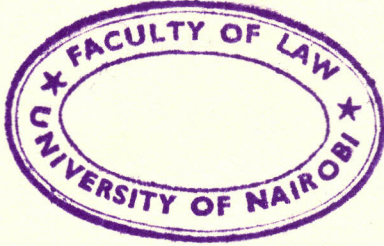


C.2
UNIVERSITY OF NAIROBI
LIBRARY

THE THEORY OF THE GRUNDNORM
AND CONSTITUTIONAL BREAKDOWN
IN COMMONWEALTH AFRICAN STATES



A dissertation submitted in partial fulfilment of
the requirements for the L.L.B. Degree, University of Nairobi

by

J. K. O. MITEY

Nairobi

April, 1979.

ACKNOWLEDGEMENTS :

First and foremost, I am greatly indebted to my supervisor, Mr. Kivutha Kibwana, Lecturer in the faculty of law for his guidance. His valuable comments and suggestions were a source of inspiration to the very end. My thanks are also due to the library staff who work in the law office for their willingness to secure me the materials I needed. My gratitude extends to my cousin Lila Sieley of the Ministry of Home Affairs who offered to aid me where she could.

Last but not least, Mrs. Rachel Langat deserves credit for typing this work.

J.K.O. MITRY

C O N T E N T S .

	<u>Page</u>
Table of cases	iv
I N T R O D U C T I O N	vi
C H A P T E R 1	
KELSENS PURE THEORY OF LAW	
Background of the theory.....	1
The pure theory of law	2
The Normative system	2
Necessity as the <u>grundnorm</u>	5
Municipal law against	
International Law	8
CHAPTER 11	
CONSTITUTIONAL BREAKDOWN	
IN COMMONWEALTH AFRICA	
Rhodesia	11
Uganda	14
Nigeria	16
Ghana	18
Lesotho	20
Swaziland	21
CHAPTER 111	
CRITICISMS OF KELSEN'S PURE	
THEORY OF LAW	24
CHAPTER 1V	
IMPLICATIONS OF KELSENS PURE	
THEORY OF LAW FOR THE JUDGES	31
CONCLUSION	34

TABLE OF CASES

(See footnotes for full citation).

Page

A.G.V. Mustafa Ibrahim and others	.....	7, 8.
Lakami V. A.G (Western State)	.....	16 -18
Madzimbamuto V. Lardner -Burke	.....	12 -13, 32, 3
Ngwenya V. Deputy Prime Minister	.....	21
Reference by His Excellency the Governor -General	.....	6, 7.
Sallah V. A. G.	.....	18-19
The state V. DOSSO	.....	V, 17
Uganda V. Matovu	.....	14, 15, 33

INTRODUCTION

The Constitutions of the present commonwealth African States are not in the form they were at Independence. Changes have been introduced to meet the needs of the new governments. These changes have been effected either by devious amendments to the constitutions or by complete overhaul. My task in the dissertation is to look into the nature and implications of an overhaul of the legal order and its replacement by another order. In investigating the problem I have used Kelsen's theory of the grundnorm as my framework of analysis. But the theory of the grundnorm is not complete without an understanding of Kelsen's pure theory of law. The pure theory of law clearly expounds the entire analysis of a legal order as Kelsen understands it or would have it be.

According to Kelsen a legal system consists of norms. These norms are in a hierarchical order. The validity of each norm is derived from the norm immediately above it in the hierarchy. This does not continue ad infinitum. At the apex of the hierarchy is the fundamental norm - the grundnorm. This basic norm gives validity to the norms below it. The basic norm is not created in any legal way. It is a postulate based on juristic thinking and is therefore extra-legal. The basic norm does not derive its validity from any legal order. A change in the grundnorm amounts to a breakdown in the legal order.

Kelsen argues that the constitution and the legal order under it may be disrupted by an abrupt political change not within the contemplation of the constitution. In law this amounts to revolution. Mohammed Munir C.J. contended that the change may be attended by violence, or it may be perfectly peaceful. It may take the form of a coup d'etat organized by those outside the government or it may be effected by persons already in public positions. The Chief justice held that a coup d'etat is an internationally recognized way of changing the constitution. He further stated that where a revolution is successful, it satisfies the test of efficacy which is necessary for the validity of a grundnorm and that the revolution becomes a basic law creating fact.

Against this background chapter one involves an analysis of Kelsen's pure theory of law. This includes the background of the theory, the validity and interrelationship of the legal norms, the doctrine of civil necessity and the relationship between municipal law and international law.

The most disturbing aspect of Kelsen's pure theory of law is the emphasis on ^{on} purity. Kelsen contends that in any legal issue that comes for determination, non-legal factors should be excluded from the determination. Kelsen emphasizes on the exclusion of morality and natural law from any explication of law. From a juristic point of view this could be possible, but as regards the ^{function of judges it is} doubtful that the purity concept can work. There are instances when the courts have to consider moral factors and doctrines of natural justice in order to reach a particular decision. When the grundnorm is replaced, Kelsen says that effectiveness of the legal order is a condition for the validity of the grundnorm. But effectiveness involves political considerations, thus defeating the purity contemplated by Kelsen.

The doctrine of civil necessity has been said to constitute the basic norm during a period when there is disorder in a country. During that period necessity supercedes the constitution and becomes the source of authority. 2

Kelsen contends that International Law is supreme over municipal law. For that reason the grundnorm of each state, according to him, is to be found in international law. Comments are given as to the truth of the contention.

Chapter two involves the extent to which Kelsen's pure theory of law has been applied in commonwealth Africa. I have used six countries to illustrate the applicability or otherwise of Kelsen's theory. In Rhodesia³ and in Uganda⁴ the courts succumbed to the theory. In Ghana⁵ and Nigeria⁶ the courts rejected the theory. Owing to the consequences of the coups in Lesotho and Swaziland, one of which was the effectiveness of the governments, I contend that the theory would have been applicable.

Chapter three deals with criticisms that have been levelled against Kelsen's pure theory of law. In the Chapter I indicate where I differ and where I concur with the critics.

In Chapter four an attempt is made to bring out the

In Chapter four an attempt is made to bring out the predicament of judges when there is a constitutional breakdown. During such a situation the courts are put in a dilemma, especially in deciding the grundnorm on which they sit. Nwabueze⁷ has argued that in a revolutionary situation a judge should respect his oath to protect the overthrown constitution and should not give allegiance to the subsequent Constitution. As experiences in the African Countries discussed in chapter two show the judges have subsequently supported the constitution of the new orders or have resigned.⁸

The conclusion entails a critical evaluation of Kelsen's pure theory of law as applied in the cases given in chapter two and presenting what I think the various aspects of the theory stand for.

INTRODUCTION

FOOTNOTES

1. - The state V. Dosso (1958) 2 Pakistan S.C.R. 180
2. - Ong D.S.K. Legal aspects of Constitutional breakdown in the Commonwealth with special reference to Nigeria and Southern Rhodesia (Unpublished London PH.D the sis, 1972)
3. - Madzimbamuto V. Lardner - Burke (1968) 2 S.A. 284
4. - Uganda V. Motovu (1966) EA 514
5. - Sallah V.A.G. (1970) C.C. 55 S.c
6. - Lakamni V.A.G. (Western State) S.C. 58/69
7. - Nwabueze B.O. Judicialism in Commonwealth Africa (London, 1977) P.155
8. - Subsequent to the privy council ruling in madzimbamuto's case the Rhodesia courts have treated the new regime as having attained sufficient success in the revolution to be given a dejure recognition by the courts. But two Rhodesian judges resigned in 1968. See Lloyd Introduction to jurisprudence (London, 1972) P. 332 footnote 66.

KELSEN'S PURE THEORY OF LAW

A. Background of the theory.

Kelsen (1881-1973) fore shadowed his theory in 1911 but its full statement came after the first world war. After this war most of the states of central and eastern Europe began to adopt new written constitution.² Kelsen himself drafted the Austrian Federal constitution of 1920. His mind was then directed to the idea of a fundamental law as the basis of the legal system. Kelsen belongs to the vienna school of thought, a school of thought which represents a quest for pure knowledge in its most uncompromising sense, for knowledge free from instinct, volition and desire.³

Kelsen was inspired by Kant's theory of knowledge. Kant was a philosopher and not a lawyer, but Kelsen used Kant's philosophy to build upon his theory. According to Kant's philosophy of knowledge the objective world is transmuted by certain formal categories applied to it by the mind of the on looker.⁴ This lies at the root of his search for the formal elements, as concepts of the human mind, which enable us to grasp the inherent structures of any legal system. Kant regards the spheres of morality and law as being clearly distinct. To him morality is a matter of the internal motives of the individual while legality is a matter of action in conformity with an external standard set by the law.⁵ In his pure theory of law Kelsen also contends that law and morals should have no connection.

Kelsen was also inspired by the school of analytical positivism. This is the school Austin and Bentham, among others, belong. According to this school law should be viewed as it is and not as it ought to be. Kelsen too, does not believe in justifying any rule of law. When he began to develop his theory, Kelsen, as he later acknowledged was unaware of Austins work.⁶ He shaped his theory by putting in some of the concepts of law regarded by the analytical positivists as necessary for a sound exposition of Jurisprudence. However, Austin's concept of law was derived from limited material, namely English and Roman law. Kelsen had an advantage over Austin. From nearly a century of varied developments in law, Kelsen was able to arrive at generalisations which hold good over a comparatively wider area.⁷

Kelsen widely travelled in most parts of Europe, especially in central Europe and know^{ON} the working of most of the legal systems. During the second world war Kelsen moved to the United States of America due to the insecurity brought by the Nazi regime in Germany. In the United states Kelsen continued the exposition of his pure theory of law and had his works published in English. 8

THE PURE THEORY OF LAW

The theory seeks to exclude all elements that are foreign to it. Kelsen contends that the pure theory of law is scientifically worked out. For that reason it has to describe its object as it is not to prescribe how it should be or should not be from the point of some specific value judgements. The latter is a problem of politics and as such concerns the art of government. According to Kelsen the science of law is a mental and not a natural science. Natural sciences explain causes and effects while the science of law is explained by a system of norms. For the theory to be pure Kelsen maintains that justice, sociology and morality should be excluded. The pure theory of law is concerned with showing^{as} it is, without legitimising the law as just or disqualifying it as unjust.⁹ Like any other science the pure theory of law is anti-ideological and as a cognition it has the immanent tendency to unveil its object. He states thus:

" Ideology covers up reality, by explaining it away if it wishes to defend it, by distorting it if it wishes to destroy it or replace it with a substitute. All ideology has its roots in willing and not in knowing. It springs from interests other than that of truth." 10

Kelsen contends that every political ideology has its root in the emotional and not in the rational element of our consciousness. The extent to which Kelsen's pure theory of law is pure in practice remains to be analysed at a later part of this work.

THE NORMATIVE SYSTEM.

According to Kelsen the essence of law lies in the domain of 'ought' propositions or the norms. A legal norm expresses not what is, or must be done, but what ought to be done, given certain conditions. Therefore if X happens, then Y should happen.

There are two types of ought propositions, namely the legal 'ought' and the value 'ought'. The legal 'ought' may state thus: If A steals, he ought to be punished. Another norm will prescribe how the trial will be conducted. Another norm will prescribe that if the magistrate finds him guilty, there should be some official to execute the sentence. On the other hand the value ought relates to whether the contents of a legal proposition are desirable or not, and this is the concern of the science of legislation.

A legal norm becomes valid owing to the way it has been constituted. It becomes valid if it is born of a definite procedure prescribed by another norm.¹¹ A legal norm is regarded as valid if it belongs to a legal order that is by and large efficacious. Efficacy of the legal order is a condition and not the reason for the validity of the constituent norms. Even so there may be norms which are valid and yet are neither obeyed nor applied. This will lead to lack of efficacy and consequently lack of their validity.¹² Kelsen states that the legal system is a hierarchy of norms. The validity of each constituent norm derives from the one immediately above it in the hierarchy. The process does not continue 'ad infinitum.' At the top of the hierarchy is the highest norm, which has been termed the basic norm, the 'grundnorm' or the initial hypothesis.

The 'grundnorm' is not created in a legal procedure by a law creating organ. According to Kelsen the basic norm is valid because it is presupposed to be valid. It derives its validity from no other norm. It is presupposed to be valid because without the presupposition, no human act could be interpreted as legal especially as a norm-creating act. The grundnorm is the postulated ultimate rule according to which the norms of a legal order are established and annulled, receive and lose their validity.¹³ Since the basic norm is abstract the process of going down from the abstract to the fact situation is known as concretization of the basis norm and focussing of the law to specific fact situations. The basic norm is concretized by the norms of substantive law and procedure as applied by the judges and administrative officials. In this manner the legislative principle established by the 'grundnorm' is put into practice. Kelsen explains the function of the grundnorm:

" The function of this basic norm is to found the objective validity of a positive legal order, that is, to interpret the subjective meaning of the acts of human beings by which the norms of an effective coercive order are created, as their objective meaning". 14

The basic norm has been termed as a fiction which is both necessary and sufficient for the positivist's interpretation of law.¹⁵ It is sufficient since no external justification is required. It is again regarded necessary because the acts of human beings can be interpreted as legal acts only on the condition that the basic norm is presupposed as a valid norm. The 'grundnorm' need not be the constitution.¹⁶ The 'grundnorm' is only the presupposition that the constitution ought to be obeyed as the supreme law of the land. Kelsen has put the point clearly.

" The reason for the objective validity of a legal order is... the presupposed basic norm according to which one ought to obey a constitution which actually is established and by and large effective; and consequently one ought also to obey the norms created in conformity with the constitution and by and large effective." 17

Kelsen concedes that it is possible for someone to ask why the first constitution should be obeyed. He replies that the fathers of the first constitution could have been empowered by God and that we ought to be bound by what they laid down.¹⁸ In this case the assumption is that the first constitution has not been replaced.

Kelsen contends that the 'grundnorm' is valid only if it enjoys the minimum of effectiveness. The coercive order should command some obedience from the masses. The 'grundnorm' could even constitute the will of a dictator so long as it has some support. The significance of the basic norm becomes clear when the legal order undergoes not a legal change but a revolution or substitution.¹⁹ From a juristic point of view the decisive criterion of a revolution is that the order that was in force has been overthrown and replaced by a new order in a way which the former did not anticipate.

No lead it
- Kelsen
works

It is irrelevant whether those who organized the revolution had good or bad motives. The revolution can be effected by those within government circles or by those from without. It may happen that the men who come to power after a successful revolution annul only the constitution and certain laws of paramount political importance, while leaving the other norms as they were. A great deal of the old legal order 'remains' valid also within the framework of the new order. Kelsen maintains that it is only the contents of these norms that remain the same, not the reason for their validity. The 'old laws' are 'new laws' in the new order. If they 'continue to be valid' under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution. The new order 'receives' that is, adopts, norms from the old order and the reason for their validity is no longer the old order. After a successful revolution a new 'grundnorm' will be presupposed. The adoption of a new 'grundnorm' marks the beginning of an autonomous system governed by its own specific laws. That these laws are autonomous and entirely specific may be seen from the fact that a revolution constitutes an absolute break in the legal order and that the new legal order can never be comprehended by reference to old one but only by dint of the adoption of a new fundamental hypothesis. This change in the grundnorm amounts in law to a revolution.

NECESSITY AS THE 'GRUNDNORM'.

There may occur situations when the public order and the public security of a state are in danger. In such situations the organs of the state are entitled to take any appropriate action to preserve the state, even in defiance of the express provisions of the constitution. Necessity there upon becomes the postulate from which any act derives its validity. The necessity of maintaining law and order during this state of insecurity becomes the basic norm. Since all the measures taken during this period will not owe their validity totally to the previous legal order, then even with the minimum of effectiveness necessity becomes the 'grundnorm'.

It has been argued that necessity abrogates the constitution. The presupposition will therefore be that the constitution has been rendered in effective. When a new constitution has been promulgated, necessity ceases to be the hypothesis for the validity of the legal order. The *grundnorm* will be that the new constitution ought to be obeyed. The doctrine of necessity has aroused great controversy among jurists and members of the bench.

The doctrine of civil necessity was accepted and applied by the Pakistani Federal Court in the case of REFERENCE BY HIS EXCELLENCY THE GOVERNOR-GENERAL.²² The Indian Independence Act, 1947 provided that the Legislative powers of India and Pakistan were to be carried on by their respective constituent assemblies for the purpose of enacting a constitution. But until such a time as the constitution was enacted by the respective constituent assemblies, the government of each country was to be conducted under the existing constitution contained in the Government of India Act 1935. After seven years the Pakistani constituent assembly was far from accomplishing the task of drafting the constitution. During the seven years the assembly passed forty four constitutional laws. These laws were put into force without submitting them for the Governor-General's assent as provided by the Indian Independence Act, 1947. The Governor-General dissolved the assembly on the ground that the assembly had failed to accomplish the task it was given. The Governor-General argued that the assembly, by excluding him from the law making process, was illegal. After he had dissolved the assembly, the Governor General declared a state of emergency and purported to validate with retrospective effect most of the void constitutional laws of the dissolved assembly. The validation of these laws, so far as it purported to be based on the Governor-General's emergency powers under the Government of India Act, 1935 was declared invalid by the court. Thereafter the Governor-General summoned a new constituent assembly. By a proclamation he sought to revalidate the enactments which the court had earlier declared he had no power to validate. But while the earlier attempt at validation was based on the Governor-General's emergency powers under the 1935 Act, the basis of the new proclamation was the doctrine of civil necessity. The in validation had broken down all the organs of the state machinery, thus threatening the state with imminent collapse. The Governor-General made a reference to the court seeking its opinion concerning the purported re-validation. The court accepted the re-validation on the basis of necessity.

The constitutional laws, the re-validation of which the court accepted, were adopted by the second constituent assembly on March 23, 1956 as the provisional constitution of Pakistan. This constitution was to remain in force till October 27, 1958 by which time a proper constitution would have been drafted. In this case necessity dictated that the transitional constitution should be recognised in order to avoid a complete breakdown in the legal order. Necessity became the new grundnorm imparting validity on the constitution and other laws that might be enacted under the constitution. Subsequent events did not go on as was anticipated by either the Governor-General or the constituent Assembly. On October 7, 1958 President Mirza, supported by the army commander-in-Chief proclaimed a 'peaceful revolution'. The constitution was abrogated. The President and the army Commander assumed law making powers. Thus necessity as the transient grundnorm was replaced.

The doctrine of civil necessity was also applied in the case of A.G.V. Mustafa Ibrahim and others.²³ The accused persons (respondents) were Turkish cypriots who were charged with the offences of preparing war and warlike activities and using force against the government contrary to sections 40 and 41 of the penal code of cyprus. In the meantime, owing to the political situation in the country the President of the supreme court resigned in 1963 followed by the President of the High Court in 1964. Thereafter the Turks in the House of representatives withdrew from participating in government. Turkish judges of the District courts also refused to attend court. In these circumstances the organs of the government were adversely affected. This was a real crisis threatening the security of the state. The House of Representatives sitting with only its Greek cypriot members passed an Act, Administration of Justice (miscellaneous Provisions) Law 1964. The act was meant to enable justice to continue to be administered pending a political settlement of the controversy. Before the appeal was heard, preliminary objections were raised by counsel for the respondents. He argued that it was a basic constitutional right that each community should be represented in the House of Representatives. He further argued ^{that} the Administration of justice (miscellaneous Provisions) Law 1964 was not enacted according to the provisions of the constitution, and should therefore be declared null and void. The court held that the disparity in the structure of the House of Representatives and the disputed law were justified by virtue of the doctrine of necessity. In order that

the court may deal with the treasonable activities, the doctrine of necessity as the basic norm gave validity to any Acts passed during this period when most of the organs of the state were ineffective. Since the doctrine of civil necessity is meant to be a provisional basic norm, the presupposition that the constitution ought to be obeyed will have to be abandoned. In the case under consideration Justice Triantafyllides maintained that to refuse the doctrine of necessity would amount to saying that a state and the people should be allowed to perish for the sake of its constitution. ²⁴

MUNICIPAL LAW AGAINST INTERNATIONAL LAW.

Kelsen use international law to justify some of his propositions. Kelsen contends that Municipal as well as international law form one unified system. According to him the international legal order, by means of the principle of effectiveness, determines not only the sphere of validity but also the reason for the validity of the a particular legal order. He states:-

" The reason for the validity of the individual legal order can be found in positive international law. In that case a positive norm is the reason for the validity of this legal order, and not merely a presupposed norm. The norm of international law that represents this reason for the validity usually is described by the statement that, according to general international law, a government which, independent of other governments exerts effective control over the population of a certain territory, is the legitimate government and that the population that lives under such a government in this, territory constitutes a 'state' in the meaning of international law, regardless of whether this government exerts the effective control on the basis of previously existing constitution or of one established by revolution. Translated into legal language: A norm of general international law authorizes an individual or a group of individuals on the basis of an effective constitution to create and apply, as a legitimate government a normative coercive order. That norm, thus, legitimizes this coercive order for the territory of its actual effectiveness as a valid legal order" ²⁵

It is quite inconceivable how state sovereignty may be limited by an international legal order that has no tribunal to enforce the norms of the legal order. The international legal order does not enjoy the minimum of effectiveness since a nation may decide to defy the 'laws' of the international legal order without any serious risk. The big nations have given preference to their national interests. These big powers pay lip service to the resolutions of the United Nations Organisation. International law is governed by public opinion and if we strictly adhere to Kelsen's pure theory of law, the invoking of what is just for the world introduces an element that the Pure theory of law seeks to exclude.

CHAPTER 1
FOOTNOTES

1. - Julius Stone, Legal Systems and Lawyers' Reasonings (sydney, 1968) Page 99
2. - Julius Stone Ibid. P.99
3. - Friedmann, Legal theory (London, 1960) P. 228
4. - Lloyd, Introduction to Jurisprudence (Londong, 19722) P.269
5. - Friedmann, Supra. P. 108
6. - Friedmann, Supra. P. 228
7. - Dias R.W.M. Jurisprudence (London, 1976) P. 489
8. - Kelsen, Pure Theory of Law (Berkeley, 1967)
Kelsen, General Theory of Law and State. (Harvard, 1945)
9. - Kelsen, 50 Law Quarterly Review, P. 9
10. - Kelsen, Ibid. P. 9
11. - Kelsen, 55 Harvard Law Review, P. 62
12. - Kelsen, General Theory of Law and State P. 119
13. - Kelsen, Ibid P. 113
14. - Kelsen, Pure Theory of Law , P. 202
15. - J.D. Finch, Introduction to Legal theory (London, 1974) P. 123
16. - Dias, Supra. P. 493
17. - Kelsen, 17 Stanford Law Review P. 142
18. - Kelsen, General theory of law and state P. 116
19. - Kelsen, 51 Law Quanterly Review P. 31
20. - Kelsen, General theory of law and state. p. 117
21. - D.S.K. Ong, Legal aspects of constitutional breakdown in the commonwealth - with special reference to Nigeria and Southern Rhodesia (unpublished London Ph.D thesis . 1972).
22. - P.L.D. 1955 F.C. 435
23. - (1964) cyprus law Reports 195
24. - Ibid, P. 237
25. - Kelsen, Pure^{theory} of Law P. 214 - 215

CHAPTER TWO.

CONSTITUTIONAL BREAKDOWN IN COMMONWEALTH AFRICA.

The symptom of constitutional breakdown has taken two forms in Commonwealth Africa. In the first place is the partial suspension of the constitution. The second form is the total suspension of the constitution. According to Kelsen's theory of the grundnorm, both types of constitutional breakdown amount to a change in the legal order. The unsuspended portions of the constitution will owe their validity to the new order and should not be interpreted as per the old legal order. Most of the revolutionary regimes have succumbed to this contention either expressly or by necessary implication. According to Kelsen the motive for organising a revolution is irrelevant.

Each analysis involves a brief background of the constitution that is suspended, the occasion of the revolution, identifying the grundnorm and how subsequent events attest to the fact of a successful revolution. It is quite important to note that in cases where Kelsen's concept of the grundnorm is relied on there is a direct confrontation between the Judiciary and the executive. While the judiciary has strived to maintain its independence - primarily to honour its judicial oath - the executive organ of government has proved to possess the ultimate power to dictate what the position ought to be legally.

RHODESIA.

Under the 1961 constitution of Rhodesia, the country remained a British Colony with dominion Status. The achievement of total independence required the assent of British Parliament.

On November, 5, 1965 the Governor, on the advice of the Prime Minister, declared a state of emergency and on November 11, Ian Smith proclaimed the Unilateral Declaration of Independence. A new Constitution for Rhodesia was promulgated by the rebel regime. It conferred full legislative powers on the Legislature. It also provided that any future Acts of the United Kingdom Parliament should only apply to Rhodesia if extended to it by the Rhodesian Legislature. Appeals to the privy council were abolished. In response to this the British Parliament passed the Southern Rhodesia (Constitution) Act, 1965 on November, 16 followed on November 18 by the Southern Rhodesia (Constitution) Order - in - Council, both of which purport to enable Britain to resume legislating for Rhodesia and removed from the Rhodesian Legislature further Legislative Power. This gesture by the British Legislature was never put into practice.

The Rhodesian Legislature has been passing enactments unfettered by the United Kingdom. This indicates that the smith regime is effectively in power.

In February 1966, the period of emergency declared in November, 1965 ended. The emergency was renewed by a proclamation under the authority of the 1965 constitution. By virtue of the proclamation the regime issued the Emergency Powers (Maintenance of Law and Order) Regulations, 1966. Section 47(3) of the Regulations Continued the detention of all persons that had been put in detention under the previous Regulations. The basis of the new legal order in Rhodesia is the Unilateral Declaration of Independence. It is the grundnorm. The Constitution derives its validity from it. The Unilateral declaration of Independence suspended the 1961 constitution of Rhodesia. The Declaration was extra - legal and did not owe its validity to any other norm.

The validity of the 1965 constitution came up for determination in the case of Madzimbamuto v. Lord Burke

Madzimbamuto and one Baron had been lawfully detained under the 1961 constitution just before the unilateral Declaration of Independence. On the expiry of the state of emergency in February, 1966 their detention was continued under the Emergency Regulations brought into force in 1966. The two challenged the legality of their continued detention. According to Kelsens theory of the grundnorm the 1965 constitution derives its validity from the Unilateral Declaration of Independence. The validity of the Unilateral Declaration of Independence would therefore be conditional on the ability of the regime to command the obedience of the people of Rhodesia. The Declaration established a legal order that enjoys the minimum of effectiveness. The regime is effective and has managed to carry on its intended policies with the minimum restraint. A legal positivist would therefore argue that the Regulations under which the appellants were detained derived their validity from the 1965 Constitution and that their continued detention was lawful. But the members of the bench had conflicting views as to the legal consequence of the Declaration and the promulgations made under it.

In the General Division of the High Court Justices Lewis and Gouldin held that they sat under the 1961 Constitution and declared the 1965 rebel constitution illegal. In the Appellate Division Justice Fieldsend took the same stand. Two members of the Appellate Division, Justices Quenet and Macdonald took the view that the 1965 constitution had become the constitution of the country as a result of the success and effectiveness of the revolution and that the judges derived their authority from it

Judges derived their authority from it. Chief Justice Beadle and Justice Jarvis, both members of the Appellate Division said that the court did not derive its authority from the 1961 Constitution which was no longer effective, or from the 1965 constitution which is unlawful. They contended that they sat as a de facto Court and derived their authority from the fact that the regime only enjoyed de facto status. They held that since the Smith regime permitted the Court to continue and exercise its functions as a Court, they were bound to recognize it. The regime, they contended, has authorized its public officials to enforce the Court's judgements and orders. Beadle C.J. said that the British Southern Rhodesia Act 1965 and the Order-in-Council could not be recognized because the convention that Britain will not legislate for Rhodesia except at her request is part of the Rhodesian grundnorm.

As regards the changes in the grundnorm the Chief Justice had this to say:

"If in the instant case the stage is reached where it can be said with reasonable certainty that the revolution has succeeded, then in the eyes of international law, Rhodesia will have become a de jure, independent, sovereign state; its grundnorm will have changed and its new constitution will have become the lawful constitution." 2

The chief justice acted like a legal positivist in this case. He even argued that the political views of a judge should not interfere in his decision, whether in a revolutionary situation, or in normal times. A subsequent analysis will show that this contention does not always hold in a developing country. The Appellate Division refused the arguments advanced on behalf of Mr. Madzimbamuto and held that his detention was lawful. On appeal to the Privy Council it was held that the 1965 constitution of Rhodesia was in valid and that all post - 1965 enactments of the Rhodesian Legislature and government were void and of no legal effect. It further held that there cannot be two lawful governments for a country at the same time. For this reason the Privy Council contended that no decrees of the rebel regime could have the force of law.

The Rhodesian judiciary took into account the fact that although the British Government was the lawful sovereign it had taken no steps to administer the country. This could be due to British aversion from extreme measures,³ and their instinct for compromise. In this way the British government has proved to be an impotent source of legal power for Rhodesia. According to Kelsen's theory of the 'grundnorm' all governments are extra-legal, therefore the

Unilateral Declaration of Independence established a legal order distinct from that existing prior to 1965. Until the effectiveness of that order has been invalidated it will remain the 'lawful' government.

UGANDA.

Uganda became Independent in 1962. The Independence Constitution provided for the establishment of the office of President and Prime Minister. On February 22 ^{the} prime minister of Uganda suspended the 1962 constitution and deposed the President. The National Assembly was dissolved and then summoned as a constituent Assembly to pass the 1966 constitution. After the 1966 constitution was adopted a state of public emergency was declared and the Emergency Powers (Detention) Regulations 1966 were enacted. The suspension of the 1962 constitution and the adoption of the 1966 constitution was extra-legal. The 1966 constitution thereby became the basic norm. According to Kelsen the basic norm as the constitution gives it the authority to validate all the acts of the government in power while the validity of this basic norm cannot be inquired.⁴

The success of Obote's 'Coup d'etat' came under test in the case of UGANDA V. COMMISSIONER OF PRISONS EX PARTE MATOVU.⁵ The applicant was arrested under the Deportation Act on May 22, 1966. He was released and detained again on July 16, 1966 under the Detention Regulations which had come into effect after ^{the} Coup d'etat. On August 11 the applicant was served in Prison with a detention order and a statement specifying in general terms the ground of his detention pursuant to Article 31 (1) (a) of the constitution of Uganda. One of the issues for the Court to determine was whether the suspension of the 1962 constitution did amount to a revolution. The Chief Justice U. Udome answered in the affirmative. He accepted Kelsen's view that a constitution may be altered or overthrown and that the resulting constitution creates a new and distinct legal order which owes nothing for its existence or validity to the previous order. In Kelsen's view the legitimacy of the new order is self-created and the test of that legitimacy is its effectiveness. The Learned Chief Justice summarized the issue thus:

"On the theory of Law and State propounded by the famous Professor Kelsen, it is beyond question, and we hold, that the series of events that took place in Uganda from February 22 to April 1966 when the 1962 Constitution was abolished in the National Assembly and the 1966 Constitution adopted in its place as a result of which the then Prime Minister was installed as Executive President with Power to appoint a Vice President could only appropriately be described in law as a revolution" 6

Due to the foregoing propositions the Court held that the detention of the applicant was legal. To establish the effectiveness of the government under the 1966 constitution the learned Chief Justice relied on "a large number" of affidavits sworn by top civil servants. One of the officials in the Ministry of Foreign Affairs testified that the new government had been recognized by foreign countries. The court relied on this testimony.

The Uganda legal order came under a second change since Independence in 1971. On January 25, 1971 the army took over. By a Proclamation⁷ the powers of government were vested in President Idi Amin. Pursuant to such powers he proclaimed chapter 4 and chapter 5 of the constitution suspended. Chapter 4 dealt with the Executive Powers of the President and the Cabinet. Chapter 5 dealt with the composition, procedure, summoning, prorogation and dissolution of Parliament. All appointments and offices except public offices held immediately before January, 25 were terminated with effect from that date. The Proclamation further stated that all legislative Powers formerly vested in Parliament were to be exercised by Amin through the promulgation of decrees.

The Proclamation therefore became the 'grundnorm' imparting the quality of Law to the military decrees. The unsuspended parts of the constitution, however, derived their validity from the new order and are to be so construed. The proclamation provides that the operation of the 1966 constitution together with the existing laws shall not be affected by the Proclamation but shall be construed with such modifications, qualifications and adaptations as are necessary to bring them into conformity with the proclamation. This means that the 'saved Laws' are to be viewed as part of the present legal order. As long as the regime exercises effective coercion on a sizeable proportion of the Uganda population, it satisfies the condition of efficacy contemplated by Kelsen as being necessary for the validity of the basic norm and consequently the whole legal order.

C. NIGERIA.

Nigeria became independent in 1960. Under its constitution it became a Dominion of the British Crown. In 1963 the Nigerian Parliament passed a new constitution which gave the country a Republican Status. All legal links with the British crown were severed.

On January 15, 1966 the Nigerian armed forces took over control of the Federal and the Regional Governments. The constitutional provisions relating to the Political organs - the legislature and the Executive - were suspended. By decree No.1 of 1966 the Federal Military government declared its power to make laws by decrees "for the peace order and good government of Nigeria or any part thereof with respect to any matter whatsoever". The Decree further provided that the constitution shall not prevail over a decree. ^{Decree} No.1 became the new 'grundnorm' of Nigeria and the validity of any decree is to be interpreted in the light of the provisions of Decree No.1. But the supreme court of Nigeria did not think that the events of January 1966 amounted to a revolution. This was stated in the case of LAKAMNI V. A.G. (WESTERN STATE)⁸

This was an appeal from the Western State Court of Appeal which heard and dismissed the appeal from the judgement of the High Court of the Western State. The application before the High Court was for an order of 'Certiorari' to remove an order dated August 31 1967 made by the Chief Justice in his capacity as the Chairman of the Tribunal of Inquiry into the assets of Public officers of the Western State. The order directed the appellants or their agents and other persons not to dispose of any of the properties of the appellants until the Military Governor of the Western State had otherwise directed. The appellants were not to operate their bank accounts by means of withdrawal under the same conditions. The learned judge of the High Court dismissed the application, holding that the order was not ultravires and that the Edict under which it was promulgated was validly made.

While the appeal to the western Court of Appeal was pending the government passed some decrees. Decree No. 45 of 1968 contained provisions which included the order relating to the properties of the applicants. The Decree prohibited any proceedings pending in court. By virtue of these provisions counsel for the government filed a notice of preliminary objection that the court had no jurisdiction to entertain the appeal. The court of Appeal accepted this submission and dismissed the application.

The supreme Court declared Decree No. 45 of 1968 invalid and contrary to the constitution, thereby allowing the appeal. The court held that the events of January 1966 did not amount to a revolution but a mere invitation to the armed forces to form an interim military government. The Court distinguished the decisions in Hatovu and DOSSO on the ground that in the two cases there was a nullification of the old constitution and the introduction of the a new one. It contended that the change from the old to the new order was effected with a partial suspension of the constitution and was consequently not a revolution. The provisions relating to fundamental rights were left intact. The court held that the applicants were entitled to the relief prayed for. The appeal was allowed. In this case it is clear that the Supreme Court did not have a full grasp of Kelsenian principles, especially as regards a revolution in law. The fact that the change is peaceful is immaterial and will still constitute a revolution. Furthermore according to Kelsen the whole constitution need not be suspended because the unsuspended laws become laws of the new order and lose any attachment to the old order. The take over by the military satisfied the test of efficacy and became a law creating fact. Ojo⁹ has argued that the search for a grundnorm in Nigeria away from Decree No. 1 is a futile judicial and academic exercise.

To clear doubts as to the true legal status of the military government of Nigeria, Decree No. 28 of 1970 was promulgated. In my view the Decree was meant to overrule the decision in the case of LAKAMNI. Its preamble states that the events of January 1966 constituted a military revolution and abrogated the whole pre-existing legal order in Nigeria. The Decree reiterated the provisions of Decree No. 1 of 1966 that the validity of any Decree or Edict could not be entertained by any Court of law, except that an Edict could be challenged for being inconsistent with a Decree. A Decree could override the unsuspending provisions of the constitution. Since the judiciary had refused to presuppose the 'grundnorm' in Decree No. 1 of 1966, Decree No. 28 of 1970 directed them to.

GHANA

Ghana became independent in 1957 and attained Republican Status in 1960. In a military "Coup d'e'tat" the government of Nkrumah was toppled on February 24th 1966. The army and Police assumed the business of governing Ghana. They formed a body called the National Liberation Council. The National Liberation Council suspended the 1960 constitution by a Proclamation. The proclamation became the basic norm. In 1969 Ghana returned to civilian rule. A constitution restoring civilian rule became effective on August 22, 1969. Kofi Busia took office as Prime Minister. The issue as to whether the proclamation of 1966 was the grundnorm came up in the case of SALLAH V.A.G.¹⁰ The plaintiff was appointed a manager in the Ghana National Trading Corporation in October 1967. The corporation had originally been established in 1961. On February 21, 1970 the plaintiff received a letter from the Presidential Commission which informed him that his appointment with the corporation had been terminated in accordance with section 9 (1) of the Transitional Provisions of the constitution of 1969 which provided:

"Any person who held or was acting in any office established under the authority of the National Liberation Council before the coming into force of the constitution shall be deemed to have been appointed under this constitution to hold office for six months unless before or on expiration of that date he shall have been appointed by the relevant authority to hold such office."

The plaintiff sued the Attorney-General for and on behalf of the government for a declaration that the government was not entitled to terminate his appointment. The major argument in the case centred on the interpretation of 'establish' as given in s. 9(1) of the Transitional provisions. The plaintiff argued that the word should be given its plain meaning. The Attorney-General submitted that the word should be given a technical meaning. He used Kelsen's theory of the legal effect of revolutions on legal systems to support his plea that the word "establish" means "deriving legal validity from." If we adhere strictly to Kelsen's theory of the grundnorm it follows that all these offices can be said to have been established or created anew by the National Liberation Council proclamation of 1966. With the suspension of the 1960 constitution the Act that established the Ghana National Trading Corporation lapsed. The Act regained its validity from the 1966 Constitution. The Majority of the judges accepted the plaintiff's argument that the word establish should be given its ordinary meaning. Sowah J.A. stated that Kelsen's analysis of a legal system is a foreign theory that was of no assistance to the court. Archer J.A. found difficulty in locating the 'grundnorm'. He declared that the 1966 proclamation was not the 'grundnorm' because it was not a constitution. This is against all reasoning because according to Kelsen the basic norm need not be the constitution. The grundnorm is any postulate to which the validity of all the laws of a legal order are traceable. Date-Bah has argued that the proclamation was clearly a constitutional document." Only one judge, Anin J.A. was persuaded by the Kelsenite argument that the revolution of 1966 was a law creating fact. He contended that although the public offices bore the same names before and after the "Coup d'e'tat", the true legal position was that these public offices were the creation of the National Liberation Council and they existed by virtue of the proclamation. Although the majority held for the plaintiff, they did not consider Kelsen's analysis on its merits before rejecting it.

A further change in Ghana's legal order came in 1972 when on January 13 the civilian government formed by the Progressive party under Busia was ousted in a bloodless Coup d'e'tat by the armed forces. A National Redemption Council of ten Soldiers, one Policeman and one lawyer was proclaimed. The 1969 constitution was suspended and the office of the President was abolished.

Busia's government was dismissed, the National Assembly was dissolved and all political parties were disbanded and proscribed. By virtue of the National Redemption Council (ESTABLISHMENT) Proclamation, 1972 the National Redemption Council assumed powers to legislate by decrees. The proclamation is presupposed to be the new "grundnorm". It laid the basis for the legal system that has existed up to the present.

LESOTHO

The Kingdom of Lesotho became independent in 1966 after ninety eight years of British colonial rule. Leboa Jonathan became the first Prime Minister. The Lesotho Independence order provided that parliament should stand dissolved by April 1970. Leboa Jonathan dissolved parliament earlier than the specified date and scheduled the elections for January 27, 1970. There were two political parties in Lesotho- Leboa's Basutoland National Party and Basutoland Congress Party. When Jonathan realised that his party was definitely losing the elections, he declared a state of emergency, and suspended the constitution. The leader of the opposition with some of his colleagues were put in detention as a result of the declaration of the emergency. The king was put under house arrest. Leboa Jonathan proclaimed the Lesotho Order (No. 1 of 1970). The order was to provide for the peace and order of the country "until such a time as a new constitution better suited to the needs of the Basutho nation shall have been agreed (Italics mine)." The order further provided that any law inconsistent with the order shall be void to the extent of the inconsistency. This order formed the basic norm of Lesotho. The motive of Leboa Jonathan, even in the face of clear defeat, is quite immaterial according to Kelsen's theory of a change in the grundnorm. The revolution was successful. On January 30, the day on which the Prime Minister was supposed to tender his resignation to the King, the Prime Minister summoned a meeting of his cabinet. His deputy together with the minister for Finance backed the Prime Minister's move. The two white police officers who commanded the police force and the para-military police mobile unit gave their support to Leboa. This support was a sign that the legal order would have some minimum of effectiveness. With this assurance Leboa Jonathan proclaimed the General Elections (Invalidation) order, 1970 .

The order affirmed the invalidation of the general elections held in January 1970. In Kelsen's analysis of the effect of a revolution, these events marked a transition in Lesotho's legal order.

SWAZILAND

By the Swaziland Independence order of 1968, Swaziland achieved its independence in September of that year. The revolution that took place in 1973 was sparked off by a decision in the case of NGWENYA V. DEPUTY PRIME MINISTER¹². On May 25 1972, one Ngwenya, who earlier that month had been elected to parliament, was deported from the country as a prohibited immigrant on an order made by the Deputy Prime Minister, under the Immigration Act, 1964. Ngwenya challenged the deportation on the ground that being a Swazi Citizen he was not liable to deportation. Since the Act under which the order was made expressly excepted from the power a person who "belongs to Swaziland". The High Court held that the plaintiff was a Swazi citizen and declared that his deportation was invalid. The government appealed. While the appeal was pending the Legislature purported to set up a special tribunal to adjudicate on the issue of Ngwenya's citizenship. If the tribunal found against him, Ngwenya would lose his parliamentary seat, he being the only remaining member of the opposition. The tribunal found that Ngwenya was not a citizen. A deportation order was subsequently issued against Ngwenya. One of his grounds of appeal to the Swaziland court of Appeal, was that the special tribunal had no power of judicial review. The court of Appeal accepted the appellants plea and ruled that the Act setting up the special tribunal was unconstitutional and that the deportation order was invalid. On April 12, 1973, only two weeks after the decision, King Sobhuza II the traditional and constitutional ruler of Swaziland for half a century repealed the 1968 constitution in a public declaration. This declaration has come to be known as the King's Proclamation to the nation. By virtue of the proclamation Sobhuza assumed supreme power in the Kingdom of Swaziland. All Legislative, executive and judicial powers now vested in him. In announcing the repeal the King stated, inter alia, that the constitution had permitted the importation into Swaziland of highly undesirable political practices alien to and inconsistent with the way of life of the Swazi Society. He declared that all

laws with the exception of the constitution would continue to function with full force and effect and would be construed with such modifications, adaptations, qualifications and exceptions as would be necessary to bring them into conformity with the proclamation. The proclamation was the new "grundnorm" granting Sobhuza the power to legislate on any matter. The unsuspended laws acquired a new validity from the new order. It is only their contents that remained the same. The legal order that was established after the revolution was effective because Sobhuza stated that the proclamation was declared at the request of both houses of parliament and the Swazi people as represented by the Swazi National Council.

CHAPTER 2

FOOT NOTES:†

- 1 - STELLA MADZIMBAMUTO V. BURKE (1968) 2 SA 284
- 2 - Ibid. P. 315
- 3 - Marshall Vol.17 International and comparative Law Quarterly P. 1033
- 4 - Kelsen 17 Stanford Law Review P. 1141
- 5 - (1966) E. A. 514
- 6 - Ibid. P. 535
- 7 - Legal Notice No. 1 of 1971
- 8 - S.C. 58/69
- 9 - 1971 International and Comparative Law Quarterly p. 136
- 10 - (1970) C.C. 55. S.C.
- 11 - 1971 International and Comparative Law Quarterly P. 322
- 12 - Unreported, 1973, Swaziland Court of Appeal.

CRITICISMS OF KELSEN'S PURE THEORY OF LAW.

The pure theory of law has been criticized mainly on its merits. The limitations of the theory have been termed the Kelsenite Sin. ¹ To Kelsen the essence of law lies in the domain of ought propositions. A legal ought expresses what the position should be given certain conditions. ² Jurists of the Realist School have found it impossible to explain rationally how facts in the actual world can produce effects in the wholly different world of the ought. Olivecrona, a Scandinavian Realist has bluntly put it thus:

"The sole basis for the nebulous words about the Supernatural relation of the 'ought' is a verbal expression in conjunction with certain emotions. The word 'ought' and the like are imperative expressions which we use in order to impress a certain behaviour on people directing them to do this or that, or refrain from something else..." ³

Hughes has voiced a similar criticism. He argues that we are dealing with a functioning legal system and not with a species of presuppositions. ⁴ I contend that these critics miss Kelsen's point. Kelsen states that the function of the grundnorm is to interpret the subjective meaning of the norms of a legal order in their objective context Kelsen is only putting forth what he thinks and does not try to impose his theory. He concedes that his pure theory of law is a mental science. ⁵

In this pure theory of law Kelsen seeks to exclude any other considerations from the explication of law. He states that law should be understood as it is. This argument is in consonance with the thinking of the analytical positivists. But as a matter of fact the legal order is not merely the sum total of laws but includes doctrines, principles and standards all of which are accepted as legal and which operate by influencing the application of rules. ⁶ Paton ⁷ states that Kelsen's analysis does not give us a true picture of law. Paton contends that Jurisprudence must go beyond the formal hierarchy of norms to study the social forces that create law. This need to include other factors in the propositions of law is also relevant as regards the grundnorm for while Kelsen states that effectiveness is a necessary condition for the validity of the grundnorm in reality effectiveness cannot be proved except by an inquiry into Political and social facts. ⁸ This renders the theory of the grundnorm impure. If the grundnorm upon which the validity of all other norms depends is tainted with impurity it is therefore arguable that the other legal norms are similarly tainted. ⁹ Kelsen's pure theory of law, being purely descriptive of legal science, can only indicate the role of the legal scientist and has no application to the role of the judge. ¹⁰ This is because a judge has to take into account many considerations before reaching a decision on a particular issue. Lloyd states that since Kelsen insists on occupying a narrow platform we are under no obligation to follow him. ¹¹ Julius Stone has given what he thinks is Kelsen's purity analysis:

"Kelsen's pure theory of law amounts to this: That if and when the sociological, political ethical and other non-legal factors in law determination have been adequately taken into account in the apex norm, they should be excluded from further entry into the legal order by the juristic method of ascertaining, interpreting and applying legal norms" ¹²

If that is what Kelsen intends to put forward, although this is not apparent in his works, then it is not quite laudable. When an Act of Parliament is being

passed, there exists a legislative principle behind it. Thus when an issue touching on the Act comes to court the judge or magistrate has to balance the original intention of Parliament with the social consequences of his decision.

Hart questions the validity of the grundnorm. The presupposition of the grundnorm, he argues, "is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurements in metres, is itself correct" 13 Hart ^{misses} Kelsen's idea that every legal system must be referable to some basic norm. According to Kelsen, where a legal system lacks a basic norm, there will be no way of demonstrating the validity of individual rules by reference to some ultimate rule of the system. Hart points out that this is only a luxury found in advanced social systems. 14 In a simple society, the primary rules regulate the affairs of men. An advanced society is regulated by both primary and secondary rules. Secondary rules are rules of procedure and entail the interpretation and enforcement of the primary rules by state officials. Hart's argument is debatable. In essence traditional societies had some code of conduct. The assumption that every individual would conduct himself in a manner acceptable to the community ought to be the grundnorm. Each society had prescribed methods of dealing with offenders of disputes between individuals. Although these methods were not written in the case of traditional African societies, the methods were known to all.

Dias prefers to analyse the validity of the grundnorm by reference to the officials that administer the law. He states:

"The criterion of validity refers to the medium or media which impart to a rule the quality of law. The minimum of effectiveness refers to the acceptance of such media by those in charge of administering law. By using the notion of the grundnorm, he (Kelsen) seems to have inflated a pedestrian simplicity into something misleadingly large" 15

Kelsen states that for legal norms to be effective they must be obeyed or applied "by and large". 16 This is a crude and unscientific test, 17 since these are dead-letter laws. Furthermore there are laws which are selectively used or enforced. This seems to erroneously suggest that some laws are more significant than others. The fact that ^{some} law is being constantly used effectively should not necessarily be representative of other laws. The efficacy of any order should be seen in this light. The effectiveness test is similar to the attempt by Austin to base sovereignty on habitual obedience. Both effectiveness and habitual obedience are political tests and are not strictly legal. 18

Kelsen gives two functions of the grundnorm: firstly, to enable anyone to interpret a command, permission or authorisation as an objectively valid legal norm; 19 Secondly, to enable the legal scientist to interpret all valid legal norms as a non-contradictory field of meaning. 20 The first function of the grundnorm has been criticized as belonging to the specialist activity of legal science and of no much meaning to the ordinary citizen. 21 The ordinary citizen who distinguishes the tax officers demand as valid and lawful does not need to presuppose a basic norm. For him the tax officers demand is legally valid while that of the gangster is not. This essentially contradicts Kelsen's contention that the subjective meaning of the tax officer's and the gangsters commands are the same.

Dias has rejected the grundnorm as a legal concept:

"In settled conditions it teaches nothing new; in revolutionary conditions where guidance is needed it is useless, for the choice of a grundnorm is not dictated inflexibly by effectiveness but is a political decision. 22

This is an unfair attack on Kelsen's analysis of the grundnorm. Every decision is based on the reality of the moment. Effectiveness is deduced from the ability of

the government in power to command the obedience of the ruled. Notwithstanding the fact that a revolution is a political fact, the court is competent to make a finding of fact in order to apply the law to facts. 23 Moreover Kelsen argues that the state and the law form a dialectical unity. The completeness and consistency of the legal norms and backed by the power of the state.

According to Kelsen the national legal order is always subordinate to international law. This is tantamount to stating that the basic norm of municipal law is to be found in international law. To argue that the reason for the validity of a legal system is a norm of international law which legitimizes any coercive order is fallacious. Such a statement seems to speak to the citizens of each state, telling them that because of a superior, supranational norm, the system under which they live properly commands their respect, so long as it can apply coercion quite effectively. 24 Nwabueze 25 is against this view. He contends international law is irrelevant to the validity of a country's constitution, since the validity of a constitution is a matter of purely domestic concern. This is a sound argument because the adjudication on a constitution is always done internally and external opinion may be ignored.

To Hart 26 the finding of the grundnorm of all legal systems in international law is a proposition which "says nothing more than that those who accept certain rules must also observe a rule that the rules ought to be observed". Hart calls this a spurious assumption.

Austin considers international law as belonging to the class of laws of positive morality. To him international law is one of the laws 'improperly so called.' He justifies this by stating that international law is a law of opinion as there is no determinate authority. The propounding of an opinion and adherence to the opinion are different things. This is a logical argument because one has a discretion to heed another's opinion or not depending on one's convenience on taking a particular stand. Friedmann 27 has gone to the extreme of recommending that the character of law be denied to international law. This is stretching the issue too far. Individual states may enter into some mutual agreements and promise to honour one another's rights. This is common with trade agreements. As long as none of the parties has defied the agreement the agreement is legally binding.

Kelsen regards wars and reprisals as providing sanction in international law. This can only be acceptable if the result of the wars and reprisals were permitted by the international legal order against a wrong committed by a state and forbidden as instruments of national policy. Within a legal system sanctions can be applied without risk to the peace and order of the government. Lloyd argues that the same result may not be achieved in international relations. He points out thus:

"This situation, however, by no means holds in regard to international relations, for since sanctions would have to be applied to whole nations rather than to individuals, there can be fearful risks involved, and the effect of applying sanctions, even on a limited scale - as for instance, if limited to the so called economic sanctions - might in fact provoke the holocaust of war rather than preserving peace and order in the international community. 28

These fearful risks involved in the application of sanctions have rendered the United Nations Organisation ineffective. The organisation passes resolutions against those states that violate international law and conventions. These resolutions are not implemented. Sanctions against Rhodesia and South Africa for their blatant violation of human rights have proved to be ^{of} no consequence. When Smith and his colleagues unilaterally proclaimed the Independence of Rhodesia in 1965 the General Assembly of the United Nations condemned this action. Considering Rhodesia a non-Selfgoverning territory in the sense of Article 73 of the United Nations charter the Assembly called upon the United Kingdom to put an end to the rebellion. The security council also passed resolutions imposing economic sanctions on Rhodesia and demanding from the United Kingdom political action and the use of force. All these proved futile. The United Kingdom has taken no positive step to reassert its authority over Rhodesia. South Africa continues to rule Namibia against the regulations of the United Nations. The Sham elections conducted in Namibia in 1978 under the supervision of South Africa were not recognized by the United Nations. Since they excluded the popular nationalist party of SWAPO. The Western capitalist powers have indirectly been providing aid to these ^{despotic} regimes in Rhodesia and South Africa. These big powers have economic stakes in these regimes and they would do anything but lose their huge investments there.

The foregoing criticisms touch on various aspects of Kelsens pure theory of law. While some of the criticisms help to elucidate the merits and shortcomings of Kelsens analysis, some appear to have been advanced for the sake of juristic argument.²⁹

Kelsen bases his analysis on 'ought' propositions. The ultimate 'ought' is the grundnorm. Although it is treated as a hypothesis it is in fact part of the factual system. When an issue arises for determination by the Court the principle enshrined in the grundnorm is concretized in the administration of the law to fact situations. Kelsen's theory of the grundnorm is helpful in revolutionary situations; for it portrays what has actually been the case in some of the Commonwealth African states. In the six African countries given as an illustration in chapter two it is evident that Kelsen's analysis of the effect of a revolution is quite applicable. The effectiveness of the governments and ^{the} establishment of strong coercive orders have been the determining

factors in the survival of these governments.

The purity concept is a weak point in Kelsen's analysis. Factors such as natural justice, sociology and some morality is recognised by the judiciary as being necessary. The judges have their own inclinations depending on their individual backgrounds and tastes. The so called independence of the judiciary is an over statement. Furthermore the judges have to consider the power of the usurping government before they can make a decision. This is a fact they cannot escape. Judges are part of the community and cannot be oblivious of the realities of the moment.

Kelsen attaches too much significance to international law. It does not deserve the treatment he has given. International relations are marred by conflicting interests and opinions some of which cannot be compromised. Kelsen gives no guidance as to how the divergence in world politics can be resolved by a grundnorm which he cannot even establish. The primacy and sovereignty of the laws of individual states remain as undisputed facts.

The marxists have also offered their criticisms of the normative theory of law. They argue that it is the desire to conceal the class essence of bourgeois law that has led the normative theory of law to isolate legal norms from real life, and to strive to attribute to them the normative theory of law. I find the Marx-lenin exposition more realistic as it clearly brings out the purpose of law.

CHAPTER 3

FOOTNOTES

- 1 Stone, Julius, Legal System and Lawyers' reasonings
(Sydney, 1964) P. 121
- 2 Lloyd, Introduction to Jurisprudence
(London, 1972) P. 271
- 3 Olivecrona, Karl Law as fact
(Copenhagen, 1939) P. 21
- 4 Hughes, G. 59 California Law Review P. 699
- 5 Kelsen 50 Law Quarterly Review P. 8
- 6 Dias R.W.M. Jurisprudence (London, 1976) P. 510
- 7 Paton, A textbook of Jurisprudence (London, 1972) P. 18
- 8 Friedmann, Legal theory (London, 1960) P. 239
- 9 Dias Supra P. 497
- 10 Brookfield, 19 University of Toronto Law Journal
PP. 342-44
- 11 Lloyd, Supra P. 279
- 12 Stone, J. Supra P. 129
- 13 Hart, H.L.S. The concept of Law (London, 1961)
P. 106
- 14 Hart, H.L.A. Ibid. PP. 89-96
- 15 Dias R.W.M. Supra P. 500.
- 16 Kelsen, Pure theory of Law (Berkeley, 1967) P. 214
- 17 Lloyd, Supra P. 283
- 18 Lloyd Supra P. 164
- 19 Kelsen, Pure theory of Law PP. 50-54
- 20 Kelsen, General theory of Law and State
(Harvard, 1945) P. 437
- 21 Harris, J.W. 29 Cambridge Law Journal PP. 106-12
- 22 Dias, R.W. M Supra. P. 502
- 23 Nwabueze, Judicialism in Commonwealth Africa.
(London 1977) P. 155
- 24 Hughes G. Suora P. 704
- 25 Nwabueze Supra P. 160
- 26 Hart, H.L.A. Supra P. 230

FOOTNOTES CONT.

- 27 Friedmann Supra P. 279
28 LLOYD Supra P. 288
29 Stone J. Supra PP 98-136

CHAPTER 4

IMPLICATIONS OF KELSEN'S PURE THEORY OF LAW FOR THE JUDGES:

The analysis of Kelsen's pure theory of law is incomplete without an understanding of the real implications of the theory as interpreted by the judges and legal scholars. Since Kelsen's theory addresses itself to jurists few judges would identify themselves with this class.¹ This is because Kelsen's theory is not a legal norm to be applied but is a theory about legal norms. These legal 'oughts' determine the legality or otherwise of a particular act. They define the procedure of determining an issue. Legal norms are valid because they satisfy the procedure prescribed by the basic norm. For example if one is charged with treason in Kenya he should be tried under the provisions of the Penal Code and the criminal procedure code. The penal code defines treason and prescribes the sentence. The next legal norm is that the accused should face a trial conducted under the provisions of the criminal procedure code. In both instances the assumption is that the two Acts of parliament have been applied in a constitutional manner. To Kelsen 'ought' propositions signify that to which we should aspire, irrespective of whether or not it can be effectuated and realised in life.

In most countries the constitution is the supreme law. Even so the constitution is valid because of a presupposition about its validity. The grundnorm therefore is the hypothesis that the constitution imparts validity to the legal norms that are lower in the hierarchy. Hughes has put the point clearly thus:

"The basic norm, then, is not the ought proposition of the constitution but rather an ought proposition about the constitution. As such it is not a legal norm in the usual sense of being the construct of an organ of the system, rather, it is a construct of juristic thought which is necessary if we are to regard the system as giving rise to valid norms. It is legal only in the sense that it has legally relevant functions."²

Since the courts apply facts and not hypotheses the real test for the validity of the grundnorm is the effectiveness of the legal order.

As I pointed out in chapter three of this work, the purity concept is a weak point in Kelsen's analysis. ~~judges are not~~ In their decisions judges are not oblivious of extra-legal factors. Palley contends that judges are guided by their personal beliefs and philosophies. He states:

\\ It is today generally acknowledged that judges, like other mortals cannot escape their own philosophies and will, when reasons are nicely balanced, reach a decision that will be consonant with their own beliefs, even though genuinely attempting to set aside their own standards of values and to ascertain in objective spirit what ordering of the life of the community will be in the circumstances before the court best accord with the law."³

Any judge represents the class he belongs in society. The interests of a judge are reflected in his thoughts and feelings, notwithstanding the air of legality adopted by judges. Kelsen's argument that the pure theory of law is anti-ideological is untrue. Every grundnorm contains some principle behind it and the courts have to give effect to this principle.

In a revolutionary situation where a grundnorm has been replaced by another the judges are put in a dilemma. Where the constitution is supreme the position is that all other laws have to be consistent with the constitution.⁴ Furthermore judges take an oath to protect the constitution. It follows that the validity of the constitution is a question beyond the competence of any court created by that constitution.⁵ A judge should be bound by a personal moral duty to observe a judicial oath. Should a judge give allegiance to a subsequent constitution - that comes about in a way not anticipated by the former constitution - he ceases to be a judge in the strict legal sense. Fieldsend J. summed up the issue by saying that the court "must accept its reason for existence as stemming from its original constitution as an unchallengeable fact."⁶ Referring to the Rhodesian crisis after the unilateral Declaration of Independence Fieldsend J. contended that nothing can encourage instability more than for any revolutionary movement to know that if it succeeds in snatching power it will be entitled to complete support of the pre-existing judiciary in their judicial capacity. In chapter two an attempt was made to show how the role of judges has been eroded in those commonwealth African countries which

have undergone changes in the grundnorm. In Rhodesia the majority of the judges gave support to the 1965 constitution of the rebel regime. They could not escape this since the judges are part and parcel of the establishment. They could not pose as umpires in a game where they were also players. They had to protect the interests of the white minority. The Smith government knew that the Rhodesian judiciary was on its side, so when the Madzimbamuto case went on appeal to the Privy Council, the government had an apprehension that it would succeed and consequently made it clear that it would not recognize the decision of the privy council. The then Attorney General, Lardner-Burke, submitted an affidavit stating that it was the deliberate decision of the government that it would not in any way enforce or give effect to any decision, or order of any other court purporting to be given on appeal from the decision of the Rhodesian High Court.

The Matovu case from Uganda illustrates an instance where a judge may disregard his judicial oath. After the 1962 constitution of Uganda was suspended by Obote, the Chief justice took an oath to uphold the 1966 constitution. The authority of the judge derived from the 1962 constitution. His pledge to uphold the 1966 constitution was a breach of his prior oath to protect the 1962 constitution. What is more curious about the case is that even after he had taken an oath to defend the 1966 constitution the Chief Justice probed into the validity of that constitution.⁷ He relied on the words * as by law established* in the oath by which he swore. He argued that this cast a duty upon the Court to satisfy itself that the constitution according to which it decided cases was in fact legally valid, for a judge, sitting as a court, could not be expected to enforce a constitution which was not by law established. If the court had pledged to defend the condition the implication was that that constitution was valid or legal. If it thought it was an illegal constitution, the court should not have bound itself by the oath. It was not competent for the court to question the validity of the 1966 constitution after it had approvingly quoted salmond to the effect that "every constitution has an extra-legal origincourts, legislatures and law had alike their origin in the constitution and therefore the constitution cannot derive its origin from them."⁸ It appears as if the court was not quite certain about the effectiveness of the Obote regime and consequently delivered a long judgement. All available evidence, however flimsy, given in support of the government was accepted by the court and

was used to justify the efficacy of the legal order.

In Nigeria, Ghana and Swaziland the courts sought a confrontation with the executive. In Swaziland the change in the grundnorm resulted from a judgement of the Swaziland court of Appeal declaring that a member of the opposition had the right to be a citizen and to be entitled for election.⁹ In Ghana the court denied that the military decrees were supreme over the constitution. The court held that the 1966 military take-over in Ghana did not amount to a change in the legal order. But with the continuance of the military government, especially after the failure of the civilian government formed in 1969, the courts have recognized the supremacy of military decrees. In Nigeria the supreme court denied the abrogation of the 1966 constitution, despite the argument on behalf of the government that the Coup d'e'tat amounted to a change in the grundnorm.¹² The military government later expressly used Kelsen's principles and declared the 1966 military take-over as extra-legal. After this declaration the courts had no option but to be bound by the declaration.

CONCLUSION:

The pure theory of law is a sub-school in analytical positivism. In Western legal philosophy many schools have sprung up, each seeking to explain the meaning and essence of law. A western legal philosopher would argue that this pluralism has been engendered by an unending search for truth. A socialist legal philosopher would give a different view. The latter would argue that the different theories in western legal philosophy reflect the diversity of the social sources from which the class of the bourgeoisie stems.

The economic base determines the superstructure of each society. In the western capitalistic countries property is privately owned. Those with property have greater chances of getting political positions by the use of economic influence. This propertied class strives to ensure that the law is in their favour. Government becomes the government of the middle and upper class. The government will therefore use one of the schools of law to justify the law being applied. In this light Kelsen's theory of law should be viewed as veiling the purpose of law by emphasizing on purity. A judge cannot fail to take extra-legal factors in his decision(s). Kelsen did not want to confess that judges are part

of the ruling class. In Europe Kelsen's theory has lost ground because the change in governments is only within the ruling classes such that there are no abrupt changes in the legal orders. Kelsen's theory found fertile soil in developing countries where revolutions are rampant. The class conflict that the theory sought to conceal using the purity analysis has come to the surface in Africa. In Uganda the coup d'e'tat by Obote was no threat to the interests of the judges and they supported it. The majority of ^{the} judges supported Smith regime after he declared the independence of Rhodesia in 1965. Their history show that the judges who supported the government in the Madzimbamuto case were part of the establishment.¹³ In Ghana and Nigeria the military regimes were a class in direct opposition to what the judges stood for. The ensuing struggle manifest in the cases was a bid by the judges to protect the interests of the ousted comrades.

Kelsen's theory of law is welcome in Africa so long as we still yearn for a spirit of fair play, self restraint and mutual accomodation of different interests and opinions.

CHAPTER 4

FOOTNOTES

- 1 - Tammelo (1963) 15 Journal of Legal education P. 353
- 2 - Hughes, G. 5a California Law Review P. 704
- 3 - Palley 30 Modern Law Review P. 264
- 4 - See Section 3 of the Kenya Constitution.
- 5 - Nwabueze, Judicialism in Commonwealth Africa (London, 1977) P. 154.
- 6 - Madzimbamuto v. Lord Burke
(1968) 2 S.A. P. 429
- 7 - Uganda v. Matovu (1966) EA. P. 530-34
- 8 - Salmond, Jurisprudence (London, 1957)
- 9 - Ngwenya v. Deputy Prime Minister
Unreported, 1973, Swaziland Court of Appeal.
- 10 - Sallah V. A.G. (1970) C.C.55 S.C
- 11 - Lakamni v. A.G. (W.state) S.C 58/69
- 12 - Decree No. 28 of 1970.
- 13 - Palley 30 Modern Law Review PP. 263-287

BIBLIOGRAPHY:

TEXTBOOKS

- Dias R.W.M. Jurisprudence (Butterworths, London, 1976)
- Finch J.D. Introduction to Legal theory
(2nd ed. Sweet Maxwell, London, 1974).
- Friedmann Legal theory (4th ed. Stevens, London, 1960)
- Hart H.L.A. The concept of Law (Oxford University Press,
London, 1961)
- Kelsen, Hans The pure theory of law
(University of California press, Berkeley, 1967)
- Kelsen Hans General theory of law and state (Harvard
University Press, Harvard, 1945)
- Lloyd Introduction to Jurisprudence
(3rd ed. Stevens, London, 1972)
- Nwabueze, B.O Judicialism in Commonwealth Africa
(Hurst, London, 1977)
- Olivecrona, Karl Law as fact (Copenhagen, 1939 reprinted by
wildy & Sons, London, 1962)
- Paton A textbook of Jurisprudence
(4th ed. clarendon Press, London, 1972)
- Salmond Jurisprudence (11th ed. Sweet & Maxwell,
London, 1957).
- Stone J. Legal systems and lawyers' reasonings
(maitland publications, sydney, 1964).

ARTICLES

- Brookfield F.M. The courts, Kelsen, and the Rhodesian
revolution University of Toronto Law Journal
Vol. 19, 1969
- Date-Bah S.K. Jurisprudence's Day in court in Ghana
International and Comparative Law Quarterly
Vol. 20, 1971.
- Harris J.W. When and why does the grundnorm change
Cambridge Law Journal Vol. 29, 1971
- Hughes G. Validity of the basic norm
California Law Review Vol. 59, 1971
- Kelsen, Hans The Pure theory of law
Law Quarterly Review Vol. 50 (1934) and
Vol. 51 (1935)
- Kelsen, Hans The Pure theory of law and analytical
jurisprudence Harvard Law Review, Vol. 55,
1941-42
- Kelsen, Hans A reply to Julius Stone
Stanford Law Review, Vol. 17, 1965.
- Marshall The legal effects
of U.D.I International and comparative
Law Quarterly Vol. 17, 1968
- Ojo The search for a grundnorm in Nigeria - the
Lakanni case International and comparative
Law Quarterly Vol. 20, 1971
- Ong, D.S.K. Legal aspects of constitutional breakdown
in the commonwealth with special reference
to Nigeria and southern Rhodesia unpublished
Ph. D. thesis, London University, 1972
- Palley The judicial process:
U.D.I and the Southern Rhodesian Judiciary.
Modern Law Review Vol. 30 1967
- Tammele Review of 'Reine Rechtslehre'
by Hans Kelsen. Journal of legal education
Vol. 15 1962-63