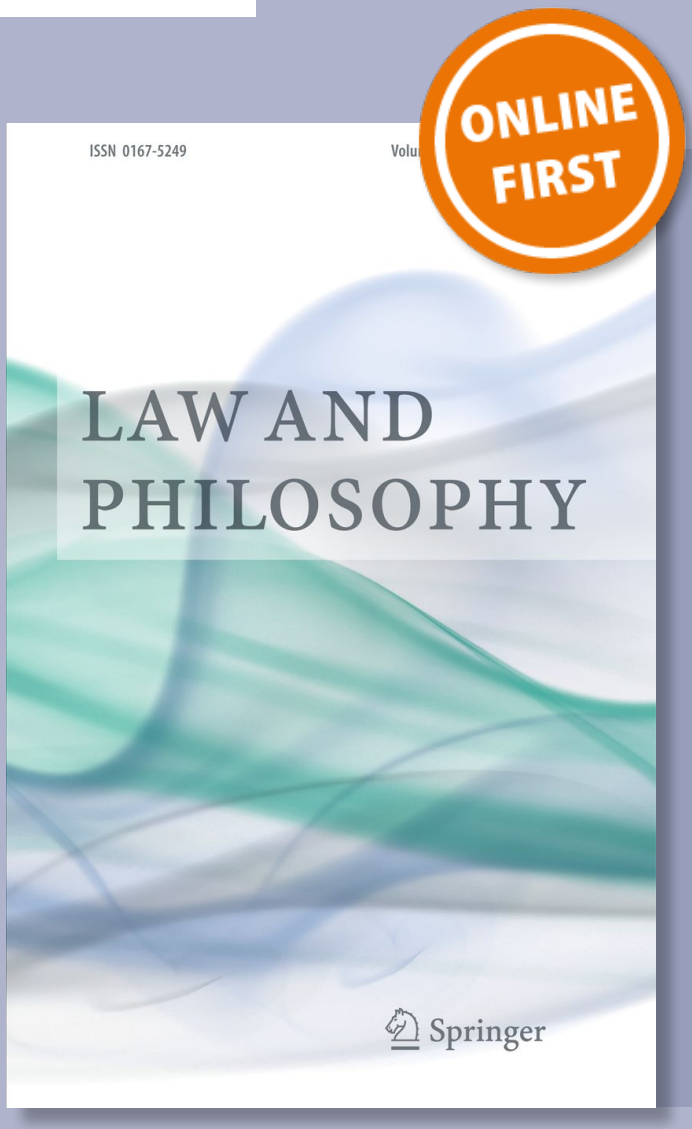


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# DOES KELSEN'S NOTION OF LEGAL NORMATIVITY REST ON A MISTAKE?

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ABSTRACT. Kelsen advanced a sophisticated naturalist conception of intention and adumbrated a methodological strategy that would enable the transformation of the sophisticated naturalist conception of 'intention' into a cognizable object of legal science while simultaneously providing an explanation of the legal 'ought'. The methodological strategy is the 'inversion thesis' which establishes that legal norms enable us to objectively identify and determine the 'will' or the intention of legal authority. Contrary to nineteenth century psychologism, Kelsen argues that it is not the case that the will or the intention of the sovereign determines what the norm is, rather it is the legal ought that 'objectifies' the will. However, it is argued that in spite of the fact that Kelsen advanced a sophisticated account of intentional action, he fails to understand the complexities of the notion of the 'will', intentional action and practical reason. What does he miss in his understanding of the notion of the practical? I will advance the view that the notion of the practical or deliberative involves, both in Kant and Aristotle, the transparency condition which establishes that the agent or deliberator intentionally acts for reasons that are self-evident or transparent to him or her. It is a recalcitrant feature of the deliberative standpoint that cannot be theorised. For Aristotle, Aquinas and Anscombe the deliberative standpoint can be known through the end or goal of the intentional action as this provides the form of the action. The end is presented as a good-making characteristic. As problematic as that might be, this means that the end needs to be presented as a good-making characteristic and therefore it involves evaluation. For Kelsen, the soundness of this conception is an insurmountable obstacle to theorise the 'ought' and therefore the 'will'. Yet, surprisingly and contrary to Kelsen's own notions, I will show that Kelsen's 'inversion thesis' is parasitic on Aristotle–Anscombe's 'ought'.

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## I. INTRODUCTION

Famously Stanley Paulson has emphasised the need to understand Kelsen through the lense of Kant[1] and through, primarily, the idea of 'jurisprudential antinomy'. Like Kant, who conceived the idea that there was both a theoretical-empirical realm where knowledge of the sensible world is possible and a practical one where freedom is manifested,[2] Kelsen conceives that there is a realm of facts and a normative domain. The jurisprudential antinomy establishes that, on the one hand, if the content of the law is determined by morality, then the law-making process is redundant; if, on the other hand, law is merely the outcome of a law-making process, then the law is the result of power and arbitrary will. The antecedent of the second horn advances the view that law can be reduced to human will and power, and therefore does not need to resort to morality. From the empirical perspective, human will and power can be observed, and known and theorised as facts. By contrast, the antecedent of the first horn establishes that law can be reduced to morality. Kelsen rejects both views: the separability thesis and the reductive thesis. However, the problem that arises is how we should understand the notion of 'will'. In this paper I will argue that Kelsen's triumph in overcoming *reductivist* naturalism[3] is only possible (a) because he advanced a much more sophisticated account of intentional action than his predecessors; and (b) because he adumbrated a methodological turn to explain the normative and authoritative character of law without morality. I will argue that Kelsen advanced a sophisticated naturalist conception of intention and that he adumbrated a methodological strategy that would enable the transformation of the sophisticated

[1] Other important works that emphasise the relationship between Kelsen and Kant are A. Wilson, 'Is Kelsen Really a Kantian?' (pp. 37–64), I. Stewart, 'Kelsen and the Exegetical Tradition' (pp. 123–148) and R. Tur, 'The Kelsenian Enterprise' (pp. 149–186). All in: *Essays on Kelsen*, Richard Tur and William Twinning, eds. (Oxford: Clarendon Press, 1986) and E. Bulygin, 'An Antinomy in Kelsen's Pure Theory of Law', *Ratio Juris* (1990), pp. 29–45.

[2] Kant, I, *The Critique of Pure Reason* (Translated from *Reine Vernunft* 1st and 2nd edition by P. Guyer and A. Wood) (Cambridge: Cambridge University Press, 1998), at A131/B169, A298/B355, A547/B575.

[3] G. Pavlakos has argued that Kelsen's legal theory does not overcome naturalism. See his 'Non-naturalism, Normativity and The Meaning of Ought' (ms with the author).

naturalist conception of 'intention' into a cognizable object of legal science while simultaneously providing an explanation of the legal 'ought'. The methodological strategy is the 'inversion thesis' which establishes that legal norms enable us to objectively identify and determine the 'will' or the intention of legal authority. Contrary to nineteenth century psychologism, Kelsen argues that it is not the case that the will or the intention of the sovereign determines what the norm is, rather it is the legal ought that 'objectifies' the will. However, it is argued that in spite of the fact that Kelsen advanced a sophisticated account of intentional action, he fails to understand the complexities of the notion of the 'will' and intentional action. Furthermore Kelsen does not take seriously Kant's two realms of the theoretical and the practical and indeed rejects the latter.[4] Why does he not take seriously Kant's two realms?[5] It is, I will argue, because he fails to understand the complex nature of the practical and its relationship to intentional action. What does he miss in his understanding of the notion of the practical? I will advance the view that the notion of the practical or deliberative involves, both in Kant and Aristotle,[6] the transparency condition which establishes that the agent or deliberator intentionally acts for reasons that are self-evident or transparent to him or her.[7] It is a recalcitrant feature of the deliberative standpoint that cannot be theorised. For Aristotle,[8]

[4] For a discussion on Kelsen's interpretation of Kant's practical reason see Marcelo Porciuncula in 'Razón Práctica y Absolutismo Político: una relación probable -la perspectiva Kelseniana' (ms. with the author).

[5] In his book the *General Theory of Law and State* (translated by Anders Wedberg, Cambridge: Harvard University Press, 1945, from nowonwards GTLS), Kelsen points out: 'the pure theory of law rests not on Kant's philosophy of law but on his theory of knowledge', p. 444.

[6] 'A voluntary act would seem to be an act whose origin lies in the agent, who knows the particular circumstances in which he is acting' (Aristotle, *Nichomachean Ethics*, III.i. 1111a 20–21, translated by H. Rackham (Cambridge: Harvard University Press, 1934), from now onwards NE). 'For a man stops enquiring how he shall act as soon as he has carried back the origin of action to himself, and to the dominant part of himself, for it is this part that chooses' (NE, III. iii. 1113 a17–18).

[7] This outward-looking approach is also present in Aquinas, *Summa Theologiæ*, Ia 87.2 ad 2, (translated by Thomas Gilby, London: Blackfriars, Vol. XVII, 1969): 'Dispositions are present in our intellect not as the objects of intellect, but as the things by which the intellect cognises. For the object of our intellect, in its state of life at present, is the nature of a material thing'.

[8] Aristotle, NE I. i. 1094a2; III. V.1114b18–21, see footnote 6. See also D. Charles, *Aristotle's Philosophy of Action* (London: Routledge, 1984).

Aquinas[9] and Anscombe[10] the deliberative standpoint can be known through the end or goal of the intentional action[11] as this provides the *form* of the action. The end is presented as a good-making characteristic.[12] As problematic as that might be, it means that the end needs to be presented as a good-making characteristic[13] and therefore it involves evaluation. If this conception is sound then Kelsen faces an insurmountable obstacle to *theorise* the 'ought' and therefore the 'will'. Contrary to Kelsen's own notions and beliefs, I will show that Kelsen's 'inversion thesis' is parasitic on Aristotle–Anscombe's 'ought'. If we can theorise about what 'he or she ought to do according to the law' it is because we can understand what 'he or she ought to do' and therefore what 'I ought to do'. This I will call the 'parasitic thesis'. Paulson has argued that there can be two readings of the normative and authoritative character of law in Kelsen. First, a strong and robust notion of normativity that involves *guidance and bindingness*. Second, a weak notion of normativity that aims to explain how law *regulates* human behaviour through empowerment. In the former case, the addressee of the legal statement is the citizen and the official whereas in the latter case the addressee is (only) the legal official. The weak reading sits well with a theoretical understanding of normativity whereas the strong

[9] Aquinas, *Summa Theologiæ*, Ia2æ. 12, I, see footnote 7. See also J. Finnis, *Aquinas* (Oxford: Oxford University Press, 1998), pp. 62–71, 79–90 and A. Kenny, *Aquinas on Mind* (London: Routledge, 1993).

[10] E. Anscombe, *Intention* (Cambridge: Harvard University Press, 2nd edition, 1957) at §32. For an analysis of Anscombe's work see R. Teichman, *The Philosophy of Elizabeth Anscombe* (Oxford: Oxford University Press, 2009).

[11] For a summary of the debate on actions on the period post-*Intentions*, see M. Alvarez, 'Agents, Actions and Reasons', *Philosophical Books* (2005), pp. 45–58 and *Kinds of Reasons* (Oxford: OUP, 2010). For other important work see B. O'Shaughnessy, *The Will*, 2 vols. (Cambridge: Cambridge University Press, 1980); J. Hornsby, *Actions* (London: Routledge, 1980); E. Anscombe and S. Morgenbesser, 'Two Kinds of Error in Action', *Journal of Philosophy*. Symposium Human Action, 1963, pp. 393–401; K. Donnelan, 'Knowing what I am Doing', in the same volume, pp. 401–409; J. Hyman and H. Steward (eds.), *Agency and Action* (Cambridge: Cambridge University Press, 2004).

[12] For contemporary formulations of the Aristotelian theory of intentional action see J. Raz, 'Agency, Reason and the Good', in *Engaging Reason* (Oxford: Oxford University Press, 2000), pp. 22–45; W. Quinn, 'Putting Rationality in Its Place', in *Morality and Action* (Cambridge: Cambridge University Press, 1993), pp. 228–255; C. Korsgaard, 'Acting for a Reason', in *The Constitution of Agency* (Oxford: Oxford University Press, 2008), pp. 207–229; C. Vogler, *Reasonably Vicious* (Cambridge: Harvard University Press, 2002); R. Stout, *Action* (Bucks: Acumen, 2005); S. Tenenbaum, *Appearances of the Good* (Cambridge: CUP, 2007).

[13] For a criticism of the idea that a reason for action ought to be presented as a good-making characteristic, see R. Hursthouse, 'Arational Actions', 57 *Journal of Philosophy* (1991); M. Stocker, 'Desiring the Bad: An essay in Moral Psychology', *The Journal of Philosophy* (1979), pp. 738–753; K. Setiya, *Reasons Without Rationalism* (Princeton: Princeton University Press, 2007), pp. 62–67 and D. Velleman, 'The Guise of the Good'. In: *The possibility of Practical Reason* (Oxford: Clarendon Press, 2000). Cf., J. Raz, 'Agency, Reason and the Good', *op. cit.*, footnote 12 above. For a helpful discussion of the idea of values as part of our actions see G. Watson, 'Free Agency', *Journal of Philosophy* (1975), pp. 205–220.

reading seems to fit better with a practical understanding of normativity. Paulson asks: 'What can be said about the fact that Kelsen appears to be running off in two different directions at once?'.[14] These conflicting directions have their origin in two conflicting views advocated by Kelsen; he aims to give a scientific status to the law while at the same time rejecting the fact-based conception of law.[15] The 'parasitic thesis' adumbrated in this paper aims to provide an answer to the puzzle of the relationship between strong and weak normativity *beyond* Kelsen's limited conception.

The paper is divided into three parts. The first part discusses Kelsen's influences on his notion of subjective meaning of intentional action and 'will'. The second part explains the deliberative viewpoint as opposed to the theoretical viewpoint in Aristotle, Aquinas and Anscombe. The third part advances arguments to show that Kelsen's 'ought' is parasitic on Aristotle/Aquinas/Anscombe's ought. The final part discusses some possible objections to the 'parasitic thesis'.

## II. KELSEN'S NOTION OF THE 'SUBJECTIVE MEANING' OF AN INTENTIONAL ACTION

My general interpretive hypothesis is that Kelsen advocated a version of what I will call the two-component model of intentional action,[16] namely that intentional action is composed of two elements. First, a mental state such as desires, wants and intentions and a second component which is the outcome of such mental states.[17] Thus, an act such as 'x is y-ing' is divided into the mental state of x and the

[14] S. Paulson, 'The Weak Reading of Authority in Hans Kelsen's Pure Theory of Law', *Law and Philosophy* (2000), pp. 131–171.

[15] *Ibid*., p. 170.

[16] In his 'critical constructivist' and 'classic' period Kelsen advocated this model of intentional action which is more 'causalist'. In a later stage, in his book *The General Theory of Norms* (translated by Michael Hartney, Oxford: OUP, 1991, from now onwards GTN), Kelsen is more explicit about the two elements of action: a mental state that is discovered by *introspection* or inward-looking and the action that can be observed. However, the argument that we can discover what we intend through looking inwards is used as an argument against the view that mental states 'cause' actions. Yet, Kelsen asserts that this is not important for his inquiry since he is considering the act of will that is directed not to the *movement of the muscles* but to certain *behaviour* (Kelsen, GTN, p. 31). Here we see the ambiguous use of the term 'action'. Sometimes he refers to 'movement of muscles' and sometimes to 'behaviour'. Kelsen explains his inward-looking approach as follows: 'If I can intend different things with the same expression – if this expression can have different meaning-contents – there must exist an inner process of intending which is different from the process of speaking' (GTN, p. 35).

[17] For an argument that supports the view that mental states cause the outcome of the action, but not the action itself, see J. Hyman and M. Alvarez, 'Agents and their Action', *Philosophy* (1998), pp. 219–245.

outcome of this mental state. For example, let us suppose we have the action 'Tom eats an ice-cream', this action has two elements which are 'Tom wants to eat this ice-cream' and the outcome which is 'Tom is eating the ice-cream'. But this model of intentional action is problematic and unsatisfactory when it is applied to the law. The idea that the 'will of the Parliament' has caused the enactment of a statute neither explains (1) the idea that law *is not* a set of rules that aims to predict behaviour and (2) the special meaning of the 'legal ought'.

Kelsen advances an inversion of the relationship between the 'will' and the norm in a truly Kantian fashion.[18] For Kelsen, the will of the sovereign neither determines nor makes intelligible the normative and authoritative character of the law; on the contrary, the issue is inverted, it is the norm that enables us to identify and determine the 'will' of the sovereign so to speak, and in this way makes intelligible for legal science the normative and authoritative character of the law.

Kelsen finds the two-component model limited in explaining intentional action and advances the 'inversion thesis', namely the idea that we need to transform the subjective meaning of an intentional action into the objective legal meaning and in this way we succeed in avoiding a fact-based explanation of the legal ought. The 'inversion thesis' is expressed in Kelsen's own words as follows:

> A transaction is willed in so far as or because it is valid, with the property of validity serving as the basis of cognition for the property of being willed. 'Will' in this relation is seen at a glance to be something other than a so-called psychical fact.[19]

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[18] Kelsen's constructivism has been influenced not only by the Baden Neo-Kantian School but also by Rudolf Von Jhering's legal constructivism which distinguished between the *concept* of law and the *practical form of a legal command*. See Jhering, *Geist des Römisches Rechts* (Leipzig: Breitkopf and Härtel, 4th edition, 1978–1988, 3 vols.). Jhering's consructivism is expanded to public law in scholars such as Gerber, Laband, and Jellinek. See H. Paulson, 'Hans Kelsen's Earliest Legal Theory: Critical Constructivism', *Modern Law Review* (1996), Vol. 59, pp. 797–812 at 800. However, as Paulson has pointed out, Kelsen criticises Gerber, Laband and Jellinek because of their psychologism and pursues to radicalise their constructivist project. See Paulson, above (n. 14), p. 801. This radicalisation is possible due to his methodological dualism, namely the view that the 'ought' and the 'is' belong to two unbridgeable realms. Contemporary scholars, inspired by a more robust reading of Kelsen's authoritative and normative character of law advocated by Joseph Raz (see Raz, J. note 54 *infra*), have also adhered to the idea of unbridgeable realms between 'the legal point' of view, the 'religious point of view' and the 'moral point of view'. See J. Gardner, 'Law as a Leap of Faith', in P. Oliver, S. Douglas-Scott, and V. Tadros (eds.), *Faith in Law* (Oxford: Hart Publishing, 2000), pp. 1–20.

[19] H. Kelsen, *Hauptprobleme der Staatrechtslehre* (Tübingen, 1923, 2nd edition), p. 133. For a discussion of this inversion thesis see S. Paulson, 'Hans Kelsen's earliest legal Theory', *Modern Law Review* (1996), pp. 797–813 at p. 803.

But what if the two-component model is not a *complete* explanation of intentional action? What if a more *basic* or *naive* explanation of intentional action is required to make sense of the two-component view which is the material upon which the legal scientist performs his transformation? What if the two-component view does not help us to make intelligible the material to be transformed? I will argue that Kelsen's inversion thesis is not justified as the *primary* explanation of the legal ought because a more *basic* or *naive* explanation of intentional action is prior to and more fundamental than Kelsen's. Furthermore Kelsen's methodological turn cannot explain specific normative features of the 'legal ought' without the more *basic or naive* explanation of intentional action. In other words, Kelsen's legal ought can only explain the regulatory role of norms and not their guiding function.

### *A. Some Textual Analysis*

I will mainly concentrate on the two initial periods of Kelsen's works[20]; what scholars[21] have identified as the critical constructivist period dating from 1906 when Kelsen wrote the *Hauptprobleme* until 1920, and the classical period which lasts from 1920 to 1960 best represented by *The Pure Theory of Law* (*Reine Rechtslehre*, 1934 and 1960)[22] and *General Theory of Law and State* (1945).[23]

In the first pages of *Pure Theory of Law,*[24] Kelsen attempts to isolate the autonomous meaning of legal norms, that is, the meaning of a norm independent of both natural events that obey causal laws and moral considerations that resort to eternal laws rooted in our nature as human beings or divine law. The main purpose is to

[20] For an analysis on the different periods of Kelsen's theoretical development, see S. Paulson, 'Four Phases in Kelsen's Legal Theory? Reflections on a Periodisation', *Oxford Journal of Legal Studies* (1998), pp. 153–166, a review of Cartsten Heidemann, *Die Norm als Tatsache. Zur Normentheorie Hans Kelsen* (Baden–Baden: Nomos, 1997) and 'Arriving at a Defensible Periodisation of Hans Kelsen's Legal Theory', *Oxford Journal of Legal Studies* (1999), pp. 351–364; C. Heidemann, 'Norms, Facts and Judgements. A Reply to S. L. Paulson', *Oxford Journal of Legal Studies* (1999), pp. 345–350. For a discussion on how and why Kelsen changed his mind in his later period on the character of the basic norm, see N. Duxbury, 'Kelsen's Endgame', 67 *Cambridge Law Journal* (2008), pp. 51–61.

[21] See S. Paulson, 'Hans Kelsen's Earliest Legal Theory: Critical Constructivism', see above (n. 19).

[22] H. Kelsen, *Reine Rechtslehre* 1st edition, 1934. All the citations are from the translation of Bonnie Litschewski Paulson and Stanley Paulson, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 2002) from now onwards PTL1; *Reine Rechtslehre*, 2nd edition, from now onwards PTL2.

[23] See H Kelsen, GTLS above (n. 5).

[24] See Kelsen, PTL1 above (n. 22).

identify the object of legal cognition and thereby to guarantee an autonomous legal science. He begins with a series of important examples to illustrate the distinction between an action as both subjective meaning and material fact and, on the other hand, the objective meaning attributed by the legal norm. In the first example, people assemble in a hall, give speeches, some rise and some remain seated.[25] According to Kelsen, these are mere external events, but their *meaning* is that a statute in Parliament has been enacted. In a second example, a man is dressed in robes and says certain words from a platform, addressing someone standing before him. Kelsen tells us that 'this external event has as its meaning a judicial decision'. In the third example, a merchant writes a letter to another merchant, who writes back in reply. In this case, according to Kelsen the *meaning* is that they have entered into a contract. In all of these cases, Kelsen refers to the *objective meaning* of an act, namely the specifically legal sense of the natural or material event in question. This meaning is assigned or attributed by a norm *'whose content refers to the event and confers legal meaning to it'*.[26] In this way, the natural event, the movements of muscles, the sounds of voices become meaningful due to the scheme of interpretation provided by the legal norm.[27] An event becomes a theft, a death penalty, a murder, a contract, etc. According to Kelsen, only through the help of the notion of a norm and its correlated 'ought' can we grasp the meaning of legal rules.[28] Kelsen goes on to assert that the meanings of these different acts are not observational; their meaning cannot be inferred from empirical facts such as colour, weight, etc. and we could add that we cannot determine what the action is merely by looking at the movement of muscles, the sounds agents produce, etc. These phenomena are given, what I believe to be, the ambiguous term of 'material facts'. Kelsen tells us that apart from the material facts of actions, acts and especially social acts have a self-attributed meaning. Thus, the agent attributes to himself the act in a certain sense. For Kelsen, however, this subjective meaning of an act cannot be the object of legal science, but, disappointingly, he does not tell us much of the nature

[25] *Ibid*., p. 8.

[26] *Ibid*., p. 10.

[27] For ease of exposition, I will use the terms 'rule' and 'norm' interchangeably, although Kelsen explicitly rejected the view that they are interchangeable.

[28] See Kelsen, GTLS, above (n. 5), p. 37.

of such subjective meanings.[29] There are two possible interpretative views that will fill Kelsen's gap and which, consequently, might enable us to understand his early notion of 'subjective meaning'.[30] First, we could assert that his idea of the subjective meaning of an act collapses into a reductive naturalistic view of mere events. We implicitly talk in this way when we assert that material facts or events acquire objective meaning due to the norm as a scheme of interpretation. Thus, self-interpreted acts can be reduced to movements of muscles, sounds of voices, and so on, and can be explained in terms of causality. In my view, even though there are some passages in Kelsen's work that could be taken to support this view, it would be an uninteresting and unfruitful interpretation. If this is all that Kelsen had in mind, why would he give examples of self-interpreted acts and try to show that on some occasions the objective and subjective meanings may not coincide? Alternatively, we could attempt a more coherentist interpretation to understand his early notion of subjective meaning and to this end we could examine the passages where Kelsen discusses his understanding of what a mental state is, and what his understanding of an intentional action is in order to grasp what he means by the subjective meaning of an act. I will proceed according to the latter strategy.

In some passages of *Pure Theory of Law*, Kelsen distinguishes between two elements of acts, including social acts, mere natural facts or events that can be perceived by our senses and the 'immanent' or 'subjective' meaning of an act.[31] The latter, *'if it can express*

[29] Kelsen explains the character of the subjective meaning of acts in a very incomplete fashion in *the* GTN above (n. 16), chap. 9, §§III and IV.

[30] For a criticism of the distinction between 'subjective and objective meaning' in Kelsen, see L. Vinx, *Hans Kelsen's Pure Theory of Law* (Oxford: OUP, 2007), pp. 32–37.

[31] My interest here is in the subjective meaning of an act and not in the idea of law in the subjective sense. For Kelsen, the law in the subjective sense, which is manifested as legal right, legal obligation and legal subject, can be reduced to mere individual interests. Kelsen points out: 'In understanding so-called law in the subjective sense simply as a particular shaping or a personification of the objective law the Pure Theory renders ineffectual a subjectivistic attitude toward the law, the attitude served by the concept of so-called law in the subjective sense. It is the advocate's view, which considers the law only from the standpoint of the individual's interests, only in terms of what the law means for the individual, to what extent it is of use to him by serving his interests, or to what extent it is detrimental to him by threatening him with something untoward. This subjectivistic attitude toward the law is the characteristic posture of Roman jurisprudence, a posture that has emerged largely from the expert practice of lawyers representing individuals with just such interests at stake, a posture that was part of the reception of the Roman law generally. The posture of the Pure Theory of Law, on the other hand, is thoroughly objectivistic and universalistic' (PTL1, above (n. 22), p. 53, § 26).

*itself verbally, can declare its own sense*'.[32] By contrast, a plant cannot say anything and cannot declare any sense about its processes and activities.[33] Legal science, whose task is to understand the legal act and the way that legal norms function as a scheme of interpretation[34] ought to be separated from the natural sciences but also from the cognitive sciences. For Kelsen, subjective meaning belongs to the latter domain as it can be explained in causal terms, and legal sociology is one of these cognitive sciences.[35] Legal sociology does not examine the connection between the subjective act and the legal norm, it rather relates the act to mental states such as motivation. For the Kelsen of the classic period, the relationship or connection between acts and mental states is causal.[36] The aim of the legal sociologist is to understand what prompts the behaviour of the citizen, what motivates him or her to act, and what wishes, motive or desires he has when he follows legal rules.[37] For the legal sociologist, law is the object of inquiry as in the consciousness or mind of those human beings who issue legal norms, comply with them or violate them.[38] However, Kelsen tells us, the Pure Theory of Law does not examine the mind or the consciousness of those human beings who issue, comply with or violate a norm. The subject matter of the Pure Theory of Law is legal norms *qua* objective meaning. However these subjective meanings or materials are the content of the legal

[32] See Kelsen, PTL1 (n. 22), pp. 8–9.

[33] *Ibid*., p. 9.

[34] On this point, Kelsen in PTL1 above (n. 22), p. 10, § 4, tells us: 'The norm functions as a scheme of interpretation. The norm is itself created by way of a legal act whose own meaning comes, in turn, from another norm. That a material fact is not murder but a carrying-out of a death penalty is a quality, imperceptible to the senses, that first emerges by way of an act of intellect, namely, confrontation with the criminal code and with criminal procedure'. Michelon has argued that the choice between different possible interpretations is not an act of cognition, but an act of will. But this passage seems to contradict Michelon's interpretive hypothesis. See C. Michelon, 'MacCormick's Institutionalism between theoretical and practical reason', *Diritto & Questioni Pubbliche* (2009), pp. 53–62.

[35] Kelsen, PTL1 above (n. 22), p. 13, §7. In the *Hauptprobleme* (n. 19) 33–53, Kelsen defends the view that the key feature of laws' heteronomy entails the view that there *must be* a separation between law and morality and, on the other hand, the historical or sociological explanations of law and the normative explanation of law.

[36] Kelsen, *Ibid*., p. 14, §7: 'Legal sociology does not relate the material facts in question to valid norms; rather it relates these material acts to still other material facts as causes and effects. It asks, say, what prompts a legislator to decide on exactly these norms and to issue no others, and it asks what effects his regulations have had'.

[37] See Kelsen, *Ibid*., p. 29, §14.

[38] *Ibid*., p. 14 §7.

norms.[39] Kelsen establishes a parallel between an analysis of the mind from the chemical and biological points of view and the psychological perspective. The latter, he tells us, cannot be reduced to the former. Similarly, the investigation of the Pure Theory of Law cannot be reduced to the kind of investigation carry out by legal sociology.[40] However, for Kelsen, the subjective meaning can be understood if one understands the motives of actions as represented by states of the mind i.e., desires, passions, intentions. These are the causes of certain effects, namely other material facts such as a signed paper, a man's speech, the killing of a man. If the man desires to sign a contract, then his *mental state* or inner process *causes*[41] the signing of the paper, but only when this material fact or subjective meaning is transformed into the objective meaning is it intelligible to the legal theorist. The legal theorist can now say that a contract has been signed and he uses the norm as a scheme of interpretation. The Pure Theory of Law does not connect the material facts through causality, but rather through imputation.[42] Nor does it establish an imperative 'you ought to comply with the contract' as this will merely reflect a conflict of interests in the garment of morality,[43] for Kelsen a type of ideology. Rather Kelsen's Pure Theory of Law establishes from the material facts a legal condition and a legal antecedent, and transforms the material facts into the reconstructed legal norms (*rechtssätze*) which reflect the particularly normative and autonomous character of law. The legal scientist can now say 'if you breach the contract, you ought to be punished'. A causal explanation cannot explain the normative character of law; it can only predict it. In our

[39] Kelsen, *Ibid*., p. 14 §7, p. 48 §25 (a). For an illuminating discussion on the tension between law as an intentional object and law as authority see B. Celano, 'Kelsen's Concept of the Authority of Law', *Law and Philosophy*, Vol. 19, No. 2 (2000), pp. 173–199.

[40] See Kelsen, PTL1 (n. 22), p. 14 §7.

[41] In later work it seems as if Kelsen rejects the causalist interpretation that mental states cause actions. See his criticism of Wittgenstein in GTN above (n. 16), footnote 39, p. 299.

[42] Kelsen distinguishes between peripheral imputation PTL1 above (n. 22), pp. 23–34 § 11(b) and central imputation § 25 (a) and (d). The former is the link between the antecedent and the consequent in reconstructed legal norms. The latter is where material facts (human behaviours) are connected to the unity of the system. Kelsen explains the distinction as follows: 'This human being is an organ of the legal community only because and in so far as his act, by virtue of being established by the legal subsystem constituting the legal community, can be connected to the unity of a legal subsystem or comprehensive legal system to be. This central imputation, however, is an entirely different operation from the peripheral imputation mentioned earlier, where a material fact is connected to the unity of the system, that is, where two material facts are linked together in the reconstructed legal norm' (PTL1, above n. 22, pp. 50–51, §25 (d)).

[43] Above PTL1 above (n. 22), p. 17 § 8.

example, the desire to sign a contract will enable us to say that because of his intense desire to buy a house, a man *will* sign the contract. By contrast, imputation establishes a link between the subjective act of the man transformed into the objective meaning of a legal act, i.e., signing a contract and the legal consequences. The result is the reconstructed legal norm: 'if you breach the contract, then you *ought* to be punished'. In order to understand the main criticism of Kelsen's conception of subjective meaning of an act of will it is necessary to make some fundamental distinctions and it is to this task that I now turn.

## III. THE PRACTICAL STANDPOINT: THE DISTINCTION BETWEEN THE DELIBERATIVE AND THE THEORETICAL VIEWPOINTS

What is the distinction between practical and theoretical knowledge? Let us take a modified version of the example provided by Anscombe in *Intention*.[44] A man is asked by his wife to go to the supermarket with a list of products to buy. A detective is following him and makes notes of his actions. The man reads in the list 'butter', but chooses margarine. The detective writes in his report that the man has bought margarine. The detective gives an account of the man's actions in terms of the evidence he himself has. By contrast, the man gives an account of his actions in terms of the reasons for actions that he *himself* has. However, the man knows his intentions or reasons for actions not on the basis of evidence that he has *of* himself. His reasons for actions or intentions are self-intimating or self-verifying. He acts from the deliberative or first-person perspective. There is an action according to reasons or an intention *in doing* something if an answer to the question *why* is applicable. It is in terms of his own description of his action that we can grasp the reasons for his actions. In response to the question '*why* did you buy ''margarine'' instead of ''butter''', the man might answer that he did so because it is better for his health. This answer, following Aristotle's theory of action[45] and its contemporary interpretation advanced by Anscombe, provides a reason for action as a desirability or good-making characteristic. According to Anscombe, the answer is intelligible to us and inquiries as to *why* the action has been com-

[44] See Anscombe above (n. 10).

[45] See Aristotle, above (n. 6), Aquinas, above (n. 7).

mitted stops. However, in the case of the detective when we ask *why* did you write in the report that the man bought margarine, the answer is that it is the truth about the man's actions. In the case of the detective, the knowledge is theoretical, the detective reports the man's actions in terms of the evidence that he himself has. In the case of the man, the knowledge is practical and the reasons for action are self-verifying for him. He does not need to have evidence of his own reasons for actions. This self-intimating or self-verifying understanding of our own actions from the deliberative or practical viewpoint is part of the general condition of access to our own mental states that is called the 'transparency condition'.[46] Its application to reasons for action can be formulated as follows:

(***TC for reasons for actions***) 'I can report on my own reasons for actions, not by considering my own mental states or theoretical evidence about them, but by considering the reasons themselves which I am immediately aware of'.

The direction of fit in theoretical and practical knowledge are also different. In the former case, my assertions need to fit the world whereas in the latter, the world needs to fit my assertions. The detective needs to give an account of what the world looks like, including human actions in the world. He relies on the observational evidence he has. The detective's description of the action is tested against the tribunal of empirical evidence. If he reports that the man bought butter instead of margarine, then his description is false. The

[46] See G. Evans, *The Varieties of Reference* (Oxford: OUP, 1982), p. 225; J. Finnis, 'On Hart's Way: Law as Reason and as Fact', in *The Legacy of H.L.A. Hart*, M. Kramer, C. Grant, B. Colburn, and A. Hatzistavrou (eds.) (Oxford: Oxford University Press, 2008); R. Edgeley, *Reason in Theory and Practice* (London: Hutchinson and Co., 1969). The most extensive and careful contemporary treatment of the 'transparency condition' is in R. Moran, *Authority and Estrangement* (Princeton: Princeton University Press, 2001). For discussion on Moran's notion of transparency, reflection and self-knowledge see B. Reginster, 'Self-Knowledge, Responsibility and the Third Person', *Philosophy and Phenomenological Research*, Vol. LXIX (2004), pp. 433–439; G. Wilson, 'Comments on Authority and Estrangement', *Philosophy and Phenomenological Research*, Vol. LXIX (2004), pp. 440–447; J. Heal, 'Moran's *Authority and Estrangement*', *Philosophy and Phenomenological Research*, Vol. LXIX (2004), pp. 427–432; J. Lear, 'Avowal and Unfreedom', *Philosophy and Phenomenological Research*, Vol. LXIX (2004), pp. 448–454; R. Moran, 'Replies to Heal, Reginster, Wilson and Lear', *Philosophy and Phenomenological Research*, Vol. LXIX (2004), pp. 455–472; S. Shoemaker, 'Moran on Self-Knowledge', *European Journal of Philosophy* (2003), pp. 391–401; L. O'Brien, 'Moran on Self-Knowledge', *European Journal of Philosophy* (2003), pp. 375–390; R. Moran, 'Responses to O'Brien and Shoemaker', *European Journal of Philosophy* (2003), pp. 402–419; C. Moya, 'Moran on Self-Knowledge, Agency and Responsibility', *Critica. Revista Hispanoamericana de Filosofia*, Vol. 114 (2006), pp. 3–26; T. Carman, 'First Persons: On Richard Moran's *Authority and Estrangement*', *Inquiry* (2003), pp. 395–408. For a critical view on the transparency condition see B. Gertler, 'Do We Determine What We Believe By Looking Outward?', in *Self-Knowledge*, Anthony Hatzimoysis (ed.) (Oxford: OUP, 2008).

man, by contrast, might say that he intended to buy butter and instead bought margarine. He changed his mind and asserts that margarine is healthier. There is no mistake here.

## IV. A DEFENSE OF THE PARASITIC THESIS

How does the previous reflection on the distinction between the theoretical and the practical standpoint shed light on Kelsen's 'inversion thesis'? How does this distinction enable us to formulate our main criticism of Kelsen's 'inversion thesis', namely the 'parasitic thesis'?[47] Let us begin with the following example. Let us suppose that there is a country called 'Kelsen Island'. The authority of the island asks a man to go to the nearest town by boat and buy some products, including butter. He buys butter as commanded, though he believes that margarine is healthier. What are the conditions that make this action an action *according to reasons*? The reasons for actions are not *his*. What does it mean that the reasons for actions are not *his* reasons? He can still describe his own actions, but not in terms of his own reasons; he could say that he bought some products in the supermarket, including butter because the authorities have asked him to do so. However, he thinks that he has better reasons to buy margarine, and therefore in buying butter he acted contrary to his reasons. Raz calls this the 'moral puzzle' of legal authority. Any account of legitimate authority needs to justify the 'surrendering of my own judgement'.[48] How can we assert that the man acted *for reasons*? From the deliberative viewpoint,[49] the reasons for buying butter are not transparent for him. Nor can he answer the question 'why did he buy butter' by providing reasons in terms of good-making characteristics. He could, however, provide a justification in terms of the 'special status' of authority. He might intelligibly say that the authorities purport to do good for the community and therefore such authority is good. This is *why* he bought butter instead of margarine. This is *why* he has surrendered his judgment to

[47] The parasitic conception is endorsed by Finnis in *Natural Law and Natural Rights* (Oxford: OUP, 1981), pp. 11–19, 233–237, but he does not explain *how* this parasitic conception works. This is the task I see myself as engaging with.

[48] See J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) and 'The Problem of Authority: Revisiting the Service Conception', *Minnesota Law Review* (2006), pp. 1003–1044.

[49] For an explanation of the 'deliberative point of view', see J. Finnis, 'Law and What I Truly Should Decide', 48 *American Journal of Jurisprudence* (2003), pp. 107–129.

the authority. The fundamental premise in his reasoning is 'this authority is good'[50] and it can be formulated as follows:

*(I) This authority is good*I ought to obey the authority's commands because it is goodThe authority has asked me to buy butterConclusion-action: I ought to buy butter!

This answer is both transparent to the agent and in terms of good-making characteristics. This is the answer that Raz provides.[51] In normal cases, i.e., central cases, authority is good and purports to do good because if the agent obeys the law, she will be complying with the reasons that apply to her. However, if she decides to act following her own reasons, she will probably not succeed in complying with the reasons that apply to her (Raz's *normal justification thesis*).

Notice that the previous reasoning is not different from the following:

*(II) Vitamin C is good for your immune system*I have a cold, therefore I need to boost my immune systemThis orange contains Vitamin CConclusion-action: I ought to eat this orange

There is no difference between premises (I) and (II). If we follow Raz, legal authorities present a similar structure. In the normal case, authority is good and Raz explains what it means to say that 'authority is a good and purports to do good'.

Kelsen advances a methodological turn, i.e., the 'inversion thesis' to explain the normative and authoritative character of the law. The norms determine and identify the intention and will of the legal authorities and therefore the norm itself makes intelligible the normative and authoritative character of the law. In other words, the norms provide the *form* of the intention or will of the legal authority.

Let us illustrate the 'inversion thesis' by returning to our example of the man who lives on 'Kelsen Island'. Everyone on the island knows that the authorities are corrupt and that *they do not purport to do good*. This is evidenced by their claims and their actions. They

[50] This could be in terms of Aristotelian necessity. See E. Anscombe, 'On the Source of Authority of the State', in *Ethics, Religion and Politics: Collected Philosophical Papers of G.E.M. Anscombe* (Oxford: Blackwell, 1981).

[51] My account differs slightly from that of Raz since he does not discuss the 'transparency condition' as necessary to explain the authoritative and normative character of law. Nor does he emphasise the 'deliberative viewpoint'.

have designed a kind of constitution that is the basic norm of the island. The legal norms of 'Kelsen Island' require the elderly and children to carry out hard labour, these norms also authorise the rape of women and men, and the execution of people without fair trial. The legal norms also authorise the authorities to kill babies who have been born with physical or mental disabilities. It is customary that the authorities do this with poisoned dairy products. A man is asked to go to the nearest town by boat and buy many kilograms of butter and milk. Is it intelligible to say that the authorities have legitimate authority and that, therefore, the man ought to buy the butter and surrender his judgement? Kelsen would say that the norm confers a sanction upon the man, if the man does not buy the milk and the butter. 'If the man does not buy the milk and the butter, he ought to be punished'. In other words, if the man does not follow the norm, then he 'ought legally' to be sanctioned. The norm itself determines the objective meaning of the authority's act, namely that in case the man does not follow the norm, then he ought to be punished. But this is not an answer to the moral puzzle of why the man ought to surrender his judgement. The moral puzzle of legal authority shows the normative and authoritative character of law in its *guiding* as opposed to his *regulative* function. Legal rules not only regulate the behavior of the citizens, but also *guide* their behaviour, that is to say that the citizens find an answer to their question of what they ought to do legally when they consider, examine and look at legal rules. My argument is that the 'inversion thesis' underestimates the parasitic relationship between the idea that 'norms determine the objective meaning of the authority's acts or will', and the moral puzzle of legal authority contained in the question 'why should I surrender my judgment to the will of the legal authorities?'

Let us go back to our previous imaginary example of Kelsen Island. The man has been asked by legal official *Z* to buy butter and milk and the man is conscious of the evil purposes of this request. He asks his lawyer for advice and she states: 'if you do not buy the milk and the butter, then you ought to be sanctioned' and will probably also add to this: 'you ought legally to buy the milk and the butter'. Notice that Kelsen emphasises that imputation should not be con-

fused with a 'psychological compulsion',[52] namely that the agent acts because he is motivated to act. In the case of threats he is motivated by the fear of punishment. Kelsen's aim is to show that the notion of imputation, namely the attribution of a sanction to an agent who does not follow the norm describes *theoretically* the legal ought. Imputation has no practical force on the man. It regulates[53] his behaviour if the hypothetical condition is met. However, if the law also plays a *guiding* role, how can a mere *theoretical reason or report* guide the conduct of the citizen? Arguably, unlike the case of the man who is asked to buy butter but buys margarine because it is healthier, the second man leaving on Kelsen Island neither has: (a) a transparent reason and (b) a reason in terms of good-making characteristics. The authoritative reasons of Z are presented to him as a theoretical reason. Let us think about the following analogy; when, as a student of A-level physics, you were given reasons for believing in the truth of classical mechanics, the reasons were presented on the evidence given. Some classical laboratory experiments were performed and you came to have these reasons 'on observation'. Similarly, the lawyer provides reasons in terms of the evidence she has. She has read and carefully studied the law, i.e., to ensure that the order that has been given to her client is compatible with the set of legal norms of the system. The lawyer therefore merely reports the reasons that she has learned by evidence. But the man does not 'have' these reasons as *practical reasons* because he *simply* cannot acquire *reasons for actions* by observation. For these reasons to make a change in his practical situation, he needs to 'have' them. Let us suppose that, after the consultation with his lawyer he declares 'I intend to buy the butter and the milk as ordered by Z'. If it is an act that follows a practical authority for *reasons*, then the question *why* is applicable. We ask the man *why* and he responds, 'because if I do not follow the law, then I will be sanctioned'. We can now stop our inquiry. The reason provided is both (a) transparent and (b) it is presented by the agent as a good-making characteristic. Notice that it is not *primarily* because he is in a mental state of fear, rather he

[52] H. Kelsen, GTLS, above (n. 5), p. 23.

[53] Kelsen in GTLS, above (n. 5), p. 35 points out: 'A 'norm' is a rule expressing the fact that somebody ought to act in a certain way, without implying that anybody 'really' wants the person to act that way'. We should emphasise that Kelsen always refers to a theoretical or third-person point of view, represented by the proposition 'she or he ought to be x-ing'. By contrast, the guiding role of rules should primarily be understood from the first-person perspective or the deliberative viewpoint.

believes that he follows the norm because he *aims at avoiding* the sanction. He looks outward to the world, he perceives *what* is fearful, namely the sanction, and intends to avoid it; he does not look at his internal states. But now we see that the only reason he can give is from the *deliberative viewpoint*. The phrase of the lawyer 'if you do not follow the law, you will be sanctioned' has no independent force in the deliberation. If I am asked whether 'X believes that p', I need to assess X's *beliefs* about p. However, if I am asked to do something because 'X believes that p', I do not assess X's beliefs and her mental states, I rather look outward and assess p. Similarly, if someone asks me whether a legal official *believe*s that the law has moral legitimate authority, I need to examine the legal official's mental state. However, if I am asked by the legal official to do p, I need to look outward and assess whether I should do p in terms of *reasons for p*. To solve the moral puzzle, the only authority is the agential authority. This means that only the agent can justify the command and surrender his judgment. The legal legitimacy of authority is *primarily* from the deliberative viewpoint.

But one might object that this analysis is not sound as Kelsen's inversion thesis is meant to apply to *authorities* rather than citizens. However, a similar criticism can also be adumbrated for the case of authorities. In our example, the 'inversion thesis' establishes that 'if the man does not buy the milk and the butter, the man ought to be punished' and the addressee of this reconstructed legal norm is the authority. The moral puzzle for the authority is, why should the legal official surrender his judgement and *apply* the norm? *Why the legal official has to punish the man if the antecedent condition is met?* If the law serves to guide a man's actions, including the actions of legal officials and he is to follow legal rules because of reasons for actions, he needs to 'have' these reasons, i.e., it is necessary to make the reasons for action transparent to him or her, and the reason needs to be presented as a good-making characteristic. The 'inversion thesis' as a theoretical standpoint on action is parasitic on the *naive or basic* explanation of action. *The theoretical standpoint depends on the deliberative point of view*.

An adequate explanation of the normative and authoritative character of the legal ought needs to explain both the regulative and guiding function of the law. In this section we have shown that the

'inversion thesis' and the notion of imputation in Kelsen conceive the normative and authoritative character of the law from a merely theoretical point of view and consequently cannot explain the guiding function of the 'legal ought', namely the idea that legal rules guide our actions and might give answers to the two questions (a) what ought I to do *qua* legal authority? and (b) why should I do what the legal authority says?

Arguably, an objector might point out that my criticism is not a difficulty for Kelsen as he only aimed to explain the regulative function[54] of the norm. However, I would argue that if the proposition 'if X does not obey the norm, then X ought to be punished' is intelligible at all, it is because it is parasitic on the citizen's deliberative viewpoint that says 'I ought to obey the norm, because I have a reason to avoid punishment'. If the proposition 'if X does not obey the norm, then X ought to be punished' is intelligible to the legal official, it is because it is parasitic on the legal official's deliberative point of view that says 'I ought to apply the norm, because I have a reason for action 'y' that is a good-making characteristic'. This good-making characteristic can be 'authority is good'. *Consequently, the regulative role is parasitic on the guiding role. We can explain how norms regulate human behaviour because we can explain how norms guide our behaviour*. Otherwise, a purely causal explanation would suffice. Thus, norms regulate the behaviour of human beings through reasons, in a meaningful way rather than through causes, but to show how reasons regulate human behaviour, we need first to understand how reasons enter into the deliberation of human beings *qua* agents,; in other words, we need to understand the deliberative point of view. The latter is a *naive* explanation of action. My argument is not that a *theoretical explanation* of action is false; on the contrary, my argument is that the *naive* explanation of action is *prior to* and more

[54] It has been argued that in Kelsen's Pure Theory of Law the basic function of law is not imposing obligations or prescribing conduct but rather the function of empowerment. See S. Paulson, 'An Empowerment Theory of Legal Norms', *Ratio Juris* (1998), pp. 58–72, 'The Weak Reading of Authority in Hans Kelsen's Pure Theory of Law', above (n. 14), pp. 131–171 and B. Celano, 'Kelsen's Concept of the Authority of Law', see above (n. 39). However, Raz has famously taken a more robust interpretation of Kelsen's normativism and his idea of obligation. See J. Raz, 'Kelsen's Theory of the Basic Norm', *The Authority of Law* (Oxford: Clarendon Press, 1979), pp. 122–135) and 'The Purity of the Pure Theory of Law', in *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, Stanley Paulson and Bonnie Litschenwski Paulson (eds.) (Oxford: Clarendon Press, 1998, pp. 57–60). Raz's interpretation seems controversial, but as Paulson has pointed out 'What, he (Raz) might ask, is the *point* of normativism if one does not take the next step, namely, turning it into a normative theory?' (S. Paulson, 'The Weak Reading of Authority', above (n. 14), p. 137 footnote 19).

*basic* than the theoretical explanation. In a nutshell, the *naive* explanation of action cannot be ignored or reduced to the theoretical standpoint.

I have shown that the transparency condition is a recalcitrant feature of the deliberative point of view. When an agent acts for reasons following legal norms these reasons are transparent to the agent and, if we can explain the way that norms regulate the action of the agent, then we can understand what the agent's reasons are. *In the language of Kelsen, the subjective meaning is manifest in the reasons that the agent has to follow the norms, whereas the objective meaning is the attribution of the 'legal ought' to the action by the norm.* Let us imagine the following example. A man steals a gun and threatens the Mayor of Sheffingham with it. We would like to elucidate the reasons for his actions and ask the man why took the gun, the man tells us that he took the gun in order to force entry into the Mayors' office and he did this in order to threat him. In response we ask the man why he threaten the Mayor with a gun, the man tells us that the Mayor is not a legitimate authority but that he *himself* is. He adds that only legitimate authorities can rule. We now understand his action. We can grasp the meaning of his act and understand that he is confused and mistaken in his reasons for action, i.e., the Mayor is not a legitimate authority. This is possible because we understand, in Kelsen's terminology, the subjective meaning of the intentional action; i.e., the reasons that explain *why* he took the gun and threaten the Mayor, we can now say that the norm attributes an objective meaning to his action and we can intelligibly say: 'If a man threatens a legitimate authority, exercising power in an illegitimately way, then he ought to be punished'. In Kelsenian terminology but *contra* Kelsen, my point is that the objective meaning can only be attributed because we understand the subjective meaning. In other words, Kelsen's 'inversion thesis' works as an explanation of the normative and authoritative character of the law because we can understand the *naive* explanation of action, namely the explanation of action from the deliberative point of view. The *naive* explanation of action is prior to and more basic than any other explanation. In our example, the actions of the man, taking the gun and threatening the Mayor were guided by the general rule that establishes that only legitimate authorities can exercise power. The rule was presented as

a reason that (a) has a good-making characteristic and (b) is transparent to the agent.

Imagine a modification of the example provided by Kelsen. Men are assembled in a hall, some give speeches, some stand up, others remain seated. They have the intention to enact a statute to kill rats, but because of a typing mistake they actually enact a statute that authorises the killing of domestic cats. The process of a valid enactment has not been breached and therefore we have a valid statute. Therefore, the subjective meaning of the act is the enactment of a statute that obligates the killing of rats in specific circumstances by the general population; however the objective meaning of the act is the enactment of a statute that obligates the killing of domestic cats in specific circumstances by the general population. In this case, the objective meaning and the subjective meaning will not coincide. The legal scientist will get wrong the *basic* subjective act. Let us suppose that a legal official ought to apply the statute. The reconstructed legal norm will say 'if a man in the specified circumstances does not kill the domestic cat, then he ought to be punished'. To the question why he ought to apply such norm, the legal scientist will refer to the antecedent and respond that this is the objective meaning of the act after transforming the subjective meaning of the act of the men in parliament. But in the example the subjective meaning was not soundly grasped. Consequently, transforming the objective meaning of the act is also mistaken. In answer to the question what is the subjective meaning of an act to be transformed?, Kelsen would be forced to reply that it is what the legislators intend to do and then he would need to provide a sound understanding of the subjective meaning of an act of will and this can only be obtained when we understand the deliberative point of view.

The problem that emerges is that the legal scientist cannot ignore the subjective meaning of intentional actions as his task is to transform it. In other words, the subjective meaning is the basic material upon which the legal scientist will reconstruct the objective meaning of a legal act. Furthermore, the legal scientist needs to get the subjective meaning correct in order to transform it into the objective meaning. These are all imaginary examples that work as thought-experiments, but the purpose is to show that there is something intuitively wrong in the assertion that a satisfactory and complete

explanation of legal normativity is provided by the 'inversion thesis' and that the 'inversion thesis' can do this without a sound understanding of what intentional action is.

## V. TWO POSSIBLE OBJECTIONS TO THE PARASITIC THESIS

A. *First Objection*: The parasitic thesis is sound, but Kelsen's inversion thesis does not need to be parasitic on Aristotle/Anscombe's explanation of intentional action. Kelsen could argue that the inversion thesis is rather parasitic on the notion of intentional action as a two-component view.

There is some textual evidence[55] that shows that Kelsen recognises that the idea of action as subjective meaning is prior to the attribution of objective meaning to a subjective meaning by the norm. Kelsen could argue that the subjective meaning of an act can be satisfactorily explained in terms of the two-component view. However, if this is correct, then we envisage that the two-component view faces difficulties in providing an intelligible explanation of intentional action and therefore making intelligible the subjective meaning. The most refined explanation of the two-component model is advanced by Donald Davidson. For Davidson if someone does something for a reason he can be characterised as (a) having some sort of pro-attitude towards actions of a certain kind, i.e. desires and (b) believing (or knowing, remembering and so on) that this action is of that kind.[56] Thus, let us suppose that a man drives his vehicle, stops it at a parking space and get out of his vehicle because he wants to go to the supermarket. On the way to the supermarket he meets a friend. What he has done for a reason and intentionally is only to park his vehicle and go to the supermarket; he did not intentionally meet his friend. His desire to go to the supermarket and his belief that driving his vehicle will get him to the supermarket constitute the reasons for his actions. The pair belief-desire is a mental state. The presupposition that is operating

[55] In PTL1, above (n. 22), p. 9, Kelsen asserts: 'Cognition encompassing the law usually discovers a self-interpretation of data that anticipates the interpretation to be provided by the legal science'.

[56] D. Davidson, 'Actions, Reasons and Events', *Essays on Actions and Events* (Oxford: Clarendon Press, 1980), pp. 3–19. This analysis is modified in his essay 'Intending' which is published in the same collection. However, he still maintains the causal account of intentions. For an illuminating critique of introspection or the inward approach see R. Hursthouse, 'Intention', *Logic, Cause and Action*, Teichman, R. (ed.) (Cambridge: Cambridge University Press, 2000).

here is that to understand the mental state of desiring and the mental state of believing is the same as to understand the content of the belief and the content of the desire. In other words, to establish whether I believe that I am intentionally driving, I need to look introspectively[57] at my mental state of believing.[58] Let us suppose that this sophisticated account is the only one that Kelsen needs to defend in order to show that his 'inversion thesis' i.e. a theoretical explanation of the normative character of law, is parasitic on another theoretical perspective such as the 'sophisticated two-component model'. The objector will argue that it does not need to rely on the Aristotelian/Anscombe notion of intention because the 'sophisticated two-component model' is a sound explanation of intentional action. However, let us suppose that the man who is driving to the supermarket intends to kill his enemy later on that day. Whilst he is driving his car, and by mere coincidence, he sees his enemy walking on the pavement and the man suffers a nervous spasm that causes him to turn the wheel of the vehicle and run over his enemy. Obviously, he did not kill his enemy intentionally. However, according to the sophisticated two-component view, in order to have an intentional action we need two conditions; (a) a pro-attitude or a desire for the action and (b) the belief that the action is of that kind. In our example, the man has the desire to kill his enemy and has the belief that driving his vehicle will result in the death of his enemy. Nevertheless, although in this case the conditions of intentional action as advanced by the sophisticated two-component view are met, the man did not act intentionally. There is clearly something wrong with the sophisticated two-component view of intentional action as it cannot explain cases where there is deviance from the causal chain. The objective meaning will say: 'if the man commits a murder, then he ought to be punished'. Following the objection, Kelsen only needs to say that to understand the subjective meaning of the intentional action that is the basis of the objective meaning, the legal scientist only needs to resort to the two-component model. But the example shows that the legal scientist will not understand the basic material

[57] Kelsen talks about subjective meaning as mental states or internal processes that are known by introspection.

[58] In this section, we have criticised this idea and argued that to know whether I have reasons for belief or action I do not need to look at the mental states since reasons for belief or reasons for actions are transparent from the first-person perspective.

that should be transformed, namely the subjective meaning of the action. My argument is that we can only understand the subjective meaning of an intentional action if we examine the description of the action *as advanced by the agent, not in terms of his own mental states, but in terms of the ends of the action*.[59] In this case, we will ask the man, why did he drive his vehicle, why did he turn the wheel and why did he run over his enemy. The answers respectively will be 'to go to the supermarket'; 'because I had a nervous spasm, and 'I did not intentionally run over my enemy'. These reasons are transparent, i.e., self-evident to him, and he does not need any evidence of his own mental state to understand *why* he accidently killed his enemy. Because of his own description of the action we understand that it is not an intentional action and we can grasp the subjective meaning of the action which is the primary material upon which the legal scientist will make his reconstruction.

B. *Objection Two*: Kelsen can prescind from the 'subjective' meaning. Furthermore, the subjective meaning can be either inaccurate or an invention. The legal scientist only needs to recognise that the action is a human action.

The objector might point out that for Kelsen the 'subjective' meaning might not coincide with the objective meaning and that, therefore, the subjective meaning could be completely inaccurate. Furthermore, it could even be an invention or a fiction. There is no need to have a 'subjective meaning'. In most cases, the objector will continue, the legal theorist will need to identify an act as a human act and this will suffice. Let us imagine that there is a statute that establishes that 'the killing of animals for religious reasons is forbidden'. A group of men and women are intentionally following a religious ritual and killing chickens. The subjective meaning of their actions is that they intend to perform a religious ritual. According to the objection, the legal authority can prescind from such meaning or, even further, it might have an inaccurate understanding of such subjective meanings. Accordingly, the legal theorist mistakenly

[59] In the *Hauptprobleme*, above (n. 19), pp. 57–94, Kelsen advocates a very narrow and mistakenly conception of teleological actions. Kelsen reduces the teleological conception of action to the two-components view. According to Kelsen, the will is a mental state that aims or desires an end. The end is the outcome of the action and belongs to what *it is* as opposed to what *it ought to be*. He argues that the creation of a norm according to an end is a historical-sociological process. Therefore, the legal theorist cannot rely on teleological conceptions of actions in order to explain the normative character of law.

believes that the group is preparing a feast and killing the chickens to prepare a soup. There is something anomalous about the proposal that the subjective meaning is dispensable. How will the legal scientist transform his inaccurate subjective meaning into the reconstructed objective meaning of the act, which will be 'if a group of men kill animals for religious beliefs, then they ought to be punished'? Because of his misinterpretation of the subjective meaning, he cannot accurately reconstruct it and therefore there is no normative statement to address to the legal official. In other words, he cannot identify the antecedent and cannot determine whether or not the group of men is breaching the norm.

## VI. CONCLUSIONS

Legal norms play two fundamental roles. First, they regulate human behaviour. Second, they guide the actions of the addressees. Kelsen's 'inversion thesis' can only provide a satisfactory explanation of the regulative role of norms and not of its guiding function. Consequently he only gives a partial explanation of the 'legal ought'. The guiding function of a norm can be better explained by the outward-looking approach to intentional action. However, Kelsen defends the two-component view of intentional action which is an inward-looking approach, namely it examines the mental states of the agents and their internal processes. Thus, the subjective meaning of an act, which is the primary material which legal science transforms into the objective meaning of an act, is conceived in terms of the inward-looking approach. The inward-looking approach cannot explain a key feature of the deliberative point of view which is the transparency condition. We have explained the distinction between the theoretical and the deliberative standpoint in understanding intentional action. The agent is guided by the legal norm only when he takes the deliberative viewpoints and this entails that reasons for actions are self-intimating or self-evident, but since the 'inversion thesis' is simply a theoretical stance where reasons for actions are *opaque*, it cannot explain the guiding role of legal norms. We have also shown the way in which the 'inversion thesis' is parasitic on the deliberative viewpoint.

Kelsen is not insensitive to these difficulties and it seems that in his later work he recognised, though not in an obvious way, the

importance of understanding correctly the 'subjective meaning' and he *explicitly* acknowledged the need to understand the subjective meaning of an act in order to correctly describe the objective meaning of a norm, including legal norms. Let me quote a long passage from his *General Theory of Norms* conspicuously makes this point:

> It is only when the addressee of a command *understands* the meaning of the expression addressed to him that he can -subjectively- comply with the command. The willing, the intending on the part of the commander or norm-positor and the understanding on the part of the addressee of the command or norm are essentially inner processes which occur when a command is issued or a norm posited and a command or norm is obeyed. When I order another person to behave in a certain way, I can discover by introspection an inner process which is a willing directed to the behaviour of someone else; similarly, when I receive a command, I can discover by introspection that I perceive inwardly the utterance of another person addressed to me, that is, that I hear certain spoken words, that I *see* a gesture or written or printed characters, and *furthermore* there occurs in me something different from this hearing or seeing, namely, I understand the utterance I hear or see, and I understand it as a *command* and not as a *statement*, i.e. I grasp the *meaning* expressed in it, the meaning that I *am* to behave in a certain way.[60]

Then he continues:

> Thus, if in the case of a command issued or received by oneself, the inner process of willing, and understanding can be discovered by introspection and are essential for a correct description of what occurred, -relying on the arguments which support the possibility of an objective psychology- we can, indeed we *must*, make use of them in the description of a command given by one person and received and obeyed by another.[61]

Kelsen's approach on the subjective meaning of an act and intentional action is an inward-looking one,[62] but he offers no explanation on the way in which the objective meaning of legal norms is parasitic on the inward-looking approach that considers and examines the internal processes of the mind. Does it mean that the explanation of the legal scientist depends on the explanation pro-

[60] See Kelsen, GTN, above (n. 16), p. 35, § IV.

[61] *Ibid.*, p. 36, § IV.

[62] In my view, he misunderstands Wittgenstein and attributes to him the view that Wittgenstein establishes a *causal* connection between the external events of uttering linguistic expressions and the respective reaction, without reference to 'internal processes'. See footnote 39, p. 299 of Kelsen, GTN, above (n. 16).

vided by the cognitive psychologist? How does the inward-looking approach explain the guiding role of legal norms? In my view, Kelsen has ingeniously mapped out all of the elements required to understand legal normativity; however he underestimated the power of the outward-looking approach of intentional action as a sound explanation of the subjective meaning of intentional action, and this limited his approach to a full understanding of legal normativity.

The core arguments of the paper can be summarised as follows:

(a) Kelsen's investigation is motivated by two different directions. On the one hand, he aims to provide a scientific explanation of law and on the other he aims to negate a fact-based explanation.
(b) Kelsen advocates an explanation of intentional action that overcomes nineteenth century psychologism. This is called the 'subjective meaning' of an act. However, there is a lack of a sophisticated and sound explanation in his early and classic period of the 'subjective meaning' of an act.
(c) The 'subjective meaning' of an act is, according to Kelsen, still fact-based and therefore unsuitable to explain the legal 'ought'.
(d) The 'inversion thesis' aims to transform the 'subjective meaning of an act' into the objective legal meaning. This transformation will ensure the avoidance of an explanation of the legal ought in terms of a fact-based explanation.
(e) I offer a reconstruction of Kelsen's explanation of intentional action and therefore of what he called the 'subjective meaning of an act' in its stronger form, namely as a sophisticated explanation of the two-component model of intentional action, and show that this explanation is parasitic on a more *naive or basic* explanation, which is called the Aristotle–Anscombe explanation of intentional action.
(f) I show that since (1) the 'inversion thesis' needs to transform the 'subjective meaning of acts' into objective legal meanings and (2) the Aristotle–Anscombe explanation of intentional action is the primary explanation, then the 'inversion thesis' needs to rely on the Aristotle–Anscombe model of intentional action.

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