THE NOTION OF BASIC NORM(S) IN JURISPRUDENCE

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I. REFERENCES TO BASIC NORMS MAY RELATE TO VARIOUS QUESTIONS

1. Law is usually—and often usefully—conceived of as a set of norms: *legal norms*.[1] These norms do not present themselves in an unorganized chaos. Within the set there are several relational connections, and thus we may speak of a *system* of norms: a *legal norm-system*. The expression "legal system" may be used in a wider sense: it then includes not only the legal norms referred to but also certain other elements—for instance, certain persons (judges, barristers, etc.), certain activities (statute-making, contract-making, etc.), and certain written texts (the texts of statutes and contracts, etc.). The word "law" (as in the expressions "Norwegian law", "international law", etc.) may be used to denote alternatively either the legal system or the legal norm-system.

Let us take a look at the legal norm-system. In jurisprudential writing this set of norms is often divided into two parts. The larger of these parts consists of norms which are in some way *derived* from other legal norms. But some of the norms in the set occupy another position. They are conceived of as the "uppermost" or "most fundamental" norms, and they constitute the smaller of the two parts referred to. They cannot themselves be derived from other legal norms. But they are used precisely to derive those other norms and thus they function, in this respect, as the highest—or ultimate—premises in the derivation. Such norms are referred to as "top norms", "apex norms" or—more often—as *basic norms* (*Grundnormen*).

The foregoing is intended as a preliminary explanation. A scrutiny of the concept "basic norm" leads to the detection of several meanings (see subsection 4 and section VI *infra*). We shall focus on the meaning which is believed to be most relevant in legal reasoning. This meaning has already been roughly indicated, but it will be defined somewhat more precisely in section II.

[1] The terms "rule" and "legal rule" are often used instead of "norm" and "legal norm". However, for some purposes there may be good reasons for restricting the use of the word "rule" to certain specific norms, cf. II.2 *infra*.

2. The notion of basic norms that exist "in" or "behind" law[2] is found in many of the most influential legal theories of our time. The idea is most familiar from Kelsen's *Pure Theory of Law*. But Kelsen's famous "Grundnorm" has acquired a well-known English successor through the writings of Hart, whose "rule of recognition" certainly reminds us of Kelsen, notwithstanding important differences. In Scandinavia Castberg has built his theory of law on similar conceptions, through a reference to the "fundamental norms" or "postulates" of legal thought.[3] Ross, too, has used the concept on some occasions.[4] His use of the concept is intimately connected with his view concerning the impossibility of self-referring laws—a view which we have criticized earlier[5] and do not propose to discuss again here.

References to basic norms may safely be characterized as all-pervasive in the main legal theories. In addition, it is a quite common view that every legal system is endowed with only one such norm, *the* basic norm. This opinon is held by Kelsen and also by Hart. Castberg and Ross, on the other hand, clearly do not share it. Ross, however, holds that what we may call *stipulated* law is linked to precisely one basic norm. "Stipulated law" is that part of the law which is founded on statute-making and on other norm-creating acts performed by so-called "competent organs".

In this paper we shall attack the current ideas on basic norms in law. In order to define more clearly exactly *what* it is we intend to attack, we need more background material. First of all, it is important to analyse the sort of questions on which references to basic norms have been thought to have a bearing.

3. One subset of such questions may be said to concern the jurists' daily work: they constitute typical *legal problems*. What legal norms are in force at a given moment in time? How are the norms to be interpreted and how do they relate to other norms in case of conflict, etc.? We may divide such problems into four groups.

(1) In the first group we are faced by a prohibition, a permission or some other *normative meaning*.[6] We may ask whether a *norm* having a

[2] Cf. our discussion *infra*, section III.2.

[3] See, for Kelsen's view, *General Theory of Law and State*, Cambridge, Mass., 1949, pp. 115 ff., 363 ff., *Pure Theory of Law*, Berkeley, Los Angeles, London 1967, pp. 193 ff., 328 ff. And see Hart, *The Concept of Law*, Oxford 1961, pp. 97 ff., 245; Castberg, *Problems of Legal Philosophy*, 2nd ed. Oslo–London 1957, pp. 43 ff.

[4] *On Law and Justice*, London 1958, at p. 83—"initial hypothesis"—, "On Self-Reference and a Puzzle in Constitutional Law", LXXVIII *Mind* 1969, pp. 21 ff.—"basic norm".

[5] See Eckhoff and Sundby, "Om selvrefererende lover" (On Self-referring Laws), *T.f.R.* 1974, pp. 34 ff.

[6] We here prefer the term "meaning" to, e.g., "proposition" or "statement". Expressions like "normative proposition" are very often used in jurisprudential writing to denote *descriptions* of norms, not the content of the norms themselves.

corresponding content is an element in the existing legal system. This could be called the question of *membership:* Is or is not the contemplated norm a member of the given legal norm-system? The question we have in mind has often been formulated in terms of the "existence" or "validity" of legal norms. However, these words are philosophically very ambiguous and we prefer to use them either not at all or very carefully.

If the question of membership has been fully answered, the result is a complete *delimitation* of the legal norm-system under consideration. The practical interest in such a delimitation is, of course, connected with the fact that judges, etc., are—according to one legal norm—often supposed to base their decisions on precisely those norms which are elements of the existing system. However, other norms, too, may be important as premises for judicial decisions. Norms based on contracts, on "fair business practice" or on the statutes of corporations may clearly be of legal relevance—even though they are not generally regarded as legal norms in the proper sense. The determination of such elements on the outskirts of the legal norm-system may for various purposes be included in the extension of our first question: the problem at hand very often bears a complete analogy to the question of membership in the strict sense. Thus we argue for the "validity" of governmental regulations as well as contracts and corporation statutes by invoking the power-conferring rules of law proper which grant norm-creating authority. On these grounds some legal theorists—notably Kelsen—have insisted that even the norms based on contracts, etc., should be conceived of as proper members of the legal norm-system itself. As already indicated, this way of looking at things conflicts with the common view among jurists. Any further discussion of this point is presumably unnecessary, the choice of classification here being of merely academic interest.

Norms stemming from "fair business practice", etc., or even from moral attitudes are, by and large, not dependent for their coming into existence on a "title" or "power" in the law. But these extralegal norms may have relevance in connection with what we call the question of content—*infra* (3)—e.g. through a reference to such standards in a statute. References in the system may also concern norms which are themselves members of *other* legal systems. Thus foreign law may be relevant in a case where the system's so-called rules of private international law are applied.

(2) Whenever the question of membership is given an affirmative answer, a certain more or less specified semantic content—a "normative meaning"—is qualified as a legal norm in a given legal norm-system. Moreover, the actual normative meaning is in such a case very often qualified as being a legal norm possessing a certain status—e.g. as a

parliamentary statute, a municipal by-law or as a recommendation from the Ombudsman. Analytically, however, this question of *status* ought to be treated separately. Thus it may happen that the answer to this secondary question is open to doubt—even though the answer to the primary question of membership is clear. For instance, it may be quite clear that something is permitted in the system, but it may be doubtful whether the permission has statutory force or not. In systems based on a written constitution, problems of status tend to arise frequently: some norms may have been created by the courts' practice in connection with a certain article of the constitution, but it may be doubtful whether these judge-made norms have acquired such a status as to be a real part of the constitution itself.

Foreign legal norms, etc.,—whose relevance *for* the system is based on a reference *in* the system—may have a quite specific and inferior "status" in comparison with the proper members. Raz[7] has drawn attention to the fact that such norms, in contrast to ordinary legal norms, must regularly be proven by calling upon expert witnesses.

(3) Sometimes we are faced with something which clearly ranks as a norm in the system with a specific status, yet the further determination of the norm's content may be doubtful. This question of *content* will, for instance, arise whenever the text of a statute is ambiguous or vague. The question of content may be discussed with the aim of obtaining a general determination of the norm's scope. Or the discussion may concern the problem as to whether a concrete set of facts can properly be "subsumed" under the norm's range of application.

(4) The content of two legal norms may conflict. In that case, the question of harmonizing the two norms will arise.[8] Perplexities due to conflict between norms may even arise in connection with what we have called the question of content: two or more principles of statutory interpretation will often lead to inconsistent results—the intention of the legislator may, for instance, contradict the wording of the statute. But sometimes the question of content has been given a *provisional* solution which, however, results in two or more conflicting norms. In such a case the *status* of the competing norms will be highly relevant: the conflict is usually resolved in favour of the "superior" norm. If the norms have equal status, there will come into operation other "principles of priority", e.g. the maxim *lex posterior derogat legi priori*. The determination of the "yielding" norm's content will be correspondingly corrected.

[7] "The Identity of Legal Systems", 59 *California Law Review* 1971, pp. 795 ff., at pp. 799 f.

[8] This terminology is inspired by the Norwegian jurist Aarbakke. See, for instance, "Harmonisering av rettskilder" (The Harmonization of Sources of Law), *T.f.R.* 1966, pp. 499 ff.

4. Basic norms are most frequently invoked in discussions concerning the question of membership. But similar ideas have also been drawn upon in connection with the other three kinds of problems.

The ideas of basic norms have, however, other ramifications as well. References to such norms have been made in order to evaluate the goodness or fairness of positive law. Such norms have also been invoked in philosophical debates on the epistemological status of legal norms, in historical discussions of the origin of the present system, etc.

Let us put these questions aside for a while (see *infra,* section VI) and focus our attention on "the ordinary legal problems" already listed.

II. METHODS FOR ANSWERING THE QUESTIONS. DEFINITION OF "BASIC NORM" AND CHARACTERIZATION OF BASIC-NORM IDEAS

1. Various methods may be used in solving the problems of membership, status, etc., which arise in connection with norms. This must be stressed. The method chosen will depend on the kind of *norm-system* facing us. When, for instance, we are considering the ethical norms of an individual human being, the answer to the question of membership of the set will depend on what kind of normative ideas the person actually feels himself committed to: we must investigate the normative meaning-contents which he has *internalized,* to use a term which is common in psychology and in the social sciences.[9] In order to solve problems of membership in such a case we are thus led to use well-known empirical methods, asking the person concerned about his normative attitudes, recording his choice of actions in various circumstances, etc. Reference to *other norms* may have little or no relevance in such a research project.

But in legal "investigation" all this is totally different. The questions of membership of the legal system, as well as the questions of status, content and harmony, are regularly discussed and solved through a reference to other legal norms. *Normative argumentation* in this sense is a leading characteristic of legal thinking. The norms referred to are used as (part of) the *reasons* in support of a particular legal solution.

Normative reasons may be of many different kinds.

2. In some cases the normative result is, in a logical sense, *derived* from another norm. For instance, a provision in the constitution saying that

[9] The result of the investigation will, of course, depend on a more precise determination of the *concepts* "norm", "moral norm" and "internalization". See Sundby, *Om Normer* (On Norms), Oslo 1974, Part I.

parliament has the power to enact law may provide a basis for the inference that parliament can delegate legislative power, since acts of delegation are covered by the term "law". A similar way of reasoning is applied when, in a case of conflict between two rules, one of them is given priority by a reference to the general maxim *lex superior derogat legi inferiori.*

Another very important form of derivation is at work whenever a norm (its membership, its status) is supported by reason of the fact that the norm has been *stipulated* on the basis of a so-called power-conferring rule. In this case the normative premise (reference to the power-conferring norm) is supplemented by the indicative premise that a concrete act of authority has actually taken place.

Some of the norms which are used as reasons are not *rules* in the proper sense, but rather a sort of normative *guidelines.*[1] Most of the norms concerning the so-called "sources of law" are typical examples. Principles of statutory interpretation, for instance, do not *determine* the answer to the question of which interpretation is the correct one. They operate in another way, by referring to various "factors", of greater or less weight, *pro et contra* a particular solution. Whenever two or more such factors point in different directions, the solution is dependent on a *weighing* of the conflicting arguments. One of the guidelines may be expressly invoked as a reason for the final result. However, the solution cannot be *derived* from any of the norms, in contrast to the examples of normative reasoning cited earlier. The distinction between derivation proper and normative support on the basis of guidelines is often disregarded in legal writing but is very important in law.

The various types of normative reasons can be used in different combinations. The "validity" of a norm may, for instance, be based on a stipulation from some competent authority. In the argument to this effect it may be of relevance to give other normative reasons in favour of a specific interpretation of the power-conferring rule on which the authority is based. And in order to support the conclusion that the norm is an actual member of the system, it may also be necessary to give "negative reasons", i.e. to argue that the norm has not been overthrown by so-called *desuetudo,* by a later, conflicting statute, etc. Thus a large set of derivations and reasonings from guidelines carrying greater or less weight may have to be

[1] See Sundby, *op.cit.*, Part II. Our "guidelines" bear a close similarity to *Dworkin's* "principles". See Dworkin, "Is Law a System of Rules?" in R. Summers (ed.), *Essays in Legal Philosophy,* Berkeley and Los Angeles 1968, pp. 25 ff. The word "principle", however, is used in many other senses both in and outside legal discussions. The term "guideline" (German: *Richtlinie*) is, in our view, better designed to direct attention to the important fact that these norms do not *determine* solutions but only give arguments in one *direction.*

brought into the picture in order to establish the solution of a single question of membership.

Kelsen often writes in such a way as to give the impression that all "lower" norms in the system can be derived from "higher" norms. This gives us an oversimplified model of legal reasoning. The normative arguments are not only linked together in chains of derivation. Very often the arguments must be *weighed* against one another. And in this weighing process, where value judgments and other preferences play an important part, the reasoning is not purely deductive in a formal, logical sense. Moreover, the legal conclusions defended are often controversial simply because of the lack of compulsive, deductive support from the given set of normative premises. In many situations it is possible to give plausible legal reasons in favour of two contradictory normative results. In the absence of some decisive "factor"—e.g. a new decision from the Supreme Court—the two competing norms could sometimes be recognized as "equally valid" in the present system.

3. What is the position of the notion of basic norms in all this?

In the daily work of ordinary lawyers ("Tatjuristen")[2] basic norms are of little or no concern. For legal theorists ("Erkenntnisjuristen") the position may be different. The theorist will often hold that "essentially" the solution of *every* legal question is dependent on a set of basic norms which are somehow presupposed in the actual normative argument. Take, for instance, any regulation issued by a country's board of commerce. In order to prove that the regulation is a member of the legal norm-system, one might point to the circumstance that the regulation was issued in accordance with a resolution from the government, which "delegated" regulatory power to the board. If the "validity" of the governmental resolution is not contested between the parties involved, the practical lawyer has normally no need to go any further. But the legal theorist is not satisfied: the argument in support of the regulation is still not complete. In order to complete it, reasons must be given for the validity of the governmental resolution, for instance by pointing out a "title" in a parliamentary statute. In systems where the lawgiving power of parliament is restricted by a written constitution, one will further have to show that the statute is compatible with the power-conferring rules of the constitution. When this line of argument is followed, it is very natural to continue by asking why the norms of the constitution should count as members of the legal system considered.

[2] The distinction between "Tatjuristen" and "Erkenntnisjuristen" stems from W. Jellinek. See Stone, *Legal System and Lawyers' Reasoning*, 2nd ed. Sydney 1968, p. 121.

It is in the attempt to answer such "limiting questions"[3] that basic norms are brought into the picture. We believe that the following *definition* of the concept is fairly representative in this connection: A *basic norm* is a norm in the system, or connected with the system,[4] which (a) can be used as a reason for supporting (through derivations or by other means) a set of other norms[5] in the system (directly or indirectly through several links of reasoning), but which (b) cannot itself be supported by means of other norms in the system.

4. Our attack on the notion of basic norms can be divided into three parts:

First, it has, as already mentioned, been—surprisingly—common in jurisprudential writing to hold the view that the various chains of legal reasoning all meet at one single point. In other words, legal systems are conceived of as hierarchical and pyramidal: at the top (or at the bottom) there is one *and only one* basic norm in (or "for") every system. We cannot agree with this view (section III). In every legal system, so far as we know, there are *several* "candidates" which seem to satisfy the given definition.

Secondly, we shall try to show (section IV) that it is only *apparently* that these norms have the character of being "basic" in the sense explained. On closer inspection all the candidates fail to satisfy the definition.

Thirdly, a refusal to accept basic norms in this sense does not—as many have believed—mean that the "rationality" of legal reasoning is vitiated to the point of catastrophe. Abandonment of the hierarchical way of thinking does not lead to a vicious circle or other logical difficulties (section V).

In other words, we shall set out to show that basic norms do not "exist" and that, moreover, there is no need for them.

III. WHY ONLY ONE BASIC NORM?

1. If we inspect an arbitrarily chosen norm-system, we may very well find that the system is characterized by one, and only one, basic norm: a norm which supports all the other norms in the system, directly or indirectly, without being supported itself by any such norms. By definition, one cannot argue *normatively* to the effect that this norm, too, is a *member* of the system. But it might be considered to be such a member on the basis of some other natural criterion: for instance, that it is internalized[6] by all the

[3] Cf. Toulmin, *The Place of Reason in Ethics*, Cambridge 1950, ch. 14.

[4] Cf. *Kelsen*'s position, *infra*, in section III.2. There we shall also discuss the problem whether the so-called "basic norm" is a *norm* in the same sense as the ordinary legal norms.

[5] More precisely: a set of solutions to normative questions of the kind listed in section I *supra*.

[6] Cf. section II.1 and Sundby, *op.cit.*, ch. 5. See also *infra*, section IV.4.

subjects which the other norms of the system concern. The sentence "Everything my father commands should be obeyed" might express such a norm in the case of an authority-dependent child.

Whether a norm-system contains such a unique point is a question which can only be settled by *empirical* investigation: we have to inspect the kind of elements which belong to the system. If we examine typical legal systems in this way, we shall find that the norm-systems do *not* contain one single norm having such a privileged status.

Thus in Norwegian law there is a fairly extensive set of candidates which—apparently (see section IV)—are at the top of the hierarchy of legal reasoning. As far as the *stipulated* legal norms are concerned, we may draw attention to sec. 112 of the Constitution, which provides rules for constitutional amendments. But this section clearly does not stand alone: thus we cannot say that the *present* sec. 112 contains "the basic norm" of the system. The "validity" of the present section can be established by normative arguments referring to the alterations of the section which have taken place through the use of older versions of that very section.[7] These older, now repealed versions of the section are still "alive" in the capacity of "rules of recognition", granting validity to sec. 112 in its present form and even to the other amendments of the Constitution effected under an earlier version of the section.

Reasoning along these lines, we are driven back to the *original* sec. 112 (then numbered 110) in the Constitution of 1814, the year Norway established its independence from Denmark. This section does indeed look like a genuine basic norm, but so does all the rest of the original Constitution except in so far as certain sections have been repealed through later amendments. All the still valid power-conferring rules of this Constitution count as "basic norms" for the stipulated part of the Norwegian legal norm-system. Sec. 112 has no unique position here: it institutes the *highest authority* of the system, but it definitely does not act as the *last premise* of every chain of normative reasoning backing up the stipulated norms of the system.

If we turn to other than power-conferring norms, we discover some new candidates: a significant proportion of the principles qualifying unwritten norms as legal does not seem to be supportable by reasoning from still higher norms in the system. Taking questions of content, etc., into

[7] The aspect of "self-reference" involved here does not present any insurmountable difficulties. See our paper "Om selvrefererende lover" (On Self-referring Laws), *T.f.R.* 1974, especially pp. 52 ff. The particular "basic norm" which Ross (*Mind, op.cit.*, pp. 21 ff.) refers to can be dismissed as a totally superfluous postulate as soon as the problem of self-reference is solved. Cf. *infra*, section III.2, where we argue that even Kelsen's "Grundnorm" can be dismissed as superfluous, albeit on different grounds.

account, something similar seems to be true. In other words, many principles concerning the "sources" and the interpretation of law occupy a fundamental position in legal reasoning.

Nothing in the system permits a "reduction" of such principles to the aforementioned "basic norms" in the Constitution. And this set of constitutional norms cannot—as already stressed—be reduced to a single basis.

The impossibility of reducing the principles concerning the sources and interpretation of law to a hierarchical basis is connected with a more general fact, to which Dworkin[8] has drawn attention: the fact that only stipulated legal rules can be supported normatively by means of a regressive step-by-step reasoning through chains of "titles". The unwritten part of the law escapes such a simple and formalistic reasoning. This is especially true of the unwritten normative *guidelines,* which are well known for instance in discussions of statutory construction but which in fact permeate the whole system in the form of relevant "considerations", "points of view", etc. Examples are the principles guiding the size and quality of criminal punishment in a concrete case,[9] the principle *prior tempore potior jure,* various principles of justice such as the principle that all citizens are equal before the law, etc. Various sorts of relations exist between such principles. The relationships have been very little analysed in legal theory, but it seems as if some of the principles are quite fundamental in legal reasoning and resist attempts to reduce them to something still more basic. Above all this appears to be true of what we may call legal *value-norms,* such as the principle of equality before the law. If we take account of such normative guidelines, a host of new candidates for basic-norm status faces us.

2. The reader may now have the impression that we are flogging a dead horse: is it not fairly obvious that the legal pyramid is flat on top and not pointed? Some legal writers have clearly stressed the point that we should not use the singular form—"basic norm"—in connection with legal phenomena.[1] But this view is far from a unanimous one in legal theory.

Thus Hart, one of the most influential writers on law in our time,

[8] See Dworkin, *loc.cit.*, pp. 54 ff. As already mentioned, Dworkin's term "principle" corresponds in part to our "guideline".

[9] Criminal sentencing and other markedly "discretionary" decisions could be classified as a fifth kind of legal problem-solving, in addition to the list presented in section I. There is, of course, only a difference in degree between decisions guided solely by a vague set of normative principles and decisions where we would say that the case is "subsumed" under a legal rule.

[1] See, for instance, Castberg, *op.cit.*, p. 47, and Lloyd, *Introduction to Jurisprudence*, 2nd ed. London 1965, pp. 194 f.

mentions one—and only one—meeting point for all the chains of legal reasoning. All can be traced back to his famous *rule of recognition.* Hart's use of the singular form—"rule"—is not fortuitous. He is, of course, aware that legal recognition can be based on several different *criteria.*[2] Nevertheless, he holds that these criteria should be thought of as being linked to one single *rule.* This is because "these distinct criteria are unified by their hierarchical arrangement".[3] This rule of recognition is "ultimate", Hart says,[4] in a sense which corresponds closely to our definition (section II.3) of "basic norm".

Speaking generally, we may stress that it is very often difficult to decide upon the exact *number* of norms in a body of normative material. Well-defined criteria of individuation are lacking here.[5] Of course we can always string together several norms by means of one long normative formulation, full of signs of conjunction ($N = N_1$ and N_2 and . . . N_n). But Hart is obviously not making such a trivial point. He thinks that the plurality of criteria for legal recognition[6] forms a unity in a more interesting respect.

As already mentioned, Hart draws attention at this point to the ordering of the criteria in a "hierarchical arrangement": norms which are recognized through the use of some of the criteria—for instance the norms based on custom—may be changed or annulled through others of the criteria—for instance by statute-making.

But, granted that (to a certain extent) there exists such a hierarchical ordering of the criteria, is this a good reason for considering them to be united under a single "rule of recognition"? We do not think so. The chains of legal reasoning follow different routes, and they end up with references to norms which bear little or no resemblance to one another.[7] Reference to the criteria for the formation of customary laws is sufficient as a positive reason for the recognition of these norms as legal. In order to make the argument really complete, we admittedly have to consider some additional *negative* conditions: the norm whose origin is based on custom must not have been overruled by statute, later customs, etc. In every case of legal recognition, we have to consider a set of both positive and negative

[2] See Hart, *The Concept of Law,* pp. 92 f.

[3] Hart, "Review of Fuller's *The Morality of Law*", 78 *Harvard Law Review* 1964–65, pp. 1281 ff., at p. 1293.

[4] *The Concept of Law,* pp. 103–05.

[5] See Sundby, *op.cit.,* ch. 18.

[6] Hart's treatment is restricted to what in section I we called the question of membership. If we also take into account the questions of content, etc., Hart's position becomes still more difficult to defend.

[7] We side with Raz in his criticism of Hart on this point. See Raz, *The Concept of a Legal System,* Oxford 1970, p. 200, and the cited article in *California Law Review,* at p. 810.

criteria in this fashion. There are several such sets in the law, and some of them are rather complex. The fact that some of the negative conditions are to be found in all or most of the sets is no reason at all for lumping the sets together under a single rule of recognition. Rather, it is far more natural to make each of the complete sets correspond to so many rules of recognition. These rules[8] occur variably as "basic norms" in the chains of legal reasoning. That the rules may be *altered* by other norms—"higher" norms in *this* sense—is, of course, an altogether different matter. In the Norwegian system all the laws may be altered through the use of sec. 112 of the Constitution. But this does not make sec. 112 the last premise in every legal argument.

We have indicated already (section I) that Hart may in some important respects be considered a successor to Kelsen. However, there is one essential difference between Hart's position and Kelsen's: Kelsen never held the view that the normative criteria of recognition *in* the legal system itself should form one single "basic norm". On the contrary, in Kelsen's opinion the norms of recognition in the system are numerous and heterogeneous. Together they form the system's "constitution in the positive legal sense". The basic norm is one level higher up: it is not a norm *in* the system.[9] Its function is to grant "validity" to the positive constitution and therefore—directly or indirectly—to the rest of the members of the norm-system considered. Kelsen characterizes the basic norm as the system's "constitution in the legal-logical sense" and he formulates it in this way:[1]

> Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes.)

For a compulsive order to be a legal order consisting of valid norms it must, according to Kelsen, be endowed with such a basic norm. A *condition* for having such a norm is that the legal order is *effective,* in the sense that its norms are by and large obeyed (*op. cit.,* pp. 211 ff.). Kelsen's considerations of the relationship between effectiveness and validity have led some of his commentators[2] to believe that he may have had in mind a

[8] Some of them are definitely not "rules" in the strict sense, but "guidelines".

[9] In this sense the "Grundnorm" is "non-legal" or "extralegal", see, for instance, Ebenstein, "The Pure Theory of Law: Demythologizing Legal Thought", 59 *California Law Review* 1971, pp. 617 ff., at p. 638, and Lloyd, *op.cit.,* p. 189.

[1] *Pure Theory of Law,* p. 201.

[2] See Stone, *op.cit.,* pp. 124 f., and the paper "Mystery and Mystique in the Basic Norm", 26 *Modern Law Review* 1963, pp. 34 ff., at pp. 46 f. See further Hughes, "Validity and the Basic Norm", 59 *California Law Review* 1971, pp. 695 ff., at pp. 698–703.

universal basic norm for all legal systems, a norm having approximately the following content:

> In every coercive order which is effective, the constitution and the laws created according to it ought to be obeyed.

However, Kelsen has made it quite clear that he does *not* operate with any such universal norm, but only with particular basic norms for the respective legal systems.[3]

A state's basic norm is not stipulated by any of the legal authorities. Probably Kelsen also does not intend to assert that the norm has been *internalized* by the members of the legal community. (He never expressly addresses himself to the question of internalization in connection with norms.) He characterizes the basic norm as "presupposed" and sometimes, in later works, as a "fictitious" norm.[4] Kelsen's so-called "Grundnorm" is not a norm at all in the usual sense of this concept,[5] but is a sort of normative postulate.

In our opinion, Kelsen's postulate is incapable of supporting normatively—i.e. giving normative *reasons* for—anything at all. Even if a considerable proportion of the population—for instance in Norway—should in fact have internalized a norm having the same content as Kelsen's basic norm, a reference to this norm would not be of much interest in legal reasoning. The content of such a norm would run approximately: "The Constitution of 1814, and the laws established under it, should be obeyed." Reference to this norm as a "reason" for the validity of the 1814 Constitution would be an argument to the effect that "The Constitution is valid because it ought to be obeyed". This argument says no more than "The Constitution is valid because it is valid". Such a reference would indeed, as Hart has remarked,[6] be a "needless reduplication".

However, our rejection of *Kelsen's* view on normative reasoning does not imply that we consider it impossible to present normative—and legal—reasons to the effect that the original Constitution as well as the other "basic-norm candidates" mentioned in this section are indeed members of, e.g., the Norwegian legal system. This we shall try to show in section IV. Here we would again stress that "normative reasoning" includes much more than derivations from one norm to another. One major weakness in Kelsen is that he gives exclusive attention to the normative derivations.

[3] See Kelsen's answer to Stone in 17 *Stanford Law Review* 1965, pp. 1130 ff., at pp. 1148 f.

[4] See, for instance, his article "On the Pure Theory of Law", 1 *Israel Law Review* 1966, pp. 1 ff., at p. 7.

[5] See Sundby, *op.cit.*, at p. 263.

[6] *The Concept of Law*, p. 246. See further Lloyd, *op.cit.*, p. 194.

3. Thus we have rejected both Hart's "inside"-situated and Kelsen's "outside"-situated basic norm. It is tempting to seek a further explanation of why they both hold the rather easily refuted "one single basic norm" view. Somewhat speculatively, we would suggest that on this point both of these scholars—and other legal theorists as well—have been influenced by a tradition having deep roots in philosophy and legal thinking.

The tendency to reduce different criteria to a single one has been very marked in Western thought.[7] Examples of this tendency abound in the history of moral philosophy. Take, for instance, the claim of some utilitarians that the criterion of utility should be the sole standard for measuring the rightness of choices of action. As far as *legal* thinking is concerned, it is very conspicuous how the notion of a single basic norm resembles the ancient idea that the whole of man-made law is tied to one supreme source or *authority*. At different times in history this supreme authority may have been God or Reason. After the development of strong, centralized state power, the supreme authority became "the sovereign" and all positive law became founded on his "will". This concept of "the sovereign's will" is regarded as of central importance by the two pioneers of modern analytical jurisprudence: Bentham and Austin. It is well known that such a "personalized" unity theory created all sorts of difficulties when laws based on customs and precedents had to be explained.

The power of the state was to become depersonalized in the modern democracies. But in legal theory the supreme authority is still with us, in the form not of a person but of a basic norm. In this perspective we may see Kelsen and, later, Hart: Kelsen continued the ancient tradition, but he depersonalized the supreme authority behind the "validity" of positive law.

Thus the basic norm serves as a surrogate for the earlier personal unity. Kelsen on several occasions stresses that the basic norm is essential to the *unity of law* in a modern national state: without the basic norm, law disintegrates into a mass of unconnected fragments. He considers that without the basic norm, it is—strictly speaking—impossible to conceive of law as a *system* of norms at all.[8]

This view is quite foreign to us. It is certainly possible—and often desirable—to treat law as a system, with the legal norms as a "subsystem". Among other things, such a treatment is advantageous to the extent that the analysis of legal phenomena can be brought under the concepts and methods formulated in the so-called *general system theory*.[9] In order to be

[7] See Galtung, *An Essay on Teutonic Intellectual Style* (mimeographed, Oslo 1974).
[8] See, for instance, *General Theory of Law and State*, pp. 110 f. Cf. Hughes, *op.cit.*, p. 696.
[9] See, for an historical survey with examples from many fields of science, von Bertalanffy, *General System Theory*, New York 1969.

able to regard something as a system, one need only require that this "something" shall be fairly well separated from its surroundings and, moreover, that there exist relations in the separated structure of such a sort that the parts may be considered to contribute to the whole in a non-trivial way. These conditions are fulfilled in the case of law.

The kind of *relations* which interest us will vary according to the purpose we have in mind. Legal norms are connected with one another and with legal activities through complex and sometimes opaque functional relations. Between the norms one will also find logical and other "argumentative" relations, etc. The adequacy of system thinking in law is not severely affected by the breaking up of *one* particular relationship: the linkage to a single basic norm. On the contrary, ideas of such a connection may easily give rise to illusions of a sort of unity, consistency and simplicity which is highly unrealistic with regard to complex modern law systems.

IV. ARE THERE ANY BASIC NORMS IN LAW?

1. In the last section we considered a large set of basic-norm candidates for Norwegian law: all the sections of the original Constitution of 1814, principles of the sources and interpretation of law, as well as some very general legal value-norms, etc. We reached the conclusion that it was not very reasonable to lump the elements of this heterogeneous set of norms under a single "rule of recognition" à la Hart. Further, Kelsen's postulated basic norm at the apex of the pyramid was rejected as superfluous and misleading.

We now turn to a closer examination of the candidates. Do they really satisfy our definition of "basic norm" (section II.3)? It seems clear enough that all these "basic norms" can be used to support a set of other norms. But is it really impossible to support *them* by means of some other norms in the system?

Whether something can be supported normatively is not a question which should be answered by an uncompromising affirmative or negative. Rather, it is a question of differences of degree. The normative part of an argument may be more or less dominant. One very rarely finds a legal argument consisting *only* of a reference to norms. Even when one argues for the "validity" of an administrative regulation by citing a delegatory statute, non-normative premises come into the picture as well: a decision containing the regulatory norms must actually have been issued, and the norms must not have been repealed by a later decision. Moreover, it is

important to stress again that there are several sorts of normative reasoning—not only derivations but also the weighing and balancing of different factors whose relevance and weight may be guided by norms.

If the concept "normative argumentation" is interpreted so as to include all the different kinds of reasoning where normative premises play a greater or lesser part, it becomes extremely difficult to find *any* legal norm which cannot be supported by such an argumentation. In any case, we have arrived at the conclusion that all our basic-norm candidates can indeed be supported in this way and, moreover, that other *legal* norms enter into the arguments.

2. This is especially clear with regard to the *Constitution*. Even if the validity of the sections was very doubtful in 1814, these norms have been *confirmed* through practice to such an extent that their validity and status today are totally beyond doubt. Generations of officials and other citizens have taken it for granted that these norms are indeed members of our legal system with a constitutional status. This assumption has been made every time our "Storting" (Parliament) has amended the Constitution by the use of sec. 112 and every single time the Storting has adopted a statute or issued some other provision under the power-conferring rules of the Constitution. The same assumption has also been made by the courts every time the Constitution or provisions under the Constitution have been applied.

This practice is not only a decisive argument in favour of the validity of the 1814 Constitution. It is also the main argument in favour of those interpretations of the Constitution which have become fixed. In addition, it is on this argument that we rely when we contend that some of its sections have become obsolete without ever having been formally annulled; a prime example of this is sec. 30, which states that the King has the prerogative of "deciding according to his own judgment". Finally, we have several new unwritten constitutional principles based on practice, such as the principles of ministerial responsibility to Parliament and the principles of judicial control of legislation and administration.

Reasoning based on actual practices apparently does not require any reference to norms. However, a normative premise is always presupposed, namely that the practice in question really *should* be considered relevant. Such norms of relevance are applied not only when considering whether the disputed norm is a member of the system but also when establishing what status and content it has and how its relation to conflicting norms is to be determined. These problems of the relevance of the actual practices are regulated by normative guidelines which, though

admittedly vague, nevertheless certainly belong to the Norwegian legal system.

On considering the matter somewhat more closely, we shall also discover that certain other norms, too, are presupposed in the argument based on "practice". What kind of relevance and weight a practice is to have depends, among other things, on *who* was the actor—e.g. Parliament or the Cabinet or the Supreme Court—and on *what kind* of practice it was, e.g. the adopting of a statute, the issuing of a decree, the rendering of a judgment, or some other kind of utterance or action. All the categories here mentioned—"Parliament", "Cabinet", "Supreme Court", "statute", "judgment", etc.—are normatively defined. The kinds of phenomena falling under these categories are determined partly by the Constitution, partly by rules based on statutes—for instance, the Parliamentary Elections Act, the Courts of Justice Act, etc.—and partly by other decisions taken under these norms—for instance, the choices made by the voters during a Parliamentary election.

A third kind of normative premise may also be brought into the picture when trying to support the validity, status, etc., of a power-conferring rule by reference to practice. A considerable part of that practice consists precisely in the creation of norms under the power-conferring rule. In such a case, it is not only the fact that the higher norm has been presupposed by officials which may be stated as an argument in its favour. Even references to the *norms* which have been created according to the rule may play a part in the argument. The fact that the content of the decisions has acquired a normative character—for instance, through internalization (see 4 *infra*)—counts in favour of the norms on which the decisions are based. Further, if the normative question concerns the content of the power-conferring rule, it is of relevance to refer to the content which the norms "derived" from it have in fact acquired.

What we have just said is not peculiar to the backing up of constitutional norms. Many of the characteristics are to be found in other areas of legal life.[1] In general, we should like to stress the following facts:

First, there is no sharp distinction to be made between norms which have been enacted on the basis of a power-conferring rule and norms based on custom or some other form of practice. The legal basis of the stipulated norm may be more or less doubtful. It may be doubtful whether the stipulation represents a transgression of power. Or it may be doubtful whether the official organ involved had any power at all to issue the given regulation. Between cases which are doubtful and cases where the regula-

[1] See further, on the fallacy of supposing strictly hierarchical "transitivity" in political systems of decision, Deutsch, *The Nerves of Government*, 2nd ed. New York 1966, pp. 54 f.

tion is clearly *ultra vires* there are only differences of degree. In any case, later practice may come into the picture—either as the sole or as a supplementary basis for the creation of law. Even where the title is quite clear from the start, some sort of practice may be needed in order to keep the power-conferring rule alive. Otherwise it may die of *desuetudo* or as a result of conflicting customs. A norm's membership of a legal system is something which—in the course of time—may acquire an increasing or a decreasing degree of certainty.

Secondly, we hold it to be quite a common phenomenon in legal reasoning that norm A serves as part of the reasons behind norm B, while norm B—in its turn—helps to back up A. Norms which, if taken literally, would conflict or else combine badly are often "harmonized" through an interpretation whose aim is the mutual adjustment of their content. In that case one must refer to norm A when giving reasons for the interpretation of B, and vice versa. A somewhat different situation arises when a legislator is in doubt as to his legal competence to issue certain norms but nevertheless considers the issuing to be highly desirable. On thinking the matter over, he may support his competence by arguing that it really must be lawful for him to issue such admirable norms—and the validity of the norms concerned is supported by reference to the power-conferring rule. Such forms of mutuality seem to have been in the mind of the Danish jurist Hyllested, when he wrote the following often-cited words:[2]

> . . . a decision—*except for the clear cases explicitly determined by the rule*—can only be "supported" by the rule to the extent that the decision in its turn *to a certain degree* supports the rule . . . .

Some of the aforementioned ways of reasoning which can be used to support the validity of the Constitution are also very common in law elsewhere: a doubtful—or altogether non-existent—authorization to legislate may be strengthened—or created—by use. The alleged power-conferring rule is cited as a reason for the issuing of new norms. If these enactments are in fact recognized as legal, they will in return strengthen the power-conferring rule. The next time the rule is used the earlier enactments may be cited in support of its validity or as a reason for giving it a sufficiently broad interpretation to cover the new enactments.

Using an expression taken from general system theory, we may say that a *positive feedback*[3] takes place in such cases. This feedback is structured

[2] *T.f.R.* 1910, p. 246.

[3] The study of feedback phenomena occupies a central position in the branch of system theory known as *cybernetics*. The classical work is Wiener, *Cybernetics,* Cambridge, Mass., 1948. See, for an elementary survey of positive and negative feedback, Forester, *Principles of Systems,* 2nd ed. Cambridge, Mass., 1971. See also von Bertalanffy, *loc.cit.*

thus: attitudes connected with the products of power-conferring rules (the stipulations) act back on the rules themselves and help to strengthen the disposition to respect similar products in the future. This interaction between attitudes and dispositions to acquire certain attitudes is mirrored in the fact that norms can be used for the mutual support of one another.

There is also a third feature which deserves mention: jurists very often share the idea that the norm, or norms, used in an argument must always have a "higher status" than the norm which is supported by the argument. This view is a central part of Kelsen's doctrine. In our opinion there is no such necessary connection between the status of norms and their position in a chain of legal reasoning. Admittedly, the power-conferring rules are regarded as having a higher status than the norms issued on the basis of these rules.[4] But—once more—derivation from rules of competence is far from being the only form of normative reasoning in law. We have already mentioned some cases where the "lower" norms serve as reasons for the "higher", and the examples could easily be multiplied. Sometimes, in the course of reasoning, one has to move steadily downwards in the hierarchy of norms. When arguing that an amendment to the Constitution is valid, it is natural to start by pointing out that the procedure presented in sec. 112 has been followed, i.e. the proposal must have been put forward by the Government or by a member of Parliament, this proposal must have been made during the first, second or third session of Parliament after an election, and the proposal must have been accepted by a two-thirds majority during the first, second or third session after the following election. However, suppose that the person to whom I am presenting the argument is still not satisfied, and demands that I shall also "prove" that the person who put forward the proposal really *was* an M.P., that this really happened during the first, second or third session, etc. In this case I shall have to refer to a number of other "lower" norms—for instance, the Parliamentary Elections Act, regulations issued by the Home Office under the statute, decisions made by the Election Executives, the citizens' votes during an election, decisions concerning the opening and closing of parliamentary sessions, rules in the manual on parliamentary procedure-regulations made by Parliament itself about the forms of and the votings on proposals, various principles guiding the interpretation of these norms, etc., etc. Of course, the chains of reasoning might also lead to norms outside the legal system proper.

[4] This, however, is not true in every case. Cf. our comments on sec. 112 of the Norwegian Constitution in the aforementioned paper "Om selvrefererende lover" (On Self-referring Laws), at pp. 59 f.

3. *General principles of law*—the second set of our basic-norm candidates —may also be backed normatively by legal norms. First, we would emphasize that these normative principles are interconnected in that frequently one of them can be used to support another: the principles guiding the analogical use of statutes may be supported by the more general principle that consistency in content should be aimed at in law. (This last norm is a guideline—not a rule; consistency in content should not be achieved without regard to the cost involved.)

Moreover, even here references to actual practice come into the reasoning: the practice of the Supreme Court is of special interest when one is trying to support principles concerning determination and application of sources of law. Here we do not have in mind the role of the Supreme Court in the creation of case law. Rather, we regard the Court's practice as being a source of information as to what kind of factors the Court holds to be legally relevant—what weight the factors should have, etc. Here, as elsewhere, a normative premise is being presupposed when reference to practice is made to support the solution of normative questions. The content of this normative premise will include the statement that others are entitled to follow the principles used by the Supreme Court, that the Supreme Court itself must try to be consistent to a certain extent—by not altering its own decision principles too frequently—etc.

This "meta-norm" on the relevance of practice for determining the principles of legal sources is also not a *basic norm*. From it, lines of reasoning lead back to ordinary legal norms. The kind of reasons which Dworkin[5] hints at can be invoked in support both of this meta-principle and of the "lower" principles concerning the sources of law: Dworkin says that the origin of such principles lies in "a sense of appropriateness developed in the profession and public over time", and, further, that the lasting force of the principles is dependent on "this sense of appropriateness being sustained". When one tries to argue that a principle is "appropriate", one is, of course, not operating in a vacuum. One has to accept the fundamental characteristics of the legal system when one sets out to argue that a principle belongs to it. For instance, it is the position actually held by the courts in our legal life which makes reference to the practice of the Supreme Court highly relevant when trying to establish that a certain legal principle is part of Norwegian law. This position of the courts is to a large extent constituted and regulated by norms: by the section of the Constitution which defines their jurisdiction, by the statutes on civil and criminal procedure, etc. Various other characteristics of the present system are also

[5] See Dworkin, *op.cit.*, p. 54.

relevant when arguing in support of the principles: for instance, the actual composition of legislative organs and the ease or difficulty of altering statutes are factors of relevance when discussing principles of interpretation, when discussing the weight of precedence and customs, etc.

Summing up, we may say that the lines of reasoning in connection with the general principles of law twist back and forth and up and down in the legal norm-system. Simple hierarchical orderings are not to be found here. Nor does an ordering based on status have much meaning in this connection: the principles are mostly *guidelines*—not rules in the proper sense. Thus they are usually not "higher" or "lower" in the same sense as rules may be: conflicts between the guidelines are not solved by giving priority to one of them but rather by weighing and balancing the conflicting factors in a concrete case.[6] A ranking into "higher" or "lower" is also rather meaningless in the relation between the general principles and written law: a statute may alter one of the principles, but the principles are in their turn used in interpreting statutes—including those statutes which aim at a modification of principles.

4. Before leaving the problems discussed in this section, something must be said on the relationship between normative *argumentation* and *internalization* of norms.

We say that a person has "internalized" a norm when it is anchored in his personality in such a way that he feels himself bound to respect the norm's content.[7] We consider internalization to be one of the criteria—but not the only one—for determining whether a normative meaning has become a *norm* for a person.[8]

The set of norms which a person has actually internalized may *influence* the normative reasons given by him as well as the reasons deemed by him to be *good*. When arguing in favour of norms which he has not internalized, he will show a tendency to seek for premises in the set of norms (and values) which he *has* internalized. For *these* he will frequently consider it unnecessary to give reasons. But to have internalized a norm does not imply that it is impossible to give normative reasons, if pressed. A jurist, for instance, who has internalized a legal principle, has the possibility of giving the sort of normative reasons mentioned above. Sooner or later, anyone supporting something by argument will reach a point from which the chains of argument can be stretched no further. Sometimes one is confronted with a principle whose acceptability seems obvious—so obvious

[6] Cf. Sundby, *op.cit.*, Part II.

[7] It is neither necessary nor sufficient that the norm is *effective*, i.e. actually obeyed.

[8] See Sundby, *op.cit.*, ch. 5.

that further normative reasons cannot be given. Such last reasoning will to a great extent be of the type "Happiness is better than unhappiness" or "Life is better than death"—and thus involve principles outside the legal system.

A reference to the fact that one has internalized a norm with a certain content, or that somebody else has done so, is not a sufficient argument that this norm is a member of the legal system. But references to internalizations may play a role as *parts* of the arguments in favour of the norm. An example is to be found in the classical doctrine of custom, demanding that practice must be carried out *opinione juris* in order to create customary law. The practice must, in other words, have been based on a belief that the norm was already part of the law. This might be interpreted as requiring that the norm had to be internalized *as a legal* norm in order to be accepted as a member of the system. If one has a principle of this kind, the relevance of actual internalizations becomes obvious. Whether Norwegian law requires something like this is a subject that will not be discussed in this paper. In what was said above about "practice", we left open the question of what sort of conditions must be satisfied in order for practice to create law.

Perhaps one could also use internalization as an independent criterion of membership of the legal system in cases where some persons (for instance, the judges or the majority of the legal profession) feel bound by a norm *as a legal* norm. This could not serve as the *sole* criterion of legality. A great many of the norms naturally counted among the legal ones are internalized by only a very few persons. But this may be different with regard to the kind of rules and guidelines discussed in this section. The criterion might therefore be used in order to determine whether these norms are members of the legal system.

We shall not discuss whether the criterion suggested here is less adequate or more adequate than the one applied above in this section. The purpose of this part of our paper has only been to show that the "highest" norms *can* be argued for normatively, even though the notion of basic norms goes by the board.

V. RATIONALITY IN LEGAL THINKING

1. We have destroyed the aesthetically attractive picture of law as a simple pyramidal structure. Considerations of aesthetics must give way to more realistic descriptions.

However, aesthetic objections are not the only ones to which we are

exposed. Are we not destroying the *logic*—or rationality—of legal thinking as well? Take our reflections in section IV on mutual normative support and feedback. Ought not these to be rejected as examples of a *circular* way of reasoning? To support norm N_1 from N_2 and norm N_2 from N_1 surely does not lead anywhere?

We do not think that such objections are fatal. The wrong thing about an argument moving in a "logical circle" is that the standpoint to be proved is already presupposed in one or more of the premises.[9] More specifically, the "wrong" thing here is that something in the premises has the same *meaning* as the conclusion. For in that case the argument becomes valueless: to point out that something is a consequence of itself amounts to little more than repeating the assertion to be proved—without proof. It may seem that something like this is happening when we support norm N_1 by a reference to N_2 and then continue to support N_2 from N_1. Are we not here supporting N_1 by means of itself?

Not necessarily. We have to remember the variety of normative questions which our arguments may concern. And the modes of normative reasoning also vary, as we have seen. *Derivation* of a normative standpoint from the same standpoint is not involved in the examples which we have examined.

Thus, for instance, we support the validity of a statute by referring to a written constitution. Here there is indeed a derivation from something presupposed. If the presupposed validity or content of the constitution is contested in its turn, we may refer to fixed practices—including the practice of issuing statutes. No derivation from the validity or content of the statutes is involved here. The premises consist, among other things, of a norm to the effect that actual practices should be a relevant and weighty factor when considering certain questions of law. This norm functions as what we have called a guideline—not as a rule: genuine derivations are not possible in such a case, for we can always think of other factors which make the reference to practices inconclusive as an argument. But the reference does indeed *support* the conclusion, and the argument is weighty and not easily overturned.

Even in our example (p. 140) of mutually "harmonizing" two statutes, no logical circle is involved. Factors connected with statute A—for instance the natural reading of the text, the intended effect of the statute's provisions, etc.—are here used as arguments when interpreting statute B—and vice versa. There is nothing circular in this: we do not use any premise whose meaning is the same as the conclusion it is intended to support.

[9] See, for examples, Mill, *A System of Logic,* Book V, ch. VII, § 2.

Most of the current theories of legal argumentation exaggerate the role of deductive connections like those met with in axiomatic systems. The oversimplified picture of law as a pyramid with basic norm(s) at the top is based on this exaggeration. The basic norms are conceived of as if they were axioms, impenetrable to reasons within the system.

Legal reasoning is not at all as simple as that. Logical deductions through a hierarchical chain of reasoning are of quite limited interest when the legal problem at hand is controversial. Faced with problems of statutory interpretation or discussions of unwritten law, we often have to content ourselves with reasoning from various normative guidelines *pro et contra.* The guidelines are of different weight and they are met with in all sorts of different constellations. The norm which is the object of argument may be supportable to a greater or lesser degree, as we have seen. And the normative aspect discussed also varies.

2. In our opinion, the traditional pyramid image may also have the unfortunate effect of concealing the *open-system*[1] character of law. There is a constant contact and interaction between the legal norm-system and other parts of law, political life, moral phenomena, etc. Underestimation of this commonplace fact is a serious shortcoming of Kelsen's *Pure Theory of Law.*[2]

Legal norms come into existence, disappear and undergo changes because of events happening on the outskirts of the legal norm-system. Admittedly, in their daily work the "Tatjuristen"[3] can ignore these relations to a certain extent and content themselves with arguments "immanent" in the system. Discussions of the "validity" of a written constitution and of the principles of interpretation, etc., will appear irrelevant to them. Should the other party in a legal dispute begin to demand reasons as to why the Supreme Court's decisions are of weight in subsequent cases or why the Constitution is binding, a lawyer will probably shake his head and conclude that his opponent has not grasped the elementary presuppositions behind a legal discussion. But the "Erkenntnisjuristen" cannot always be satisfied with such a pragmatic attitude. When aiming at a theoretical description of crucial characteristics of the legal norm-system, the model of a closed pseudo-axiomatic structure becomes one-sided and misleading.[4] For such purposes it is important to stress the limitations of objective

[1] See, on this concept in general system theory, von Bertalanffy, *op.cit.*, pp. 39 ff., 120 ff., 139 ff. and 155 ff.

[2] Lloyd, *op.cit.*, makes a similar point in his criticism of Kelsen at p. 193.

[3] See *supra*, section II.3.

[4] And, therefore, *ideological* in the traditional Marxist terminology. Cf. the well-known criticism of Kelsen from the Marxist side, for instance in Klenner, *Rechtsleere—Verurteilung der Reinen Rechtslehre*, Berlin 1972.

"rationality" through deductions and to analyse the feedback relations between the norm-system and its environment. Of special significance are the ideas of *legitimacy* held by the system's officials and by the citizens. These ideas are constantly being influenced by the current production of norms on all levels in the system. And the ideas act back on the possibility of doubting the validity of the higher-level norms which form the basis for the norm-creating activity. In the same way the daily work of the thousands of practising lawyers contributes essentially to a confirmation or a disproving of the general normative principles guiding legal reasoning.

VI. OTHER VERSIONS OF THE BASIC-NORM NOTION

1. We have reached the conclusion that it is unnecessary and sometimes misleading to use basic-norm notions in connection with legal reasoning. However, this may not be so when we turn to other kinds of problems concerning the nature of law. But we would contend that these other problems have not always been distinguished from the four legal questions which we formulated in section I. Moreover, the discussion of basic norms in law has sometimes been conducted as if it were possible to form one single concept, "basic norm", to cover the whole area of problems. To proceed from this starting point is to go in the wrong direction: one may very well think of basic norms in or for law *in another sense* than when discussing the "highest" premises of ordinary legal reasoning.

For example, in order to analyse a province of law or legal argumentation it may be helpful to construct *axiomatic models*. Some attempts occur in legal theory.[5] Many more examples are to be found in the literature on so-called deontic logic (the logic of norms).[6] The expression "basic norms" could be used as a name for the axioms in some of these purely formal systems. Of course one cannot say anything in general concerning the interpretation and adequacy of such systems. In any case we are here faced with basic norms of a totally new sort.

As we have tried to show in section IV, attempts to axiomatize adequately the whole or even the greater part of legal reasoning are doomed to failure. Axiomatic structures have a limited relevance—often in

[5] See, for instance, E. von Savigny, "Zur Rolle der deduktiv-axiomatischen Methode in der Rechtswissenschaft" (G. Jahr und W. Maihofer, ed.), *Rechtstheorie,* Frankfurt am Main 1971, pp. 315–51.

[6] See, for a good survey of the field, Hilpinen (ed.), *Deontic Logic: Introductory and Systematic Readings,* Dordrecht 1971.

the least interesting areas. Thus deontic logic formalizes certain simple connections between norms, while the *content* of the norms is presupposed. Further, it is also presupposed that the norms are rules—not what we have called guidelines. Such connections—e.g. "Obligation implies permission"—are trivial compared with the problems of weighing and balancing normative guidelines which lawyers face every day. No satisfactory "logic of weighing" is to be found in the literature. Most likely it is impossible to formalize such a logic if the results are to fit the complexity of legal argument.

2. If we start to ask for the *historical origin* of a legal system, we enter another field where a reference to basic norms may be of interest.

Most legal systems have developed slowly and gradually. The date of their origin may be difficult to determine. In the case of Norway, many would naturally point to the new written Constitution of 1814. Against this, one could contend that though the year 1814 certainly gave us a new *constitution* it did not give us a new *legal system:* private law, criminal law and the law of procedure, as well as large parts of administrative law, were retained almost unchanged. Rather, a much earlier set of "basic norms" could be picked out—for instance, the first legal codification to cover the whole of Norwegian territory in the 13th century or the still earlier writing down of the laws of the various provinces. To choose a later year than 1814 is also a possible alternative.

The question is not of great importance. But, in any case, it should be quite clear that "basic norms" in an *historical* sense do not necessarily coincide with the "highest" premises of legal argument in the present system.[7]

3. In the *evaluation* of law, basic norms may play a part. The value judgments may, for instance, concern the justice of the system considered as a whole, some important part of it, or one particular legal norm. They may refer to value-norms which are *fundamental,* in the sense that more specific evaluations of legal phenomena always take place within a framework set by those norms. Whether such "basic" value-norms may in their turn be supported from even more general normative principles is an open question.

[7] However, in section III *supra* we saw that we had to go back through history to the *original Constitution* of 1814 in order to find the "basic norm" for the stipulated part of present law. Correspondingly, we have to undertake a similar retrospect in the case of systems which have had several written constitutions, the one succeeding the other on the basis of a "title" in its ancestor. This explains why Kelsen refers to the "highest" norms in the *present* system as "the historically first constitution". See, for instance, *Pure Theory of Law,* p. 200.

Different conceptions of a *natural law* have it in common that a set of objectively valid norms are treated as "basic norms" for the evaluation of the greater or less eminence of positive law. As we know, some of the adherents of a natural-law doctrine are disposed to give those objectively valid norms a "stronger" position: they envisage their use in attempts to deny to certain positive norms the character of law at all. In other words, the criteria might be used as negative norms of recognition in discussions of legal questions in a strict sense.

While rejecting this—and also rejecting the claim of "objective" or "absolute" validity—one might still, of course, agree that all evaluations of legal phenomena ought to take place on the basis of such a set of fundamental value-norms.

Fuller[8] has formulated a well-known set of minimum requirements for every (modern) system of law. This is his list: (1) law must consist of general rules;[9] (2) the rules must be made accessible through promulgation; (3) the rules must not be retroactive; (4) the rules must have a fair amount of clarity; (5) the rules must not be contradictory; (6) the rules must not require the impossible; (7) the rules should not be changed too frequently; (8) there must be congruence between the rule and the practice of officials under the rule.

Fuller himself holds that serious violations of these principles result in the system losing its character of true law. On this point he joins the proponents of "strong" variants of a natural-law doctrine.[1] We cannot follow Fuller in this view. But we certainly agree with him that every modern system of law *ought* to respect these requirements.[2] Fuller's "legal morality" could be taken as a list of the *formal* requirements which law should satisfy. In this sense the principles work as "basic norms" for every more specific "material" evaluation of the content of law.

We can easily realize that the value-norms of such a list may to some extent enjoy a double position. In part they might be classified as norms *outside* the legal norm-system in a strict sense: they constitute a set of formal political ideals on the basis of which all proper positive law is measured. But in part such norms are also elements *in* the legal-norm system:[3] thus in Norwegian law—as mentioned in the sections above

[8] *The Morality of Law*, 2nd ed. New Haven 1969, ch. 2.

[9] Fuller uses the word "rule" in a wider sense than we do here. Our "guidelines" are presumably included in his concept.

[1] Cf. *loc.cit.*, ch. 3.

[2] Subject to certain refinements and modifications of some of them—for instance of the first and third requirements.

[3] The boundaries between "political" and "legal" value-norms are not sharply defined and are constantly open to change.

—there exist beyond doubt a large set of *legal value-norms* which are frequently referred to in discussions of statutory interpretation, etc. It is, for instance, a recognized legal principle that statutes ought to be interpreted so as to avoid a retroactive effect. Some such "basic norms" for legal evaluation might even acquire a more positive status, for instance, as parts of a written constitution or of a promulgation act.

4. We have still not covered all the uses of basic-norm conceptions in law. There are, e.g., questions of international law which have been discussed in the basic-norm terminology.[4] However, we shall not comment on any more of the specific uses of the basic-norm concept. Instead we shall end this paper with some reflections on the epistemological presuppositions behind many of the basic-norm ideas.

The belief in the necessity of basic norms in some form is often marked by a way of thinking which reminds one strongly of Kant's "categories" and "fundamental principles". This is quite clear in Kelsen, a professed neo-Kantian thinker. Kelsen makes Kant's system more complete, by treating the *normative* ways of thinking much more extensively than his master did.

The fundamental idea in Kelsen, and in many other legal theorists, is that the *existence of norms* is something which cannot be apprehended by means of the usual scientific methods: cognitive reasoning and sensory perception. Specific modes of apprehension are needed: no epistemological route leads from the realm of "is" (*Sein*) to the realm of "ought" (*Sollen*). Whenever derivations from other norms come to an end, a specific normative postulate is called for: the Basic Norm—a postulate which for Kelsen is just as fundamental as Kant's forms and categories time, space and causality.

As we have indicated already, we hold that this fundamental epistemological presupposition is misplaced. If a norm is "highest" in the sense that it cannot be supported from other norms, it exists because and to the extent that its meaning has been internalized by a group of persons. This is an ordinary fact of (social) psychology. The internalized norms may have such a content as to qualify the "existence" of other norms, here *without* the necessity of internalization.[5] There is nothing mystical or indeed very special about this. For instance, whenever a normative content which grants a certain authority to somebody has been internalized *as a power-conferring norm,* this implies that the stipulations on the basis of the

[4] Even in this field Kelsen's way of formulating the problems has been very influential. See, for instance, *General Theory of Law and State*, pp. 365 ff., and *Pure Theory of Law,* pp. 328 ff.

[5] Cf. Sundby, *op.cit.*, pp. 143 ff.

authority create "valid" norms: it is not necessary for this result that the stipulated norms, too, should have been internalized by the subjects.

Some sort of internalization—an "ordinary" empirical fact—lies at the foundation of every existing norm-system. No *specific* forms of "normative existence" are needed on this account. Kelsen's concept of "objective validity" as the specific mode of existence in connection with norms is rather hazy. It behaves as a regular *mystical* concept whenever the Kelsenian "derivations" inside the system come to an end: *What sort of quality* is it that "the Basic Norm" gives to the legal system? Kelsen never explains this. He emphatically denies that "objective validity" is identical with efficacy, etc.[6] But what, then, does the quality consist in?

The answer must be, in our opinion, that the so-called "objective validity" is nothing more than a metaphysical attribute, a superfluous and misleading addition to the simple fact that a set of normative meanings is actually respected by a set of persons. Kelsen—a professed antimetaphysician—ends up with metaphysical ideas. This fundamental weakness and lack of clarity in Kelsen's doctrine has produced interpretations of his views which are contradictory to his expressed intentions. The dangerous label "objective validity" has over and over again been given an interpretation which belongs to a well-known tradition in moral and axiological thinking: the tradition that legal norms ought to be obeyed *because* they have the superb quality of objective validity. Nothing could be more foreign to Kelsen's whole intention than such a view. However, we believe that these and similar confusions can be more easily avoided if we drop altogether the notion of basic norms when theorizing about the nature of law.

[6] Efficacy is, as already mentioned in section III.2, only a *condition* for the "validity" of the highest legal norms. See, for instance, *Pure Theory of Law,* pp. 211 ff.