Page 431 - 443 **DOI:** *https://doij.org/10.10000/IJLMH.111917*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 5

2021

Addressing the Conflict between Municipal and International Law through Hartian and Kelsenian Jurisprudence

ADITI TRIPATHI[1]

ABSTRACT

Kelsen's monistic approach indicates that its basic elements are the identification of law and state; the idea that a legal order is a compound of norms, the validity of which relies on a hypothetical basic norm, the Grundnorm. The idea of a union of primary and secondary rules to which so important a place has been granted, may be regarded as a mean between juristic extremes. This rule of recognition lies at the core of Hartian jurisprudence. The paper seeks to discuss and critique Kelsenian and Hartian jurisprudence and explain their importance as their nomological approaches to municipal and international law are given a place in ICJ case laws.

Keywords: *Hart, Kelsen, Grundnorm, Rule of recognition.*

I. INTRODUCTION

Human A brief encapsulation of Kelsen's monistic approach indicates that its basic elements are the identification of law and state; the idea that a legal order is a compound of norms, the validity of which relies on a hypothetical basic norm, the *Grundnorm*: the exclusion of any factual element in the construction of a legal order; and the repudiation of any reference to other non-logical premises, such as morals or natural law.[2] The idea of a union of primary and secondary rules to which so important a place has been granted, may be regarded as a mean between juristic extremes.[3] The rule of recognition[4] lies at the core of Hart's concept of law.

II. KELSON'S NOMOLOGICAL APPROACH

Kelsen's theory of international law conceives law as a hierarchy, the Constitution stands above the statute, the statute above the ordinance and any norm-setting organ is a higher organ than

[1] Author is a Law Graduate, India.
[2] Francois Rigaux, *Hans Kelsen on International Law*, European Journal of International Law, 325-343 (1998).
[3] Hart, *International Law.* 213-237.
[4] Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, European Journal of International Law, Volume 21, Issue 4, 967–995 (November 2010).

 [ISSN 2581-5369]

one which does not set norms but merely applies them.[5] According to Kelsen, it is not the legal order of states that occupies the highest stage in the hierarchy of law; it is international law that tops the pyramid. He believes that interstate relations are governed by law just like intrastate relations. International law is a system of norms which became such by custom and is thus, customary law. One of the norms of customary law, is the rule *'pacta sunt servanda*,' which is the basis of international treaty law.[6] Kelsen opposes the dualistic contention that only the consent of states creates international law and that the norms of international customary law are arrived at by a process of tacit consent. This theory is opposed by Kelsen because of its attachment to the conception of state sovereignty and because treaties are generally valid even when the will of the parties to be bound by treaties has vanished.[7]

According to Kelsen, international law is like any other law-for instance, like state law; it obligates and authorizes individuals and its norms have the same characteristics as those of state law.[8] But the international order still forms a primitive legal order, comparable to that of pre-state communities. In most cases, the question whether a norm has been violated is decided by the party which charges the violation, not by a judicial organ.[9]

Thus, Kelsen conceives the present international status as a primitive, "de-centralized," legal order.[10] The last step in the process of centralization will be an organic unity and a universal community of law giving rise to a world state. If one recognizes different legal orders, he argues, one should recognize one order as higher than others; and, he asserts, the international legal order is the highest order of all.[11]

Kelsen insists that dualists draw the consequences from their deductions and conceive the mutual recognition of states as a mutual grant and delegation of authority to create norms. Thus, it appears that even those who do not consider international law as the highest phase of a system of law ought to arrive at a unitary conception of the legal order.[12]

The denial of the unity of legal orders is often based on the alleged contradiction between international law and state law. The alleged contradiction, however, turns out to be merely a conflict between higher and lower norms.[13] In state law, a lower norm which is incompatible

[5] W.B. Stern, *Kelsen's Theory of International Law*, The American Political Science Review, 736-741 (August 1936).
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*

 [ISSN 2581-5369]

with a higher norm is usually not void in itself, but it is generally annihilable; also, a norm of state law which is incompatible with international law is annihilable, provided that particularist norms provide for its annihilation.[14]

The universal legal system which is conceived as an eventuality by Kelsen is at this time only intellectually discernible.[15]However, Kelsen insists that by the elimination of the dogma of sovereignty, the "pure theory of law" turns against an imperialistic ideology which is hostile to international law and champions a centralized international organization.[16] The possibility of such a political effect does not impair the theoretical value of this theory.

Kelsen considers himself a positivist in his aversion for natural law, a monist in his attack on conceptions of state sovereignty, and a purist in his endeavor to deal with an abstract body of law. But subconsciously he is also a deontologist, i.e., a philosopher who sees only human duties, obligations, perhaps also authorizations, but no rights. Thus, Kelsen's "pure theory of law" is also a positivistic, monistic, and deontological theory.[17] Kelsen claims that an "impure" theory of law is a theory which includes ingredients of psychology and biology, ethics and theology, or a theory which is consciously or unconsciously based on "ideologies," as, for instance, on imperialistic conceptions.[18]

One of Kelsen's basic contentions is that there exists no difference in the nature of the subject-matter of state law and international law. Kelsen's theory brought into focus an idea which the contemporary evolution of international law has overwhelmingly confirmed: international law is not confined to relations among states, it can encompass all human activities.[19] The clearest example of such an evolution is the international protection of human rights.

III. CRITIQUE OF KELSON'S APPROACH TO INTERNATIONAL LAW

According to Kelsen's own statement, the choice of international law as the hypothetical fundamental norm is purely arbitrary.[20] Here two objections must be levelled at Kelsen's overly narrow definition of law. Firstly, when dealing with normative systems which do not qualify for legal status, Kelsen contemplates morals which are clearly devoid of any coercive element and religious orders whose coercion is 'transcendental', meaning that 'sanctioning' is a matter for the hereafter.[21] But a religious order can also be a legal one and can thus institute provisions

[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*
[19] n 1.
[20] n 5.
[21] n 1.

 [ISSN 2581-5369]

for its followers in this life while preparing for their salvation in the hereafter.

Kelsen also contemplates normative systems which resort to physical force for their implementation. There is no difference between the Roman Empire whose rule was based on brute force and a small empire of a gang of robbers. Neither of these constitute legal orders since they do not embody Augustine's idea of justice.[22] Needless to say, Kelsen rebuts this argument, but his motivation in denying the legal nature of 'the coercive order that constitutes the community of the robber gang and comprises the internal and external order' is no less flawed than Augustine's.

The reason why such a system is not granted the legitimacy of law is that those who speak in the name of legal science do not provide it with a basic form since it is hypothetical and relies on a mere evaluation of fact and so the pure theory of law is self- defeated.

The fragility of the Kelsenian monist approach lies in the fact that he defined a legal order on the basis of the traditional features of state law. Even assuming that coercion forms part of a legal order, one cannot deny the existence of forms of constraint other than physical coercion.[23] The emergence of 'soft law' is an indication of other kinds of constraints.

International law is unique, not only because its very scope is to be ecumenical but also because no other legal order is cast in the same mould.[24] A final inadequacy of the monistic approach concerns the issue of the conflict of laws.[25] Different legal systems may subject the same 'person' to contradictory commands. Such is the case, for instance, for an Italian wishing to marry a Morrocan woman.[26] The validity of the matrimony will be decided differently in Italian civil law, ecclesiastical law if the man is a practicing Christian, and in Moroccan law which incorporated the Islamic law prohibiting the marriage of a Muslim woman with a non-Muslim. It is correct according to the Kelsenian theory, that the person of the young girl is not the same in each of the three legal systems. Each of them creates its own juridical relation. There is thus no logical contradiction among the three systems operating separately, nor is there any conflict of laws. Nevertheless, it remains the case that the same individual receives three different commands, a situation which can only be dealt with in a pluralistic approach.[27]

[22] n 1.
[23] n 1.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*

 [ISSN 2581-5369]

IV. HART'S NOMOLOGICAL APPROACH TO INTERNATIONAL LAW

Hart identifies three main recurrent issues of legal jurisprudence: how to distinguish the obligatory force of law from the conduct steering dimension of coercive force? How to distinguish legal obligations from moral obligations? How to distinguish legal rules, or more broadly social rules requiring certain behaviour, from rules which merely describe a behavioural pattern of people without determining that they are required to act in such a way?[28]

International law presents us with a case where the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings among legal theorists.[29] The absence of these institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system.[30] It is indeed arguable that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules.

Two principal sources of doubt concerning the legal character of international law are considered by Hart. Both forms of doubt arise from an adverse comparison of international law with municipal law, which is taken as the clear example of what law is. The first has its roots deep in the conception of law as fundamentally a matter of orders backed by threats and contrasts the character of the rules of international law with those of municipal law.[31] The second form of doubt springs from the obscure belief that states are fundamentally incapable of being the subjects of legal obligation and contrasts the character of the subjects of international law with those of municipal law.[32]

To argue that international law is not binding because of its lack of organized sanctions is tacitly to accept the analysis of obligation contained in the theory that law is essentially a matter of orders backed by threats.[33] It is true that not all rules give rise to obligations or duties; and it is also true that the rules which do so generally call for some sacrifice of private interests and are generally supported by serious demands for conformity and insistent criticism of

[28] n 3.
[29] Hart, *International Law.* 213-237.
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*

 [ISSN 2581-5369]

deviations.[34] Yet, once we free ourselves from the predictive analysis and its parent conception of law as essentially an order backed by threats, there seems no good reason for limiting the normative idea of obligation to rules supported by organized sanctions.[35]

The question for municipal law is: what is the extent of the supreme legislative authority recognized in this system? For international law it is: what is the maximum area of autonomy which the rules allow to states?[36]

Hart rejects the proposition that international law should best be understood as international morality. In appraising each other's conduct states differentiate between moral and legal assessments. Like rules of municipal law rules of international law are often morally indifferent. They draw arbitrary distinctions which cannot be explained by moral standards.[37] Formalism and legalism are characteristic features of international law and do not coincide with characteristics of morality. Unlike the rules of morality, the rules of international law are subject to deliberate change. A moral foundation is also not needed to explain the binding force and obligatory character of international law. While it is necessary that the rules of international law are generally followed, there can be a variety of reasons why states obey their obligations.[38] A moral obligation to abide by international law may be one of the reasons. But there is no compelling reason why it has to be a necessary feature of international law.

To a lay person, the formal structure of international law lacking a legislature, courts with compulsory jurisdiction and officially organized sanctions, appears very different from that of municipal law.[39] It resembles in form though not at all in content, a simple regime of primary or customary law. Yet some theorists, in their anxiety to defend against the sceptic the title of international law to be called 'law', have succumbed to the temptation to minimize these formal differences, and to exaggerate the analogies which can be found in international law to legislation or other desirable formal features of municipal law.[40] Thus, it has been claimed that war, ending with a treaty whereby the defeated power cedes territory, or assumes obligations, or accepts some diminished form of independence, is essentially a legislative act; for, like legislation, it is an imposed legal change.[41] Few would now be impressed by this analogy, or think that it helped to show that international law had an equal title with municipal law to be

[34] *Ibid.*
[35] *Ibid.*
[36] *Ibid.*
[37] n 3.
[38] *Ibid.*
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*

 [ISSN 2581-5369]

called 'law'; for one of the salient differences between municipal and international law is that the former usually does not, and the latter does, recognize the validity of agreements extorted by violence.[42]

V. CRITIQUE OF HART'S APPROACH TO INTERNATIONAL LAW

Hart has a problematic understanding that international law is law but does not constitute a legal system. Hart narrows his perspective and focuses strongly on namely the law of the municipal legal order of the modern state. While he employs the term law in a broad way, encompassing also the obligatory rules of a primitive society and of international law, he uses these 'doubtful cases' mainly as a contrast to the 'clear standard cases constituted by the legal systems of modern states'.[43] Focusing on this form of law in the specific nation state context he nevertheless claims to have derived general characteristics of law as a social phenomenon which he then transposes onto the international law context.

This approach exhibits three shortcomings. First, while it presumes to be concerned

with law in general it is strongly influenced by the peculiarities of law in the context

of a municipal political system.[44] However, there is no compelling reason why the concept of law as a general phenomenon should be more closely attributed to the modern state than to international law or to the law of more primitive societies. In applying his general concept of law to the international legal system, Hart conveys an archetypical theory of municipal law on the international level.[45]

Secondly, while Hart does not claim to develop a theory of the law of a specific municipal legal system, his model is designed to fit the modern constitutional state. Even with this eclectic approach, Hart's analysis is significantly incomplete. It focuses almost exclusively on private law and criminal law. Relations governed by administrative law or constitutional law do not play a significant role in Hart's concept.[46] For a general theory of law such an omission is remarkable and challenges the persuasiveness of Hart's antagonistic treatment of municipal law and international law.

Thirdly, the strong connection between the idea of a legal system and the municipal legal order is also doubtful in light of the way Hart arrives at his conception of a legal system. Hart starts his analysis with a description of a primitive social order which contains a minimum of primary

[42] *Ibid.*
[43] n 3.
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.*

 [ISSN 2581-5369]

rules but which does not have a legislature, courts, or officials.[47] Such a society is deemed to be defective in three ways: there is the problem of uncertainty, of the static character of the rules, and of inefficiency. What defines a more sophisticated legal system in contrast to a primitive social order is the ability to address and remedy these defects.[48] Within the context of the municipal legal order Hart finds the remedy for these deficits in the secondary rules of recognition, change, and adjudication.

It is more convincing to ask whether the international order comprises structures which effectively fulfil legislative, judicative, and executive functions which overcome the defects of a primitive social system. In order for international law to qualify as a legal system it needs to be able to perform these fundamental functions attributed to the law.[49] If it fulfils this requirement there are no grounds to deny international law the status of a legal system. Hart offers no compelling reason why a legal system necessarily would have closely to resemble the archetype of the municipal legal order of a modern constitutional state.[50]

The traditionally tight relationship between legal positivism and voluntarist conceptions of international law has led many scholars to believe that positivism necessarily implies a voluntarist approach to international law but that doesn't encompass the full picture.[51]

Hart rejects the proposition that international law consists of a unifying rule of recognition. However, the reasons he gives in support of this conclusion are not persuasive.[52] Hart sees a first indication of the lack of an international rule of recognition in the problems international lawyers have in formulating such a rule.[53] The *pacta sunt servanda* principle could not be the rule of recognition because not all international obligations arise from treaties or agreements.[54] However, there is no reason to deny the existence of a rule of recognition in international law. Article 38(1) of the ICJ Statute lists quite emphatically, the generally recognized sources of international law: international treaties, customary international law, and general principles of law. This criticism has to be seen in light of the ambiguity with which Hart himself endows his conception of the rule of recognition. These problems seem to be due more to Hart's failure more clearly to substantiate his concept of the rule of recognition than they are due to the structure of international law.

[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*

 [ISSN 2581-5369]

The international legal order encompasses mechanisms of law-making which transcend the image of a primitive social order as painted by Hart. While it lacks a comprehensive centralized legislature comparable to the legislative branch of government in a municipal system, it consists of manifold instruments to translate community values into binding community rules.[55] This system is far from perfect and cannot in every case avoid factional interests obstructing legislation in the interest of the international community. Yet, it is far more sophisticated than Hart suggests.

The core function of the rule of recognition in Hart's concept of law is to identify criteria for the validity of primary rules and to provide criteria for governing the relationship between different sources of law.[56] The mere fact that international law consists of a variety of sources does not oppose the existence of a rule of recognition. Hart also recognizes that the municipal legal order can consist of multiple sources of law – for example statutes, customary law, and judicial precedents.[57] It might be argued that the lack of an authoritative interpreter in international law constitutes a structural difference when compared with the municipal legal system. However, the jurisprudence of the ICJ has contributed to the identification and clarification of a number of important rules in international law, and its decisions are generally considered to have a high degree of authority whereas municipal legal systems don't clearly establish an authoritative interpreter of statutes.

VI. A BRIDGE BETWEEN THE LEGACY OF HART AND KELSEN AND ICJ CASE LAWS

Decisions of the ICJ contain undertones of Hartian and Kelsenian jurisprudence influencing their interpretation of case law. This rapprochement between jurisprudence and public international law illustrates the importance of these thinkers even in contemporary times.

In the case of *Kruger v. The Commonwealth*[58] concerning a claim of genocide brought by aboriginal peoples against the government of Australia. In this case, the Northern Territory Aboriginals Ordinance 1918 Act authorized the removal of aboriginal children from their and their transference to orphanages, foster families and mission stations. It also empowered the officials to enter any property while doing so. Plaintiff argued that the Ordinance was unconstitutional as it authorized genocide. Australia had ratified the Genocide Convention, 1949, in 1951. This convention encompasses the alleged act here. which was 'forcibly transferring children of one group to another group'. From a critical legal studies perspective,

[55] n 3.
[56] *Ibid.*
[57] *Ibid.*
[58] (1997) 146 ALR 126.

it is the linguistic theory of the Court that is most interesting. The word 'care' is treated by the High Court in a manner befitting HLA Hart, as embodying a literal core which is not open to question. To the High Court, 'genocide' and 'care' are mutually exclusive. Logically, therefore, the Ordinance is constitutional and perhaps even admirable; any genocidal acts done under its authority would, on the contrary, be ultra vires.[59]

The applicants in *Kruger* faced a further and compelling difficulty. The word 'genocide' was defined under the *Genocide Convention* as requiring "intent to bring about the destruction of the group".[60] The argument of the Court was that that intent was not manifest in the Ordinance and therefore any genocidal acts were not authorized by it.

As Justice Toohey explains,

"There is nothing in the Ordinance, according to it the ordinary principles of construction, which would justify a conclusion that it authorized acts "with intent to destroy, in whole or in part the plaintiff's racial group. Once again, at the risk of undue repetition, it is necessary to keep in mind that it is the validity of the Ordinance, not any exercise of power under the Ordinance, which is the subject of these proceedings."[61]

On this point, the High Court is distinctly orthodox: the purity of the law is rescued by carefully distinguishing it from the behavior of officials thereby invoking Kelsen's theory to clarify issues of international law.[62]

In the *Western Sahara Advisory Opinion*[63] the issue was surrounding the underlying racism of *terra nullius*. The court decided that *terra nullius* could no longer legitimize state acquisition of territories based on occupation where those territories are inhabited by peoples living as 'organized societies.'[64]

The decision in *Mabo (No. 2)*[65] in 1992 declared that Australian State cannot continue to use *terra nullius* as a justification for colonizing aboriginal land. Thus, by acknowledging that that Australian State's foundation is based on colonialism, it was hailed as being a progressive judgment protecting the rights of aboriginals. The Court while declaring the unlawfulness of *terra nullius* refrained from considering the powers held by the state to steal lands and commit acts of genocide. *Nunga* history consisting of songs and stories of spirit-law, were always

[59] Desmond Manderson,*'Apocryphal Jurisprudence' Studies in Law, Politics and Society*, 81-111 (2001).
[60] Convention on the Prevention and Punishment of the Crime of Genocide, 1949, Article II.
[61] n 47.
[62] n 27.
[63] *Western Sahara Advisory Opinion*, 1975 I.C.J. 12.
[64] Irene Watson, 'Buried Alive' Kluwer Law International, 253-269 (2002).
[65] *Mabo* v. *Queensland* (1992) 175 CLR 30.

embodied in land, the greater natural world and universal order of things in Australia. The *krinkris* imposed violence, in all its forms, rendering the Nunga life and laws pre-historic, invisible, un-evolved in time, in presence of *terra nullius*.[66]

The 'spirit law' of the indigenous people had no transcendental authority like God. It was cosmological, cyclical and based on experience. Aboriginal laws are non-adversarial based on idea of obligation and reciprocity. Law is conceived as a duty of care for everyone. It blurs the line between friends and enemies. It is neither positive nor natural law that is, neither is the law written down or enacted by a sovereign nor does it have a beginning from the authority of God. It is a constant cycle of life, with no end and beginning. It is non- anthropocentric as humans are considered as a part of nature. They are perceived as the custodians of nature and there is no hierarchy among the creatures. The rule of recognition developed by Hart can be applied by the indigenous people to give legitimacy to their own law which is not recognized because the Court views state sovereignty as legitimate. As a response to the deficit of a simple society which has a set but not a system of social rules. The identification of these rules can be done through the fact that the rules are accepted by the community. Disputes about the rules can therefore not be settled by reference to an authoritative text. This uncertainty could be solved only by introducing a rule of recognition, a rule which determines which rules are binding. Where a system consists of more than one source of law the rule of recognition also regulates the relationship between these rules, thereby unifying them into a system of rules.[67]

There are several other international case law examples which draw their interpretations from Hart and Kelsen and this clearly indicates that International law and the analytical tradition in jurisprudence is not at a vanishing point and have mutual relevance.

VII. CONCLUSION

A discussion of the principle of effectiveness, and the relation of national to international law shows that Hart challenges Kelsen's claim that international law can be understood to validate national law by arguing that Kelsen's claim is based on nothing more than the principle of validating purport that is; if two norms are related by a relationship of validating purport, they both belong to the same legal system.[68] Since that principle is false, Hart concludes that Kelsen's monism must be rejected as well. For Hart, the practices of recognition in the national context are what determines the nature of the relationship of national and international law, at

[66] *Ibid.*
[67] n 3.
[68] D.A. Jeremy Telman, *Hans Kelsen in America - Selective Affinities and the Mysteries of Academic Influence*, 59-83(2016).

least in the absence of an international practice of recognition.[69] National practices of recognition, however, typically do not recognize any dependence of the validity of national law on international law.[70]

Hart claimed that international law could not be regarded as a legal system because of the differences in form between municipal law and international law, due to the lack of an international legislature, judiciary, and centralized system of sanctions, and the absence of a uniform rule of recognition.[71] This claim needs to be challenged because his methodological approach does not imply the consequence that a legal system has closely to resemble a municipal legal order in form and structure. Even if Hart's assumption is accepted, he presents only an incomplete account of the municipal legal order. If Hart's analysis is extended to the sphere of public law, and in particular constitutional law, the divide between municipal law and international law does not seem as antagonistic as Hart's different characterization of municipal law as a legal system and international law as a mere set of primary rules suggests.[72] Applying Hart's concept to international law with these shortcomings of Hart's theory in mind, secondary rules of recognition, change, and adjudication can be identified in international law. However, international law is, to a larger extent than municipal law, characterized by non-hierarchical structures and a fragmentation of legal regimes. This plurality of international law should be viewed not only as a defect but as an endemic feature of international law as a legal system.[73] A jurisprudence which chooses the municipal legal system as the sole baseline and point of reference for an evaluation of international law will necessarily misconceive these characteristics and regard them as pathologies. International law has deficits which challenge its efficiency and significance as a social rule system with the function of governing the conduct of states and state officials and of containing the use of force and power in international relations.[74] These deficits are openly visible and, in the case of blatant violations of fundamental community values and displays of power by individual states, frustrate international lawyers and external beholders of the system alike. However, structurally comparable deficits exist within municipal legal orders, to a varying degree and with varying intensity.[75] The differences between the two legal orders justify a conceptual distinction. But

[69] *Ibid.*
[70] *Ibid.*
[71] n 3.
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*

 [ISSN 2581-5369]

they do not challenge the notion that the international order is founded on an international legal system, just as the national polity is governed by a municipal legal system.

Some concluding thoughts on Kelsen's legal monism would be that assuming unity of a legal system, there are nomological arguments in favour of the primacy of international law. One of its principal functions is to determine the scope of validity of national laws which clearly assumes its supremacy. Kelson advanced the concept of sovereignty of a state that is a legal order based on the fact that its basic norm does not derive from another legal order. If a state is bound to respect international law it cannot be deemed sovereign, it is only a partial order and more like a federated state.[76] Kelson relied on the possibility of state monism contemplating that no subject matter can be put out of bounds of any legal system. The positive aspect of that doctrine is that any human situation can be internationalized that is apprehended by international law. The perverse consequence of a monist legal order would be the ability of state law to rule on an interstate relationship.

The main assertion of legal positivism lies in the perception that all legal facts are determined by social facts alone.[77] Positivists can and do disagree about *what* those ultimate social facts are. For Kelsen it was the *Grundnorm*, for Hart the rule of recognition. This concept of law encompasses the potential for a positivist approach to international law which evades the shortcomings and limitations of voluntarism, but Hart did not fully develop the potential of such a theory of international law.[78].

*****

[76] n 1.
[77] n 3.
[78] *Ibid.*

 [ISSN 2581-5369]