

A CRITICAL EVALUATION OF THE EFFICACY-VALIDITY CRITERION OF KELSEN'S
THEORY OF REVOLUTIONS WITH ESPECIAL REGARD TO SELECTED CASE-STUDIES.

BY

FRIEDRICH KARL COHRSSSEN

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FORMAL DECLARATION

I HEREBY DECLARE THAT THIS DISSERTATION SUBMITTED FOR THE DEGREE OF
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Abstract:

The efficacy-validity criterion of Kelsen's theory of revolutions can be impugned in both its theoretical and practical dimensions.

The philosophical foundation of this criterion is contained in the Is-Ought dichotomy between which there exists, according to Kelsen, an "unbridgeable gulf". The questionable nature of this premise is borne out by empirical examination in showing that there exists a necessary and substantial connection between the Is of socio-political and factual reality and the Ought of normative ideality, which far exceeds the minimum of effectiveness which Kelsen is prepared to concede as forming the content of the Ought.

This becomes more apparent when a specific examination of this dichotomy is undertaken in relation to the efficacy-validity criterion, a special case of Is-Ought. Firstly, in its theoretical dimensions, it is clear that there exists a necessary and conditional relation between the efficacy of a single, individual norm and its validity. Secondly, and more significantly, there also exists a substantial connection between the efficacy (sociological sphere) and the validity (normative sphere) of the legal order as a whole.

This is borne out by an examination of the pivotal Grundnorm conception which Kelsen postulates as forming the ultimate, presupposed 'Ought' validating a given legal order. Even from a theoretical perspective, it is clear that this conception is predicated on more than just the minimum of effectiveness which Kelsen concedes for it. In actual fact, this fundamental norm, which validates the legal order, is a product of the very "impurities" of sociology, politics, morality, justice, history, ideology etc. which Kelsen is so vehement in delimiting from the purview of his Pure Theory of Law.

The examination of this conception in its practical applications in dynamic revolutionary situations further underscores this point and, at the same time, exposes its limitations. This can be perceived in the fact that since the destruction of the Grundnorm of the old legal order need not be done contemporaneously with the positing of a new Grundnorm, Kelsen's revolution theory admits of the possibility of there being a hiatus in the legal system. More significantly, the shortcomings of the Grundnorm conception highlight the deficiencies and inadequacies that inhere in Kelsen's efficacy-validity criterion with which the Grundnorm is inextricably interlinked. As a result, and in order to reflect more adequately the underlying politico-sociological realities of revolutionary situations, additional and more flexible criteria are suggested in order to supplement the inadequacy of, or, alternatively, to limit the socially undesirable consequences of the employment of efficacy-validity in vacuo. In so doing, the necessary overlap between efficacy and validity in its practical dimensions is further underscored.

It is especially in the critical evaluation of the relevant revolution cases that the practical inadequacies and uncompromising rigours of the judicial employment of this criterion are demonstrated. It is also noteworthy that the judges in certain revolution cases should have departed so markedly from the strict Kelsenism reflected in this criterion, by the employment of additional limiting principles. It is clear that while efficacy remains probably the dominant test of legality, its adoption as a blanket test of legality cannot be sustained.

This holds equally true within the sphere of the international legal order. Although this criterion may be readily reconcilable with the traditional criteria of statehood (all of which are based on effectiveness) this is

no longer the case in modern state practice where further limiting and, at times, contradictory principles have been evolved to serve as criteria of legality.

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Table of Abbreviations (in alphabetical order)

AJ : Acta Juridica

Am Jnl of Comp Law : American Journal of Comparative Law

Am Jnl of Int'l Law : American Journal of International Law

Am Jnl of Jurisprudence : American Journal of Jurisprudence

Am Pol Sc Rev : American Political Science Review

Calif L Rev : California Law Review

Can YIL : Canadian Yearbook of International Law

CLLSA : Comparative and International Law Journal of Southern Africa

CLJ : Cambridge Law Journal

CLP : Current Legal Problems

Crim L Rev : Criminal Law Review

Georgetown L J : Georgetown Law Journal

Harv L Rev : Harvard Law Review

Howard L J : Howard Law Journal

ICLQ : International and Comparative Law Quarterly

Inter-Am L Rev : Inter-American Law Review

Iowa L R. : Iowa Law Review

Israel L R : Israel Law Review

Jur Rev : Juridical Review

Liverpool L R : Liverpool Law Review

LQR : Law Quarterly Review

McGill L J : McGill Law Journal

Minn L R : Minnesota Law Review

MLR : Modern Law Review

New L J : New Law Journal

Nig L J : Nigerian Law Journal

N L Q : Nigerian Law Quarterly

Pol Sc Q : Political Science Quarterly

Rhod L J : Rhodesian Law Journal

SALJ : South African Law Journal

Scand S L : Scandinavian Studies in Law

Stan L Rev : Stanford Law Review

THRHR : Tydskrif vir Hedendaagse Romeins Hollandse Reg

Tul L Rev : Tulane Law Review

UCLA L Rev : University of California Los Angeles Law Review

UGLJ : University of Ghana Law Journal

U Tor L J : University of Toronto Law Journal

Vand L Rev : Vanderbilt Law Review

Western Ont L Rev : Western Ontario Law Review

Yale L J : Yale Law Journal

Zamb L J : Zambia Law Journal

Preface

The central aim of this study is to examine the controversy-prone efficacy-validity criterion of Kelsen's theory of revolutions in both its theoretical and practical significations.

In the opening Chapter, the all-important Is-Ought dichotomy will be examined, since it underlies not only the Pure Theory of Law as a whole, but also all special sub-categories which have been evolved therefrom. In this Chapter, then, these sub-categories will be considered strictly from a philosophico-theoretical perspective in order to provide, at the outset, a conceptual grasp of the subject-matter of the study. Amongst these sub-categories, it is the efficacy-validity criterion which will be singled out for sustained critical evaluation.

This criterion will, in the first instance, be evaluated from an essentially theoretical vantage point, which will form the subject-matter of Chapter Two. In the course of this evaluation, the often inextricable intertwinement which exists between this criterion and Kelsen's Grundnorm (basic norm) conception, will be broached. This, however, will be done only to the extent that it advances a theoretical understanding of this criterion per se.

Due to the centrality of Kelsen's Grundnorm conception in his Pure Theory of Law and, more importantly, because of the symbiotic relationship which may be said to exist between this conception and the crucial efficacy-validity criterion, this conception will be critically evaluated in the third Chapter of this study. This will be done from a theoretical standpoint, thus paving the way for a consideration of its practical significance, (or lack of

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it) to be dealt with in the Fourth Chapter. Chapter Three, however, will concentrate on the Grundnorm at rest by highlighting the uncertainties, ambiguities and intricacies, both legal and meta-legal, which surround it and have imbued it with such a mystical aura.

Chapter Four, on the other hand, will concentrate on the more significant problems (for the purpose of the present study) of the Grundnorm in change by accentuating the practical difficulties and implications connected with the Grundnorm idea in dynamic revolutionary situations. In so doing, the practical shortcomings, as well as the vagueness and crudity of the efficacy-validity criterion in revolutionary conditions, will be emphasized. At the same time, supplementary and limiting principles will be advanced in an effort to resolve the difficulties that arise from the employment of this criterion in practice.

An in-depth examination of the selected revolution cases in the light of this criterion will form the subject-matter of Chapters Five and Six. While Chapter Five will concentrate on those revolution cases decided in countries which had already been sovereign independent states by the time the respective revolutions occurred, Chapter Six will consider the relatively complex and intricate issues arising in the Rhodesian revolution cases at a time when the status of Rhodesia in international law had become a hotly disputed issue.

Finally, Chapter Seven of this study will focus on international law issues in toto to the extent that they impinge on Kelsen's theory of revolutions. Firstly, this will involve an examination of the traditional criteria of statehood and the efficacy principle upon which they are based.

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Secondly, and more significantly, the efficacy-validity criterion will be considered in the light of the more important and controversial criteria of legality in modern state practice as well as the extent to which these newer criteria depart from it. As in the previous Chapters, Kelsen's international law doctrine will be analysed with especial regard to the revolution cases.

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CHAPTER 1

INTRODUCTION

For Kelsen¹ the Is-Ought dichotomy lies at the foundation of his entire system. A cornerstone of his highly controversial Pure Theory of Law³ is that the Ought expresses a kind of relationship which is otherwise not evident in the entire realm of nature⁴ (the IS). Central to this dualism is to be found the rigid demarcation between the categories of cognition, of the Is (Sein) and the Ought (Sollen)⁵ as well as the consequent separation of all other disciplines, that is, politics, ethics, morality, sociology, ideology, history etc (hence the "purity"⁶ of the theory).

1. (1881 - 1973) For a rather comprehensive biographical exposé of Kelsen and his numerous works, see René Marcic: Hans Kelsen, Leben und Werk, Franz-Deuticke Verlag, Wien (1969).
2. It will be shown in the course of subsequent Chapters that the argument that there exists an "unbridgeable gulf" between the Is and the Ought cannot be sustained on empirical verification. This will be done with especial reference to the validity - efficacy criterion as applied within revolutionary situations - see further Chapters 3, 4. In this regard, see too Arnold Brecht: "The Myth of Is - Ought" in 55 Harv L Rev (1941) 811 - 831 esp at 824 - 831 where it is argued that the alleged eternal and unbridgeable gulf between "Is" and "Ought" is but a myth. See too Windelband; "Normen und Naturgesetze" in 2 Windelband Präludien (5th ed 1915); see too H Kelsen; Über Grenzen zwischen juristischer und soziologischer Methode. (1911) 6: "The contrast between Is and Ought is formal and logical as long as one keeps within the limits of formal and logical considerations. The road leads from one to the other, the 2 worlds confronting each other are separated by an unbridgeable gulf. Logically, the question as to the 'why' of some particular 'Ought' can only lead to some other Ought, time and time again, just as the question as to the why of some particular 'Is' can only receive as an answer another 'Is' time and time again".
3. The following works in English on the Pure Theory may, inter alia, be consulted. Erich Voegelin: "Kelsen's Pure Theory of Law" in Pol Sc Q 52 (1927) 268 - 276; Hersch Lauterpacht: "Kelsen's Pure Science of Law" in Modern Theories of Law Oxford (1933) 105 - 39; Charles H Wilson; "The Basis of Kelsen's Theory of Law" in Politica (1934) 54 - 82; Henry Janzen in "Kelsen's Theory of Law" in Am Pol Sc Rev 31 (1937) 205 - 226; Isaac Husik; "The Legal Philosophy of Hans Kelsen" in the Journal of Social Philosophy (1938) 297 - 324. As regards Hans Kelsen himself, see "The Pure Theory of Law" in LQR (1934) 474 - 98 and 203 (1935) 517 - 35. General Theory of Law and State (transl by A Wedberg) (1945); and The Pure Theory of Law (transl by M Knight) (1967).
4. Immanuel Kant: Kritik der reinen Vernunft, Leipzig, (1926) 479.
5. For a more recent evaluation of the Is - Ought dichotomy, see Ota Weinberger: "'Is and Ought' reconsidered" in Archiv für Rechts- und Sozialphilosophie Vol 70 (1984) 454-474. See too J Kühne; "Norm und Wirklichkeit" Schönherr collection, 427 -37.
6. See Chapter 3 for an attempted refutation of the "purity" postulate. See R W M Dias: Jurisprudence 5th ed Butterworths, London (1985). One of the central arguments of this work is that Kelsen's "pure" theory is in fact permeated with the very "impurities" he so vehemently seeks to exclude viz. ideology, sociology, politics etc.

More important, however, is the crucial efficacy-validity¹ criterion, a sub-category or, in Kelsen's words, "a special case" of the all-embracing Is-Ought dichotomy². However, before embarking on a critical evaluation of this pivotal sub-category, it is essential to place this criterion in its proper philosophical and contextual framework, at the base of which is found the already-mentioned Is-Ought dualism. This opening Chapter, then, is intended to provide no more than a conceptual grasp of this controversy-prone sub-category with especial reference to an evaluation of its philosophical underpinnings.

The Is-Ought Dichotomy and underlying Philosophical Considerations:

Kelsen begins in his first chief work³ with this Kantian⁴ distinction between Is and Ought. It is significant to note that this distinction has remained fundamental in his thought, not only in regard to his general theory of law but also in regard to his theory of the State. It must be stressed, however, that he does not follow Kant blindly, but deviates from him at certain decisive points. Thus, he carries the Kantian dualism a stage further by making of the Is and Ought, a formal- logical insoluble antagonism which results in an inevitable division of the sciences⁵. Just as the object of research is the Is of actual events - that is, reality, or an ethical, legal, aesthetic

1. The ensuing Chapters of this work provide an elaborate examination of this crucial criterion in its various applications, practical and theoretical. For their theoretical significance, see Chapters 2 and 3. For the practical significance see Ch's 4, 5, 6, 7.
2. This may be encapsulated in the following proposition: The norm is an "Ought" but the act of will is an "Is." Pure Theory of Law, (1967) at 5. See further D Lloyd: Introduction to Jurisprudence 5th ed by Lloyd and Freeman (1985).
3. Hauptprobleme der Staatsrechtslehre Tübingen, (1911)
4. Philosophically, it would seem, Kelsen is regarded as a neo-Kantian, but in his distinction between Is and Ought, he is a descendent of Hume. See R W M Dias: Jurisprudence 5th ed, Ch 16; Sed contra I Stewart: "The Basic Norm as Fiction" Jur Rev (1980) 199 - 224.
5. W Ebenstein: The Pure Theory of Law University of Wisconsin Press, Madison (1945) Ch 1.

or other Ought - that is, an ideality - so our knowledge³ divides itself into two fundamentally distinct groups, or realms which no path unites. The sciences, in turn, are divided into causal and normative sciences.¹

It is important for an understanding of the philosophical basis of the Pure Theory of Law to grasp the fact that the distinction it makes between the Is and the Ought coincides with the distinction between fact and norm,² reality and value, matter and mind, nature and purpose.³ Reality or nature, in the widest meaning of these terms, is the same as the causally regulated Is, just as mind or value are the same as the Ought.⁴ While the former is expressed in causal or natural laws, the latter is expressed in norms. In describing as normative those sciences which have an Ought as their subject-matter such as ethics, grammar and jurisprudence, Kelsen lays himself wide open to the charge of natural law tendencies.⁵

In an attempt to escape this, Kelsen stresses as strongly as possible the fact that the normative sciences need not create norms but simply know them "for science is never prescriptive, creative will but descriptive, perceptive intellectuality."⁶ Thus, for Kelsen, the term "normative" means, not setting up the norm but knowing the norm.

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1. See H Kelsen: "Die Rechtswissenschaft als Norm - oder als Kulturwissenschaft" in Schmollers Jahrbuch, (1916) at 95 - 153; Der Soziologische und der Juristische Staatsbegriff, Tübingen, (1928) 75 - 81; Hauptprobleme Tübingen, (1911), 3 - 33; Reine Rechtslehre Vienna, (1934) 19 - 37.
 2. This distinction is of especial relevance in the practical context of revolutionary situations where the law - power dualism stands on an equal footing with the validity-efficacy criterion. See Ch's 4,5,6 for elaboration on this point.
 3. (used here in a strictly objective sense). Cf W Ebenstein: The Pure Theory of Law Univ of Wisconsin Press, Madison (1945) Ch 1
 4. Ibid.
 5. Cf Ch 3 where it is argued that key concepts in Kelsen's "Pure" Theory are, in fact, tainted with natural law tendencies, especially the concepts "Grundnorm" (basic norm) and "Effectiveness". It is argued that these are invariably products of underlying socio-political realities.
 6. H Kelsen : Die Rechtswissenschaft als Norm oder als Kulturwissenschaft (1916) at 97.

It would appear, then, that as a normative science, legal science is not concerned with the actual world of events, the Is, therefore it is not an explicative discipline.¹ From a positive point of view, it has for its subject matter norms i.e. actual legal materials from which it must deduce its specific legal concepts.² It is, in Kelsen's view at least, no reflection on law as a science of norms, a science of the Ought to admit that "from a certain standpoint there exist certain relationships between the Is and the Ought"³ Kelsen is adamant, therefore, that from a formal-logical point of view, the two worlds of Is and Ought stand separated by an unbridgeable gulf ("unüberbrückbare Kluft").⁴ The search for the sanction of any particular Ought can lead logically only to another Ought, just as the sanction of an Is can be found only in another Is.

However, it is true that a material, historical, or psychological point of view often shows that the content of an Ought is also the content of some specific Is,⁵ i.e. that something which actually is has normative validity. But,

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1. W Eberstein: The Pure Theory of Law Univ of Wisconsin Press, Madison (1945) Ch 1
 2. Morris R Cohen in Law and the social order N Y, (1923) writes at 240: "Legal science is normative in the sense that it deals with norms. Legal rules are normative in that they contain imperatives or orders regulating what men should do". John Dickinson also inveighs against the tendency to confuse "legal with factual considerations". See his "A working Theory of Sovereignty" in the Pol Sc Q (1928) 43; Edward Jenks, too, sees clearly, though perhaps not always sufficiently, the distinction between legal and natural science: "We may at once disclaim for jurisprudence any direct concern with those non-human contents of the universe, whether the laws which govern those non-human contents are merely explanatory or also causal... Those natural or physical laws are not the work of the jurist, nor is he, as a jurist, interested in them, except in so far as they may throw light on his problem".
 3. Hauptprobleme (1911) at 8; Cf M P Vorster; "Kelsen" in Moderne Politieke Teorie (ed by A M Faure and D J Kriek). See too A Brecht: "The Myth of Is and Ought" in Harv L Rev 55 (1941) 811 et seq.
 4. Ibid. See too R Stranzinger: "Der Begriff der Norm bei Hans Kelsen" in Archiv Für Rechts- und Sozialphilosophie 63 (1977) at 399 - 412.
 5. In this regard, see R W M Dias; Jurisprudence Ch 16, who bears out this point by showing that the crucial Grundnorm concept of Kelsen, as an Ought - proposition, demands a "minimum of effectiveness" as Kelsen himself acknowledges. To that extent, Kelsen admits a conditional relationship between the Grundnorm and natural reality, between Is and Ought. See further Ch 2. Sed contra J W Harris: "When and Why does the Grundnorm change?" in CLJ (1968) 103 - 33.

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according to Kelsen, we are not dealing here with the "Is" in the formal-logical sense, but rather a "special case of the Is". By virtue of this "normative force of the factual" (¹"Normative Kraft des Faktischen"), actual processes are explained, certain acts are shown to correspond to a norm, to an Ought, and the process of applying the norm to its addressees and their psychological acts of will as they submit themselves to the norm, are, to be sure, rendered comprehensible.² But only the content of the norm is thereby considered, not the Ought as a formal category.

Kelsen notes a further misunderstanding of the formal nature of the Ought deriving from customary speech, which uses the Ought as an incomplete category of thought - as an Ought, that is, which requires some kind of translation into reality i.e. as an Ought-to-be.³ The Ought of logic is realized in right thinking, that of ethics, in right acting and that of law, too, in the sphere of causally determined human behaviour. Thus, to every system of norms, as its continuation and completion to the ideal Ought of logic, ethics and law, there is attributed a corresponding actual content, a piece of natural reality.⁴

However, it is suggested that this indiscriminate confusion between normative ideality and causally determined reality cannot, without more, be accepted. It has been contended in this regard that the ideal systems of logic, ethics, or law neither require, nor are capable of a translation into the sphere of the Is.⁵ Thus, if we speak of a "realization" meaning thereby certain events in the sphere of causally determined nature, one must be careful not to

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1. Adapted from the German jurist Georg Jellinek, quoted by H R Hahlo in his Art: "The Privy Council and the Gentle Revolution" in SALJ vol 86, (1969) at 419 - 39.
 2. W Ebenstein: The Pure Theory of Law Univ of Wisconsin Press, Madison (1945) at 8 - 9.
 3. Cf A Ehrenzweig: Psycho-Analytic Jurisprudence Oceana Publications, Dobbs Ferry N Y (1971), who speaks of Kelsen's Grundnorm concept as a "meta-Ought" and of his admission of the natural law "minimum of effectiveness" as a "meta-Is".
 4. See Ch 2, where the "conditional" relationship between the "Is" and "Ought" is emphasized.
 5. Ebenstein op cit 8 - 9.

confuse those factual events, which can exist only as the content of judgments of fact, with the ideal systems of logic, ethics and law. For such a distinction would, in Kelsen's words, go to the extreme of "completely abolishing the distinction between Is and Ought, between value and reality"¹.

Although Kelsen lays the greatest emphasis on the logical isolation of the spheres of ideality (Ought) and reality (Is) it is significant to note that he nevertheless admits that they are "somehow or other" comparable as to content.² The norm that the rich shall help the poor or that a thief shall be punished, although its validity can in no way be derived from the fact of causally determined human behaviour, can yet be compared to that behaviour in terms of content. Thus it is possible to say that the content of the Is does or does not coincide with that of the Ought. Furthermore, despite the formal-logical gulf which separates the spheres of value and reality, one is almost inclined to believe⁴ that the different value systems would have no meaning at all if the reality were not constructed so as to correspond to their contents. However, it is crucial that this contentual parallelism between the two logically divided spheres of knowledge should not lead us to forget that when we speak of "realizing" the norm or value, we do not imply that the value can act as the cause of the (valuable) reality, for an Ought, a norm, a value can be neither cause nor effect, since it stands outside causality.⁵

The action which conforms to the norm as to content is caused, therefore, not by the norm, which can be the cause of nothing, but by the thinking, feeling, willing of the norm, by an actual, psychical experience. The fact, the natural fact that the norm can be conceived or experienced can very well have as its effect action which conforms to

1. See H Kelsen: Der juristische und Soziologische Staatsbegriff (1928) at 79.

2. Ibid.

3. For a rather exhaustive discussion of this concept, see Ch 2. See too J W Harris: Laws and Legal Science - An Inquiry into the concepts, legal rule and legal system Clarendon Press Oxford, (1979)

4. W Ebenstein: The Pure of Theory of Law, Univ of Wisconsin Press, Madison (1945) at 10

5. Ibid.

the norm. What is thereby realized is not the ideal Ought of the norm but the real, physical, and psychical willing of the norm which thereby becomes the motive for the action which conforms to the norm.¹

Kelsen holds this strict separation of Ought and Is to be especially important in view of the different method pursued by Stammler. For Stammler,² the decisive methodological principle in dividing the sciences into social and natural sciences is the distinction between causality and teleology. In the first case, we take human behaviour as a natural event, and seek simply to view it as a link in the chain of cause and effect. In the second case, we think of our behaviour not solely as the result of a natural causality, but as depending on our own contribution. Thus, as long as one envisages future events from the standpoint of causality, teleological considerations can have no place.³

Nonetheless, Kelsen sees no "indissoluble inner contradiction"⁴ between teleology and causality, for the conception of purpose necessarily involves the conception of causality. It is difficult to see any real distinction between saying that a given action will be causally effected and saying that it will be effected by me. To be effected can thus only mean to produce an effect and to produce an effect otherwise than by a cause seems impossible.⁵ The acceptance of purposes implies that we already know of the existence of a causal nexus and are prepared to use it. On the lines of the foregoing, then, the notion of purpose involves the notion of causality. For Kelsen, this means

1. W Ebenstein: The Pure Theory of Law Univ of Wisconsin Press, Madison (1945) at 9 - 10 See too R W M Dias: Jurisprudence 5th ed Ch 16.

2. R Stammler: Wirtschaft und Recht, Berlin, (1896) 338

3. Ebenstein op cit 9 - 10

4. Stammler, op cit 338 et seq.

5. Ebenstein op cit 10.

that the teleological viewpoint (means and ends) and the causal viewpoint (cause and effect) are not two different ways of relating the elements of that knowledge, which we have to make into a unified whole, rather, they are the same relationship only seen from different points of view.¹ Although causality and teleology are not identical,² they do have a further affinity in that they both aim to explain events; they are, therefore, explicative, as distinct from normative modes of inquiry.

It is necessary here that one other possibility of misunderstanding should be clarified as well. According to Kelsen, the explicative function of the notion of purpose is bound up with Stammler's view of purpose as the representation of a future result. From this view of purpose as a real process one must rigidly exclude the objective notion of purpose or value for which the Ought is the logical expression. The distinction between Is and Ought, therefore, can be said to correspond to that of nature and purpose. For instance, to say that the purpose of the heart's activity is to provide blood for the body obviously does not mean that the heart ought to provide the body with blood, but simply that it does do so. No norm is set up here which postulates the provision of blood for the body by means of the heart's activity, but only a natural law, that is, a causal relationship.³

1. W Ebenstein: The Pure Theory of Law Univ of Wisconsin Press, Madison (1945) at 11.

2. Cf the central notions of validity - efficacy. Although they are not identical, they are not entirely distinct either; there exists a "necessary connection" between them, the relationship between them being of a "conditional" nature.

3. It is unfortunate that Kelsen does not discuss the question whether the acceptance of such a divine norm might be conceivable and significant for the religious person. For this notion of purpose in the realm of nature does indeed seem to be of religious origin, its retention in our speech is, so to speak "a teleological see R Pound: "A comparison of Ideals of Law" Harv L Rev 47 (1933-4) 1; Perhaps one of the best expositions of the philosophy of the Pure Theory of Law can be found in the writings of Frantisek Weyr, see his "Rechts Philosophie und Rechtswissenschaft" in Zeitschrift für öffentliches Recht 2 (1921) 671 - 82.

Kelsen, then, holds fast to the strict Kantian distinction between Is and Ought, dividing the sciences into causal and normative. He supplements Kant, however, in that he sets up alongside the epistemology which Kant gave to natural science, a normative epistemology.¹

In true Kantian manner, the Pure Theory of Law regulates both end and method of cognition according to the principles of critical philosophy. In particular, it transfers the Kantian view of the relation between nature and the science of nature to the consideration of law and the science of law. Just as in the case of nature, the confused manifold of sense impressions acquires the status of cognitive objects only by virtue of our imposing on it a significant unity, of our "making out of the chaos of consciousness a cosmos,"² so also the Pure Theory of Law construes the relation between law and the science of law. The fact that there is something called legal science or legal knowledge means only that there exists the tendency to consider the object law, which is composed of a multitude of legal elements as a unity or system, a cosmos out of chaos.³

The relativist attitude of Kelsen, who in much of his work consciously regards himself as Jellinek's continuator, may be glimpsed as early as the Hauptprobleme: "A demand for the reason of any concrete Ought can logically lead only to another Ought, just as the reason for an Is, any fact of existence, can only be another Is".⁴ The parallel

1. R W M Dias: Jurisprudence 5th ed Ch 16. In Kant's Critique of Practical Reason, normative meant postulating, setting up or creating norms, in the Pure Theory of Law the concept of normative science is confined to the activity of knowing norms. This guarantees the scientific character of the discipline. See further, I Stewart: "The Basic Norm as Fiction" in Jur Rev (1980) 199 - 224.
2. See Ernst Cassirer: Das Erkenntnisproblem in der Philosophie at 667.
3. H Kelsen in Veröffentlichungen der Vereinigung der deutschen Staatslehrer 4 (1928) 174. The most extensive exposition which Kelsen gives of the relation of law to legal science appears in his essay "Rechtswissen- und Recht" in Zeitschrift für öffentliches Recht 3 (1922-3) 103 - 235. See too Ernst Cassirer's classic work Substance and Function London, (1923) and Siegfried Marck Substanz- und Funktionsbegriff in der Rechtsphilosophie Tübingen, (1925) 1.
4. H Kelsen : Hauptprobleme (1911) at 8 and Pure Theory of Law (1967) 211 et seq; Dias op cit Ch 16; for a S African view, see D van der Merwe: "Hans Kelsen- Legal Positivism's Supreme Champion" 5 - 6 or A B Edwards: The Legal Nature of International Law - An Historico-Critical Analysis of Legal Positivist Thinking unpublished LLD thesis, Cape Town (1984).

there is conclusive. In both cases, the form of the demand, the form of the question is transcendent, pointing beyond the science itself to the sphere of metaphysics. Thus, normative propositions find themselves hierarchically arranged independently of further, higher, normative propositions.¹ If the regress is not to go on to infinity, there must be one such proposition, the last in the series, which can act as a basis for others, but which itself needs no foundation.² "For this reason, the final normative propositions are ... axiomatic, capable not of cognition but only of recognition", as Radbruch succinctly formulates it.

It is clear, then, that in the Pure Theory of Law, as seen above, the concepts "nature", "reality" and "Is" are employed in a single, unitary sense, just as their logical contradictories - "mind", "value" and Ought - are interchangeable. To the philosophically uncritical view it might appear that no system of norms including the law is a fit object for scientific investigation, since anything which, like the Ought in the Pure Theory of Law, can be brought into a direct opposition to existential reality, is non-existent, is nothing.

If, however, following critical transcendentalism, one looks at reality, existence, not in its unknowable, intrinsic nature, but as determined by the causal law (Is), that is, reduced to Kantian thought relationships, then it is no longer possible to refer to the norm as fictional in character, as non-existent. For the norm

1. See D Lloyd: Introduction to Jurisprudence (1985) 330 et seq; H Kelsen in his article: " What is the Pure Theory of Law" Israel L Rev 1 (1966) 1 - 7; Cf Julius Stone: " Mystery and Mystique in the Basic Norm" in MLR vol 26 (1963) 34 - 50; John Finch, Introduction to Legal Theory 3rd ed Sweet and Maxwell London 1979 Ch 5 97 - 120; M P Vorster: " Kelsen" (Ch 21) in Die Moderne Politische Theorie (ed A M Faure and D J Kriek) 427 - 455. H Kelsen: " On the Basis of Legal Validity" Am Jnl of Jurisprudence 26 (1981) 178 - 189.

2. This is the so-called Grundnorm (basic norm) also called by Kelsen the "Ursprungsnorm" (origin-norm) und "Verfassung im rechtslogischen Sinne" (constitution in the legal-logical sense). For a critical evaluation of this concept in its relation to the validity-efficacy criterion on the one hand and as a self-constituted juristic postulate on the other hand see Ch's 2 and 3 respectively.

3. Gustav Radbruch: Rechtsphilosophie 9.

4. This argument is possible too from the monistic standpoint, as Adolf Menzel shows: "Whatever does not belong to the world of the 'Is' is non-existent, is nothing", see Kelsens Allgemeine Staatslehre und Soziologie in Jahrbuch für Soziologie vol 2 (1921).

does "exist" as an object of scientific inquiry, though certainly not in the sense of the physical sciences. In the normative sphere, then, as mentioned above, existence connotes the validity of the norm.¹ Just as in the world of nature, the concept of existence has its logical contradictory in that of non-existence, so in the world of norms, the concept of validity has its counterpart of invalidity. In both cases, science asks Why, but in the former, the answer is a Causa, in the latter, a Lex, a norm. This parallel - reality, normativity: causality, validity - brings out clearly the anti-substantialism in the Pure Theory of Law. In the first case, the concept of nature is reduced from a concept of substance to a schema of order, to a thought relationship; in the second, the concept of normativity is taken out of its traditional frame of absolutism.²

From this reasoning it follows that reality can appear as directly contradictory to normativity only if it be understood as natural or physical reality. Thus, to use it in its widest sense as covering absolutely everything that is given would mean that law, too, as an object of knowledge, must be regarded as a reality. As Kelsen himself puts it: "One could then speak of the reality of the Ought".³ However, even under this wide meaning of the term, the Pure Theory of Law retains the contrast between Is and Ought for the reality of the law is different from the reality of nature. Moreover, since there is grave danger of confusion on the part of the philosophically uncritical, naive thinker, the Pure Theory of Law lays much stress, even on mere "didactic" grounds, on the strict terminology of normativity. From the point of view of scientific method, therefore, the Ought takes on a function of the first rank. In Kelsen's words, "it marks off its territory against the encroachments of natural reality, it promotes "purity".⁴ According to Kelsen, it performs this function in two ways:

1. Cf F Weyr: La Théorie normative 14. See too H Kelsen: "On the basis of legal validity" Am Jnl of Jurisprudence 26 (1981) 178 - 189; Denis S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristenzeitung 32 (1977) 169 - 172. See further Ch 2.

2. W Ebenstein: The Pure Theory of law (1945) 44 - 5. _

3. H Kelsen in Juristischer und soziologischer Staatsbegriff 76.

4. H Kelsen: Rechtswissenschaft und Recht 209.

First, it safeguards the proper character of the logical sphere against psychology; secondly, it safeguards that of the legal sphere against sociology, psychology and biology.¹

To take the second and more important demarcation first, it must be made clear at the outset that for the Pure Theory of Law, the world of reality and nature embrace physical and psychical, individual and sociological phenomena; common to them all is the category of causality. This concept of nature also includes the category of purpose, not purpose considered as the objectively valid norm, but purpose in Stammler's sense, which, as mentioned earlier, is merely a teleological form of causal relationship.² Some theorists stress this concept of nature very strongly "since it makes sociology and psychology into natural sciences".³

It is also important, at this stage, to make preliminary remarks about, and stress the significant relationship which exists between the norm, space and time. It is true that the norm as such, contrasted with the mind which posits it, is an intellectual content outside space and time, that its essence consists in its validity, not in any form of natural science. But since the norm and its content refer to actual human behaviour, time and space, which are modes of that behaviour, must figure in the content. This "must" is not a natural law

1. One of the foremost of Swiss Jurisprudes Walther Burckhardt, has written in the same vein in Methode und System des Rechts Zürich, (1936) 43: "As a normative science, jurisprudence is to be distinguished from biology, psychology and sociology". See further H Kelsen; "The Pure Theory of Law" in LQR 1 (1934) at 474 - 498; H Schambeck: "Möglichkeiten und Grenzen der Rechtslehre Kelsens" in Juristische Blätter vol 106 (1984) 126 - 134.

2. W Ebenstein: The Pure Theory of Law, Univ of Wisconsin Press, Madison (1945) at 44 - 5.

3. Kelsen's conception of life, too, is linked up with this causality of nature. Life is "a piece of causally regulated nature and therefore, subject-matter of biology and psychology; it is something wholly different from the timeless, spaceless, normatively regulated mind, which is a structure of meaning and significance." H Kelsen; Der Staat als Integration Vienna (1930) 23. This demarcation of law and nature stems from Husserl's peculiarly rigid, idealistic dualism of noesis and noema, of natural act and meaning, of psychical process and mental content - a dualism which is the product of the phenomenological philosophy expounded in his Logische Untersuchungen, (1923)

(Naturrecht) compelling the legislator to define in every norm the spatio-temporal limits of its validity. It simply means that the phrase "a norm is valid" implies that it is valid for some space-time or other, finite or infinite, since it refers to processes which are spatio-temporally conditioned.¹

Kelsen himself puts it thus:

"If we denied the norm a space-time content, if we denied that the norm was valid sometime and somewhere, in the sense that it established normative relations between spatio-temporal events, that is, 'declared' if here and now, something has occurred, then there and then something else shall occur, this would mean that the norm was never, nowhere valid, that is, not valid at all".²

Hence, the spatio-temporal sphere of validity of a norm is nothing else than its relation to the space and time which condition the behaviour it has to regulate. Thus, the norm (Ought) can refer only to a particular time and space, that is, it can be valid only for processes which have their existence in a particular time and space.³ Without such spatio-temporal limitation of its validity, "there would be the implication that a legal order, in all its parts, claimed unlimited spatio-temporal validity".⁴ This would not mean that such a validity is spaceless and timeless, it would mean only that its validity is restricted to no particular time and space.⁵

It should be briefly noted here too that the extent of a norm's validity can be limited, not only as regards space and time, but also in other ways. Many norms regulate only certain subject-matters, many relate only to persons, but in every case, the character of the norm as an intellectual content remains unaffected. Thus, the

1. Cf H W M Dias: Jurisprudence 5th ed Ch 18; H Kelsen: "On the Basis of Legal Validity" in Am Jnl of Jurisprudence vol 26, (1981) 178 - 189 (transl by S Paulson). For an elaboration of this point, see Ch's 2,3. Dias, too, speaks of the "temporal and spatial spheres of validity of a norm". op cit Ch 16

2. H Kelsen: Allgemeine Staatslehre (1925) at 137.

3. W Eberstein: The Pure Theory of Law, Univ of Wisconsin Press, Madison (1945) at 49 - 50

4. See Adolf Merkel: Allgemeines Verwaltungsrecht Vienna (1927) 208.

5. Eberstein op cit at 49 - 50

terms "material" or "personal" are simply a truncated way of saying that the norm, which as intellectual content is spaceless and timeless, refers to certain personal or material processes which are causally, spatio-temporally conditioned. From the above, it is clear that the Is-Ought distinction of the Pure Theory of Law becomes substantially less rigid with the inclusion of time and space as well as the modes of existence (Is) in a normative enquiry.¹ It is precisely here where the all-important efficacy-validity sub-category assumes great significance² for it illustrates quite vividly the "necessary" and "conditional" relation which exists between the world of Is (efficacy) and the world of Ought (validity). This relation is one of the most intricate and problematic areas of the Pure Theory of Law and will be dealt with and evaluated in extenso in the ensuing Chapters of this work. Before moving on to Chapter Two then, where a more detailed evaluation of this criterion is commenced, it might be apposite here to make a few brief, preliminary remarks of a philosophical nature in order to place the matter in a categorical perspective.

The law, it has been said with good reason, has its genesis in the sphere of social existence, but in order to know whether it is law that has so arisen, one must first of all know what the law is.³ In view of this, the attitude of the writer Verdross is of considerable interest.⁴ With regard to the present problem, Verdross begins by analysing the validity of the law. Within the positive law, the only problem is one of normative validity, since the dependence of a lower norm upon a higher is a question of that validity. The validity of the constitution, however, is a different matter. The constitution, as the highest positive stage of law, or as the positive legal order as a whole, has a double validity: its validity can be either delegated validity -

1. W Ebenstein: The Pure Theory of Law, Univ of Wisconsin Press, Madison (1945) at 49 - 50. This problem is of especial importance in regard to the triangular relation which exists between the validity-efficacy criterion and the Grundnorm. Cf Ch's 2 and 3 for elaboration of this point.

2. See Ch 2 for an important theoretical evaluation of this criterion. Cf W Ebenstein: "The Pure Theory of Law - demythologizing legal thought" Calif L Rev (1971) at 617 - 52.

3. Ebenstein op cit 53 - 4.

4. A Verdross: "Règles générales de droit international de la paix" in Recueil des cours de l'Académie de Droit International vol 30 (1929) at 277.

from a higher, supra-positive (natural law) order - or it can be its efficacy.¹ In the former case, to use the philosophical terms, the question is one of axiology (Ought); in the second, one of sociology (Is). Verdross puts it thus: "Its head towers up into the world of value, from which alone it can derive its normative validity, its feet are planted on the firm, sociological ground of actual human behaviour."² Both approaches are very important but it has been suggested that to deal with them effectively, requires different methods. The positive law, then, is inescapably caught between the two poles of axiology and sociology.

This view is closely approached by that of the Spanish legal philosopher Recasens Siches:

"There exists certainly a radical distinction between legal philosophy and sociology so far as subject and method are concerned. Legal Philosophy considers norms, sociology considers social acts. Further, legal philosophy, in one of its most characteristic modes is judicial and evaluative. Sociology, on the other hand, studies social facts in their reality, i.e. neither evaluating them, nor relating them to a norm, but simply in their effective operation".³

In its struggle to exclude sociological ideas from legal science the Pure Theory of Law attempts also to exclude the teleological point of view. In its view there is no distinction between causality and teleology, between causal and teleological methods, but rather a close connection for the two points of view are explicative by nature and contribute, therefore, to a knowledge of the existential world. On this ground alone, it is apparent that there must be opposition or "tension"⁴ between the teleological and normative methods

1. See Ch 2 for an elaboration on this crucial concept.

2. A Verdross: "Die allgemeine Rechtsgrundsätze als Völkerrechtsquelle" in Kelsen Festschrift, at 357.

3. Los temas de la filosofía del derecho at 111.

4. For an examination of the "tension" theory, see Ch 2.

since the latter aims not to explain the existential world, but to establish what ought to happen. For Kelsen, modern sociology has accomplished a revolutionary change -over from cultural to physical science since it has become a psychology operated on causal lines. As he puts it: "Law, as a psycho-physical act motivated by, and motivating other acts, is force - the power of the law - and as such it is the subject of social sociology or psychology".

From the foregoing analysis, it is clear that the original Is - Ought dichotomy can be particularized into a number of special sub-categories derived therefrom. These "special cases" of Is - Ought were examined in their philosophical significations. Against this conceptual background, the sub-category efficacy - validity may now be considered more specifically. This must involve, firstly, an examination of this criterion from an essentially theoretical perspective. This is more properly attempted in Chapter Two.

1. See Raine Rechtslehre (1934) at 127. Contained in the above excerpt is the power-law dichotomy which is yet another special instance of Is and Ought. This crucial sub-category is of especial significance in practical revolutionary situations where in some cases the argument has been to apply this dualism in measuring legality by effectiveness i.e. effectiveness ipso facto confers legality. See especially Ch's 4,5,6,7 for an evaluation of this much-disputed criterion.

CHAPTER 2

INTRODUCTION

The principal aim of this Chapter will be to evaluate more fully Kelsen's efficacy-validity criterion from an essentially theoretical¹ vantage point. The logical connections existing between this criterion and Kelsen's much-debated Grundnorm (basic norm) conception will also be considered in so far as they supplement the essentially theoretical inquiries in this Chapter by promoting a more profound understanding of this problematic criterion. A full, critical evaluation of Kelsen's Grundnorm postulate must, however, form the subject of a separate Chapter. To do full justice to Kelsen's Grundnorm, therefore, this task will be more properly pursued in Chapter Three.

NORMATIVE AND SOCIOLOGICAL JURISPRUDENCE

A good vantage point for the theoretical consideration of Kelsen's efficacy-validity criterion is to refer to normative and sociological jurisprudence. Positive law, which is the object of the Pure Theory of Law, is an order by which human conduct is regulated in a specific way. The regulation is accomplished by provisions which set forth how men ought to behave. Such provisions are called norms and either arise through custom (as do the norms of the common law) or are enacted by conscious acts of certain organs aiming to create law, as a legislature acting in its law-making capacity.²

Legal norms may be general or individual in character. They may regulate beforehand, in an abstract way, an undetermined number of cases as does the norm that if anyone steals, he is to be punished by a court; or they may relate to a single case, as does a judicial decision which decrees that A is to suffer imprisonment for 6 months because he stole a horse from B. In Kelsenian jurisprudence the law is perceived as a system of general

1. For an application of this criterion in its practical import as evidenced in its judicial employment in revolutionary situations see especially Ch's 4, 5, and 6.

2. H Kelsen: "The Pure Theory of Law and Analytical Jurisprudence" in Harv L Rev 55 (1941) at 44-6.

and individual norms. Facts are considered in this jurisprudence only to the extent that they form the content of legal norms. Only norms, therefore, viz. provisions as to how individuals should behave, are objects of jurisprudence, never the actual behaviour of individuals.¹

If we say that a norm "exists", we mean that a norm is valid. Norms are valid for those whose conduct they regulate. To say that a norm is valid for an individual means that the individual ought to conduct himself as the norm prescribes. It must be stressed, however, that this does not mean that the individual necessarily behaves so that his conduct actually corresponds to the norm. The latter relationship is expressed by saying that the norm is efficacious² (or effective). Thus, validity and efficacy are two completely distinct qualities, yet there is a certain connection between the two.³ Kelsenian jurisprudence regards a legal norm as valid only if it belongs to a legal order that is by and large efficacious; that is, if the individuals whose conduct is regulated by the legal order in the main actually do conduct themselves as they should according to the legal order. If a legal order loses its efficacy for any reason, then Kelsen regards its norms as no longer valid. Still, the distinction between validity and efficacy is a "necessary" one for it is possible that in a legal order which is, on the whole, efficacious, and hence regarded as valid, a single legal norm may be valid but not efficacious in a concrete instance because, as a matter of fact, it was not obeyed or applied, although it ought to have been. Thus, Kelsenian jurisprudence perceives law as a system of valid norms or Ought

1. H Kelsen: "The Pure Theory of Law and Analytical Jurisprudence" in Harv L Rev 55 (1941) at 50 - 1; See further R W M Dias: Jurisprudence 5th ed. Ch 16; C H Wilson: "The Basis of Kelsen's Theory of Law", Politica (1934) 54.

2. The present writer regards the concepts "efficacious" and "effective" as synonymous and thus uses them interchangeably throughout this work.

3. Although the present writer is in full accord with Kelsen on the distinction to be drawn between efficacy and validity, he believes that Kelsen's concession of a "minimum of effectiveness" representing the "necessary" connection between efficacy and validity is inadequate Cf Dias op cit Ch 16.

4. See further Ch 4.

propositions. It cannot dispense with the concept of validity as a different concept from that of efficacy if it wishes to present the specific sense of Ought, in which the norms of the law apply to the individuals whose conduct they regulate. It is this Ought which is expressed in the concept of validity, as distinguished from efficacy.¹

If jurisprudence is to present law as a system of valid norms, the proposition by which it describes its object must be Ought propositions, statements in which an Ought, not an Is, is expressed.² It is significant to note, however, that the propositions of jurisprudence are not themselves norms. They establish neither duties nor rights. Norms by which individuals are obligated and empowered issue only from the law-creating authority. The jurist, as the theoretical exponent of the law, presents these norms in propositions that have a purely descriptive sense, statements which only describe the Ought of the legal norm. It is according to Kelsen of the greatest importance to distinguish between legal norms which comprise the object of jurisprudence and the statements of jurisprudence describing that object.³ Thus, natural science describes its object (nature) in Is propositions; jurisprudence describes its object (law), in Ought propositions. In view of the specific sense of the propositions in which Kelsenian jurisprudence describes its object, it can be called a normative theory of the law.⁴

Kelsen himself maintains that this sort of jurisprudence must be clearly distinguished from another which can be called sociological. The latter attempts to describe the phenomena of law not in propositions that state

1. H Kelsen: "The Pure Theory of Law and Analytical Jurisprudence" in Harv L Rev 55 (1941) at 51 - 2; Cf R Stranzinger: "Der Begriff der Norm bei Hans Kelsen" in Archiv für Rechts- und Sozialphilosophie 63 (1977) 399 - 412; J Kühne: "Norm und Wirklichkeit" Schönherr collection 427 - 37; Denis S K Ong: "Der Normbegriff bei Hans Kelsen", in 32 Österreichische Juristen- Zeitung (1977) 169 - 172.

2. Cf RWM Dias: Jurisprudence, 5th ed Ch 16, and O Weinberger: "Is" and "Ought" reconsidered in Archiv für Rechts- und Sozialphilosophie vol 70 (1984) 464 - 474

3. Kelsen op cit at 51

4. Ibid 52 - 3.

how men should behave under certain circumstances, but in propositions that tell how they actually do behave - just as physics describes how certain natural objects behave.¹ Thus, the object of sociological jurisprudence is not legal norms in their specific meaning of Ought - statements, but the legal (or illegal) behaviour of men. It is supposed possible by observation of actual social happenings to achieve a system of rules by means of which this behaviour, characterized as "law", can be described. Those rules are supposed to be of the same sort as the laws of nature, hence, like them, to afford the means for predicting future happenings within the legal community, future conduct to be characterized as law.²

Significantly, Kelsen stresses the fact that the Pure Theory of Law by no means denies the validity of such sociological jurisprudence, but it declines to see in it, as many of its exponents do, the only science of law. Sociological jurisprudence, therefore, stands side by side with normative jurisprudence and neither can replace the other because each deals with completely different problems.³ It is on this account that the Pure Theory of Law insists upon clearly distinguishing them from each other, in Kelsen's words to "avoid that syncretism of method which is the cause of numerous errors."⁴ Thus, what must be avoided under all circumstances is the confounding - as frequent as it is misleading - of cognition directed towards a legal Ought, with cognition directed toward an actual Is.⁵

1. Cf R W M Dias: Jurisprudence, 5th ed Ch 16; See further R Schreiber: Die Geltung von Rechtsnormen, Berlin, Heidelberg, New York, (1968); H Schambeck: "Möglichkeiten und Grenzen der Rechtslehre Kelsens" in Juristische Blätter vol 106 (1984) 126 - 134.

2. H Kelsen: "The Pure Theory of Law and Analytical Jurisprudence" in Harv L Rev 55 (1937) at 52 - 3.

3. H Kelsen: Pure Theory of Law (1967) (transl M Knight) Cf General Theory of Law and State (1945) (transl A Wedberg)

4. Kelsen op cit 53 - 3.

5. Ibid.

Normative jurisprudence, then, deals with the validity of the law¹ while sociological jurisprudence deals with its efficacy. But, just as validity and efficacy are two different aspects of the law, which must be kept clearly apart, they do stand in a definite relation to each other. In much the same way there exists between normative and sociological jurisprudence a considerable connection, despite the difference in the direction of their cognitions. The sociology of law cannot draw a line between its subject - law - and the other social phenomena, it cannot define its special object as distinct from the object of general sociology - society - without in so doing presupposing the concept of law as defined by normative jurisprudence.² Kelsen maintains that the question as to what human behaviour, as law, can form the object of sociology, of how the actual behaviour of men to be characterized as law is distinguishable from other conduct, can probably be answered as follows: "Law" in the sociological sense is actual behaviour that is stipulated in a legal norm - in the sense of normative jurisprudence - as condition or consequence. The sociologist regards this behaviour not - as does the jurist - as the content of a norm, but as a phenomenon existing in natural reality, that is, in a causal nexus. The sociologist, therefore, seeks its causes and effects.³ The legal norm, as the expression of an Ought, is not for him, as for the jurist, the object of his cognition; for the sociologist, it is a principle of selection. The function of the legal norm for the sociology of law is to designate its own particular object and lift it out of the whole of social events. To this extent, then, sociological jurisprudence presupposes normative jurisprudence. It is a complement of normative jurisprudence.⁴

1. Cf W Eberstein: "The Pure Theory of Law: Demythologizing Legal Thought" in Calif L Rev Berkeley (1971) 617 -52, But see Denis S K Ong: "Der Begriff der Norm bei Hans Kelsen" (in 32 Österreichische Juristen-Zeitung (1977) 169 - 172 for a different viewpoint on the matter; See generally R Schreiber: Die Geltung von Rechtsnormen Berlin, Heidelberg (1966).

2. H Kelsen: "The Pure Theory of Law and Analytical Jurisprudence" in Harv L Rev 55 (1941) 44 - 70.

3. Ibid.

4. By analogy, efficacy presupposes validity.

To the extent that sociology of law attempts to describe and as far as possible to predict¹ the activity of the law-creating and law-applying organs, especially of the courts, its results cannot be very different from those of normative jurisprudence. While the latter determines how the courts should decide in accordance with the legal norms in force, the former determines how they do and, presumably, will decide. But, as Kelsen points out, since normative jurisprudence perceives legal norms as valid only if they belong to a legal order which is generally efficacious, that is, actually obeyed and applied, no great difference can exist between the actual and lawful conduct of law-applying organs.² As long as the legal order is on the whole efficacious, there is the greatest probability that the courts will actually decide as - in the view of normative jurisprudence - they should, or ought to decide. However, the activities of the law-creating organs, especially of the legislative organs that are not bound by legal norms in force or are bound only to a very slight extent, cannot be predicted with any degree of probability.³ Thus, the predictability of legal functioning by sociological jurisprudence is directly proportional to the extent to which that functioning has been described by normative jurisprudence.

According to Kelsen, then, whether the prediction of future occurrences is an essential task of natural science and hence, by analogy, one of sociology, is questionable. However, Kelsen does recognize that the sociology of law has other more promising problems. It not only has to describe and, if possible, predict efficacy, viz. the actual conduct of the individuals who create, apply and obey the law; it must also explain it causally.

1. The text above furnishes a theoretical exposition of the rule of prediction in sociological jurisprudence. This concept of prediction, however, also has significant practical ramifications, especially in regard to predicting the efficacy of a revolutionary regime. See Ch's 4 and 7 for elaboration on this point.
Cf C Palley: "The Judicial Process: D D I and the Southern Rhodesian Judiciary" in M L R Vol 30 (1967) 263 - 287.

2. H Kelsen: "The Pure Theory of Law and Analytical Jurisprudence" in Harv L Rev 55 (1941) 44-70 at 54-5.

3. Ibid.

In order to fulfil this task, it must investigate the ideologies by which men are influenced in their law-creating and law-applying activities. Among these ideologies, the idea of Justice plays a decisive rôle. In Kelsen's words: "The ideologico-critical analysis of this idea is one of the most important and promising tasks of a sociology of law". Bearing the foregoing relation between normative and sociological jurisprudence in mind, it is now essential to consider the efficacy-validity criterion in detail.

² VALIDITY AND EFFECTIVENESS³

This is undoubtedly one of the most problematic elements of the Pure Theory of Law. It is essential at the outset to clarify the difference between the validity and the efficacy of the law. Kelsen maintains that validity of the law means that the legal norms are binding, that men ought to behave as the legal norms prescribe, that men ought to obey and apply the legal norms. Efficacy of law means that men actually behave as according to the legal norms they ought to behave, that the norms are actually applied and obeyed. The validity is a quality of law, the so-called efficacy is a quality of the actual behaviour of men and not, as

1. H Kelsen: "The Pure Theory of Law and Analytical Jurisprudence" in Harv L Rev 55 (1941) at 68.
2. The word "Geltung" in Kelsen's native German, is, it would seem, the only word sufficiently approximate to the English designation "validity". C H Wilson, the translator of Kelsen's article, "The Pure Theory of Law" in LQR 474 - 98 maintains that although the German word "Geltung", as also the English "validity", has always an element of the meaning "value", it cannot be rendered simply as value. Moreover, this would not fit into Kelsen's theory where the word has such meanings as "Verbindlichkeit" (binding character) and "Geltung für" (Validity for). Furthermore, the German equivalent of the English "value" is "Wert". Sed contra the view of H Keller in his work "Droit Naturel et droit positif en Droit International Public", p 57 who translates the word as "valeur" instead of "validité". However, it is suggested, that the meaning of "Geltung" is nearer that of "Gültigkeit", rather than that of "Wert". See in this regard R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts- und Sozialphilosophie 63 (1977) 399 - 412. For an examination of the various meanings of "Geltung" in Kelsen, see H Stockhammer: "Begriff und Bedeutung der Rechtspositivität" in Zeitschrift für Öffentliches Recht, 1928 - 9, at 584 - 6.
3. This term is, fortunately, less controversial than "Geltung" and is rendered in German by the straightforward "Effektivität", or, alternatively, "Wirksamkeit". Cf D S K Ong: "Der Begriff der Norm bei Hans Kelsen", in Österreichische Juristenzeitung 32. (1977) 109 - 72.
4. H Kelsen: General Theory of Law and State (engl transl A Wedberg), Russel and Russel, N Y (1945) at 40-1.

linguistic usage seem to suggest, of law itself. The statement that law is effective means only that the actual behaviour of men conforms with the legal norms. Therefore, validity and efficacy refer, in Kelsen's words, "to quite different phenomena".

However, while it is true that validity and efficacy are two distinct statements, two entirely different concepts, there is nevertheless a very important relation between the two. Thus, a norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious.² It is important to stress, however, that efficacy is a condition of validity, not the reason of validity. A norm is not valid because it is efficacious; it is valid if the order to which it belongs is, on the whole, efficacious. Kelsen qualifies this, however, by saying that this relation between validity and efficacy is cognizable only from the point of view of a dynamic (as opposed to static) theory of law.³ From the point of view of a static theory of law it is only the validity of the law which is in question.⁴

The common parlance, implying that validity and efficacy are both attributes of law, is misleading, even if by efficacy of law is meant that the idea of law furnishes a motive for lawful conduct. Rather, law, as valid norm, finds its expression in the statement that men ought to behave in a certain manner, thus in a statement which does not tell us anything about actual events. The efficacy of law, understood in the last-mentioned way, consists in the fact that men are led to observe conduct required by a norm by their idea of this norm. Thus, a statement concerning the efficacy of law so understood, is a statement about actual behaviour. Kelsen

1. H Kelsen: General Theory of Law and State. Russel and Russel, N Y (1945) 118. See later this Chapter for a critical evaluation of this point.

2. See later this chapter for a criticism of Kelsen's vague and uncertain use of qualifying words for the term "efficacy" viz. "on the whole" and "by and large". Cf J W Harris : "When and why does the Grundnorm change" CLJ (1968) 103 - 133, for the practical implications of this vagueness in revolutionary situations. See further Ch 4.

3. See later this Chapter for an examination of what a dynamic theory of law entails. Cf J W Harris: Legal Philosophies (Butterworth Publishers London (1980) Ch 6.

4. Cf Kelsen op cit at 118 et seq.

maintains that to designate both the valid norm and the idea of the norm, which is a psychological fact, by the same word "norm" "is to commit an equivocation which may give rise to grave fallacies".¹ However, Kelsen does emphasize the point that we are not to say anything, nor are we in a position to say anything with exactitude about the motivating power which men's idea of law might possess. Objectively, then, we can only ascertain that the behaviour of men conforms or does not conform with the legal norms. The only connotation which Kelsen attaches to the term "efficacy" of law in his major work General Theory of Law and State² is that the actual behaviour of men conforms to the legal norms.

Kelsen clearly is at pains to stress the significant connection which exists between the validity and the effectiveness of law, so crucial for a theory of positive law. Significantly, he continues to emphasize this important connection in his subsequently published, other major work The Pure Theory of Law³ in which he concedes that this relationship is one of the most problematic of positivistic legal theory.⁴ Thus, it is only a "special case" of the relation between the Ought of the legal norm and the Is of natural reality.⁵ Kelsen here makes the significant point that the act by which a positive legal norm is created, is also an "Is-fact" (German: Seinsatsache) just like the effectiveness of the legal norm.

A positivistic legal theory, then, is faced by the task to find a via media, a middle ground between two

1. H Kelsen: General Theory of Law and State, (1945) 40 - 1. But Cf H Schanbeck: "Möglichkeiten und Grenzen der Rechtslehre Kelsens" in Juristische Blätter vol 106 (1984) 126 - 34. See further P Soper: A Theory of Law Harv Univ Press, Cambridge Mass. (1984)

2. English translation by Dr A Wedberg (1945) Russel and Russel N Y.

3. Engl transl by M Knight (1967); University of Calif Press, Berkeley, (1970) for a more critical evaluation of Kelsen's views as expressed in his Pure Theory of Law, see later this Chapter and especially Ch 4 for its practical implication.

4. For a critical evaluation of these problem areas, see later this Ch 1 and Ch 4. Cf J W Harris "When and Why does the Grundnorm Change" C L J (1968) 103 - 133.

5. See Ch 1.

extremes, both of which are manifestly untenable. The first extreme is contained in the thesis that there is no connection between validity as something that "ought" to be and effectiveness as something that "is", that is to say, the validity of the law is entirely independent of its effectiveness. The other extreme is the thesis that validity and effectiveness are identical. While an idealistic theory of law would tend to the first solution of this problem, a realistic theory would tend to the second.¹ Kelsen argues that both these theories are misplaced.²

Kelsen maintains that the first is wrong for it is undeniable that a legal order in its entirety, and an individual legal norm as well, lose their validity when they cease to be effective.³ He adds that a relation exists between the Ought of the legal norm and the Is of physical reality also in so far as the positive legal norm, to be valid, must be created by an act which exists in the reality of being.⁴ The second solution, too, is wrong, since it is equally undeniable that there are many cases in which legal norms are regarded as valid, although they are not, or not yet, effective.⁵ Kelsen then proposes the following solution in his Pure Theory of Law:⁶ just as the norm (according to which something ought to be) as the meaning of an act, is not identical with the act (which actually is) in the same way is the validity of a legal norm not identical with its effectiveness. The effectiveness of a legal order as a whole and the effectiveness of a single norm are

1. This is the so-called "Tension Theory" which will be further elaborated upon later in this Chapter. Cf W Ebenstein: "The Pure Theory of Law - Demythologizing Legal Thought" in Essays in Honour of H Kelsen, Calif L Rev Berkeley (1971) 617 - 652.

2. Cf H Kelsen: Pure Theory of Law (1967) at 11, 87 et seq. Kelsen, as can be seen, adopts a compromise solution between these two extremes, which, it is suggested, is preferable.

3. Ibid. See further R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts- und Sozialphilosophie 63 (1977) 399 - 412.

4. Cf Kelsen op cit 87 et seq.

5. Ibid.

6. It will be seen later in this work, what difficulties Kelsen's validity-efficacy criterion has given rise to in revolutionary situations. See Ch's 4, 5 and especially Ch 6.

(just as the norm - creating act) the condition for the validity; effectiveness is the condition in the sense that a legal order as a whole, and a single legal norm can no longer be regarded as valid when they cease to be effective. Nor is the effectiveness of a legal order, any more than the fact of its creation, the reason for its validity.¹ The reason for the validity, that is, the answer to the question why the norms of the legal order ought to be obeyed and applied is the presupposed basic norm² according to which one ought to comply with an actually established, by and large effective constitution, therefore with the by and large effective norms actually created in conformity with that constitution.³

In the basic norm (Grundnorm) the fact of creation and the effectiveness are made the condition of the validity - "effectiveness" in the sense that it has to be added to the fact of creation, so that neither the legal order as a whole, nor the individual legal norms shall lose their validity. It is crucial to stress here that a condition cannot be identical with that which it conditions.⁴ Thus, in the normative syllogism leading to the foundation of the validity of a legal order, the major premise is the Ought-sentence which states the basic norm: "One ought to behave according to the actually established and effective constitution"; the minor premise is the Is-sentence which states the facts: "The constitution is actually established and effective", and the conclusion is the Ought-sentence: "One ought to behave according to the legal order, that is, the legal order is valid".⁵ On the lines of this syllogistic reasoning, Kelsen argues that the norms of a positive

1. Cf H Kelsen: Pure Theory of Law, (1967) 87 et seq. See further G Hughes: "Validity and the Basic Norm" in Essays in Honour of H Kelsen, Calif L Rev Berkeley (1971) 695 - 714.

2. For an exhaustive examination and a critical evaluation of this all-important concept, see especially Ch's 3 and 4. In these two Chapters, the Grundnorm concept will be considered at rest and in change respectively.

3. For an examination of the connection between "constitution" and Grundnorm, as well as the different senses in which this term is employed by Kelsen, See Ch 3.

4. In his Pure Theory of Law, Kelsen gives the following e.g.: "A man, in order to live, must have been born, but in order that he remain alive, other conditions must also be fulfilled e.g. he must receive nutrition. If this condition is not fulfilled, he will lose his life. But life is neither identical with birth, nor with being nourished". at 87 et seq.

5. *ibid.*

legal order are valid because the fundamental rule regulating their creation, i.e. the basic norm, is presupposed to be valid, not because they are effective, but because they are valid¹ only as long as this legal order is effective.² Therefore, as soon as the constitution loses its effectiveness, that is, as soon as the legal order as a whole based on the constitution, loses its effectiveness, the legal order and every single norm lose their validity.

However, it must be emphasized at this stage that a legal order does not lose its validity when a single legal norm loses its effectiveness.³ Kelsen regards a legal order as valid if its norms are by and large effective (i.e. actually applied and obeyed). Nor does a single legal norm lose its validity if it is only exceptionally ineffective in single cases. Clearly, then, the possibility of an antagonism⁴ between that which is prescribed by a norm as something that ought to be and that which actually happens, must exist. For this reason a norm prescribing that something ought to be, which, as one knows beforehand must happen anyway, according to a law of nature, is meaningless; such a norm would not be regarded as valid. Contrariwise, a norm is not regarded as valid, which is never obeyed or applied. As a consequence of this, a legal norm may well lose its validity by never being applied or obeyed - according to what is known as the principle of Desuetudo (Desuetude).⁵

Desuetudo may be described, in Kelsen's words, as "negative custom". Its essential function is to abolish the validity of an existing norm. If custom is a law-creating fact at all, then even the validity of statutory law

1. H Kelsen: Pure Theory of Law, (1967) 98. But Cf G Hughes : " Validity and the Basic Norm" in Essays in Honor of H Kelsen, (1971) who argues one must differentiate between the "presupposition of the validity of the basic norm and the presupposition of the basic norm as valid", at 701 - 8.

2. Pure Theory of Law 213 et seq. For a critique, see later this Chapter.

3. For an important critique of this view, cf D Lloyd : Introduction to Jurisprudence, 5th ed (1985) 330. See further Ch 4.

4. This antagonism may also be rendered as the "tension" that must, of necessity, exist between the interpenetrating realms of efficacy and validity. See later this Chapter.

5. See in this regard the important Article by S Guest: "Two Problems in Kelsen's Theory of Validity" in Liverpool L Rev (1980) 101 et seq.

can be abolished by customary law. However, if effectiveness, in the developed sense, is the condition for the validity not only of the legal order as a whole, but also of a single legal norm, then the law-creating function of custom cannot be excluded by statutory law, at least not as far as the negative function of desuetude is concerned.¹ Though the described relation between validity and effectiveness refers to general legal norms, Kelsen makes the crucial point that also individual legal norms,² as for instance, judicial decisions and administrative decrees that prescribe an individual coercive act, lose their validity if they are permanently unexecuted and therefore ineffective.³

From the foregoing exposition it can be deduced that effectiveness is a condition for validity - but it is not validity. It is important to stress this, since, one may frequently be tempted to identify validity with effectiveness, to regard them as synonymous.⁴ Kelsen himself concedes that such an identification is very inviting as it tends to simplify the theoretical situation. According to him, such an effort must, of necessity, prove abortive. This is partially due to the fact that even a partly ineffective legal order or legal norm may be regarded as valid and an absolutely effective norm which cannot be violated, as invalid, because it is not regarded as a norm at all. Furthermore, if the validity, i.e. the specific existence of the law, is considered to be part of natural reality, one is unable to grasp the specific meaning in which the law addresses itself to reality and thereby juxtaposes itself to reality which can be in conformity or in conflict

1. Sed contra S Guest: "Two Problems in Kelsen's Theory of Validity" in Liverpool L Rev (1980) 101; See further Carlos S Nino: "Some Confusions Around Kelsen's Concept of Validity" in Archiv für Rechts- und Sozialphilosophie (1978) 357; See generally R Schreiber: Die Geltung von Rechtsnormen, Berlin, Heidelberg, N Y (1986).

2. H Kelsen: Pure Theory of Law (1967) 213 et seq.

3. *ibid* 214. See too p 207 where this has been shown in the discussion of a conflict between two legal decisions.

4. See in this regard Oscar Morineau: "The Individual Norm" in Inter-American L Rev 5 (1963) 31 - 59. Cf H Schambeck: "Möglichkeiten und Grenzen der Rechtslehre Kelsens" in Juristische Blätter vol 106 (1984) 128-134.

with the law only if reality is not identical with the validity of the law.¹ Just as it is impossible, in determining validity, to ignore its relation to reality, so it is likewise impossible to identify validity and reality. Kelsen argues the following in this regard:

"If we replace the concept of reality (as effectiveness of the legal order) by the concept of power, then the problem of the relation between validity and effectiveness of the legal order coincides with the more familiar problem of the relation between law and power or right and might".²

Significantly, Kelsen qualifies this relation thus:

"The solution attempted here is merely the scientifically exact formulation of the old truism that right cannot exist without might and yet is not identical with might. Thus, right (the law) according to the theory here developed, is a certain order (or organization) of might".³

The element of coercion in law does not consist, says Kelsen, in any form of "psychic compulsion", but in the fact that acts of coercion or sanctions are provided for by the legal order.⁴ Therefore, physical coercion is relevant to legal validity only in so far as the stipulation involving it forms part of the content of the legal norm. Legal rules are thus rules which provide for sanctions. Moreover, the quality of legal validity is not affected by the state of mind of any individual who is subject to the operation of the norm. It is in this sense that Kelsen refers to the efficacy of the law.⁵

1. H Kelsen: Pure Theory of Law, (1967) at 213. Cf W. Ebenstein: "The Pure Theory of Law: Demystologizing Legal Thought", in Calif L Rev Berkeley (1971) 817 - 852. See the same author in his book The Pure Theory of Law University of Wisconsin Press, Madison (1945) Ch 5. Cf Denis S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Osterreichische Juristen-Zeitung 32 (1977) 169 - 172.

2. Several writers have criticized this relation e.g. J W Harris: Legal Philosophies Butterworths Publishers Ltd London, (1980) Ch 6. See too A Ojo: "The Search for a Grundnorm in Nigeria" I C L Q 20 (1971) 117 - 136.

3. Kelsen op cit at 214 - 218. It is suggested, with respect, that the relation is not so much one of right is right but rather might conditions right, in much the same way as efficacy conditions validity. This relation has crucial practical implications in the revolution cases. In this regard, see Ch's 4, 5, 6.

4. H Kelsen: "On the Pure Theory of Law" in Israel L Rev 1 (1966) 1 - 7.

5. Pure Theory of Law at 213 et seq.

Whether or not people actually behave in such a way as to avoid the application of the sanction which is stipulated by the legal norm, is a matter which is relevant to the effectiveness of law, and, to a lesser extent, legal policy, in securing its objectives.¹ Whether or not the sanction is actually carried out by the legal officials when the necessary conditions for its application are present, relates to the practical operation and efficacy of law. It relates to enforcement and compliance, but not to validity of the law in question.²

At this stage, it might be useful to make reference to the views of the Scandinavian jurist Olivecrona,³ in order to place Kelsen's argument in some kind of perspective. It is significant to note here that Olivecrona, along with other well-known Scandinavian jurists, denies the necessity of adopting the type of normative approach to legal analysis which underlies the whole of Kelsen's juristic method. His fundamental disagreement with Kelsen's legal analysis may seem surprising when viewed in the light of one of his principal contentions.⁴ "Law", he says "consists chiefly of rules about force". Thus, the essential element of regulated force is present in the analyses of both jurists. However, it is in the method by which this regulated force is interpreted by Kelsen and Olivecrona respectively, that a notable difference of opinion between them is to be found. Olivecrona maintains that the prescriptive character of law can be represented in exactly the same

1. H Kelsen: Pure Theory of Law (1967) 213 et seq. Cf W Eberstein: "The Pure Theory of Law - Demythologizing Legal Thoughts" in Calif L Rev, Berkeley, (1971) 617 - 652.

2. Ibid. Cf John D Finch: Introduction to Legal Theory 3rd ed Sweet and Maxwell, London. (1979) Ch 5 at 97 - 120.

3. Law as Fact Einar Munksgaard, Copenhagen (1939) Ch iv at 127. For Olivecrona "law is nothing but a set of social facts". See too the second ed. of this book Stevens, (1971) which, though an altogether fresh work, is based on the same philosophy.

4. Ibid. Ch iv at 134; Cf Finch op cit at 97 - 110

way as any other social phenomenon, in terms of facts and by means of a description of the causal relationship between one fact or set of facts and another. Questions as to the validity of law arise from the problem of what is often called the "binding force" of law.¹ Kelsen's analysis, on the other hand, rests firmly on a separation between law and fact, and between the validity of law and its practical effectiveness.² Kelsen, then, insists on a separation between those different features which are related to each other in complex ways but which are not to be identified with each other.³

From the foregoing it can be deduced that the absolute purity of any theory of law is impossible.⁴ Thus, it has been suggested that the "minimum of effectiveness" which, according to Kelsen, exists as the content of the Ought is in the final analysis nothing else but Jellinek's "Normative Kraft des Faktischen".⁵ although the formula chosen by Kelsen is rather more nebulous. Here it can be asked: How can the minimum of effectiveness be proved except by an inquiry into political and sociological facts? This, it would seem, implies the necessity of a further political choice: Does the obedience of the majority, of an enlightened minority, or sheer physical force decide? Whatever the answer, purity here ceases.⁶

In his main work General Theory of Law and State Kelsen says the following (at 119):

"It cannot be maintained that legally, men have to behave in conformity with a certain norm if the total legal order of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness".⁷

1. H Kelsen: Pure Theory of Law (1967) at 220 et seq. See too H Kelsen; "What is the Pure Theory of Law?" in Tul L Rev 34 (1960) at 269 - 276; "On the basis of Legal Validity" in Am Jnl of Jurisprudence 26 (1981) at 178 - 189 (transl by S Paulson); "The Pure Theory of Law and Analytical Jurisprudence" in Harv L Rev 55 (1941) at 44 - 70.

2. (Supra)

3. For an analysis of the Scandinavian realists, See Marshall: "Law in a cold Climate" Jur Rev (1956) at 236.

4. A noted Kelsen scholar, Stammer, himself admitted this. Cf Ch 1.

5. See A Ehrenzweig: Psycho-Analytic Jurisprudence Oceana Publications, N Y (1971)

6. Austin, it seems, was much more logical in defining as sovereignty a "determinate human superior who receives habitual obedience from the bulk of a given society".

7. At 119.

This excerpt, like all the others to be found in his works dealing with this relation, clearly reveals the inadequacy and general vagueness of Kelsen's efficacy criterion, as mentioned above. For one thing, Kelsen does not say how this is to be measured. How do we know whether laws are actually being obeyed rather than ignored? Is such a criterion really susceptible of empirical verification? How do we test whether the law is, to use Kelsen's phrase, "by and large effective", or "on the whole" effective? These questions become especially problematic in revolutionary situations where practical guidance is called for.² Thus, one can legitimately ask: How do we compute the number of opportunities to obey the law?³ Especially problematic in this regard are so-called "dead-letter" laws or laws only selectively enforced (viz. police and prosecutorial discretion). Moreover, it can be asked: How many times is the law disobeyed by a motorist driving for ten miles through a built-up area, exceeding the speed limit throughout his journey?⁴ Is one's motive for disobeying the law relevant?

Needless to say, to these and countless similar questions, there is no ready answer; but a useful starting point is perhaps the suggestion put forward by a noted Kelsen scholar.⁵ This is to the effect that one might relate the number of laws in a system to the number of times that the specified sanctions have been or are likely to be applied. The ratio between the official acts and the acts of disobedience would provide an index of effectiveness. This suggestion, however, is also beset with difficulties, which are outside the scope of the present Chapter.⁶

1. For a critical elaboration on this, see further Chapter 4. Cf D S K Ong: "Der Begriff der Norm bei Hans Kelsen" in *Osterreichische Juristen-Zeitung* 32 (1977) at 169 - 172.

2. For an evaluation of these criteria in revolutionary situations, see especially Ch's 4, 5, 6. See further D Lloyd: *Introduction to Jurisprudence* (1985) 330 et seq.

3. *ibid*.

4. *ibid*.

5. See J W Harris in his important article: "When and Why does the Grundnorm change?" in *C L J* (1968) 103 - 133.

6. For a criticism of the inadequacy and vagueness of this suggestion, see further Ch 4.

The chief merit of Kelsen's Pure Theory would seem to lie in the elucidation of the relation between what has been called the "initial hypothesis", viz. the basic norm (which might less abstractly be described as the basic political faith of the community) and the validity-efficacy criterion. It is in an evaluation of this relation that the essentially dynamic character² of the Pure Theory of Law becomes apparent. It is to this triangular relation that we must now turn.

The Basic Norm and the Validity-Efficacy Criterion

From the beginning of his academic career, Kelsen sought to construct a legal theory in which all legal phenomena could be viewed, not as a helter-skelter of unco-ordinated individual norms but as a system in which each norm would have its proper place. Whereas an is-statement is either true or false, depending on whether it conforms to reality, a norm cannot be either true or false, since it refers to behaviour that ought to be. Thus, the norm is not "non-existent" or "unreal", but has a "specific existence" of its own - validity. The validity of a norm can be derived, not from the fact that something is, but only from another norm (viz. another Ought) and the legal system is made up of the sum total of such inter-dependent norms.³

The validity of a norm does not mean that it is in fact applied and obeyed. The valid norm even assumes that actual behaviour will deviate from the prescriptive behaviour, and this becomes most evident in the case of illegal conduct.⁴ In a theft, for instance, the norm against stealing does not lose its validity because the act

1. Cf W Friedmann: Legal Theory, 5th ed Stevens and Sons, London (1967) especially at 275-89.

2. The dynamic character of the Pure Theory of Law bears a significant relation to Kelsen's well-known "Stufenbau" Theorie viz. the conception of the legal system as a hierarchy of norms from the most abstract, down to the most concrete in which each individual norm derives its authority from the norm above it. This is known as the process of "dynamic derivation". Cf J W Harris: Legal Philosophies (1980) Ch 6.

3. See in this regard the important article by Oscar Morineau: "The Individual Norm" in Inter-Am L Rev 5 (1963) at 31 - 59.

4. See R W M Dias: Jurisprudence, 5th ed. Ch 16.

of stealing has occurred; only if it is no longer effective, does it lose its validity and the judge is required to apply the sanction against the delict in conformity with the norm. But even if the thief escapes and no sanction can be prescribed and applied in fact, the norm still retains its validity with respect to both the thief and the judge. It is at this stage that the dynamic¹ character of Kelsen's Pure Theory of Law enters the picture.

In ascertaining whether a specific norm is valid, one must inquire whether and how it is derived from another norm, which figuratively may be considered the higher norm. Thus, the individual norm against stealing, applied by a judge against a thief, is considered valid if it can be derived from a statute prescribing sanctions against the delict of theft. Seeking to ascertain why the statute designating theft as a delict is valid, one discovers that it, in turn, can be derived from the legal authority of the legislative body that has created the statute. The validity of the statutory acts of the legislative body must again be derived from a valid norm: under the constitution, the legislative body is authorised to create such statutes. In seeking to ascertain the validity of the constitution one finds that it cannot be derived from any higher legal source (i.e. norm of positive law) since it is itself the highest legal source from which all other (lower) norms are derived.² If, then, the validity of the highest legal norm, the constitution, cannot be derived from another legal norm it can only be derived from a non-legal norm, outside the positive law, or a basic norm,³ as Kelsen calls it.

This basic norm is presupposed to be valid, but is not itself a norm of positive law. Kelsen formulates the basic norm thus:

"coercive acts ought to be performed under the conditions and in the manner which the historically

1. For a penetrating analysis of the dynamic aspect of the Pure Theory of Law, see W Eberstein: The Pure Theory of Law University of Wisconsin Press, Madison (1945). See too D Lloyd: Introduction to Jurisprudence (1985) 330 et seq.

2. Kelsen himself differentiates between the constitution in the positive legal sense, which is the constitution in a concrete sense viz. as a written document; and the constitution in the legal-logical sense, which is properly the Grundnorm. It is crucial to note that the Grundnorm is not the constitution, but, rather, the presupposition demanded by theory that a particular constitution ought to be obeyed. See further Ch 3.

3. The consideration of the basic norm in this section is very brief. For a full discussion, see Ch 3.

first constitution and the norms created according to it, prescribe (In short: one ought to behave as the constitution prescribes¹). Without such a presupposed norm conferring validity upon the constitution, the latter would have no legal character and the norms below the constitution - the legislature, judiciary and executive - would have no legal character either, since a norm can only be derived from another norm.

It is clear, then, that Kelsen is aware of the fact that, as a normative system, the legal system needs a cut-off point in the quest for validation.² Whereas, in the realm of physical nature the quest for the cause of an effect leads to a regressus ad infinitum³, the unique characteristic of a normative order is that the quest for the validity of a specific norm must end in a highest norm, which is not posited or created by the highest norm-creating authority, but presupposed by cognition.⁴ In the normative order of religion, for instance, the question of the validity of norms posited by God arises and the answer is also to be found in a presupposed norm. Thus, theological ethics, in tracing the validity of the divine norm "Honour your parents", must end up by presupposing a basic norm "one ought to obey the commands of God". This norm cannot be presumed to be created by theological ethics, because it would then set itself up as a norm-creating authority above God, validating his norms. Nor, it is suggested, can the issue of validity be solved by presuming that God himself posited the norm "One ought to obey the commands of God" because this would still leave unresolved the

1. H Kelsen: Pure Theory of Law (1967) at 201. See too the following works by Kelsen: "The Pure Theory of Law and Analytical Jurisprudence" in Harv L Rev 55 (1941) at 44 - 70; "On the basis of Legal Validity" in Am Jnl of Jurisprudence vol 26 (1981) at 178 - 189; "The Concept of the Legal Order" in Am Jnl of Jurisprudence 27 (1982) at 64 - 84, "On the Basic Norm" in Calif L Rev 47 (1959) at 107 - 110.

2. For a more general discussion of the problem of "limiting" questions in philosophy and ethics, see S Toulmin: Reason in Ethics (1960) 204.

3. In English - an infinite regress - viz. an interminable sequence of causes and effects.

4. Cf R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts- und Sozialphilosophie 63 (1977) at 399 - 412.

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question from what other norm it could be derived. Theological ethics, therefore, must presuppose the validity of the basic norm "One ought to obey the commands of God" and from the basis of this presupposition, specific norms emanating from God then derive their validity.¹

From an epistemological viewpoint, too, the basic norm of the legal system fulfills an important function.² Kelsen views as one of the principal characteristics of the norm its function as a scheme or method of interpretation, allowing the decision of whether and to what extent the subjective meaning of specific human conduct can be interpreted as having objective meaning or legal validity. It is important to stress here that the basic norm performs this function of a scheme of interpretation for the legal order as a whole, for only the presupposition of the basic norm makes it possible to interpret the constitution and all norms created according to the constitution - the whole legal order - as legally valid. Epistemologically, therefore, Kelsen refers to the basic norm as "the constitution in a logical sense of the word",³ as "the transcendental-logical condition" of interpreting a multitude of certain phenomena as objectively valid legal norms. Kelsen suggests that his concept of the basic norm⁴ is analogous to Kant's transcendental-logical principles of cognition - time, space and causality.⁵ Just as knowledge of the empirical world cannot be derived from these principles or categories of cognition, but merely by means of them, so the content of the specific norms of positive law cannot be derived from the basic norm, but can merely be understood through the presupposition of the basic

1. H Kelsen: Pure Theory of Law (1967) at 201 et seq; Cf W Ebenstein: " The Pure Theory of Law : Demythologizing Legal Thought" in Calif L Rev. Berkeley (1971) at 638 - 9.

2. Note that the presentation of the postulate of the basic norm in this Chapter is rather brief. This crucial postulate of the Pure Theory of Law will be evaluated in detail in Ch 3. Cf Julius Stone: " Mystery and Mystique in the Basic Norm" in M L R 26 (1983) at 34 - 50.

3. Kelsen op cit at 199.

4. Ibid 202.

5. Supra Ch 1.

norm. The crucial point, then, is that the basic norm supplies the validity of a legal order, but not its content. Therefore, the validity of a legal order cannot be denied on account of its content.¹

It is important to note that the basic norm also supplies the legal order with a principle of unity.² It makes possible the consideration of a norm as legally binding if the norm can be integrated into an entire system of norms, ultimately deriving its validity from the presupposed basic norm.³ Thus, as the source of validity common to all norms of a legal order, the basic norm is also the source of their unity.

This leads to some crucial problems concerning the basic norm which is inextricably linked to the efficacy - validity criterion.⁴ The concept of the basic norm as the source of validity of a system of positive law, raises two major problems reflecting the limits of positive law and of a positivistic theory of law. Firstly, there is the problem of the relationship of the basic norm to natural law. According to the theory of natural law, the validity of the positive law rests, not on norms of the positive law, but on outside norms, viz norms set by natural law. Thus, if the positive law does not conform to the norm of natural law, then the positive law must be regarded as invalid. Kelsen, in fact, concedes that the basic norm, too, is not a norm of positive law, but a presupposed norm and yet the validity of positive law is derived from it.⁵ Kelsen, then, recognises that there is a limit to legal positivism in so far as the validity of the legal order depends on an "extra-

1. This is one of the critical arguments employed by the judges in the revolution cases to justify the according of validity (legitimacy) to a revolutionary régime on the sole basis of its efficacy, without consideration of alternative principles viz. justice, immorality, racial discrimination etc. See J H Kekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence ed. by A W B Simpson, Clarendon Press, Oxford, (1973) Ch 2; see more fully Ch 4 where this argument is developed.

2. H Kelsen: The Pure Theory of Law (1967) at 201 et seq. Sed contra J Raz: "Kelsen's Theory of Basic Norm" in Am Jnl of Jurisprudence vol 19 - 20 (1974).

3. Cf W Ebenstein: "The Pure Theory of Law: Demythologizing Legal Thought" in Calif L Rev Berkeley (1971) at 641 - 2.

4. See the Tension Theory (infra)

5. Kelsen op cit 219 et seq.

legal norm". To this, however, Kelsen offers the rejoinder that the difference between such a positivistic theory of the law and a theory of natural law is greater than their similarity. Firstly, he opines that a positivistic theory such as the Pure Theory of Law merely employs the basic norm as a cognitive device so that a mass of legal materials can be understood as a meaningful legal order whereas natural law seeks to formulate and establish a "just" legal order, superior to and independent of, the positive legal order.²

It is significant that Kelsen also defends the use of the basic norm - outside of the positive law - to establish a science of positive law, by analogy with the Kantian dilemma. Thus, Kant's transcendental-logical categories make empirical knowledge of the physical world possible and yet they themselves are not data of experience and have therefore been called metaphysical.³ If Kant's categories therefore involve a minimum of metaphysics, Kelsen admits that the basic norm contains a minimum of natural law, but only in the Kantian transcendental-logical sense since the function of the basic norm is to make possible the cognition of positive law and the formulation of a science of positive law.⁴

The second major problem raised by the conception of the basic norm is the relation of the legal order to its effective operation or efficacy. In this regard, it should be stressed that although the basic norm is presupposed, it is not arbitrarily presupposed - that is, a "free invention"; for the constitution upon which

1. It is suggested, however, that this is a highly controversial question, which admits of more than one interpretation. Cf Julius Stone: "Mystery and Mystique in the basic norm" in M L R vol 26 (1963) at 34 - 50 and Kelsen's reply: "Prof Stone and the Pure Theory of Law" in Stan L Rev vol 17 (1965) at 1128 - 1157. See further H Schambeck: "Möglichkeiten und Grenzen der Rechtslehre Kelsens" in Juristische Blätter vol 106 (1984) 126 - 34, sed contra F Lachmayer: "Die Geltungsneutralität der Grundnorm" in Österreichische Zeitschrift für öffentliches Recht 28 (1977) at 193 - 210.

2. H Kelsen: "The Concept of the Legal Order" in Am Jnl of Jurisprudence vol 27, (1982) at 64 - 84 (transl in English by S L Paulson).

3. Cf W Ebenstein: "The Pure Theory of Law: Demythologizing Legal Thought" in Calif L Rev Berkeley (1971) 617 - 52.

4. But Cf Ch 3 of this work, where it is argued that underlying the concept of the basic norm are far more natural law and metaphysical considerations than Kelsen is prepared to admit. See further R W M Dias: Jurisprudence (1985) 5th ed Ch 16.

it directly confers validity as well as the coercive order set up according to the constitution, must, on the whole, be effective.¹ Kelsen, significantly, views the Pure Theory of Law as occupying a middle ground between two extreme theories. One extreme theory, which tends toward an uncompromisingly idealistic stance, postulates that the validity of the law is completely independent of its effectiveness, since there is no necessary connection between the Ought of validity and the Is of effectiveness. The other extreme theory which tends toward a diametrically opposed, realistic outlook, assumes that validity and effectiveness are identical.²

It is significant that Kelsen rejects both these theories. The first theory he rejects on the ground that a legal order is no longer valid when it ceases to be effective.³ Moreover, the very creation of a legal norm presupposes a norm-setting act - so that there must be some relation between the Is of the norm-creating act and the Ought as the meaning of the norm.⁴ As to the second theory, Kelsen argues that effectiveness is a condition of validity, but not identical with it. A norm, for example, may be valid before it has ever been applied and its validity is not necessarily impaired by the fact that it is occasionally not obeyed or applied. Therefore, the effectiveness of a legal order is neither identical with its validity nor the reason for it. The reason for the validity is the presupposed basic norm, according to which one ought to behave in conformity with an actual constitution, which is, on the whole, effective. To put the matter in a nutshell, it may thus

1. For an examination of the inadequacy of the efficacy criterion within the practical context of a revolutionary situation, see further Ch 4. See too R W M Dias: Jurisprudence, (1985) 5th ed. Ch 16 and Ch 4. Cf J W Harris: "When and Why does the Grundnorm change" in C L J (1968) 103 - 133.

2. See earlier this Chapter, where this view was briefly touched upon with reference to Kelsen's work: Pure Theory of Law. Cf E Bodenheimer: "Power and Law: a study of the concept of law" Ethics 50 (1939-40) 127 ff.

3. H Kelsen: "Pure Theory of Law" (1967) at 213 et seq. See here Ch's 4, 5, 6, where it is shown how this is borne out in the revolution cases.

4. However, it is suggested, that since Is relates to a factual situation, it conceivably includes, social, political, moral and other extraneous considerations. See further Ch 3.

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be said that the basic norm includes two factual conditions: Firstly, that an actual constitution has been created, and secondly, that it is by and large effective.¹

²
THE TENSION THEORY

Kelsen's view of the relationship between the validity and effectiveness of the legal norm and of the whole legal order from the vantage point of the basic norm is, perhaps, most aptly clarified by his conceptualization that tension inevitably inheres in the relationship between norm (Ought) and actual behaviour (Is).³ Unless, then, such tension exists, a normative order - including a legal order - can hardly be said to exist. Thus, it is suggested, that an absence of tension between a normative order and actual human behaviour is imaginable only with respect to a normative order that prescribes only conduct that actually takes place.⁴ The norm, "you ought to do what you actually do", may look linguistically like a norm, but is, in fact, a mere description of the behaviour that actually takes place. Such a construction is especially unsuited to the legal norm, which includes, in its first half the delict as a condition which ought to be followed by a sanction.⁵ The legal norm does not state "you ought to behave as you actually behave" but, "if you behave contrary to the law, a sanction ought to follow".

1. Cf W Ebinstein: "The Pure Theory of Law : Demythologizing Legal Thought" in Calif L Rev (1971) 641 - 2, see further J W Harris: "When and Why does the Grundnorm change" in C LJ (1968) 103 - 33, G Hughes: "Validity and the Basic Norm" in Essays in Honor of Hans Kelsen, Calif L Rev Berkeley (1971) at 695 - 714. Cf Denis S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristen-Zeitung 32 (1977) at 169 - 172.

2. For a useful exposition of this theory, see W Ebinstein in his work: The Pure Theory of Law University of Wisconsin Press, Madison (1945) reprinted in 1969.

3. Cf Ch 1 where this dichotomy is expatiated upon.

4. Ebinstein op cit 641 - 2. But Cf R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts- und Sozialphilosophie 63 (1977) at 399 - 412.

5. H Kelsen: Pure Theory of Law (1967) 212 et seq. For a secondary source, see R W M Dias: Jurisprudence, 5th ed (1985) Ch 4 on "The Problem of Power"

The legal norm, then, presumes that there will always be a tension between the norm and actual conduct and comes into effect precisely when contra-normative or illegal behaviour occurs.¹ For a legal order, therefore, to have meaning, the tension between norm and conduct must not fall below a certain minimum. It is unfortunate, however, that Kelsen nowhere in his works spells out what this minimum of tension would be. Similarly, the tension between norm and conduct must not rise above a certain maximum because, if it does, the legal order may properly and legitimately be said to be no longer effective and would, accordingly, lose its validity. Here, again, Kelsen does not spell out in detail how such a maximum gap between legal order and actual behaviour can be defined and measured.²

In some cases, it is suggested, it should not be too difficult to decide whether a legal order has ceased to be effective, so that it is no longer valid. A concrete illustration in this regard is furnished by Tsarist Russia.³ After the revolutionary overthrow of the Tsarist Constitution in 1917 and the subsequent establishment of Soviet rule, it became meaningless to interpret acts of citizens and state organs from the viewpoint of Tsarist law. Since the new Soviet legal order was effective, that is, its laws were generally applied and

1. H Kelsen: The Pure Theory of Law (1967) 213 et seq, see too H Kelsen: "On the Pure Theory of Law" in Israel L Rev 1 (1966) 1 - 7; Cf Albert Ehrenzweig: Psycho-Analytic Jurisprudence Oceana Publications Incorporated, Dobbs Ferry, N Y (1971).

2. See in this regard J W Harris: "When and Why does the Grundnorm Change" in C L J (1968) at 103 - 133; John D Finch: Introduction to Legal Theory 3rd ed. Sweet and Maxwell, London (1929), Ch 5 at 97 - 120; One scholar, however, W Friedmann in Legal Theory 5th ed (1967) at 278 has explained Kelsen's refusal to commit himself on this issue in the following words: "How this minimum of effectiveness is to be measured, Kelsen does not say, nor could he do so, without going deep into questions of political and sociological reality". This, it is suggested, is indicated by the fact that underlying the efficacy criterion are the very extraneous or "impure" considerations which Kelsen so vehemently seeks to exclude from his Pure Theory of Law. See further Ch 3 where sociological moral, ethical and historical considerations are found to underlie the effective basic norm.

3. As it was at the time of the Romanov imperial dynasty, when Nicholas II reigned, until his forced abdication in 1917.

obeyed and the population by and large acted in conformity with its laws, the old basic norm - "one ought to behave as prescribed by the Tsarist Constitution" - had been replaced by a new basic norm taking into account the fact that the new Soviet legal order was effective.¹

However, it goes without saying that there may well be marginal cases in which the determination of a basic norm on the basis of its effectiveness, may not be as straightforward. Thus, in a civil war situation, it may well be the case that neither of the combatant sides is in effective control of the whole national territory or even of major specific portions which may have a high strategic or geo-political value. In this regard mention can be made of the Vietnam War in connection with which it has been frequently stated that in some areas the law of the Government of South Vietnam was effective in the daytime, but that the law of the Vietcong² was effective during the night.³ Here the problem lies in deciding which basic norm is to be chosen in such a confused situation. It is suggested, however, that a pointer here would be to consider whether the effectiveness of the control exerted by the respective forces is possessed of a substantial degree of permanency. Due to the highly volatile and fluctuating scenario prevailing there, it could be argued that neither side satisfied this criterion since their "efficacy" changed hands so frequently.⁴ In this way, it is

1. This efficacy, it is suggested, could be traced back to Nov 7 1917, the time of the Red or Bolshevik Revolution. This was the date which marked the accession to power of Vladimir Ilyich Uljanov, otherwise known as Lenin, who headed the newly created revolutionary Government. It is suggested that a situation analogous to the Russo-Soviet experience, is provided by the Weimar Republic in Germany which existed from 1919 to Hitler's accession to power on 30 Jan 1933. Hitler thus effectively became the new ruler of the newly created Government.

2. i.e. the communist-led revolutionary armed forces of the National Liberation Front of S Vietnam.

3. A situation analogous to the Vietnam experience is provided by the Spanish Civil War (1936 - 9) in which Genl Franco and his insurgent nationalists eventually succeeded in toppling the Republican Government.

4. See further especially the revolution cases in Ch's 4, 5 and 6.

suggested, the efficacy criterion may be qualified or limited in a meaningful way, thus preventing a farcical situation from arising. This may conceivably arise on the accession to power of a revolutionary government, in which such government may claim effective control over its territory, even if such control lasts for only a few hours or days and even if it is toppled within days by yet another revolutionary clique.¹

While Kelsen does not pretend that the concept of the basic norm provides accurate standards of measurement that can be applied in each marginal situation by means of sheer arithmetic, the basic norm does, it is suggested, reflect the general scientific principle of "cognitive economy".² Juristically, the choice of a starting point viz. a basic norm, which is to confer validity on the whole system of positive law, must appear "first of all as arbitrary".³ However, if the choice is to be regulated, one must have recourse to a principle outside the law. This, then, is to be found in the principle of "cognitive economy".⁴ According to this principle, physical laws are constructed under the postulate that the largest possible number of facts be explained by the simplest possible formula.⁵ Similarly, in the normative sphere or in the sphere of normative valuation, that basic norm should be presupposed which will allow the largest number of behavioural phenomena to be subsumed under the legal order that seeks to regulate them. Thus we can recognise as valid the demand that the choice of presuppositions should be so determined that the order to be deduced from the

1. This and other related difficulties concerning Kelsen's validity-efficacy criterion will be dealt with at length in Ch's 4, 5, 6 and Ch 7 where the practical difficulties regarding validity-efficacy are perhaps most vividly illustrated.

2. See H Kelsen: General Theory of Law and State (Engl transl by A Wedberg) (1945) Russel and Russel, N Y at 89.

3. Ibid.

4. i.e. as developed by the philosophers Mach and Avenarius and also employed by pragmatism.

5. Cf W Ebenstein: The Pure Theory of Law, Univ of Wisconsin Press, Madison (1945) 115 - 7.

presuppositions thus selected, shall evaluate, as complying with the norms, as many facts as possible. To put it differently, the content of the order presupposed valid shall coincide to the greatest possible extent with the factual conditions which it is to regulate. This may be either because these conditions are motivated by the idea of the order, or because they can be thought to be so motivated. Kelsen calls this principle which he was the first to introduce into the normative sphere, "the principle of the epistemological production of a value optimum".²

In many, if not in the majority of cases, the application of this principle should offer no serious difficulty. However, in marginal cases of the type mentioned above,³ quantitative analyses of the prevailing patterns of behaviour would have to provide the factual element of effectiveness which is implied in the basic norm.⁴ Just as Kelsen is willing to admit that the concept of the basic norm contains a minimal element of natural law - in as much as the validity of the legal order is derived from a norm outside of positive law - he similarly concedes that the basic norm, to be meaningful, must take into account a minimum of social facts or social reality, viz a minimum of effectiveness.⁵ Seen in this light, the concept of the basic norm seeks to solve the

1. H Kelsen: Der Soziologische und juristische Staatsbegriff (1911) at 98. Cf H Schambeck: "Möglichkeiten und Grenzen der Rechtslehre Hans Kelsens" in Juristische Blätter vol 106 (1964) at 126 - 134. Cf H Janzen: "Kelsen's Theory of Law" in Am Pol Sc Rev vol 31 (1937) 205 - 226.

2. D S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristen-Zeitung 32 (1977) at 169 - 172. Cf W Ebenstein's "The Pure Theory of Law: Demythologizing Legal Thought" in Essays in Honour of Hans Kelsen, Calif L Rev (1977) 617 - 52. See the same author in The Pure Theory of Law Univ of Wisconsin Press, Madison (1945).

3. i.e. Vietnam and Spain.

4. On this crucial point, see R W M Dias: Jurisprudence 5th ed Ch 4; Cf G Hughes: "Validity and the Basic Norm" in Essays in Honour of Hans Kelsen, Calif L Rev, Berkeley (1971) at 705 - 12. For a general theoretical exposition of Kelsen's effectiveness requirement, see J W Harris: Law and Legal Science: an inquiry into the concepts Legal Rule and Legal System Clarendon Press, Oxford (1979); see further R Moore: Legal Norm and Legal Science: A Critical Study of Kelsen's Pure Theory of Law Univ of Hawaii, Honolulu (1978).

5. This, as will be argued in Ch 3, amounts to gross special pleading by Kelsen, for, as will be shown, the basic norm takes into account far more than just sociological facts, but underlying it are also considerations of morality, justice, ethics, politics, sociology, history etc. See in this regard Dias op cit Ch 4.

problem of validity of law, while the tension concept seeks to solve the problem of its positivity. Clearly, then, the indispensable tensions between norm and behaviour must, of necessity, supplement each other.¹

It is suggested, however, that Kelsen could arrive at this principle without employing the thought-economy approach of the physical sciences, i.e. via his own relativism, rather like Gustav Radbruch, another prominent exponent of that philosophy, had done. According to Radbruch,² the systematization of communal life cannot be left to the legal views of the individuals living in that community because these different persons may possibly contribute contradictory counsel. Rather, it must be regulated by an unambiguous, supra-individual authority. Since, however, from a relativist point of view, tension and science are inadequate to such a task, will and power must take it over. If none can establish what is just in fact, someone must establish what is to be just in law, and if the declared law is to fulfil the function of settling by the authoritative pronouncement of power, disputes between opposed views of right, then it must be declared by a will which can push it through in the face of opposition from any view of right. Whoever is able to carry out the law shows thereby that he is the proper person to make the law.³

From the foregoing it should be clear that the regulative principle for the choice of the basic norm is that a definite relation shall obtain between the content of the obligation (Ought) to be enforced by the basic norm

1. Cf D S K Ong : "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristen-Zeitung 32 (1977) at 170 - 1; see further W Ebenstein: "The Pure Theory of Law : Demythologizing Legal Thought" in Calif L Rev, Berkeley (1971) 642 - 3.

2. See his Rechtsphilosophie at 81; see too H Kelsen; "The Pure Theory of Law and Analytical Jurisprudence" in Harv L Rev vol 55 (1941) 44 - 70; Radbruch recalls that this idea of the basic norm of all positive law is contained in the biblical passage Romans 13:1 "Let every soul be subject unto the higher power"

3. Cf W Ebenstein: The Pure Theory of Law, Univ of Wisconsin Press, Madison, (1945); See further: R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts- und Sozialphilosophie 63 (1977) 399 - 412.

and the content of the corresponding reality (Is).⁴⁷ It is of course true that this relation cannot be established with anything approaching mathematical precision or exactitude, but one can determine an upper or a lower limit.¹ Thus, the interval or tension between these limits must not go beyond a maximum, for then there would be no meaning in speaking of law as a special system, nor must it fall below a minimum, for this would be to remove the possibility of employing the system of law as a scheme of meaning and value for the actual behaviour of human beings, the content of the system of nature.²

According to this tension theory, then, positivity is a special relation between the content of (normatively) valid law and the world of actual events. This is but a special case of the general philosophical problem of the realization of value. Kelsen puts it thus:

"The exceptional difficulty involved in it consists in the apparently unavoidable antinomy of a necessarily presupposed dualism of Is and Ought, of reality and value, and the recognition, especially unavoidable, of a contentual relation between the systems presupposed unrelatable."³

Brief mention should also be made of the way in which Kelsen uses his theory of the basic norm with the distinction between validity and efficacy, to solve the problem of revolution⁴ as well as that of law and power, the constant preoccupation of jurists. We speak of a revolution when a system of law is terminated by methods other than those which it has itself prescribed, or when it is replaced by a new system. Revolution, therefore, means a break in the continuity of law.⁵

1. See D Lloyd: Introduction to Jurisprudence 5th ed (1985) at 330 et seq for a criticism of the vagueness and uncertainty surrounding the "upper and lower limit", see further J W Harris: "When and Why does the Grundnorm Change" in C L J (1966) at 103 - 133.

2. See H Kelsen: Allgemeine Staatslehre (1925) at 18.

3. Ibid 19.

4. This section above in the text should be seen as a theoretical background to Chapter Four where the question of revolution, the change of basic norm and its practical implications are considered in detail.

5. See here J Finnis: "Revolutions and the Continuity of Law" in Oxford Essays in Jurisprudence, Clarendon Press, Oxford, (1973) Ch 3.

Here the special nature of law is clearly expressed, for only in the normative sphere can we speak of revolution. Thus, in the sphere of reality, there is only evolution, which is the expression for the specific causal law of nature.¹

Even if the new system persists, it remains, from the standpoint of the old system, illegal force. On the other hand, if the legal view of actual conditions is to have any meaning, we must apply only the new system and assume its basic norm to be valid. Thus, might becomes right. It would be wrong, however, to deduce from this that only an effective system can be regarded as legally valid.² Kelsen puts it thus:

"Just as the basic norm does not cease to be a norm because its content is made to coincide with certain conditions of fact, so also the system of norms built on that basis does not lose its normative character because the tension between the obligation and the corresponding reality does not exceed a certain maximum".³

Law, therefore, does not coincide with power, although it cannot exist without it. Rather, law is "a particular order or organization of power".⁴ Again, the theory of the basic norm attempts, inter alia, to solve the problem of the validity of law, while the tension theory attempts to solve the problem of its positivity.⁵ Both these theories are designed to protect the special character of law as a systematic discipline against the intrusion of natural law and metaphysics as well as physical science and sociology.⁶

1. H Kelsen: "The Pure Theory of Law and Analytical Jurisprudence" Harv L Rev Vol 55 (1941) 44 - 70; "On the Pure Theory of Law" in Israel L Rev 1 (1966) 1 - 7; W Ebenstein: "The Pure Theory of Law: Demythologizing Legal Thought" in Essays in Honour of Hans Kelsen, Calif L Rev Berkeley (1971) 117 - 8.

2. See Ch 4 where it is argued that efficacy, per se, while it is the dominant principle, does not ipso facto confer legality (validity). The present writer argues that legality ought not to be measured by efficacy alone, but that several supplementary, often limiting principles should be considered by a court of law before validity or legitimacy may properly be conferred on a revolutionary government; see in this regard J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence ed. by A W B Simpson, Second Series, Clarendon Press, Oxford (1973) Ch 2. See further Ch's 5, 6, and 7 for elaboration.

3. H Kelsen: Der Soziologische und Juristische Staatsbegriff (1911) at 98

4. H Kelsen Reine Rechtslehre (1934) at 70.

5. (Supra)

6. Cf Ebenstein op cit at 118.

VALIDITY-EFFICACY IN PERSPECTIVE

The Pure Theory of Law, then, finds itself obliged to define its attitude in its theory of positive law as distinct from that of its natural law opponents.¹ It maintains that positivist theory, although it had sought to emancipate itself from the doctrine of natural law, had not understood how to give the system a pure basis, but had gone from the Scylla of ethics to the Charybdis of natural science and sociology.² In one form or another, it would seem, all the leading theorists of positivism, whether Continental or Anglo-American, when they speak of the law as being positive, mean that it is effective. For Continental positivism, it is sufficient to recall in this connection the chief exponents of the psychological interpretation of legal validity, viz. Bierling, Jellinek, Stammler, Ehrlich, Somlo and Weber.³

Bierling defines a legal norm as valid when the subjects of the legal order recognise it, i.e. "heed and respect it, feel it as obligatory upon them".⁴ Jellinek defines a norm as valid "when it has power to act as a stimulus, determining the will".⁵ Validity, then, is a question of motives, and law, is a "psychological phenomenon".⁶ Jellinek finds the decisive motive in "the normative power of the factual" (Die Normative Kraft des Faktischen) by which he means the peculiar tendency of men to look on the habitually practiced as a rule, the norm.⁷ For Stammler, the validity of law is "the possibility of its execution and the solution of the

1. See H Kelsen in Das Problem der Souveränität (1928) at 88, in Der soziologische und juristische Staatsbegriff (1926) 92 et seq.

2. Cf H Schambeck: "Möglichkeiten und Grenzen der Rechtslehre Kelsens" in Juristische Blätter 106 (1984) 126 - 134;

3. As can be seen in the excerpts above, all these leading jurists on the Continent propound a sociological interpretation of legality, thus emphasising the indubitable centrality of the efficacy requirement.

4. W Bierling: Zur kritik der juristischen Grundbegriffe 1:7 Gotha (1881), Cf Austin and his "habit of obedience".

5. W Jellinek: Allgemeine Staatslehre (1911) at 333

6. Ibid 332

7. Ibid.

problem of legal validity is to be found in a psychological inquiry¹. For Eugen Ehrlich, law is "what lives and works as law in human society"². Felix Somlo³ defines laws "as the rules of an inclusive, enduring, habitually obeyed, supreme power". Finally, Max Weber distinguishes the ideal meaning of law as "a system of logically deducible norms, from its sociological meaning as a complex of factual conditions governing real human conduct"⁴.

From the above, it should be clear that the emphasis on efficacy as the basis of validity is common, if not central to all these thinkers, whether, as in the psychological theory, the efficacy is the perception, the internal conviction of the legal subject, or, as in the sociological theory, efficacy is looked on more as a sociological phenomenon. In all this, therefore, the general position that the positivity of the law is its actuality, remains unaffected. This would hold true whether the main emphasis is laid on the proclamation of the law by the legislator, or on the application by the judge, administrative tribunal or on the obedience of the legal subjects.⁵

Before closing this Chapter, it is suggested that another way of gaining a perspective of validity-efficacy is by a brief consideration of what might be called the sphere of validity of the norm. Since norms regulate human behaviour and since human behaviour takes place in time and space, norms are valid for a certain time and for a certain space. Thus, the validity of a norm may begin at one moment and end at another.⁶ The following

1. In this regard see his Theorie der Rechtswissenschaft Berlin, (1911) 72; or for an even more lucid statement: Lehrbuch der Rechtsphilosophie Berlin, (1923) 146.

2. E Ehrlich: Grundlegung der Soziologie des Rechts Munich, (1911) 6: i.e. the actual rules followed by human behaviour.

3. F Somlo: Juristische Grundlehre Leipzig, (1927) 105

4. M Weber: Wirtschaft und Gesellschaft Tübingen, (1925) 369.

5. In Anglo-American law, the emphasis is almost exclusively on the second of these meanings. Law is known through its application by the courts. This common law definition was aptly stated more than 1 century ago by O W Holmes: "The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by Law" "The Path of the Law" in Harv L Rev 10 (1896 -7) 41.

6. H Kelsen: General Theory of Law and State (1945) 42 - 3.

example, given by Kelsen, is apposite: The norms of Czechoslovakian law began to be valid on a certain day of 1918, while the norms of Austrian law ceased to be valid on the day when the Austrian Republic had been incorporated into the German Reich in 1936.¹ In addition, the validity of a norm has also a relation to space. In order to be valid at all, it must be valid not only for a certain time, but also for a certain space or territory. e.g. the norms of French law are valid only in France, the norms of Swedish law are valid only in Sweden, etc.²

We may speak, therefore, of the temporal and the territorial spheres of validity of a norm.³ In order to determine how men have to behave, one must determine when and where they have to behave in the prescribed manner. How they shall behave, what acts they shall do, or forbear from doing, that is the material sphere of the validity of a norm.⁴ Thus, norms regulating the religious life of men refer to another material sphere than norms regulating their economic life. With reference to a certain norm, one can, however, raise not only the question of what shall be done or avoided but also the question of who shall perform or avoid it. The latter question, then, concerns, the personal sphere of validity of a norm. Just as there are norms valid only for a certain territory, for a certain time, with respect to certain matters, so there are norms valid only for certain individuals, e.g. for Catholics or Protestants. The human behaviour, therefore, which forms the contents of the norms and which occurs in time and space, consists of a personal and a material element. The norms, therefore, have to regulate human behaviour in all these respects. Among the four spheres of validity

1. This was the so-called "Anschluss" by which Austria became incorporated into Nazi Germany; H. Kelsen: General Theory of Law and State (1945) 43.

2. Ibid.

3. Ibid 44 - 5

4. Ibid.

of a norm, the personal and the material spheres are prior to the territorial and the temporal spheres.¹ The latter refer only to the territory within which and the time during which the individual shall observe certain conduct. A norm can, therefore, determine time and space only in relation to human behaviour.²

Occasionally, it is asserted that norms can have validity not for the past, but only for the future. That, Kelsen³ maintains, is not so and this assertion appears to be due to a failure to distinguish between the validity of a norm and the efficacy of the idea of a norm.⁴ Thus, what is effective is not the norm, contrary to the incorrect and abbreviated usage by which we speak of the norm's efficacy, but the psychical fact of the mental image which has a norm for content. The idea of a norm, then, as a psychic fact, can become efficacious only in the future in the sense that this idea must temporally precede the behaviour conforming to the norm, since the cause must temporally precede the effect. But the norm may also refer to the past.⁵ Past and future are, therefore, relative to a certain moment in time.

1. H Kelsen: General Theory of Law and State (1945) at 44 -5

2. Ibid.

3. Ibid 43 - 4; Cf in this regard W. Eberstein: "The Pure Theory of Law : Demythologizing Legal Thought" in Essays in Honour of Hans Kelsen in Calif L Rev Berkeley (1971) 640 - 1.

4. See H Kelsen: "Das Wesen des Staates" in Revue Internationale de la théorie du droit (1926) 7.

5. General Theory of Law and State at 43 - 4

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Chapter 3

Introduction

In Chapter Two, primacy was accorded to the evaluation of the validity- efficacy criterion, while the concept of the basic norm was considered only insofar as it was relevant and necessary to deepen and at the same time facilitate our understanding of this all-important criterion. In this Chapter, the reverse will be attempted. Priority will be given to a critical evaluation of Kelsen's basic norm, its intricacies, legal as well as meta-legal, and all that that entails. In so doing, the validity-efficacy criterion will only be considered tangentially, insofar as it promotes a more profound understanding of this cornerstone of the Pure Theory of Law. In the result, a certain degree of overlap is therefore unavoidable. Before commencing, it should be noted that this Chapter and Chapter Four are written within the framework of a crucial but necessary distinction. Thus, it is suggested that before one can hope to understand the concept of the basic norm in change, it is essential to consider the concept of the basic norm at rest. While the former will be considered in Chapter Four, the latter will form the subject-matter of this Chapter.

¹
The Grundnorm Considered : A Diachronic Perspective²

The position of the basic norm of legal orders in its conventional sense, can be traced back to the beginning of the

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- 1.A It is important to note at the outset that Kelsen himself employs a variety of concepts which he regards as being synonymous with his "Grundnorm". Among these are: "Ursprungsnorm" (Origin - norm); and "Verfassung im rechtslogischen Sinne" (Constitution in the legal-logical sense). Writers in English, too, have employed concepts to express the idea of a basic norm; Cf A Ehrenzweig : Psycho-Analytic Jurisprudence Oceana Publications Inc Dobbs Ferry, N Y (1971) who speaks of a "meta-norm" and Julius Stone : "Mystery and Mystique in the basic norm" in MLR Vol 26 (1963) 34-50 - who speaks of an "apex-norm". See too the Dosso judgment in Pakistan where Rahman J referred to it as a "thought-norm", see further Ch 4.
- B The concept of the Grundnorm is, needless to say, enshrouded in mystery and controversy, attracting, at times, extreme views. On one extreme are those writers who deny the basic norm's very existence and claim it is not even necessary to presuppose such a norm. See e.g. J Raz in his important Art. : "Kelsen's Theory of the Basic Norm" in Am Jnl of Jurisprudence (1974). 19-20 On the other extreme are those writers who say that in each legal system, there may be several basic norms. Cf T Eckhoff and N K Sundby : "The Notion of Basic Norms in Jurisprudence" in Scand S L (1975).
2. This means the Grundnorm concept will be evaluated with respect to Kelsen's changing conceptions thereof over the many years that spanned his academic career.

twentieth century to John Salmond's first edition of Jurisprudence (1902).¹ According to Salmond:

"there must be found in every legal system certain ultimate principles from which all others are derived, but which are themselves self-existent. Before there can be any talk of legal sources, there must be in existence some law which establishes them and gives them their authority."²

To this Salmond adds that the English rule that the Acts of Parliament have the force of law "is legally ultimate, its source is historical only, not legal".³

It has been suggested that when Kelsen first directly mentioned the problem in his "Das Problem der Souveranität und die Theorie des Völkerrechts" (1920), he was "unaware" of his predecessor.⁴ Kelsen's initial statement of the idea of the basic norm is that the justification of a sentence such as "The murderer ought to be punished by imprisonment" cannot be by recourse to an *is*-factum but involves recourse to an *Ought*, a norm which ultimately leads back the justification to what Kelsen calls the "origin-norm" (Ursprungsnorm) or the "constitution in the legal-logical sense".⁵ "This origin-norm", he says, "is the hypothesis of every positive legal system, of every concrete legal or state order."

1. See Salmond op cit at 110. In the Preface to his Hauptprobleme der Staatsrechtslehre 2nd ed (1923) p xv, Kelsen claims to have already foreshadowed his position in 1913 in his "Zur Lehre vom öffentlichen Rechtsgeschäft" (1913) 31 Archiv des öffentlichen Rechts 53, 190, as implicit in the distinction between the "being" and the "becoming" of a legal norm. He also there claims to have "presented clearly" the concept of the basic norm itself in his "Rechtsgesetz und Landesgesetz nach österreichischer Verfassung" 32 Archiv des öffentlichen Rechts 202 at 216 et seq "of course without the distinction developed later between the basic norm in the legal-logical sense and the constitution in the positive legal sense". Kelsen there also acknowledges A Verdross' account in 1916 of the basic norm as a hypothesis for comprehending the positive law material in a manner analogous to a hypothesis in natural science. Problem der Rechtsunterworfenheit des Gesetzgebers Juristische Blätter 45 (1916) 471 et seq as well as contributions to the basic norm theory made by L Pitamic and A Merkl

2. Salmond op cit 110 et seq

3. Ibid.

4. Cf Julius Stone: "Mystery and Mystique in the Basic Norm" MLR Vol 26 (1963) 34-50. See too W Ebenstein: The Pure Theory of Law (1945) at 9.

5. See Footnote 1 at 52

It is important to note that notwithstanding Kelsen's repeated statements and restatements up to his demise, his whole idea of the basic norm still remains shrouded in mystery while continuing to attract either vehement criticism or enthusiastic support.² It is important, therefore, to consider this concept from a theoretical vantage point or perspective first before the practical significance of this concept is briefly dealt with later in this Chapter. In doing so, it is crucial that an inquiry be made into the obscurity that still surrounds Kelsen's idea of the Grundnorm. In order to attempt this, it is necessary to collate his various statements about it from his many writings and works written at different periods of his long and illustrious academic career. This diachronic and theoretical exposition of the Grundnorm will, it is suggested, reveal its range of possible meanings as well as the implications thereof.

It is significant that the basic norm idea of Kelsen is already central to his theory in his important work Allgemeine Staatslehre (1925). Here already it is referred to variously by the names "basic norm" (Grundnorm), "origin-norm" (Ursprungsnorm) and "constitution in the legal-logical sense" (Verfassung im rechtslogischen Sinne).³ Kelsen said at the time that the basic norm "brings about the unity of the system"⁴ and "founds the system of the legal order".⁵ Thus, its typical content would be that an authority, a source of law is set up whose expressions have to obtain as valid: behave as the legal authority i.e. the monarch, the popular assembly, the parliament etc

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1. Kelsen op cit at 33. It is significant that in 1960 Kelsen credits the doctrine to analysis of the procedure always employed for knowledge (Erkenntnis) of positive law. Reine Rechtslehre 2nd ed (1960) at 209. Early in his Allgemeine Staatslehre (1925) 250 he says it corresponds to some extent to the concept of the original contract or the social contract constituting the State.
 2. It is not surprising, then, that Stone in his important Article "Mystery and Mystique in the Basic Norm" MLR Vol 26 (1963) at 34 - 50 has this to say: "... the problem of the basic norm has recently been vigorously and frontally approached by several writers".
 3. See "Allgemeine Staatslehre" at 84, 89, 104, 249
 4. Ibid 84
 5. Ibid; sed contra J Raz: The Concept of a Legal System (1973) 121-202

commands; so runs, simplified for clarity's sake, the basic norm.¹ As regards its nature and place in relation to the legal order concerned, Kelsen maintains in this early work² that it is a hypothetical norm³ which actually does not stand inside the system of positive legal propositions (Rechtssätze), but first of all founds these systems. On this view, then, the basic norm is not an enacted (gesetzte) norm, but a presupposed (vorausgesetzte) norm. It is only this norm which constitutes the unity of the enacted norms.

Kelsen proceeds to say at this stage that the basic norm must be introduced by legal cognition, "as a hypothesis in order that the material to be conceived as law ... could at all be apprehended as elements of the same system of law". There is thus, according to him, a correlation between the hypothesis and the material which this hypothesis governs. The hypothesis is here determined according to the material governed by it, as the material is determined according to the hypothesis.⁴ This, Kelsen says, is also to be so in the realm of the natural sciences. The hierarchy of the legal order then, runs into the basic norm which founds the unity of the legal order in its self-movement, setting up first of all a law-creating organ. It is important to stress here that this organ forms the constitution in a legal-logical sense⁵, while the legislature which has been thus created by enacting norms which regulate the legislation itself, forms, as the next step, the constitution in the positive legal sense.

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1. H Kelsen : Allgemeine Staatslehre (1925) at 99
 2. Ibid. See in this regard too R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts- und Sozialphilosophie 63 (1977) at 399 - 412.
 3. See however I Stewart: "The Basic Norm as Fiction" in Jur Rev (1980) 199 - 224 who points out that Kelsen in the last decade of his life, departs somewhat from the hypothesis view and states that the basic norm is a fiction in the sense of Hans Vaihinger's Philosophie des Als-Ob. For an evaluation of the Fiction view, see later in this Chapter.
 4. Kelsen op cit at 246
 5. See H Kelsen: "On the Pure Theory of Law" in Israel L Rev 1 (1966) 1 - 7. Cf H Schambeck: "Möglichkeiten und Grenzen der Rechtslehre Kelsens" in Juristische Blätter Vol 106 (1984) 126 - 134

¹ In his subsequent work Reine Rechtslehre (1934) some minor clarifications are evident.

In this work Kelsen says that the basic norm "imparts" the setting up of the fundamental fact-situation (Grundtatbestand) of law-creation. It is noteworthy that the basic norm here is viewed as the starting point of a procedure; it has a completely formal-dynamic character. From this basic norm, then, the single legal norms of the legal system cannot be deduced.² Thus, when the various norms of a legal system are referred back to a basic norm, this happens in the manner that it is shown that the creation of a single norm has taken place in accordance with a basic norm.³ Most notable here is the fact that Kelsen writes of the "validity" of the basic norm as well as of the legal order. Therefore, under the presupposition that the basic norm is valid, the legal order on which it rests is also valid and since it is not created in the legal procedure, it is valid as a non-positive legal norm.⁴

It is important to note at this stage that Kelsen's restatement of these doctrines in his seminal work General Theory of Law and State (1946) is characterized by some substantial developments. Thus "the question as to the reason of validity of a norm", he now writes, is closely related to the question: "What is it that makes a system out of a multitude of norms?"⁵ That a norm belongs to a normative order can then be tested only by ascertaining that it derives its validity from the basic norm constituting the legal order. The basic norm is, therefore, "the

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1. H Kelsen : Allgemeine Staatslehre (1925) at 249
 2. H Kelsen : Reine Rechtslehre (1934) at 64. Cf R Moore: Legal Norms and Legal Science - A critical Study of Kelsen's Pure Theory of Law Univ Press of Hawaii, Honolulu (1984).
 3. Reine Rechtslehre at 65
 4. Ibid 66. But cf G Hughes: "Validity and the Basic Norm" in Essays in Honor of Hans Kelsen, Calif L Rev, Berkeley (1971) at 695 - 714
 5. Cf Kelsen's later writings e.g. "On the Basic Norm" in Calif L Rev Vol 47 (1959) at 107 et seq. See too "What is the Pure Theory of Law" in Tul L Rev 34 (1960) 269 - 271.

last reason of validity within the normative system¹.

According to the nature of the basic norm, then, Kelsen distinguishes two types of normative systems: static and dynamic. Within an order of the first kind, the norms are "valid" by virtue of their contents. Their contents have an immediate, evident quality that "guarantees"² their validity. Put differently, it could be said the norms are valid because of their inherent appeal. The norms have this quality, because they are derivable from the basic norm "as the particular is derived from the general"³. Natural law, as Kelsen says, tends to be a static system of law (norms) whereas positive law, whose basic norm consists in the delegation of a law-making authority, constitutes a dynamic system. Since a positive legal order is a dynamic system, its basic norm "is nothing but the fundamental rule according to which various norms of the order are to be created". Yet, significantly, the particular norms of the legal order cannot be logically deduced from this basic norm. Instead, they are to be created "by a special act of will, not concluded from a premise by an intellectual operation"⁴.

In his seminal work General Theory of Law and State, Kelsen makes it clear that the basic norm is not the arbitrary product of juristic imagination. Rather, its content is determined by facts. The function of the basic norm, then, is to make possible the normative interpretation of certain facts and that means the interpretation of facts as the creation and application of valid norms. Legal norms are considered valid only if they belong to an order which is by and large efficacious.⁵ Therefore the content of a basic norm is determined by the facts through which

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1. In his General Theory of Law and State (1945) Kelsen makes the following significant correlative remark: "The quest for the reason of validity of a norm is not like the quest for the cause and effect - a regressus ad infinitum ... a last or first cause has no place within a system of natural reality" (at 111)
 2. Cf J Stone: "Mystery and Mystique in the Basic Norm" in MLR 26 (1963) 34 - 50; sed contra H Kelsen: "Prof Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) 1128 et seq
 3. General Theory of Law and State at 112
 4. Ibid 144
 5. See earlier Ch 2 where this point is elaborated upon.

an order is created and applied, to which the behaviour of the individuals regulated by this order, by and large conforms.¹ It is not required, then, that the actual behaviour of individuals be in absolute conformity with the order.

It is significant that Kelsen in his General Theory of Law and State provides more detailed formulations of the basic norm than in his earlier works.² Expressed in the form of a legal norm, the basic norm of the legal order of a single state is as follows: "Coercive acts ought to be carried out only under the conditions and in the way determined by the 'fathers' of the constitution, or the organs delegated by them".³ The basic norm of the international legal order, on the other hand, would be as follows: "The States ought to behave as they have customarily behaved".⁴ Kelsen makes the significant addition that the basic norm of a national legal order does not imply that it is impossible to go beyond that norm, since one may legitimately ask why one has to respect the historically first constitution as a binding norm. The answer might be that the fathers of the first constitution were empowered by God.⁵ It is characteristic of legal positivism, however, that it dispenses with any such religious justification of the legal order. The ultimate hypothesis of positivism, then, is the norm authorising the historically first legislator and all the other acts based on the first act.⁶ The crucial point to bear out here is

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1. See further Ch 2. Cf R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts-und Sozialphilosophie 63 (1977) 399 - 412
 2. Cf W Ebenstein: The Pure Theory of Law University of Wisconsin Press, Madison (1945). See further J Stone: "Mystery and Mystique in the Basic Norm" in MLR 26 (1963) 34 -50
 3. H Kelsen : General Theory of Law and State (1945) at 116
 4. See Ch 7 of this work, where this point is elaborated upon. see too General Theory of Law and State at 369
 5. For a fuller discussion see H Kelsen: "On the Basis of Legal Validity" in Am Jnl of Jurisprudence, Vol 26 (1981) 178 - 189, See too "Il Fondamento della Validità del Diritto" (1957) 40 Riv di Dir Intern 497 at 502 et (transl by G Arangio-Ruiz)

that the basic norm is not identical with the constitution. Rather, the basic norm is the presupposition or hypothesis demanded by legal theory that a particular constitution of a specific legal order ought to be obeyed.¹

In a significant development, the second edition of Reine Rechtslehre makes certain important clarifications aimed at countering certain disapproved interpretations. It is notable that Kelsen here says that the basic norm provides the foundation for "construing the subjective meaning of certain acts of human will as their objective meaning."²

Since the basic norm "is not a willed norm, not even willed by legal science, but only a thought-norm, legal science does not arrogate a norm-creating authority with the ascertainment of the basic norm."³ Furthermore, legal science does not prescribe that the commands of the constitution-givers ought to be obeyed. It therefore remains cognitive, even in its epistemological ascertainment that the basic norm is the condition under which the subjective meaning of the constitution-giving act and the subjective meaning of the acts done according to the constitution are interpreted as their objective meaning.⁴ Kelsen, in his Reine Rechtslehre puts it thus :

"upon the question, Who presupposes the basic norm - The Pure Theory of Law answers - whoever interprets the subjective meaning of the constitution-giving acts as their objective meaning i.e. as an objectively valid norm."⁵

1. See in this regard R W M Dias: Jurisprudence 5th ed Ch 4, 16; T C Opton: "Grundnorm and Constitution: The Legitimacy of Politics" in McGill L J Vol 24 (1978) 72 - 91. For a Latin-American perspective, see L A Warat: "La Norma Fundamental Kelseniana como criterio de Significación" in Estudios de Derecho (1981) at 39 - 62. But see e.g. A Ojo: "The Search for the Grundnorm in Nigeria" in I C L Q 20 (1971) 117 - 136 who treats the Grundnorm as synonymous with the Constitution.
2. Reprinted in 1960
3. Reine Rechtslehre (1960) 205.
4. Ibid 206 See in this regard J W Harris: "When and Why Does the Grundnorm Change?" in CLJ (1968) 103 - 133.
5. Ibid 208.
6. Ibid 208-9. But cf R Moore: Legal Norms and Legal Science - A Critical Study of Kelsen's Pure Theory of Law, Univ Press of Hawaii, Honolulu (1978).

As can be seen from the foregoing, Kelsen now, in order to avoid misunderstandings, explicitly rejects interpretations according to which the basic norm is inside the legal order, or can be construed out of the positive legal materials as being implicitly given in them.¹ He declares, instead, that the basic norm is actually "outside" the constitution.² However, in an effort to obtain greater precision, he then reformulates the basic norm of a national legal order as follows:

" Coercive acts ought to be carried out under the conditions and in the manner which is determined by the historically first state constitution and the norm enacted according to it. (In abbreviated form : "One ought to behave as the constitution prescribes")³

In addition, he also reformulates the basic norm of the international legal order thus : "The States i.e. the governments of the States, ought to behave in their mutual relations or coercion of State against State ought to be exercised under conditions and in a manner corresponding to a given custom of the States."

This, in Kelsen's words, is the "legal-logical constitution of international law".⁴

It should be noted here that Kelsen's doctrine of the basic norm, for all its significance, can be questioned and has been questioned even by the most ardent of Kelsenites.⁵ Thus, it was the criticisms of H Lauterpacht as to the relation between the basic norm and the actual facts of human behaviour in the particular, which led Kelsen to

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1. This is the so-called "intra-systemic" theory of the basic norm, as opposed to the "extra-systemic" view which holds that the basic norm is outside the legal order. Cf J Stone: "Mystery and Mystique in the Basic Norm" in MLR 26 (1963) 34 - 50.
 2. H Kelsen : Reine Rechtslehre (1960) at 207-8.
 3. Ibid 203-4. See too H Kelsen: "On the Basic Norm" in Calif L Rev 47 (1959) at 107 - 110. See further H Kelsen "On the Pure Theory of Law" Israel L Rev 1 (1966) 1 - 7.
 4. Reine Rechtslehre (1960). See too Kelsen's important Article: "Sovereignty and International Law" in Georgetown L J 48 No 4 (1960) 627 - 640. Cf G Hughes "Validity and the Basic Norm" in Calif L Rev Berkeley (1971) 708 - 714.
 5. Stone op cit at 34 -45. See further H Janzen: "Kelsen's Theory of Law" in Am Pol Sc Rev 31 (1937) 205 - 26.
 6. See H Lauterpacht: "Kelsen's Pure Science of Law" in Modern Theories of Law (ed. by W I Jennings, OUP, (1933)) Ch 7; Cf M P Golding: "Kelsen and the Concept of Legal System" in More Essays in Legal Philosophy, General Assessments of Legal Philosophies. (ed. R S Summers, Oxford, (1971)) 69.

make quite explicit that the "content" of the basic norm is "determined by facts".¹ This is confirmed by Lauterpacht who points out that "there must be a certain parallelism between what is and what ought to be".² Consequently, the tension between the factual and the normative must not be too great, if the fundamental rule is to retain its usefulness, just as it ought not to be too small if law is to remain a normative as distinct from a natural science. It goes without saying that the notions of "too great" and "too small" would require reference to some non-legal norms of judgments, as well as to the facts.³

It is significant that the renowned English jurist H L A Hart stresses that Kelsen's characterization of the basic norm for instance as "hypothetical" and "postulated" and "existing in the juristic consciousness"

"obscures, if it is not actually inconsistent with the point ... that the question what the criteria of legal validity in any legal system are, is a question of fact. It is a factual question, though it is one about the existence and content of a rule".⁴

It is noteworthy that Kelsen at one stage draws an analogy between his basic norm and the most general (and thus ultimate) principles of physics on which the unity of the system of knowledge of physics is based. It is arguable that if this analogy of Kelsen is correct, then all that Kelsen could mean by speaking of the "validity of the basic norm" is its heuristic fitness (heuristische Tauglichkeit).⁵ "Validity" in this sense, then, means that it is

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1. See H Kelsen: Reine Rechtslehre (1960) at 208-9.
 2. See H Lauterpacht: "Kelsen's Pure Theory of Law" in W I Jennings (ed) Modern Theories of Law (1933) at 111. Kelsen's later statement of the legal order to be "by and large efficacious" in order to be valid, seems a response to this criticism. Cf J Stone: "Mystery and Mystique in the Basic Norm" in MLR 26 (1963) 34 - 50. see further Ch 2 for a full discussion of this point.
 3. See further Ch 2; Cf J Stone: The Province and Function of Law (1946) at 106.
 4. See H L A Hart: The Concept of Law (1961) at 246; see too Hart's Art. "Kelsen visited" UCLA L Rev (1963).
 5. See Felix Kaufman: Methodenlehre der Sozialwissenschaften (1936) at 297. Cf G Hughes "Validity and the Basic Norm" in Calif L Rev, Berkeley (1971) 700-5.

for allowing phenomena to be apprehended, as a unity, just as the "validity" of the ultimate principles of physics means only that they make it possible to apprehend the physical happenings as a law-governing entity.¹

The basic norm is not, as it is for Kelsen, a norm *stricto sensu*, but rather the totality of the criteria by recourse to which it is determined whether norms belong to a particular legal order. These criteria, it is suggested, will invariably involve factual considerations of sociology, history, morality, ideology etc.² Some noted jurists have called it the "positivity criterion" (Positivitätskriterium) in order to understand it as the definition of the concept law according to a definite legal order.³

It must also be pointed out that the basic norm as a "norm-logical fundamental norm" is illogical in the sense that from it as a meta-juridical entity, it is impossible to derive anything juridical through "logical legal procedures". Seen in this light, Kelsen's basic norm is incapable of explaining the law or the legal order⁴ as being positive. Rather, it would be requisite to explain this norm itself as a positive norm. On this view it is arguable that Kelsen's basic norm amounts to a mere thought-construct postulated to save Kelsen's theory from "logical openness", a concept Kelsen expressly disapproves of. It has been suggested that since the Kelsenite

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1. Cf F Kaufman: Methodenlehre der Sozialwissenschaften (1936) 297
 2. See later this Chapter where this point is fully expanded upon. Cf R W M Dias: Jurisprudence 5th ed Ch's 4, 16; cf D S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Osterreichische Juristen-Zeitung 32 (1977) 169-172; Sed contra W Ebinstein: The Pure Theory of Law, Univ of Wisconsin Press, Madison, (1945); and the same author in "The Pure Theory of Law : Demythologizing Legal Thought" in Calif L Rev, Berkeley (1971) 617-52.
 3. See F Kaufman: "Juristischer und Soziologischer Rechtsbegriff" in A Verdross (ed) Gesellschaft, Staat und Recht, Festschrift Hans Kelsen zum 50 Geburtstag gewidmet (1931) at 1, 30 et seq esp 35, 40. See too O Bondy: Logical and Epistemological Problems in Legal Philosophy Australasian Jnl of Philosophy Vol 29 (1951) 81 at 92.
 4. See A T Kliiman: Orguskord (The Legal Order) publ in Estonian (1939) at 30. See too I Tammelo "A T Kliimann's Rechtstheorie" Archiv für Rechts-und Sozialphilosophie 39 (1950) at 90 - 101. It has been suggested that perhaps Kelsen's distinction between static and dynamic normative systems, developed in General Theory of Law and State (1945) 112-3 and his insistence in Reine Rechtslehre (1960) 207 "that positivity of a legal norm does not rest on the basic norm" are a response to this kind of criticism.

inquiry is essentially into the law as a logical system, neither Kelsen nor Austin needs to argue that actual law does or ought to conform to their logical schemes.¹ Taken to its extreme, this criticism would hold that there may be more than one, indeed a multitude of basic norms to a given legal order, which may even (as in one constitutional instrument) be in "irreconcilable conflict", but that until these conflicts arise and the legal order is disrupted, there is nonetheless a legal order in existence.² Moreover, it can be stated against Kelsen that mature and highly ordered systems of law have subsisted under the greatest confusion as to basic rules or fundamental norms.³

It is suggested, however, that this criticism against Kelsen's single basic norm can be countered by formulating the normative content of the relevant part of the constitution (which derives its validity from the single basic norm) by way of a disjunction as follows: "Behave in accordance with what is prescribed by the authority A or the authority B or the authority C etc". This could still be forced in the form of Kelsen's single basic norm "One ought to behave in accordance with what the constitution prescribes" since the above disjunctive fundamental norm is, in one sense, a norm of a constitution.⁴

The view has also been put forward that the basic norm idea is more difficult of use in cognizing a common law system because of the generally inductive approach of lawyers and judges to legal problems. According to this view,

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1. See J Stone: The Province and Function of Law (1946) at 110. Stone here criticizes Kelsen for having overlooked this vital point.
 2. See D Lloyd: Introduction to Jurisprudence (1959) at 304. See too in this regard the important Article by T Eckhoff und N K Sundby: "The Notion of Basic Norms in Jurisprudence" in Scand S L, (1975). The authors argue that every legal order contains a number of candidates, which could all equally readily qualify as basic norms. Kelsen's conception of one legal form for each order, they contend, performs simply an aesthetic function.
 3. See G Hughes: "The Existence of a Legal System" NYU L R 35 (1960) 1001 at 1012. Stone argues that these criticisms are due to the fact that Kelsen "has often over-stepped the limits of his own discourse". See J Stone: "Mystery and Mystique in the Basic Norm" in MLR 26 (1963) at 34 - 50, 41-2.
 4. Ibid.

this would explain why there is no case law to support squarely the norm of parliamentary supremacy. It has been suggested here that the rational reconstruction of a legal system can be done only piecemeal, step-by-step fashion, beginning at the bottom and working its way to the top. Thus, on this view, there is no a priori reason for maintaining that there is a single specific basic norm which is assumed by all the law-making officials of the territory, nor is the identity and content of such a norm a datum nor need there only be one such basic norm.¹ In this regard, Kelsen's basic norm notion can also be impugned on another ground. On the one hand, it has, in a sense, always the same content for it is in all legal systems simply the rule that the constitution or those who had laid down the first constitution, ought to be obeyed.² But, on the other hand, Kelsen insists on a "needless reduplication" in that there is a further rule to the effect that the constitution or those who laid it down are obeyed. This amounts to a rule that the rule laying down the criteria of validity shall be obeyed.

The above theoretical criticisms against Kelsen's Grundnorm notion are rather difficult to counter as they stand. Unfortunately, the difficulty of rebutting these criticisms is compounded further still by the ambiguities, perplexities and uncertainties, which are often a feature of Kelsen's phraseology.³ In this connection, one may legitimately ask what exactly is the semantic import of the other designations which Kelsen accords the entity he usually refers to as the basic norm, especially the names "origin-norm" (Ursprungsnorm) and "constitution in the

1. For an enunciation of this view, see M P Golding: Kelsen and the Concept of Legal System Archiv Für Rechts- und Sozialphilosophie 47 (1961) 355 at 385-6. See too R T E Latham: "The Law and The Commonwealth" in W K Hancock: Survey of British Commonwealth Affairs; Oxford Univ Press (1937) at 522-95.
2. See H L A Hart: The Concept of Law (1961) 245-6; see too same author: "Kelsen visited" in UCLA L Rev (1963); Cf I Tammelo: "Drei Rechtsphilosophische Aufsätze" (1948) at 13, see further J Stone: "Mystery and Mystique in the Basic Norm" MLR 26 (1963) 44.
3. It should be noted here that Kelsen might not be entirely to blame for this since academic German is, by its very nature, characterized by obscurities and vagaries which are not easily translated into English. Since Kelsen was schooled in Continental Jurisprudence, these obscurities present formidable difficulties to the Anglo-American jurist. See in this regard I Stewart: "The Basic Norm as Fiction" in Jur Rev (1980) at 199-224.

legal-logical sense" (Verfassung im rechtslogischen Sinne)⁶⁶. It would appear that Kelsen intends by all of these designations to refer to one and the same entity; however, it is suggested that they are probably not all "semantically apt" for this purpose. It is arguable that the very qualifier "basic" is itself inapt for a norm which Kelsenite theory places at the top of the pyramid of hierarchy of norms. As a result, it would seem that "apex" norm would be more appropriate, because this would still leave in Kelsen's ambiguous use of the term basic norm a residue of meaning to which that term is less semantically incongruous.²

Furthermore, the term "origin-norm", implying clarity and precision of source, seems to stand in contradiction with Kelsen's repeated assertion that the basic norm is merely hypothetical or presupposed.³ In addition, the phrase "constitution in the legal-logical sense" also raises semantic difficulties. The word "constitution" connotes a plurality of norms. Moreover, it is a term in regular lawyers' usage not necessarily implying what "basic norm" implies. Further, the import of "legal-logical" suggests that the "basic norm" is a logical principle (which Kelsen denies) and that subordinate norms can also be derived from it through logical procedures (which they cannot, according to Kelsen).⁴ In view of this, it is not surprising that the suggestion has been made that if all of these crucial terms for Kelsen's⁵ most pivotal idea are inapt in different ways for conveying what he has in mind, the possibility must be left open that what he himself has in mind may also be not very clear and may even embrace,

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1. See H Kelsen: "Das Problem der Souveränität und die Theorie des Völkerrechts" (1920) at 33; Allgemeine Staatslehre (1925) at 84, 99, 249 and later writings in which "basic norm" is still the most frequently occurring, but "origin-norm" and "constitution in the legal-logical sense" also still occur.
 2. See here : J Stone: "Mystery and Mystique in the Basic Norm" in MLR 26 (1963) 34-50 at 44-5. Sed contra H Kelsen: "Professor Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) at 1128 - 1142.
 3. See H Kelsen: "General Theory of Law and State" (1945) at 396; Reine Rechtslehre (1960) at 9, 47 as well as his frequent assertion that it is outside the system of legal norms altogether.
 4. "General Theory of Law and State" at 396 et seq.
 5. Stone op cit at 44 - 5.

without adequate articulation, different entities serving various functions.¹

Another theoretical difficulty with regard to the basic norm relates to its purpose. Thus, it can be asked whether Kelsen offers the basic norm as a device whereby jurists can comprehend a legal order as a whole i.e. as an intellectual construct to aid cognition, or whether he offers it as the Ursprungsnorm in which lawyers are to find the source of validity of all the norms of a legal system. The difficulty here lies in deciding whether its nature is "legal-logical" (i.e. "transcendental- logical") or whether it is "legal" only.² A further difficulty springing from this is whether the basic norm is a part of a legal order, the apex, as it were, of the hierarchy of legal norms, ("intra-systemic") or whether it is merely a proposition presupposed by the legal order directing one to obey the "constitution in the legal sense".³ If so, the latter, rather than the basic norm would then appear to be the norm or complex of norms at the apex of the hierarchy of legal norms.

In his early works, Kelsen seems quite adamant that the basic norm does not stand inside the system of positive legal propositions⁴ and that because the basic norm is not created in the legal procedure, it is not valid as a positive legal norm. Yet, from then onwards, he has regularly attributed functions to the basic norm which imply that this norm is part of the respective legal order. In fact, he has stressed that this norm brings about the unity of the legal system, not merely the legal scholar's cognition of the legal system.⁵ He also mentions that the hierarchy of legal norms "runs into the basic norm" and that this basic norm sets up a law-creating organ. It is

1. J Stone : "Mystery and Mystique in the Basic Norm" in MLR 26 (1963) 45, sed contra H Kelsen: "Prof Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) at 1128 - 1142. See too D Lloyd: Introduction to Jurisprudence 5th ed (1985) 330-40. But cf D S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristenzeitung 32 (1977) 169 - 172 (transl by O Bondy).
2. See H Kelsen: "The Concept of the Legal Order" in Am Jnl of Jurisprudence 27 (1982) 64 - 84. (Engl transl S Paulson) Cf Stone op cit 46.
3. See H Kelsen: Allgemeine Staatslehre (1925) 104.
4. H Kelsen: Reine Rechtslehre (1960) at 66. Cf R W M Dias: Jurisprudence 5th ed (1985) Ch's 4 and 16
5. Allgemeine Staatslehre at 84

arguable here that the fact that the later Kelsen found it necessary to repudiate the idea that his theory gives to jurists norm-creating power, suggests that he too was uncertain about the implications of his own language.¹

Unless Kelsen means to say that his basic norm is intra-systemic, there does not seem to be much sense in his assertion that it is the highest norm of a normative system.² One can only conceivably speak of something being higher or lower than something else when the entities thus compared belong to the same or a parallel order.³

Therefore, unless Kelsen's hierarchy of norms represents something non-legal altogether, it must be assumed that his basic norm is part of the hierarchy of legal norms i.e. intra-systemic. Another contradiction emerges when Kelsen says that it is the last reason of validity within the normative system.⁴

A crucial point in this matter turns on whether one takes the basic norm to mean what is implied in the operations which Kelsen purports to execute with it. Seen in this light, it would appear to be intra-systemic and its content socially conditioned.⁵ However, if one takes seriously Kelsen's explicit assertions about its location and content, this would seemingly make it extra-systemic.⁶ A difficulty here springs from the fact that in his earlier writings Kelsen fails to make clear a distinction between a proposition about law and a legal norm (or proposition of law) both of which he often runs together in the term Rechtssatz.

1. Cf H Kelsen: General Theory of Law and State (1945) at 113 where Kelsen is concerned to insist that the various norms of a dynamic system, such as a legal order "cannot be obtained from the basic norm by any intellectual operation". See further W Friedmann: Legal Theory, 5th ed Stevens and Sons, London (1967) esp at 276-89.

2. Kelsen op cit 111. Cf J Stone: "Mystery and Mystique in the Basic Norm" MLR 26 (1963) at 46.

3. Ibid. But Cf I Stewart: "The Basic Norm as Fiction" in Jur Rev (1980) at 199-210; See further J W Harris: Law and Legal Science Clarendon Press, Oxford (1979).

4. Kelsen op cit at 111-2

5. Stone op cit 45-6.

6. Ibid.

Another troublesome feature of the basic norm concerns the precise import of its formulation. It is important to ask oneself in this regard whether it is intended to express a uniform basic norm for all legal orders on a universal scale, that is to say, "the constitution in the legal sense ought to be obeyed", or whether it is intended merely "as a statement matrix with a blank to be differently filled in for each legal order"². In the latter case, the pattern adopted by the basic norm could be illustrated thus: "The constitution in the legal sense of ('Legal Order A', or 'Legal Order B' etc) ought to be obeyed" or, alternatively, "Norms (all the norms which make up the constitution of the particular legal order A or B etc. in question) ought to be obeyed"³. This formula, as an abbreviated form of Kelsen's basic norm "One ought to behave as the constitution prescribes" may represent an identical legal norm for all legal orders, or it may be intended as: "One ought to behave as the constitution of ... prescribes", representing a kind of matrix of the basic norm, in which the blank would be filled in separately for each legal order e.g. Canada Bolivia Mexico etc.⁴ A third possibility is that what are incorporated into the blanks are the actual provisions of the constitutions of each legal order. Under the three versions given above, Kelsen could probably show a kind of "aesthetic need" for a basic norm in order to cognise the various national

1. See here J Raz: The Concept of a Legal System (1973); see the same author in his Article: "Kelsen's Theory of the Basic Norm" Am Jnl of Jurisprudence Vols 19 - 20 (1974). This distinction is left confused, even in his main work General Theory of Law and State where he still uses language which fails to discriminate clearly between a proposition of law and a proposition about law. Stone makes the important point that one of the disastrous effects of this is his mixing up of the tasks of the lawyer and the jurisprudent theoretician. Yet, in the same work (at 209) he still claims that "the doctrine of the basic norm is the result of an analysis of the procedure which knowledge of the law has employed at all times".
2. See J Stone: "Mystery and Mystique in the Basic Norm" MLR 26 (1963) 48; sed Contra H Kelsen: "Prof Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) 1128 - 1142.
3. See H Kelsen: Reine Rechtslehre (1960) at 204; Cf G Hughes: "Validity and the Basic Norm" Calif L Rev Berkeley, (1971) at 700-8 who differentiates between the "weak sense" and the "strong sense" of the Grundnorm.
4. H Kelsen: Reine Rechtslehre at 204, see further Stone op cit at 48.
5. Ibid.

legal orders as existing under an assumed "world legal order".¹

A crucial inquiry here lies in determining the phenomena by reference to which the contents of the basic norm and those attributing norm-creating competence are determined. A related question is whether they are exclusively existential facts of social life and behaviour in a given community, or whether they include along with such facts non-legal normative judgements (i.e. of an ethico-political nature). If this holds true, then it would follow that the contents of the basic norm are to be implied in, or in some way to be deduced from the existing norm of the whole legal order.² It has been suggested, however, that this is not always possible in view of the fact that the legal order can only be identified by reference to its basic norm.³

It would seem that Kelsen's requirement for a legal system to be "by and large efficacious" points to the first alternative.⁴ However, his conception of the basic norm as a presupposition or a (possibly) hypothetical norm may point to the second inquiry above. Along these lines it is arguable that the basic norm is a kind of norm "which is implicitly given in the text of the statutes and the forms of expression of customary law and can be construed out of the elaboration of the positive law materials".⁵ It is significant to note here that Kelsen in his Reine Rechtslehre (1960) expressly rejects this latter point. If this rejection were final, then there would be left only

1. See J Stone: "Mystery and Mystique in the Basic Norm" MLR 26 (1963) at 48; see further: T Eckhoff and N K Sundby: "The Notion of Basic Norm(s) in Modern Jurisprudence" in Scand S L, Stockholm (1975). These authors also endorse the idea that Kelsen's basic norm merely fulfils an "aesthetic" need.
2. J Raz: "Kelsen's Theory of the Basic Norm" in Am Jnl of Jurisprudence Vols 19 - 20 (1974). Sed contra A Wilson: "Joseph Raz on Kelsen's Basic Norm" in Am Jnl of Jurisprudence 20 (1982) 46-63.
3. Stone op cit 49.
4. See further Ch 2.; cf H Kelsen: Reine Rechtslehre (1960) at 212-22 and What is Justice? (1957) 209-224 "The principle of effectiveness is the general basic norm that juristic thinking assumes whenever it acknowledges a set of norms as the valid constitution of a particular State. This norm may be formulated thus: "Men ought to behave in conformity with a legal order only if this legal order as a whole is effective".
5. I Tammelo: Drei Rechtsphilosophische Aufsätze (1948) at 13. This possibility is also referred to in J Stone: The Province and Function of Law (1946) at 106.

the possibility of determination by factual phenomena, or non-legal normative judgments, or both. Further questions then present themselves about the "purity" of Kelsen's method.²

Yet another theoretical but crucial inquiry is what precisely Kelsen means by saying that the basic norm is a "hypothesis" or that it is "hypothesized" or "hypothetical". It is important to ask here whether these are the same thing, whether they are related, but not identical notions, whether they are the notions applied to different entities (viz. two senses of the basic norm), or whether they incorporate both of these.³ It is clear that if Kelsen's basic norm is literally a hypothesis, then it cannot be a norm, *stricto sensu*. Although it may be conceivable to speak of a norm as "hypothesized" (or hypothetical in that sense), it is more difficult to speak of a norm as a hypothesis. A hypothesis, however tentative, is still a thesis and is certainly not a norm in any of Kelsen's senses of something prescriptive, or a "depsychologized command",⁴ or a proposition with an imperative or prescriptive import. However, one is prevented from dismissing this difficulty as a mere *lapsus linguae* by the fact that in this very context Kelsen describes the basic norm of a national legal order as a hypothesis "expressed in the form of a legal norm".⁵ Furthermore, it should be borne in mind that the basic norm is not sanction-stipulating, in the sense in which Kelsen lays this down as essential for a legal norm. The basic norm would, therefore, have to be some form of "dependent" ("unselbstständige") or, as Austin would have said "imperfect" legal norm.⁶ Of course, it

1. See H Kelsen: "Reine Rechtslehre" (1960) at 207.

2. See later this Chapter where the "purity" of Kelsen's Theory is further questioned by a practical evaluation of the Grundnorm and the "impurities" underlying it, viz. sociology, history, politics, morality, ideology etc. See further J Stone: Province and Function of Law (1946); see too H Lauterpacht: "Kelsen's Pure Science of Law" in Modern Theories of Law (ed W I Jennings) O U P (1933) Ch 7

3. See H Kelsen: The Pure Theory of Law (1967) at 207 et seq. See further H Kelsen: "On The Pure Theory of Law" in Israel L Rev (1966) 1-7. Cf G Hughes: "Validity and the Basic Norm" in Calif L Rev Berkeley (1971) 702-9 who differentiates between 2 senses of the basic norm viz. "weak" and "strong".

4. H Kelsen : "General Theory of Law and State" (1945) at 35.

5. Ibid 116.

6. Reine Rechtslehre (1960) at 51-9

is possible that what Kelsen means by these words is what has been called a "positivity criterion" (Positivitätskriterium)¹ and such a criterion may, conceivably, not be a norm at all. However, that still leaves Kelsen's insistence that it is both a hypothesis and a norm as a chronic source of confusion.²

However, if one adopts the alternative interpretation that Kelsen's basic norm is a hypothesized or hypothetical norm, difficulties present themselves here too. Thus, if the analogy for legal science is to be the hypothesis of a natural science, it can legitimately be asked whether the basic norm of a given legal order should not cease to be hypothetical once it is proved tenable. If, on the other hand, this hypothetical character is meant to be analogous to the axiomatic³ principles of natural science, then Kelsen's desire to insist that the other norms cannot be deduced from the basic norm seems out of place, since it is the function of such axioms to serve as major premises in deductive systems.⁴

A further important inquiry from the theoretical standpoint (already considered earlier in this work⁵ in relation to efficacy-validity), must now be considered in relation to the basic norm specifically. Central to this inquiry is what Kelsen means when he says that the validity of the basic norm of a legal order is presupposed.⁶ It is essential to establish here whether he means that the validity of this norm has still to be established, but must be established by reference to some higher norms which are not the concern of the lawyer or jurisprudent; or, alternatively, whether he means that the validity of this norm has still to be established, but must be established

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1. See F Kaufman: Methodenlehre der Rechtswissenschaft (1936) 297 et seq. Cf J Stone: "Mystery and Mystique in the Basic Norm" (1963) 26 MLR at 48 - 9.
 2. Stone op cit 49
 3. See here A M Honoré: "The Basic Norm of a Society" in Making Law Bind (1974) Ch 5 89 - 114
 4. Cf H Kelsen: Reine Rechtslehre (1960) at 64; General Theory of Law and State (1945) at 114
 5. Cf Ch 2 for a comprehensive theoretical exposition.
 6. Cf G Hughes: "Validity and the Basic Norm" in Calif L Rev Berkeley (1971) 700-4, who distinguishes between the presupposition of the validity of the basic norm and the presupposition of the basic norm as valid.

by reference to criteria, which may not be norms at all, but rather some kind of facts which again would not be the concern of the lawyer or jurist.

Both these alternatives seem entirely at odds with Kelsen's assertion that sociological jurisprudence (including the theory of justice) depends on the conclusions of the Pure Theory of Law rather than vice versa. The efficaciousness of the norms of a legal order, which, he admits to be necessary for the "validity" of the order, would seem to make sociological inquiry the pre-ordinated discipline.¹ A related difficulty here is the sense in which it is proper to speak of the "validity" of a legal order and whether it can also be proper for Kelsen to speak of the "validity" of its basic norm.² In this regard, it has been suggested that these senses must be differentiated from the ordinary one in which Kelsen speaks of a norm of a legal system as being valid, because it is made conformably to the basic norm. Thus, if one were to reason along these lines, the basic norm cannot be "the reason" for its own validity. Moreover, if there are criteria by reference to which this "validity" may be judged, they are not the lawyer's or jurist's business, nor, therefore, is "validity" in this sense. This is perhaps what Kelsen means to convey when saying its "validity" is "presupposed".

However, even allowing for this, it still seems an oddity to speak of the "validity" of the legal order, assuming this to be a self-contained order and not one subordinated to another.³ It is arguable, therefore, that in any Kelsenian sense, one should say that a legal order either exists, or it does not exist and not that it is valid or

1. See J Stone: The Province and Function of Law (1946) 48 et seq. See the same author in "Mystery and Mystique in the Basic Norm" MLR 26 (1963) where he points out at (49-50) that such a rivalry for preordination is in vain, since each discipline presupposes the other in certain respects.
2. See H Kelsen : Reine Rechtslehre (1960) at 219.
3. It is perhaps unfortunate that Kelsen's statements about the meaning of the word "validity" e.g. in General Theory at 30, 39, 155 are not very helpful. To speak of the "specific existence" and "binding force" of norms seems to obscure matters even further. Cf Stone op cit 49.
4. Ibid 51. See contra: R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv Für Rechts- und Sozialphilosophie 63 (1977) at 399- 412.

invalid. Nevertheless, it is possible that what Kelsen means is only that the legal order which has a basic norm which is "valid", (in some sense legally and jurisprudentially irrelevant), is a valid legal order.

To gain a wider perspective of Kelsen's Pure Theory of Law, a rather broad theoretical issue should also be addressed. This concerns the enquiry as to what the bearing is of Kelsen's postulate as a whole, on his idea of the basic norm. This raises the crucial but troublesome question as to whether the method of cognition of the basic norm is intended by Kelsen to be "pure" or whether Kelsen's insistence to keep the basic norm "outside" the legal system implies that the cognition of it is also methodologically outside the competence of the pure theorist of law. Here, it has been suggested that the first alternative ought to be rejected since the task of cognising the basic norm is different in toto from that which concerns its subordinate norms.² However, the second alternative too has been questioned, some have even gone as far as to say that there is no cognising of the basic norm at all and that therefore, for Kelsen, the question of the application of his purity postulate does not arise here.³

Before concluding this section (on the theoretical evaluation of Kelsen's basic norm), it would be apposite to make reference here to an apparently major re-statement made by Kelsen toward the end of his academic career which directly concerns his controversy-prone basic norm notion. Up to 1962, Kelsen maintains that his concept of the basic norm is either a "hypothesis" or a "presupposition", both of which he regards as synonymous.⁴ However, in that year he speaks of the basic norm as being a fiction, not in the conventional legal sense, but rather in the sense of Hans Vaihinger's Philosophie des Als-Ob (Philosophy of As-If). This revised view he confirms in his important

1. See later this Chapter where the "purity" of Kelsen's Pure Theory of Law is impugned by reference to the "impurities" which underlie the Grundnorm. Cf R W M Dias : Jurisprudence 5th ed (1985) Ch's 4, 16.
2. Cf J Stone : The Province and Function of Law (1946) 48 et seq; See further H Schambeck : Möglichkeiten und Grenzen der Rechtslehre Kelsens in Juristische Blätter Vol 106 (1984) 126-134.
3. Ibid 50 - 2
4. Cf H Kelsen : "Prof Stone and the Pure of Theory of Law" in Stan L Rev 17 (1965) 1128-1142.

essay: Die Funktion der Verfassung (English: The Constitutional Function).²

One of the most thought - provoking points made by Vaihinger³ and central to his theory of fictions (widely accepted nowadays) is that a false proposition may nonetheless be useful as an aid to thought. What are ordinarily called fictions i.e. propositions that contradict reality and are therefore simply false, Vaihinger calls "semi-fictions". Instead, what he calls "full fictions" are propositions that, in addition to contradicting reality and therefore, being false, are also self-contradictory. Along the lines of the foregoing terminology, Kelsen suggests that the concept of the basic norm is a "full fiction" in Vaihinger's sense. In contradicting reality, it is therefore false, (viz. a falsified hypothesis) since no such norm can be said to exist. In addition, it is self-contradictory, since it is defined as the meaning of an act of will, or, as Kelsen later puts it, the meaning of a fictive act of will, or an imaginary act of will that it is known a priori, cannot exist.

It is crucial to point out, however, that Vaihinger also distinguishes between the two senses in which the term "hypothesis" is used. In one sense he says that it refers to a presupposition about reality which is, in principle,

1. See Hans Vaihinger : The Philosophy of "As - If" (1924) at 85-90; Cf Franz Martin Schmolz (ed) Das Naturrecht in der Politischen Theorie (1963) 119-120; this is quoted by Karl Olivecrona "Law as Fact" 2nd ed, (1971) at 114
2. This essay, published as late as 1964, presents Kelsen's revised view. It is translated by I Stewart as "The Constitutional Function" in "The Basic Norm as Fiction" Jur Rev (1980), 199-224 esp at 214-24. In addition to the new view of the basic norm, it proposes an interesting dynamic and relativistic sense of the word "constitution" (Verfassung). (1964) 11 Forum Vienna 583-6. Kelsen refers to this in, his subsequent Article "On the Pure Theory of Law" Israel L Rev (1966) 1-7 at 6. In replying to critics of the "hypothesis" view, even if the critic could have noticed the revised view, Kelsen does not mention the latter view; "Prof Stone and the Pure Theory of Law" Stan L Rev 17 (1965) 1128-1157 at 1144, 1149; "Recht, Rechtswissenschaft und Logik" (1966) 52 Archiv fur Rechts und Sozialphilosophie 545-552; at 547, 550. The second edition of Reine Rechtslehre (1960) is translated into Engl by M Knight as the Pure Theory of Law in 1967. In this translation Kelsen does insert a reference to an "imaginary will" at 9,10,23. Cf Reine Rechtslehre at 9,23. Interestingly, Kelsen also discusses the possibility of fictional norms in a general way "On the Concept of Norm" in his Essays in Legal and Moral Philosophy (ed. O Weinberger) (transl by P Heath, 1973) at 216-7 at 220
3. Vaihinger op cit 88-9. Cf H Kelsen : "Zur Theorie der juristischen Fiktionen mit besonderer Berücksichtigung von Vaihingers Philosophie des ALS-OB" (1919) 1 630-58.4.

verifiable and in the other sense which he prefers to designate "fiction", it refers to a contract which is of service to discursive thought. Hence, it is suggested that by terming the basic norm a "fiction" in Vaihinger's sense, Kelsen merely re-iterates the view which has always permeated his writings, i.e. that this mental construct ("presupposition" or "hypothesis") is needed to explain the logic of legal science.²

The Grundnorm - Some Practical Issues Isolated

The following section will be rather succinct, since the issues raised here are evaluated at length in Chapter Four. This section is merely intended to isolate and define some of the major issues relevant to the position of the Grundnorm within a practical revolutionary situation. These issues will then be elaborated upon in Chapter Four and the following Chapters in correspondingly greater detail. Ideally, this section attempts to provide a focal point for the further elaboration of crucial practical issues.

It was seen above that the validity of the Grundnorm has to be assumed for the purpose of theory,³ which is why it is said to be the "initial hypothesis", the postulated, ultimate rule according to which the norms of this order are

1. See Hans Vaihinger: "Philosophie des ALS -OB" (1924) at 85-90. It should be remembered that Kelsen had been aware of Vaihinger's work for a very long time, which can be traced back to the early part of his academic career. In 1919 he even went as far as to publish a commentary on its relevance to legal concepts viz. "Zur Theorie der juristischen Fiktionen: Mit besonderer Berücksichtigung von Vaihingers Philosophie des ALS-OB" *Annalen der Philosophie* 1 (1919) 630-658. Subsequently, he credits Vaihinger with influencing him against personification of the State in *Hauptprobleme* 2nd ed at xviii. In the above-mentioned commentary he seems to come very close to considering the concept of the basic norm a fiction (at 657) but he does not decisively address the point. See too Renato Treves: *Il Fondamento Filosofico della Dottrina Pura del Diritto di Hans Kelsen* in *Atti della Reale Accademia delle Scienze di Torino* 69 (1934) 52-90 at 82-9.

2. See J W Harris, *Law and Legal Science* Clarendon Press, Oxford (1979) at 79-80.

3. Cf R W M Dias: *Jurisprudence* Ch's 4 and 16; Cf J W Harris: "When and Why Does The Grundnorm Change?" in *CLJ* (1968) at 103-33.

established and annulled, receive or lose their validity. Put another way, one cannot account for the validity of the Grundnorm by pointing to another rule of law. It was also seen how the Grundnorm validates the rest of the legal system and how one cannot therefore utilize the system or any part of it to validate the Grundnorm.²

It is at this stage that the validity-efficacy criterion should be mentioned in its practical ramification, since this is a pivotal point to the inquiry pursued in the following Chapters. As was mentioned earlier,³ Kelsenite analysis of this criterion holds that the efficacy of a legal order as a whole, ipso facto confers validity (legality).⁴ The criticism of this sweeping blanket statement forms the subject-matter of the following Chapters. In pursuing the criticism of this criterion, a two-pronged attack is envisaged. Firstly, it is contended that efficacy in itself, as defined by Kelsen, is too vague, uncertain and inadequate when confronted with the practical context of a revolutionary situation, characterized, as it is, by the change from one Grundnorm to the positing of another. Here, it is suggested that a number of additional criteria are called for in such a situation to supplement the intrinsic inadequacies of the Kelsenian efficacy criterion.

The second major point of departure to consider here is that the efficacy criterion is far too narrow with its

1. See H Kelsen: General Theory of Law and State (1945) at 113. See further at 115-6; 134, 401. Pure Theory of Law (1967) 194-5; John Salmond anticipates this point as early as 1902 in Jurisprudence (1st ed) at 110; Cf Ch's 2 and 3.

2. As one writer puts it: "It is like trying to pick oneself up from one's bootlaces" Cf R W M Dias : Jurisprudence 5th ed (1985) Ch's 4 and 16;

3. Cf Ch 2

4. See here General Theory of Law and State at 118. Cf Pure Theory of Law 194 et seq See further D S K Ong : "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristen-Zeitung 32 (1977) 169-172. Cf R Schreiber: Die Geltung von Rechtsnormen Berlin, Heidelberg, NY (1961).

blanket conferral of legality on revolutionary governments. While it is conceded that efficacy remains the dominant criterion, it is proposed that several limiting principles be considered in addition to efficacy. These ought then to be weighed up before a government can properly be said to have attained legality (legitimacy). Some preliminary remarks about the efficacy criterion, to give a background perspective to Chapter Four, will thus not be out of place. This, it is suggested, will also demonstrate the inextricable intertwine which exists between efficacy and the Grundnorm. The one cannot exist without the other; by their very nature they must, of necessity, presuppose each other.²

Firstly, it should be noted that for a Grundnorm to be effective, there need not be a universal adherence to it, although there must not be a total disregard of it. All that is required is that it should command a minimum of effectiveness.³ When, therefore, the Grundnorm ceases to derive a minimum of support, it loses its efficacy and as such ceases to be the basis of the legal order. Any other proposition which does obtain support and is thus able to command a minimum of effectiveness, will replace it.⁴ Such a change in the state of affairs is said to amount to a revolution in law. This is because the effective Grundnorm is not itself the constitution, but rather, the assumption that this effective state of affairs, as concretized in the constitution, ought to be obeyed. From this, a most crucial point emerges: The Grundnorm is not chosen or posited arbitrarily or capriciously.

1. See in this regard, the excellent Article by J M Kekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson) Clarendon Oxford, (1973) Ch 2. See further H Kelsen: Pure Theory of Law (1967) at 212 et seq and Cf What is Justice? (1960) at 262. See further: "Prof Stone and the Pure Theory of Law" Stan L Rev 17 (1965) 1128 at 1142.
2. In this regard, see the important Article by D S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristenzeitung 32 (1977) 169-72.
3. Cf R W M Dias: Jurisprudence 5th ed (1985) Ch's 4 and 16; See further D Lloyd : Introduction to Jurisprudence (1985) 334; Cf A Ehrenzweig: Psycho - Analytic Jurisprudence Oceana Publications Inc, Dobbs Ferry, NY (1971).
4. See here : W Ebenstein: "The Pure Theory of Law : Demythologizing Legal Thought" in Calif L R Berkeley (1971) 650 ; Cf T C Hopton : "The Grundnorm and Constitution : The Legitimacy of Politics" in McGill L J Vol 24 (1978) 72-91.

Rather, it is adapted to a state of affairs which is by and large effective, not vice versa.¹ Thus, an effective state of affairs must exist in the first instance, before the relevant, effective Grundnorm may be correspondingly selected in the second instance. It follows, then, that a change in the effective state of affairs involves a revolution in the theory which is adapted to it.²

The practical applications of the change from one now ineffective to another newly posited effective Grundnorm are obvious. This is amply demonstrated in this study by reference to the practical difficulties experienced during revolutionary situations, as borne out by the Rhodesian insurrection (UDI) and selected case-studies elsewhere in the British Commonwealth.³ The Rhodesian situation, especially, is a highly complex and intricate one.⁴ For the purposes of this preliminary enquiry, however, a relatively straightforward historical illustration will suffice. This is provided by the so-called Glorious Revolution in Britain in the years 1688-9.⁵ This event may justifiably be labelled a revolution, certainly in the Kelsenite sense of that term, in that the previously effective Grundnorm presupposing that the Royal Prerogative was the supreme law had become ineffective, since it had ceased to attract a minimum of support (viz. effectiveness). Instead, the newly selected Grundnorm was the presupposition of the supremacy of Parliament which attracted a minimum of effectiveness in that it was by and large applied and obeyed by the population as a whole, rendering, to use the Austinian phrase, "habitual obedience" to the new parliamentary form of government.

1. On this all-important point, see the following: R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts und Sozial- philosophie 63 (1977) 399-412. J Kühne: "Norm und Wirklichkeit" Schönherr Collection 427-37; John D Finch Introduction to Legal Theory 3rd ed Sweet and Maxwell, London (1979) Ch 5 97-120; J W Harris: "When and Why Does the Grundnorm Change?" CLJ (1968) 103-133.
2. See further Ch 4, where this change of Grundnorm within a revolutionary situation is more fully considered. Cf H Kelsen: General Theory of Law and State (1945) at 117, and Pure of Theory of Law (1967) at 200. Cf R W M Dias: Jurisprudence 5th ed (1985) Ch's 16,4.
3. For analyses of these situations, see Chapters 4,5, and 6.
4. (which is treated in extenso in Chapter Six.) See especially in this regard, the important Article by D B Molteno: "The Rhodesian Crisis and The Courts" in CILSA P (2) Vol 2 No 3 Nov (1969) 404-447.
5. See in this regard the excellent Article by G Maher: "The Identity of The Scottish Legal System" in Jur Rev (1977) 21 et seq.

In similar vein, it has been suggested that the constitutions of the various Dominions of the Commonwealth derived their validity from statutes of the Crown in Parliament at Westminster. From this it would seem to follow that the Grundnorm of the Commonwealth legal order is that enactments of the Crown in Parliament at Westminster are law, ipso jure for the Commonwealth. But the Dominions, having discarded that doctrine, their acquisition of independence has amounted to a revolution in the legal order of the Commonwealth.²

It is not surprising that many writers have criticised Kelsen by pointing out that in whatever way effectiveness of the Grundnorm is measured, Kelsen's theory has ceased to be pure at this point, since effectiveness would seem to depend on those very sociological factors which he so vehemently excludes from his theory of law.³ If, then, the Grundnorm, upon which the validity of all other norms depends, is tainted with impurity, it is arguable that the other norms of a legal order are similarly tainted. This crucial issue regarding the sociological, political, historical and ideological considerations which, of necessity, underlie the positing or selection of a Grundnorm, will be examined in detail in the following Chapter.⁴ However, a significant point must be noted at this stage as it is a cornerstone of the argument put forward in this work. Since an effective Grundnorm is predicated on what in Kelsenian terms would be "extraneous" considerations, viz. sociology, history, ideology etc, there can be no

1. Cf J M Eekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed. A W B Simpson, Clarendon Press, Oxford, (1973) Ch 2. See further J W Harris : "When and Why Does the Grundnorm Change?" in CLJ (1968) at 103-133; W Friedmann : Legal Theory 5th ed. Stevens and Sons, London (1967) 275-289.
2. See R W M Dias : Jurisprudence 5th ed. (1985) Ch's 16 and 4; See too D Lloyd : Introduction to Jurisprudence 5th ed. (1985) 330 et seq. Cf R T E Latham : "The Law and the Commonwealth" in W K Hancock : Survey of British Commonwealth Affairs Oxford Univ Press, (1937) 522-595.
3. See in this regard Dias op cit Ch's 16 and 4; See further D S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristen-Zeitung 32 (1977) 169-172. Sed Contra : F Lachmayer : "Die Geltungsneutralität der Grundnorm" Österreichische Zeitschrift für öffentliches Recht 28 (1977) 193-210.
4. Chapter 4.

objection, in principle, to the employment of similar "impure" considerations or limiting principles, viz. justice, morality, good government etc to act as restrictions on efficacy, which, if employed in isolation from these principles and leading to automatic conferral of legality, invariably yields undesirable and unpalatable results.¹ It is central to the line of reasoning presented in this work,² that the measurement of legality (or validity and legitimacy) by effectiveness in vacuo, gives rise to untenable and distasteful results which ought to be avoided at all costs.

Another line of criticism can be levelled here against the ostensible "purity" of the effective Grundnorm, which occupies so pivotal a position in the Pure Theory of Law. It is suggested that Kelsen's whole scheme is an a priori one dependent on empirical observation for confirmation. Kelsen himself offers it as a "theory of interpretation" which implies that it is not a description but a model and thus evaluative in function.³ It must be stressed, however, that Kelsen's analysis of the structure of the legal system is in no way impaired by these comments. The criticism, then, touches not the theory, but Kelsen's claim to its purity. It is significant that Kelsen himself admits in later life that the Grundnorm is founded or predicated on factors outside the law.⁴ That being the case,

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1. For this crucial point, see J M Eekelaar : Principles of Revolutionary Legality in Oxford Essays in Jurisprudence (ed. A W B Simpson, Clarendon Press, Oxford, (1973) Ch 2; See further J W Harris : Legal Philosophies (Butterworths Publishers Ltd, London, (1980)) Ch 6; See further S Paulson: "Material and Formal Authorization in Kelsen's Pure Theory of Law" in CLJ Vol 39 (1980) 172-193; J D Finch : Introduction to Legal Theory 3rd ed. Sweet and Maxwell, London (1979) Ch 5 97-120. See generally R W M Dias : Jurisprudence 5th ed. (1985) Ch 4.
 2. This is the central argument of the present study which is fully explored in its practical dimensions in Chapters 4,5,6,7.
 3. See in this regard Dias op cit Ch's 16,4. See further A V Lundstedt : Legal Thinking Revised, Almqvist and Wiksell, Stockholm, (1956.) 402-6; See too C J Friedrich : The Philosophy of Law in Historical Perspective; Univ of Chicago Press, (1958) 171-7.
 4. See H Kelsen: What is Justice? (1960) at 294.

whether his theory is said to be pure only from the Grundnorm onwards or, alternatively, only partially pure, because of its initial impurities, is not a very material issue in the present study. The crucial fact to be borne out here is that the effectiveness of the Grundnorm is a prerequisite to the validity of each single rule in the order.¹

This objection, though verbal, carries more serious implications which must be briefly enumerated in this preliminary inquiry.² If some inquiry into political and sociological factors has to precede or, at least, is implicit in the adoption of a particular Grundnorm as the criterion of validity and if the validity of every part of the system is dependent upon the continued effectiveness of the whole, then, on his (Kelsen's) own showing, the study of jurisprudence should perforce include the study of the social environment.³ It should be noted that Kelsen's picture is that of a legal order viewed in the present time-frame which⁴ would probably explain, at least, in part, his exclusion of moral, sociological and other considerations from the question of the validity of any rule. Yet, he

1. See here R W M Dias : Jurisprudence 5th ed. (1985) Ch's 16 and 4; R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts-und Sozialphilosophie 63 (1977) 399-412; J D Finch : Introduction to Legal Theory 3rd ed. Sweet and Maxwell (1979) Ch 5, 97-120; Cf F Castberg : Problems of Legal Philosophy 2nd ed. Oslo Univ Press, London : Allen and Unwin, Ltd (1957) 44-47.
2. Cf Chapters 4,5,6, and 7 for full elaboration.
3. See in this regard Dias op cit Ch 4. ; K Wilk : "Law and the State as Pure Ideas : Critical Notes on the Basic Concepts of Kelsen's Legal Philosophy" Ethics 51 (1940 - 1) 158; Castberg op cit 44-7; C J Friedrich : The Philosophy of Law in Historical Perspective Univ. of Chicago Press, (1958) 171-7.
4. On this important point see Dias op cit Ch 4. Cf H Schambeck : "Möglichkeiten und Grenzen der Rechtslehre Kelsens" in Juristische Blätter Vol 106 (1984) 126-34.

cannot avoid having to make some measure of effectiveness a decisive attribute of the Grundnorm and of the legal order as a whole. In this minimum of effectiveness, Kelsen himself admits to the presence of natural law or metaphysical elements¹. In view of this, it is not surprising the argument has been put forward that effectiveness is only one reason why courts will, in time, accept a Grundnorm i.e. "a factor operative in a continuum"².

In the light of the above, it can legitimately be asked: If Kelsen is prepared to accept one such factor, why does he exclude others, such as, for instance, morality? The force of this point may be seen when one asks why a particular Grundnorm was accepted especially if this followed on a revolution? It is crucial to inquire here whether it might not be that the new criterion of validity was able to command a "minimum of effectiveness" because it was thought to guarantee that measure of justice and morality which the previous criterion did not.³ Following from this, it is arguable that the supremacy of the Crown in Parliament was accepted in 1689 in order that tyrannous and arbitrary acts should no longer be valid as they had been by virtue of the supremacy of the Prerogative. On this line of reasoning, then, the Grundnorm is effective and continues to be effective insofar as an element of morality is built in as part of the criterion of validity.⁴ If so, the continued validity of every proposition of law derived

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1. On this point, see W Ebenstein : The Pure Theory of Law; University of Wisconsin Press, Madison, (1945) ; also, by the same author : "The Pure Theory of Law : Demythologizing Legal Thought" in Calif L Rev, Berkeley (1971) 640-52.
 2. See here R W M Dias : Jurisprudence 5th ed (1985) Ch 4 at 104; Cf the Pakistani case of Jilani vs Govt of Punjab (1972) Pak L D S C 139 at 159 (per Hamoodur Rahman C.J); 232-3 (per Yaqub Ali J).
 3. Cf F Castberg : Problems of Legal Philosophy, 2nd ed Oslo Univ Press, (1945) 44-7; C J Friedrich : The Philosophy of Law in Historical Perspective Univ of Chicago Press, (1958) 171-77; J D Finch : Introduction to Legal Theory 2nd ed Sweet and Maxwell, Ltd, (1974) 111-130;
 4. Cf Dias op cit Ch's 16 and 4. See further J D Finch : Introduction to Legal Theory 2nd ed Sweet and Maxwell, Ltd, (1974) 111 - 130.

from the validating source, has an ethical background and the separation of law from morality would consequently cease to exist.¹ Moreover, apart from the Grundnorm, if, in Kelsen's own thesis a norm in the form "If X, then Y ought to happen" is an indirect way of prescribing the behaviour needed to avoid Y (assuming Y to be a sanction) then, the values which prompted the prescription in this indirect way must also underlie the form. All this amounts to a formidable argument levelled not only against the Grundnorm, but against Kelsen's Pure Theory of Law in general.² Moreover, if sound, it would strike at the foundation of the fundamental Is-Ought dichotomy evaluated at the beginning of this study.³

Another practical issue which should be briefly touched upon in this preliminary inquiry, relates to Kelsen's not having provided a criterion by which the minimum of effectiveness of the Grundnorm is to be measured.⁴ All that he maintains is that the Grundnorm imparts validity as long as the "total legal order" remains effective or, as he later puts it, "by and large" effective. As to this, it may be inquired for how long this effectiveness must be maintained for the requirement to be satisfied.⁵ Secondly, it can legitimately be asked what is the measure of "total" and "by and large". The inadequacy of these qualifying words is further exposed and brought to the fore in some notable and crucial revolution cases where it is pointed out that an effective order cannot be said to be

1. Cf W Ebenstein: "The Pure Theory of Law : Demythologizing Legal Thought" in Calif L Rev, Berkeley, (1971) 649-55.
2. R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4, Cf H Schambeck : "Möglichkeiten und Grenzen der Rechtslehre Kelsens" in Juristische Blätter Vol 106 (1984) 126-134.
3. As to which, see Ch 1, Cf Arnold Brecht : "The Myth of Is and Ought" in Harv L Rev 55 (1941) 811-831.
4. Note that this crucial point has already been touched upon in Chapter 2. See in this regard J W Harris : "When and Why Does the Grundnorm Change ?" CLJ (1968) 103-33, See further D Lloyd : Introduction to Jurisprudence (1985) 330 et seq.
5. See further Ch's 4,5,6 where this is further analysed. See too S vs Dosso, Pak L D (1958) S C 533 - where the Supreme Court of Pakistan held expressly on Kelsenian grounds that a usurping revolutionary Government was effectively in power, hence lawful.

totally or even by and large effective as long as the judiciary refuses to accept the legality of its basis.¹

Finally, it should be asked what effectiveness itself means. It is most unfortunate that Kelsen makes no reference to the differentiation between effectiveness which makes people obliged to obey and effectiveness which makes them feel under an obligation to do so.² Thus, a usurper may by force and fear achieve the former but not the latter, which, as judicially acknowledged, is the kind of effectiveness required by Kelsen.³ This is aptly put by a judge of the Pakistani Supreme Court in words reminiscent of H L A Hart, when he said in regard to the position of a deposed usurper president: "He obligated the people to obey his behests, but, in law, they incurred no obligation to obey him."⁴

Another difficulty in practice is that an effective constitution is a fact upon which the Grundnorm posits an Ought. It has been axiomatic since Hume that an Ought cannot be derived from an Is without the interposition of a value-judgment that the Is is desirable and for that reason ought to be.⁵ Thus, it looks as if, in addition, Kelsen's idea of an effective Grundnorm conceals an ideology that might is right and hence ought to be, which is no different, after all, from the adoption of a priori assumptions by naturalists, besides being an open invitation to revolt and crude force.⁶

1. See in this regard the seminal decision of Jilani vs Government of Punjab Pak L D (1972) S C 139 in which the Supreme Court deplors both the first usurpation and the second as illegal, repudiates Kelsen in toto and overrules Dossu which relies on him so heavily and because of which "a perfectly good country was made into a laughing-stock" (per Yaqub Ali J) at 219. See too the crucial Rhodesian decision of Madzimbamuto vs Lardner-Burke 1968 (2) SA 284 especially the judgment of Fieldsend A J A at 427-8.
2. See H L A Hart: The Concept of Law (1961); Cf W Friedmann: Legal Theory 5th ed. Stevens and Sons, London (1967) 275-89.
3. Cf H Kelsen: Pure Theory of Law (1967) 211 et seq; General Theory of Law and State (1945) 118 et seq. See further H Kelsen: What is Justice Univ of Calif Press, Berkeley, (1960) 213 et seq.
4. Jilani's case, (supra) per Yaqub Ali J "The temporary silencing of the people and the Courts is not enough" (at 229).
5. Cf Ch 1.
6. See the judgment of Fieldsend AJA in Madzimbamuto vs Lardner-Burke (1968) 2 SA 248 at 430; See too Jilani's case (supra), at 172 (per Hamoodur Rahman C J); at 259 (per Sajjad Ahmad J)

It is feasible that the practical difficulties could be avoided or countered by bearing in mind the following : The criterion of validity refers to the medium or media which impart to a rule the quality of "law", "valid" here meaning "legal". The minimum of effectiveness commanded by the Grundnorm refers to the acceptance of such media by those in charge of administering "law". It is arguable that this is all that would have been needed for Kelsen's demonstration, but by using the notion of Grundnorm he seems to have "inflated a pedestrian simplicity into something misleadingly large".¹

While this idea of a medium accepted by courts is not without its difficulties, it is suggested that it does play a useful rôle in practical revolutionary contexts. By imparting to "laws" this quality of validity or legality, it seems, at least on its face, more useful than that of a Grundnorm enjoying a minimum of effectiveness.² For instance, in the lacuna or hiatus that exists during a revolution, when the old basis has been overthrown and something has still to replace it, there is no longer a Grundnorm. In these circumstances, the courts and tribunals may continue to apply "laws" identified as such by means of some criterion which they still recognize, albeit provisionally. It does not matter that that criterion belongs to the order that has gone, as long as it is accepted by the judges as having imparted the quality of "law" to the proposition in question, that is all that is needed.³

The acceptance of such a law-constitutive medium demonstrates, it is suggested, a fundamental shortcoming in Kelsen's theory of the change from one Grundnorm to another in revolutionary situations. For one thing, his theory

1. See R W M Dias: Jurisprudence 5th ed. (1985) Ch's 16 and 4 ; Cf J W Harris: "When and Why Does the Grundnorm Change?" CLJ (1968) 103-33 See further S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" AJ (1980) 1-48; See too : F Lachmayer : "Geltungsneutralität der Grundnorm" in Österreichische Zeitschrift für Öffentliches Recht 28 (1977) 193-210 at 200-4.
2. Cf Dias op cit Ch 4; See further R Stranzinger : "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts-und Sozialphilosophie 63 (1977) 399-412;
3. This was endorsed in the test case of Madzimbamuto vs Lardner-Burke 1968 (2) SA 284 at 351,421 and see ante at 105 for discussion. For an elaborate examination of this case, see Ch's 4 and 6. For comment see F M Brookfield: "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 326, at 345-6.

is liable to result in the creation of a legal vacuum in a country. Since the destruction of the formerly effective Grundnorm of the old legal order need not be done contemporaneously with the positing of a new Grundnorm, the theory admits of the possibility of there being a hiatus in the legal system.¹

The practical and preliminary issues raised above provide a good backdrop against which to approach the following Chapter. In Chapter Four, then, these and similar, related crucial issues will be evaluated in their practical dimensions, thus paving the way for the more specific applications of these issues in Chapters Five and Six.²

1. For further elaboration see Chapters 4,5,6; Cf S K Date-Bah: "Jurisprudence's Day in Court in Ghana" in ICLQ 29 (1971) 117-136. See further R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4.

2. In these Chapters the treatment of selected and relevant revolution cases will be conducted in extenso.

Introduction

In Chapter Three, Kelsen's Grundnorm notion was evaluated from a theoretical perspective, after which the practical difficulties and implications connected with the Grundnorm idea in a dynamic revolutionary context were briefly raised. It is with this background perspective in view, that this Chapter will attempt to evaluate the Grundnorm notion in change and all that that entails. In so doing, the practical inadequacy, vagueness and crudity of Kelsen's efficacy- validity criterion in revolutionary situations will be highlighted. At the same time, alternatives in the form of supplementary as well as limiting principles will be put forward in an attempt to resolve the intrinsic problems associated with the practical and judicial employment of this criterion.

Defining the Issues

1.

In a number of revolution cases, including the crucial cases decided in Pakistan, Uganda and Southern Rhodesia (present-day Zimbabwe), the courts have held themselves entitled to declare that the effect of a revolution has been to change the law in their respective jurisdictions.

1. S v Dosso (1958) 2 Pak S C R 1801; Uganda v Commissioner of Prisons, ex parte Matovu (1966) E A 514; Madzimbamuto vs Lardner-Burke N.O. JD\CIV\23\66, 9 Sept. 1966; Government Printer, Salisbury, (Lewis and Goldin JJ) (1968) (2) SA 284 A D where the judges of first instance and the majority of the AD of the HC of Rhodesia found that the revolution was not yet successful, but on various grounds held that partial recognition could be given to the legislative and administrative acts of the rebel régime; See too R vs Ndhlovu where 8 months later, after the decision in Madzimbamuto's case, (1968) (4) SA 515 the AD held the revolution to be successful so that all the new régime's laws had internal validity.
For academic commentary, see the following works: A M Honoré, "Reflections on Revolutions" Irish Jurist Vols 1-2, (1966-7) 268-278; T K K Iyer: "Constitutional Law in Pakistan: Kelsen in the Courts" in Am Jnl of Comp Law Vol 21, (1973) 759-771; Leslie J. MacFarlane: "Pronouncing on Rebellion: The Rhodesian Courts and UDI" in Public Law (1968), 326-361; S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48; J M Bekelaar: "Splitting the Grundnorm" in MLR (1967) 156-175; G N Barrie: "Rhodesian UDI: An Unruly Horse" in CILSA (1968) 110-120; C Palley: "The Judicial Process: UDI and the Southern Rhodesia Judiciary" in M L R Vol 30 (1967) 263-287; R W M Dias: "Legal Politics: Norms Behind the Grundnorm" in CLJ (1968) 233-259; F M Brookfield: "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J (1969) 327-352; T C Hopton: "The Grundnorm and Constitution: The Legitimacy of Politics" in McGill L J vol 24 (1978) 72-91; R. Welsh: "The Function of the Judiciary in a Coup d'état" SALJ (1970) 168-72; H R Hahlo "The Privy Council and the Gentle Revolution" in SALJ Vol 86 (1969) 419-39; J M Bekelaar: "Rhodesia: The Abdication of Constitutionalism" in MLR Vol 32, (1969) 19-34;

Thus, judges appointed under one effective constitution have held themselves to be bound to recognize the validity of laws promulgated under a different constitution, the judge's own political or moral persuasions having been held to be irrelevant.² It is significant that the primary authority on which the courts in these revolution cases have relied has been Kelsen's theory of the change in the Grundnorm brought about by a "successful revolution". More specifically, in several of these revolution cases it is the following controversial passage from Kelsen's General Theory of Law and State (1945) which has been cited with approval:

⁴
"Change of the Basic Norm: It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force in order to remove the legitimate government in a hitherto monarchic State and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose

1. For this crucial problem of "recognition" and its relation to "effectiveness", see later in this Chapter. See further Ch 7 where this issue is considered within the context of International Law.
2. Dosso, supra 184-5 (Muhammad Munir C J); 195 (Shahabuddin J); 222 (Amiruddin Ahmad J); ex parte Matovu, supra 530, 535 (Sir Udo Udoma C J); Madzimbamuto vs Lardner-Burke No (1968) 2 S A 284, 326-8. (Beadle C J) 364-5; (Quenet J P) 384-6; (Macdonald J A); R vs Ndhlovu 1968 (4) S A 515, 520-2, 528-35; (Beadle C J); 538-42 (Quenet J P).
3. Especially the crucial cases of Dosso, (Supra) Matovu, (Supra) Madzimbamuto, (Supra) Ndhlovu, (Supra) see further Ch's 5 and 6 for more specific treatment.
4. H Kelsen "General Theory of Law and State" (1945) at 118 - Cited and applied in S vs Dosso Supra at 185-6 (Muhammad Munir C J); 195 (per Shahabuddin J); in Matovu, supra 535-6; Sir Udo Udoma C J); in Madzimbamuto vs Lardner-Burke No JD\CIV\23-103; 10-11 (Lewis J) 1968 (2) S A 284, 315 (per Beadle C J) applied in R vs Ndhlovu (1968) 4 SA 515 by the AD of the High Court of Rhodesia, after the Privy Council decision that English Constitutional Law knew no relevant doctrine of necessity, so that an all-or-nothing choice must be made between the old and the new régime. Madzimbamuto vs Lardner-Burke No 3 (1969) AC 645. It was further held that UK Courts were constitutionally bound to accept the validity of parliamentary legislation which purported to apply to Rhodesia. See in this regard Adams vs Adams (1971) at 188; Re James (an insolvent) (1977) Ch. 41; occasionally judges have suggested that laws of effective régimes might be recognized in UK Courts even though their governments are not recognized by the executive: See here Carl Zeiss Stiftung vs Rayner and Keeler Ltd (1967) 1 AC 853 (Per Lord Wilberforce); Hesperides Hotels Ltd vs Aegean Turkish Holidays Ltd (1978) 1 All E R 277 (per Lord Denning MR) see further S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in A J (1980) 1-48.

revolutions occurring in their respective countries without entering the political arena. Successful revolutions create new legal orders whose validity may be adjudged by the courts within the territory subject to the revolution.¹ The revolution cases, or, rather, the way in which they were decided, has generated much hostile comment and unremitting condemnation. It has been contended, inter alia, that supposing Kelsen's theory of the change of the Grundnorm were to be accepted, that theory does not entitle courts to draw from it the sort of conclusion which was drawn. In this regard, several critical inquiries should be noted and then evaluated.

Firstly, the criticism has been levelled against Kelsen's revolution theory, which is to the effect that even if one supposes a revolution to be successful or "by and large" effective, (to use Kelsen's phraseology), this does not entitle a court to declare the constitution established by the revolutionaries to be valid. Kelsen himself stipulates that efficacy is only a necessary condition of validity, not the sole condition of validity, nor identical with validity.² Another criticism is contained in the proposition that when a revolution has recently occurred, no purely factual test of efficacy can be applied, so that any decision to the effect that laws enacted in accordance with the revolutionary constitution are valid, cannot merely by applying Kelsen's theory, be made free of political and kindred considerations.³ Related to this is the criticism that a court cannot make a factual judgment

1. See Dosso (Supra); and Matovu (Supra); The Madzimbamuto case (Supra) in Rhodesia, however, has been distinguished from Dosso and Matovu on the ground that there (in Rhodesia) the revolution could not be said to be successful, since the old constitutional authority was still trying to regain control: Madzimbamuto vs Lardner-Burke (1969) A C 645 724-5; In Ndhlovu, supra, at 520 and 538, Beadle C J and Quènet J P interpreted the ruling of the Privy Council to mean that as soon as the Rhodesian revolution be successful in fact, Rhodesian Courts were entitled to regard the new régime as lawful. See Ch 6, for full details.
2. In this connection see J M Eekelaar : "Splitting the Grundnorm" MLR (1967) 156, at 171-2 and "Rhodesia - the Abdication of Constitutionalism" MLR 32 (1969) 19, 22-3;
3. See here A M Honoré: "Reflections on Revolutions" Irish Jurist (1967) 268, at 271-3; Cf Annual Survey of Commonwealth Law (1967) 92-3; S A de Smith : "Constitutional Lawyers in Revolutionary Situations" Western Ont L Rev 7 (1968) 93, at 106-7 R W M Dias : "Legal Politics : Norms Behind the Grundnorm" CLJ 26 (1968) 233, 253-4;

about the efficacy of a recent revolution as a prior step to its decision whether or not to recognize the validity of revolutionary laws, since its decision on the latter question will be one of the very factors on which the ultimate success or efficacy of the revolutionary order depends.¹ Another cogent criticism concerns the fact that Kelsen's theory, being purely descriptive of legal science, can only indicate the rôle of the jurist (legal scientist) and has, therefore, no application to the rôle of the judge.²

Central to these criticisms stands the pivotal inquiry concerning the change in the Grundnorm postulated by Kelsen in his theory of revolutions. More specifically, it must be inquired what the reason is for the change from one now ineffective Grundnorm to a newly posited effective Grundnorm i.e. why the Grundnorm can be said to have changed and to have been replaced by a new one.³ A further specific inquiry is when and under what conditions an old, ineffective Grundnorm may properly be said to have been replaced by a new, effective Grundnorm and when the occurrence of a revolution can be said to have been successful. In the course of evaluating these criticisms, due consideration will again be accorded to Kelsen's efficacy-validity criterion; only this time, it will be examined in its practical and revolutionary dimensions.

1. For this criticism, see S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev 7 (1968) 93 at 106-7; R W M Dias : "Legal Politics : Norms Behind the Grundnorm" CLJ 26 (1968) 233 at 253-4; See further : F Castberg : Problems of Legal Philosophy 2nd ed Oslo Univ Press, London : Allen and Unwin Ltd, (1957) 44-7;
2. This criticism has been advanced by F M Brookfield in his important Article : "The Courts, Kelsen and the Rhodesian Revolution" U Tor L J 19 (1969) 326 at 342-4;
3. On this vital inquiry see the following : J W Harris : "When and Why does the Grundnorm change" in CLJ (1968) 103-133; R W M Dias : "Legal Politics : Norms Behind the Grundnorm" CLJ 26 (1968) 233 at 253-4; A M Honoré : "Reflections on Revolutions" in Irish Jurist 268 (1976-7) at 271-3; K Wilk : "Law and the State as Pure Ideas : Critical Notes on the Basic Concepts of Kelsen's Legal Philosophy" Ethics (1940-1) 158; D Lloyd : Introduction to Jurisprudence 3rd ed. Stevens and Sons Ltd, (1972) Ch 5, Brookfield op cit at 342-4;

The Grundnorm in Change and Kindred Practical Issues

It was pointed out in Chapter Three that the Grundnorm hypothesis is invariably predicated on underlying socio-political realities.¹ It goes without saying that in all societies on the globe, there exists a widespread, more or less inarticulate attitude of commitment towards a certain form and style of government which in Austinian phraseology could be called a "habit of obedience", which is, in significant respects, analogous to Kelsen's "by and large" effectiveness. It is equally true that in many, if not all societies, there may also exist a more explicit rule-idea functioning as a motive for social action e.g. the rule that "Whatever the Queen in Parliament enacts, is Law". This, then, is learned or communicated in this or equivalent explicit verbal formulations and as a consciously anticipated norm-formula which motivates official and other social behaviour.²

Since the Grundnorm amounts to a hypothesis of juristic thinking, it follows that it does not change automatically or instantaneously or, as one writer jocularly puts it: "... the moment the revolutionaries shoot the King"³ (or the ruler, sovereign or head of state for that matter).

1. Except that in Austin's case, he made the assumption that the attitude is directed toward a personal sovereign. In his own words: "If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is a sovereign in that society and the society (including that superior) is a society political and independent" J Austin: The Province of Jurisprudence Determined, Hart ed (1954) at 194; See further J Raz: The Concept of a Legal System (1970) and the correlations he draws between Kelsen and Austin.
2. See here further H L A Hart: The Concept of Law (1961) at 113 According to Hart: "There are thus two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed and on the other hand, its rules of recognition, specifying the criteria of legal validity and its rules of change and adjudication, must be effectively accepted as common public standards of official behaviour by its officials".
3. Cf J W Harris: "When and Why Does the Grundnorm Change?" in CLJ (1968) 103-33 at 117; see further R W M Dias: Jurisprudence 5th ed (1985) Ch's 4,16; D Lloyd: Introduction to Jurisprudence (3rd ed Stevens and Sons, Ltd, (1972) 330 et seq; See further W Friedmann: Legal Theory 5th ed Stevens and Sons Ltd, (1967) Ch 34; F Castberg: Problems of Legal Philosophy 2nd ed Oslo Univ Press, London, Allen and Unwin Ltd, (1957) 44-7; J D Finch: Introduction to Legal Theory 2nd ed Sweet and Maxwell Ltd, (1974) 111-130.

As mentioned earlier in this study¹, it cannot change until and unless the new legal order is "by and large effective"² and its laws are effectively applied and obeyed by the population generally. Only then can a new Grundnorm be posited and selected which is then adapted to the prevailing, effective state of affairs.³ Furthermore, it is arguable that the Grundnorm cannot change either, until jurists change their thinking about the legal order, that is, until they (viz. lawyers judges etc) begin to make post-revolutionary assertions to the effect "The law in the country now is such and such ..." ⁴ "Now" here refers to some revolutionary, established source of law. Thus, it is not only necessary for attitudes of commitment and rule-ideas of the type mentioned above, to take hold, but legal scientists, too, must reflect these changes in their logical arrangement of legal material.⁵

An important factor in considering when and under what conditions the Grundnorm can be said to change is, firstly, to ascertain whether the constitution,⁶ on which the relevant Grundnorm confers validity, is a written one or, alternatively, an unwritten customary one (as is the case with the UK legal order) If there is a written constitution, which does not specify custom as a source of law and yet custom is actually treated as such, "the material constitution" of the society in question will presumably count as a "customary" constitution⁷ for the

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1. As to which See Ch 3, Cf R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4.
 2. For a critical evaluation of this phrase, see later this Chapter. See further D S K Ong : "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristen-Zeitung 32 (1977) 169-172 (transl by Otto Bondy Sydney, Australia)
 3. See in this regard J W Harris : "When and Why Does the Grundnorm Change" in CLJ (1968) 103-33; Dias op cit Ch 16
 4. R W M Dias : "Legal Politics : Norms Behind the Grundnorm" CLJ 26 (1968) 233 et seq. See too H Silving : "Analytical Limits of the Pure Theory of Law" Iowa L Rev (1942-3) at 1
 5. Harris op cit 103-33
 6. See in this regard the important Article by J M Finnis : "Revolutions and the Continuity of Law" in Oxford Essays in Jurisprudence ed. A W B Simpson, Oxford Univ Press, (1973) Ch 3,
 7. Harris op cit 103 et seq.

purposes of the above distinction, but only if custom is regarded as an effective means of varying the written constitution.¹ Bearing in mind the above distinction, the Grundnorm can be viewed from a two-fold perspective : in one sense it may be said to authorize the "fathers" (of the constitution) to promulgate the written constitution at some past date and in another sense it may be said to authorize the "fathers" (of the constitution) to promulgate the written constitution from time to time a material constitution by custom.

It follows that where the constitution is written, there will be a change in the Grundnorm, viz. a revolution in Kelsenian terms, if jurists begin to deduce laws from some newly promulgated constitution.³ Thus, on a rather formal level, the new Grundnorm will differ from the old in that the personnel constituting the "fathers" (of the constitution) will be different, since they will be the promulgators of the new written constitution. Moreover, there will also be a change in the Grundnorm if the written constitution is abandoned and jurists begin to refer to as "laws" acts of legislation made in some new way sanctioned by custom.⁴ Contrariwise, it has been suggested along the same lines, that if the constitution is customary, to begin with, a change in the Grundnorm will only occur if a written constitution is substituted.⁵

In order to achieve a more "discriminating logic" for revolutions, it is necessary, therefore, to make a more detailed classification of constitutions or other relevant "ultimate sources". For instance, customary

1. See here : F Lachmayer : "Die Geltungsneutralität der Grundnorm" in Österreichische Zeitschrift für Öffentliches Recht 28 (1977) 193-210 at 208; R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4; Cf J W Harris : "When and Why does the Grundnorm Change ?" in CLJ (1968) 103-133 at 120;

2. Harris op cit 120 et seq.

3. See here R T E Latham : "The Law and the Commonwealth" in W K Hancock : Survey of British Commonwealth Affairs Oxford Univ Press, (1937) 522-95.

4. Cf Harris op cit 120 et seq. see further T C Hopton : "Grundnorm and Consitution The Legitimacy of Politics" McGill L J Vol 24 (1978) 72-91.

5. Thus, in Kelsen's terms the decision of the House of Lords in 1966 not to be bound by its own decisions did not constitute a change in the Grundnorm (revolution) neither did the "revolution" of 1688. However, in the terminology suggested above, the 1966 decision did represent a change in an important "rule-idea" and the 1688 "revolution" did represent a change in a basic "attitude of commitment."

constitutions could be subdivided according to the kind of social group which the Grundnorm effectively authorized to dictate constitutional developments and written constitutions by reference to the kind of group which promulgated them.¹ Here it could be asked whether they were, for instance, socialist or non-socialist "fathers"?²

It is clear, then, that no change in the Grundnorm can occur until legal scientists make a presupposition de novo (afresh).³ But, as Kelsen points out, this they do not and cannot do without the pre-condition of efficacy.⁴ Only in that way will they be able to fill the rôle appropriate to legal scientists.⁵ It is clear, too, that the legal scientist (jurist) does not have an arbitrary choice in the matter.⁶ The logical but crucial question which arises here and which has been posed several times,⁷ is why efficacy and efficacy alone should dictate the legal scientists' choice of Grundnorm. An answer to this question, crucial to the central aim of this study, can be found, it is suggested, by a critical and specific evaluation of the various judgments that have come to be known as the revolution cases. Due to the complexity of the issue, these are more properly and specifically discussed in the following two Chapters.⁸

However, it is essential at this stage to address a crucial issue regarding the respective rôles of legal scientist and legal practitioner. It is suggested in this regard that legal science, which consists in the logically

1. J W Harris : "When and Why Does the Grundnorm Change ? " CLJ (1968) at 109-116. See here too G Maher : "The Identity of the Scottish Legal System" in Jur Rev (1977): A related inquiry here is whether the Act of Union of 1707 between England and Scotland amounted to a revolutionary change in the Grundnorm. Many views are canvassed and discussed in this Article, but, unfortunately, opinion is divided.
2. See Harris op cit at 118; but Cf J M Finnis : "Revolutions and the Continuity of Law" in Oxford Essays in Jurisprudence ed. A W B Simpson, Oxford Univ Press, (1973) Ch 3.
3. To put it differently, the new Grundnorm must be presupposed in their juristic consciousness.
4. See later this Chapter, for the elucidation of supplementary and limiting principles to efficacy. Cf Ch's 2 and 3.
5. See H Kelsen: General Theory of Law and State (1945) at 437, Pure Theory of Law (1967) 46-8, 86-7;
6. Cf Pure Theory of Law at 201
7. Ch's 2 and 3
8. Ch's 5 and 6

consistent arrangement of normative legal material emanating from human legislators, is a socially useful activity.¹ Moreover, it would seem that Kelsen himself supports this view, or, at least, pays lip-service to it when he says :

"The possibility and necessity of such a discipline directed toward the law as a normative meaning is proved by the fact that the science of law has been in existence for millenia - a science, which, as dogmatic jurisprudence serves the intellectual needs of those who deal with the law".²

Furthermore in his main work General Theory of Law and State , Kelsen

makes the following noteworthy comment :

"... the aim of this general theory of law is to enable the jurist concerned with a particular legal order, the lawyer, the judge, the legislator, or the law-teacher to understand and to describe as exactly as possible his own positive law ...".³

In this regard, reference should also be made to Glendon Schubert, one of the protagonists on what is known as "behavioural jurisprudence", who makes the following significant comments ".....Candor compels the admission that the older mechanical jurisprudence is (legal science) the overwhelmingly dominant metaphor among judges themselves, practising lawyers, journalists and the public."⁵

It is important here to make reference to a pivotal distinction drawn by the renowned Continental jurist Walter

1. J W Harris : "When and Why Does the Grundnorm Change?" in CLJ (1968) 103-33; Sed contra F M Brookfield : "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-352; S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48; See too Kelsen himself in "Professor Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) 1128-1142
2. H Kelsen : Pure Theory of Law (1967) at 105.
3. H Kelsen: General Theory of Law and State (1945) at xiii, But Cf Kelsen in his Article " Prof. Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) 1128-1142 where he disputes the validity of the above view attributed to him.
4. i.e. the successor movement to the American realist school.
5. See G Schubert : "Behavioural Jurisprudence" Law and Society Rev 2 (1968) 407,409. By mechanical jurisprudence Schubert is referring (rather disparagingly) to what Kelsen seeks to explain and justify under the approbative title of "legal science".

Jellinek.¹ In a pamphlet entitled "Schöpferische Rechtswissenschaft" (Creative Science of Law) Jellinek differentiates between "Entscheidungs - Beziehungs - and Tatjuristen"² (viz. lawyers of decision, of relations and of action, respectively). The first two, i.e. Entscheidungs - and Beziehungsjuristen, Jellinek characterizes under the category of Erkenntnisjuristen (in English - jurists) . According to Jellinek, the function of the Entscheidungsjuristen lies in the decision of cases; the function of the Beziehungsjuristen lies in the examination of the relations of the law, while the function of the Tatjuristen is to bring about certain (practical) effects on the law.³

Although Jellinek does not explicitly distinguish between the different functions of creating and applying law and legal politics on the one hand and science as a cognition of law on the other hand, he does make it clear that the task of a "Rechtsgelehrten", that is, of a representative of the science of law, is not only to describe the law, but also to work as an Entscheidungsjurist and as a Tatjurist.⁴ In so doing , Jellinek demonstrates that the science of law consists not only in cognition, but also "creation" of law i.e. it is a "creative science".⁵ The renowned Anglo- American jurist Julius Stone makes the following relevant remarks worth noting :

"The fact ... that Kelsen's theory at its formative stage did not clearly distinguish the legal norms ... from the propositions about law ... sheds revealing light on one of the most dogmatic of Kelsen's early positions. This is that a judge (and indeed any lawyer) must, in order properly to perform his functions, operate in accordance with the Pure Theory of Law ... As soon, however, as they (that is, the propositions

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1. See Walter Jellinek : Schöpferische Rechtswissenschaft (publ in 1928) 4-5
 2. See in this regard the Article by T Eckhoff and N K Sundby : "The Notion of Basic Norms in Jurisprudence" in Scand S L (1975) These authors draw a differentiation along the same lines.
 3. Jellinek op cit at 6-7; Sed contra H Kelsen : "Prof Stone and the Pure Theory of Law " in Stan L Rev 17 (1965) 1128-1142;
 4. Ibid 15
 5. But Cf Kelsen op cit at 1135-42 where he denies this.
 6. See J Stone's classic work : Legal System and Lawyers' Reasonings (1964) at 102-3.

about law) are distinguished, as Kelsen admits they must be, then it is clear that the propositions of the Pure Theory of Law are mere jurist's propositions about law, and that they do not bind the judge in the way in which legal norms bind him¹.

From the foregoing, it can be deduced that Kelsen gives the impression that all jurists and legal practitioners who did not work with his theory "were not engaged on their proper rôle"². The above, it would seem, also alludes to the fact that Kelsen impliedly recognizes the importance of sociological and other non-legal considerations in conditioning the validity of the law.³

If legal science, then, is to be a "socially useful activity", it must purport to describe "law" which is both positive (viz laid down by human beings) and by and large effective. Kelsen puts it thus : "... the Grundnorm can only establish a law-making authority whose norms are by and large observed, so that social life broadly conforms to the legal order based on the hypothetical norm."⁴ To put it differently, one can refer to another statement made by Kelsen in the same vein : "We presuppose the basic norm only if there exists a coercive social order, by and large effective"⁵. The Grundnorm, therefore, changes when legal scientists make a new basic presupposition. However, they must do this when the legal norms which are by and large effective within a territory can be interpreted as a consistent field of meaning. This would be the case, if a new Grundnorm (authorizing a new ultimate source of law) is presupposed.⁶ The foregoing leads logically to one of the most pivotal inquiries of this study : Is it possible,

1. J Stone : Legal System and Lawyers' Reasonings (1964) at 102-3.

2. Sed Contra H Kelsen : "Professor Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) 1128-1142.

3. See for example, H Kelsen : What is Justice ? Univ of Calif Press (1957) 290 et seq.

4. See H Kelsen : General Theory of Law and State (1945) at 437.

5. Cf H Kelsen : "Prof Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) 1128-1142.

6. Cf J W Harris : "When and Why Does the Grundnorm Change ?" in CLJ (1968) 103-33; see further D S K Ong : "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristen-Zeitung 32 (1977) 169-72;

let alone desirable, to make efficacy alone the test of a change in the Grundnorm? A major criticism directed against the revolution cases examined in this work, is that whatever the position for a settled legal order may be, no objective factual judgment as to efficacy can be made soon after a revolution has taken place, much less, during a revolution (i.e. in *mediis rebus*). This criticism, it is suggested, reveals one of the major shortcomings of the efficacy test in practice, when judges are confronted with a revolution. Here one must distinguish between two possible situations where the future success of a revolution cannot be determined by, nor is it dependent upon the efficacy principle.

Firstly,² the efficacy principle can have no application where it is not clear whether the revolutionary force will succeed at all, just because the issue of effectiveness cannot be settled. In such cases, it would seem, the only course open to the judges is to reserve the question of effectiveness to be settled at a future date. Secondly,³ the efficacy principle can and does have application where the issue of the future effectiveness of the revolutionary force is reasonably clear apart from any question of the judicial determination of that effectiveness. It is at this point that an additional principle is called for in an attempt to supplement the practical inadequacy of the efficacy principle. This is known as the necessity doctrine,⁴ which is especially important where judges have the power to "turn" the revolution.

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1. For elaboration on this all-important point, see later this Chapter, and especially Ch 6. See further S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48.
 2. Guest op cit 24-46 Cf J W Harris : "When and Why Does the Grundnorm Change?" in CLJ (1968) 103-33 at 120 et seq.
 3. Harris op cit 120 et seq.
 4. See here Ch's 5 and 6 for more detail on this all-important principle. Cf D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA P (2) Vol 2 No 3 Nov (1969) 404-447.

It is, of course, true that the application of the efficacy principle will be relatively straightforward after the revolution has succeeded.¹ Moreover, if it is reasonably clear that the revolutionaries will succeed, then the doctrine will be applicable even before this crucial point. Therefore, a judgment about whether a revolutionary force will succeed or will be effective does not seem to be relevantly different from a judgment about whether a revolutionary force is effective.² However, it is where the efficacy principle is not applicable that the great practical utility of the necessity principle lies. This is to be found in the situation that prevails before the revolution has succeeded i.e. before the effectiveness of the revolution can be predicted with a reasonable degree of certainty.³ This will especially be the case where the judges have some control in determining the success or efficacy of the revolution. Thus, it is conceivable that the judges may well have the power to "turn" the revolution. Here, it is clear that a choice is possible between rival governments (or, alternatively, between anarchy and government). Here, then, the issue could not be settled by referring simply to a test of effectiveness.⁴

In these circumstances, it is not likely that judges could make a prediction about a future matter of fact i.e. the effectiveness of the government in whose favour they are about to accord validity.⁵ However, the suggestion has been

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1. See the excellent Article by S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110; This crucial point is further expanded upon in Ch 6 in regard to the Rhodesian revolution cases. Cf D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2 No 3 Nov (1969) 404-447.
 2. See further Ch 7; Cf J W Harris : "When and Why does the Grundnorm Change?" in CLJ (1968) 103-33; Molteno op cit at 430 et seq
 3. Cf here R H Christie : "Practical Jurisprudence in Rhodesia" in CILSA Vol 1 (1968) 390-407; see too the same author "Practical Jurisprudence in Rhodesia" Contd Vol 2, CILSA (1969) 3-23; and Vol 3 CILSA Vol 2 (1969) 206-221;
 4. See R W M Dias : "Legal Politics : Norms behind the Grundnorm" (1968) CLJ at 233,253.

put forward that to put the argument in the form that the determination is simply a matter of prediction, obscures the element of choice.¹ As a result, one's intended or future course of action is more properly described as the subject or content of a choice, rather than of a prediction.² The necessity doctrine, then, does have application, where the judges have the power to influence the success or efficacy of the revolution. Here the judges, instead of making a factual assessment of the likelihood of effectiveness, will have to decide how to restore civil order.³ It is in this context that the necessity doctrine is of unquestionably greater utility than effectiveness, since it places the practical question squarely before the judges. As a consequence of this, that decision could not be the result of simply predicting the success (viz. efficacy) of the revolution, but, rather, it would extend to preventing or ensuring it. Therein, it is suggested, lies the practical utility of the necessity principle, since it allows for an assessment continuously through the revolution, while the efficacy principle is unhelpful and comes to a halt, both when the factual issue of effectiveness is not clear, as well as when the effectiveness can only be determined by judicial choice.⁴

Furthermore, it is crucial to note that since the necessity principle requires a specific sort of practical justification for according validity to a revolutionary government (rather than mere theoretical or underlying socio-political considerations), it invites certain arguments supporting exceptions to it. This, it is suggested, is

1. See the helpful Article by C Palley : "The Judicial Process : UDI and the Southern Rhodesian Judiciary" in MLR Vol 30 (1967) 263-287; See further R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259.
2. Cf S Guest, : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48 In his article Guest gives the following e.g.: If a man is asked to choose between 2 paintings and keep the one chosen, he cannot choose the painting he finally keeps on the basis that it will be his own. Some other reason must be involved in order to call it a choice, for the reason "that it will be his own" does not serve to distinguish between either possible limb of his choice! He adds that 'Even the choice to accord validity to a group chosen by tossing a coin would be a choice of government rather than not and should not be hidden behind a factual determination of effectiveness'. (at 5 - 6)
3. See Ch's 5 and 6, where this doctrine is more thoroughly evaluated.
4. Cf Guest op cit at 5 et seq

amply illustrated by the situation prevailing in Rhodesia at the time of the UDI. This will be broached here by the consideration of some preliminary issues¹.

A major argument in the Rhodesian revolution cases which militated against the according of validity to the revolutionary Government on the ground that it was necessary to do so, was that a revolutionary force ought not to be allowed to take advantage of a necessity of its own making.² This, it seems, was the major argument that lay behind the Chief Justice's decision to refuse in these revolution cases, formally to apply the principle of necessity to accord even partial recognition to the revolutionary Government.³ The Chief Justice also made the significant point that effectiveness alone was not altogether sufficient in considering the question whether to accord validity to the revolutionary Government.⁴

However, one should guard against the perennial danger that additional criteria such as necessity⁵ could well tempt judges to shelter behind them and use them as smokescreens or cloaks beneath which they can conceal their own personal or political views.⁶ On the one hand, it has been suggested that if effectiveness were both a sufficient and necessary criterion of legality, as Kelsen would have us believe, then it might well be made difficult for judges

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1. (which will be considered in extenso in Chapters Five and Six). See especially the seminal case of Madzimbamuto vs Lardner-Burke 1968 (2) SALR 284; Cf S Guest : "Three Doctrines of Total Judicial Recognition of Revolutionary Governments" in AJ (1980) 1-48; see Ch's 5 and 6.
 2. Cf T K K Iyer : "Constitutional Law in Pakistan : Kelsen in the Courts" in Am Jnl of Comp Law, Vol 21, (1973) 759-781, Cf D B Moltano : "The Rhodesian Crisis and the Courts" in CILSA Vol 2 No 3 Nov (1969) 404-447.
 3. See Sir Hugh Beadle CJ in Madzimbamuto, supra at 330,351.
 4. Ibid. For a full exposition of this issue, see Ch's 5 and 6.
 5. See later this Chapter for further criteria. Cf too Ch 7 See J M Eekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson Clarendon Press, Oxford (1973)) Ch 2
 6. Guest op cit at 6 et seq.

to conceal their support of the revolution and they would consequently show more clearly where they stand on the issue.¹ On the other hand, it has been suggested that if effectiveness alone (i.e. in vacuo) were both sufficient and necessary for legality, judges could not possibly be seen to be favouring the revolutionary government, but merely deciding a factual question.² Thus, the issue of whether the judges were contributing to the success or efficacy of the revolution, or whether the revolutionaries were taking advantage of a necessity of their own making, simply had no place,³ nor, it is suggested, did the comments of the Chief Justice in this connection.

It is clear, then, that the necessity doctrine is more obviously appealing. This may also be seen in its "obvious rationale", since this doctrine can be derived by a "progression or purity of reasoning from the doctrines of the English constitutional law of partial recognition (of revolutionary governments) on the ground of necessity."⁴ Thus, a court may, (whether it chooses to accord partial or total recognition to the relevant revolutionary government) at any moment during and after a revolution ask whether a measure is genuinely necessary in the interests of the maintenance of civil order and internal stability. On account of this doctrine, then, a judge is provided with legal reasons for action throughout a revolution.⁵ As a result, it has a wider scope than the efficacy doctrine and is therefore to be preferred on that account.

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1. Cf F M Brookfield : "The Courts, Kelsen and The Rhodesian Revolution" in U Tor L J 19 (1969) 327-352; See further S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110.
 2. For this opinion see S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" AJ (1980) 1-48, at 5-6;
 3. Ibid 8-9.
 4. Ibid 5-6; Cf T K K Iyer : "Constitutional Law in Pakistan : Kelsen in the Courts" in Am Jnl of Comp Law Vol 21, (1973) at 759-781.
 5. Guest op cit 6-7.

Efficacy in practice : A critical evaluation

In order to appreciate the difficulties faced by judges practising in revolutionary situations, it is essential at this point to consider further the practicality (or lack of it), of the efficacy principle and subsequently, to evaluate this principle more specifically in the light of its use by judges who have the often unenviable task of sitting in revolutionary situations. It has already been mentioned that it is both impossible and undesirable to make efficacy the sole test of a change in the Grundnorm. It is a major criticism of the revolution cases that whatever may be the position for a settled legal order, no objectively factual judgment as to efficacy can be made soon after a revolution has taken place. Kelsen makes it plain that the identification of effective legal norms does not itself require presupposition of the Grundnorm.¹ It is only the attribution to them of the fact that they are a consistent part of a normative field of meaning, which requires this presupposition. Kelsen himself puts it thus :

"The function of the basic norm is not to make it possible to consider a coercive order which is by and large effective, as law, for according to the definition presented by the Pure Theory of Law a legal order is a coercive order by and large effective. The function of the basic norm is to make it possible to consider this order as an objectively valid order".²

The discovery of effective legal norms, therefore, is a step logically prior to the presupposition of the Grundnorm.³ Kelsen himself admits that the positivistic jurist, when he establishes the basic norm, is guided by the tendency to recognize as objective law the greatest possible number of empirically given acts the subjective meaning

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1. See H Kelsen : "Prof Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) 1128-1142; Cf R W M Dias : Jurisprudence 5 th ed (1985) Ch's 16 and 4;
 2. Kelsen op cit at 1144-1146; But Cf D S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristen Zeitung 32 (1977) 169-172..
 3. Cf R Stranzinger : "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts-und Sozialphilosophie 63 (1977) 399-412; See further J W Harris : "When and Why does the Grundnorm Change?" CLJ (1968) 103-33 at 115 et seq..

of which is to be legal acts.¹ If, then, these are in any given territory commands, permissions and authorizations which are issued by persons purporting to issue them as legislators and which are effective, then the meaning-contents of these commands, permissions and authorizations are norms which the legal scientist regards as being part of a consistent field of normative meaning. Thus, he can and must presuppose a basic norm which confers legislative authority upon those who purport to enact them.²

It is crucial to note here that the effectiveness of each individual norm is to be measured, according to Kelsen, by two criteria: firstly, by whether the norm is "obeyed" i.e. whether the conduct (the opposite of which is made the condition of the sanction stipulated by the norm) is performed, and, secondly, if the norm is not obeyed, the sanction is applied by the official whom the norm directs to apply it.³ These, then, are questions of fact. It is of course true that soon after the occurrence of a revolution, they may be future questions of fact, but that does not make apolitical judgments about them impossible or impracticable, only more subject to error.⁴ The crucial question to be posed here is what is meant by saying that norms, to be effective, must be obeyed or applied "by and large".⁵

It would be impracticable to say, in the case of many norms, whether the sanction was applied more often than not, when disobedience to the norm occurred, because statistical evidence of the number of cases of disobedience could

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1. See H Kelsen : General Theory of Law and State (1945) at 437;
 2. See J W Harris : "When and Why Does the Grundnorm Change?" in CLJ (1968) 103-33; Cf W Ebenstein : The Pure Theory of Law (1945) Ch's 1 and 4; See too the same author's Article: "The Pure Theory of Law: Demythologizing Legal Thought" in Calif L Rev Berkeley (1971) 645-52.
 3. Kelsen : op cit at 62; H Kelsen Pure Theory of Law (1967) at 11, 116
 4. See Harris op cit at 22; Cf R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259
 5. General Theory of Law and State at 118, Pure Theory of Law at 46, 86, 202, "Prof Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) 1128-1142;

not be obtained. Moreover, it would be impossible to say whether the norm was obeyed more often than not without first postulating what was to count as obedience. According to Kelsen "Law is observed by that behaviour to whose opposite is attached the coercive act of the sanction".¹ This seems to mean that laws which prohibit the performance of acts which most people do not in any case perform,² must always be generally "obeyed" i.e. one of Kelsen's criteria of obsolescence or desuetude can never apply to them.³ In addition, Kelsen makes the point that motive is irrelevant and inconsequential.⁴ It is significant that Kelsen does not deny the validity of the legal-sociological viewpoint whose object is not the study of norms, but of the legal behaviour of men in society. Kelsen even goes as far as to say that this stands side by side with normative jurisprudence and neither can replace the other. The latter deals with validity and the former with efficacy, but the two are interconnected since the sociology of law presupposes the normative concept of law.⁵

Important practical questions arise in this regard : How does one compute the number of opportunities to obey the law? What of "dead-letter" laws or laws only selectively enforced? Moreover, how many times can the law be said to be disobeyed by a motorist who drives for, say, 10 miles through a built-up area exceeding the speed limit throughout his journey? How many opportunities not to murder or steal does one get in a given period? Is motive for

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1. H Kelsen : Pure Theory of Law (1967) at 236
 2. J W Harris in his Article "When and Why Does the Grundnorm Change?" CLJ (1968) at 104 gives the example of laws against witchcraft. Cf R Moore : Legal Norms and Legal Science: A Critical Study of the Pure Theory of Law Univ Press of Hawaii, Honolulu (1978)
 3. See R Schreiber : Die Geltung von Rechtsnormen, Berlin ; Heidelberg, N Y (1966) See further S Guest: "Two Problems in Kelsen's Theory of Validity" Liverpool L Rev (1980) 101 et seq
 4. H Kelsen : General Theory of Law and State (1945) at 118,437; Pure Theory of Law at 46,86,202
 5. H Kelsen : What Is Justice ? (1959) 267-271
 6. See La Fave; Arrest : The Decision to take a suspect into custody (1965)

disobedience relevant? Are some laws more important than others? A man, for example, may never break a contract, pay all his taxes, heed the highway code, but murder the head of State.¹ Questions such as these allude to the fact that effectiveness is a crude, unscientific test in spite of the pivotal importance Kelsen attaches to it. The question, therefore, arises whether a more meaningful test can be formulated. In this regard, it has been suggested that the "by and large effective" test should be reformulated. Thus, the number of commands, permissions and authorizations issued by a legislator to the number of occasions that stipulated sanctions have been or are likely to be applied, should be represented in the following way: the first criterion (viz., obedience) should be eliminated and the test should be that "a norm is to be judged effective if the official acts of application of sanctions bear a socially significant ratio to the recorded acts of disobedience".²

This test, then, holds that provided there is a socially significant ratio which can be predicted and provided this ratio will continue to obtain for a reasonable length of time, the meaning-contents of the commands, permissions and authorizations are by and large effective norms.³ This, it is suggested, is another unsatisfactory formulation, since the operative phrase in the test - "a socially significant ratio" - is too vague,⁴ albeit, perhaps, purposely so. The phrase "a reasonable length of time" is similarly vague and uncertain. A speculative question here is whether this undefined "socially significant ratio" would involve attributing different weight to different offences.

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1. Here, reference is made to D Lloyd, : Introduction to Jurisprudence 5th ed Stevens and Sons, London, (1972) 33-6.
 2. J W Harris : "When and Why Does the Grundnorm Change?" in (1968) CLJ at 115-6. Sed Contra Lloyd op cit at 33-6; S Guest : "Three Doctrines of Total Judicial Recognition of Revolutionary Governments" in AJ (1980) 1-48
 3. Cf Lloyd op cit at 124; But see J Raz : The Concept of a Legal System (1973) at 203-5.
 4. Harris op cit 115 et seq.

Moreover, it should be asked whether greater significance would be attached to important and far-reaching constitutional laws.¹ On this test, one might argue that the legal system in Southern Rhodesia under the Smith régime was the pre - UDI system for the majority of norms of the old pre - UDI system remained in force and there might have been a certain amount of disobedience to those newly instituted, leaving on a ratio test, the balance in favour of the pre - UDI system.² It has been suggested, however, that this test need be no more precise in order to choose between the effectiveness of competing norms issued by rival legislative authorities. Some have gone as far as to state that in the revolution cases it was manifestly possible to predict at the relevant dates that official acts of sanctions would occur in accordance with revolutionary norms and that these official acts would be in a socially significant ratio to acts of disobedience to the norms.³

However, it is significant that Kelsen does qualify his efficacy principle by saying that there must be some degree of permanence⁴ to the effectiveness of legal norms before the legal scientist is justified in ascribing validity to them. It is only when norms fulfil this requirement of permanence that they can properly be regarded as consistent parts of a normative field of meaning.⁵ The question of how much, turns on whether there seems to be sufficient permanence about the new norms to make works of legal science (which, by presupposing a new Grundnorm, confer on

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1. H L A Hart : The Concept of Law (1961) at 109-110; Cf D Lloyd: Introduction to Jurisprudence 5th ed Stevens and Sons, London, (1972) at 336-7.
 2. See further Ch 7 on this issue; Cf D B Molteno "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 (1969) 404-447
 3. See J W Harris : "When and Why Does the Grundnorm Change?" in CLJ (1968) 103-33; Cf Lloyd op cit at 336 et seq.
 4. This qualification is of immense importance in practical revolutionary situations; see the Pakistani cases in Ch 5, and the Rhodesian cases Ch 6, which bear out the full practical implications of this qualification. Cf H Kelsen: "Pure Theory of Law" (1967) at 47-8.
 5. Harris op cit at 117 et seq

then validity) worthwhile in a practical, not in a moral sense.¹ A related inquiry is how does one determine how much time must have elapsed before there is sufficient "permanence" to be accorded to effectiveness. It is suggested there can be no hard and fast rule here and it would vary with the unique geo-political circumstances of each country. In at least one decided revolution case, six days was held to be sufficient,² while in others up to three years was held to be necessary.³

A thought-provoking issue which has been raised by some, is what would be the situation if a revolution is literally in the balance so that it is an even bet whether the norms of the old order or those of the rival revolutionary order will be effective during, say, the next decade or so. Here, it is suggested, another critical shortcoming of Kelsen's efficacy principle comes to light. Efficacy alone will clearly not answer the question raised in this hypothetical situation viz: "Which Grundnorm ought a legal scientist (jurist) to presuppose?"⁴ Here, it would seem that the jurist is confronted with two possible and realistic courses of action. He may either, as one writer puts it "fold his hands and refuse to make statements about what the law is", or,⁵ he could make statements in the alternative, along something like the following lines: "if the revolution should succeed, the law on this point is ..., but if it fails, the law is". It is clear that in this kind of situation, there can be no question of

1. For instance, in the Rhodesian Revolution case of Madzimbamuto vs Lardner-Burke N O 1968 (2) 284, was it at the dates when the Madzimbamuto and Ndhlovu cases came before the Court (Rhodesian AD) worthwhile to write a textbook of, say, Rhodesian Criminal Law, which presupposes a Grundnorm that confers legislative authority on the rebel Legislature? According to Harris, "an affirmative answer seems inescapable" See J W Harris: "When and Why does the Grundnorm change" in CLJ (1968) at 116 et seq. Judgments were delivered on 28 Jan 1968, and on 13 Sept 1968 respectively. The UDI was on 11 Nov 1965. See further Ch 6
2. See in this regard the Pakistani revolution case of S vs Dosso 1968 Pak Leg Dec in Ch 5. For a trenchant criticism see T K K Iyer: "Constitutional Law in Pakistan: Kelsen in the Courts" in Am Jnl of Comp Law Vol 21 (1973) at 759-781.
3. See Madzimbamuto and Ndhlovu (supra) Cf D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA Vol 2 No 3 (1969) 404-47.
4. For an ingenious attempt at a solution, see J M Bekelaar: "Splitting the Grundnorm" in MLR (1967) 156-175.
5. Cf J W Harris: Annual Survey of Commonwealth Survey of Commonwealth Law (1967) at 93

burden or degree of proof, or presumptions on this issue of fact, unless these are based on some general philosophical principle of legal conservatism which seems lacking here.¹

However, if legal scientists honestly differ about whether the revolution will succeed (i.e. be effective), the question whether the Grundnorm has or has not changed is nonetheless objective² in the same way that any judgment about future matters of fact is objective. It goes without saying that no such judgment can possibly be made with absolute certainty and many such judgments turn out to have been wrong. Nonetheless, it should be stressed that the presupposition of a Grundnorm which turns on such a judgment, does not entail any decision of political commitment.³

At this stage, reference should be made to a major criticism of the revolution cases which directly concerns the judge. This criticism is contained in the proposition that, whatever may be the position of a legal scientist, who views the situation more or less from the vantage point of a theoretical observer, the judge (being concerned with the practical application of law) cannot make an objective determination of the efficacy of revolutionary norms soon after the revolution has occurred (i.e. in *mediis rebus*), because his own decision is an element in the very efficacy which is to be determined upon.⁴ Put another way, this criticism holds that Kelsen's theory, being descriptive of legal science, can only indicate the rôle of the jurist and can in no way assist the judge.

1. Cf D Lloyd : Introduction to Jurisprudence 5th ed Stevens and Sons, London, (1972) 336-340; See further J W Harris : "When and Why does the Grundnorm Change ?" in CLJ (1968) 103-133.
2. Cf R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4; Cf D B Molteno : "The Rhodesian Crisis and The Courts" in CILSA Vol 2, No 3, (1969) 404-447; See further Harris op cit at 122
3. Harris op cit at 122-3.
4. For this view see for example F M Brookfield : "The Courts, Kelsen and The Rhodesian Revolution" in U Tor L J 19 (1969) 327-352; R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259.

On the face of it, this seems like a valid criticism and it is undoubtedly true that official action is an important element in the efficacy of norms. However, it is suggested that in evaluating whether such a criticism of a judge is well-founded, regard must be had to the prevailing circumstances.² Thus, it would depend on the relative importance of his decision as against other present and future elements in the efficacy of the revolutionary norms. Therefore, if the judge believes that the success (viz, efficacy) of the revolution might turn on what decision he gives in a case before him, then, clearly, he cannot decide as to the efficacy of the change without first making a personal (or political) choice whether or not to join the revolution. However, if he, (the judge) believes that, whatever he decides, the revolution is likely to succeed (if need be, by dismissal and the appointment of an acquiescent judge), then his decision that the revolution will be efficacious is not necessarily motivated by extra-legal considerations.³

There is an element of danger here when speaking of the rather slippery concept of judicial approval. It is true that no writers have suggested directly that the success (efficacy) of the revolutions in the sovereign independent States of Pakistan⁴ and Uganda⁵ turned on judicial approval, but there is a wide difference of opinion in regard to the "colony" of Rhodesia. Thus, it is arguable that if the Rhodesian judges had stood out against the 1965

1. Cf D Lloyd: Introduction to Jurisprudence 5th ed Stevens and Sons, London (1972) at 340 et seq; F M Brookfield: "The Courts, Kelsen and The Rhodesian Revolution" in U Tor L J 19 (1969) 337-352; R W M Dias: "Legal Politics Norms Behind the Grundnorm" in CLJ (1968) 233-259; C Palley: "The Judicial Process: UDI and the Southern Rhodesian Judiciary" in MLR, Vol 30, (1967) 263-287.

2. J W Harris: "When and Why Does the Grundnorm Change?" in CLJ (1968) at 122; But Cf Lloyd op cit at 336 et seq; and Dias op cit at 241-4;

3. Ibid 123-4; But Cf Palley op cit 263-287; Lloyd op cit 338 et seq, see further Brookfield op cit 233-259

4. See further Ch 5 for full details; Cf T K K Iyer: "Constitutional Law in Pakistan: Kelsen in the Courts", Am Jnl of Comp Law Vol 21 (1973) 759-781; See too S A de Smith "Constitutional Lawyers in Revolutionary Situations" Western Ont L Rev 7 (1968) 93-110.

5. Cf Ch 5

Constitution¹ - which was set up by the rebel régime - on grounds of morality or justice, they might well have forced the new Grundnorm to incorporate the principles for which they stood out.² Other writers, again, have criticized the view that the decision of the Rhodesian judges would make little difference to the efficacy of the revolution.³ This, it seems, was not the view of the judges in the two leading Rhodesian revolution cases in which the legality of the revolutionary régime was examined by the Rhodesian Appellate Division.⁴

Beadle C J in *Madzimbamuto* held that the decision of the Court would make little difference to the issue of success or failure.⁵ As a result, he and Jarvis A J A concluded on the facts that the revolution seemed likely to succeed.⁶ Quènet J P and Macdonald J A concluded that the revolution had already been effective.⁷ Fieldsend A J A expressed the view that whether or not the revolution had succeeded, no judge appointed under the pre-revolutionary Constitution ought to accord legality to the new Constitution.⁸

Significantly, in *R vs Ndhlovu*⁹ the Court found, on a conclusion of fact, that the revolution had succeeded, i.e. that the revolutionary régime had acquired internal de jure validity. This can be gleaned from the fact that it had become apparent to the majority judges that it could be predicted with certainty that British attempts to reassert control over the internal affairs of Rhodesia (at the time of the UDI) would be unsuccessful and ineffective. It is

1. Cf G N Barrie : "Rhodesian UDI - An Unruly Horse" in CILSA Vol 2 (1968) 110-120; Leslie Macfarlane : "Pronouncing on Rebellion : The Rhodesian Courts and UDI" in Public Law (1968) 325-361; C Palley : "The Judicial Process - UDI and the Southern Rhodesian Judiciary" in MLR Vol 30, (1967) 263-287;

2. See R W M Dias: Jurisprudence 5th ed (1985) Ch's 16 and 4. See further J M Kekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson, Second Series, Clarendon Press, Oxford, (1973) Ch 2

3. Cf F M Brookfield : "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-352;

4. The Rhodesian and other revolution cases will be extensively evaluated in Ch's 5 and 6.

5. 1968 (2) SA 284 at 321.

6. *ibid* 326,418; Cf Ch 6

7. *ibid* 369,415; See Ch 6 for elaboration

8. *Ibid* 430,432; Cf Beadle CJ, in *R vs Ndhlovu* 1968 (4) SA 515 at 522.

9. 1968 (4) at 531, (per Beadle CJ); Cf Ch 5

a difficult and, perhaps even a speculative exercise to ascertain whether the opinions expressed by the Rhodesian judges in these and other revolution cases² were truly predicated on legal principles and therefore apolitical.³ That the revolutionary régime had by the time of the Ndhlovu decision exercised effective control over the internal affairs of the country, can, however, hardly be doubted.⁴

The implications of Kelsen's revolution theory for the judge

A critical evaluation:

On the basis of the foregoing, it seems clear that the question:⁵ When does the Grundnorm change, or what are the circumstances and conditions under which the Grundnorm can properly be said to have changed? can, at least in principle, receive an apolitical, fact-based reply from a legal scientist, even when it is asked soon after the occurrence of a rebellion. In practice, the question can receive the same kind of reply from a judge in loco, since his answer to it will not affect the success (efficacy) of the rebellion or revolution.⁶

1. Cf D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 Nov (1969) 404-47; A M Honore: "Reflections on Revolutions" in Irish Jurist Vols 1-2, (1966-7); 268-78; J M Kekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson ; Second Series, Clarendon Press, Oxford, (1973) Ch 2; R S Welsh : "The Constitutional Case in Southern Rhodesia" in L Q R Vol 83, (1967) 64-88; R W M Dias: "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259; F M Brookfield : "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-352;
2. See Dhlamini vs Carter N O (1968) 2 SA 445; Madzimbamuto vs Lardner-Burke N O No 2 (1968) 2 S A 457; Dhlamini vs Carter (No 2) (1968) (2) S A 474; Dhlamini vs Carter (No 3) (1968) 2 S A 467;
3. An answer to this inquiry can perhaps be gleaned by acquiring a glimpse into the personal and political backgrounds of the Rhodesian Judges; an excellent Article in this regard should be consulted viz. C Palley : "The Judicial Process : UDI and the Southern Rhodesian Judiciary" MLR 30 (1967) 263 et seq
4. Ndhlovu (supra) ; see further Molteno op cit 404-47;
5. For revolution cases decided in sovereign independent countries, see Ch 5, for the revolution cases decided in Rhodesia, see Ch 6. These Rhodesian revolution cases, as well as those revolution cases decided in sovereign independent countries, will, in so far as they are of relevance to the present inquiry, be evaluated in extenso in the following two Chapters.
6. Cf J W Harris : "When and Why Does the Grundnorm Change?" in CLJ (1968) at 123.

However, THE Grundnorm changes when the legal norms which are by and large effective within a territory, change in such a way that a legal scientist can only interpret the content of these by and large effective norms or a logically consistent field of meaning, by presupposing a new Grundnorm.¹

The question has often been asked : What legal norms are by and large effective at any given time ? It has been suggested that this may be discovered in the following way : Firstly, by recording what commands, permissions and authorizations (stipulating sanctions) have been issued (and not repealed) by a person or body purporting to act as legislator. Secondly, by recording or predicting occasions on which the stipulated sanctions have been, or are likely to be applied by persons purporting to act as state officials. Thirdly, by recording or predicting acts of disobedience i.e. acts specified as conditions for the application of the stipulated sanctions to the actor.²

Another significant inquiry relevant to the present study concerns the question why the Grundnorm changes. Following the reasoning adopted above, the answer to this question could be formulated thus : only by presupposing the new Grundnorm³, can the legal scientist fulfill his socially useful rôle of describing the law actually in force as a logically consistent field of meaning. The following concrete illustration has been provided by a Kelsen scholar in regard to the revolutionary situation prevailing in Rhodesia :

1. J W Harris : "When and Why Does the Grundnorm Change ?" in CLJ (1968) at 124-5; See further R W M Dias : Jurisprudence 5th ed (1982) Ch's 16 and 4; and S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48 at 5 et seq
2. Harris op cit at 124 et seq. See further : R W M Dias : "Legal Politics: Norms Behind the Grundnorm" in CLJ (1968) 233-259; F M Brookfield: "The Courts, Kelsen and The Rhodesian Revolution" in U Tor L J 19 (1969) 327-352; S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110.
3. Harris op cit 125 et seq

"If anyone had to write a textbook on Rhodesia (as it then was) presupposing the old Grundnorm and therefore assuming the validity of the UK legislation of 1965, (which nullifies all laws passed and all administrative actions taken by the rebel régime) he might be considered to be performing a praiseworthy piece of propaganda against a racist régime, but he would not be acting in the rôle of a legal scientist, simply because he would not be collating the laws actually in force, viz. effective in Rhodesia."

A significant inquiry to emerge from all this is what the implications of the Pure Theory of Law are for a judge, especially a judge being in the unenviable position of having to adjudicate on the validity and efficacy of a revolutionary régime. As pointed out above, the legal scientist, if he is to fulfil his traditional rôle, must presuppose the effective Grundnorm, but what warrant, it must be asked, does Kelsen's theory give to the judge qua judge to presuppose it? If one leaves aside for the moment Kelsen's dogmatic views concerning international law, it is clear that in a direct sense, it gives none.² To the extent that this is so, the criticism above, which holds that the Pure Theory of Law does not bind the judge and is therefore of no practical utility, would appear to be

1. On this important point, see J W Harris : "When and Why Does the Grundnorm Change?" in CLJ (1968) at 125; See further R H Christie : "Practical Jurisprudence in Rhodesia" in CILSA Vol 1 (1968) 390-407; See too Vol 2 in CILSA (1969) 3-23 and Vol 3 in CILSA (1969) 206-221.
2. H Kelsen: General Theory of Law and State (1945) at 121,220-1; Pure Theory of Law (1967) at 214-217; Kelsen believes (a) that the principle of effectiveness according to which only the law effective within a territory is valid law within that territory, is a rule of positive international law - it would seem an extreme version of the declaratory effect of the recognition of states (rather than the constitutive). (b) that systems of municipal law are subordinate to and cannot contradict positive international law. If these opinions are correct, it follows that judges in a municipal court would be directly authorized to presuppose new Grundnorms following successful revolutions. While the first of these opinions is highly controversial, the second is true only of some jurists, but not of others. Unfortunately, Kelsen does not base these opinions on the evidence of positive law, but, instead, deduces them from a metaphysical interpretation of the concept of validity. See further W Ebenstein : "The Pure Theory of Law : Demythologizing Legal Thought" in Essays in Honour of Hans Kelsen, Calif L Rev, Berkeley (1971) 640-58; See too Kelsen's important Article : "Sovereignty and International Law" in Georgetown L J 48 No 4 (1960) 627-640;

well-founded.

It is true that the Pure Theory of Law is intended to describe the science of law viz. its aims, its a priori formal assumptions and the logical status of the judgments contained in it. According to Kelsen, every act of law - application is an act of law-creation in the process of concretisation and individualization of norms.¹ The judgment of the court is thus simultaneously an act applying the law and an act creating law and to the extent that it creates law, it may properly be called an act of the will (Willensakt).² However, the act of presupposing the Grundnorm he describes as an act of cognition.³ He puts it thus : "The science of law has to know the law, as it were, from the outside and to describe it. The legal organs, as legal authorities, have to create the law, so that afterwards it may be known and described by the science of law".⁴ It is clear, therefore, that the theory does not directly warrant the judge in presupposing any Grundnorm, for, as Kelsen himself concedes, jurisprudence is not a source of law.⁵

Nevertheless, it is arguable, that if one adopts an alternative line of reasoning, it will appear from this that the Pure Theory of law does have at least indirect social suggestive force for judges. Thus, the Theory assumes that legal science is socially useful which is precisely the reason for insisting that legal science should follow efficacy. Clearly, then, legal science of the kind described by the Pure Theory of Law can only continue to be socially useful, or a socially useful activity, so long as judges also indulge in it. For, if judges ceased

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1. H Kelsen : General Theory of Law and State (1945) at 132-3; Pure Theory of Law (1967) at 234;
 2. Pure Theory of Law at 10; and H Kelsen in : "Prof Stone and the Pure Theory of Law" Stan L Rev 17 (1965) at 1136-7;
 3. Pure Theory of Law at 204.
 4. Ibid 72.
 5. General Theory of Law and State, at 163; In his Stan L Rev Article at 1134, Kelsen rejects Stone's suggestion that he (Kelsen) had expressed the "Foolish opinion" that propositions of the Pure Theory of Law bind the judge in the way in which legal norms bind him.
 6. Cf J W Harris : "When and Why does the Grundnorm Change" in CLJ (1968) at 121.

altogether to think of their decisions as subsumptions under general rules;¹ if they persistently ignored the hierarchy of constitution, statute, contract etc, this sort of legal science would become pointless.² It is important, therefore, that judges are assumed to act as legal scientists for the purposes of The Pure Theory of Law. To assert that at the present time judges in developed legal systems do act as legal scientists is thus a correct and necessary description of their verbal behaviour. However, the extent to which their actual decisions are determined by factors other than what they say about "the law", is as uncertain as it is controversial.³ The Pure Theory of Law assumes that this legal science verbal behaviour is not only what judges do indulge in, but also what they ought to indulge in. As Kelsen puts it : "What sociological jurisprudence predicts that the Court will decide, normative jurisprudence maintains that they ought to decide".⁴

To the extent that judgments are acts of law-application, judges may properly be assumed to act as legal scientists and in that capacity they do and ought to presuppose the new effective revolutionary Grundnorm. The implications of the Pure Theory of Law on the basis of the above line of reasoning (which is also central to all positivist theories of law) is that, to the extent that the solution of a particular case given by the science of law is clear (i.e. to the extent that the judge has no discretion within the meaning of the relevant higher norms), the judge ought to

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1. J W Harris : "When and Why does the Grundnorm Change" in CLJ (1968) at 126; Cf D Lloyd : Introduction to Jurisprudence 5th ed Stevens and Sons, London, (1972) at 340 et seq
 2. Sed Contra the important article by F M Brookfield : "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-352;
 3. Ibid 340 et seq; Cf R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-59; C Palley : "The Judicial Process : UDI and the Southern Rhodesian Judiciary" in MLR 30 (1967) 263 et seq. Cf Harris op cit at 128.
 4. See H Kelsen : General Theory of Law and State (1945) at 172

apply that solution. From the foregoing, three relevant implications emerge for the rôle of a judge : firstly, that judges do act as legal scientists, secondly, that they ought so to act, and thirdly, to the extent that legal science gives a clear solution to a particular case, the judge ought to accept that solution as the basis for his decision.¹ Thus, where a revolution is, or is predicted to be going to be successful or efficacious, Kelsen's theory directly requires the legal scientist, acting in his rôle as legal scientist, to presuppose a new Grundnorm; in an indirect sense, the Pure Theory of Law suggests that a judge, acting in his rôle as judge (i.e. qua judge) ought to do the same.² It is suggested, then, that the judges in the revolution cases were acting properly. These cases, insofar as they are relevant to the present study, will be considered in the next two Chapters.³

A contrary view to the one given above, has, however, been put forward by some theorists who say, in effect, that judges who relied upon Kelsen's theory to solve post - revolution legal problems, were labouring under the "self-deception" that Kelsen could assist them. However, they nonetheless concede that this would in no way detract from any assistance that a legal scientist might seek in Kelsenian analysis.⁴ According to this latter view, it is questionable whether one is in fact justified in drawing the above conclusions from Kelsen's Pure Theory of Law.

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1. J W Harris : "When and Why does the Grundnorm Change?" CLJ (1968) at 130; Cf R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-59; See further A M Honoré : "Reflections on Revolutions" in Irish Jurist Vols 1-2, (1966-7) 268-79;
 2. Sed Contra F M Brookfield : "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-352
 3. Chapters 5 and 6;
 4. For this view, the following should be consulted : Brookfield op cit 327-352; Dias op cit 233-59; S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110.

Central to this view is the proposition that Kelsenian analysis of the change of a Grundnorm can only help the legal scientist "pronouncing dispassionately after the event".¹ Two additional grounds for rejecting the above conclusions have been advanced. Firstly, it has been suggested that these conclusions involve a petitio principii, namely, that legal science is presumed socially useful in that it provides guidance for judges and, therefore, cannot simply be claimed to provide suggestive force for judges on the ground that it is a legal science. The second ground for rejecting the above conclusions mentions the fact that Kelsen's Pure Theory of Law excludes any reference to values in a moral or political sense and in the absence of these, there is no other "socially useful" function for a court to perform by merely upholding or rejecting the validity of the law of the new régime.² Moreover, this contrary view holds that Kelsen's version of legal science has not, in the view of a number of judges in actual revolution cases, stood out as a "socially useful activity".³

Furthermore, it has been suggested by some jurists that the difficulty with Kelsen's Theory is that in seeking to inform us what the law is, it comes close to asserting the truth of the maxim "might equals right". In support, they cite Kelsen, who remarks in his Pure Theory of Law:⁴

"If we replace the concept of validity (as effectiveness of the legal order) by the concept of power, then the problem of the relation between validity and effectiveness of the legal order coincides with the more familiar problem of the relation between law and power or might and right. And then the solution attempted here is

1. For an evaluation of this contrary view, see R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) at 233 et seq; Cf J W Harris : "When and Why does the Grundnorm Change" in CLJ (1968) at 123;
2. See in this regard S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 18-23; Sed Contra Harris op cit 103-133;
3. Guest mentions as an example the remarks made in the course of a discussion about Kelsen's theory by Apaloo J in E K Sallah vs A-G (1970) Ghana Court of Appeal, reported in Gyandeh and Griffiths A Sourcebook of the Constitutional Law of Ghana Vol II (Part 2) 493 at 509: "The literature of jurisprudence is remote from the immediate practical problems that confront judges called upon to interpret legislation or to administer any law".
4. at 214

merely the scientifically exact formulation of the old truism that right cannot exist without might, yet is not identical with might. Right (the law), according to the theory here developed, is a certain order (organization) of might."

Seen in this light, these writers have contended that the legal scientist is nothing but an observer of events (analogous to an historian) and cannot make decisions about the binding force of legal norms.¹

It is arguable, however, that the rôle of the judge (outlined above) in presupposing a new effective Grundnorm, is both crucial as well as necessary, since it gives a practical focus to Kelsen's Pure Theory of Law which it would not otherwise possess. Moreover, it is suggested that when legal science gives a clear solution to a case, such a solution provides the necessary normative guidance to a judge in that he ought to accept it. Since the Pure Theory of Law assumes that legal science is a socially useful activity, it must, by necessary implication, have this suggestive force for a judge. It is plausible, therefore, that it falls within the ambit of the rôle of the judge to act as a legal scientist and to apply the conclusions of legal science.²

Nevertheless, it has been contended by some that it is not consonant with the rôle of a judge³ who has been appointed under one constitution to accept the authority of any other constitution. It is suggested, however, that there is nothing illogical in such a step. The rules conferring adjudicative power on a judge are legal rules which can be

1. See in this regard S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48 at 22-3; Sed contra J W Harris : "When and Why Does the Grundnorm Change ?" in CLJ (1968) 103-33, at 126 et seq

2. Cf Harris op cit at 132; It should be noted that the jurist J M Eekelaar finds another justification for the rôle of a judge as legal scientist by treating the court structure as an "institutionalized substitute" for investigating the attitudes of the population and this can survive the collapse of the old constitution. See his "Principles of Revolutionary Legality", Oxford Essays in Jurisprudence, Simpson ed (1973) at 41, 29; For a discussion of the continuity of laws where there is a change of constitution without revolution, see J M Finnis "Revolutions and Continuity of Law" in Oxford Essays in Jurisprudence ed Simpson, (1973) at 60 et seq

3. Harris op cit 127

the subject of judicial determination like any other legal rules. Since the courts frequently pronounce upon their jurisdiction in particular cases, there is no reason in logic, why a court should not embark on an inquiry as to whether or not there has been a change in the Grundnorm, even though, until the inquiry is completed, it is uncertain whether the court's jurisdiction rests on the old or new Grundnorm rules.¹ It is true that judges are normally or ideally thought of as being upholders of constitutions, rather than co-operators in rebellions.² However, whether this is always so in practice is another matter altogether; for instance, it is not inconceivable to have to contend with acquiescent judges supporting a revolution.³

In this connection, it may be asked: Ought not loyalty to the constitution which made him a judge to outweigh his ordinary duty to accept the clear ruling of legal science? Since this is a general question touching on the ethics of judgeship, there is no easy answer. The positivistic philosophy of law would probably answer it in the negative sense, for, if the revolution is successful, a loyal judge can only resign, whereas a legal science judge can continue with his useful rôle. However, even if one admits that a judge *qua* judge ought to accept the laws of a successful revolutionary régime, this legal duty may, in particular cases, be outweighed by other extra-legal duties.⁴ Thus, it may be outweighed by a political duty not to give support to an immoral régime or by a personal moral duty to observe a judicial oath. A violent revolutionary upheaval is just the kind of situation where being a

1. See A M Honoré : "Reflections on Revolutions" in Irish Jurist Vols 1-2 (1967) 268-78; Cf J W Harris : "When and Why Does the Grundnorm Change ?" in CLJ (1968) 103-33;
2. Harris op cit at 127
3. See the Pakistani revolution cases Ch 5; Cf T K K Iyer : "Constitutional Law in Pakistan : Kelsen in the Courts" in Am Jnl of Comp Law Vol 21 (1973) 759-81
4. Cf J M Kekelaar: "Splitting The Grundnorm" in MLR (1967) 156-175; See the same author in "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson, Clarendon Press, Oxford, (1973) Ch 2; see further S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev 7 (1968) 93-110; R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-59

legal order at the time of the Nazi tyranny, or the Ugandan legal order during Amin's rule, or the Cambodian legal system under Pol Pot's régime. However, as pointed out by Ross, in practice, words like "law" and "legality" do function as "titles of honour". One jurist puts it rather aptly :

'Politically (even ethically) they do ring in peoples' ears with an approbative association. If it were not so, the internal "legality" of the Smith régime would not be a political issue and that régime would not have submitted to the adjudication of Rhodesian Courts on the requirement of its "legality" and the British Government would not continue to insist that the régime was internally "illegal".²

It is essential at this point to consider whether there are any additional criteria, besides those already mentioned in this study, against which one can measure the legality (validity) of a revolutionary régime.³ It must be stressed that these criteria are not intended to replace the efficacy criterion, which, it is suggested, for all its shortcomings and uncertainty, still remains the dominant criterion in the present inquiry. Rather, they may play a useful rôle in moderating the harsh and often undesirable results which the efficacy criterion gives rise to, when employed in vacuo in practical revolutionary situations. These principles are intended, then, to supplement the efficacy criterion in cases where it is too vague and uncertain, or, alternatively, to limit the efficacy criterion in those cases where its employment may result in harshness, injustice or tyranny.

1. Cf A Ross : On Law and Justice (1958) at 31; See further F Castberg: Problems of Legal Philosophy 2nd ed Oslo Univ Press, London, Allen and Unwin Ltd, (1957) 44-7; See further W W Buckland : Some Reflections on Jurisprudence, Cambridge Univ Press, (1945) 18-24;
2. Cf J W Harris : "When and Why does the Grundnorm Change?" in CLJ (1968) at 129; For a detailed examination of this issue, see Ch 6; Cf D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 (1969) 404-47;
3. See C J Friedrich : The Philosophy of Law in Historical Perspective University of Chicago Press, (1958) 171-7; Cf J M Finnis : "Revolutions and the Continuity of Law" in Oxford Essays in Jurisprudence (Second Series) (A W B Simpson, Oxford Univ Press : (1973) Ch 3; See further J M Bekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (second series) ed A W B Simpson, Oxford Univ Press, (1973) Ch 2;

Further Rules and Principles of Legality

Legal decisions must not be viewed simply in terms of laws, but also in terms of rules and principles, both of which are normative, so that decisions based on the latter are not necessarily different from those based on the former. Although positivist theory requires that a usurper is to be regarded either as legal or illegal, this is because positivist theory only recognizes rules as law. However, it is arguable that law consists also of principles which are different from rules only in degree and sometimes not at all. These principles could play an influential rôle in governing the question of the legality of a usurper.²

If it is accepted that an executive supported by a judiciary must be viewed in a very different light from one which is not, the central problem now arises. A positivist might accept the point and yet maintain that the decision whether or not to support the executive is inherently a non-legal one. On this view, it would seem that where any given constitutional order is overthrown, the courts are placed in an insoluble dilemma. The only rules properly considered "law" were those derived from the vanquished Grundnorm.³ Thus, the courts are faced with the stark alternatives of either insisting that the previous order is the only legal one, or, apparently, acting in a non-legal vacuum.⁴

The above dilemma of the courts is a clear example of a situation that may be supposed in the midst of a revolution where the old order has gone and no new order has effectively replaced it. Where such an apparent non-legal vacuum

1. See A Khrenzweig : Psycho-Analytic Jurisprudence, Oceana Publications Inc, Dobbs Ferry, N Y (1971); See further W Ebinstein : "The Pure Theory of Law : Demythologizing Legal Thought" in Calif L Rev Berkeley (1971) 640-58;
2. Cf J M Eekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence ed A W B Simpson, Clarendon Press, Oxford, (1973) Ch 2; See too T Eckhoff and N K Sundby : "The Notion of Basic Norms in Modern Jurisprudence" in Scand SL (1975)
3. See R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4; See further, the same author : "Legal Politics: Norms Behind the Grundnorm" in CLJ (1968) 233-59;
4. Dias op cit Ch 16; Cf S K Date-bah : "Jurisprudence's Day in Court in Ghana" in ICLQ Vol 20 (1971) 315-23; See too D Lloyd : Introduction to Jurisprudence Stevens and Sons, London (1972) at 340-8;

prevails, it is suggested that the following solution could be useful: In such a lacuna or hiatus, the courts could continue to apply as "laws" the enactments of the old order, even though it is no longer effective.¹ This amounts to the so-called "splitting of the Grundnorm".² Here, the label "law" would attach to whatever the courts are prepared to accept as such; their acceptance of the law-giving medium is a separate matter. Thus, even if the old order is ineffective and even if there is a new effective order, the courts may still treat the old order as "legal" and the new as "illegal" or simply de facto.³ A case in point here is provided by the Rhodesian Revolution in Madzimbamuto vs Lardner-Burke.⁴

From this case it emerges that not only is the legality of a revolutionary regime independent of its effectiveness,⁵ but it also has jurisdictional (viz. spatial) and temporal dimensions.⁶ Although the Rhodesian regime was eventually accepted as legal by the Rhodesian Courts, the British Courts at the time still had not done so.⁷ The jurisdictional dimension is perhaps best borne out by the case of Adams vs Adams,⁸ where a British Court refused to recognize a divorce decree pronounced by a Rhodesian judge who had not taken the oath under the 1961 Constitution. This would seem to bear out that legality is dependent on the jurisdiction in which the matter is considered, quite apart from effectiveness.⁹

1. Cf R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4; See further J W Harris : "When and Why Does the Grundnorm Change ?" in CLJ (1968) 103-33; See further : J M Bekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson) (1973) Ch 2.
2. Cf J M Bekelaar : "Splitting the Grundnorm" in MLR (1968) 156-175;
3. See D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 (1969) 404-47; Cf R H Christie : "Practical Jurisprudence in Rhodesia" in CILSA Vol 1 (1968) 390 et seq
4. Court of First Instance, Judgment No. GD\CIV\126\60 of 9 Sept 1966, AD (1968) (2) SA 284 of 29 Jan 1968; Privy Council (1969) 1 AC 645; (1968) (3) All E R 561;
5. Cf Dias op cit Ch's 16 and 4;
6. Ibid Ch 4
7. Ibid
8. [1971] p 188 [1970] 3 All E R 572, rejecting Ndhlovu (supra)
9. This distinction was also acknowledged by Macdonald J A in Madzimbamuto (supra) at 467.

The temporal dimension is perhaps best borne out by the much-publicized Pakistani decision of Jilani vs Government of Punjab¹ where the Supreme Court of Pakistan repudiated Kelsen in toto, rejecting effectiveness as the sole condition or criterion of validity. This decision, it is suggested, represents a welcome departure from the earlier decisions of Dossu² and Matovu³, where the respective Supreme Courts had held that a revolutionary regime which was effectively in power was legal and had thereby destroyed the previous Constitution, no matter how, or by whom that change had been brought about. It should be noted, however, that the decision in Jilani was given after that revolutionary regime had been overthrown. Consequently, the declaration that it was illegal ab initio was retrospective.⁴

Before considering the relevant revolution cases in detail in the following two Chapters, several preliminary, but crucial points can be made which emerge from the above outline: The effectiveness of the legislative authority is not a condition of the validity, either of "laws" or even of itself. Rather, it must be regarded as a factor which in time induces the courts to accept such authority. Moreover, it is certainly by no means the only factor. Others in this regard would include force, propaganda, packing the bench with compliant judges etc.⁵ This would seem to reinforce the contention that the legality of the revolutionary government only

1. Pak L D (1972) S C 129. Cf T K K Iyer: Constitutional Law in Pakistan: Kelsen in the Courts in Am Jnl of Comp Law vol 21 (1973) 759 - 81.

2. (1958) S C Pak 533; Cf Iyer op cit 759 et seq.

3. Uganda vs Commissioner of Prisons, ex parte Matovu (1966) EALR 514

4. In view of the heavy reliance on Dossu by the AD in Matovu's case, it is interesting to speculate what effect, if any, its overruling might have had on the reasoning in Madzimbhuto. In this regard, it should be noted that in the post-war Federal Republic of Germany the courts might have declared the formally enacted legislation of the Nazi era to be void retrospectively but they refrained from actually doing so; See Poppé: On the validity of judicial decisions in the Nazi era MLR 23 (1960) at 260 et seq.

5. For further factors, see Ch 5.

comes about when the courts accept or are made to accept it. Furthermore, it is borne out by the revolution cases that effectiveness is not the criterion of the Grundnorm, but what courts are prepared to accept as the fount of validity. Moreover, it is clear that the validity of a law does not necessarily derive from an effective Grundnorm, but that this too depends on what the courts hold as valid. Another point which has emerged from these cases is that a particular Grundnorm may be accepted and rejected by the same court depending upon the time at which and the conditions under which it sits.¹

It is to be hoped that the preliminary points sketched above, as they arise from the revolution cases, provide something of a compromise solution to the stark alternatives with which the courts are confronted in revolutionary situations, viz either insisting that the previous order is the only legal one, or, apparently acting in a non-legal vacuum (or hiatus). It is clear that if the courts had disregarded this via media by sticking to either one of these alternatives in following their duty and applying the "law" so defined, an absurd result could have been reached. The following is an apt illustration in this regard: If an absolute monarch were to die without making provision for a successor, the "law" would compel them to insist on regarding him as the lawful ruler.² Consequently, to avoid such futility, it is arguable that it would be reasonable to limit the legitimacy of a ruler to the period in which he remains in effective power.³

It is important, therefore, to evaluate the situation confronting a judicial tribunal in the event of a

1. Cf R W M Dias, Jurisprudence 5th ed (1985) Ch's 16 and 4. See further Dias: "Legal Politics: Norms behind the Grundnorm" in CLJ (1968) 233 - 59.

2. See J M Finnis: Revolutions and the Continuity of Law in Oxford Essays in Jurisprudence, Second Series, (ed A W B Simpson, Oxford University Press, (1973) Ch 3; see further: J M Kekelaar: "Principles of Revolutionary Legality" (Oxford Essays in Jurisprudence) second series, (ed A W B Simpson) (Oxford University Press, (1973) Ch 2.

3. See in this regard Kekelaar op cit Ch 2; see further: C J Friedrich: The Philosophy of Law in Historical Perspective (Univ of Chicago Press, (1958) 171 - 7. F Castberg: Problems of Legal Philosophy (2nd ed Oslo Univ Press; London: Allen and Unwin Ltd (1957) 44 - 7; This has an analogy in the principle of domestic law that the courts will not make orders that will obviously be in vain.

revolution from the above angle. Here the notion of common sense dictates that the courts should cease to regard the decrees of the vanquished ruler as being authoritative and support for this can be found in Kelsen's principle of effectiveness.¹ A significant point here is that there might be some implication within the old constitution that it should be considered "frustrated" if it becomes impossible to carry out its terms.² However, it is suggested that this analogy with the contract doctrine, like most analogies, does not fit the case exactly. Here it is probably better to regard this principle as one which exists independently of the old order and which, accordingly, survives its demise.³ The weight which it carries can, then, like that of other principles, be derived from sources quite distinct from the formal constitutional rules. It is arguable that if this principle can survive the collapse of the previous system, there seems to be no a priori ground for excluding the possibility that other principles, too, might have survived.

The question now arises whether it is possible to conceive of principles according to which prima facie illegal acts may be sought to be justified. It has been suggested that such principles do exist and can be applied even to override the enacted law of an effective legal system.⁴ It might be apposite here to supply two relevant examples from the realm of domestic law. The first is drawn from the principle of sentencing offenders. In the vast majority of cases in which the court finds a mitigating factor, it cannot be said that

1. Cf J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson, second series, Clarendon Press, Oxford, (1973) at 37.

2. See A M Honoré: "Reflections on Revolutions" Irish Jurist VOLS 1 - 2 (1967) (N S) 268 - 78, at 268; See further J M Finnis: "Revolutions and the Continuity of Law" in Oxford Essays in Jurisprudence (Second series, ed A W B Simpson, Oxford Univ Press, (1973) Ch 3.

3. Cf Bekelaar op cit at 37; see further K Wilk: "Law and the State as Pure Ideas: Critical Notes on the basic ideas of Kelsen's Legal Philosophy" in Ethics 51 (1940) at 1, 158; G B J Hughes: "Validity and the Basic Norm" in Calif L Rev Berkeley (1971) 895 et seq.

4. Cf Honoré op cit 268 - 78; see further Bekelaar op cit at 37 - 8.

the presence of that factor justifies the offence (in the same way as, for example, self-defence). In some cases, however, it may come near to doing so, as where a penniless person who steals food for his family is given an absolute discharge. In one case¹ a defendant had refused to produce his national registration identity card when a policeman demanded it in connection with a traffic offence. The police power derived from wartime legislation enacted for security purposes. A divisional court of seven judges upheld the validity of the legislation, but "emphatically" approved of the absolute discharge given to the defendant and encouraged magistrates, similarly, to discharge any other person convicted of this offence. The important point here is that this decision, as has been suggested, amounts to an assertion that disobedience to this law is justified and, consequently, it can be supported only by reference to a principle which must override the enacted law - in this instance - that legislation passed for security purposes cannot be used for other purposes when the emergency is over. Therefore, courts may not only take cognizance of criteria according to which unlawful acts may be justified, but where their application involves consideration of the motives of the authorities, investigating into these motives appears to be within their competence.²

This leads logically to the more immediately analogous principle of necessity (raised earlier in this Chapter in a slightly different context). This may, inter alia, be used to justify invasions by private citizens against others, which would otherwise be unlawful.³ However, more significantly, it has also been considered

1. Willcock vs Muckle (1951) 2 KB 84; see further J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence, second series, Clarendon Press Oxford (1973) 35 et seq.

2. Ibid 37.

3. See Glanville Williams: "The Defence of Necessity" C L P 6 (1953) 216 who writes: "The law, in a word, includes the doctrine of necessity; the defence of necessity is an implied exception to particular rules of Law". See further in this regard T K K Iyer: "Constitutional Law in Pakistan: Kelsen in the Courts" in Am Jnl of Comp Law vol 21 (1973) 759 - 761.

the basis for the English doctrine of martial law.¹³¹ By this doctrine, the "ordinary law" is suspended, while the courts refuse to intervene during the course of an emergency. But it would be mistaken to suppose that there was a legal vacuum during this period, because acts which would otherwise have been unlawful will be justified only if they survive careful scrutiny as to whether they exceeded the limits reasonably set by the exigencies of the situation. This principle, it should be stressed, is also of great importance in certain of the revolution cases.¹ Thus, it was relied upon by the Court at First Instance in the test case of Madzimbamuto³ as well as in the seminal Dosso⁴ decision in Pakistan to justify those acts of the authorities which were "predominantly motivated" with a view to maintaining the functioning of society.⁵

ALTERNATIVE AND SUPPLEMENTARY PRINCIPLES OF LEGALITY

It is necessary, as one writer put it, "to salvage this area of investigation from total extinction by the operation of positivist dogmatism".⁶ In this connection, several principles can be suggested which may be relevant to a decision whether a revolutionary regime ought to be accorded legal justification. These principles would, in so far as they are relevant to the case at hand, provide significant normative guidance to judges, which they can then employ to moderate the harshness of the efficacy criterion and the undesirable

1. This doctrine is of great significance, especially in some of the Pakistani revolution cases eg S vs Dosso (Supra); see further Chapter 5; Cf T K K Iyer: "Constitutional Law in Pakistan: Kelsen in the Courts" in Am Jnl of Comp Law vol 21 (1973) 759 et seq.

2. For an elaboration of this doctrine, see especially Ch 5.

3. Madzimbamuto vs Lardner-Burke N O 1968 (2) S A 284, see further Ch 6.

4. S vs Dosso (1958) S C Pak 158;

5. For authority underlying this principle, see, for example, R F V Heuston: Essays in Constitutional Law (1964) at 159.

6. Cf J H Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson; Clarendon Press, Oxford, (1973) Ch 2.

consequences which the judicial employment of this criterion in vacuo invariably gives rise to. Apart from the criteria of efficacy and necessity to which we have already referred, mention can be made, firstly, of the principle of legitimate disobedience to authority exercised for improper purposes.¹ In the second instance one should mention the principles that violence of a right demands a remedy and that no one should profit from his own wrongful act.² As a revolution will invariably have involved the violation of some of the rights protected by the previous constitution, a combination of those principles would suggest that, even if the new order is considered legitimate, recompense should be offered to those whose rights were infringed.³ A further, related principle is that a court will not permit itself to be used as an instrument of injustice. This principle, it is suggested, would be of especial significance to judges sitting in Third World developing countries torn by revolutionary upheaval. It goes without saying, that in such situations, the possibility of intimidation of the judiciary by the revolutionary régime is a very ominous one.⁴

A further significant principle with crucial implications, is that it is in the public interest that those in de facto impregnable control be accorded legal recognition.⁵ Put bluntly, this principle states that might, once established, ipso facto becomes right.⁶ In so doing, it gives effect to the acceptable policy value that it is in the interests of the community that order be preserved. It must be stressed here, however, that this

1. See here D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA vol 2 No 3 (1969) 404 - 47; Cf J H Eckelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson, Clarendon Press, Oxford, (1973) Ch 2.

2. This has often been rephrased thus: "No-one should take advantage of a necessity of his own making" Cf R H Christie: "Practical Jurisprudence in Rhodesia" in CILSA vol 1 (1968) 390 - 402; vol 2 (1969) 3 - 23, vol 2 (1969) 206 - 22; see further F M Brookfield: "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1968) 327 - 352.

3. Cf R W M Dias: "Legal Politics: Norms Behind the Grundnorm" in CLJ (1968) 233 - 59.

4. It is suggested that Pakistan provides a classic example of this. Cf T K K Iyer: "Constitutional Law in Pakistan: Keizer in the Courts" in Am Jnl of Comp Law vol 21, (1973) 759 et seq.

5. See again the revolution cases mentioned in Ch's 5 and 6, where this principle is borne out. Cf Molteno op cit 404 et seq.

6. See Ch's 1 and 2 on this point.

principle may well be countered by other principles militating against the automatic acceptance of revolutionaries as legitimate, regardless of other considerations.¹ A further important principle here, (common to both public and private international law² - conflict of laws) and which is widely considered a central tenet of natural law, is contained in the maxim - *pacta sunt servanda* - viz. promises are to be kept. A concrete illustration thereof would be as follows: A government elected under a constitution expressly or impliedly pledges with the electorate that it will hold to the constitution. If, then, it abrogates that constitution, it breaks faith with the electorate and thus contravenes this principle until and unless it submits itself once more to the same electorate to express its acceptance or rejection of the action.³

A further principle with highly emotional undertones is contained in the proposition that government should be by the consent of the governed, whether enfranchised or not. The classic situation here is provided by a minority group exercising power of government over a disenfranchised majority.⁴ It is significant that there is nothing new in this principle. Authority for it can be found in political writings, at least from the Middle Ages onwards.⁵ More controversial, however, is the principle of the right to self-determination (which is considered *in extenso* in the final Chapter).⁶ Nevertheless, this principle, despite its political overtones,

1. See D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA vol 2, No 3 (1969) 404 - 47. Cf J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence Clarendon Press Oxford (1973) Ch 2.

2. See Ch 7; Cf I Brownlie: "Recognition in Theory and Practice" in British Yearbook of International Law, Clarendon Press, Oxford (1983) 187 - 212; see further H Kelsen: Principles of International Law Univ of Calif Press, Berkeley (2nd revised ed Robert W Tucker ed (1966)).

3. Bekelaar op cit at 37 et seq.

4. The obvious example here is provided by Rhodesia at the time of the UDI, see further Ch 6; Cf R W M Dias Jurisprudence 5th ed (1985) Ch 16.

5. See, for example, Gierke: Political Theories of the Middle Ages (1900) at 39 et seq.

6. See Ch 7.

is seemingly gaining acceptance in international law.¹ Similarly acceptable at international law is the principle emphasizing the unacceptability of racial discrimination.²

In addition, it is important to make reference to two major arguments which have been employed in an attempt to undermine the above-mentioned principles. One of these arguments takes theoretical objection to the jurisdiction of a court which indulges in the exercise. Central to this argument lies the assertion that as the court acquired its authority to determine disputes by virtue of jurisdiction conferred on it by the old constitution, the disappearance of that constitution implies a collapse of the court's own authority.³ The second argument, which is of a more practical nature, holds that whatever the legal theorists or judges may say, any court making a finding adverse to a revolutionary régime is certain to be disbanded so that in reality a judiciary will be allowed to function only if it is subservient to the new régime.⁴

The first of these arguments seems to have weighed heavily with the Rhodesian Courts in the Rhodesian revolution cases. They felt bound to conclude that the authority which enabled them to continue to function, must have been derived from the new, revolutionary Government. However, it has been suggested that this view is not necessarily correct and that it rests on questionable premises. The first of these premises is

1. See further Ch 7; For a detailed discussion of this principle, see I Brownlie: Principles of Public International Law (1966) at 483 et seq.

2. See here the U N Declaration on the Elimination of all forms of Racial Discrimination (1963). This principle, it is suggested, could be weighed up against the efficacy principle viz. that revolutionary success entails legal recognition. See further J M Kekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson, Clarendon Press, Oxford, (1973) at 40.

3. Ibid. See further R S Welsh: "The Function of a Judiciary in a Coup d'Etat" SALJ (1970) 188 - 192.

4. Cf A M Honore: "Reflections on Revolutions" Irish Jurist vols 1 - 2 (1966 - 7) 268 - 78.

5. Cf Kekelaar op cit 45 et seq.

contained in the assumption that because the source of the court's authority arose from the old constitution, it must, of necessity, have fallen with the other branches of that order. This would seem to imply that there must be one single source of authority for all law-making institutions which accordingly stand or fall together. In this regard, it is arguable that the belief in a Kelsenian basic norm, or a Hartian rule of recognition might encourage this view.¹ Nevertheless, there does not appear to be any good reason why it should not be supposed that the source from which the court's authority arose has survived independently of the demise of the old executive. Indeed, it would seem that the Rhodesian revolution provides a classic example of this latter point.² The second questionable premise is that by suffering the court to continue to function, the new executive thereby assimilates the court into its own revolutionary order and this compels the de jure recognition of the Government.³ In order to counter this premise, however, it is suggested that the very submission by the revolutionaries to litigation before the court concerning their own legitimacy, suggests that the court may have an inherent authority arising from the submission of both parties-rulers and ruled - to its jurisdiction. Thus, any group can agree on the submission of disputes to adjudication and this, in itself, is a source of law.⁴

The second objection raised above can and should, arguably, be met by an appeal to faith, since it is

1. J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence ed A W B Simpson (1973) 41. But Cf R W M Dias: "Legal Politics: Norms Behind the Grundnorm" in CLJ (1968) 233 - 59.

2. See in this regard F M Brookfield: "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1968) 327 - 352; See further R S Welsh: "The Constitutional Case in Southern Rhodesia" in LQR vol 83, (1967) 67 - 88; D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA vol 2, No 3, (1969) 404 - 47.

3. Bekelaar op cit at 41

4. "Unless one holds the preconception that all the laws in a given territory must necessarily be systematized". See A M Honoré: "Reflections on Revolutions" in Irish Jurist vols 1 - 2 (1966) 268 - 78 at 276

undoubtedly true that many revolutionaries are unlikely to be deterred by judicial opposition.¹ This point should, however, be weighed against the argument that revolutionaries are more often than not acutely aware of their international image and of the benefits to be derived internationally as a result of recognition of legality.² Thus, the extent to which even revolutionary politicians wish to appear to be acting in accordance with acceptable principles, should not be underestimated. It goes without saying that the dismissal of judges, or intimidation of the judiciary collectively would be an extreme step which may well have dangerous domestic and international consequences for a revolutionary executive. Furthermore, a revolutionary régime which takes such drastic measures is not likely to easily find a replacement judiciary without leaving itself open to ridicule. In addition, the difficulty of such a task would also depend upon the degree of strength with which constitutional principles are held in the cultural and professional tradition of the society in question. Thus, it is suggested that insistence on these constitutional principles (supra) would have the salutary effect of undermining the unprincipled nature of the threatened governmental conduct.³

One of the most important advantages to be gained by the recognition of principles of this kind is that revolutionary situations would no longer be seen in absolute terms:⁴ that either the usurpers must always and

1. This has been demonstrated in the Pakistani revolution cases; See for example, T K K Iyer: Constitutional Law in Pakistan: Kelsen in the Courts in Am Jnl of Comp Law vol 2 (1973) 759 et seq.

2. See A M Honoré: "Reflections on Revolutions" in Irish Jurist vols 1 - 2 (1966 - 7) 268 - 278 at 276. See further J M Kekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence, ed A W B Simpson, second series Clarendon Press, Oxford, (1973) at 40 - 1.

3. Kekelaar op cit at 42 - 3.

4. See R E Christie: "Practical Jurisprudence in Rhodesia" (contd) in CILSA p(3) vol 2 (1969) 206 - 221. See further R S Welsh: "The Constitutional Case in Southern Rhodesia" in LQR vol 83 (1967) 64 - 88; Cf Kekelaar op cit at 42.

inevitably remain illegitimate, or they must always and inevitably be held legitimate once they have succeeded, irrespective of the reasons why they took power, how they behaved while in power and how long they have held power.¹ Therefore, the answer to the problem of legitimacy (legality, validity) may be a qualified one, involving the judicious balancing of a wide variety of principles and factors. Had the Rhodesian Court during the revolution cases, for instance, held that the revolutionary régime could be considered lawful only if confirmed in office by the electorate, (which had elected them under the old Constitution), and if some satisfactory evidence was produced that the new revolutionary constitution was broadly acceptable to the majority of the population, (in accordance with the principles above) it is not inconceivable that the régime might have preferred to attempt to comply with that finding rather than to dismiss the judges.² It suggested that the opportunity open to the judiciary in revolution cases to influence the course of events, should not be dismissed out of hand.

It is to the specific evaluation of the relevant revolution cases that we must now turn.

1. Cf A M Honoré: "Reflections on Revolutions" in Irish Jurist vols 1 - 2 (1966 -7) 269 - 78, at 276 - 7; Cf J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence ed A W B Simpson, second series, Clarendon Press, Oxford, (1973) at 42.

2. Bekelaar op cit 42 - 3.

Chapter 5

Introduction

In the preceding Chapters of this study enough has been said on the theoretical and practical aspects of Kelsen's efficacy-validity criterion to provide a useful backdrop for this and the following Chapters where a more detailed examination of the revolution cases will be embarked upon insofar as they are pertinent to the present inquiry. The preliminary points raised in the previous Chapter in regard to the revolution cases are intended to facilitate an understanding of this criterion in the light of revolutionary situations. In these two Chapters, it is crucial to bear in mind a fundamental distinction i.e. between those revolution cases decided in sovereign independent states involving no rival claims to sovereignty (e.g. Pakistan) and those revolution cases decided in the "colony" of Rhodesia at the time of the UDI, in which the rival, external power (Great Britain) was seeking to reassert its sovereignty in the wake of the revolution. This Chapter will deal with the comparatively straightforward situation of revolutionary take-overs in sovereign independent states. Here, the emphasis will fall on the relevant Pakistani revolution cases because of their importance to the present inquiry, although certain noteworthy Nigerian, Ugandan, and similar revolution cases will also be considered in so far as they serve to promote the present inquiry. Chapter Six, on the other hand, will consider the relatively complex and intricate issues arising in the Rhodesian revolution cases.

Pakistan

It has been a disturbingly common occurrence in Pakistan in the past few decades, that the judiciary there has had to contend with threats and intimidation by the executive. This may be seen in the judiciary's handling of the term "martial law". In a period when this has been seen, all too widely, as a euphemism for military dictatorship, the

1. See later in this Chapter for a discussion of this term. Cf R F V Heuston: Essays in Constitutional Law (1964)

Judiciary has rejected as no "martial law" at all the form of military government which so many had seen as a beneficial, if temporary, panacea for Pakistan.¹ However, the intricate problem dealt with by the Courts in Pakistan has been, not so much martial law per se, but rather, and connected therewith, the revolution which seeks support from it as a matter of political expediency. The inquiry, then, is how courts are to interpret instruments purporting to be constitutional, yet actually emanating only from a desire to give a revolution the semblance of legality. One must ask to what limiting principles, to what acceptable norms can a court look, especially where attempts have been made to take questions out of the purview of the courts.² Here it is necessary to examine the Dosso decision of October 1958 where in a cause célèbre, the Pakistan Supreme Court invoked Kelsen's Grundnorm

1. See T K K Iyer: "Constitutional Law in Pakistan: Kelsen in the Courts" in Am Jnl of Comp Law Vol 21 (1973) 759-60; Province of E Pakistan vs Md Mehdi Ali Khan, Pak Leg Dec (1959) S C 387 (see especially the judgment of Cornelius J); Mir Hassan vs State, Pak Leg Dec (1969), Lahore 786, Mir Riasat Ali vs Pakistan, Pak Leg Dec (1971), Lahore 115, Zia-ur-Rahman vs State, Pak Leg Dec, December (1972), Lahore 382; Cf Abdul Majid vs Pakistan, Pak Leg Dec (1960) Karachi 921, Md Afzal vs Commissioner, Pak Leg Dec (1963) S C 401
2. Zahid Umar and Co vs Chief Secretary, Pak Leg Dec (1958) Lahore 764; Muhammad Ayub Khohso vs Pakistan, Pak Leg Dec (1960), St 237
3. Pak Leg Dec (1958), S C 533; This seminal decision has also been applied elsewhere in similar situations; See Uganda vs Commissioner of Prisons (1966) E A L R 514, In Rhodesia, in Lardner-Burke vs Madzimbawuto (1968) (2) S A 284, (see especially the judgment of Beadle C J; In Nigeria, the doctrine has apparently not been accepted: see Lakanmi and Kimelomoola vs A G, Western State; S C of Nigeria, April (1970) (unreported). Kelsen's thesis has, needless to say, attracted a wide scholarship: See L MacFarlane "Pronouncing on Rebellion: The Rhodesian Courts and UDI", Public Law (1968), 325; R W M Dias: "Legal Politics: Norms Behind the Grundnorm", C L J 26 (1968) 233; C Palley: "Judicial Process: UDI and the Southern Rhodesian Judiciary" M L R 130 (1967) 263; J M Bekelaar: "Splitting the Grundnorm" M L R 30 (1967) 156 Date-Bah: "Jurisprudence's Day in Court in Ghana" I C L Q 20 (1971) 315; A Ojo: "The Search for the Grundnorm in Nigeria - The Lakanmi Case" I C L Q 20 (1971) 117; See further S A de Smith: "Constitutional Lawyers in Revolutionary Situations" Western Ont L Rev 7 (1968) 93; A M Honoré "Reflections on Revolutions" in Irish Jurist 2 (1967) 268 and Choudhury: "Failure of Parliamentary Democracy in Pakistan; Parliamentary Affairs 12 (1958) 60: Cf D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA A Vol 2, No 2, July (1968), 254-289, "The Rhodesian Crisis and the Courts" (Contd) Vol 2, No 3, Nov (1969) 404-47, "The Rhodesian Crisis and the Courts" (contd) Vol 3, No 1, March (1970), 18-48: See too R H Christie: "Practical Jurisprudence in Rhodesia" in CILSA, Vol 1 (1968) 390-407, "Practical Jurisprudence in Rhodesia" (Contd) in CILSA Vol 2, (1968) 3-23; "Practical Jurisprudence in Rhodesia" (Contd) CILSA Vol 2, (1969) 206-221; G N Barrie: "Rhodesia UDI - An Unruly Horse" in CILSA (1968) 110-120: R S Welsh: "The Constitutional Case in Southern Rhodesia" in L Q R 83 (1967) 64-88;

thesis to uphold the validity of a coup headed by Iskandar Mirza, who was President under Pakistan's first Constitution (1956). As mentioned above, his theory has also been applied elsewhere in similar situations.¹

Kelsen, in his main work General Theory of Law and State,² after advancing his case for a Grundnorm or basic norm from which the entire legal system derives its validity, proceeds to argue that a successful or efficacious coup d'état or revolution³ could create a new basic norm and could be the supporting plank for a new legal order in the juristic sense. Once the revolution is shown to be efficacious in nullifying the old basic norm, it has to be regarded as a law-creating fact giving validity to a new legal order.⁴ A revolution in this wide sense occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is, in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the legitimate organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people or through action from those in government positions.

1. See Footnote 3 at 139.

2. Vol I, 20th Century Legal Philosophy Series, (Anders Wedberg transl (1945))

3. For a useful conceptual overview of this term, see J M Finnis : "Revolutions and the Continuity of Law " in Oxford Essays in Jurisprudence (Second Series) ed A W B Simpson, Oxford University Press (1973), Ch 3; See further J M Kekelaar: "Principles of Revolutionary Legality", in Oxford Essays in Jurisprudence ed A W B Simpson, Oxford University Press; (1973) Ch 2, See further T K K Iyer: "Constitutional Law in Pakistan: Kelsen in the Courts" In Am Jnl of Comp Law Vol 21 (1973) 759-81; Cf S Guest : " Three Judicial Doctrines of Total Recognition of Revolutionary Regimes" in AJ (1980) 1-48 See too F M Brookfield : " The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-52; R W M Dias : " Legal Politics : Norms Behind the Grundnorm " in CLJ (1968) 233-59; T C Hopton : "Grundnorm and Constitution : The Legitimacy of Politics" in McGill L J Vol 24, (1978) 72-91.

From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.¹

Bearing these Kelsenian criteria in mind, it is important now to turn to the Dosso decision specifically. The events leading up to Dosso were briefly these : Pres Mirza on 7 October 1958 unilaterally declared in a Proclamation that the Constitution under which he was holding office had been abrogated, that the Legislative Assemblies had been dissolved and that martial law would operate throughout the country and was to be administered by Gen Ayub Khan, the then army chief.² Very soon afterwards, with very little opposition to the coup, Mirza issued a document known as the Laws (Continuance in Force) Order³ which purported to avert the drastic consequences of an abrogated constitution by continuing to recognise the pre-existing laws as valid, unless expressly modified by the "martial law" Government.⁴ On the sixth day after the coup, the criminal appeals in Dosso came up for hearing.

The appellants, who had obtained judgments in their favour in the lower courts on the basis of the constitutional provisions before their abrogation, asked the Supreme Court to hold that despite the abrogation of the Constitution in the meantime and despite the contrary intention manifested by the LCFO, their appeals should be decided by the Court on the basis of the old Constitution. This raised a direct conflict between the Constitution and the LCFO (which, after all, had its basis in the coup d'état).

1. See H Kelsen: General Theory of Law and State (1945) at 117

2. Gazette Extraordinary 7 October 1958.

3. Henceforth, this expression will be abbreviated thus : LCFO Presidents Order No 1 of 1958, Gazette Extraordinary 10 Oct 1958

4. See in this regard Choudhury : "The Failure of Parliamentary Democracy in Pakistan" Parliamentary Affairs 12 (1958) 60; Cf T K K Iyer: "Constitutional Law in Pakistan : Kelsen in the Courts" in Am Jnl of Comp Law, Vol 21 (1973) 759-781.

The Court, presided over by Muhammad Munir C J, held that there had been a successful revolution by Pres Mirza and applying the Kelsenian criteria above, declared the document issued by him (viz. the LCFO) to be the law.

The Chief Justice held that a victorious revolution or a successful coup d'état is an internationally recognized legal method of changing a constitution. He added that after a change of that character has taken place, the national legal order must, for its validity, depend upon the new law-creating organ. Even courts lose their existing jurisdictions and can function only to the extent and in the manner determined by the new constitution.¹

The Chief Justice held further that if the territory and the people remain substantially the same, there is, in the modern juristic doctrine, no change in the corpus or international entity of the state and the revolutionary government, as well as the new constitution are, according to international law, the legitimate government and the valid constitution of the state.² This judgment, it is suggested, represents a straightforward application of rigorous Kelsenism. Thus, where the revolution is successful, it satisfies the test of efficacy and becomes a basic law-creating fact. On that assumption, the LCFO however transitory or imperfect, was a new legal order and it was in accordance with that order that the validity of the laws and the correctness of judicial decisions had to be determined.³ Consequently, in judging the validity of laws at a given time, one of the basic doctrines of the Pure Theory of Law requires that a jurist ought to presuppose the validity of the historically first constitution,

1. at 534.

2. Ibid; see further H Kelsen : General Theory of Law and State (1945) (transl by A Wedberg) 20th Century Legal Philosophy Series 117-8; see further Ch 7 below.

3. Ibid 535; See further Jibendra Kishore Acharyya Chowdhury and 58 other vs The Province of East Pakistan and Secretary, Finance and Revenue (Revenue Department Government of E Pakistan, P L D (1957) SC (Pak) Cf T K K Iyer: "Constitutional Law in Pakistan - Kelsen in the Courts" in Am Jnl of Comp Law 21 (1973) 759-81.

whether it was given by an internal usurper, an external invader, a national hero or by a popular or other assembly of persons. Subsequent alterations in the constitution and the validity of all laws made thereunder is determined by the first constitution.¹

Before evaluating the Dosso judgment, it might be apposite first to consider the subsequent landmark Jilani² decision, decided some 15 years later, in which the Kelsenian analysis adopted in Dosso was repudiated in toto. As with the Dosso judgment, the facts and decision of this judgment will similarly be considered. Thereafter, these two judgments (Dosso and Jilani) will be weighed up against each other and more critically evaluated in the light of Kelsen's revolution thesis.

In Jilani, a different bench of the Pakistan Supreme Court held that Kelsen's thesis on successful revolutions creating new Grundnorms could no longer be invoked in Pakistan. The second round of martial law rule, which began under Gen Yahya Khan, (after Pres Ayub Khan stepped down in March 1969), had been declared illegal. Gen Yahya Khan's rule began after the second Constitution of Pakistan (1962) was abrogated in an atmosphere of widespread unrest against Gen Ayub Khan, who called in the army to "take over" the Government. Gen Yahya Khan was the Chief of the Army in March 1969. The Court found that there was no basis under the 1969 Constitution for the "passing over" of power to the army. According to Arts. 12 and 16 of the 1962 Constitution, the Speaker of the National Assembly should have taken over from the outgoing President. However, by the time judgment was pronounced in this case, Gen Yahya Khan's illegal regime had come to an end after the General had resigned and Mr Bhutto, now President under an

1. at 538, Cf H Kelsen: General Theory of Law and State (1945) at 118.

2. Asma Jilani vs Government of Punjab, Pak Leg Dec (1972) S C 139 decided on 20 April 1972;

3. See Proclamation published in Gazette Extraordinary, 25 March 1969; see further Chowdhury: "Failure of Parliamentary Democracy in Pakistan" in Parliamentary Affairs 12 (1958) 60.

interim Constitution, had taken over.¹

The petitioners in Asma Jilani, a political leader and a newspaper editor, had been detained under Martial Law Regulation 78\71 issued by Gen Yahya Khan in his capacity as the Chief Martial Law Administrator. Simply stated, this Regulation enabled the military authorities to detain a person without trial for an indefinite period. None of the safeguards available to the detainees under the previous Constitutions was provided.² The High Court at Lahore had dismissed the habeas corpus petitions, pointing out that the Court's jurisdiction to entertain any matter arising out of Martial Law Orders and Regulations had been ousted by a specific decree of the régime, the Jurisdiction of Court's Order.³ Applying Dosso, the Lahore High Court held the decree to be binding and declined the application. However, on appeal, the Supreme Court overruled Dosso and declared the régime illegal and held that unless the application of the decree in question could be justified on grounds of public necessity, the impugned decree, as well as Regulation 78\71, would be illegal.

It is apparent at the outset, that the Court in Jilani, in a significant departure from strict Kelsenism, was prepared to entertain the principle of necessity⁴ as a principle supplementary to Kelsenian efficacy. The two main judgments in Jilani (viz. by Hamoodur Rahman C J and Yaqub Ali J) assume that Kelsen's thesis is a well-recognised and well-understood doctrine, but eventually this was held not to be the case and the Court proceeded to examine its

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1. Nonetheless, this judgment was considered sensational in Pakistan and apparently almost unanimously welcomed by the public.
 2. See the 1956 Constitution, Art 7; 1962 Constitution, Art 6 no 2;
 3. President's order no 3 of June 1969 prohibited the Courts from entertaining any petition or complaint against the exercise of power by any military tribunal "deriving from a martial law authority" Under S 3(2) of the order, any decision given by any Court in contravention of the order shall be of no effect.
 4. For a consideration of the application of the principle of necessity in these cases see later in the Chapter. Cf Ch 7; D B Molteni: "The Rhodesian Crisis and the Courts" in CILSA vol 2 No 3 Nov (1969) at 404 et seq

application in Dosso. It is significant that the hearing in Dosso commenced barely six days after the coup in October 1958 and no sooner had the decision been pronounced, than the original initiator of the coup, Iskandar Mirza, was uncereemoniously replaced by Gen Ayub Khan. This situation presents the interesting case of what one writer has called "a coup within a coup".¹ The question raised by Hamoodur Rahman C J is what difference it made in Kelsenian terms that the man responsible for the main coup d'état was himself replaced, probably in a fashion he would not have anticipated or relished. In the words of Hamoodur Rahman C J, referring to Dosso:

"Even on the theory propounded by the learned Chief Justice (Munir) himself, was this subsequent change also a successful revolution? If so, by what test, because on this occasion there was no annulment of any constitution, or of the Grundnorm of any kind which had been created by President Iskandar Mirza?"²

It is suggested that the judges in Dosso had overlooked the permanency requirement of Kelsen's efficacy principle,³ with undesirable results, in that a coup was held to be effective, although it was replaced barely six days afterwards by another coup. This perplexing point is perhaps a good illustration of how the judicial employment of Kelsen's efficacy-validity thesis in this type of situation could result in absurdity. On the other hand, some have contended that it might suggest the futility of employing any theory or doctrine to justify so unconstitutional an act as a coup d'état.⁴ However, it should be stressed here that in most coups or revolutions of the last few decades

1. Cf T K K Iyer : "Constitutional Law in Pakistan : Kelsen in the Courts" in Am Jnl of Comp Law Vol 21 (1973) 759-761;

2. Jilani (Supra) at 117

3. Cf Ch 4, where this point is raised as a preliminary issue.

4. Iyer op cit at 768, Cf S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110. F M Brookfield: "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-352.

occurring in Third World developing countries which had originally adopted an Anglo-American constitutional model, the judiciary was, for the most part, left unmolested to carry on their work after a fashion.¹ It thus fell on them to solve the often knotty problem of continuity, of bridge building or making a fresh start at the point where the revolution intruded into the legal order of an existing system.² Consequently, there existed a need to examine all possible theories governing such unprecedented situations for one to suit the particular case.³ Alternative courses of action may well be open to the judiciary, especially resignation from the bench. However, it is significant that there were few such resignations in the face of this dilemma.⁴

The Jilani Court held, (correctly, it is suggested) that the Court in Dosso had not judged the efficacy of the initial coup properly. The question was posed whether it was possible to assess that efficacy in a matter of merely six days between the coup and the hearings in Dosso when the issue was put to the test. It could legitimately be asked whether the subsequent "coup within a coup" did not prove the Dosso Court wrong. It is significant that the Court went to some lengths to show up the controversial nature of Kelsen's revolution theory.⁵ One of the primary grounds advanced by the Jilani Court for rejecting Kelsen was that the jurist assumed in whatever he said the primacy of international law. Thus, he (Kelsen) postulates as a norm of international law, that successful

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1. For this crucial point see S A De Smith: "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110
 2. Cf J M Finnis : "Revolutions and the Continuity of Law" in Oxford Essays in Jurisprudence 2nd Series ed A W B Simpson, Clarendon Press Oxford (1973) Ch 3
 3. Lord Reid in the Privy Council in Madzimbamuto (Ch 7 infra) emphasizes that the courts must decide this issue one way or the other.
 4. Cf F M Brookfield : "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327 et seq
 5. Jilani at 179, 231-2.
 6. See further Ch 7, where further limiting principles to efficacy are considered. Cf I Brownlie : "The Reality and Efficacy of International Law" in British Yearbook of International Law Vol 1 Clarendon Press Oxford (1967) 1-8.

coups d'état are law-creating facts. And it is that norm of recognition which supports the continuity of the identity of the state and national law. This approach, it was held, represents an exercise from an international law angle. According to Yaqub Ali J, the efficacy of international law itself depends on the extent to which the individual national legal order is willing to adopt its principles.¹ If that were the case, it was asked how could the reverse position be right in which the international law norms determine the nature of the national legal order. Moreover, the criterion of recognition of a state in international law would be different from that applicable to determine the legality of a municipal government.²

In a further significant development, the Jilani Court repudiated as misconceived the idea that the efficacy of a law would ipso facto confer legality. The efficacy of a law and the law-constitutive medium are distinct questions.³ What this amounts to, is that there is a rule of judicial recognition in this (as in normal peaceful situations), that Kelsen's thesis, as applied to a Dosso-like situation, affords less scope for judicial recognition, because it demands an outright total recognition of the revolutionary régime at the outset. The doctrine of necessity, on the other hand, applied in a similar situation, enables the retention of considerable judicial discretion, thus once more showing its usefulness in supplementing Kelsen's efficacy principle.⁴ In this way judges could evolve the conditions or prerequisites necessary to recognise and enforce each rule and regulation brought to them. The crucial

1. See further Ch 7; Cf I Brownlee : " Recognition in Theory and Practice" in British Yearbook of International Law Clarendon Press (1983) 197-212; Cf J Crawford : " The Criteria for Statehood in International Law" in British Yearbook of International Law (1976-7) Clarendon Press, Oxford (1978) 93-182.

2. Cf Brownlie op cit 197-212; Crawford op cit 122-149.

3. See R W M Dias : Jurisprudence 3rd ed (1970) 104-5

4. Cf Ch's 2,3,4, Cf Dias op cit 104-5

point, then, is that it is through judicial recognition and the acceptance of the legislative organ as competent to exercise that function, that laws become valid. Furthermore, it was held that this judicial recognition should be accorded only if a revolutionary constitution embodies the will of the people.¹ The Court here departs even further from Dosso and strict Kelsenism by accepting the "will of the people" concept as a significant limitation on the often harsh and undesirable consequences which the judicial employment of efficacy *stricto sensu* gives rise to. It was, perhaps, fortunate for the Court in Jilani that it found itself in the happy position of adjudicating on the legality of one coup after it had been superseded by another.

It is clear that the definition of "law" laid down by the Court during this decision is understood in terms of the judicial process. This serves to accentuate what one writer has called "the guardianship rôle of the Courts", which seems to underlie the decision.² In a further significant development, the Court goes on to hold that Kelsen could not have intended to lay down, that "every person who was successful in grabbing power" could properly claim to be the source of law and sovereignty. On this basis, the Court infers that what he means to say is, rather, that the state is not above the law; that might does not make right.³ Moreover, it was pointed out that Kelsen's theory requires that an effective constitution be in existence in order to give validity to any rule made under it. The basis of the Court's deduction is the following passage from Kelsen :

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1. See in this regard: J M Kekelaar: " Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence (ed A W B Simpson, 2nd Series, Clarendon Press, Oxford, (1973) Ch 2
 2. See T K K Iyer : " Constitutional Law in Pakistan: Kelsen in the Courts" in Am Jnl of Comp Law vol 21 (1973) 759-781; Cf F M Brookfield : " The Courts Kelsen and the Rhodesian Revolution" in U Tor L J (1969) 327-52, see further S A De Smith: " Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev 7 (1968) 93-110
 3. Cf R W M. Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4 ; Cf W Ebenstein: The Pure Theory of Law, Univ of Wisconsin, Madison (1945) Ch 4

"The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms. These norms are valid, not because the total order is efficacious, but because they are created in a constitutional way. They are valid, however, only on the condition that the total order is efficacious; they cease to be valid not only when they are annulled in a constitutional way, but also when the total order ceases to be efficacious. The principle of legitimacy is restricted by the principle of effectiveness".

Yaqub Ali J makes the significant point that after a change is brought about by a revolution or coup d'etat, the state must have a constitution and subject itself to that order. Every single norm of the new legal order will be valid, not because the order is efficacious, but because it is made in the manner provided by the constitution of the state.² On this ground, the judge states that Kelsen does not contemplate "an omnipotent President and Chief Martial Law Administrator, sitting high above society and handing his behests downwards". He adds the following significant words:

"No single man can give a constitution to the society, which, in one sense is an agreement between the people to live together under an order which will fulfil their expectations, reflect their aspirations and hold promise for the realization of themselves. It must therefore embody the will of the people which is usually expressed through the medium of chosen representatives."³

Another unexpressed, latent motive for the Court's repudiation of the Kelsen thesis lay in the Court's anxiety to

1. H Kelsen: General Theory of Law and State (1945) at 119

2. Cf R Stranziger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts-und Sozialphilosophie 63 (1977) 389-412; Denis S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristen Zeitung 32 (1977) 169-72, T C Hopton: "Grundnorm and Constitution: The Legitimacy of Politics" in McGill L J (Revue de Droit De McGill) Vol 24 (1978) 72-91.

3. at 242; Cf J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence ed A W B Simpson, second series Clarendon Press, Oxford, (1973) Ch 2.

repudiate what has come to be known in Pakistan and other revolution-prone developing countries as "martial law"; a term conveying a rather different meaning from that familiar in the common law viz. a national government backed by the military.² On the two occasions that Pakistan has been under martial law,³ the Army Chiefs took power with the title of "Chief Martial Law Administrators" and subsequently "Presidents", but without constitutions to which these offices could be referred. It is significant that in both these instances of martial law in Pakistan, both revolutionary regimes provided that the state should be governed "as nearly as may be" in accordance with the abrogated Constitutions.⁴ It is clear that in its disapproval of "martial law", the Court in Jilani makes yet another significant departure from strict Kelsenism.

However, in spite of the Jilani Court expressing its disapproval of martial law, it is nevertheless a doctrine known to legal jurisprudence.⁵ Furthermore, as was stated in the case of Mir Riasat Ali vs Pakistan,⁶ it is a principle recognized even in Western democratic countries around the globe, (governed by written or unwritten constitutions) to be imposed in a state when the civil government fails to control the situation of law and order and calls to its aid the military to restore the country to normality. Martial law is ordinarily applied to a part of the country, but may in certain cases be applied to the entire country. It may be of three kinds: It is either (1) the law for the discipline and government of the army itself (2) or the law by which the army in time of war governs foreign

1. See T K K Iyer : "Constitutional Law in Pakistan : Kelsen in the Courts" in *Am Jnl of Comp Law* vol 21 (1973) 759-781 at 766.

2. Ibid

3. on 7 Oct 1958 and 25 March 1967. It was on the second occasion that Gen Yahya Khan assumed power and it was this that has been declared illegal.

4. See the Provisional Constitution Order issued by Gen Yahya Khan Gazette Extraordinary, 4 April 1969.

5. See Mir Riasat Ali vs Pakistan (1971) Lahore at 115 et seq

6. ibid

territory in its military occupation outside the realm or (3) the law by which in time of war the army governs the realm itself, in derogation of the civil law so far as required by military necessity and the public safety. It is the legality of the third kind of martial law and the substitution of military for civil justice in the realm itself in time of war which has been the subject of many different opinions.¹

It has been held by some that it is never lawful, unless expressly authorized by Act of Parliament and that the authority of the civil courts and the civil law is absolute in time of war no less than in time of peace.² According to this view, the exercise of military authority within the realm in time of war in derogation of the civil law is always illegal, whatever moral justifications may exist in considerations of military necessity and the public safety. It is suggested, however, that the better opinion would be that even within the realm itself, the existence of a state of war and of national danger justifies, in law, the temporary establishment of a system of military government and military justice in derogation of the ordinary law of the land insofar as this is deemed necessary for the public safety.³ In view of the foregoing, it is arguable that the martial law doctrine can properly be classified as a sub-category of the wider necessity principle.⁴

Bearing the above in mind, it is significant that the Jilani Court, although disapproving of martial law, does approve of the wider principle of necessity in its pronouncements. Thus, the Court's pronouncements that the

1. Cf Mir Riasat Ali vs Pakistan (1971) Lahore 115 at 117; see further Mir Hassan vs State CPLD (1969) Lahore 786 especially at 786-7 the judgments of Bashiruddin Ahmad and Shaukat Ali JJ.

2. Mir Riasat Ali vs Pakistan at 117-8, cf Mir Hassan at 786-7.

3. *ibid.*

4. See D B Molteno : " The Rhodesian Crisis and the Courts " in CILSA vol 2, No 3, Nov (1969) 404-47; see further S A de Smith: " Constitutional Lawyers in Revolutionary Situations " in Western Ont L Rev vol 7 (1968) 93-110; F M Brookfield : " Kelsen, the Courts and the Rhodesian Revolution " in U Tor L J 19 (1969) 327 et seq

revolutionary régime, (which lasted for nearly three years) was illegal, could have meant the invalidation of a considerable number of transactions that took place under its authority and seal. It is understandable, then, that, in order to avoid damage, inconvenience and disruption on so large a scale, the doctrine of necessity was invoked.¹

It is, perhaps, fortunate that a precedent for the application of the doctrine in Pakistan could be found in the decision of the Federal Court of Pakistan in Special Reference No 1 of 1955.² There, the action of the Governor-General (functioning under the Government of India Act 1935) in unlawfully dissolving the Constituent Assembly of Pakistan, created a constitutional impasse. However, some of the Governor-General's subsequent actions, including the creation of a new Constituent Assembly, were upheld by the Court on the principle salus populi suprema lex, a restatement of the necessity principle.³ Using this principle as an application of the principle of "public necessity", the Jilani Court adds an important gloss which appears as another example of its "guardianship rôle." Thus, it held that the principle should be regarded as one of "condonation" of past illegal acts when their enforcement was justified in the interests of the general public.⁴ Nonetheless, this gloss represents a conscious departure from what has been laid down as the principle of "public necessity" elsewhere.⁵

1. See Asma Jilani (supra) at 205-7; See further Ch 7, where this doctrine is further discussed in relation to the Rhodesian revolution cases.
2. Pak Leg Dec (1955) Federal Court 435. See further Federation of Pakistan vs Moulvi Tamizuddin Khan, Pak Leg Dec (1955) F C 240, and Usif Patel vs The Crown Pak Leg Dec (1955) F C 387; Cf W F Jennings : Constitutional Problems in Pakistan (1957) 306 et seq
3. in English - "Let the welfare of the people be the supreme law" ; see further Ch 7; Cf Jennings op cit at 306-7.
4. Cf Glanville Williams : "The Defence of Necessity" in CLP 6 (1953) 216 et seq
5. eg. in Cyprus in the important decision of A-G vs Mustafa Ibrahim (1964) Cyprus LR 195; see further Lord Pearce's dissent in the Privy Council decision in Madzimbamuto vs Lardner-Burke (1969) 1 AC 645, 731; In these two cases, the generally accepted connotation of the principle was that it "legitimated" past illegal acts ; but that was no implication of their condonation.

Another significant development in Pakistan worth noting is represented by the decision of Zia-ur Rahman vs The State,¹ which was decided in the same year as Jilani and which supports the Jilani case in significant respects, thus departing further from strict Kelsenism. Here it was held that although the usurpation of power by Gen Yahya Khan was unconstitutional, state necessity as well as submission by the people, including the courts, to the usurpation of power, clothed all illegal and unconstitutional acts of the usurper with validity. The presiding judge, Muhammad Afzal Zullah J puts it thus:

"The State of Pakistan was founded through the expression of will of the Muslims of the sub-continent ... The emergence of this State cannot be delinked from its ideology for the preservation of which all our past and future generations are involved. No one generation, community, organ or individual in this State has any power to undo the same or weaken its foundation in so far as its basic realities are concerned ... The present and all the future generations of this nation stand irrevocably committed to run the State in a democratic manner through the chosen representatives of the people and cannot depart from the path of social justice... nor is it possible for anybody to do anything which affects the integrity of its territories, independence and sovereign rights²".

He then goes on to hold that :

"No revolution was brought about by Gen Yahya Khan nor has it proved effective. After the initial usurpation, people started reasserting their will and power and a leader of the chosen representatives of the people has already recaptured political power. Therefore, it is not correct to say that the change brought about by the usurper and

1. Dec 1972 Lahore 382. See further T K K Iyer : "Constitutional Law in Pakistan Kelsen in the Courts" in Am Jnl of Comp Law Vol 21 (1973) 759-81.

2. per Muhammad Afzal Zullah J at 383; See further in this regard: W I Jennings: Constitutional Problems in Pakistan (1972) at 304-8; S A de Smith : "Constitutional Law in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110; See further F M Brookfield : "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-352, R H Christie : "Practical Jurisprudence in Rhodesia" in CILSA vol 2 (1969) 206-221. R W M Dias: "Legal Politics : Norms Behind The Grundnorm" in CLJ (1968) 233-259.

called by any name was successful."

It is clear that here, as in Jilani, the Court (per Muhammad Afzal Zullah J) recognizes the importance of limiting principles to moderate the harshness of the Kelsenian efficacy doctrine in practice. As in Jilani, the necessity principle is invoked in order to supplement the inadequacy of Kelsenian efficacy, while the "will of the people" and "social justice" concepts are invoked to limit it by moderating its harshness and social undesirability. It is significant, however, that the Court in Zia-ur-Rahman stresses the fact that the invocation of the necessity principle should not be taken too far. Thus, it was held here that a distinction be drawn between those measures necessary and in the interests of the country, (i.e. for the preservation of peace and good government and the maintenance of law and order), and those illegal acts of the usurper intended to establish him in his unlawful usurpation.² The doctrine of necessity, then, if applied, has to be considered in the context of the necessity of the act impugned. As a result, measures adopted by the usurper to establish him in his unlawful possession will not be upheld as valid law, even though those measures may be effective. In addition, it has been suggested that the principle of state necessity cannot be separated from the concept of "open court".³ Again, a significant departure from Kelsenism is evident in this important decision.

1. See in this regard E K Sallah vs A-G (1970) CC 54 at 55. For academic comment see T and F S Tsikata: "Kelsen and others in the Court of Appeal" U G L J (1970) 142; and S K Date-bah: "Jurisprudence's Day in Court in Ghana" ICLQ 20 (1971) at 315;
2. Zia-ur Rahman (supra) at 384; see further Ch 7; Cf S A De Smith: "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7, (1968) 93-110; R S Welsh: "The Constitutional Case in Southern Rhodesia" in LQR Vol 83 (1967) 64-88, D B Molteno: "The Rhodesian Courts in Crisis" in CILSA Vol 2, No 3 (1969) 404-447; Cf R W M Dias: "Legal Politics: Norms Behind the Grundnorm" in CLJ (1968) 233-59.
3. Mir Hassan vs State, PLD, (1969) Lahore 786 - Dosso's case (supra) SC PLD 1958 (Pak) 533; M S Khawaja vs The State PLD (1965) SC 287; Grotius: De Jure Belli ac Pacis l 4 15 (Kerr's transl); Duncal vs Kobaramaku (1945) 327 US, 304; See too D L Kair and F R Lawson: Cases in Constitutional Law 5th ed at 224; W O Douglas: The Rights of the People at 3; W I Jennings: Constitutional Problems in Pakistan (1972) 304-5; Cf J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence ed E W B Simpson, second series, Clarendon Press, Oxford (1973) Ch 2

Uganda

It is significant that notwithstanding Dosso's repudiation¹ by Jilani some 15 years later, the years immediately following Dosso saw courts in other parts of the Third World invoking Kelsen's revolution theory as set out in Dosso's case. Perhaps the best illustration of this is provided by the Ugandan High Court decision in Uganda vs Commissioner of Prisons, ex parte Matovu where, inter alia, Kelsen's rather dogmatic international law doctrine² was invoked along the lines of Dosso. This involves the proposition that all norms of a domestic legal system are subordinate to those of international law. The validity of the domestic Grundnorm itself is therefore no longer presupposed, but is determined by a positive norm of international law, which, according to Kelsen:

"authorizes an individual or group of individuals on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order ... as a valid legal order ... regardless of whether the Government came to power in a legitimate way or by revolution and regardless of who assumes power."³

In this case the Chief Justice Sir Udo Udoma C J says :

"The constitution had extra-legal origin, therefore created a new legal order. Although the product of a revolution, the Constitution is nonetheless valid in law because in international law, revolutions and coups d'etat are recognized methods of changing governments and constitutions of several states".⁴

He continues thus : "Applying the Kelsenian principles, our deliberate and considered view is that the 1966 Constitution is a legally valid constitution".⁵

Udoma C J thus accepts that on the authorities of both Kelsen and Dosso, the 1966 Constitution is valid, saying this

1. (1966) E A L R 514,

2. H Kelsen: General Theory of Law and State (1945) at 388; Pure Theory of Law (1967) 214-5; Cf H Kelsen "Prof Stone and the Pure Theory of Law" in Stan L Rev 17 (1965) 1128-1142 at 1151-2; see J G Starke : " Law, State and the International Legal Order" in Essays in Honor of Hans Kelsen (1964) 312-3.

3. Pure Theory of Law at 215

4. Udoma C J at 537

5. *ibid* 539. The Chief Justice in his judgment also referred to Bryce and Salmond for support, at 537

submission is "irresistible and unassailable."¹ It seems clear that, as in Dosso, the judges in Matovu treat Kelsen's efficacy-validity thesis as if it were self-evidently true, viz an effective usurpation or take-over ipso iure bestows legality.² Other than in Jilani, juridical facts seem to them to arise independently of judicial decision, for, there being no rival claims to power, the basic machinery of government continues to operate virtually unchallenged.³ This is a crucial point in the matter, since there was no rival legislative or external sovereign to contest power, Uganda already being a sovereign independent State. The decision in this case, then, is a comparatively straightforward one, there being only one effective Government in control of Ugandan territory. (This should be contrasted with the more complex case of Rhodesia, which at the time of the UDI was, but a colony and where there was a rival claim to power in the form of the external sovereign Great Britain, which, for some years after the UDI was adopting various measures to reassert its sovereignty. The examination of this intricate problem forms the subject-matter of the next Chapter, since it raises crucial practical problems in Kelsen's efficacy-validity thesis).⁴

In order to better grasp the situation prevailing in Uganda at the time, it is suggested that some factual information would be apposite at this stage. In 1966 Dr Milton Obote, the Prime Minister, removed the President, suspended the Constitution and procured the adoption by a procedure not sanctioned by the legitimate Constitution, of a new Constitution under which he became President.⁵ A person placed in preventive detention under emergency regulations applied for habeas corpus on the ground that his detention was ultra vires the Constitution of 1966. The

1. at 537; The Chief Justice also referred to the authorities Bryce and Salmond in support.

2. See further Dosso's case (Supra) ; Cf J M Bekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence ed A W B Simpson, Clarendon Press, Oxford, (1973) Ch 2.

3. See further Ch 7, Cf D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 Nov (1969) 404 et seq.

4. Cf Ch 7 for elaboration.

5. The detainee in question was Michael Matovu.

Court then asked for argument to be addressed to it on the validity of the Constitution itself. In the result it took judicial notice of the fact that the coup d'etat had been efficacious in as much as the will of the Government was being generally obeyed and dismissed the application.¹ Two further points raised in argument in this case are of some interest. Firstly, the Attorney-General had contended that the Court ought to decline jurisdiction to pass on the validity of the Constitution itself since this was a non-justiciable "political question".² The Court rejected this contention, though, it has been suggested that it could have provided an easy "escape route".³ One of the most interesting features of modern constitution cases set in highly political contexts in Commonwealth and ex-Commonwealth countries⁴ has been the insistence by the courts that they are entitled to decide the issues on their legal merits.

Secondly, the Attorney-General had argued that the judges were precluded by their judicial oaths from questioning the validity of the Constitution under which they were officiating. The Court also rejected this contention, though not without some difficulty. Under the Obote Constitution of 1966, the holders of judicial office had not been required to take new oaths of office, but were deemed to have done so. On the face of it, then, the judges were estopped from repudiating the regime which they had impliedly acknowledged by remaining in office. But the wording of the judicial oath had not been changed and under it a judge swore "to do right to all manner of people in

1. at 534-5

2. Cf Geoffrey Sawyer : "Political Questions" U Tor L J 15 (1963) at 49 et seq

3. Cf S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110.

4. eg. S Africa, Ceylon (Sri Lanka) Malaysia; see Ningkan's case (1966) 2 Malayan L J; in Nigeria, Adegbenno vs Akintola (1963) A C 614. See further F M Brookfield: "The Courts Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-352; Cf R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4;

accordance of the Constitution of the sovereign State of Uganda or by law established". The judges held that this gave them the right to decide which was the Constitution by law established - the Independence Constitution or the Obote Constitution. Consequently, they did not regard the fact of their continuation in office after the coup as pointing unequivocally to the acceptance of the legality of the new régime. As a result, more than one legal interpretation of their conduct was open to them.¹

It is suggested that in some situations it is perfectly clear what interpretation is to be placed on a decision by a judge to stay in office after a coup or other breach of legal continuity.² It would have been clear enough in Uganda, if by the Obote Constitution, the judicial oath had been deemed to be modified by being related specifically to that Constitution and clear beyond any possibility of dispute if the judges had actually taken new oaths to uphold that Constitution.³ The crucial point, then, to bear out here, is that, for all practical purposes, a legal system or a constitution is valid when the judges have unambiguously accepted it as valid.⁴ To this extent, the constitution is what the judges say it is, although, as has been pointed out, one can, of course say that the judges were wrong in swearing to uphold it or proclaiming its validity in reasoned judgments.⁵

Consequently, once the judges have pronounced on the crucial issue, if they do pronounce upon it, the matter is concluded until the next coup or counter-coup, or till they resign or are removed. Although for anyone living within

1. Cf S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110 at 104;

2. *ibid*

3. J M Finnis : "Revolutions and Continuity of Law" in Oxford Essays in Jurisprudence ed A W B Simpson, second series, Clarendon Press, Oxford, (1973) Ch 2

4. See R W M Dias : "Jurisprudence" 5th ed (1985) Ch's 16 and 4

5. "One can", as de Smith argues, "even express the opinion that the Romanoffs still rule in Russia, and the Stuarts in Britain, that the Kabaka of Buganda is still President of Uganda, that heaven knows whom and under what constitutional order are the rightful constitutional authorities in India and Pakistan. But if one does not make these assertions, one ought to be aware, that the empty wheelbarrow is being trundled by oneself, not by Hans Kelsen". (at 104-5)

that legal order the attitude of the judges in office must be conclusive for the time being, it does not follow that the judges ought to regard themselves as having an arbitrary discretion in deciding what view to take. It is important to note that judges are no more exempt from moral obligations than other officers of state in revolutionary situations.¹ It is arguable that moral obligations may weigh more heavily on them than on any other group of officers. For, on the one hand, if they resign in protest, their successors may be of so low a calibre that justice may not be done in the courts, whilst, on the other hand, if they continue in office, their real or apparent acknowledgment of the efficacy of the revolutionary régime will "clothe it with the valued prize of legitimacy".² Hence, it is not unusual for the conscientious and introspective judge in a politically volatile society to be impaled on the horns of a painful dilemma.³

Nigeria

In the wake of the rigorous Kelsenian thesis expounded in Dosso and Matovu, it is encouraging to note that in two later cases which will be referred to here, the Courts refused to apply the Kelsenian efficacy doctrine, since to do so would have been to go beyond the "necessity" of the occasion. In this way the Courts have sought to moderate the harshness of Kelsenian efficacy in practice. Firstly, reference should be made to the landmark Nigerian decision of Lakanmi vs A-G (West).⁴ The decision of the Supreme Court of Nigeria in Lakanmi has been said by some to be the most important case in Nigeria in the past three decades since it raises the crucial inquiry as to the legitimacy of the

1. See F M Brookfield: "The Courts, Kelsen and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-52, Cf S A de Smith "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110
2. De Smith op cit 104
3. Ibid; Cf S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48
4. N L Q 5 (1970) 133; see further B O Nwabueze : Constitutionalism in the Emergent States (1973) 203-8; A Ojo : "The Search for a Grundnorm in Nigeria - The Lakanmi case" ICLQ 20 (1971) 117, T O Elias : "Military Decrees in Nigeria and Ghana" Wg L J 5 (1971) 129
5. Ojo op cit at 118

power of the Federal Military Government to make laws. The important inquiry here has been held to be whether or not the events which took place in Nigeria on Jan 15 1966 could be said to have amounted to a revolution or, rather, a mere "constitutional emergency." If the former, all laws emanating from the Government would not be subject to judicial review, because the old order under the 1963 Constitution would have yielded to the new legal order; if the latter, however, the provisions of the old Constitution will apply and the Supreme Court would be able to consider the validity of any law made by the Federal Military Government.¹

On the sixteenth of January 1966 the Civilian Government in Nigeria resigned in favour of the military authorities who then formed a government. The Military Government chose to govern under the Constitution of 1963, although certain changes relating to the transition from a civilian structure of government to a military one were made by the Constitution Decrees. In these Decrees, however, the Military Government declared that it had the power to amend the 1963 Constitution.² By Decree 51 of 1966, the Military Government authorized the investigation of the assets of certain public officers and the West Nigerian Military Government enacted a similar law the following year which extended to persons other than public officers. An attachment order was made against the assets of the appellant who sought certiorari on the ground that this law was ultra vires Decree 51 of 1966. The Federal Military Government intervened and passed in favour of the Western Nigerian Military Government the Investigation of Assets Decree 45 of 1968 which repealed Decree No 51 of 1966 and also purported to exclude the jurisdiction of the courts over the investigations. This action was directed at the appellants.³

The respondents argued that a revolution had occurred and that the Federal Military Government, according to the Kelsenian principles (à la Dosso), had an unfettered power to rule by decree. The Supreme Court, however, did not

1. See A Ojo : "The Search for a Grundnorm in Nigeria" in ICLQ Vol 20 (1971) 117-36; Cf T O Elias : Nigeria : The Development of its Laws and Constitution (1967) 1-72

2. eg S 3 of Decree 1 of 1966 declares that the Military Government had the power to make laws "for the peace, order and good government of Nigeria".

3. B O Nwabueze: Constitutionalism in the Emergent States (1973) at 206

accept this argument, declaring that the Military Government was merely a "constitutional interim military government" and that the 1963 Constitution remained valid except in so far as suspension of certain parts was justified under the doctrine of necessity.¹ However, since the intervention of the Federal Military Government was in breach of the 1963 Constitution, by using legislation to perform a judicial function, Decree No 48 of 1968 went "beyond the necessity of the occasion".²

In so doing, the Supreme Court took the significant step of refusing to apply Kelsen's theory of revolutions. As a result, the military coup of 1966 was not a true revolution, so that the legislative capacity of new institutions (viz. the Federal Military Decree 51 of 1966) was limited by reference to the pre-existing Constitution (of 1963). The constitutional interim Government, then, which came into being by the wishes of representatives of the people³ and whose object was to uphold the Constitution, could only derogate from that Constitution if the derogation was justified under the doctrine of necessity.

An important criticism, for the purposes of this study, which has been levelled against Lakanmi, concerns the fact that nowhere in the judgment does the Supreme Court directly challenge the effectiveness of the Federal Military Government. This, it is suggested, could hardly have been in dispute,⁴ at least not on Kelsenian grounds. As

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1. Cf Jilani (supra); see further Ch 7; D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 Nov (1969) 404-47
 2. See too the case of Awunor-Williams vs Gbedemah (1969) unreported Ghana Court of Appeal sitting as the Supreme Constitution SC 1/69 (1969); mentioned in T O Elias: "Military Decrees in Nigeria and Ghana" Nig LJ 5 (1971) 129 at 131 - In this case, on a similar set of circumstances, the Court said that the National Liberation Council's Decrees Nos 129 and 253 made in accordance with the revolutionary Proclamation of 1966 "did anything but advance the ends of justice, yet no Decree passed by the National Liberation Council could have been struck down by the Courts as unconstitutional."
 3. Cf Jilani (supra) where this point was especially emphasized.
 4. Cf A Ojo: "The Search for a Grundnorm in Nigeria" in ICLQ 20 (1971) 117-136

mentioned earlier in this study, Kelsen propounds his theory as a hierarchy of norms (Oughts) leading back to the "first constitution" whose binding effect is "presupposed". A successful revolution can displace that constitution if "the new order begins to be efficacious", because individuals behave in conformity with it. The norms, however, are valid, not because the total order is efficacious, but they are valid only if the total order is efficacious and cease to be valid when the total order ceases to be efficacious. In this way, then, the principle of legitimacy is restricted by the principle of effectiveness.¹

On strict Kelsenian grounds, therefore, there can be no argument on the effectiveness of the Federal Military Government. As one writer puts it, "knots which the law cannot untie may have to be cut by the sword."² It is true that Decree No 1 had an extra-legal origin, but, to quote Salmond:

"Every constitution has an extra-legal origin, the best illustration being the USA, which in open and forcible defiance of English Law, broke away from England and set up new states and a Constitution the origin of which was not merely extra-legal, but was illegal. Yet, as soon as those constitutions succeeded in obtaining de facto establishment in the rebellious colonies, they received recognition as legally valid from the Courts of the Colonies. Constitutional law followed hard upon the heels of constitutional facts. Courts, legislatures and the law had alike their origins in the Constitution, therefore the Constitution cannot derive its origin from them. So also is every constitution that is altered by way of illegal revolution".³

The Supreme Court of Nigeria adopted an ingenious solution to counter this criticism by having recourse to customary

1. See H Kelsen: General Theory of Law and State (1945) at 115 and 117-8 See too G Paton : A Text- Book of Jurisprudence (3rd ed) 15-16; W Friedmann : Legal Theory 3rd ed at 114; D Lloyd: The Idea of Law at 182-3; J Bryce: Studies in History and Jurisprudence Vol II (1901) at 516, in the essay " The Nature of Sovereignty"; and Julius Stone : " Mystery and Mystique in the Basic Norm" MLR 26 (1963) at 48.

2. J Bryce: Studies in History and Jurisprudence Vol 2 (1904 ed) at 107

3. John Salmond : Jurisprudence 11th ed by Glanville Williams at 101, Cf A Ojo : " The Search for a Grundnorm in Nigeria" in ICLQ 20 (1971) 117 et seq

principles of international law. The Court conceded that customary international law does recognize a coup d'état as a proper and effective legal means of changing a government. However, the Court added, that customary international law also postulates that certain fundamental requirements must be fulfilled in this regard:

- (a) There must have been an abrupt political change ~~ie~~ a coup or a revolution.
- (b) The change must not have been within the contemplation of an existing constitution.
- (c) The change must destroy the entire legal order, except what is preserved, and,
- (d) The new constitution and government must be effective.

Although the Supreme Court conceded that it is wrong that constitutions must make provision for all emergencies (that no constitution can anticipate all the different forms of phenomena which may beset a nation), it held that the events described (supra), while amounting to an "abrupt political change" (a), were not within the contemplation of the 1963 Republican Constitution.² There was certainly no provision in that Constitution which permitted the handing over of a Government under that Constitution to the Armed Forces. On this ground, then, the events of 15 Jan 1966 did not amount to a revolution.

It is of significance to note that in another decision of the Nigerian Supreme Court, in the same year as Lakanmi, i.e. Ogunlesi and others vs the A-G of the Federation,³ the Court referred to the Dosso and Matovu decisions (supra) and distinguished those two cases from the Lakanmi case on the ground that in those cases there was a nullification of the existing Constitution and an introduction of a new one which amounted to an "abrupt political change" which was tantamount to a revolution. In Lakanmi, however, what was involved was a "transfer" of power from the old order to the new order which was effected with an "agreed" partial suspension. Thus, the Court refused to

1. Lakanmi, ICLQ 20 (1971) at 117; Cf A Ojo : "The Search for a Grundnorm in Nigeria" in ICLQ 20 (1971) at 117.

2. As it was in S vs Dosso and Another (1958) 2 Pak S C Rep 180 at 184; Cf T K K Iyer : "Constitutional Law in Pakistan : Kelsen in the Courts" in Am Jnl of Comp Law Vol 21 (1973) 759-781.

3. (1970) L D/28/69 (unreported) ; see further the Supreme Court decision in Adamolekun vs The Council of the Univ of Ibadan (1967) S C 378; Cf Ojo op cit at 124 et seq

regard the events of Jan 15 1966 as revolutionary on the essentially technical grounds of the "transfer agreement".¹

In view of the significant departures from strict Kelsenism evident in *Lakanmi*, it is unfortunate that this seminal decision should have had such a disquieting sequel. Only a few days after this landmark judgment had been handed down, the Court's decision was overturned by new legislation declaring the 1966 coup to have been revolutionary. Thus, the Federal Military Government, whose legislative competence and legality had been challenged by the Supreme Court pronouncement, reasserted itself by restating its right to unfettered and unlimited legislative competence. This it did by promulgation of Federal Military Government Decree 28 of 1970.²

Grenada

Before closing this Chapter, it is essential to refer very briefly to the comparatively recent decision of *Mitchell vs DPP*, a case decided in the wake of the revolution in the Caribbean island state of Grenada. This case, it is suggested, offers further grounds for optimism by adopting similar views to those enunciated in *Jilani* and *Lakanmi*. The Court here departs quite substantially from Kelsen by its support of the view that the choice of a Grundnorm is not dictated inflexibly by effectiveness in vacuo, but is often a political decision as Kelsen himself had to concede. Thus, Haynes P in the Grenada Court of Appeal was reluctant to regard the revolutionary Government in question as legal, unless it complied with four essential conditions : (a) a successful revolution must have taken place, i.e. the Government must be firmly established administratively.

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1. Cf A Ojo : "The Search for a Grundnorm in Nigeria" in ICLQ 20 (1971) at 117 et seq. Ojo argues that the events in question were more in the nature of an "abdication" of power by the Civilian Government Ministers to the Armed Forces.
 2. Federal Military Government (Supremacy and Enforcement of Powers) Decree No 28 of 1970
 3. (1986) LRC (Const) 35
 4. This case was decided in the aftermath of the Grenada revolution of 1983, when, in the course of an army-supported coup, the Prime Minister Maurice Bishop and several other leaders were slain. The US then sent an invasion force, aided by units from other Caribbean nations, to restore constitutional government.

(b) the Government must be in effective control i.e. there must be by and large conformity with its mandates. (c) such conformity must be due to popular support, not mere tacit submission to coercion (d) the revolutionary régime must not be oppressive or undemocratic.¹

The foregoing Chapter has laid bare, not only the practical difficulties and the social undesirability of Kelsen's efficacy-validity thesis as well as his theory of revolutions generally, but it has also shown how the judicial process may be used to minimize the adverse consequences of an openly political solution to legal problems. Kelsen's reliance on efficacy as the criterion for legitimacy² was subjected to sustained critical evaluation and was found to be undesirable in practice. However, when added to some non-Kelsenian principles viz. state necessity, implied mandate, martial law, social justice, will of the people etc it provides "an almost sure cure for any legitimacy crisis".³

1. per Haynes P. at 71-2;

2. H Kelsen: Pure Theory of Law (1967) 204-214;

3. See W Jellinek : Gesetz und Verordnung (1887) at 376; R Odent: Contentieux Administratif (1958) at 136-8; G Williams : "The Defence of Necessity" in CLP 6 (1953) 216, 225-31; Samuel Shuman : " Justification of Judicial Decisions" in Calif L Rev Berkeley (1971) 715-732

Chapter 6

Introduction

In the previous Chapter, Kelsen's efficacy-validity thesis was examined with regard to sovereign independent states torn by revolutionary upheaval, in which there had been no rival claims to power. This Chapter will examine Kelsen's efficacy-validity thesis in the light of the revolutionary situation which prevailed in Rhodesia at the time of the UDI in 1965. As opposed to the independent States in Chapter 5, the "colony" of Rhodesia was confronted with a rival claimant to power in the form of the external sovereign, (viz. Great Britain) which, in the immediate aftermath of the UDI, was still imposing measures to reassert its control. Rhodesia, then, at least before 1968, had not, as one judge puts it, "succeeded in untying the apron-strings of sovereignty of the mother state".¹ Whether Ian Smith's revolutionary Government could be said to be effective in the light of these British attempts to re-establish effective control, is one of the crucial inquiries in this Chapter. It should be noted that in examining the Rhodesian revolution cases, priority will be given to the seminal judgments in Madzimbamuto vs Lardner-Burke.² The other revolution cases will only be examined in so far as they are relevant to the present inquiry. Furthermore, primary attention will be paid to the Appellate Division judgments in Madzimbamuto because of their crucial bearing on the subject-matter of this Chapter. The General Division judgments will only be discussed very briefly while the Privy Council decision will be considered only in so far as it appertains to the present inquiry.

1. See Lewis J in the General Division Judgment in Madzimbamuto vs Lardner-Burke GD\CIV\23\66 Sept 9, (1966) at 848
2. It might be useful in this introduction to list, in chronological order, all the judicial decisions which bear some relevance to the present inquiry: Madzimbamuto vs Lardner-Burke; Baron vs Ayre N O and others (a) Gen Div HC of Rhodesia Sept 9 1966 Judgment 6 DICIV\23\66 (b) AD, HC of Rhodesia, Jan 29, 1968 [1968 (2) S A 284]; Dhlamini and others vs Carter N O and Another, A D Febr 28 1968 [1968 (2) S A 445]. Madzimbamuto vs Lardner-Burke and another (No 2) AD March 1 (1968) [1968 (2) S A 457] Dhlamini and others vs Carter and Another (No 2) AD March 1, 1968 [1968 (2) S A 284] (No 3) AD March 4 1968 [1968 (2) SA 467] Madzimbamuto vs Lardner-Burke and Another, Judicial Committee of the Privy Council, July 23 1968 [PC Appeal No 13 of 1968] Archion Mdhlovu and others vs The Queen AD, Sept 13 [Judgment AD 138\68]

The important question which should be asked, then, is whether the usurping revolutionary Government, could, for any purpose, be held to be the lawful or legitimate Government of Rhodesia.

Background

In 1961 the UK granted Southern Rhodesia a Constitution which gave that colony virtually complete internal self-government. It is true that certain powers of amendment were reserved to the Crown, but the UK Government publically recognized a convention, said to have been accepted since 1923,¹ that the Parliament of the UK would not legislate for a matter within the competence of the Southern Rhodesian Legislature, except with the consent of the Southern Rhodesian Government.²

On 11 November 1965, the Southern Rhodesian Ministers under the leadership of Ian Smith made a unilateral (i.e. unauthorized) declaration of independence and purported to replace the 1961 Constitution with another, viz. the revolutionary 1965 Constitution, which, while in many ways similar to the 1961 Constitution, made certain entrenched sections easier to amend. In particular, S 142 disallowed the courts from inquiring into the validity of the Constitution. On the same day and in response to this Act, the Governor issued a statement on behalf of the Queen, which purported to remove the Prime Minister and his colleagues from office. On 16 November the UK Parliament passed the Southern Rhodesia Act³ which declared that "Southern Rhodesia continues to be part of Her Majesty's Dominions and that the Government and Parliament of the UK have the responsibility and jurisdiction, as heretofore, in respect of it".⁴ The Act also allowed Orders in Council making such provision "as appears to be necessary or expedient in consequence of any unconstitutional action taken in Southern Rhodesia".⁵ On 18 November the Southern Rhodesian

1. This has also been referred to as the non-intervention convention.

2. S A de Smith : " The New Commonwealth and its Constitutions" White paper 43 (1964) Cmd 1399

3. [(1965) 13-14 Eliz II C 76]

4. 51

5. 52

(Constitution Order-in Council (UK order) was made.¹ It made the following two important provisions: S 2 (1) "It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any constitution for Southern Rhodesia ... is void and of no effect". S 3 (1) " Her Majesty in Council may make laws for the peace, order and good government of Southern Rhodesia".²

Apart from these matters, the internal state of affairs in Rhodesia remained largely the same. Although there was provision in the 1965 Constitution which required judges appointed under the 1961 Constitution to make a specific declaration to uphold the 1965 Constitution,³ in fact, the judges were not so required and they continued to sit and to apply various administrative and legislative acts of the Rhodesian Government.⁴ It was only in Madzimbamuto vs Lardner-Burke⁵ in the General Division several months later, that the question of the validity of the 1965 Constitution was first faced. The Smith Government remained in office and continued to pay the salaries of the civil service, judges, police and the armed forces. Furthermore, the UK Government did not pretend to govern Rhodesia and the various orders made under the Southern Rhodesia Act or UK Act related, rather, to the imposition of economic sanctions.⁶ Moreover, the Queen was still regarded in Rhodesia as its titular head after the declaration of independence, until Rhodesia's purported formation of itself into a Republic.⁷

It is suggested that Kelsen's efficacy-validity thesis was accepted to some extent, either explicitly or implicitly.

1. [1965 (1952 of 1965)]

2. It has been suggested that the intention of the latter section was unequivocally to set aside the convention not to legislate for Rhodesia without her consent.

3. S 128 (4)

4. [(1966) Rhodesian Law Reports 756 ; Beadle CJ outlined some of these acts in the Rhodesian Appellate Division at 305-6.

5. (supra)

6. As will be seen in due course, the ineffectiveness of these economic measures adopted by Great Britain presents a potent argument in favour of the internal efficacy of the revolutionary Government.

7. See Annual Survey of Commonwealth Law (1970) at 3-4; Rhodesia became a Republic on 3 March 1970.

by all the judges in the Rhodesian revolution cases, except for Fieldsend AJA in the Rhodesian Appellate Division and Lord Pearce (dissenting) in the Privy Council judgment. Madzimbamuto was heard in the General and Appellate Divisions of the High Court of Rhodesia and then in the Privy Council. In R vs Ndhlovu,¹ the Appellate Division finally conferred internal de jure validity on the revolutionary Government.

Madzimbamuto vs Lardner-Burke in the General Division

The two presiding judges, Lewis and Goldin JJ, were faced by the contention of the respondents to the effect that the Rhodesian Government was the valid de jure Government and that the 1965 Constitution was the only lawful Constitution. In his judgment Lewis J first points to the crucial distinction between the terms "de jure" and "de facto".² From the case it is clear that by "de jure" he is referring to the government that is entitled to the powers of sovereignty and by "de facto" he is referring to the government that is in fact in possession of them.³ However, his argument seems to change somewhat, for afterwards he regards a "de jure" government as one which has become permanently effective.⁴ He also subsequently accepts the argument of the respondents that "de jure" validity could be acquired retrospectively through the replacement of an old order by a new one. Here he cites, inter alia, Kelsen, as support for the proposition that, in a matter of time, de facto governments "ripen" into de jure governments.⁵

1. (supra) See later this Chapter for an examination of this important decision.
2. See later this Chapter ; where Beadle CJ in the Appellate Division judgment in Madzimbamuto, defines this distinction differently i.e. from the international law perspective and also cites different authorities to that cited by Lewis J. See further, Ch 7
3. Luther vs Sagor (1921) 3 KB 532, at 543 (Per Banks L J) ; See too the Arantzazu Mendi (1938) AC 264, which Lewis J cited in support.
4. See Dosso case (supra) in Ch 5 where this "permanency" requirement of effectiveness is discussed more fully.
5. General Division, per Lewis J at 782-8; Cf D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 Nov (1969) 404-47

It is significant that Lewis J also distinguishes Madzimbamuto from Dosso¹ by holding that the revolution to which the latter case related was in an "independent sovereign state".² Thus, the difference with the situation prevailing in Rhodesia was that Rhodesia had not succeeded in "untying the apron-strings of sovereignty of the mother state".³ On this basis, Lewis J states that the revolution could succeed only when the UK had "severed" the ties of sovereignty, either by express consent, or by abandoning the attempt to end the revolution.⁴ Consequently, a mere declaration of independence is not sufficient to establish the de jure status of the revolutionary Government.⁵ On this ground he held that cases arising after the American revolution⁶ and after the dissolution of the Austro-Hungarian monarchy⁷ in which validity was held to backdate after the revolutions had succeeded, could not be authority for decisions made in mediis rebus⁸ (as in Rhodesia).

Unfortunately, it is not clear from Lewis J's citing of these cases, whether he views the success of the revolutions as dependent simply on the effectiveness of the changes or upon a formal abandonment of a claim by the mother state. If he does consider that it is a necessary condition that the mother state "formally untie the apron-strings", then this would have been to purportedly "restrict the efficacy doctrine in a way that an essentially jurisprudential doctrine cannot be restricted".⁹ In the cases arising after the American revolution, it is clear that claims of

1. See Ch 5 (supra) Cf T K K Iyer : " Constitutional Law in Pakistan: Kelsen in the Courts" in Am Jnl of Comp Law Vol 21 (1973) 759-781.

2. He also distinguished the revolutions that had occurred in Nigeria, Ghana and Zanzibar on this basis. Cf Ch 5.

3. General Division (per Lewis J) 782-8

4. General Division at 848;

5. Here the learned judge referred to the American historians Barck and Lefler : Colonial America at 102 (Quoted in General Division at 92-3)

6. See e.g. Williams vs Bruffy (1977) 24 LED 716

7. See Annual Digest (1919-22) Nos 11-21, (1925-6) Nos 13-15

8. See R W M Dias : "Legal Politics: Norms Behind the Grundnorm" in CLJ (1968) 233-259

9. Cf S Guest: " Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48

sovereignty had been abandoned by Great Britain through the signing of the Treaty of Paris in 1783.¹ Lewis J does, however, comment on the Austro-Hungarian cases in the following terms:

"The Czechoslovak State and the other new States came into existence, as sovereign independent States from the time they seized sovereignty in October 1918 and did not owe their legal existence to the subsequent peace treaties at the end of WWI. It seems clear, however, that this was because the Austro-Hungarian Monarchy was in a process of disintegration and hence powerless to prevent such seizure".²

On the strength of this argument, Lewis J seems to allow that effectiveness was sufficient in some circumstances for success in establishing independence. Thus, he concludes his judgment by saying that the sovereign tie had not been broken in the present case and as a consequence of this, the judges could not accord de jure recognition to the Rhodesian Government.

It is significant that Goldin J, the other judge sitting in the General Division, sees the efficacy principle as applying only within sovereign states. But, unfortunately, as in the case of Lewis J, it is not clear whether he believed that independence could be gained by the mere fact of effectiveness alone (of the revolutionary Government), for he states that the mother state must first accept the fact of independence. One interpretation advanced by some is that in his (Lewis J's) view, the issue of acceptance by the UK relates only to the effectiveness of the Rhodesian Government because the UK could be said to have accepted it implicitly by "abandoning the struggle".³ On the other hand, Goldin J suggests that acceptance by other states of the revolutionary

1. However, the writer Guest lists the case of M'Ilvaine vs Cox's Lessee which Lewis J does not cite. Here it was held that the American states had gained independence otherwise than through the concession of the British Crown. (1804) 2 LBD 598, Cf Beadle CJ in the Rhodesian Appellate Division at 319.

2. General Division, (per Lewis J) at 793.

3. General Division (per Lewis J) at 862, see later this Chapter under Appellate Division judgement where this point is more fully elaborated upon. Cf R H Christie : "Practical Jurisprudence in Rhodesia"; in CILSA Vol 1 (1968) 390-407.

Government's Independence was relevant and also that the legality of the 1965 Constitution was a prior condition for sovereign independence.¹

From the foregoing two judgments, the following emerges : For Lewis and Goldin JJ the efficacy doctrine, or some form of it, is a doctrine which applies only when the revolution occurs in a sovereign independent state.² At the same time, both judges held that the Court was not entitled to "project itself into" or "speculate concerning the future".³ It is unfortunate, however, that these judges failed to distinguish the situation where the judges simply make a future prediction of effectiveness, from the situation where they exercise a power to influence the success or failure of the revolution.⁴

Madzimbamuto vs Lardner - Burke in the Appellate Division

Notwithstanding the original validity of the Act and Order-in-Council⁵ as part of the law of Rhodesia and the illegality of the usurping Government, it is suggested that subsequent events had had the effect of conferring legitimacy, as the lawful Government, upon it. It is with this question that the Appellate Division is essentially concerned in Madzimbamuto's case. It is unfortunate, however, that the Court is split three ways in regard to this crucial question. The three different viewpoints are represented by the judgments, firstly, of Beadle CJ with whom Jarvis AJA (though delivering a separate judgment) substantially concurred, secondly, that of Macdonald JA with whom Quènet JP (again, in a separate judgement) was in substantial agreement; and, finally, Fieldsend AJA who stood alone

1. General Division (per Goldin J) at 862

2. See J M Bekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence ed A W B Simpson, Clarendon Press, Oxford (1973) Ch 2

3. J M Finnis : "Revolutions and the Continuity of Law" in Oxford Essays in Jurisprudence; ed A W B Simpson, Second Series; Clarendon Press, Oxford, (1973) Ch 3. This leads to the question what exactly is meant by a "sovereign independent state" See Ch 7, where this is explained in the light of international law by reference to the criteria of statehood.

4. See in this regard S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1 - 48;

5. (supra)

on this issue, being the sole dissentient in the Appellate Division.

Firstly, it is essential to examine the judgment of the Chief Justice, Beadle CJ himself. As he points out:¹

"the importance of the question in issue was in relation to its bearing upon the law to be applied by a Rhodesian Court. The main contention of Counsel for the Government had been that the Government had now become the de jure Government of Rhodesia and the 1965 Constitution, therefore, the de jure Constitution. Quite obviously, if this contention were sound, then cadit quaestio, for as the impugned Proclamation had been properly promulgated in terms of the 1965 Constitution, this would determine the main issue in favour of the Government. An alternative argument was that the usurpers at least constitute the de facto Government. If this were so, the further question would arise as to what laws, if any, of such a Government, the Court had jurisdiction to apply. For the appellant, on the other hand, the contention was that the via media of the respondents' alternative argument was not in law open to the Court, that there was no halfway house between upholding the 1961 Constitution and recognizing that of 1965".²

Thus, the argument went that judges holding office under the 1961 Constitution and obliged by their oaths to uphold it, had no jurisdiction to recognize that of 1965. To do so would amount to "joining the revolution."³

The Chief Justice, therefore, clearly found himself in a Scylla and Charybdis situation.⁴ The facts, however, present little, if any difficulty and are mostly so well-known as to be readily susceptible of judicial notice.

1. 1968 (2) SA 284 at 309

2. See R S Welsh: "The Constitutional Case in Southern Rhodesia" in L Q R Vol 84, (1967), 64 - 88; G N Barrie: "Rhodesia UDI- An Unruly Horse" in CILSA (1968) 110-20; Sed contra J M Bekelaar : "Splitting the Grundnorm" in MLR (1967) 156 - 175;

3. Sed contra R W M Dias : "Legal Politics - Norms Behind the Grundnorm" in CLJ (1968) 233 - 259; Dias argues that the judges did not join the revolution.

4. The Chief Justice, by drawing an analogy from the field of zoology, refers to the Madzimbamuto case as the "okapi of jurisprudence", at 308 - 9; Cf C Palley: "The Judicial Process: UDI and the Southern Rhodesian Judiciary", in MLR Vol 30 (1967) 263 - 287; Palley refers to this decision as providing "manna for jurists".

Despite the wide powers conferred by the 1965 Statute and Order in Council on the Queen in her government of the UK to govern Rhodesia, it is significant that the use made thereof had been virtually limited to imposing economic sanctions on the community as a whole.¹ It is noteworthy that no attempt had been made to use them for the actual administration of the country. Yet, for the two years that had elapsed since the UDI, Rhodesia had been effectively and peacefully governed by the usurping Government, whose acts, regulations and orders had been obeyed by and large, by the civil, military and police services, who, moreover had maintained and paid the judiciary and had given effect to the judgments, sentences and orders of the Courts. Thus, in all three principle branches of Government - legislative, executive and judicial - the usurping Government had effectively controlled and administered the country.² All this, it is suggested, constitutes a formidable case in favour of the efficacy of the revolutionary Government.

In addition, it must be stressed that neither the facts judicially noticed nor the evidence pointed to any imminent or foreseeable change in this situation. A crucial point in this regard is the fact that the usual method of dealing with a revolutionary régime by the legitimate authorities, namely, the employment of police or military force, had been specifically forewarned by the UK Government.³ As a result, the overthrow of the usurpers by this means could safely be discounted. Nor were there any signs that economic sanctions were seriously menacing the internal stability of the territory to the point of ineffectiveness.

1. See R H Christie : "Practical Jurisprudence in Rhodesia" (contd) in CILSA vol 2 (1969) 3 -23; see further "Practical Jurisprudence in Rhodesia" (contd) in CILSA vol 2 (1969) 206 - 22; Cf D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA vol 2, No 3, Nov (1969) 404 - 447.
2. Cf H R Mahlo: "The Privy Council and the Gentle Revolution" in SALJ vol 86 (1969) 419 -39.
3. Molteno op cit at 405 - 6; Cf J M Kekelaar : "Rhodesia: The Abdication of Constitutionalism" in MLR vol 32 (1969) 19-34; "The Constitutional Case in Southern Rhodesia" in LQR vol 83 (1967) 64 -88.

It is of course true, that no state at the time had recognized the usurping Government, either de jure or de facto.¹ In addition, the sanctions imposed by Great Britain and her allies had had certain damaging, or, at least, distorting effects upon the economy. Thus, in the years 1965-66 exports had fallen from a value of about \$ 165 000 000 to about \$ 105 000 000. And, in regard to imports, the corresponding approximate figures were : \$ 120 000 000 and \$ 84 000 000² respectively. On the other hand, presumably taking into account "invisible" exports and imports, Rhodesia was maintaining a surplus on current balance of payments accounts amounting to \$ 150 000 for the year 1966 and of sufficient dimensions for the first eight months of 1967 to render possible a level of imports some 20% higher than for the corresponding period in 1966. A building boom was, moreover, noticeable, there being no signs either of relative economic distress or failing morale among the population generally.³ Taking into account all these factors and especially the length of the period that had elapsed since the UDI, the Chief Justice arrived at the finding of fact that not only was the usurping Government in effective control, but such control "seemed likely to continue".⁴

It is significant that in his judgment the Chief Justice places great emphasis on the law dealing with the establishment of a new government by a revolutionary process. He accepts that a successful revolution which succeeds in replacing the old Grundnorm (or fundamental law) with a new one, establishes the revolutionaries as the new lawful government. Needless to say, in this, he relied⁵ heavily on Kelsen's efficacy-validity thesis.

1. Cf D J Devine : "The Status of Rhodesia in International Law" in A J (1973) 1 - 171; See further R H Christie : "Practical Jurisprudence in Rhodesia" in CILSA vol 2 (1969) 206 - 221; J M Bekelaar : "Splitting the Grundnorm" in MLR (1967) 156 - 175; G N Barrie : "Rhodesian UDI - An Unruly Horse" in CILSA (1968) 110 - 120; cf D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3, Nov (1969) 404 - 47.
2. Molteno op cit at 407 -8
3. Ibid.
4. See further: R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233 - 259; A M Honoré : "Reflections on Revolutions" in Irish Jurist Vols 1 - 2 (1966-7) 268-78;
5. T C Hopton argues that the judges confused the meanings of Grundnorm and Constitution: "Grundnorm and Constitution: The Legitimacy of Politics" in McGill L J vol 24 (1978) 72-91.

Furthermore, he follows Kelsen in saying that the efficacy of the "total legal order" is synonymous with the efficacy of the basic norm, since it is from this norm that all other norms of that order derive their validity or legitimacy.¹ From this, one crucial issue of fact presents itself for the Court's decision i.e. whether the usurpers had effectively² replaced the formerly legitimate Government. If so, it is suggested that they would be entitled to internal de jure recognition as themselves constituting the new legitimate Government. If not, they would, in Kelsenian language, represent a treasonable conspiracy.³

A crucial point made by Beadle CJ in his judgment is that a situation could conceivably arise which reveals the usurpers as the only effective government for the time being, but not as sufficiently established as such to warrant a court in recognizing them as a new legitimate government. And such, on the facts, he held to be the position in Rhodesia.⁴ In such circumstances, he held that it was the duty of the Court to recognize the usurpers as constituting the Government de facto, though not de jure, as contended for by counsel for the respondents in their alternative argument. In direct reference to these expressions (viz. de facto and de jure) the Chief Justice makes the following significant points :

"Both expressions are ones which are generally used more in international law than municipal law, but I can see no reason why an international law definition should not be used by a municipal court, because it would seem that, if a government conformed to an accepted international law definition of either a de jure or a de facto government, then, a fortiori, it should be recognized by a municipal court."⁵

As to the distinction between the two types of recognition, he quotes a passage from the judgment of Lord Reid in

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1. H Kelsen : General Theory of Law and State (1945) at 118-9
 2. Cf S Guest : " Three Judicial Doctrines of Total Recognition of Revolutionary Governments" AJ (1980) 1-48; Cf J W Harris : " When and Why does the Grundnorm Change?" in CLJ (1968) 103-133;
 3. Kelsen op cit 118-9; Cf A M Honoré : " Reflections on Revolutions" in Irish Jurist vols 1-2 (1966-7) at 268-278;
 4. Madzimbamuto (per Beadle CJ) at 313
 5. at 314

Carl Zeiss Stiftung vs Rayner and Keeler Ltd ¹:

"... it is international law which defines the conditions under which a government should be recognized de jure or de facto and it is a matter of judgment in each particular case whether a regime fulfils the condition. The conditions under international law for the recognition of a new regime as the de facto government of a State are that the new régime has in fact effective control over most of the state's territory and that this control seems likely to continue. The conditions for the recognition of a new régime as the de jure government of a state are that the new régime should not merely have effective control over most of the state's territory, but that it should, in fact, be firmly established".²

It is clear that on this international law approach, de facto and de jure governments differ only in the degree of effectiveness that they command. According to the Chief Justice, then, success alone is the determining factor. It should also be noted that unlike Lewis and Goldin JJ in the General Division, he (Beadle CJ) does not agree that the efficacy principle is applicable only in sovereign independent states and even if it was, sovereign independence could be gained otherwise than through the concession of the mother state.³

He then elaborates on the crucial factual question of effectiveness in the following terms.

"If the fact that this Court has not 'joined the revolution', seems likely to prevent the present Government from continuing in effective control, then this fact might well prove decisive in deciding its status. If, on the other

1. Carl-Zeiss Stiftung vs Rayner and Keeler Ltd 1968 (2) All ER 536 at 548 (HL) which was itself a quotation from an official statement of a British Foreign Secretary.
2. *ibid* ; see further R W M Dias : "Legal Politics: Norms behind the Grundnorm" in CLJ (1968) 233-259;
3. Here the learned Chief Justice cites M'Ilvaine vs Cox's Lessee (supra) in support; See too D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA vol 2, Nov (1969) 404-47; R H Christie : "Practical Jurisprudence in Rhodesia" CILSA vol 2 (1969) 3 - 23; "Practical Jurisprudence in Rhodesia" (contd) CILSA vol 2 (1969) 206-221; G N Barrie: "Rhodesian UDI- An Unruly Horse" in CILSA (1968) 110 - 120;

hand, this fact is not likely to have any bearing on this issue, then it will be an irrelevant consideration... This is a pure question of fact, not of law¹.

The crucial point in Beadle CJ's judgment, then, is that because of the possibility that the UK might reassert its authority over Rhodesia, it could not be said with certainty that the Rhodesian Government was the de jure Government.² It is arguable, however, that Beadle CJ may have been misled by the de facto and de jure distinctions drawn by Lord Reid in *Carl Zeiss*. Thus, to say that international law defines the conditions under which a government should be recognized de jure or de facto would seem, prima facie, at least, to mean that a government that fulfils such conditions, becomes entitled in international law, to recognition in the appropriate category.³ But this has been strongly criticized. Here it has been suggested that all that international law, according to the contemporary practice of states, has to say on the subject of recognition, (either de jure or de facto) is that it is a matter of policy lying within the discretion of each state.⁴

On the de facto and de jure issue, then, Beadle CJ held that the usurping regime, on the evidence at hand, was the Government de facto but not de jure.⁵ It is significant that in the Privy Council, this conclusion by the Chief Justice seems to have been interpreted as one to the effect that the Rhodesian Government was de facto, while the British Government, as the external sovereign, was the Government of Rhodesia de jure. This would seem to appear

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1. Rhodesian A D (per Beadle CJ) at 321 -2,
 2. Sed Contra D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA vol 86 (1969) 404-47; J M Kekelaar : "Rhodesia - The Abdication of Constitutionalism" in MLR vol 32 (1969) 19-34;
 3. Cf Molteno op cit 412-3;
 4. See Ch 7 where the international law principles are further discussed . Cf S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1 - 48, See further D J Devine: "The Status of Rhodesia in International Law" AJ (1967) at 45. The only recognized authority supporting a duty of recognition is Sir H Lauterpacht. As a result, it has been suggested that Lord Reid quoted the above statement of the Foreign Secretary merely as reflecting the general practice of the British Government in this regard.
 5. See later this Chapter where this view is challenged.

from Lord Reid's ruling that "it is not possible to decide that there are two lawful governments, at the same time, while each is seeking to prevail over the other."¹ But, this, it seems, is not what the Chief Justice has in mind. Rather, what he means is that the former pre-UDI de jure Government had disappeared and had not yet been replaced. This, it is suggested, is the correct interpretation of the Chief Justice's judgment, for he appears to reject the Act and Order in Council of 1965 as invalid. Moreover, he held that the disappearance of the former Government had left a lacuna.² This view of the Chief Justice, however, has been challenged and it is arguable here that the logical and sound deduction from the finding of fact that the usurpers had established themselves as the de facto Government, (in the sense attributed to that concept by Beadle CJ) was that they were the de jure Government also, as held by Quenet JP and MacDonald JA.³

It is noteworthy that Quenet JP in his judgment disposes of the applicability of any criterion drawn from international law.

"A new state springing into existence, does not require the recognition of other states to confirm its internal sovereignty. The existence of the state de facto is sufficient in this respect, to establish its sovereignty de jure".⁴

Significantly, Macdonald JA reaches the same conclusions,⁵ largely as a result of his view, based on his reading of the English commentators on constitutional law, that allegiance is owed to the king and his government de facto, in return for the protection extended to his subjects. He relies on Wheaton as authority, but it is important to

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1. Privy Council (per Lord Reid) at 574; Cf R R Hahlo : "The Privy Council and the 'Gentle Revolution' in SALJ vol 86, (1969) 419-39;
 2. See later this Chapter, Cf R W M Dias : Jurisprudence 5th ed, (1985) 104-5.
 3. *Infra*
 4. See D Wheaton : Elements of International Law 3rd Engl ed at 33; -But see I Brownlie: "The Reality and Efficacy of International Law" in British Yearbook of International Law vol 52 (1981), Clarendon Press, Oxford (1982) 1-8; Cf J Crawford : "The Criteria for Statehood in International Law" in British Yearbook of International Law 48 (1976-7) Clarendon Press, Oxford (1978) 93-112.
 5. Rhodesian A D (per MacDonald JA) at 413

note that Wheaton says that the existence of a state de facto is sufficient to establish its sovereignty de jure, but only as regards its internal sovereignty not its external sovereignty.¹

An important point to raise here relates to the question of the jurisdiction of the Rhodesian judiciary to review the validity of the 1961 Constitution.² Two issues must be considered here : Firstly, a Certificate was produced, signed by the Secretary of State, to the effect that Her Majesty's Governor did not recognize the Rhodesian Government as either the de jure or de facto Government of Rhodesia. It was argued here by Counsel that the Court was bound by that Certificate and could not question it. Secondly, and alternatively, it was argued that, inherently, the Court lacked jurisdiction to question the validity of the 1961 Constitution, for, if it was held to be invalid, the Court would thereby be impeaching its own title as a Court and hence its capacity to decide anything.³ It was argued that only by repudiating their offices, "joining the revolution" and assuming office under the usurping Government, could the Court acquire jurisdiction to impugn the 1961 Constitution. But, in that event, it would have no choice, but to uphold the revolutionary 1965 Constitution.

It is significant that in rejecting both these contentions, there would appear to have been no difference between the majority judges, Beadle CJ and Jarvis AJA on the one hand, and Quenet JP and Macdonald JA on the other, except in regard to the legal status of the Rhodesian Government.⁴ As regards the first point of counsel, the Court held that, though the Certificate might well bind an English Court, it did not bind a Rhodesian Court which must decide the status of the Rhodesian Government as a question of fact. Moreover, the position is wholly unlike that arising

1. D Wheaton: Elements of International Law (3rd ed) at 33.

2. See S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48; Cf T C Hopton: "Grundnorm and Constitution: The Legitimacy of Politics" in McGill LJ Vol 24 (1978) 72-91;

3. Cf D Molteno : "The Rhodesian Crisis and the Courts" in CILSA vol 2, No 3, Nov (1969) 404-8

4. See further Ch 7 for UDI Rhodesia's position in international law.

in regard to the validity Act of 1965 at the time it was passed. For, if the true facts were such that since the passing of that Act, the Rhodesian Grundnorm had been altered and Rhodesia had become a sovereign independent State, then clearly, the Courts of that State must expound the law as deriving its validity from the new Grundnorm.¹

On this assumption, then, it was essential that the Court should have jurisdiction to go behind the Certificate and decide on the facts. However, it is suggested that even if the Certificate were decisive in regard to the legal status of the Rhodesian Government, it did not follow that all the Government's laws were necessarily invalid i.e. it is crucial to note here that the legitimacy of a government per se does not necessarily involve the same issues as the validity of its laws.²

As regards the second contention by counsel, the Chief Justice makes the noteworthy point that if the events of the two years immediately following the UDI had in fact had the effect of replacing the old Grundnorm (concretized in the 1961 Constitution) by a new Grundnorm, (concretized in the 1965 Constitution) it was the duty of the Court so to declare.³ For it is the judicial function to expound the law as it is and hence, the Court had jurisdiction to undertake the inquiry essential for such exposition.⁴ It should be noted here that there is no essential difference between the alteration of the Constitution and hence the law, by legal or illegal means. The difference resides merely in the legal criteria applicable to the inquiry whether such alteration has been effected. Even then, it is arguable that if a judge concludes on the facts that originally illegal activity has had the effect of substituting

1. Rhodesian AD (per Macdonald JA) at 415; Cf R W M Dias: "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259;
2. Even Fieldsend AJA and Lord Pearce in their respective dissenting judgments concede this.
3. Rhodesian AD (per Beadle CJ) at 327-30; Cf Dias op cit 240-9; J M Bekelaar: "Splitting the Grundnorm" in MLR (1967) 156 - 175; S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48; J A de Smith: "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110.
4. Rhodesian AD (per Macdonald JA) at 415-6

a new Grundnorm for an old Grundnorm, he is not "joining the revolution", but applying the correct legal conclusion to facts found or noticed by him, facts, for the existence of which he is in no wise responsible.¹ On the contrary, for a Rhodesian judge to seek to continue to apply the 1961 Constitution, especially if satisfied on the facts that it had been superseded, would amount to a dereliction from judicial duty, since he would not be applying the law as he well knows it to be.²

One of the critical issues in the case which must be examined here concerns the contention that while the 1961 Constitution had been superseded by the revolutionary Constitution (of 1965) that had deprived it of its efficacy, it had not, by the time of the Appellate Division decision in *Madzimbamuto* (1968), been superseded de jure by the 1965 Constitution. The result, on this argument, is that Rhodesia had (pro tempore) no de jure Government at all.³ The logical question which arises here is from what source the Court did derive its jurisdiction. The answer to this question, it would seem, is best expressed in the words of the Chief Justice himself:⁴

"In these circumstances, it seems to me that the Court can only be regarded as deriving its authority from the fact that the present de facto Government allows it to function and allows its officials to enforce its orders".⁵

However, this line of reasoning does not seem very satisfactory, for we are confronted here with a Court of law that is only a Court de facto. Nevertheless, it has been suggested that this line of reasoning employed by the Chief Justice can be justified on the ground that a government, in the broad sense in which the term is used in this case, covers all three of the principal organs of state into which, subject to some ambiguities, government is

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1. Cf R W M Dias : "Legal Politics: Norms behind the Grundnorm" in CLJ (1968) 233-259; D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA vol 2, No 3, Nov (1969) 404-447;
 2. Cf S A De Smith: "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev vol 7 (1968) 93-110;
 3. Cf Molteno op cit at 416-7; R W M Dias: *Jurisprudence* 5th ed (1985) Ch's 16 and 4; See further J W Harris: "When and Why Does the Grundnorm Change" in CLJ (1968) 103-133;
 4. Rhodesian AD (per Beadle CJ) at 331;
 5. Sed Contra T C Hopton: "Grundnorm and Constitution: The Legitimacy of Politics" in McGill L J vol 24, (1978) 72-91

customarily regarded as being divided - a legislature, an executive and a judiciary.¹ If, therefore, such a creation as a de facto government, which is not also the jure government, is assumed to be capable of existence in the field of municipal law, it must, of necessity, embrace all three organs, including the judiciary, as Quènet JA and Macdonald JA conceive the judiciary to be, rather than the supersession of the 1961 Constitution.²

It is significant that Macdonald JA, unlike Beadle CJ who emphasizes the difference between a de facto and a de jure government, held that there is no difference between the two. This conclusion he reaches by examining the English law of allegiance, holding that allegiance is due and solely due to the king de facto, who is not also the king de jure and that this results in a duty to obey the laws of the government of the king de facto, provided that they are intra vires the constitution that such a government has established by means of its successful usurpation.³ In his view, then, de facto and de jure are synonymous at municipal law.⁴ This would appear to be the logical consequence of holding that all the laws of a de facto government are valid, if within the terms of the constitution that it itself has established.⁵

It must be conceded that the reasons favouring allegiance to a de facto ruler are very cogent as are the reasons stipulating a duty of obedience to the laws of a de facto government. These reasons would, in essence, appear to be based on the ultimate dependence of all rules of any legal system on some presupposition of validity of an

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1. Cf S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48;
 2. Rhodesian AD (per Macdonald J A) at 417; see too Beadle C J who, like Macdonald J A, also relies on the English law of allegiance, at 337; the Chief Justice places especial reliance on the English Treason Act of 1495. He also relies for authority on the South African decision: Union Government vs Estate Whittaker 1916 AD 194 at 203.
 3. Some writers have suggested that if this is so, the Chief Justice should logically have come to the same conclusion as Macdonald J A that in municipal, as opposed to international law, a de facto government is also the government de jure.
 4. Rhodesian AD (per Macdonald J A) at 331
 5. Cf D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA vol 2, No 3, Nov (1969) at 419

extra-legal and hence political or historical character which Kelsen designates the basic norm, but which, (as already mentioned in a previous Chapter) really underlies the thinking of jurists generally,¹ whether explicitly or implicitly. This, it is suggested, is necessarily so, for the extra-legal origin of all states or their constitutional predecessors and hence their legal systems is a demonstrable historical fact.² Consequently, it must, of necessity, follow that once a government de jure is superseded by a government de facto, (i.e. one wielding actual and effective authority, but not de jure in terms of the basic norm of the government it has superseded) it itself becomes the new government de jure by virtue of the new basic norm that it has succeeded in establishing. To this must be added the fact that a basic norm can only be posited once it is effective by and large (that is to say, when it commands a minimum of support).³ But, as mentioned in the previous Chapter, in order to be effective, it must enjoy a degree of permanence in the interests of societal peace and stability. Once this effectiveness is established and its continuation can be predicted with reasonable certainty, internal de jure validity or legitimacy must perforce follow.⁴

Whether or not a de facto government has, in truth, established itself effectively and hence has won title to the conferral of internal de jure validity, is a question of fact that may arise for determination at any particular point of historical time. If determined in its favour by the established courts, it is the duty of the latter to give effect to its laws, just as it is the duty of citizens generally to obey them. However, such a situation,

1. Cf Ch's 3 and 4; See further R W M Dias: Jurisprudence 5th ed (1985) Ch's 16 and 4; D S K Ong: "Der Begriff der Norm bei Hans Kelsen" in Österreichische Juristenzeitung 32 (1977) 169-172; R Stranzinger: "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts-und Sozialphilosophie 63 (1977) 399-412;
2. See J Bryce : Studies in History and Jurisprudence Oxford (1901) Ch 10; Cf D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 Nov (1969), at 418-9;
3. See Ong op cit at 170-1; See further J W Harris : "When and Why Does the Grundnorm Change ?" in C L J (1968) 103-133 at 117-8.
4. Cf Ch's 2 and 3. See further S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110; Cf H R Mahlo: "The Privy Council and the Gentle Revolution" in SALJ vol 86 (1969) 419-439.

existing at a given point of historical time, may alter by reason of the impact of subsequent events. Thus, the new government may, conceivably, lose the de facto authority it once exercised and be superseded, either by a restoration of the former de jure government, or by a third type of government with a new Grundnorm of its own.¹ The question has often been asked whether a restored former de jure government or a new revolutionary government is entitled to penalize as treason, service and allegiance to the former effective established government. In regard to the population generally, it would seem not,² but it is suggested that the situation would be different with the actual perpetrators of the revolutionary uprising that has resulted in the establishment of a new de facto government. Macdonald J A in his judgment points out that a crucial distinction must be drawn between those persons who set up a de facto government by revolution and persons who, taking no part in the revolution, obey the laws of the de facto government in pursuance of the duty of allegiance owed to the state.³ This latter distinction is an extremely important one because allegiance is due, not to a particular government nor, in the case of a monarchy, to an individual person, but, in truth, to the state as an entity. Consequently, the duty of obedience is to the monarch or government actually administering the state machinery for protecting the community and maintaining order.⁴

The most that lies within the capacity of any court faced with an issue of fact, such as is involved here, is to

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1. An example here would be the Russia of 1917, where the Russian Tsarist Government of Nicholas II was superseded by the Republican Government of Alexander Korensky, which, in turn, was superseded in effective authority by the Bolshevik Government of Lenin and Trotsky. Cf D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2 No 3 Nov (1969) 404-447 at 419.
 2. Such things have happened. This may be illustrated by the trials of some of the officers of the Commonwealth regime after the Stuart restoration in 1660. See Macdonald J A in his judgment at 391-2.
 3. Rhodesian AD (Macdonald J A) at 391;
 4. Cf Molteno op cit at 421-2; see too Macdonald J A earlier in his judgment at 378-384;

decide, on the evidence available to it and such facts as are sufficiently notorious to warrant judicial notice, what government, if any, is, at that point of time, in effective control of the administrative machinery of the state.¹ If, on such materials, it is possible, firmly to hold that there is such a government, the limits of legitimate judicial decision would appear to have been reached to the exclusion of such hypotheses as to whether its control of that machinery is "likely to continue" or whether it is "firmly established".² However, if the facts disclose infirmity in its establishment or the unlikelihood of the continuance of control, such facts would certainly militate against a decision in favour of the effectiveness of its control. Thus, a beleaguered revolutionary government, leading a hand-to-mouth existence behind a crumbling front, assailed by the forces of the legitimate government, might well be held neither to be firmly established, nor likely to continue, "even though its firing-squads were at the time the court was faced with the duty of decision busily engaged in the execution of all who refuse to obey its orders".³

It is true that the decision of such a court might well be different in the case of the legitimate government caught up in the same predicament by revolutionary menace. However, this would be because of a difference in onus of proof resulting from the prima facie duty of obedience to a legitimate government.⁴ Thus, a court of law can decide an issue of fact only on the facts available to it at the time of decision. If the facts disclose the existence of an effective de facto government and do not disclose any features of its situation justifying the inference that its

1. Cf Ch 4; H Kelsen: General Theory of Law and State (1945) 118-9; Cf S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48.

2. Guest op cit 22-8; See further Lord Reid's judgment in Carl Zeiss Stiftung vs Rayner and Keeler Ltd at 574 et seq.

3. See D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 Nov (1969) 404-447 at 422-3.

4. Ibid; See further J Bryce : Studies in Jurisprudence and History Oxford (1901) II Chapter 10.

hold on power is of a tenuous or temporary character, that would, it is suggested, amount to as strong a case as such a government can be expected to make in order to satisfy a court of its efficacy¹. If that government and the state it represents is being challenged by armed force or economic pressures or both, (as indeed was the case at the time of the UDI in Rhodesia) then the extent of the consequent menace to its independence must be decided on the evidence available at the time as an element in the inquiry as to whether it is, in fact, in effective control.²

If a court should find a usurping government to be in effective control "for the time being", that, it is suggested, is as much as any evidence can justify any court in holding. Thus, for the court to refuse to give effect to the available evidence because the facts that it establishes may change later under the impact of events, not on present evidence clearly foreseeable, would amount to acting on speculation rather than on hard, concrete evidence.³ If, on the other hand, such evidence does not prove the existence of an established government "for the time being", then the court must uphold the authority of the government de jure, although, it is important to note that this does not necessarily mean that the court should refuse to give effect to all the "laws" of the revolutionary régime.⁴

It is arguable that immediately a de facto government replaces one de jure, allegiance is "forthwith" transferred from the latter to the former. One distinguished legal theorist puts it thus: "Sovereignty de facto, when it has

1. Cf D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 Nov (1969) 404-447 at 422-3; See too R W M Dias: Jurisprudence 5th ed (1985) Ch's 16 and 4.
2. As to whether the mere fact of challenge precludes inquiry into this issue of fact provided the authority of the challenge is the legitimate government, see below. Cf A M Honoré: "Reflections on Revolutions" in Irish Jurist Vols 1-2, (1966-7) 268-78.
3. See in this regard C Palley : "The Judicial Process : UDI and the Southern Rhodesian Judiciary" in MLR Vol 30 (1967) 263-287; Cf Molteno op cit at 424.
4. See Ch 5; later this Ch where it is agreed some of the laws of the revolutionary régime are to be upheld on the grounds of necessity. Cf S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48.

lasted for a certain time and shown itself stable, ripens into sovereignty de jure¹. To put it differently, the lapse of some period of time after the accession to power of a revolutionary government is inherently necessary in order to demonstrate its efficacy. Unfortunately, no hard and fast rule can be laid down in regard to the crucial problem of the length of such time. In the absence of such guidance needed in practice, it is suggested that the length of such time will vary according to the other circumstances pointing towards, or militating against its efficacy, as the case may be.² One of these circumstances may lie in the common law, which could be a system providing for its own dissolution by unlawful methods.³ Beadle CJ accepts that revolutionary change in the Grundnorm of a former legitimate order is capable of being effected by unlawful methods, a principle that he subsequently applied in the Ndhlovu decision, in which he finally held that the revolutionary régime had acquired internal de jure validity.⁴ But it is arguable that this is not so much a case of the legal system providing for its own dissolution, but of recognising the political realities which any legal system must presuppose.⁵

It is quite possible for a court to be presented with a situation in which the government de jure has broken down and no longer exercises de facto authority, but no effective de facto government has yet established itself to replace it; no government "for the time being" would exist.⁶ Such a situation, it is suggested, would represent a

1. Quoted from J Bryce : Studies in History and Jurisprudence Oxford (1901) II Ch 10; See further R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259; J M Bekelaar: "Rhodesia : the Abdication of Constitutionalism" in MLR Vol 32 (1969) 19-34.
2. Cf D B Moltano : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3, Nov (1969) at 423-4; See further R H Christie : "Practical Jurisprudence in Rhodesia" in CILSA Vol 2 (1969) 206-221.
3. Cf A M Honoré : "Reflections on Revolutions" in Irish Jurist Vols 1-2, (1966-7) 268-78.
4. See later in the Chapter for an evaluation of this point in Ndhlovu. (Supra).
5. Cf Moltano op cit at 423-4 ; Cf S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48
6. Cf John Locke : "A State without a Government is a mystery in politics" in Two Treatises on Civil Government (Everymans).

state of anarchy or, at least, of great instability. In any case, such a situation obviously did not prevail in Rhodesia at any relevant time.¹

It is significant to note at this stage that the Chief Justice does differ from the other majority judges in regard to the legal consequences of a finding common to all four, namely, that the Rhodesian Government was a government de facto.² The finding of Beadle CJ that notwithstanding that the Rhodesian Government was a de facto one, this does not necessarily involve a duty of obedience to its laws, involves him in great difficulty in ascertaining a test of validity of any such laws. Thus, the cases decided in the revolting American colonies upholding the law of the insurrectionary Government after the Declaration of Independence, provide no precedence, since the courts, even in cases decided during the War of Independence,³ held that the de facto character of the Governments concerned resulted in de jure status, for reasons similar to those expounded in Madzimbamuto by Quènet JP and Macdonald JA.⁴ In similar vein, it is suggested that the cases arising out of the American Civil War⁵ provide the Chief Justice with no precedent either, for, on closer analysis, it seems they did not concern fully effective Governments that were "likely to continue", as Beadle CJ held the Rhodesian de facto Government to be.

Another crucial problem for the purposes of the present inquiry is directly addressed and examined by the Chief

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1. It is highly improbable that the Chief Justice ever thought of such a situation prevailing in Rhodesia. Cf R S Welsh: "The Constitutional Case in Southern Rhodesia" in LQR Vol 83 (1967); S A de Smith: "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110
 2. If so, it is difficult to follow why this did not have the consequence of establishing its own basic norm, either permanently, or temporarily accorded to events that had not yet occurred and hence could not be determined by any court.
 3. For example, the case of Respublica vs Chapman (1781) 1 Dallas 53, cited in Madzimbamuto (supra) at 346.
 4. Rhodesian AD (per Quènet and Macdonald JJA) at 346 et seq.
 5. For example, Texas vs White (1869) 7 Wall 700 cited in Madzimbamuto at 347.

Justice in his attempt to seek out a test of validity¹ which would fit the revolutionary situation prevailing in Rhodesia. Here it is notable that he places great emphasis on the test propounded by the jurist R W M Dias.² This test, it is suggested, provides an ideal compromise solution to the practical difficulties encountered by the judges in Rhodesia. In so doing, it both exposes and at the same time supplements the deficiencies in Kelsen's efficacy-validity thesis when applied in practical revolutionary situations.³ Dias here envisages a "lacuna" in government i.e. when a revolutionary upheaval has succeeded to the extent of overthrowing a legitimate government, but has not yet established a government qualifying for recognition as a new government de jure. Here Dias says in an important passage :

"there is no longer a Grundnorm, but the Courts have jurisdiction provisionally to continue to recognize that of the régime that has been overthrown, pending the ultimate emergence of a new legitimate government, or, presumably, restoration of the old".⁴

This principle, Beadle CJ applies thus :

"The present Government has effectively usurped all the governmental powers under the old Grundnorm, but has not yet succeeded in setting up a new Grundnorm in its place. As a result of this effective usurpation, it can do anything which the Government it usurped could have done, but until the present Government has reached the status of a de jure Government, it must govern in terms of the old Grundnorm".⁵

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1. Rhodesian AD (per Beadle J) at 351.
 2. R W M Dias: Jurisprudence 2nd ed at 381; Cf J M Kekelaar: "Splitting the Grundnorm" in MLR (1967) 156-175 at 174-5; See further A M Honoré: "Reflections on Revolutions" Irish Jurist vols 1-2 (1966-7) 268-278.
 3. Cf Ch 4 where these shortcomings are examined. See further J W Harris: "When and Why does the Grundnorm Change?" in CLJ (1968) 103-133;
 4. Dias op cit Ch's 16 and 4; Kekelaar op cit at 174-5;
 5. Rhodesian AD (Per Beadle J) at 351-2;

The crucial question that arises here is : What is the old Grundnorm? According to Beadle CJ, the Grundnorm is the fundamental law of the previous legitimate Government viz. the 1961 Constitution.¹ This, it is suggested, is questionable. Beadle CJ here seems to be reverting to his concept of the legal effect of that Constitution as dividing sovereignty between the UK and Rhodesian Governments. The more concrete application of the Dias principle he illustrates thus :

"The present Government has certainly usurped complete and effective control of the governmental powers granted Rhodesia under the 1961 Constitution. The lingering doubt as to the ultimate success of the revolution exists in the field where the UK exercises her residual powers of external sovereignty. To satisfy the conditions of a fully de jure government, the present Government must successfully sever those remaining ties. In the meantime, therefore, although the present Government has usurped all the government powers granted to its predecessor, until it has finally succeeded in severing all ties with the UK, it cannot have greater power² that its predecessor possesses".

It would seem that what was preventing the Chief Justice from holding that the Rhodesian Government had achieved internal de jure status was not the efficacy of its control of the internal administration, but its failure to assert full constitutional independence from Britain, which, in turn, depended on its usurpation of Britain's

1. See Ch's 2 and 3, where the equation of Grundnorm = Constitution is criticized from another angle. It is suggested that the Chief Justice was mistaken, at least, in Kelsenian terms, in treating Grundnorm and Constitution as synonymous. According to Kelsen, the Grundnorm is not the constitution, but, rather, the presupposition demanded by legal theory that a particular constitution ought to be obeyed. Cf R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4; See too T C Hopton: "Grundnorm and Constitution: The Legitimacy of Politics" in McGill L J Vol 24 (1978) 72-91, who argues along the same lines.
2. Rhodesian AD (per Beadle CJ) at 351-2; But Cf D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 Nov (1969) 404-47, at 424-5. This would seem to be correct if by "severing" is meant that the UK Government has failed or abandoned all hope of restoring itself as the legitimate de jure Government i.e. the revolutionary Government, is the only effective Government in the territory and is likely to continue as such.

"residual powers of external sovereignty". This, in itself, would have little to do with the question of the ultimate success or efficacy of economic sanctions adopted by Britain to reassert its control over Rhodesia. For such sanctions, if successful, would have the effect of destroying the efficacy of the Government's general administrative control, including internal control. It was, in fact, at the latter that such sanctions were principally aimed, since the most important usurpation involved in the UDI was at the expense of the rights of the Rhodesian people themselves in regard to whom (or, rather, over the unenfranchised majority of whom) Britain claimed a continuing fiduciary responsibility.¹

It is of course true that on the view later taken by the Privy Council on appeal in this case, this matter would directly involve that of Rhodesian independence from Britain, since, according to the Privy Council, the sovereignty of the British Parliament remained in law intact. As a result, British parliamentary intervention provided a residual safeguard in the event of repudiation by the Rhodesian authorities of the entrenchments of rights in the 1961 Constitution. It was precisely the application of this safeguard that the 1965 UK legislation was intended to represent. But, this was seemingly not the Chief Justice's view of the legal position.² According to Beadle CJ, the convention against such legislation was effective in law, including, apparently, the law administered by the Rhodesian Courts resulting in a division of sovereignty, all internal and much external sovereignty being vested in the Rhodesian Government and a residue of external sovereignty remaining vested in the British Parliament.³ That

1. See D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 (1969) 404-47 at 425-6; See further, R H Christie: "Practical Jurisprudence in Rhodesia" in CILSA Vol 2 (1969) 3-23; T C Hopton: "The Grundnorm and Constitution: The Legitimacy of Politics" in McGill L J Vol 24, (1978) 72-91, R W Welsh: "The Constitutional Case in Southern Rhodesia" in LQR Vol 83 (1967) 64-88; J M Kekelaar: "Rhodesia: the Abdication of Constitutionalism" in MLR Vol 32 (1969) 19-34; H R Hahlo: "The Privy Council and the Gentle Revolution" in SALJ Vol 86 (1969) 419-439;

2. Cf Molteno op cit at 425-6; Welsh op cit at 74-84;

3. Ibid 426

residue, however, was extremely limited in scope, comprising, as it did, the formal or non-controversial provisions of the 1961 Constitution which, under S III, the Queen might amend by Order in Council on the advice of her UK Ministers. These provisions were those relating to the office of Governor and to his formal powers and duties,¹ to his assent to Bills or the withholding thereof,² to the royal power of disallowance of Bills, inconsistent with royal international obligations on the rights of holders of Rhodesian stock issued on the London market,³ to the prerogative of mercy,⁴ the composition of the Legislature as consisting of the Queen and the Legislative Assembly;⁵ the definition and exercise of the executive power as being vested in the Queen and exercisable by her in person or by the Governor on her behalf.⁶

The Rhodesia Act 1 of 1966 purported to ratify and confirm the 1965 Constitution as proclaimed on 11 Nov 1965 and as embodied in the Schedule to the Act. That Constitution⁷ purported to declare the 1961 Constitution of no force and effect and to repeal and revoke the same. That, then, was the end, so far as the Rhodesian Government was concerned, of any residual powers of external sovereignty over Rhodesia exercisable by the Government of the UK. Though the 1965 Constitution declared⁸ the executive Government to be vested in the Queen, this, it seems, was no more inconsistent with Rhodesian independence than similar provisions in, say, the contemporary Constitutions of Canada, Australia or in the SA Act, after the Statute of Westminster 1931. Furthermore, such executive power is declared to be exercisable either by Her Majesty, acting on the advice of her Rhodesian Minister, or by the "officer

1. 1961 Constitution ss 1,2,3,5. See further : R S Welsh : "The Constitutional Case in Southern Rhodesia" LQR Vol 83 (1967) 64-88;

2. Ibid S 29

3. Ibid S 32

4. Ibid S 49

5. Ibid S 6

6. Ibid S 42

7. Sec 2

8. Sec 128

administering the Government", a new office established under S 3 to replace the Governor who was to be appointed by the Rhodesian Executive Council, either, as Ministers advising the Queen if she will accept such advice or, if not, by the Executive Council *mero motu*. Moreover, the Legislature is defined by S 12 as consisting of the officer administering the Government as the representative of His Majesty under Parliament. That Legislature is endowed by S 26 with sovereign legislative powers. Thus, there appears to be nothing in the 1965 Constitution reserving to that Government the very limited power of disallowance embodied in S 32 of the 1961 Constitution. It is clear that there is nothing in the 1965 Constitution corresponding to S III of the 1961 Constitution.¹ Furthermore, the legislative powers that the former confers are clearly inconsistent with any such reservations in favour of the UK Government as one embodied in that Section.²

Furthermore, in the period of two years since the UDI and the decision of the Appellate Division in Madzimbamuto, there has been no question of the Government machinery (set up for the powers conferred by the 1965 Constitution) having remained on paper only, as in the case of the UK Act and Order in Council of 1965, which purported to supersede the 1961 Constitution.³ On the contrary, ever since the UDI, Rhodesia was administered under the auspices of an officer administering the Government, advised by the Rhodesian Ministers, in direct opposition to the Queen advised by UK Ministers. Legislation again was enacted by a Legislature consisting of an officer administering the Government and a "Parliament" both the former functionary and the latter entity being unknown to the law of the UK.

1. See R S Welsh: "The Constitutional Case in Southern Rhodesia" LQR Vol 83 (1967) 64-88; H R Hahlo: "The Privy Council and the Gentle Revolution" in SALJ Vol 86, (1969) 419 et seq; D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 (1969) 404-447 at 427-8; R H Christie: "Practical Jurisprudence in Rhodesia" in CILSA Vol 2 (1969) 206-221; G M Barrie: "Rhodesian UDI - An Unruly Horse" in CILSA (1968) 110-120; S A de Smith: "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110.

2. Cf Molteno op cit at 427-8;

3. Ibid; Cf R W M Dias: "Legal Politics: Norms Behind the Grundnorm" in CLJ (1968) 233-259;

Furthermore, both for executive and legislative purposes, the Rhodesian Government entirely ignored the Governor appointed by the Queen advised by her UK Ministers under the 1961 Constitution and relied entirely for formal purposes on the officer administering the Government appointed by the Executive Council under the 1965 Constitution.¹ In addition, it should be noted that at the time of the judgment in Madzimbamuto's case, not only had the Rhodesian Government for two years ignored the Orders in Council of the UK Government imposing and regulating economic sanctions, but it had successfully defied the same in the sense of maintaining its own administrative effectiveness and stability in the face of them.²

From the foregoing details it should be clear that the efficacy of the Rhodesian Government after the UDI over its territory could hardly be impugned. In fact, it could hardly have taken more effective and decisive steps to convincingly demonstrate its successful usurpation of such residual external sovereignty as the Chief Justice himself had already held still to reside in the UK Government under the 1961 Constitution.³

The difference of opinion between the judges of the Rhodesian Appellate Division was, certainly in so far as the majority judges were concerned, rather unfortunate. This can be seen in their decisions with regard to the critical question of the efficacy of the Rhodesian Government. All of them who were in the majority viz. Beadle CJ, Jarvis AJA, Macdonald JA and Quenet JP agreed on the necessity of efficacy as a criterion of legality (validity), but where

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1. Cf R H Christie: "Practical Jurisprudence in Rhodesia" in CILSA Vol 1 (1968) 390-407; D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 (1969) 404-447 at 428-9; H R Hahlo: "The Privy Council and the Gentle Revolution" in SALJ Vol 86 (1969) 419-439;
 2. See Molteno op cit at 426-7; J W Harris: "When and Why Does the Grundnorm Change?" in CLJ (1968) 103-133; J M Bekelaar: "Splitting the Grundnorm" in MLR (1967) 156-175; S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48;
 3. Cf Molteno op cit at 427; But see T C Hopton: "Grundnorm and Constitution: The Legitimacy of Politics" in McGill L J Vol 24 (1978) 72-91;

they differed was in the degree of effectiveness which was necessary before internal de jure validity could properly be conferred upon the revolutionary Government. It is here where the de facto \ de jure distinction plays a pivotal rôle, for therein lies the essential difference in emphasis. While Beadle CJ and Jarvis AJA believe that a de facto government can only be accorded internal de jure validity once it has become firmly and effectively established over a reasonable length of time, Macdonald JA and Quènet JP believe that a de facto government is a de jure government for the purposes of municipal law. Since they held the de facto \ de jure distinction to be relevant only to international law, they regard a de facto government in municipal law as ipso iure conferring internal de jure validity.¹

Bearing these differences in mind, the case went on further appeal without any ratio decidendi of the Rhodesian Court on this issue.² It is important to note that the Privy Council denies the existence of the distinction between a de facto and a de jure government, holding such categories to be "conceptions of international law ... quite inappropriate in dealing with the legal position of a usurper within the territory of which he acquired control".⁴ However, the Board does uphold the soundness of the general principle that a government that has effectively usurped power is entitled to recognition by the courts as the lawful government once it has been decided, that is, that the usurpation is, in truth, effective.⁵ For, having contrasted the practice as to recognition of a new foreign

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1. Fieldsend AJA's minority judgment, however, is substantially different from that of the four majority judges (supra) since he held that there was in Rhodesia neither a de jure nor a de facto Government.
 2. See Fellner vs Minister of the Interior 1954 (4) SA 523 (AD)
 3. For a rather trenchant criticism of the Privy Council decision, see H R Hahlo: "The Privy Council and the Gentle Revolution" in SALJ Vol 86 (1969) 419-439.
 4. Privy Council (per Lord Reid) at 573.
 5. See further R H Christie: "Practical Jurisprudence in Rhodesia" in CILSA Vol 1 (1968) 390-407; "Practical Jurisprudence in Rhodesia" (contd) in CILSA Vol 2 (1969) 3-23;

government, either as such de jure or de facto, Lord Reid, (for the majority) continues thus:

"But the position is quite different where a Court sitting in a particular territory has to determine the status of a new régime which has usurped power and acquired control of that territory. It must decide. And it is not possible to decide that there are two lawful Governments at the same time in which each is seeking to prevail over the other".¹

Lord Reid goes on to make the following crucial point which is also in substantial agreement with that of the majority judges in the Rhodesian Appellate Division:

"It is an historical fact that in many countries there are new régimes which are universally recognized as lawful but which derive their origins from revolutions or coups d'état. The law must take account of that fact so there may be a question how or at what stage the régime became lawful".³

The Board, then, seems to have been in agreement with the general principle accepted by the Rhodesian Appellate Division, namely, that a revolutionary change in the basic norm of a legal order results in the replacement of the old, now ineffective order by the new order, the principle of legitimacy being restricted by the principle of effectiveness. However, it is suggested that in its application of this general principle to the facts of the Rhodesian situation, the Board's opinion is marred by ambiguities.⁴ This is borne out by the difficulties experienced by the Rhodesian Appeal Court in the Ndhlovu case in interpreting important aspects of it. Although the Board does⁵

1. The majority consisted of : Lord Reid, Lord Morris of Borth-y-Guest, Lord Pearson and Lord Wilberforce. The sole dissident in the case was Lord Pearce.
2. This, it is suggested, is quite correct, as there can be but one effective government over one given territory at any given time; Cf H R Hahlo: "The Privy Council and the Gentle Revolution" in SALJ Vol 86 (1969) 419-439.
3. Privy Council (per Lord Reid) at 574-5.
4. See Hahlo op cit 430-9; Cf Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3, Nov (1969) 404-447 at 429-30.
5. See later this Chapter where the Ndhlovu decision is examined.

cite the Pakistani and Ugandan revolution cases with general approval, it proceeds to distinguish them in the following terms :

"It would be very different if there had still been two rivals contending for power. If the legitimate Government had been driven out, but was trying to regain control, it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right, the ousted legitimate government was opposing the lawful ruler. In their Lordship's judgment, that is the present position in Southern Rhodesia¹".

On the face of it, it would appear that the above represents a ruling of law to the effect that where a legitimate government is overthrown and replaced, however firmly in control, by a usurper, so long as the former makes attempts, however unpromising of success, to regain its position, such attempts have the legal effect of preventing the government in de facto control from achieving the status of internal de jure legitimacy². This, it is suggested, is a highly untenable view. For one thing, such a ruling would obviously make a serious inroad into the principle of the primacy of effectiveness over legitimacy³, a principle which, moreover, the Board appears to accept. The Board adds thus: "The British Government, acting for the lawful sovereign, is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed"⁴.

Beadle CJ in *Ndhlovu*'s⁵ case reads this sentence as precluding an intention on the part of the Board to give a legal ruling as just suggested. He says in the following notable passage :

"This, however, cannot be the meaning because if the passage is taken in its context, it is clear that the "efficacy of change" is the determining factor, and the test which the Board itself applied was whether it

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1. Lord Reid, Privy Council at 574-5
 2. Cf R S Welsh: "The Constitutional Case in Southern Rhodesia" in LQR Vol 83 (1967) 64-88; H R Hahlo: "The Privy Council and the Gentle Revolution" in SALJ Vol 86 (1969) 419-439; S A de Smith: "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110; S Guest: "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" AJ (1980) 1-48;
 3. Cf D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 (1969) at 429-30;
 4. Privy Council (per Lord Reid) at 574-5;
 5. *R vs Ndhlovu* (supra)

could predict with certainty whether the British Government would succeed in regaining control. The mere fact that the old de jure Government is trying to regain control cannot be the determining factor in deciding whether it is possible to predict with certainty whether it will succeed in regaining such control. If this were so, the certainty or uncertainty of its ultimate success would be an irrelevant consideration. The certainty with which any such prediction can be made must always be a pure question of fact depending on the circumstances existing at the time when the prediction is made¹.

The passage quoted above, involving the Privy Council, commences with the words: "It would be very different if there had still been two rivals ..." etc, this is followed by a citation, with apparent approval, of Dosso's case,² as to the test being "the efficacy of the change" and the Matovu³ case in Uganda, to the effect that there it was held that the revolutionary Government "had no rival". On this ground, it has been suggested that the words - "It would be very different" - appear to mean that the test of efficacy has no application where a revolutionary government has a "rival" in the form of the legitimate government. Moreover, while it is true that the possibility of certain prediction as to the success of attempts at restoration of the legitimate government would seem to be irrelevant (if the mere fact that such attempts are made is decisive), if the Privy Council intended to lay down such possibility of certain prediction by the court as the test, the question arises, why, if the legitimate

1. This approach, it is suggested, is to be preferred over the Privy Council decision. It is significant that Quenet JP in *Ndhlovu's* case (at 540-2) similarly interprets the passage in question. Although Beadle CJ's view in *Ndhlovu* seems clearly correct, it is difficult to see that this was in fact the view of the Privy Council too; Cf D B Molteno: "The Rhodesian Crisis and the Courts" in *CLLSA* Vol 2, No 3 (1969) 440-7; see too H R Mahlo: "The Privy Council and the Gentle Revolution" in *SALJ* Vol 86 (1969) 419-439;

2. Cf *Supra* Ch 5 for elaboration.

3. *ibid*

government is "trying to regain control" is it impossible to hold that the usurper, who is in control, is the lawful ruler? For, if it is possible to predict with certainty the failure of the attempts on the part of the former, it must also be possible to hold that the usurper has become the lawful ruler.

Again, if the test laid down is, as suggested above, "the efficacy of the change" the question arises, what is the relevance of the fact that its application would mean that by striving to assert its lawful right, the ousted legitimate government was opposing the lawful ruler? If the prediction in question is in favour of the usurper, this would be a necessary consequence of the application of the test. Yet, the view of the Board appears to have been that such a consequence precludes it from upholding the achievement of internal legitimacy by a revolutionary government.² The Board also does not approach the question of the prospects of the British Government in its attempts to regain control in a manner in which one would expect it to deal with the factual issue of judging effectiveness. There is not any reference to, or analysis of the evidence, as disclosed by the affidavits filed by the parties, nor any reference to facts judicially noticed.³ In this respect, the opinion of the Privy Council stands in shrill contrast to that of the Court a quo, as well as to the Court's judgment in Ndhlovu's case. There is, in fact, nothing but the bare assertion of the impossibility of prediction.⁴

On the foregoing basis, it is arguable that the view of the Board on this pivotal question is along these lines :

1. See R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259; F M Brookfield : "The Courts, Kelsen and The Rhodesian Revolution" in U Tor L J 19 (1969) 327-352; R S Welsh : " The Function of the Judiciary in a Coup d'état" SALJ (1970) 168-192; Cf H R Hahlo: "The Privy Council and the Gentle Revolution" in SALJ Vol 86 (1969) 419-439; D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3, Nov (1969) 404-47, at 429-30;
2. Cf R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4; Hahlo op cit at 430-9; Molteno op cit 429-430.
3. R S Welsh : "The Constitutional Case in Southern Rhodesia " in LQR Vol 83 (1967) 64-88; Cf Molteno op cit 429-30;
4. Ibid.

Where a legitimate government is decisively overthrown and replaced by a revolutionary successor, the test of the achievement by the latter of a status of legitimacy is the "efficacy of the change". Where, however, the contest for power is still proceeding, whatever may be the probabilities of the outcome at any particular stage, it is inherently impossible for a court to be certain of the ultimate outcome because that depends, to a greater or lesser degree, on events that have not yet occurred and therefore cannot be investigated on evidence, but only by the inadmissible means of prophecy. While, therefore, the test of the achievement of legitimacy by a revolutionary regime remains that of efficacy, it is impossible for a court to apply that test so long as its status is still being challenged by the legitimate government. It has been suggested that it is only on this basis that it is possible to resolve what otherwise are inherent contradictions in the opinion of the Board.²

However, such an interpretation can be objected to on the ground that, seen in this way, a fallen legitimate government could indefinitely postpone the achievement of legitimacy by its effective successor by maintaining token challenges to its authority. But, even if it were to arise, it does not necessarily follow that it would have the legal effect envisaged. Whether or not serious attempts by the legitimate regime to regain its authority were still in progress would be a question of fact and it is not apprehended that mere gestures would be accounted as such. Substance, not form, would be what a court would have regard to in deciding such a question.³ Moreover, it could also be objected that if the court's jurisdiction to decide this issue depended on cessation of challenge by the legitimate government, there would be nothing relevant left to decide. This would account for the fact that,

1. Cf R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259; See further R S Welsh : "The Constitutional Case in Southern Rhodesia" in LQR Vol 83 (1967) 64-88; S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110; D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 (1969) 404-47, at 431-2.

2. Cf Molteno op cit at 431-2;

3. Ibid; Cf C Palley : "The Judicial Process : UDI and the Southern Rhodesian Judiciary" in MLR Vol 30 (1967) 263-287;

frequent in history as revolutions have been, judicial precedents of decisions on their legal effect are comparatively rare. However, this objection does not necessarily follow in all cases, for the efficacy of a revolutionary régime does not depend only on the absence of challenge from its legitimate predecessor, but also on its success in securing the loyalty and promoting the unity of the community which it is attempting to govern.¹

Thus, it is the decision as interpreted by the Appeal Court in Ndhlovu's case which must be regarded as authoritatively stating Rhodesian law, since both Beadle CJ² and Quènet JP³ purport to apply the law as laid down by the Privy Council to the facts, as they find them to be. This constitutes a majority of the Court, since only one other judge (Macdonald JA) sat whose reasons are of a nature not requiring an application of the Privy Council judgment.⁴ According to Beadle CJ⁵, the Court had already in Dhlamini vs Carter⁶ held that it no longer sat as the Court established by the 1961 Constitution, from which the Privy Council derived its jurisdiction to hear and decide Rhodesian appeals. That Constitution was no longer in force, because, as mentioned above, the Grundnorm validating it had become ineffective. On this ground, the Privy Council was no longer the Court of final appeal from Rhodesia and, therefore, its decisions were no longer binding on Rhodesian Courts. The Privy Council judgment, then, had made it impossible for the Rhodesian judges to retain office under the 1961 Constitution, since, on this basis, they could not avoid recognising official appointments, acts etc of illegal origin. Hence, the only basis upon which judges could retain office and exercise a function essential to the existence of civilized society was to recognize

1. Cf J W Harris : "When and Why Does the Grundnorm Change ?" in CLJ (1968) 103-133; R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4;

2. Rhodesian Appeal Court (per Beadle CJ) at 528

3. Rhodesian Appeal Court (per Quènet JP) at 538

4. Rhodesian Appeal Court (per Beadle J) at 526-7;

5. Ibid

6. Dhlamini vs Carter N O 1968 (2) SA 464 (RAD).

the revolutionary 1965 Constitution.

Kelsenism in Rhodesia : A critique

In the light of the foregoing examination, it is essential to draw out the implications of the seminal Madzimbamuto judgment within the ambit of Kelsen's theory of revolutions and his efficacy-validity thesis. This case, it is suggested, has revealed some significant shortcomings in Kelsen's theory of revolutions. In one place, he (Kelsen) says that the Grundnorm imparts legality, as long as the "total" legal order "is effective".¹ It is suggested, however, that this is not borne out by the revolutionary situation prevailing in Rhodesia. The Madzimbamuto case shows clearly, that although the Smith regime was "totally effective" in Kelsenian terms, it was not lawful on the ground that only some of its decrees were treated by the Court as "laws" in the interests of preserving and maintaining law and order. Hence, the invocation of the necessity principle, raised in a previous Chapter. On the other hand, the old order was "totally ineffective", yet it possessed an important controlling influence.² In strict Kelsenian terms, the loss of efficacy of the total legal order means that it loses its validity too, yet the old order, while totally ineffective, did not correspondingly lose its validity since it still possessed an important controlling influence.

It is suggested that the Madzimbamuto case also exposes the vagueness of the phrase "total legal order" employed by Kelsen. This is borne out by Fieldsend AJA's³ reasoning that an order is not totally effective so long as the judiciary is not prepared to accept it. If this minority view of Fieldsend AJA be accepted, then it is certainly not

1. See H Kelsen: General Theory of Law and State (1945) at 119; Cf J W Harris : "When and Why Does the Grundnorm change?" in CLJ (1968) 103-133; See further R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259; S A de Smith : "Constitutional Lawyers in Revolutionary Situations" in Western Ont L Rev Vol 7 (1968) 93-110; R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4.

2. Cf Dias op cit at 253-4 ; Cf S Guest ; "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48;

3. Rhodesian AD (per Fieldsend AJA) at 321 et seq; Cf Dias op cit 253-4; F M Brookfield : "Kelsen, the Courts and the Rhodesian Revolution" in U Tor L J 19 (1969) 327-352;

possible to explain the recognition of any decrees of the revolutionary régime on Kelsenian principles. This would probably account for the Court's invocation of the necessity doctrine to illustrate the illogicality of Kelsen's thesis.¹

Wider criticism concerns Kelsen's claim that his theory is a "general theory of law and state". However, it is arguable that this theory cannot be a general one, as it is not applicable to the "emergence of dependent territories"² (as opposed to sovereign independent states). The best way out of this dilemma, it seems, is to say that effectiveness is only one factor which, in time, accords legality to a Grundnorm, while the legality (lawfulness) of any particular measure during a revolution is not necessarily dependent on a Grundnorm. This shows, as one writer puts it, that "in settled conditions, the theory teaches nothing new, in revolutionary conditions, when appeal to it is most likely, it is not wholly true"³. This is intimately connected with another significant point viz the identification of "laws". In normal conditions, propositions have the quality of "laws" when filtered through some medium acknowledged by courts as capable of impressing them with that stamp. Such medium is the Grundnorm or some subordinate medium derived from it. When there is, as yet, no accepted Grundnorm, as in the midst of a revolution (in mediis rebus), the courts may nonetheless accept as "laws" propositions identified with reference to whatever criterion they choose. This, it is suggested, is what happened in Madzimbamuto,⁴ for it presented the only realistic way of overcoming this glaring shortcoming of the Kelsen thesis. Since the destruction of the Grundnorm of the old legal order need not be done contemporaneously with the positing of a new

1. Cf R W M Dias : Jurisprudence 5th ed (1985) 104-10; See too same author "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259 ; S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48; D B Moltenor "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 Nov (1969) 404-447
2. Sed Contra W Ebinstein : The Pure Theory of Law; Univ of Wisconsin Press, Madison (1945) ; Cf W Ebinstein : "The Pure Theory of Law: Demythologizing Legal Thought" in Calif L Rev Berkeley (1971) 640-658
3. Dias op cit at 253-4;
4. Rhodesian AD (per Beadle CJ) at 351; (per Jarvis AJA) at 421

Grundnorm, the theory admits of the possibility of there being a hiatus in the legal system.¹ As a result, it would seem that the majority judges in Madzimbamuto had no alternative but to adopt the compromise solution mentioned above.

It is crucial, therefore, that "laws" and the lawfulness or legality of their origin be distinguished.² This "splitting of the Grundnorm" is clearly anathema to strict Kelsenism, (which postulates only one Grundnorm, uncontradicted and supreme for each legal order) yet it was the only feasible and realistic way in which the majority judges in Madzimbamuto could conceivably deal with the practical difficulties confronting them.

A further criticism concerns the fact that Kelsen fails to define his efficacy concept sufficiently precisely and thus fails to give judges the necessary practical guidance which they require in revolutionary situations. This can be seen especially in the large-scale uncertainty surrounding its qualifying terms viz. "by and large", "total" or "on the whole".³ This, it is suggested, must have played a significant rôle in accounting for the confusing judgments in Madzimbamuto. Thus, four of the Rhodesian judges were able to say that the Smith régime was effective but unlawful,⁴ two, that it was both effective and lawful⁵ and one that it was not yet wholly effective.⁶ Moreover, the Privy Council held that it was unlawful, regardless of effectiveness.⁷

Another source of uncertainty concerns Beadle C J's statement that sanctions imposed by Great Britain would not of themselves be effective in bringing down the régime which, presumably, made it possible for the Chief Justice to

1. Cf R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4; And the same author in "Legal Politics : Norms Behind The Grundnorm" in CLJ (1968) 233-259; Cf J W Harris : "When and Why Does the Grundnorm Change?" in CLJ (1968) 103-133; See further S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48;

2. Cf Dias op cit at 253-4

3. Cf Ch's 2 ; 3 and especially Ch 4 where these difficulties are highlighted; Cf Harris op cit 120-30;

4. In the GD - Lewis and Goldin JJ, in the AD, Beadle CJ and Jarvis AJA;

5. in the AD - Macdonald JA and Quènet JP;

6. in the AD - Fieldsend AJA;

7. Carl Zeiss, (per Lord Reid) at 574-5.

hold that the régime is likely to continue¹ (as he did in Ndhlovu's case in 1968). This should be contrasted with his statement in Madzimbamuto, (seven months earlier) that the régime merely "seemed" likely to continue. Here, it is arguable that the distinction between "is" and "seems" likely to continue, for all its superficial objectivity, is essentially subjective.² This would appear to be borne out by the sanctions situation, which had not altered to any measurable extent during the seven months between the Appellate Division's decision in Madzimbamuto in January 1968 and the decision in Ndhlovu in September 1968. Thus, it has been suggested by some that so to treat the failure of sanctions as decisive by the time of Ndhlovu, could only have pointed to a subjective, extra-legal decision that the time was now ripe for acknowledging the legality of the régime.³ It seems clear, then, that effectiveness is only what the judges choose to regard as such, which places considerable power in their hands.⁴ However, it cannot be stressed too often that while effectiveness *stricto sensu* (i.e. within the practical context of a revolutionary situation) is inadequate, it remains the dominant criterion of legality, though not the only one. This, it is suggested, would explain why the judges in the revolution cases (considered in this study), while recognizing the importance of the efficacy principle, adopted alternative principles (viz. necessity, social justice, will of the people, implied mandate etc) in order to adapt Kelsenist theory to the practical difficulties with which they were confronted.

1. Rhodesian Appeal Court (per Beadle CJ) at 351-2; Cf The Times 14 Sept 1968; See further H R Hahlo : "The Privy Council and the Gentle Revolution" in SALJ Vol 86, (1969) 419-439; see further S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1 - 48; L H Leigh : "Rhodesia after UDI: Some Aspects of a Peaceful Rebellion" in Public Law (1966) 148-160;
2. See R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259 at 254-5; Cf C Palley : "The Judicial Process : UDI and the Southern Rhodesian Judiciary" MLR Vol 30 (1967) 263-287;
3. Cf Dias op cit at 254-5;
4. Cf J W Harris : "When and Why Does the Grundnorm Change?" in CLJ (1968) 103-133; see further : A M Honore : "Reflections on Revolutions" in Irish Jurist Vols 1-2, (1966-7) 268-278.

At this stage, it is essential to examine two further principles supplementary to efficacy, which serve to further underscore its inadequacy in practical revolutionary situations viz. morality and justice.¹ These two critical principles are especially relevant to the Rhodesian socio-political set-up at the time of the UDI, which saw a minority exercising power over a disenfranchised majority. (much like the principles "social justice" and "will of the people" were relevant to the Pakistani socio-political situation in Jilani).² This will emerge shortly. But first a conceptual understanding is called for. Here the time-lag between the coming into power of the régime and recognition of its lawfulness should be borne in mind.

Rules and legal phenomena do not exist only for the instant; they endure, be it for short or indefinite periods. The concept of enduring laws is more in accordance with experience than that of instantaneous laws just as enduring human beings are more "real" than instantaneous ones. The concept of any phenomenon as a continuing thing must necessarily include the factors essential to continuity as an integral part of it. These would include, inter alia, the factors, but for which it would have come into being and continue to be as well as those involved in its function and functioning. With reference to any rule, the ideals which inspired it, the values which developed it and the practicalities which affect its working are all part of the living rule.³ From this way of looking at matters, one is able to perceive two "frames of thought" that is, the "present time-frame" and the "enduring time-frame".⁴ When one thinks in terms of the former, as one does, for example, when identifying some rule as "law" for immediate purposes, the factors involved in its endurance are superfluous. However, when one has to think in terms of endurance, as one does, for example, when "doing justice" according to that rule, many aspects of "doing

1. See the ensuing pages of this Chapter for elaboration. See further R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-59;

2. See Ch 5, especially Jilani's case, where this is highlighted.

3. Dias op cit 255-6.

4. Ibid

justice" will be overlooked as long as one remains unaware of all that thought in the "enduring time-frame" implies.¹ It is suggested, that with the above conceptual approach in mind, one can more readily understand the employment of supplementary principles as criteria of legality in the Rhodesian context.

Along the lines of the foregoing reasoning, it is suggested that the Grundnorm is an enduring phenomenon and it must be appreciated that not only effectiveness, but also conformity to morality and justice are among the very springs of its continued life.² Thus, it was the immoral use of power by the Prerogative during the Glorious Revolution, that led to its supersession in 1688 when the Crown in Parliament was adopted as the Grundnorm in its place as a guarantee against abuse.³ Along similar lines it can be said that moral reasons underlay the revolt of the American colonies and the adoption there of a new Grundnorm. This, it seems, is true of many revolutions.⁴ As already mentioned, the Kelsenian tendency has been to concentrate on effectiveness per se, to the exclusion of all other "impure" principles. This has exposed the glaring inadequacies in the Kelsen thesis and led to the difficulties raised above. It is this fastening on one factor involved in continuity, to the exclusion of others, this "myopia", which has often bedevilled judicial thinking.⁵

While it is true that the revolutions in England (in 1688) and by the American colonies (in 1775) sought to establish principles that were unquestionably moral, on the same reasoning, it is doubtful whether what the Smith

1. Cf R W M Dias : Jurisprudence 5th ed (1985) Ch's 16 and 4; See further the same author : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-59; See too J W Harris : "When and Why Does the Grundnorm Change?" in CLJ (1968) 103-133;

2. Dias op cit at 255-6; Cf D S K Ong : "Der Begriff der Norm bei Hans Kelsen" in Österreichse Juristenzeitung 32 (1977) at 169-172; R Stranzinger : "Der Normbegriff bei Hans Kelsen" in Archiv für Rechts und Sozialphilosophie Ch 3 (1977) 399-412 ; F Lachmayer : "Die Geltungsneutralität der Grundnorm" in Österreichische Zeitschrift für öffentliches Recht 28 (1977) 193-210; Cf D B Molteno : "The Rhodesian Crisis and the Courts" in CILSA Vol 2, No 3 Dec (1969) 404-447;

3. Cf Ch 3 for these examples

4. Dias op cit at 254-5;

5. Cf R Dworkin ; "Lord Devlin and the Enforcement of Morals" Yale L J 75 (1965-6) at 986,1001. See further Beadle CJ in Madzimbawuto at 326-9

régime in Rhodesia stood for was moral.¹ The position in Rhodesia at the time was that a small minority of Europeans were able to maintain a most agreeable way of life by virtue of the limited privileges accorded to the African majority.² To have given them equality would inevitably have meant the loss of some, at least, of the amenities enjoyed by the Europeans. Regarding the matter as Beadle CJ did, on the basis of accepting things as they actually "are" and not simply as they "ought" to be,³ one has to concede that the Europeans would probably not have been prepared to surrender the advantages hitherto enjoyed by them.⁴

From the foregoing, the crucial question arises whether it is "moral" to posit a Grundnorm which validates a constitution that perpetuates an inequality for the benefit of a minority.⁵ That Mr Smith's party were committed to preserving this unequal set-up was manifested by the very fact of their revolt against the 1961 Constitution⁶ and their subsequent rejection of the HMS Tiger proposals, which incorporated the principle of "unimpeded progress toward majority rule".⁷

Opinion may, however, be divided on this question for the moral sense of a community may be said to be shaped, inter alia, by its institutions.⁸ This may be evidenced in the fact that in other countries of Southern Africa (viz.

1. See in this regard J M Kekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence ed A W B Simpson Clarendon Press, Oxford, (1973) Ch 2; See especially those factors and principles enumerated by Mr Kekelaar, which judges do consciously or subconsciously consider in according legality to a régime. It is suggested that if these principles are taken into consideration, they would clearly hint at the immorality of the Smith régime.
2. See D V Cowen : The Foundations of Freedom (1961) ; Cf C Palley: "The Judicial Process - UDI and the Southern Rhodesian Judiciary" in MLR Vol 30 (1967) at 263,282.
3. Rhodesian AD (per Beadle CJ) in Madzimbabuto 1968 (2) SA 284 at 326
4. Cf R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259, Dias says this is a fact which "however unpalatable, cannot be burked" at 256-7.
5. Cf Kekelaar op cit Ch 2;
6. especially in view of its entrenched clause " The Declaration of Rights"
7. Cf Dias op cit at 256-7;
8. Cf D Kanner : Rules, Rôles and Relations (1966); See too B G Mitchell : Law, Morality and Religion in a Secure Society (1967).

S Africa and, to a lesser extent, Namibia¹ racial inequality is an institution which has come to be regarded as unquestionably moral by a large segment of those who have been reared in its advantages.² Since those who do not enjoy the advantages are not permitted to have any say, the moral argument raised above may well fail to make headway with those who do have a say. Moreover, positivist judges can always take refuge behind the rather threadbare adage that courts are not concerned with morals.³

In view of these counter-arguments, one could more successfully raise an alternative argument based on justice. This argument, it is suggested, may have more substance to it. Rhodesian judges, in accordance with their judicial oath, swear to "do right to all manner of people after the laws and usages of Southern Rhodesia without fear or favour, affection or ill-will".⁴ "Do right" means "Do justice" and this requires that there shall be equal distribution among equals and unequal distribution among unequals.⁵ Reasoning along these lines, it is clear that the majority of Africans at the time of the UDI were unequal to Europeans in their political development.⁶ But that would be to look at the matter exclusively in the "present or contemporary time-frame"⁷ in which there is some justification for unequal treatment. However, in the "enduring time-frame" the question arises whether it would be just to preserve this inequality indefinitely for the advantage of a minority.

1. This was the case until recently in Namibia as well, but with the implementation of UN Resolution 435 and, in accordance with its stipulations, the consequent abolition of all discriminatory legislation, Namibia would no longer fall into that category.

2. See, for example, the S African episode of Sandra Laing, *The Times*, 2 Oct 1967; For further details Cf R W M Dias: "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) at 257-8;

3. Ibid

4. 1961 Constitution, I, repeated substantially in the 1965 Constitution, Schedule I;

5. Dias op cit (quoting from Aristotle) at 257-8;

6. Ibid

7. Ibid; Cf C Palley : "The Judicial Process : UDI and the Southern Rhodesian Judiciary " MLR Vol 39 (1967) 263-287.

The judicial oath, it should be noted, enjoins the judges to continue to "do justice according to law". The question arising here is whether they should, then, accept a constitution which will tie them to continue "doing an injustice according to law".¹ It is arguable that if the judges had continued to oppose the 1965 Constitution on grounds of morality or justice, they might well have forced the new Grundnorm to incorporate the principles for which they stood out.² An objection to this, of course, would be the unpracticality of such a suggestion in the face of determined governmental power. Nevertheless, as judges are there to do right without fear, the Rhodesian judges themselves have declared they would not yield to threats.³ It is an all-too-common occurrence in revolution-prone Third World countries that the judiciary may be subject to intimidation by the executive and be threatened with the replacement of revolutionary judges and the erection of revolutionary tribunals.⁴ It can legitimately be asked whether it is really possible, let alone desirable, to do right without fear under those circumstances.

In the Rhodesian context, however, it would seem that this threat can be overstated.⁵ For one thing, there can be no doubt that the Smith régime was acutely aware of the fact that its legality or legitimacy depended on the judges saying so. That, after all, is why it submitted to being questioned by them notwithstanding the clear provisions of the 1965 Constitution.⁶ Secondly, it has been suggested that the régime was also anxious not to become totally

1. See in this regard J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence, ed A W B Simpson, Clarendon Press, Oxford (1973) Ch 2; Cf R W M Dias: "Legal Politics: Norms Behind the Grundnorm" CLJ (1968) 233-259; See too D B Molteno: "The Rhodesian Crisis and the Courts" in CILSA Vol 2 No 3 (1969) 404-447;

2. Dias op cit 257-8;

3. See the remarks of Lewis J in Central African Examiner vs Howman 1966 (2) SA 1,14 and the Lower Court judgment in Madzimbawuto at 24; Cf Beadle CJ in the AD judgment at 329

4. Cf T K K Iyer: "Constitutional Law in Pakistan: Kelsen in the Courts" in Am Jnl of Comp Law Vol 21 (1973) 759-781 at 759-760.

5. Dias op cit at 258-9;

6. Ibid

totalitarian as it would have done had it resorted to "packing the bench".¹ It would seem that for the above reasons, no action was taken under S 128 (4)² of the 1965 Constitution and the judges continued to be paid and their orders carried out. It is essential, however, that one guard against the ominous possibility that the Rhodesian judges agree with the values espoused by the revolutionary régime which may then be mirrored in their judgments.³

Whatever the situation may have been, it cannot be doubted that the judiciary in the Rhodesian revolution cases played a significant rôle in preserving the fabric of that society and preventing an anarchical situation from arising. This is perhaps best reflected in the judges' adoption of the necessity principle which they employed to this very end. On the other hand, the judiciary had also succeeded quite admirably in asserting its independence. Thus, the revolution was and could only be complete and successful when they (the judges) said it was and the régime had to accept them throughout on these terms.⁴ As a result, they held themselves free to inquire into the status of the régime and held it invalid,⁵ thereby ignoring S 142 of the 1965 Constitution and the threat of dismissal in S 128 (4). In so doing, they made it abundantly clear that they (the judges) did so in the exercise of their own

1. This seems quite plausible, since revolutionary governments are all too frequently aware of the advantages which the seal of judicial conferral of validity carries. Cf in this regard the Appeal Court Quorum Act in S Africa. See too H R Hahlo : "The Privy Council and the Gentle Revolution" in SALJ Vol 86 (1969) 419-439;
2. S 128 (4): which makes provision for the dismissal of non-compliant judges.
3. See C Palley : "The Judicial Process : UDI and the Southern Rhodesian Judiciary" in MLR Vol 30 (1967) 263-287; Palley provides biographical sketches of the judges in the revolution cases to support her claim that they endorsed the values of the revolutionary regime.
4. See R W M Dias : "Legal Politics : Norms Behind the Grundnorm" CLJ (1968) 233-59, at 258-9. See too the remarks of Quènet JP and Macdonald JA in the AD in Madzimbamuto 1968 (2) SA 284 at 365, 391, Cf Palley op cit at 269.
5. The judges thus refused resolutely to "join the revolution". Cf Matovu's case (1966) EALR 514,526, where the Court, rejecting the A G's contention, held itself competent to inquire into the validity of the Constitution. See further : A M Honoré "Reflections on Revolutions" Irish Jurist Vols 1-2 (1966-7) 268-270; Cf Dias op cit at 258-9;

discretion and not as instruments of unlawful authority. Thus, while contriving to assert their own independence of the régime, they at the same time enabled it to derive practical assistance from their attitude.

The above-mentioned principles of morality and justice are, it is suggested, of relevance in all revolution cases, especially in the Rhodesian situation at the time of the UDI with the unequal distribution of power and the institutionalized discrimination prevailing there. As mentioned in the previous Chapter¹, if consciously articulated and applied by the judges, they could, (in addition to the alternative limiting principles mentioned in the previous Chapter²) go a long way toward containing and moderating the harsh and undesirable consequences which the judicial employment and application of Kelsen's efficacy-validity thesis gives rise to when used in revolutionary situations.³

1. Cf Ch 5, especially the Jilani and Lakanmi judgments there discussed.

2. See especially Ch 4 where these principles are enunciated. Cf J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence, ed A W B Simpson, Second Series, Clarendon Press, Oxford (1973) Ch

3. Cf Ch's 4 and 5. See further R W M Dias : "Legal Politics : Norms Behind the Grundnorm" in CLJ (1968) 233-259, especially at 253-9; Cf S K Date-bah : "Jurisprudence's Day in Court in Ghana" in ICLQ Vol 2 (1971) 117-136.

CHAPTER 7
INTRODUCTION

In this, the final Chapter of the present study, priority will be accorded to international law issues insofar as they impinge on Kelsen's theory of revolutions. This will involve, firstly, an examination of the criteria of statehood at international law and the principle of effectiveness upon which these criteria are based. Both the traditional criteria for statehood as well as the more controversial criteria evolved in modern state practice will be examined. Within the conceptual framework of those criteria, Kelsen's international law doctrine will be considered more closely with especial regard to the revolution cases. Again, the Rhodesian revolution cases (in which Kelsen's international law doctrine was given primary attention) will be considered in the light of this doctrine. A crucial inquiry in this regard would be the status of Rhodesia after the UDI in international law, at the time when it had become a major global issue.

The Criteria For Statehood and the Principle of Effectiveness

Perhaps the best-known formulation of the basic criteria for statehood is that laid down in Article 1 of the Montevideo Convention of 1933: "The state as a person of international law should possess the following qualifications (a) a permanent population (b) a defined territory (c) government (d) capacity to enter into relations with other states".

It is a characteristic of these traditional criteria (and the others after them) that they are based on the principle of effectiveness among territorial units. In contrast to these established criteria, however, there are certain ²modern criteria which show up the vagueness and inadequacies of these traditional criteria in modern state practice and which either supplement or, in certain cases, even contradict this principle of effectiveness. Nevertheless, it should be stressed that they are of a supplementary nature and operate only in rather exceptional circumstances, for instance, where the international law status of an oppressive government may be in issue. It is imperative, therefore, to deal with the accepted, traditional criteria first.

1. See later this Chapter.

2. Especially controversial in this regard are self-determination and good government; Cf J Crawford: "The Criteria for Statehood in International Law" in British Yearbook of International Law 48 (1976-7) Clarendon Press, Oxford (1978) 93-112

(1) Defined Territory

To be a state is dependent on the exercise of full government powers with respect to some area of territory.¹ But, although a state must possess some territory, there appears to be no rule prescribing the minimum area of that territory. States may thus occupy an extremely small area, provided they are independent.² It is also important to note that the boundaries of the territory of the state do not have to be precisely determined.³ As a result, the existence of boundary disputes do not affect statehood.⁴

(2) Permanent Population

Since states are territorial entities, they are also aggregates of individuals. Thus, a permanent population is necessary for statehood although it must be stressed that, as in the cases of territory, no minimum limit is apparently prescribed.⁵

(3) Government

Central to its claim for statehood is the requirement that a putative state have an effective government.

"Government" or "effective government" form the basis for the other central requirement of independence. A striking modern illustration is that of the Belgian Congo, granted a hurried independence in 1960 as the Republic of

1. League of Nations Treaty Series, vol 165 at 19; The American Law Institute Restatement (2nd), Foreign Relations Law of the US (1965) defines 'state' as "... an entity that has a defined territory and a permanent population under the control of a government and that engages in foreign relations. Fitzmaurice as I L C Rapporteur on the Law of Treaties included in an early draft the following related definition: "For the purposes of the present code (a) in addition to the entities recognised as being states on special grounds, the term state (i) means an entity consisting of a people inhabiting a defined territory and under an organized system of government and having the capacity to enter into international relations binding the entity as such, either directly or through some other state, but this is without prejudice to the question of the methods or channel through which a treaty on behalf of any given state must be negotiated depending on its status and international affiliations (ii) includes the government of the state." (Art 3 I L C Yearbook 1956- II at 107) Cf H Kelsen: "Revue de droit international" 4 (1929) at 613 - 4
2. eg Monaco and Nauru are only 1.5 and 21 km² respectively, Vatican, (0.4 km²); see generally Mendelson in ICLQ 21 (1972) 609 at 610-17.
3. For example, Israel in 1948, see General Assembly Resolution 181 (ii) of 29 Nov 1947
4. See here Deutsche Continental Gas-Gesellschaft vs Polish State (1929) Annual Digest 5 (1929-30) no 5 at 14-15. It is essential that the state must exercise independent public authority over that territory; see the North Sea Continental Shelf cases, ICJ Reports (1969) 3 at 32.
5. eg in 1973 the population of Nauru was only 6500; that of San Marino was 20 000; of putative states with very small populations, only the Vatican City may be challengeable on this ground. This is as much because of the professional and non-permanent nature of its population as because of its size. Cf Mendelson op cit at 611-2, Rousseau: Revue Generale de droit International public 37 (1930) 145-53; But Cf J L Kunz in Am Jnl of Int'l Law 46 (1982) 309-14;
6. It is clear that "government" and "independent" are closely related criteria. In fact, they may be regarded as different aspects of the requirement of separate and effective control. See later this Chapter.

the Congo (now Zaïre). No effective preparations had been made. The Government was bankrupt, divided and in practice hardly able to control even the capital.² Belgian and other foreign troops intervened shortly after independence under the claim of humanitarian intervention and extensive UN financial and military assistance became necessary almost immediately.³ Among the tasks of the UN force was, or came to be, to suppress the secession in Katanga, the richest Congolese province.⁴ Yet, despite this, there was no doubt that the Congo in 1960 was a State in the full sense of the term. It was widely recognized and its application for UN membership was approved without dissent.⁵ UN action subsequent to admission was based on "the sovereign rights of the Republic of the Congo".⁶ On no other basis, it seems, could the attempted secession of the Katanga province have been condemned as "illegal".⁷

The crucial question arising here is what one should make of the criterion of "effective government". Three views of the Congolese situation have been taken in this regard. It may be that international recognition of the Congo was simply premature or wrongful, because, not possessing an effective government, the Congo was not a State.⁸ It may be that the recognition of the Congo was a case where an entity not properly qualified as a state is treated as such by other states.⁹ Alternatively, it may be that the requirement of "government" is less stringent than has been

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1. For the situation in the Congo after independence, see Kanza : Conflict in the Congo (1972) at 192; Barraclough (ed) Survey of International Affairs 1959-60, (1961) 396-436, Hoskyns : The Congo since its Independence (1965);
 2. Cf the Rhodesian situation where the new revolutionary government was clearly effective; see Ch 6 for full details.
 3. See, for example, the UN - Congolese Agreement on Financial Assistance, 23 Aug 1960 : UN Treaty Series, Vol 373 at 327 providing \$5 million to finance normal imports (Art 4) "to meet its current budgetary need, preference being given to the government pay-roll and emergency relief expenditure" (Art 7) Cf Said : De Leopoldville à Kinshasa, le situation économique au Congo ex - Belge aujour de L'indépendance, Neuchâtel, (1969)
 4. On the Katangan secession, see Lemarchand : Am Pol Sci Rev 56 (1962) 404-16; O'Brien To Katanga and Back : A UN Case History (1962) As one writer put it "a less effective government would be hard to imagine" Cf J Crawford: "The Criteria for Statehood in International Law" in British Yearbook of International Law 48 (1976-7) Clarendon Press, Oxford at 116-7.
 5. SC Res 142, 7 July 1960; G A Res 1480 (XV) 20 Sept 1960
 6. Cf G A Res 1974 (XS - IV) 20 Sept. 1960 (70-611) para 6
 7. S C Res 169, 24 Nov 1961.
 8. Cf Baty in Am Jnl of Int'l Law 28 (1934) at 444-5;
 9. i.e., A case of constitutive recognition.

thought, at least, in particular contexts.¹ When evaluating the criterion "government", one must take note of two aspects viz. the actual exercise of authority and the right or title to exercise that authority.² Prior to 1960, Belgium had that right which it transferred to the new entity. Of course, the Congo could thereafter have disintegrated; nonetheless, by granting independence, Belgium estopped itself from denying the consequences of that independence. There was thus no international person³ as against whom recognition of the Congo could be illegal. Prima facie, then, a new state granted full formal independence by a former sovereign has the international right to govern its territory, hence the UN action in support of that right. On the other hand, in revolutionary situations no such estoppel exists and, in general, statehood can only be obtained by effective and stable exercise of government powers.⁴

The position of Suomi (Finland)⁵ in 1917-18 provides a good illustration of the latter situation. Finland had been an autonomous part of the Russian Empire since 1907, but declared its independence after the November Revolution in Russia in 1917. Its territory was thereafter subjected to a series of military actions and interventions and it was not until after the defeat of Germany by the Entente and the removal of Russian troops from Finnish territory by Sweden that some degree of order was restored. For a considerable time the conditions required for the existence of a sovereign state did not exist. In the midst of revolution and anarchy elements essential for the existence of a state were lacking. Political and social life was disorganized and the authorities were not strong enough to assert themselves. Moreover, civil war was rife and the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party and the Government had been forcibly prevented from carrying out its duties. It is difficult, therefore, to say at what exact date the Finnish Republic, in the legal

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1. Cf the position in Cyprus at various stages after 1960 : A - G vs Ibrahim, I L R Vol 48, P 6 (1964) and the cases of Rwanda and Burundi.
 2. Cf J Crawford : "The Criteria for Statehood in International Law" in British Yearbook of International Law 48 (1976-7) Clarendon Press Oxford (1978) 93-182, at 117-8;
 3. Cf Rhodesia , where there was an external sovereign in the form of Great Britain
 4. Crawford op cit at 117-8.
 5. Full official designation : Suomen Tasavalta (Republic Of Finland)

sense of the term, actually became a definitely constituted sovereign State. This certainly could not take place until a stable political organization had been created and until the public authorities had become strong enough to assert themselves throughout the territory of the State without foreign assistance. This happened in May 1918, when the Civil War was ended and the foreign troops began to leave the country so that from that time onwards it was possible to re-establish order and normal political and social life.¹

The requirement of Government may thus be said to have the following legal effects : Negatively, the lack of a coherent form of government in a given territory militates against that territory being a state in the absence of other factors, such as the grant of independence to that territory by a former sovereign. Consequently, the continued absence of a government will tend to the dissolution of any state in that area. Positively, the existence of a system of government in and referable to a specific territory indicates, without more, a certain legal status and is, in general, a pre-condition for statehood. Continuity of government in a territory is one factor determining continuity of the state concerned. Therefore, the existence of a government in a territory is a pre-condition for the normal conduct of international relations.²

(4) Capacity to enter into Relations with other States³

This is no longer, if it ever was, the exclusive prerogative of states, although it is a capacity which states pre-eminently possess. However, it is not a criterion, merely a consequence of statehood and one which is not constant, but depends on the status and situation of particular states. Capacity or competence in this sense depends partly on the power of internal government of a territory without which international obligations may not be carried

1. For a good overview of the situation prevailing in Finland, see J Crawford : "The Criteria for Statehood in International Law" in British Yearbook of International Law (1976) Clarendon Press, Oxford, (1978) at 117-8.
2. Ibid 119-20;
3. Some writers have argued that this requirement is superfluous, for if a state has an effective and independent government, it will inevitably have the factual ability to participate in international intercourse. Cf D J Devine : "The Status of Rhodesia in International Law" in A J (1973) 1-171 at 100-2 . Cf D Ijalaye : "Was Biafra at any time a State in International Law ?" in Am Jnl of Int'l Law 65 (1971) 551 at 552.

into effect and partly on the entity concerned being separated for the purpose of such relations so that no other entity both carries out and accepts responsibility for them. This requirement, then, may be said to be a conflation of the requirements of "Government" and "Independence".¹

² (5) Independence

This is arguably the central criterion of statehood. Sovereignty in the relations between states signifies independence, while independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. International Law has established this principle as the point of departure in settling most questions that concern international relations and status.³

It is important to note here that different legal consequences may be attached to lack of independence in specific cases. Thus, lack of independence can be so complete that the entity concerned is not a state, but an internationally indistinguishable part of the dominant state.⁴ Moreover, a grant of independence may, in certain circumstances, be a legal nullity or even an act engaging the responsibility of the grantor, as with so-called "puppet-states". Furthermore, an entity may be independent in some basic sense but act in a specific matter under the control of another state so that the relationship becomes one of agency and the responsibility of the latter state is attracted for illegal acts of the former.⁵

It must also be stressed that the criterion of independence as the basic element of statehood in international law may operate differently in different contexts. In particular, it is crucial to distinguish independence as an initial qualification for statehood⁶ and as a criterion for its continued existence. Thus, a new state formed by secession from a metropolitan state will have to demonstrate substantial independence, both formal and real, before

1. See I Brownlie : "Recognition in Theory and Practice" in British Yearbook of International Law, Clarendon Press, Oxford (1983) 197-211; Cf J Crawford : "The Criteria for Statehood in International Law" in British Yearbook of International Law (1976-7) Clarendon Press, Oxford (1978) at 120-1.

2. Cf Kamanda : Legal Status of Protectorates at 188-191; Van Zijl: International Law in Historical Perspective Vol 2 455-90;

3. See Judge Huber in Reports of Int'l Arbitral Awards, Vol 1, (1928) 829 at 838

4. Cf Crawford op cit at 120-1;

5. Ibid

6. A further related distinction can be drawn between independence as a criterion for statehood and independence as a right of states. Cf Whiteman, Digest Vol 5, 88 -124.

it will be regarded as definitively created. On the other hand, the independence of an existing state is protected by international law rules against illegal invasion and annexation so that the state may, even for a considerable time, continue to exist as a legal entity despite lack of effectiveness. However, where a new state is formed by grant of power from the previous sovereign¹, considerations of pre-existing rights are no longer as relevant and independence is treated as a predominantly formal criterion². In regard to municipal illegality of the actual government of a state, it has been suggested that revolutions do not affect the continuity of the state and that the municipal illegality of its actual government is therefore not a derogation from formal independence³. As regards substantial illegality of origin, it is suggested that where an entity comes into existence in violation of certain basic rules of international law, its title as a "state" is in issue.

Traditionally, it is true that in matters of statehood international law has been based almost exclusively on the principle of effectiveness⁴, although illegality of origin might be considered as grounds for non - recognition. It is essential, therefore, to examine the question whether and to what extent the modern law has developed criteria of statehood not based on effectiveness⁵. Before proceeding to these specifically, however, certain further, though less important criteria for statehood in international law will be considered briefly :

(1) Permanence : The American Law Institute's Draft Restatement provides as a pre - condition for recognition, inter alia, that an entity "shows reasonable indications that these requirements will continue to be satisfied"⁶.

1. This represents a situation known as devolution; Cf D O'Connell : State Succession (1967) Vol 2, at 88, 101 distinguishing "revolutionary" from "evolutionary" succession; see further International Law Association : The Effect upon Treaties (1965) at 1.
2. Cf J Crawford : "The Criteria for Statehood in International Law" in British Yearbook of International Law (1976-7) Clarendon Press, Oxford (1978) at 120-1.
3. *ibid*; Cf I Brownlie : "Recognition in Theory and Practice" in British Yearbook of International Law, Clarendon Press, Oxford (1983) 197-211.
4. Cf H Kelsen : Principles of International Law 2nd ed 1, (1966) 420-33; Tauscoz : Le Principe d'effectivité dans l'ordre internationale (1964) at 125-8;
5. See below
6. Restatement (2nd) Foreign Relations Law of the US (1965).

However, no such requirement is contained in its definition of "state", in fact, states may have a very brief existence provided only that they have an effective, independent government with respect to a certain area and population.² However, permanence may be relevant to issues of statehood in some cases, especially where another state's rights are involved (as in a secessionary situation), or where certain criteria for statehood are said to be missing. In these cases, the continuance of an entity over a period of time is of considerable evidential value.³ Thus, in the divided states situations, whatever the original illegality of the establishment of those régimes, long continuation has forced effective recognition of their position.⁴

(II) Willingness and ability to observe international law : This has been said by some to be a criterion for statehood.⁵ In this context, it is important to distinguish recognition from statehood.⁶ Thus, unwillingness or refusal to observe international law may well constitute grounds for refusal of recognition or for such other sanctions as the law allows.⁷ This is, however, distinct from statehood.⁸ A different, but connected point is whether inability to observe international law may be grounds for refusal to treat the entity concerned as a state. It has been suggested that a state which has fallen into anarchy ceases to be a state to which the normal rules of international intercourse can be applied.⁹

1. Restatement (2nd) Foreign Relations, Law of the US (1965)
2. The Mali Federation in Africa, for example, lasted only from 20 June to 20 Aug 1960 when it divided into two separate states. And British Somaliland was a state for 5 days from 26 to 30 June 1960 (when it united with the former Italian Trust Territory of Somaliland to form the Somali Republic it was informally accorded separate recognition by the US : Department of State Bulletin 43 (1960) at 87; Whitman: Digest, Vol 1 at 216-7; See too Waldock: I L C Yearbook, (1972 - II) at 34-5; Contini : Procedures of the American Society of International Law 60 (1966) at 127; An earlier and less well-known case was that of Yugoslavia, independent on 31 October 1918, which united with Serbia to form the Serbo-Croat Slovene State on 1 Dec 1918; Cf Marek : Identity and Continuity at 239-244; contra Peinitzsch vs Germany, Recueil des Tribunaux Arbitraux Mixtes 2 (1923) at 621;
3. e.g. the US position with regard to Yemen : Whitman, Digest Vol 2 at 240-1;
4. See Carl Zeiss Stiftung vs Rayner and Keeler Ltd (No 2) (1967) A C 853 at 907 (per Lord Reid); On the short-lived Italian Republic of Salò, see Levi claim I L R 24 (1957) at 303; Trevy claim *ibid* at 313, and Annual Digest 13 (1946) No 4 I L R, Vol 29 at 21,34,51;
5. Moore, Digest, Vol 1, at 6, Hackworth: Digest Vol 1 at 176-9, Whitman : Digest Vol 2 at 72 -3, 78 -82;
6. See below under "Recognition"
7. Cf Restatement (2nd ed) Foreign Relations of the US (1965)
8. Cf Chen : International Law of Recognition at 61-2; Lauterpacht; Recognition; at 109-14, I Brownlie: Principles of Public International Law at 80.
9. Great Britain and the Law of Nations Vol 1 18-19.

(III) A certain degree of civilization : The view has been put forward that to be a state at international law, the inhabitants of the territory must have attained a certain degree of civilization such as to enable them to observe with respect to the outside world those principles of law which are deemed to govern the members of the international society in their relations with each other.¹ However, this requirement can also be formulated as one of Government in that international law presupposes not any common faith or culture, but a certain minimum of order and stability.²

(IV) Recognition: As mentioned above, recognition is not strictly speaking a condition for statehood in international law. Thus, an entity not recognized as a state but meeting the requirements for recognition has the rights of a state under international law in relation to a non-recognizing state.³ However, in some cases at least, states are not prohibited from recognizing or treating as a state an entity which for some reason does not qualify as a state under the general criteria. Recognition, while in principle declaratory, may thus be of pivotal importance in particular cases.⁴ At least where the recognizing government is addressing itself to legal rather than purely political considerations, it is important evidence of legal status. It goes without saying that faulty characterization of a case as one of "recognition" can lead to inconvenient and unjust results.⁵ In particular, it has been pointed out that the general flavour and terminology of recognition are misleading. The implication tends to be that what is in issue is "existence" and in the simpler cases concerning the creation of states and governments, that is, in crude terms, the real issue. However, in the more difficult cases, the problem which emerges is not, so to speak, the physical status quo,⁶ but the legal status and consequences of that status quo. It is unfortunate that the "recognition" element is too often accepted as dominant and as being the key to analysis. It

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1. Cf E Hyde : International Law, 2nd ed (1947) Vol 1 at 23, Cf further at 127-9, cited in relation to Indonesia; Whiteman: Digest, Vol 1, at 223-4;
 2. Cf I Brownlie : Principles of Public International Law at 80; Chen : The International Law of Recognition; at 60
 3. Restatement (2nd ed) Foreign Relations Law of the US (1965);
 4. A régime, though effective, may be unjust e.g. Amin's Uganda, Pol Pot's Cambodia, Stalin's Russia or Hitler's Germany.
 5. J Crawford : "The Criteria for Statehood in International Law" in British Yearbook of International Law (1973-7) Clarendon Press, Oxford (1978) at 120 - 2
 6. I Brownlie : "Recognition in Theory and Practice" in British Yearbook of International Law, Clarendon Press, Oxford, (1983) 197-211.

is suggested that, in reality, the recognition element can only be given an effective evaluation and accorded its appropriate weight in the context of all the legal aspects of the given case.¹ Consequently, it cannot be considered in vacuo, much less as a "code word" to which various generalities can be attached.

(V) Legal Order : Since the modern state is the territorial basis for a legal order, it has been suggested that the existence of a legal order, or, at least, its basic rules, is a necessary criterion for the existence of a state.²

Kelsen, in his seminal work Pure Theory of Law puts it thus :

"As a political organization, the state is a legal order. But not every legal order is a state ... the state is a relatively centralized legal order ... The legal order of primitive societies and the general international law order are entirely decentralized coercive orders and therefore not states ... In traditional theory the state is composed of three elements, the people of the state, the territory of the state and the so-called power of the state exercised by an independent government. All three elements can be determined only juridically i.e. they can be comprehended only as the validity and spheres of validity of a legal order".³

Clearly, "legal order" is an important element of government and hence an indication of statehood, but, it is suggested that its status as a distinct criterion is open to doubt. It is arguable that a revolutionary (i.e. illegal) change of constitution does not necessarily affect the identity or continuity of the state.⁴ Thus, entities which by all other criteria are states at the time they come into existence may have only rudimentary legal systems. In extreme cases, there may be no more than a diffused willingness to accept the system to be established by a Constitutional Assembly.⁵ It is also possible that a single state may well compose several interlocking legal

1. I Brownlie : "Recognition in Theory and Practice" in British Yearbook of International Law ; Clarendon Press, Oxford, (1983) 197-211;

2. See D'entrèves : The Notion of the State (1967) at 96.

3. H Kelsen : The Pure Theory of Law (1967) at 286-7;

4. But Cf J M Finnis : "Revolutions and the Continuity of Law" in Oxford Essays in Jurisprudence, ed A W B Simpson, Second Series, Clarendon Press, Oxford (1973) Ch 3; Cf Brownlie op cit at 198-200;

5. Austria in 1918 is an example here ; Cf Marek : Identity and Continuity at 202; See further Kelsen op cit at 96-8;

systems having a complex interrelationship and without the subordination of one to the other ; this is the case with some federations. In these cases, the criterion of "legal order" is of little help.¹

Nevertheless, it is suggested in the alternative that although "legal system" as a whole may not be a useful criterion, the existence of a basic norm within a state is both necessary and sufficient. The prominent International Law theorist Marek finds it both necessary and possible to define "separateness" of the state in strict legal terms and in these terms it simply means that every state is determined by the basic norm of its legal order which it does not share with any other state. This basic norm is its own, it is not and cannot be derived from any other state order i.e. legal source. The reason of validity of the legal order of a state cannot be found in the legal order of one or several other states. The legal order of a state cannot be delegated by any other state or group of states, for, if it were, the entity in question would not be an independent state, but a component legal order of that state or group of states by whom it would be delegated.²

However, it has been pointed out that as a separate criterion, the basic norm is no better. It is, as Marek concedes, a purely formal notion and as such, it fails in two distinct ways. Firstly, it fails to explain the independence of a state whose basic norm was given to it by the legal system of another state. In such a case formal, even municipal legal dependence may co-exist with international independence.³ Secondly, it has been suggested that the basic norm can only explain the case of puppet states (i.e. with full formal, but no actual validity)⁴ by an equivocation on the phrase "reason for validity". In such circumstances the reason appealed to is not formal, but material, a conclusion of political fact in all circumstances. From this it can be deduced that one

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1. Cf J Crawford : "The Criteria for Statehood in International Law" in British Yearbook of International Law, (1973-7) Clarendon Press, Oxford (1978) at 143-4;
 2. Marek : Identity and Continuity at 168; Nonetheless, Marek accepts that change in the basic norm per se does not change the state (at 188)
 3. Crawford op cit at 143-4
 4. Ibid; Cf I Brownlie : Principles of Public International Law at 80 et seq

can only know the basic norm¹ of a state when the state itself is identified as such. Like international responsibility², the basic norm is a conclusion to the problems of existence, identity and continuity, rather than the means of their solution. Nor can there be such a thing as an "independent"³ basic norm, but merely a basic norm of a state that is independent. This is not to deny, however, that the legal system of an entity is a part of its general system of government and as such, relevant to questions of existence, identity and continuity of statehood.⁴

In modern state practice it is especially the principles of legality and self-determination⁵ which have played an influential rôle in either supplementing or even contradicting the all-important principle of effectiveness, thus illustrating its inadequacy in modern state relations.

1. Statehood and Legality : As mentioned above, the traditional criteria for statehood are based almost exclusively on the principle of effectiveness. It goes without saying that the proposition that statehood is a question of fact derives strong support from this equation of effectiveness and statehood. Although it would seem that most writers agree that effectiveness is a legal requirement, many have said that there can exist no legal criteria for statehood not based on effectiveness, but merely extra-legal ones.⁶

One must distinguish here between two possible positions: that there can a priori exist no criteria for statehood independent of effectiveness, but merely supplementary to effectiveness ; and that no such criteria exist as a matter of positive law, they seem for the most part to be based on considerations of political and social reality.

1. Cf Marek : Identity and Continuity at 189,

2. Ibid

3. Ibid

4. For a similar, but more pronounced criticism, see Kamanda : The Legal Status of Protectorates in Public International Law at 181-2;

5. Cf below, where this criterion is considered in detail.

6. Cf J Crawford ; " Criteria for Statehood in International Law" in British Yearbook of International Law (1976-7) Clarendon Press, Oxford (1978) at 120-8;

If the former is correct, there can be no inquiry into the effect of particular rules on status. This position should be examined more closely. In comparatively recent international state practice, effective, separate entities have existed which have virtually universally been agreed not to be states¹ (e.g. Rhodesia). On the other hand, there have been cases of non-effective entities which have been regarded as states.² It is not surprising, then, that the proposition that statehood must always be equated with effectiveness is not supported by modern practice. Several arguments can be adduced in support of that viewpoint.

Firstly, it is arguable that to apply rules of this type in the absence of an authoritative system of determination of status, is decidedly impractical. Another view holds that international law risks being ineffective and creating a fatal conflict between law and fact if it challenges the validity of effective situations, especially situations of power such as the existence of states.³ However, the question arises whether the term "state" should be regarded as for all purposes and in all cases equivalent to certain situations of power. Rather, it should be said that international law risks being ineffective precisely if it does not challenge effective but illegal situations.⁴ It has been suggested here that if international law withholds legal status from effective illegal entities, the result is a legal vacuum undesirable both in practice and principle.⁵ But this assumes that international law does not apply to de facto illegal entities,⁶ a view which has been questioned.⁷

1. For an evaluation of the Rhodesian situation in international law, see later this Chapter. Formosa (Taiwan), too, is a good example in this regard.

2. e.g. Guinea-Bissau prior to Portuguese recognition in the period 1936-1940;

3. Cf J Crawford : "The Criteria for Statehood in International Law" in British Yearbook of International Law (1976-7) Clarendon Press, Oxford (1978) at 140-50;

4. Crawford op cit at 145-6;

5. Ibid Cf I Brownlie : Principles of Public International Law at 80 et seq

6. Ibid

7. Ibid

Fundamentally, the argument that international law cannot regulate or control effective territory or territorial entities is an expression of the view that international law cannot regulate power politics at all, that it is, essentially, non-peremptory. But there can be no doubt that international law is in a stage of development toward greater coherence. In the present context, an important recent development has been the acceptance of the notion of jus cogens which refers to those rules of general international law without which legal relations between states would not be possible. It emphasizes substantive rather than structural rules.² As regards its content, several categories of jus cogens have been suggested:³ Firstly, rules protecting the foundations of the international order such as the prohibition of genocide or of the use of force in international relations, except in self-defence; secondly, rules concerning peaceful co-operation in the protection of common interests such as freedom of the seas and thirdly, rules protecting the most fundamental and basic human rights.⁴

The jus cogens concept has been linked to the controversial but critical principle of self-determination.⁵ As has been seen, there is nothing a priori incoherent about the legal regulation of statehood on a basis other than that of effectiveness. Although this has been denied, there is a considerable amount of practice supporting regulations of this type. In current modern international practice, it is suggested that other principles unrelated to

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1. Cf J Crawford : "Criteria of Statehood in International Law" in British Yearbook of International Law (1976-7) Clarendon Press, Oxford, (1978) at 145-6;
 2. See A Verdross in Am Jnl of Int'l Law 60 (1966) at 55 and 58 - 9; See further Scheuner, Zeitschrift für Völkerrecht 27 (1967) 520-32, at 525.
 3. Cf Schwelb : in Am Jnl of Int'l Law 61 (1967) 946-975; see further Reisenfeld in Am Jnl of Int'l Law 60 (1966) 511-15;
 4. Cf Scheuner op cit at 525; I Brownlie : Principles of Public International Law at 75 and 412; See further Crawford op cit at 145-6; I Brownlie : "Recognition in Theory and Practice" in British Yearbook of International Law, Clarendon Press, Oxford (1983) 197-211; Cf D J Devine: "The Status of Rhodesia in International Law" A J (1973) 1-171;
 5. Crawford op cit at 145-8; Brownlie op cit at 75 and 412;

effectiveness may be relevant.¹ No doubt, the principle of effectiveness as postulated by Kelsen remains the dominant criterion, but, as seen above, practice does not support the view that it is the only one. This can be further illustrated by an examination of the principle of self-determination. It is to this principle that we must now turn.

Statehood and Self-Determination : The relationship between statehood and self-determination, though important, is also a neglected problem. It is, moreover, a criterion dogged by controversy; in fact, some writers go as far as to question whether it is a criterion of statehood at all.² It has long been a controversial question whether there exists a legal right or principle of self-determination of peoples. Certainly, it is a principle of comparatively recent origin.³ It has been suggested that the concept self-determination has, in fact, two distinct meanings. On the one hand, it can mean the sovereign equality of existing states and, in particular, the right of a state to choose its own form of government without intervention. On the other hand, it can mean the right of a specific territory to choose its own form of government irrespective of the wishes of the rest of the state of which that territory is a part.⁴ While traditional international law recognized the first, it did not recognize the second of these from which it is said that it did not recognize the right of self-determination. For all the controversy surrounding it,

1. For municipal law principles supplementing effectiveness cf J M Bekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence, (ed A W B Simpson Second Series, Clarendon Press, Oxford (1973)) Ch 2, See Ch 4 where these principles are enunciated. See further I Brownlie : "Principles of Public International Law" at 82-3; J Crawford : "The Criteria for Statehood in International Law" in British Yearbook of International Law 48 (1976-7) Clarendon Press, Oxford (1978) 140-150; Cf H Kelsen : "Principles of International Law", (1952);
2. See, for example, D J Devine : "The Status of Rhodesia in International Law" in A J (1973) 1-171; sed contra Crawford op cit at 148-9;
3. See League of Nations, Official Jnl, Special Supplement No 3 at 5-6; Cf Report of the Committee of Rapporteurs L N Doc BT\21\68\106 [VII] at 27-8;
4. See Parry in Sorensen, (ed) Manual of Public International Law (1968) 1 at 99 and 19-20; Cf Art's 1 (2) and 55 of the UN Charter which refers to equal rights and self-determination. Self-determination is also by implication referred to in Arts 73(b) and 76(b).

however, there is no doubt that this principle enjoys substantial support¹ amongst theorists and commentators. From their works the following conclusions, supported by current state practice, can be drawn :

(1) International law does recognize the principle of self-determination.²

(2) However, it is not a right applicable directly to any group of people desiring political independence or self-government. Rather, it is a legal principle which applies as a matter of right only after the unit of self-determination has been determined by the application of appropriate rules.³

(3) The units to which the principle applies are, in general, those territories established and recognized as separate political units. In particular, it applies to the following : (a) trust and mandated territories and territories treated as non-self-governing.⁴ (b) states, excluding for the purposes of the self-determination rule those parts of states which are themselves self-determination units as defined, (c) other territories forming distinct political-geographical areas, whose inhabitants do not share in the government, either of the region or of the state to which the region belongs, with the result that the territory becomes, in effect, with respect to the remainder of the state, non-self-governing. (d) All other territories or situations to which self-determination is applied by the parties as an appropriate solution or criterion.⁵

4. Where a self-determination unit is not already a state, it has a right of self-determination; that is, a right

1. Cf I Brownlie : Principles of Public International Law at 575-8; Delupis : International Law and the Independent State (1974) 13-18; Calogeropoulos-Stratis : Le droit des peuples à disposer d'eux-mêmes (1973); Rigo Suredo: The Evolution of the Right to Self-Determination (1973); Umo Zurike: Self-Determination in International Law (1972); Bokar-Szego : New State and International Law 82-101; Tunkin: Theory of International Law (1974) 60-9; Akehurst: A Modern Introduction to International Law (2nd ed) (1971) 281-4; Sukovic in Sahovic (ed): Principles of International Law concerning Friendly Relations and Cooperation (1972) at 323-4; Johnson: Georgia Jnl of International Law and Comp Law 3 (1973) 145-163; Kaar : Indian Jnl of International Law 10 (1970) 479-502;

2. Sed Contra D J Devine : "The Status of Rhodesia in International Law" in A J (1973) 1-171

3. Cf Fawcett: Recueil des cours 132 (1971) 386-91, at 387;

4. J Crawford : "Criteria of Statehood in International Law" in British Yearbook of International Law (1976-7) Clarendon Press, Oxford (1978) at 145 et seq

5. Ibid

to choose its own political organization. Such a right, in view of its close connection with fundamental human rights, is to be exercised by the people of the relevant unit without coercion and on a basis of equality.¹

(5) Self-determination can result, either in the independence of the self-determining unit as a separate state, or in its incorporation into, or association with another state on a basis of political equality for the people of the unit.²

(6) Matters of self-determination cannot be within the domestic jurisdiction of the metropolitan state.³

(7) Where a self-determination unit is a state, the principle of self-determination is represented by the rule against intervention in the internal affairs of that state, in particular, in the choice of the form of government of the state.

It would seem that in situations such as those prevailing in the Congo in the 1960's⁴ (supra), the principle of self-determination would operate to reinforce the effectiveness of territorial units created with the consent of the former sovereign.⁵ However, this only holds good where the new unit is itself created consistent with the principle of self-determination. The same principle would apply in cases of secession. Thus, the secession of a self-determination unit where self-determination is forcibly prevented by the metropolitan state will be reinforced by the principle of self-determination so that the degree of effectiveness required as a pre-condition to recognition may be substantially less than in the case of secession within a metropolitan unit.⁶ But these are, for

1. Cf Johnson : Self-Determination within the Community of Nations (1967); and the study by Wambaugh: A Monograph on Plebiscites, Plebiscites since the World War (1933)

2. Cf Principle VI of Annexure to General Assembly Res 1541 (XV) cited with approval in the Western Sahara Opinion I C J Reports (1975) 12 at 32.

3. Cf Rajan ; UN and Domestic Jurisdiction 2nd ed (1961) 214-222, for an assessment of the earlier practice.

4. see above.

5. Cf J Crawford : "Criteria of Statehood in International Law" in British Yearbook of International Law 48 (1976-7) Clarendon Press, Oxford (1978) at 161-2;

6. It has been suggested that the contrast between the cases of Guinea-Bissau and Biafra may be explicable along these lines.

the most part, ancillary applications of the self-determination principle. The question here remains whether the principle of self-determination is capable of preventing an effective territorial unit (the creation of which was a violation of self-determination) from becoming a state. Although there is comparatively little practice in this area, the Rhodesian situation represents perhaps the classic illustration of this problem, raising it squarely.¹

Since its UDI,² the minority Government exercised effective control within the territory of Southern Rhodesia and (as has been shown in Chapter Six) it was the only Government to exercise such effective control, despite British claims to do so under the Southern Rhodesia Act of 1965. As a result, there can be little doubt that, if the traditional criteria of statehood were applied, Rhodesia would be an independent state.³ However, in the wake of the UDI, Rhodesia had not been recognized by any state as independent, nor was it regarded as a state by the UN.⁴

The UDI was immediately condemned by the General Assembly⁵ and the Security Council which decided "to call upon all states not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime".⁶ Another Security Council Resolution (of 20 Nov 1965) stated that the UDI had "no legal validity" and referred to the Smith Government as an "illegal authority".⁷ Partly, at least, on this basis, various types of sanction had been authorized against Southern Rhodesia. As a result, after the UDI the position

1. Cf Ch 6; See further J Crawford : "The Criteria of Statehood in International Law" in British Yearbook of International Law 48 (1976-7) Clarendon Press, Oxford (1978) at 102-3;

2. On 11 Nov 1965. See further Ch 6.

3. G Fawcett: MLR 34 (1971) at 417; Coetzee: The Sovereignty of Rhodesia and the Law of Nations (1970)

4. In 1966, the minority Government forwarded communications to the Secretary-General and affirmed a right as a "State which is not a member of the UN" to participate in proceedings under Art 32 of the Charter. The Secr-Gen stated that "the legal status of Southern Rhodesia" is that of a Non-Self- Governing Territory under Res 1747. and Art 32 of the Charter does not apply. There was no dissent from this view and the minority Government was not invited to participate under Art 32 or otherwise SC Official Records 1280th meeting 18 May (1966) at 23, For criticism see Stephen: Am Jnl of Int'l Law 17 (1973) 479-490.

5. GA Res 2024 (XX) 11 Nov 1965;

6. SC Res 116 (1965) 12 Nov 1965;

7. SC Res 217 (1965).

was that despite the internal effectiveness of the Smith Government in Rhodesia, the UK was still regarded as the administering authority of the territory which was still a non-self-governing territory under Chapter XI of the UN Charter.¹

Against this background it would seem that only three positions are possible in regard to Rhodesia: that Rhodesia is, in fact, a State and that action against it, so far as it is based on the contrary proposition, is illegal; that recognition is constitutive and in view of its non-recognition, Rhodesia is not a State; or that the principle of self-determination in this situation prevents an otherwise effective entity from being regarded as a state.² In the light of consistent modern state practice, it is suggested that the first position is difficult to accept.³

Furthermore, the Southern Rhodesian Government did not itself dissent from the view that the UK retain authority with respect to its affairs since it apparently accepted that any settlement of the situation must be approved and implemented by the UK. On this view, then, the principle of recognition is declaratory.⁴

In the light of this, it has been suggested that Rhodesia was not a State because the minority Government's Declaration was a nullity of international law, a violation of the principle of self-determination. This adds another significant criterion to the traditional criteria for the recognition of a régime in that a new state shall not be based upon a systematic denial in its territory of certain civil and political rights, including, in

1. Cf J Crawford : "Criteria of Statehood in International Law" in British Yearbook of International Law (1976-7) Clarendon Press, Oxford (1978) at 162-3;

2. Ibid; Cf I Brownlie : Principles of Public International Law at 100-5;

3. Cf Brownlie op cit at 101; this is also the view of the ex-British PM the Rt Hon Harold Wilson: The Labour Government 1964-70; (1971) at 966;

4. See British Yearbook of International Law, 41 (1965-6) at 103 and 112-3 citing the Universal Declaration and G A Res 648 (VI) Brownlie regards the status of Rhodesia as flowing from particular matters of fact and law without further elaboration (at 101). Marshall argues that because Rhodesia remained a monarchy, but the Queen refused to act, there was no legal entity which can be recognized, in ICLQ 17 (1968) 1022-34 at 1033; but the Proclamation of a Republic in 1970 has not been regarded as altering Rhodesia's international status.

particular, the right of every citizen to participate in the government of his country directly or through representatives, elected by regular, equal and secret suffrage. This principle, it is suggested, was confirmed in the case of Rhodesia by the virtually unanimous condemnation of the UDI by the world community and by the universal withholding of recognition of the new régime which was a consequence. It would follow, then, that while the illegality of the rebellion, per se, was not an obstacle to the establishment of Rhodesia as an independent State, it was the political basis and the objectives of the régime that made the Declaration without international effect. Thus, where a particular territory is a self-determination² unit as defined, no government will be recognized which comes into existence and seeks to control the territory as a state in violation of self-determination. However, it is arguable that this principle does not, at this stage of the development of international law, constitute a principle of law with respect to existing states, i.e. it does not invalidate the position of unrepresentative governments in existing states.³

Nonetheless, there can be no doubt that the evidence in favour of the self-determination principle as applied to self-determination units and, in particular, to non-self-governing territories, is consistent and uniform.⁴ It is arguable that although the principle of self-determination has a relatively limited extent and although it merely

1. See British Yearbook of International Law 41 (1965-6) at 103 and 112-3 citing the Universal Declaration.
2. Devine accepts the proposition that the Smith Government came into existence in violation of self-determination in a political sense, in "Status of Rhodesia in International Law" A J (1973) at 67; However, he regards self-determination as too controversial, unaccepted and vague to be used by the Rhodesians as a shield or by anyone else as a sword against them, (at 77); Cf the same author A J (1974) 182-209;
3. The analogue of self-determination in the case of existing states is the duty of non-intervention in internal affairs. The incidents of that duty are somewhat controversial; they are in any event essentially negative. Cf J Crawford : "Criteria of Statehood in International Law" in British Yearbook of International Law 48 (1976-7) Clarendon Press, Oxford (1978)
4. Cf D J Devine in MLR 34 (1971) at 415; Fawcett's reply op cit at 417. Although Rhodesia does undoubtedly represent the plainest instance, the situation does have analogues, e.g. Katanga in the Congo. The situation in Guinea-Bissau was an instance of the operation of the rule in the reverse situation. Moreover, it is quite possible for a rule to consolidate by virtue of consistent practice in one central, even if isolated case, e.g. the development of neutrality in the Am Civil War. Cf I Brownlie : "Recognition in Theory and Practice" in British Yearbook of International Law, Clarendon Press, Oxford (1983) 197-211;

serves to ratify the international position of effective but unrepresentative régimes, it is capable of having very substantial effects if generally applied. An entity is prohibited from claiming statehood if its creation is in violation of an applicable right to self-determination.¹ This principle of self-determination, then, has been used to great effect to account for Rhodesia's lack of international recognition and its consequent denial of statehood. However, it is suggested that this same principle can also be viewed from a different perspective so as to counter-balance the above argument which would deny recognition to Rhodesia at international law.

In this regard it has been pointed out that it is the right of cohesive national groups to choose for themselves the form that their political organization should take and what their relation to other groups would be.² Seen from this perspective, recognition for a group seeking self-determination should be accorded more readily than if that group were not, or, alternatively, the principle of self-determination should be made to compensate for the lack of some other quality of statehood.³ It is clear from the survey of the above contentious principles of recognition in the light of the Rhodesian cases, that the invocation of principles of international law by the Rhodesian judges could well have been, as one writer put it, "something of a two-edged proposition for the Rhodesian Courts".⁴

It is clear too, that in the Rhodesian cases and in the case of the status of Rhodesia at international law, there exists ample scope for departing from strict Kelsenism which emphasizes the traditional criteria of statehood as sufficient for international recognition. These traditional criteria, based, as they are, on effectiveness, may well have been sufficient in the state practice of yore. However, it is suggested that in more recent years, with the

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1. The Privy Council in Madzimbamuto vs Lardner-Burke (1968) 3 W L R 1229 at 1250 did not consider this position, arguing instead, that Southern Rhodesia was not a State because the legitimate Government was still trying to reassert itself. Cf In Re James (1977) 2 W L R 1 (C A)
 2. Cf S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in A J (1980) 1-48;
 3. See I Brownlie : Principles of Public International Law (1973) at 577;
 4. See Guest op cit at 46-7; Cf J M Bekelaar : "Rhodesia - The Abdication of Constitutionalism" in MLR 32 (1969) at 19 and 25; See too by J M Bekelaar: "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence 2nd ed A W B Simpson (ed) Clarendon Press, Oxford (1983) at 22

development of additional criteria of recognition not based on effectiveness and even contradicting it in some cases, this is no longer the case. It is in the Rhodesian situation especially, that the impracticality and inadequacy of Kelsen's international law doctrine within the ambit of modern state practice has been glaringly exposed.¹

Kelsen's international law doctrine and sovereign independent states

It is important to note here that in those revolution cases decided in countries which had already been sovereign independent states at the dates of occurrence of the revolutions, the employment of Kelsen's international law doctrine may well be more beneficial, though still not without its shortcomings.² Not surprisingly, then, it is in these cases in which his doctrine has been rigorously invoked. His international law doctrine has already been considered in relation to these cases in a previous Chapter.³ Here it will be considered exclusively within the parameters of International Law and its applicability in the legal systems of sovereign independent states.

This doctrine, it will be remembered, holds that total recognition should be accorded to a revolutionary government where that government and the area over which it has effective control is a state according to the criteria of statehood of international law.⁴ Important in this regard is Kelsen's theory of the relation between international and national law. Here Kelsen postulates a so-called "no-conflicts" theory. In Kelsen's words :

"International law and national law cannot be different and mutually independent systems of norms if the norms of both systems are considered to be valid for the same space and at the same time. It is logically not possible to assume that simultaneously valid norms belong to different, mutually independent systems".⁵

Kelsen's contention, then, is that there are no conflicts between international and national law and this he does by

1. Cf S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48; See further J M Bekelaar : "Principles of Revolutionary Legality" in Oxford Essays in Jurisprudence, Clarendon Press, Oxford (1973) Ch 2; J Crawford: "Criteria of Statehood in International Law" in British Yearbook of International Law, (1976-7) Clarendon Press, Oxford, (1978)
2. Cf Ch's 5 and 6; See further Guest op cit at 44-8;
3. See Ch 5 for details
4. See Guest op cit at 44-8; Cf I Brownlie : Principles of Public International Law (1973) at 570-80;
5. H Kelsen: General Theory of Law and State (1945) at 363.

stating that there is a principle of international law that fulfils the function of the basic norm of the municipal legal order. This, significantly, is the principle of effectiveness which declares that the one all-embracing criterion of statehood, under which the others are subsumed, is the existence of a set of effective norms within a certain territory.¹ The principle of effectiveness, therefore, is, to all intents and purposes, the basic norm of the international legal order and, as such, it fulfils the rôle of the basic norm of the municipal legal order. As a result, the municipal and international legal orders must, of necessity, dovetail.² More specifically, with regard to the revolution cases, Kelsen's international law doctrine may be applied thus :

"To assume that the continuity of national law, or - what amounts to the same - the identity of the state, is not affected by revolution or coup d'état, as long as the territory and population remain by and large the same, is possible only if a norm of international law is presupposed recognizing victorious revolutions and successful coups d'état as legal methods of changing the constitution".³

Only because the modern jurists consciously or unconsciously presuppose international law as a legal order determining the existence of the state in every respect, according to the principle of effectiveness, do they believe in the continuity of national law and the legal identity of the state in spite of a violent change of the constitution.⁴ Thus, the basic norms of the different national legal orders are themselves based on the general positive norm of effectiveness of the international legal order.

From the foregoing exposition it is clear that Kelsen in his international law doctrine presupposes the primacy of international over national law. Under this doctrine, then, the reason for the validity of the national legal order

1. See H Kelsen : General Theory of Law and State (1945) at 121; Cf J Crawford : "Criteria of Statehood in International Law" in British Yearbook of International Law (1976-7) Clarendon Press, Oxford (1978); See too I Brownlie : "Principles of Public International Law" in British Yearbook of International Law, Clarendon Press, Oxford (1983) 197-211.
2. See S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48 at 38-40;
3. Kelsen op cit at 368;
4. Ibid 369; Cf T K K Iyer : "Constitutional Law in Pakistan : Kelsen in the Courts" in Am Jnl of Comp Law Vol 21 (1973) 759-781;

must be sought in international law. This is possible, because, as mentioned, the principle of efficacy, a norm of positive international law, determines both the reason for and the sphere of validity of national law. This general norm of international law may be presented in the statement that according to international law the government of a community existent within a certain firmly circumscribed space, if it exercises effective control over the members of this community and is independent of other governments of analogous communities, is to be regarded as the legitimate government and the community under this government, as a state in the sense of international law.¹ It does not matter, according to Kelsen, whether the government exercises its effective control on the basis of a previously established and still valid constitution, or on the basis of a constitution that has been established by this government in a revolutionary way.² To express it in legalistic terms : A norm of general international law authorizes an individual or a group of individuals to establish and apply on the basis of an effective constitution a normative coercive order. It thereby legitimates this coercive order as a legal order valid within the territory and temporal sphere of its factual efficacy and the constitution by this legal order as a state in the sense of international law.³

It is against the backdrop of the above principles of Kelsen's international law doctrine that the revolution cases decided in the sovereign independent states should be understood. Thus, in the Pakistani and Ugandan cases (considered in extenso in Chapter Five)⁴ it was held that total recognition should be accorded to a revolutionary government where the state in which the revolution had occurred, has not lost its identity according to international law.⁵ In both Dosso and Matovu, the Courts made explicit reference to this doctrine and in each case

1. H Kelsen : "Sovereignty and International Law" in Georgetown L J vol 48 (1960) 627-640; Cf E Voegelin : "Kelsen's Pure Theory of Law" in Pol Sc Q 52 (1927) 268-276;

2. Ibid 630-1.

3. Ibid 632-3;

4. Cf Ch 5 for details.

5. See S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48, at 36-7.

the primacy of international over national law, was assumed.¹ Firstly, in Dosso² it was held that the Laws (Continuance in Force) Order was a "new legal order". The Chief Justice, Muhammad Munir CJ said in reference to Kelsen's theory :

"If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus or international entity of the state and the revolutionary government and the new constitution are, according to International Law, the legitimate government and the valid constitution of the state. Thus, a victorious revolution or successful coup d'etat is an internationally recognized legal method³ of changing a constitution".

Again, in Matovu⁴, on similarly Kelsenian lines, the Chief Justice Sir Udo Udoma CJ held that the 1966 Constitution was the only valid Constitution of Uganda. In the course of his judgment he relied on the following significant excerpt from Kelsen's General Theory of Law and State : "The government brought into permanent power by a revolution or coup d'etat, is, according to international law, the legitimate government of the state, whose identity is not affected by these events"⁵. As might be expected, the Chief Justice also referred to Dosso for support and concluded in the following terms : "... applying the Kelsenian principles ... our deliberate and considered view is that the 1966 Constitution is a logically and legally valid Constitution and the supreme law of Uganda"⁶. It is, perhaps, unfortunate that the Chief Justice left the matter here and did not deem it necessary or open to the Court to go as far as to examine whether the new Head of State of Uganda was internationally recognized or, alternatively, to accord recognition to the Ugandan Government.⁷

1. Cf S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48 at 39-41.

2. See Ch 5 (above) for full details.

3. H Kelsen : General Theory of Law and State (1945) at 368-9;

4. See again Ch 5 (above) for elaboration.

5. Kelsen op cit at 221

6. Ibid 539, Cf J M Finnis : "Revolutions and the Continuity of Law" in Oxford Essays in Jurisprudence, Clarendon Press, Oxford, (1973) Ch 3.

7. at 540;

From the foregoing it must not be supposed that all the revolution cases decided in sovereign independent states exhibited in their judgments a rigorous adherence to Kelsenism. Thus, in the seminal Pakistani decision of Jilani,¹ (which overturned Dosso) a marked departure from Kelsen's international law doctrine is evident. In this landmark case the principle (which is becoming increasingly evident in modern state practice) was accepted that a government ought effectively to represent the will of the people over which it has effective control, before recognition is given.² The efficacy of the control, therefore, is clearly not sufficient in itself to warrant international recognition. Amongst other things, this principle contains the suggestion that an exchange of views be held prior to recognition on whether the de facto government intended to hold elections within a reasonable period of time.³ Furthermore, the constitution must reflect the aspirations of the people and hold promise for the realization of themselves.⁴ It must, therefore, embody the will of the people which is usually expressed through the medium of chosen representatives. It must be this type of constitution from which the norms of the legal order will derive their validity.⁵ Sajjad Ahmad J put it aptly when he stated that "the Pakistani judicature had the power of dispensing justice as the trustee of society" and to the judiciary was assigned "the duty of being the watch-dog of the actions and virtues of the other co-ordinate limbs of the state".

Statehood without Recognition ?

Before closing this Chapter, a final controversial but nonetheless critical question must be posed : can a state properly be said to exist at international law, independently of recognition by other states ? It is significant that Kelsen has sought an answer to this question on a philosophical-metaphysical plane, holding that states exist

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1. See Ch 5 (above) for full details.
 2. Cf S Guest ; "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1-48 at 46-7. Guest gives a recent example of the existence of this principle viz Res XXVI of the 1965 Second Spatial Inter-Am Conference described as "Informal Procedure on the Recognition of De Facto Governments".
 3. Ibid
 4. Cf T K K Iyer : "Constitutional Law in Pakistan : Kelsen in the Courts" in Am Jnl of Comp Law Vol 21 (1973) 759-781
 5. Pakistan Supreme Court (per Sajjad Ahmad J) at 241
 6. At 261.

in law only in relation to the recognizing states, this theory having been labelled the constitutive theory of recognition.¹ This doctrine, however, has frequently been subject to a great deal of criticism.² Nowadays, it would seem the more generally accepted theory amongst international lawyers is the declaratory theory under which it is assumed that states "exist" according to international law independently of recognition by other states and that recognition signifies merely a formal acknowledgment of the fact that a state exists. According to this theory, then, the rules of international law that define the existence of a state, are power-conferring rules by which other states may accord recognition.³

The declaratory theory of recognition, therefore, would seem to be the better and more expedient one because it more closely accords with international practice. However, it must be emphasized that recognition by other states is still highly relevant insofar as it determines whether a state has met the criteria of statehood according to international law since it represents the crucial evidential factor as to whether other states regard it as a state according to international law.⁴

It is noteworthy that some jurists have attempted a via media between these two theories by pointing out that the truth is to be found somewhere between these theories.⁵ According to this view, both the position of the state and the reasons behind according recognition are relevant. In this regard, it has been considered significant that

1. See H Kelsen : "Recognition in International Law : Theoretical Observations" Am Jnl of Int'l Law 35 (1941) at 605
2. See, for example, T Bayt in "So-called De Facto Recognition" Yale L J 31 (1921) 470, who says that recognition being constitutive in effect, is like a teacher saying to a pupil "Your sum is right if you are a good girl" See further P M Brown : "The Effects of Recognition" Am Jnl of Int'l Law 36 (1942) 106; E Borchard : "Recognition and Non-Recognition" in Am Jnl of Int'l Law 36 (1942) at 108; This doctrine, however, is not acknowledged in the Charter for the Organisation of Am States which declares that the political existence of the state is independent of recognition by other states.
3. See S Guest : "Three Judicial Doctrines of Total Recognition of Revolutionary Governments" in AJ (1980) 1 - 48 at 44-5; Cf J Crawford : "Criteria of Statehood in International Law" in British Yearbook of International Law (1976 - 7) Clarendon Press, Oxford, (1978);
4. Ibid.
5. For this view, see M B Akehurst : A Modern Introduction to International Law 2nd ed (1971) 79; See further D W Greig : International Law (1970) Ch 4.

"mother-states" are slower to accord recognition than "third-party states."¹ This, it is suggested, would be of some importance in assessing whether the Rhodesian Government had gained international status. Although jurists have been almost unanimous in holding that there is no duty to recognize,² premature recognition has been regarded as an intervention in the affairs of other states³ and where there is clearly no opposing force at all, recognition has more frequently been given to revolutionary governments.⁴ It was, then, Rhodesia's non-compliance with the above-mentioned principles of modern state practice which would account for her lack of international recognition.⁵

1. See H Kelsen : Principles of International Law 2nd ed (R Tucker) (1967) at 391 : "The government of a state interested in the existence or non-existence of another state is, it is true, not an objective and impartial authority to decide that question. See too C G Fenwick : "The Recognition of New Governments instituted by Force" Am Jnl of Int'l Law 38 (1944) 488,; See too the case Deutsche Continental Gas-Gesellschaft vs Polish State (1929-30) Ann Dig No 5 at 11;
2. With the conspicuous exception of Hersch Lauterpacht's theory; see E J Cohn : "Review of Hersch Lauterpacht's Recognition Theory in International Law" in L Q R 64 (1948) 404; J L Kunz "Critical Remarks on Hersch Lauterpacht's Recognition in International Law" Canadian Jnl of Int'l Law III (1965) 290;
3. See Fenwick op cit at 488 et seq
4. See Pres McKinley's Annual Message of 11 April 1898 in 1 Moore International Law 109;
5. It is unfortunate that the judges in the revolution cases in Rhodesia did not consistently refer to some further principles of modern state practice such as those laid down in the International Convention on the Elimination of All Forms of Racial Discrimination; See (1965) UNGA Res 2106 XX, See further C Zimmerli : "Human Rights and the Rhodesian Law in Southern Rhodesia" ICLQ 20 (1971) 239; See too M A McDougal and W M Reisman : "Rhodesia and the UN : The Lawfulness of International Concern" Am Jnl of Int'l Law 62 (1968) and J Hopkins CLJ (1967) 1 ; The writer Quincy Wright has for example argued that these violations are evidence of the likelihood of the temporary rather than permanent effectiveness of a revolution. See his Article "The Chinese Recognition Problem" in Am Jnl of Int'l Law (1968) at 221;

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Conclusion

From the foregoing it should be clear that a common thread can be detected which pervades the present study.

At its most abstract and generalized level, this is contained in the fundamental Is-Ought dichotomy which structurally underlies Kelsen's Pure Theory of Law. In the very first Chapter of this study it was pointed out that this rigidly drawn demarcation between the realms of the Is and the Ought could not be sustained by empirical verification. This became more apparent in the ensuing Chapters, as the line of argument of this study moved gradually from the more abstract to the more concrete and where this dualism was examined in its practical ramifications. Here priority was accorded Kelsen's efficacy-validity thesis and all that that entails. In evaluating this special case of the Is-Ought dichotomy, the long-standing "myth" of Is-Ought was further accentuated.

Firstly, this criterion was scrutinized from an essentially theoretical vantage point and it was found that even at this relatively abstract level the degree of overlap between the realms of Is and Ought, fact and value, reality and ideality, normativity and sociology, efficacy and validity was already as substantial as it was unavoidable. This was found to be the case, not only in regard to the efficacy and validity of single, individual norms, but also, and more significantly, with regard to the efficacy and validity of a legal order as a whole.

Following logically from this, and, again, from an essentially theoretical perspective, Kelsen's Grundnorm conception as the ultimate and presupposed Ought of his Pure Theory of Law was subjected to

critical analysis. It was found that this conception, which, according to Kelsen, constitutes the ultimate source of validity of the legal system, was predicated on more than just the "minimum" of effectiveness which he had to concede for it. In fact, it was seen that this conception can be regarded as a product of the legal order it represents, that underlying it and central to its presupposition, are the very "impure" factors of politics, sociology, history, ethics, morality, justice, etc., which Kelsen so vehemently sought to exclude from the ambit of his Pure Theory of Law.

This was found to be especially true with the examination of this conception in dynamic revolutionary conditions in which its limitations were exposed. Furthermore, and more importantly, the deficiencies crudities and inadequacies of Kelsen's efficacy-validity thesis in practical revolutionary situations were highlighted. As a result, it was found necessary to supplement this criterion with additional, more flexible criteria, more amenable to the politico-sociological realities of revolutionary situations. In so doing, the overlap between efficacy and validity was further focused upon.

The practical inadequacies of this criterion were brought into sharp relief with the examination of the revolution cases in which the undesirable and often uncompromisingly unjust results of its judicial employment were illustrated by reference to selected case-studies. At the same time it was pointed out how the judges in some revolution cases departed quite significantly from this criterion and adopted several limiting principles designed to moderate, or, at least,

neutralize the unjust results which the measurement of legality by effectiveness alone invariably gives rise to in practice. From this, it was seen that while efficacy remains probably the dominant criterion of legality, its employment as a blanket test of legality cannot be sustained.

Finally, Kelsen's efficacy-validity thesis was examined within the sphere of international law by reference to the twin concepts of statehood and recognition. Here it was found that although Kelsen's efficacy principle remains the dominant criterion of statehood and although this efficacy-validity criterion may correspond substantially to the traditional criteria of statehood, this is no longer the case in modern state practice where further limiting principles have been evolved to serve as criteria of legality. It was seen that these relatively modern and often controversial criteria of legality tend to be predicated on political, moral, and related "impure" considerations. From this, it was made clear that even in the relatively decentralized and primitive sphere of international law, the degree of overlap between efficacy and validity, the Is of politico-sociological reality and the Ought of normative Ideality, remains formidable.

