

# AUSTRIAN MINDS: EXAMINING HOW VIENNA CIRCLE INFLUENCED ON HANS KELSEN'S NOTION OF "GRUNDNORM" AND 20TH CENTURY LEGAL POSITIVISM

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**Abstract** - This paper seeks to explain Kelsen's pure theory of law and his whole contribution to legal positivism was influenced and bolstered by his early stay in Vienna, even though the foundational stone laid by Kelsen on legal positivism is clearly distinguished from logical positivism propounded by the pioneers of Vienna circle, in this article I argue the intellectual uplifting Kelsen underwent during the youth he spent in Vienna had left a hallmark in his thoughts. Furthermore this article illustrates how both logical positivism and legal positivism grew parallel in a same time period during two great wars. Central argument I seek to explain in this article is to demonstrate Hans Kelsen as a legal modernist and how Vienna circle made impacts upon his thoughts.

**Keywords** - Vienna Circle, Legal Positivism, Pure Theory

## I. INTRODUCTION

Tracing a connectivity between logical positivism and legal positivism may seem to be a highly irrational or perhaps baseless endeavour as they are by nature constructed in completely different theoretical stances, but it would be an interesting observation to contrast how Hans Kelsen being the pioneer on legal positivism and his grand contribution to jurisprudence "pure theory of law", was influenced by the wave of modernist thoughts prevalent in Austria, mainly in Vienna Circle. After graduating from Vienna University from 1919 to 1930 Kelsen held an academic post there and it was in this epoch that Vienna circle began to grow as a new academic wing after the decline of Austrian empire. This circle was established by Moritz Schlick and Otto Neurath and Rudolp Carnap became the central intellectual figure in the circle. The developing

the ideas on logical positivism into the domain of science and philosophy were mainly done by Vienna circle in its heyday. It was absolutely in a swashbuckling process to assimilate the development of science into positivism and members of Vienna circle were particularly interested in the development of science and they saw the need of liberating 20th century philosophy from the dogmatic influence of Hegelian idealism. The phase positivism in philosophy of 20th century, while far from having a generally accepted meaning, appears to comprise at least three different trends: Empiricism, pragmatism and logical positivism. All these three aspects have enormously helped contributed to liberate philosophy from metaphysics. The intellectual grip of Vienna circle was akin to the given trends in positivism and moreover their ideas on language were crucially influenced by 20th century philosopher Wittgenstein. (Janik 1973)

In understanding how Vienna circle influenced upon the thoughts of Hans Kelsen, it is important to understand the significance of empiricism in law. The earliest understanding of Western jurists among the nature of law was primarily based on the natural laws which took more idealistic stance. The natural law discourse dominated among the Greeks and Romans as the fountain of law addressed those philosophical aspects but the empiricism became important to law, which extended the laws scope from nature, morality, religion, divinity and other external factors to the social order and how human acts involve in law. Freedman has aptly pointed out the importance of positivism in law as

"It is in modern legal theory that "positivism" has acquired major significance and come to symbolize the dominant

trends in contemporary legal thinking. Much its most important manifestation has been “analytical positivism”, scientifically established by Austin and his successors, modified in our time by Kelsen and the Vienna circle”. (Friedman 1967)

This paper will create a new discourse on how Kelsen’s approach to legal positivism or commonly called “Pure Theory “ was influenced by the contemporary intellectual transformation in the city of Vienna through the activities of Vienna Circle. Moreover this paper elucidates the slight similarities between logical positivism of 20th century analytical philosophy and legal positivism.

## II. KELSEN AND “GRUNDNORM”

The debate between ought and is has become a prevalent ideological encounter in law since the days of yore. The period where positivism grew was an era of many intellectual debates about these two elements. From one side the moralist argument on law ought to fulfil the moral order of the society was playing a pivotal role and other side Positivistic approach towards law freed it from the elements such as morality, the debate between good and bad etc. Instead of taking such idealistic standards the positivism in law focused on what the law is. English jurist John Austin was the first of entire positivist pantheon in 19th century many were yet to follow him. In examining the idea of Hans Kelsen’s “Pure theory of Law”, the influence he inculcated from Kant stands as a salient factor albeit he is regarded as a positivist in analytical jurisprudence. (Kelsen 1955) Kelsen regarded law as a hierarchy of normative relations, not a sequence of causes and effects, natural sciences. In fact this idea has gained its roots from Kantian notion of man as a fundamental part of universe subject to the law of causation. His sole objective is therefor to determine what can be theoretically known about law of any kind at any time and under any conditions. The essential foundations of Kelsen’s system may be enumerated as follows,

- (1) The aim of a theory of law, as of any science, is to reduce chaos and multiplicity to unity.
- (2) Legal theory is a science, not volition. It is knowledge of what the law is, not 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 not concerned with the effectiveness of legal norms.

- (5) A theory of law is formal, a theory of the 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 of actual law.

Even though Kelsen’s idea was akin to John Austin externally, like Austin Kelsen never considered law command of the sovereign. As a matter of fact Kelesen’s understanding of law was rather systematic. He vividly described law as a chain of events followed by conditions and sequences, he believed in a hierarchy of norms should be constituted in any given legal system, each of norm should receive its authority form a superior source and the Kelesen called the fundamental norm as “Grundnorm”. In his analysis all the other norms in the hierarchy was subjected to the deduction except the “Grundnorm”. Kelsen states “The fundamental norm itself is not capable of deduction, it must be assumed as an “Initial Hypothesis “. (Kelson1955) As an example in a sovereign state in parliament democracy, the parliament is the fundamental norm and if the legal system belongs to the country is governed by a dictator, his authority will be the highest norm.

## III. KELSEN’S ASSOCIATION WITH VIENNA CIRCLE

As an expert of constitutional law, Kelsen played a key role in drafting the constitution of Austria, which was a philosophical landmark in certain ways as the promulgation of new Austrian constitution marked the dawn of modernist legal thoughts in Europe. Having held a post in Austrian Constitutional Court, Kelsen left Austria for the U.S.A in 1930. However in understanding his intellectual contribution to the realm of jurisprudence throughout his career, it is evident that the days he spent in Vienna and his involvement in Viennese modernist movements crucially sharpened his legal acumen. In an academic paper named “Kelsen and his circle “; Clemens Jabloner has stated the following statement.

“Of Kelsen’s various connections, there are three which merit particular attention: Kelsen’s relations with the Austrian Social Democratic Party, to which he contributed notably on an intellectual level although he was not a member: the links between the pure theory of law and the logical empiricism of the Vienna circle and his contact with psychoanalysis and its founder Sigmund Freud. (Jabloner 1998)

In tracing Kelsen's links to Vienna Circle, it is an interesting factor to observe that Kelsen had never been a recognized member of the circle and ostensible Kelsonian standards were purely different from the scientific approach adopted by Vienna circle. In fact the difference between Vienna circle and Vienna school of jurisprudence of Hans Kelsen based on heavy philosophical distinctions. Mainly as stated above the phrase "Positivism" was comprehended by two schools in different styles, but nevertheless the positivism in Vienna circle like legal positivism tends towards the empirification of their object of cognition. In his defence of not being a follower of Vienna circle Kelsen has stated "In response to your letter, I would like to inform you that I did not belong to the so called "Vienna Circle" in the strict sense of the word, I had personal contact with this circle through my acquaintance with Prof. Schilick, Dr. Otto Neurath. What connected me to this circle –without being influenced by it- was its antimetaphysical thrust. From the very begging I rejected the moral philosophy of this circle –as is formulated in Schlick's issues of ethics. However the writings by Phillip Frank and Hans Reichenbach on causality did influence my view of this issue. (Jablonek 1998)

Kelsen's own statement proves how he compelled himself to diverge from Vienna circle, even in understanding logical positivism from pure theory of law, it becomes certain Kelsen always saw law a normative science and under this condition there can be no doubt that legal norms which belong to the realm of 'ought' are not to be found in reality by empirical means. However, a mental operation, the assumption of the 'basic norm', makes it possible to describe legal norms as special kinds of 'realities'. In connection with law, 'positivism' implies a limitation to a regularly effective system of Orders created by humans. On the contrary the logical positivism applied in Vienna circle paid a much concern over observation of the experience and results of experiments.

Yet, there is a significant commonality between Vienna Circle and Hans's Kelsen despite having so many major firmly established differences around. Our main objective of this paper is to trace that commonality and to propose a hypothesis that Kelsen was sharply influenced by the intellectual changes occurred during the time period between end of First World War and beginning of Second World War in the city of Vienna. Firstly Hans Kelsen wanted to found a science of law which is kept free from all the elements foreign to the Specific methods of a science whose only purpose is the cognition of law. This contention upheld by Kelsen has made him anti metaphysical and

also his anti-metaphysical stances are one paramount factor which unites Vienna Circle and Kelsonian school of jurisprudence. Kelsen wanted to overcome the traditional half-measures employed by legal science, which tends towards 'pragmatic' or 'case-by-case' solutions as soon as a consistent application of a theoretical basis leads to ideologically undesirable consequences.

On the other hand we suggest the motives of both Kelsen and the pioneers of Vienna circle such as Carnap, Neurath and Schlick have rooted in modernism. Modernism was kind of a mantra absorbed by Vienna circle in the most active period of their scholarship. Throughout their active days, members of Vienna circle strived to refute the existed philosophical dogmas and 19th century philosopher Hegel happened to be their arch rival. Hegel took the whole human history as a process in which a "world spirit" gradually reached consciousness of itself. For Hegel, individuals are less important than the state as a whole especially the role of the state in the grand march of historical progress. These ideas were taken to support strong forms of nationalism. Hegel's was an "idealist" philosophy, since it held that reality is in some sense spiritual or mental. Hegelian ideas flourished in Europe and path created by Hegel aroused German nationalism which Vienna circle vehemently opposed. Apart from Hegel Vienna circle had rivalry with German philosopher Martin Heidegger too. Heidegger 's philosophical flare over metaphysical speculation was often criticized by Vienna circle and when Heidegger delivered his lecture after assuming Husserl's chair of philosophy at University of Freiburg in 1929, he delivered a lecture titled "What is Metaphysics ?" by this lecture he professed his famous declaration " The Nothing Itself Nihilates" ( Das Nichts selbst nichtet ).(Vrahimimis2012) However Heidegger's philosophical claim on nothingness was subjected to the harsh criticism by Rudolph Cranap of Vienna Circle. (Vrahimimis2012) In fact the Vienna circle appealed to modernism and their quest was essentially focused on liberating the European values from mysticism, romanticism and sheer boredom of nationalism. We argue the same modernist objective was imbued with Kelsen's approach to jurisprudence. Jurisprudence existed prior to Kelsen dwelled in much ideological whims and fancies. It is true that first positivist revolution in law was turned by English jurist John Austin; yet, the approach of Kelsen was sui generis in many ways. Mainly like Vienna circle Kelsen too anticipated to formulate his "Pure theory of law "under modernist shadows. Kelsen had explicitly mentioned that his norm theory is to clarify the relations between the fundamental and all lower norms but not to say whether

this fundamental norm itself is good or bad. That is simply the task of political science, or of ethics, or of religion.

In comparing and contrasting the points that how Kelsen's ideas can be par with Vienna Circle, his attempt to disrupt the authority of absolute idealism in law resembles how Vienna circle struggled to remove the Hegelian thoughts from philosophy. Having realized the impracticality of existence of such absolute values in law, Kelsen was audacious to reject the natural law theories propounded by all natural lawyers. This was the decisive factor which distinguished from traditional legal theorists. In an article written by a German scholar named Jorg Kammerhofer, author points out "Kelsen shows that such an absolute value cannot exist; that all attempts by the various natural law approaches to found such a value are bound to fail. While I cannot detail them all here, let me just mention Aristotle's 'entelechia' – the derivation of an absolute value standard from the alleged social nature of man. Kelsen proves that to derive a value from a series of facts – assuming that, empirically speaking, humans have unifiable characteristics – to seek to derive value from facts is a breach of the Is- Ought dichotomy, which dissolves the very possibility of the factual becoming a standard. (Kammerhofer 2009)

However the ambivalent position of Vienna circle in Kelsen's contribution to Western jurisprudence can be finally unveiled in one of his lesser known book called "Vergeltung und Kausalit". In this writing Kelsen has formulated following arguments.

- (1) People interpret 'nature' normatively according to the principle of imputation (thus as society) or scientifically according to the principle of causality (thus as nature).
- (2) In the development of human thinking the normative method appears before the causal one.
- (3) the idea of 'causality' only gradually becomes liberated from that of 'retribution
- (4) In the course of emancipation of the idea of causality from that of "retribution" through renunciation of absolute necessity –dualism could be overcome in favour of a unified science. (Klemenes 1998 ).

These claims have a slightest affinity with what logical positivists argued in their claims and this reiterates although Kelesen was not a part of Vienna circle, his work was availed by the contemporary changes occurred in Vienna. Above mentioned factors in this paper have clearly illustrated how two ideological bents in a same city grew up parallel to each other and given factors have discussed the extend that influenced Kelsonian thought in jurisprudence.

## IV. CONCLUSION

In this paper we have considerably attempted to show the connectivity between Vienna Circle and Hans Kelsen's pure theory of law as two different academic discourses grew in same time period between two world wars. In the end of the paper viewing Hans Kelsen and his legacy as the beginning of 20th century legal modernism would be one possible conclusion that we can reach after reading and analysing how Kelson attempted himself to understand legal positivism in a novel approach which completely diverged law's position from the conventional positivism existed before Kelsen, furthermore Kelsen's "Grundnorm" or "Pure Theory made a profound impact for modern legal positivists to develop law as a science. In the end we believe scientific approach followed by Kelsen was mainly arose from the parallel intellectual transformation he witnessed in Vienna circle.

## References

- Friedman.(1967) Legal Theory, Second Edition, pp. 112.
- Jabloner, Klemens.(1998) Kelesen and his circle Viennese years, European Journal of International Law, pp.376. Ibid.,pp.382.
- Janik, Alan. (1973) Wittgenstein's Vienna, Ivan R. Dee; New edition, pp.45.
- Kammerhofer, Andreas. (2009) Hans Kelsen as the epitome of legal modernism", Journal of University Erlangen-Nuremberg, pp.67-81.
- Kelsen, Hans. (1955) General Theory of Law and State (Trans Leslie Green), Oxford University Press, pp.120. Ibid. pp.134.
- Vramhimis. Andreas, (2012) Modernism and Vienna Circle Critique of Heidegger, Willy Online Journal, pp.78.