HANS KELSEN AND THE "PURE THEORY"

The jurisprudence of Hans Kelsen almost seems to have been designed for the bureaucratic universe. Kelsen's earliest work, done with Rudolf Stammler, developed some basic notions of administrative law in Europe. Thereafter Kensen, still quite a young scholar, refined his conceptions of jurisprudence. The theory he developed, often called the "pure theory", has been associated with the German philosopher Kant. But unlike Kant's philosophy, it would appear to be amoral and an-ethical, primarily concerned with understanding and providing guidelines for behavior in complex organizations. Consider the following excerpts.

KELSEN, GENERAL THEORY OF LAW AND STATE
xiii–xviii, 110–136, 175–177 (A. WEDBERG TRANS. 1945)

The theory which will be expounded in the main part of this book is a general theory of positive law. Positive law is always the law of a definite community: the law of the United States, the law of France, Mexican law, international law. To attain a scientific exposition of those particular legal orders constituting the corresponding legal communities is the design of the general theory of law here set forth. This theory, resulting from a comparative analysis of the different positive legal orders, furnishes the fundamental concepts by which the positive law of a definite legal community can be described. The subject matter of a general theory of law is the legal norms, their elements, their interrelations, the legal order as a whole, its structure, the relationship between different legal orders, and, finally, the unity of the law in the plurality of positive legal orders.

Since the aim of this general theory of law is to enable the jurist concerned with a particular legal order, the lawyer, the judge, the legislator, or the law-teacher, to understand and to describe as exactly as possible his own positive law, such a theory had to derive its concepts exclusively from the contents of positive legal norms. It must not be influenced by the motives or intentions of lawmaking authorities or by the wishes or interests of individuals with respect to the formation of the law to which they are subject, except in so far as these motives and intentions, these wishes and interests, are manifested in the material produced by the lawmaking process. What cannot be found in the contents of positive legal norms cannot enter a legal concept. The general theory, as it is presented in this book, is directed at a structural analysis of positive law rather than at a psychological or economic explanation of its conditions, or a moral or political evaluation of its ends.

When this doctrine is called the "pure theory of law," it is meant that it is being kept free from all the elements foreign to the scientific method of a science whose only purpose is the cognition of law, not its formation. A science has to describe its object as it actually is, not to prescribe how it should be or should not be from the point of view of some specific value judgments. The latter is a problem of politics, and, as such, concerns the art of government, an activity directed at values, not an object of science, directed by reality.

The reality, however, at which a science of law is directed, is not the reality of nature which constitutes the object of natural science. If it is necessary to separate the science of law from politics, it is no less necessary to separate it from natural science. One of the most difficult tasks of a general theory of law is that of determining the specific reality of its subject and of showing the difference which exists between legal and natural reality. The specific reality of the law does not manifest itself in

the actual behavior of the individuals who are subject to the legal order. This behavior may or may not be in conformity with the order the existence of which is the reality in question. The legal order determines what the conduct of men ought to be. It is a system of norms, a normative order. The behavior of individuals as it actually is, is determined by laws of nature according to the principle of causality. This is natural reality. And in so far as sociology deals with this reality as determined by causal laws, sociology is a branch of natural science. Legal reality, the specific existence of the law, manifests itself in a phenomenon which is mostly designated as the positiveness of law. The specific subject of legal science is positive or real law in contradistinction to an ideal law, the goal of politics. Just as the actual behavior of the individuals may or may not correspond to the norms of positive law regulating this behavior, positive law may or may not correspond to an ideal law presented as justice or "natural" law. It is in its relation to the ideal law, called justice or "natural" law, that the reality of positive law appears. Its existence is independent of its conformity or nonconformity with justice or "natural" law.

The pure theory of law considers its subject not as a more or less imperfect copy of a transcendental idea. It does not try to comprehend the law as an offspring of justice, as the human child of a divine parent. The pure theory of law insists upon a clear distinction between empirical law and transcendental justice by excluding the latter from its specific concerns. It sees in the law not the manifestation of a superhuman authority, but a specific social technique based on human experience; the pure theory refuses to be a metaphysics of law. Consequently it 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.

Much traditional jurisprudence is characterized by a tendency to confuse the theory of positive law with political ideologies disguised either as metaphysical speculation about justice or as natural-law doctrine. It confounds the question of the essence of law—that is, the question of what the law actually is—with the question of what it should be. It is inclined more or less to identify law and justice. On the other hand, some theories of jurisprudence show a tendency to ignore the borderline separating a theory of legal norms regulating human behavior from a science causally explaining actual human behavior, a tendency resulting in confusing the question as to how men legally ought to behave with the question as to how men actually behave and how they probably will behave in the future. The latter question can be answered, if at all, only on the basis of a general sociology. To become merged in this science seems to be the ambition of modern jurisprudence. Only by separating the theory of law from a philosophy of justice as well as from sociology is it possible to establish a specific science of law.

The orientation of the pure theory of law is in principle the same as that of so-called analytical jurisprudence. Like John Austin in his famous *Lectures on Jurisprudence*, the pure theory of law seeks to attain its results exclusively by an analysis of positive law. Every assertion advanced by a science of law must be based on a positive legal order or on a comparison of the contents of several legal orders. It is by confining jurisprudence to a structural analysis of positive law that legal science is separated from philosophy of justice and sociology of law and that the purity of its method is attained. In this respect, there is no essential difference between analytical jurisprudence and the pure theory of law. Where they differ, they do so because the pure theory of law tries to carry on the method of analytical jurisprudence

more consistently than Austin and his followers. This is true especially as regards such fundamental concepts as that of the legal norm on the one hand, and those of the legal right and the legal duty on the other, in French and German jurisprudence presented as a contrast between law in an objective and law in a subjective sense, and, last but not least, as regards the relationship between law and the State.

Austin shares the traditional opinion according to which law and State are two different entities, although he does not go so far as most legal theorists who present the State as the creator of the law, as the power and moral authority behind the law, as the god of the world of law. The pure theory of law shows the true meaning of these figurative expressions. It shows that the State as a social order must necessarily be identical with the law or, at least, with a specific, a relatively centralized legal order, that is, the national legal order in contradistinction to the international, highly decentralized, legal order. Just as the pure theory of law eliminates the dualism of law and justice and the dualism of objective and subjective law, so it abolishes the dualism of law and State. By so doing it establishes a theory of the State as an intrinsic part of the theory of law and postulates a unity of national and international law within a legal system comprising all the positive legal orders.

The pure theory of law is a monistic theory. It shows that the State imagined as a personal being is, at best, nothing but the personification of the national legal order, and more frequently merely a hypostatization of certain moral-political postulates. By abolishing this dualism through dissolving the hypostatization usually connected with the ambiguous term "State," the pure theory of law discloses the political ideologies within the traditional jurispurdence.

It is precisely by its anti-ideological character that the pure theory of law proves itself a true science of law. Science as cognition has always the immanent tendency to unveil its object. But political ideology veils reality either by transfiguring reality in order to conserve and defend it, or by disfiguring reality in order to attack, to destroy, or to replace it by another reality. Every political ideology has its root in volition, not in cognition; in the emotional, not in the rational, element of our consciousness; it arises from certain interests, or rather, from interests other than the interest in truth. This remark, of course, does not imply any assertion regarding the value of the other interests. There is no possibility of deciding rationally between opposite values. It is precisely from this situation that a really tragic conflict arises: the conflict between the fundamental principle of science, Truth, and the supreme ideal of politics, Justice.

The political authority creating the law and, therefore wishing to conserve it, may doubt whether a purely scientific desirable. Similarly, the forces tending to destroy the present order and to replace it by another one believed to be better will not have much use for such a cognition of law either. But a science of law cares neither for the one nor for the other. Such a science the pure theory of law wishes to be.

The postulate of complete separation of jurisprudence from politics cannot sincerely be questioned if there is to be anything like a science of law. Doubtful only is the degree to which the separation is realizable in this field. A marked difference does indeed exist in this very feature between natural and social science. Of course, no one would maintain that natural science runs no danger at all of attempts by political interests to influence it. History demonstrates the contrary, and shows clearly enough that a world power has sometimes felt itself threatened by the truth concerning the course of the stars. But the fact that in the past natural science had been able to achieve its complete independence from politics is due to the powerful social interest

in this victory: the interest in that advance of technique which only a free science can guarantee. But social theory leads to no such direct advantage afforded by social technique as physics and chemistry produce on the acquisition of engineering knowledge and medical therapy. In social and especially in legal science, there is still no influence to counteract the overwhelming interest that those residing in power, as well as those craving for power, have in a theory pleasing to their wishes, that is, in a political ideology.

This is especially true in our time, which indeed "is out of joint," when the foundations of social life have been shaken to the depths by two World Wars. The ideal of an objective science of law and State, free from all political ideologies, has a better chance for recognition in a period of social equilibrium.

It seems, therefore, that a pure theory of law is untimely today, when in great and important countries, under the rule of party dictatorship, some of the most prominent representatives of jurisprudence know no higher task than to serve—with their "science"—the political power of the moment. If the author, nevertheless, ventures to publish this general theory of law and State, it is with the belief that in the Anglo-American world, where freedom of science continues to be respected and where political power is better stabilized than elsewhere, ideas are in greater esteem than power; and also with the hope that even on the European continent, after its liberation from political tyranny, the younger generation will be won over to the ideal of an independent science of law; for the fruit of such a science can never be lost.

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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 nonvalid. 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 reson 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 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 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 operations, 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 had 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 an 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 orginates 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 cases 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 requirment 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 at 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 individaul 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 only the necessary presupposition of any positivisitc 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'Etat*. 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 affected 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 masss 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 whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus, it is never the constitution merely but always the entire legal order that is changed by a revolution.

This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only *de facto* but also *de jure*. No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order—to which no political reality any longer corresponds—has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognized as valid norms.

D. CHANGE OF THE BASIC NORM

It is just the phenomenon of revolution which clearly shows the significance of the basic norms. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then the order is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm.

E. THE PRINCIPLE OF EFFECTIVENESS

If we attempt to make explicit the presupposition on which these juristic considerations rest, we find that the norms of the old order are regarded as devoid of validity because the old constitution and, therefore, the legal norms based on this constitution, the old legal order as a whole, has lost its efficacy; because the actual behavior of men does no longer conform to this old legal order. Every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole. The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A *conditio sine qua non*, but not a *conditio per quam*. The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way. They are valid, however, only on the condition that the total order is efficacious; they cease to be valid, not only when they are annulled in a constitutional way, but also when the total order ceases to be efficacious. It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness.

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The relation between validity and efficacy thus appears to be the following: A norm is a valid norm if (a) it has been created in a way provided for by the legal order to which it belongs, and (b) if it has not been annulled either in a way provided for by that legal order or by way of desuetudo or by the fact that the legal order as a whole has lost its efficacy.

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D. THE STATIC AND THE DYNAMIC CONCEPT OF LAW

If one looks upon the legal order from the dynamic point of view, as it has been expounded here, it seems possible to define the concept of law in a way quite different from that in which we have tried to define it in this theory. It seesm especially possible to ignore the element of coercion in defining the concept of law.

It is a fact that the legislator can enact commandments without considering it necessary to attach criminal or civil sanction to their violation. If such norms are also called legal norms, it is because they were created by an authority which, according to the constitution, is competent to create law. They are law because they issue from a law-creating authority. According to this concept, law is anything that has come about in the way the constitution prescribes for the creation of law. This dynamic concept differs from the concept of law defined as a coercive norm. According to the dynamic concept, law is something created by a certain process, and everything created in this way is law. This dynamic concept, however, is only apparently a concept of law. It contains no answer to the question of what is the essence of law, what is the criterion by which law can be distinguished from other social norms. This dynamic concept furnishes an answer only to the question whether or not and why a certain norm belongs to a system of valid legal norms, forms a part of a certain legal order. And the answer is, a norm belongs to a certain legal order if it is created in accordance with a procedure prescribed by the constitution fundamental to this legal order.

It must, however, be noted that not only a norm, i.e., a command regulating human behavior, can be created in the way prescribed by the constitution for the creation of law. An important stage in the law-creating process is the procedure by which general norms are created, that is, the procedure of legislation. The constitution may organize this procedure of legislation in the following way: two corresponding resolutions of both houses of parliament, the consent of the chief of State, and publication in an official journal. This means that a specific form of law creation is established. It is then possible to clothe in this form any subject, for instance, a recognition of the merits of a statesman. The form of a law—a declaration voted by parliament, consented to the chief of State, published in the official journal—is chosen in order to give to a certain subject, here to the expression of the nation's gratitude, the character of a solemn act. The solemn recognition of the merits of a statesman is by no means a norm, even if it appears as the content of a legislative act, even if it has the form of a law. The law as the product of the legislative procedure, a statute in the formal sense of the term, is a document containing words, sentences; and that which is expressed by these sentences need not necessarily be a norm. As a matter of fact, many a law—in this formal sense of the term—contains not only legal norms, but also certain elements which are of no specific legal, i.e. normative, character, such as, purely theoretical views concerning certain matters, the motives of the legislator, political ideologies contained in references such as "justice" or "the will of God," etc., etc. All these are legally irrelevant contents of the statute, or, more generally, legally irrelevant products of the law-creating process. The law-creating process includes not only the process of legislation, but also the procedure of the judicial and administrative authorities. Even judgments of the courts very often contain legally irrelevant elements. If by the term "law" is meant something pertaining to a certain legal order, then law is anything which has been created according to the procedure prescribed by the constitution fundamental to this order. This does not mean, however, that everything which has been created according to this procedure is law in the sense of a legal norm. It is a legal norm only if it purports to regulate human behavior, and if it regulates human behavior by providing an act of coercion as sanction.

XI. The Hierarchy of the Norms

A. The Superior and the Inferior Norm

The analysis of law, which reveals the dynamic character of this normative system and the function of the basic norm, also exposes a further peculiarity of law: Law regulates its own creation inasmuch as one legal norm determines the way in which another norm is created, and also, to some extent, the contents of that norm. Since a legal norm is valid because it is created in a way determined by another legal norm, the latter is the reason of validity of the former. The relation between the norm regulating the creation of another norm and this other norm may be presented as a relationship of super– and sub-ordination, which is a spatial figure of speech. The norm determining the creation of another norm is the superior, the norm created according to this regulation, the inferior norm. The legal order, especially the legal order the personification of which is the State, is therefore not a system of norms coordinated to each others, standing, so to speak, side by side on the same level, but a hierarchy of different levels of norms. The unity of these norms is constituted

by the fact that the creation of one norm—the lower one—is determined by another—the higher—the creation of which is determined by a still higher norm, and that this *regressus* is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal order, constitutes its unity.

B. The Different Stages of the Legal Order

A. The Constitution

1. Constitution in a Material and a Formal Sense: Determination of the Creation of General Norms

The hierarchical structure of the legal order of a State is roughly as follows: Presupposing the basic norm, the constitution is the highest level within national law. The constitution is here understood, not in a formal, but in a material sense. The constitution in the formal sense is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which it is to render the change of these norms more difficult. 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. The formal constitution, the solemn document called "constitution," usually contains also other norms, norms which are no part of the material constitution. But it is in order to safeguard the norms determining the organs and the procedure of legislation that a special solemn document is drafted and that the changing of its rules is made especially difficult. It is because of the material constitution that there is a special form for constitutional laws or a constitutional form. If there is a constitutional form, then constitutional laws must be distinguished from ordinary laws. The difference consists in that the creation, and that means enactment, amendment, annulment, of constitutional laws is more difficult than that of ordinary laws. There exists a special procedure, a special form for the creation of constitutional laws, different from the procedure for the creation of ordinary laws. Such a special form for constitutional laws, a constitutional form, or constitution in the formal sense of the term, is not indispensable, whereas the material constitution, that is to say norms regulating the creation of general norms and—in modern law—norms determining the organs and procedure of legislation, is an essential element of every legal order.

A constitution in the formal sense, especially provisions by which change of the constitution is made more difficult than the change of ordinary laws, is possible only if there is a written constitution, if the constitution has the character of statutory law. There are States, Great Britain for instance, which have no "written" and hence no formal constitution, no solemn document called "The Constitution." Here the (material) constitution has the character of customary law and therefore there exists no difference between constitutional and ordinary laws. The constitution in the material sense of the term may be a written or an unwritten law, may have the character of statutory or customary law. If, however, a specific form for constitutional law exists, any contents whatever may appear under this form. As a matter of fact, subject matters which for some reason or other are considered especially important are often regulated by constitutional instead of by ordinary laws. An example is the Eighteenth Amendment of the Constitution of the United States, the prohibition amendment, now repealed.

2. DETERMINATION OF THE CONTENT OF GENERAL NORMS BY THE CONSTITUTION

The material constitution may determine not only the organs and the procedure of legislation, but also, to some degree, the contents of future laws. The constitution can negatively determine that the laws must not have a certain content, e.g., that the parliament may not pass any status which restricts religious freedom. In this negative way, not only the contents of statutes but of all the other norms of the legal order, judicial and administrative decisions likewise, may be determined by the constitution. The constitution, however, can also positively prescribe a certain content of future statutes; it can, as does, for instance the Constitution of the United States of America, stipulate "that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, etc. . . ." This provision of the constitution determines the contents of future laws concerning criminal procedure. The importance of such stipulations from the point of view of legal technique will be discussed in another context.

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B. GENERAL NORMS ENACTED ON THE BASIS OF THE CONSTITUTION: STATUTES, CUSTOMARY LAW

The general norms established by way of legislation or custom form a level which comes next to the constitution in the hierarchy of law. These general norms are to be applied by the organs competent thereto, especially by the court, but also by the administrative authorities. The law-applying organs must be instituted according to the legal order, which likewise has to determine the procedure which those organs shall follow when applying law. Thus, the general norms of statutory or customary law have a two-fold function: (1) to determine the law-applying organs and the procedure to be observed by them and (2) to determine the judicial and administrative acts of these organs. The latter by their acts create individual norms, thereby applying the general norms to concrete cases.

C. SUBSTANTIVE AND ADJECTIVE LAW

To these two functions correspond the two kinds of law, which are commonly distinguished: material or substantive and formal or adjective law. Beside the substantive criminal law there is an adjective criminal law of criminal procedure, and the same is true also of civil law and administrative law. Part of procedural law, of course, are also those norms which constitute the law-applying organs. Thus two kinds of general norms are always involved in the application of law by an organ: (1) the formal norms which determine the creation of this organ and the procedure it has to follow, and (2) the material norms which determine the contents of its judicial or administrative act. When speaking of the "application" of law by courts and administrative organs, one usually thinks only of the second kind of norms; it is only the substantive civil, criminal, and administrative law applied by the organs one has in mind. But no application of norms of the second kind is possible without the application of norms of the first kind. The substantive civil, criminal, or administrative law cannot be applied in a concrete case without the adjective law regulating the civil, criminal, or administrative procedure being applied at the same time. The two kinds of norm are really inseparable. Only in their organic union do they form the law. Every complete or primary rule of law, as we have called it, contains both

the formal and the material element. The (very much simplified) form of a rule of criminal law is: If a subject has committed a certain delict, then a certain organ (the court), especially on the motion of another organ (the public prosecutor), direct against the delinquent a certain sanction. As we shall show later, a more explicit statement of such a norm is: If the competent organ, that is the organ appointed in the way prescribed by the law, has established through a certain procedure prescribed by the law, that a subject has committed a delict, determined by the law, then a sanction prescribed by the law shall be directed against the delinquent. This formulation clearly exhibits the systematic relation between substantive and adjective law, between the determination of the delict and the sanction, on the one hand, and the determination of the organs and their procedure, on the other.

D. DETERMINATION OF THE LAW-APPLYING ORGANS BY GENERAL NORMS

The general norms created by legislation or custom bear essentially the same relation to their application through courts and administrative authorities as the constitution bears to the creation of these same general norms through legislation and custom. Both functions—judicial or administrative application of general norms, and the statutory or customary creation of general norms—are determined by norms of a higher level, formally and materially, with respect to the procedure and with respect to the contents of the function. The proportion, however, in which the formal and the material determination of both functions stand to one another, is different. The material constitution chiefly determines by what organs and through what procedure the general norms are to be created. Usually, it leaves the contents of these norms undetermined or, at least, it determines their contents in a negative way only. The general norms created by legislation or custom according to the constitution, especially the statutes, determine, however, not only the judicial and administrative organs and the judicial and administrative procedure but also the contents of the individual norms, the judicial decisions and administrative acts which are to be issued by the law-applying organs. In criminal law, for instance, usually a general norm very accurately determines the delict to which the courts, in a concrete case, have to attach a sanction, and accurately determines this sanction, too; so that the content of the judicial decision—which has to be issued in a concrete case—is predetermined to a great extent by a general norm. The degree of material determination may of course vary. The free discretion of the law-applying organ is sometimes greater, sometimes less. The courts are usually much more strictly bound by the substantive civil and criminal laws they have to apply than are the administrative authorities by the administrative statutes. This, however, is besides the point. Important is the fact that the constitution materially determines the general norms created or its basis to a far less extent than these norms materially determine the individual norms enacted by the judiciary and the administration. In the former case, the formal determination is predominant; in the latter case, formal and material determination balance one another.

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F. THE "SOURCES" OF LAW

The customary and the statutory creation of law are often regarded as the two "sources" of law. In this context, by "law" one usually understands only the general

norms, ignoring the individual norms which, however, as just as much part of law as are the general ones.

"Source" of law is a figurative and highly ambiguous expression. It is used not only to designate the above-mentioned methods of creating law, custom and legislation (the latter terms understood in its widest sense comprising also creation of law by judicial and administrative acts and legal transactions) but also to characterize the reason for the validity of law and especially the ultimate reason. The basic norm is then the "source" of law. But, in a wider sense, every legal norm is a "source" of that other norm, the creation of which it regulates, in determining the procedure of creation and the contents of the norm to be created. In this sense, any "superior" legal norm is the "source" of the "inferior" legal norm. Thus, the constitution is the "source" of statutes created on the basis of the constitution, a statute is the "source" of the judicial decision based thereon, the judicial decision is the "source" of the duty it imposes upon the party, and so on. The "source" of law is thus not, as the phrase might suggest, an entity different from and somehow existing independently from law; the "source" of law is always itself law: a "superior" legal norm in relation to an "inferior" legal norm, or the method of creating an (inferior) norm determined by a (superior) norm, and that means a specific content of law.

The expression "source of law" is finally used also in an entirely non-juristic sense. One thereby denotes all those ideas which actually influence the law-creating organs, for instance, moral norms, political principles, legal doctrines, the opinions of juristic experts, etc. In contradistinction to the previously mentioned "sources" of law, these "sources" do not as such have any binding force. They are not—as are the true "sources of law"—legal norms of a specific content of legal norms. It is, however, possible for the legal order, by obliging the law-creating organs to respect or apply certain moral norms of political principles or opinions of experts, to transform these norms, principles, or opinions into legal norms and thus into true sources of law.

The ambiguity of the term "source of law" seems to render the term rather useless. Instead of a misleading figurative phrase one ought to introduce an expression that clearly and directly describes the phenomenon one has in mind.

G. CREATION OF LAW AND APPLICATION OF LAW

1. MERELY RELATIVE DIFFERENCE BETWEEN LAW-CREATING AND LAW-APPLYING FUNCTION

The legal order is a system of general and individual norms connected with each other according to the principle that law regulates its own creation. Each norm of this order is created according to the provisions of another norm, and ultimately according to the provisions of the basic norm, constituting the unity of this system of norms, the legal order. A norm belongs to this legal order only because it has been created in conformity with the stipulations of another norm of the order. This *regressus* finally leads to the first constitution, the creation of which is determined by the presupposed basic norm. One may also say that a norm belongs to a certain legal order if it has been created by an organ of the community constituted by the order. The individual who creates the legal norm is an organ of the legal community because and insofar as his function is determined by a legal norm of the order constituting the legal community. The imputation of this function to the community is based on the norm determining the function. This explanation, however, does not add anything to the previous one. The statement "A norm belongs to a certain legal

order because it is created by an organ of the legal community constituted by this order'' and the statement ''A norm belongs to a legal order because it is created according to the basic norm of this legal order'' assert one and the same thing.

A norm regulating the creation of another norm is ''applied'' in the creation of the other norm. Creation of law is always application of law. These two concepts are by no means, as the traditional theory presumes, absolute opposites. It is not quite correct to classify legal acts as law-creating and law-applying acts; for, setting aside two borderline cases of which we shall speak later, every act is, normally, at the same time a law-creating and a law-applying act. The creation of a legal norm is—normally—an application of the higher norm, regulating its creation, and the application of a higher norm is—normally—the creation of a lower norm determined by the higher norm. A judicial decision, e.g., is an act by which a general norm, a statute, is applied but at the same time an individual norm is created obligating one or both parties to the conflict. Legislation is creation of law, but taking into account the constitution, we find that it is also application of law. In any act of legislation, where the provisions of the constitution are observed, the constitution is applied. The making of the first constitution can likewise be considered as an application of the basic norm.

2. DETERMINATION OF THE LAW-CREATING FUNCTION

As pointed out, the creation of a legal norm can be determined in two different directions: the higher norm may determine: (1) the organ and the procedure by which a lower norm is to be created, and (2) the contents of the lower norm. Even if the higher norm determines only the organ, and that means the individual by which the lower norm has to be created, and that again means authorizes this organ to determine at his own discretion the procedure of creating the lower norm and the contents of this norm, the higher norm is ''applied'' in the creation of the lower norm. The higher norm must at least determine the organ by which the lower norm has to be created. For a norm the creation of which is not determined at all by another norm cannot belong to any legal order. The individual creating a norm cannot be considered the organ of a legal community, his norm-creating function cannot be imputed to the community, unless in performing the function he applies a norm of the legal order constituting the community. Every law-creating act must be a law-applying act, i.e., it must apply a norm preceding the act in order to be an act of the legal order of the community constituted by it. Therefore, the norm-creating function has to be conceived of as a norm-applying function even if only its personal element, the individual who has to create the lower norm, is determined by the higher norm. It is this higher norm determining the organ which is applied by every act of this organ.

That creation of law is at the same time application of law, is an immediate consequence of the fact that every law-creating act must be determined by the legal order. This determination may be of different degrees. It can never be so weak that the act cease to be an application of law. Nor can it be so strong that the act ceases to be a creation of law. As long as a norm is established through the act, it is a law-creating act, even if the function of the law-creating organ is in a high degree determined by the higher norm. This is the case when not only the organ and the law-creating procedure but also the contents of the norm to be created are determined by a higher norm. However, in this case, too, an act of law-creating exists. The question whether an act is creation or application of law is in fact quite independent

of the question as to the degrees to which the acting organ is bound by the legal order. Only acts by which no norm is established may be merely application of law. Of such a nature is the execution of a sanction in a concrete case. This is one of the two borderline cases mentioned above. The other is the basic norm. It determines the creation of the first constitution; but being presupposed by juristic thinking, its presupposition is not itself determined by any higher norm and is therefore no application of law.

H. INDIVIDUAL NORMS CREATED ON THE BASIS OF GENERAL NORMS

1. THE JUDICIAL ACT AS CREATION OF AN INDIVIDUAL NORM

As an application of law traditional doctrine considers above all the judicial decision, the function of courts. When settling a dispute between two parties or when sentencing an accused person to a punishment, a court applies, it is true, a general norm of statutory or customary law. But simultaneously the court creates an individual norm providing that a definite sanction shall be executed against a definite individual. This individual norm is related to the general norms as a statute is related to the constitution. The judicial function is thus, like legislation, both creation and application of law. The judicial function is ordinarily determined by the general norm both as to procedure and as to the contents of the norm to be created, whereas legislation is usually determined by the constitution only in the former respect. But that is a difference in degree only.

2. THE JUDICIAL ACT AS A STAGE OF THE LAW-CREATING PROCESS

From a dynamic standpoint, the individual norm created by the judicial decision is a stage in a process beginning with the establishment of the first constitution, continued by legislation and custom, and leading to the judicial decisions. The process is completed by the execution of the individual sanction. Statutes and customary laws are, so to speak, only semi-manufactured products which are finished only through the judicial decision and its execution. The process through which law constantly creates itself anew goes from the general and abstract to the individual and concrete. It is a process of steadily increasing individualization and concretization.

The general norm which, to certain abstractly determined conditions, attaches certain abstractly determined consequences, has to be individualized and concretized in order to come in contact with social life, to be applied to reality. To this purpose, in a given case it has to be ascertained whether the conditions, determined *in abstracto* in the general norm, are present *in concreto*, in order that the sanction, determined *in abstracto* in the general norm, may be ordered and executed *in concreto*. These are the two essential elements of the judicial function. This function has, by no means, as is sometimes assumed, a purely declaratory character. Contrary to what is sometimes asserted, the court does not merely formulate already existing law. It does not only "seek" and "find" the law existing previous to its decision, it does not merely pronounce the law which exists ready and finished prior to its pronouncement. Both in establishing the presence of the conditions and in stipulating the sanction, the judicial decision has a constitutive character. The decision applies, it is true, a preexisting general norm in which a certain consequence is attached to certain conditions. But the existence of the concrete conditions in connection with

the concrete consequence is, in the concrete case, first established by the court's decision. Conditions and consequences are connected by judicial decisions in the realm of the concrete, as they are connected by statutes and rules of customary law in the realm of the abstract. The individual norm of the judicial decision is the necessary individualization and concretization of the general and abstract norm. Only the prejudice, characteristic of the jurisprudence of continental Europe, that law is, by definition, only general norms, only the erroneous identification of law with the general rules of statutory and customary law could obscure the fact that the judicial decision continues the law-creating process from the sphere of the general and abstract into that of the individual and concrete.

3. THE ASCERTAINMENT OF THE CONDITIONING FACTS

The judicial decision is clearly constitutive as far as it orders a concrete sanction to be executed against an individual delinquent. But it has a constitutive character also, as far as it ascertains the fact conditioning the sanction. In the world of law, there is no fact "in itself," no "absolute" fact, there are only facts ascertained by a competent organ in a procedure prescribed by law. When attaching to certain facts certain consequences, the legal order must also designate an organ that has to ascertain the facts in the concrete case and prescribe the procedure which the organ, in so doing, has to observe. The legal order may authorize this organ to regulate its procedure at its own discretion; but organ and procedure by which the conditioning facts are to be ascertained must be—directly or indirectly—determined by the legal order, to make the latter applicable to social life. It is a typical layman's opinion that there are absolute, immediately evident facts. Only by being first ascertained through a legal procedure are facts brought into the sphere of law or do they, so to speak, come into existence within this sphere. Formulating this in a somewhat paradoxically pointed way, we could say that the competent organ ascertaining the conditioning facts legally "creates" these facts. Therefore, the function of ascertaining facts through a legal procedure has always a specifically constitutive character. If, according to a legal norm, a sanction has to be executed against a murderer, this does not mean that the fact of murder is "in itself" the condition of the sanction. There is no fact "in itself" that A has killed B, there's only my or somebody else's belief or knowledge that A has killed B. A himself may either acquiesce or deny. From the point of view of law, however, all these are not more than private opinions without relevance. If the judicial decision has already obtained the force of law, if it has become impossible to replace this decision by another becauses there exists the status of *res judicata*—which means that the case has been definitely decided by a court of last resort—then the opinion that the condemned was innocent is without any legal significance. As already pointed out, the correct formulation of the rule of law is not "If a subject has committed a delict, an organ shall direct a sanction against the delinquent," but "If the competent organ has established in due order that a subject has committed a deliet, then an organ shall direct a sanction against this subject."

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