

Does the Declaration Express the Will of the State or Is It the Interpreters Who Builds it: Unilateral Declaration

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Abstract

The word unilateral means an action or decision performed by or affecting only one person, group, or country involved in a situation, without the agreement of another or the others, or something relating to or affecting only one side of an organ, the body, or another structure. The word declaration means a formal or explicit statement or announcement. A unilateral declaration is a one sided decision made by a state. Now dealing with the research paper, that does the declaration express the will of the state or is it the interpreter who builds it, with respect to unilateral declaration. Meaning, is it the will of the sovereign or the people or the interpreters that is the judges who makes the laws or the declaration.

In this research paper we shall have a comparative analysis of the positive school of law, the sociological school of law versus the realistic school of law.

Key Words: *Interpreters, Judges, Schools of law, Sovereign, Unilateral Declarations*

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Introduction

Focal Theme and Object of the Research

A Unilateral Declaration is signed by a State after going through aspects of the declaration at that point of time. But is ultimately, handed over to its interpreter who accordingly moulds it and interprets it according to them. Different theories have been discussed in this context to test if declaration expresses the will of the State or is it the interpreter who builds it.

Hypothesis

It is not possible for a State to totally depend on the will of the sovereign or the interpreters. A combination of both is a must for smooth functioning of a State.

Unilateral Declaration

The unilateral declaration are the one sided declarations made by State. These include laws made by the State, treaties conventions as signed by a State. But then here a question lies as in, in what context was the law made or in what context was a treaty signed. Here comes the role of the interpreters, who interprets the law according to the contemporary society. Therefore, making unilateral declaration; a combination of the will of the state and the interpreter who interprets it.

Is it the Will of the State, of the Sovereign? In the light of Positive School

Austin

The positive school of law basically focuses on the principle of theory of command; where, the Sovereign, the State is the supreme. The main exponent of this school is: John Austin, who may be regarded as the founder of the Analytical School, though he drew his inspiration from Hobbes, and Bentham, his teacher. According to him law is a command given by a superior to an inferior and enforced by material sanctions. He discovers in the State a person or body of persons which, in the last resort, has the de jure right to issue commands and fixes punishment for violation of such commands.

Now coming back to the same question if it is the Will of the State, of the Sovereign? According to this school law is a creation of the sovereign power, which is either established directly or indirectly, as what sovereign commands is law and accordingly penalties are incurred for its disobedience. According to Austin "law is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."²

Like for example, under the authority of the Constitution, if India signs a disarmament treaty with Pakistan, so on border even if mass genocide is happening in Pakistan, then also the Indian soldiers cannot go beyond the line of control without the permission of the sovereign.

Bentham

According to Bentham the end of the legislation is the greatest happiness of the greatest number.³ Accordingly, the law is made in such a way that it satisfies the maximum number of subject. As the main purpose of law is to bring pleasure and remove pain. Therefore, the made shall in a way express the will of the greatest number. This is the Utilitarian Theory of Bentham.

Like in the Olga Tellis Case⁴, the issue was whether vendors are allowed to sell things in footpath? Here, the questions which came into light were that, the order for eviction is infringement of Right to livelihood under Article 21⁵ of the Constitution, the compound action of the State Government and Bombay Municipal Corporation is invalid under Article 19(1)(3), and Section 34 of Bombay Municipal Corporation is arbitrary. Here, Bentham's utility was applied. Since, all agents seek personal good aiming at maximum pleasure. Therefore, it was held that vendors should not be

²Dr. B.N. Mani Tripathi, Jurisprudence Legal Theory, Publication: Allahabad Law Agency, XVIII ed., p. 19.

³ Extracted in Lloyd, Introduction to Jurisprudence (IV ed.), p. 172.

⁴1986 AIR 180, 1985 SCR Supl. (2) 51.

⁵Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

allowed to sell things in footpath, as it affects the city as a whole rather the vendors should be rehabilitated to some other place. Therefore, satisfying; on the side of the vendor.

Kelsen

Every legal act relates to a norm which gives legal validity to it. Legal norms derives its validity from an external source i.e., from a particular ought norm or sanction. According to him, sanction is itself another norm not different in nature from the norm which it supports. In this way every legal norm gains its force from a more general norm which backs it. Ultimately the hierarchy relates back to an initial norm called Grundnorm. This is a basic fundamental norm which validates the sanctity of different legislatures.

The Grundnorm theory seems to accord with the citizen's everyday experience. Like in the Indian Constitution is a grundnorm as it checks whether the Act is valid or not. Grundnorm therefore is the supreme law from which all norms have been derived.

The Analytical School, thus, emphasises that the sovereign is a determinate superior, what the sovereign commands is law. Therefore every declaration made is the will of the State.

Is it the Will of the State, of the Sovereign? In the light of Sociological School

This approach studies the effect of law and society on each other. This approach takes law as an instrument of social progress.

Duguit

Duguit gave the social solidarity theory. Accordingly, focused on the fact that firstly, people cannot live in isolation. Secondly, people are interdependent on each other. Thirdly, each man cannot procure the necessity of life and lastly, end of all human activities should be to ensure interdependence. Therefore, indicating that a society cannot be successful until and unless people are interdependent on each other.

Therefore, if the declaration will express the will of the State then in a way it shall express the will of the society as well.

Like in case of Hudhud in Visakhapatnam in the year 2014, red alert was declared, it was not only the will of the state but also of the people.

Roscoe Pound

Man is a social animal and needs a society for his living. Whenever there is any conflict of interest, law must act as an instrument to solve the conflict. The force which asks for the adoption of social engineering is nothing but the conflict of interests of individual. Here, Pound made and converted the society into a factory 'Social' means group of individuals forming a society and compared sovereign i.e., the law makers with engineers, like just as an engineer chalks up plan before starting up a project so do the lawyer's. They must work in such a way so as to satisfy their clients at the same time venturing new spheres of law. This is called the Social-Engineering Theory.

From the positive and analytical theories of law, it can be drawn that declaration is the will of the State. As the State is the sovereign authority. It has the supreme authority. Therefore the declarations made by it shall be binding, provided they are at par i.e., socially accepted by the society.

Is it the Interpreter who builds it? In the light of the Realist School of law

The realist school of law is a combination of analytical positivism and sociological approach. It is a practical school of law framed by usage and realism. It comprises of two things: firstly, law making that is the Legislation and secondly, decision making that is the Court. But, realists don't give much importance to laws made by legislature rather they only uphold judge-made laws as genuine law. As according to them, law should be framed by those who have the idea of law. This can be reached by two approaches. First, Pragmatic Approach, which is a practical approach, which means the decision made or law framed keeping yourself in that situation and the second is Pragmatic Approach which are based on the guideline, principles and theories, which forms the basic structure of law. This school is based on the principle that Law is a means to social ends and every part of it has to be examined for its purpose and effect and to be judged in the light of their relation to each other.

As society changes faster than law, so there is a constant need to examine how law meets contemporary social problems. This approach lays greater stress on psychological approach as it is concerned with human behavior. Therefore, making the judge, sit on the irony chair. As, a judge is the person, who actually interprets the laws made by the legislation according to the changing need of the society.

Karl N. Llewellyn

Llewellyn gave the Law-Jobs theory, where law is an 'institution' which is comprised not only of rules but also contains an ideology and a body of pervasive and powerful ideals which are largely unspoken.

According to him a law should be made in accordance with the changing need of the society and that law should be based on reasoning. Therefore, when any interpretation is made by a judge it should be logical enough, should be governed by reasons. Judges must not blindly trust on the conventional legal rules but must be innovative therefore, breaking out the traditional cocoon.

Jerome Frank

Frank gave the Father's Symbol Theory. According to him Certainty of law is a myth, which means that law is not fixed. As law changes according to the interpreters who interpret it, keeping in mind the basic legal rule which acts as a guide. According to him, judges do not make law instead they discover it that is Judges do not come up with new law but then they adhere to it and accordingly they interpret it. Hence, keeping the statue as it is, but then changing its interpretation.

Benjamin Cardozo

Society is a dynamic process where nothing is static. Society is a control point around which law goes on revolving. As society is pragmatic in nature therefore laws are interpreted keeping in mind the dogmatic approach, making it an ambit, therefore, reaching the final course of law, which is the welfare of society at large.

According to him Judges play a very important role. As a judgment is given after thorough reasoning; keeping in mind history, customs, and metaphysical jurisprudence. Therefore, reaching, the roots of the society.

Conclusion

Law is a system of rules which a particular country or community recognizes as regulating the actions of its members. Unilateral Declaration is a source of law, when a question is made as to why are unilateral declarations made? Then, the answer which strikes is; to make law in accordance with the need. Law is a system of rules which a particular country or community recognizes as regulating the actions of its members. In this case here, unilateral declarations are made between two or more countries in such a manner that all the terms, conditions and interests are at par. The declaration henceforth, take the shape of law.

Now, law is something which is static in nature, once a law is made, it remains the same forever. A law is made according to the contemporary society, where the society has to adhere to it. Since, the

law is made by the sovereign as has been said by Austin, therefore the law is made by the will of the State. Also, the sovereign is supreme, therefore the sovereign must make law in such a way that its subjects adhere to it. The subjects shall adhere to the law made by the sovereign if it fulfils and satisfies their need as has been rightly said by Bentham that the end of the legislation is the greatest happiness of the greatest number. Now this shall happen which the origin of such declaration will come from a commonly accepted norm or custom prevailing in that particular society. As unilateral declaration is not something like a child's play but are something which are very serious, so it must have its validation from an accepted norm in the society, as rightly said by Kelsen.

When a declaration has a validation from an accepted norm in the society, therefore, it does not only express the will of the state but of the people as well, as has been rightly said by Duguit in his social solidarity theory. But for a law to work, the things should be at place as has been rightly pointed by Roscoe Pound in his Social Engineering Theory.

Now, once the unilateral declarations have come into existence, there arises a question of their interpretation and survival. As they have been made; by the sovereign at a certain period of time, in the society. But society changes with time. So, there comes the need of the interpreters or the judges. According to the Law Jobs Theory given by Llewellyn, as the society changes, the law needs to be changed accordingly; a judge must mould the law according to the changing needs of the society. A judge must not come with a new law, as a new law is made by the sovereign, the judge must interpret the old existing law reasonably as had been rightly pointed by Jerome Frank.

Unilateral Declaration are an amalgamation of the will of the State and the interpreters, where the main motive is the welfare of the state. For a peaceful state to run there is a need of both. The sovereign must execute the unilateral declaration while the interpreters must keep as check by their time to time interpretations according to the changing need of the contemporary society.

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