



RAMA UNIVERSITY

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FACULTY OF JURIDICAL SCIENCES

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Lecture-9



Lecture – 9- Pure theory of Hans Kelsen

Pure theory of Hans Kelsen

Generally, there is a system of laws, rules, and regulations which are implemented through social institutions to operate human behavior. Although, the word “law” has no universally accepted definition. Laws can be made by law legislation through legislation resulting in statutes, the executive through decrees and regulations, or judges through binding precedents.

The idea of a Pure Theory of law was propounded by the formidable Austrian jurist and philosopher Hans Kelsen (1881-1973). Kelsen began his long career as a legal theorist at the beginning of the 20th century.

Kelson theory stands at the same level and has a similar importance to Austin’s theory. Kelson developed his theory on law and made a great contribution to jurisprudence. Positivism was redefined and redefined by Kelson’s pure principle and is part of analytic positivism and parcel. Kelson developed his theory on a theoretical and philosophical basis.

According to Kelson, the weather of positivism was sown by natural lawyers like Stamler, not positivists. Stamler invents the concept of purity. The concept that the law would be pure from any other investigation such as sociological, political, historical, logical, etc. reflects the purity of the law. The law will not be based on all those components, deprived, connected, or mixed. Thus, according to Kelson, “the law will stand on its own.”

Hans Kelsen:-

Hans Kelsen (d. 1973) was an Austrian jurist, legal philosopher, and political Philosopher belonging to a legal positivism school of thought. Roscoe Pound was appreciated as Kelsen’s “undoubtedly the leading jurist of time.” Kelsen is considered to be one of the pre-eminent jurists of the 20th century. Kelson became famous due to his pure theory of law and the doctrine of Pure law.

His book, entitled “The Pure Theory of Law”, was published in two editions, one in Europe in 1934, and a second extended edition after he had joined the faculty at the University of California at Berkeley in 1960.

According to Kelsen, laws are scattered in the society which creates ambiguity in the source of the law. There is a whole variety of laws and regulations. The laws have scattered which have created the inequality of the class. There is a kind of chaos in the legal system. Therefore, Kelsen went to develop his pure principle of law to achieve uniformity.

Object:-

The objective of this story is to become the homogeneity of laws and the legal system of laws is scattered and it is difficult to find the actual source of the law. Kelsen rejected Austin's proposal to set up a superior authority (sovereign) as a source and he interpreted the pure principle which is necessary to achieve the order of symmetry in the legal system. So the source of the law can be traced. The validity of the law can be fixed on the basis of pure principle.

Key Features of Kelsen's Pure Theory ?

1. Law as Science:

Kelsen tried to present a theory that could be attempted to change Law in science, a theory that could be understood through logic.

2. As a positive law:

In the first paragraph of the pure theory of law, Kelsen introduces his theory as a theory of positive theory. This principle of positive law is then presented by Kelsen as a hierarchy of laws that begins with one basic norm, i.e. **Grundnorm** , where all other norms are related to each other either being inferior norms.

3. Law "As it is":

Kelsen emphasized that analysis should focus on the law 'as it is' in fact laid down, not as 'it ought to be'.

4. Law and morality:

Kelsen's strict separation of law and morality is an integral part of his pure theory of law.

5. The theory of law should be uniform:

According to Kelsen, the theory of law should be applied at all times and in all places.

6. Static Aspect of Law:

Kelsen distinguished the static theory of law from the dynamic theory of law. The static theory of law represented the law as a hierarchy of laws where individual laws were related to each other either being inferior, the one to other, or superior with respect to each other.

Critical Analysis:-

1. The theory of Kelsen suggests that Grundnorm is the concept of the Constitution that ought to be followed. The Constitution of a country is a sociological, political document, and therefore Grundnorm is not pure.
2. Kelsen also said that the law should be kept free from ethics/morality. A general question should be raised here, whether it is possible to keep the law free of ethics/morality? Kelsen insisted on the law to be effective and thus he accepted indirectly ethics as a part of effectiveness.
3. Kelsen attempted to change the law into a science, a theory that could be understood through logic, but on the other hand, he emphasized the validity of the Grundnorm to "assumed", rather than based on some "logic".

4. Kelsen tried to find the law and legal norms in a middle realm between absolute ethical values and social facts. Therefore, rejection of the relevance of ethics ideas makes the legal science sterile and useless and rejects the factual nature of law separating it from reality.

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.