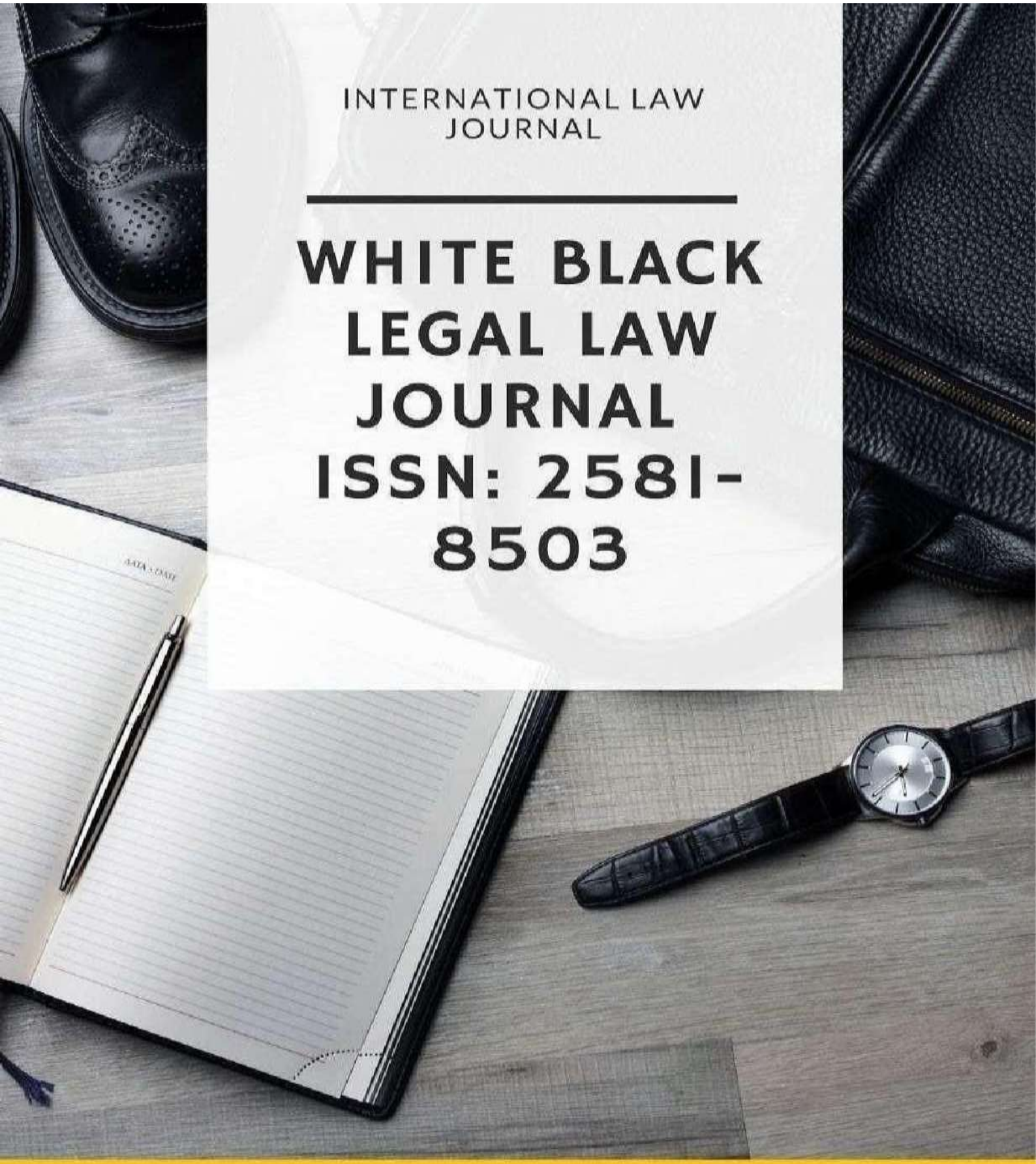

INTERNATIONAL LAW JOURNAL

WHITE BLACK LEGAL LAW JOURNAL

ISSN: 2581-8503

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

EXAMINATION OF KELSEN'S THEORY OF GRUNDNORM IN LEGAL SYSTEMS

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According to Kelsen the law is "basically a scheme of interpretation"[1] and that law becomes what we interpret its legal meaning to be. Kelsen believes that it is necessary to presuppose a grundnorm (basic norm) to be able to explain a legal system as the basic norm is a presupposition, it's the Supreme authority of the legal system, and also the foundation of the legal system. He believes that there is an endless chain where one norm influences the other and another and gets legal validity. For example, Traffic rules get its legal validity from the Motor Vehicles Act which gets legal validity from the parliament which gets its legal validity from the Constitution which raises the question where the Constitution gets its legal validity. Kelsen answers this question by claiming that there is some starting point which is the basic norm (Grundnorm) which states that the constitution is not the basic norm but that the basic norm accepts that the Constitution is valid and binding. In a Dictatorship, the basic norm would have you believe and obey everything the Dictator says.[2]

In order to understand the legal system it is imperative, according to Kelsen, to trace individual norms to a basic norm and this helps one understand how the very first Constitution cannot be traced back to anything but that there's a presupposition of its validity. This presupposition is what makes the distinction between legal authorities and other individuals. You can discern a legal obligation only if you presuppose the basic norm which is to say I can make any legal system only if I presuppose this basic norm. Basic norm also unifies all individual norms for example I know I need to stop at a red light and I know I need to pay taxes because of a legal system in place but how do I know that both these obligations belong to the same legal system? It's through the connection made by the basic norm. The basic norm is not valid because it was rightfully created by the right authority. It's valid because it's presupposed. Without this presupposition, it's

[1] "The Pure Theory of Law." November 18, 2002. https://plato.stanford.edu/entries/lawphil-theory/.
[2] "The Pure Theory of Law." November 18, 2002. https://plato.stanford.edu/entries/lawphil-theory/.

impossible to make out any legal action. This presupposition is nothing but an explicit acknowledgement of what jurists assume when they consider positive law as a system of valid norms. The basic norm already exists in juristic consciousness.

I believe that Kelsens pure theory of law is flawed and one of the critiques becomes that he believed that the legal system gets its legal validity from a basic norm and that this process of tracing back to the basic norm is one without space for morality or reason and is purely from a legal point but his very postulation of the basic norm is itself an inclusion of morals, because the basic norm 'ought' to be followed. This is to say, that the basic norm is by itself is not free of moral principles and is valid by itself because a basic norm is one which is required to be followed which is a naturalist approach as it looks at law as something that's inter related with morals unlike a positivist approach, which Kelsen claims to propagate, that looks at law as it is and not with a moral lens. For example if a law regarding murder and punishment for murder exists and it gets its legal validity from a basic norm that states "People should not be killed because it's a heinous crime" is not void of morals. There is no basic norm that would exist which has not been subject to morals or facts and is strictly legal in its approach. When you trace back any norm to its basic norm it inevitably has been formed by elements of morality or facts or reason and hence in the crux of Kelsen's pure theory of law there is a naturalist perspective and therefore making it a critique. [3]

Kelsen also talks about international law and its superiority. Every state has its own legal system and body that it is governed by but a state may also look at the laws of another state and either acknowledge it or even adopt it. This does not mean that the first state believes that the other state is superior. Sovereignty is still with the original state. Kelsen believes that by doing so we neglect the supremacy of International law and that is problematic as international law is according to him superior to national laws followed by the state. The simple critique to this is the fact that most countries have more respect for their domestic state laws as oppose to international laws because of a sense of nationality that comes along with domestic national laws making Kelsen's belief of the superiority of international laws unreal. [4]

[3] Goel, Avantika. "Discuss Kelsen's Pure Theory of Law. What Are the Mains Points of Criticism of This Theory ?" December 17, 2016. http://www.infipark.com/articles/discuss-kelsens-pure-theory-of-law-what-are-the-mains-points-of-criticism-of-this-theory/.

[4] Okhira, Scott Ayo. "A CRITIQUE OF HANS KELSEN'S PURE THEORY OF LAW." https://www.academia.edu/31008713/A_CRITIQUE_OF_HANS_KELSENS_PURE_THEORY_OF_LAW.

According to Kelsen laws retain legitimacy till they are invalidated in a way that the legal order determines. This is the Principle of Legitimacy, but it doesn't apply when there's a revolution because in a revolution, the old laws are invalidated in a way that wasn't anticipated by the old system. Validity of a specific norm is not affected just because they aren't followed, just as long as the specific norm gets its validity from the basic norm. If an entire legal system is not effective, then it becomes invalid. Validity and effectiveness are interrelated only at the level of the whole legal system, not at the level of specific norms. New order gives validity to norms which have the same content as the norms of the old order. The content of the laws might be the same, but the laws have changed in the sense that the source of their validity is now different and so the content remains the same but not the reason for their validity. When the revolution succeeds, a new basic norm is presupposed. When it fails, then the earlier system remains and the revolutionaries are tried for treason. The critique to this becomes that when a new legal system comes to place a new basic norm comes to place and if that's the case then a basic norm is not the grundnorm in terms of it being the last thing all individual norms are traced back to as its subject to change. This means that the source of validity changes and so the basic norm that an entire legal system relies on is subject to change because the there's new order. [5]

In conclusion this paper has attempted to critique Kelsen's idea of morality and its place in the basic norm, false narrative of superiority possessed by International law and the idea of changing of the basic norm with new order. While several critiques can be levelled against the ideas put forth by Kelsen, his work still remains a great contribution to the school of legal positivism.

[5] Goel, Avantika. "Discuss Kelson's Pure Theory of Law. What Are the Mains Points of Criticism of This Theory ?" December 17, 2016. http://www.infipark.com/articles/discuss-kelsons-pure-theory-of-law-what-are-the-mains-points-of-criticism-of-this-theory/.