CRIMEA-IS MIGHT RIGHT?

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Abstract

This paper explores the scope and validity of international law through the Crimean crisis in the light of two theories of jurisprudence. One is the theory Hans Kelsen and the other if of H.L.A. Hart. Hans Kelsen was a monist and believed that the national and international law are part of the same legal framework. But Hans Kelsen's theory gives us a conflicted view of the Crimean crisis in terms of the positive law and the principle of effectiveness. Hence Kelsen has given a new direction to jurisprudence of international law but in present scenario the modification of international has been much beyond the scope of his theory. I have relied on the theory of H.L.A hart to critique Kelsen's point of view because his view on international on law is based on rule of recognition .He recognises the actual practice of international law unlike Kelsen whose whole theory is based upon presumption of the grundnorm. According his theory Kelsen's monist approach is erroneous. If we reflect upon the Crimean situation keeping in mind Kelsen's theory, Russia's annexation of Crimea should be considered valid but it is in conflict with the positive law and the view of the international community itself. While taking in view Hart's philosophy I want to bring to light the flaws in Kelsen's theory and also in what light Crimean crisis can be looked upon through rule of recognition.

Keywords: *International law, Hans Kelsen, Hart, Crimea, Grundnorm, Principle of effectiveness, Rule of recognition.*

Introduction

The term 'law' has been subjected to much debate for the past centuries.The major reason for the change in the arguments and the understanding of law is because of the change in legal structure which gives law its applicability.Different philosophers according to the time in which they started writing have given different suitable interpretation to the term. Many of them, rather than defining the law itself havestarted inquiring about the human behaviour which gives law, nature of compulsion. The changing scenario in which law has to be applied has increased the requirement of law to be more versatile to include within its ambit all the possible fields without affecting the very identity of law.In this regard the most significant contributions have been made by Hans Kelsen and H.L.A Hart.

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Hans Kelsen (1881-1973) was German legal theorist.He started writing during the times of both World War I and World War II. His theory of law is knows as Pure Theory of Law.He attempted to define law independent from other normative standards such as morals[1]. Kelsen was inspired by Kant's transcendental idealism. I will be further elaborating on his theory in context of international law in later part of the essay. H.L.A Hart (1907-1992)was a British legal philosopher. His most famous work is 'The Concept of Law'.It has been argued that Hart gave a new definition to the jurisprudence[2]. He indulged into significant debate on law and its relation with other normative standards and also tried to save law from the misinterpretation given by other philosophers. For instance his book 'Concept of Law' critiques Austin's theory of law.He also wrote at the time of World War II.

Facts of the Crimean Upheaval

In this essay I will try to bring to light the Crimean situation in the view of Hart and Kelsen. The upheaval in Crimea at present can be dated back to the 1783 when Crimea was annexed by Catherine to become part of the Soviet Union.But when Soviet Union ceded into Ukraine and Russia, Crimea became part of Ukraine[3]. The present situation arose due to the pro-Russian tilt in Crimea against the pro-EU tilt.In November 2013, President Viktor Yanukovych pulled out of a deal with European Union which sparked huge streets protest.During this whole protest going on in its full swing Russia reacted by annexing Crimea where pro–Russian sentiments were very strong[4]. On June 4,separatist rebels took two Ukrainian military bases in the eastern region of Luhansk as fighting continued near the rebel-held town of Sloviansk[5].The major objective of the protests was to re-join Russia and return to the status quo according to the 1992 constitution. On March 16, referendum was signed to re-join Russia[6].However,the international community called the referendum illegal[7]. The referendum was the result of the pro-Russian protesters blocking Crimean parliament demanding independence [8].Meanwhile the Russian parliament also approved Vladimir Putin's request to use force to protect the Russian interest in eastern Ukraine.Barack Obama toldMr. Putin to pull forces back to bases [9].In his defence, Vladimir Putin said that the armed men in Crimea werenot Russian troops but self-defence forces. Russia also declared that it will support Crimea if the region seceded from Ukraine[10]. UN passed a draft resolution which criticised Crimea's secession but Moscow vetoed it.97% of the majority in Crimea voted to re-join Russia.On 17th March there was an official declaration of independence from Ukraine to join Russia.Vladimir Putin announced Crimea as its constituency.Again UN General Assembly said that the referendum is illegal and 100 countries voted in the favour of the resolution. On 1st April NATO suspended all the practical and military cooperation with Russia.On 15th April Ukraine's acting president OlexanderTurchynov, announced anti-terrorist operation against pro-Russian separatists [11].

Hans Kelsen's perspective on Crimea

The situation in Crimea has led to the change in regime.Hans Kelsen wrote during the time of World War I and World War II and hence his writings are influenced from the change of regimes in that period because that was also the period of instability and politics largely affecting law. Hans Kelsen in his quest for normativity of law has come to the concept of basic norm or

grundnorm.Kelsen justifies that the normativity in law existsbecause of the 'ought' statements which are called norms [12]. He says that there is a difference between 'is' and 'ought' that is a fact and a norm. He states in his theory that the people follow law because of the 'ought' content of the law[13]. Kelsen has established a chain of norms.According to him every norm gets its validity from a higher norm and then there is one ultimate norm which is presupposition [14]. For instance, the right of freedom of speech gets its validity from the constitution and the constitution may get its validity from the constituent assembly because people hold a belief in the constituent assembly.In this chain, the basic norm or *grundnorm* will be the constituent assembly. Kelsen was very critical of the duality of the legal structure and he favoured monism even in the international legal system. According to monism, international law and the state law are derived from the collective will of states themselves[15]. Kelsen considers the international legal order to be superior of the national legal order. In the international community, state is only considered as legal subject[16]. The *Grundnorm* of the international system has to be founded in the very structure it has created[17]. The presupposition of the historical process through which the states came into existence to international community initially has to be disregarded[18]. Kelsen considers the principle of '*pacta sun servanada'*as the *grundnorm* of international law although in later works Kelsen agreed of customs as the *grundnorm* of international law[19]. If we contrast this concept with the Crimean situation, we can determine that the *grundnorm* in Crimea before the upheaval was the government of Ukraine or the president of Ukraine, Viktor Yanukovych, because all the laws in Ukraine got its validity from the president who was the *grundnorm*. People followed the law and the rules made by him because they had a belief in the president. Hans Kelsen also speaks about this belief of people in the *grundnorm* which he calls the 'principle of effectiveness'. Principle of effectiveness provides the justification as to why the norms are followed or the legal system as whole is valid, it is because of the efficacy of the legal order[20]. The principle of effectiveness can be better understood when there is a revolution and there is change in the *grundnorm*. Kelsen in his theory states that a *grundnorm* of the country can be changed if there is revolution. During a revolution, if it is successful, a new legal order is established as the old legal order loses its efficacy[21]. A new legal structure is established which changes the *grundnorm* of state. Even if this new legal order is being established through the use of force it is considered as legitimate legal order. In the Crimean situation there was an uprising against the government because it pulled out of the EU deals. Russia then sent military which they said was to protect Russians in the region where the uprising has started[22]. Along with Russia's military support and the pro-Russian agitation already going on the government was taken over. Also during the vote on referendum 97% of people voted in favour of joining Russia.When Russia finally declared Crimea to be its territory, the *grundnorm* of Crimea changed from the Ukrainian government to Russian government. So according to Kelsen there can be change in the regime according to which law is more effective.

In the case of Rhodesian revolution anargument was made on behalf of the regime based on Kelsen's theory:

"*Legal order ceases to have validity when it loses efficacy and nolonger coincides with reality, and that this applies whether the new order which replaces it came about in a legitimate way or not, provided only that the prior efficacy of the old order has passed to the new one.*"[23],this very thing happened in the Crimean situation.

Digging up more on the principle of effectiveness we can question what gives the validity to this principle. Kelsen being amonist,believed that the national and international legal order cannot exist without each other and are part of the universal legal order[24]. Kelsen believes in primacy of international law in this regard.The principle of effectiveness belongs to international law which actually establishes that authority is the legitimate government and the coercive order enacted by such government is the legitimate order[25]. It was also argued by him that even if the government is not a *de jure* government but is a *de facto* government its acts will be considered as legitimate because the de facto government is the effective government[26]. And since Kelsen believes in the primacy of the international legal order and principle of effectiveness, being the norm in international law has to be followed by the subordinate national legal order[27]. In Crimea, Russians used force, although portraying it as just a defence, established a new legal order.

According to Kelsen, since the effective legal order at present will be the Russian legal order and hence that has to be followed as a legitimate government in Crimea, Ukraine cannot hold any power.Since now the international legal order is the primary legal order,the *grundnorm*of the international legal order has to be established. Kelsen says the *grundnorm* of the international legal order is *pacta sun servanda* which means contracts have to be honoured [28]. All the national legal orders are bound by this norm.So the norm which gives this validity to the change in regime and use of force in doing so is the international law because it is governed by the principle of effectiveness. But as in the case of Crimean situation although the actions of Russia seem to be justified according to Kelsen's theory of law but the international community was against it.The UN considered the referendum as illegal although it was vetoed by Moscow. Thus the actual practice of international law differs from the theory which is given by Kelsen. The positive law in international law states that use of force in other state territory is prohibited but this law was overridden by Russia hence international law is only valid till the time it is recognized by the individual states, which again creates a conflict that the internationallaw and the national law may not be the part of the same legal framework.

Thus, it leads to two conflicting opinions -norm of the principle of effectiveness and its primacy over the national legal order which validates use of force for annexing a sovereign territory and on the flip side there are laws of the international law as mentioned in the UN charter being the positive law which states under article 2(4) that use of force is illegal. In the Crimean situation, on one hand, principle of effectiveness being the general norm of international law justifies Russia's action but on the other hand the UN charter and the UN general assembly is against the Russia's reactions in Crimea. It creates a large conflict within the theory of Kelsen because he believes international law as being a 'law' but he also places his reliance on the principle of effectiveness. In contemporary international scenario Kelsen's theory might prove enlightening but not practical.

Hart's perspective on Crimea

H.L.A Hart traced the validity of laws to the rule of recognition. Hart in his philosophy has laiddown that law is the union of primary rules and secondary rules.Hart's whole theory is based on the doctrine of rules. According to his theory people follow rules because they understand the internal aspect behind those rules; he rejected Austin's theory of order backed by threats[29].

Primary rules state how the people have to behave. They are basically statutes. While secondary rules are power conferring rules[30],it includes the legal system which ensures that the primary rules are being implemented and followed. They both combined follow the 'rule of recognition' which establishes law[31]. If we contrast it with the Crimean situation on the basis of 'rule of recognition' to evaluate whether the international law gives the justification to Russia's reaction, it will again lead us to question whether the national legal order is subordinate to the international legal order. Hart while evaluating whether international law is in fact a law or not analyses that international legal system lacks secondary rules which will ensure the implementation of international laws[32]. The system of international law lacks compulsory jurisdiction [33]. Although there exists a charter but it remains only on paper because of the veto power given to certain states. In the present situation, Moscow vetoed the GA resolution declaring the referendum illegal which clearly shows the lacunae of compulsory jurisdiction in the international legislature.

Hart has in fact critiqued Kelsen unity of law theory. Hart's criticism is less methodological rather it is based on factual situations[34]. Kelsen has argued that the national legal order and the international legal order are part of one frame which subjects both individual and states.But Hart believes that international law and national law subjectsare different things. While international law deals with states, the national law deals with individuals and they cannot be subjected to similar laws and hence Kelsen's theory fails[35]. Hart also finds it problematic to observe that the sovereign states are subject to the obligation of international law which is out of their states purview of rule of recognition. Hart also rejects the conception that*pacta sun servanda*is the rule of recognition of international law because the obligations in international arise from not merely factual situations[36].

He has stated in his book concept of law that,

"*there is indeed something comic in the effort made to fashion a basic rule of the most simple form of social structures which exist without one. It is as if we were to say that a naked to savage must really be dressed in some invisible variety of modern dress. Unfortunately there is also here a standing possibility of confusion we may be persuaded to treat as basic rule, something which is an empty repetition of the mere fact that society concerned(whether of individuals of state) observe certain standards of conduct as obligatory rules, this is surely the status of the strange basic norm which has been suggested for international law; 'states should behave as they have customarily behaved' for it says nothing more than that those who accept certain rules must also observe a rule that the rules ought be observe. This is a mere useless reduplication of the fact that a set of rules are accepted by states as binding rules."[37]*

He also rejects the idea that customary rules are the rules of recognition but that does not create any compulsory obligation on the international society[38]. He comes to a conclusion that international law therefore consists of rules which constitute not a system but a set of rules.The difference between Hart and Kelsen on this point is regarding the fact that Hart's rule of recognition finds its validity not in ultimate presupposition but in actual practice and social facts but Kelsen believes in the validity of *grundnorm* as the presupposition[39]. This presupposition of Kelsen has led him to the conclusion that the international legal order is higher in hierarchy of norms. According to hart, what is missing is the identification of institutional practice of recognition and facts of recognition to show norms are systematically connected. But Hart

compares the international law to actual practice and understands it as only a set of rules which may or may not be accepted. In the Crimean situation, the use of force by Russia and finally Crimea becoming the part of Russia can be justified as there is rule of recognition. 97% of people voted in favour of Russia which shows that they understand the internal aspect of the rule. Also the UN criticising this may or may not be accepted by Russia because according to Hart international law is not law but only set of rules.Hence Kelsen's conflicting opinions can be answered with Harts concept of actual practice. Hart understands the reality of international law which has unequal distribution of power, unpredictability of war and hence sanction does not always work[40]. He understands that sanctions work in different ways in both international and municipal legal system, because of this very reason he does not agree with the monist approach. On the Crimean crisis, Hart's view may not provide with the clearest of situation but very much accepts and highlights the drawbacks in the international legal system as a whole. There is no absolute nexus between the positivity of international law and its practice by the international community when Russia was asked to justify its actions, it stated that the US did the same thing in Iran.Hence the fair recognition of international law is far from just missing.

Conclusion

The conclusion here is not very easy to draw because theory of both the philosophers in Crimean situation clears out what cannot be done, but what can be done is still debatable. The referendum is in conflict with the positive international law which is essentially a debate between popular will and the law. Hence through this paper I have tried to bring to notice the opinion of the philosophers on the same issue. It is not for the first time that these theories have been referredto. Kelsen's theory was at first applied in Dosso case(PLD 1958 SC 533), they were rejected as a guide in the subsequent Pakistan Supreme Court decision in Jilani. Similarly, in Bhutto, the Court criticised reliance upon Kelsen's approach as confusing between 'is' and 'ought'[41]. After analysing the case of Jilani v. Chief of Army Staff(PLD 1972 SC 139),Cyrus Das, now the chief Justice of Supreme Court of Malaysia, observed that "*Kelsen's theory has an unacceptable face to it. It endorses unconstitutional behaviour and legalises the actions of usurpers and mutineers*"[42].Hart's critique of the Kelsen's theory gives us a view of the problems we face while considering international law as law.Also, even if we view international law as an imposing obligation it should not be considered the same as the national legal structure. The Crimean crisis which has sparked much of debate regarding the application of international law from political point of view,this paper presents the debate from the jurisprudential view.

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