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Applicability of Hans Kelsen's 'Grundnorm'

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ABSTRACT

Kelsen took this argument very seriously. He observed that the actions and events that constitute, say, the enactment of a law, are all within the sphere of what "is" the case, they are all within the sphere of actions and events that take place in the world. The law, or legal norms, are within the sphere of "ought", they are norms that purport to guide conduct. Thus, to get an "ought" type of conclusion from a set of "is" premises, one must point to some "ought" premise in the background, an "ought" that confers the normative meaning on the relevant type of "is". Since the actual, legal, chain of validity comes to an end, we inevitably reach a point where the "ought" has to be presupposed, and this is the presupposition of the basic norm. The author will discuss the applicability of the 'Grundnorm' of Kelsen in today's scenario.

I. THE CASE

Hans Kelsen – The Austrian jurist was born at Prague in 1881 and was Professor of Law at the Vienna University. He was the judge of the Supreme Constitutional Court of Austria 1920-30. He became Professor of Law in several American Universities. Of late he was emeritus Professor of Political Science of the University of California where he expounded his Pure Theory of Law in the twentieth century which has evoked world wide interest. Kelsen has been the author of several works – of Austrian Constitution (1920), General Theory of Law and State (1945), The Pure Theory Law (1934) revised (1960), Principle of International Law (1952), What is Justice (1957), and many other works. Kelsen has opposed with determination the tendency on the part of jurists to broaden the scope of jurisprudence to embrace all social sciences and has rigidly advocated the separation of law from metaphysics, politics and sociology. He is disgusted at 'politics in masqueradings as jurisprudence'. Like John Austin in the nineteenth century Kelsen challenges both the philosophical and natural law theories of law. He owed his fame chiefly due to the Pure Theory of Law or the Doctrine of Pure Law divested of all extra-legal and non-legal elements.[3] In his book Reine Rechtslehre 1934 (Pure

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[3] S.N. Dhyani, Fundamentals of Jurisprudence The Indian Approach, Central Law Agency,2004 at 24.

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Theory of Law) Kelsen writes " It is more than two decades since I undertook the development of a pure theory of law, that is, a theory of law purified of all political ideology and all natural-scientific elements and conscious of its particular character because conscious of the particular laws governing its object. Right from the start, therefore, my aim was to raise jurisprudence, which openly or covertly was almost completely wrapped up in legal-political argumentation, to the level of a genuine science, a science of mind." According to Kelsen the pure theory of law is called likewise because it only describes the law and attempts to eliminate from the object of this description everything that is strictly not law: Its aim is to free the science of law from alien elements" Wayne Morrison, describes the pure theory of law as a theory of positive law. Morrison Page states "As a theory it is exclusively concerned with the accurate definition of its subject matter. It endeavors to answer the question, what is the law? But not the question, what ought it to be? It is a science and not a politics of law." As a positivist, Kelsen believed that the existence, validity and authority of law had nothing at all to do with such non-legal factors as politics, morality, religion, and ethics.

II. KELSEN THEORY ANALYSIS

According to Kelsen's Pure theory of law, the objects of the science of law are those norms "which have the character of legal norm, which makes certain acts legal or illegal." By the term norm, Kelsen means that "something ought to be or ought to happen, especially that a human being ought to behave in a certain way." Finally laws being 'ought' proposition, knowledge of law means a knowledge of 'ought' i.e. norms and a norm is a proposition in hypothetical form: 'if X happen, then Y ought to be happen.'[4] According to Kelsen, a dynamic system is one in which fresh norm are constantly being created on the authority of original, or basic, norm, a Ground norm; a static system is one which is at rest in that the basic norm determines the content of those drives from it in additional to imparting validity to them.[5] Kelsen distinguishes the legal norm and normal norm. Legal norm derives it validity from the external sources and the particular "ought" of the legal, as distinguish from the moral norm, is the sanction.[6]

III. THE 'GRUNDNORM'

This is the top of Kelsen's hierarchy of norms. The Grundnorm gives validity authorizes the creation, amendment and repeal of all legal rules it also lays down the criteria for distinguishing a legal rule from any other rule. The validity of the all norms is finally based on the Grundnorm. Particular individual laws such as judicial decisions are the lowest level of norms. Acceptance

[4] Edgar Bodenheimer, Jurisprudence (Delhi :Universal Law Publishing Co. Ltd, 2004) at 101.
[5].RMW Dias, Jurisprudence ,Supra note. 3 at p. 359.
[6] W. Friedman, Legal Theory (Delhi: Universal Law Publishing Co. Pvt. Ltd , 1967) at 276.

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and validity of these norms are determined by another set of norms (statutes). These norms received power from another set of norms which are general and more concrete (constitutions). The Grundnorm is not a legal norm since it cannot be validated by a higher norm. It's not a legal norm since it is not created by a law creating institution, using legal procedures it is the limit of law, the border between law and other social disciplines. It is a presupposition that lies above the entire legal system. The Grundnorm cannot be verified or proved. The content of the basic norm is not fixed, but will alter according to changes in society or politics. Every country has its own Grundnorm from which the other norms are originated. kelsen recognized that the Ground norm need not be the same in every legal order, but a Ground norm of some kind will always exist whether it be a written constitution or the rule of a dictator. Kelsen described the Grundnorm as the fundamental assumption made by people in society about what would be treated as law. It is not the constitution, which for Kelsen was simply another positive norm. It is the existence of the Grundnorm which, for Kelsen, makes the difference between a gangster's demands and a tax official's demands. Both demands express an individual's subjective wish that another person should pay over a certain amount of money, but the official's demands are authorized by a tax law, and ultimately by the Grundnorm, and this confers objective validity on them. It is by virtue of the Grundnorm that we can say that the official's demands objectively ought to be obeyed. It is apparent that what particular Grundnorm applies in a society simply depends upon what fundamental assumptions are made by the members of that society. The identity of the Grundnorm is ultimately a matter of sociological fact. No moral or other judgement or assessment is being made about it. The Grundnorm is the base or start of a legal system in Kelsen's theory. The rest of the system is pictured as broadening down gradations from it and becoming more and more detailed and specific. It is a dynamic process and the application of higher norms results in creation of lower norms. Kelsen's basic norm becomes important in the event of a revolution. Kelsen says that a revolution occurs whenever the legal order is replaced in an illegitimate way, in a way not prescribed by the former order. When there is a change in a legal system Keslen the Grundnorm accepts this change this acceptance could be another reason for the validity of such norm. Kelsen regards Martial law as revolution which should be accepted by constitution of the country (to Kelsen it can be a Grundnorm). Kelsen's theory has been considered in cases involving radical norm change. Kelsen's theory has been argued in courts in many occasions. In revolutionary period within countries where one legal order has been challenged by a revolutionary force, pure theory has come out. Revolutionary group has argued that a change in the Grundnorm can actually be observed. Kelsen explains; if they succeed, if the old order ceases and the new order begins to be efficacious because the individuals whose behaviour the new order regulates actually behave,

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by and large, in conformity with the new order, then this order is considered valid order. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as legal, law creating act, as the establishment of the constitution, but an illegal act, as the crime of treason, according to old monarchy constitution and its specific basic norms. From what Kelsen says, it seem all that is required for the recognition of the new basic norm as valid is that there is a certain level of support, that is, that it is seen as efficacious. But in the actual cases where Kelsen's ideas have been argued, they do not seem to have been basis for the decisions. The basis of Kelsen's pure theory of law is on pyramidical 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. Kelsen considers it as a fiction rather than a hypothesis.[7] According to Kelsen 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 Kelsen 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.[8] Kelsen 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. Effectiveness of the Grundnorm depends on the very sociological and political questions, which he excluded from the purview of his theory of law.[9]

[7]Dr. N.V.Paranjape, Studies in Jurisprudence and Legal Theory, (Central Law Agency, Allahabad, 6th Ed.2011) at 28
[8]S.P. Dwidedi, Jurisprudence And Legal Theory, (Central Law Publications, 4th Ed.2003) at 29
[9]S.P. Dwidedi, Jurisprudence And Legal Theory, (Central Law Publications, 4th Ed.2003)

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IV. Criticisms Of Grundnorm

The legal system consists of complex series of norms each one gets its validity from a higher norm. There is a hierarchy of norms. Each one gets its validity from a higher norm. For instance, an act is legal wen it is done according to law, the law is valid if it is passed by the parliament in the proper manner, parliament gets law making power from the constitution, and the constitution gets its validity form previous constitution and so on. If we go on to the top of hierarchy of norms it would be infinity. There need to be a stop. Kelsen regard this stop which gives validity to all norms as grundnorm or basic norm. However validity of this grundnorm does not depend on any other norm. According to Kelsen grundnorm is a presupposition. We assume that it is valid just like we assume certain measurement of length is a meter. The presupposition of the basic norm, Kelsen explains, is necessary for anyone who wants to conceive of law as a valid system of norms, while remaining within the framework of legal positivism. The reason is that the separation thesis bars the legal positivist from grounding the normativity of law in morality, say, by a reference to democracy or human rights, or, for that matter, by reference to the will of God. Since the grundnorm is presupposed we cannot say that it is pure. An assumption contains morality, ideology and other factors, which Kelsen regard as impure element. The question arises is that who assumes the grundnorm. Surely citizen would not assume the grundnorm. Kelsen says grundnorm is assumed by the people who have interest in the legal system. This means the grundnorm is assumption of a group of people. Pure theory of law is monistic. This means there can be only one grundnorm. When it comes to municipal law and international law, surely there need to be more than one grundnorm. Kelsen argues that there can be one or more grundnorm if there is no conflict with each other. Kelsen has not given proper characterization to the concept of legal system. His legal system is consisting of norm, held by conceptual string called grundnorm. His theory is considered as empty formula. Raz criticized Kelsen's version of validity of law. According to Raz validity of law arises from the law itself, which take into account factual and historical account of legal system. The valid norms do not identify the legal system. Grundnorm is too general to validate law. Raz (1979) makes a distinction between justified normativity and social normativity and argues that whereas Hart works with a conception of social normativity, Kelsen operates with a conception of justified normativity. As Raz explains, justified normativity is normativity that is justified, whereas social normativity is normativity that is accepted and insisted on by the people concerned.

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V. Application Of Kelsen 'Grundnorm'

In A.K. Gopalan v/s State of Madras,[10] where it interpreted the expression, "the procedure established by law" in Article 21of the Constitution of India as any substantive or procedural provision of enacted law. However, in Maneka Gandhi v/s Union of India,[11] the Supreme Court of India adopted an interpretation which brought Article 21 of the Constitution of India[12] into a concept of fairness, justness and reasonableness which is not there in the word of that article. The meaning of the definition of 'fair, just and reasonable' could vary from person to person and is a reflection of ideology of an individual which consideration if brought to bear upon the test of constitutional validity of particular statute liable to be struck down if it is not in conformity with the mental conception of an individual who is the judge. While A.K. Gopalan's case gave limitless power to the law maker, Kesavanda Bharati's case introduced the doctrine of basic structure according to which the term "amendment" in Article 368 of the Indian Constitution means addition or change within the contour of the preamble or the constitution but not replacement of the constitution or its basic foundation and structure. Kelsen's Pure Theory provides the principle of judgement in Kesavananda Bharati, the Grund Norm cannot be replaced except by revolutionary methods. Basic structure is unnameable, limitless and indivisible like Austin's Sovereign. Kelsen's Grund Norm is alterable by changing the presupposition.

Madzimbamuto v Lardner – Burke[13] (1968)

The Privy Council considered whether the actions of Rhodesian Government in making a Unilateral Declaration of Independence (UDI) were consistent with the constitution laid down by the British 1961. The Privy Council ruled that the actions under UDI were illegal and that regime was illegal. The court had been referred to Kelsen's theory, but they found that in this particular case it did not aid them. Here, the case was not decisive of the essentially political question as to whether a change in the Grundnorm had been effected.

Mitchell v Director of Public Prosecutions[14]

The Court of Appeal in Grenada raised four conditions to regard the revolutionary government as legal;

1. A successful revolution must have taken place

[10] 1950 S.C.R. 525.
[11] 1978 A.I.R. 597.
10 Article 21.Protection of life and personal liberty.-No person shall be deprived of his life or person liberty except according to procedure established by law.
[13] [1969] 1 AC 645
[14] [1985] UKPC 27

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2. The government is in effective control

3. Such conformity is due to popular support not mere tacit submission to coercion

4. The regime must not be oppressive or undemocratic

The Republic of Fiji v Chandrika Prasad [15]

In 2000, the military had overthrown Fiji's elected government and had issued a decree abrogating the 1997 Fijian Constitution. Prasad, a farmer who had been forced off his land during the upheaval, brought an action in the High Court of Fiji, seeking a declaration that the revocation of the 1997 Constitution was unconstitutional and that the elected government was still a legally constituted government. The High Court found for Prasad, at which point the Interim Civilian Government, established by the military, appealed to the Court of Appeal. As George Williams explains: the High Court and Court of Appeal were not placed in the passive role of observers of an historical shift in the Grundnorm of Fiji. They were cast in the centre of an unfolding drama as important actors, and were asked by the coup leaders to recognise a new regime so as actually to lead to a shift in the basic norm of the nation. Prasad is a very important case because the court refused to recognise the validity of the coup, saying that the overthrow of the 1997 Constitution was illegal. This makes it the only case in which a domestic court has pronounced a coup illegal Though the court spoke the language of effectiveness, in fact it departed from Kelsen's understanding of effectiveness, saying that compliance with the new laws is not sufficient: obedience to the new regime must stem from popular acceptance and support, not from tacit submission to coercion or fear of force.

Kesavananda Bharati vs State of Kerala[16]

This is a land mark judgment, delivered by a thirteen judge bench, in the year 1973, which held that Preamble is an integral part of the constitution. The parliament has no power to amend the basic structure of the constitution of India, including the Preamble. The parliament can make laws only to enhance the basic structure of the constitution for betterment of citizens of India, but, cannot amend or make laws to delete or degrade the basic structure of the constitution.[17] The Supreme Court of India in this judgment held that the Constitution of India which included the Preamble, is considered as the Grundnorm and all laws are derived from the main source, i.e., the Grundnorm. No law can be contrary to the Constitution and the basic structure and if such laws are passed by the parliament, they can be held ultra vires, and hence be declared null

[15] Unreported, Court of Appeal of Fiji, 1 March 2001, Civil Appeal No. ABU0078/2000S
[16] (1973) 4 SCC 225
[17] AIR 1973, SC 1461

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and void by the Supreme Court of India being the highest court of justice in India.

However, the critics argue that there is no such term called Basic Structure defined under the constitution itself and that the existence of the so called Basic Structure is constitutionally illegitimate.[18] The response to this predicament can be justified through the doctrine of Implied Limitation. In Constitutions which are written, the possibility that everything is said expressly is very rare. Therefore, limitations and powers are necessarily implied irrespective of the fact that they flow from express provisions or not. This is known as doctrine of Implied Limitation which essentially envisages that there exist certain inherent and implied conditions in a Constitution which are inviolable and hence un-amendable. It hence follows that doctrine of implied limitations is the edifice on which basic structure premises itself.[19] Hence, doubts regarding the existence of a Basic Structure must be dispelled without giving much thought. The effective unanimous solution which could come into place is to substitute these nuances concerning morality with constitutional morality. The principle of constitutional morality essentially means that one has to follow and consider the norms of the constitution as supreme and that one should avoid acting in any arbitrary manner so as to violate such rules.[20] This would be pertinent in establishing the validity of law irrespective of concerns related to its conventional or critical morality. For instance, to establish the validity of a given law, the law should be in conformity with the provisions of the Constitution which ultimately means that if the law satisfies the parameters set by the Grundnorm, then the law would be considered as valid. In the present context, if the given law does not violate the Basic Structure, the law shall be considered as valid. Therefore, there should be no leeway provided to contemplate whether the law is morally sound or not as per conventional or critical morality.

A possible application of the approach suggested above was seen in the landmark judgment of Naz Foundation v. Government of NCT of Delhi[21] It has been argued that criminalization of homosexuality is justified on the basis of morality. However, the ideal approach as suggested above and as was also held in the instant case is the use of Constitutional morality. In the absence of compliance with Constitutional morality, laws such as these should be invalidated. Hence, reference to the Basic Structure and hence, the Grundnorm is an ideal method to avoid the contentious debate surrounding morality.

[18] Raju Ramachandra, *The Supreme Court and the Basic Structure Doctrine'* in SUPREME BUT NOT INFALLIBLE, 108 (2000)
[19] Manoj Narula *v.* Union of India 41 (2014) 9 SCC 1
[20] Supra.
[21] 2010 Cri LJ 94

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VI. CONCLUSION

Kelsen believes that the grundnorm validates whatever constitutional order is currently in force. But how do we know what constitutional order is in force? Kelsen's answer to this is: whatever constitution is effective, a constitution being effective when the norms whose creation it licenses are on the whole applied and obeyed. This implies that if there is a revolution in a particular country and if the revolutionary leaders are effectively in control and generally obeyed, we have to postulate a new grundnorm as the reason for the validity of the new constitutional order. Kelsen explains that he does not regard validity and effectiveness as identical. Effectiveness is a condition of the validity of legal norms but the reason for their validity is the grundnorm. Thus legal norms are valid only while the political order to which they correspond is effective, but the reason that the norms are valid is the presupposed grundnorm. Kelsen states suppose that a group of individuals attempt to seize power by force. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is a norm endowing the revolutionary government with legal authority. Sometimes the basic norm of the legal order changes by means not authorised by the basic norm. This can happen in a number of different ways, sometimes violently, sometimes by peaceful and consensual means. It happens when one state conquers another and imposes its own sovereign power over the conquered state. The establishment of Crown sovereignty over Britain‟s colonies subordinated local legal systems to the English law and constitution. It happens when a region of a country secedes from the whole and establishes its own legal order.

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