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HANS KELSEN THEORY OF LEGAL NORMATIVITY

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INTRODUCTION

Since time immemorial every civilized society requires a system or set of rules to govern and regulate the behavior of individual. Such system or set of rules nurtured the seed of law in that particular society and help in the development of individual and society simultaneously. Generally, Law is, a system of set of rules and regulations which are enforced through the mechanism of social institutions to govern human behavior. Law of a system is changing phenomenon. As society changes with the passing of time, law also changes according to needs and condition of society. Thus, law changes with the change of society to meet growing needs.

In present scenario, laws are made by different organs of government. legislative branch of government make it through legislation and statutes are its outcome, the executive branch of government through the decrees and regulations, or the judicial branch of government through judges by means of binding precedents. Law of land govern the society so incorporate many things and may be influenced by the constitution and the rights encoded therein. The system of law in turn affects and shape politics, economic, and society in various ways and on other hand it also serves as a mediator of relations between people. It brings forth the dual aspects of law in a society, on one side it act as mechanism which control or deter individual from involving in coercive acts and on other side it act as. helping hand by way of providing justice to individual in society. The subject of Jurisprudence originally initiated as a method controlling human behaviour through the help of ideal laws or norms which are devised by some super-natural power for establishing justice and order in civilized society.

In modern time, the concept of law to some extend is perplexed and amalgamated with other concepts, which act as a barrier in its functioning. In order to cop up from such barriers, a clear understanding of law is required. So legal theorists and scholars in order to get, deeper and wider understanding of the nature of law so as to known about practicality of law, of the legal reasoning which in a sense provide legal backing to law in practicality, legal systems and of law enforcing legal institutions.

LEGAL POSITIVISM

Legal positivism is a school of thought on thesis philosophy of law and jurisprudence, and belong to analytical jurisprudence school,was largely developed by the eighteenth and nineteenth century by legal scholars. In legal term, legal positivism is studying of law which is concerned with the law as it is[1] and not the law as it ought to be[2]. It is referred as positivism because the advocates of this thought are concerned neither with the past nor with the future of law but in true sense it deal with law as it actually exists in society. The school of legal positivism is also termed as imperative school of Jurisprudence because the jurists and scholars of legal positivism takes law as a command of state and puts emphasis on legislation as the source from which law comes.

Jurists or Scholars of positivism school do not deny that judge make law but as a matter of fact, majority of positivist admit it to some extend and also bring into light the influence of ethical aspects or viewpoint of judges and legislators who in turn make law. Legal positivism thus recognize the sovereign powers of the rulers as the source of valid law and leading positivists are Jeremy Bentham, H.L.A. Hart and Kelsen.[3]

Legal positivism emerge as a reactionary against the 'Prior' methods of thinking that signalized the preceding age.[4] Legal positivism elucidate that positive law means law established in an independent political community by express authority or implied authority of its sovereign who is the head or supreme government. The school of legal positivism focused on describing law by reference to formal rather than moral criteria.

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[1] Law exists in present from though it may be unjust.
[2] Which is morally desirable.
[3] Harold J. Berman, Law and Revolution, The Formation of the Western Legal tradition, 779 (Harvard UP, Cambridge, 1988).
[4] Dias, Jurisprudence,331 (Lexis Nexis Publication, 2013).

Legal positivism endeavour to gain an accurate and intimate understanding of the fundamental working concepts of all legal reasoning which in term provide backing to laws and excludes all external considerations which fall outside the scope of law.

Some contribution in legal positivism is as follows;[5]

- All positive law are derived from a law giver i.e. sovereign.
- Legal positivism has done a clear distinction between positive law and ideal law .
- From where law proceeds that legal sources are taken under consideration.
- It puts emphasis on codified law and considers law as sovereign command with legal attach to it in case it was not followed.
- The essential element is to make the law concept more like state sovereign and facilitate justice administration process.

Thus, legal positivism school revolves around the belief, the assumption/ presupposition or the dogma that law is separate(Law in present) from & must be kept distinctly separate from the question of what the law should be. (Law in Future).

KELSEN VIEW ON LEGAL POSITIVISM

According to Kelsen, 'law' is, " Order of human behavior that react against certain regarded as detrimental against such orders of human behavior, with a coercive act."

Kelsen challenged both the philosophical and natural theories of law and propounded his own theory ' Doctrine of pure law' or 'pure theory of law'.

Kelsen in his theory of 'Pure Theory of Law' represe0nts a development in two directions in the sense that on one hand it marks the most refined development to date of analytical positivism and on other hand, it reacts against the role of different approaches that were prominent in the opening of twentieth century.

The prominent task behind Kelsen theory was to proceeds to free the law from the metaphysics mist with which it has been covered by the all times by speculations on

[5] Dr. Avtar Singh and Dr. Harpreet Kaur, Introduction to Jurisprudence, 15(Lexis Nexis)

justice or by the doctrine of jus naturally.[6]Kelsen in his theory propounded that law should be uniform all over and at every time and in all places. Kelsen advised a pure theory of law, which would have the ingredients of only one discipline, i.e. law and in toto devoid of other aspects like sociology, political science, etc though it is to take into consideration that their value is not denied but it must be kept in mind that theory of law must not have such consideration. As law is based on a cause and effects and is a normative science. According to Kelson, it is the norm that directly or indirectly directs an official to apply force which control human conduct under certain circumstances, thus the theory of law is a theory of positive law.

KELSEN'S PURE THEORY OF LAW

Kelsen pure theory of law is positive law and not legal norm of any kind of specific legal order. Kelsen theory of law offers a theory of interpretation. Kelsen theory of law had its footing in the continent and rejected the idea of natural law. Kelsen pure theory of law emerge as a reaction against the modern schools which in a sense have widened the boundaries of jurisprudence to such an extent that they seen almost conterminous with those of social sciences.

It is called a "pure" theory of law, because it endeavor to describe the law and attempts to eliminate and discard everything from the object of this theory everything which is not strictly law and not adhere to law. Pure theory of law compartmentalize the concept of legal completely from that of the moral norm and established the law as a distinct system independent even of the moral law. Consequently, a general norm takes the form of legal norm only because it has been constituted in a particular way which is required in that particular situation, born of a particular procedure and system and the last is a definite law. This theory stipulate that law is valid only as a positive law, that is, statue law. Therefore, the basic norm of law can only be fundamental rule, in accordance to which the legal norms are to be produced in society by the sovereign; as it is fundamental to law making process.[7]

[6] Supra note 71 at 204.
[7] Supra note 30 at 17-18.

Kelsen pure theory of law conceives law as a mechanism or system of norms, which norms functions as schemes of interpretation in the light of which human behaviour and other natural events which takes place in every society. Kelsen pure theory of law describe that the structure of law system which help in justice administration are put forth in the way that norms on a higher level authorize the creation of norms on a lower level.

According to Kelson, norms functions as a scheme of interpretation in the way that the judgment that the act of human conducting his act, in a particular time and space, which is "lawful" or "unlawful" according to the condition is the outcome of a specific, namely prescriptive interpretation.

A legal norm in order to be valid it had to exists and to say that exists is to say that it ought to be obeyed or applied that it has binding force or sanction and it was created in accordance with another and higher legally valid norm.

BASIC CORE OF KELSEN'S THEORY- " THE GRUNDNORM"

The system of law as per Kelsen is a system of norms. Norms which are legal are created by the acts of will of human or products of willing human actions, as opposed to moral norms which are superimposed by God. Kelsen pure theory of law, revolved around the norms which are created by acts of human being out of will, not norms which come from other superhuman authorities like God. Norm is an "ought proposition; it expresses not what is, or must be, rather but ought to be, given in certain condition[8], which refer to its connection with a of norms which it forms a vital part.

Basic norm or the grundnorm is a concept which is result of Hans Kelsen. In every legal system there is always a 'Grundnorm' although its form are different in different legal systems as per its needs and condition. Kelsen used the term 'Grundnorm' to denote the basic norm, order or legal system and it is the reason for the rest of legal mechanism. In Kelsen theory 'Grundnorm' is the starting point as the legal order consists of norms placed in hierarchal manner i.e. one norm place above the other norm and

[8] Hans Kelsen, What is Justice, P. 235-244

every norm deriving its validity from norm which is higher in place. Thus, the function of 'Grundnorm' in legal system is to give objective validity to positive legal order that is the common source for validity of all norms. Kelsen state that Grundnorm of some kind will always be there in legal system. In legal system is not the constitution itself, but it is the pre occupied supposition, demanded by particular theory that this constitution ought to be obeyed.[9] In literal term, the grundnorm only imparts validity to the constitution and all norms derived from it, it does not dictate their content.[10]

According to Kelsen, positive norms are valid by the reason only on one assumption that is basic norm which set the supreme law creating authority in society and also normativity of legal system.

The two proposition which are regarded as axioms of this theory are:

- Two laws, from which one law gives authority to other law are part of same legal system.
- All laws in legal system derives its authority from other laws which are already in existence either directly or indirectly. .

Basic norm are not enacted, nor they are created in any other way. Kelsen clearly says that that it is form by acts of enacting and establishing other law or by the recognition by the population on which duty is cast to obey the law, as some nor is a power conferring law.

FUNCTION OF NORMS WITHIN THE LEGAL SYSTEM

The concept of norms is central to Kelsen theory of law. According to Kelsen, norm are either nomo static or nomo dynamic depending upon the relationship between the norms construced.

Nomo Static system are that lower norms are derived from a higher norms and these are valid because they origin from some other norms are considered because these are derived from some other norm or they are self evident like you should not lie.

[9] Supra note 9 at p. 201
[10] Supra note 10 at p. 362

Nomo dynamic norms are those norms as they are created as per the procedure defined by higher norms. According to Kelsen, these norms formed through a specific procedure which are followed by the higher norms.

As norms are legal order in legal mechanism it does not imply that is not possible to go beyond that particular norm. The constitution is the first binding norm.Thus, the ultimate hypothesis of legal positivism is the law creating authorizing the historically first legislator. According to Kelsen, the ultimate function of basic norm is to confer or grant law creating power on the act of the first legislator. The concept of basic norm is only the presupposition of any positivistic interpretation of the legal material.[11]

A legal system is not a collection of "oughts", but a hierarchy descending downwards from a "Grundnorm" which is the core of Kelsen theory. In a legal system norms serve following functions.

Proposition of Law- as Kelsen stated that legal proposition deal with what "ought to be" which in turn implies that force is acting behind the act.. In law, if a person steals from another person wallet, he ought to be punished as per the law mention in our system clearly states the sanction which is attached to the act of stealing.. It has the attribute of sanction which deter an individual from doing illegal act.

Thus, Kelsen theory recommends that the positive law system should be viewed as a system of norms which elucidated that under certain situation, a coercive measure is ought to be taken to adhere obedience on part of individual.

A basic norm is not created by law making organ and it is not similar to positive law legal norm is- valid because positive legal norm is created in a certain way by the legal act which is strictly within the law , but it is valid by the reason that it presupposed to be valid from very beginning and without this presupposition no human act could be interpreted as a legal act in eyes of law, especially as a norm-creating ,etc.When any kind of norm is legal order it cannot be deduced from basic norm as the legal norm. For example Help your neighbor whenever they need can be deduced from

[11] Supra note 9 p. 116.

always love your neighbor. There are numerous ways to create norms. General norms can be deduced from customs, and individual norm scan be derived from administrative and judicial acts.

THE "OUGHT" AND THE "IS"

In legal system when a rule of law "stipulates", "provides for", or "prescribe" a certain human conduct or behaviour is in fact quite similar to situation when one individual wants another individual to behave in such -and-such a way and express this will in the form of a command , such abstraction eliminates the psychological act of will which is expressed by a command. The conduct prescribed by the rule of law is "determined" without any human being having to "will" it in a psychological sense attach to it. This is expressed by the statement that one "shall", one "ought" to observe the conduct prescribe by the law in the legal system. A term "norm" is a rule expressing the fact that somebody ought to act in a way, without implying that anybody really "wants" the person to act or behave that way in some situation that way.[12]

The dualism of Is and Ought coincides with that reality and value in the sense that no value can be derived from reality, and no reality from the value. The Is realm in the theory is associated with the causality and Ought with imputation. The realm of Is the primary layer for the actor's actions and can be visualized with the stage metaphor which include not only persons but also things and moreover the actual substrates of legal acts. The next layer, of rules is the realm of Ought. It deals with the specific legal significance. The Ought comes up to the actual substrate, the Is in the Kelsen theory. Legal acts of the laws, judgment, the private laws, etc constitutes the Ought as a regulatory background of the Is ream layer.

Acts which come in law making process, especially legislative acts, "create " or "posit" a norm, in the sense that the meaning or the significance of the particular act or series of acts that constitute the legislative process is a norm for that very purpose.A clear division of the subjective and objective meaning of act which were then known as norm.

[12] Hans Kelson, General Theory of Law, Translated by Anders Wedberg. New jersery: The Lawbook Exchange, Ltd. 2009, p.35.

"Ought" is the subjective meaning of every act of will of human behaviour directed at the conduct of another human conduct in society. Here not every such act has also objectively this meaning in context: and only if the act of will also has objective meaning in context to particular act then the objective of an "Ought" is called a "norm". The realm of Ought which is the subjective meaning of an act of will is also the objective meaning of the act, if this act has been imbedded with this meaning, if it has been authorized by a norm which therefore has the character of a "higher" norm.

CRITICAL ANALYSIS

- Hans Kelsen theory points out that the Grundnorm is presupposition that the constitution ought to be obeyed in legal system by every citizen in a Legal system. But in reality, the constitution of a country is the sociological, political document and so it cannot picture the grundnorm pure.
- Kelsen propounded that basic norm are means of giving unit to the legal system, enabling the legal scientist to interpret all valid legal norms as a non-contradictory filed of meaning in his theory.[13].
- Hans Kelsen analysis of formal structure of law as a hierarchical system of norms[14] and also his focus on the dynamic character of process are illumination and avoidsome.

CONCLUSION

Hans Kelsen in his theory defines the law in terms of certain norms. The whole legal system is inter-connected with other norms and there is basic norm which is called Grundnorm. Another aspect of this theory is that it present dynamic legal order rather than a merely static order and the law tends to be orderly through maintaining consistency between various parts, and perfect and complete logical system.

[13] Supra note 9 at p.72
[14] What is Justice, p.349.