VOLUME 2 | ISSUE 3

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

MORALITY AND LAW: IS KELSEN'S 'GRUND-NORM' MERELY A MORAL NORM?

- *Parth Parikh*[1]

1. Abstract

In his work Pure Theory of Law, prominent jurist Hans Kelsen rejects the understanding of the law in terms of other disciplines and attempts a non-reductive interpretation of it. Kelsen attempts to express laws as an objective ought of such nature that it ought to be performed not just by the person positing the norm, but also by the person whose behavior the norm regulates. He argues that the validity of such legal norms in a particular system is derived from another higher norm of the same system, thereby also providing a means of identifying a 'unified system of norms'. However, what logically evolves is a question regarding the validity of the highest norm of a particular unified system, which is neither authorized by any superior norm of the present system, nor is likely to be authorized by the preceding system. Kelsen answers this critique of the highest norm, identified by him as the 'Grundnorm', by presupposing its authorization by the people of the particular legal order. This paper attempts to analyse on what grounds would people accept the Grundnorm, whether this acceptance defeats the non-reductive approach Kelsen propagates, and how Kelsen's theory has been applied by judicial courts at the ground level in authorizing regime changes.

2. PURE THEORY OF LAW

In the *Pure Theory of Law,* Kelsen attempts to understand the law not in terms of other disciplines like morality, which natural lawyers do and he rejects, but in terms of the law itself. He attempts a description and understanding of the law which would not reduce the law to any other discipline or science.[2]

3. FUNDAMENTALS

In pursuit of this, Kelsen describes the law as a *unified* system of norms. Legal norms in his theory are expressed as an *objective ought* such that the act that the norm envisages ought to

[1] Student at Jindal Global Law School, JGU.
[2] Joseph Raz. *Kelsen's Theory of the Basic Norm.* American Journal of Jurisprudence. Oxford University Publications.

be performed not only from the viewpoint of the person positing the norm, but also from the viewpoint of the person whose behaviour the norm regulates, and from the viewpoint of a neutral third party.[3] He builds on this understanding by maintaining that the validity of a particular norm in a legal system can only be authorized by another higher norm of the same system, whose own validity is again authorized by an even higher norm of the same system, and so forth.[4] This idea of a chain of validity across all laws in a particular system in central to Kelsen's theory as the same is used to determine whether two laws belong to a particular legal system or not, i.e. test the unity of a particular system.[5] He also postulates that every legal system *must* have one non-positive law which authorizes all the fundamental laws of that system, and terms it the *Grundnorm* (or the basic norm). The next paragraph provides a critical analysis of this idea of a Grundnorm in an attempt of answering the given question.

4. THE GRUNDNORM

Keeping in mind the chain of validity Kelsen proposes, any rational (even non-legal) thinker would come to question the validity of the highest norm of a specific legal system. Without a doubt, this document cannot be deemed as positive law as there would be no legal framework authorizing its creation (it is highly unlikely that a legal system lay down a procedure validating the creation of a new system).[6] Kelsen answers this question and ends the chain of validity by *presupposing* that the populace of a legal system *ought* to behave in accordance with the 'historically first constitution'[7]. What this amounts to, and why this is important is discussed in the next section.

4.1 FUNCTIONS

There are two primary functions of the Grundnorm: firstly, to enable a person to interpret a command, permission or authorisation as an objectively valid norm; and secondly, to enable the legal scientist to interpret all valid legal norms as a non-contradictory field of meaning.[8] Kelsen highlights the first function by giving an example of how people give different

[3] Hans Kelsen. *General Theory of Law and State*. Cambridge, Massachusetts 194. Pg. 4-5, 7-8, 45-6.;Hans Kelsen. *What is the Pure Theory of Law?*, 34 Tulane Law Review. Vol. 34. 270. (1959).
[4] Hans Kelsen. *General Theory of Law and State*. Cambridge, Massachusetts 194. Pg. 196,197
[5] Joseph Raz. *Kelsen's Theory of the Basic Norm.* American Journal of Jurisprudence. Oxford University Publications. Pg. 97.
[6] T.C. Hopton. *Grundnorm and Constitution: The Legitimacy of Politics.* McGill Law Journal. Vol. 24 (1). (1978).
[7] Hans Kelsen. *General Theory of Law and State.* Cambridge, Massachusetts 194.Pg. 197, 203.
[8] J.W. Harris. *When and Why Does the Grundnorm Change? The Cambridge Law Journal , Apr., 1971, Vol. 29, No. 1 (Apr., 1971) pg 106.*

interpretations to the order of a Mafia to pay a particular sum of money, as compared to an order of a Tax Official to pay the same amount. Both commands have the same 'subjective meaning' as the maker wants the individual to pay a certain amount, but the person interprets the subjective meaning of the officials order as its 'objective meaning', meaning that he interprets it as a valid legal norm. Kelsen argues that such an objective interpretation is not exercised in the Mafia's case and this **distinction** can only be understood by taking into account the Grundnorm of the particular system. Hence it is imperative to *presuppose* the Grundnorm in order to understand the normative value of the law. The other function deals with the issue of identifying the unity of a particular legal system, and does not require elaboration or discussion in the present answer. However, it must be noted that both these functions are the reasons why Kelsen emphasises the need for hypothesising the Grundnorm.

4.2 IDENTIFICATION

It is important to note that the test of identifying the Grundnorm is based on its 'efficacy' in a particular legal system[9]. Kelsen maintains that neither the content of the Grundnorm nor the reason for its efficacy is relevant in *determining* its existence / *identifying* it: what is essential is that the most (relevant) people of the legal system follow it. [10] Although Kelsen does accept that there may be anarchists in a particular system who don't agree with the Grundnorm,[11] it is essential that majority of the relevant people of the system actually follow it.

4.3 GRUNDNORM AS A MORAL NORM

The question then arises that why would people follow the Grundnorm if its authority is not validated by some positive law. The question given in the present assignment asks whether the acceptance of the Grundnorm by the people reduces it to just a moral norm.

Natural lawyers describe 'moral norms' as laws that people follow because they derive their validity from being 'morally just'. They are completely and objectively just and good.[12] Natural lawyers only judge the moral validity of a law: if it wrong and unjust, it is invalid as

[9]Hans Kelsen. *Reine Rechtslehre*. 2d. ed., Wien 1992. [1960]. Pg 204.
[10]HANS KELSEN. GENERAL THEORY OF LAW AND STATE. Anders Wedberg, trans. Harvard University Press. (1945); Torben Spaak. *Kelsen and Hart on the Normativity of Law.* Scandinavian Law Review. (1957).
[11]Andrei Marmor. The *Pure Theory of Law.* The Stanford Encyclopedia of Philosophy (Spring 2016), https://plato.stanford.edu/entries/lawphil-theory/.
[12] Joseph Raz. *Kelsen's Theory of the Basic Norm.* American Journal of Jurisprudence. Oxford University Publications. Pg. 100

per their understanding of validity. At the onset, it is important to note that Kelsen himself even refers to the Grundnorm as a natural law –

"If one wishes to regard it [Grundnorm] as an element of natural law doctrine…..very little objection can be raised….What is involved is simply the minimum…of natural law without which a cognition of law is impossible." '[13]

Therefore, Kelsen admits that the Grundnorm can be understood as the minimum reference of natural law without which one cannot indulge in any cognition about the law (he defends his anti-reductive approach here by arguing that the presupposition of the Grundnorm is *outside* the system of norms constructed in the Pure Theory of Law). However, one must keep in mind that though the Grundnorm can be seen as an *element* of the natural law doctrine, its identity cannot be limited to being a moral norm. This is so simply because even an unjust norm can be the Grundnorm of a system. Neither the content, nor the reason for its efficacy is relevant for its *presupposition*; what is essential is that it is efficacious. Kelsen emphasizes that although the basic norm refers directly to a specific constitution in an efficacious legal system, the moral value of the legal system does not enter into consideration when one presupposes the basic norm.[14]

EXAMPLE 1

Let us go back to the Mafia example discussed above to understand the function of the Grundnorm. However here we assume a situation where the Mafia has such strong control over a particular territory that everyone follows their orders out of fear of death or hostility. As a result, their coercive commands are the most efficacious in that particular territory because of this fear, such that the demands of payment they make are seen in their objective meaning, as a valid legal norm. In such a system, a Kelsenite would still presuppose a Grundnorm that interprets their coercive orders as a valid legal system, regardless of why people follow it.[15]

EXAMPLE 2

[13] HANS KELSEN. GENERAL THEORY OF LAW AND STATE. Anders Wedberg, trans. Harvard University Press. (1945) Pg 437; Joseph Raz. *Kelsen's Theory of the Basic Norm.* American Journal of Jurisprudence. Oxford University Publications. Pg. 99.
[14] Torben Spaak. *Kelsen and Hart on the Normativity of Law.* Scandinavian Law Review. (1957). Pg. 404
[15] Hans Kelsen. *General Theory of Law and State*. Cambridge, Massachusetts 194.Pg. 45-9

Suppose there is a military coup in a democratic state, and an autocratic military government is declared to be in power. This government sets up a constitutional assembly that drafts a new constitution which authorizes highly unjust [and immoral] laws. An example of such a law can be one that allows the state to arbitrarily impose exorbitant fines of anti-government protestors. According to Kelsen, the Grundnorm of the particular state will still presuppose the validity of such a constitution, not because it is a moral norm, but because the people identify coercive actions under the constitution as valid legal norms.

It is pertinent to note that a similar ratio was also laid down by the Pakistan Supreme Court in the case of State vs. Dosso.[16] In 1958, earlier Governor-General and the first President of Pakistan under the Constitution of 1956 Iskander Mirza issued a proclamation dismissing the Central and Provincial governments, abrogating the Constitution and declared martial law across the newly formed republic. This 'coup' was supported by the Commander-in-chief of the Pakistani Army, General Mohammad Ayub Khan. This military government had subsequently promulgated a highly coercive Law (Continuance in Force) Order to govern the State under martial law. As a result, a challenge was made in the Pakistan Supreme Court regarding the legality of the military government and the martial law imposed by it. The Court used Kelsen's positivist theory to validate the military government and its laws on the ground that the earlier constitution was abrogated, the new government rose to power by imposing the martial law, and as there were no protests among the people, there is sufficient evidence to hold that the Grundnorm of the State has been changed.[17] There was no significance given to the reason, either moral or otherwise, why the people were not protesting and hence, were deemed to have 'accepted' the change. The reasoning of this case also influenced a similar court decision that validated the legality of a revolutionary military government in Uganda in 1966.[18]

5. CONCLUSION

The above explanation and examples regarding the Grundnorm conclusively answer the question of it solely being a moral norm in the negative. The Grundnorm cannot be reduced to just a morality-based norm, even though people must ultimately accept it. There may be other socio-political reasons of why people accept the Grundnorm, and as a result, its moral

[16] 1 The State v. Dosso (1958) 2 Pakistan S.C

[17] Md. Abdul Halim. *Martial Law and Military Intervention: The Role of the Judiciary.* The Daily Star. Vol. 209. (October 2005) ;H.W. Harris. *When and Why Does the Grundnorm Change?* The Cambridge Law Journal. Vol. 29, No. 1. (April 1971).

[18] Uganda v. Commissioner of Prisons, ex p. Maiovu (1966) E.A

validity may not be the sole criterion. Kelsen admits that such reasons exist, but still defends his non-reductive approach to understanding and describing the Law.