

IS THE CONCEPT OF THE BASIC NORM HELPFUL?*

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I. Introduction

The aim of this paper is to examine whether and how the idea of the Basic Norm (Grundnorm), which plays a distinctive, apparently essential role in Kelsen's Pure Theory of Law (Reine Rechtslehre), is helpful to understanding law. My answer to this question will be in the negative on the whole. Before going to my main arguments, however, let me first clarify some preliminary points.

First, I use Kelsen's two major books in English, *General Theory of Law and State* (Kelsen [1945]) and *Pure Theory of Law* (Kelsen [1967]), as the canonical texts of his legal theory. Although the early and latest phases of his legal theory are said to be significantly different from the middle one, I focus on the latter, which is stated most systematically in these two books. They are also important in that they, unlike his books prior to his migration to the United States (e.g., Kelsen [1925][1934]), deal squarely with customary law as well as statute law, thereby bringing into focus the problems inherent in Kelsen's legal theory which identifies legal system with state. And I will be concerned only with Kelsen's most important tenets on the Basic Norm, and not with the sometimes self-contradictory details of it.

Secondly, I do not claim to be well-versed in the formidable critical literature on Kelsen's legal theory. Indeed, my research in this field is limited to several books and papers in Japanese and less in English, so I am afraid that many of my observations below may have already been made in some ways by critics in the past. But I do hope to add something original to the past literature.

Finally, my critique is intended to be internal to Kelsen's own purpose; it is not an external critique coming from some moral theory or pragmatic concern of the legal profession. I follow Kelsen in recognizing the significance of non-evaluative analytical legal theory and finding nothing objectionable in his Pure Theory of Law's refusal to answer the problems of legal practice. In fact, I find many valuable and fruitful insights and ideas in his theory, including the hierarchical nature of the legal system, the distinction between the primary and secondary norms, and the validity of "unconstitutional" laws, though I do not necessarily agree with Kelsen on those topics. I also disagree with those critics who claim that the Pure Theory of Law becomes impure and thus defective when it takes into account sociological facts in the basic norm itself (see section III below). My evaluation of Kelsen's legal theory is basically favorable. My critique of the Basic Norm is internal in that it claims the concept is unhelpful even if we work in such a value-free legal theory as advocated by Kelsen. In other words, the

* This paper was originally presented at "International Symposium on Hans Kelsen and Contemporary East-Asia Legal Civilization", which was held at Law School of China Renmin University, Beijing, China, May 25-26, 2011.

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Pure Theory of Law without the Basic Norm is not only a possibility, but also an improvement.

II. *The Overview of the Basic Norm*

Kelsen's account of the Basic Norm is found mainly in the chapter entitled "The Legal Order" in *General Theory of Law and State* and in section 34, "The Reason for the Validity of a Normative Order: the Basic Norm" in *Pure Theory of Law*. I do not find any substantial difference between these two accounts, and will mainly follow and quote from the latter.

According to Kelsen, a legal order is a normative system. The statements that describe it cannot follow from a statement of facts.

[T]he question why a norm is valid, why an individual ought to behave in a certain way, cannot be answered by ascertaining a fact, that is, by a statement that something *is*; that the reason for the validity of a norm cannot be a fact. From the circumstance that something *is* cannot follow that something *ought* to be; and that something *ought* to be, cannot be the reason that something *is*. The reason for the validity of a norm can only be the validity of another norm. A norm which represents the reason for the validity of another norm is figuratively spoken of as a higher norm in relation to a higher norm.

(Kelsen [1967] p. 193)

Some authority is often claimed to be the reason for the validity of a higher norm, but that authority itself requires a norm to invest power in it.

[T]he search for the reason of a norm's validity cannot go on indefinitely like the search for the cause of an effect. It must end with a norm which, as the last and highest, is presupposed. It must be *presupposed*, because it cannot be "posited," that is to say: created, by an authority whose competence would have to be derived from a still higher norm. This final norm's validity cannot be derived from a higher norm, the reason for its validity cannot be questioned. Such a presupposed highest norm is referred to in this book as basic norm. All norms whose validity can be traced back to one and the same basic norm constitute a system of norms, a normative order. The basic norm is the common source for the validity of all norms that belong to the same order – it is their common reason of validity. The fact that a certain norm belongs to a certain order is based on the circumstance that its last reason of validity is the basic norm of this order. It is the basic norm that constitutes the unity in the multitude of norms by representing the reason for the validity of all norms that belong to this order.

(Ibid., pp.194-5)

We can distinguish, according to the nature of the reason for the validity, two kinds of normative orders: static and dynamic. In a static order, a norm is valid because its contents are derived from another, more general norm, for example, the norm of promise-keeping derived from that of sincerity. In a dynamic order, however, a norm is valid because it is created by one who is empowered by a higher norm. The chain of empowerment ultimately reaches the presupposed Basic Norm, beyond which it is impossible to go higher. In contrast to morality, a legal order is essentially a dynamic normative order rather than a static one. Thus, any content can be a law (ibid., pp. 195-6).

The basic norm of a legal order is not a material norm which, because its content is regarded as immediately self-evident, is presupposed as the highest norm and from which norms for human behavior are logically deduced. The norms of a legal order must be created by a specific process. They are posited, that is, positive, norms, elements of a positive order.

(Ibid., p. 198)

The basic norm is a norm which is presupposed in the creation of a constitution. It can be called the constitution in a logical sense in contrast to the one in the sense of positive law. The basic norm is not a positive law itself as it is not created by some legal organ or custom; it is a presupposed starting-point for the legislative procedure (ibid., pp. 198-9).

Let us consider the dynamic aspect of law. For example, the reason why capital punishment is not murder, a crime, but rather a legal act is that it is an application of criminal law. Why is such criminal law valid? It is valid because it was created by the legislature authorized by the existing constitution to create general norms. Then why is the constitution valid? It is valid because it was created according to the amendment rules of an earlier constitution. Thus, the ultimate reason for the validity of the legal norms goes back to the “historically first constitution” (ibid., pp. 199-200).

[I]f we ask for the reason of the validity of the historically first constitution, then the answer can only be that the validity of this constitution – the assumption that it is a binding norm – must be *presupposed* if we want to interpret (1) the acts performed according to it as the creation or application of valid general legal norms; and (2) the acts performed in application of these general norms as the creation or application of valid individual legal norms. Since the reason for the validity of a norm can be only another norm, the presupposition must be a norm: not one posited (i.e., created) by a legal authority, but a presupposed norm, that is, a norm presupposed if the subjective meaning of the norm-creating facts established according to the constitution are interpreted as their objective meaning. Since it is the basic norm of a legal order (that is, an order prescribing coercive acts), therefore this norm, namely the basic norm of the legal order concerned, must be formulated as flows: Coercive acts sought 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.) The norms of a legal order, whose common reason for their validity is this basic norm are not a complex of valid norms standing coordinately side by side, but form a hierarchical structure of super- and subordinate norms.

(Ibid., pp. 200-01)

The basic norm described above refers to the constitution of a state. But Kelsen also gives an account of the basic norm of international law. I quote its concluding part since it is relevant to the next section.

These [international customary] norms are interpreted as norms binding the states, because a basic norm is presupposed which establishes custom among states as a law-creating fact. The basic norm runs as follows: “State – that is, the governments of the states – in their mutual relations ought to behave in such a way”; or: “Coercion of state against state

ought to be exercised under the conditions and in the manner, that conform with the customs constituted by the actual behavior of the states.” This is the “constitution” of international law in a transcendental-logical sense.

(Ibid., p. 216. See also Kelsen [1945] p. 369: “The States ought to behave as they have customarily behaved.”)

According to Kelsen, treaties between states have validity as international legal norms simply because custom authorizes states to establish them.

The theory held by many authors (and at one time also by myself) that the norm of *pacta sunt servanda* is the basis of international law is to be rejected because it can be maintained only with the aid of the fiction that the custom established by the conduct of states is a tacit treaty.

(Kelsen [1967] p. 216 n. 81)

The basic norm of the above international law represents the basic norm of all customary law, which reads “the individuals ought to behave in such a manner as the others usually behave (believing that they ought to behave that way)” (ibid., p. 216).

III. *The Presupposition of the Basic Norm is not Necessary to the Existence of a Legal Order*

I find several problems with Kelsen’s theory of the basic norm described above. The first problem may seem naïve, but it is compelling to me. It is as follows. The basic norm alone is exempt from Kelsen’s requirement that the validity of a norm can be derived only from another higher norm. But how can such an exemption be justified? It is not helpful at all merely to claim that the last and highest norm must be presupposed. That seems to me only an arbitrary stipulation.

Kelsen might respond that the presupposition of the basic norm is necessary for any lawyer or legal scholar to understand legal norms as belonging to the same legal order even if he or she were unconscious of that norm. But is it not possible to stop just before the basic norm, at the fundamental constitution (in a substantial rather than a formal sense) in the case of national law or at the international custom in the case of international law? It is simply because lawyers and officials have some reason to accept their specific legal order itself that they obey that law, not because they (consciously or unconsciously) accept the ulterior basic norm requiring that the constitution be obeyed. The same can be said of the system of international law. It appears that it is because the governments of states accept international customs that they usually, though not always, obey international law, and not because they presuppose the Kelsenian basic norm of international law which provides that the states ought to behave as they have customarily behaved.

Maybe Kelsen says the basic norm is not the cause for creating a legal order, but rather only the presupposition of its cognition (cf. Kelsen [1967] p. 204 and n. 72 on the distinction between positing and presupposing a norm); it is supposed to be an epistemological condition, not a causal one. But it has already been pointed out by several scholars that, *pace* Kelsen, we can understand law and explain its unity without the aid of the idea of the basic norm, which

stands outside the legal system and gives validity to it. Thus, H. L. A. Hart claimed in *The Concept of Law*:

If a constitution specifying the various sources of law is a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criteria it provides, then the constitution is accepted and actually exists. It seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who 'laid it down') are to be obeyed.

(Hart [2012] p. 293)

Similarly, Joseph Raz writes:

The structure and arrangement of the legal system, its unity, remain virtually unaffected by the elimination of the basic norm.

(Raz [1980] p. 105)

The basic norm is a redundant notional entity which ought to be shaved off by Occam's razor. My guess is that one of the reasons there is much less influence of Kelsen's legal theory on Japanese legal academia at present than, say, thirty years ago is that this kind of criticism goes unchallenged and is widely accepted. It seems the recent Japanese legal theorists with a positivist bent have found Hart's idea of the "rule of recognition" much more fruitful than the idea of the basic norm in explaining the validity of a legal system. Indeed, I am one of them.

In relation to the argument above, another assumption of Kelsen is that every norm must obtain its validity from a higher norm; that normative power must be given by someone else. But this assumption is groundless. As Raz points out, "This argument is based on the mistaken assumption that a man can have legislative powers only if they were conferred on him by a law. Legislative power is simply the ability to create or repeal laws" (Raz [1980] p. 138).

It is not a logical impossibility, as Kelsen claims without arguments, but an everyday practice that one creates a norm *ex nihilo* or that one empowers oneself to create norms. Thus, when two people play chess, they are bound by the rules of chess not because they are bound by a higher norm saying "follow the rules of chess", but simply because they voluntarily accept the rules. The same can be said of a legal order. It is possible that some people who are not authorized by anyone create a new constitutional norm. Nay, even in a much more ordinary case where people obey an already established legal order or constitution, they do not necessarily do so on account of its pedigree of validity. As the quote from Hart above suggests, they may obey it because they believe they have a good pragmatic reason to do so whatever its historical roots are. In such cases, people are continuously creating the validity of their legal order every day through their practice of acceptance. (It is possible to interpret Hart's argument on the rule of recognition as pointing this out.) It is not by the force of authorization by the "historically first constitution" that people engage in legal activity. One may empower oneself, so to speak, by accepting a norm. The very concept of autonomy is not unintelligible without this self-empowerment. In other words, there are "self-referring laws" (Hart [1983] ch. 7) that authorize themselves.

In fact, Kelsen himself acknowledges, when describing the formation of customary law, the possibility that individuals who are not authorized by other organs create norms. He writes:

Customary law is created by the individuals subject to the law created by them, whereas

statutory law is created by special organs instituted for that purpose. In this respect, customary law is similar to law made by contract or treaty, characterized by the fact that the legal norm is created by the same subject upon whom it is binding. (Kelsen [1945] p. 128)

If we are forced to accept the scheme of the basic norm, should we say that people create law by the way of custom because they are authorized to do so by the basic norm? This presupposition seems unnecessary. People may simply accept (and validate) the spontaneously developed norms (cf. *ibid.*, p. 114).

In defense of Kelsen, one may reply to the above-mentioned Hartian claim as to the unhelpfulness of the basic norm in understanding law as follows: that Hartian argument derives the legal norm from the social fact of people's (especially officials') behavior, thereby committing a logical error of the unwarranted leap from "is" to "ought". I do not find this reply cogent. The Hartian claim above does not make such an error. It only states that the law is binding for those who accept the law: the law is valid from the internal point of view. That claim does not derive the objective or universal validity of law from the fact of people's acceptance or identification of the former with the latter. The claim itself is not made from an internal point of view.

Kelsen writes:

A sociologist or psychologist may observe that some people believe themselves to be obliged, that others believe the opposite, and that some oscillate between the two views. A sociologist or psychologist see only the factual, not the normative aspect of law and morality. He conceives of law and morality as a complex of facts, not as a system of valid norms.

(*Ibid.*, p. 376)

But the critics of Kelsen I described above in this section, unlike a sociologist or psychologist (and maybe some legal realists), mainly consider the norms of law which people in a society accept. To follow Karl Popper's terminology, an individual's legal consciousness as a psychological condition belongs to the World Two, while the contents themselves of a normative belief belong to the World Three. Both Kelsen and those critics write of law in the latter sense.

Kelsen distinguishes his own legal theory from the "doctrine of recognition" that "positive law is valid only if it is recognized by the individuals subject to it" by reason that the latter, unlike the former, "presupposes the ideal of individual liberty of self-determination, that is, the norm that the individual ought to do only what he wants to do" (Kelsen [1967] p. 218 n. 83). But the doctrine of recognition does not necessarily presuppose such a political ideal; it merely claims that the law needs not only enforcement, but also some social recognition for its validity.

In any event, we cannot deny that the social fact of people's acceptance of law (even though partial and passive) is necessary for the validity or existence of a legal system. Though Kelsen sharply distinguishes his Pure Theory of Law from both sociology and morality and emphasizes its "purity", he still agrees that the efficacy or effectiveness of law is indispensable to law's validity. Efficacy is a necessary condition of the validity of a legal order, though not its sufficient condition (Kelsen [1945] pp. 118-9). Thus "[t]he norms which normative

jurisprudence regards as valid are norms that are ordinarily obeyed and applied” (ibid., p. 170. See also Kelsen [1967] p.213). In addition, the content of the basic norm itself, which is the presupposed fiction of a legal order, is said to be determined by social facts, too. According to Kelsen, “the content of a basic norm is determined by the facts through which an order is created and applied, to which the behavior of the individuals regulated by this order, by and large, conforms” (Kelsen [1945] p.120. See also Kelsen [1967] p.212). It is not clear, however, how much efficacy Kelsen regards as a condition of validity on the level of particular norms and that of the basic norm. Thus I am not sure whether those statutes that are not usually but very seldom applied by officials are valid or not in Kelsen’s theory.

Anyway, he writes:

[P]ositive law cannot be derived from the basic norm, but can merely be understood by means of it. The content of the basic norm, that is, the particular historical fact qualified by the basic norm as the original law-making fact, depends entirely upon the materials to be taken as positive law, on the wealth of empirically given acts subjectively claiming to be legal acts.

(Kelsen [1945] p.436)

Some critics regard this “transformation of power to law” (ibid., p. 437) by the basic norm as an Achilles’ heel; they believe Kelsen’s Pure Theory of Law is impure at its very apex in spite of his intention. I do not agree with them. As both the first and the second editions of *Pure Theory of Law* begin with the sentence, “The Pure Theory of Law is a theory of positive law,” it is neither a theory of any possible law nor a general theory of norms; it treats positive law that is valid in a real world as a normative order. Though Kelsen insists on the purity of the theory, it cannot be understood to be so pure as to cease to be a theory of positive law. Any theory of positive law has to be connected with social facts in some way. I do not find anything objectionable in this kind of “impurity” in the Pure Theory of Law.

IV. *The Basic Norm is not Helpful in Explicating the Contents of Law*

Another problem with the Basic Norm is that since its content is so empty, it does not help identify the contents of a legal order. This becomes even more apparent in the case of customary law, including international law, than in statutory law, where the basic norm states, “Obey the constitution.” The Pure Theory of Law is claimed to apply to customary law as well as to written law, but it seems Kelsen’s writings prior to his migration to the United States seldom examine customary law.

According to Kelsen, the basic norm of international law is “the states ought to behave as they have customarily behaved,” while that of customary law is “the individuals ought to behave in such a manner as the others usually behave.” The phrases as “customarily behave” and “usually behave” seem to me quite ambiguous (see, Rottleuthner [2005] pp.163-4. “From an empirical point of view it might be almost impossible to find out whether a whole legal order is by and large observed” p.163.). Unlike many legal positivists Kelsen seems to be little interested in this problem, but at least he writes, “[t]he question of whether a law-creating custom is present may be decided only by the law-applying organ” (Kelsen [1967] p. 227). So the law would be quite indeterminate in many cases before those organs’ decisions.

Where both statutory law and customary law exist in a state, the situation is even more complicated.

Custom has to be, like legislation, a constitutional institution. This might be stipulated expressly by the constitution; and the relation between statutory and customary law might be expressly regulated. But the constitution itself can be, as a whole or in part, be unwritten, customary law. Thus it might be due to custom that custom is a law-creating fact. If a legal order has a written constitution which does not institute custom as a form of law-creation, 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 customs.

(Kelsen [1945] p. 126)

After all, it may well be a matter of custom itself as to whether a written constitution has validity as law; a written constitution need not always have legal validity.

Some authors understand the basic norm as the criterion by which we decide whether a norm belongs to a legal order, but this interpretation is wrong. The basic norm is nothing but the presupposition of any legal thinking; it does not clarify what the law is. Kelsen writes:

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 understand the mentioned [legal] fact not as causally determined, but instead interpret their subjective meaning as objective valid norms, that is, as a normative legal order....The theory of the basic norm is merely the result of an analysis of the procedure which a positivistic science of law has always applied.

(Kelsen [1967] pp. 204-5)

Kelsen even thinks the supposed fact that the basic norm as ultimate reason is necessary for the validity of a normative system applies not only to legal positivism, but also to natural law doctrine and theology (Kelsen [1957] p. 263).

If understood in this formalistic manner, the basic norm does not, however, appear to be very interesting at all to many lawyers since it is silent on the substantive content of the law. Thus, it is only natural that several Japanese constitutional theorists reinterpret Kelsen's doctrine of the basic norm to make it the basic political or moral value or principle of a constitution, such as democracy or human rights. It would be easy to reject such an attitude as misinterpreting Kelsen, but their practical interest in interpreting law is quite legitimate, too.

V. *The Unity of Law*

Why was Kelsen so preoccupied with the idea of the basic norm? One reason is the (wrong) assumption that the unity of a legal order is impossible without it. But, as I argue above, the unity can be maintained even if we take the hierarchical nature of law, if the system of domestic law is to be derived from a constitution and that of international law from international custom. More fundamentally, is such a systematic understanding of law always appropriate? It seems possible to understand the law even if it does not constitute a hierarchical order, but consists of independent parts – for example, customary law for some

parts, case law for another, and statutory law for the rest – as long as there are no conflicts or contradictions among them. Does positive law make a hierarchical order, or is it more like a patchwork of norms (and values)? It is an empirical question, not an *a priori* matter. (For that matter, Ronald Dworkin's holistic legal theory, while very different from Kelsen's, also seems to exaggerate the unity or integrity of law in regarding law as a seamless web.)

It sometimes happens that a few lawyers accept the entire legal system, while other citizens do not have interest or knowledge in rules empowering officials and even the officials themselves know only such norms as are directly pertinent to them. In such societies, most individuals, including officials, obey the law as it concerns them not because it is law, but for moral or prudential reasons. The reason of the validity of law may not be completely different from morality for those people. In other words, law may be valid not only because of its roots, but also because of its moral content. Kelsen acknowledges the interrelationship between law and morality only when one of them “delegates” the other, as when positive law refers to a certain morality (Kelsen [1945] p. 374). But law can include morality in a less formal manner, as I have just pointed out.

If we turn from the Pure Theory of Law as a theory of positive law to the sphere of morality, the requirement of unity in the normative system seems more constrained.

Kelsen believes there is a basic norm in the sphere of morality (almost synonymous with “natural law” in his terminology), too. But he also claims that law has not only a static, but also a dynamic aspect, where a higher norm creates lower norms by authorization, while morality is an essentially static order where norms are not formal, but material, and derived from higher norms by the logical inference from the general to the particular. Here lies a great difference between law and morality (Kelsen [1945] p. 112). But I believe not only law, but also morality, have both static and dynamic aspects. For example, a morality that honors the autonomy of individuals invests in them the power to create norms by means of promise. And Kelsen admits the fact that law has a static aspect. Thus, law and morality are similar in having both aspects. Kelsen understands law and morality too much in terms of contradistinction in this regard, too.

Kelsen assumes that morality as well as law must be a hierarchical normative order which is derivable from a single norm or principle. But there are different sorts of morality. Thus, we can imagine a pluralist morality where various values exist that are not reducible to each other and where some compromise among them is always needed. It might even be claimed that those values are not only irreducible, but also incommensurable. Although not every morality is so pluralistic, there are many moralities that are not derivable from a single ultimate source. It seems that the moralities most real people hold consist of various considerations, some of which are consequential, others deontological, and others neither of them. There is also a bottom-up thinking that evaluates abstract principles and rules by concrete, particular beliefs, as well as a top-down one that goes down from a general principle to concrete cases.

Those pluralist moments exist not only in morality, but also in law, albeit to a lesser extent. While legal positivists distinguish law and morality with good reason, Kelsen goes too far in denying altogether the close interrelations and similarities between them. He gives too much credence to a certain conception of law and morality which seems too organized and hierarchical to be fruitful in understanding law.

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