Kelsen and Scholten on Reason and Emotion in Solving Cases

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Abstract

The article focuses on the role of emotions in legal decision making and compares Paul Scholten's General Method of Private Law and Hans Kelsen's Pure Theory of Law in opposition to and concurrence with the dominant legalist beliefs of jurists. Contrary to those legalist beliefs both Kelsen and Scholten recognize an unescapable non-rational ingredient (will and/or emotion) in decision making. They keep, however, quite different views about the role of this non-rational ingredient for legitimation.

Jurists, who adhere to the dominant legalist belief, normally don't see – as Kelsen did – that judging comprises two phases: 1. Establishing a set of possible interpretations; 2. Making a choice between these possible meanings. According to Kelsen, rationality can only play a legitimate role in the first phase, setting up the hermeneutical frame of the possible meanings of a certain law-wording. The second phase could be based on any method, including ideology, emotions or throwing a dice… Anything but reason decides here. Scholten, on the other hand, does not make a demarcation between two phases but accepts – in opposition to the dominant legalist beliefs – a concurrence of emotion and reason in all dimensions of the process of legal decision making.

What makes Scholten more interesting and more akin to the reality of legal decision making is his assumption that the choices that authorities make are based on emotions and are nevertheless also subjected to discussion. Although legal decisions are not simply applications of norms, these decisions still have to be accounted for as juridical decisions according to Scholten.

Keywords

Paul Scholten; Hans Kelsen; Law-finding; Law-applying; Emotions; Legal Methodology.

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1. Emotion and contemporary theories of law

Many theories of law exclude emotions from the process of finding law in particular cases. [1] These theories assume that understanding is a purely intellectual faculty which success depends on isolating the scholar's preferences and passions from his or her ratio. Neutrality, as intended here, means exposing and removing the observer's desires and feelings, so as to leave the work to reason alone. This is thought to enable a better understanding of the object of study without distorting it. Objective knowledge would be achieved this way. This claim has been questioned by several approaches in the humanities and beyond. The history of hermeneutics is a dialogue about the limits of cognitivism. Nothing can be understood without emotion and desire playing a role, taught Dilthey, who advocated for the autonomy of human sciences. An important movement in contemporary legal theory draws attention to the positive involvement of emotions in legal decision making. 'Law and Emotions' scholars in particular contribute to this movement. Despite strong criticisms, however, most jurists would still describe their activities in ways that conform to a rationalist-cognitive schema. A kind of vulgar legal positivism thus holds out as the current description of what authorities do when implementing legal norms

By the term 'vulgar legal positivism' I invoke a set of opinions:

- that judging is an application of positive laws;
- which occur logically and chronologically prior to the case and to the judgment;
- which relationship (between laws and judgement) is syllogistic;
- which turns application into a primarily (or exclusively) rational operation;
- which is largely incompatible with emotional grounding and argumentation.

These steps of legal positivism are often labeled as Kelsenian. They are nevertheless far from true in describing Kelsen's view. Let us consider Kelsen's *Pure Theory of Law*, and its description of the process of rule application. We will see that Kelsen's theory includes

an important recognition of emotions in the process of finding law.

2. Kelsen's theory of interpretation

A number of topics in Kelsen's account of legal interpretation deserve emphasis: Topics concerning legal interpretation as a purely rational activity; Topics concerning the insufficiency of interpretation to decide and the limits of reason; 2.3. Topics related to the role of emotions in legal decision making.

2.1 Topics concerning interpretation as the rational and necessary task of establishing a set of the different possible meanings of a text-wording – the field of legal reason

2.1.1 Necessary task

Kelsen's account of legal interpretation takes the hermeneutical nature of law seriously: The legal norm is not text but meaning. The task of grasping normative meanings encompasses the entire experience of law: Making laws involves the interpretation of the constitution, which is in force; establishing administrative decisions involves the interpretation of the constitution and the laws, which are in force; and the same is true for judging particular cases, making contracts *etc*. Interpretation is required in all phases of the dynamic process of establishing norms based on other (superior) norms, and every norm requires interpretation, when applied. Kelsen's understanding of Law as a Stufenbau [2] is unthinkable without interpretation.

> Interpretation (…) accompanies the process of law application in its advance from a higher to a lower level. [3]

The judge's task of finding law, on which I focus here, is for Kelsen just a particular case of the general schema of applying superior norms – and it involves, inevitably, interpretation.

2.1.2. A set of different possible meanings

Interpretation is inevitable because the wording of the superior norm (which grounds the validity of the decision to take) necessarily tolerates more than one single meaning. The simple fact that there is a difference between the conception the lawgiver had in mind concerning his words (*voluntas legislatoris*) and the objective meaning of these same words (*voluntas legis*), leads to a plurality of hermeneutical possibilities. The plurality of meanings may be intended, such as when the legislator leaves the conditioning facts or the conditioned consequences undetermined. But even when the lawgiver intends to be precise, his/her wording can have more than one meaning, due to the very nature of language. As the linguistic expression of the norm is ambiguous, different interpretations of the words are possible. [4] This is always possible as Kelsenemphasizes. Judicial authority is never

totally constrained in his/her decision by the superior norm.

> The higher norm cannot bind in every direction the act by which it is applied. [5]

The inevitable imprecision of language opens some "room for discretion", the famous frame to be filled by the authority in applying law:

> If 'interpretation' is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. [6]

2.2 Topics concerning the nonexistence of rational criteria to choose among the various meanings of the text-wording – the field of politics

While interpretation is inevitable, it is not the only thing that is implied in applying law. Interpretation is just an aspect of the task of establishing the rule in a particular case. Kelsen employs a very strict rational-cognitive account of interpretation. One can oppose this view, but it would be wrong to argue that Kelsen reduces law because of this to an intellectual, one-sided activity. Interpretation is an intellectual activity which must determine the meaning of the norms to be applied in given cases, [7] but this is also for Kelsen not the whole story. As interpretation always leads to a plurality of meanings of the norm's wording, it does not encompass the entire process of deciding which meaning should be applied in this case. In addition to intellect, applying law mobilizes other mental faculties as well, such as wishing and desiring. Kelsen takes the decisional nature of applying law very seriously and recognizes that the activity of law application is not reducible to a logical schema. In every experience of law, there is room for deciding, and application is always more than logically subsuming. Kelsen values this as an important difference between his theory and (some of) the theories he calls *traditional*: it is not possible to deduce the inferior norm from the higher. It is not a question of logical syllogism. Traditional theory describes according to Kelsen

> the interpretative procedure as if it consisted merely in an intellectual act of clarifying or understanding; as if the law-applying organ had to use only his reason but not his will, and as if by a purely intellectual activity, among the various existing possibilities only one choice could be made in accordance with positive law. [8]

In Kelsen's view legal reasoning involves the rational job of discerning the various meanings the wording of the law provides. From this point on, it is not reason that works anymore, but the voluntas (wish) of the individual who judges. It's Politics, not Law anymore – and therefore also emotions are allowed to partake it.

2.3 The elimination of emotions from law-finding*i.e.* the confinement of emotions in the non-juridical (but political) phase of the process of applying laws

According to Kelsen cognition alone can never decide how law should be applied. So the question is how does legal thinking distinguish among the various possible meanings inside the frame? Kelsen is sharp and acknowledges that legal decision making requires an element of irrationality. Law-application necessarily introduces an element of will, an emotion, and cannot suffice with simply working inside a cognitive frame:

> In the application of law by a legal organ, the cognitive interpretation of the law to be applied is combined with an act of will by which the law-applying organ chooses between the possibilities shown by cognitive interpretation. [9]

Kelsen emphasizes that the role of legal reasoning should be restricted to establishing the frame. Juridical rationality can play no role at all inside it: all meanings inside the frame are equivalent, from a legal point of view. The judge has surely to decide, but then he/she is free to follow any other rationality, choosing according to his/her moral, religious or ideological convictions:

> it is not cognition of positive law, but of other norms that may flow here into the process of law-creation – such as norms of morals, of justice, constituting social values which are usually designated by catch words such as 'the good of the people', 'interest of the state', 'progress', and the like. [10]

Anything can work to guide the judge inside the frame:

> from the point of view of positive law nothing can be said about their validity. Seen from the point of view of positive law, all these norms can be characterized only negatively: they are norms that are not positive law. [11]

At this point, according to Kelsen, we reach the boundaries of legal theory. If one wants to know what guides judges to choose among the possible meanings of a statute, one must study another subject, not law but politics.

3. Why we should not follow Kelsen in legal methodology

I believe that Kelsen gives a poor picture of what law is about, of what lawyers and judges actually do. The weakness of Kelsen's theory lies in the way intellectual and other psychic faculties relate to each other. Kelsen's concern about the objectivity of law leads him to demarcate law sharply from politics, ethics and other fields where in his view there is no objective truth, but merely opinion. He tries to guarantee the objectivity of legal thought through the clear delimitation of its scope: legal thought runs no further than the definition

of the frame and must stop right there. To get objectivity, Kelsen turns the judge's decision into something which falls outside the range of law. More than this, his frame theory prevents any attempt of legal theory to understand the legal decision in legal terms:

> Jurisprudential interpretation can do no more than exhibit all possible meanings of a legal norm. Jurisprudence as cognition of law cannot decide between the possibilities exhibited by it but must leave the decision to a legal organ which, according to the legal order, is authorized to apply the law. [12]

Every legal authority receives its competence from a higher standard, a superior norm that establishes the framework within which authority is exercised. Based on this higher standard, the authority is allowed to act – and this way it creates a new standard. In this way the authority engages in two clearly distinct activities, one rational and the other not. Only one of them can be considered an exercise of legal reasoning. Kelsen is concerned with distinguishing the autonomy of legal thought from other forms of argumentative or deliberative thought. Legal thought is interpretation, and interpretation is conceived by him as a completely rational activity. Only the rational activity of determining the meaning of the statute, which is to be applied, is legal – and therefore of any interest to legal science. Choosing is not a matter of intelligence. However, the work of the legal authority does not cease there: he/she needs to create a new rule from those possibilities, and thus resolve the case. From this point on the decision has a different nature. It takes on a political nature, or becomes *legal policy*, to use the language of Kelsen. Within the framework constructed by rational interpretation, the judge will render a decision without using reason – by following any other road. The decision does not matter to the science of law. At this level the religious, political and moral convictions of the judge play a role, as well as his or her emotions. No legal justification can be required from the judge at this point.

Does this fit with the understanding of a court as a legal institution? Legal reasoning does not seem to be reducable to the discovery of a set of possible decisions, from which the selection is legally irrelevant. Contemporary legal systems do not allow such a large field to the personal preferences of the legal authority. Instead, they expressly establish the duty to rationally and legally justify any decision. We need a theory that helps us more realistically understand how legal authorities reach legal decisions. Kelsen helps us understand that the legal decision is not only rational. His demonstration that intellectual grounding alone is insufficient is convincing. However, his account of the relationship between rationality and other activities of the mind has nothing to do with our everyday experience of law.

4. Paul Scholten's General Method of Private Law

Kelsen takes issue with traditional theories in their efforts to find the unique correct solution for the case:

> Traditional theory will have us believe that the statute, applied to the concrete case, can always supply only one correct decision and that the positive-legal 'correctness' of this decision is based on the statute itself. [13]

He is skeptical about the ability of juridical methods to offer such a safe model for applying law. The common belief in the possibility of one correct decision is the kernel of what Kelsen means by "traditional Jurisprudence" and is probably represented according to him by the conceptions which from von Savigny on have discussed the methods to build legal decisions in the context of legal systems. As these discussions do not lead to a clear answer, Kelsen simply throws them aside. By doing so he overlooks almost all crucial questions of legal theory, such as whether interpretation grasps the genetic sense of law or the actual one (a question which separates subjectivists and objectivists in hermeneutics), or the dispute about the elements, ends or paths of interpretation (from which the diverse methods generate– the literal, systematic, teleological, logical, sociological, historical – and their divergent results).

> Despite all efforts of traditional jurisprudence, it has not been possible so far to solve in an objectively valid fashion the conflict between will and expression in favor of the one or the other. All methods of interpretation developed so far lead only to a possible, not a necessary, result, never to one which is alone correct. [14]

From this perspective, Paul Scholten [15] would be a perfect representative of traditional Jurisprudence. Scholten's *General Method of Private Law* is an elegant and intense treatise. It covers the main topics and the complex problems that arise in actual cases: analogy and legal refinement, the various methods of legal interpretation, the validity of interpretation, the sources of law, fictions and presumptions, *voluntas legis* and *voluntas legislatoris*, legal lacunae, extensive interpretation, syllogism, the relationship between facts and norms, different classifications of statutes, objective and subjective law, public and private law, common and statutory law, and so on. Scholten takes seriously the traditions of legal philosophy, theory of law and legal methodology in order to understand the process of finding law. Scholten's treatise must be read in its totality [16], for all these topics are brought together to understand the kind of reasoning that jurists develop when they solve cases in the context of legal systems.

Very differently from Kelsen, Scholten does not ignore the primary duty to justify the judgment even though he sees how problematic this is, more or less in the same way as Kelsen. He argues that it is mandatory that in the judicial decree the judge mentions the reasons which persuaded him. [17] This does not mean, that the judgment's foundations can be simply presented in the form of the premises of a syllogism. Scholten's criticism of traditional jurisprudence leads him to the conclusion that there is no decision without a concurrence of reason, emotion and will. Like Kelsen, Scholten also refuses any one-size-fits-all account of legal decision making. But his account of the role of reason, will and

emotion, and also of the way they relate to each other differs very much from the account of Kelsen. According to Scholten legal decision making involves reason and emotion.

4.1 Reason

Reason is not an individual capacity that the judge uses to grasp the meaning of a statute. Reason refers to the legal concepts that develop overtime in a society and that structure the law in its very process of historical development. Legal tradition is not a blind process. A legislator actively construes the tradition, but at the same time the legislator thinks in terms of the legal concepts that have been developed by tradition.

> The legislator is bound by the categories, which are studied by legal theory. It is simply impossible for him to put them aside, just as it is impossible that somebody could choose not to use the forms of our thought which logic uncovers, or those of the language which are studied by the philosophy of language. [18]

Legal reasoning engrains language, and it is impossible to create or apply law without using language which is forged in discussions concerning legal decisions. The way reason is involved in legal experience goes quite deeper in Scholten than in Kelsen. Scholten addresses his criticism of Kelsen exactly on this point: [19]

> People sometime make a sharp separation between law and the science of law. Kelsen (…) even goes as far as stating that the law comprises an 'alogical material' and that it is the science of law which turns this into judgments and [legal propositions]. [20]

There is no rationality in the normative material itself, thinks Kelsen, but in the way legal science perceives it. Scholten on the other hand, thinks that legislative outcomes and legal science's construction are one, the one being an extension of the other. I think Scholten is clearly right in showing that,

> a modern Code is full of constructions and cannot be understood without knowledge of the science of law. [21]

It is important to keep in mind that when Scholten speaks about the science of law, he refers to the traditional dogmatic science of law, which Kelsen rejects. There are many examples and arguments in Scholten's book to show how in his view rationality integrates history and legal tradition. This leads Scholten to a broad conception about the so-called sources of law, and to a new view on the authority of doctrine, costumes and judge-made law.

4.2 Legal principle as the concurrence of law and emotion

At this point, I would like to briefly highlight Scholten's vivid conception of reason and note that reason is not something divorced from emotions. According to Scholten reason assists in arriving at a moral understanding of law. He thinks that it is one of the most important functions of (traditional) legal science to trace and unravel the legal principles in positive law. [22] A legal principle is the *moral* element in law. [23] Legal principles express the orientation which our moral judgment requires from the law. [24] At the same time legal principles cannot be found without reason, for they are recognized from the work of systematization of legal materials. When looking for the *ratio legis*, we reach a point where it is impossible to further reduce a norm from another:

> (…) we can't go further (…). We have come to that point here, when we formulate a statement, which is for us — people of a certain time living in a certain country with a certain system of law — immediately evident. [25]

The formulated principle relates to the legal system, but at the same time we can only find it if we can recognize it as something which is ethically accepted by us. Principles of law function in every law application, each time we hark back to the legal principle. Although a legal principle is not law, no law can be understood without it. [26]

The search for the principle is an activity of the intellect and the most important work done by the (traditional) science of law. [27] From the rational activity of reconstructing law in ever more abstract concepts, we are then driven to an insight which is not intellectual but emotional: we feel that the principle expresses something which is, essential for our understanding of law:

> Although we find it in the positive law, in the system of rules, decisions and institutions in their totality, it transcends the positive law by pointing to the moral judgment, the division between good and evil, in which the law is founded. [28]

4.3 Emotion

The decision has an autonomous meaning in face of the rule, because it partly owes its origin to elements of finding law, which are not captured by reason and/or logic, such as the will, which is needed to act and the emotions which drive the will. The intuitive choice needed to act is therefore also an integral part of the decision. [29] The different faculties that come together in the judicial decision do not work separately. The non-rational ingredient of finding law appears in all the criticisms Scholten points to the dominant legalist opinions in legal theory. Rather than report on these accounts, I focus now on the 'conscience of law', a very problematic concept in legal methodology that can help us

understand Scholten's account of emotions in finding law.

The conscience of law is

> (…) the active awareness in every human being of what law is and should be, a specific category of our spiritual life, by which we distinguish with immediate evidence between right and wrong, independently of the way one finds this expressed in existing institutions. [30]

Scholten is skeptical about the concept of legal conscience: the feeling of immediate evidence is subjective and is no guarantee of "being right". Grounding decisions on legal conscience is therefore problematic in his view. The feeling of immediate evidence could never be supported by intellectual inquiry, as its holders often believe. The view that it is possible to establish an objectively true criterion of right and wrong is strongly rejected by Scholten, who categorizes such a view as an intellectualist and rationalist conception of life. [31]

Legal conscience is open to dispute and can hardly be kept apart from ideological views that people and groups support. Legal experience shows clearly that decisions continuously change, expressing the prevalence of different principles in the formation of law. When we reach the moral boundary of legal experience – as we do when we talk about conscience of law and principles of law – we do not find a unique norm, but a plurality of principles. Judges have to deal with this situation. Morality is not homogeneous. However, differently from Kelsen, the judges are not dismissed from the task of finding law – and especially from doing this *as judges*, which means taking into account the mutually different feelings of right and wrong of themselves and of the parties

This is a chief point: the judge has to face this task as a judge, not as a politician: he has to take a legal decision in the individual case. Kelsen leaves the decision-making authority free to choose among possibilities inside the frame, based on his or her own religious, moral or political convictions. Scholten does not. Despite the acknowledgment that the moral grounds of legal decision-making are plural, they are still binding. Judging is weighing arguments, in a context of dispute between opposing claims. The judge is not allowed to just let his/her feeling, will or even worse, prejudices decide. He or she has to give reasons for the decision – even for the non-logical part of it. How can this be done and justified? Judging requires knowledge of all relevant circumstances, a weighing of all relevant factors that point in one or the other direction (…) after mature deliberation. [32] This is not the same as letting one's own or the legal conscience of one's social class decide. Instead it gives room to openly question prejudices. Neither is it simply letting particular views work as the judge does not decide in his/her own name. The judge is an authority and must act in the name of the community.

> The judge is always an agent of the community — his decision is not an individual moral judgment, but a statement given by somebody with power that binds the community. [33]

Here we have the decisive point of his theory. There is no guarantee of objectivity in finding law. There is only the judge's commitment, both rational and non-rational, to the act of judging. The judge is not an observer; the judge acts. Decision making is a deed, an expression of moral agency, with both internal and external bonds – and is dependent on his or her own commitment to his/her act of judging. Judging is not making a scientific statement but is deciding on the basis of intertwined reason and emotion. It does not appeal to intelligence only, but to the entire mind of the judge – who does not act merely as a particular individual but as a representative of a given community. There is much more than intellect and logic in finding law, which is not the same as applying law, [34] and is not reducible to an interpretative task:

> … every decision, also those which are so-called done according to the wording of the law, are at the same time application and creation; there is always the judgment of the person who decides, that co-determines the decision. This follows already from the nature of the application itself. [35]

Finding law is both applying and creating law, and the point is to understand how these dimensions of the very same activity relate to each other. It is deciding, and this involves desire and emotions.

> To find law is always at once an intellectual and an intuitively moral job. It is a decision about what is and what should be at once, and precisely because of this it is distinguished from the moral as well as from the scientific judgment. [36]

The task that legal theory addresses to the judge – of finding the correct answer – is not founded on the existence of established and peremptory criteria for solving the case. It is founded on the invocation of the judge's human responsibility for the act of judging. [37] Deciding seriously means not stopping investigating before finding the conclusion that is morally and intellectually unavoidable for the judge. Judges act and this way they become links between past and future, being aware of their individual responsibility in this process. Kelsen and Scholten agree on the point that there is objectively seen arbitrariness in the judicial decision. Scholten however emphasizes the moral responsibility which is especially high when people have the authority over others. In the end no legal methodology can show the way to make correct decisions, but the judge is the one who did it and therefore has to take the responsibility. Summoning responsibility and making transparent what is involved in the process of finding law is what legal theory, as a practical science, can do to help judges to understand their job.

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[1] Maroney, “Emotion as Judicial Vice or Virtue.” speaks in this respect of the persistent cultural script of legal theory.

[2]Layered hierarchical system of levels of decision.

[3]Kelsen, *Pure Theory of Law*, 348.(chpt VIII, 45.)Kelsen, *Reine Rechtslehre*, 346. “Interpretation ist somit ein geistiges Verfahren, das den Prozeß der Rechtsanwendung in seinem Fortgang von einer höheren zu einer niedrigeren Stufe begleitet.”

[4]Kelsen, *Pure Theory of Law*, 350.(chpt. VIII, 45c) Kelsen, *Reine Rechtslehre*, 348.

[5]Kelsen, *Pure Theory of Law*, 349.(chpt VIII,45a) Kelsen, *Reine Rechtslehre*, 347.“Die Norm höherer Stufe kann den Akt, durch den sie angewendet wird, nicht nach allen Richtungen hin binden.”

[6]Rahmens sein, den das zu interpretierende Recht darstellt, und damit die Erkenntnis mehrerer Möglichkeiten, die innerhalb dieses Rahmens gegeben sind. Dann muß die Interpretation ei n es Gesetzes nicht notwendig zu einer einzigen Entscheidung als der allein richtigen, sondern möglicherweise zu mehreren führen, die alle – sofern sie nur an dem anzuwendenden Gesetz gemessen werden – gleichwertig sind, wenn auch nur eine einzige von ihnen im Akt des rechtsanwendenden Organs, insbesondere des Gerichtes, positives Recht wird.”

[7]Kelsen, *Pure Theory of Law*, 348.(chpt. VIII,45)Kelsen, *Reine Rechtslehre*, 346.

[8]Kelsen, *Pure Theory of Law*, 351.(chpt. VIII,45d) Kelsen, *Reine Rechtslehre*, 349.„Sie stellt den Vorgang dieser Interpretation so dar, als ob es sich dabei nur einen intellektuellen Akt des Klärens oder Verstehens handelte, als ob das rechtsanwendende Organ nur seinen

Verstand, nicht aber seinen Willen in Bewegung zu setzen hätte und als ob durch eine reine Verstandestätigkeit unter den vorhandenen Möglichkeiten eine dem positiven Recht entsprechende, im Sinne des positiven Rechts richtige Auswahl getroffen werden könnte.“

[9]Kelsen, *Pure Theory of Law*, 354.(chpt. VIII,46) Kelsen, *Reine Rechtslehre*, 351.„In der Anwendung des Rechtes durch ein Rechtsorgan verbindet sich die erkenntnismä?ige Interpretation des anzuwendenden Rechtes mit einem Willensakt, in dem das rechtsanwendende Organ eine Wahl trifft zwischen den durch die erkenntnismä?ige Interpretation aufgezeigten Möglichkeiten. Mit diesem Akt wird entweder eine Norm niederer Stufe erzeugt oder ein in der anzuwendenden Rechtsnorm statuierter Zwangsakt vollstreckt.“

[10]Kelsen, *Pure Theory of Law*, 353.(chpt. VIII,46) Kelsen, *Reine Rechtslehre*, 351.„(...) ist es nicht eine Erkenntnis des positiven Rechts, sondern anderer Normen, die hier in den Proze? der Rechtserzeugung einmünden können; Normen der Moral, der Gerechtigkeit, soziale Werturteile, die man mit den Schlagworten Volkswohl, Staatinteresse, Fortschritt usw. Zu bezeichnen pflegt.“

[11]Kelsen, *Pure Theory of Law*, 353.(chpt. VIII,46) Kelsen, *Reine Rechtslehre*, 351.„Über deren Geltung und Feststellbarkeit lä?t sich vom Standpunkt des positiven Rechts nichts aussagen. Von hier aus gesehen, lassen sich alle derartigen Bestimmungen nur negativ charakterisieren: es sind Bestimmungen, die nicht vom positiven Recht selbst ausgehen.“

[12]Kelsen, *Pure Theory of Law*, 355–56.(chpt. VIII,47)Kelsen, *Reine Rechtslehre*, 353.„Rechtswissenschaftliche Interpretation kann nichts anderes als die möglichen Bedeutungen einer Rechtsnorm herausstellen. Sie kann als Erkenntnis ihres Gegenstandes keine Entscheidung zwischen den von ihr aufgezeigten Möglichkeiten treffen, sie mu? diese Entscheidung dem Rechtsorgan überlassen, das nach der Rechtsordnung zuständig ist, Recht anzuwenden.“

[13]Kelsen, *Pure Theory of Law*, 351.(chpt. Viii, 45,d)Kelsen, *Reine Rechtslehre*, 349.„Die übliche Theorie der Interpretation will glauben machen, da? das Gesetz, auf den konkreten Fall angewendet, stets nur eine richtige Entscheidung liefern könne und da? die positivrechtliche „Richtigkeit“ dieser Entscheidung im Gesetz selbst begründet ist.“

[14]Kelsen, *Pure Theory of Law*, 352.(chpt. VIII,45e)Kelsen, *Reine Rechtslehre*, 349–50.„Es ist trotz aller Bemühungen der traditionellen Jurisprudenz bisher nicht gelungen, den Konflikt zwischen Wille und Ausdruck in einer objektiv gültigen Weise zugunsten des einen oder des anderen zu entscheiden. Alle bisher entwickelten Interpretations-methoden führen stets nur zu einem möglichen, niemals zu einem einzig richtigen Resultat.“

[15]Scholten, “General Method of Private Law.”

[16]See the Preface of “General Method of Private Law. In the context of the translation project, only the first chapter of the original book is published as a book. Paul Scholten

refers with his remark in the preface to this first chapter.

[17]Scholten, “General Method of Private Law,” block 513.

[18]Scholten, block 234.

[19]Other references to Kelsen in Scholten’s book: in the blocks 48, 58, 302 and 380.

[20]Scholten, “General Method of Private Law,” block 225.

[21]Scholten, “General Method of Private Law,” block 225.

[22]Scholten, “General Method of Private Law,” block 253.

[23]Scholten, block 252.

[24]Scholten, block 252.

[25]Scholten, block 251.

[26]Scholten, “General Method of Private Law,” blocks 252–253.

[27]Scholten, block 261.

[28]Scholten, block 260.Scholten.

[29]Scholten, “General Method of Private Law,” block 46.

[30]Scholten, block 481.

[31]Scholten, “General Method of Private Law,” block 484.

[32]Scholten, “General Method of Private Law,” block 493.

[33]Scholten, block 500.

[34]Scholten, “General Method of Private Law,” block 31.

[35]Scholten, block 299.

[36]Scholten, “General Method of Private Law,” block 520.

[37]Scholten, “General Method of Private Law,” para. 525.

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