Hans Kelsen's Pure Theory of Law

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Structure

- What Kelsen has in common with Austin:

The coerciveness of law

the separability thesis

- What sets him apart from other legal positivists: The normativity of law

What kelsen and Austin have in common

The Law as a Coercive Norm

- A legal norm is a norm providing for coercion. And that precisely distinguishes legal norms from other norms.

All legal norms could and should be understood in terms of an authorization to an official to impose sanctions:

If A (citizen) does X (wrong action), **then** B (an official) is authorized to impose Y (a sanction).

Kelsen's Insistence on Separability Thesis

- Kelsen was emphatically opposed to any kind of natural law theory. Justice and the higher law had no place in scientific jurisprudence.

An Ideology-free Account of Law

- Why?
- For one thing, justice is not accessible to cognition. Only positive law is given to cognition.

"The pure theory of law aims to **depict** the law as it is, without legitimizing it as just or disqualifying it as unjust...to grasp the positive law in its essence, and to understand the positive law by **analyzing its structure**—this alone is the task the pure theory of law sets for itself as a cognitive science."

An Ideology-free Account of Law

"Moreover, the pure theory refuses to serve political interests of one sort or another by providing the ideological means either to legitimize or to disqualify the existing social order."

A Third Theory of Law

Empirico-positivist theory of law:

- reductive thesis: law is reduced to facts.
- **separability thesis: the separation of law and morality**

Natural law theory:

- **normative thesis (non-reductive thesis)**
- morality thesis (in-separability thesis)

what sets kelsen apart from other legal positivists

Deficiencies in Austin's command theory of law:

the lack of normativity
the randomness of the validity of legal norms

David Hume

- Invalid syllogism:

All animals procreate (major premise)

Human beings are animals (minor premise)

Therefore humans *ought* to procreate (conclusion).

David Hume

- The Separation of “is” and “ought”:

Facts about the world or human nature cannot be used to determine what *ought* to be done or not done, and vice versa.

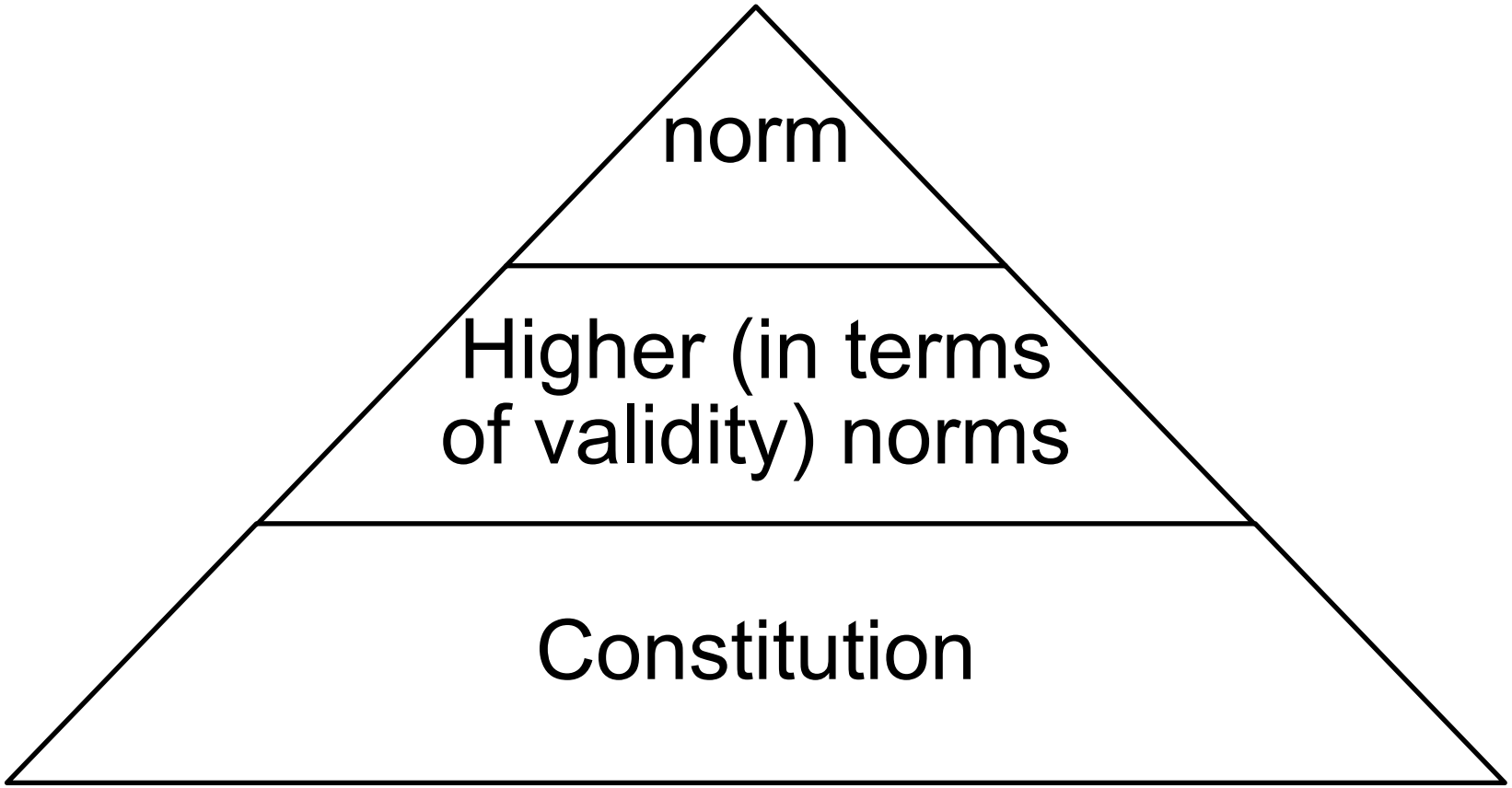
Two types of systems of norms

norms of morality: valid by virtue of *content*

norms of law: valid by virtue of *being posited*

For both types, the validity of the norm can be traced back to the basic norm constituting the system.

System of Norms of Law



Legal System and the Basic Norm

- The validity of the norms can be traced back to a single norm as the ultimate basis of validity.→ *Grundnorm*
- The basic norm is valid not as a positive legal norm, but as a *presupposed* condition of all lawmaking.

The Normativity of Law

- For Kelsen, the idea of normativity is tantamount to a genuine “ought”.
- But, legal normativity ≠ moral normativity

Imputation as a Neo-Kantian Transcendental Argument

- For Kant:

P as empirical data,

P ⊇ Q (for instance, causality),

Therefore, Q;

Therefore, R (derivative cognition from Q).

- For Kelsen:

R (statement of cognition),

R ⊇ Q (Q as imputation),

Therefore, Q.

The Normativity of Law and Morality

- "ought" in moral norm: imperative
- valid by virtue of content
- basic norm in morality:

Substantive, static

- "ought" in legal norm: *imputation*
- valid by virtue of being posited
- basic norm in laws:

Formal, dynamic

What's the theoretical connection between Austin's framework and Kelsen's?

(What do they have in common?

& Where do they differ from each other?)

What do you think attractive from Kelsen's image of law?

And what's not attractive?