**Introduction of Kelsen’s Pure Theory of Law**

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2. **Kelsen’s pure theory of law**

**Introduction;**

Hans Kelsen was born at Prague in Austria. He was renewed professor of law and judge of Supreme Court act Austria. He revived original analytical thoughts in 2th century by expounding “Pure theory of law”

2.1 **Keelson’s view about his theory**

Kelsen describes his theory as a positive law in general not of a specific legal order. It is quite general having no concern about interpretation of specific national or international norms; however, he offers theory of interpretation. He has systematically described that what or how the law is not how it ought to be. He believes that law is especially a ‘science of law’ not legal politics. Therefore he terms it as ‘pure theory of law’ which is free from amalgamation of impure material that has no concern with law. It is the methodological basis of theory.

2.2 **Silent features of Kelsen theory**

Following are the significant features of pure theory of law

**A) Pure concept of law;**

Kelsen is of the view that theory of law must be free from ethics, politics, sociology, history etc. He does not demise the significance of aforesaid value but his aim is to purify the law from additional or unnecessary materials.

**B) Normative Science;**

Kelsen considers legal theory as a science not violations. He writes that it is normative science not a natural science. Moreover, his theory is not concerned with the effectiveness of legal norms. According to Keelson, knowledge of law is knowledge of norms. The proposition in hypothetical form is like this.

**“If X happens then Y should happen”.**

**C) Proposition of law and those of science**

Proposition of science deals with what necessarily happens while proposition of law deal with what ought to happen. If A commits theft, the proposition of law is that he must be punished according to law of the country. Even if person has not been punished for committing that offence, it does not disapprove the proposition. The proposition does not change even if that person commits an offence law demands that he must be punished. The legal proposition deals with what ought to be. **To Quote Kelsen;**

**“The principal according to whom the science of law elaborates its object informatively.”**

**D) Reduction of Chaos and confusion**

The pure theory of law is directed to reduce the confusion, chaos and multiplicity created by the propagators and supports of natural law theory. Indeed, his aim was to give a clear idea about law free from unnecessary material. Therefore, he termed it pure concept of law.

2.3 **Grundnorm**

Kelsen writes that there are certain fundamentals or initials on which other whole system based are termed as Grundnorms or the basic or fundamental norms. Following are peculiar elements of Grundnorms settled by Kelsen.

**A) Initial hypothesis**

Kelsen considers Grundnorms as initial hypothesis on which the entire system is based. He says that Grundnorms contains justification for the rest of all legal system but there are is no need of any rule or norm to justify the validity of Grundnorm.

**B) Acceptance of Grundnorm**

Kelsen is of the view that minimum effectiveness is required for approval of Grundnorm. That happens when a certain number of person are willing to abide by it. It necessary that it should commands a certain support.

**C) Substitution of Grundnorm**

Kelsen says that a Grundnorm can be substituted with another Grundnorms. He states in his theory that a Grundnorm is required certain minimum support of people. If it fails to acquire that minimum support, it is converted into another Grundnorm that commands a certain minimum support.

**D) Application of norm**

Kelsen says that during application of general norms, a judge exercises his discretion. He has to consciously choose between alternative interpretations which the norm permits. The application of general norms depends upon the act of parties who may come to agreement.

2.4 **Implication of pure theory**

Kelsen draws some conclusion in his theory of “pure theory of law”

**A) No distinction between public and private law**

Kelsen is of the view that all the laws have been derived from the same Grundnorm. He believes that both private and public laws are part and parcel of a single process of concretization.

**B) Concept of right and duty**

Another conclusion that is drawn is an order of human behavior. He describes the duty as essence of law whereas right is not essential.

**“The idea of right is** **merely the byproduct of law. Today, the concept of individual right is not base of criminal law. The machinery of law was administrated by injured person in the past but now state performs this function.** He concludes that idea of person means totality of rights and duties.

**C) Third conclusion drawn by Kelsen**

Kelsen is the rejection of distinction between natural and juristic persons. He says that state is a system of human behaviors and order of social compulsion. Whereas, law is also a normative order of human being backed by **“force”** thus law is not subject to state but both are identical. He states that all legal personalities are artificial and derive their validity from Grundnorm.

**D) Application of pure theory to international law**

Pure theory demands that Grundnorm be discovered. However, if conflict crises, then theory provides no way forward. Kelsen provides that Grundnorm should command a certain support of people. International sphere, there are two possible Grundnorm either the supremacy of municipal law or the supremacy of international law. The municipal law of one state cannot recognize any norm superior to its own Grundnorm. International law does not fit in the **“pure theory of law”.** Kelsen theory describes **“war and reprisal” as** **“sanction”** of international law but this proposition does not seem to be valid. There are many wars in the world which have taken place due to **“violation of international law”** not under sanction of law. Moreover, there is no “Tribunal” at international level to determine whether **“war is under sanction or not”**

**2.5 Criticism on Pure theory of Law**

**A) Without Sociological Foundation**

Kelsen’s theory excludes all the sociological facts from legal terms for making it pure ignoring the fact of necessity of social aspects for legal terms.

**B) Phenomena of Grundnorm**

Kelsen’s claim of Grundnorm which can be termed as basic norms is required no justification. This argument holds no logical authentication.

**C) Hypothetical Considerations**

This theory has been criticized for mere presenting hypothesis without and factual support. Thus, this theory lacks practicability.

**D) No way forward in case of any conflict**

If any conflict arises with respect to application of norms, this theory fails to provide any way forward.

**According to Prof. Dias;**

One should not rank this point as a criticism against Kelsen who was most apprehensive to insist that he was not concerned with that aspect. To criticize him for not having done which he clearly disclaimed is not just. He set out to attain a restricted objective of presenting a proper picture of the legal structure and what he set out to do, he actually did. To say that he should have aspired to do more is not a criticism of what he has done, but a criticism of his limited purpose. A legal order is not only the sum total of laws but includes doctrines, values and principles all of which are accepted as ‘legal’ and which function by influencing the application of regulations. Their validity is not perceptible to the Grundnorm of the order. The question is whether those are to be lumped with values and banished from a theory of law even though they are admitted to be legal. Dias says that it is a serious weakness in the theory of Kelson.

**According to Lord Lloyd;**

The relation of Kelsen’s logic structure to the actual facts of specific states is not clear. Kelsen aimed at presenting necessary form divorced from content, but nevertheless his whole argument is clearly aimed at a structure which can be revealed to fit the facts. Kelsen seems to involve the universality of the system, but much of it is not related to anything but a complex political state. It is very hard to grab exactly to what extent Kelsen admits the relevance of fact at all. He nowhere analyses especially the link between fact and law.

**2.6 Contribution of Kelsen;**

Kelsen made an original, conspicuous and valuable input to jurisprudence. He considerably inclined the modern legal thoughts. His ideas regarding right personality, State and public and private law have obtained significant support from a variety of station. His theories suggest the necessity of the revaluation of the above concepts. With his scientific accuracy and mighty and unmatched legal intricacy, Kelsen analyzed the legal order in a very credible way. **The view of Paton is that Kelsen has made an original and remarkable contribution to jurisprudence.**

The great input of Kelsen was that he established the unity of the legal system as well as the mechanics of its function and that was really a precious contribution.

2.7 **Conclusion;**

To sum up, the entire discussion over the pure theory of law, Kelsen’s theory has proved instrumental to studies the law in a new direction. Though this theory has been criticized by the many critics yet its positive contribution cannot be ignored at all. Though his theory he tired to purify the law from all other unnecessary material. His effort of establishing Grundnorms as supreme norms that needs not to be attested by any other norm. At one point, he comes close to the idea of **“Austin”** about the enforcement of law through “**Sanction”** to which **“Kelsen”** terms as “norms”. Friedman writes; the ruthless way in which Kelsen has revealed the political ideology veiled in the theories which profess to state objective truth has had a very healthy effect on the whole field of legal theory. The view of Lord Lloyd is that it was the purpose of Kelsen, in his pure theory of law so explains the required structure of a legal system and thereby present what he argued was the only way legal science could explain the formal logic of such a system in comprehensible way.