

The Influence of Kelsen on Korean Legal Philosophy*

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Abstract

The discussion of Hans Kelsen's Pure Theory of Law among mainstream legal theorists is quite commonplace in Korea. What has Korean legal philosophy gained, and what has it lost through its communion with Kelsen? With this question in mind, I will, at least, roughly retrace the steps made in modern Korean legal history and consider what kind of impact Kelsen's theory of law has made in several crucial moments. I will reflect upon three moments: the adaptation of Kelsen's Pure theory of Law immediately after the liberation from Japanese occupation, Kelsen's comments on the actions taken by UN Security Council in Korean War, the reference of the Korean Prosecution to Kelsen's Grundnorm and the so-called 'successful coup' in the accused 1995 high treason and murder/attempted murder in the May 18th related case. Furthermore, with this background in place, I will venture to discuss each of these questions. First, whether or not the Pure Theory of Law has been conducive to the scientizing of jurisprudence in Korea, secondly, whether or not it has contributed to constitutional democracy. Thirdly, whether or not it is a theory that aids in solving hard cases in the court decisions, fourthly, whether or not it is a theory which helps us view law in light of the new changes brought about by globalization, fifthly, whether or not it is a theory which corresponds to our experiences and natural practices in society. Finally, without regard to whether the answers to these questions are positive or not, we will keep these issues in mind and consider how we can overcome or go beyond Kelsen's theory.

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I. Postulation of the Problem

They say there is such a thing as the 'postage stamp principle.' In order to make a well-known theory, you need to be able to fit the concept or the core of the theory into a size as small as the postage stamp. As the name 'The Pure Theory of Law (*Reine Rechtslehre*)' tells us, Kelsen's theory of law, which emancipated law from ethics and gave it its own neutral zone away from politics, is simple, straightforward and insightful, solving a knotty problem readily and is a model example of just what the postage stamp principle should entail. However I do think that of all objects of inquiry, law is something that should be approached at from all angles. I find it difficult to accept a concept of law or theory of law which fits neatly into the size of a postage stamp. That, in fact, reminds me of the fable, 'The Blind Men and the Elephant.' In this fable, some blind men happened to come across an elephant. The first blind man who touched its head believed it to be a big pot, the man who felt its ears - a fan, the legs - a trunk, the long nose - a snake, and its tail - a rope, in this way each one feeling a different part, but only one part and so they end up in complete disagreement, each man failing to concede the others' point of view.

In truth, the discussion over the Pure Theory of Law among mainstream legal theorists is quite commonplace in Korea. What has Korean legal philosophy gained, and what has it lost through its communion with Kelsen? With this question in mind, I will, at least, roughly retrace the steps made in modern Korean legal history and consider what kind of impact Kelsen's theory of law has made in several crucial moments. Furthermore, with this background in place, I will venture to discuss each of these questions. First, whether the Pure Theory of Law has been conducive to the scientizing of jurisprudence in Korea, secondly, whether it has contributed to constitutional democracy. Thirdly, whether it is a theory that aids in solving hard cases in the court decisions, fourthly, whether it is a theory which helps us view law in a different perspective in light of the new changes brought about by globalization, fifthly, whether it is a theory which corresponds to our experiences and natural practices in society. Finally, without regard to whether the answers to these questions are positive or not, we will keep these issues in mind and consider how we can

overcome or go beyond Kelsen's theory.

As a legal theorist, I do wish to hold Kelsen's passion in high regard, wherein he sought to reveal the science behind jurisprudence, and how it stands on its own as a unique area of study. However, the law does not exist only as a field of study. One legal scholar who is critical of discussions of law solely based on the Pure Theory of Law, argued that discussions based on the Pure Theory of Law in Korea is much like the 'Glass Bead Game (*Das Glasperlenspiel*)' by Herman Hesse. Far away from secular or civil life, the world of an academic professional group making rules with glass beads that ordinary people do not understand...

Occasionally the economy is described as a 'living organism,' and in a sense law too, is a living thing. The law is a living institution, very much alive, and living things, as we all know, cannot survive in waters that are crystal clean. Kelsen's Pure Theory of Law was too pure in its outer form, therefore the confrontation of Kelsen and Korean Legal Philosophy started off on the wrong foot in Korean legal history, the history rife with mistakes and painful wounds.

II. The Confrontation of Kelsen and Korean Legal Philosophy

1. *The First Confrontation – Pure Theory of Law or Legal Realism?*

Modern history of Korean law, can be seen as broadly encompassing about 100 years, starting from the enlightenment period, or in the narrow sense, around half a century starting from the emancipation from Japanese colonization. During the past half or more century, the Korean legal philosophy and professionals met or confronted Kelsen three times.

Immediately after the liberation from Japanese occupation, Korean legal philosophy took its baby steps by adopting the Pure Theory of Law by Hans Kelsen.¹⁾ This was a result of Odaka Domoo (尾高朝雄) who taught

1) See Un Jong Pak, *Hangukbeopcheolhagui Banseonggwa Gwaje [Self-reflection and the Future Task of Korean Legal Philosophy]*, 10 BEOPGWA SAHOE [THE LAW AND SOCIETY], 189-190 (1994). This piece was supplemented and published in my book *PROBLEMS IN PHILOSOPHY OF LAW* (2007).

legal philosophy at Gyeongseong Imperial University — the predecessor of the present Seoul National University — following the tradition of continental law. As a consequence, teaching legal philosophy scholars who succeeded Odaka such as Hang Nyung Lee, San Duk Hwang introduced Kelsen-style legal positivism without any evaluation or critical inspection of the theory.

Some scholars believe that the Pure Theory of Law acted as a kind of ‘godsend’ for people in those times who dreamed of reforms in law and rebuilding the law directly after the liberation.²⁾ However, the Pure Theory of Law was not a ‘godsend’ of legal philosophy as some thought but in fact an unavoidable reality to law scholars of that time, and merely an exemplification of this pressing need. In fact Odaka actually changed his legal philosophical view after he discovered that citing Kelsen was meaningless after the war.

After emerging from the second World War, Korea was tasked with the need to rebuild democracy. The fact that Korea at this stage started off with Kelsen was not a result of autonomous enthusiasm for learning or through deep introspection, but actually it was a result of the shadows of the old times. San Duk Hwang, who translated and published the Pure Theory of Law and wrote in the preface, “In terms of our independent efforts to establish the law in our nation, considering the fact that Japanese legal scholars sought to put our country under Kelsen’s influence rather than any other Western country, I simply place our starting point in overcoming Kelsen’s theory.”³⁾ However, afterwards San Duk Hwang failed in contributing any other theoretical building block or practical discourse for overcoming Kelsen, and as a result abetted law education and legal circles in being overrun by Kelsen’s theory.

In truth if there was a need to pay heed to Kelsen in order to dispose of the abuse of law and for the reconstruction of constitutional democracy, it was necessary to critically assess Kelsen’s work on the essence and value of democracy alongside his theory of pure law. Instead there was exclusive devotion to his pure theory of law alone. However it was only in the 1960s

2) *Id.* at 66.

3) HANS KELSEN, SUNSUBEOPAK [THE PURE THEORY OF LAW], at i (San Duck Hwang trans., 1949).

and 1970s that Kelsen's work on democracy was taken notice of, and only a little. In this way the "pure theory of law" planted its roots deeply in law school education as mainstream legal theory. In making this possible scientism which was advocated by the pure theory of law probably played a large role. At any rate the pure theory of law discussion has so far been the most appealing to Korean legal scholars, legal practitioners, and others studying law more than any other theory.

In facing the task of disposing of laws established by Japanese colonial rule and reconstruction of the rule of law after the liberation, legal philosophy should not have focused on Kelsen's pure theory of law but rather on the restoration of morality of law, on discovering the gap between rule and reality and how to bridge this gap, among other things, and in fact a line of thinking very unlike the pure theory of law should have been requested. In truth there was some movement that advocated a shift away from legal. This movement did not spring from legal theorists but from those who were practicing law.

If legal scholars lead the general atmosphere of legal positivism, legal philosophy of the judicial officers emphasized 'living law' as opposed to 'law in the books' and sought to find a road that went beyond legal positivism. In the face of the great gap between a hastily established law⁴⁾ and the reality at hand, and in order to overcome this they tried to find ways to actively and formatively interpret the law. Furthermore they did not see the law and politics separately, and on the basis of acknowledgement of the connection between the two they understood the special function that the judicature played, and feared the destruction of the law by political power. It was in this atmosphere which sought to rescue legal decisions according to the 'living law,' that Ehrlich's *Fundamental Principles of the Sociology of Law* and other books on sociological legal theory

4) At the time, one side argued for the rapid compilation of a new statute law, and the other side said that there were serious problems with such rough-and-ready legislation and argued for the continued use of custom law for the time being, but in the end the direction was laid in opting for a rapid establishment of new statutes. Because the establishment of basic law was too hurried, for the reasons that Japanese legislative system was the modern legal system, the Japanese law system was adopted and translated into Korea's new legislative system. Criminal law, civil law and other major laws were established during the Korean War of June 25th 1950 in refuge.

begun to be translated. However this request from legal realism was neglected by educational circles. Therefore the issues involving the reality of society, wherein the basic assumptions of legal judgment are, were ousted from Korean law textbooks. In this way the scope of law as a field of study was limited to a normative approach, and a climate that tended to focus on literal interpretation of the existing law and statutes was created.

2. *The Second Confrontation – The Korean War and the UN Law*

In his book published in 1951, *Recent Trends in the Law of the United Nations*⁵⁾ Kelsen wrote in detail about the international problems related to the actions taken by the UN in the Korean War in 1950. At the time the UN Security Council passed three Resolutions (June 25, 1950; June 27, 1950; July 7, 1950). It is difficult to go into the content of these Resolutions in detail so here we will look at the Resolutions in brief.

In the first Resolution the UN Security Council, on the armed attack by the North Korean army stated that “this kind of activity fosters the destruction of peace” and resolved that the army retreat to the 38 parallel as a provisional measure. Kelsen firstly pointed out that it was problematic that the Resolution of the UN Security Council, considering that North Korea was a rebel organization that was not formally recognized by the UN, was addressed at the Authorities of North Korea and not at a state. More than anything else, ‘international peace’ in the UN Charter in principle means ‘peace among states’ and therefore the ‘destruction of peace’ as outlined in the UN Charter, in principle, was not relevant to the North Korean army’s forceful act of attack as it was not an armed attack among states.

The second Resolution stated that “it recommends that the UN Member States provide necessary help to Korea in order to restore international peace and safety,” and it included the use of armed force. Kelsen questioned whether the ‘recommendation’ under the Charter could include armed action. If there was a need for forceful measures, it could not be made in the fashion of a recommendation to the U.S., a Member State, the

5) HANS KELSEN, RECENT TRENDS IN THE LAW OF THE UNITED NATIONS (1951)

only way such an action could be made was by UN Security Council itself. According to Kelsen such measures could be legitimate only in the case that the UN Security Council recognized the Korean War as an international war among different states, however this did not appear in the Resolution adopted by the UN Security Council.

In the end according to Kelsen Korea's armed dispute which can be seen as a civil war, forceful measures, according to Article 39 of the Charter, can only be enacted in the case of 'threat' not 'destruction' of international peace, and therefore not in the 'restoration' of peace but only in 'maintenance' of peace. Therefore the UN Security Council formally saw the armed conflict in the Korean peninsula as civil war, however in reality it thought of it as an international war between two states and made a series of measures. Accordingly Kelsen had pointed out these problems pertaining to international law.

The third Resolution recommended that the 'Joint Forces Command' "use all forces and other assistance." Kelsen asserted that the third Resolution passively legalized U.S. action, and criticized that collective self-defense was invoked after safety maintenance measures had already been taken and therefore in principle was not able to be taken under UN laws. Furthermore it was difficult to assume that action taken by a Member State as being UN action, and also action taken under mere recommendations cannot be the Action by UN and is therefore problematic.

3. *The Third Confrontation - 'Grundnorm' and the 'Successful Coup d'état'*

In 1995 the Korean Prosecution referred to Kelsen's *Grundnorm* in the accused high treason and murder/attempted murder in the May 18th related case. Following the legal principles of the so-called 'successful coup,' two former presidents including those responsible for the May 18th Gwangju civil massacre were not prosecuted, the Prosecution holding up Kelsen's *Grundnorm* as their brazen shield. At the time the Prosecution cited legal philosophers such as Kelsen, Jellinek, Radbruch, and in accordance with the legal principles of the so-called 'successful coup,' stated that in the case that a new leading power at the front of major political change has been successful in creating a new government, they cannot be charged (in

defense of the former government) for rebellion against the former political order, and accordingly the successive actions cannot be the object of judicial review. That is, the Prosecution cited Kelsen's *Grundnorm* and asserted that "if political reform has been successful and the new order becomes the effective new order, this becomes a change in fundamental norm which follows the recognition of the new government as the authority for establishment of the law."⁶⁾

It is common knowledge that Kelsen tried to understand all legal matters from a normative standpoint, that is, 'norm from norm.' Because this standpoint is hypothetical and logical, fundamental norm can be completely free from the reality of law legislation and the content of law. Kelsen asserts that in this way, free from ethical, political, social methods, purely normative legal positivism, that is, pure legal theory can be established.

Kelsen, who claims that the principle of 'legality' is limited by the principle of 'effectiveness,' included coup d'état or rebellions in the scope of revolution which limits legality. Success of resistance from the 'grassroots' masses and revolution which has its core aim in reform of ideology can be justified by the theory of general recognition or by the idea of the law. However the same rule, I think, cannot be applied to coups and rebellions. However Kelsen's amoral attitude disregards this point and only defines according to whether it is successful or not.

The Korean Prosecution could have been confused about the so called 'points of view.' That is to say, as legal practitioners the Prosecution should have recognized the law as being binding and should have taken an 'participant standpoint,' instead they unduly took an 'observer standpoint' same as the standpoint a theorist such as Kelsen takes when explaining the law as having a value free and scientific bearing.⁷⁾

In truth as Kelsen himself said, "Pure theory of law does not stipulate to

6) See UN JONG PAK & IN SUP HAN, MAY 18TH: LEGAL RESPONSIBILITIES AND HISTORICAL RESPONSIBILITIES (1995). On 'actual normative power' citing Jellinek, and for the section citing Radbruch see Hun Sup Shim, *Beopcheollhak. Hyeongmyeong. Kudeta: Geomcharui 5.18 Bulgisocheobuneul Gyegiro* [Legal Philosophy ion citing *ciCoup d'état: From the Non-indictment of the May 18 Cases by the Prosecutor's Office*], MAY 18TH: LEGAL RESPONSIBILITIES AND HISTORICAL RESPONSIBILITIES, 40 (1995)

7) To read in more detail on this assertion see *id.* at 60.

obey the commands of the constitutional legislator.” According to Kelsen the duty to obey the law cannot be answered by academic theory but it is dependent on the decision made in accordance to our conscience. However how can one say that obedience of law is dependent on the freedom of those subject to law in one hand, and in the other hand assert that the underlying hypothesis of *Grundnorm* is that ‘objective binding force’ lies in the same law? It is incomprehensible.

The decision by the came to head against a pan-national resistance. Bowing to the pressure from the masses, the Prosecution later on changed its legal standpoint 180 degrees, and a special law for the May 18th movement was legislated, which was finally legally settled.

III. What Kelsen left

1. How did the Pure Theory of Law Contribute to Scientization of Jurisprudence?

Kelsen’s lifelong work was to place jurisprudence, in the same level as science. That is, as a field of study, reveal that the law stands separate in its own entity and accordingly demonstrate the innateness of law. Kelsen’s interest in scientization was insofar as that he aimed to write on law to the heights of natural science, and some point out that the concept of *Grundnorm* could have risen from the hypothesis method used in building a theory in natural science. According to Kelsen the core of law as a field of study is to purely understand the law as a norm based on what it ought to be, and establish normative theory on this. Here oughtness, that is, norm refers to the actions which humans ‘ought to’ perform according to a certain method, and this statement is essentially different from the statement that predicates the fact of existence.⁸⁾

We can acknowledge the enlightening, pragmatic significance of the dualistic method. At the very least the existence of a norm that is distinct from reality can be illuminated in introduction to law. It can be useful in

8) HANS KELSEN, REINE RECHTSLEHRE [PURE THEORY OF LAW], 4 (1976) (German)

that it also reveals the structure of working legal regulations and therefore allows for better understanding of the structure of the working law. In reflecting on my own past in teaching law to students, the Pure Theory of Law appeals most to those studying law because of these advantages.

Till the 1970s in China Kelsen's legal theory was usually subject to criticism from the Marxist viewpoint, but in 1990 after the "rule of law (依法治國)" was established in the Constitution, there was increasing awareness for the need to set up a legal system, and resolve legal problems within legal structure and due process away from political influence or dependence on parties, and accordingly this led to interest in Kelsen among legalists.

Kelsen describes law as the existing forcible order, that is, "law in itself" and therefore refers to positive law. Kelsen contended that his Pure Theory of Law, in the sense that it does not ask whether positive law is "ideal" or "justifiable" and therefore has an "anti-ideological tendency," and from the fact that it also asks whether it is a "realistic," "possible" law it is a "realistic legal theory." This unique 'realistic' theory devised an extreme artificial structure that is Grundnorm in order to answer to the scientization of law as a field of study, and the issue of legitimacy was excluded from norms, which is understood as a delegation of power from this Grundnorm. Here is where the core of Kelsen-style scientization comes in.

The request for law to be placed in a separate entity, regarded as being equal to the request for the scientization of law, is closely related to the request for law to have a formal character. To want the law to have a formal character means, in other words, for the law not to be subordinate or included in the structure which is different from, in other words, outside the law. Also, the emphasis on the formal structure that law should have is also a precaution against the dangers of partisanship. In other words, it is assuming the dogma of a complete legal order, so plainly put that in the implementation of law the meaning or interpretation is unnecessary as the law is self-explanatory. However a supposition of law of which its interpretation is obvious, or where there is no need for interpretation, is becoming more and more unrealistic. Even in history, we can see that the area of law where interpretation is obvious due to its formality has continued to be reduced. Today judicial officers must consider customary practice, public sentiments and other factors, and in short it has become

increasingly difficult to decide a case to be null and void due to the fact that it does not concur with the formal law. The spirit of the times has changed in a direction that pursues the discovery of 'substantive truth.'

In conclusion the law does not have its own window for looking out into the world. But it would be an overstatement to assert that the law, in its discourse and methodology, does not have its own intrinsic character. What I believe is that it is impossible to completely rule out discretion or the factor of subjectivity in legal decisions. Therefore in order to prevent this discretion or subjectivity turning into an arbitrary decision, it is important to include a process of reviewing via content or by method. There is danger, however, in this process, legal decisions may be thought of as an epigone of moral judgment or an ideological dispute. But in one society the function of law as an institution is distinctively separate from morals or politics. If we fail to address the problems of purpose and direction of law and continue to simply maintain the order created by statutes, the study of law will indeed merely be a technique learnt for earning money and there will not be any point in earning a degree in law at law school.

2. Whether the Pure Theory of Law Contributed to the Realization of Constitutional Democracy

According to Kelsen the concept of 'the rule of law' does not seek to secure freedom, rather it seeks to ensure the predictable execution of the law in administration and judiciary. "The effect of the rule of law lies in the rationalization of the government's activity. That is, the most important thing is the institution and application procedure of the law. What it aims for is not freedom but safety."⁹⁾ Kelsen's state under 'the rule of law' does not refer to a specific type of state order but all state action taken under an established law order. That is the concept of the state under 'the rule of law' is that all states need to legislate a state order that compels human action, and this enforceable action, whether it is autocratic, democratic and whatever its content may be, must be a legal order. If the execution of the

9) Kelsen, *supra* at. 314.

law is the core of the state under the rule of law, democracy can be easily toppled under the name of 'the rule of law.'

Kelsen believed that by protecting the separate identity of law we can place democracy on a higher level. His norm-centered ideas are reflected in his theory on democracy as well. He asserted that political freedom, general will, peoples' sovereignty and other democratic ideas cannot be realized in the real world because of division among the people of a nation, the need to maintain order, etc. In other words these concepts are bound to undergo a transformation in meaning whilst staying as close as possible to the original democratic ideas. Therefore, for example, the original idea of unanimity as the original contract for establishing a legal order must undergo a change in meaning. The meaning of unanimity is justified by allowing for the barest minimum of people having a contradictory opinion against the state's will, while the greater majority of the people's interest must coincide with the will of the state.¹⁰⁾

Similarly, Kelsen also talks about the transformation of the concept of freedom. That is, as each individual human being refuses to be dominated by another's rule, they end up emphasizing the freedom they can enjoy within a state, that is, 'freedom as a social group,' rather than the freedom they can have as an isolated individual. In this way the freedom of the individual transforms into a concept that request for the 'freedom of the state.'¹¹⁾

Consequently the transformation of the meaning of freedom which is required to prevent the freedom of the individual turning into anarchical freedom is made in order to introduce some form of norm. That is, Kelsen, in order to emphasis order, conceptualizes the meaning of freedom into a normative form. Additionally, he contends that we can only argue about freedom solely in the normative sense. So under Kelsen, 'national unity' which symbolizes the general will transforms into "the unity of a legal order of the state which regulates the actions of the people who abide by norms."¹²⁾

10) Kelsen, *Vom Wesen und Wert der Demokratie [The Nature and Value of Democracy]*, SCIENTIA VERLAG AALEN, 8 (2d ed. 1981)

11) *Id.* at 11-13.

12) *Id.* at 15.

According to this 'norm realistic approach' by Kelsen, democracy is but a mode or method for the formation of national will, and is unrelated to any kind of approach which supports a substantive principle.¹³⁾ Kelsen maintains that the moment democracy is understood as a substantive principle and not a modal principle, totalitarianism in the name of democracy will appear. In other words democracy should be understood only as an apparatus for change of government 'by the people'; to go further and understand democracy being 'for the people' can be dangerous.¹⁴⁾ Hence the right of political decision is summed up as the right to vote.

Kelsen's approach in severing legal concept from the political ideals of democracy was an attempt to overcome the unclear inconsistency of the mixture of law and politics we found ourselves in. As history demonstrates, the law did not develop separately under its own form of logical reasoning by surpassing or by going against politics, but rather it was very much connected to political actions in that it had its struggles against problems such as the use of power by the existing authority, and the prejudice of the legal authorities. In short the law is not a servant of politics, nor does it surpass politics. To assert that the law is nothing but a product of power play is to go against the complications of the legal experience. The appeal the law has to justice cannot be ignored when we understand the fact that citizens follow and abide by the law. The normative aspect of law does not merely refer to what the law should be, i.e. a command which asserts that something 'shall be' done, but it is something that appeals to an ideal, and it is something that cannot be detached from our legal experience. Not only is this, but the appeal to legal values is innately connected to that which is sought after in politics. This is why even the aggressor always takes on the pretence of saying that the law is an appeal for justice.

The law functions in a way to structure and assess the methods by which political authority is practiced. On this point we should heed the

13) *Id.* at 98.

14) Kelsen contends that if you understand the principle of democracy not just as 'by the people' but also 'for the people,' ideology and value-laden judgment is incorporated, and the distortion of democracy — for example that authoritarianism is also for the good of democracy — occurs. Kelsen, *Foundations of Democracy*, ETHICS 1, 1 (1955).

opinion that the legal discourse has its roots in political practice.¹⁵⁾ When we think about the ‘judicialization of politics’ that is happening in today’s world, I am inclined to take note of the following opinion rather than Kelsen’s opinion: The law is another form of political discourse, the only difference being that because of the special role and responsibilities of the judicature, it is a political discourse having a special function.

3. Whether the Pure Theory of Law Aids in Solving Hard Cases

As one Roman legal scholar once said, at any rate the law doesn’t really apply to rare cases but it applies to everyday cases that happen often in everyday life (Celsus D1.3.5). However an increasingly large number of hard cases are arising where in one case among more than two legal practitioners differ in opinion. What does Kelsen’s theory on law suggest to us on this issue? As a general rule, legal philosophy or legal theory does not really help us directly solve cases. Even so, theories that help legal practitioners who have to make decisions look at things from a larger perspective can sometimes be sought after for reference in certain situations. Radbruch’s “*Unrecht* argument” or Dworkin’s “principle argument” are good examples of this. Academically the study of law is ultimately one of learning how to make decisions. Without the assumption that there is a better or a worse decision, it would be axiomatically incorrect to make a choice at all.

From Kelsen’s positive law point of view there is no objective standard for justification of one interpretation over another. However among legal practitioners it is worthwhile in asking which one is the better path when legal opinions clash. Also, on this point the practice of law is not complete with just formal reasoning. Legal reasoning does not only include conceptual analysis but unification and association of intelligence, presentation of the evidence, demonstration of proof through discourse, inter-subjective validity, possibility of mutual agreement, etc, and by including all these things it finally displays its practical reasoning ability on the cognitive front.

15) MARTIN LOUGHLIN, *SWORD AND SCALES. AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS*, (2000).

4. What does the Pure Theory of Law offer in terms of Globalization of Law?

So far I have discussed Kelsen's theoretical structure, although it has not been judged on moral grounds, in that it is useful in our recognition of what the structure of positive law looks like. Kelsen, while purifying formal law from all non-legal areas, in order to understand all laws from one perspective, introduces the hierarchical structure theory. This theory which is usually introduced as a pyramid model of the stages of law has almost become a symbol of law itself. I myself as a student, remember listening to my professor's lecture, and being impressed as I watched him draw a pyramid with rules and regulations on the bottom, above it ordinances and enactments, and finally on top the constitution. The pyramid model allows one to understand the law, and helps convey the message that the world of law is one that is orderly, comprehensive and at the same time scientific. More than anything else, as Kelsen admitted himself, it demonstrates that the law regulates its own creation. Kelsen's hierarchical structure theory which foments confidence in the self-sufficiency structure, alongside syllogism, helps put an illuminating halo around law to make it seem more scientific.

However in the stream of globalization, the hierarchical structure theory of law has its limitations in explaining the conflict in the vast domain among national law, regional law, international law and supranational law.¹⁶⁾ Perhaps it may be more appropriate to no longer use the 'pyramid' model but to describe the current predicament with the 'network' model.¹⁷⁾ In short the law is only partly explained by the pyramid model. When we consider overlapping or pluralizing of legal order and the difficulties involved in setting boundaries of governance, the boundaries in the pyramid model also become ambiguous.

16) On this refer to my thesis *Kelsen's Pure Theory of Law from the Perspective of Globalization*, 9 JOURNAL OF KOREAN LAW, 146, 146 (Dec. 2009)

17) Mario G. Losano, *Turbulenzen im Rechtssystem der Modernen Gesellschaft - Pyramide, Stufenbau und Netzwerkcharakter der Rechtsordnung als ordnungstiftende Modelle* [Turbulence in the Legal System of Modern Society - Pyramidal, hierarchical structure and network character of the legal system as a regulatory-creating models], 38 RECHTSSTHEORIE, 14-30 (2007) (German)

Kelsen's theory on the hierarchical levels of law is a result of legislative positivism. Fundamentally, it springs from the idea of a legislative state and it is a positivism model appropriate for the state law structure. However, today we have departed from state-centrism and with the strong wind of globalization, the state law is placed under pressures and exposed to new environments where overlapping with local laws, international laws, trans/supra-state laws are inevitable. The pyramid model cannot but face limitations in explaining such new predicaments.

5. Does Kelsen's Theory Concur with our Experience and Natural Practice?

Kelsen's theory springs from neo-Kantian's dualistic methodology. At the same time it limits the object of the study of law to normative law. In Korean academic legal circles, the dualistic method is used as the standard methodology. However I believe that Kelsen-style explanation on 'what is' and 'what ought to be,' does not suit our experience or the natural practice of law. Furthermore I believe that the task of legal theory and the field of academic law are to find a theory which better conforms to our experiences in society and natural practice of law.

Kelsen, who strictly differentiates between norms and the real world, adheres to the standpoint that observance of norms, and problems arising from the implementation of law are merely problems of fact, problems of existence and are not objects of the study of law. However the institution of law has always given and taken from history and has continued to be influenced by it. Also like other fields of study, it has always sought after the ideal of objectivity and at the same time seeking the spirit of the times. One scholar's passionate bid for objective science, in the next chapter of history, was revealed to be objectivity sought after as compensation for the instability of that era.

Unlike Kelsen even if we accept the non-positivist concept of law, the law cannot be just deduced from the idea of law, nor can judicial decisions be simply deduced from the law. In order for deduction to be successful, inclusion of factors from the real world is indispensable. Also for the induction of judicial decisions to be successful, a value-laden perspective

must be included.¹⁸⁾

It has already been pointed out by many scholars that judgment of practical reason does not signify that we simply 'apply' certain rules or principles that we have to individual cases. Very early on Aristotle objected to the idea that moral judgment is the application of a general principle to a particular situation. In explaining the ethics behind Aristotle Hans-Georg Gadamer asserted that we do not start off in possession of moral knowledge that we can just apply, but rather through our efforts we end up creating moral knowledge.¹⁹⁾ It may be that Aristotle's moral theory is more compatible with the natural implementation of our experiences.²⁰⁾ Recently in cognitive/neural science there have been attempts to defend Aristotle's moral theory. I myself do not agree with the inclination of explaining normative theory as a continuum of science. But at the very least, these attempts show us that Kelsen's explanation of the relationship between norm and reality does not really fall into place with our experiences.

In some aspects, norm exists in all areas of everyday life. Cass R. Sunstein realized this while explaining the position of norm in social activities. For example minor exemplary activities – taking out the trash, going out on a date, singing, expressing anger, talking ... – it affects these social activities. Sunstein understood such minute moral activities as being norms.²¹⁾

IV. Going Beyond Kelsen

Kelsen asserted that his normative inquiry of the formal existence of law as what ought to be is separate from the inquiry of the social sciences in explaining existence, yet he left an alibi by stating that he does not overlook the relationship between the effective legal order and the existence of a

18) *Supra.*, p. 323.

19) Hans-Georg Gadamer, *Wahrheit und Methode [Truth and Method]*, 3 Aufl., J. C. B. MOHR, 300 (1972) (German).

20) Joshua Greene & Jonathan Cohen, *For the law, neuroscience changes nothing and everything*, *Phil. Trans. R. Soc. Lond. B*, 359 (2004), available at PubMed.

21) Cass R. Sunstein, *Norms and Roles*, in *THE PROGRAM FOR THE STUDY OF LAW, PHILOSOPHY & SOCIAL THEORY* (Ronald Dworkin ed., 1995).

corresponding society. In reality he did not truly disregard the phenomena of law. That is, he really only excluded regulations of positive law that were wholly ineffective in his inquiry, he considered the realistic power relations between the two groups, and carefully inspected the volition of the legislator as well. What does all this mean? Could it be that even the study of law, which purported to be a science, was standing on the empirical social dimensions that Kelsen refused to allow into his theory of law? Paradoxically it leads one to believe that Kelsen's Pure Theory of Law can only become a sound and intact legal theory by incorporating those areas that Kelsen sought to drive out so completely.

The law has played a pivotal role in creating the overall concept and frame of society, politics, economy, and culture like the one we have today. The law that binds us today was developed from modern Western law since the inception of the modern state, and modern law alongside modern science have been the two pillars of driving force that has rationalized, systematized, institutionalized, and stabilized our lives. On this point as science and technology is in today's world, the law is linked to our society, politics, economy, and culture as a whole much like the way light and dark are irrevocably linked.

Since of modern age, legal knowledge, through integration with the rationality of science — like the words 'knowledge is power' from Francis Bacon — continues to maximize its utility and became a mode of social control and social development.

The strategy of positivism is to separate legal knowledge from social power. Instead of ascertaining the autonomy, universality, and generality of law, the theoretical conditions of legal knowledge is its subordination in the interests of the state. On this point we can say that scientific positivism undermined the 'emancipatory factor' that modern law, whilst aiming for freedom and equality, held onto.²²⁾

This is a moment for social change as well as a turning point for our awareness. It is also a chance for us to see clearly the bright sides and shadows of our legislative system. This is precisely why we must look upon

22) On this refer to the work by Latin American progressive social philosopher BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE*, 5, 62 (2d ed., Butterworths, 2002)

the law from a higher perspective. By looking at the law from a higher standpoint, we can ultimately understand that the formality and content of our regulations and institutions are not something that has been given to us out of some sort of necessity and inevitability.

How is the law related to a good social order? Under the world finance and capitalism, when people studying economics and business management produced unbelievable financial derivatives through pedantic mathematical models in Wall Street, legal practitioners followed suit by interpreting de-regulation related laws, finance modernization laws and other liberalist legislations in a favorable manner for businesses and the market. In order to stop disappointment and lamentation toward mainstream economists and economic experts — who were bent on nothing else but reaching market goals — being transferred to mainstream legal scholars and legal experts who are used to the Kelsen-style argumentation, we must extricate ourselves from the occult slogan ‘norm from norm.’ The theory of law must once again reconcile itself to find a way to merge soundly with empirical research.

KEY WORDS: Kelsen, Pure Theory of Law, Grundnorm, Korean legal philosophy, scientizing of jurisprudence, the ‘Successful Coup d’etat’

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