INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed Edition :

www.ijlra.com

 ISSN: 2582-6433

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 ISSN: 2582-6433

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A CRITICAL ANALYSIS OF KELSEN'S PURE THEORY OF LAW WITH SPECIAL EMPHASIS ON ITS DISREGARD TO JUSTICE

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Introduction:

The theories of law propounded by both the positivists and naturalists emphasize on one main objective, i.e, regulating human conduct in a particular way[1]. Hans Keslen, an Austrian jurist is a rigorous positivist who excludes law from all other ethical, sociological, historical, political and psychological influences[2]. He finds the true essence of the law's command from its own letters. To validate this theory he introduces the 'Grund norm Theory of Law', where he states that, the other system of law is based on a higher fundamental law that could only be changed by political revolution[3]. In order to develop this theory kelsen utilized Hegelian Philosophy of studying jurisprudence, where hegel wanted to place all cultures in an extensive philosophy of history. This in turn motivated kelsen to define a basic central principle which will ultimately include other legal structures of all cultures[4].

Kelsen argues that when checking the validity of law, going up the hierarchy of law one has to arrive at a finishing point. And if there's no such finishing point, then the process of checking the validity of the law becomes a never ending process[5]. He also affirms that there can vary differently in each legal order, but there shall be grundnorm which exists in any form such as a constitution or a will of the dictator. It does not dictate the content, rather it is a mere pre-supposition which only imparts the validity to the constitution and other subordinated laws that are derived from it[6]. Thus this research paper seeks to critically analyze the pure theory of law of Hans Kelsen by

[1] Dhananjai Shivakumar, "The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology", *The Yale Law Journal* , vol. 105, (1996), pp. 1383. https://doi.org/10.2307/797179
[2] Cotrell Roger, "Jurisprudence", *Lexis Nexis,* Ed.2, 2001, pp. 104.
[3] Ibid
[4] Hans Kelsen, "General Theory of Law and State", (1945).
[5] Michael Doherty, "Jurisprudence: The Philosophy of Law", Ed.2, (2001), pp. 98.
[6] Ibid

interlining it with different theories of justice such as John Rawls, Aristotle, Plato etc. The paper aims to ascertain how this rigorous positive law theory disregards justice. Thus the researcher will rely upon secondary resources to comprehend the argument effectively.

Research Questions:

1. Whether Kelsen's pure theory of law undermines justice?
2. Whether Kelsen's pure theory of law intends to place law and justice in distinct disassociated spheres?

Research Objectives:

1. To examine the intricacies of the Pure theory of Law introduced by Hans Kelsen .
2. To evaluate the Pure Law theory of Hans Kelsen through the lens of theories of Justice of Philosophers.
3. To investigate the relation between law and justice.

Statement of Problem:

Though there are many discussions held on how kelsen's pure law theory disregards justice, the widely accepted conclusion akin Kelsen was that, "the law and justice are two different principles and don't have any relation with one another". Hans Kelsen's Pure theory of Law emphasizes only on the hierarchical structure of norms and its validity, and deliberately excludes the considerations of justice within the framework of legal positivism. This deliberation of Kelsen in itself erodes the validity of law.

Research Methodology:

This research paper has utilized doctrinal methodology of research. Various journal articles, books were used by the researcher to gain fundamental knowledge on the purview of Pure theory of Law.

Limitation: The study will not cover all the existing theories of justice and picks up only the justice theories that are required for testing the applicability of Kelsen's pure theory within the circumference of legal positivism.

Review of Literature:

1. **Joseph Raz, "Kelsen's Theory of Basic Norm", T*he American Journal of Jurisprudence*, Vol. 68, (2023).** The author of the article provides a detailed theoretical explanation of Hans Kelsen's Grundnorm theory. The central argument of this article is that the attempt of kelsen in rejecting natural law theories in itself constantly uses the concept of natural law normativity. The article in this way evaluates the theory with illustrations which has provided the researcher to grasp the theory effectively.
2. **Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", *Harvard Law Review*, 1941, vol. 55, (1941). pp. 44-70.** The philosopher intends to preclude the law from other foreign elements. He aims at two aspects in drawing a limit to this theory. He states that jurisprudence has to be distinguished from philosophy of justice and from sociology. This work of the author made the researcher analyze how the pure theory of law disregards justice.
3. **John Rawls, "A Theory of Justice", *Harvard University Press*, (1971). pp. 3- 86.** This book provides a greater insight to the theory of justice propounded by John Rawls. His theory of justice that introduces the principles of Minimax principle and the original position. The author wanted to present a viable doctrine to the readers by emphasizing on the idea of maximizing the good of the people.
4. **Bibi Hamedi, "The Concept of Justice In Greek Philosophy (Plato and Aristotle)". *Mediterranean Journal of Social Sciences*. (2014). vol. 5, pp. 1163.** The author of the article discusses the theories of justice propounded by Aristotle and Plato in brief. The article seeks to view both the theories from the same perspective and persuades the readers that, both the philosophers aim in finding a principle that brings unity, harmony and happiness in a society. The author concludes that both the theories of justice are functional and teleological and contain moral principles.
5. **Chris Brown, "On Amartya Sen and the Idea of Justice", *Ethics & International Affairs*, vol. 24 (3), (2010). pp. 309-318.** This article discusses the theory of justice of Amartya Sen comprehensively which has shaped the fundamental understanding of his idea and its relevance in the contemporary period. The author has examined the theory in light of the criticisms on Rawls's theory of justice by Amartya Sen. The article is easily graspable as it also provides various examples and illustrations used for assessing its applicability.

CH 1: INTRICACIES OF THE PURE THEORY OF LAW OF HANS KELSEN

The pure law theory of kelsen though has its own significance has faced many challenges in its practical applicability as the theory reflected rigorous positivist notion. Kelsen postulates that each legal system should have a basic norm, whose existence is measured on its validity[7]. The pure law theory has deviated itself away from its very own objective. Therefore, this chapter will analyze the intricacies in the pure law theory provided by Hans Kelsen.

1.1. Inconsistency "within" two axioms propounded by Kelsen:

He also adds on that two basic norms differ in its content though it may have similar structure. The ultimate motive of kelsen is to unify legal systems and that's where he provides two axioms. The first is that, when there exists two laws which may directly or indirectly authorize the creation of the other belong to the same legal system[8]. The second states that all the laws that exist in a legal system are directly or indirectly authorized by a single law[9]. Comparing these two axioms it could be noted that a single, basic law's existence is required for the other two law's creation. So the second axiom most likely exhibits an empirical conclusion which is in turn inconsistent with the positive nature of his theory.

Therefore, he proceeds to correct the second axiom stating that this basic single law should be non positive in nature which does not depend on any law making authority and is merely a logical necessity[10]. From this, it could be inferred that, being a stringent positivist who completely rejects the natural law theory himself, provides that the basic or the so called grundnorm should have certain naturalistic characteristics.

1.2 Division between the Facts and Norms:

Kelsen, by introducing the basic norm theory, wanted to bridge the gap between norms and facts, i.e, between "is" and "ought". This again became one of the central characteristics of "Normative Hierarchy"[11]. The utmost significance of this division is to have at least one ought premise which according to him serves the purpose of law, i.e, obeying the command of the creator. As he doesn't consider morality or the subjective nature of law, and just emphasizes on accepting the order or

[7] Berkeley, "What Is Justice?", (1960).
[8] Joseph Raz, "The Purity of Pure Law Theory" *Revue Internationale de Philosophie* , 1981, Vol. 35, pp. 442.
[9] Ibid.
[10] "The Concept of a Legal System", *Oxford*, (1970), pp. 97.
[11] Supra Note 8.

coercive nature of norm, he created the stringent division between 'is' and 'ought' in his theory.

1.3 Absolute Disapproval of Natural Law Theories:

Kelsen rejects all natural law theories stating that they are metaphysical, illusional and unscientific. Kelsen states that the entire nature law's conception is based on the ideal reality of laws that have objective existence rather than imperfect statutes and precedents as completely metaphysics and are beyond practical reality[12]. He completely rejects "morals" as an illusion which forms the part of natural law as it is subjective in nature. He adds that the moral opinions are just personal preferences which can't be proved. He condemns the theories of natural law as "unscientific" as they can't be confirmed objectively[13]. Kelsen in order to purify the theory excludes morals and deliberately forgets the fact that only based on morals, law could have its essence of applicability[14].

1.4 Purifying Law from Other External Influences:

Kelsen intended to establish value free legal theory using the concept of normativity[15]. He wanted to separate law from sociological, political, psychological and philosophical investigations. By analyzing his attempt in doing so, two implications can be made. Firstly, without a political institution like the "government" or some "sovereign power", law cannot exist independently or cannot be enforced without the presence of a supreme power. And secondly, without considering the social, philosophical, and psychological factors law cannot be furnished which accommodates the interest of the people. Though in general, the purpose of law is to bind the behavior of a human, it shouldn't neglect the interests of the people. There has to be a balance between the coercive nature of law and the interests of people.

Hence, his theory which rejects the source where law actually derives its nature of power and application in itself is against the positive law principles. To sum up the inferences made in analyzing kelsen's "fictitious" pure law theory, all the addressed complexities arise due to his elimination of natural law theories of law. His attempt to give pure law theory its essence, in itself deviated the principles from the notion of positive law theory.

[12] Joseph Raz, "Kelsen's Theory of Basic Norm", The American Journal of Jurisprudence, vol. 68, (2023).
[13] Ibid.
[14] Mridushi Swarup,"Kelsen's Theory of Grundnorm". https://manupatra.com/roundup/330/articles/article%201.pdf
[15] Berkeley:, "The Pure Theory of Law", 2nd ed. (1967).

CH 2: PURE LAW THEORY FROM THE LENSES OF THEORIES OF JUSTICE

The preceding chapter of this paper has briefly discussed the intricacies that are inherently found within kelsen's pure law theory. Various philosophers like Plato, Aristotle, John Rawls and Amartya Sen have provided distinct theories of justice and also faced a wide range of criticisms. The central question of what is justice has been defined from many perspectives including utilitarian perspective, political libertarian perspective that actually clashed with each other. There's no concrete accepted idea of what justice is, but by evaluating the distinct theories of various scholars on justice, enables one to ascertain the core objective of justice[16]. Thus, this chapter will analyze the pure law theory from the lenses of various theories of justice.

2.1 Plato's Theory of Justice:

Before Plato, Pythagoras, an ancient Greek philosopher, who influenced Plato propounded that justice is "equality"[17]. He stated that a state should promote equality to provide justice, where ethical regulation of life was the central aim for achieving the same. Not only pythagoras, various other scholars such as Cephalus, Socrates, Thrasymachus and Glaucon argued their own perspective of justice. Most of the Greek philosophers conceived justice in terms of maintaining order and harmony in a society[18]. They deeply supported the belief that the state exists for the sake of life and for the good life of the people. Plato's theory of justice was based on ethics and morality and didn't have any legal basis. His theory of justice was based on two perspectives, Individual Justice and Social Justice[19].

Therefore, in his prominent work *Republique*[20] justice is defined in terms of contractual relationship between individuals and the state which gradually resulted in the codification of the laws in regulating human conduct and accomplishing justice. To support his argument, he analyzed the complex concept of justice in a wider sense where he has established an interwoven relationship between the individuals and the just society. In order to ascertain the qualified person with morals who can perform the function of statesmanship, Plato has classified human

[16] Uwaezuoke Precious Obioha, "The Nature of Justice", *Journal of Political Science,* vol. 29(2), (2011). pp. 185-190. https://www.researchgate.net/publication/267941412

[17] Bibi Hamedi, "The Concept of Justice In Greek Philosophy (Plato and Aristotle)". *Mediterranean Journal of Social Sciences*. (2014). vol. 5, pp. 1163.

[18] Plato's Republic, Jowett's Translation, *The Modern Library, New York*, (2013) pp. 147-148.

[19] Ranjithkumar A . "Plato‟s Notion of Justice in Understanding Order and Stability in Stratified Societies: A Study of India's Experience". *International Journal of Political Science Development*, vol 5(2), (2017). pp. 45-49. https://www.academicresearchjournals.org/IJPSD/PDF/2017/March/Ranjithkumar.pdf

[20] Plato, "The Republic". *Translated by Desmond Lee. England: Penguin Books Ltd*, (1974).

behavior into three categories namely, Knowledge (or Intellect/Reason), Emotion (or Spirit), Desire (or Appetite) and Justice as the fourth virtue which balances other three human soul qualities. The virtue of wisdom/ knowledge is possessed by the philosopher kings or the rulers who are courageous and rational enough to rule a state. With the same categorization of human souls, he further talks about the Myth of Metals and the earth born where each of the categories are born mixed with metals such as gold, silver and bronze respectively.

His central view on Justice is "*One Man - One Duty*", where the state is expected to realize the dominant natural aptitudes and behavior that every individual is assigned in a society[21]. If this hierarchy is disturbed or meddled by the interchange of duties between the classes, injustice happens which eventually harms the society[22]. This theory also faced criticism especially by Nietzsche who stated that Plato's justice theory favors rigid class division among the people and unreasonably placed rulers at the top most ladder to the ruled[23].

With the above discussion of perceiving law and justice from the perspective of Plato, it could be noted that he considers the law as an outcome of justice where the individuals are expected to perform their duty and simultaneously the state protects their interests. However when we proceed to view kelsen's pure law theory from plato's theory on justice, one similarity can be noticed i.e, placing rulers/the sovereign at the top and expecting impulsive adherence to the commands of the superior without opposition. But kelsen didn't consider ethics and morals as Plato did. Plato took the idea of law with *persuasion* combined with *compulsion*. The persuasion to follow the law could be guaranteed by protecting the best interests of the people and the compulsion gradually arises in the form of punishment[24]. Plato's perception of justice as the precursor for the formation of law is not compatible with kelsen's grundnorm theory where kelsen doesn't even bother about the idea of justice.

2.2 Aristotle's Theory of Justice:

Aristotle, the follower of Plato and the true founder of Naturalism contrastingly provides the theory of justice from perspective of rights of people in a state[25]. According to him the highest

[21] Ibid.
[22] Supra Note 20.
[23] D.R. Bhandari, "Plato's Concept of Justice: An Analysis",Obioha, Precious. (2011). http://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm#top, downloads on 05.04.24 (Retrieved April 5, 2024).
[24] Patrick Kernahan, "The Meaning of Law: Plato's Minos". *In On Religion and Politics*, *IWM Junior Visiting Fellows' Conferences*, Vol. 13, (2004). pp. 5-6.
https://files.iwm.at/uploads/jc-13-01.pdf
[25] Heywood, Andrew, "Political Theory: An Introduction",Ed. 4, *Palgrave Macmillan Education*, United Kingdom,

thing that a man could attain by his actions, i.e, happiness is what justice is. He also adds on that none desires happiness for others and only for the sake of other than itself[26]. Therefore, in Nichomachean ethics, he classified justice into two types: Distributive Justice and Rectificatory Justice. Distributive justice encompasses on just distribution of consumable resources equally and unequally with respect to one's contribution to the state[27]. In simpler terms, treating equals equally and unequals unequally where an individual's rights are made in proportion with his/her contribution towards the state. Such a distribution is not arbitrary in nature as is it done in geometrical proportion.

The second type of justice, i.e, corrective or rectificatory justice which appeals that a person can perform certain actions where an agent gains benefit and the victim suffers which solves the issue of unequal gains and suffers. By punishing the wrongdoer and compensating the aggrieved person/ the victim, restoration of equality is accomplished. In this type of justice theory, one's status is not counted as a consideration and looks only into the nature of demerits that are caused to the person. Thus in this way just society is created where all individuals in the state are living with peace and harmony with equality.

Aristotle has already made a clear view that happiness should not be the result of one's own instincts which makes a man more animalistic and erodes the functioning of the state. He states that every man should have one telos, and that should focus on attainment of happiness. His perception on law is considered as an arena of ambiguity as whether his theory of law included justice or not[28]. He on a whole defines law as a rule where a man is induced to do an act or refrained from doing so. His definition is quite subjective in nature which doesn't suit the contemporary world, especially in democratic countries like India. By considering his theory of justice, the researcher wants to make make certain inferences connecting it with the Kelsen's pure law theory;

1. Aristotle effectively provides the theory of justice but doesn't take much effort in explaining the objective or actual essence of law. This distances the theory of justice far

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(2015).
https://mgdc-chararisharief.com/elearn/Political%20Theory-1stSem.pdf

[26] Sooraj Kumar Maurya, "Aristotle's Theory of Justice: Revisited", *World Congress on Innovations and Research in Arts, Culture, Literature, Languages, Philosophy and Spirituality*, (2019). pp. 14. https://krishisanskriti.org/vol_image/31May201903055012%20%20%20%20Sooraj%20Kumar%20Maurya%20%20%20%20%2013-17.pdf

[27] W.D Ross, "Aristotle's The Nicomachean Ethics, Revised with an Introduction and Notes by Lesley Brown", *Oxford University Press*, Oxford, (2009), p. 85.

[28] Tony Burns, "Aristotle and natural law". *History of Political Thought*. vol. 19. (1998), pp. 142-166.

away from the theory of law.

2. When such a deliberation is made, the purpose of law in serving justice in itself becomes an enigma. The same applies to kelsen's theory who focused only on the structure of law but not on its practical applicability.

2.3 John Rawls Theory of Justice:

John Rawls, an American political philosopher, defines justice as "*fairness*" in which he depicts an egalitarian economic system as a society which consists of free citizens with equal access to basic rights[29]. In 1971, a book written by John Rawls, "A Theory of Justice" and an article with the title "*Justice as Fairness*" provides a thorough explanation of his theory of distributive justice by outlining two fundamental concepts of justice[30]. John Rawl's theory focuses on three principles and it is thought to be an alternative to utilitarianism. First, among other things, he wants to organize society such that each member has as much freedom as possible, while also making sure that no person's freedom is being curtailed. Second, he accepts social and economic inequalities in contrast to an equal distribution, so long as the arrangement promotes the advancement of the least fortunate members of society. Thirdly, he believes that such inequality should be beneficial for those who don't have access to resources and to occupy power[31].

2.3.1 Original Position and Veil of Ignorance:

In order to provide an explanation of his theory of justice, Rawls partially draws on the social contract theory. He uses an imaginatory "Original Position" theory to illustrate his ideas of justice in detail. John Rawls assigns this original position to every member of the community. According to Rawls, when members of the society are positioned as they were, they are hidden behind a curtain of ignorance. Everyone is so completely blindfolded by this "veil" that they lose all knowledge of who they are and their social standing, including their location, class, and status within society[32].

John Rawls provided us with two crucial justice principles in order to further clarify his theory of justice. First, he referred to the first principle as the biggest *Equal liberty principle*: "Everyone is to have an equal right to the most extensive total system of equal basic liberties compatible with

[29] Sampurnaa Dutta, "Rawls Theory of Justice: An Analysis", *IOSR Journal Of Humanities And Social Science* (IOSR-JHSS) Volume 22, Issue 4, (2017) pp. 40-43. https://www.iosrjournals.org/iosr-jhss/papers/Vol.%2022%20Issue4/Version-1/G2204014043.pdf
[30] Ibid.
[31] John Rawls, "A Theory of Justice", *Harvard University Press*, (1971). pp. 3- 86.
[32] Ibid.

a similar system of liberty for all". Second, the *Equal Opportunity Principle* where, according to Rawls, "Social and economic disparities should be arranged so that they are both attached to positions open to all under the conditions of fair equality of opportunity and to the greatest benefit of the least advantaged, consistent with the just savings principle"[33].

He claims that the distribution of rights and freedoms is the primary concern of the maximum equal liberty principle. By identifying specific rights and freedoms like the ability to vote and hold public office, the freedom of speech and assembly, the freedom of conscience and thought, and individual freedom from psychological oppression and physical and arbitrary arrest, among others, he also defines political liberty and liberty of conscience under this principle. In elucidating the difference principle, Rawls has embraced a more equitable methodology.[34]

His vision is a society in which the most disadvantaged people benefit more from each other than from those in the more advantaged group. In order to achieve this, he even supports inequalities that favor the least advantaged because he thinks that morally arbitrary factors like one's caste, creed, race, or family of birth shouldn't determine one's chances in life to obtain something better than what they were born with[35].

By examining his theory of justice, the two principles namely; equal liberty principle and equal opportunity principle are contradictory with each other. Rawls unlike Aristotle and Plato measures the validity of law in accordance with his principles of justice. When we attempt to analyze kelsen's theory through the lens of Rawls theory of justice, there are no instances where kelsen takes into account the effectivity of law and its functioning as he limited the theory only to its structure. From the above analysis of Rawls theory of justice, John Rawls is like other natural law theorists who focuses on the content of law, i.e, justice.

2.4 Amartya Sen's Theory of Justice:

Amartya Sen, a renowned economist and philosopher, provided a different approach towards justice from other pre- discussed scholars. His critique on Rawls theory of justice was again based on his criticism on transcendental institutionalism represented by Immanuel Kant, Locke, Hobbes, Rousseau and Rawls. Sen placed transcendental idealism within the realm of social contract

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[33] T.R.Sharma, "Rawlsian Justice:Disjunction between choice and observation", Vol. 28, IJPS (1989), p 33-34. https://www.questjournals.org/jrhss/papers/vol9-issue3/2/L09036468.pdf
[34] Ibid.
[35] R. M. Hare, "Review of *Rawls' Theory of Justice--I*, by John Rawls". *The Philosophical Quarterly (1950-)* 23, no. 91 (1973). pp. 154.. (https://doi.org/10.2307/2217486.)

theory. Sen centrally criticizes Rawls second theory of justice as "Impartial" with a *flute Illustration*[36] and on his equal liberty and difference principle[37]. His argument was that the idea of liberty is too extreme, where Sen regards the idea of liberty as one of the main aspects of justice and other facts such as hunger, medical neglect and starvation should also be considered where Rawls has neglected the sam[38].

Sen primarily focused on achieving justice through eliminating the element of injustice present in it rather than in the search of achieving a perfect just society[39]. Sen also takes into account distinct theories of justice to discuss it more comprehensively. For the same, he utilizes two Sanskrit terms 'Niti' and 'Nyaya' where the former resembles *just institutions* and the latter focuses on *realization of justice*. He proceeds to praise Roman Emperor Ferdinand I's statement "*Fiat justitia, et pereat mundus*", meaning Justice should be done though the world perishes[40]. Therefore, he focuses on what are the just institutions and rules that serve justice[41].

Another important perspective on the theory of justice of Sen, in contemporary political philosophy, is the differentiation between "transcendental institutionalism" and "realization focused comparison". Transcendental idealism encompasses what is just or unjust for examining the idea of justice.In comparative approach, i.e, realization focused comparison he, doesn't want to remove injustice, rather intends to reduce basic injustices to attain justice. He also propounded another theory of "Closed and Open Impartiality". By the theory of closed impartiality he means that, in a social contract limited to certain citizens whereas the open impartiality asserts that the social contract is applicable even to those people who are not citizens[42].

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[36] Amartya Sen, "What Do We Want from a Theory of Justice?", *Journal of Philosophy* vol. 103 (2006), pp. 215-238. (http://www.jstor.org/stable/20619936.)
[37] Ibid.
[38] Amartya Sen, "The Idea of Justice", *Allen Lane, London* (2009).
[39] Supra Note 29.
[40] Afif Mahfud et al. "Agrarian Justice and Contextuality in Maxim Fiat Justitia Ruat Caelum and Fiat Justitia Ne Pereat Mundus".*Research Gate*. vol.23. 65-79. 10.24815/kanun.v23i1.20178.
[41] Umut Dag, "Amartya Sen's Idea of Justice and its relation with John Rawls and Adam Smith", (2015), pp. 19-25.
[42] Amartya Sen, "Open and Closed Impartiality," Journal of Philosophy, Vol; 99, No.9, (2002). pp. 445-460.

CH 3: KELSEN'S THEORY OF LAW ERODES JUSTICE?

The researcher through this chapter, after a detailed analysis made in the previous discussions, will address the significance of the relationship between law and justice. Before evaluating the need for understanding the interconnection between law and justice, one has to stick to the idea of what an actual, concrete justice is. Out of all those theories of justice propounded, Amartya Sen's theory of justice is quite clear, free from ambiguities and seeks to view justice as a tool for measuring the validity of law. By analyzing the detailed theoretical discussion done in the preceding chapters 1, 2, both Aristotle and Plato, who were the ancient Greek philosophers, did not consider justice as an element for validating law. With the passage of time, contemporary theorists, like Rawls, Amartya Sen have started giving importance to justice as a part of law.

3.1 Kelsen's Justification for placing Law and Justice in two distinct spheres:

Kelsen differentiates empirical law and transcendental justice from the subject of pure law theory. He also justifies that pure law theory nowhere excludes what makes a law provide justice, rather he asserts that it is barely impossible to answer the question of what is just law as his theory is entirely based on empirical aspects of law and considers transcendental justice unscientific and beyond reality[43]. Kelsen's theory emphasizes only on the structure and validity of law and doesn't not delve into the substantive aspects of law i.e, justice. He blindly justifies the same by stating that when a grundnorm is valid, it can not be unjust. Kelsen justifies the fact that he places law and justice in two distinct spheres. He claims that law is determinate but justice is not as it is subjective in nature[44]. He also states that answering to the question whether or not a law is just, is outside the scope of legal validity of law. As he alienates law from morals and natural law principles, the objective of law, i.e, providing justice is consequentially disregarded.

3.2 Misconception of the Notion that Justice is a "Subjective" Concept:

There prevails a wide misconception on the nature of justice, though many theories were propounded by many theorists on this purview. As each theory of justice advocates differing and clashing perspectives of justice, many lawyers and legal philosophers consider justice as 'subjective' in nature. Though, what seems to be just for one person may not seem just for another may be a valid argument, it can't be considered that it is subjective in nature. There are many

[43] Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", *Harvard Law Review* ,vol. 55, (1941), pp. 46.
https://www.jstor.org/stable/1334739

[44] M. Maurice Orona , "What Is Justice?by Hans Kelsen", *Washington Law Review*, vol. 32, (1957), pp. 401. https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=3245&context=wlr

further arguments from lawyers who fear that justice would replace law and it would create indeterminate subjectivity in the courtroom[45].

Moreover, when one considers the indeterminacy aspect of justice, the written law or words of the statute at times provides the clause "*If Justice so requires*". Again, this clause depends on what the judges think as just and can be easily ascertained when he/she is a Realist Judge[46]. Therefore, a judge can't deliver a verdict that is unjust as it will promote revolution among the people in fighting against the injustice. Thus, the researcher dismisses the arguments of justice as a subjective concept and it would substitute itself with law.

3.3 Justice as a Tool to Measure the Validity of Law:

Justice riding with law, with a mission and a vision, achieves its goal. Law without justice is a form of tyranny. Justice without law is extensive with chaos. This emphasizes the basic principles of justice under the law[47]. Even while justice and law appear to be related, their interactions in different real-world contexts in society have made them appear to be two entirely different ideas. There is a universal conception that justice is only a legal judgment or that there is no evidence to substantiate the idea that justice as a component of law[48]. As a result, justice and the law are perceived as just two sides of the same coin. It is difficult to picture justice and law separated from each other since they are so closely related. Law and justice are also seen as moral instructors, and they are supposed to provide peace and justice to the state.

CONCLUSION:

With the above detailed discussions, the researcher concludes that Kelsen's theory of law undermines justice by placing law and justice in two distinct spheres. The researcher has arrived at this conclusion by primarily analyzing the intricacies of Kelsen's Grundnorm Theory and by examining the theory through the lenses of various theories of justice propounded by many theorists. There are various inferences that could be drawn from this analytical research. Firstly, Kelsen's pure law theory focuses only on the structure of law and doesn't consider justice. Also

[45] D' Amato, Anthony. "On the Connection between Law and Justice.", (2011), *Davis L. Rev.* 527, pp. 18. https://www.researchgate.net/publication/228187530_On_the_Connection_between_Law_and_Justice
[46] Michael S. Green, "Legal Realism as Theory of Law", *William & Mary Law Review*, vol. 46, (2005). pp. 1988. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1299&context=wmlr
[47] Godstime Otamiri, LEGAL EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND JUSTICE, (2023). pp. 10. https://www.researchgate.net/publication/371856181_LEGAL_EXAMINATION_OF_THE_RELATIONSHIP_BETWEEN_LAW_AND_JUSTICE
[48] Ibid.

his theory is purely factitious and doesn't give any explanation of where he derives the basic norm from which in itself is inconsistent to the principles of Positive Law school.

Secondly his complete alienation or deliberate rejection of morals and natural law theories from law, makes the law so stringent and will not serve its purpose where its content is completely neglected. In the second chapter, the researcher analyzes various justice theories, their criticisms and subsequently examines kelsen's pure law theory with justice theories. There, the researcher concludes that though from the classical period of Socrates, Plato and Aristotle, the justice theory could be traced, only after Rawls the theory of justicd experienced a radical change where the modern theorists did not place law and justice in different spheres.

From the third chapter, where the inevitable relationship between law and justice is established, addresses that the idea of justice is not subjective in nature and such a perception is a mere result of misconception of the notion. When one views justice from a realist perspective, justice can't be subjective in nature and thus the judges can't utilize the same which causes friction in the society. Therefore, justice is a tool for measuring the validity of law and when kelsen excludes justice from law, he actually invalidates the purpose of law. Thus, his theory is archaic and outdated and will not fit in the contemporary period, especially for those democratic countries like India which aim at achieving social justice.

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