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## AN EARLY CRITIQUE OF KELSEN'S PURE THEORY OF LAW: SLOBODAN JOVANOVIĆ ON THE BASIC NORM AND PRIMACY OF INTERNATIONAL LAW

*The keystone of Kelsen's Pure Theory of Law is his doctrine of the basic norm. The basic norm is therefore the subject of Jovanović's critique of Kelsen's entire theory. According to Kelsen, the basic norm precedes the authority of a state, since it is positioned between the factual social force, which establishes the authority of the state, and the state. According to Jovanović, there is neither the law without a state, nor a state without the law; hence neither can Kelsenian legal norm, perceived as a norm prior to the state, be a positive legal norm, but an abstract, natural law norm. Jovanović discusses and criticizes Kelsen's solution to the problem of the relationship between national and international law, which depends on the establishment of the basic norm.*

Key words: *Basic norm. Sovereignty. International law. State law. Pure Theory of Law. Philosophy of Law.*

### 1. INTRODUCTION

Slobodan Jovanović devoted his attention primarily to the criticism of Kelsen's notion of the basic norm (*Grundnorm*).<sup>1</sup> He focused on the

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<sup>1</sup> Slobodan Jovanović (1869-1958) was a renowned Serbian scholar and statesman, lawyer, legal and political philosopher, historian, literary critic and writer, professor of public and constitutional law. He was president of the Royal Serbian Academy, rector of Belgrade University, dean of Belgrade University's Law School, president of the Serbian Cultural Club. He served as prime minister and deputy prime minister of the Kingdom of Yugoslavia. He died in 1958 in London, where he had acted as prime minister of

position and meaning of this basic, primary presupposition, that the entire Kelsen's system has been derived from.<sup>2</sup> Although Jovanović's critique of Kelsen's legal theory refers only to Kelsen's works published between the two world wars, the arguments of this criticism are neither outdated nor obsolete.<sup>3</sup> The analysis of Jovanović's criticism of Kelsen's pure theory shall evince that his arguments are still current.

## 2. THE BASIS OF KELSEN'S PURE THEORY OF LAW

Revival of interest in Kant's philosophy of the second half of the nineteenth century left a significant mark on the General Theory of State

the Yugoslav government in exile during the Second World War. In post war Yugoslavia, in a political trial held in 1946, he was sentenced to twenty years' hard labour. He was rehabilitated in Serbia in 2007, as a victim of post war communist judiciary. On Slobodan Jovanović, see Aleksandar Pavković, *Slobodan Jovanović: An Unsentimental Approach to Politics*, (New York: Columbia University Press, 1993); Boris Milosavljević, "Liberal and Conservative Political Thought in Nineteenth century Serbia: Vladimir Jovanović and Slobodan Jovanović", *Balkanica* XXXIX 2010, 131-153; Dimitrije Djordjević, "Historians in politics: Slobodan Jovanović", *Journal of Contemporary History* 3:1 (January 1973), 2-40; M. B. Petrovich, "Slobodan Jovanović (1869-1958): The career and fate of a Serbian historian", *Serbian Studies* 3:1/2 (1984/85), 3-26.

<sup>2</sup> Jovanović, "Kelsen", vol. 9 of *Sabrana dela Slobodana Jovanovića* (hereafter SD) [*The Collected Works of Slobodan Jovanović*], ed. R. Samardžić and Ž. Stojković (Belgrade: BIGZ, Jugoslavijapublik and SKZ, 1991), 366, remarks that Kelsen had previously published larger and more systematic work, *Hauptprobleme der Staatsrechtslehre* (1911), but it was not taken into consideration since, according to Kelsen's own words, there were certain vantage points that differed from the ideas presented in later published *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920).

<sup>3</sup> In the second edition of his book on the state (*Osnovi pravne teorije o državi*, Belgrade: Kon, 1914), Jovanović analyses Kelsen's *Über Grenzen zwischen juristischer und soziologischer Methode* (Tübingen: Mohr, 1911). Jovanović's critical review of Kelsen's *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer reinen Rechtslehre* (Tübingen: Mohr, 1920) was published in *Društveni život*, [*Social life*] 2 (1920), 218-228. Critique of normativism has been presented in the third edition of Jovanović's book on the state (*O državi, osnovi jedne pravne teorije*, Belgrade: Kon, 1922), which was used as a textbook at The Faculty of Law in Belgrade. Jovanović held a doctoral course titled "Dr Kelsen's theory of state" at the University of Belgrade, Faculty of Law. In the fourth edition of *The State* (*Država*, Belgrade: Kon, 1936), he takes into consideration Kelsen's *Allgemeine Staatslehre* (Berlin: Springer, 1925) and in his study on Marx (1935), Kelsen's *Sozialismus und Staat. Eine Untersuchung der politischen Theorie des Marxismus* (Leipzig: C. L. Hirschfeld, 1920). See S. Jovanović, chap. "Kelsen", in "Marks" [*Marx*], SD 9, 300-306; "Kelsen's Criticism of Marxism", *Arhiv za pravne i društvene nauke* XXIX 1-2 (1934), 1-7; Danilo Basta "Slobodan Jovanović i Hans Kelsen" [*Slobodan Jovanović and Hans Kelsen*]. *Anali Pravnog fakulteta u Beogradu* 49 (2001), 28-29. Normativism has also been analysed in Jovanović's "Dr. Leonid Pitamic: *Država* [*The State*], 1927, založila Družba sv. Mohorja, *Arhiv za pravne i društvene nauke* XVIII (1928), 142-159.

(*Allgemeine Staatslehre*) and Philosophy of Law.<sup>4</sup> Just as Kant employed critique of pure reason, Kelsen employs critique of pure law, reestablishing the entire law on neo-Kantian basis.<sup>5</sup>

According to Kelsen, state power could occur only after legal order (*Rechtsordnung*), which recognized that power as an authority. However, there is a question of how that legal order has been constituted. Kelsen believes that constitution of the legal order is not a legal process, but a social one, since it has been constituted by social facts that had factual power.<sup>6</sup> Both authority and norm sprung directly from social life. The authority which established basic norm was not legal authority, but the factual situation of power.

Jovanović points out that Kelsen's originality lies in his assumption that in the course of transformation from social into legal, legal norm appeared first, and only then did the state authority appear: "The basic norm established certain authority, which in turn vest norm-creating power in some other authorities".<sup>7</sup> Kelsen believes that it is impossible to understand authority which has no legal basis, for the authority which has not be justified by norm, is not authority in legal sense, but a factual situation of power. However, it is equally impossible to legally understand a norm existing before organized state authority. Jovanović argues that the separation of the state and the law inevitably leads to contradictions: "In that manner, Kelsen reverts to the question of which came first, the state or law. It is quite unnecessary to discuss whether the state preceded law or *vice versa*".<sup>8</sup> Law, which is a command of the state's authority, could not be established before that authority. On the other hand, authority, as a right to command, could not have existed before its right to command was legally authorized. Jovanović argues that (during the twenties of the twentieth century), jurists often attempted to exclude the notion of author-

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<sup>4</sup> On General Theory of State see Thomas Fleiner, Lidija R. Basta Fleiner, *Allge meine Staatslehre, Über die konstitutionelle Demokratie in einer multikulturellen und globalisierten Welt*, Springer, Berlin Heidelberg N. York 2004.

<sup>5</sup> Kelsen does not adhere to Kant's *Critique of Pure Reason*, as much as he does to Hermann Cohen's interpretation of that work. See G. Edel, "The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen", *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, S. L. Paulson and B. Litschewski Paulson (eds), Oxford: Clarendon Press Oxford, 1998, (hereafter *Normativity and Norms*), 199. On neo Kantian pure method [*Reinheit der Methode*] of Marburg school and pure law see M. Jestaedt, "Hans Kelsens Reine Rechtslehre", in: H. Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*, [1934], Herausgegeben von Matthias Jestaedt, Mohr Siebeck, 2008, 35.

<sup>6</sup> C.f. H. Kelsen, *General Theory of Law and State*, transl. A. Wedberg, [Harvard University Press 1945] The Lawbook Exchange, Ltd, Clark, New Jersey 2009, 116.

<sup>7</sup> Jovanović, *Država*, [*The State*] SD 8, 107.

<sup>8</sup> *Ibid.*, 106.

ity from their theories of the state, thus attempting to base everything on norms.<sup>9</sup>

### 3. NORM AND AUTHORITY

Jovanović gives historical overview of norm – authority relationship.<sup>10</sup> At the time of absolute monarchies, the absolutist theory was a governing one and the basic notion of the state law was authority. Starting with the seventeenth century, there was a reaction to the absolutist theory and the ideas of natural laws emerged; therefore the norm became the basic notion of the state law. The natural law theory has gradually converted in the theory of popular sovereignty. Within a short time, the idea of natural rights was abandoned and the only one recognized was the idea of positive law, i. e. of the law constituted by the state authority. Thus the notion of authority again becomes the basic notion of the public or the state law (*Staatsrecht*). However, it was followed by a theory of legal state (*Rechtstaat*): “In its first form, this theory is very modest and aims at bringing executive power within the boundaries of law. Gradually, the supremacy of law over the government has been converted into the supremacy of the norm as such, over the authority as such, — which resulted in the theories such as Kelsen’s, according to which only norm, and under no circumstance authority, might be a basic notion of the state law”.<sup>11</sup>

To understand Jovanović’s critique of Kelsen’s normativism it is necessary to examine philosophical foundations of the pure theory of law (*Reine Rechtslehre*). Kelsen criticizes, as he says, “conservative”, “metaphysical”, “transcendent” natural law theories from the vantage point of “the pure theory of law, whose ultimate consequences were derived from the philosophy and legal theory of the 19th century, which were originally hostile to the ideology and based on the theory of positive law; therefore it strongly opposed those disproving Kant’s transcendental philosophy and legal positivism”.<sup>12</sup> By employing neo-Kantian model for Kelsen’s establishment of law, all *theories of transcendence* which *sought to provide grounding* in transcendent – God or nature, should be overcome. By using the model of Kant’s critical reestablishment of the philosophy (*Critique of Pure Reason*), Kelsen intended to “*purify*” law. For Kelsen, it is not about transcendent, but transcendental (synthetic *a priori*

<sup>9</sup> See Joseph Raz, *The Authority of Law*, 2<sup>nd</sup> ed. (Oxford UP: Oxford, New York 2009), 3 and further.

<sup>10</sup> Jovanović, “Kelsen” [1920, 1935] *SD* 9, 374.

<sup>11</sup> *Ibid.*, 375.

<sup>12</sup> H. Kelsen, *Reine Rechtslehre*, 37.

judgments).<sup>13</sup> Kelsen's pure theory of law would be a transcendental theory of legal cognition.

As Kant is followed by Hegel, neo-Kantians, including Kelsen, are followed by Hegelian dialectics.<sup>14</sup> It turns out that Kelsen's positive normative law, critical of natural law, in an unexpected dialectical shift, finds its basis in a seemingly opposite principle of natural law. Although Kelsen implies that Kant's categories are presented in such a manner that it might be said that they are metaphysical data, a reference to Kant does not diminish the argument regarding natural law status of the first norm.<sup>15</sup> Kelsen fails to solve the problem of the first norm "purity". He only succeeds in pointing out that, for Kant, there are *a priori* data.<sup>16</sup>

Though Kelsen, as a positivistic jurist, rejects natural law theories, by separating the legal norm from the state authority and treating the legal norm as something that preceded the state power, in fact, he gives priority to the law that precedes the state.<sup>17</sup> Thus, Kelsen trespasses into the natural law theory.<sup>18</sup>

<sup>13</sup> For Kant, owing to pure forms of sensibility—time and space, synthetic *a priori* judgments are possible, which unlike analytic, basically mathematical judgments, allow *a priori*, non-analytical, i.e. experiential, synthetic cognition (with the help of the power of *imagination* [*Einbildungskraft*]). It is on the Kantian notion of *imagination*, which supports the entire system, that Heidegger based his critique of neo-Kantians. M. Heidegger, *Kant und das Problem der Metaphysik*. Herausgegeben von Friedrich Wilhelm v. Herrmann. 6. Auflage, Frankfurt am Main: Vittorio Klostermann, 1998, 127 and further. On neo-Kantian influence on Kelsen see: S. Hammer, "A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law?", *Normativity and Norms*, 176–194; G. Edel, "The Hypothesis of the Basic Norm: Hans Kelsen and Hermann Cohen", *Normativity and Norms*, 195–220.

<sup>14</sup> According to Hegel's well-known metaphor (*Lectures on the History of Philosophy* 3, 428; *Encyclopedia* § 412, 66), Kant is trying to learn to swim before entering the water. It is impossible to have law out of, or before the authority.

<sup>15</sup> Kelsen, *General Theory of Law and State*, 437, later defends his opinion, referring to Kant: "If one wishes to regard it [i.e. the basic norm] as an element of a natural law doctrine [...] very little objection can be raised just as little, in fact, as against calling the categories of Kant's transcendental philosophy metaphysics because they are not data of experience, but conditions of experience. What is involved is simply the minimum [...] of natural law without which neither cognition of nature nor of law is possible." C. f. Joseph Raz, "Kelsen's Theory of the Basic Norm", *The American Journal of Jurisprudence*, 19 (1974), 94–111; Andreas Kalyvas, "The basic norm and democracy in Hans Kelsen's legal and political theory", *Philosophy & Social Criticism*, 32/5 (2006), 574.

<sup>16</sup> Up. Danilo Zolo, "Hans Kelsen: International Peace through International Law", *European Journal of International Law*, 9 (1998), 323: "On the plane of the epistemology of legal knowledge, Kelsen's monistic assumption stands or falls with the neo-Kantian philosophy from which it derives".

<sup>17</sup> On pre-state law, that is pre-state legal community [*vorstaatliche Rechtsgemeinschaft*] see H. Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*, [1934], Herausgegeben von Matthias Jestaedt, Mohr Siebeck, 2008, 129.

<sup>18</sup> Jovanović, "Kelsen", 375.

As Jovanović points out, Kelsen's pre-state law (*vorstaatliches Recht*) basically means the same as natural law. The difference between the notion of natural law and the notion of natural rights is not affecting Jovanović's criticism of Kelsen's basic norm. Every right (*Recht*) assumed to exist before the state (which is the only one conferring legal obligation), might be considered as natural (human) right (*Naturrecht*) or natural law (*Natargesetz*). Since such rights do not include obligation in their notion, they are not legal notions. They are some kind of non-compulsory rights (laws). Jovanović clearly states that "natural law" (natural right) is *contradictio in adjecto*.

#### 4. CRITICISM OF KELSEN'S CRITIQUE OF LEGAL PERSONALITY OF THE STATE

According to Kelsen, all notions of the science of law (jurisprudence) should be "purified" from other disciplines, especially sociology and politics. According to him, law can be only legally comprehended; therefore the state can be legally comprehended only if it is understood as system of legal norms, i.e. law. Thus, the state is, in fact, merely legal order, i.e. system of legal norms that are effective in the state. Contrary to the legal theory that defines state as a legal person (juristic person)<sup>19</sup>, Kelsen deems that the deeper analysis leads to the conclusion that a legal person is but the sum of its legal norms. State personality [*Staatsperson*] is merely a legal person (increased in extent), as well as a physical person, just a "personification of the legal norms".<sup>20</sup> Thus Kelsen eliminates "fictitious" legal person, replacing it with points of imputation (*Zurechnung*), or "conceptually constructed points of normative reference".<sup>21</sup>

Jovanović states that the notion of the state personality is implied within the notion of the legal norm: "Legal norm is defined as a norm commanded by the state authority."<sup>22</sup> The notion of the state personality cannot be expelled from legal reasoning without losing *differentia specifica* that determines a legal norm: "Truly, neither does Kelsen go so far as to claim that the legal norms exist *per se*, without organized authority to

<sup>19</sup> Jovanović, "Pitamic", *SD* 9, 377. At the end of the 19th and the beginning of the 20th century the most distinguished representatives of the German school of Law were Laband and Jellinek. Jurists of this school considered state as a legal person.

<sup>20</sup> H. Kelsen, *Das problem der souveränität und die theorie des völkerrechts; bei trag zu einer reinen rechtslehre*, Tübingen, J.C.B. Mohr (P. Siebeck) 1920. See Jovanović, *Država, [The State]*, 105.

<sup>21</sup> See Paulson, Hans Kelsen's "Hans Kelsen's Earliest Legal Theory: Critical Constructivism", *Normativity and Norms*, 36; "Hans Kelsen's Doctrine of Imputation", *Ratio Juris*, 14 /1 (2001), 47-63.

<sup>22</sup> Jovanović, *The State*, 105.

prescribe them. However, he argues that the authority as a legal concept becomes possible only if based on the legal norm that has established it”.<sup>23</sup> According to Kelsen, legal norm is valid not because it is enacted by the authority, but because the right to command, i.e. the authority, is based on a legal norm. He presupposes that creation of the legal order is not a legal process, but a social one. All authorities reside in the legal order, and the legal order has its source in social life. Kelsen assumes that in this process of transformation from social into state and legal, the basic legal norm that established certain authority emerges first. This first legally established authority in turn vest norm-creating power in other authorities.<sup>24</sup> Jovanović deems that it is vain to discuss which came first – the state or law. Actually, it is impossible to conceive the law without the state, or the state without the law, since the state authority springs from the law, and the law from the state.<sup>25</sup> According to Jovanović, the state, the law and the authority emerged simultaneously. They are one integral phenomenon. Since the state emerges at the same time as the law and the authority, it contains the notion of law in its very creation.

Jovanović evinces that any presupposition of legal norms existent before the creation of the state authority, which is the only one that may confer the obligation to the law, is a contradiction. The legal norm apprehended as the norm before the state is not a positive legal norm. Since it has not been derived from any higher norm, the basic norm of the legal order, it cannot be the legal norm, “which does not mean that it could not, in the absence of the legal significance, have some other significance – religious, ethical, political”.<sup>26</sup> Therefore, the law before the state, i.e. the basic norm, is not the law in legal sense, but a moral attitude, sentiment or an opinion. Jovanović clearly states that: “coercion is not an accidental social phenomenon: it enters the content of concept of law, as one of its essential features that makes a difference between the law and all other norms – primarily religious and moral ones. Those norms may exist without the coercion, but not the law.”<sup>27</sup>

Jovanović considers the state as a legal person since there is no difference between the will of an association or corporation, which is a legal person, and the will of a state as a legal person. He indicates that, by employing the principle of division of powers, a clear difference between the state as a legal personality and the organs of the state has been made. The state is, as a legislature, the legal person that obligates itself by enact-

<sup>23</sup> *Ibid.*, 106.

<sup>24</sup> *Ibid.*, 107.

<sup>25</sup> *Ibid.*

<sup>26</sup> Jovanović, “Pitamic”, 381.

<sup>27</sup> *Ibid.*, 383.

ing laws.<sup>28</sup> The executive and the judiciary are at the lower level than the legislature and they are obligated to act in accordance with the rules enacted by legislature.

Kelsen criticizes the notion of the state as a legal personality and the idea of auto-obligation. According to him, legal personality is but the sum of its legal norms. On the other hand, Jovanović indicates that the notion of state personality is implied in the notion of the legal norm, for the legal norm has been defined as the norm commanded by the state: “Normative school of law objected the leading theory of the time the invention of the legal personality of the state, which, as they argued, was not derived from any previous legal order. One may answer that jurists of the Normative school of law invented a system of legal norms which lacked the legal basis, as much as the legal personality of state did.”<sup>29</sup>

Jovanović points out that the norm preceding the authority of the state may have both factual and moral validity, but not a legal one. Therefore the best solution is to presuppose that both the law and the state have sprung from the social life at the same time as an inseparable whole: “The first authority that emerged, at the same time represented the first norm, which was that such authority should exist. Conversely, the first norm by its own existence represented a certain act of authority, for those who created it had to act as authority in the very moment of its creation. State authority springs from the law and the law springs from the state, until a primordial moment is reached, when both the state authority and the law appear as the two sides of the same thing [phenomenon].”<sup>30</sup>

The authority is based on legal norms, and their validity is based on the authority.<sup>31</sup> The answer to all objections on the circular reasoning occurring in defining law and state is that the state authority and the law appear as the two sides of the same thing [phenomenon].<sup>32</sup> Although *circulus vitiosus* occurs, it is inevitable in solving fundamental questions, since it exists in the very nature of thinking. For basic concepts of thinking, it is not obligatory to apply the laws of logic that are applied in their further deduction.<sup>33</sup>

<sup>28</sup> See G. Jellinek, *Lehre von den Staatenverbindungen* (Wien: A. Hölder, 1882), 55.

<sup>29</sup> Jovanović, “Pitamic”, 381.

<sup>30</sup> Jovanović, *Država*, 107.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* Cf. D. Basta “Slobodan Jovanović i Hans Kelsen”, 32.

<sup>33</sup> For Kant, “freedom is *ratio essendi* of moral law, and moral law is *ratio cognoscendi* of freedom”. See E. Kant, *Kritik der praktischen Vernunft, Kritik der Urteils kraft*, Kants gesammelte Schriften, Band V, Berlin: G. Reimer, 1913, 4. As for the logicians’ objections to the vicious circle, Heidegger answers: “This circle of understanding is not an orbit in which any random kind of knowledge may move; it is the expression of the existential fore structure of *Dasein* itself. It is not to be reduced to the level of a vicious

## 5. THE PRIMACY OF NATIONAL OVER INTERNATIONAL LAW, OR THE PRIMACY OF INTERNATIONAL OVER NATIONAL LAW

According to Kelsen, the theory which presupposes the primacy of state law over international law, as well as the theory which presupposes the primacy of international over state law, are both logically deduced. Kelsen argues that: “according to the first of the legal constructions, one’s own state is at the center of the legal world, so likewise, in the Ptolemaic conception, the earth is at the center of the universe, with the sun revolving around the earth. And just as, according to the other legal construction, international law is at the center of the legal world, so likewise, in the Copernican conception, the sun is at the center of the universe, with the earth revolving around the sun. But this opposition of two astronomical conceptions is simply an opposition of two different frames of reference.”<sup>34</sup> Although he claims that it is simply about two different frames of reference, it is certain that, when it comes to “Copernican shift”, Kelsen opts for Copernicus and not for Ptolemy. According to Kelsen, the notion of the sovereignty of the state – rightly or wrongly – was standing in the way of everything that was aimed at forming international legal order and establishing special organs for further development, application and implementation of international law, as well as for the further development of international community from its state of primitiveness into a *civitas maxima*.<sup>35</sup> The primacy of international law over national law is also confirmed by Kelsen’s association of the primacy of international law with the ideology of pacifism.<sup>36</sup> Although Kelsen does not explicitly give priority to the primacy of international law, he still presupposes its primacy over national law: “it expands scope of legal cognition. Theory which presupposes the primacy of national over international law, cannot legally comprehend more than one state; theory which presupposes the primacy of international law is legally able to comprehend multitude of states”.<sup>37</sup>

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circle, or even of a circle which is merely tolerated. In the circle is hidden a positive possibility of the most primordial kind of knowing”. See M. Heidegger, *Sein und Zeit*, 19. Auflage, M. Niemeyer, Tübingen 2006, 152 153.

<sup>34</sup> H. Kelsen, “Sovereignty”, *Normativity and Norms*, 535.

<sup>35</sup> Kelsen, *The problem of Sovereignty*, 268 269.

<sup>36</sup> Although nowadays the question may be raised whether it is correct to connect the creation of the global super power (that Kelsen does not conceive as a rule of the abstract law and the abstract norms, but the necessity of the force behind the law is understood) with pacifism or the reality of the modern world provides the basis for the quite opposite conclusions. Even Kelsen considers pacifism as a process of achieving the world peace through the justified wars that will punish recalcitrant states and individuals breaching the prescribed order. See H. Kelsen, “Sovereignty”, *Normativity and Norms*, 532.

<sup>37</sup> Jovanović, “Kelsen”, 370.

Although Kelsen presupposes the primacy of international over national law, he has not settled the dispute between these two theories to the benefit of the primacy of international law. The dispute between those systems is still in progress in legal science, and it is difficult to determine which theory is going to win. According to Kelsen the problem remains unsolved. Contrary to Kelsen, Jovanović asserts that the problem is not unsolved since the theory of the primacy of national law is still valid. As long as a state has its sovereignty, the international law has to be based on its sovereignty, i.e. it has to be derived from nation-state law.

Jovanović points out that Kelsen's position was logically deduced, but the question is what the contribution of that new position was: "Did it help us to solve the problems of legal science that the German school failed to solve? The answer to this question has to be negative, since the major problem he had been solving, Kelsen had to declare unsolved, even with this new standpoint."<sup>38</sup>

## 6. BASIC NORM AND INTERNATIONAL LAW

When it comes to the question of sovereignty in particular, the difference between Kelsen and the German school does not seem so great. According to Kelsen, sovereignty belongs to the legal order that is not derived from any other legal order, which, therefore, is not a part of any other legal order, but is a separate entity. Jovanović evinces that the terminology differs from the one of the German school, but the main idea remains the same. Sovereignty belongs to the public person, that is, the authority which is not subordinated to any higher person, i. e. authority: "The notion of sovereignty means the same both for Kelsen and for the German school – namely, it is something that is not legally derived from anything else and it does not depend on anything else. The only difference is that Kelsen ascribes this attribute to the legal order, while the jurists of the German school ascribe it to the legal person".<sup>39</sup> Any legal person might decomposed into its legal norms and all the norms related to a legal person may personify, i.e. may be understood as legal attributes of the person: "if legal norms may be converted into a legal person, and the legal person into the legal norms, then those two notions are interchangeable – consequently, it is allowed to apprehend the state as a legal person, as well as legal order".<sup>40</sup>

According to Jovanović, Kelsen's theory could be applied parallel with the theory of the German school. It can be used for a critical exami-

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<sup>38</sup> *Ibid.*, 371.

<sup>39</sup> *Ibid.*, 372.

<sup>40</sup> *Ibid.*

nation of the results obtained by the German school, especially when it comes to the risk of anthropomorphism expressed in the opinion that national and international law can exist parallel since they are two separate, mutually independent legal orders that could be even incompatible. According to them, the state may be obligated in accordance with international law; however, those obligations could be invalid for national law, as would be the example of unconstitutional international agreements. According to Jovanović, Kelsen rightly points out that the state is not a person in the real sense, but only in legal sense as a personification of the national legal order.

Jovanović states that as much as Kelsen's theory may be useful for the detecting fallacies the German school was exposed to, all the same, the German school may be useful for detecting fallacies Kelsen himself was exposed to. Kelsen reduces the notion of state to the notion of legal norm. He refuses to accept the definition of legal norm prescribed by the state authority, since it fails to comply with his notion of legal norm. According to Kelsen, the basic norm as the starting point of the entire legal order and the entire state organization has to precede everything, even the supreme state organs (*oberste Staatsorgane*) which may not prescribe it, since the basic norm establishes them. However, the question is where the basic norm came from, since it had to be prescribed as well. Kelsen argues that the legal reasoning becomes possible only when the basic norm has been acquired. What preceded it and how it came into existence is not relevant from the legal standpoint.

Jovanović indicates that Kelsen ended up asking a completely futile question what came first in the state – legal norm or organs of the state authority: “a state cannot be conceived without the legal norms or the authority: the norm which is not supported by the state authority is not a legal norm; the authority which is not standardized by the legal regulations is not a legal notion. Therefore, it is the best to hold onto the standpoint of the German school who claim that the state is a legal person. The concept of the legal person contains both elements: the organs and the norm”.<sup>41</sup>

According to Jovanović, “it happens that Kelsen, in his long chains of abstract reasoning ceases to sense the authority behind the norm” and, actually, holds on to the basic logical theses. If the state is reduced to the sum of its legal norms, and the system of the legal norms is logically organized, the consequences are in compliance with the logic, but the question is whether they are true or not. Logic has its limitations and Kelsen transfers those limitations and dilemmas to the law by reducing the law to the logic. Logical frame implies that something is general and something particular or specific, and that the specific is subsumed under the particu-

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<sup>41</sup> *Ibid.*, 373.

lar and the particular under the general. Following this logic, Kelsen subsumes the narrower system under the extensional one.<sup>42</sup> Kelsen perceives national and international law exclusively as two systems of norms; a narrower one, since it comprises only one state (national law), and the wider one, since it comprises a multitude of states (international law); therefore he finds it completely logical that the narrower system should be subordinated to the wider one.<sup>43</sup>

Jovanović states that Kelsen forgets that it is not all about the norms that should be logically connected. Behind every system of norms is authority which prescribed them: “For national law, it is an organized state authority; as for international law, it is an unorganized international community. The organized state authority is a public legal person that has an *imperium*; the international community is a kind of a social awareness that has not become completely legally organized yet”.<sup>44</sup> National law cannot be subordinated to international law, since the stronger legal organization of national law makes that formally logical precedence of international law illusory. The German school with its understanding of the state as a public legal person, without difficulties explains the relation between state law and international law, while Kelsen “who perceives those two laws as two systems of norms, concludes that international law should have a precedence over the national law, but instantly adds that the precedence has not been granted in practice yet. His theory is inadequate to explain reality and should be completed and corrected by the theory of the German school”.<sup>45</sup>

## 7. IDEOLOGICAL TENDENCIES OF “ATNI-IDEOLOGICAL PURE THEORY OF LAW”

Jovanović points out that, whenever an old regime is falling apart, the notion of norm is getting importance in theory. Rationalistic criticism appears among the destructive forces, which rejects any authority and ac-

<sup>42</sup> Kelsen, *Pure Theory of Law*, 332: “the evolution of international law is similar to that of national law. Here, too, centralization begins with the establishment of tribunals [...] The entire legally technical movement, as outlined here, has in the last analysis the tendency to blur the border line between international and national law, so that as the ultimate goal of the legal development directed toward increasing centralization, appears the organizational unity of a universal legal community, that is, the emergence of a world state. At this time, however, there is no such thing. Only in our cognition of law may we assert the unity of all law by showing that we can comprehend international law together with the national legal orders one system of norms, just as we are used to consider the national legal order as a unit”.

<sup>43</sup> Jovanović, “Kelsen”, 373-374.

<sup>44</sup> *Ibid.*, 374.

<sup>45</sup> Jovanović, “Kelsen”, 374.

cepts only the pure ideas that could be logically apprehended and proved. During the period of the creation of state order, the law has been defined as a command of state authority; within the period of its destruction, the authority has been defined as a legal institution. In the first case, the law has been reduced to the notion of authority, and in the second case, the authority has been reduced to the notion of law. Reducing the authority to the notion of law would be, surely, Kelsen's option, while Jovanović considers it as equally wrong as the reducing the law to the authority.<sup>46</sup>

Placing the law halfway between social, factual creation of the state and the authority, Kelsen instituted basic principles of the theory of the primacy of international law over the law of sovereign states.<sup>47</sup> This primacy has been ensured neither during Kelsen's life nor today, but for Kelsen it is something that ought to be.<sup>48</sup> Whether this can be seen as a deviation from the initial Kelsen's principle of value-free anti-ideological tendency of the pure theory of law?<sup>49</sup> According to Kelsen "pure theory of law refuses to serve any political interests by supplying them with an ideology by which one social order is justified or disqualified. [...] Thereby the pure theory of law places itself in sharpest contrast to traditional legal theory which, consciously or unconsciously, more or less, has an 'ideological' character."<sup>50</sup> Kelsen criticizes Hegel's theory of the state sovereignty according to which "International law (*das äußere Staatsrecht*) applies to the relations between independent states [...] because it actuality depends on distinct and sovereign wills."<sup>51</sup>

According to Normative school "the notion of the state sovereignty has not been rejected yet; however, the idea of the single international law which denies the state sovereignty begins to invade, since it has been imposed on the states as a higher legal order. On the one hand, national awareness which can be fully expressed only within the sovereign state is

<sup>46</sup> It may be said that at the end of the Cold War, when the old world order was destroyed, it was insisted on the law; however, it may also be noticed that, regardless of the reasons, when it comes to the attempt of creating the new world order, once again the law has been reduced to the command of the power.

<sup>47</sup> It may be concluded that it is legally irrelevant which force acting as a social fact is going to ensure the primacy of international law; it is important that this primacy is going to be ensured on a global level.

<sup>48</sup> On the importance of is/ought [Sein/Sollen] for Kelsen and on methodological dualism in his early works see S. L. Paulson, "Hans Kelsen's Earliest Legal Theory", *Normativity and Norms*, 29.

<sup>49</sup> Kelsen, *Reine Rechtslehre*, 30. On the relativity of the meaning of certain terms in Kelsen's works see J. Raz, "Kelsen's Theory of the Basic Norm," in *The Authority of Law*, 2<sup>nd</sup> ed, (Oxford UP: Oxford, New York 2009), 122 145.

<sup>50</sup> Kelsen, *Reine Rechtslehre*, 30.

<sup>51</sup> G. W. F. Hegel, *Grundlinien der Philosophie des Rechts, Naturrecht und Staatswissenschaft im Grundrisse*, [1821] Werke 7, E. Moldenhauer und K. Markus Michel, Suhrkamp, Frankfurt a. M. 1979, [§ 330], 497.

still strong. On the other hand, a much larger awareness appears – the awareness of the mankind in general, which perceives a sovereign state as an obstacle for creation of a legal community on a higher level, which would comprise each and every state as its member.”<sup>52</sup> The law ought to be above the state, instead of the state being above the law; therefore the state authority would become a tool for maintenance of legal order.<sup>53</sup>

Jovanović points out that the presupposing the legal norms of international law to the authority of a sovereign state, implies either that the norms themselves oblige the state authority or that the legal norms ensue from the authority greater than the state. Firstly, he analyses hypothesis that the legal norms themselves oblige the state authority: “Nobody disputes that there are norms which impose themselves on their own on the consciousness and conscience of a normal man. However, those norms are not what we call legal norms”.<sup>54</sup> Since they are not legal norms, they cannot be the foundation of the theory which imposes itself as purely legal. Legal norms must gain its obligatory character from the state authority, otherwise they cannot be considered as legal norms. Those norms which are not related to the external state authority, such as a voice of the *sensus communis*, are not legal, but moral norms.<sup>55</sup>

Jovanović indicates that the second hypothesis, according to which the legal norms ensues from the authority which is higher than a state, would not change old theory of state sovereignty. The only difference would be that the state authority, subordinated to the legal norms, would not be sovereign any more, and the higher authority would gain sovereignty. In other words, if the states belonging to an international community were subordinated to the norms of international law, that would mean that the sovereignty ceased to be the attribute of the certain states and became the attribute of the international community; “there would be a sovereign superstate consisting of a great number of non-sovereign states”.<sup>56</sup> However, the sovereignty of the global superstate would be the state sovereignty and not the legal (normative, constitutional) sovereignty.

Although it may be said that Kelsen presupposes international law over national law in axiological and ethical sense, when it comes to the

<sup>52</sup> Jovanović, “Kelsen”, 371.

<sup>53</sup> *Ibid.*, 368.

<sup>54</sup> Jovanović, *The State*, 141.

<sup>55</sup> *Ibid.*

<sup>56</sup> Jovanović, *The State*, 141. Cf. M. Milojević, “Shvatanje Slobodana Jovanovića o odnosu između međunarodnog i unutrašnjeg prava” [Slobodan Jovanović’s apprehension on the relation between international and national law], *Delo Slobodana Jovanovića u svom vremenu i danas*, [Slobodan Jovanović and his work in his time and today] S. Vračar (ed), Belgrade: Faculty of Law, 1991, 149–153.

law, he states that the dispute over the primacy of these two laws has not been resolved yet.<sup>57</sup> Kelsen does not argue that the norm can exist *per se*, without organized authority that would authorize it. Therefore, the dispute can be resolved in favour of international law when international law gains capacity to sanction.

Jovanović points out that, for now, not only has the dispute been solved, but also it has been solved in favour of primacy of the law of the state. The states, as well as individuals, may conclude contracts and form alliances: “The League of Nations was intended to be the coalition of sovereign states and not a superstate. As long as a state is sovereign, international law has to be based on its sovereignty – in other words, it has to be derived from national law.”<sup>58</sup>

The state shall remain sovereign until some global supranational authority is created. However, the states that would be parts of that new state would not be states in the modern sense of the word, but non-sovereign regions of the new universal federal world state. Therefore, for Jovanović, the existence of the new world state would not mean the victory of the theory in favour of the primacy of international law; on the contrary, it would be confirmation of always existing theory of the primacy of national law. The only difference, if it is difference at all, would be that the theory of the primacy of nation-state law now applies to the sovereign global world state, rather than its current parts, once sovereign state-nations. Logically deduced conclusions of Kelsen’s hypotheses lead to the vantage point according to which the primacy of international law, actually, abolishes international, i.e. interstate law in favour of the state law, since the conferred primacy of international law, actually, means that it became the state law of the new global world nation-state. Therefore, Kelsen’s doctrine, consistently derived, presupposes the ideology of a world state, confirmed in his later works.<sup>59</sup>

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<sup>57</sup> Cf. D. Zolo, “Hans Kelsen: International Peace through International Law”, 323: “The thesis of the primacy of international law (with its four corollaries, in particular acceptance of the doctrine of the *iustum bellum*) cannot aspire to any objective scientific validity, not even in the attenuated version that presents it as a hypothesis needed in order to construct legal knowledge. From the cognitive viewpoint, it is no more necessary than the opposite ‘subjectivist’ hypothesis that argues the primacy of state law, and does not subordinate the individual dimension to the objective validity of law. In Kelsen – an Austrian intellectual personally involved in the tragedy of the Second World War – legal internationalism is very likely a (noble) ethico political option”.

<sup>58</sup> Jovanović, *The State*, 141.

<sup>59</sup> D. Zolo, “Hans Kelsen: International Peace through International Law”, 317: “Kelsen borrows from Kant both the ideal of perpetual peace and the federalist model, as well as the idea of a *Weltbürgerrecht*, a ‘world citizenship’ which includes as its subjects all the members of the human species. According to Kelsen, the royal road to achieving the aim of peace is the union of all states (or the greatest possible number of them) in a world federal state. But to be realist, this objective must be viewed as the outcome of a

## 8. CONCLUSION

Jovanović's critique of Kelsen's pure theory of law may be divided into three mutually related topics. Firstly, Jovanović analyses the notion of the basic norm. The basic norm exists after the factual force and before the establishment of a state. The ascertaining the primacy of state and norm leads to a circular reasoning which is actually a dead end. The concept of law implies obligation which is ensured by state. If there is no obligation, then there is no law; therefore, according to Jovanović, the notion of natural (pre-state) law (right) is *contradictio in adjecto*. The basic norm preceding the state can be conceived as a natural law norm, that is, the norm which obliges in the moral or religious sense, but not in the legal sense. According to Jovanović, the norm coexisting with the authority is a legal personality of the state (*Staat als juristischer Person*) of the German school, which Kelsen's theory failed to surpass. Jovanović proves that the state and the law are the two sides of the same phenomenon. It is naïve to believe that the law could exist without force that would guarantee its enforcement.

Although Kelsen believes that, from the formally legal standpoint, monistic theories of international law based on the primacy of national law and those based on the primacy of international law are equally valid, in his works, even in those published before the World War II, it is clear that he confers the primacy to the international law. However, international law cannot have primacy for the same reason that the basic norm cannot have primacy over the state. International law has no power over the states; it acts as an expression of a certain vision or moral presupposition. International law is based on an agreement of the sovereign states and not until a sovereign authority which would have the primacy over the states is established, shall international law have primacy over national law. If the primacy of international law were established over the states, it would not be inter-national law anymore, but national law, since it would be the law of a new global superstate, which would be the state, while the former states would be its more or less autonomous non-sovereign regions.

The purity of the pure theory of law implies reestablishment of the entire antecedent law in accordance with Kant's attempt of reestablishing philosophy and, consequently, the complete antecedent knowledge based on new critical and pure foundations.<sup>60</sup> Kelsen explicitly compares objec-

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long historical process. It is only through numerous intermediate stages and on the basis of a conscious ideological, political and educational commitment that it is possible to achieve an attenuation of national feelings and a levelling out of cultural differences between the various countries."

<sup>60</sup> D. Zolo, *Ibid.*, 323, rightly determines that the basis of Kelsen's legal cosmopolitanism are the ideas of the enlightenment represent basis of Kelsen's legal cosmopoli

tivity and purity of his theory with political and ideological tendencies of the former theories. Assuming that something can be based out of the presuppositions of political philosophy, most often turns out to be a naïve lack of reflection on one's own presuppositions. Jovanović indicates the importance of reflection of one's own prejudices and critical consideration of their influence on general and individual world view. Kelsen's theory is not ideologically and politically pure. It presupposes Kant's and Wolf's theories on universal world state and perpetual peace. Paradoxically Enlightenment contents subversive ideal of destroying the old and starting all over again on the basis of the "pure" reason.

Jovanović's critique of Kelsen's pure theory of law shows that Slobodan Jovanović's insights, although not widely known both in his country and abroad, were profound and accurate. The critique of Kelsen's theory developed, though not under Jovanović's influence, largely within the frame that he depicted and analyzed.<sup>61</sup>

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tanism. On cultural and social influences that affected Kelsen's family life and education see Clemens Jabloner, "Kelsen and his Circle: The Viennese Years", *European Journal of International Law* 9 (1998), 368 385.

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