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Grundnorm and Grounding
A modern Metaphysics for Hans Kelsen's Pure Theory?[1]

Abstract: This article explores the possibility of reconstructing Hans Kelsen's neo-Kantian theory of the basic norm (Grundnorm) with the help of the theory of (metaphysical) grounding. First, we outline Kelsen's theory of the basic norm as an integral part of his neo-Kantian transcendental idealism and give a sketch of grounding theory; we then try to fit these theories together. As it turns out, grounding theory has some internal flaws. More importantly, several of the features of a metaphysical ground are not compatible with the roles which Kelsen ascribes to the basic norm – its roles as a keystone of the legal hierarchy and as a transcendental-logical condition of legal cognition. Finally, an alternative conception is examined, according to which the legal system is grounded not by the basic norm but by social facts, with the basic norm serving as a bridging principle. However, this alternative is flawed as well; its main problem seems to be that it violates the dualism of 'Is' and 'Ought'. The argument is relevant for the concept of personhood, because Kelsen treats the term 'person' in law as a mere expression for the unity of a specific set of legal norms, so that the identity of persons is ultimately dependent on the identity and function of the basic norm of the legal system.
Keywords: basic norm, grounding, Hans Kelsen, legal personhood

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Introduction

This text is an attempt to reconstruct Hans Kelsen's neo-Kantian theory of the basic norm as it was developed in his writings between 1920 and 1934, by means of current conceptions of metaphysical grounding. There are a number of reasons for this thematic choice. First, the theory of the basic norm is, in spite of its prominence, notoriously unclear. Second, theories of metaphysical relations, and especially grounding, are in vogue in present general philosophical discourse. Third, Kelsen's specific neo-Kantian conception of legal knowledge is the only elaborate (and arguably the only feasible) philosophical background theory he ever presented. Fourth, parts of neo-Kantianism and parts of grounding theory share the aim of replacing traditional ontology, which concentrates on 'what there is', by a theory of fundamental relations. Fifth, Kelsen employs terminology which comes close to grounding vocabulary: he maintains that a *Grundnorm* ('Grund' may be translated both as 'ground' and as 'reason') is at the base (or apex) of the legal system and that, in the legal hierarchy, a higher norm is the 'ground' or 'reason' of the validity of a lower norm. But he never defines the notion of a ground.

The intention is not to give a thorough analysis or critique of either grounding theory or Kelsen's neo-Kantian theory of the basic norm; the aim is rather to examine whether it is possible, on the basis of a broad-brush rendering of both theories, to rationally reconstruct relations which are underdetermined in Kelsen's texts as grounding relations, in order to enhance the coherence of the Pure Theory of law.

At first sight, our undertaking seems to be of little relevance for the topic of this volume, as it does not cover the concept of a 'person' or the question of how the identity of a person is established. However, due to a peculiarity of Kelsen's theory, it is exactly to the point. In the 1920s, Kelsen discussed the concept of a person from a juristic point of view extensively (see especially 1925, pp. 62–76). His argument is among the most complicated and outlandish parts of his theory. He holds that the notion of a person does not belong to those elements which are necessary in constructing the law. Law is made up of 'primary' norms which connect, via the normative category of peripheral imputation, a legal condition – some human action and other circumstances – with the exertion of coercion (we will say more about this below). All elements which are necessarily involved in constituting primary norms, or which are presupposed by them, are indispensable in the construction of the law. The concepts of person, duty and right do not number among these elements. The term 'duty' designates a 'secondary' norm commanding the avoidance of behaviour which normatively triggers a sanction. The term 'right' roughly designates the legal capability to contribute to the circumstances under which somebody else's action or omission normatively triggers a sanction. Both duties and rights are not essential elements of law; they merely facilitate legal cognition or construction and accommodate everyday legal talk.

In Kelsen's view, a person is, from the legal perspective, not the 'bearer' of duties and rights; rather, the term 'person' merely denotes a set or 'cluster' (*Bündel*) of such duties and rights, no matter whether the person is a 'natural' or a 'legal' person. The natural person is the set of those duties and rights that have the acts of one human being as their content; the legal person is the set of duties and rights that have the acts of several human beings as their content. The person of the state, finally, is identical with the (centralized) legal order as a whole. So the concept 'person' is, for Kelsen, an auxiliary construct of a 'second order', as it were. It is an anthropomorphic hypostatization of the unity of a set of secondary norms, which are themselves only protheses of legal thought.

This strange conception is the outcome of rather diverse considerations. First, Kelsen opposes the distinction between law in a subjective and an objective sense. There can be just one homogeneous manifestation of law: objective law. But the notions of person, right and duty smack of subjectivity. So, to preserve the unity of law, they must be reducible to the objective law. Second, Kelsen is an anti-psychologist, and the term 'duty' (as an 'Ought' directed at some empirical human being) has, for him, psychologistic connotations. Third, the unity of law demands uniformity. Besides the primary norm, which merely connects two states of affairs or acts in a normative way, there must be no other essential normative units in law. Fourth, Kelsen is influenced by the neo-Kantian trend to replace concepts of objects (*Gegenstandsbegriffe*) by predicative, relational or functional terms (that is, he adheres to the project of detecting hypostatizations and doing away with them). And the term 'person' is a problematic object term.[2]

This is not the place to deal with Kelsen's argument, which is fraught with difficulties. What is important is the consequence that as any person can, in law, be reduced either to the legal order as a whole (in the case of the person of the state) or to subsets of the legal order (in the case of the natural or the legal person), the identity of persons depends on the identity of the legal order, and the identity of the legal order depends on the basic norm. So the relation of the basic norm to the legal order, or whether and how the basic norm 'grounds' the legal order, is what in the end determines the identity of persons from the legal perspective.

We will proceed as follows: first, the basic idea of grounding theory, the main features of the grounding relation and problems connected with them will be outlined. Next, the characteristics of Kelsen's neo-Kantianism and the two main aspects of the

2 In nuce, these motives can be found in a pointed programmatic passage of his Allgemeine Staatslehre, where Kelsen describes the aims of the Pure Theory as follows: 'Dualism of Is and Ought; replacement of metaphysical postulates and hypostases by transcendental categories as the conditions of experience; transformation of absolute, qualitative and transsystematic contrasts within one and the same discipline into relative, quantitative, intrasystematic differences; advancement from the subjectivistic sphere of psychologism into the area of logical-objective validity' (Kelsen, 1925, vii. All the translations in this article are our own unless specified otherwise.)

basic norm will be depicted, namely, its status as part of the legal hierarchy and its status as a transcendental-logical condition of legal cognition. There follows an attempt to reconstruct the basic norm in terms of grounding theory. Finally, an alternative reconstruction of the basic norm as a 'bridging principle' constituting a grounding relation between natural facts and legal norms will be examined.

1. Grounding

Grounding theory is a very recent branch of philosophy; it is expressive of a post-analytical and post-modal move 'back to metaphysics' (Chalmers, 2018, pp. 1–2). Grounding debate is still very much a construction site, and many points are controversial. There seems to be unanimity concerning some points: grounding is a fundamental relation of determination which captures the meaning of the connective 'in (or by) virtue of' and has the capacity to replace traditional ontology. It is not an empirical relation and allows for finer-grained differentiations than analytical or modal relations, and it is connected with the concept of 'explanation': if something is a ground for something else, it explains it.

Some standard examples for sentences purported to describe grounding relations are (Correia & Schnieder, 2012, p. 1):

1. Mental facts obtain because of neurophysiological facts.
2. Legal facts are grounded in non-legal, e.g. social, facts.
3. Normative facts are based in natural facts.
4. A set of things is less fundamental than its members.

In the literature, four formal properties of grounding, which are responsible for its 'directedness', are more or less uncontroversial: (1) it is asymmetric (if *a* grounds *b*, *b* does not ground *a*); (2) it is irreflexive (*a* does not ground *a*); (3) it is transitive (if *a* grounds *b* and *b* grounds *c*, then *a* grounds *c*); (4) it is non-monotonic (it is not the case that if *a* grounds *b*, *a* and any arbitrary fact *c* ground *b*) (see Bliss & Trogdon, 2021).[3] Non-monotonicity, however, seems to play a minor role, and irreflexivity seems to be a superfluous feature, because it is entailed by asymmetry.

Then there are two related features which are slightly more specific and more controversial, although they still seem to be mainstream grounding:

1. Grounding is a relation between existing elements; this is the demand of *factivity*. It delimits the relation of grounding from the hypothetical relation expressed by general laws (see Fine, 2012, pp. 37–80).

3 In fact, counterexamples to practically all of these properties have been brought forward in grounding literature; still, they are named as features by the mainstream of grounding theory.

2. The ground and the grounded element must exist at the same time. This is the demand of *synchronicity* which is especially used to delimit (metaphysical) grounding from causal relations (Bernstein, 2016, pp. 21–38).

Finally, there are two features of grounding which on the one hand seem to concern the *differentia specifica*, and thus the very core, of grounding, while, on the other, they seem to lead to a paradox:

1. The ground has metaphysical or ontological priority over the grounded element (Correia & Schnieder, 2012, pp. 24–25). It is more fundamental; that is, while it is in some way possible to conceive of the ground without the grounded element, it is (arguably) not conceivable that the grounded element is given without the ground.[4] E.g. we can think of the members of a set independently of the set, but we cannot think of the set without its members.
2. Besides this, a full ground (completely) determines the 'that' and 'how' of the grounded element – in fact, this seems to be necessary for grounding to have an explanatory function (Glazier, 2020; Skiles, 2020). This dependency relation is neither a causal one nor an analytical or conceptual one – which is what makes grounding 'metaphysical'.

These features seem to lead to a paradox, because if a (full) ground completely determines the grounded element, then it must be possible to infer the grounded element directly from the ground. That seems to contradict the feature that it must be conceivable that the ground exists without the grounded element. Besides, there regularly seems to be some meaning surplus in the grounded element (see the examples given above), which would speak against the relation being one of 'full' determination.

This problem might partly be overcome by recurring to the relatively unproblematic notion of 'hyperintensionality' (Correia & Schnieder, 2012, p. 14): Roughly, hyperintensionality is given if two expressions have the same extension in all possible worlds, while they still may not be exchanged for each other in every context *salva veritate*.[5] It is a relatively unproblematic notion, because there are obvious examples for it; an uncontroversial one is the relation between the properties of 'being an equilateral triangle' and 'being an equiangular triangle' – it is neither an empirical nor an analytical relation, but the one can be inferred from the other, while conceiving of an equilateral triangle is still possible without conceiving of its equiangularity (and vice versa). One can know that a triangle is equilateral without knowing that it is equian-

4 There might be exceptions in case there are alternative grounds, for example the fact that Socrates was a philosopher seems to ground the fact that there was a philosopher. But the existence of the latter fact does not presuppose that Socrates was a philosopher.

5 In fact, the notion of hyperintensionality has had quite a career recently and has earned its own entry in the Stanford encyclopedia of philosophy.

gular. In the same way, it may be possible that the grounded element is inferred from the ground, while it is still possible to conceive of the ground without the grounded element. (This does not, of course, solve the puzzle of what the 'metaphysical priority' of the ground amounts to. See section 4.3 for discussion of this problem.)

Finally, there are several contested features of grounding. The four most important open questions seem to be:

1. Is grounding really a primitive relation, or is the term just a name for a subclass of other well-defined relations or phenomena – for example, a subclass of supervenience relations or a subclass of deductive relations (Audi, 2012)?
2. Is grounding a unitarian concept, that is, does the concept cover just one specific phenomenon, or is it a 'portmanteau' concept, covering very different phenomena? Famously, Arthur Schopenhauer (1903) held the principle of sufficient reason to rest on a 'fourfold root'.
3. What elements are connected by the grounding relation? Some grounding theorists seem to think that these elements are part of a realist world which is structured in levels of different fundamentality; at the opposite end of the spectrum, more reticent authors seem to think that grounding is rather a relation between propositions (Audi, 2012, p. 108; Chalmers, 2018; Schaffer, 2012, pp. 123–124).
4. As humans are not endowed with a specific metaphysical sense, and as grounding seems not to be reducible to any empirical or analytical features, how can one 'detect' a grounding relation? Hardcore metaphysicians might assume that grounding relations are self-evident, but one might also hold that the grounding relation has to be grounded itself (cf. Wallner, 2018); then again, one might assume that 'bridging principles' are needed to establish or cognize the relation (but this seems to lead to further problems; see the discussion in section 4.3).

2. Kelsen's Neo-Kantianism

Kelsen's theory is often said to belong to the neo-Kantian tradition, 'neo-Kantianism' meaning the specific philosophical movement which dominated German philosophy between approximately 1870 and 1920.[6] Its orientation is expressed by two notorious slogans: *Zurück zu Kant* ('Back to Kant'),[7] and *Kant verstehen heißt* über *ihn hinausgehen* ('To understand Kant is to go beyond him') (Windelband, 1907, p. iv). On the one hand, philosophy – which, around 1850, was fragmented and in

6 This section is mainly taken from Heidemann, 2022, pp. 14–19, 31–38.

7 Otto Liebmann ended each chapter of his influential book (1865) with some version of this slogan.

danger of being usurped by the successful natural sciences – had to be salvaged by going back to Kant's philosophy. On the other hand, Kant's philosophy was taken to be partly inconsistent and in need of being complemented and improved to do justice to its spirit.

Neo-Kantians tend to neglect Kant's practical philosophy; they are suspicious of his conception of the 'transcendental unity of apperception' as an indubitable starting point; and they are anti-realists – more than Kant himself was. For them, the objective world is not given independently of cognition – rather, it is 'constituted' by it – and they do without assigning any function to the notion of a thing-in-itself. Epistemology rather than ontology is at the centre of most neo-Kantian philosophies.

There are two main schools of neo-Kantianism: the Marburg and the Baden schools. The Marburg school, represented foremost by Hermann Cohen and Paul Natorp, holds transcendental philosophy in a Kantian vein to be a theory of the exact sciences. It accepts the judgements of the culturally established and successfully operating natural sciences as a 'given' fact and critically explores the conditions of their possibility. This brand of neo-Kantianism is of great importance for the further development of philosophy, influencing logical positivism and analytical philosophy. The Baden school, on the other hand, represented mainly by Wilhelm Windelband and Heinrich Rickert, dissolves philosophy into a theory of values. It focusses on the dualism of 'Is' and 'Ought', making use of it to distinguish between the 'genesis' and the 'validity' of cognition; for them, both theoretical and practical cognition gain their objectivity by complying with norms which are derived from universal 'values'. These basic values are truth and goodness. They do not exist like objects exist; rather, they are 'valid', preceding any ontology. From such values, norms emanate which make it possible to distinguish correct from incorrect thinking.

Kelsen's neo-Kantianism combines traits of both schools. He shares the thesis that it is impossible to have cognition of objects if these objects are independent of cognition; he summarizes the Kantian position, approvingly, as follows:

> It is impossible for cognition to play just a passive part in relation to its objects; it cannot be restricted to reflect things somehow existing 'in themselves', i.e. in a transcendent sphere. As soon as we can no longer assume objects to have a transcendent, i.e. knowledge-independent, existence, cognition has to play an active, creative part in relation to these objects. It is cognition itself which creates its objects from the material given to it by the senses according to its immanent laws. Cognition being guided by rules guarantees the objective validity of its result. […] What takes the place of metaphysical speculation is the task of determining the rules guiding the process of cognition, i.e. the objective conditions of this process. (Kelsen, 1928, p. 62)

Focussing on this normative element of cognition – the rules guiding cognition – is, together with the emphasis on the dualism of Is and Ought, part of the Baden school inheritance in Kelsen's theory. The Marburg school is represented by Kelsen's thesis that the valid cognitive judgements which are the object of the transcendental analysis should be extracted from the established sciences:

> Referring to the fact of science is the essential of transcendental philosophy, its only basis from which it – as a theory of scientific experience – performs its analyses of its only possible object, the synthetic judgement of experience as science. (Kelsen, 1922b, p. 128)

It follows that scientific judgement is 'the cornerstone of transcendental philosophy, which, therefore, can only be critique of science, critique of cognition, because it is restricted to analysing the synthetic judgement' (Kelsen, 1922b, p. 128). Kelsen concludes that

> the law of legal science is a system of *Rechtssätze*, a system of judgements, just as nature as the object of natural science is, for transcendental philosophy, a system of judgements. (Kelsen, 1923, vi)

For him, law, as a set of legal norms, is a system of hypothetical normative judgements embodied in the institutional practice of legal science which connect a certain state of affairs with a sanction by the category of the peripheral imputation (the legal Ought) (Kelsen, 1922a, p. 75). It is the task of the Pure Theory, as a transcendental philosophy of law, to carve out the necessary elements and structure of these judgements and to determine their presuppositions.

3. The basic norm

The basic norm was introduced into Kelsen's texts in the 1920s, together with this explicit neo-Kantian background theory and the theory of the legal hierarchy, and it plays a crucial role in both of them.[8]

3.1. The basic norm as the apex norm of the legal hierarchy

On the one hand, the basic norm is a necessary part of the legal hierarchy. In his first texts, Kelsen had tabooed the question as to why a legal norm is valid (Kelsen, 1911, 353), while maintaining at the same time that there are in principle endless chains of deriving an Is, via causal laws, from another Is, and of deriving an Ought from another Ought. But he did not elaborate on this, and he did not explain how

8 The section about Kelsen's conception of the legal hierarchy and the status of the basic norm is mainly taken from Heidemann (2022, pp. 43–48).

an Ought might be derived from another Ought. This explanation seems, for the legal sphere, to be achieved by the theory of the *Stufenbau* which Kelsen adopted from Merkl around 1920 (Kelsen, 1923, p. xv).

The theory of the legal hierarchy is well known and is in fact one of the most famous conceptions of the Pure Theory. It need not be discussed in detail in this context; the interesting point for present purposes is that it more or less boils down to the thesis that any legal norm, in order to be valid, must conform to the criteria for its creation laid down in another norm of a higher logical order. At first sight, this seems clear enough; at second sight, however, things are a bit more complicated. There are two different versions of the relation between the higher – and lower-order norms; the first is prominent in specific neo-Kantian writings. As a system of cognitive normative judgements, law is created by legal science, using 'higher' norms as schemes to bestow the mode of Ought or validity onto some alogical material which is 'given' in the guise of, or as the content of, certain empirical acts of some norm-positing organ:

> I have claimed that questioning the specific validity of any individual legal norm leads us, step by step, to higher and higher legal norms […], while the question concerning the content of the legal norm […] leads us to the acts of legislation, adjudication, etc., which are the 'material' of the legal norms. This distinction is analogous to the distinction made in transcendental philosophy between concept and sensation, between the logical *form* and the perceptual *material*. I have distinguished between the content, meaning the material still to be formed, and validity, meaning the form of the material when construed into a valid logical judgement. The logical creation of the law (meaning, of course, the law of legal science, the *Rechtssätze*) from the basic norm proceeds step by step and under constant reference to a parallel fact (Kelsen, 1922b, pp. 214–215).

While having a Kantian hue, this is metaphorical and vague, and it is difficult to reconstruct it in terms of logical relations. However, there is a second version of the relation between a higher and a lower norm:

> A norm is a valid legal norm only if it has been realized in a certain way, created according to a specific rule, posited according to a certain method. […] As a result of the dynamic character of law, a norm is valid because and as far as it has been created in a way determined by another norm; therefore, the latter is the ground of the validity of the former (Kelsen, 1934, pp. 64, 74).

According to this version, the higher norm (necessarily) regulates the 'creation' and (possibly) the content of the lower norm. What does this mean? In the neo-Kantian phase, Kelsen takes the legal norm to be a logical Ought judgement, and one obviously cannot create a valid logical judgement in the same way one might create, say, a painting or a cake. Still, 'creating' a valid Ought judgement can be achieved

by fulfilling the conditions for the judgement to be valid, or for the corresponding normative sentence to be true, which amounts to the same. After all, in a Fregean or neo-Kantian spirit, a true judgement in a logical sense is the same as a fact, and nothing speaks against saying that one can create or bring about facts.[9] In this case, the higher norm is logically a higher-order or meta-level judgement providing criteria for some lower-order judgement to be valid or to be a fact. Simplified, it has a form somewhat like:

> If there is a performative/utterance 'O*p*' under certain conditions and with a certain content, then O*p* is a valid norm.

The circumstances of the performative and the limitations to its content would be the conditions for the (lower) norm to be valid. The legal *Stufenbau* would be a logical hierarchy of higher-order and lower-order levels, or object and meta-levels, with the higher-level norms defining criteria for norms of the lower level to be valid.

In this structure, the basic norm stands at the end of the chain of validation. As the highest norm, it answers the question as to why the constitution of a legal order (or rather, the historically first constitution, from which the validity of the current constitution can be derived) is valid. One possible answer to this question might, at first sight, be to say that its validity is simply presupposed by legal science. For legal science as an existing socio-cultural practice, law seems to be 'always there', and as no jurist questions the validity of the constitution (or the historically first constitution that validates it), its validity is presupposed. This is, however, not the way Kelsen proceeds. He holds that legal cognition, once justifying the validity of a norm comes to an end for lack of another higher positive criterion for valid norms, presupposes a norm according to which the content of a performative, be it custom or the intentional act of some body exerting factual power, counts as the highest legal norm, that is, as constitution (Kelsen, 1934, pp. 65–66). While Kelsen seldom explains the necessity of the basic norm in detail, there are several reasons why it is not just a 'needless reduplication'. First, law is, according to Kelsen, only positive law; that is, any legal norm must get its content from a factual act which is in accordance with a 'higher' norm. It follows that the constitution would only be positive law if it 'rests' on a performative which fulfils the condition for being norm-triggering named in a yet-higher norm; this higher norm cannot itself be a positive legal norm but can only be presupposed as a basic norm. Second, the institutionalized scientific practice that legal cognition is embedded in only takes the constitution to be valid if it adheres to a legal system which is effective and regularly applied in a way that takes the constitution to contain the highest criteria of legal validity. So the basic norm is necessary

9 'Was ist eine Tatsache? Eine Tatsache ist ein Gedanke, der wahr ist' (What is a fact? A fact is a thought which is true) (Frege, 1986, p. 33).

to capture the legal system being conditioned by its efficacy; sometimes Kelsen even seems to identify it with the principle of efficacy.[10] Third, the 'positive' constitution as such often consists of disparate regulations, posited both by those who had the power to do so and by custom. To unify these highest norms of positive law, it is necessary to presuppose a single norm which declares the factual acts by which these highest norms were posited to be the highest criteria for legal validity, thus unifying them (Kelsen, 1934, pp. 62–66).

3.2. The basic norm as a transcendental-logical condition

The basic norm's comparatively tangible position in the legal hierarchy is, however, just one aspect of it. Kelsen also holds that it is a (or the) 'transcendental-logical condition' for legal cognition, and thus for law (this is mainly responsible for the vast literature concerning the basic norm), or that it is a 'hypothesis' in the sense of Cohen, that is, a fundamental constitutive element (*Grundlegung*) posited by cognition. This is argued for by Kelsen in the following well-known passage:

> By formulating the basic norm, the Pure Theory does not want to inaugurate a new scientific method for jurisprudence. It just aims to bring to awareness what all jurists do – mostly without being aware of it, when, in conceiving their object, they decline to resort to natural law from which the validity of the positive legal order might be derived, but still conceive this positive law as a valid order, […] that is, as norm. With the doctrine of the basic norm, the Pure Theory of law simply undertakes to lay bare the transcendental-logical conditions of the longstanding method of cognizing the positive law by analysing its factual procedure (Kelsen, 1934, p. 67).

This is a rather high-flown claim which is only partly justified. For Kantian philosophy, transcendental-logical conditions are those conditions of cognition which make reference to objects possible. They are the categories of understanding which can be extracted, according to Kant, from the possible functions of judgements; so for Kelsen, who levels out the difference between cognitive judgement and cognitional object and holds legal norms to be hypothetical judgements, the categories are identical with the 'connector' between antecedent and consequent of these judgements. Peripheral imputation, the specific legal Ought constituting the hypothetical judgement of the *Rechtssatz*, is such a category of relation; it might truly be said to be a transcendental-logical condition. The basic norm, on the other hand, is a presupposed fundamental rule offering criteria for legal validity, yet it is not really an applicable criteria rule but just a necessary corollary if one takes the constitution to be valid. The rela-

10 This is especially apparent in those passages where Kelsen holds that, if one assumes a primacy of international law over municipal law, the basic norm of the municipal law transforms into a positive norm of international law, namely, the principle of efficacy (cf. Kelsen, 1934, pp. 70–72).

tion between the legal system, as an ordered system of cognitive judgements, and its presuppositions is one of equiprimordiality: while from 'inside' the legal system, the basic norm is necessarily given, it exists only relative to this legal system. One cannot exist without the other, and neither can be derived from anything else. So the validity of the legal system depends on its implicit basic norm, but making the basic norm explicit reveals that it is valid only relative to the legal system. This is responsible for its hypothetical character; it is in accordance with the function of the Pure Theory of performing a presuppositional analysis of the 'factum' of legal science: legal science as an institutionalized practice is given, and only if we are ready to accept that the claim of objective validity raised by legal scientists for their normative judgements is justified, do we have to acknowledge the validity or existence of certain presuppositions, the basic norm being one of them.

There is no real equivalent for this function in Kantian philosophy, and to call the basic norm a transcendental-logical condition is at least oblique. Yet, as shown above, neo-Kantianism tends to downgrade transcendental philosophy to a critical meta-theory of an existing scientific practice, that is, a critical analysis of the presuppositions of the established sciences, those non-factual conditions which are necessary to make it possible. One might regard the basic norm as a transcendental-logical condition in this very weak sense of being not an object but an implicit general presupposition of legal science in practice.

4. The basic norm as part of a grounding relation

At first sight, grounding theory, with its claim of going 'back to metaphysics', seems to be scarcely compatible with a (neo-)Kantian approach. After all, Kant's fame is as a destroyer of metaphysics. By contrast, grounding theory seems to rely on the notion that there is a world 'in itself', consisting of ontological layers. However, most grounding theorists avoid subscribing to philosophical realism, and indeed, a realist background theory does not seem to be necessary for their enterprise. Even for the general claim that grounding is 'metaphysical', the difference between the approaches is less grave than it appears. Kant did not abolish metaphysics but revised it, replacing traditional ontology with an analytics of the transcendental conditions of thinking. Likewise, grounding theory aims at a revisionary metaphysics, in a similar way replacing the traditional ontology of 'what there is' by a theory of relations concerned with 'what grounds what'. Still, to make grounding compatible with the theory of the basic norm, it must be understood in a specific way: the elements connected by the grounding relation must be cognitive judgements. This is unproblematic because, for a neo-Kantian point of view, a fact is nothing but a true proposition or a valid judgement. So for this view, there is no decisive difference between saying that grounding relates valid judgements and saying that grounding relates facts; many grounding

theorists could accept having facts or true propositions as possible elements of the grounding relation. Under this interpretation, the asymmetry, irreflexivity and transitivity features can easily be accounted for. If judgement *p* grounds judgement *q*, then judgement *q* does not ground judgement *p*. Any judgement *p* does not ground itself. If judgement *p* grounds judgement *q*, and judgement *q* grounds judgement *r*, then judgement *p* grounds judgement *r*. In an analogous manner, the feature of factivity means that grounding connects only valid or true judgements; the feature of synchronicity means that it is impossible that grounding and grounded judgements are not valid at the same time.

The feature of metaphysical priority is more difficult to capture in terms of judgements. It can perhaps best be explained by saying that in all possible worlds where the grounding judgement is valid, the grounded judgement is valid as well, while it is still somehow possible to think of the grounding judgement without thinking of the grounded judgement, due to the phenomenon of hyperintensionality mentioned above. And maybe the specific 'by virtue' function, the material component of grounding, can be captured by saying that the grounding judgement is in some non-empirical and non-analytical way 'responsible' for the validity of the grounded judgement.[11]

4.1. The basic norm as the apex norm of the legal hierarchy

As part of the legal hierarchy, the basic norm is the last element in a sequence of higher-level rules determining the conditions for norms of a lower level to be valid; so far, it plays the role of any 'higher' norm in the *Stufenbau*. Can it be assumed that such higher norms 'ground' the lower-level norms? Without straining language, one might say that the lower-level norm exists 'in virtue of' the higher norm, given the indeterminacy of the expression 'in virtue of'; the relation may be taken to be asymmetric, irreflexive and transitive.

But there does not seem to be synchronicity. It is correct to say that the lower-level rule cannot exist without (some) meta-rule determining exact criteria for its existence. Yet the meta-rule might well exist without the lower-level rule: it is a regular feature of legal systems that a law empowering someone to issue norms exists before the norms it validates come into existence. The related demand of factivity seems to pose a similar problem. Still, these difficulties might be overcome in the special case of the basic norm, because it seems to be impossible that the basic norm and a valid constitution exist without each other.

11 David Chalmers has attempted to assimilate metaphysical grounding to conceptual/analytical grounding, promoting the thesis 'When P and Q are composed of transparent concepts, P metaphysically grounds Q if and only if P conceptually grounds Q' (2018, p. 9), with P conceptually grounding Q if the truth of P fully explains the truth of Q by virtue of the concepts involved. Should this enterprise be successful, it would be a big step towards fully reconciling metaphysical grounding with a Kantian position.

A worse problem is that any higher-level norm does not seem to 'fully' determine the validity of the lower-level norm; without any factual act, there would not be a lower norm with a certain content. So the higher norm might at best be a 'partial' ground for the lower norm; the full set of grounds would include some norm-positing act. This, however, is problematic for two reasons: on the one hand, it contradicts Kelsen's thesis that the higher norm alone is the 'ground' of the validity of the lower norm, while the factual law-giving act (and its content) only 'conditions' it (Kelsen, 1922a, pp. 93–95). On the other hand, grounding theory claims that grounding is a 'finer-grained' relation between elements, being able to express distinctions which cannot be captured by analytical or modal relations. But if the higher norm, as a meta-rule, and the factual act which is norm-creating 'by virtue of' the higher norm are indiscriminately stuffed into the set of 'partial grounds', any differences between them seem to be steamrollered, and grounding seems in fact to be too *coarse*-grained a relation to reconstruct the legal hierarchy with.

A partial solution might be to regard validity, contra Kelsen, not as the *existence* of a norm, but as a *quality* that transforms the subjective meaning contained in acts claiming to be norm-positing into an objective meaning-content: a legal norm. In this case, it might be said that the higher norm fully determines not the lower norm altogether, but only the quality which distinguishes something which is just a claim to normativity (a subjective meaning-content) from a norm (an objective meaning-content). This solution might also solve the problem that, according to Kelsen, any higher norm does not provide the content of the lower norm.

But there is another difficulty. In grounding literature, it is regularly assumed that facts of an object-level ground facts of a meta-level. For example, the fact that snow is white grounds the fact that the sentence 'Snow is white' is true, but not vice versa (even though they are equivalent) (Correia & Schnieder, 2012, p. 1). As shown above, the higher norm belongs to a meta-level vis-à-vis the lower norm because it 'thematizes' this norm in a general way by determining criteria for its validity. Now, if one assumes that the higher norm grounds the lower norm, then it seems to follow that in the case of the legal hierarchy, the meta-level grounds the object level; that is, it is metaphysically prior to it. This would be strange, to say the least.

4.2. The basic norm as a transcendental-logical condition

It was shown above that the basic norm as a transcendental-logical condition is not a 'given' fundament of the legal system, with the latter 'resting' on it; rather, it is the result of an analysis of the presuppositions of an existing intellectual practice. This is what makes up its hypothetical character: if the law is valid, then the basic norm exists; conversely, the validity of the legal system depends on the existence of the basic norm. This is a kind of interdependence or equiprimordiality that seems to be a central feature of any Kantian-minded philosophy. In the *Critique of Pure Reason*, it can be found in the relation between subject and object, or between the tran-

scendental unity of apperception – the 'I', the possibility of which accompanies any of 'our' representations – and 'the world' as referred to by the system of our objectively valid judgements; for neo-Kantians, it is found in the interdependence between the successfully operating sciences and their presuppositions (e.g. Cohen, 1885, p. 77). (A late offshoot in the sphere of practical philosophy seems to be Rawls' theory of a 'reflective equilibrium'; on this concept, see Knight, 2023).

How does the basic norm as part of such a hypothetical relation of equiprimordiality fare when assessed with the conceptual means of grounding theory? Of the more or less uncontested features of grounding, transitivity poses no difficulties: if the basic norm grounds the constitution, it also grounds the norms which are grounded by the constitution. However, the features of irreflexivity and asymmetry are troublesome. While, on the one hand, it seems that the basic norm is on a 'higher' level vis-à-vis the legal system, so that, logically, they are not equally ranking, it is nevertheless the case that the existence of the legal system allows us to conclude that there is a basic norm triggering it, and it is impossible for the basic norm to exist without a legal system adhering to it. As shown above, it is a matter of interdependence, which seems to be incompatible with the 'directedness' of grounding.

There are two possible ways of getting out of this predicament. The first might be to say that irreflexivity and asymmetry are not necessary elements of a grounding relation. The second might be to point to the fact that the basic norm is only implicit on the level of the positive law; it is explicit only on the level of meta-theory. Belonging to different levels in this sense seems to exclude genuine symmetry and, together with it, reflexivity. However, on the one hand, the different levels are still in a peculiar relation of coequal balance: think one element away, and the other one vanishes. On the other hand, the argument seems also to be destructive to the assumption that there is a grounding relation between the basic norm and the legal system: can something which is part of a meta-level vis-à-vis the whole legal system, and only implicit on the level of the law itself, really 'ground' it?

As for the further features of grounding, there is no problem with synchronicity; in fact, equiprimordiality seems to afford that both elements co-exist at the same time. However, given the hypothetical character of the basic norm, the feature of factivity is doubtful. Again, neither the basic norm nor the legal system exist unconditionally – they condition each other; clinging together, they 'float in the void', as it were.[12] What is a fact is the institutionalized legal practice, but this alone does not suffice to say that both the system of legal norms and the basic norm are (normative) facts. Kelsen's approach is not to say 'the law exists *because* it is grounded by the basic norm'; rather, he says, 'the law exists *if* the basic norm is presupposed'.

The basic norm as a transcendental-logical condition does not seem to live up to the demand that the ground should fully determine the grounded element. It cer-

12 See Kelsen's (1934, p. 36) standpoint that there might be no law for the anarchist.

tainly does not determine the content of the legal system. Even if we accept the solution mentioned above that the basic norm does not 'ground' the constitution but only its feature of being 'valid', there is still the problem that the basic norm as a presupposition is just parasitic to the legal system; it does not determine it in a significant sense.

4.3. An alternative conception: The basic norm as a bridging principle

Finally, a short look at a completely different attempt to apply grounding theory to the theory of the basic norm which might be more promising. In a recent paper, George Pavlakos (2021, pp. 473–489) defended the view that, from a Kelsenian perspective, legal norms are not grounded by other legal norms but by natural facts. This is not an unusual move; taking natural facts to ground legal facts is a common view in grounding theory, and there are indeed arguments speaking for such an interpretation. Grounding is a matter of non-causal and non-analytical determination; the ground is responsible both for the 'that' and for the 'how', for the existence and the quality of the grounded element. For a legal positivist view of a Kelsenian hue, it seems to be natural to assume that there is such a dependence relation between fact and law. Pavlakos' conception seems to be better suited to accounting for several of the features of grounding named above than the relation examined in this text. The relation between norm-positing facts and the law is asymmetric and irreflexive, and the peculiar feature that the ground allows inference of the grounded element, while it is still conceivable that the ground exists without the grounded element, is given as well: only a certain constellation of natural facts allows us to infer that there is a legal norm, and at the same time, the legal norms might be 'thought away' and the natural facts would still exist. However, there are some smaller snags and two big ones.

The features of factivity and synchronicity are problematic. Synchronicity demands that both ground and grounded element are given at the same time, which is not the case with law-giving acts and the legal norm. Usually, the law-giving act exists just momentarily, and the legal norm comes into existence only once the act is completed and is valid until derogated. So there is no synchronicity. Again, according to Kelsen, the validity of law is hypothetical; the argument of the anarchist who fully concedes us all the natural facts we want and still denies that there is such a thing as a legal norm is unanswerable. This seems to speak against the demand of factivity being fulfilled. But there are worse problems: first, the conception is not compatible with the fundamentals of Kelsen's theory, the basis of which is the dualism of Is and Ought, or the thesis that it is not possible to infer norms from a completely non-normative set of facts. Accordingly, Kelsen is quite adamant on the point that it is not possible to ground norms on facts. Facts may 'condition' norms, and they are responsible for the content of legal norms, but they can never 'ground' them or be responsible for their existence or validity:

> If we trust the common parlance, it almost seems as if the *last* sovereign ground of an Ought must always be an Is fact, be it an act of commanding by the state, an absolute monarch, god, the conscience or reason: there always seems to be a real fact which the question after the 'why' of an Ought hits upon. But this is only an inexact and sloppy use of language which belies the logical relations. I *ought* to behave in a certain way not because God, conscience or reason commands it, but because I *ought* to obey the commands of God, reason or conscience. (Kelsen, 1920, p. 95)

This seems to be contrary to Pavlakos' conception, which takes natural facts to ground norms, thus allowing to infer Ought norms from Is facts.

Second, in an attempt to solve the puzzle of how the grounding relation between fact and norm might be established and/or detected in spite of the dualism of Is and Ought, Pavlakos introduces the notion of a 'bridging principle' that connects ground and grounded element, thus turning the dyadic relation of ground and grounded element into a triadic one of ground, bridging principle and grounded element. He takes the principle which bridges fact and law, in the framework of Kelsen's theory, to be the basic norm (Pavlakos, 2021, p. 486). This might indeed be a partial remedy which explains how the grounding relation comes about in spite of the Is/Ought dualism. However, *every* 'higher' norm in the legal hierarchy would have to count as such a bridging principle, because, as a competence norm, it connects certain empirical acts with a resulting norm, sewing together Is and Ought, as it were, and the special nature of the basic norm as an implicit presupposition of any cognition of law, its 'symbiotic' relation with the legal system, is lost in this model.

But this is just a minor flaw. The main difficulty is that the status of the bridging principle is questionable. To be sure, there are many grounding theorists who rely on such 'bridging principles' or 'enabling conditions' in order to make the relation between ground and grounded element comprehensible.[13] But there seems to be something wrong about it. What exactly is the function of the bridging principle? Is it just a heuristic means to make a pre-existing grounding relation 'transparent'? Some passages in Pavlakos' text seem to insinuate as much, for example when he writes about the bridging principle being needed for the 'epistemic' transparency of the grounding relation (2021, pp. 485–486), and about the basic norm's task being to 'bridge' the 'epistemic gap' between its elements (2021, p. 487). In this case, however, there would still be the question of how the basic norm enables us to cognize a pre-given grounding relation. Even if the relation between ground and grounded element might be made 'transparent' by the basic norm, the relation between the basic norm and the grounding relation itself would stay 'opaque' (to use Pavlakos' term), as would the

13 On the necessity of general laws constituting the grounding relation, see Rosen (2017, pp. 279–301).

origin and justification of the basic norm.[14] Also, the 'heuristic' solution would not be compatible with Kelsen's theory, for the basic norm is, for Kelsen, *constitutive* of the legal system. It is not just instrumental in getting cognitive access to a pre-existing legal system; rather, there would not be a legal system without it. Besides, if the basic norm just enables cognizance of a pre-given grounding relation between facts and norms, introducing it would not remedy the violation of the Is/Ought dualism.

Or is it that the bridging principle is not simply a heuristic means but is constitutive of the grounding relation – does it ground the grounding relation, so to speak? This would be more in accordance with Kelsen's approach, and it would remove the violation of the Is/Ought dualism; but the problem with this solution would be that the bridging principle would be more fundamental than the grounding relation itself. Grounding would be neither primitive nor fundamental. Furthermore, as David Chalmers has argued, founding the grounding relation on a metaphysical law, external to the elements of the grounding relation, is a 'fundamentally foreign conception', because the convincing intuition connected with grounding is that it should be a relation derived from the 'nature' or 'essence' of its elements (2018, p. 10).

One might well ask whether introducing a bridging principle as a constitutive law does not shift the explanatory force of the grounding relation from the ground to the bridging principle, thus dissolving an explanation based on a grounding relation into something which strongly resembles the traditional deductive-nomological model of explanation: the Hempel–Oppenheim scheme, according to which the statement of a general law and a statement to the effect that the condition named in the general law is given together 'explain' the statement that can be deduced from them. In this case, the grounding relation would simply be the result of an application of general laws; it would not be a primitive or substantive philosophical concept and would run risk of falling prey to Occam's razor.

In fact, the affinity of the triadic conception of grounding to the deductive-nomological model of explanation seems to be a point where grounding theory and neo-Kantianism might meet; the deductive scheme is compatible not only with the neo-Kantian focus on general laws as the fundamental building bricks of reality, but also with Kelsen's own depiction of the legal hierarchy according to which the higher norm is a hypothetical if–then judgement which, together with a judgement confirming that the antecedent of the higher norm is fulfilled, allows the lower norm to be inferred (and thus explained).

14 'Opacity' means in this context that it is not apparent how the connection between the elements is established, so that there is an explanatory gap; there might be 'different mappings', as Pavlakos calls it. 'Transparency' is given if the 'how' of the connection is apparent; it is achieved by bridging principles.

Conclusion

The conception of the basic norm is an integral part of two different segments of Kelsen's theory. On the one hand, it is part of the theory of the legal hierarchy which is expressive of *Begründungsdenken*; it serves as the last-level rule laying down criteria for legal validity. On the other hand, it is part of Kelsen's neo-Kantian epistemology; it serves as a transcendental-logical condition, that is, a general implicit presupposition, of the possibility of any legal knowledge.

In both functions, reconstructing the basic norm as a 'ground' in the sense of current theories of metaphysical grounding is difficult. In its function as part of the legal hierarchy, the relation between the basic norm and the constitution might be said to be asymmetric, transitive and irreflexive. Synchronicity is given; factivity is problematic. Also, there is no full determination of the legal constitution by the basic norm. Furthermore, the basic norm belongs to a logical meta-level vis-à-vis the constitution, so that a meta-level element would ground an object-level element. This is contrary to the intuitive meaning of grounding. If the basic norm is taken to be a transcendental-logical condition, the features of asymmetry and irreflexivity are problematic, because transcendental-logical conditions à la Kelsen stand in a balanced relation of interdependence with the judgements of institutionalized legal science: the law. There would further be the anomaly that an implicit element, the basic norm, would ground an explicit element, the law.

At first sight, a model which takes legal norms to be grounded by natural facts, with the basic norm operating as a 'bridging principle', seems to be more successful. The relation would be asymmetric and irreflexive, and, for a positivistic view, facts indeed seem to fully determine legal norms. But there seems to be no synchronicity, and the status of the basic norm as a bridging principle is highly doubtful. Its provenance and justification would be unclear. To take it to be (only) a *heuristic* means would presume that there is a pre-existing grounding relation between fact and law which just has to be discovered; this would not only violate the Is/Ought dualism, but would also be incompatible with one of the main tenets of Kelsen's theory, according to which there is no law without the basic norm. Yet to ascribe a *constitutive* function to the basic norm as a bridging principle would mean that the grounding relation between facts and norms is merely a by-product of the application of a general law.[15] Grounding could not be regarded as a primitive or fundamental relation, and it could, at least for present purposes, be replaced by a deductive-nomological model

15 Supervenience might be a promising alternative to grounding if one wants to capture the relation between Is and Ought in law without neglecting the fundamentality of these domains or violating Hume's Law. This is elaborated in a forthcoming publication by Zalewska (2024).

of explanation. This, however, would fly in the face of the core intuition of grounding theory.[16]

Grounding theory is a rapidly developing domain, and there are not many tenets which can be regarded as fixed. By modifying the features of grounding, it might be possible to ascribe a grounding function to the basic norm. But the intellectual price to pay seems to be high, and the gain is doubtful.

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16 In a recent paper, Chilovi and Wodak (2022) maintain that grounding legal norms exclusively on facts is in accordance with the dualism of Is and Ought. In a nutshell, their argument is that Hume's Law says that one cannot deduce any normative proposition from a set of purely non-normative propositions; this is a question of entailment. Grounding, on the other hand, is a metaphysical relation which is not congruent with entailment. If p entails q, there is no logically possible world where p is true but q is not. If p grounds q, however, there are possible worlds where p is true and q is not. How does this argument fare? First, it follows from the Is/Ought dualism, at least in its Kelsenian version, that the truth of any set of purely non-normative sentences alone never justifies taking any normative sentence to be true. This seems to exclude a grounding relation between facts and law because, according to grounding theory, if a set of full grounds is given in the actual world, the grounded element is always given as well. Otherwise, the ground would not fully determine the 'that and how' of the grounded element, and there could not be an explanatory function of the grounding relation. Second (and relatedly), if grounding does not mean that in every logically possible world where the ground is given, the grounded element is given as well, it is necessary to distinguish possible worlds where these elements go together (in some necessary way) from worlds where they do not. The only criterion available for this distinction is the existence, in those worlds where they do, of a general law constituting the relation. While this might leave the Is/Ought dualism intact, it deprives grounding of being a primitive substantial relation, as we just expounded.

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