

Chapter 2

Kelsen on Vaihinger

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Abstract This is a comment by the translator on the translation of Hans Kelsen’s ‘On the Theory of Juridic Fictions. With special consideration of Vaihinger’s Philosophy of the As-If’ (Chap. 1).

Vaihinger’s philosophy of the As-If is a work which is almost as famous as it is unread and the strong intuitive appeal of its programme—so very neatly expressed in its title—has not been appealing enough to generate a lasting debate or something of a heritage in the English-speaking world.¹ However, Kelsen’s early engagement with this work is still relevant and should attract our attention. This is so not only because of Kelsen’s comments on the concept of juridic fiction, but also because in this work Kelsen sketches out, and be it en passant, early ideas on freedom, normativity and the relation of law and morality. In this early discussion of his ideas we can see themes evolve which are central to the Pure Theory albeit not yet overburdened by the discourse of the basic norm.²

Apart from a respectful but largely critical analysis of Vaihinger’s use of juridic fictions, to which I will turn in a moment, Kelsen also makes two important points not trivially related to the question of juridic fictions. Kelsen claims, firstly, that the concept of the freedom of the will with all its metaphysical confusions is an unnecessary consequence of an insufficient separation of the realm of the is and the

¹ Being a commentary on Kelsen’s essay, this is not the place to discuss Vaihinger’s work in any detail. It has to suffice to say that it is a surprisingly erudite work, rich in detail which mainly suffers from a repetitive urge to subsume everything under the construct of the fiction and to claim that all problems of philosophy can be solved thereby. Vaihinger is convinced the fiction is the key to a mediation between the actual and the ideal, a mediation which he calls “idealistic positivism” and which turns out to be a thoroughly un-dialectical assemblage of disparate and incompatible elements. He is drawn to the fiction because in it he believes to have found a construct that allows us to continue to talk about the phantasies and dreamt up concepts we hold so dearly, yet still remain devoted to cognition of the actual world. It is thus a theory which promises to allow us to eat the cake, yet at the same time have it. Philosophically Vaihinger’s work is a combination of voluntarism, naturalism, Nietzscheanism, pragmatism and a reading of Kant along the lines of pragmatism.

² On the misunderstood role of the Basic Norm, see Jestaedt 2013.

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realm of the ought and that as soon as one accepts this separation, the concept of freedom becomes superfluous; he claims, secondly, that the law can only ever be an object of cognition if it is understood as a sovereign normative order not derived from morality or religion and that, accordingly, law and morality cannot stand in any relation to each other, because they are not realms of actuality.

But let us start with the fictions themselves. According to Kelsen, Vaihinger is right in his general characterization of them. They are very peculiar intellectual constructs: they help us gain a better understanding of the world, but they do that by making claims about the world which are in clear opposition to facts or are plainly self-contradictory. For instance, in mathematics we make regular and expedient use of the concept of the “infinitely small”, despite it being clear that there is nothing in the world which is actually infinitely small and that the concept of something being infinitely small yet not being nothing, is self-contradictory; the same holds true for imaginary numbers (the square root of negatives); ditto for concepts like “matter”, “force”, and so on.³ In a fiction we treat X as if it were a Y in order to better understand the world, even though we very well know that X actually is not Y or cannot be Y.

From this Vaihinger develops the four main characteristics of fictions: (1) they include a contradiction with reality or a self-contradiction, (2) the fiction has to be fundamentally provisional, i.e. it has to disappear later on or be logically eliminated, (3) the awareness of the fictivity has to be expressly stated, and (4) the fiction has to be expedient.⁴

So far so good. However, Vaihinger states that it was only in mathematics and in the law that fictions have so far been systematically discussed,⁵ and goes on to elaborate his understanding of the use of fictions in the law. And it is precisely this to which Kelsen takes exception. He claims that on close inspection nearly all the examples Vaihinger uses to illustrate juridic fictions cannot count as fictions in Vaihinger’s own sense. After all, Vaihinger quite naively talks about the “fictions of the law” and does not distinguish between the various possible authors of fictions, i.e. between who exactly makes the fictitious statement. According to Kelsen, Vaihinger refers to at least three possible authors: the legislature, the judiciary (and other agents applying the law) and legal science. Now, of these three, only the latter can be said to satisfy all four of Vaihinger’s own characteristics of fictions.

(A) Fictions of the legislator, e.g. cases where the legislator decrees “that goods not returned to the sender within the proper time are regarded *as if* the recipient had definitely authorised and accepted them”⁶ cannot count as proper fictions as by

³ Vaihinger actually ends up arguing that nearly every concept is a fiction. In the 800 pages of his work there seems to be no linguistic construct which he thinks would not benefit from being understood as a fiction. After all he says that every abstract and every general term is a fiction. Now, since every term, even an indexical, has an element of generality, according to Vaihinger every term must have a fictional element. This, however, is clearly proving too much as this generality robs fictions of any explanatory power.

⁴ Vaihinger (1924, p. 97).

⁵ Vaihinger (1924, p. 33).

⁶ Vaihinger (1924, p. 35).

means of them the legislator does not attempt to facilitate knowledge of the actual world and they do not set up an explicit contradiction to the actual world. Legislative acts are acts of will, and as such they do not intend to represent knowledge of anything. What is more, a legislative act cannot set itself in contradiction to actuality (which it does not even intend to represent). All it does is create a normative reality. So when the legislator says that A is to be treated as if it were a B, then by that he is not asking us to treat A as B in order to better know A, even though we know A not to be B. Rather, the legislative act normatively *makes* A a B. This means that the same normative consequences which are attached to B are by means of this “fiction” also attached to A. The legislator does not ask us to treat A “as if” it was a B, but he asks us to treat A “just as” B. Rather than being “fictions” in Vaihinger’s sense these constructs are only a convenient way of legislating, they are mere regulative shortcuts.

There can be little doubt that Kelsen is correct here. Whether he has made more than a terminological point, and whether he ever intended more, remains, however, doubtful. What nevertheless warrants comment is the fact that since Kelsen has not yet incorporated Merkl’s doctrine of the “double-headedness of the legal act”,⁷ he did not yet seem to appreciate the fact that there can be no difference in principle between legislation and adjudication, since both apply existing law and create new law.

(B) In contrast, the fictions of the application of the law, e.g. fictions used by a judge to treat a case which is explicitly not covered by a statute as if it were covered by a statute, might satisfy the “cognition requirement” in that as a subaltern element the application of law involves a cognitive element in relation to the law which is applied; however, what this supposed “fiction” lacks is expediency, since, according to Kelsen, these “fictions” cannot reach a *correct* conclusion. They cannot reach a correct conclusion, Kelsen claims, since as concerns the cognition of the law, only the law itself can be the standard of correctness. Now, adjudicative “fictions” do not simply provisionally treat cases as if they were different, but they permanently alter the legal material, thus violating criterion (2) and (4) of Vaihinger’s above stated characteristics of fictions.

Kelsen is correct, as long as we presuppose the truth of positivism, i.e. as long as we accept that the law includes only positive norms and not some interpretative elements. However, Kelsen himself seems aware of the limitation of his position as he concedes that since juridic fictions are ultimately indistinguishable from analogical interpretations, they have to be accepted as legitimate insofar as the legislator himself allows for the latter or insofar as they are warranted by means of customary law or a “natural principle of law”.⁸ If that is the case, however, then it is doubtful how much Kelsen has actually shown in his discussion of the fictions of the application of law. It is generally unclear if the big problems of interpretation and the filling of legal gaps can be adequately discussed under the heading of juridic fictions.

⁷ Merkl (1918).

⁸ See Kelsen, Chap. 1 above, p. 16.

However, Kelsen's treatment of the fictions of the application of the law faces another challenge, one similar to the one faced by the legislative fiction: after all, just as legislation has also an element of the application of (constitutional) law, so adjudication has an element of creation of law. In that sense the "fictions" of adjudication cannot be true fictions at all, since the judge in his judgment not only applies law, but also creates new law and the same logic of legislative "fiction" applies. Now, whereas Kelsen is aware of this legislative function of judges when he talks about the Roman Praetor being a legislative organ,⁹ he does not take this into consideration when dealing with fictions of the application of law.

(C) So the only legitimate fictions are the fictions of legal theory itself, i.e. the fictions used by legal science to better understand the law. So, for instance, Kelsen takes the legal subject and the legal person (including the legal person of the state)¹⁰ to be but a personification or hypostatisation of a complex of norms which is effected by legal theory in order to better understand and handle this complex of norms. According to Kelsen there is no actual bearer of legal rights and duties out there in the world. Rather the legal subject is a construct. The fiction is created for the purpose of simplification and illustration and it becomes an error only when we mistake it to not be a mere (provisional and counterfactual) fiction, but a hypothesis or even dogma about the actual world.

(D) Let us now turn to Kelsen's discussion of freedom. Here Kelsen presents an argument he will take up again in his *Allgemeine Staatslehre* and according to which the concept of the freedom of the will is mainly the result of a profound confusion. Freedom is certainly not a fiction in Kelsen's view. It is a mistaken solution to a pseudo-problem that emerges from the insufficient distinction of the realms of the is and the ought. As soon as we sufficiently distinguish between the realms of the is and the ought, the need for freedom of will withers away:

Only if one ignores the difference between is and ought (as two distinct forms of cognitions) and takes the possibility of being actual as a condition of an ought-statement, only then the illusion is created that there existed a contradiction between the statement, which posits that something ought to be, and the statement, which claims as a matter of fact that this something is actually impossible; only then the following error emerges: that a certain content (the action which ought to occur) has to be actually possible, the actor thus has to be feigned to be free, in order to make possible the statement of ought, and thereby to simultaneously make possible the duty to act and maybe even the duty to act differently than one actually acts, differently than one actually must or can act. A methodological error leads to the fiction of freedom, which becomes superfluous as soon as one acknowledges this error. This is the only way to explain the curious fact that a strict opposition between the freedom within ethics and jurisprudence, on the one hand, and the un-freedom within natural science, on the other, could emerge, yet could at the same time be ignored by both sides. The ethical fiction of freedom thus is useful and necessary only as long as the adequate methodological insight is absent.¹¹

⁹ See Kelsen, Chap. 1 above, p. 13.

¹⁰ For a discussion of Kelsen's treatment of legal persons see Paulson (1998). It is unfortunate that Paulson does not refer to Kelsen's fiction paper.

¹¹ See Kelsen, Chap. 1 above, p. 17.

Freedom seems necessary only if we claim that the statement

1. A ought to ϕ

can be true only if¹² the statement

2. A actually can ϕ

is true. Now, Kelsen's argument simply is that an ought statement cannot be conditioned by an is statement. For Kelsen (1) cannot have as its necessary condition (2), as normative and factual statements cannot stand in any logical relation to each other whatsoever. They can not contradict each other and they cannot condition each other. The absence of the relation of implication can be seen from the fact that (1) does not contradict

3. A actually cannot ϕ

Now, to claim that (1) implies (2) means that (1) cannot be true without (2) being true. But this, according to Kelsen, can only be the case if (3) conflicted with (1), which, according to Kelsen, it does not. "Peter ought to be nice" does not conflict with "Peter is not nice". Nor does it conflict with "Peter cannot ever be nice" or "Peter is not free to be nice". But if "Peter ought to be nice" does not conflict with "Peter is not free to be nice" then it is hard to see how "Peter ought to be nice" could ever presuppose "Peter is free to be nice".

The point Kelsen is making is simply that the existence of freedom, which would be a fact, cannot ever be derived from the statement of a norm.

However, Kelsen thinks that even if we make the Kantian assumption that the natural world is fully determined causally, and that there is no place for freedom, there is still a point of talking about the ought. The normative realm can do well without freedom the concept of freedom is the result of a misunderstanding of the normative realm as having a logical relation to the actual realm.

According to Kelsen the statement "Peter ought to be nice" makes sense even when we do not attribute a magical quality of being able to suspend causation to Peter, just as it makes sense to state "The coffee ought to be hotter" without attributing any such quality to the coffee. Of course, one might argue that "The coffee ought to be hotter" only makes sense if understood as "Someone ought to have made the coffee hotter". But, this begs the question as then again we could ask whether this someone, who supposedly ought to have made the coffee hotter, was actually in a position to have been able to make the coffee hotter.

The point Kelsen is making is that we do not need freedom to make sense of ought statements. Ought cannot and does not need to be analysed in terms of freedom, it is rather itself fundamental. We know what we mean by "Peter ought to be nice", "The coffee ought to be hotter", "Brutus ought not have killed Caesar" and this understanding does not presuppose freedom of will. This Kelsenian view, of course, sits much more comfortably with a non-cognitivist, expressivist or emotivist

¹² The relation here is the relation of simple implication: (1) \rightarrow (2) making (2) a necessary but not a sufficient condition of (1).

meta-ethical commitment, which takes the above statements to mean: “Peter is not nice, but I’d prefer if he was”, “The coffee is not hot, but I’d prefer if it was”, and “Brutus did kill Caesar, but I’d prefer if he had not” and thus takes ought-statements as expressions of desires and not of beliefs. This again shows that despite claims to the contrary Kelsen in his fundamental normative convictions might be much closer to Hume than to Kant.

(E) The second theme that Kelsen discusses en passant his debate of juridical fictions is the epistemological constitution of the object of legal science, i.e. the understanding that the sovereignty of the law is a necessary epistemological presupposition of legal science. This theme will later move more to the centre of Kelsen’s legal theory and turn out to be one of the foundations of the Pure Theory of Law. Here, in contrast to the above discussion, we can find strong Kantian allusions:

After all, legal science—as cognition of a particular object—can only be possible if one assumes the sovereignty of the law (or, which is the same, of the state), i.e. if one takes the legal order as an independent system of norms which is not dependent on any higher order. Otherwise only a moral science (ethics) or theology would be possible, depending on whether one takes the law to be a result of morality or religion. (As long as we consider the law to be an order, a complex of norms, we do not need to consider here a possible natural science or sociology of law, which clearly would also have to be considered a science of law).¹³

In this statement we can find neatly encapsulated many themes Kelsen will develop further later on: the separation of law and morality as a condition of legal science, the distinction of the legal order as a normative order from other possible objects of empirical sciences, and the sovereignty of the law as an overspill of an epistemological requirement into the quality of the law itself.

What follows from this is that opposed to what Vaihinger claims, the separation of law and morality cannot be fictitious. Or, as Kelsen himself put it in exceptional clarity:

The relation of law and morality is in no sense a relation between two “realms of life” as two parts of natural reality. Their “actual” relation is no relation in actuality, i.e. in reality which can be captured by natural science understood in the broadest sense and also including social sciences. The juridic perspective which Vaihinger accuses of committing a fictitious isolation, cannot depart from an integrated part of actuality, not even in determining the relation of its object to morality, since it does not even have actuality in view. However, insofar as law and morality are considered as—social—facts, as “actual” goings-ons in nature (and it remains an open question whether this is at all possible), they are not objects of specific juridic cognition, or of normative ethics. And in this sense the related fictitious isolation cannot take place at all. There is no need for it at all. For an inquiry of the actuality of the so-called experience of law, of the factual moral ideas and the “moral” actions effected by them—its methodological possibility simply assumed—law and morality are something completely different than what these two same words denote as objects of normative legal science and ethics.¹⁴

Kelsen’s engagement with Vaihinger’s theory of fictions is an early text which despite suffering from some defects, like the language in places being laboured and

¹³ See Kelsen, Chap. 1 above, p. 18.

¹⁴ See Kelsen, Chap. 1 above, p. 19.

stilted, or Kelsen not yet having fully found his elegant voice and intellectual vocabulary, surprises in many passages with deep insights and fresh formulations still unburdened by his later systematic endeavours.

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