Kelsen Revisited

New Essays on the Pure Theory of Law

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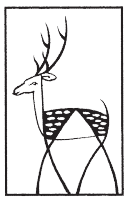

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The Basic Norm Revisited

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I. THE BASIC NORM *QUA* NORM

A. Kelsen's Views

In the first edition of the *Reine Rechtslehre* (1934), every legal norm is, roughly speaking, a command.[1] In the second *Reine Rechtslehre* (1960), Kelsen distinguishes between commands, permissions and empowerments.[2] Finally, in the posthumous *Allgemeine Theorie der Normen* (1979), Kelsen further distinguishes four kinds of norms – commands, permissions, power-conferring (or 'empowering') norms and derogatory norms.[3]

I assume that this distinction of kinds of norms tracks differences in content and/or logical status. Thus commands and permissions both bear upon actions (or states of affairs brought about by actions), but ascribe different deontic statuses; derogatory norms bear, not upon actions, but upon (other) norms; commands and power-conferring norms can be mapped onto Hohfeldian modalities of a different sort (duty and power, respectively);[4] and so on.

Now, in the light of Kelsen's typology, what kind of norm is the basic norm of a positive legal system? In particular: is it a command (ie a deontic norm of conduct) or a power-conferring norm (a 'norm of competence', as it is also

[1] *cf* H Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the* Reine Rechtslehre *or Pure Theory of Law*, BL Paulson and SL Paulson transl (Oxford, Clarendon Press, 1992 [1934]) 22ff, 43ff.

[2] *cf* H Kelsen, *The Pure Theory of Law*, 2nd edn, M Knight transl (Berkeley, University of California Press, 1967 [1960]) 4–5, 15ff.

[3] *cf* General *Theory of Norms*, M Hartney transl (Oxford, Clarendon Press 1991 [1979]) 96ff; and see also 'Derogation' in H Kelsen, *Essays in Legal and Moral Philosophy* (Dordrecht, Reidel, 1973). All such norms, however, are understood by Kelsen as expressions of what 'ought' (or 'ought not') to be the case – in a very wide sense of 'ought'. See also N Bobbio, '"Sein" and "Sollen" in Legal Science' (1970) 61 *Archiv für Rechts- und Sozialphilosophie* 7ff.

[4] *cf* WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' in WW Cook (ed), *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven, Yale University Press, 1919) 23ff.

sometimes called[5])? There is in Kelsen's works, as far as I can see, no straightforward answer to this simple question.[6]

In the first *Reine Rechtslehre*, the basic norm is characterised as a norm 'delegating lawmaking authority',[7] the norm 'according to which the norms of the legal system are created'.[8] Nevertheless, Kelsen also provides a different – deontic – 'schematic formulation': 'Coercion is [ie ought] to be applied . . . as determined by the framers of the first constitution or by the authorities to whom they have delegated appropriate powers'.[9] Accordingly, he also states that 'the basic norm confers on the act of the first legislator . . . the sense of "ought"'.[10] The basic norm, hence, seems to have a mixed character – half conferring normative powers, half commanding (viz. commanding obedience to whatever further commands are issued by the organ to which the normative power is being conferred).

In the *General Theory of Law and State* (1945), Kelsen's mixed attitude is even clearer. On the one hand, Kelsen says that '[t]he basic norm merely establishes a certain authority, which may well in turn vest norm-creating power in some other authorities';[11] that the basic norm 'confers legal authority';[12] that its 'whole function' is 'to confer law-creating power on the act of the first legislator and on all the other acts based on the first act'.[13] On the other hand, however, when trying to articulate an explicit formulation of the norm at stake, Kelsen offers the following: 'One ought to behave as the individual, or the individuals, who laid down the first constitution have ordained'.[14] Once more, the basic norm appears to hang in the balance between an imperative or command and a power-conferring norm. It seems that, according to Kelsen, to attribute to some agent the power of issuing commands is tantamount to commanding (someone else) to obey or apply the commands issued by that agent.

[5] See GH von Wright, *Norm and Action. A Logical Enquiry* (London, Routledge & Kegan Paul, 1963) 192ff, or E Bulygin, 'On Norms of Competence' (1990) 11 *Law and Philosophy* 201–16.

[6] In 'Beyond the Basic Norm' in R Vázquez (ed), *Filosofia Jurídica. Ensayos en Homenaje a Ulises Schmill* (Mexico, Porrúa/UNAM, 2005), Stanley Paulson lists 10 Kelsenian 'formulations' of the basic norm. However, not all of them are, strictly speaking, 'formulations' *of* the basic norm; most are statements concerning its function and/or its status within the legal system. 'The basic norm *qua* ultimate basis of legal validity', for example, or 'the basic norm *qua* constitution in the juridical-logical sense', say nothing about the basic norm's 'formulation', strictly understood.

[7] Kelsen, *Introduction* (n 1) 59.

[8] ibid 56.

[9] ibid 57. Observe that, according to this formulation, the basic norm is addressed, not to legal subjects, but to legal officials (viz. those who 'apply' coercion).

[10] ibid 58.

[11] H Kelsen, *General Theory of Law and State*, A Wedberg transl (Cambridge, Mass., Harvard University Press, 1945) 113.

[12] ibid 120.

[13] ibid 116.

[14] ibid 115. Observe that, according to this new formulation, the basic norm is addressed, not to legal officials, but to legal subjects.

In the second *Reine Rechtslehre*, Kelsen repeats that 'the presupposed basic norm contains nothing but the determination of a norm-creating fact, the authorization of a norm-creating authority'.[15] As to its formulation, nonetheless, the basic norm looks definitely deontic: 'Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution . . . prescribes. (In short: One ought to behave as the constitution prescribes.)'.[16]

In the *Allgemeine Theorie der Normen*, the basic norm once again exhibits its seemingly double nature. It 'empowers the individual or individuals who posited the historically first constitution to posit the norms which represent the historically first constitution;' as a consequence, 'one has [ie ought] to behave as the historically first constitution prescribes'.[17] In this late work, however, Kelsen does not suggest, as he (implicitly) had in previous works, that empowering is somehow identical or equivalent to (indirectly) commanding. Referring to empowering and commanding as two different normative 'functions',[18] he adds that when the power at stake is 'that of *positing norms*' (and thus, in the last analysis, the power of issuing commands), then 'empowering can *imply* a command'.[19] Thus 'by empowering the legislative organ to enact statutes *binding* on those subject to the law, the constitution . . . thereby makes the statutes he [the legislator] enacts *binding* on the subjects of the law'; such subjects are therefore 'commanded by the constitution to comply with the statutes'.[20] Nonetheless, Kelsen stresses that in these cases we have one and the same norm performing 'two different functions concerning two different subjects': it 'decrees (1) that the legislative organ can posit norms, and (2) that people whose behaviour is regulated by these norms are to comply with them'.[21]

In summary, Kelsen's basic norm appears to have a puzzling mixed nature. It both confers constituent power to the framers of the historically first constitution, and commands people to comply with the commands issued by such framers.[22]

[15] Kelsen, *The Pure Theory of Law* (n 2) 196.

[16] ibid 201. Observe that, according to this last formulation, the basic norm is addressed – once more – not to legal subjects, but to legal officials.

[17] Kelsen, *General Theory of Norms* (n 3) 255.

[18] ibid 96ff, and 103.

[19] ibid 103.

[20] ibid 104.

[21] ibid.

[22] *cf* J Raz, 'Kelsen's Theory of the Basic Norm' in *The Authority of Law. Essays on Law and Morality* (Oxford, Clarendon Press, 1979 [1974]) 126: 'The basic norm is power-conferring law. Kelsen, however, formulates it as duty-imposing'.

B. Discussion

Let us isolate for discussion three slightly different tenets which on the basis of the previous survey we can now ascribe to Kelsen:

1. To attribute to some agent the power of issuing commands, and to command that the (further) commands issued by that agent be obeyed or applied, *amount to the same*: these are just two different ways in which the same (basic) norm can be formulated.
2. The attribution to some agent of the power of issuing commands *implies* the command that the (further) commands issued by that agent be obeyed or applied (and perhaps vice versa).
3. The basic norm simultaneously decrees *both* that the framers of the historically first constitution are authorised to posit norms *and* that legal subjects ought to comply with such norms.

i. The First Tenet

The first tenet is implausible. It seems evident that an authorisation and a command – although somehow connected – amount to two different norms. They have different contents, different objects, different addressees, and map onto different Hohfeldian modalities:

1. Different contents (different 'phrastics', in Hare's terms[23]): the *issuance* of (further) norms, in the case of authorisation; *compliance* with (future) norms (to be enacted by the authorised agent), in the case of command.
2. Different objects: the authorisation bears upon (future) normative *acts*;[24] the command, in turn, is a blanket meta-norm bearing upon compliance with (future) *norms*.
3. Different addressees: the authorisation is addressed to the *framers* of the first constitution; the command, to legal *subjects* and/or *law-applying organs*.
4. Different Hohfeldian modalities: *power* and *duty*, respectively.[25]

ii. The Second Tenet

Can it nevertheless be maintained that the command, though not directly *expressed*, is *implied* in the authorisation, as Kelsen's second tenet suggests? The answer depends on the kind of implication one has in mind.

[23] RM Hare, *The Language of Morals* (Oxford, Oxford University Press, 1952) 17ff.

[24] By a 'normative act' I mean an act of issuing norms.

[25] Power-conferring norms, however, can also be understood as permissions: see von Wright, *Norm and Action* (n 5) 192. If one accepts this view, then one should say that authorisation and command map onto different *deontic* modalities.

a. Pragmatic Implication

If understood by reference to some sort of 'pragmatic implication' (a Gricean 'implicature',[26] perhaps), the thesis seems sound. It seems a matter of course that the point of authorising someone to issue commands is to make such future commands binding on their addressees.[27]

This is only true, however, under certain conditions concerning the actual formulation of the norms at stake. Take, for example, articles 54 and 70 of the Italian constitution. Article 54 provides that 'All citizens have the duty to . . . comply with the constitution and the statutes'. Article 70, in turn, stipulates that 'Legislative [ie statute-making] power is exercised jointly by the Chambers'. It is not fully clear that one could plausibly maintain that article 70 'implies' – in some unspecified 'pragmatic' way – article 54, ie that this particular authorisation implies this particular command. At any rate, the opposite is certainly not true. The command to comply with statutes does not by itself imply any particular authorisation; and indeed amounts to nothing unless statute-making power is conferred to some definite state organ by a further norm. Article 54, arguably superfluous in view of article 70, would be empty and pointless if left unaccompanied.

b. Logical Entailment

If, on the contrary, the 'implication' in Kelsen's second tenet is understood in terms of logical entailment, the underlying argument would run, it seems, along the following lines:

1. The framers of the first historical constitution are authorised to issue commands (or norms).
2. Validity is the characteristic property (the 'specific existence') of authorised commands (or norms).[28]
3. The commands (norms) issued by the framers of the first historical constitution are valid.
4. Validity is (or entails) binding force.[29]
5. The commands (norms) of the framers of the first historical constitution are binding.
6. 'Binding' means 'obligatory'.[30]
7. The commands (norms) of the framers of the first historical constitution are obligatory, ie they ought to be obeyed.

[26] See P Grice, 'Logic and Conversation' in his *Studies in the Way of Words* (Cambridge, Mass., Harvard University Press, 1989).

[27] This seems to be Alf Ross's suggestion in *On Law and Justice* (London, Stevens & Sons, 1958) 32.

[28] *The Pure Theory of Law* (2) 10.

[29] ibid 193.

[30] ibid.

The conclusion actually follows from the premises. The key premise of this argument, however, is premise 4: the highly disputable statement of equivalence (or entailment) between validity and binding force. This is in fact one of the central theses of the Pure Theory of Law.[31] And without it, the conclusion no longer follows. We can agree that authorisation is a necessary and perhaps even a sufficient condition of validity (whatever 'validity' may exactly mean); but if 'valid' does not entail 'obligatory', the fact that a command is authorised, and thus valid, does not entail it is obligatory to obey it.

There are good and well-known reasons to reject premise 4. The equation of validity and binding force amounts to the statement that there is a general obligation to obey the law. But, first, such an obligation cannot be a *legal* one. This is so for plain logical reasons. The sentence 'The law ought to be obeyed' takes as its object *the law as a whole*. So that sentence does not belong to the language of law itself; it belongs to a second-order language *about* the law. It follows that the putative obligation to obey the law cannot be a *legal* obligation; it can only be a meta-legal, and thus non-legal, obligation: viz. a moral or political obligation.

Second, the statement that there is a moral or political obligation to obey the law is incompatible with the purely cognitive enterprise of methodological positivism, which Kelsen himself espoused. Legal cognition can certainly not command obedience to positive law;[32] that much is a plain consequence of Hume's law. The statement that there is a moral or political obligation to obey the law is to be understood as a piece of 'ideological positivism' instead.[33]

[31] For discussion, see B Celano, 'Validity as Disquotation' in P Comanducci and R Guastini (eds), *Analisi e Diritto* 1999. Ricerche di Giurisprudenza Analitica (Turin, Giappichelli, 2000) 35–77; B Celano, *La Teoria del Diritto di Hans Kelsen. Una Introduzione Critica* (Bologna, Il Mulino, 1999) 291ff; and B Celano, 'Cuatro Temas Kelsenianos' in PE Navarro and MC Redondo (eds), *La Relevancia del Derecho. Ensayos de Filosofía Jurídica, Moral, y Política* (Barcelona, Gedisa, 2002) 153–84.

[32] Even though this seems to be precisely what the conceptual framework of the Pure Theory seems (inconsistently) to require: see B Celano, 'Kelsen's Concept of the Authority of Law' (2000) 19 *Law and Philosophy* 173–99, esp 188.

[33] I use Norberto Bobbio's familiar distinction between (a) methodological positivism, understood as the neutral description of the law in force; (b) theoretical positivism, understood as a set of substantive theses about the law (such as the thesis that law is imperative, coercive, etc); and (c) ideological positivism, understood as the thesis that there is a general obligation to obey the law. See N Bobbio, 'Sur le Positivisme Juridique' in *Mélanges en l'Honneur de Paul Roubier*, vol 1 (Paris, Dalloz-Sirey, 1961) 53ff; as well as his *Il Positivismo Giuridico* (Turin, Giappichelli, 1996 [1961]). On ideological positivism (which he calls 'quasi-positivism'), see A Ross, 'Validity and the Conflict between Legal Positivism and Natural Law' in SL Paulson and BL Paulson (eds), *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (Oxford, Clarendon Press, 1998 [1961]) 147–63, esp §VI; and *cf* also Raz, 'Kelsen's Theory of the Basic Norm' (n 22) 144: Kelsen 'uses the natural law concept of normativity, ie the concept of justified normativity'.

iii. The Third Tenet

Kelsen's third tenet, taken literally, cannot be accepted; it is hard to see how one and the same norm could both authorise someone and command someone else.

Can this tenet be non-literally construed instead as the claim that one and the same normative *sentence* – the so-called basic 'norm' – simultaneously expresses *two* different norms: (1) an authorisation and (2) a command? Well, there is certainly nothing peculiar about the idea that one single sentence can express a plurality of norms. Think, for example, of a constitutional provision stipulating that 'All citizens are equal before the law, without regard to their sex, race, language, religion, and political opinions'. Under what seems to be the natural way of interpreting such a provision, it expresses not one, but five norms: 'Discrimination on the grounds of sex is prohibited'; 'Discrimination on the grounds of race is prohibited'; 'Discrimination on the grounds of language is prohibited'; and so on.

Kelsen, however, would not accept this non-literal construction of his tenet. He clearly thinks of his basic 'norm' as a *norm* – and indeed as *one* norm – rather than as a *sentence* expressing a plurality of norms.

My unsurprising conclusion: Kelsen had no definite, coherent view about the nature – the content and logical status – of the basic norm.

II. THE BASIC NORM *QUA* BASIC

Within the Pure Theory of Law, and because of Kelsen's well-known conflation of a norm's (a) existence, (b) binding force and (c) validity, the basic norm is a conceptual necessity.

'By the word "validity" ' – says Kelsen – 'we designate the specific existence of a norm';[34] and to say 'a norm is "valid" ' means 'that it is binding',[35] ie 'that it *ought* to be obeyed and applied'.[36] Existence being no predicate, Kelsen's equivalence entails that he takes validity and binding force to be definitional features of 'norm'. A non-existent norm is not a norm at all. Hence, according to Kelsen, since existence is the same as validity, an invalid norm is not a norm; and since validity is the same as binding force, a non-binding norm is not a norm.[37] By the same token, his doctrine that validity depends on authorisation

[34] Kelsen, *The Pure Theory of Law* (n 2) 10.

[35] ibid 193.

[36] ibid 10f.

[37] Kelsen's stipulations, of course, are seriously at odds with ordinary legal discourse. In ordinary discourse we do not take the phrases 'valid norm' or 'binding norm' to be redundant, nor do we take 'invalid norm' or 'non-binding norm' to be self-contradictory. In other words, we treat validity and binding force as contingent properties – rather than definitional features – of norms.

by a higher norm is equivalent to the doctrine that existence, and thus also binding force, depends on authorisation by a higher norm.[38]

Because he cannot accommodate the idea of an invalid norm – which is for him a contradiction in terms – Kelsen is forced to search for a reason for the validity (and thus for a higher, authorising norm) of any existent norm. When faced with the historically first constitution, therefore, he has but two possibilities. He must either (a) deny its validity, binding force and existence – which would be a rather odd move, given that, from the standpoint of the Pure Theory, the entire legal system would lose its validity, binding force and existence; or (b) postulate a meta-constitutional (and thus non-positive) norm which confers validity, binding force and existence to the constitution and to the entire legal system.

The postulation of this 'basic' meta-constitutional, non-positive norm is nevertheless subject to two main criticisms.

A. Needless Reduplication

As Hart pointed out, the basic norm is a 'needless reduplication' of the (first) constitution:

> If a constitution specifying the various sources of law is a living reality . . . then the constitution is accepted and actually exists. It seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who 'laid it down') are to be obeyed.[39]

The charge of reduplication is grounded on the fact the basic norm and the (first) constitution share two distinctive features: both are effective; and both are non-valid,[40] their validity being merely presupposed. It is true that unless the basic norm is presupposed, the constitution cannot be *said* to be 'valid', given that validity admittedly depends on authorisation by a higher norm, and that there simply is no higher positive norm authorising the issuance of the constitution. As a matter of course, however, the basic norm itself is also non-valid: were it valid, there would be no need of presupposing its validity.

There is nothing surprising in the non-validity of the constitution. It is logically impossible for all the norms of a legal system to be valid. The ultimate,

[38] cp Raz, 'Kelsen's Theory of the Basic Norm' (22) 132: 'The basic norm is necessarily presupposed when people regard the law as normative'.

[39] HLA Hart, *The Concept of Law*, 3rd edn (Oxford, Oxford University Press, 2012 [1961]) 293.

[40] I use 'non-valid' (instead of 'invalid') because it can be argued that both validity and invalidity are norm-relative concepts, ie that a norm is valid or invalid 'relative to another norm permitting its issuing'; as a consequence, strictly speaking, the supreme (or 'sovereign') norm of a normative system is *neither* valid *nor* invalid: *cf* von Wright, *Norm and Action* (n 5) 196, 199. See also R Caracciolo, *El Sistema Jurídico. Problemas Actuales* (Madrid, Centro de Estudios Constitucionales, 1988) 31ff.

supreme norm of the system cannot itself be valid; indeed it makes no sense to ask about its validity (or invalidity) at all.[41] The entire system, in other words, must necessarily rest upon a non-valid norm.

But then, if the very basis of the legal system cannot but be an effective, non-valid norm, why should one need this idea of a presupposition of a non-positive norm beyond the constitution – instead of just admitting that the positive constitution itself is non-valid? Why not plainly acknowledge that the constitution – a positive norm (or set of norms) whose binding force[42] is simply assumed in virtue of its effectiveness – is *the* basic, supreme norm of the system? It is 'basic', to echo Kelsen himself, 'because nothing further can be asked about the reason for its validity'.[43]

B. Paradoxical Consequence

The historically first constitution is the product of the so-called 'constituent power' (Sieyès's '*pouvoir constituant*'). By definition, constituent power – in opposition to 'constituted powers' such as the legislative power – is neither conferred nor regulated by any previous (or 'higher') norm. It is *extra ordinem* power: it is, in other words, de facto, non-legal, power. This is why the (first) constitution is necessarily non-valid. It does not rest on any previous ('higher') authorisation.

Now, the presupposition of the basic norm – understood as a norm which empowers the framers of the historically first constitution[44] – has the paradoxical result of turning the constituent power into a constituted one. Given that, under the basic norm, the framers of the historically first constitution enjoy a *legal* (legally 'constituted') power – the norm-creating power conferred by the basic norm – constituent power is converted into a legally conferred, de jure power.

In the posthumous *Allgemeine Theorie der Normen*, Kelsen seems eventually to be aware of this paradox. He states – indeed he 'confesses'[45] – that the basic

[41] *cf* Hart, *The Concept of Law* (n 39) 108ff, though Hart is discussing the 'rule of recognition' rather than the constitution.

[42] *Pace* Kelsen, binding force is not to be conflated with validity; authorisation by a higher norm entails no obligation to obey.

[43] *General Theory of Norms* (n 3) 255.

[44] *cf* H Kelsen, 'The Function of a Constitution' in R Tur and W Twining (eds), *Essays on Kelsen*, I Stewart transl (Oxford, Clarendon Press, 1986 [1964]) 112ff, esp 114f: 'If the historically first constitution was laid down by a resolution of an assembly, the basic norm authorizes the individuals forming that assembly; if the historically first constitution arose by way of custom, the basic norm authorizes this custom – or, more correctly, authorizes the individuals whose conduct forms the custom giving rise to the historically first constitution'.

[45] The verb is used by Kelsen in the following passage: 'In my earlier writings . . . I represented my entire doctrine of the basic norm as a norm that is not the meaning of an act of will but, rather, that is presupposed in thought. Now I must unfortunately confess to you, gentlemen, that I can no longer

norm, a 'merely thought norm', is a 'fictitious' norm (ie one 'contrary to reality'), and that it is 'self-contradictory, since it represents the empowering of an ultimate . . . legal authority and so emanates from an authority – admittedly, a fictitious authority – even higher than this one'.[46]

III. FROM FOUNDATION TO RECOGNITION

The basic norm is meant to provide the normative foundation of the legal system; it is supposed to be its ultimate, supreme norm. Our discussion of the 'needless reduplication' and the 'paradoxical consequence' worries, however, suggests that the problem of the ultimate *normative* foundation of a legal system is simply a false problem. The basis of a legal system is simply its (historically first) constitution. No further 'foundation' is required.

But in giving up the basic norm a different problem is now left open: the problem of the identification of each legal system as such. This is not the same as the foundational problem which we have just discussed. The latter is the problem of determining the ultimate norm of a system; the former is the problem of determining the *identity* of each system: the problem, in other words, of identifying which norms belong to it.

This is the problem that Hart seeks to address in *The Concept of Law* by means of his doctrine of the 'rule of recognition': a rule which, 'providing criteria for the *identification* of other rules of the system',[47] is seemingly meant to differentiate any one system from another. Unfortunately, Hart's solution is unpersuasive. Here is why.

That Kelsen's basic norm amounts to a 'needless reduplication' is 'particularly clear', Hart writes,

> where, as in the United Kingdom, there is no written constitution: here there seems to be no place for the rule 'that the constitution is to be obeyed' in addition to the rule that certain criteria of validity (e.g. enactment by the Queen in Parliament) are to be used in identifying the law. This is the accepted rule and it is mystifying to speak of a rule that this rule be obeyed.[48]

maintain this doctrine. I have to give it up' (H Kelsen, 'Diskussionsbeitrag' (1963) 13 *Österreichische Zeitschrift für öffentliches Recht* 119; as quoted by R Alexy, *The Argument from Injustice. A Reply to Legal Positivism*, BL Paulson and SL Paulson transl (Oxford, Clarendon Press, 2002 [1994]) 110 fn 189).

[46] *General Theory of Norms* (n 3) 256. See also Kelsen, 'The Function of a Constitution' (n 44) 116f. A further problematic consequence of Kelsen's late views is pointed out by Alexy, *The Argument from Injustice* (n 45) 111: '[A] further basic norm would have to be invented to empower the fictitious authority to issue the basic norm, which would amount to not only denying the original basic norm its character as a basic norm, but also – since the further basic norm, too, could only be the content of an act of will – presupposing *ad infinitum* further fictitious authorities and the fictitious basic norms empowering them'.

[47] *cf The Concept of Law* (n 39) 111 (emphasis added).

[48] ibid 293.

This passage seems to imply that – at least when an unwritten, customary constitution is in force – the rule of recognition (the set of 'criteria of validity . . . to be used in identifying the law') and the fundamental rules *of* rule-production (by setting criteria of validity such as 'enactment by the Queen in Parliament'), which Hart calls 'rules of change', are, after all, one and the same thing.[49] And such fundamental rules of change – a set of power-conferring rules – are but *the constitution itself*, which provides the criteria of validity of legislation and any further 'lower' rules. But then, as Bobbio has argued, Hart's rule of recognition seems *itself* to be but a 'needless reduplication' of his own fundamental 'rules of change'.[50] From this standpoint, moreover, it appears that the constitution, understood as a set of criteria of recognition of the law, is in a sense not itself (part of the) law.[51] The law is thereby reduced to ordinary, infra-constitutional norms only.

This is a rather implausible stance. From a juristic point of view, it seems a matter of course that the constitution is not an extra-legal criterion of recognition, but part of the law itself. Moreover, the constitution, written or unwritten, *is* – or includes, at any rate[52] – a set of power-conferring rules of change: and power-conferring rules are not, as such, *criteria* of recognition (though of course they may be connected to criteria of recognition[53]); they are, rather, genuine (albeit non-deontic) norms. Finally, the constitution, too, needs to be 'recognised', which means that the rule of recognition, properly understood

[49] Note that this reading suggests that the rule of recognition is to be read as a power-conferring rather than a duty-imposing rule.

[50] *cf* N Bobbio, 'Per un Lessico di Teoria Generale del Diritto' in *Studi in Memoria di Enrico Guicciardi* (Padua, Cedam, 1975) 47–55, at 52: 'the norms regulating the production of norms ['rules of change', in Hartian parlance] provide the necessary and sufficient criteria to "recognise" the valid norms of the system'; such norms and the rule of recognition are 'one and the same thing' (my translation). In light of this identification of constitution and rule of recognition, Hart's remark about Kelsen's 'needless reduplication' can be given a slightly different reading. Prima facie Hart's suggestion is that Kelsen's basic norm is a needless reduplication of the constitution; but he can now be seen as holding that the basic norm is a needless reduplication of the rule of recognition, too. (It is unclear whether the same implication would hold for systems with written constitutions, ie whether where a written constitution does exist, the rule of recognition is also precisely the set of empowering norms provided by the constitution. Hart seems not to have held consistent views on these matters.)

[51] I am taking for granted that any criterion of recognition *of the law* is necessarily *meta-legal*, for plain logical reasons; *cf The Concept of Law* (n 39) 111: the rule of recognition 'is not a rule on the same level as the "laws strictly so called" which it is used to identify'. Hart adds that 'the case for calling the rule of recognition "law" is that the rule providing criteria for the identification of further rules of the system may well be thought a defining feature of a legal system, and so itself worth calling "law" '.

[52] Some authors (including Kelsen) view the constitution (in the 'material' sense) as amounting to just a set of power-conferring norms. See eg *General Theory of Law and State* (n 11) 124: 'The constitution in the material sense consists of those rules which regulate the creation of the general legal norms, in particular the creation of statutes'.

[53] Namely, a criterion of recognition can *refer to* a power-conferring norm; this is the sort of connection I have in mind.

– and in spite of what Hart seems at least sometimes to suggest – (a) cannot be the constitution itself, and (b) must provide a criterion for the identification of the constitution, too.

Hart is right to think that the rule of recognition is logically a necessary condition of our knowledge of the law. (The same is not true of Kelsen's basic norm, as I tried to argue.) The description of (the normative contents of) a legal system presupposes the identification of the system itself.[54] Hart's own picture of the rule of recognition, however, is unsatisfactory.

The rule of recognition, as I understand it, is *no legal norm*. It is no *norm*; it neither prescribes nor authorises. It is not *the* constitution itself, though it refers to the constitution. It is instead a conceptual tool for the identification (the 'recognition') of each particular legal system (its constitution included). Each rule of recognition, to put it differently, is a *definition* of the legal system to which it refers.[55] It is also not *legal*, because it is not a member of the system to which it refers; it is an extra-systematic criterion for identifying the system itself.

For any given legal system, its rule of recognition would run more or less along the following lines:

The legal system includes:

1. the norms expressed by its (historically first) constitution (which is supposed to be by and large effective), whether written or customary; and
2. the norms issued (and not derogated) by any organ authorised to do so by the constitution.[56]

There is no need to insist, I think, that such a rule – differently from Kelsen's basic norm – neither authorises nor commands anyone to do anything.[57]

[54] See *The Concept of Law* (n 39) 104, 108.

[55] See E Bulygin, 'Sobre la Regla de Reconocimiento' in CE Alchourrón and E Bulygin, *Análisis Lógico y Derecho* (Madrid, Centro de Estudios Constitucionales, 1991 [1976]) 383–91.

[56] See E Bulygin, 'Sobre la Regla de Reconocimiento' in CE Alchourrón and E Bulygin, *Análisis Lógico y Derecho* (Madrid, Centro de Estudios Constitucionales, 1991 [1976]) 383–91.

[57] For a different view, however, see J Ruiz Manero, *Jurisdicción y Normas. Dos Estudios Sobre Función Jurisdiccional y Teoría del Derecho* (Madrid, Centro de Estudios Constitucionales, 1990) 99ff.