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REVOLUTIONARY FORCES AND THE GRUNDNORM: A CRITICAL REVIEW OF THE LEGALITY AND THE RECOGNITION OF NEW CONSTITUTIONAL ORDERS

K.A.A.N. Thilakarathna[#1], G.P.D. Madhushan[*2]

[#]*Lecturer, Institute of Human Resource Advancement, University of Colombo*

[1]akalanka@ihra.cmb.ac.lk

[2]dumindu@law.cmb.ac.lk

Abstract: *The pure theory of law as advanced by Hans Kelsen endeavour to explain the law as it is pure from the impunities of morality, justice, equity and other types of blurry subject matter. This theory is based on the relationship of norms, where the grundnorm of a given legal system has the ability of empowering all the subsequent norms below it. The constitution, being the supreme law of the country, is recognized as the grundnorm in many of the countries whether you label them as democratic or not. While the change in constitutional order, if done according to the constitutional provisions themselves, if it is done otherwise can pose serious questions related to the legal validity of such a new order. In order to explain this phenomenon, Courts have often made recourse the Kelsen's pure theory of law. Therefore, this article examines how courts of law in different jurisdictions have use the pure theory of law in explaining the constitutional orders through revolutionary forces.*

Keywords: *Jurisprudence, Pure Theory of Law, Hans Kelsen*

I. INTRODUCTION

Jurisprudence is the science of law which explains the meaning and the rationale of law. While it does not consider any law in particular (i.e., contract law, tort law etc.) jurisprudence helps to both critique and evaluate law from different perspectives. Ratnapala states that 'jurisprudence consists of scientific and philosophical investigations of the social phenomenon of law and of justice generally'[1]. In the realm of jurisprudence, the theories of naturalism, positivism, realism, feminism and critical theory among the others have made significant contributions for the development of law.

Hans Kelsen, a prominent scholar in the realm of jurisprudence belongs to the positivistic school of legal thought. However, he had a project of his own to separate law from all its impurities and to study the phenomenon of law in a pure manner. To do so he advanced a theory termed the 'pure theory of law' which was not affected or polluted by such other ideas as morality, religion, justice, fairness, equity, etc. 'It is called a "pure" theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements.

1 S. Ratnapala, *Jurisprudence* (3rd Edn, CUP 2017) 3

This is the methodological basis of the theory.[2] 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.[3]

In this background, this research focuses on the application of the pure theory of law in explaining changes in the constitutional order and how such has been both recognized as forming a basis of the legal system, while at other times it has been rejected with the use of the pure theory of law.

II. METHOD

Legal research is a process for identifying legal rules which apply to a given situation. It is used to analyse and evaluate the current situation and to propose possible solutions. This study is conducted using a qualitative methodology, where the method of doctrinal research was adopted. This is done because the qualitative method is concerned with words rather than quantification of the collection and analysis of the data. The main primary sources used in this study includes, Constitutional provisions, statutory provisions and decided case law from both Sri Lanka and other jurisdictions. As secondary sources, related journal articles and books have been used.

III. RESULT AND DISCUSSION

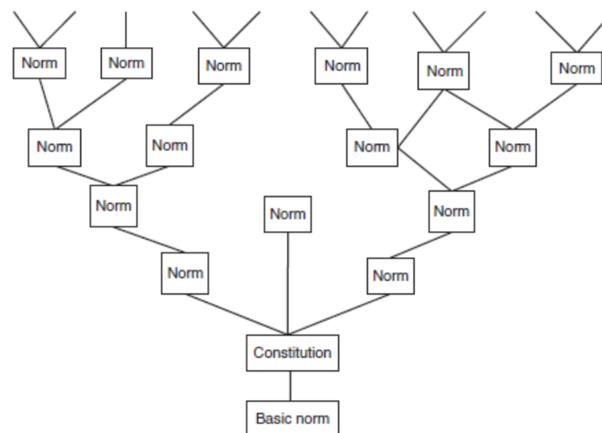
3.1. Law as a Norm

Kelsen builds his arguments about the validity of law based on norms. Kelsen explains that, 'by "norm" we mean that something ought to be or ought to happen, especially that a human being ought to behave in a specific way. This is the meaning of certain human acts directed toward the behavior of others.' In his analysis of legal norms, he speaks of validation of a lower norm by a higher norm, to the point where a higher norm becomes incapable of further validation, such is called the grundnorm which has the power of validating all the other norms below it.

This can be explained with the following example. Imagine that a Cabinet Minister is empowered to acquire land for a public purpose. This power of the Minister itself would not be valid if there is another legal norm which can empower a Minister to act in the manner described above. This power would usually come from the executive (i.e. the President) who will assign such a power to the Minister. Then the question is, how can the president assign such a power to the Minister. This can come from the constitution, which will assign the powers to the President.

Then, the question is how can the constitution assign such powers to the President. Unfortunately, we have to end our chain there. The constitution will have to be construed as an ultimate construct which cannot be validated through a higher norm and as a presumption, we have to accept it as the ultimate norm, which Kelsen terms the 'grundnorm'. The legal validation of a particular norm can be depicted using the following illustration.

2 H. Kelsen, *Pure Theory of Law* (2nd Edn. California Press 1967) 1
3 M. Friedman, *Lloyds Jurisprudence* (7th Edn, Sweet and Maxwell 2001)



In a country with a written Constitution, the Constitution for the most part will be considered as the grundnorm which will have the power and the authority to validate all the laws that are found in its legal system. These legal norms are made out with the 'ought' proposition. That is to say, where the constitution says that fundamental rights are ought not to be violated through administrative or executive acts, those who perform these acts are ought not to act in a manner which would violate these fundamental rights. Whenever this ought premise is violated, it will necessarily carry sanctions being imposed upon those who failed to act under the ought proposition.[4]

3.2. The Grundnorm under Kelsen's Pure Theory of Law

According to Kelsen, the Grundnorm is considered as the ultimate norm which is capable of validating all the other norms which are below it. Since the grundnorm itself is not capable of being validated through another higher norm, what is deemed as the grundnorm is something which is a presupposition. It is something hypothetical and we have to start our analysis agreeing to this fact. Since it is something which is presumed, how the grundnorm is to be changed has become an issue of controversy. The controversy lies in the fact that, the grundnorm can be changed both through legitimate and illegitimate ways. Where, the grundnorm is changed through a legitimate manner, such change will occur according to the procedure laid out in the grundnorm itself. For example, a Constitution of a country will have the respective procedures that have to be followed in repealing a Constitution and how a new one may be enacted.

Explaining this, Kelsen points out that, 'the norms of a legal order are valid until their validity is terminated according to the rules of this legal order. By regulating its own creation and application, the legal order determines the beginning and end of the validity of the legal norms. The principle that a norm of a legal order is valid until its validity is terminated in a way determined by this legal order or replaced by the validity of another norm of this order, is called the principle of legitimacy. However, when the grundnorm is changed in a manner not anticipated under the grundnorm which is sought to be replaced, questions will inevitably arise.

According to Kelsen, the way in which a new grundnorm is created has no impact on its validity to validate any norm which is below it. He argues that as long as the new grundnorm is capable of getting things done effectively, its validity will

4 R. Alexy, 'Hans Kelsen's Concept of the "Ought." [2013] Jurisprudence, 235

not be questioned. Kelsen states that, this especially happens in a revolution where, in the broader sense of the word (that includes a coup d'état) where the current grundnorm is changed not in the manner prescribed under the existing grundnorm (most likely the Constitution). When one considers the effectiveness of a grundnorm, A constitution is "effective" if the norms created in conformity with it are by and large applied and obeyed. As soon as the old constitution loses its effectiveness and the new one has become effective, the acts that appear with the subjective meaning of creating or applying legal norms are no longer interpreted by presupposing the old basic norm, but by presupposing the new one.

The issue that arises with such an instance as a revolution, where the existing grundnorm is changed in a manner not anticipated by it, how the Courts are to recognize such a change, and what is their role in recognizing the new regime as being in effective control of the situation. In order to truly understand this, one must consider the judicial decisions of jurisdictions around the world, where the issue pertaining to the validity of the new grundnorm is raised. The following section is dedicated at analyzing the selected cases from different jurisdictions as to the approaches and rationalizations given by the Courts in such jurisdictions.

3.3. Courts and the Grundnorm

A revolution in a country is complete in law as soon as its courts hold the new regime to be lawful. If such recognition is delayed, those in power may wax impatient but they know only too well the advantage which the seal of legality carries.[5] In Pakistan, Uganda and Southern Rhodesia, courts have held themselves entitled to declare that the effect of a successful revolution has been to change the law in their respective jurisdictions. 'Judges appointed under one constitution have held themselves to be bound to recognize the validity of laws promulgated under a different constitution; the judge's own political opinions have been said to be irrelevant.[6]

In the landmark case of ***State v Dosso and Khan***[7] In 1958, for reasons that appear to be a measure to avert the likely loss of power through the Constituent National Assembly enacting a new law, the first President of Pakistan, Mr. Iskandar Mizra, in a pre-emptive civilian action dissolved the National Assembly and Provincial Assemblies, dismissed the cabinets, declared the 1956 Constitution to be in abeyance, declared martial law and appointed the then Army Chief, General Ayub Khan, as the Chief Martial Law Administrator. He proceeded to issue the Laws (Continuation in Force) Order No.1 of 1958 which purported to avert the drastic consequences of the abrogated 1956 Constitution by continuing to recognize the pre-existing laws as valid unless expressly modified by the martial law government. On the sixth day after the coup, the Supreme Court in its usual session came up to an appeal in which Dosso and Khan, who had obtained judgements in their favour in the lower courts on the basis of the 1956 Constitutional provisions before its abrogation, asked the Supreme Court to hold that, despite the abrogation of the 1956 Constitution in the meantime and despite the contrary intention manifested by the Law (Continuation in Force) Order, their appeals should be decided by the Court on the basis of the 1956 Constitution. The Supreme Court, presided on by Muhammad Munir CJ, held that, applying Kelsen's pure theory of law that, the declaration by President Mizra was the law. The day after the judgement, General Ayub Khan removed President Mizra and exiled him and

5 R. W. M. Dias, 'Legal Politics: Norms behind the Grundnorm' [1968] CLJ 233
6 W. Harris, 'When and Why Does the Grundnorm Change?' [1971] CLJ 103
7 [1958] PLD SC 139.

declared a Military Government in power. The Court held that, the effect of the 1958 annulment of the Constitution by the President represents 'not only the destruction of the existing Constitution but also the validity of the national legal order.

In the case of ***Uganda v Commissioner of Prisons ex parte Matovu***[8] the applicant, Mr. Michael Matovu, a Bugandan County Chief, had been arrested, detained, released and rearrested on 16 July 1966 before he could leave the prison compound under orders made under the Emergency Powers (Detention) Regulations 1966. In his application to the High Court of Uganda for a writ of habeus corpus ad subjiciendum before Jeffreys Jones J sitting alone, Matovu challenged that his arrest and detention had been ultra vires vis-à-vis the 1962 Constitution which had remained the supreme law of Uganda. Since the application raised questions of law for determination relating to the interpretation of the 1966 Constitution of Uganda, the matter had to be referred to a Full Bench of three judges of the High Court. The question of the validity of the 1966 Constitution was raised suo motto by the Court after the application had insisted that only the 1962 Constitution was valid and the Attorney General objected because he indicated that the 1966 Constitution either arose from a political act outside the scope of the Court or it was a product of a successful revolution. Leaving apart the main issue of the application, the Court directed itself to the question it raised on its own to be satisfied: the validity of the 1966 Constitution. The Chief Justice of Uganda, Sir Udo Udoma, declared: 'our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity'.

In somewhat different circumstances, in the case of ***Madzimbamuto v Lardner-Burke***[9] Mr. Madzimbamuto who had previously been in and out of detention since 1958 was on 19 June 1965 restricted under the Law and Order (Maintenance) Act 1960 and on 6 November 1965 detained under the Emergency Powers Act. The continued detention of Madzimbamuto was challenged as being carried on without lawful authority for it was evident that the Rhodesian rebels were acting contrary to established law under the 1961 Constitution and the English Southern Rhodesia Act 1965. The respondents replied that the 1965 Constitution was then the only law and, even if the current government was not a de jure Government it was the de facto government, and its laws and acts must be recognized. Further, the de jure status had in fact been achieved by the effective control of the country in effect from 11 November 1965. In the judgement of the High Court, the court acknowledged the respondents' cross reference to Hans Kelsen's General Theory of Law and State in that a successful revolution, when efficacious can displace a constitution and establish a new legal order. On the respondents' reliance on ***State v Dosso and Khan***[10] in which the Supreme Court gave a de jure recognition of the coup d'état, the court distinguished the situation in that such a situation is valid when a government replaces another within an existing sovereign power. In this case, however, the Southern Rhodesia regime had only internally staged the rebellion against sovereignty of the United Kingdom but had not succeeded in untying the strings of the sovereignty of the United Kingdom as had happened in the USA Declaration of Independence of 1789. Neither had the United Kingdom abandoned its claim to sovereignty as demonstrated by the subsequent enactments and purported dissolution of the rebellious regime. Therefore, it can be seen from this decision that an internal turn of events would not change the grundnorm of a colonial country which is in effective control of its colonizer.

8 [1966] EA 514
9 [1968] 2. SA 284.
10 [1958] PLD SC 139.

In the case of ***Asma Jilani v Government of Punjab***[11] in which the petitioner, a newspaper editor and self-styled political leader, had been detained under General Yahya Khan's Martial Law Regulation of 1971 which had enabled the military authorities to detain a person without trial for an indefinite period, disregarding the 1956 Constitutional safeguards for the detainees. The High Court at Lahore had dismissed the habeas corpus petition on the basis that the Regulations had ousted the courts' jurisdiction specified by the regime and relied its authority on Dosso. On appeal the Supreme Court, overruled Dosso, declared the regime of General Yahya Khan as illegal and declared the decree unless proven on the grounds of public necessity, had no validity and hence the Regulation was illegal. Justice Yaqub Ali, stated that, after a change is brought about by a revolution or coup d'état the state must have a constitution and subject itself to that order. Every single norm of the new legal order will be valid not because the order is efficacious but because it is made in the manner provided by the Constitution of the State. Kelsen, therefore, does not contemplate an omnipotent President and Chief Martial Law Administrator sitting high above society and handing has behests downwards. No single man can give a constitution to the society which in one sense is an agreement between the people to live together under an order which will fulfil their expectations, reflect their aspirations and hold promise for the realization of them. It must therefore embody the will of the people which is usually expressed through the medium of the chosen representations.

In the Sri Lankan Case of ***Walker Sons & Co. (U.K.) Ltd. v. Gunathilake and Others***[12] the question was whether after the Constitution of 1978 came into operation, this law as laid down by the then Supreme Court continued in force or only the bare Industrial Disputes Act continued in force. The question was whether, when a Minister of Labour refers a dispute to be resolved by arbitration has the power to revoke the reference and re-refer the same to another arbitrator. The Supreme Court established under the Administration of Justice Law had already decided that the Minister had no such power in ***Nadarajah v. Krishnadasa***.[13] The Court of Appeal under the provisions of Articles 125 of the Constitution referred the matter to the Supreme Court for a decision in the form of two questions. Firstly, does the above decision of the Supreme Court constituted under the Administration of Justice Law No. 44 of 1973 belong to the category of unwritten law within the meaning of Article 168(i) of the 1978 Constitution? Article 168 (i) of the 178 Constitution states that, unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution, shall, mutatis mutandis and except as otherwise expressly provided in the Constitution, continue in force." Secondly, whether the Court of Appeal constituted under the present Constitution a Court of subordinate jurisdiction or a Court of Co-ordinate jurisdiction to the Supreme Court established under the Administration of Justice Law 44 of 1973 for the purpose of the application of the principle of Stare Decisis. The court held that, in answering the first question, the ratio decidendi of the decision of the Supreme Court constituted under the Administration of Justice Law No. 44 of 1973 belongs to the category of unwritten laws within the meaning of Articles 168(1). The Court also went on to state that ones the first question is answered, the second questions become irrelevant and that at any rate, the Court of Appeal constituted under the present Constitution is neither a Court of subordinate jurisdiction nor a Court of coordinate jurisdiction to the Supreme Court established under the Administration of Justice Law No. 44 of 1973.

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11 [1972] PLD SC 139.
12 [1978 - 79 – 80] 1 Sri LR 231
13 78 N.L.R 255

In explaining its decision, the Court pointed out that, a change of Constitution did not affect its binding force. Its binding force or coercive force continued. Article 168(1) was a statement of an existing position in the law to place the matter beyond doubt. It was also open to the present Court of last resort possessed with final authority to take a different view. Citing Kelsen, the Court observed that, "the validity of legal norms may be limited in time, and the-end as well as the beginning of the validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy". In analyzing Article 168 (1) of the Constitution, the Court explained that, the main object of this Article was that at no time should the country be without a Constitution in operation. There must always be a Constitution or basic norm. There was no other restriction on a new Constitution replacing the old. In short, the new basic norm or the new Constitution was validated or made valid in the way which the old basic norm or the old Constitution determined and therefore the replacement of the old basic norm by the new basic norm was legitimate and continued as a successor to the old without a break giving a continuing validity to all norms to which the old basic norm had given validity. It is only when the new Constitution is brought into operation in a way not provided for in the old Constitution that there occurs a break in all the norms under the old basic norm and can be kept in force by some express or implied provision in the new Constitution. In the words of Kelsen, The Pure Theory of Law, "The function of the basic norm becomes particularly apparent if the Constitution is not changed by constitutional means but by revolution, when the existence-that is the validity of the entire legal order directly based on the Constitution is in question."

IV. CONCLUSION

From the above analysis, it is clear that according to the theory postulated by Kelsen, the way in which the grundnorm is changed has no effect on its efficacy for the control of a given society. However, where a grundnorm is changed in a manner which was not anticipated under the grundnorm which is being replaced, the legitimacy of the new norm will have to be declared by a Court of law for it to become legitimate while also being effective. When one considers the attitudes of the Courts explained above, they have also shown a tendency that, irrespective of the manner in which the grundnorm has been changed, if the new grundnorm is able to function effectively, such has been recognized.

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