

**BA-LL.B Vth Sem.**

**Jurisprudence-I**

**(Legal Theory)**

**(BL-5005)**

**Hans Kelson (1881-1973)**

Hans Kelson was great jurist of the analytical school, who gave a theory “the Pure Theory of Law”. This theory is known as Vienna school. Kelson belong to Austria. He was born at Prague in Austria in 1881 .He was a Professor of law at Vienna University .He was also the judge of the Supreme Constitutional Court of Austria for ten year during 1920-1930.After some time he shifted in England .He came to United States and worked as Professor of law in several American Universities .He wrote many books–

- The pure theory of law.
- What is justice
- Principles of International law

**Kelson`s Pure Theory of Law:** - Hens Kelson`s theory is an interesting revival of analytical jurisprudence. Kelson said that Law is a normative science not a natural science. This theory is known as pure theory of law because he separates law from politics, sociology ,history, economic ,psychology ,ethics etc. .Such approach is usually known as Vienna School with Hans Kelson its founder. It is said that Kelson`s pure theory of law tried to rescue jurisprudence from vague mysticism and thus it was in a way revival of john Austin `s 19<sup>th</sup> century analytical jurisprudence .He create a pure science of law devoid of all moral and sociological considerations. but he rejected Austin `s definition of law as a command because it introduces subjective considerations where as he wanted legal theory to be objective .He defines science as a system of knowledge or a totality of cognitions systematically arranged according to logical principles .Kelson said law must be “As it is” not “ought to be” Kelson`s Grundnorm is analogous to Austin`s concept of “sovereign” without which law cannot be obligatory and binding thus Kelson`s pure theory of law is a theory of positive law based on normative order eliminating all extra legal and non legal element from it. Kelson said that his pure theory was applicable to all place and at all times .it must be free from ethics ,sociology ,history .

**Law As Normative Science :** - Kelson defined law as the depsychologised command . He described law as a normative science as distinguished from natural science which are based on cause and effect such as Gravitation .The natural science are capable of being accurately described, determined and discovered in the form of “Is”(sein) which is an essential element of all natural science .But the science of law is knowledge of what law ought to be (sollen).it is the “ought” character which provides normative character to law.

The Grundnorm:- Kelson`s pure theory of law is based on pyramidal structure of hierarchy of norms of which derive their validity from the basic norm it is called Grundnorm .The Grundnorm or basic norm determines the content and gives validity of other norms derived from it. Kelson considers legal science as a pyramid Norms with Grundnorm at the apex .the subordinate norms are controlled by norms superior to them in hierarchical order .However the Grundnorm is independent of any other noun being at the apex .the process of one norm deriving its power from the norm immediately superior to it, until it reaches the Grundnorm has been termed by Kelson as concretization of the legal system thus the system of norms proceeds from downwards to upwards and finally it closes at the Grundnorm at the top.

### **Essential foundations of Kelson theory**

- 1) The aim of theory of law as of any science, is to reduce chaos and multicity to unity.
- 2) legal theory is science, not volition it is knowledge of what the law is not of what the law “ought to be”.
- 3) The law is a normative not a natural science.
- 4) Legal theory as a theory of norms is no concerned with the effectiveness of legal norms.
- 5) A theory of law is formal, a theory of way of ordering, changing contents in a specific way.
- 6) The relation of legal theory to a particular system of positive law is that of possible to actual.

**Implications of Kelson`s theory pure science of law :-**Kelson`s pure theory of law covers wide concept of state such as state as State sovereignty, private public law ,

legal personality ,right and duty and international law. the implication of Kelson`s theory of law are discussed below-

- 1) Law and state are not different from each other
- 2) There are no difference between Public law and private law.
- 3) There are no difference between natural person and juristic person.
- 4) There are no individual rights and duties in legal system.
- 5) Supremacy of international law

#### **Criticism of Kelson`s pure theory of law**

- 1-Grundnorm is vague and confusing
- 2-The purity of norms cannot be maintained
- 3-This theory has lacks practical significance
- 4-Kelson ignored Customs
- 5-Kelson ignored Natural law and Morality.
- 6-International law is the weakest point of Kelson s theory.

**Conclusion-**Hans Kelson was one of the greatest jurist of the 19th century. He gave a new shape of jurisprudence .Kelson took positive law as the subjects matter of his study .The credit goes to Kelson for developing a pure theory of law .He has separated jurisprudence from all other social science, and liberated the law from the metaphysical mist with which it has been covered at all times by the speculations of injustice .

## **Herbert Lionel Adolphus Hart (H. L. A. Hart) (1907- 1992)**

**Introduction:-**H.L.A Hart was a one of the greatest jurist of 19<sup>th</sup> century he belongs to Analytical school. his theory was based on the relationship between law and Society. He makes very important modifications in the theories of Austin and Kelson

**H.L.A. Hart:-** he was born in England in 1907. He practiced at the chancery Bar in his early age .He worked as a professor of jurisprudence at Oxford University from 1952-1968. Then he joined as principal of Brasenose College oxford. He rejected the Austin theory of analytical positivism. His legal theory based on the relationship between law and society .His book The Concept of law was written of Austin`s theory .His books are-

- Liberty and Morality
- The Morality of the Criminal Law
- Punishment and Responsible

**Hart Concept of law:-**In the Hart`s concept of law .There are two type of rule in legal system.

**1) Primary rule :-**The union of which provides key to the science of jurisprudence .These rule are called primary rule . Primary rules which impose duties upon individuals and these rule are binding because of the popular acceptance such as rules of kinship ,family These being unofficial rules ,they suffer from three major defects like –

- a) Uncertainty
- b) Static character
- c) Inefficiency

**2) Secondary rule :-**The secondary rule are power conferring ,which enable the legislation to modify their policies according to changing needs of the society. The remedy for the defects of the primary rule and it is out of the union of these two types of rules that law takes its birth.

**Difference between Primary rule and secondary rule:-**

- 1) Primary rules impose duties, while secondary rules confer powers either public or private.
- 2) Primary rules are concerned with action which individuals must do or must not do, while secondary rules are all concerned with primary rules themselves .

**Rule of Recognition:-** Hart`s positivism explains the existence of law with reference to the rule of recognition binding force of which depends upon its acceptance .The validity of law is to be tested on the basis of rule of recognition which is similar Austin`s theory Sovereign .Hart`s rule of Recognition is not an extra -jural hypothesis like Kelson`s basic Grundnorm. Hart`s rule of recognition is the sole rule in a legal system whose binding force depends upon its acceptance .For example whatever is enacted by British Queen in Parliament is rule of recognition .the

various constitution laws ,which constitute rule of recognition are rules of positive law which are binding on citizens officials legislatures courts and various other Governmental agencies.

**Hart's Views on Law and Morality:-** Hart does not reject significance of natural law in his positivism .unlike Austin and Kelson. Hart said that it is necessary for law and morality to have certain element of natural law as a logical necessity .thus morality is implicit in Hart`s positive law which he describes as union of primary and secondary rules .As a member of society ,individuals feel morally bond to abide by these rules both as a matter of complementary and supplementary to each other .There are four type of morality

1-Importance

2-Immunity from deliberate change

3-Voluntary character of moral offence

4-forms of moral pressure which separate it from etiquette ,custom and other social rules

**Criticism of hart`s Concept of law:-**Hart`s concept of law was criticized by Ronald Dworkin and Lon Luvois Fuller .They have many doubts in his concept of law as a union of primary and secondary rules .

**Conclusion :-**Hart was one of the greatest jurist who improved the analytical positivism. the main base of his theory was to focus on the socially constructive function of law. He has greatly influenced the legal thought in modern times.

### Exercise

**Q-1** Explain Kelson`s pure theory of law?

**Q-2** What are the points of criticism of this theory?

**Q-3** What do you understand by Hart`s concept of law?

### Reference:-

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