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The Metaphorical Aspect of Hans Kelsen's Pure Theory of Law

Metaforyczny aspekt czystej teorii prawa Hansa Kelsena

Summary

The article examines the cognitive, metaphorical dimension of the pure theory of law and demonstrates that Hans Kelsen used metaphorical language in his description of law, and unintentionally created a unique set of cognitive metaphors in order to make the theory of law focused on the abstract “Ought” world comprehensible. The paper argues that it would be impossible for Kelsen to describe norms without metaphors. The paper uses Lakoff and Johnson’s theory as a framework for the interpretation of this metaphorical aspect of the pure theory of law. Hence the following paragraphs will examine the cognitive context of the abstract categories crucial for the pure theory of law, such as: the category of Ought, imputation, basic norms and the dynamic (hierarchical) structure of law. This article is based on the position that an analysis of the cognitive dimension of the pure theory of law might yield promising results which could reveal new aspects of the central categories in this theory. This article is an attempt to explore the possibilities provided by merging these two theories and checking if the results brings some new knowledge about the pure theory of law and legal thinking in general.

Keywords: Hans Kelsen, cognitive science, George Lakoff, Mark Johnson, cognitive theory of metaphor, pure theory of law, normativism

Streszczenie

W artykule badam zagadnienie wymiaru metaforyczno-kognitywnego czystej teorii prawa. Jednocześnie wykazuję, że Hans Kelsen w opisie prawa używał metaforycznego języka i nieświadomie stworzył grupę metafor kognitywnych, co umożliwiło zrozumiałe opisa-

nie abstrakcyjnego świata powinności. Wykorzystując teorię metafory kognitywnej Lakoffa i Johnsona, argumentuję, że bez metafor opis norm byłby dla Kelsena niemożliwy. W kolejnych akapitach badam kluczowe dla czystej teorii prawa abstrakcyjne kategorie: powinność, imputacja, norma podstawowa i szczeblowa (hierarchiczna) struktura prawa. Punktem wyjścia jest założenie, że analiza kognitywnego wymiaru czystej teorii prawa może przynieść obiecujące rezultaty, odkrywając nowe aspekty centralnych kategorii dla teorii Kelsena. Jest to zatem próba zbadania możliwości, jakie daje kombinacja dwóch teorii, a także próba odpowiedzi na pytanie, czy rezultat wniesie nową wiedzę o czystej teorii prawa i myśleniu prawniczym w ogólności.

Słowa kluczowe: Hans Kelsen, kognitywistyka, George Lakoff, Mark Johnson, kognitywna teoria metafory, czysta teoria prawa, normatywizm

0. Introduction

Hans Kelsen's pure theory of law is one of the most well-known and widely-discussed theories in jurisprudence. It has been examined from many points of view; however, the cognitive aspect seems relatively unexplored. The aim of this article is to examine Hans Kelsen's Pure Theory of Law in the context of Lakoff and Johnson's theory of cognitive metaphor (Lakoff and Johnson 2003).

In a cognitive linguistic context, which is precisely defined by Lakoff and Johnson, a metaphor is understood as being not simply a linguistic or styling trope, but rather a tool of cognition and action, the primary mechanism which facilitates the understanding of abstract concepts such as law, and allows abstract reasoning to be performed by relating these terms to concepts which are less abstract. Kelsen's pure theory of law is a perfect example of such a conceptualization, since Kelsen defines the separation of "Is" and "Ought" as the main rule in his methodology. While the world of "Is" is only partially ab-

stract, the world of "Ought" is completely abstract and hence demands metaphorical explanation.

This paper consists of two main parts: The first will demonstrate that Kelsen needed to use metaphors to describe his theory, because of the methodological assumption that he makes, i.e. that it is impossible to derive "Ought" from "Is" and, as a consequence, that to build a science of law, normative phenomena cannot be explained by facts. Hence, if there is no direct and solid link between is and ought, such as logic, the only tool left available for Kelsen to describe law is metaphor.

The paper will then address some particular elements of Kelsen's theory, such as: Ought, imputation, the basic norm, and the dynamical structure of law. These elements are arguably the most important elements in Kelsen's theory, which together provide a complex definition of law.¹

The first element, "Ought" will be analyzed in the first part of the text, as the distinction between the "Is" and "Ought" worlds. In this context, Kelsen's claim that an abyss impossible to cross lies between these worlds is the basis of his entire theory. At first glance, it can be seen that Kelsen uses very obvious metaphorical language with regard to organizing space. It is interesting that Kelsen had no choice but to refer to the world of "Is" in his theory, even if he preferred not to, as categories from this world need to be operated in the form of metaphors. Metaphors may be a bridge between "Is" and "Ought," but they are the kind of bridge which has to be built when other more scientific methods, based on logical rules, fail. This rather supports Hume's guillotine.

The second element, peripheral imputation, which is described in the second part, is a category which Kelsen perceives as analogical to causation. But this is not a linguistic analogy, since it is understood by Kelsen in Neokantian terms, that cau-

¹ I elaborated on the issue of the definition of law in my paper (Zalewska 2015).

sality is a relative category a priori allowing cognition. This leads to the question of whether it is possible to speak about the analogy between imputation and causality in terms of conceptual metaphor. Lakoff and Johnson provide a broad analysis of causation (Lakoff and Johnson 2003, 68–75) as an experiential gestalt and in this part, I will attempt to determine whether it can act as an analytical framework of imputation. This analysis will be based on Kelsen's descriptions of imputation as a normative connection between two elements, namely two acts of human behavior analogical to causality (Kelsen 1967, 99).

The third part discusses the basic norm. This element, the most obscure one in Hans Kelsen's pure theory of law, is "not created by a real will at all but is presupposed by legal thinking" (Kelsen 1967, 23). In this case, Kelsen uses ontological metaphors (Lakoff and Johnson 2003, 23–28) treating norms in general as things which are created, so they are perceived as typical material objects. However, the basic norm is presupposed, which grants it a different ontological status than other norms. A subject of discussion will be whether the basic norm in the metaphorical dimension resembles Aristotelian form or substance, as is held in the doctrine.

The final element, the dynamical structure of law, is one of the strongest concepts in the pure theory of law. It describes law in terms of formal connections between norms. Their formal character is based on the assumption that the organ which is higher in the hierarchy delegates the competence to the organ which is lower in the hierarchy to issue an act of a certain content. Such a structure in metaphorical terms indicates the presence of a very basic group of metaphors: orientational metaphors that are strictly associated with our body and how we perceive reality through it: up is more important than down for example (Lakoff and Johnson 2003, 14–17). On the other hand, Kelsen also describes a chain of connections which is built by norms. In terms of Lakoff and Johnson's theory, this

recalls the metaphorical structure of causality, which would be valid for Kelsen because he considered two types of imputation: peripheral and central. Central imputation is strictly bound up with the dynamical structure of law.

Finally, the last part contends that Hans Kelsen needs metaphorical expressions to conceptualize law in terms of his theory, which postulates a separation of "Is" and "Ought." The analysis provided in following paragraphs demonstrates that very often Kelsen's intuition has a metaphorical dimension and hence the metaphors which he uses could afford a greater insight into how his words may be interpreted, even though some layers of meaning may be unintentional. Furthermore, an analysis of his theory would also add further support to the Lakoff and Johnson theory of metaphors.

1. Why and how the pure theory of law conforms with the theory of cognitive metaphor?

1.1. Kelsen and the cognitive dimension

For obvious reasons, Kelsen was not familiar with the Lakoff-Johnson theory and it was not his intention to create a theory pertaining to the field of cognitive science. However, I believe that an analysis combining both theories might be beneficial for both sides. Conceptual metaphors might enhance the knowledge about the most famous categories in the pure theory of law, such as Ought, the basic norm, imputation and the dynamic structure of law (*Stufenbau*). On the other hand, Kelsen's pure theory of law might endorse Lakoff-Johnson's claim that such metaphors are necessary in order to explain abstract concepts. Furthermore, it can be argued that Kelsen's theory is able to be perceived as a reconstruction of legal thinking. Although Kelsen was not familiar with cognitive science, the main question posed by Kelsen's theory is how the law is cognized, and to some extent Lakoff and Johnson's question is

similar: “How do people think about abstract phenomena?” In Kelsen’s case this question is more particular and concerns only normative phenomena, specifically law. Perhaps it would not be a mistake to perceive Kelsen’s theory as a more basic layer of legal thinking, while the cognitive metaphor concerns exploring the same topic on a deeper level. In order to identify legal thinking on a cognitive level, first legal language has to be identified and reconstructed. The Pure Theory of Law achieved this aim effectively, influencing several generations of lawyers in Central Europe and South America. Therefore, these two theories might be perceived not only as compatible but also complimentary, since they analyze the schemas of legal thinking on different levels.

In the next section Lakoff-Johnson’s theory of metaphor will be briefly presented. Following this, there will be an explanation of how the methodological assumptions of Kelsen’s pure theory of law are compatible with the theory of conceptual metaphor and make it possible to analyze Kelsen’s theory from cognitive standpoint.

1.2. The Lakoff-Johnson theory of metaphor

The Lakoff-Johnson theory of conceptual metaphor grants this category a brand-new meaning. In their theory, metaphor is not understood as some linguistic device, but refers to our way of thinking. Thus, it is called a cognitive or conceptual metaphor. Its existence is based on the assumption that the objects of the cognition which are not abstract, and are thus accessible to us via our senses, are easiest to comprehend. In contrast, abstract objects are inaccessible to our senses. They cannot be weighed, measured or described in terms of shape or color. Hence, there must be another way to comprehend them. Lakoff and Johnson ascribe such a function to cognitive metaphor. Its aim is to facilitate more abstract concepts by relating them to less abstract objects. Hence, conceptual metaphor is

a tool of cognition. For instance, the metaphor of argument as a war influences our thinking about argument in terms of conflict. Thus, we “win” an argument, we “conquer” the opponent (Lakoff and Johnson 2003, 4). As a result, the structure of arguing resembles the structure of war. Perhaps if the metaphor of argument as a journey were more common, in terms of a pursuit of truth, our mode of discussion would be more peaceful and instead of being oriented to winning – truth-oriented. Hence the metaphor of argument as a war hides another aspect of arguing, which is seeking the truth, due to being pushed out of ones’ comfort zone.

Try to imagine a culture where arguments are not viewed in terms of war, where no one wins or loses, where there is no sense of attacking or defending, gaining or losing ground. Imagine a culture where an argument is viewed as a dance, the participants are seen as performers, and the goal is to perform in a balanced and aesthetically pleasing way. In such a culture, people would view arguments differently, experience them differently, carry them out differently, and talk about them differently. (Lakoff and Johnson 2003, 4–5)

Another useful concept introduced by Lakoff and Johnson is experiential gestalt, understood as a cluster of components (Lakoff and Johnson 2003, 69). The characteristic feature of experiential gestalt is that its components are more complex than its cluster. In this context, Lakoff and Johnson provide the example of causation. Causation is perceived as a basic concept. For Kant, causation was even an *a priori* category that enabled cognition of phenomena. However, as Lakoff and Johnson argue, causation contains elements which are less basic than causation itself. This will be elaborated in the following sections concerning imputation, however, in order to introduce the concept of imputation, first the duality of Is and Ought will be explained.

1.3. *The duality of Is and Ought*

Law can be perceived in many ways. For instance, legal positivism in its classic form reduced law to facts. On the other hand, natural law doctrines perceived law as a value. Hence, various concepts of law can be more or less abstract. The attempt to reduce law to facts is less abstract than describing law as a value. Kelsen's approach was similar to the latter group of concepts. Although he rejected the idea of law as a value, he perceived it in the abstract Ought realm, in contrast to the only partially abstract Is sphere, where the primary role is reserved for facts (Kelsen 1967, 7). Furthermore, Kelsen holds that there is a strict separation between Is and Ought. This methodological assumption forced Kelsen to create his own abstract categories, such as the aforementioned Ought, the basic norm, imputation or the hierarchical structure of law² (*Stufenbau*). Since Kelsen is unable to explain them directly by relating them to facts and material world, it is necessary for him to find another way to make his legal science comprehensible. In the next section I will argue that Kelsen unintentionally used conceptual metaphors as a cognitive tool which allowed him to build his famous pure theory of law. The following sections will analyze the categories of Ought, the basic norm, imputation and the hierarchical structure of law (*Stufenbau*) from a metaphorical standpoint.

2. *Normative (abstract) elements of the pure theory of law and metaphorical context*

2.1. *Irreconcilable abyss: Is and Ought*

When describing the Is – Ought dichotomy, Kelsen explains that these two worlds are separated by an irreconcilable

² Translation based on Pils 2016.

abyss.³ “Irreconcilable” is a translation of the German word *Unüberbrückbare*. *Unüberbrückbare* refers to a bridge metaphor, namely the inability to conjoin two sides of a river or abyss. Hence, in the sentence quoted above, this German word indicates the impossibility of building any bridge. This metaphor is crucial for Kelsen’s theory and works in the main dimensions of the pure theory of law, that is, on the ontological, methodological and epistemological levels.

On the ontological and methodological levels, this metaphor refers to space organization in terms of the relation between Is and Ought. As such, it sets the stage for legal thinking. If the abyss is irreconcilable, the possibility of explaining legal phenomena in the Is sphere is excluded. Not only is there an abyss between them, but any attempts to build a bridge between them are also hopeless. Is and Ought are separated in a definite way (the ontological aspect), therefore one cannot be reduced to another, specifically Ought to Is.

Another aspect of the metaphor of the irreconcilable abyss is related to epistemology. In this aspect, the metaphor of the abyss is understood in terms of a journey, as a metaphor for the process of cognition. During such journey, when the law is cognized, there are some radical boundaries which force the traveler (the person who cognizes the law) to stop. At some point, the traveler cannot go any further, to the realm of Is. He needs to stay in the realm of Ought. Taking this metaphor further, it can be noticed that the abyss allows the traveler to see another side of the abyss. He can be aware of the objects and the events taking place there with some proximity, he just cannot actively participate in them. For that reason, the metaphor of the abyss is much more accurate for the Is-Ought duality than the metaphor of the box. A legal scholar is not “closed” in normative box, which separates him from the Is realm. A box would

³ “[...] stehen beide Welten durch eine Unüberbrückbare Kluft getrennt einander gegenüber” (Kelsen 1923, 8).

exclude the awareness of the events in the sphere of facts. The comparison between the metaphor of the box and the abyss demonstrates an interesting and occasionally misunderstood aspect of Is and Ought. According to Kelsen, these two realities are independent and separate, but they still somehow interact. Acknowledging the separation of Is and Ought does not mean that the Is dimension is completely ignored and rejected from the normative perspective. Facts influence the law, and the law influences the facts. The abyss must be created just for the purpose of cognizing the law. Hence, normative categories (from the Ought world), abstract in their principle, need to be explained by categories derived from the empirical (Is) world. As will be demonstrated, Kelsen indeed uses very familiar metaphors which are empirical in nature.

Regarding the above, it is worth asking if metaphors are the bridge between Is and Ought. A possible answer is that although metaphors are not part of Kelsen's theory, on the cognitive level they are the only tool which allow the realm of Ought to be reached. After introducing the dichotomy of Is and Ought and acknowledging that there is no direct link between them, Kelsen had to find another way of explaining the Ought reality. Since the most familiar reality is based on facts and material objects, at the outset the Ought is unknown and inaccessible. Typically, in less abstract cases, other scientific methods or their combination could apply. For instance, experiment, observation or conclusions derived from them in process of induction or deduction could apply. With Kelsen's claim that Is and Ought are separate, such a *modus operandi* is excluded, since it is based on facts, which are typically a foundation of understanding. In Ought realm there is no direct explanation derived from facts. Hence there must be another possible reason why the realm of Ought is comprehensible, despite its separation from the material world of Is. The use of conceptual metaphors seems to be a plausible explanation since they can

function as indirect link between Is and Ought. In this sense, metaphors can be perceived as a bridge between Is and Ought.

To sum up, this metaphor strongly influences further thinking about law in legal science, thereby establishing a starting point for Kelsen's whole theory.

2.2. Peripheral imputation and causality as experiential gestalt

Peripheral imputation, which for the purposes of this paper is called "imputation," is one of the main categories in the pure theory of law. For Kelsen's epistemological project imputation has a similar function to the category of causality in Kant's *Critique of the Pure Reason*. Hence, imputation makes it possible to organize undifferentiated legal material and cognize it as law (Paulson 2001). Kelsen defines imputation as "normative connection between two elements, namely two acts of human behavior" (Kelsen 1967, 99). This definition is comprehensible only if the Neokantian analogy to causality is followed, although Kelsen does not elaborate on the ontological understanding of causation. It might be worth trying to examine the understanding of causality in order to answer the question of whether some extra knowledge about imputation can be derived. Therefore, the following paragraphs analyze and compare the idea of imputation with the understanding of causality as experiential gestalt in Lakoff-Johnson theory.

For Lakoff and Johnson causality is understood as a cluster of components (Lakoff and Johnson 2003, 70). In this context they introduce the idea of experiential gestalt, understood as a "complex of properties which is believed to be more basic than the properties itself" (Lakoff and Johnson 2003, 70). Next, they demonstrate what experiential gestalt is regarding causality. This category is believed to be one of the most basic (for instance, for Kant causality is the category which enables cognition). However, causality contains several components that are less basic in their nature than causality itself. As such,

prototypical causation has some features enumerated by Lakoff and Johnson (2003, 71).

- (a) The agent has a goal to bring about some change of state in the patient.
- (b) The change of state is physical.
- (c) The agent has a “plan” for carrying out this goal.
- (d) The plan requires the agent’s use of a motor program.
- (e) The agent is in control of that motor program.
- (f) The agent is primarily responsible for carrying out the plan.
- (g) The agent is the energy source and the patient is the energy goal.
- (h) The agent touches the patient, either with his body or an instrument.
- (i) The agent successfully carries out the plan.
- (j) The change in the patient is perceptible.
- (k) The agent monitors the change in the patient through sensory perception.
- (l) There is a single agent and a single specific patient.

If these features are adapted to imputation, it turns out that all the features fit to the schema. However, they are described in the language of facts. The next step is to “translate them” into normative language and find corresponding elements in Kelsen’s theory. In Table 1 there are potential corresponding elements.

Table 1

Causality	Imputation
(a) The agent has a goal to bring about some change of state in the patient	General norm
(b) The change of state is physical	General norm

(c) The agent has a “plan” for carrying out this goal	General norm
(d) The plan requires the agent’s use of a motor program	Empowerment
(e) The agent is in control of that motor program	Empowerment
(f) The agent is primarily responsible for carrying out the plan	Empowerment
(g) The agent is the energy source and the patient is the energy goal	Sanction
(h) The agent touches the patient, either with his body or an instrument	Imposing a sanction
(i) The agent successfully carries out the plan	Efficiency
(j) The change in the patient is perceptible	Efficiency
(k) The agent monitors the change in the patient through sensory perception	Efficiency
(l) There is a single agent and a single specific patient	Individual norm

The three first components are related to a general norm and its goal. The lawmaker wants to achieve a certain effect in social reality (a and b), hence he issues a legal norm (c). At the next stage the norm is valid. Validity means that the empowered⁴ organ applies the norm to the individual case (d, e, f). The final part of this process is the imposition of a sanction (g and h). The next three components (i, j, k, l) refer to the efficiency

⁴ On empowerment in Kelsen’s pure theory of law, see: Paulson 1988.

problem, that is, if the legal norm is efficient in general and if the organ decided to impose the sanction in a particular case. Finally, from an individual is derived from the general norm. Hence, in the normative sphere imputation can be perceived as a gestalt of the following components: a general norm, empowerment, a sanction, efficiency and an individual norm. All of them are less basic than imputation, which is understood by Kelsen as a relative category a priori, and as such the condition under which cognition of legal norms is possible (Paulson 1992).



Hence, imputation is a mode which allows a general norm to become an individual one. The main component enabling this transformation to be put in motion is empowerment, which Stanley Paulson views as being one of the main features of the pure theory of law (Paulson 1988) Furthermore, metaphorical analysis conforms with the doctrine which binds empowerment with imputation and sanction.⁵ Undeniably, efficiency is one of the main puzzles of Kelsen's pure theory of law.⁶ Kelsen

⁵ I elaborated on this problem in: Zalewska 2015.

⁶ Kelsen elaborated on the problem of tension between validity and efficacy, stating that: "Efficacy is a condition for validity of a legal norm, namely, in the sense that a legal norm forfeits its validity if it does not become efficacious or if it loses efficacy" (Kelsen 2015, 67). This means that efficacy is a sufficient condition for validity (if a legal norm is efficacious then the norm is valid) but not a necessary one, because legal norms can be valid before they become efficacious (Kelsen 2015, 68). In his reply to Kelsen, Bulygin notes that, contrary to this claim, in *General Theory of Norms and State*, Kelsen perceives efficacy as a necessary (sine qua non) condition (Bulygin 2015a, 74). Next, Bulygin distinguishes four modes of the norm's existence. Firstly, there is factual existence, which is understood by Kelsen as efficacy; secondly, the membership when a norm belongs to a certain system of norms; thirdly, existence as validity or binding force, and finally, existence as formulation, for instance the draft of the statute. Bulygin claims that Kelsen was interested in the

himself gave a lot of attention to the problem of efficacy in the context of empowerment. He provides the following formula of efficacy: “The law is efficacious if use is made of the empowerment of the permission granted by law and the law is thereby applied or if the proscription established by the law is respected and the law is thereby complied with” (Kelsen 2015, 66). Bulygin’s text *The Concept of Efficacy* from 1965 (Bulygin 2015b) might provide a hint about a potential link between efficacy and imputation. Namely, Kelsen binds efficacy either with fulfilling legal obligations or with a sanction. Hence, efficacy is a result of empowerment, which leads to the second element of imputation, a sanction.

2.3. The basic norm and the dynamic structure of norms: ontology and orientational metaphors

The basic norm is another landmark of the pure theory of law. Due to a methodological assumption, namely the separation of Is and Ought, Kelsen is unable to provide a classic answer to the question of why the law is valid. He cannot reduce law to facts and claim that law is valid because of the facts which led to establishment of the first constitution. At the same token, as a legal positivist, Kelsen cannot justify the validity of law by appeal to a higher normative order and natural doctrine, since he rejected them. Hence the basic norm is the only possible normative explanation for the validity of the legal system (Kelsen 2010, 235–236).

first three understandings and they are incompatible, especially efficacy and validity, which are understood as both membership and binding force (Bulygin 2015). Furthermore, the tension between efficacy and validity is problematic: namely by accepting the notion that in order to be valid a norm needs to be efficacious, Kelsen impairs his main methodological two-worlds assumption of the duality of Is and Ought (Bulygin 1990, 299–305) which has been very influential in Kelsen’s thought, particularly in his early period.

Kelsen understands the basic norm as a hypothetical assumption which must be made by each lawyer, namely that law is valid. In *Pure Theory of Law* Kelsen explains that the basic norm is: “not created by real will at all but is presupposed by legal thinking” (Kelsen 1967, 23). Kelsen uses in this context an ontological metaphor connected with creation and introduces the contrast between creation and presupposition. It can be assumed (and that is the case) that ordinary legal norms are created by human will. Hence, in this context, the metaphor: a “norm is an artefact” applies. Ordinary legal norms have analogous qualities to artefacts. Just like them, they are created by human beings. However, that is not the case with the basic norm. The basic norm is not created and thus the metaphor of artefact does not apply. One might ask then, what kind of metaphor applies to the basic norm? In *General Theory of Law and State* Kelsen writes: “[...] particular norms have been created in accordance with the basic norm” (Kelsen 1945, 11). This might be a hint that if legal norms are artefacts, which are created, they must be created in accordance with some ultimate norm. Whatever is created, first there must be a design of this thing. It seems that a basic norm is such a norm. After metaphorical analysis it might be worth asking whether an analogy to Aristotelian form and matter is valid in this case. The potential answer might be as follows: the nature of the basic norm is a puzzle and certainly it bears some features which are comparable to the Aristotelian form. However, in the doctrine, the basic norm was also compared to substance. This is in accordance with Heidemann’s view, who suggests that the basic norm is analogical to the category of substance (Heidemann 1997, 97), and appears to be valid from the metaphorical perspective. Putting aside controversies about the relation between form and substance in Aristoteles’s *Metaphysics*, it seems that both conceptions have advantages and disadvantages that are worthy of further exploration. Such a notion proves the usefulness of the cognitive approach to Kelsen’s theory.

2.4. *The dynamic structure of law in relation to orientational and ontological metaphors*

The basic norm remains at the top of the hierarchy of norms that Kelsen calls dynamic or the hierarchical structure of law (*Stufenbau*). In the metaphorical context the direct meaning of *Stufenbau* is essential, since it means: “staircase structure.” Such a normative system is characterized as dynamic due to the competence of one organ to issue a legal norm, with this competence being granted in a higher norm. For instance, there is a general competence in a constitution for parliament to issue statutes, and incorporated in these statutes are the competences for ministers to issue ordinances (Kelsen 2010, 240–41). This feature distinguishes the legal system from morality. In morality the content of the higher norm determines the content of the lower norm. For instance, the norm “love your neighbor” determines that one should help one’s neighbor, not kill, not steal etc.

Typical orientational metaphors characteristic for any hierarchy can be derived from the description of *Stufenbau*. Hence there is a higher organ and a lower organ. Up is more important than down, and this is a characteristic structure for power relations. However, this orientational metaphor does not reveal to what extent the content of a lower norm is determined and hence does not provide any characteristic features for the legal order. However, when combined with Kelsen’s claim from *Das Problem der Souveränität* that *Stufenbau*, as a relation between superiority and inferiority, is a metaphor (*bildliche Darstellung*) the aim of which is to visualize logical derivation, additional information is provided (Kelsen 1920). Hence, the logical aspect is a second dimension of *Stufenbau*, at least till 1960.⁷ A potential interpretation of Kelsen’s state-

⁷ In his last book Kelsen rejected the possibility of applying logic to norms (Kelsen 1979).

ment is: “general is up.” The norms which are the highest in the hierarchy are at the same time the norms which have a more general character. From the general formulation of superior norms, lower and more detailed norms can be inferred. However, it is worth noting that Kelsen needs to provide the interpretation of this metaphor himself. For instance, he uses such formulations as the “creation of a lower norm,” “determination of the creation process,” “law creation,” and “law application” (Kelsen 1967, 236). In contrast to the conceptual metaphors mentioned above, the metaphor of logical relations is not independent. Kelsen does not use expressions belonging to logic. On the contrary, he needs to show the reader that the connection between *Stufenbau* and logic exists. Hence, this metaphor is not of a cognitive character, but rather can be perceived as an interpretative directive provided by Kelsen.

The staircase metaphor, which stems from direct translation, supports the claim about orientational metaphors and reveals more. Namely, it envisions the hierarchy of law not as a straight top-down line, but rather as a more complex stair structure. And indeed, if Kelsen’s concept was presented in a diagram it could be seen that *Stufenbau* resembles a staircase. The vertical level would be occupied by norms, while the horizontal one would be defined by a competent organ.

Another aspect can be derived from the phrase “dynamic system.” When something is dynamic it is imagined as something in movement, in constant change. Heraclitus said “you cannot step into the same river twice” and this rule specifically applies to objects characterized as “dynamic.” This metaphor reveals the nature of law. When following the law in its dynamic aspect, as a chain of competences at the end of this chain there is an individual norm. This last norm is a result of subsuming facts into a general norm. As each legal case is one of its kind, the law in its dynamic dimension is changing all the time when applied. Law can be analyzed in terms of one case, but each case is unique and can be representative for the whole

legal system only to some extent. Perhaps, for that reason, revealed by cognitive analysis, Kelsen distinguishes between legal dynamics and static law, where law is perceived as if it was a universal and unchangeable object of cognition.

Finally, Kelsen uses the metaphor of a chain in the context of *Stufenbau*. The chain of legal norms, applied one after another resembles causality. And indeed, term *Stufenbau* is familiar to another type of imputation which Kelsen calls "central." This type of imputation has a different character than peripheral imputation, since it concerns the hierarchy of norms and the law-making process. Each legal act can be imputed to a certain organ. As *Stufenbau* describes a top-down relation, the central imputation has a contrary direction: bottom-up. The final point of imputation is the state itself, and as a result all legal acts can be imputed not only to its particular organ but also to the state. Hence, the metaphor of the chain revealed the close proximity between two categories of the pure theory of law, *Stufenbau* and the central imputation.

3. Concluding remarks

The preceding examples do not exhaust the numerous metaphors used by Kelsen. The aim of the analysis was not to analyze all the metaphors in Kelsen's pure theory of law but to demonstrate the usefulness of Lakoff-Johnsons' theory for analyzing Kelsen's Normativism. Due to the abstract character of the normativist theory, it seems to be a perfect subject for cognitive studies.

The Kelsenian doctrine broadly discusses various elements, such as the basic norm or the configuration of elements, for instance, the relation of the basic norm and validity. However, there are also some less apparent problems, such as the relation of imputation to efficiency. The initial metaphorical analysis completed in this paper revealed several problems that are worthy of further examination. The relations of Is and Ought

as the abyss, imputation and efficiency, the basic norm and Aristotelian form, or a profound exploration of the dynamic aspect of law are the issues which are able to enhance the knowledge of the legal system in the normativist paradigm and modes of thinking about law. The analysis revealed the compatibility of the metaphors used by Kelsen with his theory on the cognitive level. Given that they are rather based on Kelsen's intuitions, it might be assumed that they indeed reconstruct legal thinking on a cognitive level about law. They also help the readers of Pure Theory of Law comprehend this abstract theory.

The final conclusion of the research is that metaphors can be a vital practical device for the purpose of examining Normativism, which might be helpful, for instance, in central Europe, where legal thinking is dominated by the Kelsenian paradigm. This paradigm, although considered by many as outdated, is very much alive. Even though there are postulates of changing the paradigm and introducing a more modern legal theory as the basis of legal thinking, this plan till now has not been successful. The next generations of lawyers are still thinking about law in Kelsenian terms. Perhaps the reason lies not in the theoretical level, but deeper. Lawyers use specific legal language based on Kelsen's theory and also have a certain idea about this abstract object which is law. This idea perhaps is built from the cognitive metaphors used, and these might be even more difficult to change than the positivistic language used by lawyers.

If the theory of conceptual metaphors is correct, it indicates that by using appropriate metaphors Kelsen successfully reconstructed the mode of thinking of continental lawyers. Since what Kelsen did was a reconstruction – or rather a discovery – of thinking, and not a revolutionary invention of a new mode of thinking, a potential change in this field might be difficult to achieve by ordinary, linguistic means. Perhaps if one wants to change legal thinking, he (or she) needs to find the answer not in the linguistic dimension but in the cognitive one. However,

before this will be achieved, there are at least two questions to answer: if and how this would be possible, and is it worth trying. Obviously, there are some essential questions which the pure theory of law is unable to answer, especially those concerning legal practice. But perhaps these questions should be a subject of a new theory on a different level, just compatible with Kelsen's pure theory of law, understood as a reconstruction of legal thinking.

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Bibliography

- Bulygin, Eugenio. 1990. "An Antimony in Kelsen's Pure Theory of Law." *Ratio Juris* 3 (1): 29–45.
- Bulygin, Eugenio. 2015a. "Remarks on Kelsen's *Validity and Efficacy of the Law*." In *Essays in Legal Philosophy*, edited by Carlos Bernal, Carla Huerta, Tecla Mazzaresse, Jose Juan Moreso, Pablo E. Navarro, and Stanley L. Paulson, 69–74. Oxford: Oxford University Press.
- Bulygin, Eugenio. 2015b. "The Concept of Efficacy." In *Essays in Legal Philosophy*, edited by Carlos Bernal, Carla Huerta, Tecla Mazzaresse, Jose Juan Moreso, Pablo E. Navarro, and Stanley L. Paulson, 37–51. Oxford: Oxford University Press.
- Bulygin, Eugenio. 2015c. "The Problem of Legal Validity in Kelsen's Pure Theory of Law." In *Essays in Legal Philosophy*, edited by Carlos Bernal, Carla Huerta, Tecla Mazzaresse, Jose Juan Moreso, Pablo E. Navarro, and Stanley L. Paulson, 311–323. Oxford: Oxford University Press.
- Heidemann, Carsten. 1997. *Die Norm als Tatsache*. Baden-Baden: Nomos Verlagsgesellschaft.
- Kelsen, Hans. 1923. *Hauptprobleme der Staatsrechtslehre*. Tübingen: Scienta.
- Kelsen, Hans. 1945. *General Theory of Law and State*. Translated by Anders Wedberg. Cambridge: Harvard University Press.

- Kelsen, Hans. 1967. *Pure Theory of Law*. Berkeley: University of California Press.
- Kelsen, Hans. 1979. *General Theory of Norms*. Oxford: Clarendon Press.
- Kelsen, Hans. 2010. "Die Philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus." In *Die Wiener rechtstheoretische Schule*, edited by Hans Klecatsky, Rene Marcic, and Herbert Schambeck, 231–288. Wien: Franz Steiner Verlag.
- Kelsen, Hans. 2015. "Validity and Efficacy of the Law." In *Essays in Legal Philosophy*, edited by Carlos Bernal, Carla Huerta, Tecla Mazzarese, Jose Juan Moreso, Pablo E. Navarro, and Stanley L. Paulson, 52–68. Oxford: Oxford University Press.
- Lakoff, George, and Mark Johnson. 2003. *Metaphors We Live By*. 2nd edition. Chicago: University of Chicago Press.
- Paulson, Stanley L. 1988. "An Empowerment Theory of Legal Norms." *Ratio Juris* 1 (1): 58–72.
- Paulson, Stanley L. 1992. "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law." *Oxford Journal of Legal Studies* 12 (3): 311–332.
- Paulson, Stanley L. 2001. "Hans Kelsen's Doctrine of Imputation." *Ratio Juris* 14 (1): 47–63.
- Pils, Ramon. 2016. *Terminologiewörterbuch Hans Kelsen*. Vienna: Manz Verlag.
- Zalewska, Monika. 2015. "Gunman Situation, Vicious Circle and Pure Theory of Law." In *Problems of Normativity, Rules and Rule-Following*, edited by Michał Araszkiewicz, Paweł Banaś, Tomasz Gizbert-Studnicki, 189–198. Berlin: Springer Verlag.

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