

COUP D'ÉTAT IN THE UKRAINIAN PARLIAMENT AND ITS LEGITIMACY ACCORDING TO THE THEORIES OF KELSEN AND H.L.A. HART

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Abstract

The revolution in Ukraine or the Crimean crisis has been in the front-line news for over months because for the most of it depends upon whether there is a revolution within the Parliament of Ukraine. The philosophers such as Hart and Kelsen have propounded different theories which answer the question regarding the continuity of authority or legitimacy of the new government brought through revolution. The following paper aims at setting forth background facts of the situation in the Ukraine and Crimea peninsula and then analysing the revolution in contrast with the theories of Fundamental Rule of Recognition and Ground Norm of the above mentioned philosophers. The objective of the papers is to explain the two complementary theories and then comparing their result with one another to better understand which theory lead to more a reasonable justification.

INTRODUCTION

The peninsula of Crimea is going through an international crisis of annexation and succession involving the Russian Federation and the Government of Ukraine. The Peninsula of Crimea was a territorial part of the sovereignty of Ukraine. Ukraine's president Viktor Yanukovych was heading towards an economic catastrophe due to the rampant corruption prevalent during his office years.² He faced a choice, either to make a long-term, initially painful deal with the EU which would involve augmenting of trade and integration, or to accept the \$15 billion loan offered by the Putin's government in exchange of moving his country towards a planned

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² MarcSus Baram, *Ukrainian Regime's Corruption Detailed In Documents Dumped By Yanukovych As He Fled His Estate*, INTERNATIONAL BUSINESS TIMES, February 25, 2014. Available at

<http://www.ibtimes.com/ukrainian-regimes-corruption-detailed-documents-dumped-yanukovych-he-fled-his-estate-photos-1557943>

“Eurasian Union”.³ Since, Yanukovych chose the latter⁴, thousands of people protested at the Kiev’s Independence Square.⁵ Dozens were killed as protestors clashed with the armed Police in the capital of Ukraine.⁶ Soon after the chaos was much settled, Yanukovych had fled from Kiev, leaving the capital in turmoils. Protestors raided Yanukovych’s house and found vast evidence of Yanukovych’s unparalleled corruption.⁷ The Verkhovna Rada⁸ impeached Yanukovych of his official duties, but not according to procedure specified in the Constitution of Ukraine which would be formally charging the President with a crime, a review of the charges done by the Constitutional Court of Ukraine, and a three-fourth majority vote by the members of the Rada.⁹ Instead, Yanukovych was stripped off his post by the Rada because he withdrew from his “official duty in an unconstitutional manner” and declared to hold an early presidential elections on 25th May, 2014.¹⁰ For the interim period, the members of the opposition appointed Oleksander Turchinov as the President of Ukraine and the new speaker of the Verkhovna Rada.¹¹ Russians duly refused to recognize the new authorities set forth as the interim government of Ukraine stating that they had come to power through armed insurgencies and unconstitutional methods. On the contrary, the government of the United States of America and the European Union approved of the interim government in Kiev.¹² Majority of the Russian-speaking residents of Crimea, who formed the base of the Yanukovych’s government have revolted and protested

³ Alan Yuhas, *Ukraine crisis: an essential guide to everything that's happened so far*, The Guardian, April 13, 2014. Available at <http://www.theguardian.com/world/2014/apr/11/ukraine-russia-crimea-sanctions-us-eu-guide-explainer>

⁴ Carol Matlack, *Ukraine Cuts a Deal It Could Soon Regret*, BLOOMBERG BUSINESS WEEK, December 17, 2013. Available at <http://www.businessweek.com/articles/2013-12-17/ukraine-cuts-a-deal-it-could-soon-regret>

⁵ Daniel Sandford, *Ukraine protests: Two protesters killed in Kiev clashes*, BBC News, January 22, 201. Available at <http://www.bbc.com/news/world-europe-25843988>

⁶ Ian Traynor & Shaun Walker, *Ukraine violence: dozens killed as protesters clash with armed police*, THE GUARDIAN, February 20, 2014. Available at <http://www.theguardian.com/world/2014/feb/20/ukraine-protesters-force-riot-police-independence-square-kiev-battle-control>

⁷ Andrew Higgin, *Archival Is Freed as Ukraine Leader Flees*, N.Y. TIMES, February 22, 2014. Available at http://www.nytimes.com/2014/02/23/world/europe/ukraine.html?_r=0

⁸ Supreme Council of Ukraine i.e. the Parliament

⁹ UKRAINE CONST, ARTICLE CXI.

¹⁰ David Stern, *Ukrainian MPs vote to oust President Yanukovych*, BBC News, February 22, 2014. Available at <http://www.bbc.com/news/world-europe-26304842>

¹¹ David Stern & Mark Lowen, *Ukraine: Speaker Oleksandr Turchynov named interim president*, BBC News, February 23, 2014. Available at <http://www.bbc.com/news/world-europe-26312008>

¹² Maxim Nikitin, *US, EU, UN recognize Ukraine's new government*, ITAR-TASS News Agency, February 24, 2014. Available at <http://en.itar-tass.com/world/720696>

against the new government of Keiv.¹³ Owing to this the Parliament of Crimea called for extraordinary session on the February 21 for supporting the deal struck between the Yanukovych and the Putin government. Russia condemned the acts of the new government in Keiv as illegitimate and the result of a *coup d'état* and accused the government of United States and the EU of supporting and funding the revolution in Ukraine.¹⁴ Establishment of these facts gives a certain ground to critique the situation in Ukraine on the basis of the different theories laid down by philosophers such as Kelsen and Hart.

KELSEN'S GRUND NORM AND EFFICACY TEST

Austrian philosopher Hans Kelsen propounded the idea of Pure Theory of Law in which he considered Jurisprudence as a normative science and not a natural science and therefore concluded that the definition of law cannot take into consideration factors like morality, religion, natural law, social factors and other accretions.¹⁵ He characterized law as rules or norms that have been backed by another rule.¹⁶ The command is binding not because it is commanded by a superior individual, but because it is authorized or empowered by another norm, which is already binding in nature. This forms a chain of validity which does not regress indefinitely and ultimately reaches the absolute rule or the Grundnorm. Therefore, Grundnorm is the fundamental norm of the land, which forms the basis for presupposing the fact that you ought to obey the law to maintain coherence in the existing legal system. It is to this pre-supposition that enables us to distinguish between individuals who are legal authorities and other individuals who aren't, between those acts which create binding legal norms and acts which have no such effect.¹⁷ Following from this, the logical structure of law can be linked to a pyramid with the most central and authoritative norm ("the Grundnorm") at the top and the more particular norms at the base.

¹³Daniel Sandford, *Ukraine Crimea: Rival rallies confront one another*, BBC News, February 26, 2014. Available at <http://www.bbc.com/news/world-europe-26354705>

¹⁴ Margaret Besheer, *Russia Blames West for Ukraine Instability*, VOICE OF AMERICA, May 2, 2014. Available at <http://www.voanews.com/content/russia-blames-west-for-ukraine-instability/1906624.html>

¹⁵ Kelsen, *On, the Basic Norm*, 47 Calif.L.1lev. **107, 110 (1959)**: "This is the essence of legal positivism, in contradistinction to the natural law doctrine."The whole of Chapter 3 of Pure Theory is devoted to insisting that the pure theory is a "true science."

¹⁶ R.S. Clark, *Hans Kelsen's Pure Theory of Law*, 22 J. Legal Educ. 170

¹⁷KELSEN, GENERAL THEORY Of LAW AND STATE (Wedberg's trans. 1945) (hereafter cited as GENERAL THEORY). The translation was made by Professor Anders Wedberg of the University of Stockholm, page 116.

In relevance to the situation in state of Ukraine, the social conduct in the state is reciprocated in its Penal code which is in turn validated by the Ukrainian Constitution of 1996. Consequently, according to the Pure Theory of Law by Kelsen, all subsequent laws in the state of Ukraine derive their legitimacy through this Constitution. And this Constitution of 1996 derives its validity through the Constitution (Fundamental Law) of Ukraine SSR adopted in 1978.¹⁸ Therefore, the chain of validity of Constitution of Ukraine SSR, 1978 can be traced back until the stage of a basic norm which validates this and hence forth the entire legal system of Ukraine. A Grundnorm is a norm that validates the working of the entire legal system.¹⁹ When a Constitution exists in such a continuity, it remains in force until is repealed by an internal usurpers as a resultant of abrupt political change that is not in accordance with the Constitution.²⁰ Kelsen further added that a successful revolution or a *coup d'état* can create a new basic norm or Grundnorm. The norms of the old order are considered to be devoid of validity only because the old constitution and, therefore the legal norms on this constitution have lost their efficacy; because the actual behaviour of people do not confer to the old legal order.²¹ The enactment or pre-supposition of the new Grundnorm would validate the new legal order. The new legal order becomes efficacious only when the people behave in the manner prescribed by it. The efficacy of the total legal order is a *condition sine qua non* for the validity of each legal norm generated by it.²²

Post Yanukovych fled away from Kiev²³, the Rada of Ukraine meet and dismissed the government of Yanukovych not in accordance with the procedure established by Article 111 of the Constitution of Ukraine which is the norm of the state regarding the dismissal of the President.²⁴ The reason stated for this departure from the Constitution of Ukraine was justified by the Rada of Ukraine by declaring that Yanukovych withdrew from his “official duty in an unconstitutional manner”. With respect to the continuation of existence of the Constitution, the

¹⁸KATARZYNA WOLCZUK, THE MOULDING OF UKRAINE: THE CONSTITUTIONAL POLITICS OF STATE FORMATION 46 (Cent. European Univ. Press 2001).

¹⁹ Edwin W. Patterson, *Hans Kelsen and His Pure Theory of Law*, 40 CAL. L. REV. 5, 8-10 (1952).

²⁰GENERAL THEORY, *supra* note 16, page 116.

²¹*Ibid* at 366 -368.

²²*Id* at page 367.

²³*Supra* note at 6.

²⁴*Supra* note at 8.

internal wrongful seizure of the post of the President of Ukraine was a result of the abrupt political behaviour shown by the Rada which was not in accordance with the Constitution. Therefore, the Rada acted against the established legal norm of impeachment of a President and voted for an interim-government.

The revolution within the Rada of the Ukraine failed to put forth a new Grundnorm to justify the new legal order brought in by the interim President. Since, the Constitution of the Ukraine still remains in tact, the new government of Oleksander Turchinov and its legal orders cannot be justified because the legal orders issued are not in consonance with the legal norm through which he can come into power. Therefore, his acts or orders are indirectly not in consonance with Constitution of Ukraine, 1996.

Kelsen also puts forth the argument that a revolution must constitute as every illegitimate change brought about to the present Constitution or its replacement by another constitution. It is totally irrelevant the manner in which this revolution has been brought about, either by application of force towards the present government or by the members of the Government itself. It is immaterial to revolution whether it was created by the people or by the officials of the Government. There exists no substantial change to the Constitution of Ukraine which can either validate the new legal order of interim President. The people of Ukraine still correspond according to the old legal order and the efficacy of it still remains intact. Failure to put forth a new basic norm has led to undivided attention to the old constitution and its efficacy. The absence of a new Grundnorm has led to the invalidity of the legal orders and acts done by the interim President. For his acts to be legitimate there has to be new Grundnorm as the old legal order, i.e. Constitution of Ukraine, 1996 does not permit his appointment. Therefore, the account for the claims of Russia that the Ukraine has been through a revolution or *coup d'état* is false in term of Kelsen's theory.

HART'S FUNDAMENTAL RULE OF RECOGNITION

HLA Hart's perspective on the same issue is different from what Kelsen propounded upon. The contrast in opinion can be traced in the origin of this idea of continuity of habit of obedience which was one of the most vital question raised by Hart in his book 'The Concept of Law' against Austin's Command Theory. Austin contended that law is an intimation or expression of a wish to do or forbear from doing something issued by the sovereign, backed up by the power to

do harm to the actor in case he disobeys.²⁵ Hart specifically questioned the definition, legitimacy and continuity of the authority to make laws of the sovereign.²⁶ Austinian definition of sovereign with reference to habit obedience is: a person or body of persons whose orders the great majority of the society habitually obey and who does not habitually obey any other person or persons²⁷; according to Hart this heavily depends upon the habit or what he calls as the convergence of behaviour of the people. Hart argued that mere convergence of behaviour is not sufficient to explain the continuity of authority and laws of the next sovereign. Mere habit of obedience to give orders by one legislators cannot ensure or confer any form of legitimacy to the next legislator.²⁸

He pointed the difference between a habit and a social rule in a simple primitive society because it plays a much more important role in understanding the continuity of authority of sovereign. Firstly, habit, for a group of individual, is that practice or behaviour which converges, on the contrary, social rules are those general convergence or identity of behaviour which will lead to criticism if departed from.²⁹ Secondly, where there exists such rules, not only such criticism is observed but any deviation from the standard is accepted as a good reason for making it.³⁰ Third, social rules have an internal aspect to it, which means that the people ‘feel bound’ to behave in certain ways.³¹

Hart also envisions the probability of a general rule already being present and obeyed by the people which grants a right to the new legislator to legislate even before his turn comes. People follow or obey this general rule laid by the current legislator as a part of habitual obedience towards him.³² However, the acceptance of a rule by a society at a given instance does not guarantee its continued experience; because at times there may be a revolution or *coup d'état*. The usurp might bring about a situation which leads to a drop of faith in the rules.³³

²⁵JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832). London

²⁶ H.L.A. HART, THE CONCEPT OF LAW (2^d ed. 1994), page 50-51

²⁷HART, *supra* note 25, page 50.

²⁸*Ibid* at page 59.

²⁹*Id* at page 55.

³⁰*Id* at page 55-56.

³¹*Id* page 56-57.

³²*Id* page 58.

³³*Id* page 59.

However, if we consider a simple primitive society where a person whose general orders are habitually obeyed, he may be called a legislator and his orders laws, but the habit of obedience towards him will not account for the right of a successor to succeed and demand such obedience. To this, Hart pointed out two set of problems – first, habits are not normative, they cannot confer rights or authority on anyone and secondly, habit of obedience to one individual cannot render obedience to them likely.³⁴

Hart further emancipated that to understand the difference between a habit and a rule we might have considered a simple primitive society which works on the internal aspect of people being bound by the law because they feel so, however the situation might be different in a modern state.³⁵ In a modern state, however law-abiding might the people, there will be a clear lack of realization of the rules specifying the qualifications of a continually changing body of persons entitled to legislate.³⁶ Therefore, if simply put, general acceptance of a new regime is a complex phenomenon with respect to a modern state in a sense that it is divided between official and ordinary citizens;³⁷ the officials of a system may acknowledge explicitly such fundamental rules conferring legislative authority by enacting laws which are in accordance with the new rules and which empowers them to do so, however, the ordinary citizen manifests his acceptance largely by acquiescence them in the result of these official operations. The citizens might not be able to comprehend the origins of these laws, but he may tacitly consent to it when he exercises powers and rights conferred by it. Thus, the new regime or the revolution is legitimised and the continuity of authority re-establishes with acknowledgement of the new fundamental rules of recognition.

In the instance situation, the Rada of Ukraine deposed Viktor Yanukovych of his presidential duties by a count of vote within themselves. Instead of following the Constitutional procedure laid down for the impeachment of a President under Article 111, the Rada rather followed an unconventional and unconstitutional method of overthrowing the Yanukovych's government.³⁸

³⁴ *Id* at page 60.

³⁵ *Id* at page 60.

³⁶ *Id* at Page 60.

³⁷ *Id* at page 61.

³⁸ *Supra* note 8.

They acclaimed that he withdrew from his “official duties in an unconstitutional manner” and thus granting the Rada the power to override this effect.³⁹

The Parliament of Ukraine further decided to place Oleksander Turchinov as the interim President with the acknowledgement of EU and USA.⁴⁰ Act of displacing the old president and putting forth a new one was accepted by a majority in the House of the Parliament. These Houses of the Parliament and the Judiciary of the state form what Hart calls as the official citizens who are capable of understanding the complexities of the system. Others constitute as the ordinary citizens who tacitly consent to the new legal order by exercising their powers and rights. However, the Soviet-nostalgic industrial East of Ukraine (who constitute 17.3% of the entire Ukraine’s population⁴¹) protested against the interim government as according to them it was brought through illegitimate means. However, the officials of the State of Ukraine did not object the formation of an interim government.⁴² According to Hart, the new regime gets its authority, if, the new fundamental rules of recognition are acknowledged by the officials of the state and by the citizens through an indirect way of tacitly consenting to it. The two criteria set by Hart to determine the legitimacy of the new regime are fulfilled in the state of Ukraine as the majority population did not object the formation of interim Government led by Oleksander Turchinov and the official citizens, i.e. the members of the Rada and the Judiciary, accepted him as the President. Therefore, the interim-regime installed by the Rada in the territory of Ukraine is justified as a new regime in co-relation with the theories of Hart.

CONCLUSION

The efficacy test and the Grundnorm emancipated by Kelsen hold that there exists no revolution or *coup d'état* by the Ukrainian Parliament as they failed to put forth a new Grundnorm which will validate the new legal order of the interim President. However, according to the theory of Fundamental Rule of Recognition proposed by HLA Hart, the interim- President gained his validity or legitimacy when the rules set-forth by him were acknowledged by the important

³⁹Supra note 6.

⁴⁰Supra note 10.

⁴¹"Results / General results of the census / National composition of population". *2001 Ukrainian Census*.

⁴² Sam Frizell, *Ukraine's Parliament Elects Oleksander Turchinov Interim President*, TIME, February 23, 2014.

Available at <http://time.com/9246/ukraine-parliament-revolution-new-president-yanukovych/>

officials of the state and the ordinary citizens tacitly consented to it by enjoying the rights and powers conferred upon them concentrates itself.