IDENTIFYING IMPURITIES IN KELSEN’S PURE THEORY OF LAW

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Abstract

To legal positivists, which include Hans Kelsen, law is concerned with what it is and not what it ought to be. Kelsen presents a pure theory of law free from all psychological, ethical and metaphysical entities. The aim of the paper is to expose the impurities in Kelsen’s pure theory of law. The paper finds that his pure theory itself is also tainted with certain impurities and concludes that the theory is not after, all as pure as he would want us believe.

Introduction

The legal theory of Hans Kelsen marks a major development in the history of legal thought. To some scholars, it represents an epochal era in the development to date of analytic jurisprudence on one hand, and marks a reaction against the welter of different approaches that characterized the opening of the twentieth century on the other hand. His theory is an interesting one. Let us begin from the major premise from which he based his theory. Like John Austin before him, he argued that a theory of law must deal with law as it is actually laid down and not as it ought to be. Kelsen’s approach is seemingly different from that of Austin. (Ojealaro, 2002:35) Kelsen was of the view that a theory of law must be pure, that is, free from all forms of impurities such as psychology, politics, religion, sociology, history, ethics, metaphysics and all value judgments. (Omoregbe, 1994:134) Unlike Austin, he refused to make sanction an essential part of the concept of law or in the existence of a legal system. According to him sanction itself is stipulated by a system of law. The paper therefore, seeks to examine Kelsen’s claim of a pure theory of law.

The Pure Theory of Law

Kelsen defined law in terms of a normative order. He says norms are regulations setting forth how men are to behave in societies and positive law is simply a normative order regulating the behaviour of men in societies. He distinguished between legal and non-legal norms. Non-legal norms represent norms of morality and religions. They do not stipulate sanctions. (Omoregbe, 1984:145) The legal norms on the other hand, are “ought” norms or “ought propositions”. This means that legal norms are expression of an “ought”. A legal norm can be reduced to a hypothetical proposition of the type: if x happens then y ought to happen (Omoregbe, 1984:145)

Kelsen also distinguished between proposition of law and that of science. (Dias, 1980:359). According to him, the former deals with what ought to be or happen while the latter deals with what will necessarily happen. In his book, the General Theory of law and state, he stated:

The principles according to which natural science describes objects is causality, the principles according to which the science of law describe its objects is normality(Kelsen, 1945:59)

To Kelsen, all legal norms of a legal (normatively or connected) system are fitted with one another. In fact, they are arranged hierarchically or in a pyramidal form. (Kelsen, 1967:200) This implies that there is a strong norm, a stronger norm and a strongest norm in that order. The validity of legal norm is by reference to a higher norm in the hierarchy. In other words, the validity of a norm is ascertained with reference to its authorizing norm which confers a power to create it and may also specify conditions for its exercise. (Dias, 1980:36) This shows that the validity of a particular norm is derived from another norm within the same legal system and the validity of this other norm is also derived from yet another norm within the same legal system and so on. This procedure is mechanistic and logically deductive. The picture Kelsen painted is that law has a form that is valid from which all inferences are deduceable by the jurist. It is like a closed logical circuit or system.

The question that looms large is, that can one continue the deductive process ad infinitum? Theoretically the answer is “yes” but in practice it is “no”. This carries the implication that there must be some ultimate norm postulated on which all the other norms of the legal system rest. As Kelsen
puts it, no matter with what proposition one may begin, a hierarchy of “ought” (norms) is traceable back to some initial, fundamental “ought” on which the validity of all the others rest. (Kelsen, 1945:4) This is what Kelsen calls the grundnorm (the basic norm) or the fundamental norm. To Kelsen, the grundnorm has to be postulated or pre-supposed for obvious reasons. It is extra-legal since ex hypothesi, it does not rest upon another norm for it to be valid; its selection is based on the principles of efficacy or effectiveness. This shall be discussed later.

According to Keslen, the basic norm is not a norm of a positive legal order but postulated to account for the validity of the whole legal systems. As Keslen (1945:49) put it:

The basic norm is not created in legal procedure by a law-creating organ. It is not as a positive legal norm is – valid because it is presupposed to be valid, and it is presupposed to be valid because without this presupposition, no human act could be interpreted ‘as’ legal especially as a norm creating act

Thus, the grundnorm is only a presupposition, a mental construction, a fiction and a hypothetical norm which owes its validity to no other norm beyond itself. (Elegido, 1994)

It is the ultimate source and criterion of validity of the entire legal system. It is the foundation of any legal system. In addition, the basic norm need not be the same in every legal order. It is usually adapted to the prevailing state of affairs. It has no rule of law standing behind it.

Kelsen’s Concept of Validity and the Principle of Effectiveness of a Legal Order

Kelsen’s account of the hierarchy of the norm and the grundnorm can only be better appreciated when one considers the role he attributes to the concept of validity and the principle of effectiveness of a legal norm within a legal system. According to him, the validity of each norm in the hierarchy except the grundnorm does not depend on whether it is effective, observed or not. A norm is valid if it is “created” by a higher norm within the hierarchy. But the entire legal order is valid as a result of the presupposition of the Grundnorm. Also the whole legal order is valid and effective if the grundnorm receives minimum support from the people. This means that a legal order is effective if it continuously receives the support or obedience of the people. It is a necessary and not a sufficient condition for the validity of individual norms and the grundnorm.

According to Kelsen, when the grundnorm stops to receive minimum of support or obedience of the people, it ceases also to be the basis of the legal system. This principle was applied in the unreported case of Adegbenro V Akintola where the court upheld the grounds for the removal of the defendant as premier of the western region by the western regional House of Assembly. The premier was removed from office by the then Governor because it appeared to him that the premier no longer enjoys the minimum of support of the members of the regional legislative House. But this should be contrasted with the behaviour of people in respect of the validity of a given norm. The behaviour of people, it should be noted, does not make law or norm to be valid because we cannot rely on the behaviour of people, which always changes with time.

It should be noted also that when the grundnorm ceases to be the basis of the whole legal order, any other presupposition put forward which does not obtain the support of the people will replace it (Kelsen, 1945). This has been used for the justification of successful coups and revolutions by usurpers of legitimate Governments. Thus, from the above, a legal system exists if it has valid norms and the grundnorm is valid and effective. The concept of the grundnorm has been severely inveighed by scholars over the years.

Impurities in the Pure Theory of Law

Kelsen’s major initial task is to rid law of all forms of impurities, which include ethical, political and religious impurities. He regarded law as a fixed logical deductive system where legal rules are deducible from the facts of the case by the jurist or judge. This implies that the validity of law should be sought from within the legal order itself and not from outside it. But this claim to purity is not very clear in his theory.

Some scholars have pointed out that from the point of view of the principles of effectiveness and the grundnorm, the theory cannot be pure as Kelsen would want us believe. For example, Kelsen never gave us the criterion by which the minimum of effectiveness is to be measured. He only pointed out that the grundnorm imparts validity as long as the legal order remains effective. It has been
argued that in whatever form or manner the principles of effectiveness of the grundnorm is measured, his theory cannot be pure. The principles of effectiveness seems to depend on those very sociological factors which he so vehemently excluded from his theory of law. (Dias, 1980:369) It can therefore be further argued that if the grundnorm upon which the validity of all other norms is based, is tainted with impurities, then the other norms themselves are also tainted with impurities.

Another attack on Kelsen’s claim to purity is that his theory is primarily an apriori one on which depends empirical observation for confirmation. He offered it as a theory of interpretation which implied that it is not a description but a model and thus evaluative in function. This criticism however, does not in any way touches on the structure of the legal system which Kelsen erected but on his claim to absolute purity. Besides, Kelsen’s theory is not consistent with his position that a legal system is self-validating without reference to any ideal law or superior law outside the system. Kelsen by his theory of the basic norm, traced the ultimate criterion of validity of a legal system beyond the positive system itself. This is not consistent with his theory. The grundnorm is at best a metaphysical concept or entity.

In addition to the above, Kelsen’s theory of the basic norm with reference to the principle of effectiveness has been criticized on the ground that it has been used to justify judicial recognitions of new regimes during revolutions or coup de‘ tat. For example, the theory was the basis for the judicial recognition of illegal governments in Pakistan in 1958, Uganda in 1965 and Rhodesian unilateral declaration (UDI) of independence from Britain in 1965.

According to Kelsen, the principle of legitimacy is limited by the principle of effectiveness. As he put it,

_It cannot be maintained that legally men have to behave in conformity with a certain norm, if the total order of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness_ (Dias, 1980:364)

The above statement implies that once an adventurer is in effective control, cloths himself with the cloaks of legitimacy even if he ascends power by unlawful means. This is capable of leading to the use of naked force in order to get power for the administration of men. The following cases are illustrative of the above position. In State v Dosso (NLR, 2004: 8), the supreme court of Pakistan held that since the usurpers were effectively in power, their regime was lawful. The then president of Pakistan had, contrary to the provisions of the 1956 constitution of Pakistan, and being supported by the Army declared martial law and dissolved the Cabinet and the National Assembly. (Elegido, 1994:378)

Also in Ex-parte Matovu, (Elegido, 1994: 378) the high court of Uganda held that the legal effect of the abrupt change of Government was the establishment of a new legal order. The prime Minister of Uganda had issued a statement on the 22rd of February, 1966, declaring that, that in national interest, he had taken over all powers of the Government of Uganda. But it has been argued that the principle of effectiveness cannot be used to justify the takeover of legitimate government by illegitimate means. This position is illustrated with the case of Jilani v Government of Punjab (Kelsen, 1945:35) where the court held that an usurper cannot be said to be in lawful control and this as a result overruled Dosso (Supra). This shows that a forceable overthrow of a lawful government is _abi-nitio_ unlawful. The fact that an usurper is in effective control temporally is not sufficient.

Another criticism against Kelsen’s theory of the grundnorm is that, it is very difficult to locate where it resides in a civil society especially in a pluralist one as Nigeria. The precise location of the grundnorm in Nigeria has elicited a lot of controversy over the years in each epoch of its political history.

According to Kayode (1990), under the 1960 constitution, the grundnorm is located in the principal organs of government- the legislature and the executive on one hand and the judiciary on the other hand. (Dias, 1980:315). Writing under the same vein, Ojo (1987) also believed that under the military dispensation, the grundnorm resides in the supreme military council or whatever name it was called He wrote that:

_In the present Military administration the supreme military council (now the armed forces ruling council, AFRC) is a source of its own legal order. Any search for a grundnorm away from the supreme military council (AFRC) or the expression of its powers as declared in Decrees is a futile judicial and academic exercise(Ojo, 1987: 110)
Also discussing the exact location of the grundnorm in Nigeria, Aguda (1989) canvassed the view that the Nigeria grundnorm resides in the 1979 constitution: As he wrote in his own words:

*Before the Military seized power on December 30-31 1983 the undoubted and incontrovertible Grundnorm of the Nigeria legal order was the 1979 constitutions (p 22)*

Tobi (2000) also added his voice to the controversy by agreeing with the view of Aguda by suggesting that the Nigerian grundnorm is located in the unsuspended provisions of the 1979 constitution. As he puts it:

*What then is the grundnorm in the Military regime of General Ibrahim Babangida? It is the constitution (suspension and Modification) Decree, 1984, the constitution (suspension and modification) Decree no 17 of 1985, the unsuspended provisions of the 1979 constitution and any other decrees which directly relates to the above in their total package (Tobi, 2000: 40)*

In response to the above suggestions as to the precise residence of the Nigerian Grundnorm following Kelsen’s conception of the grundnorm, the constitution, the legislature together with the executive, the judiciary and the unsuspended provision of the constitution cannot be regarded as the Nigeria grundnrom. For example the grundnorm cannot be the 1979 constitution because it is an institution and not a norm. Besides, according to Kelsen, the grundnorm is something or norm that has to be presupposed and not a norm that is consciously enacted by a legitimate authority. It must also be noted that under the military, the exact location of the grundnorm is difficult to determine because of its over-bearing command structure. For example under the Abacha Military Regime, the grundnorm could as well be anybody, who wielded some kind of power in his domain. Some even contended uncharitably that the grundnorm under Abacha was Major Mustapha!

Thus prefaced, the problem with the location of the grundnorm is due to lack of precise explanation given to it by Kelsen in his concept of law. It is very abstract and difficult to justify being a metaphysical concept which David Hume (1771-1776) said must be committed to the flames. (Omoregbe, 1994: 138)

**Conclusion**

We have examined the Pure Theory of law by Kelsen. He defined law in terms of a normative order. His task has been to purify law from all forms of impurities which include moral, political, metaphysical and psychological considerations. From all indications, he was unable to achieve this dream; for the theory itself became more “polluted” with impurities against his own expectations. For example, he could not explicate the sudden emergence of the grundnorm (a metaphysical entity) that is the basis of the validity of the whole legal system. The grundnorm among other things, is one of the impurities in the pure theory of law.

**References**


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