REVIEW ON HANS KELSEN'S HIEARCHY OF NORMS AND LAW MAKING PROCESS AND 'SMT. AMARAWATI AND ANOTHER v STATE OF UTTAR PRADESH, ALL. HC, 2004'

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Hans Kelsen was born on October 11th 1881. He was born in Prague, Czechoslovakia. He was a not only a jurist but was also a legal philosopher and political philosopher. He studied at several universities like the Berlin, Heidelberg and Vienna. He is regarded as one of the most popular jurist in 20th century. His dissertation work on Dante's theory became his first book on political theory. The theory was all about making rigorous examination about the "two swords doctrine" of Pope Gelasius I and Dante's sentiments in the Roman Catholic debates.

In 1920, kelsen worked as a part of the drafting commission for the Austrian government. The document still serves as a basis of Austrian constitution and kelsen was appointed to the constitutional court, for his whole lifetime. During this period of time itself, kelsen published five books in the areas of government, public and international law.in the year 1933; due to rise of Nazi power kelsen left Germany and shifted to Switzerland.

In Switzerland also he made his mark with the explicit research work put forward by him. In Switzerland, until 1940 he taught at the Graduate Institute of International Studies of the University of Geneva and later he accepted the position of lecturer in Harvard University Law School and relocated to United States of America. And later he became the permanent faculty member in the University of Berkeley. He stayed in Berkeley till the time of his retirement.

Kelsen is considered as one of the most important jurist of 20th century. He is one of the most influential in the areas of jurisprudence and public law. He worked for 29 years in the Department of politics and not in the Department of law. Hence, his work greatly reflects a

ISSN 2454-1273

political dimension even before and after joining the faculty Of Berkeley. One of the most important legal theories put forward by kelsen is "The Pure Theory of Law".

All this theories were contradicted and many controversies prevailed even after his death in the year 1973. But then there are a lot of elements in his writings which influenced scholars around the globe. On the occasion of 90th birthday of Hans kelsen, the Austrian Government established a foundation called the name Hans-kelsen-Institu. It started its operation in 1972 and the main task was to inform and encourage and develop pure theory of law. In 2006, Hans kelsen research centre was found and in 2011 the centre was transferred to some other place.

The research centre in cooperation with the institute aims to publish historical-critical edition of kelsens work in more than 30 volumes; as of July 2013. Till date first five volumes have been published.

THE PURE THOERY OF LAW:

Analytical positivism was put on a different footing in the twentieth century by Hans Kelsen through his "Pure Theory of law". It was "restated, developed and put on a theoretical philosophical basis by him and his followers are collectively called as "Vienna School".[1] In legal positivism we see a greater shift from metaphysical facts to facts based on observation.

Precisely, it defines law on the basis of formal criteria and on the facts which are generally followed by people. Analytical positivism concentrates on law as it is and not on what law ought to be. It is seen that science of law is a mixture of psychology, sociology, ethics and political theory, Kelsen through his theory wanted to make law uncontaminated from all these factors. Even though he strongly believed that the study of law had a deep connection with other areas of study. According to analytical positivism approach, law is not influence by a custom, precedent or legislation; instead it is the command of the political authority.

[1] *See* Dr.T.P. Tripathi*, An introduction to the study of Jurisprudence*, Allahabad Law Agency p.161.

Hans kelsen's theory is basically a contradiction to Justin Austin's imperative theory. Austin defines law as the general command of a sovereign to his subjects obliging them to a course of conduct.

- **LAW IS A SCIENCE OF NORMS:**

According to kelsen," state is a synonym for the legal order which is nothing but a 'pyramid of norms'. He derives pure science of law from 'ought propositions' of juristic science. He builds up his pure theory of law on the hypothesis of the *grundnorm* or basic norm. This *grundnorm* is not capable of being derived from principles of pure science of law.[2]

In kelsen's words "by 'norm' we mean something ought to happen especially that a human being ought to behave in a specific way. This is the meaning of certain human acts directed towards the behaviour of others". Again "norm is the meaning of an act by which certain behaviour is commanded, permitted or authorised".[3]

According to kelsen the reason why jurisprudence exists is to make standards or norms in a society. It exist to make a feeling of obligation in the minds of people, it exist in order to make people realise that they can be punished for not following the rule. The pure theory of law separates the concept of legal completely from that of the moral norms and establishes the law as a specific system independent even of moral law.[4]

- **LAW AND STATE:**

According to kelsen: "The state is neither more nor less than the law are object of normative, juristic knowledge in its ideal aspect, that is, as a system of ideas, the subject matter of social psychology or sociology in its material aspect, that's is, as a motivated and motivating physical act(force)"[5]

[2] *See* Dr.N.V.Paranjapa,*Studies in Jurisprudence and Legal Theory*, Central Law Agency, 6th Edition, p.148
[3] *See Kelsen pure theory of law*, chapter 1, p.4
[4] *See* M.D.A Freeman, *Introduction to Jurisprudence*, Thomas Reuters, Eighth edition, p.328
[5] *See* Kelsen, *The Pure Theory of Law*,Vol.51,p,534

ISSN 2454-1273

Kelsen never offered any specific definition for the law made by state. He always considered law as something which is a technique of social organisation. Being an analytical positivist, for him law always meant the command of the highest sovereign authority and it is uninfluenced by customs, precedents or traditions.

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- **LAW AND SANCTION:**

Kelsen and Austin both believed on the concept of sanction in the wide concept of law. But it is seen that they referred to the concept of sanction in two different ways. Austin believed that law is a command backed by law whereas kelsen believed that sanction forms a part of the concept of law. Kelsen sums up: "all the norms of a legal order are coercive norms, that is norms providing for sanctions, but there are norms the efficacy of which is not secured by other norms"[7] Austin and kelsen even agrees on the concept of command , but then again they differ on the way it is being applied. Kelsen says that when idea of command is inculcated it introduces psychological element into the theory of law which contradicts the whole idea of pure theory of law. And for Kelsen operation of sanction depends on the operation of law. But for Austin, sanction is something which is outside the purview of law imparting validity to it.

- **AMARAWATI AND ANR.(Smt) VS STATE OF UP (2004):**

  On 15th October 2004, a bench consisting of seven judges considered the following questions:

  1. Whether the arrest of the accused is a must if cognizable offense is disclosed in the FIR or in a criminal complaint.

[6] *See* Dr.N.V.Paranjapa,*Studies in Jurisprudence and Legal Theory*, Central Law Agency, 6th Edition, p. 170
[7] *See* Dr.N.V.Paranjapa, *Studies in Jurisprudence and Legal Theory*, Central Law Agency, 6th Edition, p.

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2. Whether the High court can direct the subordinate courts to decide the bail application on the same day it is filed.
3. Whether the case **Dr. Vinod Narain v State of UP, (1996**) has been correctly decided by the full bench of this court.

- **WHETHER THE ARREST OF THE ACCUSED IS A MUST IF COGNIZABLE OFFENSE IS DISCLOSED IN THE FIR OR IN A CRIMINAL COMPLAINT:**
  - Sections in chapter V of the Code of Criminal Procedure entitled "Arrest of Persons" of which section 41, 42, 43, and 44 empowers different authorities to arrest a person. Section 41 2(c) of the Code of Criminal Procedure defines the cognizable offence as:

    "'cognizable offence' means an offence for which, and 'cognizable case' means a case in which , a police officer may, in accordance with the First schedule or under any other law for the time being in force, arrest without warrant"

The definition clearly says that the police officer "may" arrest and not that he "must" arrest. This was debated in the case **Pramod kumar v Sadha Ram (1989)** wherein the court interpreted the word "may" and "must". In **Joginder Kumar v State of UP and others, (1994)** the Supreme Court observed that existence of power is one aspect and another important aspect is the right justification for the exercise of power. No police officer has made an arrest on a routine basis based on some mere allegation. Instead the police officer should make use of his prudence and should see to it that he protects the constitutional rights vested within a person. In the case of **Dr. Vinod Narain v State of UP (1992)**, the Hon'ble Palok Basu observed in paragraph 183 of the judgement that once the disclosure of cognizable offence is made, arrest of the accused or suspect is a "must" and there's is no other method by which he can be brought before the court of trial.

- Article 21 of the constitution of India says: "No person shall be deprived of his life or personal liberty except according to procedure established by law".

In **AX Gopalan v. Union of India, AIR 1950 SC27,** it was held that Article 19 and Article 21 of the constitution of India are mutually exclusive, and hence responsibility test of Article 19

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is not applied when testing a law on the anvil of the article 21. Thus in Gopalan's case, Article 21 is violated only as a guarantee against executive action unsupported by statutory law.

But then in the case of **Maneka Gandhi v Union of India, AIR 1978 SC 597**, Gopalan's case was overruled and it was held that 'life' in Article 21 means a life of dignity as a civilised human being and not just animal survival.

- Section 157(1) CrPC says: "If, from information received or otherwise, an officer-in-charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the state government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case , and, if necessary to take measures for the discovery and arrest of the offender"

- **WHETHER THE HIGH COURT CAN DIRECT THE SUBORDINATE COURTS TO DECIDE THE BAIL APPLICATION ON THE SAME DAY IT IS FILED:**

  - Chapter XXXIII of the Code of Criminal Procedure deals with the provisions of bail and bonds.
  - The various provisions for granting a bail by the Magistrate are provided in Section 437, CrPC. It talks about non- bailable offence, arrest on unreasonable grounds and about cognizable offence.
  - Section 439(3), CrPC talks about the special powers of the High Court or Court of Session regarding bail.

In the case of **Dr. Vinod Narain v State of UP**, the Hon'ble Palok Basu expressed his view regarding the grant of bail. This view was disagreed because the grant of bail should be in

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conformity with Article 21 of Constitution of India. In the case of **A R Antualy v Us Nayak (1992)** and **Raj Deo Sharma v State of Bihar (1998),** it is held that the right of speedy justice is the fundamental right of a person.

- **JUDGEMENT:**

  - Even if it is disclosed that it is a cognizable offence in the FIR or complaint in arrest is not a must. With reference to **Joginder Kumar v State of UP and others, 1994** the police officer should consider all the aspects before deciding to arrest or not.

  - There's hierarchy on the powers of the court. The high court should not interfere in the working of any subordinate court.

  - According to Section 437 a Magistrate need to grant bail on the same day and if it is not done then the reason for not granting the bail should be given. And according to section 439 it is based on the discretion of the Session judge whether to grant bail on the same day or not and it is also his discretion to grant interim bail or not.

  - The decision in the case of **Dr. Vinod Narain v State of UP (1996)** is incorrect and is substituted by this judgement.

CASE ANALYSIS ON THE BASIS OF KELSEN'S PHILOSOPHY:

Hans kelsen, one of the most eminent jurists had put forward the theory called 'The Pure Theory of Law'. He said that in a country there is hierarchy of norms and there is a law making process which is done by the highest political authority. In a country, there is hierarchy of laws and if there's any conflict between a higher law and a lower law then the higher law will prevail. In our constitution also such a hierarchy is followed:

- The Constitution of India
- Statutory laws i.e.; parliamentary or state legislature
- Delegated or subordinate legislation

- Government orders.

CONCLUDING REMARKS:

Kelsen's theory of law was a major revolution but then just like any other theory even this theory has got certain criticisms. I feel that kelsen has tried to contradict the fundamental norms. He has even called the basic norm as "hypothetical", how can a society be based on a hypothetical norm? His concept of grundnorm is static, because he did forgot the fact that the grundnorm should change with the modern times. Hierarchy of norms is one of the most noted aspects in this whole theory.

The reason for calling it noted is that it has helped in framing even the Governmental system in a country. Like in India, there is a clear hierarchy of norms which has to be followed.

ISSN 2454-1273