

1 Kelsen's Doctrine of the Basic Norm

INTRODUCTION

The expression “basic norm problematic” alludes to problems surrounding the question why – and how¹ – norms generally are valid. In the field of legal theory, the term “basic norm” (*Grundnorm*) refers to the source (*Grund*) of the validity of positive law.² According to Kelsen's legal theory, the objective validity of positive law is conditioned by presupposing the *Grundnorm* – something which jurists, as Kelsen affirms, do more or less unconsciously when thinking in legal terms.

There is no doubt as to Kelsen's purpose with his doctrine of the basic norm:³ this doctrine, he says, enables legal scientists to answer inquiries into the “*Grund*” of the validity of a positive-law constitution and the legal system resting upon it – in short, to reply to the question why a particular constitution (and, in continuation, a particular legal system) is conceived of as a system of valid and binding norms. The very presupposition of the *Grundnorm* enables us in the first place to speak of “valid law”.⁴

¹ “Why” is used both causally and normatively; in connection with the Pure Theory “why”, evidently, has normative import. In my view, the expression “why and how” renders, to a certain degree, the purely formal legitimacy of valid law.

² The idea of a *Grundnorm* qua source of the validity of positive law dates back to the end of the 18th century – more precisely, to the year 1797 when Kant's *Metaphysics of Morals* (commencing with a treatise on the philosophy of law) was published. According to Kant, it has to be conceived that there is a “[äussere] Gesetzgebung ..., die lauter positive Gesetze enthielte; alsdann aber müsste doch ein natürliches Gesetz vorausgehen, welches die Autorität des Gesetzgebers (d.i. die Befugnisse, durch seine blosser Willkür andere zu verbinden) begründete” (Immanuel Kant, *Die Metaphysik der Sitten*, Bd. VI. [Berlin: Akademieausgabe, 1907] p. 224; my emphasis). Thus, Kant – without, however, using the term “*Grundnorm*” – turns to the powers of the legislator: in his view, these powers are purely formally grounded in a “natural” norm – natural in the sense that the norm can be perceived (*erkannt*) *a priori* “durch die Vernunft” (*ibid.* p. 224); see Werner Krawietz, ‘Grundnorm’, in *Historisches Wörterbuch der Philosophie*, ed. Joachim Ritter, Vol. 3 [Basel/Stuttgart 1947], column 918).

³ See e.g. Kelsen, *Die Selbstbestimmung des Rechts* (n. 110 below) p. 1451.

⁴ By offering the doctrine of the basic norm, the Pure Theory, Kelsen contends, “merely makes conscious what most legal scientists do, at least unconsciously, when they understand the mentioned facts not as causally determined, but instead interpret their subjective meaning as objectively valid norms, that is, as a normative legal order, without basing the validity of this order upon a higher, meta-legal norm, that is, upon a norm enacted by

Legal theory distinguishes between the validity of legal norms and the justification (legitimation) of validity. In Kelsen's view, inquiring into the "*Grund*" of the validity of law is the same⁵ as asking why law is valid.

The answer offered by the doctrine of the basic norm is the following: The "*Grund*" of valid law is the basic norm – an ultimate and merely thought norm saying that the constitution (and the legal system resting upon it) ought to be observed – that they are valid and binding law. Or in other words: law is valid and binding because the basic norm says so (that is, if it is presupposed).⁶

Thus, the question "*why?*", for Kelsen, does not refer to any ultimate – moral or political – justification of valid law: rather, it is aimed at purely *formal* justification: The basic norm contents itself with saying that one "ought" to observe the constitution and the norms deriving from it – it does not say, *why* one ought to do so.⁷

Kelsen's basic norm has three distinct functions – an epistemic function,⁸ a (formally) legitimizing function,⁹ and a unifying function.¹⁰ Less clear is its status: is the *Grundnorm* merely a conceptual assumption, or is it a genuine, binding norm? and in this case, binding upon whom?¹¹

Kelsen himself has various names for the basic norm¹² – "*Ursprungsnorm*",¹³

an authority superior to the legal authority; in other words, when they consider as law exclusively positive law. 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" (PTL § 34(d) (pp.204–5) [RR 2, p. 209]).

⁵ "Das Recht *begründen*, bedeutet: den Grund der Geltung des Rechts angeben, die Frage beantworten: warum man den Normen einer positiven Rechtsordnung entsprechen soll" (Kelsen, *Die Selbstbestimmung des Rechts* [n. 110 below] p. 1445).

⁶ "Grund der Geltung, das ist die Antwort auf die Frage, warum die Normen dieser Rechtsordnung befolgt und angewendet werden sollen, ist die vorausgesetzte Grundnorm, derzufolge man einer tatsächlich gesetzten, im großen und ganzen wirksamen Verfassung und daher den gemäß dieser Verfassung tatsächlich gesetzten, im großen und ganzen wirksamen Normen entsprechen soll." (RR 2, § 34(g) (p. 219)). The English translation of this passage runs as follows: "The reason for the validity – that is, the answer to the question why the norms of this legal order ought to be obeyed and applied – is the presupposed basic norm" (PTL § 34(g) (p. 212)).

⁷ "The presupposition of the basic norm does not approve any value transcending positive law" (PTL § 34(d) (p. 201) [RR 2, p. 204]); cf. Robert Walter, *Der Aufbau der Rechtsordnung. Eine rechtstheoretische Untersuchung auf Grundlage der Reinen Rechtslehre* (Graz: Leykam Verlag, 1964), p. 14, note 11.

⁸ PTL § 34(i) (p. 218) [RR 2, pp. 224–5, 443–4].

⁹ PTL § 34(d) (p. 202) [RR 2, p. 205].

¹⁰ PTL § 34(a) (pp.193–5); § 34(e) (p. 205) [RR 2, pp. 196–7, 209].

¹¹ RR 2, pp. 208–9, note *). On the issue of the addressee(s) of the basic norm, see PART II, ch. 1, section 1.1.

¹² The enumeration above does not claim to be exhaustive.

¹³ See Hans Kelsen, *Das Problem der Souveränität* (Tübingen 1920, repr. Aalen 1981) [herein-after: *PS*], Foreword pp. VII–VIII; § 24, 98n, 100; § 26, p. 107 *et passim*; see also Hans Kelsen,

presupposed norm,¹⁴ presupposition,¹⁵ a norm included in a supposition,¹⁶ juristic hypothesis,¹⁷ ultimate hypothesis of positivism,¹⁸ ultimate (conditional or hypothetical) *Geltungsgrund* of a legal system,¹⁹ thought norm (that is, thought qua "*Voraussetzung*"),²⁰ genuine fiction,²¹ juridico-logical constitution,²² constitution in the transcendental-logical sense,²³ transcendental-logical and, at the same time, legal concept,²⁴ transcendental-logical condition of the interpretation

Allgemeine Staatslehre (Berlin: Julius Springer, 1925) [hereinafter: *ASL*], § 19(c) (p. 99); § 20(b) (p. 104).

¹⁴ See for example *PTL* § 34(a) (pp.194–5) [*RR* 2, p. 197].

¹⁵ "[the] reason for the validity of a norm is a presupposition, a norm presupposed to be an ultimately valid, that is, a basic norm" (Hans Kelsen, *General Theory of Law and State* [Cambridge, Mass.: Harvard University Press, 1945, repr. New York: Russell & Russell, 1961][hereinafter: *GT*], p. 111; see also Kelsen, *Die Selbstbestimmung des Rechts* [n. 110 below] p. 1451).

¹⁶ "The norm whose validity is stated in the major premise ... is included in the supposition that the norms, whose reason for validity is in question, originate from an authority" (*PTL* § 34(a) (p. 194; my emphasis)); "[ist] in der Voraussetzung inbegriffen, daß die Normen, deren Geltungsgrund in Frage steht, von einer Autorität ausgehen" (*RR* 2, p. 197); "[die] Grundnorm einer staatlichen Rechtsordnung [ist] – wie eine Analyse unserer juristischen Urteile zeigt – vorausgesetzt, wenn der in Frage stehende Akt als verfassunggebender Akt und die auf Grund dieser Verfassung gesetzten Akte als Rechts-akte gedeutet werden. Diese Voraussetzung festzustellen, ist eine wesentliche Funktion der Rechtswissenschaft. In dieser Voraussetzung liegt der letzte, aber seinem Wesen nach nur bedingte und in diesem Sinne hypothetische Geltungsgrund der Rechtsordnung" (*RR* 2, § 6(c) (p. 47; my emphasis).

¹⁷ See, for example, *GT* p. XV: "The pure theory of law ... seeks the basis of law – that is, the reason of its validity – not in a meta-juristic principle but in a juristic hypothesis – that is, a basic norm, to be established by a logical analysis of actual juristic thinking."

¹⁸ "The ultimate hypothesis of positivism is the norm authorizing the historically first legislator" (*GT* p. 116).

¹⁹ "This presupposition is the ultimate (but in its character conditional and therefore hypothetical) reason for the validity of the legal order." (*PTL* § 6(c) (p. 46) [*RR* 2, p. 47]).

²⁰ "[kann] sie [i.e. the basic norm] nur eine gedachte Norm sein, und zwar eine Norm, die als Voraussetzung gedacht wird, wenn eine im großen und ganzen wirksame Zwangsordnung als ein System gültiger Rechtsnormen gedeutet wird" (*RR* 2, § 34(d) (pp.207–8)). The expression "als Voraussetzung gedacht" is omitted in *PTL* (p. 204).

²¹ See Kelsen, *Die Funktion der Verfassung* (n. 126 below) at p. 1977; cf. Hans Kelsen, *Allgemeine Theorie der Normen*, ed. Kurt Ringhofer and Robert Walter (Vienna: Manz, 1979) [hereinafter: *ATN*], p. 206 f.; trans. Michael Hartney, *General Theory of Norms* (Oxford: Clarendon Press, 1991). I have used the German rendition.

²² *PTL* § 34(c) (p. 199) [*RR* 2, p. 202]; see also Hans Kelsen, 'Der Begriff der Rechtsordnung', in *Logique et Analyse, Nouvelle Série* (1958) pp. 155–67; repr. in *WRS II*, pp. 1395–1416, at p. 1399; I have used the latter rendition. .

²³ "The basic norm may be termed 'constitution in the transcendental-logical sense', as distinct from the constitution in the positive-legal sense. The latter is the constitution posited by human acts of will, whose validity is grounded by the presupposed basic norm" (Kelsen, *The Function of a Constitution* [n. 126 below] p. 118).

²⁴ See Kelsen, *Professor Stone and the Pure Theory of Law* (n. 161 below) p. 1148.

Why Grundnorm?

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