The Basic Norm: An Unsolved Murder Mystery

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Neil Duxbury*

Abstract: Near the end of his life, Hans Kelsen did away with the conception of the Basic Norm which he had defended so vigorously throughout his career and formulated a new version which was less well suited to his objective of demonstrating that law is genuinely

the 1910s and was still engaged in it in the 1960s. Many of his contemporaries were in awe of his vision and his energy in pursuing that project, and his many books and essays on the pure theory keep legal scholars busy to this day. He developed the pure theory rigorously and defended it robustly, publishing replies to various challengers which mercilessly exposed their attacks as wrongheaded.[3] Indeed, anyone reading Kelsen's responses to critics might be forgiven for thinking that his theoretical convictions were unshakeable.

It would be a mistake, in fact, to think that Kelsen refused to see faults in his own theory. When he conceded mistakes, however, he was usually succumbing to his own doubts rather than to those of others; for Kelsen, the most perceptive critic of the pure theory of law was Hans Kelsen. The doubts that he did have about his own jurisprudential project were not minor. It is well known among legal philosophers that Kelsen, in his late years, made two radical alterations to the

exist: positive law *qua* the object of cognitive legal science would not be possible.[7] In the quarter century separating the two editions of the *Pure Theory of Law*, Kelsen's conception of the basic norm remains unaltered in principle.[8] 'The basic norm', he wrote in 1934, 'is simply the expression of the necessary presupposition of every positivistic understanding of legal data. It is valid not as a legal norm … but as a presupposed condition of all lawmaking.'[9] Every legal norm 'must be

conception of the basic norm as a 'fiction'.[13] The implications of this change of thinking will be set out in a moment, but before we reach that point it is worth mentioning at the outset that nobody seems to have found Kelsen's reformulation of the basic norm particularly enlightening or helpful. His radical revision of some of his arguments in the last thirteen years of his life tends to be treated by legal philosophers – in so far as they ever address it – as a bewildering complication which only detracts from the magnitude of his jurisprudential achievement.[14] More often than not Kelsen's jurisprudence is discussed, sometimes quite deliberately, as if he stopped writing about the pure theory of law once he had completed the second edition of his book on the subject.[15] Even Kelsen, we will see, seems uncharacteristically diffident when claiming that his reformulation of the basic norm is an improvement upon the version which he had developed between 1911 and 1960. This diffidence contrasts markedly with his conviction that his efforts during this period to devise a properly scientific account of legal validity had not met with success. Indeed the reformulation of the basic norm was, John Finnis has recently observed, part of 'the spectacular debacle' whereby Kelsen 'rightly acknowledg[ed] the failure of his legal philosophy … to explain or even coherently describe law's validity'.[16]

I am sure this assessment is correct. Kelsen reformulated the basic norm because he became convinced that none of the articulations of it to be found in his writings up to 1960 satisfied the demands of legal science. But what convinced him that he had been wrong? The purpose of this short essay is to try to scratch this particular itch. Do not expect the itch to disappear completely: the fact is that any answer to the question of what prompted Kelsen's change of heart must be speculative. But the question deserves some consideration, for presently Kelsen remains so much an open case: what we know is that this exceptional jurist carefully defended and developed his pure theory of law for half a century and then, in his final years, when most of us would have lost the motivation and the energy to defend our theoretical positions, let alone re-scrutinize them, he cast doubt on some of the key components of that theory, his new version of the basic norm as a fiction representing perhaps the most serious of his doubts.

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[13] The English translation of the second edition of the *Pure Theory of Law* was published after Kelsen's reformulation of the basic norm. Although he was able to check and make some alterations to the text, it is not surprising that he should not have regarded the translation to be 'the final word' on the pure theory: see ibid vi (translator's preface). Even in the original German version of the second edition, there are hints that the reformulation of the basic norm was on its way: see n 8 above, 161.

[14] See, e.g., J. Gardner, 'Law as a Leap of Faith', in *Faith in Law: Essays in Legal Theory*, ed. P. Oliver et al.

II

Just how Kelsen's conception of the basic norm changed in the 1960s is not too difficult to explain, though the implications of what he did are complicated. In the second edition of the *Pure Theory of law*, one of Kelsen's many reiterations of his argument that the basic norm is a presupposition comes by way of the following image:

> A father orders his child to go to school. The child answers: Why? The reply

went to a society dedicated to the pursuit of pigeon-shooting. Why did Kelsen do what he did? What could he have been thinking? It seems impossible to answer this question without some amount of guesswork, and without inviting further questions. Perhaps Kelsen simply became sceptical about the Kantian epistemology that informed his idea of the basic norm as a presupposition. But what led to the scepticism? Perhaps the answer is Vaihinger, whose philosophy certainly seems to have led Kelsen to the idea of the basic norm as fiction. But it is not clear why Vaihinger's argument should have persuaded Kelsen to jettison the conception of the basic norm that he had been refining for half a century.[30] However we try to answer explain Kelsen's change of heart, there is always the question: 'but then why did he do *that*?'

It seems to me that Kelsen's revision of the basic norm is an outgrowth of, rather than a complete departure from, his pre-1960 legal science. Roughly between 1920 and 1960, he followed his Vienna School colleague, Adolf Merkl, in arguing that a legal system can be understood as a hierarchy of legal norms, from the most general constitutional and legislative stipulations down to the most concrete legal acts. All legal norms, except those at the lowest level, confer the power to create lower-level legal norms, and every legal norm is itself empowered by some higher legal norm.[31] But the idea of norms empowering norms, Kelsen recognized (or certainly came to recognize), is simplistic: valid legal norms, he elaborated in the second edition of the *Pure Theory of Law*, do not empower other legal norms but 'confer upon someone else a certain power, specifically the power to *enact* norms himself. In this sense the acts whose meaning is a norm are acts of will.'[32] So it is that, in Kelsen's legal science, the legal norm comes to be characterized as embodying the meaning of an act of will, which will is the will of some person or body empowered to act by a higher legal norm, which must itself embody the meaning of an act of will, and so on. Every legal norm, to simplify the matter, must derive from some prior mental act.

The notion of the basic norm – which, strictly speaking, is the highest norm, and so at the pinnacle rather than at the base of the hierarchy[33] – obviously does not fit comfortably, if indeed it fits at all, within a theory which has it that all legal norms derive from some prior mental act. Can such a norm really be accommodated within such a theory? One way of accommodating it would be to say that it is only enacted legal norms that need to be explained as the meaning of an act of will. Since the basic norm is not an actual norm of the positive legal order – since it is simply an idea – why cannot we say that every legal norm must be the meaning of an act of will, apart from the basic norm, which, because it is

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[30] Especially since Kelsen had examined the legal-scientific potential of Vaihinger's philosophy as early as 1919: see H. Kelsen, 'Zur Theorie der juristischen Fictionen' (1919) 1 *Annalen der Philosophie* 630.

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not a posited norm, can simply be presupposed? This seems to be the position which, by around 1960, Kelsen had decided he could not accept. He concedes in the second edition of the *Pure Theory* that 'a norm need not be only the meaning of a real act of will'.[34] This ambiguous statement – which I take to mean that not every norm has to be the meaning of an act of will – opens up the opportunity for him to argue that the basic norm is a special exception in the way that I have just suggested it might be. At first glance it looks as if he seizes this opportunity – for he remains committed to the claim that the basic norm has to be presupposed. It turns out, however, that he takes a different path – the path that eventually leads him to the notion of a fictitious basic norm. Continuing from his observation that a norm need not be only the meaning of an act of will, he says that

> it can also be the content of an act of thinking. Just as we can imagine things which do not really exist but 'exist' only in our thinking, we can imagine a norm which is not the meaning of a real act of will but which exists only in our thinking. Then, it is not a positive norm. But since there is a correlation between the ought of a norm and a will whose meaning it is, there must be in our thinking also an imaginary will whose meaning is the norm which is only presupposed in our thinking – as is the basic norm of a positive legal order.[35]

In the last part of this passage we see Kelsen conceiving of the basic norm as the meaning of an imaginary act of will – an act of will which exists only in our thinking. The language of the passage suggests that Kelsen was already, in the second edition of the *Pure Theory*, coming around to the view of the basic norm which surfaces in 'The Constitutional Function' and the *General Theory of Norms*.

fiction is Kelsen's effort to take his argument concerning norms embodying the meaning of an act of will to what he considered to be its logical conclusion.

IV

Persevere all we might, we sometimes, with Kelsen, have to admit defeat. One sees Hart getting close to this point in his incisive essay on Kelsen's *General Theory of Law and State*, 'Kelsen Visited', wherein, at times, Hart is not so much critically engaging with Kelsen as simply trying to understand what Kelsen could have been hoping to achieve – such as when Kelsen distinguishes the ought-quality of legal norms from the ought-quality of legal scientists' statements about norms (or 'norm', as Kelsen puts it, 'in the descriptive sense of that term').[36] My purpose here has been to try to understand what might have motivated one of Kelsen's more mystifying manoeuvres: how are we to explain his change of heart over the basic norm? Kelsen, even before he began to conceive of the basic norm as a fiction, struggled to understand how a norm is connected to human volition. His ultimate attempt to resolve this difficulty in the case of the basic norm requires logical reasoning no less bizarre than that which led him to conclude that legal systems may accommodate norms which are valid but which conflict. If a norm of the positive legal order must have an author, then it follows logically, Kelsen appears to have concluded, that the imagined basic norm must likewise have an imagined author, as if the constraints of logic apply to the imagination as they do to the real world. Why Kelsen should have concluded that an imagined norm must share the formal qualities of an actual, enacted norm is a mystery. The itch, I warned earlier, would not disappear altogether. It rarely does with this most original and complicated – and sometimes exasperating – of legal philosophers.

[36] n 7 above, 46. See H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 286, 287-95.