



# **Syllabus Revision Program for Batch 25** **By Islami Jamiat Talba PULC.**



**Subject : Philosophy of Law (Part 1)**

**Topic No. 07**

**The Pure Theory of Law**

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## **The Pure Theory of Law**

### **Background:**

The idea of a Pure Theory of Law was propounded by the eminent Austrian jurist and philosopher Hans Kelsen. The traditional legal philosophies in 20<sup>th</sup> century in which legal theorists restrained the aim of legal theory on moral basis and on the other hand, bounded the scope of law to natural or social sciences. He found both of these reductionist endeavors seriously flawed. Instead, Kelsen suggested a “Pure Theory of Law” which would avoid reductionism of any kind. The jurist Kelsen claimed his theory as a “Pure Theory of Law” because it aims at cognition focused on the law alone and this purity serves as its basic methodological principle.

### **Introduction:**

Kelsen, an analytical jurist, in his ‘Pure Theory of Law says,’ Law is the norm which stipulates sanction. Kelsen’s ‘Pure Theory’ is about the ‘hierarchy of norms. He also says about the normative behavior which takes validity from the ‘Ground norm’. In his ‘Pure Theory of Law’ says Kelsen, that law should be kept pure from extra legal affairs. According to Kelsen, the legal system must be “pure” that is, self-supporting and not dependent on extralegal values. The pure theory of law maintains that laws are norms handed down by the state. Laws are not defined in terms of history, ethics, sociology, or other external factors.

### **The Basic Norm:**

The view of Kelsen is that in every legal system, no matter with what proportion of law we start, a hierarchy of norms is traceable to some initial or fundamental norms from which all others emanate. This is called ‘*Grundnorms* ’ or the ‘*basic*’ or ‘*fundamental norm*’.

Groundnorm is the base of the pyramid on which the law of a State is build or verified.

- **Conditions for acceptance of Grundnorms :**

A Grundnorm is said to be accepted if it has secured for itself, a minimum of effectiveness. That happens when a certain number of persons are willing to abide by it. There must not be total disregard of the Grundnorm, but there is no need of universal acceptance.

- **Validity of Grundnorm:**

According to Kelsen the validity of the groundnorm is not based upon some other norms behind it, rather its validity is to be 'assumed'. Thus, one cannot point at some other norm in order to declare the grundnorm valid but grundnorm can be used to verify other laws.

- **Altering Grundnorm:**

When a grundnorm ceases to drive a minimum support, it ceases to be basis of legal order and it is replaced by some other grundnorm which obtain the support of people. Such change in the state of affairs leads to a revolution.

### **Salient features of Pure Theory:**

- **Law as Science:**

Kelsen tried to present a theory that could be attempted to convert law into a science, a theory that could be understood through logic. Legal theory is a science and not volition. According to Kelsen:

*"Law is a normative science."*

- **As a Positive Law:**

Kelsen introduces his theory as being a theory of positive law. This theory of positive law is then presented by Kelsen as forming a hierarchy of laws which start from a Basic Norm, i.e.

'Grundnorm' where all other norms are related to each other by either being inferior norms.

- **Law "As it is":**

Kelsen emphasized that analysis must focus on law as it is actually laid down, and not as it ought to be.

- **Law Contains set of Rules:**

Kelsen emphasized that the Law contains mass of rules, and a theory should organize them in an ordered pattern.

- **Law and Morality:**

Kelsen's strict separation of law and morality, is an integral part of his presentation of the Pure Theory of Law. The application of the law, in order to be protected from moral influence or political influence, needed to be safeguarded by its separation from the sphere of conventional moral influence or political influence. Kelsen did not deny that moral discussion was

still possible and even to be encouraged in the sociological domain of inter-subjective activity. However, the Pure Theory of Law was not to be subjected to such influences.

- **Theory of Law should be Uniform:**

According to Kelsen, the theory of law should be applicable at all times and all places. Kelsen advocated general jurisprudence. He arrived at generalizations which hold good over a very wide area.

- **Law is 'Ought' Proposition:**

A norm is a proposition or a statement: "If A happens, then B is ought to happen." Thus, "If someone commits a theft, the judge ought to punish him." A legal system is composed of series of such norms.

- **Static Aspect of Law:**

Kelsen distinguished the static theory of law from the dynamic theory of law. The static theory of law represented the law as a hierarchy of laws where the individual laws were related to the one of the other as either being inferior, than the one to the other, or superior with respect to each other.

- **Dynamic State of Law:**

Kelsen discussed the dynamic theory of law. In the dynamic theory of law, the static theory of law comes into direct contact with the governmental administration of the state which must recognize the function of the legislature in the writing of new law. At the same time there is also the understanding of law as being affected by the accumulated standing law which represents the decisions of the courts which in principle become part of the hierarchical representation of the pure theory of law. Importantly, Kelsen allows for the legislative process to recognize the law as the product of political and ethical debate which is the product of the activity of the legislature before it becomes part of the domain of the static theory of law.

## **Comparison of Kelson's and Austin's views:**

According to Kelson, the distinction between legal "oughts" and other oughts is that the former is backed by the force. To this extent, the view of Kelsen and Austin agree, but they differ in elaboration of ideas.

The view of Austin is that law is the command backed by sanction. However, Kelsen rejects the idea of command as he introduced that "Law is a depsychologized command, a command which does not imply a will in psychological sense of the term."

The view of Austin is that if a person commits theft, he is to be punished according to law and that is the sanction. But the view of Kelsen is that the operation of sanction itself depends on other rules of law. One rule says that he must be arrested, other says that he should be brought to trial. These rules regulate his trial. Another rule says that if he is found guilty by jury, the judge should sentence him. Still another rule lays down that the sentence should be executed by certain officials. Thus, sanction itself dissolves into rules of law and the distinction between law and sanction disappears.

## **Importance of Pure Theory:**

The theory is 'pure' because it separates jurisprudence from other disciplines like ethics, politics and psychology. This is important because different disciplines have different methodology, and so it's hard to analyze law when it's all mixed up with other things. Kelsen's pure theory allows for a pure 'legal science'.

## **Criticism:**

- ✚ Kelsen's theory points out that the Grundnorm is presupposition that the constitution ought to be obeyed. The constitution of a country is a sociological, political document and so the Grund norm is not pure.
- ✚ Kelsen's theory is open to serious criticism on ground of excluding, from consideration, the sociological factors like justice and morality. Kelsen also pointed out that law should be kept free from morality. A general question should be raised here, whether is it possible to keep law free from morality? Kelsen made emphasis in the effectivity of law and by this way he indirectly accepted the morality as a part of effectiveness.
- ✚ Kelsen attempted to convert law into a science, a theory that could be understood through logic, but on the other hand he insisted on the validity of the grund norm to be "assumed", rather than based upon some "logic"

- ‡ Kelsen attempted to locate law and legal norms in a middle realm between absolute moral values and social facts. Hence, the denial of the relevance of moral considerations makes legal science sterile and useless, and the denial of the factual nature of law disconnects it from reality
- ‡ Kelsen's theory don't provide any solution arising from ideological differences.

## **Conclusion:**

We can conclude that Hans Kelsen's Pure theory of Law is of great help for all in the field of law. He contributed in finding the answers of certain questions relate to law.

The first of these is the relation of law to theories of what the law should be, on one hand, and to the institutions, practices and mores of its society, on the other hand.

The second aspect in Kelsen's theory is that the whole system is interconnected with each other in the form of a hierarchy of norms, and there is a basic norm which stands at the top of this hierarchy called the grund norm.

Another aspect of Kelsen's theory is that it presents us with a dynamic legal order rather than a merely static one. The law tends to be orderly through maintaining consistency between its various parts, through the broadening and simplifying of principles and conceptual compartments and, in short, through tending to become a logical system, a perfect and complete logical system.

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