PURE THEORY OF LAW

1. The ‘Pure theory of Law’ which is also known as ‘Vienna School of Legal Thought’ was propounded by Hans Kelsen, a professor in Vienna (Austria) University.

2. Though the first exposition of theory took place in 1911, it came in full bloom in post-war Europe. The Austria Code, in force at that time was prepared hundred years before when the natural law was at its height. The ‘pure theory of law’ also rejected the idea of natural law.

3. Kelson’s theory came also as a reaction against the modern schools which he considered the boundaries of jurisprudence to such an extent that they seem almost co-terminous with those of social science.

4. After World War-I, most of the countries adopted written constitution the idea of a fundamental law as basis of legal system was referred in them. The idea of ‘Grund Norm’ and the definition of law as “hierarchy of norms” seem to be inspired by the above principle.

5. In the words of Prof. Dias, the pure theory of law of Hans Kelson represents a development in two different directions. It marks the most refined development in two different directions. It marks the most refined development to date of analytical positivism. He sought to expel ideologies of every description and present of law, austere in its abstraction and severe in logic.

6. According to Kelsen ‘pure theory of law means that it is concerned solely with that part of knowledge which deals with law, including from such knowledge everything, which does not strictly belong to the subject matter of law. That is, it endeavours to free the science of law from all foreign elements. This is its fundamental methodological principle’

7. According to him, a theory of law must deal with law as it is actually laid down and not as it ought to be. In this, he agreed with Austin and insistence on this point got him title of ‘positivist’. A theory of law must be distinguished from law itself.

8. According to Kelsen, a theory of law should be uniform. It should be applicable to all times and in all places. Kelsen advocated general jurisprudence. He arrived at generalisations which hold good over a very wide area.

9. Kelsen writes that theory of law must be from ethics, politics, sociology, history, etc...In other words it must be pure. Kelsen did not deny the value of ethics, politics, history, sociology, etc...but his theory of law was clear of those consideration.
10. The aim of a theory of law is to reduce chaos and multiplicity to unity. Legal theory is science and not volition. It is knowledge of what the law is not of what the law ought to be.

11. According to Kelsen, law is a normative science. But law norms of being of ‘Is’ (sein), while the law norms are ‘ought’ (sollen).

12. Law does not attempt to describe what actually occurs but only prescribes certain rule.

13. As a theory of norms, legal theory is not concerned with the effectiveness of legal norms. The relation of legal theory to a particular system of positive law is that of possible to actual law.

14. To Kelsen, knowledge of law is knowledge of norms. A norm is a proposition in hypothetical form. The science of law consists of the examination of the nature and organisation of normative propositions.

15. The science of law to Kelsen is the knowledge of hierarchy of normative elation. He builds on Kant’s theory of knowledge and extends this theoretical knowledge to law also.

16. The task of legal theory is to clarify the relations between the fundamental and all lower norms, but not to say whether this fundamental norm itself is good or bad. That is the task of political science or of ethics or of religion.

17. According to Kelsen, the principle according to which natural science describes its object is casualty. The principle according to which the science of law describes its object is normativity.

18. According to Kelsen, the distinction between legal ‘oughts’ and the other ‘oughts’ is that the former is backed by force. Refers to a command which does not imply a wield in a psychological sense of the form.

19. The view Kelsen is that in every legal system, no matter with what proposition of law we start, an hierarchy of ought is traceable to some initial or fundamental ‘ought’ from which all others emanate. This is called by him as ‘grund norm’ or the basic or fundamental norm. This norm may not be the same in every legal system, but is always there.

20. Every rule of law derives its efficacy from some other rule standing behind it, but the grund norm has no rule behind it. The grund norm is the initial hypothesis upon which the whole system rests. We cannot account for the validity or the existence of the grund norm by pointing to another rule of law. The grund norm is the justification for the rest of the legal system.
21. The task of the legal theory is to clarify the relations between ‘Grund norm’ and all other inferior norms and not to enter into questions of goodness or badness of ‘grund norm’

22. The grund norm can be recognised by the minimum effectiveness which it possesses. Kelsen does not give any criterion by which the minimum of effectiveness is to be measured.

23. The grund norm is the starting point for the philosophy of Kelsen. The rest of legal system is considered as broadening down in gradations from it and becoming progressively more and more detailed and specific. The entire process is one of the gradual concentration of the basic norm and the focussing of the law to specific situations.

24. To summarise:
   - The aim of theory of law is to reduce chaos and multiplicity to unit
   - Legal theory is science and no volition. It is knowledge of what law is.
   - The law is a normative, not a natural science.
   - Legal theory is a theory of norms and is not concerned with effectiveness of legal norms.
   - A theory of law is formal, a theory of way of ordering, changing contents
   - The relation of legal theory to a particular system of positive law is that of possible to actual law.

**IMPLICATIONS OF THE PURE THEORY:**

1. Certain conclusions were made by Kelsen. The implications of Kelsen’s theory are wide and many. It covers the concepts of state, sovereignty, private and public law, legal personality, right & duty and international law.

2. Kelsen empathetically denies the existence of sovereign as a personal entity. He denies also the existence of state as an entity distinct from law. State is neither more nor less than the law, an object of normative juristic knowledge in its ideal aspect, that is, as a system of ideas, the subject matter of social psychology or sociology in its material aspect.

3. As the state is nothing but a legal construction, there is no demarcation between physical and juristic persons. A law is a system of normative relations. All legal personality is artificial and deduces its validity from a superior norm. according to
Kelsen, the concept of person is merely a step in the process of concretisation and nothing else.

4. According to Kelsen, there is no difference between legislative, executive and judicial processes as they are all norm creating agencies. For Kelsen the distinction between substantive and procedural law is relative, procedure assuming greater significance. It is the organ and process of concretisation that constitute the legal system.

5. The distinction between questions of law and fact becomes relative. The ‘facts’ are a part of the condition contained in the ‘if X’ part of the formula, ‘If X, then Y ought to happen.’ The application of norm concretises every part of it.

6. The most significant feature of Kelsen’s doctrine is that, the state is viewed as a system of human behaviour and an order of compulsion. The conclusion is that, state and law are identical but this does not mean that every legal order is a state. E.g. orders in primitive communities. Only relatively centralised legal orders are states.

7. Kelsen’s conception of law as a system of normative relations leads to the conclusion that there is no such thing as individual right in law. Legal duties are the ‘essence of law’. Law is always a system of oughts’. The concept of right is not basically essential for a legal system.

8. Kelsen says that international law is a judicial order. To remove the difficulty which arise by the fact that international law does not losses all the characteristic of law especially the appearance of compulsion he says that it is comparable to primitive law. The international law is in early stages of and In future will have all the characteristic which the modern law has it. The weakness and limitation of the pure theory is more exposed in their point.

9. So far as the ground norm of international laws concerned Kelsen points out that it is “pacta sunt servanda” he says that the sanction of the international law are war and reprisals but nobody would for the war and reprisal and sanction in the legal sense. a number of wars have taken place not as a sanction but in utter violation of the international law. International organisation also have no tribunal to decide with binding effect whether war is under a sanction or not.

CRITICISM:

1. The view of Lord Lloyd is that the basic ground norm is A very trouble so nature of keelson system we are not bar as to what sort of norm his really is nor what it does
nor where we can find it. Given its characteristic as minimum effectiveness it is very vague and confusing and is very difficult to trace in every legal system. Ground norm is made up of many elements and any one of these elements alone cannot have the title of Ground norm.

2. The quality of purity, claimed by keelson for all norms dependant on the basic norms has been the subject of attack for a long period. Julies stone writes since the basic norm itself is obviously most impure, the very purity of the subsequent operations must reproduce that originality impurity in the inferior norm.

3. Sociological jurists criticise on the ground that it laws practical significance prof. Laski was of the opinion that the logic beyond the pure theory of law was not applicable in life.

4. Some criticise the kelson theory for its excluding natural law from law. but Hager storm a follower of keelson appear to have unfolded the natural law philosophy concealed in keelson assumption of the unconditional authority of the supreme power.

5. Kelsen in his attempt to apply the theory of international law runs into a number of inconsistencies and artificialities in his approaches exposed. his compensation of international law with primitive law is artificially and juristic conclusion can be based upon it.

6. The contention of hart is that there is no reason at all why we should insist that international law as a legal system must have a basic norm. such as assertion really depends upon the false analogy with municipal law. International law may simply consists of a set of separate primarily rules of obligation which are not united in this particular will.

7. About international law prof. stone writes “it is difficult to see what the pure theory of law can contribute to a system which it assumes to be law, but which it derives from a basic norm which it cannot find.”

8. Kelsen says that the sanctions of international law are war and justice. Nobody would agree that war and sanction are connected in a legal sense. International law has not compulsory out favoured as an instrument of national policy.

CONTRIBUTION OF KELSEN:

1. About the contribution of Kelsen to legal theory, prof. friedmen writes, the merciless way in which Kelsen has uncovered the political ideology hidden in the theories
which profess to state objective truth has had a very wholesome effect on the whole field of legal theory. Hardly a branch of it whether natural law theories of international law or corporate personality of public and private law has remained untouched. Even the bitterest opponents, if the Vienna school have concede that it has forced legal theory to reconsider the position.

2. The view of Paton is that Kelsen has made an original and striking contribution to jurisprudence. He considerably influenced the modern legal thought. His view regarding rights personality state and public and private law received great support from various quarters. His theories suggest the necessity of revaluation of the above concept. With his scientific profusion and mighty and unparallel legal subtitles Kelsen analysis, the legal order in a very convincing way.

3. The theory was very much criticise in the beginning a sit propounded something very original and starting but now it is drawing very wide appreciation, study and support from jurists.