

## 1 Introduction\*

Normativism is an important strand in philosophy. It can roughly be defined as having three basic features. First, there is a fundamental mode of Ought, or normativity, which cannot be reduced to the mode of Is, or factuality. Second, normativity is in some way objective. Third, normativity is constitutive of a certain domain, be it ontology, epistemology, language, morality, or law.

In accordance with the third feature, philosophical normativism is not restricted to securing the objectivity and autonomy of the 'practical' sphere; it also plays an important role in metaphysics. As will be shown (Section 2.2.2), Kant's rejection of transcendental realism without succumbing to skepticism was only possible by his adopting a variety of normativism for his theoretical philosophy. In present-day philosophy, normativism dominates not only parts of the theory of meaning in a narrow sense; it is also central to Hilary Putnam's internal realism, Jürgen Habermas's discourse theory, and Robert Brandom's inferentialism – to name some prominent examples.

Normativism in legal theory is mainly associated with the writings of Hans Kelsen (1881–1973). While there is scarcely any legal theorist who would subscribe to its tenets without restrictions, the Pure Theory of Law gained worldwide recognition and had an impact on authors like H. L. A. Hart, Joseph Raz, and Robert Alexy. The normativistic tendencies of current legal theory are generally due to Kelsen's immediate or mediated influence. But Kelsen's texts represent not only what might be called the 'historical core' of legal normativism; having undergone several changes of paradigm during the long span of time in which they were published, they also give an overview of a broad range of divergent aspects of normativism. All of this justifies a closer look at his theory.

The term 'normativism' seems to owe at least part of its currency to Kelsen's theory. It is comparatively young. The German equivalent, *Normativismus*, had been in use since the nineteenth century; it gained prominence after it was introduced into legal theory, by the right-wing legal philosopher Carl Schmitt, as a pejorative 'battle term,' when polemicizing against Kelsen's theory of law in the 1930s.<sup>1</sup> Schmitt saw normativism in law as the view that law is exclusively a system of (normative) rules which are objective, impersonal, and independent of factuality (Schmitt 1977: 370–1). This definition captures fairly well the three aspects mentioned above and what Kelsen probably had in mind as the lowest common denominator of his different conceptions of normativism.

\* I am grateful to two anonymous reviewers for helpful remarks. Special thanks go to Monika Zalewska for our enriching discussion of Kelsenian and philosophical topics.

<sup>1</sup> On the Kelsen–Schmitt controversy, see Paulson 2017.

In the second section of this Element, the development of the Is–Ought dualism and normativism in philosophy is traced, by sketching some historical ‘landmarks’ which informed Kelsen’s theory. This is necessary because the meaning and role of ‘Ought’ can hardly be understood without drafting the history of this concept – unless one is content with the meagre and apodictic explanation of the dualism Kelsen gave in the second edition of *Pure Theory of Law*:

The difference between is and ought cannot be explained further. We are immediately aware of the difference. Nobody can deny that the statement ‘something is’ – that is, the statement by which an existent fact is described – is fundamentally different from the statement: ‘something ought to be’ – which is the statement by which a norm is described. (Kelsen 2005: 5–6 [Kelsen 1960: 5])

In the third section, the genesis of Kelsen’s version of normativism is sketched. His first major text, *Hauptprobleme der Staatsrechtslehre* (1911), is treated comparatively extensively. It contains the germs of Kelsen’s later Pure Theory of Law while connecting it to the jurisprudential tradition of the nineteenth century; besides, though little known, it is a true specimen of normativism in its own right.

Both the second and third sections concentrate on neo-Kantianism for three reasons. First, neo-Kantianism is the predecessor of modern analytical philosophy; the Baden school developed normativism as a metaphysical theory in a highly sophisticated manner so that it still informs present-day discourse.<sup>2</sup> Second, Kelsen’s theory emerged at a time when neo-Kantianism impregnated German academic culture. It incorporated neo-Kantian theorems ‘subcutaneously’ from the beginning and is not intelligible without this theoretical surrounding. Third, Kelsen’s explicitly neo-Kantian writings from the 1920s, especially *Das Problem der Souveränität*, *Der soziologische und der juristische Staatsbegriff* and *Rechtswissenschaft und Recht*, though philosophically his best, are not well known; they are written in a difficult style and have not been translated into English.

Finally, the fourth section gives a short summary of the findings of sections two and three.

## 2 The Genesis of Normativism in Philosophy

### 2.1 Hume’s Law

Hume’s Law is the starting point of the modern discussion of the dualism of Is and Ought.<sup>3</sup> Although the notion that there is some form of normativity is

<sup>2</sup> On this topic, see the instructive paper Beiser 2009: 9–37.

<sup>3</sup> However, in secondary literature both whether Hume’s text is the origin of the philosophical tradition of a dualism between Is and Ought and what Hume really meant is contested; see the seminal paper McIntyre 1959: 451–68.

millennia-old, so that saying something is valuable, obligatory, or ought to be the case is not just a statement of fact, it is only since David Hume (1711–76) that it has been an explicit topos of philosophy that norms cannot be deduced from nature, or Is-propositions.

Hume, together with Kant and Wittgenstein, is one of the great innovators of modern philosophy (if it is deemed to be an analytical enterprise) insofar as he tries to completely reform metaphysics, doing away with any elements which have a supernatural flavor. Hume's classic formulation of the dualism of Is and Ought runs as follows:

In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surprised to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it should be observed and explained; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason. (Hume 2007a: 302)

This is 'Hume's Law', usually summarized as saying that it is impossible to deduce Ought-propositions from Is-propositions. But actually the text is richer than that. It comprises different claims. First, Is and Ought are "copulations of propositions" (*a is b* vs. *a ought to be b*). Second, Ought-propositions concern morality, God, or human affairs. Third, it seems to be inconceivable (though perhaps a reason might be given) that Ought-propositions could be deduced from Is-propositions, because the Ought-denotes some "new relation or affirmation." Fourth, Ought-propositions cannot be validated by "relations of objects" or by reason.

Hume does not argue for these claims; he seems to take them as self-evident. The short passage quoted above more or less exhausts what he has to say concerning the subject; the dualism does not play a vital role in his theory, nor is Hume consequent in observing it. In his philosophical system, the Is–Ought dualism results in skepticism concerning the objectivity of moral propositions, because Hume only accepts two categories of objective knowledge, namely, "relations of ideas" (expressed by analytical/mathematical sentences)

and “matters of fact” (expressed by empirical sentences) (Hume 2007b: 18). Accordingly, his description of the Is–Ought distinction differs in two (possibly contradictory) points from the provisional definition of normativism given above. Ought-propositions, for him, are not objective; and he does not altogether exclude the possibility that there might be a derivation of Ought from Is, after all.

## 2.2 Normativism in Kant’s Critique of Reason

Immanuel Kant (1724–1804) shares the critical concern of revising metaphysics with the aim of purifying it from any supernatural elements. His approach, however, is different from Hume’s. To put it simply, Hume’s perspective is that of an observer of ‘human nature’; he analyzes the elements of cognition from the outside, so that cognition seems, to him, to be a matter of associations of perceptions. Kant’s philosophy, on the other hand, starts – as it were – inside cognition and explores the necessary conditions for the possibility of objective judgments – it is the perspective of a participant. And while Hume radicalizes the theories of his empiricist predecessors by jettisoning rationalist elements, Kant seeks a synthesis between rationalism and empiricism by assigning both empirical and rational elements their proper place in cognition.

Kant advocates the thesis that Ought-judgments cannot be reduced to or deduced from Is-judgments without referring to Hume in this context (of course, he explicitly mentions him when confessing that it was Hume who aroused him from his “dogmatic slumber” (Kant 2004: 10 [A 13])). This is understandable considering the background that normativity plays a different and more important role in Kant’s philosophy than in Hume’s. His transcendental idealism tries to steer a middle path between empiricism and rationalism in order to avoid Humean skepticism, and normativity plays an important part in this project. Kant points to normativity to strictly separate practical questions from empirical or theoretical ones. But Kant is also the first major philosopher to turn the tables and hold not only that Ought-propositions cannot be reduced to Is-propositions; rather, any kind of theoretical or Is-cognition presupposes normativity. For him, practical reason has, in several ways, priority over theoretical reason.

### 2.2.1 *The Distinction between Is and Ought*

Kant maintains explicitly that there is no way of deriving what ought to be (done) from natural facts. Conversely, the Ought is meaningless when dealing with proceedings in nature. To describe this state of affairs, he uses terminology very similar to that which Kelsen employed some 150 years later:

The ought expresses a species of necessity and a connection with grounds which does not occur anywhere else in the whole of nature. In nature the understanding [*Verstand*] can cognise only what exists, or has been, or will be. It is impossible that something in it ought to be other than what, in all these time-relations, it in fact is; indeed, the ought, if one has merely the course of nature before one's eyes, has no significance whatever. We cannot ask at all what ought to happen in nature, any more than we can ask what properties a circle ought to have; but we must rather ask what happens in nature, or what properties the circle has. (Kant 1998: 540 [A 547])

This passage contains some further qualifications of the Ought which are not important in this context, but which are noteworthy: The Ought goes along with a kind of necessity, and it expresses a “connection with grounds,” not with causes.

In another passage in the *Critique of Pure Reason*, Kant maintains:

Whereas, so far as nature is concerned, experience supplies the rules and is the source of truth, in respect of the moral laws it is, alas, the mother of illusion! Nothing is more reprehensible than to derive the laws prescribing what ought to be done from what is done, or to impose upon them the limits by which the latter is circumscribed. (Kant 1998: 398 [A 318–19/B 375])

Like Hume, in both passages Kant does not further argue for this point, but seems to take it to be self-evident. Finally, in the *Critique of Judgment*, regarding the sphere of practical reason, Kant holds:

Now since . . . the objective necessity of the action, as duty, is opposed to that which it, as an occurrence, would have if its ground lay in nature and not in freedom (i.e., in the causality of reason), and the action which is morally absolutely necessary can be regarded physically as entirely contingent (i.e., what necessarily should happen often does not), it is clear that it depends only on the subjective constitution of our practical faculty that the moral laws must be represented as commands (and the actions which are in accord with them as duties), and that reason expresses this necessity not through a be (happening) but through a should-be, which would not be the case if reason without sensibility (as the subjective condition of its application to objects of nature) were considered, as far as its causality is concerned, as a cause in an intelligible world, corresponding completely with the moral law, where there would be no distinction between what should be done and what is done, between a practical law concerning that which is possible through us and the theoretical law concerning that which is actual through us. (Kant 2002: 273 [A 338–9/B 342–3])

Compared to the previously cited passages, which are pleasantly clear, this one seems obscure and needs some explanation. What Kant seems to mean, as far as our topic is concerned, is that the Ought (or the moral law) expresses what

is morally necessary, in contradistinction to the natural law which expresses what is physically necessary. That which is morally necessary may be the case or may not be the case; only in an “intelligible world,” that is, an ideal world in which all norms are complied with (a deontically perfect world), is everything that ought to be the case really the case – norms and natural laws would be one. And Kant insinuates some other important points that he elaborates elsewhere and which have an impact on Kelsen’s conception: The Ought emanates from reason; that is why it is on the one hand subjective (having its origin in a faculty of mind) and on the other hand objective in the sense of being ‘reasonable.’ So (pure) reason has two different functions – a theoretical (speculative) one, directed at “the cognition of the object up to the highest a priori principles,” and a practical one, directed at “the determination of the will with respect to the final and complete end” (Kant 2015: 97 [A 216]). Further, the Ought is expressive of “freedom,” defined as independence from causal laws. Accordingly, the Ought-laws are contrasted with natural laws; and by complying with norms, a “causality by freedom” originates.

### 2.2.2 *The Primacy of Ought over Is*

Although Is and Ought have to be kept apart, there are, for Kant, at least two relations between them where the Ought is logically prior to the Is. First, there is a “primacy” of practical reason over theoretical reason. Second, understanding’s activity of judging presupposes a minimum of autonomy and, thus, of normativity.

#### 2.2.2.1 The Primacy of Practical Reason

Kant explains the possibility of a primacy of the practical function of pure reason over its theoretical function as follows:

If practical reason may not assume and think as given anything further than what speculative reason of itself could offer it from its insight, the latter has primacy. Supposing, however, that practical reason has of itself original a priori principles with which certain theoretical positions are inseparably connected, while these are withdrawn from any possible insight of speculative reason (although they must not contradict it): then the question is, which interest is supreme (not, which must give way, for one does not necessarily conflict with the other)?<sup>4</sup> (Kant 2015: 97 [A 216])

And the “practical interest” of reason overrides, because it involves original principles a priori which are practically necessary and insofar proven, but

<sup>4</sup> “Interest,” in this context, is defined by Kant as “a principle that contains the condition under which alone [the] exercise [of a faculty of mind] is promoted” (Kant 2015: 97 [A 216]).

theoretically undecidable; they consist of the moral law, which is a “fact of reason,” and its presuppositions (the “practical postulates,” freedom, immediately, and immortality of the soul and God in a mediated way) – or so I read Kant.<sup>5</sup> This is a metaphysically demanding relation between Is and Ought which need not be discussed any further in the present context, because it presupposes the complex conceptual edifice of Kant’s explanation of reason and has no impact on Kelsen’s theory.

### 2.2.2.2 The Spontaneity of Understanding

There is, however, a less obvious role for normativity in Kant’s *Critique of Pure Reason* which also indicates a primacy of Ought over Is. Kant’s explanation of ‘understanding’ (*Verstand*) is probably the first major attempt at a normativistic theory of cognition. In fact, it is easy to see why some conception of normativity, or rules, should be fundamental to Kant’s theoretical philosophy as soon as one considers the argument that triggered his transcendental idealism. To be sure, the *Critique of Pure Reason* sets out to vindicate the possibility of synthetic judgments a priori, i. e. of judgments that extend our knowledge but which are not dependent on experience; yet Kant’s transcendental idealism is foremost an answer to the aporias of philosophical realism, that is, of a position according to which cognition deals with objects which are independent of it:

Truth, it is said, consists in the agreement of cognition with its object. In consequence of this mere nominal definition, my cognition, to count as true, is supposed to agree with its object. Now I can compare the object with my cognition, however, only by cognizing it. Hence my cognition is supposed to confirm itself, which is far short of being sufficient for truth. For since the object is outside me, the cognition in me, all I can ever pass judgement on is whether my cognition of the object agrees with my cognition of the object. The ancients called such a circle in explanation a *diallelon*. And actually the logicians were always reproached with this mistake by the sceptics, who observed that with this explanation of truth it is just as when someone makes a statement before a court and in doing so appeals to a witness with whom no one is acquainted, but who wants to establish his credibility by maintaining that the one who called him as witness is an honest man. (Kant 1992: 557–8)

Kant tackles this problem not by succumbing to skepticism, but by dissolving metaphysics into epistemology: “The proud name of an ontology . . . must give way to the modest one of a mere analytic of the pure understanding” (Kant 1998: 57–8 [A 247/B 303–4]). He dismisses the idea that the truth and objectivity of judgments are guaranteed by their referring to a transcendent reality and

<sup>5</sup> This topic is discussed elaborately in Willaschek 2009.



holds that they are instead the result of an interaction between receptive or passive sensibility and the spontaneous activity of understanding (*Verstand*). Other candidates not being available, this spontaneity is made up by understanding's activity – that is, thinking or judging – being guided by rules, and by the judging subject's competence to distinguish correct from incorrect applications of these rules.

There are quite a number of passages where this indispensable normativist level of Kant's theory emerges – for example, when he explains concepts as rules for uniting representations, or when he defines understanding generally as the “faculty of rules” (*Vermögen der Regeln*) (Kant 1998: 242 [A 126]). In fact, Kant's theoretical philosophy might presuppose a solution of the third antinomy (Willaschek 2010: 165–84). That is, in short, the cognitive constitution of the world of objects might presuppose some form of freedom of will, or normativity.<sup>6</sup>

Against this background, it is not astonishing that, for Kant, logic is concerned with normative rules: “In logic, however, the question is not about contingent but about necessary rules; not how we do think, but how we ought to think” (Kant 1992: 529). In a similar vein, borrowing from the language of jurists, he distinguishes between questions of what is lawful (*quid juris*) and questions of fact (*quid facti*) (Kant 1998: 219–20 [A 84/B 116]), that is, between empirical questions and questions of justification, or genesis and validity.

What is noteworthy about this kind of ‘theoretical normativity’ is that, unlike moral normativity, it does its work implicitly. Kant describes it in a way which is close to Wittgenstein's explanation of the phenomenon of rule following. In the *Jäsche-Logik*, Kant holds:

The exercise of our powers also takes place according to rules that we follow, *unconscious* of them at first, until we gradually arrive at cognition of them through experiments and lengthy use of our powers, indeed, until we finally become so familiar with them that it costs us much effort to think them *in abstracto*. Thus universal grammar is the form of a language in general, for example. One speaks without being acquainted with grammar, however; and

<sup>6</sup> Cf., in the same direction, Walker 2017: 205: “So, after all, does not theoretical reasoning provide as sound a basis for presupposing freedom as practical reasoning does? [Kant] seems to be suggesting this in the *Groundwork*, when he says ‘one cannot possibly think of a reason that would consciously receive direction from any other quarter with respect to its judgments, since the subject would then attribute the determination of his judgment not to his reason but to an impulse. Reason must regard itself as the author of its principles independently of alien influences, consequently, as practical reason or as the will of a rational being, it must be regarded of itself as free.’ This makes it seem as though the same case can be made for autonomy in judging as in acting, though he is here appealing only to how one must think of oneself. One might wonder why he never develops the idea.”



he who speaks without being acquainted with it does actually have a grammar and speaks according to rules, but ones of which he is not himself conscious. Like all our powers, *the understanding* [*Verstand*] in particular is bound in its actions to rules, which we can investigate. (Kant 1992: 527 [A 2])

The most remarkable feature of these rules is that, although they can in principle be made explicit or “thought of *in abstracto*,” in their basic form they are not ‘objects’ to be applied in certain situations; rather, they are just *implicit* in certain acts: This is the only interpretation that takes care of Kant’s thesis that you can have a grammar without knowing it. It anticipates Wittgenstein’s famous dictum: “When I follow the rule, I do not choose. I follow the rule blindly” (Wittgenstein 2009: 92 [219]).

This interpretation is underpinned by Kant’s text on schematism, where he discusses the problem of how an intuition might be subsumed under a concept. That poses a problem because intuitions and concepts are heterogeneous (*ungleichartig*), stemming from different cognitive faculties. Concepts – or the judgments which employ them – are the result of exerting the spontaneous faculty of understanding, while intuitions stem from the passive faculty of sensibility. Kant’s solution is that an intuition and a concept can be related to each other by applying a scheme, which is a

rule for the determination of our intuition, in accordance with some specific universal concept. The concept “dog” signifies a rule according to which my imagination can delineate the figure of a four-footed animal in a general manner, without limitation to any single determinate figure such as experience, or any possible image that I can represent *in concreto*, actually represents. This schematism of our understanding, in its application to appearances and their mere form, is an art concealed in the depths of the human soul, whose real modes of activity nature is hardly ever likely to allow us to discover, and to have open to our gaze. (Kant 1998: 273–4 [A 141/B 180–1])

Concepts, therefore, signify rules, and schematism guides their application in a way which is not a possible subject of reflection. Accordingly, in the introduction to the chapter on schematism Kant says that if logic claims to show, universally,

how we are to subsume under these rules, that is, to distinguish whether something does or does not come under them, that could only be by means of another rule. This, in turn, for the very reason that it is a rule, again demands guidance from judgment. And thus it appears that, though understanding is capable of being instructed, and of being equipped with rules, judgment is a peculiar talent which can be practised only, and cannot be taught. (Kant 1998: 268 [A 133/B 172])

Some lines later on Kant maintains that a physician, lawyer, or politician

may have at command many excellent pathological, legal, or political rules, even to the degree that he may become a profound teacher of them, and yet, none the less, may stumble in their application. For, although admirable in understanding, he may be wanting in natural power of judgment. . . . Or the error may be due to his not having, through examples and actual practice, adequate training for this particular act of judgment. (Kant 1998: 268–9 [A 134/B 173])

This is, again, a striking anticipation of Wittgenstein's rule-following considerations – even as far as the terminology is concerned. Kant recognizes the problem of applying a rule, if taken to be an object, to its “material”; he discusses the problem of an infinite regress of rules/interpretations, and he deems a competent application of a rule to be a question of “training.” These arguments are at the core of Kant's theoretical philosophy, because any cognition of an object presupposes the correct application of the categories; and categories, being pure concepts of understanding, are, like all concepts, rules which are applied in the procedure of schematizing. Since, for Kant, classical ontology dissolves into an analytic of understanding, we might say that, for a Kantian-minded philosophy, implicit normativity is one of the most basic elements of any metaphysics.

### *2.2.3 Relations between Is and Ought*

Although Is and Ought are fundamentally different functions of reason, there are, for Kant, several relations between them. First, as was shown in Section 2.2.2, the “primacy” of practical reason postulates the existence of freedom, the immortality of the soul, and God which, for theoretical reason, were just a possibility. Second, the cognition of any natural object (and thus the possibility of nature itself) presupposes a set of implicit rules guiding cognition, the ‘theoretical Ought.’ Third, there is a structural analogy between laws of nature and practical laws. Fourth, the categorical imperative is a rule guiding the choice of maxims, thus influencing the empirical will. Fifth, any act that is exerted by following such a maxim, which is in accordance with the categorical imperative, starts a new chain of “causality from freedom.” Sixth, any Ought aims at producing a certain state of affairs, and this state of affairs must be possible:

Now although there is an incalculable gulf fixed between the domain of the concept of nature, as the sensible, and the domain of the concept of freedom, as the supersensible, so that from the former to the latter (thus by means of the theoretical use of reason) no transition is possible, just as if there were so