EMPOWERMENT AS THE FUNDAMENTAL LEGAL CONCEPT

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Concepts play a crucial role in the law. Not only because legal rules are framed by means of concepts, but also because the choice of basic concepts considerably influences the way in which a whole legal system is considered. One may, for example, look at law as primarily procedural (like Roman law) or as primarily substantive (modern Western law). If one takes the law substantive, major differences in the conceptualization of law are still possible. If the law is seen as a means to guide behavior, the obvious basic legal concept is that of a duty. One could also choose rights rather than duties as the fundamental concept. In this paper I explore the view that empowerment is the law's most fundamental concept. This approach was famously taken by Hans Kelsen, and it is through a discussion of some aspects of his work that I analyze empowerment as the fundamental legal concept.

Kelsen's later work produces difficult problems for legal scholars, generally, and for Kelsen scholars in particular. As is true of many great philosophers, Kelsen's later work repudiates much that was central to his earlier work. But, unlike Wittgenstein or Rorty, whose repudiation is total, Kelsen retains some central elements of his early views while casting aside others that seem equally central. He abandons the principle of normative non-contradiction and the principle that one norm can be deduced from another; yet, he retained the view that the validity of all norms must be grounded in a presupposed basic norm and that all norms can be formally reduced to the deontic modality of empowerment. More than a few prominent commentators—Bobbio, Harris, Paulson, Raz, Weinberger—find Kelsen's partial repudiation of his earlier views troubling. Raz, for instance, argues that since the doctrine of the basic norm entails the principle of normative non-contradiction,[1] Kelsen cannot retain the former while abandoning the latter. Harris argues that Kelsen should

abandon neither the principle of normative non-contradiction, nor the model of normative deduction.[2] My goal is not to argue the details of the critiques Kelsen's shifting doctrines. Rather, I want to look at the conceptual benefits of retaining a reduction to empowerment as the fundamental concept for legal philosophy. Specifically, I believe that the formal reduction to empowerment allows Kelsen to address in a systematic and coherent way many of the fundamental issues of legal philosophy including validity, collective action, indeterminacy, legal gaps, and the problem of normative contradiction.

Problem of Validity

Since at least one crucial function of law is to guide or direct behavior, perhaps the most fundamental question for legal philosophy is: "How does one know whether a purported rule is a true rule or merely an imposter?" This is the question of validity—how does one know that a law is valid or binding? Enough has been written about Kelsen's theory of normativity that I need not rehearse it here.[3] Suffice it to say that reduction to empowerment is the essence of Kelsen's theory of validity:

> A legal norm is not valid because it has a certain content, that is, because its content is logically deducible from a presupposed basic norm, but because it is created in a certain way—ultimately in a way determined by a presupposed norm. For this reason alone does the legal norm belong to the legal order whose norms are created according to this basic norm. Therefore any kind of content might be law.[4]

On this view, validity is no more and no less than deducibility from the basic empowering norm in combination with a set of true factual premises. A norm, any norm, which can be traced back to a duly empowered norm issuing authority, is valid. The validity of the norm is entirely independent of its content and can be known by the legal person without need to examine its content. Here we can understand Kelsen's reasons for prescribing a very limited role for constitutional courts. The only unconstitutional action that might occur is the agent acting *ultra vires*. Accordingly the only role for a constitutional court is the determination of whether the agent was empowered to act. Kelsen's view of the role of a constitutional court strikes many raised in the American system, with its long tradition of robust judicial review, as unsatisfactory. In fact, it sounds strikingly close to James Bradley Thayer's infamous rule of clear mistake (whatever is rational is constitutional),[5] wherein the norms issuing from a duly empowered authority are presumed valid. For Thayer, only those activities which are expressly prohibited by the constitution itself are, if undertaken by the state, unconstitutional. Unless the state has made a clear mistake, the presumption must be that the state has acted in a constitutionally permissible manner. In matters of policy where the constitution leaves open a range

of choices, Thayer argues that whatever choice is rational is constitutional. Without trying to decide the merits of such a position here, it should be clear that the position follows from a reduction to empowerment.

Collective Action

Reduction of all normative forms to empowerment enables Kelsen to address one of the fundamental problems of democratic legal theory, namely the attribution of individual action to a collective. Kelsen was loath to reify a collective, and he was highly critical of any legal theory he found guilty of such "legal anthropomorphism." The problem is neatly expressed in a passage in the second edition of the Pure Theory of Law:

> If the state is presented as an acting subject, if it is said that the state has done this or that, the question arises which is the criterion according to which certain acts performed by certain individuals are attributed to the state, are qualified as acts or functions of the state, or, what amounts to the same, why certain individuals in performing certain acts are considered to be organs of the state?[6]

For Kelsen, the only manner in which a collective subject can act is through its representatives. To represent the state as an acting agent is to attribute (earlier Kelsen said "impute") an official's act to the collective. At the conceptual level, legislation itself is impossible absent mechanisms or representation and attribution. It is here that reduction to empowerment provides the key. As Kelsen put it: "Since the law governs its own creation and application, the normative function of empowerment plays a particularly important role in the law."[7] The legitimate attribution of an act to the state requires that acts of sort attributed be authorized by a higher-level norm. Empowerment to create norms is the vehicle through which the law authorizes collective action. Of course, the attribution of legislation to a collective subject has a regressive structure -one moves from the act of norm-creation to the norm that authorizes it, then to the norm that authorizes it, and so on—but the regression is not infinite. By making the Grundnorm itself an empowering norm that is presupposed rather than grounded, Kelsen provides an account of collective action that is consistent with a justificatory account of normativity but that avoids the thorny problems associated with self-empowerment or self-validation. He writes:

> What distinguishes the relation characterized as state power from other power relations is the fact that it is legally regulated, which is to say that those who exercise power as the government or the state are *authorized by the legal system to exercise that power by creating and applying legal norms,* which is to say that state power has normative character.[8]

Incompleteness, Indeterminacy, and Normative Gaps

Reduction to empowerment provides a solution to the thorny issues of normative incompleteness, indeterminacy, and legal lacunae. For Kelsen, a legal norm is incomplete or underdetermined unless and until it has been instantiated and made concrete through application by a duly empowered official to a particular case.[9] As Kelsen puts it,

> [t]he higher-level norm cannot be binding with respect to every detail of the act putting it into practice. There must always remain a range of discretion ... so that the higher-level norm, in relation to the act applying it (an act of norm creation or of pure implementation) has simply the character of a frame to be filled in by way of the act.[10]

Every act of law application or interpretation is thus also an act of law creation. Kelsen treats difficult cases of first impression—cases that call for the judge to create law—exactly as he treats easy cases of rather straight forward application of a rule to a set of facts.

The indeterminacy of law can be either intended or unintended.[11] The delegation of rule-making authority to an administrative law body or agency is a clear example of intentional indeterminacy. The legislature intends to make a set of rules for a certain area, but it does not know what rules it wants to make. Further, legislation is always subject to interpretation and implementation by courts or by administrative agencies. Thus, for Kelsen, judicial discretion does not threaten the integrity of a norm-based legal system in the slightest. Rather, discretion, via empowerment, accounts for the functioning of a norm-based system. On this score, Kelsen would surely find odd the contemporary American political discourse in which legislators routinely decry judges who "legislate from the bench." Similarly, the call for judges who "interpret the law, not make it," or the claim by judicial nominees that they embrace such a view of the judicial role, would strike Kelsen as bizarre. Anticipating in many ways Quine's thesis of the indeterminacy of translation,[12] Kelsen rejects the notion that there is only one proper way of interpreting the law or filling in the gaps between legal norms.

> From the standpoint of the positive law, however, there is no criterion on the basis of which one of the possibilities given within the frame of the norm to be applied could be favored over the other possibilities. In terms of positive law, there is simply no method according to which only one of the several readings of a norm could be distinguished as "correct"—assuming, of course, that several readings of the meaning of the norm are possible in the context of all other norms of the statute or legal system. In spite of every effort, traditional jurisprudence has not yet found an objectively plausible way to settle the conflict between will and expression.[13]

A similar line of reasoning leads Kelsen to conclude that, because the system is one that assumes that norms are only realized when applied in an individual case, there are, in fact, no gaps in the law and no problem of gap-filling.[14] A true normative gap, "a case in which a decision is impossible for want of a norm,"[15] is impossible, for to even speak of a case presupposes that a valid empowering norm vests decisional authority in the official.

Kelsen's solution to the problem of indeterminacy and legal gaps thus turns on the formal reduction to empowerment. The basic norm empowers the legislature to posit normative rules which themselves empower judges to apply them to all and any cases that fall under them, even to cases wherein it is at best difficult to determine anything remotely resembling legislative intent. In this way the basic norm creates a legal system in which the empowering of officials to resolve indeterminacy issues eliminates normative gaps. If we, as a society, are concerned that judges and other interpreting bodies are not accountable, then perhaps we have chosen poorly in empowering certain officials with discretion.

One particularly interesting result here is that the reduction to empowerment enables Kelsen to embrace "no-gaps" thesis while rejecting a "one-right–answer" thesis. Simultaneously, there are no Dworkinian hard cases where Judge Hercules must search outside the law for a basis for a decision; yet there are no uniquely right answers to legal questions.

The Inferential Model of Norms

Empowerment as the fundamental deontic modality helps make sense of Kelsen's abandonment of the inferential model of norms and normative validity. His earlier work insisted that the validity of a norm depended upon its derivability from a superior norm, the inferential trail ultimately leading back to the basic norm. While appealing, this model encounters increasingly difficult questions the farther one moves form the basic norm towards individual norms. It is now a commonplace to assert that the expressions "Jones did precisely what the law forbids" and "Jones is guilty" have very different meanings. The former is a statement of fact while the latter is a normative judgment that, in theory at least, should follow directly from the former. Of course, there are a wide variety of reasons that can disrupt the inferential chain deriving the normative judgment from the factual statements. The trouble for the inferential model is that it is very difficult to give a plausible account of this difference. One can modify the inferential model to make it a very complex conditional, but it is odd to ascribe to legislators the view that only those who are caught, and who the prosecutor chose to prosecute, are guilty. Empowerment, however, faces no such difficulties. As Kelsen puts it:

> Now it is undoubtedly possible for the general norm "All thieves should be punished, i.e., sent to prison" to be valid, since created by way of legislation, and for the statement "Smith is a thief" to be true, and even

> to be asserted by the competent court, while the individual norm "Smith should be sent to prison" is nevertheless not valid, because the competent court has for some reason failed to posit this individual norm.[16]

Moreover, empowerment as the fundamental modality leads to the view that norms simply cannot be *derived* from other norms at all. Nothing logically follows from the ascription of a power to an individual or body. The empowered official may or may not act in a particular, and efforts *infer* anything at all are exercises in psychology, not legal science.

Normative Conflict

Perhaps the most controversial change in Kelsen's later work is his abandonment of the principle of normative non-contradiction. Kelsen's view is that normative conflicts are fairly common.[17] What is important here is that reduction to empowerment makes normative conflict tolerable (and allows for an account of what I take to be the empirical reality of well-functioning legal systems that contain contradictions and other conflicts). Should a duly empowered official issue contradictory orders, or merely unwise orders, the remedy lies neither in logic nor in assumed derogating rules, but in informing the discretion of the officials or, should that fail, in choosing other, better officials.

Stanley Paulson has argued that the very possibility of normative conflicts "may well be fatal to the doctrine of the legal man and the normativity that the doctrine represents."[18] From the norm subject's point of view, however, empowerment does not threaten to collapse the system. When confronted by inconsistent directives, the citizen, rather than deriving a contradiction and then declaring that anything follows, should conclude that she is the victim of irrational or unwise norm issuers and that her position is one of being damned if she obeys and damned if she does not obey. Though this is an unpleasant place in which to find one's self, it does not threaten one's normative view of the world. The citizen-subject of the law cannot, under an empowerment model, conclude that from a contradiction follows that everything is permitted.

One final benefit of the empowerment model it that it provides the sort of positivist account of derogating rules Kelsen ultimately embraced. The existence of even one genuine normative conflict—a conflict insoluble by derogating rules—makes this view of derogation implausible. Paulson[19] has suggested, following the lead of Adolph Merkl,[20] that one could insist upon a *lex priori* instead of the more conventional *lex posterior* rule, because the earlier rule is temporally closer to the source and thus closer to the original intentions of the rule maker. It is not difficult to imagine some originalists in American constitutional law making such a case. While such a case may be in error, it is not because of a *logical* error.

An Impurity in the System?

Kelsen's pure theory of law is an attempt to construct "a legal theory purified of all political ideology and every element of natural sciences."[21] It seeks to raise the study of law to the level of a theoretical science (as distinct from an empirical science), in which "cognition [is] focused on the law alone."[22] Harris describes this as a theory about "pure legal-information-giving" purged of all non-legal concerns. But who is the receiver of this pure legal information? Who is the addressee of the norms of a system? Felix Cohen once argued that:

> Fundamentally there are only two significant questions in the field of law. One is, "How do courts actually decide cases of a given kind?" The other is, "How ought they to decide cases of a given kind?" Unless a legal "problem" can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense.[23]

Cohen's claim is puzzling *for a realist* because it looks at law only from the official's point of view, failing to take into account the other addressee of the law, the citizen as receiver of the law. Kelsen, too, would reject Cohen's claim because the psychological question of how judges actually decide is not a *legal* question at all and is not properly part of the science of law. Reduction to empowerment enables Kelsen to provide a legal epistemology that enables the *officials* to know the law. But what of the other norm subject, the citizen? The problem facing both Cohen and Kelsen is that they have embraced what Mortimer and Sanford Kadish call a rational-bureaucratic model of legal obligation, one that sees the law exclusively from the producer's point of view—at the expense of the citizen. If norms are to direct the behavior of citizens, then it must be as easy for the citizen to know what the law is as it is for the official. But the corollary to the indeterminacy thesis is the thesis of the under-determination of theory. A receiver of the law can always legitimately ask "Is this official duly empowered to make this norm?" and the under-determination of theory entails that there will always be competing answers to the question. And the receiver of the law's choice between competing basic empowering norms will ultimately turn on non-legal, social considerations. As Kadish and Kadish put it:

> Before he [a receiver of the law] can be in any position to conclude that he has an obligation to obey a rule, he must first have ascertained that the rule maker is indeed authorized to make the rule. Is the receiver of the law to accept as valid the rules made by anyone claiming to be the true prince, so long as he looks like the true prince?[24]

An answer to this question constitutes a principle of acceptance *for* a legal system.[25] While there is great debate about such principles, one thing is clear: a

rational-bureaucratic model of legal authority, focusing on the producer's view of obligation, *cannot* provide such principle. From the rational-bureaucratic point of view, where authority is monopolized and flows in only one direction, the question cannot be intelligibly formulated. A principle of acceptance for the receiver of the law cannot be merely a *logical* phenomenon, rather it must be a *sociological* one. Hart's analysis of the rule of recognition as a social rule should have put to rest once and for all any attempt derive, a priori, a formal/logical rule for the validity of a legal system. To the extent that a basic norm as an empowering norm is a legal norm at all, it must be treated as a social rule. This is the essential impurity of which the law and legal philosophy cannot be cleansed.

Notes

1. Joseph Raz, *The Purity of the Pure Theory*" in Stanley L. Paulson, ed, *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford: Oxford University Press, 1999) 456.
2. J.W. Harris, "Kelsen and Normative Consistency," in Richard Tur and William L. Twining, eds, *Essays on Kelsen* (Oxford: Clarendon Press, 1986).
3. H. L.A. Hart, *Kelsen's Doctrine of the Unity of Law*, *Ethics and Social Justice,* ed. H.E. Kiefer and M.K. Munitz, (Albany: SUNY Press: 1970); Sylvie Delacroix, "Hart's and Kelsen's Concepts of Normativity Contrasted," *Ratio Juris* 17:4, (2004):501; Joseph Raz, "Kelsen's Theory of the Basic Norm," *The Authority of Law* (Oxford:Clarendon Press, 1979), 122.
4. Hans Kelsen, Pure Theory of Law, trans. Max Knight (Berkeley and Los Angeles: University fo California Press, 1967) hereinafter referred to as PTL198.
5. James B. Thayer, "The Origin and Scope of the American Doctrine in Constitutional Law," Harvard Law Review 7 (1893): 129.
6. PTL 240.
7. Hans Kelsen, *General theory of Norms*, trans. Michael Hartney (Oxford: Clarendon Press, 1991), hereinafter referred to as GTN, at 102.
8. PTL 289. Emphasis added.
9. Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992), hereinafter referred to as LT, at 11-12.
10. LT 78.
11. LT 78-79.
12. Willard van Orman Quine, *Word and Object* (New York: Wiley and Sons,1960).
13. LT 81.
14. LT 84-87.
15. LT 85.
16. Hans Kelsen, Essays in Legal and Moral Philosophy, ed. Ota Weinberger, trans. Peter Heath (Dordrecth and Boston: Reidel, 1973), hereinafter referred to as ELMP, at 240-241.
17. ELMP 271.
18. S. L. Paulson, „Kelsen without Kant," In Öffentliche oder private Moral? Vom Geltungsgrunde und der Legitimität des Rechts. Festschrift für Ernesto Garzon Valdés, Ed. W. Krawietz and G. von Wright, 153–62. Berlin: Duncker & Humblot. 1992 at 161.
19. Stanley L. Paulson, *On The Status of the Lex Posterior Derogating Rule, Liverpool Law Review* 5.1 (1983): 5.

20. Adolf Merkl, "Die Rechtseinheit des osterreichischen Staates," *Archiv des offentlichen Rechts* 37 (1918): 56.

21. LT, 1

22. LT 7-8.

23. Felix S. Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review* 35 (1935): 809; reprinted. in W.W. Fisher III, M.J. Horowitz, and T.A. Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993), 215 (hereafter, *ALR*)

24. Mortimer R. Kadish and Sanford H. Kadish, *Discretion to Disobey, A Study of Lawful Departures From Legal Rules*, (Stanford: Stanford University Press, 1973), 186.

25. Contrast this with a principle of acceptance *within* a system.