LEGAL ORDER AND LEGAL PRINCIPLES

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1. *The various legal orders*

If a multiplicity of legal rules displays a juridical unity we can speak of a *legal order* or a *legal system*. Thus the *international* legal order is the unity of all legal rules having legal validity in the international relations between states and other international organizations. The *national* legal order of constitutional law, administrative law, criminal law, civil law, etc., is the legal unity of the legal rules produced by the state organs (legislature, administration, judiciary) within the various fields of their legal competences. The *supra-national* order of, *e.g.*, European economic law, is the legal unity of the legal rules made by the organs of the European Economic Community within the specific fields of administration which the participating states have delegated to the European authorities. This supra-national law should not be confused with international law. It is a legal system in between international and national law. It is true, that it can only be made by supra-national organs, which have been instituted on the basis of international treaties, but for this reason it is not international law. The supra-national economic law remains a species of administrative law of the same character as national economic law, although national law in this case can be derogated by the supra-national law.

Besides the international, national, and supra-national legal orders there are orders of a private character, e.g., the internal ecclesiastical law of churches and other religious denominations, the internal law of universities, corporations, enterprises, etc. These types of private legal orders, which are produced by non-state organizations for their internal legal relations, were called "Genossenschaftsrecht" by Otto Gierke.

All kinds of legal orders (international, national, supra-national and private) are reciprocally related to each other. They are not window-less, closed monads, but display innumerous inter-relations and

interlacements within the legal forms of treaties, statutes, contracts etc., etc. These nexa of the various legal orders are only *external* with regard to their inner spheres. Thus, the public ordering of corporations and business-enterprises by the State's legislation is limited to the external public-legal side of these organizations and may not intrude into the inner spheres of the latter. They have their own domestic jurisdiction.

In the context of this contribution I cannot, however, treat these questions any further. I will confine myself to the problem: what makes the legal unity in the multiplicity of legal rules possible? Which legal factors determine the legal order or system?

2. *The formal-legal side of the legal order, Kelsen's conception of legal order. His "Grundnorm". The "monistic" construction.*

We should distinguish between the *formal-legal* and the *material-legal* sides of the legal order.

The formal-legal side concerns the process of legal formgiving or positivation within a legal system. In the highly differentiated legal systems of modern states we find a hierarchy of legal organs positivizing the legal rules. So we encounter in modern administrative law of continental states a highest constitutional lawgiver which delegates the competence for administrative legislation to the general legislator (government and parliament in their constitutional cooperation); the general legislator delegates again a part of his competence to the government as such or to the member of government which is the head of the department; the government, respectively, the head of the department, may delegate parts of its competences to lower organs, etc. There are innumerable administrative organs in a modern state which all have their legal competence formally delimited by a higher kind of legal rules, which in their turn are produced by higher organs whose own sphere of competence is again formally delimited by still higher legal rules, etc. It is this undeniable hierarchical order of legal organs within a complicated legal system as administrative law, which is the real basis of Hans Kelsen's theory of levels ("Stufentheorie"). According to this theory law is a dynamic system of higher and lower levels of legal formgiving by legal organs. Kelsen teaches that every legal rule possesses *legal validity* only if it is produced by a formally competent legal organ, whose sphere of competence must be regulated by higher legal rules. These rules are also legally valid if they are made by a formally competent higher organ, etc. Ultimately, the legal validity of the whole legal system depends upon a hypothetical,

non-positive, fictive apex-norm ("Grundnorm") formulated by legal theory. This fundamental legal norm cannot itself have positive legal validity, because in that case it would presuppose a higher organ and could not be the ultimate foundation of all legal validity. The validity of the fictive, scientific apex-norm is itself fictive and presupposes the fictive will of a fictive legislator. In Kelsen's conception, the unity of the legal system can only be guaranteed by the fictive "Grundnorm" In this "Grundnorm" the whole process of legal formgiving by competent legal organs finds its *scientifically necessary,* one could say with a Kantian word, its *transcendental* condition and foundation.

I do not want to dwell now upon the question whether Kelsen really has changed his idea of the "Grundnorm" in his later developments after the 2nd ed. of the "Reine Rechtslehre" (1960). There are in my opinion strong arguments for the thesis that the transition from the "Grundnorm" as a scientific hypothesis to the "Grundnorm" as a fictive norm emanated by a fictive legislative will, is no real change because the fictions of the "legal will" and the "Grundnorm" are *theoretical,* not practical. As practical fictions they would be part of positive law just as the fiction of the *nasciturus*-rule. As theoretical fictions they are but the result of scientific thinking. In this respect they are considered as necessary, theoretical conditions on the same footing with the theoretical hypothesis of the "Grundnorm" in his older view.

What I now want to stress is the fact that Kelsen in his theory of the "Grundnorm" has elevated the *relative truth* of the formal-legal factor of the dynamic process of law-making within a certain legal order, to a universal scheme, in which all *material-legal* factors of the legal system are eliminated. As we saw, we do indeed find the hierarchical order of levels of legal formgiving within a particular legal order, such as the order of administrative law. But Kelsen detaches this dynamic process of legal formgiving from the typical *material-legal* limits to which it is bound within a particular legal order. All kinds of material-legal differences between constitutional law, administrative law, criminal law, civil law, international law, etc., are totally denied within his legal theory. These differences might be the object of investigation of non-legal theories (such as sociology of law), but in legal science there can be no place reserved for these factors because a "pure" theory of law may only be directed to the generally valid normative characteristics of legal norms. Here the fundamental Kantian distinction between "Seain" ("Is") and "Sollen" ("Ought") plays an all encompassing role in Kelsen's thinking. The material differences of legal spheres due to the typical social phe-

nomena for which they have validity, fall within the order of "Sein". Law, as far as investigated by legal theory, can only belong to the order of "Sollen". And, so Kelsen consequently concludes, this order of legal "Sollen" may only be determined in a *formal-legal* way, because the material-legal differences are dependent upon the extra-legal phenomena ("Is") of social life. For this reason Kelsen defends a radical legal-positivist theory in which all typical differences between the various legal spheres of public and private law are out of bounds. The distinction of public and private law is reduced to ideological influences which an objective theory of law has to get rid of. And this means that all legal spheres of constitutional law, administrative law, criminal law, civil law, etc. are, from a formal-legal view, structurally the same. All these legal spheres may only be delimited in a formal-legal sense and are mutually connected in *one* legal order or system by the dynamic process of higher (delegating) and lower (delegated) levels of law-making.

Especially in the relation of international law and national law this purely formal-legal approach of the legal order leads Kelsen to a "monistic" construction, in which either national law is viewed as a delegated form of law-making dependent upon delegation by international law (primacy of international law), or international law is considered to be a delegated sphere of law dependent upon delegation by national law (primacy of national law). According to Kelsen both options are theoretically open and the choice for one of these possibilities is a question of ideological consideration falling outside the limits of legal theory. The choice for the primacy of international law (determined by the ideology of pacifism) implies that the "Grundnorm" of *the* legal order functions as the validity ground for international law and all national legal systems delegated by it; the choice for the primacy of national law (determined by the ideology of imperialism) implies that the "Grundnorm" of the legal order is placed at the basis of a special national law from which international law in considered to be a delegated from of law-making.

In the same line of thought, Kelsen concludes that the internal regulations of a private society are but a delegated form of national law.

3. *The material-legal side of the legal order. Legal principles and juridical formgiving. A pluralist view of legal orders.*

Kelsen's "monistic" construction is the result of the purely formal-legal and legal-positivist view of the legal "Sollen" and the radical

elimination of all *material-legal factors* from his concept of legal norms.

We should, however, recognize that legal norms for their *normative* structure are dependent not only upon the dynamic process of legal formgiving by competent legal organs, but also upon *material-legal principles* which determine the content of these norms. The legal principles are not but extra-juridical, ethical-political postulates as Kelsen suggests, which fall outside the field of legal theory, but they are the real determining factors of legal *normativity,* which, as *legal* factors, belong to the field of legal theory. All legal norms are the result of the dynamic *legal formgiving* by competent legal organs to *material-legal principles.* Both, legal formging and material-legal principles, presuppose each other in the process of law-making. The age-long combat between legal positivism and ius-naturalism can be explained by the fact that each of these movements absolutises one-sidedly one of the mutually correlated moments of law-formation: legal positivism the process of legal formgiving, ius-naturalism the material-legal principles. Neither will ever convince the other of the correctness of its view because both appeal to a real moment in the process of law-making. In recent days the Hart-Dworkin debate also concerns the question whether the legal structure of legal rules depends only upon the dynamic process of legal formgiving, as Hart defends, or also upon legal principles which are not but principles of (positive or critical) morality and therefore of a non-legal character, but possess a real *legal* character and are an essential that Dworkin in his conception of legal principles does not hold the traditional iusnaturalist view in which the legal principles have a *legal validity per se* independent of the process of legal formgiving, but teaches that these principles only function within the frame of legal institutions of legal legislation and adjudication, and have, therefore, no validity per se. In fact, Dworkin defends, as far as I see, the correct view upon the relation of the dynamic process of legal formgiving and the material legal principles, namely, that legal formgiving makes no sense without legal principles and that legal principles only possess a real legal function in their being positivized through the legal formgiving by competent legal organs.

For the problem of legal order this insight is highly important. It means that any legal order is based not only upon the dynamic process of legal formgiving, but also upon the material-legal principles. Acknowledgement of these principles, as determinative for a legal order next to the element of juridical formgiving discloses the way to break with the "monistic" construction à la Kelsen, which is so much

at variance with legal reality. Instead of *one,* rigid, all-encompassing formal-legal order in which all legal phenomena must be moulded, now a *pluralist* view of legal orders becomes possible. This may account for the rich variety of materially (concerning the content of the legal rules) different legal orders. International law, supra-national administrative law, constitutional law of the state, the state's civil law, the internal law of enterprises, associations, etc. —all these law-systems have their own peculiar irreducible material structure. Therefore, they may not be forced into a formal-legal hierarchical relation of delegating and delegated rules within the frame of *one* "monistic" construction. They all have their own original and highest level of law-making, which pre-supposes an original legal competence which is not delegated by a higher legal organ. They all possess *juridical sovereignty* within their peculiar, materially delimited legal bounds. Only *within such a materially independent sphere of legal rules* the hierarchy of delegating and delegating and delegated levels of legal competence may be found. So within the sphere of administrative law we find a hierarchical order of the highest and original level of competence in the legal form of the constitution (or as in England, in the form of parliamentary convention) from which lower levels of law-making via statutes, ordinances, decrees, etc. can be derived. The same situation is found within the field of civil law. Here the highest and original level of legal competence is also included in the legal form of the constitution, from which the lower levels of legislation and ajudication receive their delegated legal competences. And these examples show already a very important legal state of affairs, namely, that materially different legal orders are interrelated in the legal forms of a constitution, legislation, etc. The fact, that they meet in one and the same constitution concerning the legal competence of the general legislator within the fields of administrative and civil law, does not mean that structurally —as to their material character— administrative law and civil law are the same, These legal spheres are structurally different because they are based on different material-legal principles. The constitutional law-maker delegating the competences of the general legislator in administrative and civil law, appears each time in an original and highest material-legal competence, which receives its positive legal form in the constitutional rules. In other words, the *legal form* of a constitution does not decide about the *material-legal* character of the rules being positivized in this form. And this holds for any kind of legal form and legal positivation. We may never conclude from the legal form to the material-legal character of the rules included in the form. This is especially clear with regard to international treaties. It is nonsense to

say that everything regulated in an international treaty is international law. International treaties may contain next to real international rules, administrative law, criminal law, constitutional law, civil law, even internal contractual rules (commercial treaties).

4. *General legal principles*

In order to make clear how material-legal principles determine the internal structure of a legal order –with all the consequences of juridical pluralism and inter-relation of different legal orders within the legal forms of law-making just mentioned– we have to distinguish between *general* and *typical* legal principles and between *constitutive* and *regulative* legal principles. Both distinctions are *intersecting*. Thus we meet constitutive and regulative general principles as well as constitutive and regulative typical principles.

General principles are those principles which are enclosed in the *general normative structure of the legal aspect as such*. They express the general normative legal characteristics which in any system of positive law must be acknowledged for it to be experienced as a system of legal norms in distinction of moral, conventional or religious rules. They concern the general traits of legal normativity which is theoretically approached in the fundamental concept of law as investigated in legal theory.

Thus, the general trait of a legal order as a legal unity in a multiplicity of legal norms is itself a general normative principle. It appeals to the consciousness of any competent legal organ to bring the multiplicity of legal rules to a legal unity. Without this legal unity the legal system would not be consistent and would fall into capriciousness and arbitrariness. In our modern legal systems, the necessity of systematic interpretation and of unity in adjudication (guaranteed by a highest court of appeal) show the fundamental significance of the general principle of legal unity in a multiplicity of legal rules.

Every legal order as a unity in a multiplicity of legal norms presupposes an *area of legal validity* which is not unlimited, but is bound to certain legal limitations ("Geltungsbereich"). This trait too is a general legal principle which requires from any competent legal organ to restrict his law-making to the legal bounds set to him. Within this legal area legal norms must have *legal validity* ("Rechtskraft"), which it is the function of legal norms to connect legal effects to legal causes. This characteristic is a general legal principle, too. It implies the duty

of any competent legal organ to apply effectively the legal norms to legal facts. E.g., a rule of criminal law has only legal validity if it is effectively applied by the judge in punishing the criminal acts. Without this effective application of a legal rule, the rule would fall into disuse and become a "dead letter".

Legal effectivity of legal norms presupposes in its turn the existence of legal organs with legal competence. Legal competence expresses itself in the legal formgiving to material-legal principles in order to make the principles valid law. Here we meet the general principles of *juridical organ-functionality,* of *legal competence or authority,* and of *dynamic legal formgiving.* No legal system is possible without legal rules determining the legal organs having competency to make legal rules. Hart has rightly stressed, in his *The Concept of law,* that for a legal system, there are essential not only primary rules of legal obligation for legal subjects, but also secondary rules of legal recognition (of competence), of change, and adjudication. These rules are all rules which determine the legal organ-functions in a legal system, which delimit their legal competences and regulate how existing rules are to be changed or applied in disputed questions (dynamic legal formgiving).

Very important are the general legal principles of *legal economy and legal harmony.* Legal economy forbids any excessive promoting by legal organs of legal interests entrusted to them at the cost of equally valuable or higher evaluated interests, as well as any exceeding by legal organs of their limits of competence. Legal economy is the principle of *no-legal-excess* ("Ausgewogenheit"). Legal harmony requires legal equivalence of legal interests. While legal economy has a negative function in forbidding any legal excess, legal harmony has a positive function insofar it demands a *just proportion* between the interests and between legal causes and legal effects (e.g., between the criminal act and the punishment).

5. *Constitutive and regulative legal principles.*

The general legal principles, which we have mentioned, are but a selection from the whole series of structural moments included in the general aspect of law. A further theoretical analysis of the general structure of this aspect could bring to light the other general legal principles as well as their reciprocal relations and their inner coherence. For we may presume that all the general legal principles presuppose each other and can only be positivized in legal norms in their unbreakable connection.

The general principles mentioned above play a *constitutive* role in legal life. Any system of positive law, even a primitive one, has to acknowledge these principles. Even in primitive societies we find a legal unity of the gentilical and tribal law; we meet there a primitive legal validity, legal economy, and harmony (e.g., in the "Erfolgshaftung"). But in developed countries, in which the process of cultural differentiation has set in, these constitutive legal principles are disclosed, refined, and deepened by *regulative* general principles, such as legal equity (*aequitas*), good faith (*bona fides*), *mens rea* in delicts, human dignity (*dignitas humana*), etc. These regulative legal principles belong to juridical morality, which is characteristic for every highly developed legal order. They have an *individualizing* and *concretizing* function in modern law insofaras they reveal their juridical meaning only in their application *in concreto*. Only in an individual case can we taking account of all its peculiar circunstances, detect what legal equity demands (e.g., in the performance of a valid contract). Think of the well known equity-rules in equity-law, as: Equity looks to the intent rather than to the form. Concerning the relations between constitutive and regulative principles we may state that the constitutive principles are the basis for the application of the regulative ones, so that the latter cannot function in legal life without their foundation in the former. Although the constitutive principles are deepened and disclosed by the reulative ones, the latter may never be applied at the cost of the former. The constitutive principle of legal certainty in commercial contracts (*pacta sunt servanda*) is the basis for commercial legal equity; never may this equity lead to dissolution of the strict, legal binding to a legal contract on the sole ground of "imprevision" and "*clausula rebus sic stantibus*".

6. *The typical legal principles. Law and typical social structures.*

The general legal principles, both constitutive and regulative, must be positivized in any modern legal order. Legal validity, legal economy, legal harmony, etc., as well as modern principles of legal equity and reasonableness have to be acknowledged in all spheres of public and private law. Although they are an essential part of any legal order, they cannot because of their general character function as the material-legal factors which determine the material structure of a legal order (next to the hierarchical order of law-making via levels of legal delegation). For the determination of the material structure of a legal order, we need to acknowledge *typical legal principles*. In order to understand what is meant by these principles, we have to break

with Kelsen's idea of the mabridgeble gulf between the typical structures of social life as part of the order of "Sein" and legal normativity as part of the order of "Sollen". Starting from the traditional Kantian dualism of "Sein" and "Sollen", Kelsen accepted only a formal-legal conception of the legal order and rejected any influence of typical social structures upon the content of legal norms as irrelevant for legal theory. Over against this view we should acknowledge that the normative legal aspect is an *aspect of concrete social realities,* which functions as concrete unities function in all the aspect of our world of experience: the legal, the moral, the economical, the lingual or symbolical, the historical, etc. All these aspects, which form the abstracted fields of investigation of the various cultural sciences, are the modes of being in which concrete social entities reveal their typical structures. The state, for example, is a concrete social reality which does not only function in the legal aspect. Such is the conception of Kelsen concerning the state as a relatively centralized legal order and organization within a territory. In this view, the legal aspect of the state is completely isolated from all the other aspects in which the state functions and which are left to the state as a factual power-complex investigated by the naturalistic statesociology or politicology. In Kelsen's view a dualistic state-theory, according to his dualism of "Sein" and "Sollen", is the result. We should, however, start from the presupposition that the typical social structures of social entities as the state, church, school, enterprise, family, and the multitude of inter-individual relations of social intercourse, of commercer, etc. are concrete unities which function in all the aspects of social life. The typical structure of the state functions in the moral aspect (public morality), the economic aspect (political economy), the lingual aspect (national language(s)), and the historical aspect (the state as political organization of sword-power —political history is the history of internal and external wars to consolidate and expand the power structure of the state). All these functions receive their structural unity and typical character from the underlying *typical structure* of the state, which as we saw, reveals itself in these functions. We can describe this typical structure as a public-legal community of the government and subjects on the basis of a monopolistic organisation of sword-power (*ius gladii*) over a population within a territory. This typical structure with its typical traits stamps the function of the state within the legal, moral, economic, etc. aspect. In all spheres of public law of the state we meet the typical trait of the *res publica* (the idea of common good) and the state's sword-power as the finally decisive factor in the application of this law. For this reason public law of the state is

quite different from international law, civil law, ecclesiastical law, etc. What holds for the public law of the state, holds *mutatis mutandis* for all other legal orders. They display the typical traits of other typical social structures. International law cannot be understood without acknowledgement of the typical structure of international intercourse between states c.q. international-legal organizations. Civil law, although made by state-organs (legislature, judiciary), does not display the typical structure of the state, but rather that of the free inter-individual relations between everyone (including legal persons) within the state's territory. Civil law is the legal aspect of the "bürgerliche Gesellschaft". Ecclesiastical law shows the typical traits of the church as a faith-community of believers in Christ based on an organization of administration of the Word and Sacraments.

7. *Again the distinction between constitituve and regulative legal principles*

I hope to have made clear with these examples that law and typical social structures (field of investigation of sociology) are closely connected and that law is never a uniform and homogeneous complex of rules, but reflects the social plurality of the typical social structures. *There are as many legal orders as there are typical social structures.* The typical structures determine the material content of the legal rules and their material-legal area of validity. This determination reveals itself in *typical legal principles.* Therefore we may conclude that the essential material-legal factors of a legal order must be sought in the typical legal principles. These principles deliver the necessary material-legal component of any legal order next to the hierarchy of delegating and delegated levels of law-making. Within this category of legal principles we may again distinguish between *constitutive* and *regulative* principles. Let me give here some examples from the field of constitutional law and civil law. They may suffice to give an impression of the significance of this distinction hare, too.

In constitutional law, the principle of *trias politica*, or "checks and balances", is surely constitutive. It means is modern times that the specific constitutional function of legislation, execution (administrative power), adjudication, federative (treaty making) power, etc. must be distinguished and at the same time related in a good constitutional proportion, even if they are attributed to one and the same state-organ. The elder conception of De Montesquieu in which these functions had to be distributed to different authorities and, according

to which the adjudication was considered to be something nil ("en quelque facon nulle"), can no longer be maintained.

Another constitutive principle is the principle of *representation.* This means that citizens with franchise may, via chosen representatives, with free mandate determine the major trends of state policy and legislation in legislative and political bodies of the state. This principle, which excludes direct democracy à la Rousseau, is the normative foundation of representative democracy in a modern state. It is so very essential for our constitutional law that law-state and democracy are generally identified.

The fundamental constitutional freedoms ("Grundrechte") are also based on constitutive principles in constitutional law. They express the material limits of legal competence of the state with regard to the individual sphere of personality and the social spheres of non-state social institutions. They must be strictly distinguished from so-called "social basic rights". The latter are but regulative ideas of modern administrative law. They formulate goals of state-policy in the social economic field and may not be placed on the same level with the basic human freedoms in the classical sense of the word (freedom of religion, of asembly, of press, *habeas corpus,* etc.).

These typical constitutive principles are disclosed, deepened, and refined by typical regulative principles of constitutional law. The central regulative principle here is the idea of a just and harmoniously construed common-wealth (*res publica*). Here also the regulative principle may never be detached from the constitutive principles and may neither encroach upon the latter.

In civil law, we find the typical constitutive principles of civil freedom and equality, which express their meaning in the freedom of contract, the freedom of disposal concerning goods, the freedom to sue, etc. These constitutive principles are disclosed, deepened, and refined by the typical regulative principle of *iustitia commulativa.* Here too, the regulative principle may never be applied at the cost of the constitutive ones.

8. *Conclusion*

All the material-legal principles, the general as well as the typical, can only be applied in their inner coherence. We never may isolate them from each other. Each legal principle presupposes the other and can only reveal its juridical meaning via the dynamic process of legal formgiving by competent legal organs, in the organic interwovenness with all other principles. These principles are all fundamental for the

concept of legal order, although the *typical legal principles* in a special sense determine the material-legal side of any legal system. In order to understand the *legal order* of constitutional law it is not enough to call in state-organs in their hierarchical organization and levels of law-making, but essential is the acknowledgement of the typical constitutive legal principles, which express the typical social structure of the state and determine the typical material character, by which this legal order can be distinguished from other legal systems. The same holds *mutatis mutandis* for the legal order of civil law.