

Exploring the Kelson's Pure Theory of Law beyond the Philosophical Value

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Abstract

Jurisprudence is the philosophy of the law, which delivers an interesting narrative by analyzing law from different perspectives. As far as positivism is concerned, this is one of the luminescent schools of jurisprudence among other ideologies. German Positivism ideas differ from the British Positivism since it neither considers ethics nor facts. Kelson is one of the frontline scholars who introduced the Pure Theory of Law by enriching the Jurisprudence widely, while influencing other scholars to contribute to the legal system. Even though this eminent philosophy fattened the Jurisprudence, still there are some existing conundrums which did not fathomed by the Kelson. This paper intends to discuss the nature of the pure theory while focusing on the effectiveness and validity of Kelson's basic norm with the separability thesis to identify the practical issues for better application.

Keywords: Effectiveness, Grundnorm, Jurisprudence, Pure Theory, Kelson

1.Introduction

Kelson's pure theory is a very controversial theory among scholars since it has a philosophical value beyond comprehensibility.¹ Kelson neither depends on the ethics nor the facts, hence this theory can be considered as a separability thesis² due to a lack of contamination, there is a boundary line between the political, psychological, economic, and ethical phenomena and the law. This theory has been identified as a Pure Theory since this just elaborates the law by

excluding every other circumstance in society. The Legal System only depends on the norms when deciding legality and never considers the natural rules.

¹ J.E. Penner, E. Melissaris, Textbook on Jurisprudence, (Fifth Edition, Oxford University Press,2008) 48

² J.E. Penner, E. Melissaris, Textbook on Jurisprudence, (Fifth Edition, Oxford University Press,2008)49

Kelson's ideology leads to the development of a theory of law that was abstract and free from empirical or normative connotation. Kelson intended to establish a theory with a logical rationale of legal norms and their hierarchical structure, without incorporating moral, ethical, or political elements. Instead of pursuing phenomenal aspects, he focused on non-phenomenal aspects, which were postulated through philosophical reasoning or scientific inquiry. These unique features differentiate the Pure Theory of Law from other schools of law.

As far as Naturalism is concerned, this is the oldest school of law and is still living despite the prevailing criticisms. Naturalism is a normative jurisprudence that considers imperishable possession of the human mind, and also never wholly died out in this society. Scholars have identified natural law as a universal law, and it is interpreted by the people with an ethical rationale. Eventually, scholars identified lacunas in the Natural Law. According to the Ross Natural Law School is like a harlot.¹ As Ross mentioned, under naturalism, anyone is able to interpret the law to fulfill their determinations based on ethical and religious beliefs. It is evident in the hypothetical case of Speluncean Explorer². Chief Justice Trupenny, Justice Foster, Justice Tatting, Justice Keen, and Justice Handy have given different overviews regarding the same issue according to their ideologies.

As far as positivism is concerned, this theory is a response to the vagaries and uncertainties inherent in the natural school tradition. Positivists depend on the visible fact and the practical scenario of the society and derive from the ethical and religious belief due to that the death penalty, euthanasia, abortion, and same sex marriages are not prohibited under Positivism with religious and ethical considerations. Even though Hans Kelson got the exposure of the School of Positivism, it is not possible to identify him as a traditional or soft Positivist. He introduced the pure theory of Law and was influenced by Immanuel Kant and identifying the law as a self-contained system in society further he purified law from moral connotation and the facts to enlighten jurisprudence by his illuminating analysis.³

According to Kelson, Law is a norm that explains what ought to be done in society. People can recognize permitted and authorized behavior by considering the law. It provides clear and specific guidelines for social behavior. Norms do not exist in the physical world as facts; norms exist in the hypothetical world as a meta-legal idea. There is a chain of norm hierarchy, and all norms are empowered by the basic norm, which is called the Grundnorm. Behavior, Order, Permission, and Giving Authority also come under a norm in the Pure Theory.⁴ Everything is based on the Grundnorm; at the same time, there is a hierarchy in this norm chain inferior to

¹ Alf Ross, Forthcoming in Ross, Alf, *On Law and Justice*, ed. Jakob v. H. Holtermann, tr. Uta Bindreiter (Oxford: Oxford University Press, 2018)

² 112 *Harvard Law Review*, 1883 (1999)

³ Freeman, Michael D. A. *Lloyd's Introduction to Jurisprudence*, (Ninth Edition, Thomson Reuters (Professional) UK Limited, 2014.) <https://ci.nii.ac.jp/ncid/BA5557726X> page 195-200

⁴ Freeman, Michael D. A. *Lloyd's Introduction to Jurisprudence*, (Ninth Edition, Thomson Reuters (Professional) UK Limited, 2014.) <https://ci.nii.ac.jp/ncid/BA5557726X> page 279

superior.⁵ Notwithstanding, there are some grey areas which not addressed by Kelson through his explanation.

2. Methodology

This study is based on Black letter qualitative research methodology. This is based on a literature review; primary and secondary sources are referred to for the research, such as legislation, case laws, published books, and articles regarding pure theory and jurisprudence, to achieve the objective of the research.

3. Results and Discussion

3.1. Feasibility of Kelson's separability thesis

Since Kelson tried to establish the concept of separation, pure theory has become strongly arbitrary. Kelson separated law from everything. According to him self-contained legal system is independent from moral and political judgements.

Nevertheless, Law is a rule of external human action enforced by the sovereign political authority⁶ as well as the law protects people and controls their external behavior, literally law is for the public's betterment. Finally, it has effects for the development of the country and the well-being of the society by upholding democracy. Humans a social beings and have lived together since ancient times. Religion, Ethics, and Traditions are part of human life; hence, it is difficult to isolate law from social phenomena.

In addition to that, this global village is expanding day by day with modern technology. Nowadays, everything is at our fingertips. Globalization, Urbanization, and Industrialization have modernized the world drastically. Due to that, some laws are outdated and not potent enough to address modern issues in society. As an example, in Sri Lanka Sale of Goods Ordinance was enacted in 1896 and is still in use without any amendments. Even definitions are not adequate to address modern types of goods.

In this modern world, notes and coins are being replaced by digital currencies (Bitcoin, Ethereum, Ripple, and Litecoin); at the same time, digital transactions have made our day-to-day life easier. Nevertheless, there are some issues regarding data protection policies, payment methods in e-commerce. When it comes to the online shopping sites, various types of issues are prevailing in

⁵ Freeman, Michael D. A. *Lloyd's Introduction to Jurisprudence*, (Ninth Edition, Thomson Reuters (Professional) UK Limited, 2014.) <https://ci.nii.ac.jp/ncid/BA5557726X> page 284

⁶ GPD Madhushan, KAAAN Thilakarathna, "Revolutionary Forces and the Grundnorm A critical Review of the Legality and the Recognition of New Constitutional Orders", (International Journal of Social, Policy and Law, 2021).

society regarding shopping platforms such as Ali Express, eBay, Amazon, Etsy, Shopify, but the Sale of Goods Ordinance does not address these issues sufficiently.

Not only that existing Labor Laws, Homosexuality laws, and Exercise Ordinance can be considered as some of the other outdated laws in the usage. As far as the Sri Lankan supreme law is concerned, the 1978 constitution consisted of more than twenty amendments, and according to the Public Representative Committee Report still does not sufficiently address the people's requirements. The best example is the Right to life has not been identified as a fundamental right under the constitution, but judges are interpreting it progressively. If lawyers and judges depend on these outdated laws since the nature of separability of Kelson's theory, justice will not be achieved in this society. The legal system should be updated with social requirements and new trends without being stagnated by excluding social phenomena.

Unrecognition of the Right to life has impacted the judgment of *Somawathie v Weerasinghe* and Others⁷ case, but later in the *Sriyani Silva V Iddamalgoda*⁸ The case court declared a very progressive judgment since judges did not rely on the black letter approach.⁹

At the same time, in the case of *Sugathapala Mendis V Chandrika Bandaranayaka*¹⁰ justice Shiranee Thilakawardena interpreted the Public Trust Doctrine without following the literal rule to establish the justice.

The Court discussed the illegality and unconstitutional practices of the Triple Talaq in the case of *Shayaro Bano V Union of India*¹¹ and this judgment assists in reducing the divorce rate under this ground without adhering to the existing usage. *Shakthiwahini v Union of India*¹² Judgment is also very progressive since judges were not limited to the prevailing restrictions. As discussed above, if we follow the black letter approach without considering practical and social scenarios, it does not establish justice in society.

3.2. Impact from the Grundnorm to the Kelson's separability thesis

According to the Kelson legal system depends on the special Grundnorm, and other norms are validated through this basic norm, yet people do not have the discretion to create this basic norm, which violates the sovereignty of the people. Meta Legal Grundnorm is the core, and it unifies the legal system. It is also an interpretation of several facts because of that, it is the most important part of society. At the same time, every other rule, custom, and usages are oriented according to it.

⁷ (1990) 2 SLR 121

⁸ (2003) 2 SLR 63

⁹ *In the case of Sriyani Silva V Iddamalgoda*

⁹ court accepted that a person who has a "bad record" is entitled to the same rights as any other person and recognized the right to life beyond the constitutional provisions

¹⁰ SC FR 352/07.

¹¹(2017) 9 SCC1

¹² (2018) 7 scc 192

All the norms of society are empowered through the basic norm; however, there is not enough clarity under Kelson's explanation regarding the basic norm. As far as the derivation of the grundnorm is concerned, it goes to God, but Joseph Raz criticized Kelson by mentioning that all the norms of the legitimate regime consisted in the constitution of the country, so there is no need to go to theism. Then this chain of validity ends with the constitution and general law provided power for the authors of the first constitution, and god does not provide any powers for this enactment.¹³ Grundnorm is the core of Kelson's thesis, and it provides power to all other norms, but the conundrum is vagueness of the grundnorm does not provide a strong foundation for this thesis.

3.3. Effectiveness and validity of Kelson's separability thesis

Effectiveness and validity can be considered as the most significant features of the grundnorm. Legal norms become effective when it is followed by the public, even though when it comes to grundnorm, there is no requirement for the majority consent. This minimum effectiveness is contrary to the democracy of the country. Freedom, Equality, and Rights are the main pillars to uphold the democracy. To establish democracy, there should be majority representation. Fairness and Equality, Efficiency in Decision Making, Accountability, Stability, Legitimacy, and Peaceful resolution of conflict can be recognized as important impacts of the majority representation. The minimum effectiveness of Kelson's Pure theory does not endorse the democracy of the country.

In the 1863 Gettysburg Address, former president of the United States Abraham Lincoln defined democracy as "...government of the people, by the people, for the people...".

This statement evidences the importance of democracy to empower the citizens of the country.¹⁴ In closing, Kelson has challenged the democracy of the country through the minimum effectiveness concept.

3.4. Validity of the basic grundnorm

Even though Grundnorm is considered the supreme law, it is legitimate to alter grundnorm under some circumstances, but it creates uncertainty in Pure Theory since everything is based on the Grundnorm. Most probably constitution consists of articles regarding the amendments, but there may be some limitations regarding alteration of the constitution.¹⁵ Under some different circumstances, Grundnorm is being changed ardently without following a peaceful agreement. In the 1688 English Revolution, the 1776 American Revolution, the 1789 French Revolution, and

¹³ GPD Madhushan, KAAAN Thilakarathna, "Revolutionary Forces and the Grundnorm A critical Review of the Legality and the Recognition of New Constitutional Orders", (International Journal of Social, Policy and Law, 2021)

¹⁴ A.Lincoln , *The collected works of Abraham Lincoln* (Vol. 2),(Wildside Press LLC,2008)

¹⁵ Germany Constitution 1949, Article 79(3) of the

the 1917 Bolshevik Revolution also changed grundnorm in the relevant legal systems. According to Kelson, after the revolution old legal system lost validity and created a new legal regime.

In 1858, Pakistan's new president was appointed as a result of a conspiracy. In the case of *The State V Dosso*¹⁶ the Chief Justice followed Pure Theory and accepted that the previous constitution is null and void and adopted new rules for the new regime.

According to the 1966.02.22 dated declaration Uganda Prime Minister arrogated all the powers to himself as a result of the conquering revolution, and in the case of *Uganda v Commissioner of Prison*¹⁷ judges accepted that the Uganda Constitution had become null and void because of the successful revolution. *Asma Jilani v Government of Punjab*¹⁸, *Mitchell v Dppp*¹⁹ and *Controller of Taxes v Ramniklal ValaBhaji*²⁰ also discussed the nullification of the Constitution after the conquering revolution. In the case of *Maximbamuto V Lardner Burke*²¹ Deadle Chief Justice cited the above judgments and mentioned that there should be a new grundnorm after the declaration of unilateral independence.

Since the grundnorm is the core of the legal system, everything is structured according to it. This basic norm should be clear and certain since everything is empowered by it, but as discussed above, there is no certainty regarding that. It violates the purity of the Kelson's Pure Theory.

4. Conclusion

There is no debate that as a leading jurist, Kelson enriched the jurisprudence by introducing his Pure theory of law; at the same time current legal system was influenced by his ideology. Basically, his ideas cater to the development of legal positivism by separating moral considerations from the law. It clarifies the pure legal structure. He especially contributes to the ongoing debate, and scholars were influenced by his ideas.

Nevertheless, there are some criticisms of Kelson's Pure theory. As discussed above, some concepts are not clear; at the same time, this makes his ideology ambiguous and vague. Grundnorm is the key to his theory, and most scholars have criticized it due to the uncertainty. According to the criticisms, Pure theory is based on a shaky foundation, along with loose concepts that are not strong enough to address prevailing practical issues in society. And also when the validity of the grundnorm is concerned, it is not possible to find a legitimate origin, and minimum effectiveness violates the democracy of the society since it is not concerned about the majority consent.

¹⁶ (1958) SC 533

¹⁷ (1966) 1EA, at p.514

¹⁸ PLD 1969 LAH 786

¹⁹ GD 1984 HC 6

²⁰ Civil Appeal no. 11 of 198

²¹ (1969) AC 645

Pure theory conflicts with basic constitutional principles like the Separation of Powers and the Checks and Balances theory due to the power centralization towards the government. Philosopher Montesquieu articulated the Separation of Powers to prevent tyranny by controlling discretionary power to protect individual liberty. But Kelson violates the Separation of Powers while establishing pure theory.

Kelson wrongly assumed that the Legal System is consummated; however, the Law is just a patchwork that needs to be developed according to the necessities of the people for their betterment.²² In this global village, needs and wants are changing day by day with modern trends. Hence law should not be immutable in society; it should be possible to alter the law with modern requirements and changes in society.

As far as the significance of law is concerned, law is there to protect human rights by regulating people's behavior and conduct. Literally, law is for the people, but under the Kelson's pure theory existing conundrum is that this theory is too pure to address the practical requirements of society, and explanations are not comprehensive enough to realize the importance of Kelson's theory.

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