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LEGAL POSITIVISM

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In Natural Law theory the source of law was ambiguous and vague which becomes a main defect of natural law. Theory of Position is emerged as a reaction against natural law. It opposed the natural law which indicates opposition to morality and provides that law shall not be based on morality as it is a man – made law.

Core of positivism is law is law and is nothing to do with morality. It means it opposed to relationship between law and morality.

Once a law comes to an existence, we don't have authority to question the legality of that law; it shows "Law as it is" and not "Law as ought to be"

KELSEN PURE THEORY OF LAW

Kelsen was socialist Jew who left Austria in 1930 and was dismissed from the position and forced to leave Germany in 1933. He redrafted the Austrian constitution in a ways that promoted democratic decision – making and assisted the recognition of human rights. He also served from 1921 to 1930 as a judge of the Austrian constitutional court.

Kelsen theory stands at equal footing and equally importance as Austin's theory. Kelson developed his theory on law and has great contribution toward jurisprudence. Positivism was reshaped and redefined by the pure theory of Kelsen and is a part and parcel of the systematic positivism. Kelsen developed his theory on theoretical and philosophical basis.

According to Kelsen, seed of positivism were not sown by positivist but by natural lawyer like Stammler. Stammler invents the concept of purity. The Concept that law shall be pure from any other enquiry like sociological, political, historical, logical etc. denotes purity of law. So law shall not be based, derived, linked or mixed to those entire ingredients.

Thus according to Kelsen, "law shall stand on its own". Though Stammler and Kelsen represent different schools they talked about "purity" of law as such.

According to Kelsen laws are scattered in society that create ambiguity in the source of law. There is a Total heterogeneity of laws and rules. Laws are scattered which create heterogeneity of class. There is a kind of chaos in a legal order so to achieve homogeneity Kelsen want to develop his pure theory of law.

Object of his theory is to form homogeneity of laws and legal order because laws are scattered and becomes difficult to trace the real source of law as such.

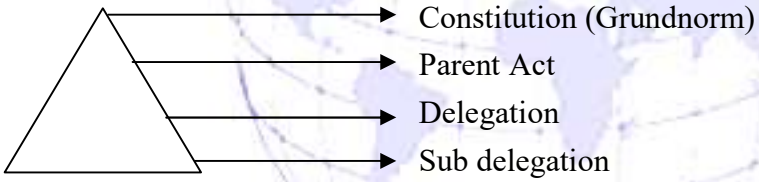
Kelsen rejected Austin's proposition of determinate superior authority (sovereign) as a source and he propounded a pure theory, which is necessary to achieve the order or homogeneity in legal system. So the source of law could be traced. The validity of law can be decided on the basis of pure theory.

LAW IS A HIERARCHY OF NORMATIVE RELATIONS

Kelsen's legal system is one single unit and is normative legal system or order.

Norms are those, which regulate the human conduct and human behavior in a society. According to Kelsen , Laws and rules are norms. These norms in a normative legal system are in a hierarchical nature. There is clear – cut order or stratification in legal system one cannot interchange the position of a norm in this hierarchy. Every norm in system derives its existence and validity from its superior norm the highest norm in this legal system is called as basic norm or grundnorm.

At the top level of such hierarchy there is to be a basic norm or grundnorm. This basic norm doesn't derive any existence or validity from any other source therefore it is supreme.



In above levels sub delegation must be in accordance with the delegated legislation Delegated legislation is to be in accordance with the Act of parliament i.e. parent act and this act should be in accordance with the constitution Thus legality or validity of each norm is to be decided by the higher norm as well as the rest of the higher norm including grundnorm.

The position of grundnorm in this hierarchy is a supreme, as it doesn't derive its validity and existence from any other sources. Thus it is Sue Generis is means it is stand on its own.

Every norm in this legal order is to be tested for legality and validity from basic norm thus basic norm could not be tested by any external source. In every legal system grundnorm is self existed it doesn't come from any other sources then its validity and legality couldn't be judged.

Thus grundnorm are immune from any kind of scrutiny. Norm means standard of behavior. Standard in its sense that human being ought to behave or ought not to behave in society. In this juncture "ought to" proposition came to be incorporated or injected in area of positivism. Here law is as implied ought to proposition contradictory thing Kelsen explain this "ought" in positivist sense and says that, "Yes it is an 'ought' it is a 'legal" ought and not a 'moral' one".

While criticizing Austin's theory he said that when we called law as a command it shows an involvement of psychological element in it.

In Kelsen's theory, there is clearcut hierarchical normative legal order if a person commits an

offence, he arrested and then charge – sheeted according to procedural law and then tried in a court of law and thereafter judge decide a matter according to penal law of a state derived its validity from Constitution of a state.

Kelsen further say that basic norm of grundnorm could be constitution or parliament in India constitution is a basic norm while in United Kingdom parliament is a basic norm.

Jayalalita Vs. Union of India (1994)

Supreme Court held that constitution is a supreme rather than mandate of public here in this case. K.K.Venugopal the advocate for Jayalalita contended that Jayalalita and her party get brutal majority and it is a mandate of people, which is superior and so she cannot be removed. the supreme court rejected he contention and said that constitution is supreme.

So In India a basic norm could be termed to constitution.

"MINIMUM EFFECTIVENTESS" AND "INITIAL HYPOTHESIS"

Kelsen branded basic norm or grundnorm as initial hypotheses because they are sue generis which represent basic politic faith of the community. But various other jurists criticized him in using a word "hypothesis" which represents imagination. Which is opposite to the notion of positivism. Thus it is not in real sense. To reduce this criticism he used "fiction" word instead of "hypothesis" which also criticized by jurist the thing. Which is in factious in nature shows that it is not real in nature shows that it is no in real sense if those are hypothetical or fictitious in nature then how could they count the legality and existence of those norms? From where basic norm comes into existence?

Subsequently, Kelsen went out to point out basic foundation of pure theory of law it also shows an aim of pure theory of law.

1) The aim of theory of law is to reduce chaos and multiplicity, to bring unity and homogeneity.
2) Legal theory is a science and not volition. It is knowledge of 'what law is? & not 'what law ought to be?
3) It is a theory of norm which is not concerned with the effectiveness of legal norm.
4) Law is normative in nature.
5) Theory of law is formal and it is a way of ordering and changing content in a specific way.

Kelsen theory of law revolves around the basic norm, which is not under any scrutiny. Grundnorm which is to be one and only one single entity. Grundnorm comes into existence on it own basic norm doesn't derive from any external authority. Mere existence is sufficient to call as basic because existence of that law itself confers the legality or validity of law.

Such basic norm must secure a kind of minimum effectiveness. Efficiency of total legal order is to be based upon minimum effectiveness of basic norm if that basic norm possesses such minimum effectiveness then that legal system is valid one.

Effectiveness of legal norm is not concerned for him. Existence of basic norm itself conferred the validity to basic norm which means validity and existence goes hand in hand.

Basic norm shall secure minimum effectiveness which is nothing but a minimum obedience i.e. minimum legitimacy so minimum acceptance to those norms conferred the validity to (those) basic norm.

Existence is not per se depending upon basic norm but adherence, acceptance or obedience by minimum people in that particular country is sufficient.

Recognition to grundnorm gives recognition to all norms. Efficacy of legal order is an efficacy of every individual norm. Legality or validity of norm is conditioned by minimum effectiveness of grundnorm so the minimum acceptance is necessary condition for total legal order.

Is his theory is made applicable in revolutionary regime like Pakistan and Iraq.

Has the minimum effectiveness any value in Revolutionary regime? In any revolution, revolutionary tries to overthrow the existing governmental machinery by not abiding to parliament or constitution as grundnorm. Kelsen's initial hypotheses are nothing but a basic political faith of community. So revolutionary's faith represents the initial hypotheses.In

Madzimbamuto v. Lardner – Burke I (1968) 2 SA 284

Illustrate the point that the validity of 'laws' and of the law – constitutive medium is separate questions. Effectiveness relates to the acceptance of the later. Both the Rhodesian Courts and one judge on the judicial committee held that, although the regime was not lawful, at least some of its enactments could be accepted as 'laws' provided that they conformed to the old "1961 Constitution" the implication of which is that an illegal authority can enact valid 'laws', while the previous and now effective authority continues to possess some legal force.

In the result it would seems that the effectiveness of the legislative authority is not a condition of the validity either of 'laws' or even of itself. It is a factor which in time induces the courts to accept such authority.

Thought the legal system which was accepted by people therefore effective in terms of Austin but it remain ineffective in case of Kelsen.

In Pakistan after independence .martial law imposed which was validated by judiciary as follows.

Meer Hasan Vs. State Pak LD (1969) lAH. 786 I

A Pakistani judge, who used the historical context to strike down a piece of legislation by the revolutionary government and he was fearless enough to do so while that government was still firmly in power so Pakistani supreme court held that usurper as illegal, invalid and ineffective. If the regime nullified the power of the court to decide the validity of the regime then court could declare revolutionary regime as unconstitutional.

In recent scenario in Pakistan, once again supreme court nullified Kelsen on news of times of India (Pune edition) dated 2/10/2002, it was stated that Pakistani supreme court has said that all the laws and rules promulgated by president Mushrrafs government would not be valid without the approval of parliament, to be elected on 10th October,

A Full bench of the Supreme Court on Monday observed that laws promulgated under provisional constitutional order had no legal status without validation by the parliament.

Kelsen drew no distinction between effectiveness which makes people obliged to obey and effectiveness which makes them feel under an obligation to do so. A usurper may by force and fear achieve the former, but not the later. Which is judicially acknowledged kind of effectiveness required by Kelsen.

KELSEN AND INTERNATIOANAL LAW:-

No doubt every independent sovereign state has its own legal order but they must be in tune with international law the fact is that the law is treated in the legal order . no independent state is entitled to make law without regard to international law in that sense international law operates as something higher principle of "Pacta Sand Servanda" which is to be treated as binding in every legal order international law operates as superior where the state law is to be in tune with the international law international law thus operates as replication on the municipal legal order.

According to Kelsen, state exists only on the basis of international law for Kelsen, International law and state law are same he believe in monism in international theory he rejects the notion of dualism. To him, state law and international law are same and there is no difference between them, but it is rater a state that is just legal construction.

According to Kelsen, there are no rights but only duties are there and if everyone follows his duty then there is no questions of rights arouse because all need will be fulfilled when everyone do his duties.

INDIAN POSITION

On the Question whether grundnorm is immune from any kind of scrutiny or any determination? Validity of every norm is on the grundnorm is not subject to any scrutiny. Legality or validity cannot judge.

But in our constitution Constitutional amendment is an integral part of constitutional mechanism. As it was held in.

Keshavanand Bharti Vs. State of Keral (1973)

That the legality of constiutional amendment is subject to judicial review.

Indira Neharu Gandhi Vs, Raj Narain (1975)

Mathew J discuss this theory i.e. amending power of constitution is constituent power law making power is a power to make law in tune with the constitution law making power is to be exercised with sovereign legislative power which has to be derived from the constitution whenever amending body exercised power in the form of law and that law could be a constitutional law legality or validity of a legislative law is to be determined on the basis of constitutional law where as the validity of constitutional law cannot be judge or determined on the basis of any other external source.

Any valid law has to satisfy two conditions.

1) Legally constituted body (Parliament)
2) Legally valid procedure (Article 368)

Amendment of Constitution is also subject to two ingredient every constitutional amendment is to be tested with basic structure doctrine of the constitution by the supreme court.Thus the basic structure doctrine is nothing but a grundnorm on which the constitutional amendment is to be tested. So Kelsen's contribution towards legal theory is vast as he brought the notion of recognition of law by validity.

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