

Introduction

1. PURPOSE OF THE TREATISE

This treatise addresses the issue of the source or ground (*Grund*) of the bindingness of law.

Of the theories on initiation and transmission of normativity that have been advanced that far, the theory of Hans Kelsen, the Pure Theory of Law, is, in my view, the richest and most logical. What distinguishes Kelsen's positivism from other types of legal positivism is the idea of a specifically legal normativity.

The Pure Theory of Law is a consistent legal theory, with a conceptual apparatus that is fairly precise. Kelsen's view of law (that is, law as a unified system of binding norms, topped by a single norm-issuing authority) is a view that seems to be congenial to many jurists – after all, even judges harbouring a dualistic view of law are obliged to take, *qua* point of departure in their argumentation, *one* legal system as given. And what is more: Kelsen's idea of a juridico-internal, purely formal legitimacy has a great advantage in leaving aside controversial moral issues.

According to Kelsen, it is necessary to presuppose a basic norm in order to bridge the gap between the “is” and the “ought”; or in other words: in order to understand law as a system of *binding legal norms*.¹ By this presupposition, Kelsen claims, jurists are doing no more than marking the basis upon which their argumentation is grounded, and *via* the doctrine of the basic norm he advances plausible arguments for a source of normativity – a normativity, however, that requires the existence of *one* unified system of norms.

The treatise purports to highlight the role of basic assumptions in the law. In the present context, this role concerns the preconditions for the sense of “bindingness” to arise with the norm-addressee. Arguing that the verb “to presuppose”, with Kelsen, not only has a conceptual but also a normative dimension and, what is more, that the expression “presupposing the basic norm” is adequate in so far as it marks the specific, descriptive-normative nature of utterances made in specifically *legal* speech-situations, I shall contend two things:

First, that Kelsen's doctrine lends itself to an interpretation according to which the very act of “presupposing” the *Grundnorm* can be understood as a *Grund* (in the sense of normative source) of all positive law; and,

Second, that this interpretation admits of addressing the issue of the (formal) legitimacy of supra-national and directly applicable rules and other norms.²

¹ According to Kelsen, the “ought” of the norm is not reducible to “is” since norms have an ontology of their own. On the “Is/Ought” debate, see PART I, Introduction n. 14.

² Usually, we distinguish between legal rules and legal principles. Legal rules mark, more or less clearly, the limit between prescribed and prohibited behaviour and can, therefore,

2. TERMS AND THEORIES

At this initial stage, it may be useful to consider, more closely, some of the terms that will appear frequently in the following, namely: “validity”, “applicability” and “legitimacy”. Under subsection 2.1, I shall also take up different conceptions of validity.

2.1. Validity

To consider legal rules as valid is an indication that these rules possess a certain quality – a quality, however, that lacks gradations: a legal rule is either valid or not valid – there is no in between, no “more or less valid”.³ This quality may be ascertained or established in different ways, namely, by applying different criteria of validity. Thus, whether or not legal rules are considered as valid rules of a given system has to do with the criteria or principles according to which “valid law” is identified. For example, one can identify valid law by investigating into the origin – the source – of the rules in question, or also by means of a definition of, what in this particular system, and at a given time, counts as “valid law”.

What is more, “valid” can be used and understood in different senses – a legal rule can be valid descriptively or normatively. According to *Eugenio Bulygin*, “valid” can be used in at least three different senses.⁴

First, a legal rule can be valid in the sense of being binding or having “binding force”, which means that the rule purports to establish an obligation for the addressee to obey the norm in question. This concept of validity is *normative*: “*N* is valid” means that the norm *N* “ought” to be observed and applied – and that it is justified (validity *qua* “bindingness”);

Second, a legal rule can be valid in the sense of “belonging to” a given legal system. This concept of validity is *descriptive* in so far as it expresses a certain relation that obtains between individual rules and the legal system as such. According to this concept of validity, “*N* is valid” is a purely descriptive sentence (validity *qua* “membership”); and

either be observed or not observed. Legal principles, by contrast, express an ideal that can be realized to a certain extent – that is, more or less – and, consequently, have to be weighed against each other.

³ Democracy, by contrast, *does* have gradations: a state can be more or less democratic. See Aleksander Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* (Stockholm: Fritzes Förlag AB, 1995).

⁴ See Eugenio Bulygin, ‘Time and Validity’, in *Deontic Logic, Computational Linguistics and Legal Information Systems*, ed. Antonio A. Martino, Vol. II (Amsterdam-New York-Oxford: North-Holland Publishing Company, 1982), pp. 65–81, at pp. 65 f.

Third, a legal rule can be valid in the sense of being “applicable”. The expression “applicable” is an indication that there is *another* rule (on a “higher” level within the norm hierarchy), saying that the first rule “ought” to be observed in the case at hand – and that it is binding.

This concept of validity is *descriptive*, too. “*N* is valid” does not prescribe anything but, rather, informs about the existence of *another* norm: a norm (*N*) is “applicable” – that is, ought to be applied as a valid and binding norm – in accordance with the stipulations of *another* norm (validity *qua* “applicability”).

The legal positivist *Hans Kelsen*⁵ embraces a *normative* concept of validity.⁶ According to Kelsen, the validity of a norm is, as he puts it, the “specific existence” of that norm: a norm being valid means, that the norm exists (and *vice versa*) and that it is binding. The bindingness, or “binding force”, of the norm implies that the norm-addressee “ought to” behave in the way stipulated by the norm.

In Kelsen’s view, the validity of legal norms is conditioned by two things: *first*, by their having been “posited” (i.e. issued or created) according to another and more general – and therefore “higher” – norm; and, *second*, by the fact that the legal system to which the norms belong is by and large effective. When asserting that a particular legal rule is valid, jurists – or so Kelsen claims – mean not only that the rule in question has been issued according to the prescriptions of a “higher” and more general norm: they also mean that one ought to act in accordance with that rule. This “ought”, however, does not imply any kind of moral evaluation.

Kelsen was intent on reconstructing the law – from the inside, as it were – as a closed, coherent and dynamic system of hierarchically ordered, binding norms. In order to succeed, however, he was forced to transcend the positive-law system and to appeal to an extra-legal, non-positive norm – the *Grundnorm* or basic norm. The basic norm of a legal system is a norm that is conceptually presupposed in legal argumentation and, as such, has to be understood as the ultimate “ground” of the validity of the entire system.

Kelsen’s basic norm says no more than that the highest positive norms of a legal system, the norms of the constitution, are valid and binding and, therefore, ought to be observed. Once the constitution is conceived of as valid and binding, all the norms that can be traced back to it must also be conceived of as valid and binding.

Thus, given that the basic norm is presupposed – something which jurists, as Kelsen maintains, usually do, albeit unconsciously – one is able to conceive of

⁵ Hans Kelsen, *Reine Rechtslehre. Mit einem Anhang: Das Problem der Gerechtigkeit*, 2nd edn. (Vienna: Franz Deuticke, 1960, repr. 2000 [hereinafter: *RR* 2]); trans. Max Knight, under the title *Pure Theory of Law* (Berkeley and Los Angeles: University of California Press, 1967; repr. Gloucester, Mass.: Peter Smith, 1989 [hereinafter: *PTL*]).

⁶ That is, to a certain extent: Kelsen sometimes uses the term “valid” also in a descriptive sense (validity *qua* membership).

law as a unified system of binding norms and to identify the norms that count as “valid law”. This type of identification implies a validity test that builds upon a regress to the positive-law constitution (the validity and binding force of which is taken for granted).

Another concept of “validity” is employed by the legal positivist *H.L.A. Hart*:⁷ according to Hart, legal validity is *descriptive*, indicating the membership of a rule in a certain class of rules.

In Hart’s view, the validity of legal rules implies that it is possible to identify them as valid rules by means of a test that can be performed, objectively, by external observers, that is, by persons who are not themselves participants of the legal system in question.

In every legal system, Hart says, there is one ultimate Rule of Recognition. The Rule of Recognition is a customary and legally binding rule which offers the criteria – the legal sources – according to which *other* rules are identified as valid rules of the system. By applying these criteria, judges and other “officials” establish the membership of rules in this system, that is, they decide whether or not a rule belongs to, or is a member of, the system in question. Ordinary citizens, on their part, will know which rules are valid legal rules by observing the practices of those who apply them.

However, legal rules – in contrast to mere habits – have an “internal” aspect as well: according to Hart, the normative dimension of the law is lodged with the internal aspect. When establishing the membership of rules, judges and other officials apply the so-called “internal point of view” in recognizing certain rules as a common standard that ought to be followed. This “recognition” on the part of the judges is decisive: for a rule to be a valid rule of the system means that it has been recognized internally, by the “officials”, as a valid member of the system.

Ronald Dworkin,⁸ finally, claims that it is impossible to identify valid law with the help of any kind of “ultimate” rule. In Dworkin’s view, the notion (embraced by legal positivism) that methods of identification necessarily must refer to the origin or source of legal norms is simply erroneous.

Valid law, Dworkin says, does not only comprise established rules but also the principles that underlie these rules. The rules of positive law are either valid or invalid and – owing to a special mechanism within the legal system – cannot be in conflict with each other. Principles, by contrast, *can* be in conflict with each other and yet retain their validity because they have a dimension of weight which rules do not have. Principles indicate the direction in which a case “should”, not “must” be solved – consequently, principles must be weighed against each other.

⁷ H.L.A. Hart, *The Concept of Law*, 2nd edn. With a Postscript edited by Penelope A. Bulloch and Joseph Raz (Oxford: Clarendon Press, 1994) [hereinafter: Hart, *CL*].

⁸ Ronald Dworkin, *Taking Rights Seriously*, 5th edn. (London 1977), p. 40. Dworkin’s attack on legal positivism in general, and on H.L.A. Hart in particular, was met, by Hart, in a postscript to the Second Edition of his major work, *The Concept of Law* (n. 7 above).

Following Dworkin's theory, legal principles cannot be identified by reference to their origin, or membership, in the system; rather, they are identified by their justification of the established rules: the validity of legal principles is established, Dworkin says, by their being part of the best-grounded legal theory that is able to justify the rules of positive law.

Thus, while Kelsen's and Hart's respective concepts of validity "fit" into Bulygin's classification, Dworkin's view of law, comprising both descriptive and prescriptive elements, is standing by itself.

2.2. Applicability

In establishing the validity of legal rules, one must take into account the issue of coextensivity: that a rule is considered valid does not always mean that it is applicable as well.

In Criminal Law, for instance, there are cases of "competing" offences where one of the (*prima facie* equally applicable) rules is not applied. Or within areas regulated by EC law, it may be the case that a national Competition Law, although principally applicable, is disregarded because there is a Council Regulation which has precedence before national law. In neither of these cases the national rule is considered to lose its validity – and yet, the rule is not applied.⁹

Thus, applicability is not identical with validity, nor has it necessarily to do with membership – on the contrary: "applicable" rules may stem from three different sources – namely: the national norm system, the legislative powers vested in international or supranational organisations, and the valid law of another state.

2.3. Legitimacy

The term "legitimacy" is used *vis-à-vis* legal systems as well as individual norms and can be understood and defined in different ways. The basic import of "legitimacy", however, is tied to the term "acceptance" – acceptance, that is, on the part of the norm addressees, of the norms, the institutions and the decisions taken by the legal organs.

Legal rules can be legitimized from the internal, legal point of view, which means that the source of the validity of the rules is established *within* the framework of a given norm system. Legal rules can also be legitimate in the sense of being justified – that is to say, justified from a point of view different from the internal, legal point of view mentioned above: in conceiving of given rules as legitimate, one falls back on certain ideas and values – such as, for example, the principle of democracy, or justice, or common interest.

⁹ However, while the (not applied) rule of Criminal Law is ignored in the case at hand but may be applied in a future case, the national Competition Law constitutes so-called "non-applicable law" and will be repealed in the course of time.

Why Grundnorm?

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