

Lecture XIII: The Legal System and its Hierarchical Structure, Kelsen take 3

Agenda

1. The *Grundnorm* (Basic norm) and two types of norms under it
2. Hierarchical structure of a legal system
3. Remind of Hart's Conception of Law as a Union of Primary and Secondary Rules as a Similar, but Contrasting Example of Kelsen's Hierarchical Structure of the Legal System
4. Discussion

I. The *Grundnorm* (Basic norm) and two types of norms under it

The law qua system—the legal system—is a system of legal norms. The first questions to answer here have been put by the Pure Theory of Law in the following way: what accounts for the unity of a plurality of legal norms, and why does a certain legal norm belong to a certain legal system? (Kelsen, pp. 56)

Basic norm (*grundnorm*): the founding order or set of commands of a legal system e.g., a constitution. The validity of legal norms is rooted in the basic norm, that is, without the basic norm no law can be said to have legal validity (Kelsen, pp.55).

- “The basic norm of a positive legal system...is simply the basic rule according to which the norms of the legal system are created; it is simply the setting into place of the basic material fact of law creation”(Ibid, pp. 56).
- Basic norm is presupposed as the hypothetical foundation of any possible law and therewith a corresponding legal system (system of norms stemming from the basic norm)

Two types of norms possible under a basic norm:

Norms of morality (substantive, static character): norms or rules of behavior derived from the *content* of a norm, and the basic norm of truthfulness (Ibid, pp. 55). For example, one derive particular rules such as ‘keep your promise’, ‘do not steal’, ‘do not lie’, etc. from a general norm such as “do good to one’s neighbors”.

Norms of the law (formal, dynamic character):

- Not valid by virtue of their content

- No human behavior excluded in virtue of its capacity to be the content of a legal norm i.e., any human behavior can be regulated by the law
- Cannot be said to be invalid if its content does not directly correspond to a moral value
- Only valid as a law if it has been issued or created as such i.e., requirement of issuance
- Independent of norms of morality
- Particular norms cannot be deduced from norms of the law in the same way moral norms can be deduced from general commands
- Only caught as norms of law if created by an act of *intellect*, not *will*

Regarding the basic norm once more:

“What is to be valid as norm is whatever the framers of the first constitution have expressed as their will—this is the basic presupposition of all cognition of the legal system resting on this constitution. Coercion is to be applied under certain conditions and in a certain way, namely, as determined by the framers of the first constitution or by the authorities to whom they have delegated appropriate powers...”(ibid, pp. 57).

II. Hierarchical structure of a legal system

1. The constitution (ibid, pp. 63)
 - a. The norm that determines the creation of the highest level of norm possible (higher-level norm)
 - b. Based on the basic norm which is “the hypothetical basic rule—and thus...the ultimate basis of validity, which establishes the unity of the chain of creation [of the legal system starting from the basic norm]”(ibid, pp. 64).
 - c. Essential function: governing the creation and preservation of legislation and legal organs
 - d. Can determine the content of future laws
2. Legislation (ibid, pp. 65)
 - a. The process of legislation is not only to determine how legal organs should function or the process for creating laws, but also the determination of the content of legal norms.
 - b. Determine in equal measure “both the content and the creation of judicial and administrative acts”(ibid)

- c. Source of law can derive from custom which is a decentralized creation of law by legal parties
 - d. Source of law can derive from enactment, which is a centralized creation of law by legal organs
3. Adjudication (Ibid, pp. 67)
 - a. The literal act of law creation (Ibid, pp. 68)
 - b. "...the judicial decision is itself an individual legal norm, the individualization and concretization of the general or abstract legal norm; it is the continuation of the process of creating law—out of the general, the individual"(Ibid)
 4. Judiciary and Administration (Ibid, pp. 68)
 - a. Individualization and concretization of statutes as administrative regulations
 - b. Judges tend to be independent, free to rule based on their own intellect in accordance with the internally established rules of conduct for judging
 - c. Administrators are not typically independent in the sense of (b)
 - d. Kelsen proposes we understand the differences between judiciary and administration levels of a legal system as divided between indirect and direct state administration, based usually on the social good of the people (Ibid, pp. 69)
 5. Legal transaction/realization of the coercive act (Ibid, pp. 69)
 6. Relativity of the Contrast between Creating and Applying the Law (Ibid, pp. 70)
 7. Conflict between Norms at Different Levels (Ibid, pp. 71)

III. Reminder – Law is the Union of Primary and Secondary Rules

Internal statement/expression (about law): any statement or expression that manifests the internal viewpoint of law. The user of an internal statement about law both accepts the rule as already valid and therefore does not go the extra mile of explaining the *fact* that it is valid (pg.102).

External statement/expression (about law): any statement or expression that manifests the external viewpoint of law in which the user refers to the *fact* of the rule's existence. Such a statement does not already accept the rule as valid and recognizes it as a rule apart of a broader, coherent, legal framework (pg. 103).

Primary and Secondary Rules

Primary rules are those rules which oblige its citizens to behave in ways which promote social well-being and civility in a society. Thus, Hart writes of primary rules "are concerned with the actions that individuals must or must not do" (pg.94).

Secondary rules are those rules – rule of recognition, rule of adjudication, and rule of change – which allow for modification of primary rules in various ways (pg.94). Thus, Hart writes of secondary rules “are all concerned with the primary rules themselves”(pg.94).

- **The rule of recognition** remedies this problem of uncertainty about whether or not a body of documents count as legally valid since it allows for officials to review the documents, statutes, etc. deemed legally valid. Without a rule of recognition, something by which one can exercise a legal right to assess the legal validity of a document or statute, primary rules would reduce to pure sovereignty.
- **The rule of change** allows for one to make new determinations regarding the efficacy or applicability of a law depending on how one comes to recognize that law as legally valid.
- **The rule of adjudication** allows for legal officials to make determinations regarding whether or not a primary was rule, the sanctions to be issued, and how such sanctions are to be issued.

