



RAMA UNIVERSITY

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FACULTY OF JURIDICAL SCIENCES

Course : B.A LL.B/BB.A LL.B

Semester :IInd

SUBJECT: Jurisprudence

SUBJECT CODE: BAL206/BBL 206

LECTURE: 3

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Lecture-10



Lecture – 10:-Pure theory of law with Indian perspective

Pure theory of law with Indian perspective:-

Shifting of legal paradigm from ancient to colonial to the modern legal system gives Kelsen's pure theory of law a theoretical framework. After Independence, When a democratic country was to be formed, a need for standard and supreme law was felt for the coordination of people. Hence, a committee was formed for drafting the Constitution of India that would confirm public welfare and the public rights of society. It was drafted in such a manner that it is accepted and followed by everyone

Constitution of India is the supreme source of law in our country. Constitution is accepted and followed by everyone in the country. It is the basis of legal order which can be called a Grundnorm that validates legal system of our country. It is believed that all the laws made should comply with the principles mentioned in the constitution. It is deemed that Grundnorm cannot be changed and it can only go through a change when it is the basis of a political revolution. However, according to Article 368 of Constitution, Parliament has the power to amend any part of the constitution for the welfare of society to match the needs of changing nation.

Preamble of our constitution starts with "WE, THE PEOPLE OF INDIA, having solemnly resolved...", clearly shows the source of authority of the constitution. Moreover it ends with "...do HEREBY ADOPT, ENACT, AND GIVE OURSELVES TO THE CONSTITUTION." This shows that people of India have themselves adopted and given themselves to the constitution. "having solemnly resolved" means people are obligated by the constitution without any exemption. The Preamble also mentions "given by the people to themselves." Herein, the Constitution abides by the test of Grundnorm that demands pre-supposition.

One can also refer to the principle of constitutional morality, which mentions that one is obligated to follow norms as mentioned in constitution and consider constitution to be

supreme. It also says there must not be any action that is arbitrary and thus, violates the supreme law of the land. This approach was explained in **Naz Foundation vs. Government of NCT, Delhi**, where criminalization of homosexuality created a conflict between basis of morality and constitutional morality. It was held that, in the absence of compliance with constitutional morality, such laws would be invalidated. Thus, Grundnorm is seen as an ideal method to avoid conflict based on morality. Article 37 Indian constitution says that all the law must obey the Directive Principles provided in Part IV of the constitution and they shall form the basis of governance of the country. But, in **State of Madras Vs. Smt. Champakam**, the Supreme Court overruled past government order and held that reservation at educational institutions on the basis of caste violates fundamental right Article 29 of the constitution. Herein, the Supreme Court believed the fundamental right to be the supreme law of the country. Similarly in **A.K. Gopalan vs. State of Madras**, Supreme Court interpreted 'procedure established by law' mentioned in Article 21 as any substantive or procedural provision of enacted law. Herein, Court interpreted the law as it is and not as what it ought to be. Reference to Kelsen's theory can also be found in parts of **Shrimati Indira Gandhi vs. Raj Narain And Ors.**

Article 13 of Constitution mentions that, no such law shall be made which is in violation of fundamental rights. In **Kesavnanda Bharti Vs. State of Kerala**, It was held that, yes, fundamental rights can be amended but they should not disrupt the basic structure or framework of the constitution. In this case, the Supreme Court introduced the principle of basic structure. In the words of Hon'ble Mr. Justice Arjan Kumar Sikri "The expression 'amendment of this Constitution' does not enable the Parliament to completely change the fundamental features of the Constitution so as to destroy its identity" Here again, Constitution of India fits under the purview of Grundnorm that says there ought to be a basic rule and here, the Constitution proves to be the ultimate source of law.

In the case of Squadron Leader **H.S. Kulshrestha vs. Union of India**, court clearly mentioned Constitution of India to be Grundnorm of the nation. It held that "According to the theory of the eminent jurist Kelson, in every country there is a hierarchy of laws, and the highest law is known as the Grundnorm of law. In our country the fundamental norm is the Constitution. Similar statement was provided in another case of **Abdur Sukur & Another v State of West Bengal & others**, court mentioned constitution as a Grundnorm of all Indian statutes.

Conclusion:-

Hans Kelsen is one of the most influential legal philosophers of the last century has contributed to answering some basic questions about the law.

The first of these is related to the theories of law, which should be on the law, on one hand, and on the other hand, for the institutions, practices, and works of our society.

The second aspect of Kelsen's theory is that the whole system is interconnected to each

other as a hierarchy of norms with each other and a basic norm stands on top of this hierarchy, which is called Grundnorm, which is the highest order, and the validity of this Grundnorm is to be supposed. All other norms are their derivatives of the legitimacy of this Grundnorm, and no one can question the validity of this Grundnorm.

Another aspect of Kelsen's theory is that it presents us with a dynamic legal order instead of just a static. Law is organized through the maintenance of the system stability through the broadness and simplification of its various parts principles and ideological compartments and, in a nutshell, though tending to become a logical system, a perfect and complete logical system.