

KELSEN'S THEORY OF GRUNDNORM

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This article is an attempt to explain as to what is meant by Kelsons theory of grundnorm, in what way are they effective, its functions and whether the concept can be found in the Indian Constitution. Further a critical analysis has been drawn to come to a viable opinion with regard to the theory.

Introduction

Hans Kelsen (1881-1973) Austrian jurist and philosopher of law. Kelsen is known for the most rigorous development of a 'positivist' theory of law, i.e. one that rigorously excludes from its analysis any ethical, political, or historical considerations, and finds the essence of the legal order in the 'black letter' or laid-down law. A system of law is based on a Grundnorm or ground rule, from which flows the validity of other statements of law in the system. The ground rule might be that some particular dictates or propositions, such as those of the sovereign, are to be obeyed. The Grundnorm can only be changed by political revolution. The theory is best known in its development in the Allgemeine Staatslehre (1925, trs. and revised as General Theory of Law and State, 1945).

The theory of Hans Kelsen represents development in two directions. On one hand, it marks the most defined development to date of analytical positivism; on the other hand, it marks a reaction against the welter of different approaches that characterized the opening of the twentieth century. The most important feature of Kelsen's theory is grundnorm.

Grundnorm

Norms are regulations setting forth how persons are to behave and positive law is thus a normative order regulating human conduct in a specific way. A norm is an "ought proposition; it expresses not what is, or must be, but ought to be, given in certain conditions¹; its existence can only mean its validity, and this refers to its connection with a system of norms which it forms a part.

Frequently Kelsen remarks on the 'most significant peculiarity of law that regulates its own creation. That is, the creation of legal norms is authorised by other legal norms.² The decision of a judge creating a norm governing the circumstances, to which the decision relates, is authorized by the norms defining the court's jurisdiction. Those norms may be expressed in a statute, the enactment of which was authorised by other, more fundamental norms defining the proper procedures for legislations. They may be contained in a constitution, itself established on the authority of the norms contained in an earlier constitution. Thus, 'higher' norms authorize the creation of lower ones in various ways, indicating who can create them in what circumstances and

within what limits.³ 'Basic norm of a positive legal system is simply the basic rule according to which norms of the legal system are created; it is simply the setting into place of the basic material fact of law creation.'⁴

In an effort to use Hegelian philosophy in study of jurisprudence, Kelsen tried to develop Grundnorm. Hegelian philosophy wanted to place all cultures in a grand overarching philosophy of history according to the principle of freedom, Kelsen wants to identify a basic legal principle which will ultimately include or define the legal structures of all cultures. According to Kelsen the Grundnorm or Basic Norm is a statement from which all other duty statements ultimately get their validity from.⁵

Going up the chain of validity, or hierarchy, of law, on order to find its root of title, we must come to a finishing point, says Kelsen. If we were to continue this process, then we would never be able to establish the validity of any norm, because we would have to go till infinity.⁶ But, since, we can in fact, establish the validity of legal norm, then we must be able to get back to some ultimate norm which confers validity upon all other norms. This norm, for it must be a norm of course (because only norms can confer validity on other norms), Kelsen calls the grundnorm or the 'basic norm'.⁷

Basic norm or the grundnorm is a concept created by Hans Kelsen, a jurist and legal philosopher. Kelsen used this word to denote the basic norm, order, or rule that forms an underlying basis for a legal system.⁸ For Austin, law is a command backed by a sanction. However, Kelsen disagreed in two respects. Firstly, he rejected the idea of command, because it introduces a psychological element into a theory of law, which should, in his view, be 'pure'.⁹ Secondly, to Austin the sanction was something outside a law imparting validity to it. To Kelsen such a statement is inadequate and confused. For the operation of the sanction supporting a rule revolves itself into the operation of other rules; and further, the validity of a rule has nothing to do with its sanctions.¹⁰ To Kelsen, the operation of the sanction itself depends on the operation of other rules of law. In this way, the contrast between law and sanction in the Austinian sense disappears.¹¹

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 authorized if it can be subsumed under a more general norm.¹² The conjecture which this opens up is the end of progression.¹³ Kelsen's solution was that in every legal order, no matter with what proposition one may begin, a hierarchy of 'oughts' is traceable back to some initial, fundamental ought on which the validity of all others ultimately rests. This he called the grundnorm, the basic or fundamental norm.¹⁴

In this way, Kelsen's picture of a legal order emerges, not just as a collection of 'oughts', but a hierarchy depending downwards from a grundnorm, or branching upwards from it, whichever way

one chooses to depict it.¹⁵

Kelsen recognized that the grundnorm need not be the same in every legal order, but a grundnorm of some kind will always be there, whether, eg a written constitution or the will of a dictator. The grundnorm is not the constitution, it is simply the pre supposition, demanded by theory that this constitution ought to be obeyed.¹⁶ Therefore, the grundnorm is always adapted to the prevailing state of affairs. The grundnorm only imparts validity to the constitution and all other norms derived from it, it does not dictate their content.¹⁷ The difference between his positivism and natural law theory is that the latter determines the content as well. there is no reason why there need only be one grundnorm, nor has it to be a written constitution.¹⁸

BASIC NORM AS TRANSCENDENTAL - LOGICAL PRESUPPOSITION

Kelsen's conceptualism require no such search for the ultimate legal rule in each actually existing legal system, providing validity for all other rules in the system. Kelsen portrays a basic norm which gives validity to all legal rules. But, this is, as with all the concepts of pure theory, deliberately created as a theoretical idea (not found in experience) for a specific theoretical purpose.¹⁹

The purpose of Kelsen's basic norm is to portray the unity of the legal system, the fact that all its norms trace validity from a single source and must do so if they are to be considered part of the same legal system. Thus, if the sequence of the authorization of the norms is traced back from a court's decision, through the statutory norms providing jurisdiction, through the constitutional norms authorizing the enactment of the statute, to the original constitution, the pure theory of law deliberately postulates a further single norm 'standing behind' and giving validity to the original constitution.²⁰

To understand the nature of the basic norm, it must be kept in mind that it refers directly to a specific constitution, actually established by custom or statutory creation, by and large effective, and directly to the coercive order created according to this constitution and by and large effective; the basic norm thereby furnishes the reason for the validity of this constitution and of coercive order created in accordance with it. The basic norm, therefore is not a product of free invention.²¹ It is not presupposed arbitrarily in the sense that there is a choice between basic norms when the subjective meaning of a constitution creating act and the acts created according to this constitution are interpreted as their objective meaning.²² Only if this basic norm, referring to a specific constitution, is presupposed, that is, only if it is presupposed that one ought to behave according to this specific constitution - only then can the subjective meaning of the constitution-creating act be interpreted as their objective meaning, that is, as objectively valid legal norms, and the relationships established by these norms as legal relations.....²³

The Principle of Effectiveness

Kelsen's distinction between validity and effectiveness has only been touched upon. Every norm other than the grundnorm is valid, not because it is, or is likely to be, obeyed by those to whom it is addressed, but by virtue of another norm imparting validity to it. Thus, a norm is valid before it is effective, as with the case of a new statute before it has been applied. Yet, the validity of each norm depends on the effectiveness of the legal order as a whole.²⁴

If we attempt to make explicit the presupposition on which these juristic considerations rest, we find that the norms of the old order are regarded as devoid of validity because the old constitution and, therefore, the legal norms based on this constitution, the old legal order as a whole, has lost its efficacy; because the actual behavior of men does no longer confirm to this old legal order. Every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole.²⁵ The efficacy of the whole legal order is a necessary legal condition for the validity of every single norm of the order. The efficacy of the total legal order is a condition, but not the reason for the validity of its constituent norms. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way.²⁶ They are valid however on the condition that the total order is efficacious; they cease to be valid, not only when that are annulled in a constitutional way, but also when the total order ceases to be efficacious.²⁷ It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness.²⁸

He later on modified this somewhat to the extent of saying that the legal order has to be 'by and large' effective.²⁹ It will therefore be seen that, with reference to a given norm, its validity and its effectiveness have to be kept separate. Effectiveness of the order as a whole is a condition, not a reason for the validity of the grundnorm and of any individual norm: 'a condition sine qua non, but not a condition per quem.'³⁰

The Specific Function of The Basic Norm

That the norm of the kind just mentioned is the basic norm of the national legal order does not imply that it is impossible to go beyond that norm. Certainly, one may ask why one has to respect the first constitution as a binding norm. The answer might be that the fathers of the first constitution were empowered by God. The characteristic of so called legal positivism is, however, it dispenses with any such justification of legal order. The ultimate hypothesis of positivism is the norm authorizing the historically first legislator. The whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act. To interpret these acts of human beings as legal acts and their products as binding norms, and that

means to interpret the empirical material which presents itself as law's such, is possible only on the condition that the basic norm is presupposed as a valid norm. The basic norm is only the presupposition of any positivistic interpretation of the legal material.³¹

Change of The Basic Norm

It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to cease power by force, in order to remove the legitimate government in a monarchic state, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individual whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the behavior of the individuals is interpreted as legal or illegal.

International Law

According to Kelsen, *pacta sunt servanda* is the grundnorm of international law.

In order to answer the question whether international law and national law are different and mutually independent legal orders, to form one universal normative system, in order to reach a decision between monism and pluralism, we have to consider a general problem of what makes a norm belong to a definite legal order, what is the reason that several norms form one and the same normative system.....³²

.....If the national legal order is considered without any reference to international law, then its ultimate reason of validity is the hypothetical norm qualifying the "Fathers of the Constitution" as a law creating authority. If, however, international law is taken into account, it is found that this hypothetical norm can be derived from.

Rooted as the recent international law is, and its recent jurists have been, in either legal positivism or a priori ethical jurisprudence, the norms of international law of necessity have to be left in the form of vacuous ethical grundnorms. Under such circumstances not even a modern Western nation can trust its fate to such an international law, even though it be its own creation. For the time must inevitably come, if such a vacuously defined international law is accepted without reservation, when its grundnorms will be given content by representatives of cultures such as contemporary Soviet Russia, Middle Eastern Islam or Hindu India. Such content will differ from and even in some cases be antithetical to that of the living law of our own culture.³³

One problem that has perplexed the critics of Kelsen in his assertion in later writings is that all legal systems could be seen to be subsumed under one basic norm. Kelsen suggests that in the modern world jurists must perhaps look at the national law as being validated by international law.

Take for example. An English legal theorist may be asked, 'Why is the law in England valid?' his probable answer is that it is made in accordance with the procedural requirements of a valid constitution. He is here presupposing the basic norm of national law, that the authors of the constitution were vested with the authority from a fictive norm, to make a valid constitution.³⁴

Indian Constitution

The time has been burgeoning "constitutional justice" which has in a sense combined the forms of legal justice and the substance of natural justice. Desirous of protecting the permanent will rather than the temporary whims, States have reasserted higher law principles through written Constitutions. Thus, there has been synthesis of three separate concepts: The supremacy of certain higher principles, the need to put even the higher law in written form, and the employment of judiciary as a tool for enforcing the Constitution against the ordinary legislation.³⁵

Prof. Wheare rightly says :

"That these two institutions - the supreme Constitution and the written Constitution - are essential institutions to a federal government. The supreme Constitution is essential, if the government is to be federal, the written Constitution is essential, if the federal government has to work well."³⁶

The Indian Constitution is basically federal in form and is marked by the traditional characteristics of federal system, namely, Supremacy of the Constitution, division of powers between the Union and the State Governments, existence of an independent judiciary and a rigid procedure for the amendment of the Constitution.³⁷ Slight reference to Kelsen's grundnorm can be found in the case of *Shrimati Indira Gandhi v. Raj Narain and Ors.*³⁸

The Constitution operates as the fundamental law of the land.³⁹ The government organs owe their origin to the Constitution and derive their authority from, and discharge their responsibilities within the framework of the Constitution. The Union Parliament and the State legislature are not sovereign. The validity of a law, whether Union or State, is judged with reference to their respective jurisdictions as defined in the Constitution of India. The judiciary has the power to declare any norm as unconstitutional, if the law is found to have contravened any provision of the Constitution.⁴⁰

Criticism of Kelsen's Grundnorm

Kelsen's analysis of the formal structure of law as a hierarchical system of norms⁴¹, and his emphasis on the dynamic character of this process, are certainly illuminating and avoid some, at any rate, of the perplexities of the Austinian system.⁴² The basic norm is a very troublesome feature of Kelsen's system. It is not clear what sort of norm this really is, nor what it is does, nor,

where it can be found. Part of the problem lies in Kelsen's own obliqueness. In his last published article⁴³ he tells that it is not "positive" (which means for Kelsen that it is not a norm of positive law, i.e. created by a real act of will of a legal organ, but is presupposed in juristic thinking).⁴⁴ Hence, he argues, it is "meta-legal"; but, it is "legal" if by this term it can be understood as anything which has legally relevant functions. And, since it enables anyone to interpret a command, authorization or permission as an objectively valid legal norm,⁴⁵ its legal functions are not in doubt. Nonetheless, it is told that it is purely formal, is a juristic value judgment and has a hypothetical character; yet it forms the keystone of the whole legal arch. Goodhart was doubtful of the value of an analysis which did not explain the existence of a basic norm on which the whole legal system was founded.⁴⁶

Kelsen propounds the fact that every jurist presumes the basic norm to be the basis of the legal order; and that it merely means that legal order as a whole is effective, and that it may be stated in the form that men ought to behave in conformity with the legal order only if it is as a whole effective.⁴⁷ This seems to invoke either a total unnecessary fictitious hypothesis. Moreover, the basic norm is propounded as the means of giving unity to the legal system, and enabling the legal scientist to interpret all valid legal norms as a non-contradictory field of meaning.⁴⁸ Presumably, therefore, there can be only one basic norm. But is this so? And if it is so, then how is it related, if at all, to the constitution of the country. These questions are complicated by lack of clarity in Kelsen's thoughts.

Conclusion

The scope of Kelsen's work is different from that of Austin. His writings address a multitude of other issues which have no place in latter's writings. According to him law can be defined in terms of certain norms. The whole system is interconnected with other norms and there is a basic norm which is called the grundnorm. What this norm is, what is its function is still not clear. There are many complexities in Kelsen's thoughts regarding this. All other norms are derived from the grundnorm. Grundnorm is the norm of highest order. Also, no one can question the validity of grundnorm. It is always constitutional in nature and although, it is purely formal, it forms the main basis of the legal system.⁴⁹

Similarly, *pacta sunt servanda* i.e. all the treaties must be obeyed in good faith, is the grundnorm of international law. Kelsen's theory finds a place in the Indian Constitution also. In India, Constitution is the highest law of the land. It is the supreme law. All the other laws derive their validity from the Constitution of India. If a law is unconstitutional, it can be struck down by the judiciary as null and void. Hence, Kelsen's ideas find a place in modern day's world also.⁵⁰

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1. "ought" here does not refer to moral obligation but simply to normative forms of legal propositions. See Kelsen Hans, WHAT IS JUSTICE, p. 235-244
2. Cotterrell Roger, JURISPRUDENCE, Butterworths Lexis Nexis, 2nd Edn., 2001, p. 104
3. Ibid.
4. Kelsen Hans, GENERAL THEORY OF LAW AND STATE (trans. Anders Wedberg 1945), at 56.
5. Available at <http://www.lawyerjourno.com/2008/11/kelsen-theory-on-jurisprudence.html> accessed on 17/03/2010
6. JURISPRUDENCE: THE PHILOSOPHY OF LAW, ed., Doherty, Michael, Old Bailey Press, 2nd ed., 2001, p. 98
7. Ibid.
8. Available at http://en.wikipedia.org/wiki/Basic_norm accessed on 16/03/2010
9. 'The norm is an ought, but the act of will is an is': Kelsen, PURE THEORY OF LAW, p. 5
10. Dias R W M, JURISPRUDENCE, Aditya Books Private Limited, New Delhi, 5th edn., 1994 reprint, p. 361
11. Ibid.
12. Harris , 'Kelsen's Concept of Authority', (1977) 36 CLJ 353; Paulson, 'Constraints on Legal Norms: Kelsen's Views in the Essays', (1975) 42 U ChLR 768
13. supra note 10 at p. 361
14. Ibid.
15. supra note 10 at p. 362
16. supra note 9 at p. 201
17. supra note 10 at p. 362
18. supra note 9 at p. 222
19. supra note 2 at p. 105
20. Ibid.
21. Freeman, M.D.A, LLOYD'S INTRODUCTION TO JURISPRUDENCE, Sweet & Maxwell, London, 7th ed., 2001, p. 314

22. Ibid.
23. But insisting that the validity of the basic norm is a presupposition, Kelsen excludes it from a category of propositions that may be verified. By investing his rules of recognition with the criterion of acceptance, Hart clothes his concept of the ultimate source of law with more meaningful purpose and reality. See, further, Hughes, 59 Calif.L.Rev. 695, 699-705
24. supra note 10 at p. 363
25. supra note 9 at p. 118
26. Ibid.
27. supra note 21 at p. 303
28. Ibid.
29. supra note 9 at p. 212; Kelsen, WHAT IS JUSTICE?, p. 262; 'Professor Stone and the Pure Theory of Law', (1965) 17 Stanford LR 1128 at 1142
30. supra note 9 at p. 119
31. supra note 9 p. 116
32. supra note 9 at p. 366
33. Morris R. Cohen, 'Philosophy and Legal Science', 32 COL. L. REV. 1103 (1932); 'Reason And Nature', 333-457 (1931); 'Law And The Social Order' (1933); Felix Cohen, 'Ethical Systems And Legal Ideal: An Essay On The Foundation Of Legal Criticism' (1933); 'The Problems of a Functional Jurisprudence', 1 MOD. L. REV. 5 (1937-8). And see Stammler, 'The Theory Of Justice' (Husik's transl. 1925).
34. supra note 6 at p. 105-106
35. Lakshminath A, BASIC STRUCTURE AND CONSTITUTIONAL AMENDMENTS, Deep and Deep Publications Pvt. Ltd., 2002, p. 4-5
36. Wheare K.C., FEDERAL GOVERNMENT, 56 (1963)
37. Shukla V.N., CONSTITUTION OF INDIA, Eastern Book Company, 11th edn., 2008, p. A-27
38. AIR 1977 SC 69
39. Chaubey R.K., FEDERALISM, AUTONOMY AND CENTRE-STATE RELATIONS, Satyam Books, Delhi, 1st edn., 2007, p. 16
40. ibid

41. See WHAT IS JUSTICE?, p. 349 for further discussion as to normative basis of law

42. supra note 21 at p. 282

43. In (1965) 17 Stan L.Rev.1130, 1140-1142. Later articles are published but these are translations from the German and appeared in the original earlier than 1965

44. Ibid. p. 1141. Kelsen reiterates in German terminology that the basic norm is fictitious norm presupposing a fictitious act of will that lays down his norm. See in Olivecrona, LAW AS FACT, 2nd edn., 1971, p. 114 and 1 Israel L.Rev.1, 6-7. In this way Kelsen seemingly aimed at encompassing both his view that the norm must ultimately be based on an act of will, and the norm can only rest on another norm. But postulating a "fictive act of volition" he hoped to surmount his dilemma. That the attempt failed is brought out by A.Wilson, 'The Imperative Fallacy in Kelsen's Theory', (1981) 44 M.L.R.270, who justly remarks that a fictive act of volition does not bring us back to "human will and reality".

45. Though according to Harris, "The citizen or lawyer who distinguishes[for example] the tax officer's demand from the gangster's demand as "valid" or "lawful" does not need to presuppose a basic norm, unless he is a legal scientist seeking to show the contents of tax officer's directive form part of an unified field of meaning constituted by it and all other valid legal norms."

46. English and Moral law, 1953.

47. It seems that Kelsen was influenced by the "coherence theory" of truth once propounded by the so-called Vienna Circle of logical positivists.

48. supra note 9 at p. 72

49. supra note 33

50. supra note 39.