

The Advent of Islamic State in Iraq and Syria from a Jurisprudential Perspective

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Abstract: *This paper critically examines the advent of the Islamic State in Iraq and Syria from a jurisprudential perspective, with special emphasis on the views of John Austin, Hans Kelsen and H.L.A Hart on revolution, sovereignty and legitimacy.*

Keywords: *ISIS, Sovereignty, Legitimacy, Obedience, Grundnorm, Rule of Recognition.*

I. Introduction

The ISIS (Islamic State in Iraq and Syria) is the most brutally violent terrorist group in modern history. The story of ISIS began in 2003 when the US invaded Iraq to depose Saddam Hussain. The US not only removed Saddam Hussain from power but also destroyed much of Iraq's infrastructure. The ISIS was formed as a small insurgent group in Iraq in the year 2006. In the year 2009, ISIS shifted its focus to Syria from Iraq where it was largely unsuccessful. In 2011, when the Syrian civil war was underway ISIS had its chance. Within a matter of weeks the Syrian General making his plea for international help, the United States, Jordan, Qatar, Turkey and Israel had began providing weapons, training and money to the so-called rebel groups like the Free Syrian army. By September 2013, the American Media Outlets began reporting that weapons were being given to Syrian rebels. CNN reported that while the weapons are not 'American Made', they were funded and organised by the CIA. Within less than one year, after the U.S supplied weapons to the so called Syrian freedom fighters, those weapons ended up in the hands of ISIS fighters. By the time ISIS began to make headlines the United States president Mr. Barack Obama himself acted as if ISIS was nothing to be worried about. Consequently, by June of 2014 ISIS had emerged going from a no-name group in Syria to crossing back over the border and into Iraq. Likewise, one of the reasons for ISIS to become so powerful in such a short span of time was because of their ability to grab the U.S military gear and also because of the vast amount of wealth that they had accumulated mostly by seizing oil fields in Iraq and Syria.

Sayed Yousif Khoei of the 'Al Khoei Foundation' has stated that one of the reasons for this form of extremism is that there are powerful forces in the world which have recently become loaded with petro dollars who are using an ideology of hate of the other to promote their own national interest in the good name of Islam. These forces in the past have always existed but they were marginal and not at the heart of it. Their understanding of sharia and of humanity is very cheap. They don't understand the Tawheed (the Qur'anic concept of God's oneness) the way it was meant to be understood. He further reiterates that the Tawheed should not have been forced by war. Certain countries including Turkey and Saudi Arabia have exploited this problem to further their own foreign agenda. For instance, Turkey has allowed access to the ISIS to move into Syria and Iraq. They are also contributing to the rise of this form of extremism by supporting Al-Qaeda related groups in Syria.

II. John Austin's Perspective On The Islamic State In Iraq And Syria

John Austin regards sovereignty as the command of the sovereign backed by sanctions. The key to the notion of sovereignty lies in the idea of ultimate authority. A sovereign is an individual or a determinate superior who habitually receives obedience from the bulk of the society and is not in a habit of obeying any other superior. Sovereign commands must be express or tacit. Consequently, whatever is commanded by the sovereign becomes law throughout the society, irrespective of the harshness or unfairness of such command. Likewise, the Islamic State in Iraq and Syria has a vision of a caliphate, but it sees it as the end result of something that, imposed by force, will draw good Muslims to its cause irrespective of the harshness or unfairness of such command imposed by them (ISIS).

Moreover, Austin, like Bentham had reasoned that aggregate happiness is served by identifying the law with sovereign's will. He created a sub-set of laws properly so called – 'positive law' - to signify laws made by the sovereign and its delegates. Positive law, he argued is the law set by political superiors to political inferiors. Austin excluded the unrevealed part of law of God from the class of laws properly so called, because it was founded on opinions and not text. In other words, he considered the laws of God as the subject matter of

theology. Furthermore, the common law, according to Austin, is the law made by sovereign through their delegates, the judges. In case a given society is torn by war, and in case the conflicting parties are nearly balanced, the given society is in one of the two positions. If the bulk of each of the parties is in a habit of obedience to its head, the given society is broken into two or more societies. If the bulk of each of the parties is not in a habit of obedience then, the given society is simply or absolutely in a state of nature or anarchy. It appears that in order that a given society may form a society political, the bulk of its members must be in a habit of obedience to a certain and common superior. Similarly, Austin would argue that the citizens residing in Syria and Iraq had no choice but to obey the command of the ISIS leaders (sovereign) and the majority of the members of the State were also in a habit of obeying the Islamic State in Iraq and Syrian (ISIS) leaders.

III. Thomas Hobbes Views On Sovereignty

Hobbes described sovereignty in terms of power rather than authority. He built upon a tradition dating back to Thomas Augustine which explained the need for a sovereign in terms of the moral evils that resides within humankind. In *Leviathan*, Hobbes defined sovereignty as a monopoly of coercive power and advocated that it be vested in the hands of a single ruler. Although, Hobbes preferred form of government was a monarchy, he was prepared to accept that, so long as it was unchallengeable, the sovereign could be an oligarchic group or even democratic assembly. Alternatively, the self proclaimed Islamic State's (ISIS) militant movement led by its leaders that conquered territory in western Iraq and eastern Syria, where it had made a bid to establish a state in territories that encompassed some six and a half million residents were regarded as sovereign since the power vested in the hands of the ISIS leaders.

IV. Hart's Perspective On The Islamic State In Iraq And Syria

The most significant contribution in the field of law which has been applied within its ambit of all possible fields without affecting the very identity of the statute has been propounded by H.L.A Hart. The situation in Iraq and Syria has led to a change in regime. The leader of the Islamic State, **Abu Bakr Al-Baghdadi** was one of fifty casualties killed in an air strike in northern Iraq. It was a significant short term blow to the Islamic State. Three sources close to ISIS have confirmed that ISIS is now being led by a long-term senior official, **Abu Alaa al-Afri**, who had been appointed deputy leader when his predecessor was killed by an air strike earlier.

Hart has criticised the simple model of Austin's view on sovereignty who regarded law as coercive orders backed by sanctions. Furthermore, Hart gives an example of an absolute monarch (REX I) who controls his people by general orders backed by threats requiring them to do various things which they would not otherwise do, and to abstain from doing things which they would otherwise do. He further states that since what Rex I requires is often onerous, and the temptation to disobey and risk the punishment is considerable, it is hardly supposed that the obedience, though generally rendered, is a 'habit' or 'habitual' in the usual sense of the term. The habit of obedience is a personal relationship between each subject and Rex I: each regularly does what Rex I orders him to do so. This unity is constituted by the fact that its members obey the same person, even though they may have no views as to the rightness of doing so.

Additionally, Hart further states that suppose after a successful reign, Rex I dies leaving a son or a successor named Rex II who then starts to issue general orders. The mere fact that there was a general habit of obedience to Rex I does not by itself even render probable that Rex II will be habitually obeyed. There is as such no established habit of obedience to Rex II. There is nothing to make him sovereign from the start. It is only after his orders have been obeyed for some time we shall be able to say that a habit of obedience has been established. The basis of Hart's argument rests on the fact that habits are not 'normative', i.e., they are incapable of generating rights or obligations all by themselves. Secondly, habits cannot establish the 'continuity' of legal authority: Rex I's successor, Rex II, will be the sovereign from the moment he takes office even though Rex II has yet to be the object of habitual obedience. Thirdly, habits cannot establish the 'persistence' of law: Rex I's laws will be legally valid after his death despite the fact that the dead cannot be habitually obeyed. Instead, Hart argued that sovereignty is created by rules and not habits. Rules are normative: they are capable of conferring rights and imposing duties. Moreover, rules can account for the continuity of legal authority: Rex II has the power to legislate from the moment of Rex I's death because the legal system contains a secondary rule of change giving him the power to do so. Lastly, these rules can explain the persistence of law: Rex I's rules are valid even after his death because the rule of recognition requires judges to apply all the rules made by the past kings. Likewise, ISIS which is now being led by a long-term senior official, **Abu Alaa al-Afri**, who had been appointed deputy leader when his predecessor Al-Baghdadi was killed by an air strike earlier, has become, in the words of Hart, Rex II who has the power to legislate from the moment of Rex I's (Abu Bakr Al-Baghdadi) death because the legal system contains a secondary rule of change that gives him power to do so.

More so, in the words of H.L.A Hart, the ultimate rule of recognition has special importance. A customary practice of those whose role is to apply primary rules, a rule of recognition provides criteria of legal

validity by determining which acts create law. So, the fundamental constitution of a legal system does not rest on moral justification or logical presupposition, but on this customary social rule created by a complex practice of the Courts, officials and private persons. The primary rules are the rules of conduct which state that how people have to behave. While secondary rules are power conferring rules, it includes the legal system which ensures that the primary rules are being implemented and obeyed. Combining both these rules establishes the 'Rule of Recognition'. Hart further suggests that the rule of recognition in the United Kingdom is something like this; 'Whatever the Queen in parliament enacts is law'. Parliamentary enactments are law not because of their moral credentials but because an actually practised customary rule recognizes them as such, thereby, rejecting Kelsen's view. On the ISIS crises, Hart's view would not provide a precise solution but stress upon the drawback of a society without a legislature or a social structure of a kind as one of primary and secondary rules of obligation.

V. Kelsen's Perspective On The Islamic State In Iraq And Syria

The situation in Syria and Iraq has led to a change in regime. The Islamic State did not originate from barbaric community or pre-historic peoples. The ISIS is a fundamentalist Islamic group stemming from the core of radical Islamic jurisprudence. The most important fatwa upon which the Islamic State bases its holy war or Jihad is the 'Mardin' fatwa. The historical frame of this fatwa can give us an image of the cause of this form of extremism, which marked all Ibn Taymiyyah Fatwas. Many Jihadists believe that when he (Ibn Taymiyyah) became an Islamic Jurists, Ibn Taymiyyah issued a fatwa encouraging the fight against Mardin and its people (although the fatwa has been a source of disagreement among many Muslim scholars for a long time). Various advocates of the Salafist Jihadi school of thought perceive this fatwa as a permission to wage war to impose Sharia even within Islamic countries.

According to Hans Kelsen, law is presented as a norm in the realm of ideas and not as a fact. A norm is an 'ought to proposition' that expresses not what it is, or must be, but what ought to be, its existence can only mean its validity. Furthermore, according to him a law is a norm of action and it ('the law') is valid irrespective of consequences. More so, a norm is valid if it has been made in accordance with another valid norm. Ultimately, this chain of validity stops at a norm whose validity cannot be derived from another valid norm, that is, the 'Grundnorm'. A grundnorm is a basic norm, order or a rule that forms an underlying basis for a valid legal system. Kelsen would argue that the grundnorm is the 'Mardin' Fatwa which the ISIS leaders have relied upon and it ought to be obeyed in the present circumstances. The grundnorm is not really the Mardin Fatwa; it is simply the pre-supposition, demanded by theory that this fatwa ought to be obeyed. Thus, the grundnorm is always adapted to the prevailing state of affairs and it only imparts validity to the fatwa and all other norms derived from it.

VI. Conclusion

In the current scenario, the hypothesis of all the philosophers with regard to the ISIS crises seems unclear. So, what can be done is still debatable. I am of the opinion that the entire Muslim community must realize that this ideology of ISIS is a menace to us all and we are all in it together and we have a real duty in dealing with such issues together. We as individuals have a real duty to speak out against all forms of injustice. Imam Hussain and Alif Salaam had offered their blood not because they wanted to rule but because they refused injustice. The single most important factor in ISIS's recent resurgence is the conflict between Iraqi Shia's and Iraqi Sunni's. ISIS fighters themselves are Sunni's and the tension between the two groups is a powerful recruiting tool for ISIS. I firmly believe that this issue of Shia-Sunni rivalry is not resolved through hate and war and we must learn to respect our differences and resolve them amicably. Additionally, we should see all Muslims as Muslims with different colours, different flavours and different traditions that bring strength to the entire Muslim community.

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