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HANS KELSEN ON THE NORMATIVITY OF LAW: A CRITICAL APPRAISAL

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ABSTRACT

Hans Kelsen (1881-1973) is an outstanding American philosopher, jurist, and public affairs analyst whose enormous contributions to the realms of philosophy of law, political sociology, civil and criminal litigation, legal reasoning, etc., cannot be over-emphasized. His conception of law is coloured and shaped, to a large extent, by his uncompromising and unflinching commitment to the major assumptions or ideals of rigorous legal positivism as a school of thought in legal philosophy which holds that there is no necessary connection between law and morality. This paper therefore, attempts an exposition of Kelsen's concept of the normativity of law. It x-rays his idea of 'basis norm' (*Grundnorm*) and how it features in a legal system noting its relative strengths and weaknesses. Methodologically, it adopts qualitative research method which is basically descriptive and employs textual analysis of both primary and secondary texts. It also utilizes the method of philosophical hermeneutics in its exploration and interpretation of Kelsen's pure theory of law. Its epistemological significance consists of a conceptual and logical clarification of key themes in Kelsen's legal theory. It also provides a blueprint or template for the law making process in the Nigerian body-politic. It posits in conclusion, that Kelsen's conceptualization of law and its operational workings in a legal system is both infallible and plausible as it tends to accord the concept of law an autonomous status. It recommends a reconstructive adaption of Kelsen's idea of basic norm for contemporary Nigerian legal system.

Keywords: Hans Kelsen, Normativity, Law, Critical, Appraisal.

INTRODUCTION

The central focus of this paper is to critically explore Kelsen's conception of law which is supposedly an instrument of state power. Thus, the intellectual burden of this discourse is to attempt an exposition of his idea of the normativity of law with particular attention to the notion of 'basic norm' which

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is the foundation underpinning his general understanding of law and its operational workings in a legal system. This in the main is Kelsen's major contribution to the province of philosophical jurisprudence. Recall that philosophy of law is a systematic study of the nature and character of law with particular reference to the origin and ends of law and the principles that should govern its formulation and dispensation. In other words, it is the philosophical inquiry into the general nature of law, legal institutions, and legal processes in the application of law in a legal system (Wallace, 1977).

Kelsen on the Concept of Law

In an attempt to properly situate law in its proper perspective, Kelsen wittingly articulates what is known in legal philosophy as *Pure Theory of Law*. His major preoccupation is to present an empirical and working definition of law devoid of all moral, metaphysical, and psychological considerations. He articulates a theory of law that is seemingly and diametrically opposed to all value judgments which characterize legal naturalism. Thus, his overall aim is to advance a descriptive analysis of law as a hierarchy of binding norms. In his celebrated text, *Pure Theory of Law*, Kelsen(1967) emphatically puts it that:

> Legal science can only describe the law by making certain presupposition such as that valid norms do not conflict, that there is a hierarchy of norms within a legal order, from the more abstract all, that description of the law is only possible if we presuppose a basic norm from which all norms within the system derive their validity (p.59).

It is manifestly evident in the above position that Kelsen is strongly convinced that statements of positive law are different from statements of moral, political or value judgements of facts. Here, unlike the command school of law, Kelsen is primarily concerned with the view that law is basically a set of hypothetical norms. Suffice it to say that the Pure Theory of law revolves around the fact that laws are not part of natural reality but norms by which reality may be measured. For him, "legal studies should be freed from all these extra-legal considerations which do not form part of law" (Kelsen, 1967, p.62). The import of the foregoing is that Kelsen aims at an objective science of law

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properly purified from all subjective and moral elements namely of approval or disapproval; of justice or injustice.

Kelsen on the Basic Norm

The concept of 'Basic Norm' is central to Kelsen's philosophical jurisprudence. It ultimately lies at the nucleus of his philosophy of law. The major challenge for a theory of law, in Kelsen's view, is to provide an explanation of legality and the normativity of law without any attempt to reduce jurisprudence to other metaphysical or ideological worldviews. The law, Kelsen maintains, is basically a scheme of interpretation, in which case, its reality and objectivity reside in the sphere of meaning. Thus, Kelsen (1967, p.10) posits that, "We tend to attach a legal-normative meaning to certain actions and events in the world which deviates ultimately from the true nature and character of the law. This presupposes that the concept of law has been systematically misconstrued and misconceived by a number of jurists, philosophers, theologians, statesmen, etc. Attempting to properly domesticate the actual nature of law vis-à-vis the place of basic norm, Kelsen adopts the following dialectical schema as a basis:

> Suppose for example, that a new law is enacted by the California legislature, how is it done? Presumably, some people gather in a hall, debate the issue, eventually raise their hands in response to the question of whether they approve a certain document or not, count the people who say "yes", and then promulgate a string of words, etc. Now, of course, the actions and events described here are not law. To say that the description is of the enactment of a new law is to interpret these actions and events in a certain way (1967, p.11-12).

Here, Kelsen expresses his disdain for, and dissatisfaction with, the conceptualization of law as a command of the sovereign to his subjects and backed by force as postulated by John Austin in his masterpiece, *The Province of Jurisprudence Determined*, wherein he represents the "Command School". On the contrary, Kelsen sees law primarily as a norm. By logical implication, law, as noted by Kelsen, prohibits, permits, and authorizes certain actions or behaviour. In other words, it prescribes moral standards and stipulates

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sanctions in cases of violation of law itself. It should be noted however, that Kelsen's conception of law which finds expression in his notion of the "Basic Norm" which is technically referred to as the "Grundnorm" is basically a reaction to the abysmal discontents and gross inadequacies associated with legal naturalism, the command school, and classical legal positivism of Hart and others.

Furthermore, one fundamental and perplexing question that strikes our minds is: Why certain acts or events have such a legal meaning and others do not? To be sure, Kelsen's answer to this vexing question is surprisingly simple. For him:

> An act or an event gains its legal-normative meaning by another legal norm that confers this normative meaning on it. An act can create or modify the law if it is created in accordance with another "higher" legal norm that authorises its creation in that way. And the "higher" legal norm, in turn, is legally valid if and only if it has been created in accord with yet another "higher" norm that authorises its enactment in that way (Kelsen, 2002, p.22-23).

The import of the above position, as established by Kelsen, is that for an act or enactment to qualify as a legally binding principle it has to be in conformity with a higher norm which is a derivative of the basic norm of the society. It must be in sync with the normative standard of acceptable behaviour or moral decorum of the society. This does not in any way entail or presuppose a variant of legal positivism or legal formalism. For instance, for any law made by the legislature (known as the National Assembly in Nigeria) to be generally acceptable and have binding effect on the citizens, it has to be in tandem with the provisions of the 1999 constitution of the Federal Republic of Nigeria (as amended). It is therefore, a norm in the political sociology of Nigeria, as a sovereign state, that the legislative arm of government is conferred or vested with the statutory function or responsibility of law making. As part of its oversight functions, it also formulates policies by way of social engineering using the instrumentality of state power. Suffice it to say that the constitution confers this power on the legislature i.e., the National Assembly as in the Nigerian context, to enact laws within certain prescribed boundaries of content and jurisdiction. At any rate, the constitution is peculiar to the extent that it

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represents the supreme law of the land. Consequently, the problem here is that the chain of authorization comes to a closed-circuit end. In fine, there is not a higher legal norm that authorizes the enactment of the constitution as a political article of faith from which state laws are derived. This, no doubt, presents a mind boggling problem in a situation where such a precedent does not exist. In an attempt to resolve this puzzle, Kelsen vehemently opines that one must presuppose the legal validity of the constitution as an extant law. In his own formulation:

> At some stage, in every legal system, we get to an authorizing norm that has not been authorized by any other legal norm, and thus it has to be presupposed to be legally valid. The normative content of this presupposition is the basic norm (Grundnorm). The basic norm is the content of the presupposition of the legal validity of the (first historical) constitution of the relevant legal system (Kelsen , 1961, p.117-118).

As noted above, Kelsen is of the view that there is simply no alternative. Put differently, any alternative would ultimately violate David Hume's injunction against deriving an "ought" from an "is". Hume categorically submits that any practical argument that concludes with some prescriptive statement, a statement of the kind that one ought to do this or that, would have to contain at least one prescriptive statement in its premises. If, for any reasons whatsoever, all the premises of an argument are descriptive, telling us what this or that is the case, then there is no prescriptive conclusion that can logically follow. In point of fact, Kelsen has obsession for the foregoing analogy. He has strong conviction that the actions and events that constitute, say, the enactment of a law, are all within the sphere of what "is" the case, they are all within the sphere of actions and events that take place in the real world. In his own estimation, the law or legal norms are within the sphere of "ought", in which case, they are norms that purport to guide conduct. Thus, in order to get an "ought" type of conclusion from a set of "is" premises, one must point to some "ought" premises in the background, an "ought" that confers the normative meaning on the relevant type of "is" (Ogbu, 2019, p.42-43). Since the actual legal chain of validity comes to an end, we inevitably reach a point where the "ought" has to be presupposed, and, of course, this is the presupposition of the

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basic norm as enunciated by Kelsen. In Kelsen's philosophy of law, the idea of basic norm serves the following theoretical functions:

i. It provides a ground for a non-reductive explanation of legal validity
ii. It serves as a framework underpinning a non-reductive explanation of the normativity of law.
iii. It provides a model for explaining the systematic nature of legal norms.

More so, Kelsen aptly observes, and rightly so, that legal norms necessarily come in an array of systems. This observation underscores the indispensable fact that there are no free-floating legal norms. If for instance, someone suggests that "the law requires a will to be attested to by two witnesses", one should always wonder which legal system is being talked about: Is it United States Law, Canadian Law, Nigerian Law, German Law, or the law in some other legal systems? (Eseyin, 2017, p.114-115). To say the least, legal systems are themselves organised in a hierarchical structure, manifesting a great deal of complexity but also a certain systematic unity. This systematic cohesion and unity is meant to portray the following postulates in Kelsen's analysis and understanding of a legal system:

i. Every two norms that ultimately derive their validity from me basic norm belong to the same legal system.
ii. All legal norms of a given legal system ultimately derive their validity from one basic norm (Okon, 2017, p.115).

It is also germane to stress that norms, according to Kelsen, are legally valid within a given system. In other words, they have to form part of a system of norms that is in force or in vogue in a given social milieu or cultural context at a particular point in time (Elegido, 204-205). All the same, it is paramount to note that another key theme or typical issue that features prominently in Kelsen's philosophical jurisprudence is obviously the relation between legal validity and legal efficacy. He (Kelsen) unequivocally writes that "A norm is efficacious if it is actually (generally) followed by the relevant population" (Kelson, 1961, p.163-164). He further adds that "a norm is considered to be legally valid on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious" (Kelsen, 1961, p.42). The import of the foregoing is that the relationship consists in the fact that efficacy is not a condition of legal validity of individual norms. In any case, any given norm can be legally valid if nobody follows it. Assuming a new law is just enacted; it is legally valid even if nobody has yet had an opportunity to comply with it.

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It is however important to note that, a norm can only be legally valid if it belongs to a system, a legal order, that is by and large actually practised in a certain political enclave or populace. This in the main implies that the idea of legal validity, as Kelsen sincerely admits, is closely tied to the reality of social practice; the operational workings of the processes of administration and dispensation of justice in a legal system, as it were. Hence, it is a social reality, a reality that consists in the fact that individuals actually follow certain rules or normative standards.

Similarly, Kelsen, in his text entitled, *Pure Theory of Law*, emphatically notes that:

> By norms, we mean something ought to be or ought to happen, especially that a human being ought to behave in a specific way. Norm is that meaning of an act by which a certain behaviour is commanded, permitted or authorized (1967, p.22).

Here, he attempts to draw a sharp line of distinction between a moral norm and a legal norm. For him, while a moral norm does not stipulate sanctions, a legal norm does stipulate sanctions. He succinctly distinguishes between their distinctive *modus operandi* in the civil society or social order. Thus, while a moral norm states that people 'ought not to kill', a legal norm, on the other hand explicitly states that 'if anyone kills, he ought to be punished' (Ozurumba, 2021, p.195). In effect, Kelsen's argument on basic norm cumulatively boils down to the fact that in any normative system, there must come a point beyond which you cannot go because you have come to the outer edge of the whole system, and any further inquiry you make is really an extraneous rational inquiry outside the scope of the system (Nwosu, 2020, p.92).

Attempting to properly domesticate the notion of basic norm, Kelsen argues that the basic norm differs fundamentally from the other existing legal norms. Thus, the peculiarities of the basic norm consist in the fact that it is not posited or framed by an act of norm-creation. For instance, when a presiding judge passes sentence (verdict), he has created an individual norm. However, "its validity is guaranteed if authorized by the basic norm (higher norm)" (Unah, 92). It therefore follows, *ipso facto*, that the basic norm is the ultimate source

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and the criterion of validity of the entire gamut of a legal system. It is indeed, the foundation of legal validity in a positive legal system.

Kelsen on Relativism and Reduction

Kelsen's argument for the presupposition of the basic norm as the underlying principle of his idea of law takes the form of a Kantian transcendental argument. His exposition of the interrelated concepts of relativism and reduction provides a theoretical construct for legal reasoning using the rules of syllogism. Here is the structure or logical schema of his general conceptualisation of relativism and reduction:

i. *P* is possible only of *Q*
ii. *P* is possible (or, possibly *P*)
iii. Therefore, *Q*

In Kelsen's argument, *P* stands for the fact that legal norms are "ought" statements, and *Q* is the presupposition of the basic norm. In other words, the necessary presupposition of the basic norm is derived from the possibility conditions for ascribing legal significance to actions and events. Thus, in order to interpret an action as one of creating or modifying the law, it is necessary to show that the relevant legal significance of the act or event is conferred on it by some other superior legal norm. His analysis and understanding of relativism and reduction vis-à-vis normative character of law in a legal system can be better appreciated using the rules of formal logic as applicable in the domain of legal reasoning. In what follows, biconditionals or material equivalence seems appropriate or suitable for this discourse. The truth functional connective "if and only if" is represented as logically equivalent below:

$$P \equiv Q \equiv P \supset Q \cdot Q \supset P$$

$$P \equiv Q \equiv P \cdot Q \ V \sim P \cdot \sim Q$$

Here, if *P* is equivalent to *Q*, then they have the same value. If *P* is true then *Q* is true, and if *P* is false *Q* is also false as well. By way of analogy, we necessarily run out of legal norms that confer the relevant validity on law creating acts, in which case, such a legal validity has to be presupposed. Hence, the resultant effect of this presupposition is the 'basic norm'.

Nonetheless, Kelsen relies on the logic of Kant's transcendental argument in a bid to seeking an adequate explanation for the rationale of the *Grundnorm* in relation to the validity of relativism and reduction. He resorts to a kind of neo-

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Kantian perspective and subsequently anchored his position on the Humean account of causal relations of events. Recall that Kant employed a transcendental approach in establishing the necessary presuppositions of some categories and modes of perception that are essential for rational cognition. Consequently, they form deep, universal, and necessary features of human cognition (Iroegbu, 1995, p.204). Suffice it to say that it was Hume's scepticism about the possibility of an objective knowledge that informed Kant's transcendental unity of apperception in the structure of rational thought. Kelsen's commitment to Hume's sceptical empiricism is seemingly opposed to Kant's moderate rationalism. By this connection, Kelsen's unflinching belief in skepticism explains why he cast a shadow of doubt about the objective grounding of morality to the extent that he (Kelsen) jettisons Kant's uncompromising optimism in the role of reason in moral consciousness. Thus, Kelsen's perspective of morality is inherently relativistic in the true sense of it. He explicitly rejects the idea that the basic norm (either in law or other normative domains) is a necessary feature or category of human cognition. Kelsen opines that the presupposition of a basic norm is optional. This implies that one does not have to accept the normativity of law; anarchism, etc. By logical extension, this underscores the glaring fact that a rejection of law's normative validity is certainly an option by way of an individual's subjective volition. At the bottom line, the basic norm is meaningful to only those who accept the "ought" as the yardstick for normative validity of the law. However, one is not rationally compelled or coerced to develop an attitude of respect for the *Grundnorm*.

Kelsen(1967) straight forwardly avers that:

> The pure theory describes the positive law as an objectively valid order and states that this interpretation is possible only under the condition that a basic norm is presupposed…The Pure Theory, thereby characterizes this interpretation as possible, not necessary, and presents the objective validity of positive law only as conditional – namely conditioned by the presupposed basic norm (p.217-218).

As noted in the above remark, Kelsen draws an analogy or comparison between religion and law. In an analogous sense, the normative structure of

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religion is very similar to that of law as a social force. They have the same logic in Kelsen's thought pattern. Simply put, religious beliefs about what one ought to do ultimately derive from one's belief about God's commands. As a matter of fact, God's commands would only have normative validity for those who presuppose the basic norm of their respective religions, namely that one ought to obey God's commands. Thus, the normativity of religion, like that of the law, rests squarely on the presupposition of its basic norm. Hence, obedience to both commands is not dictated by *Reason*. It is on the strength of the foregoing that Kelsen brilliantly writes that, "An anarchist, for instance, who denied the validity of the hypothetical basic norm of positive law…will view its positive regulation of human relationships…as mere power relations" (1961, p. 413).

It is noteworthy to emphasize that the normative relativism which is inherent in Kelsen's conception forces him to ground the content of the basic norm in the social facts that constitute its content, namely, the facts about actions, beliefs, attitudes, etc., actually demonstrated by the citizenry or populace inevitably makes it quite questionable that reductionism could be avoided.

Kelsen on the Normativity of Law

Kelsen is quite optimistic that the basic norm helps to explain the sense in which law is a normative domain and what this normativity consists in. For Kelsen, the first point to note is that the idea of normativity is tantamount to a genuine "ought". In other words, it is a justified demand on practical deliberation of matters of public importance. In a nutshell, a certain content is regarded as normative by an agent if and only if the agent regards that content as a valid reason for action.

Kelsen agrees with Natural Law Principle on the nature and character of the normative content of law, giving primacy to morality, religion, and reason. He further writes that "even an anarchist, if he were a professor of law, could describe positive law as a system of valid norms, without having to approve of this law" (Kelsen, 1967, p.218). Basic norm, which is Kelsen seminal modal for understanding law, is an appendage or predicate of normativity which is itself a categorical imperative to borrow the Kantian phrase. Kelsen maintains that legality or basic norm (legal norm) is normativity in relation to reason, i.e., normativity qua reason without having to conflate the normativity of morality with that of law. To say the least, what makes legal normativity unique is the uniqueness of its point of view, the legal perspective, and its application in a given legal system in course of the administration of justice.

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Kelsen on Judicial Review

The notion of judicial review constitutes one of the salient themes in Kelsen's philosophy of law. His uncompromising and unrepentant commitment to the operational workings of judicial review in a legal system cannot be over-emphasized. Thus, the constitutionality or legality of the process of judicial review becomes an issue of utmost concern to him. A rational attempt to appreciating the nitty-gritty of judicial review in Kelsen's legal philosophy evokes the following baffling questions: In what does judicial review consist? How does judicial review impact on the administration of justice in a legal system? What is the necessity or rationale for judicial review? Which organ or agency of government is responsible for judicial review? All these thought-provoking questions revolve around the centrality of judicial review especially in a constitutional democratic setting.

Judicial review is a procedure by which a court can review an administrative action by a public body and secure a declaration, order, or award (Kelsen, 1961, p.204-205). It is a process under which a government's executive, legislative, or administrative actions are subject to review by the judiciary. In the course of a judicial review, a court may validate or invalidate laws, acts, or governmental policies and programmes that are considered incompatible with a higher authority. For instance, an executive policy may be invalidated on account of being unlawful or outdated. All the same, a statute may be invalidated for validating the terms of a constitution.

In carrying out judicial review, a court may ensure that the principle of *ultra vires* are followed, that a public body's actions do not exceed the latitude of legitimate powers conferred on it by the constitution. It is within the ambit or jurisdiction of a court to enforce that principles of procedural fairness are followed when making judicial decisions. In point of fact, common law judges are seen as sources of law, capable of creating new legal principles, and also capable of rejecting legal principles that are no longer valid. On the other hand, judges are seen, in the civil-law tradition, as those who apply the law, with no power to create or destroy (repeal) existing legal principles or extent laws (Jibril, 2017, p.11-118).

In sum, the dynamic theory of law, according to Kelsen, is the explicit and acutely defined mechanism of state by which the process of legislation allows for new law to be created and already established laws to be revised, as a result of political debate in the sociological and cultural domains of activity. Hence, judicial review.

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Grounds for Judicial Review

i. *Ultra vires*
ii. Breach of rule of natural justice
iii. Non-compliance with the law
iv. Corruption
v. Delay of cases/litigation
vi. Lack of judicial independence
vii. Conflict of interest
viii. Problem of law enforcement agency
ix. Public distrust
x. Intimidation of judges

For instance, in the case of Nigerian legal system, the 1999 constitution of the Federal republic of Nigeria (as amended) states unequivocally in section 1(1) that the constitution is supreme and its provisions shall have binding effect or force on every authority and person. It also states categorically in section 1(3) that any law which is inconsistent with the constitution is null and *void* to the extent of its inconsistency. Thus, having derailed from the basic norm (*Grundnorm*), it lacks constitutionality and legality.

Critical Evaluation

Kelsen's attempt to reconstruct the entire edifice or gamut of law using the pure theory of law as a model or paradigm, no doubt, represents his enormous contributions to the province of philosophical jurisprudence. His masterly articulation of the concept of basic norm (*Grundnorm*) noting its relevance in the emerging trends and evolving dynamics of a legal system underscores his creative ingenuity, novelty, and originality within the domain of legal philosophy. His unflinching commitment to liberating the concept of law from metaphysical, theological, and moral colouration elevates him to the exalted status of a world-class philosopher of law.

It is, however, important to note that Kelsen's accounts of the nature and character of law is not error free, as it were. It is laden with inherent weaknesses and gross inadequacies. For instance, his idea of basic norm is shrouded in obscurity as it lacks epistemic clarity and coherence. Kelsen violates his own adherence to Hume's injunction against deriving "ought" from an "is". It is manifestly evident that Kelsen toys with the idea that perhaps structural changes in the basic norms of the legal system of a sovereign state are occasioned by the determination or direction of international law and diplomacy. Granted that it is a basic principle of

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international law, that state sovereignty is determined by the dynamics of national interest articulation and aggregation.

Moreover, it becomes very difficult to understand how the explication of legal validity he offers is non-reductive. Kelsen's problem here is how to reconcile the major assumptions of his pure theory of law with the ideals of morality and religion. His interrelated concepts of relativism and reduction remain an unresolved puzzle in his legal reasoning. What is more, Kelsen's conception of legal normativity eventually turns out to be a form or variant of Natural Law completely relativized and redefined in a different semantic fashion. Thus, his goal of developing a rigorous legal positivism devoid of moral and religious connotations is ultimately defeated. He is also inconsistent in his professed belief in the authenticity of legal positivism. What remains questionable, however, is whether Kelsen succeeds in providing a non-reductive explanation of legal normativity given the fact that his account of legal validity turned out to be reductive after all. In consequence, the trouble here is not simply the relativity of the basic norm. Rather, the problem resides in Kelsen's failure or inability to ground the choice of the relevant point of view in anything like *Reason* or *reasons* of any sort.

The notion of 'basic norm' as the foundation of all other legal norms, as postulated by Kelsen, involves either a hasty generalization or an inconsistency. Kelsen has only surreptitiously accepted a metaphysical ground or basis for law which he was initially opposed to. Perhaps, he has indirectly admitted that positivism is unable to account for the ultimate validity and binding force of law.

CONCLUSION

In this paper, we have critically explored the concept of normativity of law in Kelsen's philosophical jurisprudence. The notion of 'basic norm' which is the fulcrum of his philosophy of law vis-à-vis the administration of justice in a legal system is also interrogated. This, no doubt, forms the hard core of his legal philosophy. At the bottom line, it concludes that Kelsen's idea of normativity of law which anchors and hinges on the foundation of pure theory of law represents an authentic basis for understanding law and its practical application in a justice system.

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