SUPREMO AMICUS

VOLUME 30 | JULY, 2022 ISSN 2456-9704

THE PURE THEORY OF LAW: REVISITING THE NORMATIVE DIMENSIONS AND CRITICAL LEGAL SCIENCE OF HANS KELSEN

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ABSTRACT

Hans Kelsen (1881-1973) was one of the most pre-eminent and leading German-American legal positivists whose popularity has been associated with his major works in the "General Theory of Law and State" and the "Pure Theory of Law". Kelsen's Pure Theory of Law has been one of the most acclaimed and refined developments in the domain of analytical legal positivism. The Pure Theory of Law has been distinguished from the law itself and has created a mechanism for uniform application of the law at all times and places. The Pure Theory of law emphasizes on the 'purity' of law which is devoid of any metaphysical notion corresponding to the psychological and sociological domain. Professor Kelsen has formulated a pyramidal structure of legal norms where the authenticity of norms is dependent upon 'superior' norms and the chain continues until the highest rung of the ladder is reached where lies the 'Grundnorm' which gives validity to all the other subordinate norms. Kelsen through his theory has conceded that law is a 'de-psychologised' command and has used the term 'norms' instead of 'sanctions'. His theory, today finds a place in many legal systems across the globe where 'Grundnorm' has been given its due recognition. Kelsen's theory has been a subject matter of a great deal of criticism by many jurists yet it has been one of the most illustrious and enlightening works which have made its place in analytical jurisprudence. The Pure Theory of Law although has some obscure facets which have proven to be contentious but it has considerably shaped the legal system and heavily influenced modern legal thought.

KEYWORDS: *Grundnorm, Pure Theory, Norms, Positive law, Metaphysical notions*

1. ABOUT HANS KELSEN: THE PROPOUNDER OF THE "PURE THEORY OF LAW"

Hans Kelsen, one of the greatest jurists of the time was born on October 11, 1881, in Prague to Jewish-Viennese parents. At the age of twenty-five, he received his doctorate in law from the University of Vienna, thereafter he pursued additional study in the Universities of Heidelberg and Berlin. It was in the year 1911 that he became a professor of 'public law and jurisprudence' at the University of Vienna, where he remained for the next nineteen years which also demarcates the most creative interval of his life[1].

Hans Kelsen has witnessed two significant revolutions and escaped the ruthless tyranny of the European nations. In his remarkably acclaimed life, he also served as an advisor to the Austro-Hungarian Government shortly after the World War I where he submitted

[1] Patterson, E., 1952. Hans Kelsen and his Pure Theory of Law. *California Law Review*, [online] 40(1), pp.5-11. Available at: <https://www.jstor.org/stable/3477839> [Accessed 5 March 2022].

several drafts of the constitution for the nation's newly established republic. One of his drafts with a few changes was adopted as the Austrian Constitution in the year 1920. Professor Kelsen also had the honour to experience the valuable membership of the Supreme Constitutional Court of Austria for the period lying between 1921-30. Throughout his glorious life, he preached his theories on International Law and Jurisprudence in several universities such as the University of Cologne, the Faculty of Law at Vienna as well as the Graduate Institute of International Studies, Geneva.

Being a leading and well-recognized German-American legal positivist, his works include *General Theory of Law and State* and the *Pure Theory of Law* which is both agnized worldwide as a major theory along with being placed in the 'born so beautiful basket' as the paradigm case of formalistic irrelevance[2].

Kelsen greatly contributed towards answering a few of the greatest fundamental questions of law and propounded his 'pure theory of law' which thereby became a subject matter of numerous scholarly and analytical studies of the time in different countries. Although *Roscoe Pound* had no well-founded intention of following Kelsen's concept of law, yet he regarded Kelsen to be *"undoubtedly the leading jurist of the time"*[3]. Professor Kelsen wrote almost 300 books in multiple languages during his lifetime and was still working on his final book in the year 1973 when he died at the age of 92.

2. THE MAIN PRINCIPLES OF THE "PURE THEORY" OF LAW

With the advent of Jurisprudence as a subject of research and study, there have been scores of theories pertaining to law surfacing from diverse perspectives but there is hardly any theory that has been a subject of so much controversy and contentions as the Hans Kelsen's "Pure Theory of Law". Kelsen was a positivist as he commenced on his theory with a certain premise that law must be understood as it is actually laid down and not as it is ought to be and the 'positivity' in his words can be elucidated as *"positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems."*[4]

I. LAW AS A NORMATIVE SCIENCE

Kelsen considered that the theory of law must be distinct from the law itself. Law as a whole is composed of non-identical components of rules and codes which seek to organize it into a single, ordered pattern. Kelsen advocated that law must be pertinent at all times and in all places and the generalization made must be applicable over a wide area irrespective of the differences, therefore he was denoted as a jurist who was a staunch believer of 'uniformity' of laws. But to foster uniformity of laws the theory of law must be shorn of all variable factors thereby making it 'pure'.

Kelsen's popularity in the nineteenth century was attached to his "Pure Theory" which was a theory of positive or general law and was

[2] Stewart, I., 1990. The Critical Legal Science of Hans Kelsen. *Journal of Law and Society*, [online] 17(3), pp.273-308. Available at: <https://www.jstor.org/stable/1410155> [Accessed 5 March 2022].

[3] Pound, R., 1934. Law and The Science of Law in Recent Theories. *Yale Law Journal*, 43, pp.525-532 [Accessed 5 March 2022].

[4] Kelsen, H., 1960. *Pure Theory of Law*. 2nd ed. p.114.

not a presentation or interpretation of a special legal order[5]. The Pure Theory of Law has been denoted with the word "pure" as it seeks to preclude from the cognitions of positive law all components which are 'alien' to it. Through this theory, Professor Kelsen crafted a mechanism that was value-free in nature and focused only on the cognitions of law which was completely distinct from the philosophy of law. It can be described as a vast chronicle of law which was *"...not like sociology, of casually related social facts; because it is a theory of law and not of ethics"*[6]. Therefore, Kelsen commended that the theory of law must be devoid of the presence of ethics, politics, sociology, history etc as these considerations are foreign to the cognitions of law and affect its purity. The theory propounded by Kelsen does not answer the questions such as whether the law is good or bad, or whether the law constitutes of justice as these are questions that cannot be answered through the scientific study of law and most importantly these belong to the domain concerning the legislators or politicians and not experts like jurists.

The Pure Theory of law stands distinct from the sociological jurisprudence as the former focuses on the studies of norms ("propositions how men should behave") whereas the latter focused on 'what actually is'- ("how men actually behave"). Therefore, Professor Kelsen rejected the proposition of the natural law theorists who believed that law and morality share the same origin moreover he also disapproved the belief of the legal realists who considered that the law is composed of court made decisions with which the litigants must abide by.

II. Aim of the Pure Theory of Law

The motive of Kelsen's Pure Theory of Law, *is to know and to describe its objects"* that is, to know and to describe the law[7]. Through the 'purity' of law, the aim was to reduce the chaos and the multiplicity of unity prevailing in the society. The legal theory was stripped of any foreign considerations and was inhibited from venturing into the domain of testing the efficacy of legal norms. The legal theory being a normative science and not a natural science was a repository of knowledge about what the law *'is'* and not what the law *'ought'* to be.

Kelsen's perspective of analytical jurisprudence used transcendental reasoning to divulge the necessary cognitions of laws. It seeks to explicate the legal phenomena pertaining to its interpretations and recognition within a jurist's mind in order to empower him to accomplish the task of acknowledging certain norms as binding laws.

III. Law as a De-psychologised command

Kelsen's analytical jurisprudence asserts that the element of 'coercion' is quintessential to the validity and efficacy of the pure theory of law. Although Kelsen and Austin similarly

[5] Kelsen, H., 2022. The Pure Theory of Law and Analytical Jurisprudence. *Harvard Law Review*, [online] 55(1), pp.44-70. Available at: <http://www.jstor.org/stable/1334739> [Accessed 7 March 2022].

[6] Parker, R., 2022. The Pure Theory of Law. *Vanderbilt Law Review*, 14(1), pp.211-220.

[7] Murphy, T., 2004. Hans Kelsen's Pure Theory of Law. *Western Jurisprudence (Dublin, Thomas Round Hall)*, [online] p.254. Available at: <https://ssrn.com/abstract=2616604> [Accessed 7 March 2022].

trace the contradistinction between legal 'ought' and other 'ought' where the former is backed by supreme authority. However, they differ in their opinion while they elaborate on their ideas. Austin postulated laws to be a *'species of command'* [8]which commands the will and expression of the sovereign. Law was characterized as 'enforceable' or rule 'enforced' by the supreme authority. However, such command tries to regulate men and forces them to behave in a certain fashion through the mechanism of infliction of an evil called 'sanctions'. Contrastingly, the inducement of compliance towards law is a psychic one, which is the tractability attained through the fear of sanctions.

But from the standpoint of the Kelsian approach, there was a complete rejection of the concept of sanctions issued by the sovereign as psychic coercion is not a component of the law. Kelsen dismissed the command theory as it brought into play a psychological constituent into the theory which must be otherwise 'pure' rather he conceded that law should be a "de-psychologised command", a command which does not insinuate will in the psychological sense of the term[9]

Kelsen used the term 'norms' instead of 'sanctions' asserting that a man must behave in a certain fashion but not adducing it as a will of anyone. Legal norm is associated with the conduct of two entities: *firstly*, the citizens against whom the coercive action is being directed and *secondly*, the governmental organ applying coercive force[10]. These legal norms attach sanctions as a consequence of certain conditions or in situations where there is a breakdown of the legal machinery thereby bringing socially desired conduct instead of the socially undesired conduct (delict). But the functionality of these norms or sanctions is not independent rather it depends upon other rules of law, therefore sanction diffuses into rules and the line of distinction between rules and sanctions disappears.

IV. THE STEP-STRUCTURE OF KELSEN'S NORMS AND THE ULTIMATE 'GRUNDNORM'

Kelsen's Pure Theory of Law forms its basis on the hierarchical framework of norms where each norm positions itself above other norms. In such a structural system of norms, each norm derives its functional authority from norms placed just above it, giving rise to a pyramidal structure of norms. The structure comprises of different levels of norms which rise to the last level of the norm in the hierarchy which is the "fundamental norm" also known as the *"Grundnorm"*. The cornerstone of Kelsen's ideology is that each legal system irrespective to what proposition of law it is concerned with has a hierarchy of 'oughts' which is traceable to some initial or fundamental 'ought' from which all other norms emanate thereby forming the 'Grundnorm'[11].

Grundnorm is the basis on which the validity of all the norms deriving authority from it is determined. Although Grundnorm is an intrinsic element of the Pure Theory of law, yet it may not be the same in every legal system but it would always be present moreover, it is not mandatory that there

[8] Cohen, *supra* note 7, at 148.
[9] Mahajan, V., 1987. *Jurisprudence and Legal Theory*. 5th ed. Lucknow: EBC, p.472.
[10] Kelsen, *supra* note 5, at 58.
[11] Mahajan, *supra* note 10, at p.473.

would be only one fundamental norm. Even though *Grundnorm* represents the substratum of the pure theory of law which renders every other law valid, but the validity of the Grundnorm can never be questioned rather it is presumed. The fundamental norm, *"is not….valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted as legal especially a norm creating, act."*[12] The *Grundnorm* must be effective which must be duly followed by the general public which would mark its efficacy in terms of its functional validity.

The normative character of law for Kelsen lies in recognizing that a fact has legal implication only in so far as it has meaning in the confines of normative system, "a system that says that if such and such happens, then such and such *should* be the consequence."[13]The legal system is a *Stufenbau,* which represents a pyramid like hierarchical structure where norms at one level commands the officials at the subordinate level and regulate the formulation of norms by the subordinate officers. Norms found in the constitution regulate the act of the legislators in the legislative process, the norms mentioned in the statutes provides guidelines to the judges and modulates their judicial decisions, lastly the norms in the judicial decisions commands the enforcement officials who are thereby authorized to use coercion against specific individuals.[14]

Therefore, every legal norm in Kelsen's theory derives its authority or efficacy from some other norm lying above it which is ultimately preceded by the 'Grundnorm' which has no rule above it. On this hypothesis rests the entire system of the Pure Theory, where the validity or the efficacy of the 'Grundnorm' cannot be accounted for nor any part of the legal system can be used to justify the 'Grundnorm'. But for the Grundnorm to be effective it must have secured for itself "minimum effectiveness" in the society. It is not necessary that the Grundnorm must be abided by all in the society rather it must be endorsed by a minimum number of people in the society. There need not be universal adherence to the Grundnorm but there must not be a total disregard of the same in the society as well. The moment the Grundnorm ceases to derive effective support from the masses, its power of bestowing validity upon other lower norms comes to an end whereby it is replaced with some other Grundnorm which obtains the support of the people and forms the basis of the legal system[15]. Hence, such a drastic change of overthrowing a Grundnorm and replacing it with the other marks the period of a 'revolution'.

[12] Kelsen, H., 1945. General Theory of Law and State. *Harvard University Press, Cambridge*, [online] 1, p.116. Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol6/iss3/17> [Accessed 10 March 2022].

[13] Dyzenhaus, D., 1997. *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. Oxford University Press, p.102.

[14] Kelly, J., 1992. *A Short History of Western Legal Theory*. 1st ed. Clarendon Press, p.479.

[15] Mahajan, *supra* note 12.

V. VALIDITY AND EFFICACY OF THE NORMS

According to Kelsen, a 'valid' norm essentially means that the norm has imperative force that signifies its legal existence. Legal existence combined with binding force necessitates that the addressees of the norms has an obligation to abide by the rules or commands expressed by the norms and their acts must be in consonance with the same.[16] The content of the normative system creates an obligation or a legal duty for the addressees, which must be considered by the juristic thinkers in addition to the law-applying bodies. It is postulated in Kelsen's theory that a norm would continue to be valid unless it is declared invalid and ineffective by a competent authority. Here, a competent authority or organ is the court's verdict that renders the norm in the question invalid.

But for a norm to be valid, it has to fulfil certain pre-requisites envisaged by the superior norm therefore, for the validity of the norm the sine qua non stipulation is the authenticity of the legal system to which the norm belongs. In the words of Kelsen, *"a general legal norm is regarded as valid only if the human behaviour regulated by it actually conforms with it, at least to some degree. 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 as a valid norm. Minimum effectiveness is a condition of validity."*[17] Wherefore, if a norm fails to secure 'minimum effectiveness' and lacks complete efficacy then the norm would be invalid as per the doctrine popularly known as *desuetude.* However, this principle formed by Kelsen has been a subject of severe criticism as it is inconsistent with Kelsen's theory of dualism of the 'is' and the 'ought'. The fact that norms acquire their authority from superior norms implies that they can only turn invalid if the superior norm loses its validity. But the invalidity of norms based on the doctrine of *desuetude* is at odds with the ladder of validity formed by the hierarchical structure of norms. Despite laying down 'minimum effectiveness' as a precondition for validity, Kelsen formulated the basic norm to be the last knot in the sequence of validity. Professor Kelsen was mindful that the hierarchy of norms would be endless if there will be a search for a 'still higher norm' hence, he laid the presupposition of the Grundnorm which only exists in the minds of the jurists and enable for efficient comprehension of the normative legal system.

Minimum efficacy of the legal system is a pre-requisite not only for the credibility of the legal system in its entirety but also for individual norms thereof, where the legal system and the norms contained in it would not be valid if the entire system loses its efficacy.[18] The efficacy of a legal norm plays a significant role in forming a distinction between legal order and other social or legal orders along with determining the categories of social normative orders which can be pre-determined.

Consequently, the authenticity and effectiveness of the legal norms as well as the legal system to which the norms belongs play

[16] Gülgeç, Y., 2017. INTERRELATIONSHIP BETWEEN VALIDITY, EFFICACY AND COERCIVENESS. *Ankara Üni. Hukuk Fak. Dergisi*, [online] 66(4), pp.684-689. Available at: <https://dergipark.org.tr/tr/download/article-file/621395> [Accessed 10 March 2022].

[17] Kelsen, *supra* note 5.

[18] Gülgeç, *supra* note 17.

a dominant role in deducing the authoritative powers of the norms. The minimum effectiveness ensures that the norm is accepted by a certain number of people in the society and is not completely disregarded yet not making it worthy of universal application.

3. INCORPORATION OF THE PURE THEORY OF LAW IN THE INDIAN LEGAL SYSTEM

The pure theory of law considers the Grundnorm as the final postulate in the ladder of validity, incumbent upon which the validity of the entire legal system depends. The existence of Grundnorm in the legal system of any country is to be necessarily presupposed, in the absence of which the norms lying in the lower rung of the series could not be explained. The Pure Theory of Law finds its existence in the Indian context similar to many other countries. In India, it is popularly believed that each law must align with the provisions of the Constitution, which provide legitimacy and validity to the laws subordinate to it. As each rule of law is evaluated on the touchstone of the Constitution which thereby qualifies as the Grundnorm in India. Unlike the unamendable attribute attached to Kelsen's Grundnorm, the Constitution of India can be amended and there is a subtle possibility of derogating from the authority of the Constitution itself. If Constitution stands amended substantially then it would fail to confer validity upon the laws subordinate to it. Hence, the idea of referring to the Constitution of India as the Grundnorm would be a fallacy entirely misguided.

Against this backdrop, it would be befitting to reckon the Basic Structure which lies at the core of the Constitution as the Grundnorm in the Indian milieu. It is the Basic Structure of the Constitution that endows legitimacy to the provisions of the Constitution including the amendments the Constitution is subjected to. Any provision which seems to transgress the Basic Structure doctrine is considered to be null and void. The Basic Structure doctrine has its genesis in the most celebrated and illustrious case of *Keshvanandan Bharti vs. State of Kerela*[19] where it was posited that the Basic Structure is the essence of the Indian Constitution which is un-amendable. Any law would come into being only after being scrutinized on the benchmark of Basic Structure[20]. Therefore, it can be surmised that the authenticity of any law is dependent upon the Basic Structure which lies at the crown of the hierarchy and is bestowed with the prerogative of conferring credibility to the entire legal system. As a mandate of the Basic Structure doctrine, the Basic structure can neither be amended nor repealed. Hence, the problem which was pointed out with the Constitution in its entirety does not hold true for the Basic Structure, thereby making it the legitimate source of all the legal norms.

Despite these comprehensive ideologies, there had been a thriving contention that Basic Structure does not find an explicit mention in the Constitution per se, however, the contention was resolved by referring to

[19] Keshavanandan Bharti v. State of Kerela AIR 1973 SC 1461.

[20] Joshi, S., 2015. Grundnorm in India: A new perspective. *International Journal for Legal Developments and Allied Issues*, [online] 1(4), pp.136-139. Available:<https://thelawbrigade.com/wpcontent/uploads/2019/05/Shubham.pdf> [Accessed 11 March 2022].

the 'Doctrine of Implied Limitation' which discerns that certain implied and inherent conditions can be deduced from the Constitution. The Basic Structure is an alternative route to take instead of venturing into the vehement dispute over conventional or critical morality. The Basic Structure doctrine forms the bedrock of the principle of constitutional morality which means that the norms of Constitution must always be considered to be supreme and any act which is done arbitrarily would be a violation of such norms[21]. Accordingly, the Basic Structure provides no leeway for consideration of any law within the ambit of conventional or critical morality.

In the pre-eminent case of *Naz Foundation vs. Government of NCT of Delhi*[22] where criminalization of homosexuality was justified on the basis of critical morality, but the ideal approach as suggested by the Hon'ble court was held to be the use of Constitutional morality. Wherefore, the Grundnorm is an ideal way to avoid the contentious usage of conventional morality. Consequently, the stance of equating Basic Structure with the Grundnorm has been widely accepted thereby replacing Constitution as the supreme source of validity and authenticity.

4. IMPLICATIONS OF THE PURE THEORY OF LAW

The 'Pure theory of Law' being an exhaustive theory has enabled Kelsen to deduce certain implications which hold necessarily true from his standpoint. These implications of this theory are exhaustive and have been a subject of much criticism by many jurists of Kelsen's era.

I. NO DIFFERENCE BETWEEN LAW AND THE STATE

Kelsen rejects the dissimilarity between law and State and he was against the opinion of demarcating the state as an independent entity from the law. The 'State is a system of human behaviour and an order of social compulsion' and 'law is also a normative ordering of human behaviour backed by force'[23]. Thus, the State and law are indistinguishable in nature and it would be erroneous to consider that law is the will of the State as the latter cannot be segregated from the former. Kelsen puts forward the idea that State is nothing but a legal construction of normative juristic knowledge which does not concur with the distinction between physical and juristic persons. Once the hierarchic character of law is grasped, the distinction between law-creating body or the legislature and executive or law-applying body do not have the absolute character that the traditionalist attribute to it[24]. As per Kelsen's view, there is no distinction between legislative, executive and judicial bodies as they all are norm creating bodies. For him, the disparity between substantive and procedural law is a matter of relative importance where the latter takes precedence. Therefore, every action of the State is presumed to be a normative order which is legally determined. The State as a mechanism regulates the social behaviour of the people and is constituted by territory, independent

[21] Manoj Narula vs. Union of India ¶ 41 (2014) 9 SCC 1.

[22] Naz Foundation vs. Government of NCT of Delhi 2010 Cri LJ 94.

[23] Mahajan *supra* note 10, at p.474.

[24] *Id.*

government and population endowed with the right of forming diplomatic ties with other states. Hence, from the standpoint of Kelsen's Pure Theory, law and State are the same things and the distinction arises on account of studying these from two non-identical perspectives.

II. No Dissimilarity between Public and Private Law

There is no place for disparity between public and private laws in Kelsen's pure theory of law. Kelsen was of the view that both public and private laws find their genesis in the same 'Grundnorm' which confers it with credibility and authoritative powers. Since, both the laws emanate from a single source they are the part and parcel of a solitary undertaking of concretization[25]. The distinction cannot form its basis on the fact that both the laws seek to safeguard the disparate interests of the people rather it must be elucidated that in public interests, the private interests are preserved. He associated the divergence hatched between the two laws as a consequence of the modern political philosophy aiming to 'elevate the public law and justice authoritarianism'.

III. Lack of Demarcation between Natural and Legal Personalities

Kelsen rejects the distinction between natural persons and juristic persons. Natural persons are biological entities and are beyond the purview of the legal theory and the State is nothing but a legal construction. As the law is a system of normative relations and uses personification merely as a technical device to constitute points of unification of legal norms, the distinction between natural and juristic persons is irrelevant[26]. He defines that all legal personalities are fictitious and draw their credibility from superior norms hence, leaving no scope for a distinction between the natural and legal persons.

IV. Obligation as the Essence of Law

Legal duty or obligation is the quintessence of the 'Pure Theory of Law' which has hypothesized the absence of individual rights as an element of the law. 'Liberty' in Kelsen's view is an "extra-legal phenomenon"[27]. Liberty and duty are jural opposites and form the opposite sides of the same coin. Although the notion of right or liberty is not fundamental to the theory of law yet it may result from the fact that the judges and legislators have not pronounced on the matter or the deliberate decision of abolition of the pre-existing duty and even the decision not to interfere. However, a claim is only a by-product of the law in force and legal right is just the responsibility for the one who has the authoritative power to demand that it must be fulfilled.

5. Criticism of the Pure Theory of Law

Kelsen's Pure Theory of Law has been significantly acclaimed and termed extremely influential in terms of legal theory. Its dynamic character has certainly been illuminating and has successfully steered clear of many of the perplexities and obscurity of the Austinian legal system. But this theory has been a substance of a great deal of criticism and disapproval. The idea of a 'pure' Grundnorm had also been regarded

[25] *Id.*
[26] *Id.*
[27] *Id* at p.476.

as the most 'impure' aspect of the theory by several jurists.

I. FICTITIOUS NATURE OF THE GRUNDNORM

Margaret Davies undertook the herculean task of deconstructing Kelsen's theory with the aim of revealing its obscurity and she expressed her view stating that *"Grundnorm is a fiction not only because it contradicts reality (that is, it does not exist), but also because it is self-contradictory."*[28] This criticism is the reiteration of the criticism expressed by Lord Lloyd who stated that the "Basic Norm" or the "Grundnorm" is the most troublesome and the vague feature incumbent upon which the entire theory is based. Although Kelsen has positioned the Grundnorm on the highest pedestal in the ladder of validity but has not explicated what Grundnorm is, what it does and how to find Grundnorm. Kelsen maintains that Grundnorm is not 'positive' rather it is 'meta-legal' which facilitates the interpretation of the command, permission or authorization as a valid legal norm. But contrastingly, this very Grundnorm is hypothetical in nature that is it only exists in the minds of the jurists, thereby basing the kingpin of the entire legal theory on a shaky foundation having loose ends. Hence, it is contended that Pure Theory of Law is an abstract idea of a purely logical theory that is "devoid of any real-life"[29].

II. INAPPLICABILITY OF THE GRUNDNORM IN THE INTERNATIONAL SPHERE

HLA Hart has contended that there is absolutely no reason to insist on the formation of the Basic norm in the international sphere. International law clearly comprises of a set of preliminary rules or obligations which are not united in this particular will and insistence upon the need of a basic norm, within the context of such a system as modern international law, often leads to rather empty repetition of the mere fact that society observes as obligatory[30]. It would be an empty rhetorical form of Grundnorm in the international context which recapitulates that "States must behave as they have customarily behaved". Professor Stone has also stated that it is baffling to witness how Pure Theory can contribute to such a system or realm of law which it has assumed to be law, but which emanates from a basic norm that cannot be traced.

III. IMPURITY OF THE GRUNDNORM

Julius Stone has addressed the basic norm as "obviously impure" as it depends on the test of minimum effectiveness in order to derive its authoritative powers. The Pure Theory has rigorously tried to eliminate from itself all metaphysical elements with the aim of making it the most practical form of law, however, it is hinged upon "minimum effectiveness" which seeks to examine whether the norm is being recognized and supported by a certain number of people. The test of minimum effectiveness is itself obscure and there is no way to quantify such effectiveness of a legal system. On one hand, it is trying to reflect norm devoid of all sociological and psychological impact but on the other, it is dependent upon to what extent the norm is being accepted and followed in the society. The test of 'minimum effectiveness' does nothing but adulterates the purity of the basic norm which is the

[28] Davies, M., 1994. *Asking the Law Questions*. 1st ed. Sydney: Sweet and Maxwell, p.268.

[29] Parker *supra* note 6.

[30] Mahajan *supra* note 10 at p. 478.

bedrock of the whole legal system thereby making Kelsen's theory self-contradictory.

IV. Amorality

Furthermore, it has also been contended that divorcing law from metaphysical notions such as ethics, religion, morality from the Pure Theory is thereby fostering amorality. It equates the legal system of that belonging to the United States or Switzerland with that of the fascist regime of the Soviet Union. It somehow confers validity to the amoralistic view of the law, which led to the depletion of the moral side of positivism thus resulting in the dictatorial regime of Hitler or Franco. Legal order does not merely comprise of the sum total of laws but also includes certain principles, standards that are also endowed with legal recognition and operate for influencing the application of rules. However, the validity and credibility of such elements cannot be traced to the Grundnorm and the controversial question arises whether these extraneous elements should be banished from the theory of law although they have been admitted to be legal and such a contention marks a grave weakness in the Kelsen's theory of law.

V. War and Reprisal

Kelsen believes that international law takes precedence over state law and gives validity to all the subordinate laws however, international law cannot be regarded as law in a strict perception rather it is only a set of moral obligations. International law is based upon the sanction of 'war and reprisal' where war has been assumed to be an instrument of national policy. But 'war and reprisal' cannot be regarded as an appropriate sanction for a modern civilized society where war is presumed to be an utter violation of the binding effect of international law.

Therefore, there are several facets of Kelsen's pure theory of law that has been criticized by many legal jurists as Kelsen to a certain extent has failed to establish guidelines for the actual application of the Pure Theory of Law. Although there is a certain degree of truth in Kelsen's theory but it has failed to do justice to his concept of purity of laws as there are certain unexplained and unanswered questions that his theory is unable to elucidate upon.

6. Conclusion

Professor Friedmann writes that "The merciless way in which Kelsen has uncovered the political ideology hidden in the theories which profess to state the objective truth has had a very wholesome effect on the whole field of legal theory. Hardly, a branch of it, whether natural law theories, theory of international law of corporate personality, or public and private law has remained untouched. Even the bitterest opponent of the Vienna school has conceded that it has forced legal theory to reconsider its position."[31]

Kelsen through his pure theory of law has widely contributed to the field of legal understanding as well as the formation of the legal system. Kelsen has elaborated on the theory of law through the lens of critical legal science by the use of formal logic in an intelligible way. Despite the present 'impurity' in the Grundnorm, it is still comprehensive and illuminating. Austin had earlier cleared away some of the deadwood

[31] Wolfgang, F., 1960. *Legal Theory*. London, p.237.

however it was Kelsen who by his legal acumen exposed many fallacies of the legal system.

Kelsen has presented the world with the dynamic aspect of the law replacing the static ideology of the law and resolving the ancient judicial paradox, which has stirred the modern legal theory. In addition to that, he has attached recognition to the judge made laws stating that every act of law-applying is also an act of law-creating. Kelsen led to the formation of a standard legal logic that finds its trace back to the Grundnorm or the popular Constitution of the land. Although Kelsen's doctrine of Pure Theory could not be universally applicable but it is definitely one of the most enlightening theories that could be accounted for. His unconvincing truths and fallacies have found a locus in the general theory of law and have been appreciated by many research scholars and jurists. Kelsen's perspective of rights, personality, State, public and private laws has undeniably improved the subject of jurisprudence as a whole irrespective of being complicated and unnecessarily comprehensive in several areas.

Despite being a subject of vast criticism the contribution of Kelsen has demonstrated the unification of the legal systems as well as subtle mechanics for its operation which is regarded as a valuable contribution to the entire analytical jurisprudence.

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