

Kelsen and Hart on the Normativity of Law

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our reason and which confers binding force on positive law, if and insofar as the latter is in keeping with the former. More specifically, natural law theory asserts (i) that there is a conceptual connection between law and morality, and (ii) that moral values and standards exist independently of people's beliefs and attitudes.³ On this analysis, the moral authority of law is part of the concept of law, and the thesis that an unjust law cannot be legally valid, i.e., cannot be a law at all (*lex injusta non est lex*), turns out to be a *corollary* to (i).

Legal positivism is a *general* and *descriptive* theory of law of the type advanced by scholars like John Austin,⁴ Hans Kelsen,⁵ Alf Ross,⁶ H. L. A. Hart,⁷ Joseph Raz,⁸ and Neil MacCormick & Ota Weinberger,⁹ not a theory telling the judge how he should decide hard cases or when civil disobedience is justified.¹⁰ Underlying, though neither entailing nor entailed by, legal positivism is meta-ethical *noncognitivism*, according to which moral claims have no cognitive meaning.¹¹ Legal positivism thus conceived could perhaps be described as a *meta-theory*, a theory *about* theories of law, because it aims to lay down requirements that any adequate theory of law must meet.¹² Since legal positivists usually exclude from the study of law questions concerning the moral value of law, they tend to describe law in terms of formal features, saying for example that it is a "specific social technique of a coercive order."¹³

Now the problem about the normativity of law, as I have said, concerns the nature of the *legal ought* or law's *normative force*, or, if you will, the nature of *legal reasons for action*. Philosophers tend to conceive of normativity in general as that which is common to the normative (right, wrong, duty) and the evaluative (good, bad) in regard to theoretical as well as practical questions.¹⁴ We are not concerned with normativity in general, however, but with *legal* normativity; and I take legal normativity to be stronger than other types of normativity – ex-

³ See, e.g., Aquinas, Thomas, *Summa Theologiae* (R. J. Henle ed.) 1993, Q 90, Art. 2, C. & Art. 4, C.; A. P. d'Entrèves, *Natural Law*, London 1951, p. 85; Moore, Michael S., *Law as a Functional Kind*, in *Natural Law Theory* (Robert P. George ed.) Oxford 1992, p. 189-92; Radbruch, Gustav, *Rechtsphilosophie*, 7th ed., Stuttgart 1950, p. 353.

⁴ Austin, John, *The Province of Jurisprudence Determined*, Indianapolis/Cambridge 1954.

⁵ Kelsen, Hans, *General Theory of Law and State*, Cambridge, Massachusetts 1945; Kelsen, Hans, *Reine Rechtslehre*, 2d. ed., Wien 1992 [1960].

⁶ Ross, Alf, *On Law and Justice*, Berkeley & Los Angeles 1959.

⁷ Hart, H. L. A., *The Concept of Law*, Oxford 1961; Hart, H. L. A., *Essays on Bentham*, Oxford 1982.

⁸ Raz, Joseph, *The Authority of Law*, Oxford 1979, Ch. 3; Raz, Joseph, *Authority, Law and Morality*, *The Monist* Vol. 68 1985, p. 295-324.

⁹ MacCormick, Neil & Weinberger, Ota, *An Institutional Theory of Law*, Dordrecht 1986.

¹⁰ See also Gardner, John, *Legal Positivism: 5^{1/2} Myths*, in *American Journal of Jurisprudence* Vol. 46 2001, p. 199 and Hartney, Michael, *Dyzenhaus on Positivism and Judicial Obligation*, in *Ratio Juris* Vol. 7 1994, p. 48-51.

¹¹ See MacCormick, Neil, *Legal Reasoning and Legal Theory*, 2d. ed., Oxford 1994, p. 5; Kelsen *GTLS*, *supra* note 5, p. 13-14.

¹² See Raz, *AL*, *supra* note 8, p. 39.

¹³ Kelsen *GTLS*, *supra* note 5, p. 19.

¹⁴ See Dancy, Jonathan, *Editor's Introduction*, *Normativity* (Jonathan Dancy ed.) Oxford 2001, p. 1.

erkenntnistheoretische Antwort der Reinen Rechtslehre lautet: unter der Bedingung, daß man die Grundnorm voraussetzt.⁶¹

This characterization makes it clear that the act of presupposing the basic norm is really an *act of cognition*, not an act of volition, and that therefore the basic norm is the meaning of an act of *thinking*, not the meaning of an act of will.⁶² It is also in keeping with Kelsen's view that anyone interested in conceiving of the law as a system of valid norms – judges, lawyers, legal scholars, ordinary citizens – *may but does not have to* presuppose the basic norm:

Die Grundnorm kann, muß aber nicht vorausgesetzt werden. Was die Ethik und Rechtswissenschaft von ihr aussagt ist: Nur *wenn* sie vorausgesetzt wird, kann der subjektive Sinn der auf das Verhalten anderer gerichteten Willensakte auch als ihr objektiver Sinn, können diese Sinngehalte als verbindliche Moral- oder Rechtsnormen gedeutet werden. Da diese Deutung durch die Voraussetzung der Grundnorm bedingt ist, muß zugegeben werden, daß Soll-Sätze nur in diesem *bedingten* Sinne als objektiv gültige Moral- oder Rechtsnormen gedeutet werden können.⁶³

3.3 The Basic Norm as Fiction

After years of referring to the basic norm as a *hypothesis*,⁶⁴ Kelsen changed his mind in the beginning of the 1960's, suggesting instead that we think of it as a *fiction* as that concept is understood in Hans Vaihinger's *Philosophy of As-If*.⁶⁵ Having maintained for a long time that the basic norm is really the meaning of an act of thinking, Kelsen now emphasizes that there is an important correlation between will (*Wollen*) and ought (*Sollen*), that there can be no norm without a corresponding act of will.⁶⁶ Accordingly, he explains that presupposing the basic norm involves presupposing an imaginary authority, over and above the "fathers" of the historically first constitution, whose act of will has the basic norm as its meaning.⁶⁷ But, he points out, this means that the notion of the basic norm *contains a contradiction within itself*, as it involves presupposing the existence of an authority that *could not possibly exist*.⁶⁸

Kelsen concludes that the basic norm is best described as a genuine fiction in the Vaihingerian sense. Following Vaihinger, he conceives of a fiction as an *aid to thought* (*ein Denkbehelf*) to be used when one cannot reach one's aim of

⁶¹ Kelsen *RR II*, *supra* note 5, p. 205.

⁶² *Id.* p. 205-6.

⁶³ Kelsen, Hans, *Allgemeine Theorie der Normen* (Kurt Ringhofer & Robert Walter, eds.) Wien 1979, p. 206. *See also* Kelsen *RR II*, *supra* note 5, p. 223-4.

⁶⁴ *See, e.g.*, Kelsen, *GTLS*, *supra* note 5, p. 116.

⁶⁵ Kelsen, Hans, *Die Funktion der Verfassung*, (Neues) Forum Vol. 132 1964, p. 585; Kelsen, *On the Pure Theory*, *supra* note 32, p. 6-7; Kelsen, *ATN*, *supra* note 63, p. 206-7. *See also* Vaihinger, Hans, *Die Philosophie des Als Ob* (4th. ed.) 1920.

⁶⁶ Kelsen, *Verfassung*, *supra* note 65, p. 585.

⁶⁷ *Id.* p. 585.

⁶⁸ *Id.* p. 585.