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KELSEN'S ENDGAME

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> Having supposed a super-norm we may indeed suppose another still superior norm, and so on *ad infinitum*, like the elephants and tortoise which have been supposed to support the earth. Clearly there is no help in that.[1]

I

HANS Kelsen was a remarkable legal philosopher. His list of publications during his own lifetime runs to somewhere in the region of 400 works – half that again if we include his translated works and book reviews.[2] These publications address all manner of topics, legal and non-legal, and anyone who does not know anything about Kelsen but simply peruses a bibliography of his works might be forgiven for assuming that he was one of those restless eclectics who was unable to develop and sustain a serious intellectual project and so used up his energy by forever flitting from one short-lived preoccupation to another. In fact, Kelsen was remarkably tenacious in pursuing his main intellectual obsessions. He embarked upon his main jurisprudential project, the pure theory of law, at the beginning of the 1910s and was still engaged in it in the 1960s. Many of his contemporaries were in awe of his vision and his energy in pursuing that project, and his many books and essays on the pure theory keep legal scholars busy to this day. He developed the pure theory rigorously and defended it robustly, publishing replies to various challengers which mercilessly exposed their attacks as wrongheaded.[3] Indeed, anyone reading Kelsen's responses to critics might be forgiven for thinking that his theoretical convictions were unshakeable.

It would be a mistake, in fact, to think that Kelsen refused to see faults in his own theory. When he conceded mistakes, however, he was

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[1] W. W. Buckland, *Some Reflections on Jurisprudence* (Cambridge 1945), 21.

[2] For a sense of just how vast is the secondary literature, see Michael Steven Green, "Hans Kelsen and the Logic of Legal Systems" (2003) 54 Alabama L. Rev. 365, 410–13.

[3] Consider, *e.g.*, Kelsen's lengthy and highly technical replies to Paul Amselek and Julius Stone respectively, both published in Kelsen's eighty-fourth year: "Eine Phänomenologische Rechtstheorie" (1965) 15 Österreichische Zeitschrift für Öffentliches Recht 363; "Professor Stone and the Pure Theory of Law" (1965) 17 Stanford L. Rev. 1128. Amselek and Stone both typify what might be termed a "look no, Hans!" approach to the pure theory. Kelsen, in his replies, concedes no significant ground to either opponent.

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usually succumbing to his own doubts rather than to those of others; for Kelsen, the most perceptive critic of the pure theory of law was Hans Kelsen. The doubts that he did have about his own jurisprudential project were not minor. It is well known among legal philosophers that Kelsen, in his late years, made two radical alterations to the pure theory. First, having argued for the best part of his life that conflicting norms cannot be simultaneously valid, in the 1960s he changed his mind and began to argue that although logic cannot accommodate valid conflicting norms, it is perfectly conceivable that conflicting norms could co-exist and be valid within a legal system.[4] Kelsen's ultimate conclusion on the matter of conflicting norms is wholly unconvincing – an exercise in "mad logic", as Joseph Raz once put it, whereby one valid law within a legal system might oblige and another valid law might forbid the same action[5] – but it is at least possible to work out from some of his last writings how the conclusion was reached.[6] However, for a clear explanation of his second radical modification of his theory – his change of heart concerning the basic norm of a legal system – one will search in vain.

Roughly speaking, Kelsen, for most of his professional life, conceived of the basic norm – that citizens ought to obey legal norms validly created in accordance with the historically first constitution – as a presupposition. That all the norms of a legal system derive ultimately from the basic norm has to be presupposed, he argued, because without this assumption that which we know to exist could not exist: positive law *qua* the object of cognitive legal science would not be possible.[7] In the quarter century separating the two editions of the *Pure Theory of Law*, Kelsen's conception of the basic norm

[4] "As far as conflicts between general norms are concerned", he observes in his posthumously published *General Theory of Norms*, "it is not the case – as I claimed in my *Pure Theory of Law* [the last edition of which was published in 1960] – that a conflict of norms which cannot be resolved by the principle *Lex posterior derogat legi priori* [a later law prevails over an earlier law] makes no sense and that both norms are therefore invalid. Each of the two general norms makes sense and both are valid." Hans Kelsen, *General Theory of Norms*, trans. M. Hartney (Oxford 1991), 214.

[5] See Joseph Raz, "Critical Study: Kelsen's General Theory of Norms" (1976) 6 Philosophia 495, 502–4.

[6] See, in particular, Hans Kelsen and Ulrich Klug, *Rechtsnormen und Logische Analyse. Ein Breifwechsel 1959 bis 1965* (Vienna 1981), 14–29, 36–8, 42–51, 87–91; Hans Kelsen, *Essays in Legal and Moral Philosophy*, ed. O. Weinberger (Dordrecht 1973), 228–75; above n.4, 211–51. For most of the 1960s Kelsen sought to defend the conclusion against critics, but by the end of the decade was struggling to do so. "My memory", he wrote to the editor of Rechtstheorie in September 1968, "is weakened owing to advanced age and I fear that other mental faculties are drawn in as well. I believe I ought not to publish anything else." Cited by Klaus Adomeit, "Hans Kelsen" (1973) 9 Rechtstheorie 129, 129.

[7] "The hypothetical basic norm answers the question: how is positive law possible as an object of cognition, as the object of juridical science; and, consequently, how is a juridical science possible?" Hans Kelsen, *General Theory of Law and State*, trans. A. Wedberg (New York 1945), 437.

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remains unaltered in principle.[8] "The basic norm", he wrote in 1934, "is simply the expression of the necessary presupposition of every positivistic understanding of legal data. It is valid not as a legal norm … but as a presupposed condition of all lawmaking."[9] Every legal norm "must be created by way of a special act … not of intellect but of will"[10] – the will of not just anybody, but of a person or body legally authorised to create the legal norm. That authority is itself conferred on that person or body by another legal norm – Kelsen might not have distinguished explicitly between power-conferring and duty-imposing rules, but he understood the distinction clearly enough – which must itself be created by way of an act of will issuing from a person or body whose law-creating capacity is authorised by yet another legal norm. And so on, until we reach the basic norm. Whereas we can explain the reason for the validity of any legal norm by saying that it is attributable to the will of a person or body whose action is authorised by another legal norm, this explanation cannot be applied to the basic norm. The basic norm is not an enacted norm. "It must be *presupposed*," Kelsen elaborated in 1960, "because it cannot be 'posited,' that is to say: created, by an authority whose competence would have to rest on a still higher norm. This final norm's validity cannot be derived from a higher norm, the reason for its validity cannot be questioned."[11] Because it is not an enacted norm, moreover, it "cannot be the meaning of an act of will"; rather, "it can only be the meaning of an act of thinking" – the consequence of "presuppos[ing] in our juristic thinking the norm: 'One ought to obey the prescriptions of the historically first constitution.'"[12]

I have deliberately avoided the sorts of technicalities one usually encounters in discussions of the pure theory – references to Kelsen's Kantianism, his transcendentalism, his conception of the legal order as a *Stufenbaulehre*, and so on – and have sought to present the conception of the basic norm to which Kelsen subscribed for most of his life as rudimentarily as possible, for what interests me is not this conception but Kelsen's ultimate rejection of it. As legal philosophers well know, soon after the appearance of the second edition of the *Pure Theory of Law* in 1960, Kelsen began to write very differently about the basic norm. Gone was the notion of the basic norm as a presupposition essential to the enterprise of conceiving of law as a science, and in its place was put the distinctly less robust conception of

[8] See Stanley L. Paulson, "Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization" (1998) 18 O.J.L.S. 153, 160.
[9] Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. B. L. & S. L. Paulson (Oxford 1992), 58.
[10] *Ibid.*, 56.
[11] Hans Kelsen, *Pure Theory of Law*, 2nd ed., trans. M. Knight (Berkeley 1967), 194–5.
[12] *Ibid.*, 204.

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the basic norm as a "fiction".[13] The implications of this change of thinking will be set out in a moment, but before we reach that point it is worth mentioning at the outset that nobody seems to have found Kelsen's reformulation of the basic norm particularly enlightening or helpful. His radical revision of some of his arguments in the last thirteen years of his life tends to be treated by legal philosophers – in so far as they ever address it – as a bewildering complication which only detracts from the magnitude of his jurisprudential achievement.[14] More often than not Kelsen's jurisprudence is discussed, sometimes quite deliberately, as if he stopped writing about the pure theory of law once he had completed the second edition of his book on the subject.[15] Even Kelsen, we will see, seems uncharacteristically diffident when claiming that his reformulation of the basic norm is an improvement upon the version which he had developed between 1911 and 1960. This diffidence contrasts markedly with his conviction that his efforts during this period to devise a properly scientific account of legal validity had not met with success. Indeed the reformulation of the basic norm was, John Finnis has recently observed, part of "the spectacular debacle" whereby Kelsen "rightly acknowledg[ed] the failure of his legal philosophy … to explain or even coherently describe law's validity".[16]

I am sure this assessment is correct. Kelsen reformulated the basic norm because he became convinced that none of the articulations of it to be found in his writings up to 1960 satisfied the demands of legal science. But what convinced him that he had been wrong? The purpose of this short essay is to try to scratch this particular itch. Do not expect the itch to disappear completely: the fact is that any answer to the question of what prompted Kelsen's change of heart must be speculative. But the question deserves some consideration, for presently Kelsen remains so much an open case: what we know is that this exceptional jurist carefully defended and developed his pure theory of law for half a century and then, in his final years, when most of us would have lost the motivation and the energy to defend our

[13] The English translation of the second edition of the *Pure Theory of Law* was published after Kelsen's reformulation of the basic norm. Although he was able to check and make some alterations to the text, it is not surprising that he should not have regarded the translation to be "the final word" on the pure theory: see *ibid.*, vi (translator's preface). Even in the original German version of the second edition, there are hints that the reformulation of the basic norm was on its way: see Paulson, above n.8, 161.

[14] See, *e.g.*, John Gardner, "Law as a Leap of Faith", in *Faith in Law: Essays in Legal Theory*, ed. P. Oliver et al. (Oxford 2000), 19, 24–5; Deryck Beyeleveld, "From the 'Middle Way' to Normative Irrationalism: Hans Kelsen's *General Theory of Norms*" (1993) 56 M.L.R. 104, 118–9.

[15] See, *e.g.*, Brian H. Bix, *A Dictionary of Legal Theory* (Oxford 2004), 114 ("… the claims about his work here apply to most of what he wrote, but will generally not apply to his last works, when he mysteriously rejected much of the theory he had constructed during the prior decades").

[16] John Finnis, "The Priority of Persons", in J. Horder, ed., *Oxford Essays in Jurisprudence. Fourth Series* (Oxford 2000), 1, 6.

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theoretical positions, let alone re-scrutinise them, he cast doubt on some of the key components of that theory, his new version of the basic norm as a fiction representing perhaps the most serious of his doubts.

II

Just how Kelsen's conception of the basic norm changed in the 1960s is not too difficult to explain, though the implications of what he did are complicated. In the second edition of the *Pure Theory of Law*, one of Kelsen's many reiterations of his argument that the basic norm is a presupposition comes by way of the following image:

> A father orders his child to go to school. The child answers: Why? The reply may be: Because the father so ordered and the child ought to obey the father. If the child continues to ask: Why ought I to obey the father, the answer may be: Because God has commanded 'Obey Your Parents,' and one ought to obey the commands of God. If the child now asks why ought one to obey the commands of God, that is, if the child questions the validity of this norm, then the answer is that this question cannot be asked, that the norm cannot be questioned – the reason for the validity of the norm must not be sought: the norm has to be presupposed.[17]

Four years later, in a short essay concerning the function of a constitution, Kelsen uses this image again, and appears to reach the same conclusion: when "[t]he son replies: "Why should one listen to the commands of God?' … [t]he only possible answer to this is: because, as a believer, one presupposes that one ought to obey the commands of God. This is the statement of the validity of a norm that must be presupposed in a believer's thinking in order to ground the validity of the norms of a religious morality … no further question can be raised about the basis of its validity."[18] But as one continues with this essay, it becomes clear that his argument has, within four years, undergone a subtle but radical shift. For most of the essay, he makes his familiar moves: the basic norm of a legal order is basic "because no further question can be raised about its existence; for it is not a posited … norm … but a norm presupposed in juristic thinking … the transcendental-logical condition of the judgments with which legal science describes law as an objectively valid order."[19] Then he drops a bombshell: "along with the basic norm, presupposed in thought, one

[17] Kelsen, above n.11, 196–7.
[18] Hans Kelsen, "The Function of a Constitution" (1964), trans. I. Stewart in R. Tur & W. Twining, eds., *Essays on Kelsen* (Oxford 1986), 109, 112.
[19] *Ibid.*, 115–6.

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must also think of an imaginary authority whose (figmentary) act of will has the basic norm as its meaning."[20]

In the second edition of the *Pure Theory of Law*, we have observed already, Kelsen argued that any legal norm embodies the meaning of an act of will, but that the same cannot be said of the basic norm since to claim that the basic norm is dependent upon some anterior act of will is to refuse to accord it the status of a presupposition. Following Kelsen's own reasoning if the basic norm is, like any legal norm, the meaning of an act of will, then that act of will must be the act of some entity with the authority to create a valid basic norm, and that authority must – again following Kelsen's reasoning – derive from some norm even "higher" than the basic norm itself (which must also embody the meaning of an act of will of some entity authorised by an even higher norm and so on, *ad infinitum*). Before 1960, Kelsen had rested content with his argument that the basic norm is presupposed as an act of juristic thinking, the thought of jurists being that citizens ought to obey legal norms which are valid in accordance with the historically first constitution. By 1964, however, this argument was no longer satisfactory to him. "To the assumption of a norm not posited by a real act of will but only presupposed in juristic thinking, one can validly object that a norm can be the meaning only of an act of will and not of an act of thinking",[21] and if the validity of this objection is conceded then the basic norm, like any posited legal norm, must be understood to be the meaning of an act of will. But whose will? And what authorised that act of will? And whose will lay behind that authority? And so on.

Could Kelsen extricate himself from this tangle? In his last works he answered, not at all convincingly, that the only way to do so is to conceive of the basic norm as a fictitious norm. His argument faithfully accords with Hans Vaihinger's theory of fictions. Vaihinger distinguishes between semi-fictions which contradict reality and genuine or full fictions which not only contradict reality but are also self-contradictory.[22] Around 1962, Kelsen is reported to have argued that the presupposition of a basic norm had to be fictional in the first sense because it contradicts reality: the presupposed basic norm does not exist.[23] By 1964, he was arguing that the basic norm is a fiction in the second sense as well:

[20] *Ibid.*, 117.
[21] *Ibid.*, 116.
[22] See Hans Vaihinger, *The Philosophy of "As If"*, 2nd English ed., trans. C. K. Ogden (London 1935), 16, 97–100. The first German edition of this text was published in 1911.
[23] Hans Kelsen, "Diskussionsbeitrag", in F. M. Schmölz, ed., *Das Naturrecht in der Politischen Theorie* (Vienna 1963), 118, 119–20.

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> For the assumption of a basic norm … not only contradicts reality, since no such norm exists as the meaning of an actual act of will, but also contains contradiction within itself, since it represents the authorization of a supreme moral or legal authority, and hence it issues from an authority lying beyond that authority, even though the further authority is merely figmentary.[24]

Vaihinger regarded fictions as useful falsities, as does Kelsen here.[25] The basic norm, he is arguing, can still be presupposed as if it exists as the meaning of an actual act of will, even though it does not. He briefly elaborates the argument in his swan song, the posthumously published *General Theory of Norms*. The basic norm may be "a merely thought norm …, the meaning of a merely fictitious, and not a real, act of will", but we should not underestimate the utility of such a norm as "a cognitive device", for it alone enables us to distinguish the valid norms of a positive legal order from other types of directive.[26] But the basic norm, conceived as a fiction, seems not to do the work that Kelsen wants it to do. At best, it enables us to proceed *as though* particular directives are the valid norms of a positive legal order.[27] The notion of the basic norm as a fiction does not demonstrate that those directives *are* valid legal norms. So it is that Kelsen, by embracing this notion, did serious damage to his own lifelong effort to *show* that a legal system is a system of dynamically interrelated valid legal norms.[28] Nor did the revised version of the basic norm remedy the problem of infinite regression which arises if one insists that every norm is the meaning of an act of will. If a fictitious norm is assumed to provide the foundation for a legal order then, Alexy argues, keeping with Kelsen's reasoning, "a further basic norm would have to be invented to empower the fictitious authority to issue the basic norm, which would

[24] Kelsen, above n.18, 117. The translator argues in his writings on Kelsen that the argument that the fictitious basic norm contains a contradiction within itself must be wrongheaded, because the fictitious norm "is a nothing and therefore no question of truth or falsity can arise." Iain Stewart, "Kelsen and the Exegetical Tradition", in *Essays on Kelsen*, above n.18, 123, 133; similarly "The Basic Norm as Fiction" (1980) 25 Juridical Rev. (N.S.) 199, 208. But I think what Kelsen means in the passage quoted is that the idea of the fictitious basic norm entails a contradiction, because, as he conceives of it, it represents both the highest authority and yet derives from a higher (imagined) authority. For a similar reading, see Stanley L. Paulson, "Introduction", in S. L. & B. L. Paulson, eds., *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford 1998), xxiii, xlv.

[25] See Vaihinger, above n.22, xlii.

[26] Kelsen, above n.4, 256. See also Hans Kelsen, "On the Pure Theory of Law" (1966) 1 Israel L. Rev. 1, 6–7 ("[T]he presupposition of the basic norm is the typical case of a *fiction* in the sense of Vaihinger's *Philosophie des Als-Ob*. Its presupposition is the condition under which the coercive order established by acts of human beings and by and large effective, called 'law', may be interpreted as a system of objectively valid legal norms …").

[27] See Robert Walter, "Der Gegenwärtige Stand der Reinen Rechtslehre" (1970) 1 Rechtstheorie 69, 80 ("This basic norm is nothing other than an *assumption*. It permits the interpretation and description of efficacious coercive directives … *as though* they were normative directives …").

[28] This is clearly Paulson's view, though I suspect he would express the point slightly differently: see, *e.g.*, Stanley L. Paulson, "Kelsen's Legal Theory: The Final Round" (1992) 12 O.J.L.S. 265, 270; "Introduction", above n.24, xlv.

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amount to not only denying the original basic norm its character as a basic norm, but also – since the further basic norm, too, could only be the content of an act of will – presupposing *ad infinitum* further fictitious authorities and the fictitious basic norms empowering them."[29] The problem of infinite regression which arises once the basic norm is conceived to be the meaning of an act of will is not remedied by Kelsen's recourse to the doctrine of fictions. Rather, it is reiterated.

III

Kelsen's comments on the basic norm in his last decade read rather like those of somebody who professed to love birds and who made a will for the benefit of avian protection but who, soon before dying, changed the will so that the money went to a society dedicated to the pursuit of pigeon-shooting. Why did Kelsen do what he did? What could he have been thinking? It seems impossible to answer this question without some amount of guesswork, and without inviting further questions. Perhaps Kelsen simply became sceptical about the Kantian epistemology that informed his idea of the basic norm as a presupposition. But what led to the scepticism? Perhaps the answer is Vaihinger, whose philosophy certainly seems to have led Kelsen to the idea of the basic norm as fiction. But it is not clear why Vaihinger's argument should have persuaded Kelsen to jettison the conception of the basic norm that he had been refining for half a century.[30] However we try to answer explain Kelsen's change of heart, there is always the question: "but then why did he do *that*?"

It seems to me that Kelsen's revision of the basic norm is an outgrowth of, rather than a complete departure from, his pre-1960 legal science. Roughly between 1920 and 1960, he followed his Vienna School colleague, Adolf Merkl, in arguing that a legal system can be understood as a hierarchy of legal norms, from the most general constitutional and legislative stipulations down to the most concrete legal acts. All legal norms, except those at the lowest level, confer the power to create lower-level legal norms, and every legal norm is itself empowered by some higher legal norm.[31] But the idea of norms empowering norms, Kelsen recognised (or certainly came to recognise), is simplistic: valid legal norms, he elaborated in the second

[29] Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans. B. L. & S. L. Paulson (Oxford 2002), 111.

[30] Especially since Kelsen had examined the legal-scientific potential of Vaihinger's philosophy as early as 1919: see Hans Kelsen, "Zur Theorie der Juristischen Fictionen" (1919) 1 Annalen der Philosophie 630.

[31] See Kelsen, above n.9, 63–75. For Merkl's theory of law as a hierarchical structure, see Adolf Julius Merkl, "Prolegomena einer Theorie des Rechtlichen Stufenbaues", in A. Verdross, ed., *Gesellschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre* (Vienna 1931), 252–94.

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edition of the *Pure Theory of Law*, do not empower other legal norms but "confer upon someone else a certain power, specifically the power to *enact* norms himself. In this sense the acts whose meaning is a norm are acts of will."[32] So it is that, in Kelsen's legal science, the legal norm comes to be characterised as embodying the meaning of an act of will, which will is the will of some person or body empowered to act by a higher legal norm, which must itself embody the meaning of an act of will, and so on. Every legal norm, to simplify the matter, must derive from some prior mental act.

The notion of the basic norm – which, strictly speaking, is the highest norm, and so at the pinnacle rather than at the base of the hierarchy[33] – obviously does not fit comfortably, if indeed it fits at all, within a theory which has it that all legal norms derive from some prior mental act. Can such a norm really be accommodated within such a theory? One way of accommodating it would be to say that it is only enacted legal norms that need to be explained as the meaning of an act of will. Since the basic norm is not an actual norm of the positive legal order – since it is simply an idea – why cannot we say that every legal norm must be the meaning of an act of will, apart from the basic norm, which, because it is not a posited norm, can simply be presupposed? This seems to be the position which, by around 1960, Kelsen had decided he could not accept. He concedes in the second edition of the *Pure Theory* that "a norm need not be only the meaning of a real act of will".[34] This ambiguous statement – which I take to mean that not every norm has to be the meaning of an act of will – opens up the opportunity for him to argue that the basic norm is a special exception in the way that I have just suggested it might be. At first glance it looks as if he seizes this opportunity – for he remains committed to the claim that the basic norm has to be presupposed. It turns out, however, that he takes a different path – the path that eventually leads him to the notion of a fictitious basic norm. Continuing from his observation that a norm need not be only the meaning of an act of will, he says that

> it can also be the content of an act of thinking. Just as we can imagine things which do not really exist but 'exist' only in our thinking, we can imagine a norm which is not the meaning of a real act of will but which exists only in our thinking. Then, it is not a positive norm. But since there is a correlation between the ought of a norm and a will whose meaning it is, there must be in our thinking also an imaginary will whose meaning is the norm

[32] Kelsen, above n.11, 5. Emphasis added.
[33] See Michel Troper, "La Pyramide est Toujours Debout!" (1978) 94 *Revue du Droit Public et de la Science Politique en France et à l'Étranger* 1523.
[34] Kelsen, above n.11, 9.

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> which is only presupposed in our thinking – as is the basic norm of a positive legal order.[35]

In the last part of this passage we see Kelsen conceiving of the basic norm as the meaning of an imaginary act of will – an act of will which exists only in our thinking. The language of the passage suggests that Kelsen was already, in the second edition of the *Pure Theory*, coming around to the view of the basic norm which surfaces in "The Constitutional Function" and the *General Theory of Norms*. Any norm must, according to Kelsen, be the meaning of an act of will – even if, in the case of the basic norm, it is the meaning of an imaginary act of will. This line of reasoning, which we find in the second edition of the *Pure Theory*, Kelsen takes a stage further in "The Constitutional Function": if the basic norm is the meaning of an imagined act of will then that imagined act of will itself must be authorised by some imaginary norm still higher than the basic norm – and this imaginary norm beyond the basic norm must be the meaning of another imagined act of will, and so on. A legal norm is the meaning of an act of will, which is authorised by a higher legal norm. The basic norm shares with a positive legal norm the quality of being the meaning of an act of will, except that in the case of the basic norm the act of will is imagined. Nevertheless, this imagined act of will, according to the structure of Kelsen's normative argument, must itself be grounded in a norm. He wanted to demonstrate the normativity of the basic norm – to demonstrate that, as with any legal norm, it is the meaning of an act of will. But once the basic norm is conceived to be the meaning of an imaginary act of will which itself demands an imaginary higher authority, it is no longer basic. The idea of the basic norm as a fiction is Kelsen's effort to take his argument concerning norms embodying the meaning of an act of will to what he considered to be its logical conclusion.

IV

Persevere all we might, we sometimes, with Kelsen, have to admit defeat. One sees Hart getting close to this point in his incisive essay on Kelsen's *General Theory of Law and State*, "Kelsen Visited", wherein, at times, Hart is not so much critically engaging with Kelsen as simply trying to understand what Kelsen could have been hoping to achieve – such as when Kelsen distinguishes the ought-quality of legal norms from the ought-quality of legal scientists' statements about norms (or "norm", as Kelsen puts it, "in the descriptive sense of that term").[36]

[35] *Ibid.*, 9–10.
[36] Kelsen, above n.7, 46. See H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford 1983), 286, 287–95.

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My purpose here has been to try to understand what might have motivated one of Kelsen's more mystifying manoeuvres: how are we to explain his change of heart over the basic norm? Kelsen, even before he began to conceive of the basic norm as a fiction, struggled to understand how a norm is connected to human volition. His ultimate attempt to resolve this difficulty in the case of the basic norm requires logical reasoning no less bizarre than that which led him to conclude that legal systems may accommodate norms which are valid but which conflict. If a norm of the positive legal order must have an author, then it follows logically, Kelsen appears to have concluded, that the imagined basic norm must likewise have an imagined author, as if the constraints of logic apply to the imagination as they do to the real world. Why Kelsen should have concluded that an imagined norm must share the formal qualities of an actual, enacted norm is a mystery. The itch, I warned earlier, would not disappear altogether. It rarely does with this most original and complicated – and sometimes exasperating – of legal philosophers.

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