HANS KELSEN: GENERAL THEORY OF LAW, New York, Russel & Russel, 1961

Questions to the text:

3. Kelsen: The legal order + Bix: Dictionary (p. 110-117 + Bix)

1. How Kelsen and Bix characterize the concept legal validity
2. How Kelsen and Bix characterize the concept legitimacy
3. What Kelsen understands the positivity of law?
4. What does Kelsen use the term the basic norm for?

ıns Kelsen: General Theory of Law and State.
:w York: Russell and Russell, 1961

X. THE LEGAL ORDER

A. The Unity of a Normative Order

a. The Reason of Validity: the Basic Norm

The legal order is a system of norms. The question then arises: What is it that makes a system out of a multitude of norms? When does a norm belong to a certain system of norms, an order? This question is in close connection with the question as to the reason of validity of a norm.

In order to answer this question, we must first clarify the grounds on which we assign validity to a norm. When we assume the truth of a statement about reality, it is because the statement corresponds to reality, because our experience confirms it. The statement "A physical body expands when heated" is true, because we have repeatedly and without exception observed that physical bodies expand when they are heated. A norm is not a statement about reality and is therefore incapable of being "true" or "false," in the sense determined above. A norm is either valid or non-valid. Of the two statements: "You shall assist a fellowman in need," and "You shall lie whenever you find it useful," only the first, not the second, is considered to express a valid norm. What is the reason?

The reason for the validity of a norm is not, like the test of the truth of an "is" statement, its conformity to reality. As we have already stated, a norm is not valid because it is efficacious. The question why something ought to occur can never be answered by an assertion to the effect that something occurs, but only by an assertion that something ought to occur. In the language of daily life, it is true, we frequently justify a norm by referring to a fact. We say, for instance: "You shall not kill because God has forbidden it in one of the Ten Commandments"; or a mother says to her child: "You ought to go to school because your father has ordered it." However, in these statements the fact that God has issued a command or the fact that the father has ordered the child to do something is only apparently the reason for the validity of the norms in question. The true reason is norms tacitly presupposed because taken for granted. The reason for the validity of the norm, You shall not kill, is the general norm, You shall obey the commands of God. The reason for the validity of the norm, You ought to go to school, is the general norm,

Children ought to obey their father. If these norms are not presupposed, the references to the facts concerned are not answers to the questions why we shall not kill, why the child ought to go to school. The fact that somebody commands something is, in itself, no reason for the statement that one ought to behave in conformity with the command, no reason for considering the command as a valid norm, no reason for the validity of the norm the contents of which corresponds to the command. The reason for the validity of a norm is always a norm, not a fact. The quest for the reason of validity of a norm leads back, not to reality, but to another norm from which the first norm is derivable in a sense that will be investigated later. Let us, for the present, discuss a concrete example. We accept the statement "You shall assist a fellowman in need," as a valid norm because it follows from the statement "You shall love your neighbor." This statement we accept as a valid norm, either because it appears to us as an ultimate norm whose validity is self-evident, or — for instance — Christ has bidden that you shall love your neighbor, and we postulate as an ultimate valid norm the statement "You shall obey the commandments of Christ." The statement "You shall lie whenever you find it useful," we do not accept as a valid norm, because it is neither derivable from another valid norm nor is it in itself an ultimate, self-evidently valid norm.

A norm the validity of which cannot be derived from a superior norm we call a "basic" norm. All norms whose validity may be traced back to one and the same basic norm form a system of norms, or an order. This basic norm constitutes, as a common source, the bond between all the different norms of which an order consists. That a norm belongs to a certain system of norms, to a certain normative order, can be tested only by ascertaining that it derives its validity from the basic norm constituting the order. Whereas an "is" statement is true because it agrees with the reality of sensuous experience, an "ought" statement is a valid norm only if it belongs to such a valid system of norms, if it can be derived from a basic norm presupposed as valid. The ground of truth of an "is" statement is its conformity to the reality of our experience; the reason for the validity of a norm is a presupposition, a norm presupposed to be an ultimately valid, that is, a basic norm. The quest for the reason of validity of a norm is not — like the quest for the cause of an effect — a *regressus ad infinitum*; it is terminated by a highest norm which is the last reason of validity within the normative system, whereas a last or first cause has no place within a system of natural reality.

b. The Static System of Norms

According to the nature of the basic norm, we may distinguish between two different types of orders or normative systems: static and dynamic systems. Within an order of the first kind the norms are "valid" and that means, we assume that the individuals whose behavior is regulated by the norms "ought" to behave as the norms prescribe, by virtue of their contents: Their contents has an immediately evident quality that guarantees their validity, or, in other terms: the norms are valid because of their inherent appeal. This quality the norms have because they are derivable from a specific basic norm as the particular is derivable from the general. The binding force of the basic norm is itself self-evident, or at least presumed to be so. Such norms as "You must not lie," "You must not deceive," "You shall keep your promise," follow from a general norm prescribing truthfulness. From the norm "You shall love your neighbor" one may deduce such norms as "You must not hurt your neighbor," "You shall help him in need," and so on. If one asks why one has to love one's neighbor, perhaps the answer will be found in some still more general norm, let us say the postulate that one has to live "in harmony with the universe." If that is the most general norm of whose validity we are convinced, we will consider it as the ultimate norm. Its obligatory nature may appear so obvious that one does not feel any need to ask for the reason of its validity. Perhaps one may also succeed in deducing the principle of truthfulness and its consequences from this "harmony" postulate. One would then have reached a norm on which a whole system of morality could be based. However, we are not interested here in the question of what specific norm lies at the basis of such and such a system of morality. It is essential only that the various norms of any such system are implicated by the basic norm as the particular is implied by the general, and that, therefore, all the particular norms of such a system are obtainable by means of an intellectual operation, viz., by the inference from the general to the particular. Such a system is of a static nature.

c. The Dynamic System of Norms

The derivation of a particular norm may, however, be carried out also in another way. A child, asking why it must not lie, might be given the answer that its father has forbidden it to lie. If the child should further ask why it has to obey its father, the reply would perhaps be that God has commanded that it obey its parents. Should the child put the question why one has to obey the commands of God, the only answer would be that this is a norm beyond which one cannot look for a more ultimate

norm. That norm is the basic norm providing the foundation for a system of dynamic character. Its various norms cannot be obtained from the basic norm by any intellectual operation. The basic norm merely establishes a certain authority, which may well in turn vest norm-creating power in some other authorities. The norms of a dynamic system have to be created through acts of will by those individuals who have been authorized to create norms by some higher norm. This authorization is a delegation. Norm creating power is delegated from one authority to another authority; the former is the higher, the latter the lower authority. The basic norm of a dynamic system is the fundamental rule according to which the norms of the system are to be created. A norm forms part of a dynamic system if it has been created in a way that is — in the last analysis — determined by the basic norm. A norm thus belongs to the religious system just given by way of example if it is created by God or originates in an authority having its power from God, "delegated" by God.

B. THE LAW AS A DYNAMIC SYSTEM OF NORMS

a. The Positivity of Law

The system of norms we call a legal order is a system of the dynamic kind. Legal norms are not valid because they themselves or the basic norm have a content the binding force of which is self-evident. They are not valid because of their inherent appeal. Legal norms may have any kind of content. There is no kind of human behavior that, because of its nature, could not be made into a legal duty corresponding to a legal right. The validity of a legal norm cannot be questioned on the ground that its contents are incompatible with some moral or political value. A norm is a valid legal norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only. The basic norm of a legal order is the postulated ultimate rule according to which the norms of this order are established and annulled, receive and lose their validity. The statement "Any man who manufactures or sells alcoholic liquors as beverages shall be punished" is a valid legal norm if it belongs to a certain legal order. This it does if this norm has been created in a definite way ultimately determined by the basic norm of that legal order, and if it has not again been nullified in a definite way, ultimately determined by the same basic norm. The basic norm may, for instance, be such that a norm belongs to the system provided that it has been decreed by the parliament or created by custom or established by the courts, and has not been abolished by a decision of the parliament or through custom or a contrary court practice. The statement mentioned above is no valid

legal norm if it does not belong to a valid legal order — it may be that no such norm has been created in the way ultimately determined by the basic norm, or it may be that, although a norm has been created in that way, it has been repealed in a way ultimately determined by the basic norm.

Law is always positive law, and its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems. This constitutes the difference between positive law and natural law, which, like morality, is deduced from a presumably self-evident basic norm which is considered to be the expression of the "will of nature" or of "pure reason." The basic norm of a positive legal order is nothing but the fundamental rule according to which the various norms of the order are to be created. It qualifies a certain event as the initial event in the creation of the various legal norms. It is the starting point of a norm-creating process and, thus, has an entirely dynamic character. The particular norms of the legal order cannot be logically deduced from this basic norm, as can the norm "Help your neighbor when he needs your help" from the norm "Love your neighbor." They are to be created by a special act of will, not concluded from a premise by an intellectual operation.

b. Customary and Statutory Law

Legal norms are created in many different ways: general norms through custom or legislation, individual norms through judicial and administrative acts or legal transactions. Law is always created by an act that deliberately aims at creating law, except in the case when law has its origin in custom, that is to say, in a generally observed course of conduct, during which the acting individuals do not consciously aim at creating law; but they must regard their acts as in conformity with a binding norm and not as a matter of arbitrary choice. This is the requirement of so-called *opinio juris sive necessitatis*. The usual interpretation of this requirement is that the individuals constituting by their conduct the law-creating custom must regard their acts as determined by a legal rule; they must believe that they perform a legal duty or exercise a legal right. This doctrine is not correct. It implies that the individuals concerned must act in error: since the legal rule which is created by their conduct cannot yet determine this conduct, at least not as a legal rule. They may erroneously believe themselves to be bound by a rule of law, but this error is not necessary to constitute a law-creating custom. It is sufficient that the acting individuals consider themselves bound by any norm whatever.

We shall distinguish between statutory and customary law as the two fundamental types of law. By statutory law we shall understand law created in a way other than by custom, namely, by legislative, judicial, or administrative acts or by legal transactions, especially by contracts and (international) treaties.

C. The Basic Norm of a Legal Order

a. The Basic Norm and the Constitution

The derivation of the norms of a legal order from the basic norm of that order is performed by showing that the particular norms have been created in accordance with the basic norm. To the question why a certain act of coercion — e.g., the fact that one individual deprives another individual of his freedom by putting him in jail — is a legal act, the answer is: because it has been prescribed by an individual norm, a judicial decision. To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute, finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes.

If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly. The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends. It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained. This is the basic norm of the legal order under consideration. The document which embodies the first constitution is a real constitution, a binding norm, only on the condition that the basic norm is presupposed to be valid. Only upon this presupposition are the declarations of those to whom the constitution confers norm-creating power binding norms. It is this presupposition that enables us to distinguish between individuals who are legal authorities and other individuals whom we do not regard as such, between acts of human beings which create legal norms and acts which have no such effect. All these legal norms belong to one and the same legal order because their validity can be traced back — directly or indirectly — to the first constitution. That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order. The basic norm of a religious norm system says that one ought to behave as God and the authorities instituted by Him command. Similarly, the basic norm of a legal order prescribes that one ought to behave as the

"fathers" of the constitution and the individuals — directly or indirectly — authorized (delegated) by the constitution command. Expressed in the form of a legal norm: coercive acts ought to be carried out only under the conditions and in the way determined by the "fathers" of the constitution or the organs delegated by them. This is, schematically formulated, the basic norm of the legal order of a single State, the basic norm of a national legal order. It is to the national legal order that we have here limited our attention. Later, we shall consider what bearing the assumption of an international law has upon the question of the basic norm of national law.

b. The Specific Function of the Basic Norm

That a norm of the kind just mentioned is the basic norm of the national legal order does not imply that it is impossible to go beyond that norm. Certainly one may ask why one has to respect the first constitution as a binding norm. The answer might be that the fathers of the first constitution were empowered by God. The characteristic of so-called legal positivism is, however, that it dispenses with any such religious justification of the legal order. The ultimate hypothesis of positivism is the norm authorizing the historically first legislator. The whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act. To interpret these acts of human beings as legal acts and their products as binding norms, and that means to interpret the empirical material which presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm. The basic norm is only the necessary presupposition of any positivistic interpretation of the legal material.

The basic norm is not created in a legal procedure by a law-creating organ. It is not — as a positive legal norm is — valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating, act.

By formulating the basic norm, we do not introduce into the science of law any new method. We merely make explicit what all jurists, mostly unconsciously, assume when they consider positive law as a system of valid norms and not only as a complex of facts, and at the same time repudiate any natural law from which positive law would receive its validity. That the basic norm really exists in the juristic consciousness is the result of a simple analysis of actual juristic statements. The basic norm is the answer to the question: how — and that means under what

condition — are all these juristic statements concerning legal norms, legal duties, legal rights, and so on, possible?

c. The Principle of Legitimacy

The validity of legal norms may be limited in time, and it is important to notice that the end as well as the beginning of this validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy.

This principle, however, holds only under certain conditions. It fails to hold in the case of a revolution, this word understood in the most general sense, so that it also covers the so-called *coup d'État*. A revolution, in this wide sense, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the "legitimate" organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order "remains" valid also within the frame of the new order. But the phrase "they remain valid," does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which were introduced under the old constitution "continue to be valid" under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution. The phenomenon is a case of reception (similar to the reception of Roman law). The new order "receives," i.e., adopts, norms from the old order; this means that the new order gives validity to (puts into force) norms which have the same content as norms of the old order. "Reception" is an abbreviated procedure of law-creation. The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws

Debates about the nature of legal rights are frequently characterized as arguments between 'will theories', which locate the nature of rights in powers and choices given to a right-holder, and 'interest (or benefit) theories' which locate the nature of rights in the legal protection of an interest.

Wesley Hohfeld (1879–1918) offered a well-known stipulative definition of 'right', as that term was used in judicial decisions, in four kinds: (1) claim rights, (2) liberties (Hohfeld used the term '[illegible]' (3)

Brian H. Bix: A Dictionary of Legal Theory. Oxford University Press, 2004

legal validity In discussions within and about law, the term 'valid' has a number of distinct meanings, though these meanings are frequently related or overlapping. The description 'valid' or its opposite 'invalid' is usually ascribed to individual rules or norms, relative to a particular legal system. A rule or norm may be described as 'valid' if it is consistent with the other rules or norms of the legal system (including being authorized by some 'higher' or 'more basic' rule or norm); or if it is generally accepted by legal officials or generally followed by the citizens ('efficacy').

There are occasional references to 'valid' legal systems, where 'valid' means something like 'legitimate' or 'just', but this usage is rare.

legitimacy A term referring to the moral value of a practice, institution, or entire system. The term is used primarily for discussing political actors, actions, and institutions, and some would use the term exclusively in that context. Others apply the term more broadly, to all (or almost all) rule-bound practices.

Some theorists have suggested a (controversial) distinction between 'legitimacy' and 'justification', with the first applying to whether an action is consistent with the rules accepted within a practice, and the second to evaluate (morally) the practice as a whole.

Similarly, some theorists have suggested that 'legitimate' should be distinguished from 'just': in that it may be sufficient for legitimacy that a government work hard to achieve justice, even if it is ultimately unsuccessful.

See **justification**

legitimation Critical theorists, in particular theorists associated with critical legal studies, often emphasized the extent to which law could

make oppressed groups erroneously perceive their society as just, by the way that law portrays society's rules as neutral and fair, and legal officials as representing the interests of all.

Discussion of legitimation within legal theory can be traced to the works of earlier theorists from other fields, Antonio Gramsci (1891–1937), Louis Althusser (1918–90), and, to a lesser extent, Max Weber (1864–1920). (Within Marxist theory, the same concept sometimes goes under the label 'hegemony'.)

The emphasis on legitimation can be seen as a way of viewing and explaining law, more subtle than a 'naive Marxist' view that law directly serves the interests of the powerful. Such a view runs up against apparent counterexamples, where court decisions or legislative rules seem to favour the less powerful. A theory of legitimation allows critical theorists to argue that such occasional victories for the less powerful only increase the usefulness of the law for the interests of the powerful: by giving the less powerful some basis for believing that the government is *generally just*, the system, which in fact (under this argument) predominantly serves the interest of the powerful, can go forward with little or no organized resistance.

See **critical legal studies; Gramsci, Antonio; ideology; Marx, Karl**

Levi, Edward H. Edward Hirsch Levi (1911–2000) was at various times the Attorney General of the United States (under President Gerald R. Ford) and president of the University of Chicago, but within legal theory he may be best known for a small text, *An Introduction to Legal Reasoning* (1949), a concise introduction to the vagaries and paradoxes of legal reasoning in general, and common-law reasoning in particular. Less well known, but perhaps equally important, was Levi's decision, as a law professor teaching antitrust law, to team up with an economist. Many commentators trace the development of the 'law and economics' school to that decision, and also credit it for encouraging the growth of interdisciplinary work in law (in later years Levi was to add a statistician and a sociologist to team-teach courses with law professors). Levi founded the *Journal of Law and Economics* in 1958, which remains a prominent journal in law and economics.

See **common law; law and economics; legal reasoning**

lex iniusta non est lex 'An unjust law is not law.' The phrase, in Latin or English, is usually associated with traditional natural law theory. One can find similar statements in the works of St Thomas Aquinas (1224–74), and also in the works of Plato, Aristotle, Cicero, and Augustine.