

LEGAL THEORY SEMINAR

**TOPIC: - THE PLACE OF KELSONS PURE THEORY OF LAW IN
FUNCTIONAL JURISPRUDENCE**

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**THE PLACE OF KELSON'S PURE THEORY OF LAW IN FUNCTIONAL
JURISPRUDENCE**

INTRODUCTION

Jurisprudence is technically divided into three main branches. This division is based on certain basic assumptions about 'Law' characterized by jurists belonging to each school which distinguishes them from those of other schools. During the 19th century with the changing time the scope of Jurisprudence has widened considerably.¹ The emergence of the modern State as the more and more exclusive repository of political and legal power not only produced professional class of civil servants, intellectuals and others, but it also demanded more and more organization of the legal system, a hierarchical structure of legal authority and the systematization of the increasing mass of legal material.² A comprehensive basis of classification of Jurisprudence into different schools according to the legal philosophy propounded by the advocates of this school, had become necessary. Salmond tried to divide jurisprudence into three major schools which he called as 1) Analytical school, (2) Historical School, and (3) Ethical school. These divisions correspond to legal exposition, legal history and science of legislation i.e. dogmatic, historical and ethical aspects of jurisprudence.

Analytical School deals with law as it exists in the present form. The exponents of this school consider that most important aspect of law is its relation to the State. They treat law as a command emanating from the sovereign, namely the State. This school is therefore called as Imperative school. The advocates of this school are neither concerned with the past of the law nor with the future of it, but they confine themselves to the study of law as it actually exists i.e.

¹ Dr. N.V.Paranjape, *Studies in Jurisprudence and Legal Theory*, (Central Law Agency, Allahabad, 6th Ed.2011) at 16

² S.P. Dwivedi, *Jurisprudence And Legal Theory*, (Central Law Publications, 4th Ed.2003) at 13

positus. Therefore this school is also called the Positive School of jurisprudence. The exponents of this school are Bentham, Austin, Holland, Sir John Salmond, Sheldon, Amos, Markby etc. the school received encouragement in united states from distinguished jurists like Gray, Hohfeld and Kocourck and in the European continent from Kelson, Korkunov and others.³

³ Dr. N.V.Paranjape, *Studies in Jurisprudence and Legal Theory*, (Central Law Agency, Allahabad, 6th Ed.2011) at 17

KELSON(1881-1973)

Hans Kelson was another jurist who has the credit of reviving the original analytical legal thought in the 20th century through his 'Pure Theory of Law'. He was born at Prague in Austria in 1881 and was a professor in law at the Vienna University. He was also the judge of the Supreme Constitutional Court of Austria for ten years during 1920-1930. Thereafter he shifted to England. He came to United States and worked as Professor of law in several American Universities and authored many books. He was Emeritus Professor of Political Science in the California University when he expounded his Pure Theory of Law which is considered to be Kelson's unique contribution to legal theory. Kelson belonging to 20th century had opportunities in observing the old legal theories and later developments in the field of science and technology, political science, economics, sociology and law.⁴ Though the first exposition of the theory took place in 1911, it came to full flower in the post war conditions of Europe. Kelson himself drafted the New Austrian Federal Constitution of 1920. The attention of the lawyers was drawn to the idea of a fundamental law as the basis of the legal system.⁵ He developed Austin's Positivism Theory in his own style. Here he named his theory under the title "General Theory of Law and State" in 1945. He also named his theory "The Pure Theory of Law".

⁴ *Id* at 27

⁵ S.P. Dwivedi, *Jurisprudence And Legal Theory*, (Central Law Publications, 4th Ed.2003) at 26

Kelson's Theory of Pure Science of Law

Kelson was not in favour of widening the scope of jurisprudence by co-relating it with other social sciences. He insisted on separation of Law from politics, sociology, metaphysics and all other extra-legal disciplines. Kelson tried to rescue jurisprudence from vague mysticism and in a way revival of John Austin's 19th century analytical jurisprudence. Kelson wished to create a pure science of law devoid of all moral and sociological considerations. He rejected Austin's definition of law as a command because it introduces subjective considerations whereas he wanted legal theory to be objective. He defines 'science' as a system of knowledge or a 'totally of cognitions' systematically arranged according to logical principles. Kelson's Grundnorm is analogous to Austin's concept of sovereign without which, law cannot be obligatory and binding. Kelson's theory being a theory of positive law is based on normative order eliminating all extra-legal and non-legal elements from it. He believed that a theory of law should be uniform.⁶ The theory of Hans Kelson, says Dias, has represented a development in two different directions; on the one hand, it marks the highest development to date of analytical positivism. On the other hand, it marks a reaction against the welter of different approaches that characterized the close of the 19th century and the beginning of the 20th century. For Kelson and his followers any such legal idealism is unscientific.⁷ He claimed that his pure theory was applicable to all places and at all times. He wanted it to be free from ethics, politics, sociology, history, etc. though he did not deny the value of these branches of knowledge.

⁶ Dr. N.V.Paranjape, *Studies in Jurisprudence and Legal Theory*, (Central Law Agency, Allahabad, 6th Ed.2011) at 28

⁷ S.P. Dwivedi, *Jurisprudence And Legal Theory*, (Central Law Publications, 4th Ed.2003) at 27

Laws as Normative Science

Kelson described law as a 'normative science' as distinguished from natural sciences which are based on cause and effect such as law of gravitation. The laws of natural science are capable of being accurately described, determined and discovered in the form of 'is' (das sein) which is an essential characteristics of all natural sciences. But the science of law is knowledge of what law ought to be (das sollen). It is the 'ought' character which provides normative character to law. For instance, if 'A' commits a theft he ought to be punished. Like Austin, Kelson also considers sanction as an essential element of law but he prefers to call it 'norm'.⁸ Kelson argues his science of law as 'pure' and time and again, insists that law 'properly so-called' must be put unspotted from elements which merely confuse and contaminate it. It should not be mixed with politics, ethics, sociology and history. By 'pure theory of law', he meant it is concerned solely with that part of knowledge that deals with law, excluding from such knowledge everything which does not belong to subject matter of law. He attempts to free the science of law from all foreign elements.⁹ It is called positive law because it is concerned only with actual and not with ideal law. For Kelson, legal order is the hierarchy of norms having sanction and jurisprudence is the study of these norms which comprise legal order.

⁸ Dr. N.V.Paranjape, *Studies in Jurisprudence and Legal Theory*, (Central Law Agency, Allahabad, 6th Ed.2011) at 28

⁹ S.P. Dwivedi, *Jurisprudence And Legal Theory*, (Central Law Publications, 4th Ed.2003) at 27

The 'Grundnorm'

The basis of Kelson's pure theory of law is on pyramidal structure of hierarchy of norms which derives its validity from the basic norm i.e. 'Grundnorm'. Thus it determines the content and gives validity to other norms derived from it. He was unable to tell as to from where the Grundnorm or basic norm derives its validity. But when all norms derive their validity from basic norm its validity cannot be tested. Kelson considers it as a fiction rather than a hypothesis.¹⁰

According to Kelson it is not necessary that the Grundnorm or the basic norm should be the same in every legal system. But there will be always a Grundnorm of some kind whether in the form of a written constitution or the will of a dictator. In England there is no conflict between the authority of the king in Parliament and of judicial precedent, as the former precedes the latter. For example, In England, the whole legal system is traceable to the propositions that the enactments of the crown in Parliament and Judicial precedents ought to be treated as 'law' with immemorial custom as a possible third. Keelson says that system of law cannot be grounded on two conflicting Grundnorms. The only task of legal theory for Kelson is to clarify the relation between the fundamental and all lower norms, but he doesn't go to say whether this fundamental norm is good or bad. This is the task of political science or ethics or of religion.¹¹

Kelson further states that no fundamental norm is recognizable if it does not have a minimum of effectiveness e.g. which does not command a certain amount of obedience. Producing the desired result is the necessary condition for the validity of every single norm of the order. His theory ceases to be pure as it cannot tell as to how this minimum effectiveness is to be measured.

¹⁰ Dr. N.V.Paranjape, *Studies in Jurisprudence and Legal Theory*, (Central Law Agency, Allahabad, 6th Ed.2011) at 28

¹¹ S.P. Dwivedi, *Jurisprudence And Legal Theory*, (Central Law Publications, 4th Ed.2003) at 29

Effectiveness of the Grundnorm depends on the very sociological and political questions, which he excluded from the purview of his theory of law.¹²

Pyramid of Norms

Kelson considers legal science as a pyramid of norms with Grundnorm at the top. The basic norm (grundnorm) is independent of any other norm at the top. Norms which are superior to the subordinate norms control them. He defines 'Concretisation' as the process through which one norm derives its power from the norm superior to it, until it reaches the Grundnorm. Thus the system of norms proceeds from bottom to top and stops when it reaches to the top i.e. 'Grundnorm'. The Grundnorm is said to be a norm creating organ and the creation of it cannot be demonstrated scientifically nor it is required to be validated by any other norm. Thus a statute or law is valid because they receive their legal authority from the legislative body and the legislative body derives its authority from a norm i.e. the constitution. According to him the basic norm is the result of social, economic, political and other conditions and it is supposed to be valid by itself.¹³ There is a difference between propositions of law and propositions of science. Propositions of science are observed to occur and necessarily do occur as a matter of cause and effect. Whenever, a new fact which is found not to comply to a scientific law it is so modified to include it. On the other hand propositions of law deal with what ought to occur e.g. if 'A' commits theft, he ought to be punished.

¹² Ibid

¹³ Dr. N.V.Paranjape, *Studies in Jurisprudence and Legal Theory*, (Central Law Agency, Allahabad, 6th Ed.2011) at 29

Implications of Kelson's Theory Pure Science of Law

Implications of the pure theory of Kelson are wide and include concepts of State, sovereignty, legal personality, private and public law, etc.

1. Law and state are not different things for Kelson. He denies the existence of State as an entity distinct from law and he also denies the existence of a 'sovereign' as a personal entity. According to him, if each one derives their power and validity ultimately from the 'Grundnorm' then there can be no supreme or superior person as sovereign.
2. He does not make any difference between natural or juristic persons. There is no difference between physical juristic persons. For him 'Personality' in law means an entity capable of bearing rights and duties. All legal personality is artificial and derives its validity from superior norms.
3. Kelson says that there is no such thing as individual right in law. Legal duties are the 'essence of law'. Law is always a system of ought. According to him, the concept of right is not basically essential for a legal system. Legal right is merely the duty as viewed by the person entitled to require its fulfillments.
4. Kelson also denies that there can be any such difference between public and private laws. There shall be only one legal process and system, which controls the sovereignty, government, State and people. No distinction can be made between contracts made by the parties which derive their validity from the same 'Grundnorm' on the ground that they protect interests of different nature. According to him, private interests are protected in public interest.

Kelson's theory in Indian Context

Kelsonite theory of Grundnorm, fits into the legal philosophy of ancient India in so far as the Indian jurists also subordinated the authority of the King to Dharma which was above the Kings Sovereignty. The scriptures enjoined upon the king, a duty to rule and administer justice in accordance with the Dharma, which was akin to Grundnorm as it did not derive its validity from the King.¹⁴

After Independence the Constitution of India was drafted which came into force on 26th January 1950. It can be termed as Grundnorm in the Kelsonite sense because all the statutes and legislative enactments derive their validity from the Constitution of India whose validity lies in its whole hearted acceptance by the Indian community without any exception. In fact it is presupposed to be valid.¹⁵

¹⁴ Dr. N.V.Paranjape, *Studies in Jurisprudence and Legal Theory*, (Central Law Agency, Allahabad, 6th Ed.2011) at 32

¹⁵ Id at 33

Criticisms of Kelson's Theory

1. It ignores the purpose of law. Kelson's account of legal dynamics is inadequate.
For example, While considering the validity or otherwise, of a particular enactment, the courts do take into account the prevailing custom or the motives of the legislature and try to co-relate it with the social purpose which the act seeks to achieve.
2. It suffers from certain methodological shortcomings. For a law to be valid the action of the enforcing authority has to be in accordance with the procedure and therefore it becomes necessary to probe into the content of law.
3. Kelson's theory suffers from practicability. It is based on hypothetical considerations. He does not consider justice and morality as essential attributes of law.
4. According to Friedmann, whenever there are ideological differences Kelson theory provides no solution. Law cannot be completely separated from ethics and morality which gives it a, honourable place in the society.
5. Kelson's assertion that all the norms which except the basic norm (Grundnorm) are pure cannot be said to have logical basis because it is difficult to understand as how the subsequent norms which derive their authority from the Grundnorm can be pure when the Grundnorm itself is based on a hypothesis that it is an outcome of the combination of various social and political factors and circumstances in a given situation.
6. Kelson's theory is said to be without any sociological foundation as it excludes all references of social facts and felt needs of the society.
7. Kelson's idea that Grundnorm would be applicable for every country, and it would also apply universally was a wrong assumption. Scientific principles do not apply in laws. All Laws cannot be equally applicable throughout the world.

Conclusion

Kelson attempted to break away with the traditional natural law theory on one hand and legal positivism on the other. He asserted that legal knowledge is free from foreign elements, such as ethics, psychology, sociology, etc. His normative theory separates law from morality on one end and law and 'fact' on the other. He refused to separate law from the State and held that law is the 'will of the State'.

Kelson's contribution has been of great value and has had a notable effect on current jurisprudence. His 'Normative' view has led him to re-examine with a most stimulating originality, many of the traditional doctrines of jurisprudence. His views regarding the nature of State and of legal personality have received wider support. His work is also valuable in its emphasis that in executing the norms of law the judge has much discretion, he may consciously choose between alternative interpretations which the norm permits. He has made a more illuminating analysis of the legal process than any writer of that century. Even though none of his special doctrines have found universal acceptance, some have moved into common juristic thought. His half-truths and manifest errors have also influenced in the development of jurisprudential thought.¹⁶

¹⁶ S.P. Dwivedi, *Jurisprudence And Legal Theory*, (Central Law Publications, 4th Ed.2003) at 35

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