

A CRITICAL TREATISE ON HANS KELSEN'S PURE THEORY OF LAW

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Abstract

The central thrust of this chapter has been an expository and evaluative reflection on Kelsen's Pure Theory of Law. It established the governing propensity of his legal thinking was the desire to respond to certain fundamental questions regarding the concept, nature and validity of law. His main aim was to postulate a notion of law and legal system that is clean and unadulterated by extra-legal factors like morals, metaphysical speculations, values and other external factors that he believed encumber a good understanding of law. He made incisive contributions to the understanding of the nature and validity of law and this has earned him global scholarship and accolades.

Keywords: Treatise, Hans Kelsen, Theory of Law, Jurisprudence, Legal School

Introduction

It is germane to commence this chapter on Hans Kelsen's normative jurisprudence by scripting a succinct preamble of the central object of jurisprudential debate and discourse Kelsen's legal theory responded to. The linchpin and central problem of jurisprudence in all its variants (legal schools) is the task of establishing the meaning, nature and validity of law. It is equally pertinent to say without equivocation that, the notion of binding and obligation is not just crucial to the concept of law, but also essentially inalienable. In the naturalist perception of law as well as in the positivist explication of law, the notion of binding is given fundamental attention. These two jurisprudential schools taught that obedience to the law is a necessary requirement for the stability of a legal system. However, the point of disagreement or conflict, between legal naturalism and legal positivism (which are the two most outstanding and contending legal thoughts) revolves around the question: Where exactly does or from where does the law acquire its obligatory or binding or legal force? Differently put, in what does the validity of the law subsists? What invests a legal stamp or seal on a piece of legislation? Or what confers legality on legal norms that justifies and commands their obedience? While the naturalist appeal to some extra-legal, moral

and metaphysical (the ethico-metaphysical oughts) elements as the foundation of the binding force and validity of law, the legal positivist took a formal, empirical and descriptive approach to the explanation of the obligation and validity of law (law as it is, without recourse to metaphysical or moral oughts, is valid and commands unconditional obedience). Their position is premised on David Hume's (one of the formidable precursors of positivism) opinion that one cannot plausibly derive the "is" from the "ought". In other words, factual statements cannot be derived from prescriptive statements.

Consequently, one of the most intriguing and contentious altercation that has made attempts toward resolving the question of the nature and validity of law, a herculean task, is the "is-ought" contrast. This gulf responsible for the heated polemics between legal naturalists and legal positivists has in time resulted to the prevailing pandemonium in the legal parlance. Ironically, both the naturalist and the positivist (Hart) affirmed the union of law and morals. However, their point of divergence and contention is on the nature of this relation; namely, whether it is necessary or contingent (whether it is the sole and inevitable prerogative of morals to confer legality on law). While the naturalist holds it necessary, the legal positivist opted that it is contingent. Then this gave rise to what is now known in philosophical jurisprudence as the inseparability and separability theses respectively. The inseparability thesis is the view that law and morality are not conceptually, logically and necessarily separate and separable.¹ This means that the validating factor of law lies outside the law. Put differently, this asserts that it is morality that essentially imprints the stamp of legality and authentication on law. Again, it entails that the connection between law and morals cannot be severed; and in fact morals (justice) are the validating basis of law. The separability thesis as proposed by the legal positivists contends that the connection between law and morals is only but contingent. Thus, law and morality are separate and in any case where they accidentally coincide they can be separated and studied in isolation. That whether or not law conforms or reflects moral precepts and justice, so long it is enacted by a legitimate authority in accordance with laid down rules, it remains valid and binding. In other words, law as posited by a legitimate authority is the valid law, and it abhors any constraint from the natural or moral law of nature.²

¹ Idowu C. cited in M. M. Uzomah, *The Concept of Law: An Ontological Conceptualization of the Basis of Law*, (Kafanchan: De-Young Press, 2018), 51.

² Uzomah M. M., *The Concept of Law: An Ontological Conceptualization of the Basis of Law*, (Kafanchan: De-Young Press, 2018), 51.

Hans Kelsen whose legal reasoning is the exclusive focus of this chapter belongs to the hue of legal positivism that champions the separability thesis. He is considered one of the prominent jurists of the 20th Century and has been highly influential in Europe and Latin America, however, he is not so considered in common law countries. Kelsen is an Australian-American philosopher and jurist whose incisive legal reasoning contributed immensely to responding to certain pertinent questions pertaining to the meaning, nature and validity of law. He is one of the most outstanding positivists whose legal thinking constituted a formidable objection and antagonism of legal naturalism otherwise known as naturalistic jurisprudence.

Born in Prague, Czechoslovakia, on October 11, 1881, he attended the University of Vienna and received his Doctorate Degree at the age of twenty-five. After few years of additional study at the Universities of Heidelberg and Berlin, he became a Professor of Public Law and Jurisprudence at the University of Vienna in 1911. In furtherance of his career, in 1930 he proceeded to the University of Cologne, where he was given the chair of International Law and Jurisprudence and Dean of the Faculty. The years that followed saw the emergence of Adolph Hitler and his Nazi regime and this instigated Kelsen to transfer his service to Geneva, where he joined the Faculty of the Graduate Institute of International Studies. Kelsen had a number of works to his honour, meanwhile, some of his most famous and successful works include *Pure Theory of Law* and *General Theory of Law and State*. Kelsen has the credit and honour of been the one who drafted the Australian Constitution. He also was a judge in the Australian Supreme Court and he helped draft the United Nations Charter.³ As it is the way of all mortals, Kelsen died in 1973. It is important to note that Kelsen's version of legal positivism belongs to the subdivision of legal positivism known as the normative school.

Another legal scholar most commonly known for his stack opposition of legal naturalism in the order of Kelsen is John Wild. The two other notable legal theorists that attempted to rubbish naturalistic jurisprudence are H. L. A. Hart and Joseph Raz. For instance:

In the mid-twentieth century, Kelson, Hart and Raz espoused Legal Positivist doctrines in a bid to uphold and sustain Legal Positivism that had been prior presented by Austin and had now lost its influence among working legal philosophers. Its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts and its insistence on the role

³ Doherty Michael, *Jurisprudence*, (Britain: The Old Bailey Press, 1999), 32.

of coercive force gave way to theories emphasizing the systematic and normative character of law.⁴

The central thesis of legal positivism holds that law and morals are conceptually and logically separate and in any case if law and morals merge, they are separable. The positivists see law as 'it is' as sufficient and conclusive of the question of legal validity and obedience. In line with the central tenet of legal positivism Kelsen considered law as "it is" (positive law) as the valid law. Meanwhile, it is instructively relevant to observe that the central thrust of Kelsen's jurisprudence was not to consider law per se but to highlight or enunciate principles that may influence lawmakers to enact laws that would be to the best interest of the general populace where it holds jurisdiction. This is pursuant to the assumption that laws are enacted not merely for anyone but for everyone. Moreover, another governing propensity of Kelsen's legal reasoning was the need to highlight the dynamism of law (or a legal system) as a stable entity yet flexible in nature. In the circle of legal theorists and scholars, the problem of the nature of law with regard to whether it is static or fleeting is known as ancient paradox.

Kelsen's *Pure Theory of Law* aimed principally to extricate law from theories projecting ought laws and from the institutions, practices and values of the given society where it holds jurisdiction. In other words, his intent was to assert that legal science should be separated from political science and ethics. He was convinced that a "pure" approach toward the study of law would forestall reductionism of any kind. The main thesis that encapsulates the methodological purity of Kelsen's science of law is the postulate: The task of the legal scientist is to know and describe law and not to evaluate it. Guided by this main thesis, Kelsen opined that the task of the legal scientist ought to be to cognize and describe the law or legal order. His 'unadulterated conception of law defines law as norms and an objectively valid entity or system. He maintained that the validity of law lies within itself (the legal system where it subsists). Within a legal system, there exists a basic norm that acts as the validating substance of all the component laws making up such system.

The project of the pure theory of law was to propound a clean, unadulterated and an unencumbered concept of law—a notion of law that would describe the clear-cut demarcation between law and morals, jurisprudence and ethics, politics and other social contingencies. The teaser questions that inform the analysis in this chapter include: Was Kelsen able to reasonably achieve this project? How pure is law? Can such a complex concept which intertwines with morals and which emanates from

⁴ Green, cited in Uzomah M. *The Natural Law as the Basis of the Human Law: A Philosophical Appraisal*, (Unpublished Masters Degree Thesis, Submitted to the Department of Philosophy, Ekiti State University, Ado-Ekiti, 2015), 45.

social facts, be treated in isolation from the society? Can law which is a technique or mechanism for social control be investigated with no regard for the parochial society in which it subsists? Let's find out.

Consequently, with no prejudice to extant approaches toward the study of Kelsen's work, this chapter consists of an expository and evaluative analysis (study) of Kelsen's pure theory of law. The thrust of the chapter is to analyze the basic assumptions and ideas underpinning the pure theory, highlight the incontrovertible contributions of Kelsen to legal scholarship; and, to through argumentative approach demonstrate that the supposed “pure theory” is itself overtly impure, value-laden, and an excise in rigid logic and not practicable in real life situation.

The Normative School

The normative school is a subdivision of the legal positivist school. There are two big names associated to the normative school, Hans Kelsen and H. L. A. Hart. Hart was the first respondent to Kelsen's idea of the pureness of law. Central to the works of Kelsen, Hart, and many other legal theorists of the past century is the idea that law is a normative system, and that any theory about the nature of law must focus on its normativity.⁵ As the name implies, the normative school holds that law consists of normative relations. It presents a normative approach to the study and concept of law and it is concerned with what “ought” to happen in an entirely different way to metaphysical propositions.⁶ According to Kelsen, “by norm we mean that something ought to be or ought to happen, especially that a human being ought to behave in a specific way”.⁷ Kelsen further elaborates how his sense of “ought” defers from the traditional sense of “ought” employed by legal scientists in legal naturalism:

The word “ought” is used here in a broader sense than the usual sense. According to customary usage, “ought” corresponds only to a command, while “may” corresponds to a permission, and “can” to an authorization. But in the present work the word “ought” is used to express the normative meaning of an act directed towards the behaviours of others: this “ought” includes “may” and “can”. If a man who is commanded, permitted or authorized to behave in certain way ask for the reason of such command, permission or authorization, he can only do so by saying: Why “ought I behave in this way? Or in customary usage: Why or how may I or how can I behave in this way?”⁸

⁵ “Brian Bix”, November 2017, 2019. URL : <http://journals.openedition.org/revus/3984> ; DOI : 10.4000/revus.3984.

⁶ “Brian Bix”, URL.

⁷ Hans Kelsen, *Pure Theory of Law*, Translated by Max Knight from the second (Revised and England) German Edition, New Jersey: The Law Book Exchange Ltd., 2008, p. 4.

The Kelsen and Hart's sense of “ought” are not concerned with the ethical or metaphysical norms that the naturalists advanced as the substantial element that confers legality on law; rather, their perspective were positive legal norms that regulate behaviours, by prescribing certain act. They conceived law as social facts. Law as a social fact principally has to do with systems of rules detailing the oughts of human conduct. Law is a normative concept because it is definitive of or it prescribes how a society and its people are expected to conduct their affairs. For instance, according to Kelsen, “laws are directions instructing officials on the application of sanctions in particular circumstances”.⁹ For this school, the validity of law lies within itself, and not with some imagined or real ethical, metaphysical, or sociological principles. The ideas of Kelsen, Hart and other scholars were categorized as normative in nature owing to the fact that they considered laws as rules and standards that guide and regulate human conducts. In other words, by normative is meant the fact that legal rules prescribes codes that either permits or restrain certain conducts, actions, activities or behaviour in the affairs of humans. Kelsen as well as Hart preferred to see laws in terms of norms rather than in terms of commands or imperatives earlier conceptualized by Bentham and Austin.

The norm is considered as a scheme of interpretation in Kelsen's normative jurisprudence. In this regard he asserted thus: “... specifically the legal meaning of an act is derived from a “norm” whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. The norm functions as the scheme of interpretation”.¹⁰

In other words, “the judgment that act, as an act of human behaviours, performed in time and space, as legal (or “illegal”) is the result of specific, namely normative interpretation.”¹¹ Specifying what norms are to be considered as the object of jurisprudence, Kelsen posited that “These norms then, which have the character of legal norms and which make certain acts legal or illegal are the object of the science of law. The legal order which is the object of this cognition is a normative order of human behaviours-a system of laws regulating human behaviours.”¹² In a nutshell, he simply defined a norm as “the meaning of an act which a certain behaviours is commanded, permitted or authorized”.¹³ On the strength of this postulate, a legal

⁸ Kelsen, *Pure*, 5.

⁹ “Brian Bix”, URL.

¹⁰ Kelsen, *Pure*, 4.

¹¹ Kelsen, *Pure*, 4.

¹² Kelsen, *Pure*, 4.

¹³ Kelsen, *Pure*, 5.

norm is simply is a coercive act detailing certain behaviour as permitted or authorized or detailing certain behaviours as prohibited or outlawed. From the analysis thus far, it should be observed that Kelsen's conceptualization of law as a norm is motivated by the cognition and understanding that the law share same form with social norms. Legal norms as well as social norms are concerned with prescribing or inducing certain behaviour in their subjects. They also refrain and prohibit certain act or behaviour.

Expository Analysis of the Pure Theory of Law

Kelsen's *Pure Theory of Law* attempted a general theory of positive law. It is concerned with law in general rather than with a specific legal norm or legal order. It is concerned with positive law, law as it is rather than as it ought to be.¹⁴ In other words, his interest was not to prescribe what law ought to be as the legal naturalists do. "Kelsen's aim was to elucidate law of all times by isolating their common key elements. He sought for a science of law free from metaphysical elements".¹⁵ His jurisprudence was saddled with the responsibility of cognizing and describing the law or legal order. Commenting on the antecedence that instigated Kelsen to postulate a doctrine emphatically stressing the purified nature of law, the *Stanford Encyclopedia of Philosophy* wrote thus:

The traditional legal philosophies at the time (20th Century), when Kelsen was theorizing according to him were hopelessly contaminated with political ideology and moralizing on the one hand, or with attempts to reduce the law to natural or social sciences, on the other hand. He found both of these reductionist endeavors seriously flawed. Instead, Kelsen proposed a 'pure' theory of law which would circumvent reductionism of any kind.¹⁶

In other to preclude the above maladies that encumber the cognition of the true nature of law, he attempted to establish the connection of law to doctrines on what law ought to be and the relation of law to institutions, practices and the society. His opinion about law's relations to these variables is that an ideal approach to the study of law is one that extricates law from these variables. He aligned himself with the general legal positivists' project of separability thesis inaugurated by John Austin. His pure conception of law prescribes that a legal norm (rule or principle, judicial or legislative in origin) may be valid despite its incompatibility with some extraneous norms. Consequently, his legal doctrine is called pure for the simple fact that:

¹⁴ William, <http://scholarship.law.berkeley.edu>

¹⁵ Doherty, *Jurisprudence*, 32.

¹⁶ Marmor Andrei, "The Pure Theory of Law", *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/spr2016/entries/lawphil-theory/>>.

It seeks to preclude from the cognition of positive law all elements foreign thereto. The limits of this subject and its cognition must be clearly fixed in two directions: the specific science of law, the discipline usually called jurisprudence, must be distinguished from the philosophy of justice, on the one hand, and from sociology, or cognition of social reality, on the other.¹⁷

In *Pure Theory of Law*, Kelsen sort to establish that law is a pure or clean concept. As a result, inquiry or study of law should be devoid of any external infiltrations—no moral, psychological, sociological, political, axiological or metaphysical elements should be introduced into the study of law. These extraneous factors blur or frustrate an incontrovertible understanding of law. Succinctly put, he opined that legal science is to be separated from political science. Keenly mindful of the unique and autonomous nature of law, his antireductionist theory sought to disentangle law from all alien intrusions.

According to Kelsen, by the pure theory, Kelsen aimed to describe law as binding norms. Central to the pure theory is the notion of a basic norm (*grundnorm*), a hypothetical norm, presupposed by the jurist, from which in a hierarchy of lower norms in legal system proceeds; beginning with constitutional law, are understood to derive their authority or legality”.¹⁸ In this way, Kelsen contends that the legality of legal norms, their peculiar legal character, can be understood without recourse to some supra-human sources such as God. This approach sought to strip all subjective considerations of law in the interest of objectivity. In postulating the pure theory, one of the most daunting challenges of Kelsen was to “provide an explanation of legal validity and legal normativity without an attempt to reduce jurisprudence to other domains.”¹⁹ Hence:

The pure theory of law is a theory of positive law; a general theory of law, not a presentation or interpretation of a special legal order. From a comparison of all the phenomena which go under the name of law, it seeks to discover the nature of law itself, to determine its structure and its typical forms, independent of the changing content which it exhibits at different times and among different peoples. In this manner it derives the fundamental principles by means of which any legal order can be comprehended. As a theory, its sole purpose is to know its subject. It answers the question of what the law is, not what it ought to be. The latter question is one of politics, while the pure theory of law is science.²⁰

¹⁷ Hans Kelsen, “The Pure Theory of Law and Analytical Jurisprudence” *Harvard Law Review*, Vol. 55, No. 1 (Nov., 1941): 44.

¹⁸ Kelsen, *Legal*, 580.

¹⁹ Marmor, *Pure Theory*, 6.

²⁰ Kelsen, “The Pure Theory of Law and Analytical Jurisprudence” 44.

Kelsen's jurisprudence which adopted the methodological purity approach was motivated by his conviction that the law is an independent entity and as such, legal scholars must separate legal studies from ethical, political and other related studies, in order to foster a proper understanding and description of law. Kelsen's immaculate concept of law specified that the thrust and task of jurisprudence ought to only be to cognize and describe the law or legal order. And that it must not be extended to the evaluation of law. A crucial aspect of the pure theory is the description of law as normative system.

Law as Normative Systems

As mentioned above, Kelsen adopted a normative approach to the investigation of law. He conceived law in terms of norms. Kelsen's jurisprudential edifice was built on the normative nature of law. That is, law is essentially made up of norms, and that this requires an approach distinctively different from descriptive and empirical approaches.²¹ Kelsen's approach assumes or is grounded on the view that there is a sharp division between “is” statements and “ought” statements in particular, that no conclusion about what one ought to do can be derived from statements regarding what is the case.²² Here one can vividly see the influence of Hume who earlier opined that factual statements cannot be logically deduced from prescriptive judgments.

Kelsen's *Pure Theory of Law* is an attempt to combine the separability of law and morals (or 'separation thesis') with the separability of law and fact (or 'normativity thesis'). The separation thesis is the usual domain of legal positivism and the normativity thesis reflects a classical part of natural law theory, hence the combination of both theses effectively adopts a Kantian or neo-Kantian middle-way or, as Kelsen put it between the two theories. In this sense, Kelsen's analysis was concerned with how positive laws are validated, however in a completely different way to metaphysical, moral or sociological propositions. His idea of a norm consists of something one is expected (ought) to do or an expectation that something ought to happen. This clarification became necessary against the backdrop that conflate and confuse his notion of norm with the legal naturalist's notion of moral and metaphysical norms (oughts) advanced as the validating basis of laws and legal systems. Hence, he views law as a normative propositions detailing or pronouncing what should happened within a legal system. Laws are directions instructing officials as to the application of sanctions in particular circumstance.²³ This is most probably what the founder of the American legal realism, Oliver Wendel Holmes implied when he opined that law is essentially a systematized prediction of public force through the instrumentality of the court. According to Holmes, to say that an

²¹ “Brian Bix”, URL.

²² “Brian Bix”, URL.

²³ Doherty, *Jurisprudence*, 32.

individual or a legal entity has a legal duty to do whatsoever invariably implies that one is predicting that, should such a legal person fail, it shall be punished in a specific way through the pronouncement of a court of competent authority. Hence, laws or legal systems are all about predictions (prescription) of what will happen to a certain person if he/she carries out certain actions contrary to legal norms or refrains from actions which he or she has legal duty (commanded or authorized) to perform.

In the view of Kelsen, laws are essentially standing instructions or directions instructing officials on the application of sanctions in particular circumstances. He maintained that in any given instance (case), it would be much more appropriate to concentrate on the direction to the official as to the sanction, rather than on the offence or the offender.²⁴ Contrary to Austin's view, the point Kelsen is making is that the principal attention of the legal scholar should not be focused on the mere fact that an official is under a duty to execute or enforce law, but it should also be imperatively focused on the fact that he/she has the power and discretion to do so in the given case.

Another important aspect of Kelsen's version of normative jurisprudence is his postulate that beside legal norms there are other norms concerned with the regulation of the behaviour of men to each other. These other norms he referred to as moral norms. "Therefore the science of law is not the only discipline directed toward the cognition and description of social norms. These other social norms may be called "morals" and the discipline directed towards their cognition and description, "ethics".²⁵ The questions that ensue here is: What are moral norms? What form do moral norms have? Do moral norms share same form with legal norms? Do moral norms serve the function of validating legal norms in the sense that the law must essentially have certain moral content? These questions guide our next discourses-on the relations between morals and law.

The Law vis-à-vis Morals

It is germane to state that the core or linchpin of Kelsen's immaculate and objective treatise on law was his idea on the relationship between the legal order and the moral order, the law and justice. Unlike other positivists, Kelsen was unequivocal in asserting that although the law and morals share certain ineluctable differences, yet they are related in several perspectives. The most fundamental points of relationship between these separate orders are: both orders share the same form (the ought form-prescribes certain behaviour as norm for human conduct or prohibits certain behaviour to refrain certain human behaviour); both orders presuppose that good (justice) be done and evil avoided in human affairs; etc. Conversely, in the spirit of

²⁴ Doherty, *Jurisprudence*, 32.

²⁵ Kelsen, *Pure Theory of Law*, Translated by Max Knight, 59.

purifying the concept of law, Kelsen was equally unequivocal in asserting that despite these points of convergence (and others that would be indicated shortly) the law and morals are separate orders and that morals are not needed for the validation of a legal order; he cited relativism that undeniably characterize the moral order as the most fundamental reason and justification of his claim. A detailed discussion on this core of his pure concept of law (in terms of looking at the similarities, differences, and the expedient need to separate the law from morals) suffices.

Kelsen considered moral norms as social norms; he maintained that “So far as justice is a postulate of morals, the relationship between justice and law is included in the relationship between law and morals”.²⁶ It should be noted that: In common usage of language, morals is often mixed up with ethics, just as law is mixed up with the science of law; and to ethics is attributed what is a function of morals: that it regulates human behaviours, that it stipulates duties and rights, in others, that it authoritatively posits norms, whereas actually its function is the cognition and description of the norms that has been created by a moral authority or by a custom.²⁷

Consequently, “The methodological purity of the science of law is jeopardized not only because the bar that separates it from natural science is ignored, but even more so because the science of law is not (or not clearly enough) separated from ethics—that no clear distinction is made between law and morality.”²⁸ In order to properly delimit or specify the boundary between law and morals, Kelsen first and foremost outlined four principal areas of similarities that constitute no go area as far as the attempt to distinguish the law and morals is concerned.

Similarities of Law and Morals

- i. A distinction between morals and law cannot relate to the behaviours to which the norm of these two social orders obliged man. Eg. Suicide may be forbidden not only by morals, but also by law; courage and chastity may be moral as well as legal obligations.
- ii. The frequently asserted opinion that law prescribes external and morals internal behaviours is not correct. The norms of both orders determine both kinds of behaviours. The moral virtue of courage consists not merely in the internal quality of fearlessness, but also in an external behaviours conditioned by this quality. And if on the other hand, a legal order prohibits murder, it prohibits not only the bringing about a man's death by the external behaviour of another, but

²⁶ Kelsen, *Pure*, 59.

²⁷ Kelsen, *Pure*, 59.

²⁸ Kelsen, *Pure*, 59.

also an internal behaviour, namely the intention to bring about such result.²⁹

- iii. It is not possible to distinguish law and morals by reference to the creation and application of their norms. Moral norms precisely like legal norms are created by customs and by acts of will. In this sense, morals, like the law, because actually posited, are positive and only positive morals are the object of scientific ethics, even as only positive is the only object of the science of law.
- iv. The law as well as morals (as social norms) has the same form—they are normative in nature.
- v. It is true that a moral order does not provide for organs working according to the principle of division of labour, that is, central organs for the application of norms. This application consists in the moral evaluation of other individuals' behaviours as regulated by this order. But, as a primitive legal order too is decentralized and, in this respect, is indistinguishable from a moral order.³⁰

Moreover, Kelsen noted that “It is significant that the entirely decentralized general international law sometimes is considered merely as international morals”.³¹ International laws are so considered most probably because in the kingdom of man-made law, they are closest to the precepts of the natural law; and they are not posited because they have no identifiable creators. Despite these outlined insurmountable similarities of law and morals, Kelsen insisted on the separation of these two social orders to make way for a proper cognition and description of the legal order.

Differences of Law and Morals

Two fundamental points of difference is discernible in the Kelsenian concept of law. These points of divergence include:

- i. Although, a difference between law and morals may not be found in what these separate moral order command or prohibit, however, it would be found in how they command or prohibit certain behaviours
- ii. Laws and morals are distinguishable in terms of sanction or coercion. For instance, the former is coercive in nature, whereas the latter is a mere social order without a coercive imperative.

Expanding on the second point of distinction which is considered as the most contrast demonstrating the independency of the legal and moral orders, he wrote:

²⁹ Kelsen, *Pure*, 61.

³⁰ Kelsen, *Pure*, 62

³¹ Kelsen, *Pure*, 62.

The fundamental difference between law and morals is: law is a coercive order, that is, a normative order that attempts to bring about certain behaviours by attaching to the opposite behaviours a socially organized coercive act; whereas morals is a social order without such sanctions. The sanctions of the moral order are merely the approval of the non-conforming and the disapproval of the non-opposing behaviour, and no coercive act are prescribed as sanctions.³²

Kelsen was of the view that “Once laws and morals are organized as different kinds of normative system, the question of the relationship of law and morals arises”.³³ The question of the relationship between law and morals is invariable the question on whether morals are essentially required for the validation of a legal order. According to Kelsen, “The question has two meanings: One, what is the relationship between the two? The other, what ought it be? He maintained that “If both questions intermingle, misunderstandings result”.³⁴ He described the two common responds to the first question thus:

The first question is sometimes answered by saying that law by its nature is moral, which means that the behaviours commanded or prohibited by legal norms is also commanded or prohibited by the moral norms. Furthermore, that if a social order commands a behaviours prohibited by morals or prohibits a behaviour commanded by morals, this order is not law, because it is not just. The question is also answered, however, by stating that law may, but need not, be moral-in the mentioned sense, that is, “just”, that a social order that is not moral (which means just) may nevertheless be law, although the postulate is admitted that the law ought to be moral, which means- just.³⁵

The first answer to the question of relationship between law and morals described by Kelsen above is associated to conservative legal (classical natural law) theorists who vehemently maintain that the precepts of the natural law, considered as the supreme norms of human conduct, ought to be the substantial validating content of law. Contrary to this value-laden postulate, Kelsen, (who subscribes to the second response to the question of relationship), appealed to moral relativism to demonstrate that the law does not need morals as its validating basis. According to him, moral values are fleeting in nature as they vary from place to place, time to time; and even within the same clime, the notion of what is good or just changes with passing time. Therefore, there exists multiple (and conflicting too) moral systems

³² Kelsen, *Pure*, 62.

³³ Kelsen, *Pure*, 63.

³⁴ Kelsen, *Pure*, 63.

³⁵ Kelsen, *Pure*, 63.

and as such it is impossible to decipher an element common to all moral systems. Furthermore, he maintained that:

Even if one could detect an element common to all moral systems valid so far, there would not be sufficient reason to regard as not “moral” or not “just” and therefore not as “law” a coercive order that does not contain this element, that commands a behaviours that so far in a community has been considered to be good or just and that prohibits a behaviours that in so far in no community has been considered to be evil or unjust. For if one does not presuppose an a priori, that is, absolute, moral value, one is unable to determine what must be considered good and evil, just and unjust, under all circumstances.³⁶

An appeal to moral relativism for Kelsen is a justification to hold that the moral content of a law is irrelevant to the question of validity of the legal order. Therefore, for Kelsen if the question of the relationship between law and morals is understood as a question concerning the content of law and not as a question concerning its form; then there exists no relationship between law and morals in this regard. Based on this tokenism, he argued, “And then, undeniably, also that which the mentioned coercive order demands may be considered as good and just, and that which it prohibits as evil and unjust; so that this order too is relatively moral or just”.³⁷ This implies that the legal order having the same form with other social norms may be relatively adjudged moral or just, immoral or unjust, yet the moral nature of a law is insignificant to the question of validity of law. He explains:

All moral orders have only one thing in common; namely that they are social norms, that is, norms that order certain behaviour of men directly or indirectly toward other men. All possible moral systems have in common their form, the “ought” they prescribe something, they have normative character. Morally good is that which conforms with the social norms that prescribe a certain human behaviour; morally evil that which is opposed to such a norm. The relative moral value is established by a social norm that men ought to behave in a certain way. Norm and value are correlative concepts.³⁸

Consequently, he opined that “Under these presuppositions the statement “law as law is moral by nature” does not mean that law has a certain moral content, but that it is a norm –namely a social norm that men ought to behave in a certain way. Then in this relative sense, every law is moral, every law constitutes a relative moral value.”³⁹

³⁶ Kelsen, *Pure*, 64-65

³⁷ Kelsen, *Pure*, 65.

³⁸ Kelsen, *Pure*, 65.

³⁹ Kelsen, *Pure*, 65.

Moreover, 'this means: the question about the relationship between law and morals is not a question about the content of the law, but one about its form'.⁴⁰

It is interesting to note that although Kelsen sued for an objective (value-free) consideration of law devoid of any subjective (value-laden) interference, albeit, he was not oblivious of the empirical fact that the legal order is value-laden. He ironically admitted that "The law constitutes a value precisely by the fact that it is a norm: it constitutes the legal value, which at the same time is a (relative) moral value; which merely means that the law is a norm".⁴¹ Moreover, he noted that "True legal norms as prescriptions of what ought to be, constitute values; yet the function of the science of law is not the evaluation of its subject but its value-free description. The legal scientist does not identify itself with any value, not even with the legal value he describes."⁴² In keeping with his methodological purity approach to the study of law, which prescribes that the science of law must be limited to the cognition and description of law, he maintained that the study of law must eschew appraisal of law.

Consequently, Kelsen expressed his disapprobation regarding the view conceded by Hart and other legal theorists stating that the law in its essence embodies a moral minimum. For instance, when Hart was confronted by a vast array of unjust, iniquitous and immoral law enacted in strict adherence to the tenets of legal positivism; he reluctantly and inadvertently conceded thus:

What surely is most needed in order to make men clear sighted in order to forestall official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that however grant the aura of majesty or authority which the official system may have, its demands must be in the end be submitted to moral scrutiny.⁴³

With this assertion, Hart inadvertently affirmed that, he had worked so hard to discredit or debunk. Consequently, to say a rule is valid is to recognize it as passing all the tests provided by Hart's rule of recognition and so as a rule of the system. We thus simply say that a rule is valid when it satisfies all the criteria provided by the rule of recognition. Kelsen rejected the view that for "a coercive order, to be regarded as law it must fulfill a minimum moral postulate."⁴⁴ He did not mince words in stating his reason for this rejection. In his view:

⁴⁰ Kelsen, *Pure*, 65.

⁴¹ Kelsen, *Pure*, 65.

⁴² Kelsen, *Pure*, 68.

⁴³ Hart H. L. A. cited in Uzomah, *Concept*, 126.

⁴⁴ Kelsen, *Pure Theory of Law*, Translated by Max Knight, 65.

For to assume the existence of this postulate presupposes an absolute morality, determined by its content, or at least a content common to all positive moral systems-usually the ideal of peace. From what has been said it follows that the legal value, as used here, does not represent a moral minimum in this sense, that specifically, the peace value is not an element essential for the concept of law.⁴⁵

The point he is making is that based on the fact that there is no such thing as an objective moral order, there cannot be a minimum moral content (precepts) that the law must at least embody as a necessary requirement for its validity. Hence, “The demand for the separation between law and morals, law and justice, means that the validity of a positive legal order is independent of the validity of this one, solely valid, absolute moral order, “the” moral order par excellence”.⁴⁶

For the purpose of clarity, it should be reintegrated that Kelsen did not state that law cannot be adjudged as either good or bad, just or unjust (even when this is not the purview of legal science); however, his position is that owing to moral relativism, the moral nature of a law is inconsequential to the question of validity of law. He elaborates this thus: “For the concept of the “good” cannot be defined otherwise than as that which ought to be: that which conforms to a social norm; and if law is defined as norm, then this implies that what is considered is good. The postulate made under the supposition of a relativistic theory of value, to separate law and morals and therefore law and justice, merely means this:

1. If a legal order is judge to be moral or immoral, just or unjust, these evaluation express the relation of the moral order to one of many possible moral systems but not to “the” moral system and therefore constitute only a relative, not absolute, value judgment, and
2. The validity of a positive legal order does not depend on its conformity with some moral systems.⁴⁷

In the light of the above he further explained, “The postulate to differentiate law and morals, jurisprudence and ethics, means this: from the standpoint of scientific cognition of the legal order, it is irrelevant, because the task of the science of law is not to approve or disapprove its object, but to know and describe it”.⁴⁸ The question that ensues here is this: if the province of legal science is restricted to just to understand and describe law, whose duty then is the noble task of appraising the law? Another question may be asked, is it philosophically significant to hold that the appraisal of the legal order is irrelevant to the proper conceptualization of law?

⁴⁵ Kelsen, *Pure*, 65.

⁴⁶ Kelsen, *Pure*, 66.

⁴⁷ Kelsen, *Pure*, 66-7

⁴⁸ Kelsen, *Pure*, 68.

Kelsen's answer to the second question is obviously in the affirmative. His justification for this answer obviously is based on the discrepancies in the prescriptions of morals arising from moral relativism. According to him:

If the moral order does not prescribe to obey the positive legal order under all circumstances, if in other words, a discrepancy between a moral and a legal order is possible, then the postulate to separate law and morals, science of law and ethics, means that the validity of positive legal norms does not depend on their conformity with the moral order; it means that from this standpoint of a cognition directed toward positive law, a legal norm may be considered valid, even if it is considered at variance with the moral order.⁴⁹

It suffices to indicate that appealing to empirical socio-cognitive fact of moral relativism, the pure theory of law rejects the thesis that holds that law by its nature must be moral and that an immoral legal order is not a legal order, widely championed by traditional science of law. Therefore, morals cannot be considered as the validating element of law, or as the essential principle that confers legality on legal norms.

At this point one may dare to ask, if laws are essentially standing instructions dictating appropriate sanctions and empowering officials on appropriate application of sanction in a given instance, if neither morals (justice) nor coercion nor sanction is the authenticating stamp of law, on what then is law grounded? Kelsen's simple response to this is that the seal of legality of the law subsists in the legal system of which it is a component. Put differently, the validity of a legal system lies within itself. To give a credible account of the validating basis of law, Kelsen adduced what he termed “grundnorm” or “basic norm”. A detail explication of this suffices.

Grundnorm as the Material Validating Substance of Law

Kelsen saw himself as a champion of legal positivism. According to him, law is not only a dynamic system of norms, but also a coercive order. It is inseparably bound up with the normatively regulated activity of a state apparatus of coercion. Although Kelsen saw coercion or sanction as important to law, yet he rejected the idea that sanction is an essential validating element of law. Consequently, the most controversial aspect of Kelsen's immaculate theory of law is his thought on what constitutes the validating basis of law. Without mincing words, Kelsen argued that the validity of law is necessarily located in terms of other higher laws from which it is derived. Kelsen proposed that there is a hierarchy of laws or norms, at the zenith of

⁴⁹ Kelsen, *Pure*, 68.

which is a 'grundnorm' or basic norm. This grundnorm is the ground, the root and seat of all laws.⁵⁰ “The norms themselves become more concrete as one descends the hierarchy-this is the concretization of norms”.⁵¹ By this tokenism, extra-legal variables like morals, social and political considerations are hence inconsequential to the validity of legal norms. In a legal system, there is this chain of authorization or authentication and at the end of this chain is the fundamental norm.

The concept of the basic norm serves three theoretical functions in Kelsen's legal doctrine, and these specific functions include to:

- i. ground a non-reductive explanation of legal validity.
- ii. ground a non-reductive explanation of the normativity of law.
- iii. explain the systematic nature of legal norms.⁵²

But what is this grundnorm and from whence does it proceed? Is it actual or imagined? Is it a mental or real entity? Is it speculative or empirical? The grundnorm, Kelsen alleged, is the norm that performs the function of validating all other norms within a legal system. It is not itself validated by another; and each legal system has a basic norm. As to its essential status, Kelsen alleged that this norm is presupposed or assumed; that is, it is hypothetical, it is not formulated by any legal authority. The idea of the grundnorm is the presupposition of the legal validity of the first constitution.⁵³ This presupposition according to him is an expedient guide against living an entire legal system baseless or without authority.

The idea of the grundnorm is based on Kelsen's belief in the systematic nature of law. He expatiated this thus:

An act or an event gains its legal-normative meaning by another legal norm that confers this normative meaning on it. An act can create or modify the law if it is created in accordance with another, “higher” legal norm that authorizes its creation in that way. And the “higher” legal norm, in turn, is legally valid if and only if it has been created in accord with yet another, “higher” norm that authorizes its enactment in that way.⁵⁴

By this he implies that:

1. Every two norms that ultimately derive their validity from one basic norm belong to the same legal system.

⁵⁰ Uzomah M. *The Concept of Law: An Ontological Conceptualization of the Basis of Law*, (Kafanchan: De-Young Press, 2018), 90.

⁵¹ Doherty, *Jurisprudence*, 32.

⁵² Marmor Andrei, "The Pure Theory of Law", *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.),
URL=<<https://plato.stanford.edu/archives/spr2016/entries/lawphil-theory/>>.

⁵³ Marmor, *Pure Theory*, 10.

⁵⁴ Kelsen H. *General Theory of Norms*, trans M. Hartney, (Oxford: University Press, 1991), 440–454.

2. All legal norms of a given legal system ultimately derive their validity from one basic norm.⁵⁵

A practical example to explain the ideas expressed above suffices. For instance, when one speaks of the Nigerian legal system, Ghanaian laws, or French law, one does not so speak merely because these are independent countries with their extant laws respectively, moreover, one can rightly distinguish these independent legal systems based on the empirical fact that these countries have distinct legal systems exhibiting a certain cohesion and unity.

The idea of a basic norm, which though, indisputably controversial, became expedient to account for the validation of the first Constitution. For a better understanding of Kelsen's chain of authorization, let's cascade his method to the Nigerian legal architecture. For instance, the Imo state House of Assembly is legally authorized to make certain types of laws. The power to make laws is conferred on it by the Imo State Constitution to make within certain prescribed limitations of content and jurisdiction. The question now is from where does the Imo State Constitution derive its validity? The answer is simply that the Imo State Constitution got its validation by the authority of the Nigerian 1999 Constitution (as amended). According to the chapter one of this constitution, part 1:

The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.

(7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters:

(a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.

(b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and

(c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.⁵⁶

Now another fundamental question that ensues here is, from whence did the 1999 Nigerian Constitution (as amended) derive its seal of legality? Is it because it proclaims itself the supreme law of the land? Definitely not, the Nigerian 1999 Constitution (as amended) is actually the Supreme law in Nigeria. In this sense, the

⁵⁵ “Marmor, Andrei”, SEP.

⁵⁶ Constitution of the Federal Republic of Nigeria (As Amended) 1999, Chapter 1, “General Provisions”, Part 2, “Powers of the Federal Republic of Nigeria”, sections 6&7.

Nigerian 1999 Constitution (as amended) is the highest legal norm in Nigeria. Foregrounding Kelsen's systematic authorization to the Nigerian Constitutions it behooves to posit that the 1999 Constitution derived its validity from the 1993 Constitution, 1993 Constitution is authenticated by the 1976 Constitution, the 1976 Constitution from the 1963 Constitution, the 1963 Constitution from 1960 Constitution, the 1960 Constitution from the 1954 Constitution, the 1954 Constitution from the 1951 Constitution, the 1951 Constitution from the 1946 Constitution, the 1946 Constitution from the 1922 Constitution and the 1922 Constitution from the 1913 Constitution. If this is the case, there is still an issue with Kelsen's chain of authorization. The issue is, from where did the 1913 Constitution derived its seal of authentication? What other higher legal norm validated the very first Constitution Nigeria had? With regard to this question, Kelsen has this to say:

One must presuppose the legal validity of the Constitution. At some stage in every legal system, one can get to an authorizing norm that has not been authorized by any other legal norm, and thus it has to be presupposed to be legally valid.⁵⁷

The normative content of this presupposition is what Kelsen has called the basic norm. The basic norm is the content of the presupposition of the legal validity of the first historical Constitution in the case of Nigeria and as in other climes (or of the relevant legal system).⁵⁸ From the analysis of the chain of authorization above, one can aptly deduce that in Kelsen's view, "The idea of a basic norm is a logical necessity for the ultimate validation of a legal system".⁵⁹ Now, the question that Kelsen and probably those sympathetic to his course should answer is, if the idea of a basic norm is a logical imperative, why then did he rejected the idea of natural law which can also be considered as a logical imperative to account for the authentication of positive laws? Until this question is answered, one may be apt to consider Kelsen's rejection of the legal naturalist inseparability thesis as instigated by double standard and unfounded aversion.

The Relationship between Legal Validity and Efficacy

An import aspect of Kelsen's spick-and-span concept of law is his consideration of the relationship between legal validity and legal efficacy. Kelsen's position, by efficacy is meant that a rule of law which commands certain behaviour is obeyed more often than not. He is plain in asserting that there is no necessary connection between the validity of any particular rule and its efficacy. Kelsen maintained that a legal norm is not an unconditionally or absolutely valid norm except the legal system of which it is a component is on the whole effective in the society where it holds

⁵⁷ "Marmor, Andrei", SEP.

⁵⁸ "Marmor, Andrei", SEP.

⁵⁹ "Marmor, Andrei", SEP.

jurisdiction. In specific terms, Kelsen opined that:

- A norm is *efficacious* if it is essentially or practically followed by those it addresses.
- The efficacy of a legal system is the condition of its existence.
- The efficacy of a basic norm is the condition of its legal validity.⁶⁰

Kelsen posited that a norm is considered to be legally valid “on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious”. This implies that a basic norm is legally valid if and only if it is a component of a legal order or system that is actually adhered to in a given population where it has jurisdiction.

Kelsen's view on the relationship between legal validity and legal efficacy would have been influenced by the principle of pragmatism championed by John Dewey that maintains that the test of validity of any idea or principle or system is its practical usefulness, effectiveness or practicability. Of course, the justification for the existence of a legal norm is its practical usefulness to maintaining law and order in the society where it is applicable as this is the ultimate essence of law. According to Kelsen, the law is a social technique designed to enforce certain behaviours, through prescribing certain consequence should there be contrary behaviour. Thus:

To view law as simply an external coercive system, however, is to conceive of it merely as specific social technique. What is socially desired is brought about or pursued by attaching a consequence to human behaviour, that is, the opposite of what is desired-the consequence, namely of a coercive act (the coercive deprivation of something good, such as life, liberty, or property). The legal system is obviously taking as its point of departure the assumption that the human beings whose behaviours it governs consider this coercive act and evil to be avoided.⁶¹

Consequently, “The purpose of the legal system is to induce human beings by means of this evil threatening them if they behave in a certain way, opposite what is desired-to behave in the desired way.”⁶² In this motivation lies the efficacy aimed at by the legal system”.⁶³ This may imply that efficacy is important in the conceptualization of law because the law is not some form of purposeless social modality or technique. Rather it is a social ad hoc modality fashioned to foster rational ordering of the society. Rational ordering because:

⁶⁰ Marmor, *Pure*, 12.

⁶¹ Hans Kelsen, *Introduction to the Problems of Legal Theory*, Trans, Bonnie Litschewski Paulson and Stanley Paulson, (New York: Clarendon Press, 1992), 28-9.

⁶² Kelsen, *Introduction*, 28-9.

⁶³ Kelsen, *Introduction*, 28-9.

With the eye on efficacy, the content of legal norms (like that of social norms generally) is limited to human behaviours, for only the human being, endowed with reason and will, can be motivated with the notion of a norm, motivated to behave in conformity with that norm.⁶⁴

In a word, it could be adduced that Kelsen's thought on the relationship between the efficacy and validity of the legal system is that, although efficacy is not required to confer legality or validity on a legal order, yet efficacy is essential in the sense that efficacy is needed to determine if a given legal system achieves the purpose of a legal system which consists of controlling social affairs through threatening evil consequences, should certain contrary actions be exhibited.

Appraisal of the Pure Theory of Law

The nature of scholarship in general and philosophical discourses in particular is such that no theory, thought, idea or philosophical system is inoculated from critique. Two reasons may be adduced as responsible for this-the first reason is that, no man is an island; while the second reason is that philosophy and philosophical discourses are collectively a continuous conversation (philosophy is a dialectical refutation). In lieu of this backdrop, Kelsen's pure theory of law has received its fair share of critique which consists of comments of approbation and disapprobative comments, respectively. Consequently, in what follows, the disparaging comments on Kelsen's theory are considered.

Comments of Approbation

The following has been outlined as the main contributions of Kelsen's legal thinking:

- i. It provides a conception of law which includes the case law of judicial and administrative tribunals as well as the legislative norms of legislatures, administrative bodies and even courts (as to judicial procedure). The English imperative school ascribed all of these to a command or a rule of the sovereign. The Pure Theory which is a trend of the normative school significantly (and positively so) differs from the command/imperative school, in the sense that it regards legal norms as having two functions: to confer power on subordinate officials to create subordinate legal norms, and to indicate, at least in part, the content of those norms. Hence, one may distinguish two classes of norms: power norms and decisional norms.
- ii. It delineated that what a court may decide and what it must or should decide, in the exercise of its discretion are distinct aspects of the judicial process.
- iii. Kelsen's theory of law conceptualized a dynamic legal order rather than a merely static system.

⁶⁴ Kelsen, *Introduction*, 28-9.

- iv. His legal reasoning highlights the inviolable value of orderliness as the teleology of law.
- v. His theory emphasized the fundamental imperative of the maintenance of logical consistency of the component laws in a legal system to achieving orderliness within a legal system.
- vi. It responded to the question of judicial precedence and the question of whether or not courts make law. It asserted that every act of the application of law (adjudication of cases and interpretation of laws) invariably implies an act of law-making; and every precedent creates a new analogy of an old concept, and a locus standi for subsequent legal litigations.
- vii. The pure theory does not in any sense negate the separation of powers; the judicial lawmaking function when considered holistically respect certain perspectives subordinate to the legislature. This theory has been rightly considered by some legal scholars and analysts as a valuable instrument synthesizing the principle of judicial subordination with the rejection of Blackstone's concept of law.
- viii. The pure theory improved Austin's theory of law in the sense that it perceived law in a more profound depth and not merely in terms of duties.⁶⁵
- ix. It rightly pointed out that although sanction is a functional necessity of legal enforcement, yet it is not an essential factor of law with regard to the question of validity.
- x. Although some scholars may have strongly disparaged the pure theory as been overtly utopic, however, his legal postulations remain a local classic (judicial precedents) as there have been practical instances of where it has been invoked in litigations and adjudication of cases. Doherty listed some of these instances to include the following:
 - (a) *The State v Dosso 2 Pak LD* (1958) SC 533
 - (b) *Uganda v Commissioner of Prisons, ex parte Matovu* (1966) EA 514
 - (c) *Madzimbamuto v Lardner Burke* (1968) 2 SA 284
 - (d) *Sallah v Attorney-General* (1970) CC 54
 - (e) *Jilani v Government of Punjab Pak LD* (1972) SC 139.⁶⁶
- It has also been argued that even if Kelsen erred about the details of the unity of legal systems, his main insight remains true, and quite important. It is true that law is essentially systematic, and it is also true that the idea of legal validity and law's systematic nature are very closely linked. Norms are legally valid within a given system, they have to form part of a system of

⁶⁵ Doherty, *Jurisprudence*, 35.

⁶⁶ Doherty, *Jurisprudence*, 34.

norms that is in force in a given place and time.⁶⁷

- The incisiveness and philosophical significance of the pure theory is demonstrated by its global assertiveness. It has also been pointed out that the pure theory of Kelsen has been the subject matter of numerous scholarly and critical articles globally. Some scholars even purport that apparently no extant works of law in the prevailing century has equaled the pure theory's global presence.
- Above all, the pure theory was a sincere attempt towards postulating a notion of law that is free from every encumbrance that militates against establishing the real meaning, nature and essence of law.

Notwithstanding the positive contributions of Kelsen's pure conceptualization of law, it has also been criticized on several grounds. The most pertinent critical and summative comment against this theory of law is that instead of being a pure theory of law it provided an analysis of law that is value-laden.

Disapprobative Comments

It is pertinent to stress here that the pure theory seem very sophistry or illusory.⁶⁸ This remark is motivated by the realization of how complex and dependent the concept of law is on ethics, politics, etc. Kelsen's clean or unadulterated law disregards practices, values and mores of the society whose political institution, legislative processes or other legitimate ad hoc and standing modalities that collectively contributed to the making of the law or has properly instituted that law.⁶⁹ Law is such a concept that is a mixture or amalgam of so many elements, and these elements are essential to the proper and integral understanding and articulation of law. Law as a social concept is said to be ad hoc- it is of the essence of man; necessitated by social facts, social ethos and social needs that ensue or erupt from social intercourse (relations of individuals to individuals and relations of individual to the state). Specific laws are enacted in time to address specific social issues or reality. This justifies the American Legal Realists' conceptualization of the subject matter of law as life itself. Hence, law cannot be aptly underscored without the least consideration of these social facts. This polemic is given a firm footing in De Montmorency's analysis of law, "law ultimately consists of the rules which bind men together in society in its struggle against natural environment. Adaptation to this environment is the condition for survival. Custom was the method by which man adapted himself to his".⁷⁰ In this case, law which is an expression of this phenomenon or adaptation

⁶⁷ "Marmor, Andrei", SEP.

⁶⁸ See M. M. Uzomah, *The Concept of Law*, (Kafanchan: De-young Printing Press, 2018), 98-105.

⁶⁹ Uzomah, *The Concept*, 98-105.

⁷⁰ Kolajo, *An Introduction*, 5.

cannot be perceived outside what it expressed. This implies that it is the society and its cultural and social challenges that give birth to law. Therefore, elementary logic demands that any legal system cannot be meaningfully studied outside these cultural and social paraphilia that necessitate and define law.⁷¹

Consequently, law is the result of human wisdom acting upon human experience for the benefit of the public.⁷² Granted that law is a product of human experience, understanding of such experiences and rationales behind the enactment of the particular law is basic and veritable to an exploration of law. In addition, we also learnt from Michael Bauman why the pure theory could be described as a futile effort. He indicates: “why the founding fathers of America did not consider demarcating morality and politics. He argued, “they all knew quit well that morality belonged in politics, an integral part (morality is an integral part of politics). In fact politics was simply morality applied to the public square to the public business.”⁷³ It is self-evident even to the layman on the street that morality, politics and law intercepts (this interception is not merely accidental rather essential). Orderliness and the pursuit of social justice and the supreme good of all in the society are collective object and essence of these trio inextricable entities. As a study of one at the exclusion of others is not only inconclusive but essentially futile effort.

Consequently, the forceful attempt to eliminate morality from law by Kelsen, on the pretext of moral relativism, may be described as inimical to the entire legal system and the whole essence of law in the society. To my opinion, justice defines law; every law supposedly is built on a perceived sense of natural justice upon which the political order is installed. In this light, Doherty, indicated that ultimately, the notion of justice in the form of the feelings or preferences of individuals are a reality in a legal system. It is the central feature of law; they (justice) would thus be paramount if real issues were being raised as to the validity or otherwise of laws or legal system.⁷⁴ Omoregbe corroborated Doherty on the expediency of justice to law, “the concept of justice is central to law and morals and this is another point of similarity between them.... Justice is the standard to which law must conform.... Although, it is not possible for law to ensure perfect justice, nevertheless it tries to establish as much of it as possible and necessary for peaceful co-existence. We readily agree with Aquinas and Pizzorni that the purpose of law is, inter alia to attain justice and that an unjust law is consequently null and void”.⁷⁵

⁷¹ Uzomah, *The Concept*, 98-105.

⁷² Kolajo, *An Introduction*, 2.

⁷³ Bauman Michael, *God and Man: Perspectives on Christianity in the 20th Century*, (Hillside: Hillside Collage Press, 1995), 5.

⁷⁴ Doherty, *An Introduction*, 35.

⁷⁵ Omoregbe Joseph, *An Introduction to Philosophical Jurisprudence*, (Lagos: Joja Educational Research and Publishers Ltd. 1997), 167.

A very crucial aspect of the pure theory that calls for critical reflection is the notion and nature of *grundnorm*. The point of this assessment establishes is that his concept of this basic norm is vague, ambiguous, speculative and evasive. According to Kelsen, this basic norm is hypothetical or an assumption or presupposition. Hypothetical, understood in the light of Plato, is a self-evident fact, but that depends on a higher truth. By the admittance of the notion of a *grundnorm*, Kelsen inadvertently affirmed the brute fact that no legal norm or legal system can stand on its own, that the validity of positive law lies beyond itself. By this token, the logical conclusion of the *grundnorm* being the validating norm or basis of the bindingness of law is the bitter admittance of the existence of the natural law. The case or the point I am making is that, if this assumed or presumed validating character or signature or seal is to be relevant to the legal system, it must be built on human nature, must be a rational principle and must be a principle of justice, instead of an imaginary norm not based on fact. If Kelsen is not comfortable identifying this basic norm (which I have named natural law) which according to him is not posited by any legal authority, with God, he can at least identify it with nature. Well, those who are sympathetic to Kelsen's obstinate philosophico-legal concept of *grundnorm* may not concede to this prescription because that would mean totally dismantling the foundation of the defenseless pure theory. Meanwhile, the ensuing question that Kelsen and probably those sympathetic to his course should answer is, if the idea of a basic norm is a logical imperative, why then did he rejected the idea of natural law which can also be considered as a logical imperative to account for the authentication of positive laws? Until this question is answered, one may be apt to consider Kelsen's rejection of the legal naturalist inseparability thesis as instigated by double standard and unfounded aversion. Kelsenians may be quick to appeal to moral relativism as a justification for this. However formidable this defense may appear, it could be plausibly considered spurious because moral relativism is not only the widely accepted theory in ethics; moral objectivism is even more widely accepted. And as such, the latter may be more strongly appealed to as a justification for the natural law thesis.

Against this backdrop, Laski, observed that “the pure theory is an exercise in logic and not in life (reality) and that granted its postulates, it is unanswerable. But these postulates reflect the uncompromising demands of a rigid logic, and their utilization involves ignoring the fundamentals of the social life which creates and therefore colours the law”.⁷⁶

The fundamental flaw inherent in this rigid logic may be likened to the fallacious blunder committed by the logical atomist, Bertrand Russell, who thought that logical complexity is the same as spacial complexity. However, he was unable to fulfill the

⁷⁶Doherty, *An Introduction*, 36.

burden of proof, and was condemned by the legal maxim “no evidence, no case”. The making of law is influenced by historical, social, moral, and other germane antecedents, and in the study of law, these factors are crucial to a genuine and proper understanding of law. Hence, Kelsen's rigid and utopic logic is defective when it comes to a meaningful study of law. Of course he may have realized the vague and utopic nature of his concept of *grundnorm*, and that such notion made his concept of law not only impure but also undeniably speculative. With the passage of time, he inadvertently changed his notion of the *grundnorm*.

Consequently, with these limitations one can hold, the so-called “Pure Theory” to be a futile project. In this light, Brian observes that, “in looking at contemporary situation, one could comment that though there are many institutions, academic journal devoted to law, there are arguably sighs of a “pure science of law” or study of law “as it is” separated sharply from law “as it ought to be”.⁷⁷ So, the pure theory of law is an unpragmatic and utopic theory of law motivated by Kelsen's over ambitious move to apply the strict demands of rigid logic to social reality, thereby committing the fundamental mistake of equating logic to life. Life itself and social realities, institutions, practices and core moral values that give rise to and constitute law can never be successful severed (excluded) from the concept and study of law because they are intrinsically part of the ontology of law; and also they are larger than former and informer logic. This is responsible for why Kelsen was not able to provide a 'pure theory' of law, a concept that is itself not pure.

At this point one would agree no less with Doherty that “Justice in the form of feelings or preferences of individuals has no place in Kelsen's legal scheme. Ultimately, the notions of justice are a reality in legal system. They should not be defined from a legal theory-for some the notions and demands of justice would be the central feature of legal reflections. They would thus be paramount if real issues were being raised as to the validity or otherwise of laws or legal systems”.⁷⁸ The essence of law is to achieve and sustain an orderly (peaceable), just and equitable society. If the proper notion of law is to be underscore, law must neither be studied nor conceived in exclusion from these core values that define the nature of law.

The last but not the least disparaging comment on Kelsen's supposed pure theory of law is the fact that he was an unalloyed exponent of legal monism. Legal monists maintain that there is one legal system, with international law taking precedence over domestic laws. According to Doherty, “this notion is too difficult to accept and leaves

⁷⁷ Uzomah, *The Concept*, 31.

⁷⁸ Doherty, *An Introduction*, 34-5.

Kelsen open to strong criticism; for instance, Freeman aptly opined that it disregard the realities of the situation”.⁷⁹ For contemporary legal scholars, legal monism, especially the one championed by Kelsen is unrealistic because international laws, treaties, conventions and regulations do not have automatic jurisdiction in countries or states unless they are domesticated by local legal systems or municipal legal frameworks.

Conclusion

The central thrust of the foregoing chapter has been an expository and evaluative reflection on Kelsen's Pure Theory of Law. The analysis above established that the governing propensity of his legal thinking was the desire to respond to certain fundamental questions regarding the concept, nature and validity of law. His main aim was to postulate a notion of law and legal system that is clean and unadulterated by extra-legal factors like morals, metaphysical speculations, values and other external factors that he believed encumber a good understanding of law.

There is indeed no denying the fact that he made incisive contributions to the understanding of the nature and validity of law and this has earned him global scholarship and accolades. However, Kelsen's purported pure theory at a point became extremely pure to the extent of rendering his concept of law baseless. To forestall this unintended consequence he resorted to importing a basic norm-a norm with no known human legislator and instead hypothetical. The idea of grundnorm unarguably contaminated his supposed pure notion of law; for if the idea of a basic norm is a logical imperative, why then did he rejected the idea of natural law which can also be considered as a logical imperative to account for the authentication of positive laws? Until this question is answered, one may be apt to consider Kelsen's rejection of the legal naturalist inseparability thesis as instigated by double standard and unfounded aversion. Consequently, it is plausible to conclude that Kelsen's theory of law is overtly impure, therefore, his attempt towards advancing a pure theory of law ended up a futile project. His supposed pure theory of law inadvertently demonstrated the intertwine and inextricability of legal science, moral science and political science. These three social sciences are inclusively complementary and essentially bonded. Therefore, a study of one is incomplete without the others.

Research Questions

1. How pure is Hans Kelsen's 'Pure Theory' of law?
2. What does Kelsen mean by Grundnorm (Basic Norm)?
3. What is the relationship between legal validity and efficacy?
4. One of the controlling ideas of the pure theory states that, the task of the legal

⁷⁹ Doherty, *An Introduction*, 35.

- scientist is to cognize and describe the law. Discuss.
5. In Kelsenian purified notion of law, should the question of the relationship between law and morals be properly understood as a question concerning the content of law or as a question concerning its form?
 6. Differentiate between Kelsen and the legal naturalist normative delineation of law.
 7. Highlight and discuss the strengths and loopholes of Kelsen's pure theory of law.

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