

GRUNDNORM IN INDIA: A NEW PERSPECTIVE

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The Grundnorm or the Basic Norm is a concept given by Hans Kelsen, an Austrian jurist through his renowned Pure Theory of Law. Grundnorm refers to the source of the validity of positive law.⁴²⁶ Kelsen comments on the most significant peculiarity of law that regulates its own creation i.e. the fact that creation of legal norms is authorized by other legal norms.⁴²⁷ According to him, while tracing the validity of a given legal norm such that the chain of validity is formed, one finally arrives at the highest norm which cannot have been created in accordance with another and higher valid norm. Consequently, the chain of validity is terminated by simply presupposing that we ought to behave in accordance with the highest norm.⁴²⁸ Such presupposition of the highest norm or the basic norm is referred to as Grundnorm and is considered as the final postulate, incumbent upon which, the validity of all the norms of a legal system depend.⁴²⁹ As far as the validity of Grundnorm is considered, it exists through its acceptance by the society as the reason for the authority of all the rules of the system.⁴³⁰ Therefore, the existence of a Grundnorm is necessarily presupposed, for without it the rest of the norms could not be explained.⁴³¹ Moreover, any norm can be a Grundnorm, with only condition being that it would justify or validate the norm underneath it.⁴³²

In Indian context, laws need to be evaluated on the touchstone of the Constitution in order to be declared as valid laws.⁴³³ The laws of the land derive legitimacy from the Constitution and are consequently subordinate to it. Therefore, it is widely believed that Constitution of India qualifies as the Grundnorm in India.⁴³⁴ However, the very fact that the Constitution can be amended⁴³⁵ shows that it is possible to derogate from the authority of the Constitution itself.⁴³⁶ If a Constitutional provision is amended substantially, it can no longer confer validity upon

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⁴²⁶ Uta Bindreiter, WHY GRUNDNORM? A TREATISE ON THE IMPLICATIONS OF KELSEN'S DOCTRINE 15 (2002).

⁴²⁷ Roger Cotterrell, JURISPRUDENCE 104 (2nd Edn., 2001).

⁴²⁸ Hans Kelsen, GENERAL THEORY OF LAW AND STATE 115 (1945).

⁴²⁹ Hans Kelsen, GENERAL THEORY OF LAW AND STATE 115 (1945).

⁴³⁰ Graham Hughes, *Validity and the Basic Norm*, 59 CALIFORNIA LAW REVIEW 695 (1971).

⁴³¹ Hans Kelsen, PURE THEORY OF LAW 244 (3rd Edn., 2000).

⁴³² Hans Kelsen, PURE THEORY OF LAW 244 (3rd Edn., 2000).

⁴³³ *Keshvanandan Bharti v. State of Kerala* ¶ 1590 AIR 1973 SC 1461.

⁴³⁴ *Keshvanandan Bharti v. State of Kerala* ¶ 1586 AIR 1973 SC 1461; *Indira Gandhi v. Raj Narain* ¶ 33 AIR 1977 SC 69;

Government of Andhra Pradesh v. P. Laxmi Devi ¶ 28 AIR 2008 SC 1640.

⁴³⁵ Article 368, THE CONSTITUTION OF INDIA, 1950.

⁴³⁶ T. C. Hopton, *Grundnorm and Constitution*, 24 MCGILL LAW JOURNAL 72 (1978).

the laws under it. Similar would be the effect, if, a provision of a Constitution is repealed. Thus, it would be improper to refer to the Constitution as the Grundnorm.⁴³⁷

Given this backdrop, the author suggests that the Grundnorm in the Indian context should lie in the Basic Structure. As we proceed, it is prudent to understand the context and evolution of the Basic Structure. The Basic Structure is the core of the Constitution on the touchstone of which the validity of the provisions of the Constitution including the amendments made to the Constitution is evaluated. If a provision violates the Basic Structure of the Constitution, then, that provision is considered as null and void. Its origin can be traced back to the landmark case of *Keshvanandan Bharti v. State of Kerala*⁴³⁸ where the concept was evolved in the form of doctrine in which it was held that the basic features of the Constitution are un-amendable and form the crux of the Constitution. This meant that any law⁴³⁹ could come into existence only after it is tested on the touchstone of the Basic Structure. Consequently, any provision of the Constitution or the laws flowing from it would be redundant if they violate the Basic Structure of the Constitution. Therefore, it can be construed that the validity of the provisions of the Constitution and that of the laws under its authority is dependent upon the Basic Structure. Hence, this is in accordance with the Kelsen's theory of Grundnorm. The Basic Structure (i.e. the Grundnorm) authenticates other provisions of the constitution (i.e. lower norm) which further confer validity on the laws made under it, provided, they do not violate the basic structure. Moreover, the Basic Structure cannot be amended or repealed as mandated by Basic Structure doctrine.⁴⁴⁰ Therefore the problem pointed out with the Constitution as a whole doesn't hold true for the Basic Structure and thus it could be contended that Basic Structure is the Grundnorm in Indian context.

Similarly, the argument can be supported by H.L.A. Hart's rule of recognition⁴⁴¹ theory as well. According to this theory, every legal system necessarily contains a unique rule which sets out the parameters of validity for that system and hence is considered as the ultimate source of a legal system.⁴⁴² Broadly, it answers the question of the validity of any given law. This essentially conveys that 'to say that a given rule is valid', the rule would be recognized only if it passes all the parameters provided by the rule of recognition.⁴⁴³ Therefore, in this scenario,

⁴³⁷ T. C. Hopton, *Grundnorm and Constitution*, 24 MCGILL LAW JOURNAL 72 (1978).

⁴³⁸ *Keshvanandan Bharti v. State of Kerala* AIR 1973 SC 1461.

⁴³⁹ It has been debated quite extensively that only constitutional amendments could be included under the ambit of basic structure. However, the courts have come to an interpretation wherein ordinary legislations are also required to go through the scrutiny of basic structure doctrine. Hence, it has been stated as 'any law'. See *Kuldip Nayar v. Union of India* AIR 2006 SC 3127.

⁴⁴⁰ *Keshvanandan Bharti v. State of Kerala* AIR 1973 SC 1461.

⁴⁴¹ See HLA Hart, *THE CONCEPT OF LAW* (2ND Edn., 1994). There are two types of rules of recognition which are supreme rule of recognition and ultimate rule of recognition. The research paper is concerned with the latter.

⁴⁴² HLA Hart, *THE CONCEPT OF LAW* 106 (2ND Edn., 1994).

⁴⁴³ HLA Hart, *THE CONCEPT OF LAW* 106 (2ND Edn., 1994).

Basic Structure could be construed as the rule of recognition (and subsequently the ultimate source of a legal system) since the validity of other rules such as the provisions of the constitution and the laws under its authority are determined by their conformity to the parameters specified by the Basic Structure.

However, the critics argue that there is no such term called Basic Structure defined under the constitution itself and that the existence of the so called Basic Structure is constitutionally illegitimate.⁴⁴⁴ The response to this predicament can be justified through the doctrine of Implied Limitation. In Constitutions which are written, the possibility that everything is said expressly is very rare. Therefore, limitations and powers are necessarily implied irrespective of the fact that they flow from express provisions or not. This is known as doctrine of Implied Limitation which essentially envisages that there exist certain inherent and implied conditions in a Constitution which are inviolable and hence un-amendable. It hence follows that doctrine of implied limitations is the edifice on which basic structure premises itself.⁴⁴⁵ Hence, doubts regarding the existence of a Basic Structure must be dispelled without giving much thought.

The author is of the view that the above-mentioned approach of considering Basic Structure as the Grundnorm is an alternative solution to the contentious debate surrounding the primacy of critical over conventional morality and vice versa. The effective unanimous solution which could come into place is to substitute these nuances concerning morality with constitutional morality. The principle of constitutional morality essentially means that one has to follow and consider the norms of the constitution as supreme and that one should avoid acting in any arbitrary manner so as to violate such rules.⁴⁴⁶ This would be pertinent in establishing the validity of law irrespective of concerns related to its conventional or critical morality. For instance, to establish the validity of a given law, the law should be in conformity with the provisions of the Constitution which ultimately means that if the law satisfies the parameters set by the Grundnorm, then the law would be considered as valid. In the present context, if the given law does not violate the Basic Structure, the law shall be considered as valid. Therefore, there should be no leeway provided to contemplate whether the law is morally sound or not as per conventional or critical morality.

A possible application of the approach suggested above was seen in the landmark judgment of *Naz Foundation v. Government of NCT of Delhi*.⁴⁴⁷ It has been argued that criminalization of homosexuality is justified on the basis of morality. However, the ideal approach as suggested above and as was also held in the instant case is the

⁴⁴⁴ Raju Ramachandra, *The Supreme Court and the Basic Structure Doctrine* in SUPREME BUT NOT INFALLIBLE, 108 (2000).

⁴⁴⁵ Manoj Narula v. Union of India ¶ 41 (2014) 9 SCC 1.

⁴⁴⁶ Manoj Narula v. Union of India ¶ 64 (2014) 9 SCC 1.

⁴⁴⁷ Naz Foundation v. Government of NCT of Delhi 2010 Cri LJ 94.

use of Constitutional morality. In the absence of compliance with Constitutional morality, laws such as these should be invalidated. Hence, reference to the Basic Structure and hence, the Grundnorm is an ideal method to avoid the contentious debate surrounding morality.

Therefore, it is humbly submitted that the Grundnorm in the Indian context is the Basic Structure instead of the Constitution. Such a stance could possibly give an alternative solution to avoid the debate of critical and conventional morality. The researcher advocates that laws should be evaluated on the touchstone of Basic Structure viz. the Grundnorm, so as to, avoid the issues surrounding the morality of law.



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