Page 1309 - 1322 **DOI:** *https://doij.org/10.10000/IJLMH.116238*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 6

2023

Hans Kelsen and His Pure Theory of Law: The Great Mystery Revisited

DR RAJIB HASSAN[1]

ABSTRACT

Hans Kelsen advanced a highly distinctive philosophy or theory of law having a significant impact on the development of modern jurisprudence. He was another jurist who has the credit of reviving the original analytical legal thought in the 20th century through his "Pure Theory of Law". Kelsen did not favour widening the scope of jurisprudence by co-relating it with other social sciences and rigorously insisted on separation of law from politics, sociology, metaphysics and all other extra-legal disciplines. Kelsen's theory is represented to be 'pure' in the sense that it carefully excludes from consideration all factors and issues which can be considered not to be strictly legal. These include all the moral, ethical, sociological and political factors and values which are commonly advanced in explanation or pleaded in justification of law.

Keywords: *Pure theory, norm, 'is' norm, 'ought' norm, Grundnorm, normative science, hierarchy of norms, process of concretisation.*

I. INTRODUCTION

Hans Kelsen (1881-1973), the Austrian jurist was born at Prague in 1881 and was Professor of law at the Vienna University. He was the Judge of the Supreme Constitutional Court of Austria during 1920-1930. Subsequently, he came to England and in 1940 he moved to the United States and became Professor of law in several American Universities. Of late he was emeritus Professor of Political Science of the University of California where he expounded his Pure Theory of law in the 20" century which has evoked worldwide interest.[2] Law according to Kelsen, is a specific technique of social organisation. "The concept of law has no moral connotation whatsoever"; its decisive criterion is 'the element of force.'[3] This approach got him the title of Neo-Analytic or Neo-Austinian. Kelsen also asserts the identity of State and law. As a political organisation, the State is a legal order, and every State is governed by law.[4] "A State not governed by law is unthinkable."[5] The State is nothing but the sum total of norms ordering

[1] Author is an Assistant Professor at Government Centre of Legal Education, Hooghly Mohsin College Campus, Chinsurah, District: Hooghly, West Bengal, India.
[2] Dr SN Dhyani, *Fundamentals of Jurisprudence: The Indian Approach,* CLA, Allahabad 3rd Edn. 2004, p. 214
[3] Hans Kelsen *General Theory of Law and State*, transl. A. Wedberg (Cambridge Mass., 1949) p. 5
[4] Kelsen, *The Pure Theory of Law*, transl. M. Knight (Berkeley, 1967), p. 286
[5] *Supra note 5*, p. 312

 [ISSN 2581-5369]

compulsion, and it is thus coextensive with the law.[6]

Kelsen was a prolific writer and has written several books[7] like Austrian Constitution (1920), General Theory of Law and State (1945), The Pure Theory of Law (1934), revised (1960), Principle of International Law (1952), What Justice (1957), and many other works. Like John Austin in the 19th century, Kelsen challenges both the philosophical and natural law theories of law. He owed his fame chiefly due to the Pure Theory of Law or the doctrine of Pure Law divested of all extra- legal and non-legal elements.

II. HISTORICAL BACKGROUND OF PURE THEORY

Kelsen's theory also came as a reaction against the modern schools which had widened the boundaries of jurisprudence to such an extent that they seem almost coterminous with those of social sciences.[8] Though the first exposition of the theory took place in 1911, it came in full bloom in post-war Europe. Kelsen's work originated in the intellectual climate of post-1918 Vienna. This was a period of dramatic change. The dismemberment of the Austro-Hungarian Empire after the First World War and the transition from imperil centre to the capital of a much-reduced republic enhanced a critical 'scientific' tradition which already had deep roots in pre-war Austria, seen, e.g., in the psycho-analytical work of Freud. Both the strengths and the weaknesses of this general tradition may be seen to advantage in Kelsen's legal theory.[9] The national and international conditions at Kelsen's time may throw fight on the basis and necessity of the approach of 'pure theory of law'. The Austrian Code, in force at that time, was prepared a hundred years ago when the natural law theory was at its height. Though the natural law was rejected in England as early as in the 19th century but in the Continent, it had its footing till the beginning of the century. Kelsen also rejected the natural law concept and drafted the Austrian Constitution in 1920. After World War I most of the countries in Europe adopted written Constitutions. The race of fundamental law as the basis of the legal system reflected in them. The idea of Grundnorm which is the foundation stone of pure theory and the definition of law as the 'hierarchy of norms' seem to be inspired by the above principle.

III. WHY IT IS CALLED PURE THEORY?

The main point of Kelsen's theory is that it proceeds to free law from metaphysical mist with which law has been at all times by the speculations on justice or by the doctrine of *'jus*

[6] E. Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law*, 2nd Indian Rep. ed. 1997, p.103, Published by Universal Book Traders, Delhi under Special Arrangement with Harvard University Press, U.S.A.
[7] Dr NV Paranjape, *Studies in Jurisprudence and Legal Theory*, Cent. Law Ag. Allahabad, (3rd Edn. 2001) p. 27
[8] AR Biswas, *Modern Jurisprudence*, Kamal Law House, Calcutta, (1998) p. 79
[9] H. McCoubrey & Nigel D. White, *Text Book on Jurisprudence*, Oxford Indian (3rd Edn. 1999), pp 144-145

 [ISSN 2581-5369]

naturale'.[10] Kelsen is of the view that jurisprudence must be kept separate from all other social sciences. He puts emphasis on the fact that a theory of law must remain free from ethics, politics, sociology, history etc. In other woods, a theory law must be pure (*rein*).

Kelsen termed his legal theory "pure" implying some lack of contamination. By this he meant that the theory is excluded from consideration of all factors which could not be regarded as of the essence of 'law'.[11] Pure theory means that it is concerned solely with that part of knowledge which deals with law - it endeavours to free the science of law from all foreign elements- that is its fundamental methodological principle. Kelsen was of the opinion that, "the science of law has been mixed with elements of psychology, sociology, ethics and political theory."[12] He sought to restore the purity of the law by isolating those components of the work of a lawyer or judge which may be identified as strictly 'legal'.[13]

Kelsen's object in aiming at 'purity' in his legal analysis is to eliminate alien elements which are not the proper concern of an account which confines itself strictly to the specifically legal phenomena in the structure of a system of law. He criticises the way in which contributions to this field of learning have, during the 19th and 20th centuries, included ventures into the related but different fields of psychology, sociology, ethics and political theory. "This adulteration is understandable," says Kelsen, because the latter disciplines deal with the subject matters that are closely connected with law."[14]

IV. DISTINCTION BETWEEN THEORY OF LAW AND THE LAW

Before attempting to understand Kelsen's theory of law it is essential to study the premises from where he argues and it is also essential to understand the fine distinction between "theory of law" and the "law" itself:[15]

- Kelsen argues that a theory of law must deal with law "as it is" and not "as it ought to be". Here we find that Kelsen is quite in agreement with Austin. Insistence on this point got him the title of "positivist".
- A theory of law must be distinguished from the law itself. The reason being that the law itself consists of a mass of diverse rules and the function of a theory of law is to correlate them in a logical pattern and to organise the whole field of law into a single unity.

[10] Kelsen, *Law, A Century of Progress*, ii, p. 231
[11] H. McCoubrey & Nigel D. White, *Text Book on Jurisprudence*, Oxford Indian (3rd Edn. 1999), p145
[12] Kelsen, *The Pure Theory of Law*, transl. M. Knight (Berkeley, 1967), p.1.
[13] E. Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law*, (2nd Indian Rep. ed. 1997), p.101, Published by Universal Book Traders, Delhi under Special Arrangement with Harvard University Press, U.S.A.
[14] H. Kelsen, *Pure Theory of Law*, transl. M. Knight (Berkeley, University of California Press, 1967), Chap.1, p.1
[15] RWM Dias, *Jurisprudence*, Aditya Books Pvt Ltd. New Delhi, 5th Edn (Indian Rep) 1994, p.358

 [ISSN 2581-5369]

- A theory of law should be uniform so as to be applicable at all times and in all places.
- A theory of law must be free from ethics, politics, sociology, history etc; it must be pure (rein).
- Finally, law being "ought propositions", knowledge of law means knowledge of "ought norms."

V. KELSEN'S CONCEPT OF LAW

(A) Law is a Normative Science:

Kelsen described law as a normative science as distinguished from natural science which is based on cause and effect. According to Kelsen, law is a normative science. But law norms have a distinctive feature. They may be distinguished from science norms on the ground that norms of science describe a relationship which exists can be accurately described, determined and discovered in the form of 'is' (*sein*), while law norms are 'ought norms', law is the knowledge of what 'law ought to be' (*sollen*). Laws do not have a causal connection. Kelsen said, the principle according to which the natural science describes its object is 'causality', and the principle according to which the science of law describes its object is 'normativity'.[16]

In other words, the distinction between normative science and physical science is that physical science has causal laws. They are in propositions that, if A is then B is If A is the cause, then B is the effect. They are statements. It has been said that these laws are not subject to violation. If it is broken in any case then the law has not been formulated in the correct manner. For example, the law of gravitation says that, if an apple is let loose from the tree it will fall on the ground. This law is not subject to violation.

Law does not attempt to describe what actually occurs but only prescribes certain rules. It says, if one breaks the law, he ought to be punished. Normative statements or rules of law are prescriptive. These are prescriptions. They invite violation. They can be broken and they are being broken. Their validity is not affected by violation Section 379 of I.P.C remains valid though theft is being committed every day. A conduct which is bound to happen is physical law. The true idea of norm is that there is choice of observance, whether a few observe and a few do not. If there is no choice then it will be physical law.

(B) Now what is a Norm...?

Norms are regulations setting forth how men are to behave and positive law is simply a

[16] Kelsen, *General Theory of Law and State*, Harvard University Press (1945), p.46

 [ISSN 2581-5369]

normative order regulating human conduct in a specific way. A 'norm' is an 'ought' proposition; it expresses not what is, or is done, or must be, but what ought to be.[17] Rules or norms are kinds of directives which set out directions for behaviour. According to Kelsen's pure theory of law, the objects of the science of law are those norms "which have the character of legal norms and which make certain acts legal or illegal."[18] By the term 'norm' Kelsen means that "something ought to be or ought to happen, especially that a human being ought to behave in a certain way."[19]

Non-Legal Norms and Legal Norms: Norms may be of two types non- legal norms and legal norms. About non-legal norms Kelsen tells us, truly enough, that even if racketeers enforce a tax on night clubs by coercion, that is not a legal norm. The reason he gives is that this can only be created by persons who are considered legal authorities under the Constitution. In other words to be legal a norm must form part of the official hierarchy.

About legal norms, Kelsen says that, norm is a hypothetical judgement which directs of doing and not doing of a specified act to be followed by coercive measures of the state, Kelsen says, "a norm is a rule forbidding or prescribing a certain behaviour". Indeed, legal order is the hierarchy of norms having sanction and jurisprudence is the study of these norms which comprise the legal order. This constitutive element of law as a coercive social order is the "norm" or the rule that somebody ought to act in a particular way. Like Austin, Kelsen also considers sanction as an essential element of law but he prefers to call it a 'norm'. Thus, according to Kelsen, "law is a primary norm which stipulates sanction". It is called positive law because it is concerned only with actual and not with ideal law. *Dr Allen* has described Kelsenite theory as "a structural analysis, as exact as possible, of positive law- an analysis free of all ethical or political judgments or values".[20]

(C) The Hierarchy of Norms/Normative Relations:

The science of law to Kelsen is the knowledge of hierarchy of normative relations in which each norm is validated by a prior norm until the point of origin of legal authority is reached with the fundamental norm i.e., the Basic Norm or the Grundnorm. The subordinate norms are controlled by the norms superior to them in the hierarchical order. The Grundnorm is independent of any other norm being at the top or at the apex. The process one norm deriving its validity from a prior norm immediately superior to it, until it reaches the Basic Norm has been characterised

[17] Lloyd, *Introduction to Jurisprudence*, Stevens & Sons Ltd. London (5th Edn. 1985), p. 322
[18] Kelsen, *The Pure Theory of Law*, transl. M. Knight (Berkeley, 1967), p.4
[19] *ibid.*
[20] Dr NV Paranjape, *Studies in Jurisprudence and Legal Theory*, Cent Law Ag, Allahabad, (3rd Edn, 2001), p. 28

 [ISSN 2581-5369]

by Kelsen as "concretisation of the legal system". The hierarchical relation can be understood through the following examples:

a. **The Structure of Norms/Pyramid of Norms:**

Norm: A If anyone commits theft, he ought to be arrested.

Norm: B If anyone is arrested for theft, an investigation ought to be started against him.

Norm: C If investigation says that he is guilty, he ought to be charge-sheeted.

Norm: D If he is charge-sheeted, he ought to be put on trial.

Norm: E If he is found guilty after trial, he ought to be convicted.

Norm: F If he is convicted, he ought to be sentenced

Norm: G If he is sentenced, the sentence ought to be executed.

b. Validation in the Hierarchical Structure of Norms- Reaching the Grundnorm:

The Kelsenite norms are not represented as being equal in status. Their relationship is vertical rather than horizontal. Kelsen stated that: the legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms. Its unity is brought about by…. the fact that the validity of a norm, created according to another norm, rests on that other norm, whose creation in turn, is determined by a third one.[21] The relation between a higher norm and a lower norm lies in the validity of one norm grounding, In one way or another, the validity of another norm. A norm is related to another norm as higher to lower if the validity of the latter is grounded by the validity of the former. If the validity of the lower norm is grounded the validity of the higher norm, in that the lower norm was created in the way prescribed by the higher norm, the higher norm as it relates to the lower, gives validity to the lower is of creative and regulating in nature - this higher rather the highest norm is the Grundnorm.

c. Now the Grundnorm:

According to Kelsen, the law or the legal order is a system of legal norms. The first question we have to answer therefore, is this:

- What constitutes the unity in diversity of legal norms?
- Why does a particular legal norm belong to a particular legal order?

A multiplicity of norms constitutes a unity, a system, an order, when validity can be traced back

[21] H. Kelsen, *Pure Theory of Law*, transl. M. Knight (Berkeley, University of California Press, 1967), pp. 221-22

 [ISSN 2581-5369]

to its final source in a single norm. This single norm is the basic norm or Grundnorm which constitutes the unity in diversity of all norms which make up the system. The Grundnorm is the starting point of any chain of legal norms, it is the apex of a normative pyramid, which through a long line of connections, authorises the decisions and actions taken in the system at ground level.[22] What then is the Grundnorm? According to Kelsen: ……the Basic Norm…. must be formulated as follows: Coercive acts sought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes.)[23] The reference to a *'historically first'* constitution involves a chain of constitutional validations in which constitutional evolution, through processes of amendment and other procedures (not involving a revolutionary discontinuity), lead back to a first accepted constitution. The *'historically first'* constitution is the starting-point of the current constitutional order.

The Grundnorm is the cornerstone of the whole legal system. The whole foundation of the legal system is built upon it. According to Kelsen every legal act relates to a norm which gives validity to it. The legal norm derives its validity from a particular ought norm or sanction. Kelsen's concept of sanction is quite different from Austin's concept of sanction. Kelsen's 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 more general norm which backs it. Ultimately that hierarchy relates back to an initial norm called - Grundnorm.

d. **Test of Grundnorm: Minimum Effectiveness:**

Kelsen says that in every legal system there is always a Grundnorm although its forms are different in different legal systems, for example, in Britain, the Grundnorm is "Crown in the Parliament" and in the U.S.A it is the Constitution. In India also it is the Constitution of India. Grundnorm can be recognized by the *'minimum effectiveness'* which it possesses. But any discussion about the nature and origin of the Grundnorm is not within the province of the Pure Theory of Law. These are pre- legal questions in which a jurist is not concerned. We can only explain how this principle was accepted but cannot demonstrate it by pure logic.

Kelsen said that the task of legal theory is only to clarify the relations between Grundnorm and all other inferior norms and not to enter into other questions as to the goodness or badness of the Grundnorm. Any discussion of such questions may involve the study of things political science, ethics, religion and subjects which may adulterate and contaminate the pure

[22] H. McCoubrey & Nigel D. White, *Text Book on Jurisprudence*, Oxford Indian 3rd Edn 1999, p 149
[23] H. Kelsen, *Pure Theory of Law*, transl. M. Knight (Berkeley, University of California Press, 1967), pp. 200-201

 [ISSN 2581-5369]

Grundnorm theory. According to Kelsen, before applying the Grundnorm theory to any legal system one must discover the Grundnorm first.

The basic norm is considered by Kelsen as the ultimate source for that validity of all norms that belong to the same legal system. For the validity of a legal norm Kelsen distinguishes it from effectiveness. Effectiveness means that a norm is actually obeyed and applied, while validity means that it ought to be obeyed and applied.[24] In his later writings Kelsen assumed a closer relationship between validity and effectiveness by declaring that "a norm that is not obeyed by anybody anywhere, in other words, a norm that is not effective at least to some degree, is not regarded a valid norm." Kelsen thus reached the conclusion that, although a norm required authorization by a higher norm, a minimum of effectiveness was a further condition of its validity.

VI. THE PROCESS OF CONCRETISATION

It may be observed at the outset that all the subordinate norms are controlled by norms superior to them in a hierarchical fashion. The Grundnorm is independent of any other norm in the system itself and controls all other norms of the system. The entire legal system thus presents a hierarchy or pyramid of norms. The process, by which other norms are derived from the Grundnorm at each successive level of normative rules, Kelsen terms it as 'Concretization of the system'. Whatever particular form they may take, legal norms ultimately have real effects, whether it be through judgments of courts or through other procedures. The law is considered in Kelsen's model to operate at different levels of abstraction, from the hypothetical Grundnorm, which ultimately authorises the whole system, to the actual application of substantive norms in different cases This process of movement from the abstract to the substantive application is described as the 'process of concretization'.[25]

VII. IMPLICATIONS OF KELSEN'S THEORY

Several implications follow from such a view of a legal system. The implications have been summarized by Sir Dias[26] which may be briefly discussed as under:

In the *first* place, the traditional distinction between 'public' and 'private' law is seen to be one of degree, while at times it disappears. They are both part of the process of concretization and both are norm-creating. The distinction between them lies sometimes in the fact that they operate at different levels of the structure, and at others in the organs which apply them. With

[24] H. Kelsen, *Pure Theory of Law,* transl. M. Knight (Berkeley, University of California Press, 1967), pp. 10-11
[25] H. McCoubrey & Nigel D. White, *Text Book on Jurisprudence*, Oxford Indian 3rd Edn 1999, p 152
[26] RWM Dias, *Jurisprudence,* Aditya Books Pvt Ltd. New Delhi, 5th Edn (Indian Rep) 1994, pp.368-369

 [ISSN 2581-5369]

criminal law, for example, the distinction would seem to disappear altogether.

Secondly, in a similar way the distinction between legislative, executive and judicial processes appears in a new light. They are all norm-creating agencies, the executive and judiciary being but steps in the concretization of norms in particular cases.

Thirdly, the distinction between substantive law and procedure is relative, procedure assuming greater importance. It is the organs and process of concretization that constitute the legal system.

Fourthly, the distinction between questions of law and fact also become relative. The 'facts' are part of the condition contained in the "if X' part of the formula, 'If X, then Y ought to happen'. The application of a norm concretizes every part of it, including the 'If X' part. Therefore, the finding of fact by a judge is not necessarily what actually happened but what he regards as having happened for the purpose of applying the particular norm.

Fifthly, the legal order is a normative structure which operates so as to culminate in the application of sanctions for certain forms of human behaviour. It follows that the idea of duty is of its essence, which is evident in the 'ought'. Kelsen made no specific allowance for powers, while liberty, in his view, 'is an extra-legal phenomenon'[27]. Liberty is the jural opposite of duty, but Kelsen's stand in the matter reflects a wider issue, namely, between an 'open' and a 'closed' concept of law. The former is one in which law concerns only specific regulation so that anything as yet unregulated falls outside law. The latter is one in which all aspects of behaviour are within law, whether positively through specific' regulation or negatively through liberties; in short, liberty and duty are two sides of the same coin. Kelsen's theory is an 'open' one.

On the other hand, when he turned to the concept of claim, he stood on firmer ground. This, he maintained, is not essential. It appears when "the putting into effect of the consequence of the disregard of the legal rule is made dependent upon the will of the person who has an interest in the sanction of the law being applied".[28] Claim is only a by-product, as it were, of the law. Kelsen showed how modern criminal law has for the most part discarded ancient ideas of the law being set in motion by the injured person and is now enforced directly by officials, ie the idea of individual claims is no longer the foundation of the criminal law. It is still the basis of the law of property and contract and so on, but in Kelsen's view there is no reason why it need be, and may well be dispensed with in the future.

Sixthly, to Kelsen the concept of 'person' was simply a step in the process of concretisation. This

[27] Kelsen, *Das Problem der Souveranitat,* p.247
[28] Hersch Lauterpacht, '*Kelsen's Pure Theory of Law',* in *Modern Theories of Law* (London, 1933) at p. 112; Kelsen *Pure Theory of Law,* pp.126-127

 [ISSN 2581-5369]

has been previously discussed, and it was seen that by 'person' he meant only a totality of claims etc. 'Person' is a legal conception, and he therefore rejected the traditional distinction between 'natural' and 'juristic' persons. The former are biological entities, which lie outside the province of legal theory. They are only the concern of the law in so far as they focus duties and claims etc.

Lastly, a significant feature of Kelsen's doctrine is that the state is viewed as a system of human behaviour and an order of social compulsion, Law is likewise a normative ordering of human behaviour backed by force, which 'makes the use of force a monopoly of the community'.[29] Moreover, a state is constituted by territory, independent government, population and ability to enter into relations with other states, and each of these requirements is legally determined. The inescapable conclusion is that state and law are identical. This is not to say that every legal order is automatically a state, e.g. highly decentralised orders like primitive communities; only relatively centralised legal orders are states. Kelsen further rejected any attempt to set the state apart from law or to say that law is the 'will of the state'.

VIII. CRITICISM

Kelsen's analysis of the formal structure of law as a hierarchical system of norms and his emphasis on the dynamic character of this process, are certainly illuminating but his theory was criticised on many grounds some of are discussed as under:

(A) Grundnorm Vague and Confusing:

Though Kelsen has given the characteristic of Grundnorm as possessing minimum effectiveness; it is very vague and confusing and it is very difficult to trace it out in every legal system. But its discovery is a condition precedent for a successful application of Kelsen's theory. Moreover, Kelsen does not give any criterion by which the minimum effectiveness is to be measured.[30] Writers like Friedmann, Stone and Stammer have pointed out that in whatever way the effectiveness is measured; Kelsen's theory ceases to be pure on that point. Prof *Stone* says: He (Kelsen) does not recognise that the inquiries called for must include those of sociological jurisprudence and theory of justice. Excluded though these are from all the side doors and back doors of his pyramid of norms, the front is wide open to both".[31]

The main stumbling-block here is the question of what exactly is meant by 'effectiveness'. The Kelsenite view of revolutionary change has from time to time been judicially considered. In a

[29] Kelsen, *General Theory of Law and State*, Harvard University Press (1945), p.21
[30] RWM Dias, *Jurisprudence,* Aditya Books Pvt Ltd. New Delhi, 5th Edn (Indian Rep) 1994, p.365
[31] Quoted by Prof Nomita Aggarwal, Jurisprudence (Legal Theory), CLP, (Allahabad 10th Edn. 2014), p.311-312

 [ISSN 2581-5369]

case arising from the unilateral declaration of independence by the Smith regime in Rhodesia (now Zimbabwe). All he maintained that the Grundnorm imparts validity as long as the 'total legal order' or as he later put it, 'by and large' effective. As to this this may be asked, in the first place, what is the measure of 'total' and 'by and large'? In the *Rhodesian case* i.e. *Madzimbamuto v. Lardner-Burke*[32], exposes the weakness here, because a Judge pointed out that an effective order cannot be said to be totally, or even by and large, effective as long as its judiciary refuses to accept the legality of its basis (as per Fieldsend., AJA). Interestingly, in *The State v. Dosso*,[33] the Supreme Court of Pakistan had held a usurper to be effectively in power and hence lawful on Kelsenian grounds. Later in *Jilani v. Government of Punjab*,[34] the Supreme Court declared both the first and the usurpers illegal, repudiated Kelsen in toto and overruled *Dosso* decided in 1958 which relied on Kelsen heavily.[35]

(B) Grundnorm not the Source of Law:

The Grundnorm of a national legal system does not imply that it is impossible to go beyond that norm. Certainly, one may ask why one has to respect the constitution as a binding norm. The answer will invoke the reference to a 'historically first' constitution which involves a chain of constitutional validations in which constitutional evolution takes place through constitutional amendments and it leads to the formation of the first accepted constitution. The 'historically first' constitution is thus the starting point of the current constitutional order. Now, if one asks why the "historically first constitution" is considered to be binding, the answer may be that the fathers or the markers of the "historically first constitution" were empowered by God. One of the essential characteristics of legal positivism is that it dispenses with any such religious justification of a national legal order. Invocation of any metaphysical foundation for the legal system would represent an 'impurity' in Kelsen's positivistic analysis.[36]

(C) The Purity of Norm cannot be maintained:

The purity of norms cannot be maintained because for proper analysis of legal norms one will have to go to the Grundnorm and in tracing the Grundnorm by applying the test laid down by Kelsen (i.e., minimum effectiveness) one will have to look into the political and social facts, it will cause adulteration in the theory because the impurity of the Grundnorm will affect other norms which emerge from it. The Grundnorm, for its effectiveness would seem to depend on

[32] (1968) 2 SA 284
[33] PAK LD (1958) SC 533
[34] PAK LD (1972) SC 139
[35] H. McCoubrey & Nigel D. White, *Text Book on Jurisprudence*, Oxford Indian 3rd Edn 1999, p. 151 [See also: RWM Dias, *Jurisprudence*, Aditya Books Pvt Ltd. New Delhi, 5th Edn (Indian Rep) 1994, p.365]
[36] John D Finch, *Introduction to Legal Theory*, Universal Law Publishing Co., Delhi, (2nd Edn. 2009) p. 123

 [ISSN 2581-5369]

those very sociological factors which he vehemently excluded from his theory of law. So, the Grundnorm upon which the validity of all other norms depends, is tainted with impurity, it is arguable that other norms are similarly tainted.[37]

(D) International Law- The weakest point in Kelsen's Theory

Kelsen in his attempt to apply his theory on international law runs into a number of inconsistencies and the artificiality of his approach is exposed. Austin relegated international law to the realm of positive morality, contrary to the universally accepted usage of modern states and lawyers. Kelsen seeks to overcome this difficulty by demonstrating how state laws can be dovetailed into the international order of norms so as to form one monistic system. He preferred monism though he was well aware that in existing society a dualistic pattern is still retained. He however, was hopeful that monism will prevail: it was, thus, merely a heuristic suggestion.[38]

And also, to treat war and reprisals as providing the element of force would be acceptable only if resort to them was permitted by the international legal order and forbidden as instruments of national policy. It is true that international law does not forbid war and reprisals entirely as instruments of national policy, not even after the Briand-Kellogg Pact 1928, or the Charter of the United Nations, but the object of international law is to try to prevent these. War represents the breakdown of international law. In the light of all this, as Professor *Friedmann* observed: "Logically Kelsen should have been led to deny the character of law to inter- national law in present international society".[39]

Lord Lloyd is of the view that the Basic Norm is a very troublesome feature of Kelsen's system. We are not clear what sort of norm this really is, nor what it does, nor where we can find it. We are told that it is purely formal, is a juristic value judgment and has a hypothetical character. It forms the keystone of the whole legal arch. It is at the top of the pyramid of norms of each legal order. [40]

Sociological jurists have criticised Kelsen's Pure Theory of Law on the ground that it lacks practical significance. *Prof Laski* says: "Granted its postulate, I believe the pure theory to be unanswerable but, believe also that its substance is an exercise in logic and not in life".[41]

Dr Allen says: "in the anxiety to keep theory 'pure', he has raised it to such a remote and

[37] RWM Dias, *Jurisprudence,* Aditya Books Pvt Ltd. New Delhi, 5th Edn (Indian Rep) 1994, p.364
[38] Lloyd, *Introduction to Jurisprudence*, Stevens & Sons Ltd. London (5th Edn. 1985), p. 336
[39] Friedmann, *Legal Theory* p.279
[40] VD Mahajan, *Jurisprudence and Legal Theory*, Eastern Book Company, Lucknow, 5th Edn. (Rep) 2003, p. 551
[41] Harold J. Laski, *A Grammar of Politics*, G. Allen & Unwin Limited (4th Edn.1938) p.6

 [ISSN 2581-5369]

inaccessible altitude that it has difficulty in drawing the breath of life".[42]

*****

[42] Allen, *Law in the Making* [Quoted by: Mani & Tripathi, Jurisprudence (Legal Theory) Allahabad Law Agency (14th Edn. Rep. 2003), p.65]

 [ISSN 2581-5369]

IX. REFERENCES

1. Lloyd, *Introduction to Jurisprudence*, Stevens & Sons Ltd. London (5th Edn. 1985)
2. RWM Dias, *Jurisprudence*, Aditya Books Pvt Ltd. New Delhi, 5th Edn (Indian Rep) 1994
3. John D Finch, *Introduction to Legal Theory*, Universal Law Publ Co., 2nd Edn. (Delhi, 2nd Edn. 2009)
4. H. McCoubrey & Nigel D. White, *Text Book on Jurisprudence*, Oxford Indian 3rd Edn 1999
5. E. Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law*, (2nd Indian Rep. ed. 1997)
6. VD Mahajan, *Jurisprudence and Legal Theory*, Eastern Book Company, Lucknow, 5th Edn. (Rep) 2003
7. Dr SN Dhyani, *Fundamentals of Jurisprudence: The Indian Approach*, CLA, Allahabad 3rd Edn. 2004
8. AR Biswas, *Modern Jurisprudence*, Kamal Law House, Calcutta, (1998)
9. Dr NV Paranjape, *Studies in Jurisprudence and Legal Theory*, Cent Law Ag, Allahabad, (3rd Edn, 2001)
10. Nomita Aggarwal, Jurisprudence (Legal Theory), CLP, (Allahabad 10th Edn. 2014)
11. Mani & Tripathi, Jurisprudence (Legal Theory) Allahabad Law Agency (14th Edn. Rep. 2003)
12. Hans Kelsen *General Theory of Law and State*, transl. A. Wedberg (Cambridge Mass., 1949)
13. Kelsen, *The Pure Theory of Law*, transl. M. Knight (Berkeley, 1967)
14. Hersch Lauterpacht, '*Kelsen's Pure Theory of Law',* in *Modern Theories of Law* (London, 1933)
15. Harold J. Laski, *A Grammar of Politics*, G. Allen & Unwin Limited (4th Edn.1938)

*****

 [ISSN 2581-5369]