given society. There is no place for hypo
considerations in positivist's approach.[29]

Taylor in his treatise 'The Conception of Morality in Jurisprudence' has stated that morality emanates from natural law whereas law emerges from absolute obligation, morality exists in abstract form whereas law exists in concrete form, though both have a separate existence but they are components of a single phenomenon. Morals are modified and adjusted with changes in society, whereas law, which is characterised as an inert normativity, needs outside force of the state to be set in motion. When individual moralities begin to clash due to changing norms of the society, it calls for enactment of a law to lay down common standards of behaviour. Therefore, genetically morality and law are complementary.[30]

Friedmann also observed that there cannot be and there never has been—a complete separation of law and morality. According to him, there is a distinct interaction between law and morality but this by itself does not permit a law to be rejected on the ground of its morality.[31]

Reconciling the *is/ought* controversy and positivist's obsession with "law as it is", R. W. M. Dias observed that those who assert law as it is, and not as it ought to be, do not deny the value of the latter, that is moral aspect of law, but only contend that the two should be kept apart. Positivism flourished in the Benthamite and Austinian period in Britain when social conditions had become stable and the necessity of projecting a rigid separation between 'what law is' and what 'law ought to be' occasioned only when social conditions were in turmoil.[32] Thus positivism represents the intellectual reaction against naturalism and need for respect for law to maintain order in society.

Hans Kelson (1881-1973)

Hans Kelson was another jurist who has the credit of reviving the original analytical legal thought in the 20th century through his *'Pure Theory of Law'*. He was born at Prague in Austria in 1881 and was a Professor of Law at the Vienna University. He was also the Judge of the Supreme Constitutional Court of Austria for ten years during 1920-1930. Thereafter, he shifted to England. He came to United States and worked as Professor of Law in several American Universities and authored many books.[33] He was Emeritus Professor

29. S. N. Dhyani : Fundamentals of Jurisprudence (3rd Ed 2004) p. 208.
30. T.W. Taylor : *The Conception of Morality in Jurisprudence*, (1896), P. 40.
31. Friedmann : *Legal Theory* (1960) p. 309.
32. Dias R. W. M : Jurisprudence (5th Ed 1985) First Indian Reprint (1994) p. 331.
33. Kelson's main works include *Austrian Constitution* (1920); *General Theory of Law and State* (1945); *The Pure Theory of Law* (1934); *What is Justice* (1957); *Principles of International Law* (1952); Revised Version of *Pure Theory of Law* (1960), etc.

of Political Science in the California University when he expounded his Pure Theory of Law which is considered to be Kelson's unique contribution to legal theory.

Kelson's Theory of Pure Science of Law

Kelson did not favour widening the scope of jurisprudence by co-relating it with all social sciences and rigorously insisted on separation of law from politics, sociology, metaphysics and all other extra-legal disciplines. It is quite often said that Kelson's pure theory of law tried to rescue jurisprudence from vague mysticism and thus it was in a way revival of John Austin's 19th century analytical jurisprudence. Like Austin, Kelson divested moral, ideal or ethical elements from law and wished to create a 'pure' science of law devoid of all moral and sociological considerations. But he rejected Austin's definition of law as a command because it introduces subjective considerations whereas he wanted legal theory to be objective. He also discarded the notion of justice as an essential element of law because many laws, though not just, may still continue as law. He defines 'science' as a system of knowledge or a 'totality of congnitions' systematically arranged according to logical principles. Kelson's grundnorm is analogous to Austin's concept of sovereign without which law cannot be obligatory and binding. Thus Kelson's pure theory of law is a theory of positive law based on normative order eliminating all extra legal and non-legal elements from it. He believed that a theory of law should be uniform.

Kelson's theory of pure science of law which is also known as Theory of Interpretation was a reaction against vicious ideology which was corrupting the legal theory and the jurisprudence of a totalitarian state. He nomeneclatured his theory as "Pure Science of law" because science to be called rational, must stand in a two-fold relation to its object, *viz.*, it determines the conception of the object and establishes its reality. The former is theoretical while latter is practical. Kelson claimed that his pure theory was applicable to all places and at all times. It must be free from ethics, politics, sociology, history, *etc.* though he did not deny the value of these branches of knowledge. He only wanted that law should be clear of them.

Law As Normative Science

Kelson described law as a 'normative science' as distinguished from natural sciences which are based on cause and effect such as law of gravitation. The laws of natural science are capable of being accurately described, determined and discovered in the form of 'is' (*das sein*) which is an essential characteristic of all natural sciences. But the science of law is knowledge of what law *ought* to be (*das-sollen*). It is the *'ought'* character which provides normative character to law. For instance, if 'A' commits a theft he ought to be punished. Like Austin, Kelson also considers sanction as an essential element of law but he prefers to call it 'norm'. Thus according to Kelson, '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 of law as 'a structural analysis, as exact as possible of positive law—an analysis free of all ethical or political judgments or values'.

According to Kelson 'norm (sanction) is a rule forbidding or prescribing a certain behaviour'. For him, legal order is the hierarchy of norms having sanction and jurisprudence is the study of these norms which comprise legal order. He distinguishes moral norm with legal norm. For example, moral norm says that 'one shall not steal' but since it has no punitive consequence, it lacks coercive force but if it is to be reduced in form of legal norm, it would say, " if a person steals, he *ought* to be punished by the competent organ or State". This 'ought' in the legal norm refers to the sanction to be applied for violation of law.

The 'Grundnorm'

Kelson's *pure theory of law* is based on pyramidical structure of hierarchy of norms which derive their validity from the basic norm which he termed as '*Grundnorm*'. Thus *Grundnorm* or basic norm determines the content and gives validity to other norms derived from it. Kelson has no answer to the question as to wherefrom the *Grundnorm* or basic norm derives its validity. He considers it to be a meta-legal question in which jurist need not intrude. Commenting on this point, Julius Stone rightly comments that just as Austin's sovereign in a particular society is a mere starting point for his legal theory, so also basic norm has to be accepted as a hypothetical starting point or fiction which gives a legal system coherence and a systematic form. Thus while all norms derive their validity from the basic norm (*Grundnorm*), the validty of basic norm cannot be objectively tested, instead, it has got to be presumed or pre-supposed, Kelson, however, considers *Grundnorm* as a fiction rather than a hypothesis.

The Supreme Court of Pakistan in *State* v. *Dosso*,[34] had also upheld the Kelsenite theory of effectiveness and validity of revolutionary government which had come into power by overthrowing the legitimate Government and destroying the previous Constitution. However, this decision was subsequently over ruled by the Supreme Court (of Pakistan) in *Jilani* v. *Government of Punjab*,[35] which rejected the authority of the revolutionary government by overthrowing the existing regime. The same history repealed again in Pakistan in 2007 when the Military General Parvesh Musharraf removed the Nawaz Sharif's popular Government in 2007 by military coupe d'etrat and assumed reigns of Pakistan as its President repudiating the Constitution to suit his own dictatorial military government. He legitimatised in coupe and declared an state of emergency in October 1999 and suspended the Constitution and closed the Prime Minister's office and put Nawaz Sharif in Jail. He asked the Judges of the Supreme Court to take fresh oath of allegiance to his new military government and remained in office as President from 2001 to 2008.

The present conflict (March-April 2013) between North and South Korea has also put the *grundnorm* of the Government of that country in jeopardy.

34. 1958 SC Pak 533.
35. 1972 SC Pak 139.

These instances clearly shows that Kelsenian *grundnorm* during the revolutionary change has to be determined by the political and extra-legal expediency in the context of the prevailing situation and changed conditions.

Kelson recognised that the *Grundnorm* need not be same in every legal order (State), but it must be necessarily there. It may be in the form of a written Constitution or the will of the dictator.

Pyramid of Norms

Kelson considers legal science as a pyramid of norms with *Grundnorm* (basic norm) at the apex. The subordinate norms are controlled by norms superior to them in hierarchical order. The basic norm which is otherwise called *Grundnorm* is however, independent of any other norm being at the apex. The process of one norm deriving its power from the norm immediately superior to it, until it reaches the *Grundnorm* has been termed by Kelson as 'concretisation' of the legal system. Thus the system of norms proceeds from downwards to upwards and finally it closes at the *Grundnorm* at the top. The Grundnorm is taken for granted as a norm creating organ and the creation of it cannot be demonstrated scientifically nor is it required to be validated by any other norm. For example, a statue or law is valid because it derives its legal authority from the legislative body, the legislative body in its own turn derives its authority from a norm i.e. the Constitution. As to the question from where does the Constitution derives its validity there is no answer and, therefore, it is the Grundnorm according to Kelsonite conception of pure theory of law. In his view the basic norm is the result of social, economic, political and other conditions and it is supposed to be valid by itself.

The legal order as conceived by Kelson receives its unity from the fact that all manifold norms of which the legal system is composed can be traced back to a final source. This final source is the basic norm or the *Grundnorm* which he defined as "the postulated ultimate rule according to which the norms of this order are established and annulled, receive or lose their validity."

Kelson characterised law as a technique of social organisation. It is not an end but is a specified means, as an apparatus of compulsion to which there adheres no political or ethical value. According to him, "law is not an eternal sacred order, but a compromise of battling social forces" and, therefore, "the concept of law has no moral connotations whatsoever."

As a necessary consequence of the extra-jural origin of the *Grundnorm*, it loses its applicability when a new Government comes into power overthrowing the existing Government by revolution. In that event the courts are confronted with the problem whether to continue applying the 'laws' of the overthrown regime even though they are no longer effective or to apply the laws introduced by the new revolutionary government which are lacking legitimacy. There is no

unanimity of judicial opinion in this regard.[36] It must, however, be stated that this being a matter beyond the purview of jurisprudence, has to be decided according to political exigencies of the situation and general acceptance by the people.

Salient Features of Kelson's Theory of Pure Science of Law

The pure theory of Law as propounded by Kelson is founded on certain basic assumptions which may be summarised as follows :—

1. The theory is aimed at reducing chaos and confusion created by the supporters of natural law philosophy.

2. Pure theory of law deals with the knowledge of what law *is*, and it is not concerned about what law *ought* to be.

3. The theory considers law as a normative science and not a natural science.

4. Kelson's pure theory of law is a theory of norms not so much concerned with the effectiveness of the legal norm.

5. It is formal theory confined to a particular system of positive law as actually in operation.

Implications of Kelson's Theory Pure Science of Law

Kelson's pure theory of law covers a wide spectrum of legal concepts such as State, sovereignty, private and public law, legal personality, rights and duty *etc.*

According to Kelson law and State are not different but they are in fact one and the same. Likewise, there is no difference between public and private law. Kelson also denies any legal difference between natural and juristic personality. For him, all legal personality is artificial and derives its validity from *grundnorm*. He does not believe in the existence of individual rights and asserts that "legal duties" are the essence of law. In his view legal right is merely the duty as viewed by the person entitled to require its fulfilment.

Criticism of Kelson's Theory

Undoubtedly, the credit of evolving a normative theory of law goes to Hens Kelson. It seeks to divest law from natural law doctrines and from the element of justice which was a predominant characteristic feature of the laws introduced by fascist States and totalitarian governments. However, Kelson's pure theory of law suffers from certain glaring defects.

Firstly, it excludes all references of social facts and felt needs of the society, Thus his pure theory of law is without any sociological foundation.

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36. *Madzimbamuto* v. *Lardner-Burks*, 1968 All E.R. 561 an appeal from Rhodesian Court. This case involved unilateral Declaration of Independence by Rhodesian Government from Britain in 1965 by repudiating the Constitution of 1961 and promulgation of a new Constitution in its place. The Rhodesian Courts which were constituted under the earlier Constitution accepted the change which was in defiance of the old Constitution on grounds of necessity..

Secondly, Kelson's assertion that all the norms excepting the basic norm (*Grundnorm*) are pure, has no logical basis. One really fails to understand as to how subsequent norms which derive their authority from the *Grundnorm* can be pure when the grundnorm itself is based on a hypothesis that it is an outcome of the combination of various social and political factors and circumstances in a given situation. Commenting on this point, Julius Stone has sarcastically remarked, "we are invited to forget the illegitimacy of the ancestor in admiration of the pure blood of the progeny".

Thirdly, the theory is found to be based on hypothetical considerations without any practicability. It is not possible to divest law from the influence of political ideology and social needs. He does not consider justice and morality as essential attributes of law.

Fourthly, as stated by Friedmann, Kelson's theory provides no solution for the conflicts arising out of ideological differences. His theory rejects the element of justice as a mere emotion which is indeed not true. Law cannot be completely divorced from ethics and morality which gives it a honourable place in the society.

Wolfgang has also criticised Kelson's theory as it totally fails to provide a practical solution or guidance for resolving legal conflicts between alternative ideologies. One really wonders as to how law can be completely divorced from ethics or morality and socially accepted values.

Fifthly, Kelson's account of legal dynamics is inadequate. It ignores the purpose of law. For example, while considering the validity or otherwise, of a particular enactment, the courts do take into account the prevailing custom or the motives of the legislature and try to co-relate it with the social purpose which the Act seeks to achieve. They take into consideration the competing interests which may not necessarily be purely legal.

Sixthly, Kelson's pure theory of law also suffers from methodological short-comings. He ignores the fact that the action of the authority enforcing law to be valid, has to be in accordance with the procedure and therefore, it becomes necessary to probe into the content of law. Mere use of force would not validate a law. Kelson's normative system being one-sided remains indifferent to the content of norms.

Seventhly, Kelson maintained that *Grundnorm* imparts validity as long as the "total legal order' remains effective. But this does not hold good when judiciary of a State refuses to accept the legality of a usurper who assumed power by force and is deposed sooner or latter because of his legal order cannot be said to be effective. Thus, in *Jilani* v. *Government of Punjab*,[37] the Supreme Court of Pakistan declared the usurpers of State power as illegal as they were unlawful *ab initio* notwithstanding effectiveness. This decision amply illustrates that Kelson drew no distinction between effectiveness of legal order which the subjects are compelled to obey due to fear and force of the usurper of State power and effectiveness of a democratically accepted ruler whose legal

37. Pak LD (1972) SC 139 overruling its earlier decision in *State* v. *Dosso*, Pak LD (1958) SC 533.

order they willingly obey. Thus, it would be seen that Kelson's theory does not apply to revolutionary situations where someone assumes dictatorial power by usurption.

Professor Laski also criticized the Kelson's theory of pure science of law as impracticable as it is not desirable to free law from politics and ideology. He observed that Kelson's theory is wholly formal which attempts to create an 'algebra of law'. His theory is in fact an over-reaction to the modern theories of jurisprudence.

Desp..e these shortcomings, Kelson's contribution to legal theory cannot be ignored. His main contribution lies in that, he attempted to break away with the traditional natural law theory on the one hand and legal positivism on the other.[38] He asserted that legal knowledge is free from foreign elements, such as ethics, psychology, sociology, *etc.* His normative theory separates law from morality on the one hand and law and 'fact' on the other. Kelson refused to separate law from the State and held that law is the 'will of the State."