

3 Choice of Doctrine

Chapter One has shown that Kelsen's basic norm combines somehow the status of legal concept with that of genuine norm: according to Kelsen, the function of the *Grundnorm* consists in being *Erkenntnisvoraussetzung* as well as *Geltungsgrund* of positive law.

From Chapter Two, on the other hand, it has emerged that the Rule of Recognition – a duty-imposing rule, addressed to the judges – is a legal rule, containing the validity criteria for other rules. The Rule of Recognition is neither valid nor invalid as such but “exists” nevertheless, namely in the outcome of the social practices.

Hart's interest lies with the connection that obtains between, on the one hand, the source of the “quality of being valid law” and, on the other, social practices. Kelsen's doctrine of the basic norm, by contrast, is *not* related to this issue – a point that might explain why Hart and Kelsen failed to understand each other.¹

There are striking similarities between the Rule of Recognition and the *Grundnorm*.² To mention only a few: Both Rule of Recognition and basic norm are ultimate rules and constitute, as such, the “ground” of the validity of all the other rules of a positive legal system; both can be arrived at by climbing, as it were, the various levels of a *Stufenbau* in quest of this ground – in Hart's case, a hierarchy of validity criteria, in Kelsen's, a hierarchy of norms;³ both are devices in order to highlight the normative dimension of the law; and both purport to constitute a highest point of reference with respect to all the validity

¹ Cf. Pawlik, *Die Reine Rechtslehre* (I/2 n. 9) p. 160.

² This point was acknowledged by Hart himself (see Hart, *CL* p. 292).

³ Hart's views on the “ranking” of legal sources are somewhat elusive. Similar to Kelsen's *Stufenbau* of legal norms, Hart's hierarchy is a hierarchy of criteria: “where, as is usual, there are several criteria ranked in order of relative subordination and primacy one of them is supreme” (Hart, *CL* p. 105). Hart does not use the term “derogation”. It is obvious, however, that his hierarchy of criteria (mentioning “superior” and “subordinate”) is owing to certain rules having a derogating effect upon other rules. In Hart's view, it is here a question of “displacement”: if rules that have been identified with the help of a certain criterion are recognized as valid even if they conflict with other rules (identified by other criteria) – then the first validity criterion is “supreme” (*ibid.* p. 106). A comparison between Hart's and Kelsen's views on the issue of rank is advanced by Pawlik, *Die Reine Rechtslehre*, p. 113 ff.).

Hart's “hierarchy” of validity criteria has other shortcomings. Apart from the fact that this hierarchy is rudimentary compared with Kelsen's *Stufenbau*, the ultimate Rule of Recognition – more precisely: the instant of “recognition” – falls short of grasping *all* the rules that are considered as applicable and binding in a legal system. On Hart's hierarchy of validity criteria, see Pawlik, *Die Reine Rechtslehre* pp. 155–6 and note 40.

relations that obtain within a legal system – an “ultimate” point that holds together and brings to a close the (normative) system as a whole.⁴

However, there are also obvious differences between Rule of Recognition and basic norm – differences stemming from their authors’ highly different views of law.⁵

The differences become evident as soon as one inquires into “existence” and “content” of Hart’s ultimate rule. With Hart, these inquiries are of a purely empirical nature. To say that there “exists” an ultimate Rule of Recognition – that is, in a specific legal system, and at a given time – implies two things: first, that the “officials” actually apply the validity criteria contained in the Rule of Recognition and, second, that most of the officials accept this rule, from an internal point of view, as “a public, common standard of correct judicial decision”⁶ – which, according to Hart, gives rise to fully normative statements.

The ultimate Rule of Recognition, then, can be said to exist thanks to the observable practices of those who apply the law – especially the courts. This existence is, as Hart puts it, a question of (social) fact – fact in the sense of constituting the outcome of these practices. It is a kind of existence that becomes evident by the manner in which the officials identify certain rules as valid law.

Hart’s Rule of Recognition contains the criteria for “valid law” that are relevant in a concrete legal system; or in other words: the rule sets out the specific conditions that must be satisfied in order for a rule to count as a “member” of the system in question. Thus, ultimate rules of recognition, existing in different legal systems, may considerably vary in content.⁷

What Hart’s Rule of Recognition actually achieves, is a separation between the legal relevance of single rules and their – factual – acceptance by the participants in a given legal system. Rules are not valid legal rules of this system thanks to their acceptance but, rather, thanks to the circumstance that their quality of being valid law can be traced back, objectively, to established criteria for that which counts as “valid” within this system.

The Rule of Recognition is a matter of social fact, and this fact – the acceptance, as a standard, from the internal point of view – explains why it can “exist” although it is not valid in itself: “acceptance” is seen to imply “existence” – and the latter, for Hart, serves as the reason why *other* rules can be considered valid.

⁴ Pawlik very aptly speaks of a “‘Schlußstein’ eines Gewölbes” (*ibid.* pp. 150–1).

⁵ On this issue, see Paulson, *Continental Normativism* (I/1 n. 67). Paulson shows that Hart’s alternative to the reductive view of law is not a case of Kelsen’s (continental) normativism but, rather, *another* fact-based theory of law: the difference lies merely in the nature of facts (see *ibid.* pp. 239–41).

⁶ Hart, *CL* p. 116.

⁷ The *Grundnorm*, by contrast, is entirely devoid of content. In so far as it is at all admissible to speak of “content”, the basic norm, as Kelsen puts it, contains nothing except “the determination of a norm-creating fact, the authorization of a norm-creating authority”. Although formulated as a norm of action, the basic norm can, therefore, also be understood as a (hypothetical) competence norm (*PTL* § 34(b) (p. 196) [*RR* 2, p. 199]).

Thus, Hart “grounds” the legal relevance of individual rules by simply tracing back their validity to certain established criteria, contained in the Rule of Recognition.

However, to accept a rule the existence of which shows in a certain common practice and to “recognize” it as binding means, to take the step from the factual (that is, the existence of certain practices) to the normative – namely, that one “ought” to follow these practices.

What is more: even if we should agree that the authority of the Rule of Recognition depends on its being accepted by the “officials” – what about the rules that are subordinate to the Rule of Recognition? According to Hart, the valid rules of a legal system are valid according to the criteria contained in the Rule of Recognition. Thus, what happens is, that the authority of the latter is simply transferred to a large amount of rules the legal relevance of which depends on their being valid *according to* the former.

Here we face the problem with Hart’s doctrine: the Rule of Recognition does not allow for the “bindingness” of law to be transmitted from the observable practices of legal organs to the other rules of the system. Hart’s views on validity do not comprise the descent of normative force; rather, they make a halt at the notion of “criterion of validity” (*qua* test of membership). The “complex social practice” in Hart’s theory, tying the ultimate rules of a legal system to social reality, does indeed succeed in establishing the membership of certain – by no means all⁸ – rules in this system; it does not, however, succeed in transmitting the binding force of law from one norm to another. For Hart, there is no difference between the role of legislative acts and that of social practice.

Turning to Kelsen: Kelsen emphasized that the relation between the ultimate rules of a system and their sources is different from the relation between ordinary rules and their sources. The basic norm purports to endow the norms of the constitution with the quality of law in the same way as statutes and administrative acts endow “lower” norms with this quality – namely, *via* interpretation (*Deutung*) on the basis of a higher-level norm. In view of Kelsen’s idea of the nature of legal normativity, that which is achieved, by constitution and statutes, within the legal system, the basic norm achieves for the legal system as a whole, namely, the transformation of subjective will into objective meaning – or of power into law.

What the “complex social practice” fails to accomplish in Hart’s doctrine – namely, to endow the fundamental rules of the legal system with binding force – is accomplished, in Kelsen’s theory, by a conferral: it is the purported function of the basic norm to confer validity on the positive law and on nothing else (that is, given the “purity” of the Pure Theory).

Investigating into the source of legitimacy (that is, legitimacy from the internal, legal point of view), I cannot see that Hart’s doctrine of the “Rule of Recognition”

⁸ Hart’s criterion of “membership” is too narrow to grasp non-original but nevertheless applicable rules (cf. I/2, subsection 2.1.3 above).

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Why Grundnorm?

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