

# KELSEN'S THEORY OF THE BASIC NORM

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OF ALL THE VARIOUS DOCTRINES of Kelsen's legal philosophy it was his theory of the basic norm that succeeded most in attracting attention and capturing the imagination. It acquired enthusiastic devotees as well as confirmed opponents. Both admirers and critics owe much to the obscure way in which Kelsen explains his theory. The obscurity was criticized and led people to suspect that the whole theory is a myth; but it also provided admirers trading on ambiguities an easy escape from criticism. In the following pages yet another attempt to demythologize the theory will be made. An explanation of the concept of the basic norm as Kelsen's attempt to provide an answer to some well-known jurisprudential problems will be offered. It will be further claimed that the attempt has failed, but that its failure is illuminating. It sheds light on the intricacies of the problems involved and on their possible solutions.

Criticism will follow the exposition. The exposition, however, cannot be faithful to all the relevant texts. Some ambiguities and even contradictions cannot be eradicated by interpretation, however ingenious. Not wishing to trace the development of the theory or to present an exhaustive discussion of all the texts, the strategy adopted will be always to prefer the more interesting of two conflicting interpretations, and to disregard the rest. The theory will be examined in relation to the problems it was designed to solve. It stands or falls according to its success in dealing with them. Kelsen regards the concept of the basic norm as essential to the explanation of all normative systems, moral as well as legal. Only his use of the concept in legal theory will be examined here.

## I

According to Kelsen's theory it is logically necessary that in every legal system there exist one basic norm. The basic norm can be said to exist for Kelsen says that it is valid,<sup>1</sup> and validity is the mode of existence of norms.<sup>2</sup> This does not mean that all basic norms are identical in content. Indeed, no two basic norms can have the same content. They are all called basic norms not because of their content but because they all share the same structure, the same unique position each in its own system, and because they all perform the same functions.

Kelsen postulates the existence of basic norms because he regards them as

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<sup>1</sup> For example, *GT* 111. *PTL* 194. In referring to Kelsen's books the following abbreviations are used: *GT* for *The General Theory of Law and State* (New York: 1945); *PTL* for *The Pure Theory of Law*, 2nd ed. (Berkeley: 1967); *TP* for *Theorie Pure de Droit* (Paris: 1962) (this is the French translation of *PTL*); *WJ* for *What Is Justice?* (Berkeley: 1960).

<sup>2</sup> *GT* 30; *WJ* 214, 267.

necessary for the explanation of the unity and normativity of legal systems. A legal system is not a haphazard collection of norms. It is a system because its norms, as it were, belong together. They are interrelated in a special way. Kelsen accepts two propositions which he considers too self-evident to require any detailed justification. They can be regarded as axioms of his theory. The first says that two laws, one of which directly or indirectly authorizes the creation of the other, necessarily belong to the same legal system.<sup>3</sup> For example, a criminal law enacted by parliament and a constitutional law authorizing parliament to enact criminal laws belong to one legal system just because one of them authorizes the creation of the other. The second axiom says that all the laws of a legal system are authorized, directly or indirectly, by one law.

It follows from the second axiom that two laws, neither of which authorizes the creation of the other, do not belong to the same system if there is no law authorizing the creation of both. It follows from the first axiom that if one law authorizes the creation of another or if both are authorized by a third law then both belong to the same legal system. Thus the two axioms provide a criterion for the identity of legal systems and make it possible to determine with regard to any law whether it belongs to a certain legal system or not.<sup>4</sup>

Assuming, as I think one should, that Kelsen is trying to elucidate the common concept of the legal system and is not simply using the term to introduce a completely different concept, the second axiom looks on the face of it like an empirical generalization. To ascertain its truth one will have to examine all legal systems and find whether there is in each one a law authorizing the creation of the rest. Is there, e.g., a law in Britain authorizing both parliament and the common law? This problem is implicitly recognized by Kelsen in the following passage:

If a legal order has a written constitution which does not institute custom as a form of law creation, and if nevertheless the legal order contains customary law besides statutory law, then, in addition to the norms of the written constitution, there must exist unwritten norms of constitution, a customarily created norm according to which the general norms binding the law applying organs can be created by custom. (*GT* 126)

In such a legal system there will be no positive law authorizing all the rest. Some laws will be authorized by the customary constitution, whereas others will be authorized by the enacted constitution, and there will be no positive law authorizing both constitutional laws. Kelsen, therefore, is aware that as an empirical generalization, his second axiom is false. He overcomes this problem by postulating that there is in every system one nonpositive law—a law which authorizes all the fundamental constitutional laws and the existence of which does not depend on the chance action of any law-creating organ, but is a logical necessity. These laws are the basic norms of legal systems and their existence is necessary for the truth of the second axiom; they make it a logical truth. Since

<sup>3</sup> A law authorizes indirectly the creation of another if and only if there is a third law authorized, directly or indirectly, by the first and authorizing the second.

<sup>4</sup> For Kelsen's criterion of identity of legal systems see *GT* 111, *PTL* 195.

Kelsen's criterion of identity of legal systems depends on the truth of the second axiom it also depends on the theory of the basic norm.

This is one line of argument which Kelsen implicitly uses to prove the necessary existence of a basic norm in every legal system. Kelsen has a different and independent argument which he employs to reach the same conclusion. It aims to show that only the basic norm can explain the normativity of the law.

All laws are created by human actions, but human actions are facts and they belong to the realm of the "is," whereas laws are norms and belong to the realm of the "ought." It is another of Kelsen's unquestioned beliefs that there is an unbridgeable gap between the "is" and the "ought"; that norms cannot derive their existence from facts. This can be regarded as a third axiom of his theory. He says:

Nobody can assert that from the statement that something is, follows a statement that something ought to be. (*PTL* 6)

Therefore, he concludes:

. . . the objective validity of a norm . . . does not follow from the factual act, that is to say, from an *is*, but again from a norm authorizing this act, that is to say from an *ought*. . . . (*PTL* 7-8)<sup>5</sup>

The principle of dichotomy, of the unbridgeable gap between the "ought" and the "is" entails the principle of the autonomy of norms. Norms exist only if authorized or entailed by other norms. In the law the autonomy of the legal norms is secured by the fact that they are all links in what may be called chains of validity. The term is not used by Kelsen, but the idea is essential to his philosophy. He explains it as follows:

To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute, finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes. If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly. . . . It is postulated that one ought to behave as the individual, or the individuals, who laid down the constitution have ordained. This is the basic norm of the legal order under consideration. (*GT* 115)<sup>6</sup>

Thus, though every law is created by human action, it derives its validity not from the act, but from another law authorizing its creation. Ultimately all positive laws owe their validity to a nonpositive law, a law not created by human action. Only a nonpositive law can be the ultimate law of a legal system; only it does not presuppose another norm from which it derives its normativity. This nonpositive law is the basic norm.

<sup>5</sup> This principle is often repeated by Kelsen; see, e.g., "Value Judgment" in *WJ* 218.

<sup>6</sup> Cf. *PTL* 199f. On Kelsen's concept of chains of validity see further Raz, *The Concept of a Legal System* (Oxford: 1970), pp. 97-9. Two chains of validity linked together by a common link are regarded as parts of one chain.

The idea of a chain of validity is central to Kelsen's solutions of the problems of normativity and unity of the legal system. Two laws belong to one chain of validity if one authorizes the other or if there is a third law authorizing both. The unity of the legal system consists in the fact that all its laws belong to one chain of validity and all the laws of a chain of validity are part of the same system. The normativity of laws is assured by the fact that each of the laws in a chain derives its validity from the one before it. The basic norm is essential to the solution of both problems. It provides the nonfactual starting point essential to the explanation of the normativity, and it guarantees that all the laws of one system belong to the same chain of validity.

The functions assigned to the basic norm explain its content and its special status. It must be a nonpositive norm. Basic norms are not enacted, nor are they created in any other way. It is presupposed by legal consciousness, but Kelsen makes it clear that it is not created by being presupposed.<sup>7</sup> Nor is it created by the acts of enacting other laws,<sup>8</sup> or by the recognition by the population of a duty to obey the law,<sup>9</sup> as some commentators assumed. It does not make sense with regard to any basic norm to ask when was it created, by whom or how. These categories simply do not apply to it. Nevertheless, they can be said to exist, for they are valid, and despite their uniqueness basic norms are part of the law, for they perform legally relevant functions.<sup>10</sup>

For them to explain the normativity and unity of a legal system, basic norms must authorize the creation of the laws of the various legal systems. Thus the functions of the basic norm account for its structure. It is an authorizing norm. It

qualifies a certain event as the initial event in the creation of the various legal norms. It is the starting point of a norm creating process. (*GT* 114)

The basic norm of any positive legal order confers legal authority only upon facts by which an order is created and applied which is on the whole effective. (*GT* 120)

The basic norm is a power-conferring law. Kelsen, however, formulates it as duty imposing: "... the basic norm . . . must be formulated as follows: Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes.)" (*PTL* 200-1) It is always possible to describe every law conferring legislative powers by saying that it imposes a duty to obey the laws made by the authorized organ.<sup>11</sup> This possibility should not obscure the nature of the law as power conferring. The basic norm will, therefore, be regarded as conferring legislative power on the authors of the first constitution.

<sup>7</sup> *PTL* 204.

<sup>8</sup> *TP* 271.

<sup>9</sup> *PTL* 218n.

<sup>10</sup> "Professor Stone and the Pure Theory of Law," *Stanford Law Review*, 17, Vol. 2 (1965), p. 1128, 1141.

<sup>11</sup> See further on this subject, *The Concept of a Legal System*, pp. 21, 23, 166f.

The formulation given by Kelsen in the quoted passage is not of any particular basic norm of any legal system. It merely exhibits the structure common to all basic norms. The content of basic norms varies according to the facts of the systems to which they belong. Kelsen explains that the content of a basic norm "is determined by the facts through which an order is created and applied." (GT 120)

## II

Kelsen's doctrine of the unity of legal systems fails for two independent reasons. As I have discussed them rather extensively elsewhere,<sup>12</sup> the following discussion will be brief. His doctrine depends on the first two axioms explained above. It is not difficult to see that both axioms must be rejected.

The first axiom asserts that all the laws belonging to one chain of validity are part of one and the same legal system. If this axiom were correct, certain ways of peacefully granting independence to new states would become impossible. Suppose that country A had a colony B, and that both countries were governed by the same legal system. Suppose further that A has granted independence to B by a law conferring exclusive and unlimited legislative powers over B to a representative assembly elected by the inhabitants of B. Finally, let it be assumed that this representative assembly has adopted a constitution which is generally recognized by the inhabitants of B, and according to which elections were held and further laws were made. The government, courts, and the population of B regard themselves as an independent state with an independent legal system. They are recognized by all other nations including A. The courts of A regard the constitution and laws of B as a separate legal system distinct from their own. Despite all these facts it follows from Kelsen's first axiom that the constitution and laws of B are part of the legal system of A. For B's constitution and consequently all the laws made on its basis were authorized by the independence-granting law of A and consequently belong to the same chain of validity and to the same system.

Kelsen's mistake is in disregarding the facts and considering only the content of the laws. For his theory the only important fact is that the legal system of A has a law authorizing all the laws of B. That the courts and population of B do not consider this law as part of their own legal system is irrelevant. But the attitude of the population and the courts is of the utmost importance in deciding the identity and unity of a legal system in the sense in which this concept is commonly used.<sup>13</sup>

This criticism does not directly affect Kelsen's theory of the basic norm. However, if the doctrine of the unity of legal systems is rejected, one of the reasons for accepting the theory of the basic norm disappears. Kelsen's theory of the unity and identity of legal systems is vitiated by a second flaw which directly concerns the role of the basic norm.

<sup>12</sup> *Ibid.*, pp. 100-109.

<sup>13</sup> The same point is made in H. L. A. Hart, "Kelsen's Doctrine of the Unity of Law," published in H. E. Kiefer and M. K. Munitz (eds.), *Ethics and Social Justice* (New York: 1970.)

The second axiom on which his theory of the identity and unity of the legal system depends says that all the laws of one system belong to one chain of validity. When discussing this axiom we saw that Kelsen admits, at least by implication, that disregarding the basic norm, all the positive laws of a system may belong to more than one validity chain. Some may owe their validity to a customary constitution while others derive their validity from an enacted constitution. It is only the basic norm that unites them in such a case in one chain of validity by authorizing both constitutions.<sup>14</sup>

A legally minded observer coming to such a country and wondering whether the enacted and the customary constitutions belong to the same legal system will be referred by a Kelsenite to the basic norm. It all depends, he will be told, whether or not there is one basic norm authorizing both constitutions or whether each constitution is authorized by a different basic norm. Being told in answer to further questions that to know the content of the basic norm he should find out "the facts through which an order is created and applied," (*GT* 120) for they determine it, he may very well be driven to despair. It seems that he can only identify the legal system with the help of the basic norm whereas the basic norm can be identified only after the identity of the legal system has been established. Even if our diligent observer succeeds in establishing that at least two sets of norms are effective in the society, one, a set of customary norms, the other, of enacted norms, there will be nothing a Kelsenite can say to help him decide whether or not they form one system or two. There is nothing in the theory to prevent two legal systems from applying to the same territory. Everything depends on the ability to identify the basic norm, but it cannot be identified before the identity of the legal system is known. Therefore, the basic norm cannot solve the problem of identity and unity of legal systems, and Kelsen has no other solution.

### III

If the previous criticism is correct the case for the basic norm must rest on its function in explaining the normativity of the law. It is with this problem that the rest of the paper will be concerned.

The role of the basic norm in explaining the normativity of law, and indeed Kelsen's explanation of that normativity, is closely connected with his critique of natural law theories. He conceived his own theory as an alternative, the only possible alternative to natural law. Kelsen even refers to the basic norm as a natural law.<sup>15</sup> This is not the place to examine in detail Kelsen's critique of natural law theories, but a few remarks on some of the key ideas are essential to the understanding of his theory of the basic norm.

According to Kelsen's account, natural law theories claim that there is a

<sup>14</sup> It should be noted that the basic norm in such cases is said to authorize several constitutional laws created by several norm-creating acts. It is not clear in what sense a basic norm doing this is itself one norm rather than a conjunction of several norms.

<sup>15</sup> "If one wishes to regard it (i.e., the basic norm—J.R.) as an element of a natural law doctrine . . . very little objection can be raised. . . . What is involved is simply the minimum . . . of natural law without which a cognition of law is impossible." (*GT* 437)

set of norms, discoverable by reason, which have absolute and objective validity. They are completely and objectively just and good. Positive law, insofar as it is valid, derives its validity from natural law. It is valid to the extent that the natural law pronounces it just and good. Statutes, court decisions, etc., which are contrary to natural law are not valid and hence not laws at all. Kelsen correctly points out that according to natural law theories there is no specific notion of legal validity. The only concept of validity is validity according to natural law, i.e., moral validity. Natural lawyers can only judge a law as morally valid, that is, just or morally invalid, i.e., wrong. They cannot say of a law that it is legally valid but morally wrong. If it is wrong and unjust, it is also invalid in the only sense of validity they recognize.<sup>16</sup>

Kelsen has four major reasons for rejecting all natural law theories. They are burdened with objectionable metaphysics, they are conceptually confused, they thrive on moral illusion, and they are unscientific.

1) Natural law theories presuppose the dualistic metaphysics which has bedeviled the Western world since Plato.<sup>17</sup> They presuppose an ideal reality of completely just and good laws enjoying some form of objective existence independent of human acts or will which is contrasted with the imperfect social reality of man-made statutes, regulations, and decisions. The latter are imperfect and less real than the former, and whatever reality they have is due to the ideal reality. Only by imitating the ideal laws do human laws acquire validity. Kelsen is very much opposed to this kind of metaphysics and rejects it in favor of the antimetaphysical flavor of Kant's critical philosophy. Rejecting this metaphysical dualism deprives natural law theories of their metaphysical foundation.

2) Natural law theories are conceptually confused. They are of two varieties, one secular, and the other religious. The secular theories regard natural laws as rationally binding and self-evident in themselves. The religious theories regard them as the commands of God revealed to man through rational speculation about nature.<sup>18</sup> Both varieties commit the naturalistic fallacy of deriving an is from an ought. Whatever is natural can only be a fact, and God's commands are also facts, even if divine facts, and from facts no norm is entailed. To avoid the naturalistic fallacy both types of natural law theories must be assumed to postulate a basic norm investing the facts with normative character.<sup>19</sup> The secular basic norm is that nature be obeyed, the religious basic norm dictates that God be obeyed.<sup>20</sup> The basic norms must be considered self-evident. They cannot be derived from any other norm, yet they are said to be objectively valid and binding. In this way Kelsen attempts to rectify the confusions committed by the proponents of the natural law.

<sup>16</sup> For example, *WJ* 144, 257ff., 295.

<sup>17</sup> Cf. *GT* 419-433; *WJ* 198ff. Kelsen is not rejecting the possibility of regarding laws as abstract entities provided they are given adequate interpretation relating them to human behavior. Such a doctrine does not have the metaphysical implications of Platonism.

<sup>18</sup> For the explanation of the two types of natural law theories, see, e.g., *WJ* 285ff.

<sup>19</sup> *WJ* 141.

<sup>20</sup> *WJ* 258, 260f.

3) "The doctrine is a typical illusion, due to an objectivation of subjective interests." (*WJ* 228) On Kelsen's analysis the natural law's claim to objective validity rests on the assumption that its basic norms are self-evident. Kelsen rejects all such claims as illusions. He is a moral relativist.<sup>21</sup> No moral position can be objectively proved and defended. There are no intuitively true moral beliefs.<sup>22</sup> Moral opinions are matters of personal preferences. By claiming objective validity, natural lawyers breed illusions and use them for various ideological purposes. Most commonly the natural law illusion has been used by conservative optimists to justify existing legal and political institutions. Occasionally the same illusion has been turned into a tool for promoting reform or revolution.<sup>23</sup>

Kelsen's relativism does not preclude the possibility or necessity of assessing the law by moral standards. He simply insists that every evaluation is valid only relative to the particular moral norm used which in itself has no objective validity. Consequently moral criticism or justification of the law is a matter of personal or political judgment. It is not an objective scientific matter and does not concern the science of law.<sup>24</sup>

4) By condemning natural law theories as unscientific Kelsen means that they cannot be objectively confirmed. Therefore, Kelsen's desire to construct a scientific theory of law leads him to renounce the morality of the law as a subject of the theory. "The problem of law as a scientific problem is the problem of social technique, not a problem of morals." (*GT* 5) Legal theory is and should be concerned with a special type of social technique for controlling human behavior. Natural law theories, by distinguishing between just statutes which are law, and unjust ones which are not law, obscure the issue. For they thereby exclude some normative systems from being classified as legal, even though they are instances of the use of the same social technique.

#### IV

To perform its task legal theory must be value free. Consequently its explanation of the normativity of law must be independent of the moral value of the law. The validity of laws must be understood as legal, not moral validity. The basic norm is the reason of the validity of the law in the legal sense of validity. How is the notion of legal validity and normativity to be explained? Kelsen resorts to the conceptual framework of Kantian critical philosophy. Kant himself adopted a version of natural law theory only because he did not remain true to his own premises.<sup>25</sup> His philosophy, however, provides the intellectual tools for ridding legal theory of its dependence on the notion of moral validity.

A legal concept of validity and normativity is made possible only through the concept of the basic norm:

<sup>21</sup> Cf. *WJ* 141, 179f., 228f., 259, 295; *PTL* 64.

<sup>22</sup> *PTL* 221.

<sup>23</sup> Cf. *WJ* 297.

<sup>24</sup> Cf. *WJ* 295, 302; *GT* 436; *PTL* 68f.

<sup>25</sup> *GT* 444f. Kelsen's interpretation of Kant can be disputed, but this need not concern us here.



To interpret these acts of human beings as legal acts and their products as binding norms, and that means to interpret the empirical material which presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm. The basic norm is only the necessary presupposition of any positivistic interpretation of the legal material. (*GT* 116)

The basic norm is necessarily presupposed when people regard the law as normative, irrespective of its moral worth:

. . . the basic norm as represented by the science of law may be characterised as the transcendental-logical condition of this interpretation, if it is permissible to use by analogy a concept of Kant's epistemology. Kant asks: "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms? . . ." The epistemological answer of the Pure Theory of Law is: "By presupposing the basic norm that one ought to behave as the constitution prescribes. . . ." The function of this basic norm is to be found in the objective validity of a positive legal order. (*PTL* 202)

The concept of the basic norm provides legal theory with an objective and value-free concept of legal normativity. "The presupposition of the basic norm does not approve any value transcending positive law." (*PTL* 201) "It does not perform an ethical political but only an epistemological function." (*PTL* 218)

Not performing a moral or political function the basic norm is objective:

To the norms of positive law there corresponds a certain social reality, but not so to the norms of justice. . . . Juristic value judgments are judgments that can be tested objectively by facts. Therefore they are admissible within a science of law. (*WJ* 227)

The basic norm, therefore, is not the product of free invention. It is not presupposed arbitrarily in the sense that there is a choice between different basic norms when the subjective meaning of a constitution-creating act and the acts created according to this constitution are interpreted as their objective meaning. (*PTL* 201)

With the aid of the concept of a basic norm Kelsen claims he has established a value-free legal theory using a specific legal concept of normativity:

The postulate to differentiate law and morals, jurisprudence and ethics, means this: from the standpoint of scientific cognition of positive law, its justification by a moral order different from the legal order, is irrelevant, because the task of the science of law is not to approve or disapprove its subject, but to know and describe it. . . . The postulate to separate law and morals, science of law and ethics means that the validity of positive legal norms does not depend on their conformity with the moral order; it means that from the standpoint of a cognition directed toward positive law a legal norm may be considered valid, even if it is at variance with the moral order. (*PTL* 68)

## V

Thus far it has been established that Kelsen regards the concept of a basic norm necessary to the understanding of law as a normative system, and that he thinks that only by using this concept can legal theory be value free and objective and avoid the blunders of natural law theories. Nothing has been said so far about the nature of the normativity accruing to the law by virtue of the basic norm. To this problem we must now turn.

Two conceptions of the normativity of law are current in the literature. I will call them justified and social normativity. According to the one view legal standards of behavior are norms only if and insofar as they are justified. They may be justified by some objective and universally valid reasons. They may be intuitively perceived as binding or they may be accepted as justified by personal commitment. On the other view standards of behavior can be considered as norms regardless of their merit. They are social norms insofar as they are socially upheld as binding standards and insofar as the society involved exerts pressure on people to whom the standards apply to conform with them. Natural law theorists characteristically endorse the first view, positivists usually maintain the second view. The most successful explanation of the normativity of law in terms of the concept of social normativity is Hart's analysis in *The Concept of Law*. Theorists using the concepts of justified normativity claim that a legal system can be regarded as normative only by people considering it as just and endorsing its norms accepting them as part of their own moral views. Theorists using the concepts of social normativity maintain that everyone should regard legal systems as normative regardless of his judgment about their merits.

Much of the obscurity of Kelsen's theory stems from the difficulty in deciding which concept of normativity he is using. It will be claimed that:

- (1) Kelsen uses only the concept of justified normativity.
- (2) According to him an individual can consider a legal system as normative only if he endorses it as morally just and good.
- (3) Legal theory considers legal systems as normative in the same sense of "normative" but in a different sense of "consider" which does not commit it to accepting the laws as just.

Let us consider the first statement first. Quite often Kelsen considers a concept of social normativity only to reject it as not being really a concept of normativity or at any rate not being appropriate for legal theory. Thus he distinguishes between a subjective and an objective "ought,"<sup>26</sup> claiming that legal norms are objective norms, explained by the concept of an objective "ought." His subjective "ought" is a variety of social normativity. Connected with this distinction is his comparison between objective and subjective value judgments. The latter are an explication of one type of social normativity and are judged by him to be factual rather than normative judgments:

<sup>26</sup> For example, *PTL* 7. Here as elsewhere when Kelsen examines and rejects the concept of social normativity he considers only crude explanations of it. Social normativity cannot be explained in terms of efficacious commands.

The value constituted by an objectively valid norm must be distinguished from the value that consists (not in the relation to a norm, but) in the relation of an object to a wish or will of an individual directed at this object. If the object is in accordance or not in accordance with the wish or will, it has a positive or negative value. . . . If the judgement describing the relation of an object to the wish or will of an individual, is designated as a value judgement . . . then this value judgement is not different from a judgement about reality. For it describes only the relation between two facts, not the relation between a fact and an objectively valid norm. . . . The value that consists in the relation of an object . . . to the wish or will of an individual can be designated as subjective value. (*PTL* 19-20)

Describing laws as commands of a sovereign is, on this theory, describing them as subjective "ought." If one does not presuppose the basic norm, then judgments about the lawfulness of action, understood as judgments about their conformity to the commands of a sovereign are merely subjective value judgments. Kelsen acknowledges that the law can be consistently interpreted in this way, but in this case it is not regarded as normative:

The fact that the basic norm of a positive legal order *may* but *need not* be presupposed means: the relevant interhuman relationship may be, but need not be, interpreted as "normative," that is, as obligations, authorisations, rights, etc. constituted by objectively valid norms. It means further: they can be interpreted without such presupposition (i.e. without the basic norm) as power relations (i.e. relations between commanding and obeying or disobeying human beings)—in other words, they can be interpreted sociologically, not juristically. (*PTL* 218)

This is a key passage. Kelsen claims in effect that the concept of social normativity is not a concept of normativity at all. It does not allow the interpretation of law as imposing obligations, granting powers, rights, etc. It makes the law indistinguishable from the commands of a group of gangsters terrorizing the population of a certain area.<sup>27</sup> Only by using the concept of justified normativity can one understand the true character of legal systems as normative systems.

Because Kelsen regards the concept of justified normativity as the only concept of normativity, he considers law as an ideology. For law is normative, i.e., justified and good for everyone who regards it as normative:

This is the reason why it is possible to maintain that the idea of a norm, an "ought," is merely ideological. . . . In this sense the law may be considered as the specific ideology of a certain historically given power. (*WJ* 227)

One should be careful to distinguish between the two senses in which legal norms are said by Kelsen to be objective. In the first sense they are objective for they reflect a social reality, i.e., because they are normative in the sense of social normativity. In the second sense they are objective for they are normative in the sense of justified normativity; they are an ideology. The two senses are manifested in the following passage:

<sup>27</sup> Kelsen uses this example for a different purpose in *PTL* 47.

If we conceive of the law as a complex of norms and therefore as an ideology, this ideology differs from other, especially from metaphysical, ideologies so far as the former corresponds to certain facts of reality. . . . If the system of legal norms is an ideology, it is an ideology that is parallel to a definite reality. (*WJ* 227)

In other words, it is normative in the sense of justified normativity (i.e., it is objective "ought") but also normative in the sense of social normativity (i.e., corresponding to objectively ascertainable facts the meaning of which is the subjective "ought"). This constant shift from one sense of objective to the other has not helped scholars to understand what concept of normativity Kelsen is using.

To anyone regarding the law as socially normative, the question "why should the law be obeyed?" cannot be answered by pointing out that it is normative. The law is normative because of certain social facts. It should be obeyed, if at all, for moral reasons. The normativity of the law and the obligation to obey it are distinct notions. Not so to people who admit only the concept of justified normativity. For them to judge the law as normative is to judge it to be just and to admit that it ought to be obeyed. The concepts of the normativity of the law and of the obligation to obey it are analytically tied together. Kelsen, therefore, regards the law as valid, i.e., normative, only if one ought to obey it.

By "validity," the binding force of the law—the idea that it ought to be obeyed by the people whose behaviour it regulates—is understood. (*WJ* 257)

A norm referring to the behaviour of a human being is "valid" means that it is binding—that an individual ought to behave in the manner determined by the norm. (*PTL* 193)

These statements are unavoidable for a theorist working with the concept of justified normativity. They are misleading if the normativity of the law is explained as social normativity only.

## VI

The normativity of the law is justified normativity; its reason is the basic norm which is, therefore, a justified norm. But it is not justified in any absolute sense. Kelsen believes in moral relativism. For him moral opinions are matters of personal preference which cannot be rationally confirmed or refuted. Hence he claims that the basic norm is presupposed, i.e., accepted, and the law is regarded as normative only by people who consider it to be just:

But there is no necessity to presuppose the basic norm. . . . The system of norms that we call "legal order" is a possible but not a necessary scheme of interpretation. An anarchist will decline to speak of "lawful" and "unlawful" behaviour, of "legal duties" and "legal rights," or "delicts." He will understand social behaviour merely as a process whereby one forces the other to behave in conformity with his wishes or interests. . . . He will, in short, refuse to presuppose the basic norm. (*WJ* 226/7)

. . . an anarchist, for instance, who denied the validity of the hypothetical basic norm of positive law . . . will view its positive regulation of human relationship . . . as mere power relations. (*GT* 413)

A communist may indeed not admit that there is an essential difference between an organisation of gangsters and a capitalistic legal order. . . . For he does not presuppose—as do those who interpret the coercive order as an objectively valid normative order—the basic norm.<sup>28</sup>

For an individual to presuppose the basic norm is to interpret the legal system as normative, i.e., as just. For Kelsen all the values endorsed by one individual, all his moral opinions form necessarily one normative system based on one basic norm. One can speak of an individual's normative system, or of the normative system from the point of view of a certain individual. Regarded from one point of view every set of norms necessarily forms one consistent and unified normative order. The individual may think that some of the norms to which he subscribes conflict. But this is a psychological not a normative fact. He may feel torn between two opposing modes of action.<sup>29</sup> But it makes no sense to say that his normative system contains conflicting norms. It is of the essence of the concept of a normative system that it guides behavior; it guides the behavior of those persons who adopt the relevant point of view. But if conflicting norms are assumed to be valid from one point of view, then they do not guide behavior for they point in opposing directions at the same time. Therefore all the norms held valid from one point of view necessarily form one consistent system:

It is logically not possible to assume that simultaneously valid norms belong to different, mutually independent systems. (*GT* 363)

If two different systems of norms are given, only one of them can be assumed to be valid from the point of view of a cognition which is concerned with the validity of norms. (*GT* 407)

If one assumes that two systems of norms are considered as valid simultaneously from the same point of view, one must also assume a normative relation between them; one must assume the existence of a norm or order that regulates their mutual relations. Otherwise insoluble contradictions between the norms of each system are unavoidable. (*WJ* 284)

All this is incomprehensible if it is assumed that Kelsen uses the concept of social normativity. It gains some plausibility if it is recognized that Kelsen is operating throughout with a concept of justified normativity. Then it is possible to appreciate Kelsen's reasons for maintaining that (1) for an individual to acknowledge that something is a norm is to accept it as just; (2) from an individual's point of view all his moral beliefs form one normative system;

<sup>28</sup> "Professor Stone and the Pure Theory of Law," *ibid.*, p. 1144.

<sup>29</sup> Cf. *GT* 375. In "Derogation" published in *Essays in Jurisprudence in Honor of Roscoe Pound* (New York: 1962), and "Law and Logic" published in *Philosophy and Christianity* (Amsterdam: 1965), Kelsen retracted his claim that valid norms are necessarily consistent. Unfortunately he did not discuss there the reasons that led him to accept this doctrine in the first place, nor did he modify those parts of his theory that depend on his previous doctrine, such as the relation of law and morality, municipal and international law, etc. Consequently his theory of the normativity of law is intelligible and consistent only on the assumption that valid norms are necessarily consistent.

(3) all the norms held valid from one point of view must be consistent. For the normative interpretation of a person's belief is not a psychological but a rational enterprise intended to elucidate the direction in which his views guide him.

One rather surprising consequence of this analysis is that the concept of normative systems loses much of its importance. The most important concept is that of a point of view. It is logically true that from every point of view there is just one normative system, and therefore just one basic norm. An individual accepting the justice of his country's laws, but subscribing to further values not incorporated in the law accepts not two normative systems but one. His country's laws are part of this system, though they can be viewed as a subsystem of his total normative system. To assert that all the norms held valid from one view-point constitute one system with one basic norm is, of course, to assert more than that they do not conflict. It is to claim that they all derive their validity from one basic norm. This is tacitly assumed rather than argued for by Kelsen. Granting however that the basic norm can confer validity on more than one norm renders this a rather technical matter of no great importance.<sup>30</sup>

## VII

So far the notion of a point of view was considered only as applying to particular individuals; only points of view adopted by individuals were discussed. But there are also more complex points of view. One can ascribe a point of view to a group of individuals, to a population, provided the population shares the same values. It is possible to consider hypothetical points of view, e.g., to discuss what norms are adopted by individuals who accept all and only the laws of their country as valid, without assuming that such individuals exist. One may call this particular example of a hypothetical point of view the point of view of *the legal man*. Throughout his work Kelsen uses the concept of a point of view of legal science. He talks about "the basic norm of a positive legal order, the ultimate reason for its validity, seen from the point of view of a science of positive law." (*WJ* 262) He also says that the science of law presupposes the basic norm, but nevertheless is not committed to regard it as just.

There is, for Kelsen, a great difference between a personal point of view and the scientific point of view. Norms judged as valid from a personal point of view are those adopted as just. But legal theory is value free and norms judged to be valid from its point of view are not thereby adopted as just. Any individual can discuss the law sometimes from his personal viewpoint, sometimes from the point of view of legal science. Adopting the latter "even an anarchist, if he were a professor of law, could describe positive law as a system of valid norms, without having to approve of this law." (*PTL* 218n.) At the same time the anarchist will reject the validity of the law when considering it from his personal point of view. What is the nature of the point of view of legal science? How can it be value free, and at the same time regard the law as normative in the only sense admitted by Kelsen, i.e., that of justified normativity? One tempting explanation is that legal theory asserts that a legal system exists only if adopted, from the

<sup>30</sup> See footnote 14 above.

personal viewpoint, by the population to which it applies, and describes the law as seen from this point of view. Kelsen, however, rejects this interpretation:

The doctrine of the basic norm is not a doctrine of recognition as is sometimes erroneously understood. According to the doctrine of recognition positive law is valid only if it is recognised by the individuals subject to it, which means: if these individuals agree that one ought to behave according to the norms of the positive law. This recognition, it is said actually takes place, and if this cannot be proved it is assumed, factitiously as a tacit recognition. (*PTL* 218n.)

The pure theory of law does not assert or assume any attitude of the population to the law. A legal system exists if it is effective and this does not entail acceptance as morally just.

An alternative interpretation would be that legal science describes not the population's point of view but the point of view of the hypothetical legal man, i.e., of a person accepting from a personal viewpoint all and only the legal norms, without assuming that such a person actually exists. Such an interpretation is supported by various passages like the following one:

The Pure Theory describes the positive law as an objectively valid normative order and states that this interpretation is possible only under the condition that a basic norm is presupposed. . . . The Pure Theory, thereby characterizes this interpretation as possible, not necessary, and presents the objective validity of positive law only as conditional—namely conditioned by the presupposed basic norm. (*PTL* 217-218)

This interpretation comes very near the core of Kelsen's doctrine but it is not free from difficulties. On this interpretation the Pure Theory itself does not adopt any point of view; it does not presuppose any basic norm. It merely describes the point of view of the legal man and the basic norm he adopts. Is Kelsen mistaken when regarding legal science as having a point of view and presupposing a basic norm? Does he use these terms in a completely different sense when applied to legal science? Kelsen himself is unsure of his position on this crucial point for occasionally he can be seen to waver.<sup>31</sup> The difficulty results from the fact that Kelsen does not distinguish between the science of law dealt with by jurists talking *about* the law, and the activities of lawyers and judges *using* the law. He considers both under the one title of juristic cognition. He wants to claim that:

By offering this theory of the basic norm, the Pure Theory of Law does not inaugurate a new method of legal cognition. It merely makes conscious what most *legal scientists* do, at least unconsciously, when they interpret the mentioned facts not as causally determined, but instead interpret their subjective meaning as objectively valid norms. . . . The Theory of the basic norm is merely the result of analysis of the procedure which a positivistic *science* of law has always applied. (*PTL* 204-5)

<sup>31</sup> Compare his treatment of the anarchist in *PTL* 278n. with his discussion of the same problem in previous and subsequent publications. See also his explicit discussion of the question whether the Pure Theory presupposes the basic norm *PTL* 204n.

Kelsen, however, makes a similar claim not only about legal scientists, but also about legal practitioners. The following passage applies to lawyers as well as law professors:

That the basic norm really exists in the juristic consciousness is the result of simple analysis of actual juristic statements. The basic norm is the answer to the question: how—and that means under what condition—are all these juristic statements concerning legal norms, legal duties, legal rights, and so on, possible. (GI 116-7)

It can perhaps be claimed that legal scientists do not adopt a point of view; they do not regard the law as valid but simply describe what is considered valid from the point of view of some other person, i.e., the legal man. But legal practitioners do not describe what somebody else regards as valid but themselves consider the law as valid, refer to it as valid, and apply it to particular cases. They cannot be said merely to describe a point of view; they actually adopt one. Yet when acting professionally they need not express their personal point of view. An anarchist can be not only a law teacher, but also a lawyer. As a lawyer he adopts and expresses a professional point of view, the point of view of legal science, as Kelsen calls it, which does not commit him, and is understood not to commit him to the view that the law is just.

For Kelsen the legal scientist, as well as the legal practitioner, not only describes a point of view, but actually adopts one. Legal science regards the laws as valid and hence presupposes the basic norm. The point of view of legal science is that of the legal man. It is not merely described but actually adopted, and it is adopted in a special sense.

If a man were actually to adopt the point of view of the legal man he would adopt the law as his personal morality, and as exhausting all the norms he accepts as just. Legal science does not accept the point of view of the legal man in this sense. Legal science is not committed to regard the law as just. It adopts this point of view in a special sense of "adopt." It is professional and uncommitted adoption. Legal science presupposes the basic norm not as individuals do—i.e., by accepting it as just but in this special professional and uncommitted sense.

### VIII

The analysis of Kelsen's theory of normativity and of the basic norm clarifies some of Kelsen's fundamental theses. It explains his insistence that the basic norm presupposed by legal science authorizes the first constitution and does not refer to any nonlegal authority like God or nature. Individuals from their personal point of view are indeed unlikely to adopt this norm as their basic norm. They are likely to appeal to God or to nature or some other moral norm as their basic norm. But this is irrelevant to legal science which has a special point of view, that of the legal man, which it adopts in the special professional sense of adopting. Legal science, therefore, presupposes, in the special sense, this particular basic norm, for it is concerned as a science only with positive law.

On the present analysis Kelsen's position on the relation of law and morality



is seen as entailed by the rest of his theory: "When positive law and morality are asserted to be two distinct mutually independent systems of norms, this means only that the jurist, in determining what is legal, does not take into consideration morality, and the moralist, in determining what is moral, pays no heed to the prescriptions of positive law. Positive law and morality can be regarded as two distinct and mutually independent systems of norms, because and to the extent that they are not conceived to be simultaneously valid from the same point of view." (*WJ* 284)<sup>32</sup> Kelsen is discussing here the professional points of view of the legal and moral scholar. He is not denying that a legal order can incorporate moral rules or that morality can incorporate the law and regard it as morally valid. Nor is he denying that an individual from his personal viewpoint can regard both legal and nonlegal norms as valid. To the individual they will all form part of his personal normative system, based on his personal point of view. From the point of view of legal science, however, only the law is valid, just as from the point of view of ethical theories only moral norms are valid.

Kelsen's insistence that from a single point of view there can be just one normative system and just one basic norm explains why his theory of normativity in itself entails that there is just one basic norm to every legal system. Insofar as basic norms are necessary only to enable us to consider the law as normative, there is nothing to prevent one from postulating several basic norms relating to one system. One basic norm can make the criminal law normative, another will relate to the law of property, etc. However, on Kelsen's theory this will mean that there is no one point of view from which the legal system is considered but several, each corresponding to every one of the basic norms.

Furthermore, since there is one general science of law, it follows, on the Kelsenian premise of the unity of a point of view, that all the laws form but one legal system. The ultimate reason for Kelsen's theory of the unity of national and international law is his theory of normativity. Since all the norms held valid from one point of view form one normative system, it follows without further argument that since both national and international law are considered valid from the point of view of one legal science, they are parts of one system. All that remains to do is to explain how they should be thus understood. "The unity of national and international law is an epistemological postulate. A jurist who *accepts both* as sets of valid norms must try to comprehend them as parts of one harmonious system." (*GT* 373) "Once it is conceded that national and international law are both positive laws, it is obvious that both must be valid *simultaneously from the same juristic point of view*. For this reason, they must belong to the same system." (*WJ* 284) "If both systems are considered to be *simultaneously* valid orders of binding norms, it is inevitable to comprehend both as one system." (*PTL* 332 emphasis added)

## IX

This analysis of Kelsen's doctrine of the basic norm in its function in establishing the normativity of law is based on the claim that though Kelsen

<sup>32</sup> Compare also *GT* 374, 490.

rejects natural law theories, he consistently uses the natural law concept of normativity, i.e., the concept of justified normativity. He is able to maintain that the science of law is value free by claiming for it a special point of view, that of the legal man, and contending that legal science adopts this point of view; that it presupposes its basic norm in a special, professional, and uncommitted sense of presupposing. There is, after all, no legal sense of normativity, but there is a specifically legal way in which normativity can be considered.

This is the core of Kelsen's theory. To it he adds the further claim that all the norms held valid from one point of view must be considered as one consistent system. This further thesis can and should be criticized and rejected. It leads to a distorted view of the relations between the various values subscribed to by an individual. It also leads to a distortion of the common concept of a legal system. This is not the place to examine the inadequacies of Kelsen's view of personal morality. Kelsen's failure to account for the concept of a legal system is treated elsewhere.<sup>33</sup> It is, however, important to remember that it is possible to reject Kelsen's identification of the concepts of a normative system and a normative point of view while retaining the other basic tenets of Kelsen's theory of normativity and the basic norm.

It seems to me that Kelsen's theory is the best existing theory of positive law based on the concept of justified normativity. There is, however, a different concept of normativity, that of social normativity. An explanation of the law based on this concept will have no use for the concept of the basic norm. The basic norm is needed to bridge the gap between facts and norms, between the "is" and the "ought." But this gap exists only if norms are understood as justified norms. Once they are understood as social norms then the gap disappears. Legal norms themselves become facts, and their explanation can be carried out without recourse to the basic norm. Kelsen himself, as we have seen, admits as much.<sup>34</sup> The fact that the basic norm is not consciously presupposed by legal scholars and practitioners becomes, therefore, a considerable argument in favor of explaining the law in terms of social normativity rather than Kelsen's explanation in terms of justified normativity. The necessity to ascribe to legal scholars and practitioners a special point of view—that of the legal man—and to regard them as presupposing the basic norm in a special professional way complicates Kelsen's theory still more. An explanation in terms of social normativity is free of these complexities and should be preferred as being simpler. All the more so as Kelsen does never explain what is the special sense in which lawyers and jurists presuppose the basic norm. This omission may lead one to suspect that they regard the law as socially normative, as a fact about the society in which they live. Does not Kelsen himself say that "the principle of effectiveness is the general basic norm that juristic thinking assumes whenever it acknowledges a set of norms as the valid norms of a particular state"? (*WJ* 224) Would it be wrong to regard this statement as an unconscious admission that juristic thinking interprets the law in terms of social normativity?

<sup>33</sup> Cf. Section II above and Hart: "Kelsen's Doctrine of the Unity of Law," *ibid.*

<sup>34</sup> Cf. Section III above.