

The Rule of Recognition and Basic Norm

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ABSTRACT: *Hans Kelsen, an Austrian jurist, is most known for his acclaimed Pure Theory of Law, which introduced the notion of "Basic Norm" (also known as "Grundnorm"). The theory is regarded as the most thorough statement of a positivist theory of law, in that its philosophy excludes the examination of any ethical, political, sociological, or historical dimensions, leaving it free of all "evaluative criteria" such as fear, morals, psychological factors, and so on. The Grundnorm is the foundation of positive law's validity. H.L.A. Hart, a British legal philosopher, is best known for his work on 'The Concept of Law,' which states that the system of rules is created by people and that it generates responsibilities without any inherent link between law and morality. From the standpoint of legal positivism, both philosophers regarded the extent of a legal system. The paper is split into two halves. The first section examines H.L.A. Hart and Hans Kelsen's jurisprudential work on the "Rule of Recognition" and "Basic Norm" in current legal contexts. As a result, a brief description of the similarities and differences between "the Rule of Recognition" and "the Grundnorm" will be provided. We'll also figure out which hypothesis is more viable in today's legal environment. The second section examines whether a nation state's constitution may be called its Grundnorm. A comparative study of India and the United Kingdom is carried out to determine the varied perspectives of 'Grundnorm' as they have been implemented in their legal systems.*

KEYWORDS: *Grundnorm, Law, Norm, Recognition,*

INTRODUCTION

Only the empirical work of H.L.A Hart and Hans Kelsen is covered in this publication. The two thinkers are from the analytical school, whose slogan is "There will be no anarchy where there is a State." The study is limited to such documents and publications because Hart and Kelsen alluded to numerous legislations, judicial precedents, and other legal sources. The article focuses on the legitimacy and efficacy of a legal system's chosen norm. However, all theoretical arguments and critiques will be explored and alluded to in order to compare the work to other schools of thought.

Two nations, India and the United Kingdom, were compared in order to discover the grundnorms that were not included in the Constitution. For this, all of Kelson's essential postulates and critiques have been stated. Aside from that, the opinions expressed are beyond the scope of the article[1].

DISCUSSION

Hans Kelsen's Basic Norm Theory is described in detail.

According to Kelsen, the most essential component of the legal system is the 'Basic Norm,' which is a set of norms devised by humans and often understood as a set of laws governing human behavior. Kelsen proposed the law as a "pure" and "normative" science rather than a natural science. The term "Norm" can be interpreted in two ways: "descriptive" and "perceptive." The former indicates that you are in line with the norm, but the later means that you must follow the norm. Kelsen intended the law to grow as a rationally self-supporting norm, free of any political or social prejudice. Sanctions are also included. A legal norm's legitimacy is completely dependent on the approval of a higher-ranking legal norm.

According to Kelsen, the norm is a valid or non-valid assertion about reality, rather than a true or untrue statement about reality. Consider the case of Arnab Goswami, an Indian journalist who was detained for assisting two people in committing suicide, for which he will be prosecuted under the penal code. To put it another way, if someone commits a crime, they will be penalized. So far, we've spoken about the legal system dealing with the concept of what "supposed" to be rather than what "is" (reality). So, how we decide whether an act of human behavior is lawful or criminal is the consequence of a certain, normative interpretation. Then we arrive at the society's legitimate or correct standard. A criminal statute here states that "abetting suicide is punishable by jail[2]."

The meaning of this sentence is not a statement about what happened; rather, it is a demand to jail Arnab Goswami. As a result, these actions and legislations uphold fundamental norms that cannot be challenged or questioned, but instead immediately penalize those who have broken them.

The Philosophy of Kelsen's Hierarchy of Norms Theory Grundnorm, to be precise.

Kelsen developed the idea of grundnorm in his article Pure Theory of Law, which means "the highest norm that is presupposed of other legitimate norms." This assumes that the "historically first constitution" must be followed. The idea of grundnorm is presupposed in our legal thought that we should conduct as the Constitution prescribes, rather than being established from the standpoint of a positive legal act, i.e., generated by human behavior. Let us use the Indian Constitution as an example; nevertheless, it is not viewed as a grundnorm, but rather as the presumption necessitated by theory that we must adhere to all of the norms set down in this Constitution. The Grundnorm is a hypothesis with a fictitious character, as it is assumed to be at the top of each legal order's pyramid of norms.

The Validity and Effectiveness of Norms Concept

According to Kelsen, a standard is only deemed to be legitimate if it is derived from or commanded by another "higher norm." The validity of a norm indicates that "one should conduct as the norm dictates," but the effectiveness of a norm implies that "one really does behave as the norm dictates." The Grundnorm states that "any norm is valid if any other norm is presumed legitimate." To be considered legitimate, a norm must be sanctioned by a higher standard, such as the Grundnorm. Validity refers to the quality of the law, but effectiveness refers to the quality of men's real acts rather than the law itself. So, for example, "a standard is legitimate only until it is effective," and it is assumed that all rules within the Constitution should be followed. There will be a legal revolution if such change occurs[3].

Hart's concept of law is described in detail.

Professor Hart wrote *The Concept of Law*, which was a scathing critique of Austin's Theory. He thought that the law should be based on "social realities that suggest a rule that produces duty" or be the consequence of "strong societal pressure" to impose harsh penalties for crimes. According to Hart, laws are built on social rules ("born of social pressure") that take on the "character of legal regulations." 6 He thought that "a law should be accepted by society where there is a necessity to follow it," and that "a law should be accepted by society where there is a compulsion to obey it." As a result, rather than coercion, legislation should focus on duty. We must look at rules and habits, internal and exterior elements of rules, and main and secondary rules to fully comprehend his argument.

'The Rule of Recognition' and 'The Grundnorm' have certain similarities

Because both theories are formed from the standpoint of legal positivism, we may observe a slight link between Hart's notion about "the Rule of Recognition" and Kelsen's "Grundnorm." However, Hart's idea is thought to be true, but Kelsen's concept of basic standard is a transcendental philosophical knowledge. Both thinkers, however, are opposed to reductive legal positivism. For Hart and Kelsen, the determinacy of a particular standard when seen as a unit is a question of degree. According to Kelsen, the constitutional rules governing the proper exercise of legislative power are somewhat ambiguous in terms of what laws should be enacted by the legislature, whereas the substance of judicial decisions ostensibly enforcing the statutes is relatively more determined by the statutes. Hart, on the other hand, thought that the penumbras of the laws might be greater or smaller[4].

The difference between 'The Rule of Recognition' and 'The Grundnorm'

To distinguish between the two theories, Hart observes that "the Rule of Recognition" is more prone to legal positivism, whereas Kelsen sees the Grundnorm as a negative. Though Kelsen clarified in 1960 that "the theory of basic norm is not to be confused with the rule of recognition," the two are completely distinct. Kelsen's interpretation of the Basic Norm is more akin to "an epistemological instrument serving cognitive function," whereas Hart's interpretation is the polar opposite. In other words, for Kelsen, the Grundnorm is both

“epistemologically” fundamental and adequate, but for Hart, it is still cognitively required but factually deficient as an epistemological hypothesis.

The second distinction is that the ‘Rule of Recognition’ is concerned with the legal system's factual legitimacy, whereas the Basic Norm is concerned with the logical presumption of “juristic reasoning.” To clarify, the Rule of Recognition states that a legal system will exist only if it includes fundamental and secondary norms, which then combine to form a legal system. The Grundnorm, on the other hand, is seen as a higher standard that cannot be questioned or disputed[5].

Which hypothesis is more likely to hold up in a current legal context?

I'll investigate which ideas are more feasible in contemporary legal texts. We must first understand the concept “viability” before proceeding. The definition of viability, according to the Cambridge Dictionary, is “the capacity to work as planned or succeed, the ability to function effectively, or the ability to continue to live or grow into a living creature, or capable of operating successfully in the future.”⁸ When we look at both ideas separately, we can see that Hart's interpretation is more amenable to legal framework than Kelsen's. There are both fundamental and secondary rules in Hart's theory. And if primary rules control society, it will be unpredictable and inefficient.

In order for individuals to follow the rules, the legal system must be functional. People must, for example, follow fundamental rules, while authorities must follow secondary regulations. According to Peter Oliver, an American jurist, “the Rule of Recognition” implies judges' judgments in high-profile constitutional issues. As a result, Hart referred to “the Rule of Recognition” as the supreme and last law in the legal system. To put it another way, the rule of recognition has a better probability of becoming lawful. How? To establish this, a rule is legitimate only if it fulfills the requirements set out by the recognition rule, and it is effective only if it is followed by the people. As a result, the final “Rule of Recognition” is both legitimate and effective[6].

The Grundnorm, on the other hand, deals with situations where they “convert chaos and diversity to oneness.” Its sole virtue is that it makes the civil law legal system easier to understand than Hart's rule of recognition. It has a major role in legal education in civil law in legal science, but Hart's rule is completely absent. It is rare for a grundnorm to be regarded as a hypothetical higher authority and therefore be difficult to dispute or question. As a result, if a fundamental rule becomes sovereign, changing it will be difficult. People in the modern period look at law and the legal system more objectively. According to Hart's interpretation in “The Rule of Recognition,” rules evolved as a result of social or political pressure, where people are willing to obey such rules or want others to do so, so we can apply primary and secondary rules to produce valid and effective rules, whereas Kelsen's laws are fundamentally non-empirical, and his hypothesis was just that. The grundnorm was created for the goal of providing logical structure in legal systems. As a result of the preceding debate, Hart's rule of recognition appears to be more feasible than Kelsen's grundnorm.

Grundnorm and Basic Structure

In India, the Constitution's “Basic Structure” is assumed to be a grundnorm, or the ultimate source of a legal system. Whatever legislation is enacted must be consistent with the Basic Structure. They will be sanctioned by law if their compatibility is authentic. The remainder of the constitution would be unknown to a Grundnorm since it is amendable or may be amended with higher authority, but a Grundnorm does not allow for such alterations or modifications. I'll look at whether the Indian Constitution may be considered its founding document. To identify the requirements for the Grundnorm, one must first determine whether it is a basic norm, rule, or order, or whether it is applicable and acceptable to everyone. Let's have a look at the Indian Constitution[7].

The substance of the Indian Constitution is derived from moral ideals, and its efficacy is based on many political and socioeconomic factors. If the Indian people decide they do not want to accept such facts, the Indian legal system will not take them into account. First and first, I'll point you what characteristics of basic structures might be considered essential norms. In the Preamble, the words “sovereign, socialist, secular, democratic, republic” are used. Furthermore, the constitution's “federal character,” the nation's “unity and integrity,” and the “separation of powers” between the legislature, the executive, and the judiciary.

Part III, or Fundamental Rights, is the most essential. All of them are fundamental rules that no one may challenge or reject. As a result, it is apparent that there is no authority higher than the basic structures. It cannot be altered or updated, as this would be extremely illegal under the legal system. Though parliament having the ability to alter the Constitution, this was quickly overturned in the landmark decision of *Keshavnanda Bharti v State of Kerala*, in which it was determined that Parliament had no jurisdiction to intervene in changing the Indian Constitution's Basic Structure. Because in the Indian legal system, the Basic Structure is the ultimate and highest norm of recognition[8].

In *Indira Gandhi v Raj Narayan*, the court struck down Article 329, clause (4), since it was determined to be outside the “amending power of the parliament” and incompatible with “the fundamental characteristic of the Constitution.” If any norm or regulation is deemed to be incompatible with the Basic Structure, the court is given additional authorities. For example, in *L. Chandra Kumar v. Union of India*, the court decided that “the power of judicial review for the Supreme Court is under Article 32 of the Constitution, while the power of judicial review for the High Court is under Article 226 of the Constitution,” and this was considered part of the Basic Structure because it is an integral feature of the Constitution. Because the remainder of the constitution is amendable, I would conclude that just the fundamental framework created in the Indian Constitution serves as its grundnorm.

Grundnorm and Magna Carta

There is no written constitution for the United Kingdom. The “rule of law” is one of the key concepts they have accepted in their government. A.V. Dicey created the concept of "rule of law" in 1214. The Magna Carta was used to draft this "rule of law." The Magna Carta is a pact between the King and the Barons that aims to keep the country safe and secure by prohibiting armed warfare and military activities. In Runnymede cathedrals, they hung a magna carta, and the same norm was followed in other churches and cathedrals.

Now I'll go through the elements of Magna Carta that can be referred to as its grundnorm. “The Constitution may be a grundnorm for one legal system, but not necessarily for another,” it is apparent. The majority of the components are Magna Carta-related laws and rights. The “Petition of Rights of 1628,” which was established in the 17th century and confers rights, freedoms, and liberties against unlawful arrests, is one of these. Second, the “Bill of Rights (1689)” stressed free elections to the Common House, freedom of speech and expression, human rights, and free parliamentary debates, among other things[9].

Finally, there is "the Act of Settlement (1701)," which grants the Crown authority. There have been several more acts and laws enacted, all of which are based on the ideals of Magna Carta.

As a result of the preceding explanation, Magna Carta and the Bill of Rights are the underlying standards that plainly provide the UK laws and impositions legitimacy and efficacy. Kelsen's theory follows the validity of each formal act through the highest authority of the initial state of constitution, which is why they're named "Rule of Recognition." However, Kelsen's theory has not been particularly designed for the Constitution, but it appears to be beneficial for written constitutions rather than unwritten constitutions, such as the United Kingdom, which has neither a written nor a codified constitution.

CONCLUSION

I'd want to conclude affirmatively with the premise that the Grundnorm provides validity and efficacy in order to assess all rules or norms on its anvil, therefore establishing the grundnorm as a legitimate document that presupposes other valid norms. In other words, the concept of efficacy is important in addition to the validity of a Grundnorm. When it comes to the two countries, the United Kingdom and India, the former refers to the Magna Carta as their fundamental norm, whilst the latter refers to the Basic Structure as their grundnorm. Finally, Professor Hart's thesis is more feasible in a current legal environment than Kelsen's theory.

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