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Assistant Professor

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HANS KELSEN

Kelson was born at Prague in Austria in 1881 and was a Professor of 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 expounded his 'Pure theory of law' which is considered to be Kelsen's unique contribution to legal theory. Kelsen's pure theory of law is akin to that of Austin's theory of law, although Kelsen, when he began to develop his theory was quite unaware of Austin's work. He nevertheless recognised the essential identity of his own objectives with Austin's, namely, to base a theory of law on a positive legal order or on a comparison of the contents of several legal orders and thus by confining jurisprudence to a structural analysis of positive law to separate legal science from philosophy of justice and sociology of law. He wished to free the law from the metaphysical mist with which it has been covered all times by the speculations on justice or by the doctrine of 'jus naturale'. In this sense Kelsen's theory is called the 'pure theory of law'.

As a theory, thus, 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 it ought to be? It is a science and not a politics of law.

The theory of Kelsen says Dias has represented a development in two different directions. On one hand, it makes the highest development to date of analytical positivism. On the other hand, characterised the close of 19th century and the beginning of 20th century. This is not to suggest that Kelsen reverted to ideology. For Kelsen and his followers any such legal idealism is unscientific. Nearly a century separates the work of Hans Kelson from that of Austin.

If Austin was driven to make his jurisprudence rigid because of the confusion of previous writers, Kelsen represents a reaction against the modern schools which have so far widened the boundaries of jurisprudence that they seem almost conterminous with those of social science. But while Austin did not consciously formulate a detailed philosophy, Kelsen admittedly builds on the doctrine of Kant. Most philosophers emphasize that jurisprudence must study the relationship between law and justice, but Kelsen wishes to free the law from metaphysical mist with which it has been covered at all times by the speculations on justice or by the doctrine of ius naturae. He

is thus a philosopher in revolt from the tendencies to which philosophy had led so many writers. He desires to create a pure science of law, stripped of all irrelevant material, and to separate jurisprudence from the social sciences as rigorously as did the analysts.

The mathematician is not interested in the way in which men thinks nor is he directly concerned whether his work is to be used to build a bridge or to work out a new system to break the bank at Monte Carlo: so the jurist, if he is to be scientific, must study the legal rules abstracted from all social conditions. Kelsen refuses to define law as a command, for that introduces subjective and political considerations and he wishes his science to be truly objective.

An interesting example by which to test Kelsen's theory is the Unilateral Declaration of Independence by Rhodesia. The Privy Council, as part of the English legal order, naturally decided against the validity of the Rhodesian emergency powers which had not been laid down in accordance with the Grundnorm the court accepted. The Rhodesian courts looked at the problem in the light of the new legal order created by the declaration of independence and relied partly on the theory of necessity and of the actualities of politics. In other words, these courts in effect accepted a new Grundnorm for Rhodesia.

LAW IS A NORMATIVE SCIENCE

Law norms are 'ought norms'. According to Kelsen, law is a normative science. But law norms have a distinctive feature. They may be distinguished from science norms on the ground that norms of science are norms of being of is' (sein), while the law norms are 'ought'(sollen) norms. Law does not attempt to describe what actually occurs but only prescribe certain rules. It says, if one breaks the laws, then he ought to be punished.' These legal 'ought' norms differ from morality norms in this respect that the former are backed by physical compulsions which the latter lack, but Kelsen does not admit the command theory of Austin as it introduces a psychological element into the definition of law which Kelsen avoids.

HIERARCHY OF NORMATIVE RELATIONS

The science of law to Kelsen is the knowledge of hierarchy of normative relations. He builds on Kant's theory of knowledge and extends this theoretical knowledge to law also. He does not want to include in his theory 'what the law ought to be' and speaks of theory of law as a structural analysis, as exact as possible, of the positive law, an analysis free of all ethical or Practical judgment of value. According to Kelsen, a legal order is comprised of norms placed in a hierarchical manner, one norm placed above another norm and every norm deriving its validity

from the norm above it. The hierarchy takes a pyramid shape and symbolizes the legal order. In this way there comes a final stage of highest norm which serve basis for all infertile norms, that is known as the basic norm or Grund Norm. The Grund norm is the basic point of the philosophy of Kelsen. The legality or validity of all the norms can be tested against the Grund norm. The validity of Grund norm can't be objectively tested. The Grund norm is the common source for the validity to the positive legal order or all norms that belong to the legal order. The Grund norm must be efficacious i.e., it must be obeyed by the people at large. Efficacy is the validity of the Grund norm.

Basic Norm (Grundnorm)

Enabling Act (Tertiary Norm)

By Law (Secondary Norm)

Special official Action Particular Primary Norm

GRUND NORM

The Grund norm is the starting point in a legal system. From this base, a legal system broadens down in gradation becoming more and more detailed and specific as it progresses. Kelsen calls it 'general concentrisation' of 'Grund norm' or the basic norm thus focusing the law to specific situations.

Kelsen's pure theory of law is based on pyramidal structure of hierarchy of norms which derive their validity from the basic norm which he termed as Grund norm. Thus, Grund norm as basic norm determines the content and gives validity to other norms derived from it. Kelsen has no answer to the question as to whereupon the basic norm derives its validity. He considers it to be a meta-legal question in which jurist need not to intrude.

The task of legal theory is only to clarify the relation between Grund norm and all other inferior norms and not to enter into other questions as goodness or badness of Grund norm. This is the task of political science, or ethics or of religion.

Jullius Stone rightly comments that as Austin's sovereign in a particular society is a mere starting point for his legal theory, so also basic norm has to be accepted as a hypothetical starting point or fiction which gives a legal system countenance and a systematic form. Thus, while all

norms derive their validity from the basic norm, the validity of basic norm cannot be objectively tested, instead, it has got to be presumed or pre-supposed. Kelsen however considers Grund norm as a fiction rather than a hypothesis.

Kelsen recognised the Grund norm need not to be the same in every legal order, but a Grund norm of same kind there will always be, whether in the form, e.g., of a written constitution or the will of a dictator. There appears no reason why there need not to be one Grundnorm. 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. This is not in contradiction of Kelsen's theory of law. Kelsen has firmly said that a system of law cannot be grounded on two conflicting Grundnorm. In England, obviously, there is no conflict between the authority of the King in Parliament and of judicial precedents, as the former precedes the latter. The pure theory of law thus operates with this basic norm as with a hypothesis, but where no such explicit formulation exists, Kelsen is by no means clear in guiding our search. For him the only task of legal theory is to clarify the relation between the fundamental and all lower norms, but not to say if this fundamental norm is good or bad. This is the task of Political science or ethics or of religion.

NORM

To Kelsen, a norm is the meaning of an act of willing by which a certain behaviour is commanded or permitted or authorized. The meaning of such act of will cannot be described by the sentiment that the other individual will behave in that way only but he ought to behave in that way.

ESSENTIALS OF KELSEN'S SYSTEM

The essential foundations of Kelsen's system maybe enumerated as follows;

- The object of a theory of law, as of any science, is to reduce chaos and multiplicity to unity.
- Legal theory is a science and not volition. It is knowledge of what the law is and not of what it ought to be.'
- The law is normative and not a natural science.
- Legal theory is a theory of norms, and is not concerned with the effectiveness of legal norms.

 A theory of law is formal, a theory of the ordering, changing contents in a specific way.

 The relation of legal theory to a particular system of positive law is that of possible to actual law.

FEATURES OF KELSEN'S THEORY

The theory of law must be ideal with the law as it is and not with the law as it ought to be. i.e., it must concern with the existing law.

 The theory of law is different from the law itself. Law is a mass of heterogeneous rules. The function of the theory is to distinguish between the different types of the law.

 A theory of law must be pure. It must be free from all ambiguities. A theory must explain all the aspects of law without reference with other subjects like sociology, political science, economics, history etc., because they are subject to variation from one place to another and from one time to another. The pure theory which would have the ingredient of only one discipline, i.e., law.

 Law is a norm, which is a prescription norm, the function of which is to prescribe.

 Law is the hierarchy of the norms, and each norm derives its validity from the superior norm.

 Finally there comes the highest norm to which all inferior norms derive their validity i.e., known as Grund norm.

 Kelsen's approach is much wider than that of Austin, as Kelsen includes; policy, rule, doctrine and standards in addition to the commands within the purview of the norm.

IMPLICATIONS OF THE KELSEN'S THEORY

The implications of Kelsen's theory are wide and many. It covers concepts of state, sovereignty, private and public law, legal personality, right and duty and international law.

LAW AND STATE NOT TWO DIFFERENT THINGS

The most significant feature of Kelsen's doctrine is that both the law and state are identical; for him the state is nothing but a system of human behaviour, an order of social compulsion. This compulsive order is different from the legal order, for the reason that within one community only one and not two compulsive orders can be valid at the same time. It is therefore, redundant to distinguish between law and state, because every act of state is a legal act. A human act is only designated act of state by virtue of a legal norm which qualifies it as

such; on the basis of the norm the act is imputed to the state, is related to the unity of the legal order.

The state as person is simply the personification of the law. Kelsen, thus, rejects any dualism by saying that dualism of state and law is one of those tautologies which double the object of knowledge. Legal dualism, for him, is nothing but a reflection of and substitute for theology, with which it has substantial identities.

The reality of state is that it is a system regulating the social behaviour in a normative order. But such a working can be discovered only in a legal system. Really speaking, law and state are the same and the difference between them appears because we look at them from two different points.

NO DIFFERENCE BETWEEN PUBLIC AND PRIVATE LAW

Another very significant feature that comes out of the hierarchal structure of law is Kelsen's attack upon the traditional distinction between public and private law. Behind the division of public and private law Kelsen suspects, not without a reason, a political ideology which wishes this sphere of private law to appear as being beyond politics, whereas in reality private law institutions consist of a political ideology as strongly as public law institutions and relations.

According to Kelsen, there is no difference between public and private law when all law derives its force from the same Grund norm. No distinction between them can be made on the ground that they protect interests of different nature. Private interests are protected in public interest. He traces a political ideology behind this distinction- a motive to elevate public law and justice authoritarianism'. On this point, though from different premises, Kelsen reaches the same conclusion as Dugit and Renner.

NO DIFFERENCE BETWEEN NATURAL AND JURISTIC PERSON

Kelsen does not admit any legal distinction between physical and juristic person. Since, state is nothing but a legal construction; this leads us to the nest part of Kelsen's theory, the denial of any distinction between physical and juristic persons. As law is a system of normative relations and uses personifications merely as a technical device to constitute points of unification of legal norms, so the distinction between natural and juristic persons is irrelevant, while all legal personality is artificial and deduces its validity from superior norm. To Kelsen, the concept of

person is merely a step in the process of concretization, e.g., totality of claims, etc., and nothing else.

NO INDIVIDUAL RIGHTS

As law is a system of norm relations, so Kelsen and his followers recognise no individual right, except as a technical device which the law may or may not recognise in order to carry out legal transactions. Legal duties are the essence of law, for law is a system of 'oughts', whereas legal rights are by an incident. This necessarily severs law from any associations with political theory of the law, for example, from those which affirm certain inalienable rights of the individual.

CRITICISM AGAINST KELSEN'S THEORY

NO PRACTICAL SIGNIFICANCE

Sociological jurists criticize it on the ground that it lacks practical significance. Professor Laski, says, Granted its postulates, I believe the pure theory to be unanswerable but I believe also that its substance is an exercise in logic and not in life'. Some see Kelsen as "beating his luminous wings in vain within his ivory tower."

PURITY OF NORMS CANNOT BE MAINTAINED

Although Kelsen's theory has warmly been recognised, yet most writers point out that it provides no guidance whatever to a person in the actual application of the law. The quality of purity claimed by Professor Kelsen for all norms dependent on the basic norm had always been subject of serious attack. In the most enchanting language of Jullius stone: "….Since that basic norm itself is obviously most impure, the very 'purity' of the subsequent operations must reproduce that original impurity in the inferior norms, we are invited to forget the illegitimacy of the ancestor in admiration of the pure blue-blood of the progeny. Yet the genes are at work down to the lowliest progeny."

As absolute purity of any theory of law is a far cry, so Kelsen had to admit his defeat when it comes to the question of conflicting fundamental norms. The question which is the valid fundamental norm, his pure theory cannot avoid, for without it the whole structure would collapse. Similarly, the "minimum of effectiveness" formulae which Kelsen chose for him is at bottom nothing else but Jellink's normative Kraft des Faktischen.

How can the minimum of effectiveness be proved except by an inquiry into socio-political facts? Writing as late as 1942, he himself suspected if his pure theory of law is a

foundation without which the sociological and evaluative inquiries cannot proceed. Sociological jurisprudence according to him, presupposes normative jurisprudence, since until the later has determined what are legal norms, sociological jurisprudence has no definite province. The truth is, however, something else. It is his pure theory of law which is important as an instrument until the other approaches to law provide the hypothesis of the basic norm.

HIS GRUND NORM VAGUE AND CONFUSING

The first point in Kelsen's theory which is greatly criticised is his conception of Grund norm. Though Kelsen has given its characteristics as possessing 'minimum effectiveness' it is very vague and confusing and it is difficult to trace it out in every legal system. But its discovery is a condition precedent for a successful application of Kelsen's theory to a legal system. Kelsen seems to have given his thesis on the basis of the written constitutions as Austin created his 'sovereign' on the basis of the English system of government but eve in written constitutions. 'Grund norm' is made up of many elements and any one of these elements alone cannot have the title of Grund norm. Another criticism against the conception of Grundnorm is from the point of view of the Historical school. It says that the origin of law is in customs and Volkgiest and not in any other source, such as 'Grund norm'. But on this point Kelsen finds in Professor Friedmann and stone very strong advocates of his view. Friedmann says, "The fact that the ultimate authority in any given legal order may be a composite one, as in the United States of America, or Great Britain, does not alter the fact that such an ultimate authority must exist". So far as the criticism by the jurists of the Historical School is concerned, Kelsen is decidedly a positivist and therefore, this criticism does not hold good against him.

NATURAL LAW IGNORED

Lauterpacht, an ardent follower of Kelsen, has also from a different side questioned if the theory of hierarchy of legal norms does not imply a recognition of natural law principles, despite Kelsen's blatant warning of natural law ideology. Many natural law theories do not establish absolute ideals but affirm the principle of higher norm superior to the positive law. as mankind become legally organised, natural law rules would become positive norms of a higher order, and the difference between Kelsen's theory and those of modern law theories would disappear. Hagerstorm, too, appears to have unfolded the natural law philosophy concealed in Kelsen's assumption of the unconditional authority of the supreme power, or, in verdross, "constitution of

the law of nations" as the formulation on which the principle of international law (Pacta Sunt Servanda) is supposed to ground.

THE REALIST MOVEMENT-LEGAL REALISM

Legal realism implies that judicial decisions must conform to socio-economic factors and questions of policy and values. In America we have the Realist School of jurisprudence. This school fortifies sociological jurisprudence and recognises law as the result of social influences and conditions, and regards it as judicial decisions.

OLIVER HOMES 1841-1935

Oliver Holmes is, in a sense, an exponent of the realist school. "Law is what the courts do; it is not merely what the courts say." Emphasis is on action. As Holmes would have it, "The life of the law has not been logic; it has been experience."

K. N LLEWELLYN

Karl Llewellyn, in his earlier writings was a spokesman for orthodox realist theory. He argued that the rules of substantive law are for less importance in the catula practice of law than had hitherto been assumed. "The theory that rules decide cases seems for a century to have fooled, not only library-ridden recluses, but judges." He proposed that the focal point of legal research should be shifted from the study of rules to the observance of the real behaviour of the law officials, particularly the judges. "What these officials do about disputes is, to my mind, the law itself."

This last statement, however, was withdrawn by Llewellyn in 1950. In his more recent writings, he has placed a somewhat greater stress on the importance of normative generalization in law, pointing out that the rule part of law is "one hugely developed part" of the institution, but not the whole of it. He has also, in keeping with the postulates of sociological jurisprudence, sought to explore the relations and contacts between the law and the other social sciences, coming to the conclusion that the lawyers as well as the social scientists have thus failed to make an "effective effort at neighborliness."

K. N Llewellyn concentrated rather on the uncertainty in the actual operation of the rules in appellate courts- he wished to make a sustained and realistic examination of the best practice and art of the best judges and their judging and he had, in a major work attempted just such a study. In America, sociological jurisprudence has developed an extreme wing under the name of

the Realist School. The sociological method has brought legal science into intimate relation with the facts of social life and made jurists recognise law a product of social forces.

Llewellyn, one of the exponents of the realist movement, has set forth the following points as the cardinal features of American realism;

- Realism is not so much a new school of jurisprudence as a new methodology in jurisprudence.
- Realists regard law as dynamic and not as static. They regard law as serving certain social ends and study any given cross-section of it to ascertain to what extent these ends are being served.
- Realists, for the purpose of observation of the functioning of any part of the legal system accept a 'divorce of is from ought". This means that the ethical purposes which, according to the observer, should underlie the law, are ignored and are not allowed to blur the vision of the observer.
- Realism emphasises the social effects of laws and of legal decisions.

Another leading realist was Frank (1889-1957) who was known as a "constructive legal sceptic." Mr. Justice Cardzo, in his "The Nature of the Judicial Process", points out that law never is, but is only about to be. Even existing decisions may be overrules. Law is not something certain- not what the judges have said, but what they will do.

SELF-TEST QUESTIONS

S.NO	Question	Option (a)	Option (b)	Option (c)	Option (d)
1	Hons Kelson defined 'Science' as a	System of knowledge	Branch of law	Totality of cognitions	a' & 'c' both
2	Kelson pure theory of law is also known as	Theory of Interpretation	Theory of Implication	Theory of Pyramid	Theory of Science
3	Kelson described law as	Normative Science	Formal Science	Branch of Science	Divine Science
4	Like Austin, Kelson also considers 'sanction' as _____ element of law	Unessential	Essential	Extra	Intrinsic
5	As per Pure theory of Law by Kelson, law is a primary norm which stipulates	Sanction	Command	Sovereignty	None of these

Answers: 1-(d),2-(a), 3-(a),4-(b),5-(a)