KELSEN'S DOCTRINE OF IMPUTATION

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Summary

This thesis deals with Hans Kelsen's concept of peripheral imputation, a relation established by law between material facts as legal conditions and consequences. Being a fundamental concept of his idea of legal science, this paper describes how Kelsen draws the comparison between imputation and causation, a fundamental principle of natural science that also connects material facts, albeit differently. In addition to the comparison itself, the paper discusses how Kelsen uses it to work in favor of legal science. Firstly, the difference between the two relations is used by Kelsen to justify the autonomy of legal science. After all, if it makes sense to talk about a way of relating things in the world that's not causation, it makes sense to have a science that describes things as they're related in this other way. Secondly, pointing to the analogies between the two relations, and consequently between legal and natural science, is supposed to prop up the legitimacy of former. For Kelsen, causal relations take the form of statements of scientific laws, so exploring this second move requires us to answer what makes scientific laws important in scientific explanation and whether this can be mimicked by imputation. The answer if far from obvious, but it's tentatively proposed that Kelsen could make use of the idea of nomic necessity of scientific laws, as Kelsen has no

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trouble describing both relations as necessary in his early works. As this changes in his later works, the question arises whether Kelsen's whole manoeuvre falls apart.

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1. INTRODUCTION

Austrian legal theorist Hans Kelsen was one of the leading figures in the field during the 20th century. Born in Prague in 1881 and passed away in 1973, Kelsen's career spanned over half a century, resulting in work which remains an important source of discussion, controversy and inspiration.

The sheer volume of his academic output and different philosophical traditions influencing his work make it a difficult task to arrive to a neat and simple periodization of his long career.[1] Nonetheless, I believe that having a rough sketch of his intellectual development will prove useful, so this is precisely what we get to now.

Generally, Kelsen's career overlapped with the birth of modern analytic philosophy and a shift from German idealist tradition to the empiricist movement that remained dominant in Anglo-American philosophy to this day. Consequently, Kelsen's philosophical influences are best described as interplay of neo-Kantianism and empiricism.[2] As I hope will become clear, drawing a firm division in time between the two influences is a difficult task. Still, it's somewhat clear that the former is dominant in his work during the first part of his career, up to 1960-ies. This include most of the works cited in this thesis, namely both the first and second edition of *the Pure Theory of Law*[3], then his sociological work in causation, the book *Retribution and Causality* [4] and finally his essay *Causality and*

[1] The topic was, at one point, an object of fierce debate. See Paulson, S. L., Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory, *Oxford Journal of Legal Studies*, Vol. 19, No. 2, 1999, pp. 351-364.

[2] Important facets of these traditions and their influence on Kelsen's work will be explained.

[3] Kelsen, H., *Introduction to the Problems of Legal Theory*, *A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, Oxford University Press, Oxford, 1997; Kelsen, H., *Pure Theory of Law*, The Lawbook Exchange, New Jersey, 2005.

[4] Kelsen, H., *Retribucija i kauzalnost*, Naklada Breza, Zagreb, 2013.

Imputation[5]. Empiricism looms large in Kelsen's work from the start, and as Neo-Kantian influence wavers gradually during the 40-ies and 50-ies, Kelsen's work enters the second phase, characterised by scepticism about Neo-Kantianism and greater endorsement of empiricism. This development culminates in his posthumous book *the General Theory of Norms*.[6] One thing is worth bearing in mind. The fact that I mention these general philosophical trends suggests that I hold them to be important for understanding Kelsen. That much is true, but it's also true that Kelsen's own treatment of these influences was described, not without reason, as superficial.[7] I think this will become clear, as a good part of this paper is dedicated to explaining how these influences are reflected in Kelsen's work, especially its main topic.

It's hard to overstate the importance and originality of Kelsen's ideas. Among them, the Pure Theory of Law*,* Kelsen's version of legal science, is arguably the best known. Pure Theory of Law is Kelsen's attempt to create an autonomous discipline of legal science, one separate from both empirical and natural law approaches to law.

The main subject of this work is the cornerstone of the Pure Theory of Law, namely the doctrine of imputation*.* Let me tentatively define it as a proposition that there exist a special kind of relation (imputation) between the conditions of a hypothetically formulated legal norm and its legal consequences. This relation is expressed by propositions of legal science in the form of "If a, then it ought to be b", where a and b are (sets of) material facts or events, and "ought" marks this connection.[8]

I will aim to elucidate this concept, especially its two features. Firstly, the role it has in justifying the need for legal science as a discipline separate

[5] Kelsen, H., Causality and imputation, *Ethics* Vol. 61, No. 1, 1950, pp. 1-11.
[6] Kelsen, H., *General Theory of Norms*, Clarendon Press, Oxford, 1991.
[7] Zalewska, M., Causality and Imputation (Kelsen), in Sellers, M., Kirste, S. (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy*, Springer, Dordrecht, 2017. https://doi.org/10.1007/978-94-007-6730-0_220-1, p. 3.
[8] It's important to note that „ought" does not necessarily express an obligation for someone to do something, so the propositions mustn't be understood as "if some events happen, subject x is to do something". The meaning of „ought" is a complicated topic in Kelsen studies and one I will mostly try to evade, so it suffices to say for now that it is to be understood in a very limited way, simply marking that there's a legal relation of two material facts, or events. Kelsen's short summary of everything encompassed by "ought" can be found in the second edition of Pure Theory. Kelsen, *op. cit*. in 3, p. 5.

from natural sciences and secondly, its similarities and differences with causation.

Due to reasons of space, I ignore one important feature of Kelsen's work. There's a well understood ambiguity in Kelsen's work regarding the term "imputation". Tentative definition stated above describes what Kelsen himself dubs the "peripheral" imputation, as opposed to that of "central" kind. Given that the goal of this work is the elucidation of peripheral imputation, this introduction briefly deals with the central type, after which the qualification of "peripheral" is dropped when using the term.

Kelsen builds the idea of central imputation on the traditional Kantian doctrine of imputation. Kant writes:

"Imputation (imputatio) in the moral sense is judgement whereby someone is deemed the author (causa libera) [free cause] of an event, which thereupon is called a deed (factum) and is subject to laws."[9]

Therefore, traditional view of imputation casts it as a relation between a person and an act ascribed to the person. Kelsen importantly parts way with the tradition by using the term "central imputation" to designate ascribing to some person, namely legal entity or an organ of an entity, acts committed by another person. In other words, it's a relation that ascribes acts to a fictionalized entity.[10]

In the first edition of his Pure Theory of Law, Kelsen explicitly distinguishes it from peripheral imputation, describing it as "an entirely different operation from the aforementioned peripheral imputation, which connects a material fact [...] to another material fact within the system."[11] Regarding the relation of central and peripheral imputation, Stanley Paulson notes the following:

[9] Kant, I., *Introduction to the Metaphysics of Morals*, as cited in Paulson, S. L., A 'justified normativity' thesis in Hans Kelsen's pure theory of law? : rejoinders to Robert Alexy and Joseph Raz, in Klatt, M. (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy*, Oxford University Press, Oxford, 2012, p. 103.

[10] In this way, by connecting acts of organs and legal systems, whether comprehensive or subsystems, are material facts related to the unity of a system. Kelsen, *op. cit.* in 3, §25(d), p. 50.

[11] Kelsen, *op. cit.* in 3, p. 51.

"If Kelsen's doctrine of central imputation in Main Problems (1911) differs from the traditional doctrine in manifesting no personalized subject, his doctrine of peripheral imputation, which he introduces a decade later, differs from both versions of the doctrine of central imputation in having, stricto sensu, no subject of attribution at all."[12]

What is ignored in this work is the evolving nature of Kelsen's view regarding central imputation. The distinction between central and peripheral imputation is not found in his very early works. Moreover, central imputation designates a special kind of relation, so the role of justifying the need for an autonomous legal science, later ascribed to peripheral imputation, was first ascribed to central imputation.[13]

At this point, just a common sense view of causation will suffice. Events or goings-on are caused by one another, physically linked together in some way such that if one event hadn't happened, the other would not either. Describing how and what is causally linked together is arguably one of the main tasks of scientific research and explanation. The question now is whether there is a different but analogous relation to causation, the existence of which would, in some yet to be specified way, justify that we also have a different sort of science. This science would not be interested in what is caused by what, but what is imputed to what. This is the sketch of the Kelsenian project in legal science, one we investigate more thoroughly throughout this work.

This work has the following structure. Section 2 focuses on the interplay of empirical and legal science as we take a closer look into Kelsen's overall project, namely justifying the independence of legal science. In the end, Kelsen notes the differences and similarities between imputation and

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[12] Paulson, *op.cit.* in 9, p. 106.

[13] A good historical overview of this development is presented in Zalewska, *op. cit*. in 7. As Paulson notes, despite the terminology, Kelsen himself considered peripheral imputation to be of the more fundamental kind. See Paulson, S. L., Hans Kelsen's Doctrine of Imputation, *Ratio Juris*, Vol. 14, No. 1, 2001, p. 48.
In an interesting article, Langford and Bryan engage with Kelsen's 1926 Lecture Course where the concept of normative imputation is used to argue for a monist theory of international law and against the primacy of national law. Moreover, they present the change in Kelsen's views on imputation between 1926 and *Introduction to the Problems of Legal Theory* as an internal development of Kelsen's views, rather than his divergence from Kant. See Langford, P., Bryan, I., Hans Kelsen's Concept of Normative Imputation, *Ratio Juris*, Vol. 26, No. 1, 2013, pp. 85-110.

causation mainly as a part of an argument in this project. After sketching the importance of the distinction between the two relations, section 3 zooms in on the comparison itself, but also aims to explain how it's made to work in favour of legal science.

2. LEGAL SCIENCE AND CAUSAL SCIENCE

For Kelsen, nature is an order of things related by the principle of causality. Consequently, causal science describes nature as it is ordered in this way, by statements of laws of nature expressing the various causal relations.[14] It's worth noting that, by causal sciences, Kelsen has in mind not only the usual candidates like physics and chemistry, but also psychology, sociology and history, as they all aim to describe their object in virtue of causal relations between certain causes and effects in the relevant subject area.[15] One question might naturally arise. Why couldn't law also be described by one of these disciplines, and why is there any need for a special legal science?[16] Now, the question isn't should law be a subject of inquiry for psychology or sociology. Kelsen's answer to that question is clearly affirmative.[17] It's fully obvious that all these disciplines might provide interesting insight into workings of legal systems or their societal roles. The question, on the other hand, is whether legal science as dogmatic

[14] Kelsen, *op. cit.* in 3, p. 75. Kelsen links the ideas of scientific explanation, causal relations and statements of scientific laws. This idea is further explored in section 3.

[15] He divides sciences into natural and social, depending on what's the object of their inquiry, and the latter are further divided into causal and normative. All the mentioned natural and social sciences are described as? causal, while a normative social science would be legal science.

[16] Generally, most (empirical) scientific disciplines face the questions about the possibility of their reduction. This is a perennial theme in philosophy of science, so let me sketch a definition. Reduction of one theory to another involves full representation of statements of the former theory in terms of the latter. What is thus achieved is that "distinctive traits of a given subject matter are allegedly explained by, and in some sense reduced to, more inclusive […] traits not distinctive to that subject matter." The hope is that this manoeuvre marks a scientific progress either by realizing that something which was previously unclear is "nothing but" something that is clearer, or that by reduction, we achieve more theoretical simplicity by placing explanatory power on fewer theoretical terms or entities of some other kind. See Nagel, E., Issues in the Logic of Reductive Explanations, in Curd, M., Cover, J. (eds.), *Philosophy of Science: The Central Issues*, Norton, 1998, pp. 905-906.

[17] Kelsen, *op. cit.* in 3, pp. 13-14.

jurisprudence can be fully replaced by them. And, to put it very simply, for this to happen it is required that all there is to be known or can be known about law, can be known by the methods of these disciplines.

It's worth here to give some contours to what and how exactly presents the danger to the autonomy of legal science.[18] The main culprits in this regard were psychologism and sociology of law. Psychologism presents an important intellectual movement in general intellectual and legal thought of late 19th and early 20th century and it can briefly be characterised as a doctrine that everything[19] is psychological or expressible in such states.[20] When it comes to law, such a doctrine implies that legal concepts, e.g. norms, obligations, etc. are ultimately a matter of our psychology.[21] The story is similar when it comes to sociology of law, which examines how certain causes influence the creation, application of and obedience to law

[18] The work mostly focuses on other sciences. It's well known that Kelsen viewed theories of natural law as posing danger to the „purity" of legal science as well.

[19] This „everything" usually means a domain of interest to a certain discipline. E.g. psychologism in logic claims that laws of logic are ultimately reducible to, or in some other way just a matter of our psychological states.

[20] This short description of psychologism and its relationship with Kelsen's work is adopted from Stalney L. Paulson. See Paulson, *op. cit.* in 3, pp. 93-102.

[21] So, to be bound by a norm is just to have a certain psychological attitude towards some facts. One of Kelsen's targets is psychologism found in works of Georg Jellinek. When talking about the normative significance of certain material facts, Jellinek thus describes „the normative force of the factual":

„[…] its normative import lies in the underived quality of our nature, on the strength of which something accustomed is physiologically and psychologically easier to reproduce than something new."

Georg Jellinek, *Allgemeine Staatslehre,* cited in Paulson, S. L., *ibid*., p. 101.

Recently, Matthias Klatt offered a more sympathetic interpretation of Jellinek. Klatt argues that Jellinek understands validity as (psychological) efficacy of law. Thus what Jellinek understands by "normative" is the capability of law to motivate, an obviously psychological disposition. Jellinek's "normative power of the factual" is really just "regarded-as-normative power of the factual. This sense of validity clearly cuts no ice with the usual understanding, consequently making Kelsen's accusations of Is-Ought fallacy misguided. Two points are worth mentioning here. Firstly, if indeed, this is all there is to Jellinek's theory, it's harmless to the normative theory of law as it doesn't truly aim to replace it. Secondly, whether Kelsen is right about attributing harmful psychologism to Jellinek is incidental for our present purposes, interesting as it may be. The fact remains that Kelsen thought of Jellinek as holding such views and presented his theory in part as an opposition to Jellinek's. See Klatt, M., Law As Fact and Norm: Georg Jellinek and the Dual Nature of Law, in Bezemek, C., Ladavac, N., Schauer, F. (eds.), *The Normative Force of the Factual: Legal Philosophy Between Is and Ought*, Springer, Dordrecht, 2019, pp. 45-64.

in a given society. Consequently, familiar "normative sounding" concepts are to be eliminated or explained in more congenial terms.[22] Both of these approaches to law have ultimately the same upshot: causal explanations of law suffice.

Kelsen' response to these methodological claims is rather straightforward. There's more to law than causal relations of material facts, as law's normative meaning is not a matter of any one person's psychological states or something to be explained in any similar statements about material facts. Kelsen aims to establish this by invoking the special "oughtness" of law, that is, normative meaning law provides when it renders material facts legally relevant. This normative meaning is not argued for by any sophisticated argument in Kelsen's work, nor Kelsen think there is much need for this. The "oughtness" of law is simply what is grasped when one fully understands the meaning of legally relevant facts or events, e.g. the meaning of a group of people raising their hand is only grasped if we understand that it represents passing a new law. Kelsen calls this the "objective" sense to accentuate that its meaning does not depend on subjective meanings ascribed to the fact by individuals.[23] The objective sense of law is readily apparent in our descriptions of law[24] as well as the fact that legal science, in form of dogmatic jurisprudence has existed for millennia.[25] As Kelsen puts it:

"[…] if all meaning is denied to the "ought" – then it would be senseless to say: "this is legally permitted, that is forbidden". […] The thousands of statements in which the law is expressed daily would be senseless. In contrast to this, the fact is undeniable that everybody understands readily that it is one thing to say: "A is legally obligated to pay $1000 to B." and quite another "There is a certain chance that A will pay $1000 to B."[26]

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[22] Kelsen, *op. cit.* in 3, p. 32-33. and in 3, pp. 100-103.

[23] Kelsen, H., *op. cit.* in 3, pp. 8-10. It's a famous part of Kelsen's work that this meaning is objective because it's an object of a valid legal norm, the validity of which ultimately rests on it's creation being authorized by the presupposed Basic Norm.

[24] Kelsen presents this argument in *Introduction to the Problems of Legal Theory*, but he puts it very explicitly in *Pure Theory of Law* in this way: „If we analyze our statements about human behaviour […] we discover that we connect acts of human behaviour toward each other and toward other acts […] also according to a principle different from causality." See Kelsen, *op. cit.* in 3, p. 33 and in 3, p. 76.

[25] Kelsen raises this point in *op. cit.* in 3, p. 105.

[26] Kelsen, *op. cit.* in 3, p. 33

To this, one might add that it's one thing to say that someone wishes someone else to do something, and a different thing to say that someone legally ought to do something.

The upshot, aside from there even being legal norms and legal meaning in addition to material facts, is that there is a gap between the two.[27] Consequently, making any explanation of law which refers to material facts only is simply a non-starter. George Pavlakos sums it up:

"[…]it is logically possible that we can know all the relevant facts without knowing that the relevant legal norm obtains. The ensuing explanatory gap is modelled by Kelsen as an Is-Ought gap, whereby it is impossible to derive an Ought-fact (legal norm) from any given set of Is-facts (lower-level facts)."[28]

So, Kelsen hopes to have, *prima facie* at least, established that in addition to causation, there is another way of thinking about material facts and how they can be connected – they can be imputed to one another in virtue of legal norms.[29] As Kelsen takes it, describing this relationship requires a special, normative kind of science.

At this point, legal science comes in, as it aims at cognition of legal norms, *qua* legal norms. In doing so, legal science describes legal norms by

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[27] From a general philosophical perspective it's perhaps worth pointing out that this commits Kelsen to some sort of ontological realism concerning abstracta, that is, non-spatiotemporal entities. Kelsen himself is clear about this point, explicitly describing norms as outside of space and time. See Kelsen, *op. cit*. in 3, p. 12.
Given that it is somewhat of a default view that abstracta are causally inert, it follows that inquiry into them cannot be a matter of describing causal relations they enter into. For the sake of some broader themes we get into in this work, it's worth noting that empiricism is characterised by a thoroughgoing distrust of positing abstract entities. Arguments for this distrust vary, but we might point out scepticism about the possibility of humans as beings firmly situated in time and space to have epistemic access to something outside it and claiming that abstracta are explanatorily vacuous.

[28] Pavlakos, G., *Kelsenian imputation and the explanation of legal norms*, Revus [Online], 37 | 2019, Online since 22 November 2018, accessed on 2nd of October, 2020., URL: http://journals.openedition.org/revus/4808; DOI: https://doi.org/10.4000/revus.4808.

[29] I say *prima facie* because there's a bit more to this story. Kelsen hopes to have established that there are legal norms and that we can have knowledge of them. Establishing that there is imputation requires another step, one explained in more detail in the section about the nature of imputation.

propositions of law, statements about norms.[30] Crucially, these statements take the form of hypothetical propositions, "If a, then it ought to be b", which express a specific kind of connection established between a and b by the legal norm. When lawyers describe positive law, they take themselves to be describing how a certain legal condition is legally related to a certain legal consequence. Of course, whether this connection between the two events will, as a matter of fact, causally obtain is clearly a separate matter, one that might or might not be of interest to a lawyer.[31] This relates to an important difference between the two relations. It's a feature of imputation that it is brought about by fiat of legal authority, or as Kelsen puts it, "by a legal norm created by an act of will" or "established by acts of human or superhuman beings".[32] Contrary to this, causality is free from such human intervention. This in turn has the consequence that statements of natural laws are falsifiable; they're a matter of nature so they can be contrary to it, and if they are, natural science revises them. Violation of a norm, on the other hand, is in itself no reason to regard it as invalid and consequently, propositions of law aren't revised because they contradict reality.[33] This, of course, is not to say they never change, as norms can change the same way they were created, by fiat of a legal authority.

In this section we already mentioned some differences between the two, mostly to see how these motivate the existence of legal science. For the sake of avoiding repetition, these won't be mentioned again as the precise nature of imputation and its differences as well as similarities to causation are further described in the following section.

[30] Kelsen, *op*. *cit*. in 3, p. 71.
Kelsen dubs these as „rules of law". Following M. Hartney, I shall dub them „propositions of law". See Michael Hartney's Translator's note in Kelsen, *op*. *cit*. in 6, p. xxxiii.
[31] Moreover, that the legal relationship exists while the actual relationship might not obtain, points to the necessity of describing the legal rules with "ought" statements. Kelsen, *op*. *cit*. in 3, p. 88.
[32] Kelsen, *op*. *cit*. in 3, p. 77 and in 5, p. 6. I mention just in passing that in *Introduction to the Problems of Legal Theory*, imputation is a distinctly legal relation and Kelsen does not extend it to analysis of moral statements, which are considered to have imperative structure. This changes in his later works.
[33] Kelsen, *op*. *cit*. in 3, p. 88 and in 6, p. 37.

3. IMPUTATION AND CAUSATION

3.1. General nature of imputation and causation

In what follows, we go back to those general philosophical traditions and see how they have influenced Kelsen's understanding of causation and imputation. Kelsen's own statements of those relations, mostly from his earlier phase, are also presented here in 3.1. We continue with these early views in 3.2, this time in more detail and with a lot of focus on how it all plays a part in his overall goal.[34] These two sections form our backdrop as we continue to the following one, where we focus on what has changed in Kelsen's views. As we will see, some important features are retained, but what is changed is significant.

Causation itself is a perennial topic in philosophy and any serious inquiry into it far exceeds the scope of this work. One caveat is worth bearing in mind. Modern work on causation mostly focuses on particular instances of it, e.g. breaking of a window by Annie's throwing of a rock. As it will soon become clear, this is not what Kelsen usually had in mind when talking about causation, as he placed more focus on law-like formulations of causal links.[35] All in all, very explicit definitions of causation are hard to find in Kelsen's work. The notion is mostly defined by examples and pointing out its particular features. So before we head into that, there's no harm in sticking to where we left this topic in the last section, namely that Kelsen views causation as a specific principle which connects elements in nature.[36]

Traditionally, causation was seen as special kind of connection between things in the world, sometimes even dubbed the "cement of the universe", holding everything together in some special way. Subsequent empiricist tradition has generated a lot of scepticism about such a notion. Famously starting with Hume, the general empiricist thrust against causation is that our senses only perceive sequences of events, e.g. throwing of the rock, followed by the breaking of a window, without any deep metaphysical

[34] Admittedly, some of his later works are referenced in this part, but only where his position did not change and later quotes present a clearer expression of the idea.
[35] This is symptomatic of empiricist views of causation. More on this in the section discussing the structure of the two relationships.
[36] Kelsen, *op. cit.* in 3, p. 75.

connection or force underlying those sequences.[37] Given that empiricists hold all genuine knowledge is in some way ultimately justified by senses, the project then becomes recasting the idea of causation in less metaphysically suspicious terms.

I'm breaking no philosophical news in saying that Kant, another important influence to Kelsen, felt the force of these concerns. His response was accepting that causation isn't a matter of our experience, but that it nevertheless exists as an *apriori,* non-experiential*,* principle of our thinking. Kant establishes this by transcendental arguments, those concerned with the very possibility of knowing objects, before we even experience them. The argument proceeds by starting from something which is "given", namely, our experience and deducing something which is necessary for the given. This something are Kant's *apriori* categories without which we could not have experience.[38] The general form of this kind of argument is thus:[39]

(1) P (given).

(2) P is possible only if Q (transcendental premise).

(3) Therefore, Q (transcendental conclusion).

Important for our present purpose is that causation is one of those categories. That is, causation is a synthetic *apriori* principle of thinking

[37] Alexander Rosenberg, in a somewhat different context, puts it nicely: "Nothing, so to speak, hopped off of the first set of molecules and landed on the second set; the first set of molecules didn't have a set of hands that reached out and pushed the second set of molecules. […] at a deeper level, say the level of atoms, or the quarks and electrons that make up the atoms, we will still only see a sequence of events, one following the other, only this time the events are sub-atomic. In fact, the outer shell electrons of the molecules on the surface of the first ball don't even make contact with the electrons on the outer shells of the molecules at the nearest surface of the second ball. […] No matter how far down we go in the details, there does not appear to be any glue or cement that holds causes and effects together that we can detect or even imagine. Rosenberg, A., *Philosophy of Science: A Contemporary Introduction*, Third Edition, Routledge, New York, 2012., pp. 66-67.

[38] Rohlf, M., "Immanuel Kant", The Stanford Encyclopedia of Philosophy (Fall 2020 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2020/entries/kant/>. Accessed on 9th of October, 2020.

[39] Paulson, *op. cit.* in 9, p. 75.

and empirical, causal laws of nature count as *necessary* for Kant in virtue of being "particular determinations" of this principle.

Before seeing how this strategy is mimicked by Kelsen when it comes to imputation, let's give the term some more contours.

Perhaps the clearest Kelsen's definition of imputation is found in his *Pure Theory of Law.* Thus Kelsen writes:

"…legal norm in not understood… as an imperative, but a hypothetical proposition expressing a specific link between a conditioning material fact and a conditioned consequence."[40]

In the same section, he adds:

"The relationship of sanction to a delict […] has only normative meaning. Ought is the expression of that relationship, termed "imputation", and thus the expression of specific existence of law, […], representing the characteristic sense positing the reciprocal relation between material facts belonging to the legal system.[41]

And the general formulation of a proposition of law is: "Under the conditions determined by the legal order, a coercive act ought to take place".[42] That is, Kelsen understands the reconstructed legal norms as having the form of "If A, then B ought to be", where "ought" designates "a specific sense in which the legal condition and consequence belong together in a legal proposition".[43]

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[40] Kelsen, *op*. *cit*. in 3, p. 23.
[41] *Ibidem.*
[42] Kelsen, *op*. *cit*. in 3, p. 76.
[43] *Ibid*., p. 28. A point of clarification is in place here. As mentioned, legal science deals with descriptive statements about the law, aiming to offer reconstructions of norms created by the legal authority. That is, its statements are truth apt and descriptive, not prescriptive, as they're about norms, but not themselves norms. In the quoted paragraphs, Kelsen uses the term "legal norm" and "imputation" somewhat interchangeably, even though imputation is the relationship expressed by sentences of legal science, not norms themselves. As his usage of the term "legal propositions" for expressions containing the "ought" suggests, Kelsen had this idea mind even in the first edition of *The Pure Theory of Law*, albeit only becoming explicit about this point in his later works. This was marked

No, let's set the stage for Kelsen's version of transcendental deduction.[44] Kelsen's twist to the transcendental question is asking how law or legal science is possible. His answer starts with the given. In the last section we saw that Kelsen assumes that norms exist and that we have legal knowledge. This was the force of his arguments that we, with perfect sense, talk about norms and how they relate material facts as well as his contention that dogmatic jurisprudence has existed for millennia. So, (our knowledge of) norms is our given, taking the form of hypothetical judgements, that is, reconstructed legal norms which are the objects of the cognition in legal science. What is consequently derived is imputation as a principle of thinking without which cognition of norms is impossible. So, the argument is:[45]

(1) These legal norms, together representing a legal system, are objectively valid.

(2) The objective validity of these norms is possible only if the category of imputation is presupposed.

(3) Therefore, the category of imputation is presupposed.

Putting all of this together, the following, by now familiar image emerges. There are two kinds of connections between things in the world, causation and imputation. The comparison of the two plays two important roles in Kelsen's work. Firstly, the idea of causation is used to give us a clearer picture of imputation by noting their similarities and differences. Secondly, it's a way to philosophically justify legal science. The role of their differences was already explained, but their similarities are arguably just as important, as it is a way for legal science to piggyback its way into respectability. As Stanley Paulson puts it:

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by the introduction of the already mentioned terminology, dubbing the objects of legal science "legal norms" and sentences of legal science "rules of law".

[44] This part follows Paulson's brilliant exposition. Interestingly, Paulson's claim is that transcendental deduction fails to establish imputation as a necessary category of thought. See Paulson, S. L., The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, *Oxford Journal of Legal Studies*, Vol. 12, No. 3, 1992, pp. 323. and 324. and *op. cit.* in 3, pp. 71-78.

[45] Paulson, *op. cit.* in 3, p. 74.

"If it can be shown that aspects of the fundamental ordering principle of the natural sciences are reflected *per analogiam* in the fundamental ordering principle of legal science, then Kelsen's parallel will indeed enhance the status of legal science qua science." [46]

The how and why of this piggybacking manoeuvre is never fully explained in Kelsen's work, so one might wonder about the details. Exploring potential problems for Kelsen throws us headfirst into philosophy of science, so section 3.2 is dedicated to this topic as we analyse the substantive and structural aspects of the two, as they appear in Kelsen's work.[47]

3.2. The structure, relata and nature of causation and imputation

Let's start with Kelsen's favourite, and very telling, example of causation: "If the metallic body is heated, it expands."[48] What becomes apparent from this example is the following. Firstly, what Kelsen mostly has in mind when discussing causation are actually scientific laws, hypothetical propositions expressing a general relationship of the form "If A, then (it must be) B".[49] Secondly, his concept of causation importantly echoes empiricism.

As already mentioned, empiricist project in causation was aimed at recasting the idea using the more empirically palatable notions, e.g. sequences, facts, events and regularities. We can observe certain events followed by certain other events. But, certain events can follow other events without being causally related, so an empiricist must tell us what distinguishes any random accidental sequence of events from genuine causal relations. The answer is that, unlike accidental sequences, they are

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[46] Paulson, *op. cit.* in 3, p. 107.

[47] I analyse the issues of the nature of a relation itself and the nature of its relata separately. This way of presenting the topic was inspired by Schaffer's presentation of causation. See Schaffer, J., "The Metaphysics of Causation", The Stanford Encyclopedia of Philosophy (Fall 2016 Edition), Edward N. Zalta (ed.), accessed on 4th of October, 2020. URL = <https://plato.stanford.edu/archives/fall2016/entries/causation-metaphysics/>.

[48] Kelsen, *op. cit.* in 3, p. 90, in 5, p. 1, and 6, p. 22.

[49] In the second edition of PTL, Kelsen considers Laws of Nature to be applications of the principle of causation. Kelsen, *op. cit.* in 3, p. 75.

instances of general laws, and general laws are just well confirmed universal regularities.[50]

Kelsen's views in all of his works seem to be influenced by this a great deal. Causation is a link between material facts, and it expresses "a functional connection" between them.[51] This is Kelsen's rejection of causation as a deep, mysterious force of universe, and adoption of a very "low-key", metaphysically unsuspicious version, something which he is explicit about.[52] Importantly, this isn't all there is to the story. In the first edition of *Pure Theory of Law* a step away from empiricist views is made when causation is described as "inviolable" – that is, necessary, something a lot of modern philosophers are sympathetic with.[53] There's a thought that

[50] Rosenberg puts this idea nicely: "On the empiricist view, causation consists in law-governed sequence because there is no other observationally detectable property common and distinctive of all causal sequences besides exemplifying general laws. When we examine a single causal sequence—say one billiard ball hitting another. and the subsequent motion of the second ball, there is nothing to be seen that is not also present in a purely coincidental sequence, like a soccer goalkeeper's wearing green gloves and her successfully blocking a shot. The difference between the billiard-ball sequence and the green goalie-glove sequence is that the former is an instance of an oft-repeated sequence, and the latter is not. […] All causal sequences share one thing in common that is missing in all merely coincidental sequences: they are instances of—they instantiate—general laws." Rosenberg, *op. cit.* in 37, p. 43.
It's doubtful whether this really solves the problem, because it simply shifts the problem to providing an answer to what makes some universal regularities laws of nature as opposed to just regularities which are accidental. A trivial example might be the regularity of thunder sounds following the lightening, since there's little doubt that one isn't caused by the other. Cogency of an empiricist recasting of causation in terms of laws of nature heavily depends on whether we can distinguish laws of nature and just widespread, but accidental generalizations. It's far from clear that this can be done without invoking some metaphysically extravagant notions of necessity. More is said on this later in the text.

[51] He uses this phrasing in both his early works and his later ones. See Kelsen, *op. cit.* in 3, p. 24 and in 4, p. 360.

[52] And Kelsen is very explicit about this point even in his earlier stages, rejecting the notion of causation as a "magical force". Kelsen, *op. cit.* in 3, p. 24. Following Godfrey-Smith, I use an informal term "low-key" to mean this rejection of metaphysically deep connection. Godfrey-Smith, P. *Theory and reality: an introduction to the philosophy of science*, University of Chicago Press, Chicago, 2009, p. 191.

[53] One other interpretation of "inviolable" might be that laws of nature are non-statistical, something which he explicitly denies and goes at length to argue against in his later work, *Retribution and Causality.* I did not opt for this interpretation because in Kelsen's earlier work, both relationships are described as "unbreakable" and it simply makes no sense do describe imputative relations as either statistical or non-statistical. See Kelsen, *op. cit.* in 3, p. 25.

laws of nature have what is called "nomic" necessity to them, different and weaker from the familiar logical necessity. Although laws of nature generally aren't thought to be a matter of logic, they don't seem to be just generalizations of their particular instances, but link their relata in some deeper way. They express how things, in some way must be.[54] Allow me to leave this issue precariously hanging in the air for now, with a promise to offer some motivations later in the text.

Propositions of legal science are modelled closely after statements of scientific laws. Just like causation, they have a hypothetical structure of "If A, then B ought to be". Just like with causation, I take Kelsen to insist on similar "low-keyness" of imputation as both statements about norms and about nature express a sort of "functional connection" between material facts. Accordingly, just like it is a mistake to think there's anything deep to causation, it's a mistake to think that the "ought" of imputation has some morally deep meaning.[55] But again, in the same breath with causation, imputation is characterised as necessary. The characterisation of both relations as necessary represents Kantian influences on Kelsen's early work, as the empiricists have, expectedly, been sceptical of any type of necessity that isn't a matter of analytic entailment.[56] After all, it's hard to

[54] Nomic necessity and Kantian view of necessity should not be equated. More will be said on this later, but suffice to say for now that what this nomic necessity amounts to is a topic for debate. A common symptom of it is taken to be that statements of laws of nature, unlike just universal accidental generalizations, support the truth of counterfactual statements, e.g. "if the metallic body had not been heated up, it wouldn't have expanded". Rosenberg, *op. cit.* in 37, pp. 63-65.

[55] Kelsen, in his arguably still Kantian phase in the second edition of Pure Theory of Law, puts it this way: „Such fallacy [that the „ought" has a moral meaning, author's comment] is present if indeed the legal „ought" is interpreted to constitute an absolute value. But one cannot speak of [this] if the „ought" in the law-describing rule of law merely has the meaning of a specific functional connection. […] Imputation, just like causation, is a principle of order in human thinking, and therefore just as much or just as little an illusion or ideology as causality, which – to use Hume's or Kant's words – is only a thinking habit or category of thinking.„ Kelsen, *op. cit.* in 3, p. 103.
So, as a matter of Kelsen exegesis, it's a mistake to ascribe to so called justified normativity thesis to actual Kelsen, irrespective of what „the philosophically most compelling or interesting" aspects of his work is. This point is forcefully argued for by Paulson, *op. cit.* in 3.

[56] And what was previously said of genuine causal relations, namely that they support counterfactuals, arguably works for imputative relations as well, even though it's hard to see what would be the equivalent of accidental generalizations in the sphere of imputation. Additionally, the formulation is rather quirky, e.g. "if the delict had not been committed, it is not the case that there ought to be a sanction.

make sense of a relation being both necessary and "low-key" if one doesn't endorse Kantian conception of them as categories of thought. Whether this low-keyness and necessity of both relations works as a matter of their role in scientific explanation is something we turn our heads to now.

Stanley Paulson, continuing on his earlier quote, pinpoints the importance of the analogy between causation and imputation for Kelsen's overall project:

"It is of utmost significance here that Kelsen wishes to highlight a necessary, nomological or law-like relation in the law running parallel to the necessary, nomological or law-like relation manifest in causality. Kelsen's development of this parallel is a central part of his effort to turn the legal science of his day into something scientifically respectable."[57]

To explore this, we enter into some difficult topics in philosophy of science and also a bit of speculation about Kelsen's own views, but not extravagantly so.[58] It's clear that Kelsen thinks that scientific laws form an important part of science, and it's clear that he thinks that whatever is it about them which makes science legitimate, can also be mimicked by imputation to make legal science legitimate. Again, formulating scientific laws seems part and parcel of most sciences which don't have their status regularly doubted, so as a matter of rhetoric and persuasive strength, liking legal science to them makes perfect sense. But this isn't what currently interests us as we want to see whether this makes sense philosophically.

To answer this, we need to see what is it generally that makes scientific explanation explanatory, or justified. And there's a consensus that it isn't enough for science to tell us how things are, but also why are things the way they are. Intuitively, simply knowing that something happens when something else happens seems insufficient for genuine understanding.[59]

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[57] Paulson, *op. cit.* in 3, p. 107.

[58] A lot of terminology and problems described in this paper was developed after Kelsen's early statements of his views, so it might be argued that what follows is more of a „rational reconstruction" of his views.

[59] Modern philosophy places a lot of focus on explaining this idea of scientific explanation. The reader doesn't need to feel bad if they feel suspicious about all of this, as they are in good company. A common feature of empiricism is a distrust of putting such extra goals for science, as they take science to simply be a system for predicting experiences. For an empiricist, the questions of "why?" go beyond this and ominously

With that in mind, we go into a very bad example of a theory of scientific explanation – the covering law model of explanation (hereinafter "CL").

This influential account, historically developed by empiricists of the 20th century, nicely connects scientific laws and scientific explanation. On this model, explanation is an objective, context-independent relation because to explain something is simply to show how it's derived in an argument which uses laws of nature as one of its premises. I call it a bad example because it is a view of explanation on which there isn't really much explanation going on. All scientific explanation can tell us is that, given that when some a happens, some b happens, and that a has happened, it was expected that b will happen as well. For this to be successful, conditions of scientific laws need to be formulated such that their occurrence guarantees the effect. This is what explanation amounts to – showing that you had good grounds to expect what had occurred, so on this view, explanation is prediction.[60] Consequently, scientific laws are valuable because they show us causal relations or in some other way allow us to deduce knowledge of particular instances that we previously didn't have or generate further testable hypotheses.[61]

Regardless of whether one accepts this exact version of explanation, this account has a positive feature of pointing to an intimate relationship between providing an explanation, laws of nature and causation, something Kelsen might wish to draw on.[62] Before saying more about why this idea might have appeal for Kelsen, let me go into some problems

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echo some purposive, spiritual interpretations of nature. Consequently, their view of scientific explanation is extremely narrow.
On this note, it's very likely that Kelsen would, echoing the empiricists, also just deny this extra role of science or downplay the whole notion.

[60] Godfrey-Smith, *op. cit.* in 52, p. 192.
CL has a straightforward application to laws that are formulated such that they express sufficient conditions for something to occur. Extending the model to probabilistically formulated laws is explained in bit more detail later, but the problems it presents for CL are shown nicely in Rosenberg, *op. cit.* in 37, pp. 51-52 and ch. 5.

[61] Carnap, R., The Value of Laws, in Curd, M., Cover, J. (eds.), *Philosophy of Science: The Central Issues*, Norton, 1998, p. 682.

[62] One symptom that something like this could be at play seems to be that both explanations and causation are asymmetric. Explanations, just like causation, don't seem to work in both directions. That is, if an event a causes an event b, then b doesn't cause a. Similarly, if a explains b, it's not the case that b explains a. arguably, the same works for imputation. If an event b is imputed to a, a is not imputed to b.

which occur when empiricism about laws and CL are combined. I want to focus on only some of them which I think are most interesting for our present purposes. I'm under no illusion that this brief overview has the force of an argument against sophisticated empiricist positions, but my point is to show how Kelsen escapes them.

When CL is based on an empiricist view of scientific laws, which are just generalizations of facts actually existing in this world, it follows that generalizations of facts are used to explain those same facts. This just seems to turn explanation into a completely trivial activity, similar to saying that "A" is explained by "A and B" being true.[63] Additionally, the same way laws can be invoked to "explain" particular facts, those same particular facts can be invoked to "explain" laws as laws just are summaries of them.[64] And finally, laws explain because they provide understanding that if something had been different, something else would have as well – they support their counterfactual statements. This involves reference to non-actual scenarios which just, by definition, aren't captured by universal generalizations about things which are true in actual world. In other words, laws explain precisely because they seem to tell us that some things are related in virtue of something more than just brute regularity.

This whole class of objections can be stated simply. It's hard to see how something generated simply out of facts that have actually occurred can be explanatory for those same facts, or predictive about facts that haven't occurred.

At this point, the already mentioned idea of nomic necessity comes into play.[65] The general idea is based on this thought that laws can explain precisely if they go beyond what actually happened, and state not only how things are, but how they must be. Obviously, making sense of this without

[63] All of the following points are variations of those raised by Dretske, F., Laws of Nature, in Curd, M., Cover, J. (eds.), *Philosophy of Science: The Central Issues*, Norton, 1998, pp. 837-838.

[64] Again, the problem is that explanation seems to be an asymmetric relationship. Given that causation seems to be an asymmetric relationship as well it's natural to think that explanatory relations must be based on causal relations, broadly understood. It's to be noted that CL isn't necessarily based on causal relationships. Laws of nature in that model do not purport to be expressions of some hidden causal structures. Il get back to this topic in 3.3.

[65] Rosenberg, *op. cit.* in 37, p. 62

descending into metaphysical occultism is not an easy task, but we can see now how Kelsen could do it.[66]

I've already hinted at some important features of Kelsen's understanding of natural science, so putting the pieces together, we arrive at the following picture. He accepts the view of scientific explanation that weds it to the idea of scientific laws.[67] Obviously, Kelsen needs to be careful not to draw on CL too strongly, because his view of legal science, by definition, is not involved in producing testable hypotheses. He needs to take a different route, so the appeal for Kelsen might be motivated by his goal to use legal science as a way to indirectly apply logic to norms.[68] Just as scientific laws are used in natural science to deduce knowledge of particular facts, propositions of law are used to deduce knowledge of what is "ought" in particular situations.[69] The project of legal science would then be to formulate legal statements such that their conditions are sufficient for the consequent to occur, in parallel to what we have said about scientific laws.[70] The problem raised by empiricist views of causation is evaded as in his early works Kelsen has no trouble ascribing necessity to both causation and imputation, and understandably so, given the Kantian thread of it. Finally, the answer to our original question is this. Assuming we have knowledge of norms, which Kelsen doesn't consider to be a troublesome notion, the piggybacking manoeuvre occurs because imputation mirrors laws of nature as tools for deducing knowledge in particular cases.

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[66] E.g. Fred Dretske's solution is that if laws exist, they have to be relations among properties, abstract entities, and not relations among particulars. They hold among properties throughout different possible worlds, regardless of the extension of those properties in a particular possible world. Dretske, *op.cit.* in 63, p. 841.

[67] Historically, proponents of CL hold that scientific explanations must invoke laws even in history and sociology. Now, it's very doubtful whether the two disciplines really do have laws, especially ones satisfying the good grounds condition which might lead to one denying their scientific status or adopting a different theory of explanation.

[68] He expresses this idea clearly in Klesen, *op. cit*. in 3, p. 74.

[69] We could even relate a theme from the previous section with objections to "laws-as-regularities" view. There's no hope to reduce legal science to, e.g. just what particular legal decisions by the courts are, because knowledge of these particulars cannot explain or give us knowledge about what is "ought" in some other particular cases, at least not without an imputative link.

[70] I mention as an interesting side note that the problem for CL that is presented by probabilistic laws is mirrored by (arguable) existence of defeasible norms, open to an indeterminate list of exceptions.. Kelsen doesn't think either presents the problem, as he doesn't seem to think that norms can be strongly defeasible.

So far I have talked about nomic necessity of laws and (Kantian) necessity that Kelsen ascribes to causality and imputation as if the two are closely linked. This might be deemed a mistake by some and surely, to think these are exactly the same would simply be a silly equivocation. Proponents of nomic necessity of laws of nature usually think of this trait as being an objective, real feature of the world, whereas an important Kantian premise is that empiricists were right in rejecting such claims as empty metaphysical speculation.[71] While this much is true, it's ultimately irrelevant where this necessity comes from. It seems that, *prima facie* at least, both notions can do the work required in answering why some descriptions are explanatory and others not.

To sum up, scientific laws and imputation are explanatory because they are, in some sense, necessary. What makes legal science worthy of the name science is that it, just like natural science, describes necessary links, which allows for generating further knowledge about particulars.

That's it for now about the structure. When it comes to relata of the two relations, generally one of the issues in philosophy of causation is their number. In other words, the question is how many distinct roles are there in an expression of causal and imputative relations with the view that there are two relata being somewhat of a default position.[72] In addition, question whether the relata are events, facts, propositions or something else, might be posed. It's then a separate question of how many of these individual entities fulfil a particular role of relata.

Kelsen's answers to these issues are rarely very explicit and thus I will mostly concentrate on what is clear. In the first edition of *Pure Theory of Law*, he endorses exactly the aforementioned default position. Both the causation and imputation are presented as linking two entities, "material facts" as Kelsen dubs them, which play the roles of cause and effect in the

[71] For Kant, necessity of laws of nature points to their apriori nature, whereas nomic necessity in the modern sense is presumably a piece of aposteriori knowledge. Despite this latter claim seeming odd at first, the idea that there are necessities („metaphysical necessities") which are described by science gained traction in the last century. Theoretical identifications such as „Water is H_2O" is a classic example of such supposedly aposteriori necessities.

[72] Just to give a glimpse into the alternatives, one might mention the so called "contrastive explanation". On this view causal relations have the form: *a* causes *b* rather than *c*, where c has a role of "effectual difference". See Van Fraassen, B., *The Scientific Image*, Oxford University Press, Oxford, 1980.

case of causation and legal condition and legal consequence in the case of imputation.[73] We've already seen an example of causal relationship, so the following quote will shine some light on what are material facts in imputative relationships:

"[…] the legal consequence is linked by imputation to the legal condition. This is what it means to say that someone is punished because of a delict, that a lien against someone's property is executed because of an unpaid debt."[74]

That is, legal consequences of imputative relations are sanctions, as commonly understood, while legal conditions are unlawful acts.[75] Relata of both relationships seems to fall into a broad category of events or states of affairs. In his work, Kelsen puts special attention to human behaviour as an instance of these material facts. As we've seen, Kelsen has no trouble admitting the possibility of "causal" social sciences, those describing human behaviour in statements of causal laws. That is, it's perfectly possible for human behaviour to be relata of causal relations.[76] At first it may seem that imputative relations will link human behaviour exclusively, but Kelsen explicitly denies this. To recall the intro briefly, this would be the traditional view of imputation, which imputes sanction to a person. On the other hand Kelsenian imputation imputes a sanction, which must always be a human behaviour, to any event whatsoever.[77] This isn't so surprising as, after all, imputative links are established by fiat of legal authority.

3.3. Later works and changing views

In the introduction, I have said that there's a gradual shift from the first to the second phase in Kelsen's work. This change, marked by the weakening

[73] Kelsen, *op. cit.* in 3, p. 23.
[74] Kelsen, *op. cit.* in 3, p. 24.
[75] There's a related and complicated issue here. It's widely thought that Kelsen understood all norms to be directions to officials to impose sanctions. All other legal modalities, such as obligation etc., are just constructed out of this. Paulson nicely presents how Kelsen's views have changed on this topic throughout his career as well as the many complexities of this simple picture. Paulson, *op. cit* in 9, section E.
[76] Kelsen, *op. cit.* in 3, p. 85.
[77] *Ibid.*, p. 100.

of Kantian influences, occurs between the first and second edition of the Pure Theory of Law. By the second edition, the Kantian influence isn't so much gone as it is treated as a trivial trinket to the whole theory. Cognition of legal norms is still taken as a "given", but the explicit reference to the deductive machinery of transcendental arguments is dropped. Perhaps it's tempting to describe this as a shift to Humeanism, and I do think this is roughly true. But it's even more the case that Humeanism gets a treatment similar to Kant, as both are mentioned somewhat superficially and almost interchangeably.[78]

An important motivation for this shift must've been his sociological inquiry into causation, culminating in his *Retribution and Causality*.[79] The crux of this line in Kelsen's work is that our modern conception of causality historically evolved from primitive views which do not see nature as a casual order, but anthropomorphically, according to the principle of retribution. This principle relates what we today consider causes and effects in such a way that causes are considered guilty or responsible for the effects, which in turn, depending on whether they are harmful or beneficial, are rewards or punishments. So, causal and normative interpretations of nature are both possible, and former has historically evolved from the latter.[80]

This line of work, for our purposes at least, has the following main implication. Not only is causation, contra Kant, not a necessary category of our thought, but as a matter of historical fact it can be demonstrated that humans did not always think in causal terms.[81] Moreover, given that Kelsen embraces Humean rejection of necessity of causation as an objective link between things in the world, this somewhat straightforwardly turns Kelsen into a Humean about causation. So, while both imputation and causation are still described as a "functional

[78] Let me once again use the following quote from the second edition to illustrate this point. „Imputation, just like causation, is a principle of order in human thinking, and therefore just as much or just as little an illusion or ideology as causality, which – to use Hume's or Kant's words – is only a thinking habit or category of thinking." Kelsen, *op. cit*. in 3, p. 103.
[79] With some anthropological overtones, as he cites works into various different tribal people. See Kelsen, *op. cit*. in 4.
[80] A brief statement of this can be found in Kelsen, *op. cit*. in 3, pp. 82.-85.
[81] Kelsen, *op. cit*. in 4, p. 358

connection", Kelsen drops the description of them as necessary.[82] In the essay *Causality and imputation*, one other difference between the two becomes prominent, namely that imputative relations have definite conditions, fulfilment of which requires the consequence ought to take place, whereas causality is always a statistical relation, meaning that even if the cause takes place, the effect may be absent.[83] This is an interesting development because, historically, probabilistic formulations presented a problem for the CL model, as after all, probabilistic laws don't always seem to be good predictions, despite being good explanations.[84] Now, Kelsen gives us no reason to think such laws present any kind of problem for his views on scientific explanations, despite it historically being an important reason for philosophers to shift focus from formulations of laws to causal links more directly.

Let's now take stock to see where this leaves us. Equating law-likeness of imputation to causation seems to assume that laws have some sort of explanatory power. I have speculated in the last section that this must be due to both of them being, in some sense, necessary and that in both cases this necessity was argued for using Kantian-style arguments. It's not really clear where we are left. Obviously, while causation isn't a necessary relation, imputation might still be. This would imply that whatever justifies imputation and whatever justifies scientific laws differs, making the whole

[82] Kelsen, *op. cit.* in 2, p. 103. A clarification of Kelsen's terminology is important. "Necessity" is often used by Kelsen to mean non-statistical. My use of the term differs from this and was hopefully somewhat made clear in the previous section. So, not only does Kelsen deny that causality is necessary in his sense due to being statistical, his acceptance of Humeanism and rejection of Kant's arguments imply the rejection of causality as necessary in my sense.

[83] Statistical nature of all laws of nature is something Kelsen argues for at length in Retribution and Causality, mostly basing his arguments on irreducible probability of quantum mechanics. Kelsen, *op. cit.* in 4, pp. 362.-366.

[84] Let's just to develop this point slightly. The fact that a person has cancer is explained by the fact that they smoke, but the fact that one is a smoker does not give you good grounds to expect that they will have lung cancer, as they likely will not. A proponent of CL might try to respond to this example by requiring that a law linking smoking and cancer would also have to include statements about the requisite genetic makeup or some environmental factors that, when combined with smoking, tell us when the probability of lung cancer reaches 1, and thus give good grounds to expect a person to have lung cancer. While this might help in this case, as Kelsen himself points out, some laws of nature seem to be irreducibly probabilistic. The most famous example might be the second law of thermodynamics, stating that the entropy of a closed system will probably increase over time. See Rosenberg, *op. cit.* in 37, pp. 101-102.

manoeuvre just a rhetorical trick. This isn't a satisfactory solution, so we might want to reinterpret our previous analysis on what makes scientific laws explanatory. This, on the other hand, will not be an easy task as denying nomic necessity of laws in considered biting the bullet.[85] So, it's seemingly a positive development that in his final work, *General Theory of Norms*, both relations are again described as necessary,[86] but let me just briefly delve into why this optimism is premature.

General Theory of Norms drops the Kantian apparatus of transcendental deduction and presuppositions and adopts the views of German fictionalist philosopher Hans Vaihinger. Vaihinger's basic thought, built on advances in evolutionary science, is that what is selected for in the evolution of our cognitive capacities is the ability to aid us in carrying out activities that are useful for the purposes of survival.[87] For the bare purposes of carrying out those actions necessary for survival our intellect doesn't need to be a fully reliable guide on how the world is so ultimately our guiding cognitive aim is the prediction and control of empirical phenomena, not correspondence to objective reality. This is why fictions, theoretical claims known to be untrue, may have an indispensable role to play here, provided they allows us to arrive to useful predictions. Our total theoretic image of the world is ultimately limited by those fictions that have been preserved as most adaptive for our basic practical aims. The upshot is that for Vaihinger, science rests heavily on practical output and testability. The problem might be clear now, because it's the one we warned against in the discussion about CL. By substituting Kantian presuppositions with fictions, Kelsen might have adopted a view of science that's too reliant on prediction and testing.[88]

[85] Rosenberg goes so far to say that those who deny it „have no resources for illuminating the indispensibility of laws in scientific explanation." Rosenberg, *op. cit.* in 37, p. 75.
[86] Kelsen, *op. cit.* in 6, p. 22.
[87] The source for Vaihinger's views is Stoll, T., "Hans Vaihinger", The Stanford Encyclopedia of Philosophy (Spring 2020 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2020/entries/vaihinger/>.
[88] Kelsen explicitly adopts a view that he no longer thinks of Basic Norms as being presuppositions, but Vaihingerian fictions. Kelsen, *op. cit.* in 6, p. 256.

Finally, let's point out two structural features of imputation and causation that Kelsen starts highlighting in his later works. Firstly, causation has an infinite chain structure, whereas imputation does not.[89]

As Kelsen puts it:

"…every concrete cause has to be considered as the effect of some other cause, and every concrete effect as the cause of some other effect, and so—by the very nature of causality—the chain of cause and effect is endless in both directions.[90] In the case of imputation, the situation is completely different. The condition to which a sanction is imputed […] is not necessarily a consequence which has to be imputed to some other condition. And the consequences […] need not necessarily be conditions to which further consequences are imputed. […]. If we say that a certain consequence is imputed to a certain condition […] then the condition […] is the endpoint of imputation."[91]

Prima facie, this might seem to contradict the previously stated characterisation of causality as a link between two elements, so a clarification is in order.[92] While the overall chain of causality is infinite,

[89] This particular difference has an important additional role for him. In *Causality and Imputation* and the second edition of *Pure Theory of Law*, Kelsen explores whether the infinite chain structure of causality can be squared together with freedom of will and retributive imposition of sanctions.

[90] Kelsen almost derisively talks about the idea that there is a God-induced first cause of some kind, claiming that such thinking can only be explained as primitive thinking and a lingering reference to principle of retribution. Kelsen, *op. cit*. in 3, p. 91.

[91] Kelsen, *op. cit*. in 6, pp. 24-25. One might wonder whether this is consistent with another Kelsen's doctrine, that of "legal completeness" or legal "closure". The doctrine, roughly put, states that law provides solution to every problem, or that every event is legally qualified in some way. Consequently, if every event is legally qualified in some way, then then consequences imputed to some conditions are, contrary to Kelsen's claim, conditions for some further consequences. The doctrine of legal completeness is one of the cornerstones of Kelsen's view of law in the *Pure Theory of Law*. I take Kelsen to maintain the crux of the doctrine even in *General Theory of Norms*, despite his somewhat cryptic remarks about it, namely that "behaviour which is not determined by any legal norm is subject to the legal order – potentially if not actually." See Kelsen, *op. cit*. in 6, p. 148.

[92] Kelsen's remarks easily add to the confusion. In *Retribution and Causality*, he explicitly denies that causality has only „two links", insisting that the chain of causality is infinite. Later, in *General Theory of Norms*, he maintains, in the same paragraph, that causality links „two material facts", but also that it doesn't have only „two links" and is infinite in both directions.

each particular link can be expressed by a hypothetical judgement containing two parts, in roles of a cause and an effect. This is consistent with Kelsen's claims that "no event depends on a single cause" because despite the plurality of necessary conditions for something to occur, they all play the role of "cause" in hypothetical judgements.[93]

The second feature is exactly this last point. Kelsen considers all the necessary conditions for something to occur are to be considered as causes, so he doesn't distinguish between causes of a certain event, the "main triggers" of it and some sort of "backgrounds conditions".[94] I mention this structural feature because it's interesting in its own right, but also to relate it to one other view in philosophy of science. Historically, some philosophers have felt scepticism towards the view that scientific laws are such a fundamental part of scientific explanations. This is related to the already mentioned problems of probabilistic laws but also to problems of extending CL to special sciences. In the end, if we want to make sense of explanations in sociology and history, some other theory might be necessary. One attempt of this kind involves divorcing causation from laws of nature and recasting explanation so that it involves descriptions of causes, but not necessarily laws of nature. This might be familiar from history. We say that one of the causes of German defeat in the Eastern front during World War II is the fact that they were caught up by winter. This seems to be an explanatory statement, but there's no reference to laws here or pretence that this is the only necessary condition that brought about the German defeat.[95] It's interesting to note how Kelsen precludes himself from adopting some version of this view because this type of explanation requires a somewhat robust distinction between potentially infinite number of necessary conditions for something to occur, and the subset of them that we call "causes" and which do the explanatory work. The views that do this often ground this distinction in the context of an inquiry making what

[93] Kelsen, *op. cit.* in 4, p. 359.
[94] Views that do discriminate between these draw on the fact that, e.g. the event of the universe coming to be some time ago seems to be a background condition for Annie's breaking of the window yesterday, but it isn't a cause of it. Something like this is occasionally mirrored in legal science when there's an attempt to draw the difference among all the conditions necessary for some legal consequence to come about. See, e.g. Klarić, P., Vedriš, M., *Građansko pravo*, Narodne Novine, Zagreb, 2014, pp. 26-29.
[95] The famous "If you invade Russia in winter, you will lose." is only mockingly called the law of history.

counts as a cause (and explanation) context-relative, and not an objective relation.[96]

It seems that causality and imputation share this feature. As I said, on Kelsen's views, legal norms would have to be formulated such that they include all the necessary conditions for the consequence to be "triggered". The problem of norm-individuation is a difficult one[97] but if, analogous to causality, there's no distinguishing between different types of legal conditions, I cannot help but wonder whether there's a missed opportunity for legal science. After all, as a matter of how legal science actually formulates norms or explains particular facts, this doesn't seem right. After all, legal science rarely, if ever, individuates norms such that they include all the spatiotemporal conditions necessary for their application, and the legal conditions are usually just some more immediate ones.[98] A view of explanation that accounts for this feature of legal science would be interesting, but it doesn't seem to be the one that Kelsen endorses.

4. CONCLUSION

This was, by all accounts, a whirlwind treatment of a wide array of difficult topics, so let me conclude with some brief remarks and summaries. It would be a mistake to think that anything in this work aims to undermine the legitimacy of legal science. I completely follow Kelsen in thinking that dogmatic jurisprudence has a positive status of some kind and cannot be replaced by any sort of naturalised versions of it. No "norm-sceptic" will be convinced by section 2 and Kelsen's arguments presented in them, and this was not the point. Interesting as debating a sceptic may be, sometimes philosophy just needs to assume that there's a good answer to him or that

[96] Rosenberg, *op. cit.* in 37, p. 84.

[97] Raz, J., *The Concept of a Legal System*, Clarendon Press, Oxford, 1980, pp. 70-92.

[98] Let's illustrate this with just one example. Criminal procedure jurisprudence will identify conditions for arrest and detention as some formal requirments (written warrant) and material requirements (certain level of doubt and *causae arresti*). Quite clearly, some other unstated requirements need to occur as well, regarding even the applicability of national law to the case, formal procedural requirements, etc. See Krapac, D., *Kazneno procesno pravo; Prva knjiga: Institucije*, Narodne Novine, Zagreb, 2015, pp. 381-393. Now, context-sensitive theory of explanation will claim that in certain context, exactly these „background" requirements will be those that are more important in our explanation, and not the more immediate ones.

common sense is true to proceed to tell something interesting that builds on it. A good part of this work aimed at exploring something like that, namely the doctrine of imputation, and trying to make sense of Kelsen's attempt to show legal science and natural science to be fundamentally alike. The conclusion was that it makes most sense if we make the most work out of the idea of nomic necessity, as it is a relatively uncontroversial notion in philosophy of science. In the latter part, we saw how Kelsen seems to fail on his own terms in answering what's the point of his interesting "piggybacking" manoeuvre. So this, seeing whether Kelsen's move makes sense on its own terms, is what we mostly confined ourselves to. We didn't go very deep into a discussion whether the terms themselves make sense, aside from this brief glimpse at the end, which might be an impetus for some further study.

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KELSENOVA DOKTRINA IMPUTACIJE

Svan Relac

Sažetak

Rad se bavi pojmom perifernog pripisivanja iz teorije Hansa Kelsena, odnosom kojeg pravo uspostavlja između pravnog uvjeta i posljedice kao materijalnih činjenica. Kao temeljni pojam pravne znanosti, Kelsen ga opisuje kroz usporedbu s uzročnošću, temeljnim načelom prirodnih znanosti koje također, iako na drukčiji način, povezuje materijalne činjenice. Osim prikaza same usporedbe, u radu se obrađuje način na koji Kelsen koristi usporedbu dva odnosa u prilog pravne znanosti. Prvo, njihova se razlika koristi da se motivira potreba za autonomijom pravne znanosti. Ako ima smisla reći da su stvari povezane na način koji nije uzročni odnos, ima smisla reći da postoji potreba za znanošću koja opisuje stvari kroz prizmu tog odnosa. Drugo, isticanjem se sličnosti između pripisivanja i uzročnosti te posljedično pravne i prirodne znanosti, pokušava uzdići znanstveni ugled one prve. Budući da su, u Kelsenovim djelima, odnosi uzročnosti zapravo znanstveni zakoni, istraživanje ovog drugog Kelsenovog poteza zahtjeva objašnjenje što točno čini znanstvene zakona tako važnima u znanstvenom objašnjavanju i može li se isto preslikati na odnos imputacije. Odgovor na ovo nije sasvim očit, no rad oprezno predlaže da bi se Kelsen mogao poslužiti idejom nomičke nužnosti zakona, budući da Kelsen, u ranijim radovima barem, oba odnosa opisuje kao nužne. Kada u kasnijim radovima Kelsen odstupi od ove karakterizacije, postavlja se pitanje može li cijeli manevar uopće opstati.

Ključne riječi: *Kelsen, pripisivanje, pravna znanost, uzročnost.*