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APPLICATION OF KELSEN'S THEORY IN INDIA

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Abstract

New problems created by new changes and developments necessitated a pragmatic approach. The advancement in contemporary science induced the legal thinkers to reject metaphysical quests in favour of fact observations or experiences on the nature and functions of law. Jeremy Bentham heralded a new era in the history of legal thought. John Austin, an influential jurist, is considered as the typical representative of analytical positivism. The major thrust in Austinian positive law was on separation of law from morals. Although, Bentham and Austin are considered to be the forerunners of positivist school in England yet, the school later received encouragement in the United States and in the European continent from a number of jurists. Hans Kelsen, an Austrian jurist and legal philosopher, has the credit of reviving the original analytical legal thought in the 20th century. His "Pure Theory of Law" was with substantial analytical refinement of theories propounded by his precursors namely, John Austin. Kelsen, indeed, attempted to device a logically consistent theory which could be uniformly acceptable to any legal system. In this endeavour, the present study made an attempt to trace and testify the application of Kelsen's theory in Indian context. The study for this purpose collected data from diversified sources which mainly include secondary sources. Data gathered from various sources have been reviewed and analysed thoroughly using, wherever needed, appropriate illustrations. The study records initial finding that the application of Kelsenite idea of Grundnorm in India can be traced back to ancient legal system itself.

Key Words: Positive Law, Analytical Positivism, Pure Theory of Law and *Grundnorm*.

Introduction

The natural law theory suffered a setback in the wake of 19th century developments and practical approach to law by the positivists. New problems created by the new changes and developments necessitated rational and concrete solutions. Doctrine of *laissez faire* which favoured minimum interferences of the State in the economic and political activities of individual was weakening the power and authority of the sovereign which could be restored only by a stable deterministic legal theory instead of fluid and reflex theories of natural law which in turn resulted in the surfacing of positivism.

The chief propounders of positivism namely, Jeremy Bentham and John Austin condemned natural law in strongest words calling it absurd and confusing. In Germany, Darwin's *Origin of Species* and Herbert Spencer's *Social Statics* shattered the foundation of natural law as it was realised that 19th century complex problems needed a matter-of-fact approach which the natural law theories could not provide (Paranjape, 2013).

Jeremy Bentham heralded a new era in the history of legal thought. Although, Austin is considered to be the father of positivist thought yet, Bentham whose many works have lately become known appears to be the founder of this approach. Positivist approach insists on a strict separation of positive law from ethics and social policy and identifies justice with legality. Positivism indeed concentrates on law as it *is* and not on law as it *ought to be*. This separation eliminates all considerations of ideologies and value judgments.

While Bentham and Austin are being considered to be the forerunners of positivist school in England, the school later received encouragement in the United States as well as in the European continent from a number of jurists. Hans Kelsen, who has developed the "Pure Theory of Law" with great analytical refinement, belongs to this school. He was one among the jurists who has the credit of reviving the original analytical legal thought in 20th century through his pure theory of law which is considered to be Kelsen's unique contribution to legal theory.

Kelsen rejected Austin's definition of law as a command because it introduces subjective considerations whereas he wanted legal theory to be objective. He tried to modify Austin's theory of law by propounding his own theory. For Austin, sovereign being the law maker was considered superior to law. But Kelsen denies the existence of sovereign as a personal entity. When all derive their power and validity ultimately from the *Grundnorm* there can be no supreme or superior person as sovereign. He denies the existence of State as an entity distinct from law, but they are in fact one and the same. Kelsen, however, observed that *Grundnorm* need not be same in every legal order but there will always be a *Grundnorm* of some kind.

Thus, it can be asserted that Kelsen's pure theory of law made a substantial refinement of the theories propounded by his predecessors. Indeed, Kelsen attempted to device a logically consistent theory which could be uniformly acceptable to any legal system. Kelsen believed that a theory of law should be uniform, that is, it should be applicable at all times, and in all places. In this endeavour, the present study made an attempt to testify the relevance of Kelsen's theory in context of Indian legal system.

Objectives of The Study

The present study, thus, undertaken with the following aims and objectives:

- To trace the emergence of positivism ;
- To define and analyse Kelsen's "Pure Theory of Law"; and
- To trace and testify the application of Kelsen's theory in India.

Research Methodology

The methodology adopted for the purpose of this study is a *doctrinal method*. However, the present study is analytical one.

The study has referred to the Constitution, case laws, and existing *secondary sources* such as, books, research papers on the topic published in various journals, and other published web based resources accessed through internet to incorporate the observations of various jurists, authors and researchers who worked on the subject with the intention of presenting a holistic view.

The data gathered from various sources have been reviewed and analysed thoroughly using, wherever needed, illustrations and findings thereon have been recorded sequentially in line with the objectives and purposes set out in the study.

Hans Kelsen and His Contribution to Legal Theory

Hans Kelsen was an Austrian jurist and legal philosopher, with major area of interests "Philosophy of Law". The German *Reine Rechtslehre* (Pure Theory of Law*)* is a book by Hans Kelsen, first published in 1934. Late in his career while at the University of California (although officially retired in 1952), Kelsen rewrote his short book of 1934 which resulted in a greatly expanded second edition (effectively a new book) published in 1960. The second edition of the book appeared in English translation in 1967 as *Pure Theory of Law* and the first edition in English translation in 1992 as *Introduction to the Problems of Legal Theory*. The theory proposed in this book has probably been the most influential theory of law produced during the 20th century. Kelsen throughout his active career was also significant contributor to the theory of judicial review, the hierarchical and dynamic theory of positive law, the science of law etc.

Kelsen's Pure Theory of Law- Defined

The distinction between propositions of science and propositions of law is the starting point of Kelsen's reasoning. Kelsen described law as a "normative science" as distinguished from natural science. Law does not attempt to describe what actually occurs but only prescribes certain rules. It articulates, "If one breaks the law, s(he) *ought* to be punished" and thereby, it is the *ought* proposition which provides normative character to law. Thus according to Kelsen, law is a "primary norm which stipulates sanction". Norms are regulations setting

forth how men *ought* to behave, and positive law is thus a normative order regulating human conduct in a specific way (Kelsen, 1941). These legal *ought* norms differ from morality norms in the sense that the former are backed by physical compulsion which the latter lack.

Kelsen's theory is known as the pure theory of law because according to him a theory of law should be free from all extra-legal disciplines. Kelsen, thus, does not admit the Austin's idea of command as it introduces a psychological element into a theory of law and therefore, be rejected. Hence, a theory of law, according to Kelsen, should be pure.

The Grundnorm- The Starting Point- A Fiction

Grundnorm is a German word meaning "fundamental norm". Kelsen's pure theory of law is based on pyramidical structure of hierarchy of norms with *Grundnorm* at the apex. Kelsen defined *Grundnorm* as "the postulated ultimate rule according to which the norms of this order are established and annulled, receive or lose their validity". The Grundnorm is thus at the top of the hierarchy of norms which inspire the prescriptive elements of the positive laws of a legal system (Hopton, 1978).

The *Grundnorm* is the starting point in a legal system and from this base; a legal system broadens down in gradation becoming more and more detailed and specific as it progresses. This is a dynamic process (Patterson, 1952). He named Austin's theory static because it considers law as a system of rules complete and ready for application without paying any attention to the process of their creation. But the study of dynamics of law is also necessary because law regulates its own creation and Kelsen's theory includes it. Thus, according to Kelsen in every legal order there will always be a *Grundnorm* of some kind.

Kelsen, however, added that any discussion about the nature and origin of the *Grundnorm* is not within the province of pure theory of law. The task of legal theory is to clarify the relations between the fundamental and all lower norms, but not to say whether this fundamental norm itself is good or bad. He considers *Grundnorm* as a *fiction* rather than a hypothesis.

Pyramid of Norms- Legal Order of A State- A Dynamic Process

In Kelsen's view State is a "synonym for the legal order which is nothing but a pyramid of norms". Kelsen treats State as a unity of legal order. The legal order as conceived by him receives its unity from the fact that all manifold norms of which the legal order is composed can be traced back to a final source. The process of one norm deriving its power from the norm immediately superior to it, until it reaches the *Grundnorm* has been termed by him as "concretisation" of the legal system (Paranjape, 2013). Thus the system of norms proceeds from downward to upward and finally it closes at the *Grundnorm* at the top.

Every legal act relates to a norm which gives legal validity to it. The validity of a norm in turn, however, is not to be derived from any fact outside the law, but from some other norm standing behind it and imparting validity to it. The validity of a norm is ascertained with reference to its authorising norm, which confers a power to create it, and may also specify conditions for its exercise. A particular norm, therefore, is authorised if it can be included under a more general norm. In any legal order, a hierarchy of norms is traceable back to some initial fundamental norm on which the validity of all others ultimately rests. Thus, the entire hierarchy of norm-making organs and the process of concretisation of norms which in Kelsen's view termed as the legal order of a State take the shape of a pyramid.

Assumptions

Kelsen's theory, thus, is founded on certain basic assumptions namely,

- Legal theory is science, not volition for it is knowledge of what the law is, not of what the law *ought* to be;
- The aim of a legal theory is to reduce chaos and multiplicity to unity;
- The law is a normative not a natural science;
- Legal theory as a theory of norms is not concerned with the effectiveness of legal norms;
- A legal theory is formal, a theory of way of ordering, changing contents in a specific way, etc.

Application of The Theory In India

Kelsen used the word *Grundnorm* to denote the basic norm, order, or rule that forms an underlying basis for a legal system, and it is regarded as the source of the validity of positive law of that very legal system. Thus, the question is whether Constitution can be regarded as the *Grundnorm*? The answer is simply no. The *Grundnorm* is the reason for the validity of the Constitution and merely marks the fact that a Constitution is accepted by the legal system. It is not the Constitution itself. It is for this reason why Kelsen said that *Grundnorm* is not the Constitution, it is simply the pre-supposition made in the theory for the interests of legal science that this "Constitution *ought* to be obeyed" (Hopton, 1978). The theory is based on a need to find a point of origin for all laws (similar to the concept of first principle). Hence, *Grundnorm* only imparts validity to the Constitution, and all other norms derived from it; but it does not dictate its content. The *Grundnorm* can only be changed by political revolution.

Analytical positivism which dominated the English legal system for more than a century was mainly founded on three basic assumptions namely, First, sovereign as the law creating authority; Secondly, emphasis on law as it is and Thirdly, insistence on sanction, that is, the coercive force behind enforcement of laws. The analytical positivism of the English legal system when examined in the light of the ancient Indian jurisprudence would bring to forefront certain contradiction. In the Austinian positivism, sovereign being the law maker

was considered superior to law. On the contrary, the ancient India legal order was based on sovereignty of *Dharma* and not that of a monarch, which was given the highest place by which the subjects as well as the ruler were uniformly bound.

India has an unbeatable tradition of the principle of *Dharma* governing all activities of all persons in community life individually and collectively. The concept of *Dharma* has been well understood and accepted as a code of conduct to be observed by all. The present study thus hereby records the initial finding that the application of Kelsenite idea of *Grundnorm* in *Indian context* can be traced back to the legal philosophy of ancient time in so far as the Indian jurists also subordinated the authority of the King to *Dharma*. The scriptures enjoined upon the King, a duty to rule and administer justice in accordance with *Dharma*. Moreover, the same was accepted by all whole heartedly for the very survival of the society.

However, the advent of British rule in India brought about radical changes in the then existing legal system which sought to embed British imperialism in the land. Macaulay, the Law Member of the Governor-General-in-Council rejected ancient Indian legal and political institutions. He then gradually introduced the notions of British juristic concepts through equity, justice and good conscience and brought about codification of laws. Theses codified British laws were similar to Austinian concept of positive law having the element of certainty, definiteness, effective enforcement and sanction, and as such, positivism found its place in the Indian legal system during the British colonial rule.

The struggle for independence was over by August 1947. But the attainment of independence was not an end in itself. It was only the beginning of struggle, that is, the struggle to live as an independent nation and also to establish democracy based on the ideas of *Justice, Liberty, Equality* and *Fraternity*. The need of the Constitution forming the basic law of the land for the realisation of these ideas was paramount. Therefore, one of the first tasks undertaken by independent India was framing the Constitution which came into force on 26th January, 1950.

The *Preamble* to the Constitution begins with the words "WE, THE PEOPLE OF INDIA, having solemnly resolved ….", thus, clearly indicates the source of all authority of the Constitution. Further, the Preamble ends with the words "…. IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT, AND GIVE TO OURSELVES THIS CONSTITUTION", which further indicates that it is the people of India who adopted, enacted and given to themselves this Constitution. Thus, the Preamble declares that the Constitution has been "given by the people to themselves". Moreover, the people of India themselves after "having solemnly resolved", declared to be bound by this Constitution without any exception.

Hence, *Grundnorm* test is satisfied *for* the pre-supposition demanded by the theory found its place in Indian legal system even during post-independence era.

Further, as early as 1951, the argument that there is a distinction between Constitutional law and ordinary law was accepted in India. Patanjali Sastri, J., in *Sankari Prasad's Case* (1951) did not elaborate the point. But he emphasised the distinction when he observed:

"There is a clear demarcation between ordinary law which is made in exercise of legislative power, and constitutional law which is made in exercise of constituent power".

Constitution in India is regarded as basic law of the land due to its social acceptance or recognition and other laws assume validity because of their conformity with the Constitution. The institutions established under the Constitution namely, the Legislature, the Executive and the Judiciary (being norm-creating agencies in the Kelsenite sense) are subordinate to and have to act in conformity with provisions of the Constitution. For example, the legislative power of Parliament and the State Legislature has been subjected to certain limitations. The power derived from Articles 245 and 246 to make laws has to be exercised keeping in view the limitations outlined under Article 13 of the Constitution.

Hence, unity of the legal system is established for all laws enacted trace validity from a single source, that is, the source of validity of all laws here is the Constitution.

Although, the fact that the Constitution can be amended shows that it is possible to derogate from the authority of the Constitution itself. If a Constitutional provision is amended substantially, it can no longer confer validity upon the laws under it. Similar would be the effect, if, a provision of a Constitution is repealed. Yet, the reason for incorporating the provisions for amendment in the Constitution was that if no provisions for amendment were provided, there would be constant danger of revolution. Again, if the methods of amendment were too easy, there would be the danger of too hastily action all the time. Thus, a proper balance was kept between the danger of having non amendable Constitution and a Constitution which is too easily amendable.

In this backdrop, the Hon'ble Supreme Court in its landmark judgment given in *Kesavananda Bharati's Case* (1973) made it clear that under Article 368 Parliament cannot amend the "Basic Structure" of the Constitution. The question involved was as to what was the extent of the amending power conferred by Article 368 of the Constitution? A Special Bench of 13 Judges was constituted to hear the case. A proposition enunciated, by a majority consisting of Sikri, C.J., and Shelat, Hegde, Grover, Jaganmohan Reddy, Khanna, and Mukherjee, JJ., is that the power to amend does not include the power to alter the basic structure or framework of the Constitution to the extent of changing its identity. It is this proposition that will be applied in testing the validity of a constitutional amendment in the future. This ratio is common in the opinions of seven judges may be substantiated by the pure mechanical process of presenting excerpts from the opinions.

Sikri C.J., however, in his conclusion observed:

"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".

Though, the majority decision held that the basic structure of the Constitution cannot be destroyed by means of amendment, however, what constitutes the basic structure is not clearly made out. However, Sikri C.J., sets down the following as forming what he calls the "Basic Structure" of the Constitution.

"(1) Supremacy of the Constitution;
(2) Republican and Democratic form of government;
(3) Secular character of the Constitution;
(4) Separation of Powers between the Legislature, the Executive and the Judiciary;
(5) Federal character of the Constitution".

While the Judges enumerated certain essentials of the basic structure of the Constitution, they also made it clear that they were only illustrative and not exhaustive. They will be determined on the basis of the facts in each case.

In *Indira Nehru Gandhi v. Raj Narain* (1975), the Hon'ble Supreme Court applied the doctrine of "Basis Structure", and struck down clause (4) of Article 329A inserted by the Constitution (Thirty-ninth Amendment) Act, 1975 on the ground that it was beyond the amending power of the Parliament as it destroyed the basic structure of the Constitution. The amendment was made to validate with retrospective effect the election of the then Prime Minister which was set aside by the Allahabad High Court. Khanna J., struck down the clause on the ground that it violated free and fair election which was an essential postulate of democracy which in turn was a part of the basic structure of the Constitution. Chandrachud J., struck down clauses (4) and (5) as unconstitutional on the ground that they were outright negation of the right to equality conferred by Article 14, a right which is a basic postulate of our Constitution. He held that these provisions were calculated to damage or destroy the Rule of Law. The Hon'ble Court has thus added the following to the list of basic structure laid down earlier.

"(1) Rule of Law;
(2) Judicial Review;
(3) Democracy;
(4) Jurisdiction of the Court under Article 32".

Further, in *Minerva Mills's Case* (1980), the Hon'ble Court has held that the following are the "Basic Features" of the Constitution.

"(1) Limited power of Parliament to amend the Constitution;
(2) Harmony and balance between Fundamental Rights and Directive Principles;

(3) Fundamental Rights in certain cases".

Moreover, In *M. Nagraj's case* (2007), the Hon'ble Supreme Court has explained the "Basic Structure Theory" again in detail. The Court has held that basic structure theory develops systematic principles underlying and connecting provisions of the Constitution. These principles provide coherence and durability to the Constitution. The basic structure theory has its roots in the German Constitution. The theory is based on the concept of Constitution identity, and main object behind the theory is continuity.

Thus, the constitutional amendments made under Article 368 can still be challenged on the ground that they are destructive of the "Basic Structure" of the Constitution. Hence, supremacy of the Constitution prevails at all times, and the ideals upon which the Constitution is based cannot ever be destroyed.

Conclusion

As noted earlier, the emergence of positivism in point of fact is the outcome of a transition. The advancement in contemporary science induced the legal thinkers to reject metaphysical pursuits in favour of fact observations or experiences on the nature and functions of law. A notable feature of the positivist approach was its rejection of any attempt to articulate an idea of law outshining the empirical veracity of existing legal system.

The separation of law from value considerations, begun by John Austin in 1832 and carried on by a succession of English writers, has been improved and clarified in some important respects by Kelsen's theory. Moreover, Kelsen's theory came also as a reaction against the modern schools which have widened the boundaries of jurisprudence to such an extent that they seem almost coterminous with those of social science.

Indian jurisprudence is as old as humanity itself, there is no founder of it other than the Creator himself. Law proper has been a part and parcel of ancient *Sanatan Dharma* (meaning *"eternal dharma"*) which in Kelsenite sense can be regarded as *Grundnorm*. The advent of British rule in India, however, brought about radical changes in the existing legal system which was indeed, based on the model of British imperialism.

The post-independence era altogether called for a fresh approach to the existing laws which were hardly suited to the changed socio-economic and political conditions of the country. Thus, the Constitution of India based on the ideal notions of *Justice, Liberty, Equality and Fraternity* as laid down in the preamble itself has been "given by the people to themselves" thereby, the pre-supposition made in the theory propounded by Kelsen that *"One ought to obey the Constitution"* is established. Thus, the Constitution so adopted and in force is regarded as the supreme law of the land, and all other subordinate laws that seem to appear in the order gain their validity by reason of their conformity with the Constitution. Furthermore, no amendment can take away this "Fundamental Framework" of the Constitution.

Hence, the legal system prevailing in India bears a resemblance to the structure of legal system so put forward by Kelsen through his "Pure Theory of Law".

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