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Purity of Law by Kelsen and Its Practical Ramifications

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ABSTRACT

The aim of the article is to analyze the Kelsian view of Law and Justice as a pure enterprise free from societal constructs and political contexts. The Paper concludes by answering the question of whether such a view of Law is approachable in the Indian legal system. The article navigates between Kelsen's famous theory of the 'grundnorm' and the 'is and ought' dichotomy, which is the cornerstone of his entire Philosophy of Law.

I. INTRODUCTION

The pure theory of Law, propagated by the Austrian jurist Hans Kelsen, identifies Law as a science. He felt that in the 20th-century, Law was either heavily influenced by political, social and moral hues, or it was broken down into concepts that relate to social sciences. These approaches tend to reduce Law and thus make it an impure discipline. Kelsen was an anti-reductionist, and his theory accordingly solely focused on Law and not anything else.

Purity can be achieved when we fix the direction of jurisprudence into two streams, firstly, by distinguishing it as a subject that deals with the science of Law rather than the philosophy of justice and by separating it from the realm of psychological understanding of society.

II. MORALS ARE NOT LAW

Further delving in the question as to why Kelsen disregards the social order, it is because he believes that a society that just follows a fair system of Law that caters to men's happiness. This understanding complicates our conception of Law because the idea of happiness is not a uniform one. Moral values are indeed a social phenomenon varying in their essence as per the needs of the society in which they emerge. Propositions like ' all men should be free' is an ideology that, for Kelsen, is self-deceptive in nature.

Ideologies in their core element attempt to satisfy some ultimate end which is an eternal requisite for humankind. This is a natural law approach that, for Kelsen, can never be as accurate as natural science, which can easily tell us about our physical surroundings. Moral concepts like the Kantian Categorical Imperative were also criticized by Kelsen as it was trapped in the maze of natural Law.

'Kant, whose transcendental philosophy was destined to provide, in particular, the foundation

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for a positivist legal and political philosophy, remained, as a legal philosopher, in the rut of natural law theory. Indeed, his Foundations of the Metaphysics of Morals can be regarded as the most nearly perfect expression of classical natural law theory as it developed out of Protestant Christianity during the seventeenth and eighteenth centuries.'[2]

III. NORMS AS LAW

Law is a normative system, which is structured and complex like any theory of science. Law, according to Kelsen, gains its authority through the basic norm, which can be understood as a norm that establishes an authoritative agency. According to him, events gain a legal meaning by another norm that confirms some normative meaning on such event.[3] Kelsen answers the question of why some acts are considered as Law and some are seen as acts only, in a simple manner: An act can create or amend a law if it is established in compliance with another 'higher' legal rule that allows it to be established in that way. And the 'higher' legal rule, in turn, is constitutionally permissible if and only if it has been formed in compliance with yet another 'higher' norm that requires it to be enforced in this manner. The legal system flows from one norm to another in a hierarchy. However, we do reach a stage in which we find that this chain of normative authorization comes to a halt.

Kelsen has acknowledged that the chains of credibility do not regress endlessly and that one will probably run out of the higher authorities of valid norms. Consequently, what confers authority on the scheme as a whole is not another positive rule of Law, but what Kelsen called the ***grundnorm*** often interpreted as 'basic norm'. The grundnorm is the basic societal assertion about what will be treated as Law. The nature of it is so fundamental that it cannot be broken down into fragments to describe it further. It is clear that the application of a specific grundnorm in a society is determined solely by the fundamental assumptions of the citizens of the society. The grundnorm's identity is largely determined by sociological facts.

The basic structure doctrine of the Indian legal system, which originates from the landmark Kesavanada Bharti case[4]- forms the bedrock of the constitutional jurisprudence of the country can be understood as an example of the grundnorm. It limits the Parliament's power to amend the Constitution. In Kesavananda Bharati, the Supreme Court held that Article 368 of the Constitution does not provide the Parliament with the absolute power to amend the Constitution. The limitation was that the 'basic structure' of the Constitution could not be altered. Inevitably, the doctrine has profound implications for the role of the judiciary in democratic societies and any theory of separation of powers. However, the legitimacy of the

[2] Kelsen, Philosophical Foundations of Natural Law Theory and Legal Positivism, Stanley L. Paulson, Oxford Journal of Legal Studies , Autumn, 1992, Vol. 12, No. 3 (Autumn, 1992), pp. 311-332.

[3] Andrei Marmor 'Pure Theory of Law' Stanford Encyclopedia of Philosophy http://plato.stanford.edu/entries/lawphil-theory.

[4] AIR 1973 SC 461.

doctrine has been the subject of much controversy.[5]

The basic structure is similar to the grundnorm as it is not part of the Constitution. It is a presupposition that this is the demand that ought to be adhered to. The doctrine was adapted according to the prevailing state of affairs; it serves to impart validity to the other norms that are elucidated in the Constitution but do not dictate the content of the Constitution[6], just like the grundnorm.

Reflections of the grundnorm can also be seen in the Indira Gandhi v Raj Narain and Ors.[7] which struck down the 39th constitutional amendment[8], as it found it to be ultra vires of the Constitution and violative of the basic structure.[9]

IV. THE IS/OUGHT DICHOTOMY

The pure theory understands jurisprudence as a series of individual and general norms. Factual considerations are given value only when they serve in the formation of some legal norm. Norms find themselves to exist when they attain validity. To say that a norm is valid for an individual means that the individual ought to conduct himself as the norm prescribes; it does not mean that the individual necessarily behaves so that his conduct actually corresponds to the norm. The latter relationship is expressed by saying that the norm is efficacious. Validity and efficacy are two completely distinct qualities, and yet there is a certain connection between the two.[10] Efficacy is a condition but not a reason for the validity of the grundnrom, 'a condition sine qua non, but not a condition per Quem.'[11]

Norms, according to Kelsen, attain legal validity when they are followed by a large section of the population. Pure theory is similar to the natural law theory in the descriptive sense as there exists a legal rule that gives meaning to specific consequences which lead to specific conditions. The distinction is in the way in which condition and consequence are associated.

Natural Law affirms that another phenomenon (the effect) happens when an incident (the cause) occurs. The rule of Law, using the word in a descriptive context, states that if one person behaves in a certain way, another individual should behave in a certain way. The distinction between natural science and jurisprudence does not lie in the conceptual form of the propositions representing the object, but rather in the object itself, and thus in the sense of the explanation. Natural science describes its object, i.e. nature, in 'is-propositions', whereas jurisprudence describes its object, i.e. Law in 'ought

[5] Economic and Political Weekly , Madhav Khosla, Aug. 4-10, 2007, Vol. 42, No. 31 (Aug. 4-10, 2007), pp. 3203-3204.

[6] Mridushi Swarup, Kelsen Theory of Grundnorm, Manupatra.

[7] AIR 1977 SC 69.

[8] The amendment made the election and disputes relating to the president, vice president and prime minister outside the scope of judicial intervention and modified the 9th schedule.

[9] Articles 32 and 226 i.e. Right to approach Courts, Democracy, Federalism, Secularism .Free and Fair Elections, Judicial Review, Rule of law, Separation of Powers, Supremacy of the Constitution. Therefore, if an amendment curtails/modifies any of the above listed principles, the amendment could be struck down for violating the basic structure doctrine.

[10] The Pure Theory of Law and Analytical Jurisprudence, Hans Kelsen Harvard Law Review, Vol. 55, No. 1 (Nov., 1941), pp. 44-70 Published by: The Harvard Law Review Association.

[11] 'The norm is an ought, but the act of will is an is': Kelsen, PURE THEORY OF LAW, p 119.

propositions'. Law falls in the scope of ought propositions as they function to govern our actions. Thus the possibility to arrive at an ought to proposition only occurs when it is followed by at least one prescriptive statement, and when the chain of norms comes to an end, we presuppose the basic norm which caters to some universal standard. (e.g. the basic structure doctrine, which is understood to concretize the force of a democratic system)

Kelsen was inspired by Hume's contention of the fact-value distinction[12] , which bears a resemblance to the is and ought problem mentioned in the pure theory of Law. A statement of fact is descriptive and denotes the object as what it is (e.g. The sun rises in the east and sets in the west). On the other hand, statements of value tell us how things ought or should be like, (e.g. We should always speak the truth). These are evaluative in nature.

Law achieves its normative characteristic because of its element of ought. Factual propositions are evaluated on the basis of truthfulness and falsity, whereas value-based propositions are often reflective and emotive in nature. Logical positivism, similar to the pure theory of Law, viewed philosophy as science and focused on the principle of verification. If we follow Hume's theory, statements, like we should treat everyone equally, gets converted into article 15 of the Constitution, various sections of the Indian Penal Code, the protection of minorities etc.

V. CONCLUSION-WHAT IS LAW?

The question that can Law be viewed as a consequence of a fact-value distinction? If we go by Kelsen's theory, it does reduce the subject matter of Law and makes it almost a passive discipline. Valid norms for Kelsen serves as the binding force (e.g. P is possible only if Q, where Q is the basic norm). Validity in the pure theory denotes what is considered to be true, which is the essential characteristic of the statement of fact (an is a proposition).

However, according to Kelsen, norms are value-based ought propositions. We simply cannot reduce the norms scientifically without taking into consideration the sociological and political contexts prevailing in society. To put this in perspective, let's take the Vishakha guidelines, which deal with sexual harassment of women at the workplace; prior to this, cases related to sexual harassment at the workplace were filed under section 354 [13], this we could say originates from the grundnorm that women should be treated with respect.

Going by the kelesian theory, the guidelines would not be needed as we already have the 'is' and the 'ought' in place; we find ourselves questioning, is Law really relative then? *'The problem stems from the fact that Kelsen was quite right about the Law. Legal validity is*

[12] First mentioned in the third book of his *Treatise*. Hume famously argued that any practical argument that concludes with some prescriptive statement, a statement of the kind that one ought to do this or that, would have to contain at least one prescriptive statement in its premises. If all the premises of an argument are descriptive, telling us what this or that is the case, then there is no prescriptive conclusion that can logically follow.

[13] Indian Penal Code,1860,

essentially relative to the social facts that constitute the content of the basic norm in each and every legal order…..legal validity is always relative to a time and place. Kelsen admits as he does that the content of a basic norm is fully determined by practice; it becomes very difficult to understand how the explication of legal validity he offers is non-reductive[14].

The Indian democracy, from the roots of its conception, is the culmination of the socio-economic-political events that existed when India was freed from the shackles of British rule. The realpolitik cannot be subdued; the pure theory's complete disregard to take into consideration the circumstances which lead to the forming of laws is not only impractical but also makes the origin of the grundnorm ambiguous.

Kelsen's theory is similar to natural Law as both explain the normativity of Law along the lines on which religious and moral laws are determined[15]. His theory is concerned with only a legal perspective, which is described as detached normative statements by Joseph Raz. What ought to be good conduct is answered by many natural law theorists. Parallels can also be drawn between Austin and Kelsen, as both aim to separate the moral and social element from the study of Law. The concept of the sovereign and the grundnorm are also similar as they are the source of valid Law in both theories; they are also forceful in nature.

However, we cannot completely say that pure theory does not find a place in the modern day and age. Many societies all over the world follow the democratic system which regards a written constitution as the chief source to give validity to their respective laws.

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[14] Ibid. 2

[15] At the philosophical level the 'ought' occurs from a specific conception of morality much like Aquina's dictum, the measure of human acts is the reason, the reason is the factor which make us pursue the good and avoid the evil.