

Grundnorm and Constitution: The Legitimacy of Politics

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Hans Kelsen's Pure Theory of Law and its doctrine of the *Grundnorm* has achieved a certain notoriety rather removed from its contribution to jurisprudence as such. This notoriety arises from its use by Commonwealth courts in analyzing the difficult political and constitutional situations created in the aftermath of revolutions, such as those in Pakistan in 1958 and Uganda in 1966.¹ However, its most complex and controversial application to date occurred in Rhodesia following the Unilateral Declaration of Independence (U.D.I.) of 1965.² There the courts moved towards acceptance of the Smith regime and its new Constitution in a series of decisions of major political significance. Since these decisions purported to derive their validity from Kelsen's theory, that theory becomes the legitimate object of scrutiny.

In view of recent political developments in Quebec, the fundamental constitutional decisions made by the Rhodesian courts may eventually assume a possible relevance to Canada. Also, given recent events, there could well be another change of regime in Rhodesia itself, with the new regime potentially viewed as a continuation of the pre-U.D.I. regime or its legitimate successor. Thus, a decade later, the judgments in the Rhodesian constitutional cases of the late 1960's take on a renewed importance both within and without their original forum. This paper will examine the courts' use of the Pure

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¹ *The State v. Dosso* [1958] 2 P.S.C.R. 180; *Uganda v. Commissioner of Prisons, Ex parte Matovu* [1966] E.A. 514.

² Proclamation no. 53 of Rhodesia, *Government Notice*, 1965, no. 737N (reprinted in *International Legal Materials* (1966), vol.5, 230-31). See *Madzimbamuto v. Lardner-Burke N.O.*; *Baron v. Ayre N.O.*, Judgment no. GD/CIV/23/66, Government Printer, Salisbury, 1966 (General Div., Rhodesia H.C.) *per Lewis and Goldin JJ.*; [1968] 2 S.A. 284 (App. Div.); [1969] 1 A.C. 645 (P.C.); *R. v. Ndhlovu, infra*, note 41; *Dhlamini v. Carter N.O., infra*, note 45.

Theory³ in those cases and the ensuing controversy this caused amongst legal theorists.

After outlining the main legal events, it will be argued that the Rhodesian judiciary, and notably Beadle C.J., misrepresented Kelsen's positivist Pure Theory and its concept of *Grundnorm* in order to disguise from observers, and perhaps from themselves, the profoundly political nature of their actions. In particular, this paper will demonstrate that the Judges used the Pure Theory to set the terms of deliberation and to provide justification for upholding the 1965 Constitution and, consequently, the Smith regime, an utterly illegitimate use according to that same Theory. Furthermore, it will be argued that according to the Pure Theory itself the courts' actions could *only* be political and not the outcome of purely legal reasoning. In this light, the paper will examine the debate that arose concerning the role the Pure Theory was made to play. The doubts raised about its integrity in that context will be shown to be unfounded; the Rhodesian example does *not* provide evidence of the immorality thought by some to be consequent upon a positivist approach to law.⁴ This paper should vindicate Kelsen's model in the minds of those who would dismiss it as a result of its Rhodesian misapplication.

I

Prior to U.D.I. (11 Nov. 1965), the Rhodesian courts were sitting under the 1961 Constitution⁵ granted by Britain which reserved certain residual powers to the British Government but at the same time limited the right of the United Kingdom Parliament to legislate for Rhodesia to cases where the Constitution was being breached by local legislation.⁶ Entrenched therein was a Declaration of Rights which guaranteed basic human rights and freedoms, such as observance of proper legal procedure and protection from discrimination by laws or administrative action; it also provided a right of appeal to the Privy Council. In addition, the *Colonial Laws Validity*

³ Kelsen, *General Theory of Law and State* (1945). See also Kelsen, *Pure Theory of Law* 2d ed. (1967) and Kelsen, *Professor Stone and the Pure Theory of Law* (1965) 17 *Stan.L.Rev.* 1128. Where possible I shall use the expression "*Grundnorm*" rather than "Basic Norm".

⁴ Positivism is here taken to denote an attitude which radically separates law from morality, and thus recognizes only positive laws as law, thereby excluding systems such as "natural law".

⁵ *Constitution of Southern Rhodesia, 1961*, granted by *Southern Rhodesia (Constitution) Order in Council, 1961* (1961, no.2314).

⁶ The Crown retained ultimate control over the power to pardon.

Act, 1865,⁷ denied the right of a colonial legislature to alter a constitution except in the manner stipulated in that constitution.

At the time of U.D.I. the Smith regime promulgated a new constitution which, while retaining some provisions of the 1961 law, introduced certain fundamental changes. The new Constitution provided for the appointment of an official to serve as the Queen's representative, replacing the Governor. The Rhodesian legislature took all power to make laws, denying any such power to the United Kingdom Parliament, and made the previously entrenched clauses of the 1961 Constitution subject to a majority decision of the legislature. It also abolished the right of appeal to the Privy Council, while providing for the continuing in office of the sitting judges, subject to an oath of loyalty. The 1965 Constitution did not present itself as deriving validity from its predecessor; it declared its own validity.

In response to U.D.I. and the new Constitution, the Governor issued statements dismissing the Ministers forming the government and calling on the people to refrain from supporting the new regime. However, the people were asked to carry on their normal tasks and maintain law and order, the judiciary being specifically included in that request. A few days later the British Government replied with the *Southern Rhodesia Act 1965*⁸ and the *Southern Rhodesian Constitutional Order, 1965*.⁹ These were made retrospectively effective from the date of U.D.I. and denied legality to the acts of the Rhodesian legislature, placing authority in Her Majesty in Council.¹⁰ During this period, the United Nations passed a resolution (5 Nov. 1965)¹¹ calling upon Britain to resolve the situation by the use of force. This was followed by a Security Council resolution (12 Nov. 1965)¹² calling on member states not to recognize the Smith regime and to enforce sanctions against it. The British Government eschewed the use of force and adopted a policy of negotiation, relying on the effect of sanctions to ensure a successful conclusion.

The Rhodesian judiciary thus was placed in a very difficult position. The new regime, presumably motivated by a desire for

⁷ 28-29 Vict., c.63 (U.K.).

⁸ 1965, c.76 (U.K.).

⁹ S.I. no.1952.

¹⁰ The British Government did very little in using these powers for legislation.

¹¹ G.A. Res. 2022 (XX), para. 11.

¹² U.N. Doc.S/RES/216 (1965/Rev.1, 217 (1965)).

respectibility,¹³ allowed the courts to continue in office, even after the attempt to enforce an oath of loyalty proved unsuccessful. As Beadle C.J. said:

That the present situation is a wholly unprecedented one seems beyond question. It is unprecedented because here, during the course of the revolution, a court which has not "joined the revolution" has been permitted to sit and continue to function and now has to adjudicate as such a court.¹⁴

What the court had to adjudicate was the validity of the new regime and its Constitution, and thus, ultimately, the success of the revolution. This occurred in a series of cases which questioned the legitimacy of the new regime, the most important being *Madzimbamuto v. Lardner-Burke N.O.*; *Baron v. Ayre N.O.*¹⁵ which, for obvious reasons, became known as the "Constitutional Case".

Both Madzimbamuto and Baron were subject to a detention order made before U.D.I. and which, in terms of the state of emergency under which it was made, had expired. Their detention was nevertheless continued by an order made under the 1965 Constitution. This was challenged before the High Court of Rhodesia on behalf of the detainees on the grounds that, "the Parliament of Rhodesia has no legal existence and everything done by it is invalid...".¹⁶ In reply, on behalf of the regime, it was argued before the High Court (in terms redolent of Kelsen's Pure Theory),

... that a legal order ceases to have validity when it loses efficacy and no longer coincides with reality, and that this applies whether the new order which replaces it came about in a legitimate way or not, provided only that the prior efficacy of the old order has passed to the new one.¹⁷

In the alternative, it was argued (in terms imported from international law) that even if the regime was not clearly the *de jure* government, it was undoubtedly the *de facto* government and, hence, some of its acts were clearly legitimate.¹⁸ Closely connected to this

¹³ As Dias says, this enhanced the show of legality and avoided the controversy of packing the bench. See Dias, *Legal Politics: Norms behind the Grundnorm* (1968) 26 C.L.J. 233, 258. The provision for oaths of the 1965 Constitution was ignored.

¹⁴ *Madzimbamuto v. Lardner-Burke N.O.*; *Baron v. Ayre N.O.* [1968] 2 S.A. 284, 307 (App.Div.).

¹⁵ *Supra*, note 2.

¹⁶ Judgment no. GD/CIV/23/66, Government Printer, Salisbury, 1966, 6 (General Div., Rhodesia H.C.).

¹⁷ *Ibid.*, 9. The Court then referred to "The Basic Norm of a Legal Order" in Kelsen, *supra*, note 3, 115. The applicability of Kelsen's theory was rejected, *ibid.*, 17.

¹⁸ *Ibid.*, 26.

was an argument that the enforcement of the regime's laws was necessary for public order — the "doctrine of recognition through necessity".¹⁹

The High Court²⁰ held that the first grounds of defence failed because this was not an argument applicable to the present situation where, despite the lack of a legitimate internal succession of regimes, there was still an external sovereign. This being the case, the Court could not decide whether such sovereignty had ceased, internal efficacy not being considered as a critical test. In reply to the alternative argument, the Court emphasized its reliance on the regime for continuing in office and the lack of British assistance in that respect. It was held necessary to avoid the risk of creating what would be, in effect, a legal vacuum. Consequently, the Court found that the detention orders at least were consistent with maintaining order without detriment to the fundamental rights of the 1961 Constitution.²¹

Both arguments advanced by the government figured in the appeal, with the former, that of "efficacy therefore validity", setting the terms of much of the deliberation.²² The appeal Judges carried out an extensive survey of cases from other legal systems (including those arising from the American Civil War²³) and of numerous works of jurisprudence. Amongst the latter, Kelsen's Pure Theory was prominent. The Chief Justice, in particular, imparted a strong Kelsenite flavour to the proceedings, especially by the employment of Kelsen's concept of *Grundnorm*. The concept of *Grundnorm* will be discussed in more detail shortly; suffice it to say for present purposes that it is:

The fundamental norm, which furnishes the basis for the making of any of the "ought" statements which represent the legal consequences or legal meaning of certain physical acts within the operation of a legal system, is that which gives the legal system its coherence and its systematic form as a particularisation of a prescriptive phenomenon. All the other stages in the process can be tested for their legal validity against this basic norm. Since, however, the basic norm constitutes the final standard of legal validity, its own validity cannot be objectively tested. Its validity, Kelsen tells us, must be presupposed or assumed.²⁴

¹⁹ *Ibid.*, 63. The discussion was in terms of *salus populi suprema lex*.

²⁰ Lewis and Goldin J.J. presiding.

²¹ *Supra*, note 16, 74.

²² *Supra*, note 14, 284.

²³ E.g., *Baldy v. Hunter*, 171 U.S. 388 (1898); *Johnson v. The Atlantic Gulf and West Indian Transit Co.*, 156 U.S. 618 (1894). See, *supra*, note 14, 335.

²⁴ Finck, *Introduction to Legal Theory* 2d ed. (1974), 121.

Beadle C.J. posed the problem as one of deciding whether the *Grundnorm* had changed. This he proposed to determine by judging the efficacy of the new regime, that is, whether it was generally accepted and obeyed, thereby making *efficacy* the criterion of *validity* of the Constitution. In this connection Beadle C.J. cited the use of Kelsen's theory in the earlier Pakistan and Uganda cases.²⁵ The sections of Kelsen's *General Theory of Law and State* specifically relied on were those entitled "The Principle of Legitimacy", "Change of the Basic Norm" and "The Principle of effectiveness".²⁶

With these references in hand, Beadle C.J. argued that although the Smith regime was the effective government, it was impossible to say whether it would remain so because, at that time, the *outcome of the application of sanctions could not be predicted*. Hence, it was not possible to accept the regime as having validity. He then held that the old *Grundnorm* was inoperative but that the regime had not yet succeeded in "setting up" a new *Grundnorm*. Consequently, the legal system was in the position described by Dias; where there is no longer a *Grundnorm*, some criterion which gives the quality "law" has to be used, even if it belongs to the old order.²⁷ Eekelaar's view that there was a "split" in the *Grundnorm*, retaining *de jure* elements of the 1961 Constitution while depending on a *de facto* change, was also referred to.²⁸ These formed the background to Beadle C.J.'s solution which was to base the Court's authority on the *de facto* government while not "joining the revolution". This did not, of course, imply that everything the *de facto* government did was lawful, for otherwise it would be *de jure*.²⁹ The Chief Justice concluded:

The present Government has effectively usurped all the governmental powers under the old Grundnorm, but has not yet succeeded in setting

²⁵ *The State v. Dosso*, *supra*, note 1 and *Uganda v. Commissioner of Prisons*, *supra*, note 1; cited by Beadle C.J., *supra*, note 14, 316-18.

²⁶ *Supra*, note 3, 117-19.

²⁷ *Supra*, note 14, 351; see Dias, *Jurisprudence* 2d ed. (1964), 381. Kelsen would doubtless say that this would still ultimately (in interpretation) require a *Grundnorm*. Beadle C.J. however, appeared to rely on the 1961 Constitution. While it is possible to make sense of this when coupled with dependence on a *de facto* regime, it is difficult to square in legal theory as Fieldsend A.J.A. pointed out. See text, *infra*, p.78.

²⁸ *Supra*, note 14, 351 referring to Eekelaar, *Splitting the Grundnorm* (1967) 30 Mod.L.Rev. 156. See also, Finch, *supra*, note 24, 127, who states: "A split in governmental allegiance in a country does not, for instance, connote a split in the basic norm, any more than the inapplicability of the basic norm to a disunited political system presents us with a case of juristic schizophrenia!"

²⁹ Beadle C.J. pointed this out, *supra*, note 14, 351.

up a new Grundnorm in its place. As a result of this effective usurpation, it can do anything which the Government it usurped could have done, but until the present Government has achieved the status of a *de jure* Government, and the revolutionary Grundnorm becomes the new Grundnorm, it must govern in terms of the old Grundnorm [and] until its new constitution is firmly established, and has thus become the *de jure* constitution of the territory, its administrative and legislative acts must conform to the 1961 Constitution.³⁰

Taking a more rigorously legal view, Fieldsend A.J.A. rejected this "halfway house" solution, pointing out that the Smith regime could not even be regarded as the *de facto* government because it **did not control the judiciary**. Claiming that the Court still sat under the 1961 Constitution, Fieldsend A.J.A. rejected the possibility of even embarking on an enquiry into the existence of a constitution for **"the court cannot sit to determine whether the constitution under which it was created has disappeared A court created by a written constitution can have no independent existence apart from the constitution . . ."**³¹ He concluded that the Court's authority could come only from the original Constitution, and if this was in doubt then so must be the Court's authority.³² However, in the circumstances he was prepared to accept a limited doctrine of **necessity to avoid a legal vacuum in practice**, providing that it did not further the usurpation, was necessary for public order, and retained the individual rights of the 1961 Constitution.³³ This approach was rejected by Beadle C.J.

The Court upheld the validity of the Proclamations of Emergency³⁴ as necessary for the maintenance of law and order. However, the Judges unanimously held that the particular detentions under

³⁰ *Ibid.*, 351-52.

³¹ *Ibid.*, 429-30, criticising the Pakistan and Uganda cases, *supra*, note 1. The Privy Council, [1969] 1 A.C. 645, 668, concurred. For Fieldsend A.J.A., a court is normally thought of as a guardian of its constitution.

³² *Supra*, note 14, 431. See also, Harris, *When and Why Does the Grundnorm Change?* (1971) 29 C.L.J. 103, 127, who accepts the possibility of judicial determination of its own power in individual cases and argues that it is thus correct to extend this to the constitution. This does not follow, for the latter effectively entails that judges can determine their own powers in all cases *at once*, including the very determination by which they do so. Nevertheless, it cannot be denied that judges can enquire into *particular* contents of their constitutions.

³³ *Supra*, note 14, 441.

³⁴ The original Proclamation of Emergency (5 Nov. 1965) was Proclamation no.51 of Rhodesia, *Government Notice*, 1965, no.736. The O.A.G. under the 1965 Constitution issued Proclamation no.3 (3 Feb. 1966) in terms of which the Government issued the *Emergency Powers (Maintenance of Law and Order) Regulations (Government Notice*, 1966, no.71).

review were invalid, as the need for continuing the detention had to be reassessed on each renewal by the Minister and such reassessment had not occurred in this instance.³⁵ The Smith regime regarded this as something of a victory and proceeded to embark on a new series of detentions within the Court's criteria. These included the detentions of Madzimbamuto and Baron.

The case was considered by the Privy Council which held unambiguously that the British Government retained sovereignty. It rejected both the compromise solution of Beadle C.J. and the *de jure/de facto* distinction, holding the latter to be inapplicable in an internal situation.³⁶ The doctrine of necessity was also rejected as inappropriate for there was, in the opinion of the Board, no legal vacuum since the power to make laws still lay with Her Majesty in Council.³⁷ The Privy Council appeared to accept the argument by the Chief Justice of Pakistan,³⁸ which purported to rely on Kelsen's authority to argue that the essential condition to determine whether a constitution has been annulled is the efficacy of the change. In this respect, it was held that it was impossible to say that the British attempt to reassert sovereignty would fail. The Board emphasized the difficulty of determining efficacy, as witnessed by the different views of the Rhodesian judges.³⁹ Furthermore, it took that difference of opinion to indicate that the decision lay with the Court and was not, therefore, to be decided by an objective test.⁴⁰

The case of *R. v. Ndhlovu*⁴¹ gave the Rhodesian Court an opportunity to reply to the Privy Council. Beadle C.J. criticized the Privy Council's approach as being unrealistic and legalistic.⁴² The

³⁵ That is, on grounds independent of the constitutional position.

³⁶ *Madzimbamuto v. Lardner-Burke*, *supra*, note 31, 723. The Privy Council felt that this pertained to international recognition which was a matter of politics. They held that the continued sitting of the court was proof of British sovereignty, *ibid.*, 670, agreeing with Fieldsend A.J.A. (see text, *supra*, p.78).

³⁷ Lord Pearce, *ibid.*, 731-45, in his dissent reached a position similar to Fieldsend A.J.A.

³⁸ *The State v. Dosso*, *supra*, note 1, 185.

³⁹ *Supra*, note 31, 669.

⁴⁰ *Ibid.*, 669-71. They held that the regime was not *de facto* (agreeing with Fieldsend A.J.A.) and implied that the Judges should continue under the 1961 Constitution or resign.

⁴¹ [1968] 4 S.A. 515.

⁴² *Ibid.*, 517-23. This seems partly a reply to the Board's criticism of his political leanings, *supra*, note 31, 670, and to its failure to conduct an enquiry into efficacy. The Privy Council is open to this latter charge because of its use of the efficacy argument, *ibid.*, 725.

efficacy of the regime was then reconsidered and it was found possible to "predict with certainty that sanctions will not succeed in their objective of overthrowing the present Government . . .".⁴³ The new Constitution was thus efficacious, and hence, valid. Citing the Pakistan and Uganda cases, Beadle C.J. concluded that, by remaining sitting, the Court therefore accepted this change.⁴⁴

Whatever weight might be attached to considerations of efficacy, this acceptance of the regime was not unexpected, coming, as it did, in the wake of the decision in *Dhlamini v. Carter*.⁴⁵ There the Rhodesian Appeal Court refused a delay to allow sufficient time to appeal to the Privy Council, thus denying an entrenched clause of the 1961 Constitution on the grounds that a favourable decision would prove ineffective.⁴⁶ Despite that decision, the accused were reprieved by Royal Prerogative from their death sentences. This put to the test the regime's pretence of loyalty to the Queen and brought the courts to a Rubicon, placing their loyalty into conflict with their dependence on the regime and its executive. No compromise was possible, and the Court held that the prerogative of mercy now lay with the regime.⁴⁷ Any idea of retaining whole or part of the 1961 Constitution was no longer possible. Fieldsend A.J.A. and Young J. resigned. The majority of the judiciary remained, in effect joining the revolution. The three Africans reprieved by the Queen were executed on March 6, 1968.

It is clear from these decisions that the Court, and the Chief Justice in particular, formed much of their deliberation in terms of the Pure Theory and especially its concept of *Grundnorm* and the relation of efficacy to validity. Indeed, the dependence of the change of *Grundnorm* on efficacy was made the crucial test in determining the Court's attitude toward the Smith regime and in resolving the status of the new Constitution. While there can be little doubt of the relevance of the Pure Theory to these events, what may be doubted is the propriety of the role in which it was cast.

II

Speaking generally of the causes of misconceptions of Kelsen's theory, Finch rightly asserts that "they are largely attributable to a confusion of the two senses of the word constitution. . . . In

⁴³ *Supra*, note 41, 532, the use of force being ruled out.

⁴⁴ *Ibid.*, 522. A republican Constitution followed on 1 March 1970.

⁴⁵ [1968] 2 S.A. 445, 464.

⁴⁶ *Ibid.*, 466.

⁴⁷ *Ibid.*, 469.

particular, the constitution in the positive legal sense has been taken for the basic norm, which it is not".⁴⁸ It is submitted here that the Rhodesian case is a classic example of such confusion. Although the Court misinterpreted Kelsen's work at other points, as several writers have indicated,⁴⁹ these misinterpretations all arise from the deeper confusion of *Grundnorm* with constitution indicated by Finch and are explicable only in terms of it. *Grundnorm* and constitution were generally treated as synonymous in the Rhodesian case, as they were in the cases of Pakistan and Uganda. This enabled the Court to treat Kelsen's remarks on the legal science concept of *Grundnorm* as being directly applicable to the status of the Constitution.

Evidence of this confusion becomes apparent from an examination of the language of the Judges and from a tracing of the source of some of the Court's other misinterpretations. Beadle C.J., who gave the authoritative formulation adopted by the Court in *Madzimbamuto v. Lardner-Burke*,⁵⁰ consistently used the terms *Grundnorm* and constitution synonymously and, in one place, *Grundnorm* is equated with another concept called the "fundamental law":

It may be accepted that a successful revolution which succeeds in replacing the old *Grundnorm* ("or fundamental law") with a new one establishes the revolutionaries as a new lawful government.⁵¹

They were satisfied that the revolution had succeeded and the "fundamental law" had changed and had been replaced by the new *constitution*.⁵²

There are many examples in history of a country's economy being reduced to dire straits without this causing ... an *unconstitutional* change in the *Grundnorm*.⁵³

The present Government has effectively usurped all the governmental powers under the old *Grundnorm*, but has not yet succeeded in setting up a new *Grundnorm* in its place ... To sum up here, therefore, I consider that the present Government, having usurped effectively the governmental powers under the 1961 *Constitution*, can now lawfully do anything which its predecessor could lawfully have done, but until its new *constitution* is firmly established ... its administrative and legislative acts must conform to the 1961 *Constitution*.⁵⁴

⁴⁸ Finch, *supra*, note 24, 126-27. This also contains a careful analysis of the relation of the two concepts and of the use of the concept of *Grundnorm* in general. Probably the clearest exposition provided by Kelsen is that given in his reply to Stone, *supra*, note 3.

⁴⁹ See Eekelaar, *supra*, note 28, 171 and *infra*, note 65, 22; de Smith, *infra*, note 76, 106.

⁵⁰ *Supra*, note 14.

⁵¹ *Ibid.*, 315 (emphasis added).

⁵² *Ibid.*, 327 (emphasis added).

⁵³ *Ibid.*, 323 (emphasis added).

⁵⁴ *Ibid.*, 351-52 (emphasis added). The expression "setting up a *Grundnorm*" is the most obvious betrayal of the confusion because while it is clear how a

The situation in the Pure Theory is radically different; *Grundnorm* and constitution are sharply distinguished. The *Grundnorm* is the reason for the validity of the constitution as seen by legal science and merely marks the fact that a constitution is accepted by the legal system. It is not the constitution itself. It says that "[o]ne ought to obey the prescriptions of the historically first constitution",⁵⁵ and the *prescriptions* of a constitution, or any other positive law, are based on certain accepted norms indicating what the rule ought to be. But the *Grundnorm* lies outside of these laws and their norms; it is a *presupposition* of them made for the interests of legal science. If it were otherwise, that is, if the *Grundnorm* were merely another positive law, it would always be possible to ask why that prescription in turn was itself valid. But, as we noted earlier, the *Grundnorm's* validity cannot be objectively tested; it must be presupposed or assumed. The *Grundnorm* is thus at the top of the hierarchy of norms which inspire the prescriptive elements of the positive laws of a legal system.

It is the *Grundnorm* which makes it possible for the lower norms and the constitution to derive validity from other norms rather than from facts. According to Kelsen⁵⁶ and much of recent ethics, a norm (or value) is never entailed by any set of facts, for example, the process of norm creation or the personality of the person creating it. The validity of a lower norm is derived from a higher one. It may seem that validity really derives from a court's decision or from the legislative process, but these in turn rely on norms which grant such powers. The system is, in Kelsen's words, "dynamic"; rather than merely dictating specific norms, it provides powers of norm creation, and the courts and the legislature exercise those powers.

Ultimately, the system derives from the norms of the constitution, but when those are questioned their validity can only be established by means of the *Grundnorm*. Since no facts can give validity, yet the hierarchy of norms must stop somewhere, the system rests on a *presupposed* validity. Indeed, legal science defines the system as comprising those norms which derive their validity from the single common source, the *Grundnorm*. In Kelsen's words,

government may "set up" a constitution, it is far from clear how it should "set up" a concept of analytical jurisprudence. If it is strange to find the courts acting as legal scientists, then it must be stranger still to find a government doing so as well!

⁵⁵ Kelsen, *Pure Theory of Law*, *supra*, note 3, 204.

⁵⁶ *Ibid.*

by means of the *Grundnorm* "the subjective meaning of the acts performed in accordance with the constitution, are interpreted as their objective meaning, as valid norms...".⁵⁷ By this, Kelsen means that it is only by analysing *norms* that the laws which contain them can be understood and that one can distinguish between a demand, such as a gangster may make, and a prescription, which we see as the outcome of a valid legal system.

It is important to note that, even though it is presupposed, the *Grundnorm* has no independent status; it always refers to a specific constitution. However, its role is clearly not to determine the contents of that constitution. As well, it must be emphasized that the *Grundnorm* is not *prescribed* by the Pure Theory.⁵⁸ To prescribe would be to make laws, and the Pure Theory could not create a law on its own account; only those authorized to do so by the legal system can do that. Thus, the Pure Theory is concerned only with intellectual coherence in legal analysis. It is true that Kelsen does refer to the *Grundnorm* as the "constitution in the legal-logical sense" as opposed to the "constitution in the positive legal sense",⁵⁹ but these radically different concepts are never confused by him. This distinction is so basic, moreover, that it is difficult to imagine a more fundamental misinterpretation. Reasserting this distinction against Stone's attempt to merge the two concepts, Kelsen testily remarked: "This interpretation is without any foundation in my writings."⁶⁰

The Rhodesian Court of Appeal was also guilty of this fundamental error. It persistently treated as *prescriptive* a theory that is entirely *descriptive*. In other words, the judges saw the *Grundnorm* itself as granting validity rather than as being a reflection of the Courts' granting validity. They equated the validity *presupposed* of a constitution because of the *Grundnorm* with the validity *bestowed*

⁵⁷ *Ibid.*

⁵⁸ Except in the limited sense that the *Grundnorm* is stipulated by Kelsen for use in interpretation by legal science, it is never prescribed to *law*. Kelsen is here maintaining a distinction between cognition (understanding) and volition (willing). All science, including legal science, is concerned with cognition, even if its' subject matter is actually created by "acts of will", in the case of legal science, by the prescription of norms. This distinction derives from Kant, where it is expressed as the distinction between pure and practical reason. This is correlated to the fact-value distinction, facts and values being the outcome of cognition and volition respectively. This is so even in legal science where a system's value (a norm) is a fact from the point of the legal scientist.

⁵⁹ *Professor Stone and the Pure Theory of Law, supra, note 3, 1141.*

⁶⁰ *Ibid.*

on a constitution by its acceptance by the Court, never realizing that, whichever constitution is accepted, legal science automatically assumes there is a *Grundnorm*. In this way, they disguised the overtly political nature of their actions. Their political decision to bestow validity was seen as inevitable as a result of being presented in the guise of jurisprudential interpretation. The *logical* necessity of the Pure Theory was enlisted in support of *political* necessity. As a result, the Court concluded that its decision had to reflect the change they believed had occurred in the *Grundnorm*. The clearest demonstration of this is the way they posed the problem; they asked whether the government had successfully "set up a Grundnorm".⁶¹

By such means the Rhodesian judiciary converted what, according to Kelsen, is a purely cognitive concept into an impossible prescription. Moreover, by their confusion of *Grundnorm* and constitution the Judges were able to present themselves as impartial scientists whose role it was to *predict* efficacy. Such an activity, of course, is utterly alien to the Pure Theory, for how can a concept whose purpose is to describe the post-decision situation take part in making that very same decision.⁶² Such a decision can only be an act of norm creation and not a presupposition of legal science, and acts of norm creation, Kelsen explains, may quite reasonably be politically inspired, constrained only by the need to found the validity of the norm thus created on a higher norm.⁶³ However, when the norm to be created is the constitution itself, the highest *positive* norm (given that the *Grundnorm* is formal and in no way affects its contents), then it follows logically that the requirement of a higher norm is absent and the decision is entirely political.⁶⁴ The pretension of impartiality and objectivity falls. Such a chain of events was never specifically rejected by Kelsen for the simple reason that it was never envisaged by him.

The Court, having already confused *Grundnorm* with constitution, assumed that Kelsen's remarks on the relation of efficacy to the concept of *Grundnorm* were equally applicable to the 1965 Constitution. This launched them on a new misinterpretation. According to the Pure Theory the relationship of efficacy to validity is always

⁶¹ *Supra*, note 14, 351.

⁶² A descriptive theory can only be interpreted as prescriptive if its description is treated as being of a future state of affairs, which it is then held as implicitly prescribing to the present.

⁶³ See, e.g., Kelsen, *Science and Politics* (1951) 45 *Am.Pol.Sci.Rev.* 641, 654.

⁶⁴ *Ibid.*

a conditional one. *Efficacy*, coupled with an act of norm creation, is a prerequisite to the existence of that norm. If a norm was never obeyed, it would cease to be a norm as far as legal science is concerned, although its corresponding law might remain on the statute book. On the other hand, we have seen that a norm's *validity* can only be based on another norm, and ultimately on the *Grundnorm* itself. There is, therefore, a difference between asking whether a norm exists and asking whether it ought to be obeyed as valid. This follows from Kelsen's rigorous positivist distinction between facts (is) and norms (ought), for, as seen above, no fact can make a norm valid.

Notwithstanding that the conditional nature of the relation was pointed out in an article by Eekelaar⁶⁵ which was cited by the Court,⁶⁶ the Judges saw efficacy as automatically conferring validity. Because of their confusion of *Grundnorm* and constitution, the Court obliterated the distinction between descriptive theory and prescriptive decisions and treated as a necessary consequence a merely conditional relation. It is hardly surprising that they should have adopted this interpretation, despite Eekelaar's caveat, given the deeper source of their misunderstanding. Eekelaar's point has been criticised by J.W. Harris⁶⁷ on the grounds that it wrongly assumes that, to confer validity, Kelsen requires something more than a

⁶⁵ *Supra*, note 28, 161. See also Eekelaar, *Rhodesia: the Abdication of Constitutionalism* (1969) 32 Mod.L.Rev. 19, 22-23. According to Kelsen, efficacy is a necessary condition for a norm to be said to exist. Only then, if the existence of a norm is established, can its validity be determined solely by its derivation from other norms. The Court took the relation as being "conditional" in the sense that efficacy was an immediate, necessary and sufficient condition for validity, thus neglecting Kelsen's insistence on the distinction between fact and value. This perversion of Kelsen's theory followed readily from the merger of the constitution in the positive legal sense with the *Grundnorm*.

⁶⁶ *Supra*, note 14, 351.

⁶⁷ *Supra*, note 32, 116. In the space available it is not possible to deal with Harris's arguments which are based on distinctions made between various types of validity. It is argued here that these are rendered irrelevant by an appreciation of the central confusion made by the Courts. Harris thus maintains that judges can be both judges and legal scientists at the same time, a view seen here as profoundly mistaken and not in any way in accord with the Pure Theory. Even were this granted, it is submitted that Harris is misled by distinguishing between validity, as derived from higher norms, and non-conflict between norms, and by greatly over-emphasising the role of the latter in Kelsen. While it is true that this logical version of validity plays a role in Kelsen's work, it is progressively diminished and rejected in the 1965 essay, *Law and Logic*, reprinted in Kelsen, *Essays in Legal and Moral Philosophy* (1973) Weinberger (ed.), 228.

decision to interpret the system of laws as a logically consistent field of meaning, "a decision which entails no value commitment".⁶⁸ From the above discussion it is clear that, while this may be true for a legal scientist interpreting a legal system, it has absolutely no import for the quite different position of a judge deciding whether or not to accept a regime's constitution as the basis of the law.⁶⁹

Doubts may remain that, even correctly understood, the Pure Theory might have some indirect persuasive authority in support of the Rhodesian Appeal Court's decisions.⁷⁰ However, this would be a basic misunderstanding of the strict limits that the Pure Theory sets itself. It could not attempt to usurp the decision-making role of a judge because it is not part of the legal system. As Kelsen puts it, "[n]ever, not even in the earliest formulation of the Pure Theory of Law did I express the foolish opinion that the propositions of the Pure Theory of Law 'bind' the Judge in the way in which legal norms bind him".⁷¹ This, once again, points out the differing roles of legal scientist and judge in Kelsen's view.

Another line of attack on the Pure Theory has centered on how imprecise Kelsen's criteria of efficacy are. Kelsen's formulation is that, "[a] legal order is regarded as valid, if its norms are *by and large* effective (that is, actually applied and obeyed)".⁷² This appears to leave open a wide area of judicial politics. As Dias states, "[t]he truth of the matter is that effectiveness is only what the judges choose to regard as such; which places considerable power in their hands".⁷³ This seems abundantly borne out by the type of evidence that the Rhodesian Judges considered in deciding efficacy (the state of the Rhodesian building trade!⁷⁴) and by the disagreement amongst the Judges as to the degree of efficacy required. One cannot escape the conclusion that this discussion became a "cloak for personal decision".⁷⁵ However, this should not be interpreted as

⁶⁸ Harris, *supra*, note 32, 116 and *cf.* 123.

⁶⁹ This reasserts the distinction cogently argued by Brookfield, *The Courts, Kelsen, and the Rhodesian Revolution* (1969) 19 U.of T.L.J. 326, 342-44. It is here implied that Harris is wrong in rejecting Brookfield's argument, and that this logical distinction has tremendous political import.

⁷⁰ *Cf.* Harris, *supra*, note 32, 125.

⁷¹ *Supra*, note 3, 1134, in reply to Stone, *Legal System and Lawyers' Reasonings* (1964), 102-103.

⁷² *Pure Theory of Law, supra*, note 3, 212.

⁷³ *Supra*, note 13, 254.

⁷⁴ *Supra*, note 14, 418.

⁷⁵ Dias, *supra*, note 13, 254.

a weakness in the Pure Theory; it was never intended to be applied by judges at all. It is simply a methodological device of legal science, yet it was seen to be in some sense binding on the Court. Such a formulation as Kelsen provides can afford to be loose because it was not designed to serve as a crucial test in a situation where the constitution is in doubt.⁷⁶ The Court's real mistake was not so much in misinterpreting the Pure Theory of Law as in applying it at all. The legal scientist only begins his work once the courts have resolved these problems in their *own* terms.

Honoré, too, was critical of the Rhodesian judgments.⁷⁷ He points out the circularity in the position of Judges whose acceptance of validity is part of the very efficacy on which they rely in deciding whether to accept that validity. Once the courts decide that a constitution is *valid*, they apply it and the laws coming under it; this represents part of that constitution's *efficacy*. So how can efficacy, which theoretically follows from validity, be used as a test of validity? Such a use poses a classic "chicken and egg" dilemma. This is evident from the Pure Theory, where acceptance of norms by organs of the legal system as well as by the general populace is relevant to efficacy. As Dias asserts;

One cannot help remarking that it is the judges who, by these decisions, kept cementing effectiveness layer by layer until it reached a point at which they could look back on their own handiwork and treat it as an objective fact.⁷⁸

This state of affairs only arose because the Judges merged their role with that of legal scientists,⁷⁹ and it could not arise in the Pure Theory properly understood. There the legal scientist is not in a position to help to create efficacy; he can only commence his work once it has been established.

It is interesting to note the efforts of the majority Judges to maintain an appearance of intellectual and emotional passivity in their judgments.^{79a} Honoré, despite his own arguments casting

⁷⁶ As de Smith, *Constitutional Lawyers in Revolutionary Situations* (1968) 7 *Western Ont.L.Rev.* 93, 106, points out, Kelsen's model is of a straightforward *coup d'état*.

⁷⁷ Honoré, *Reflections on Revolutions* (1967) 2 *Ir.Jur.* (n.s) 268, 272. Also referred to by the Privy Council, *supra*, note 31, 669.

⁷⁸ *Supra*, note 13, 253.

⁷⁹ *Cf. Harris, supra*, note 32, 123.

^{79a} See Harris, *ibid.*, 122-23. Beadle C.J., *supra*, note 14, 326 and Jarvis A.J.A., *ibid.*, 418, claimed that the decision would make very little difference to the regime; it being already the *de facto* government. Quènet J.P., *ibid.*, 369, and Macdonald J.A., *ibid.*, 415, claimed that it would make no difference at all because the revolution had succeeded in all respects. Fieldsend A.J.A., *ibid.*,

doubt on the Court's use of the Pure Theory, sees this as an outcome of "Kelsen's political quietism".⁸⁰ However, the "quietist" attitude the Court professed bears little relation to what, in fact, they were doing, which was of a highly political nature, as seen indeed by Honoré's own argument. Kelsen's theory is politically quietist because it is a science of law and strives to be non-ideological; it was never intended to be an ideology of passivity to be adopted by courts. That the Rhodesian Judges used it as such can only be attributed to their deeper-lying confusion.

It has been emphasized above that the Judges' misrepresentation of the Pure Theory allowed them to present their decision as the unavoidable outcome of legal realities. Some idea of the consequences of such reasoning can be seen in Beadle C.J.'s remarks in the Constitutional Case:

That law cannot vary with the political views of the individual Judge who "declares" it.⁸¹

The question of whether or not at that time the "fundamental law" had changed was a question to which only one correct answer could in the circumstances be given, and this did not in any way depend on the political views of the Chief Justice.⁸²

[I]n a revolutionary situation the political views of the Judge do not play any more significant a part in determining what the law is than they do in normal times.⁸³

And in *R. v. Ndhlovu*, having accepted the Smith regime as valid, he rejected the view that,

... a Judge, by carrying on with his humane task of preserving the law and order and avoiding chaos is either joining or at least aiding or approving of the revolution. This is not so. The Judge is simply forced into a position of accepting the facts and the laws as they are, whether he likes them or not. He has, as I have said before, simply been overtaken by events.⁸⁴

Beadle C.J. then drew an analogy between a murder and the demise of the 1961 Constitution, claiming that they were both unalterable

430 and 432, however, held that the Court's position was of sufficient significance to render the revolution inefficacious while the courts remained independent. (Hence for Fieldsend A.J.A. a favourable decision would at least be a conferment of efficacy). From this it is apparent that the more inclined the Judges were to recognize the regime, the more they reduced the significance of this in maintaining an appearance of passivity.

⁸⁰ *Supra*, note 77, 272.

⁸¹ *Supra*, note 14, 327.

⁸² *Ibid.*

⁸³ *Ibid.*, 328.

⁸⁴ *Supra*, note 41, 533. See also, *supra*, note 54.

facts, the establishment of which did not entail judicial approval in either case. Declaring the 1961 Constitution invalid he added:

The Judges, by taking cognisance of the fact that this is so, cannot justly be accused of being in any way responsible for the change, nor can it be implied that by accepting the fact of the change they approved of it. The change is not a matter of their making.⁸⁵

We have seen that by Kelsen's Pure Theory of Law, Beadle C.J.'s own choice of rules, this reasoning is patently incorrect.

Where Beadle C.J. *did* speak of a personal choice this was in terms of a decision to carry on after the "fact" had been established.⁸⁶ But, as de Smith says:

For all practical purposes a legal system or a constitution is valid when the judges have unambiguously accepted it as valid. [...] To this extent the constitution is what the judges say it is.⁸⁷

Somewhat in tension with his repeated apolitical professions, the Chief Justice also stressed the need to accord with political realities, which provoked the Privy Council to remark:

Beadle C.J. frequently invokes "political realities". It is difficult to avoid saying that in so doing he departs from the terms of his judicial oath since he appears to prefer "political realities" to the law.⁸⁸

It should now be clear that the "politics" of the court are in no way derived from the Pure Theory of Law. This answers the charge made against Kelsen by Dias, who sees the case as an illustration of the practical evils of positivism, with its divorce of morals and law, and as proof of the need to make the *Grundnorm* a moral phenomenon by introducing a natural law element.⁸⁹ His argument seems to gain strength when one considers Beadle C.J.'s statement:

My approach to the position of the Judges and of the High Court and, indeed, to these cases as a whole, is a "positivist" approach; because I think that in the situation which exists in Rhodesia to-day what "is" or what "is not" the law can only be decided on the basis of accepting things as they actually "are", and not simply as they "ought to be".⁹⁰

As Dias points out, it is clear that the Judge's decision was primarily a personal one, but the issue here is whether Kelsen's positivism supports this.⁹¹ From the foregoing discussion it should be obvious that it does not.

⁸⁵ *Supra*, note 41, 533.

⁸⁶ *Supra*, note 14, 327.

⁸⁷ *Supra*, note 76, 104.

⁸⁸ *Supra*, note 31, 670. Compare Beadle C.J., *supra*, note 14, 327.

⁸⁹ Dias, *supra*, note 13, 255-56.

⁹⁰ *Supra*, note 14, 326, and quoted by Dias, *supra*, note 13, 256. Once again Beadle C.J. merges the roles of legal scientist and judge.

⁹¹ *Supra*, note 13, 256.

Dias contends that the main issue should be whether (morally) to accept a *Grundnorm* which perpetuates inequalities, something he sees a positivist theory neglecting.⁹² However, it should now be clear that this has nothing to do with a legal science approach. It is the constitution that may perpetuate inequalities and be morally repugnant, not the *Grundnorm*. In this respect it must be remembered that Kelsen's theory is entitled, and for good reason, the "Pure Theory of Law", not the "Theory of Pure Law". It would be highly misleading to build a moral bias into the Theory and the *Grundnorm*, no matter how congenial this might be. On the other hand, there is no reason why the constitution should not have a moral bias. Moreover, although the Pure Theory makes no evaluation itself, this in no way rules out moral evaluation of constitutions.⁹³ The Rhodesian decisions cannot be taken as a warning of the evils of the Pure Theory's positivism, for the Judges, despite their statements to the contrary, did not and could not act as Pure Theorists.

Conclusion

The above discussion demonstrates that the Rhodesian decisions are what de Smith has called "fundamentally political judgments dressed in legalistic garb".⁹⁴ It was therefore not surprising to see them emanating from members of the ruling European elite of Rhodesia.⁹⁵ Nevertheless, this conclusion must be tempered by the fact that the Privy Council also committed the same basic confusion, that is, of *Grundnorm* and constitution.⁹⁶ This serves as a clear warning against using a complex and demanding theory like

⁹² *Ibid.*

⁹³ For a defence of positivism against this type of charge, see Hart, *Positivism and the Separation of Law and Morals* (1958) 71 Harv.L.Rev. 593.

⁹⁴ *Supra*, note 76, 94.

⁹⁵ See de Smith, *ibid.*, 108. For the political backgrounds of the Judges see Palley, *The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary* (1967) 30 Mod.L.Rev. 263. The fact that Young J. was once a leader of an anti-African party, yet resigned from the Court on legal grounds, should caution against seeing all the judiciary as merely motivated by personal politics.

⁹⁶ *Supra*, note 31, 725. Having asserted sovereignty, the Privy Council had no need to consider the efficacy argument. Munir C.J.'s discussion was referred to (*supra*, note 1, 185) but was held inapplicable as there were two rivals contending for power in the Rhodesia case but no rival in that of Pakistan or Uganda. Nevertheless, the Privy Council did appear to follow Beadle C.J. in regarding the efficacy of the regime (determined by the possibility of the British Government regaining control) as relevant. Although the Board concluded on these grounds that the Smith regime was illegal, this argument

Kelsen's without great caution, all the more so since Kelsen's work is so rarely considered by Commonwealth courts, and then only as a last resort when other authorities are found wanting.⁹⁷ It is in just such circumstances that one can be easily, albeit innocently, misled, for then the Rhodesian Court's decision may seem, after all, to be a perfectly natural outcome. As Wittgenstein remarked in a different context, "[t]he decisive movement in the conjuring trick has been made, and it was the very one we thought quite innocent".⁹⁸

was superfluous. Moreover, Beadle C.J. took the Privy Council's discussion as supporting his own emphasis on the efficacy argument. Despite this, the Board made it clear that it rejected the idea that Kelsen or any other writer of jurisprudence could serve as an authority in the way the Rhodesian Court intended, *supra*, note 31, 668.

⁹⁷ See de Smith, *supra*, note 76, 93.

⁹⁸ *Philosophical Investigations* (1968), 103e, para.308.