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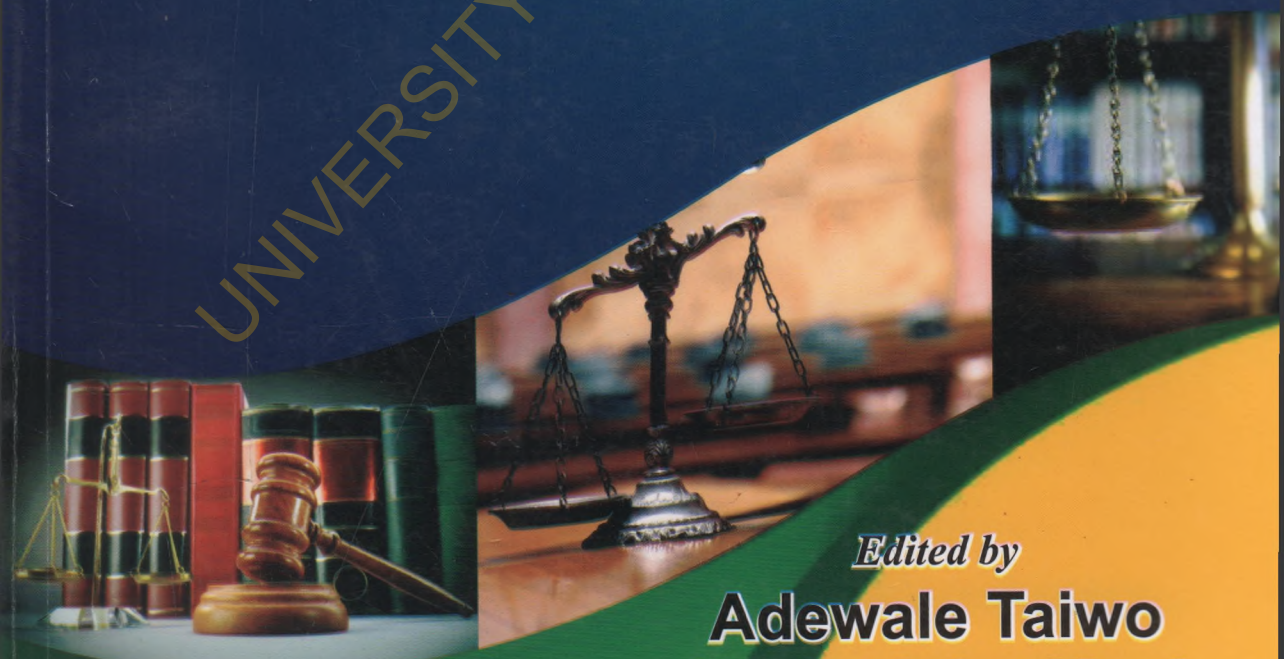

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CHAPTER SIX: THE NATURAL LAW SCHOOL

Chapter 11

Pure Theory of Law: Another Perspective

1. Aim and Objectives of the Chapter

This chapter gives another perspective on the Kelsen's pure theory of law. It is expected that at the end of the chapter, the student should be able to understand the following:

- the pure theory of law as postulated by Kelsen;
- the effect of revolution on the Grundnorm;
- the concept of sanctions, norms and the Grundnorm;
- the contributions of pure theory of law to jurisprudence and legal theory; and
- the location of Grundnorm in Nigeria.

2. Introduction

The origin of notion that activates Pure Theory of Law (PTL) into existence can be traced to the positive school of thought. Consequently, Hans Kelsen, an Austrian philosopher who propounded the theory also admits that it 'is a theory of positive law'.[1] In spite of that admission, it is noteworthy that PTL does not only carve its own separate identity but becomes a theory to be reckoned with in the sense that it distinguishes between normative

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1 Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941)*55 Harvard Law Review*, 44 at 44.

jurisprudence and sociological jurisprudence.[2] This is done by jettisoning philosophy of justice and sociology of law from its cognition and concentrate on the science of law which is pure and unadulterated by emotion and sentiment that often characterize the logic of law. Thus, Kelsen insists that its purity is justified 'because it seeks to preclude from the cognition of positive law all elements foreign thereto'.[3]

Pure theory of law can be defined as a 'general theory of law' which explains law in normative form in order to distinguish the concept of its efficacy from that of its validity. It postulates that law is a norm whose validity as law is not measured by the degree of its compliance by the peoples whose conducts it seeks to regulate but by its link to the higher legal order called the *Grundnorm* as a result of which it acquires its coercive power. Although, pure theory of law is 'a general theory of law', yet, it is aimed to address a specific purpose. The main purpose of pure theory of law is to discuss the general nature and function of law. In doing that, it seeks to answer the puzzling question of 'what law is and not, what it ought to be'.[4] In setting that parameter and limitation of scope, pure theory of law opts for pure scientific diagnosis of law and not a discourse on ideology. There is no doubt that an adequate response to the puzzling question requires an effective mechanism, if in particular, the unique objective of the theory must be accomplished.

Thus, Kelsen, its progenitor developed a normative jurisprudence in attaining this. Kelsen observes that legal norms are expressed in propositional or hypothetical statements.[5] In that sense, the law of nature or natural law describes its objects by adopting the 'cause and effect' approach which is

2 *Ibid* at 52. On this Kelsen said 'Sociological jurisprudence stands side by side with normative jurisprudence, and neither can replace the other because each deals with completely different problem'.
3 *Ibid*, at 54.
4 *Ibid*.
5 *Ibid* at 51.

known as principle of causality.[6] For example, 'If a metallic body is heated it expands'. The correlation between heat and expansion is that of 'cause and effect'.[7] This is a proposition that is actuated by an 'is' regime. In contrast, the proposition by which jurisprudence should describe law (its objects) should be 'with an "ought" proposition, statements in which an "ought," not an "is", is ex- pressed'.[8] This is in consonance with how the jurist interpret the law in the sense that they 'presents these norms in propositions that have a purely descriptive sense, statements which only describe the "ought" of the legal norm'.[9] This regime of 'ought' means that the proposition of law revolves around what should occur not an 'is' which is what has already occurred. Examples of such statements are, if a man steals, he ought to be punished or if a man cheats in an examination he ought to be reprimanded or to pick one example from Kelsen himself, 'if a delict has been committed, a sanction ought to be executed'.[10] It is crucial to note that there seems to be similarity between the two regimes of 'is' and 'ought' because there is a connection in each of them that links the two elements together. In spite of this, the meaning and significance of those connections are not the same.[11]

Of course, Kelsen notes in one of his writings that 'the difference between natural science and jurisprudence lies not in the logical structure of the propositions describing the object, but rather in the object itself, and hence in the meaning of the description'.[12] In another writing, he debunks the argument that the connection in the 'ought' regime can be traced to course and effect approach of natural science and prognoses instead that the

6 In his early writing Kelsen expressed this cause and effect approach with an example that 'if A is then B must be' with an explanation that was misleading but he later corrected himself in another writing, see, Dias, *Jurisprudence* (1985, 5th ed., Butterworths, London) 360.
7 Hans Kelsen, 'Causality and Imputation' (1950) 61 *Ethics* 1.
8 Kelsen, *op. cit.* note 1 at 51.
9 *Ibid.*
10 Kelsen, note 7 *op.cit* at 2.
11 *Ibid.* He noted that 'the connection described by the rule of law has a meaning totally different from that of causality'.
12 Kelsen, *op.cit.* note 1 at 51.

connection emerges from the fact that it is a law or norm enacted by the law maker.[13] What that means is that there is no connection between stealing of a car and the sanction of one month imprisonment by a judge to the thief in such a way that is analogous with a cause and effect approach. In the alternative, he notes that the cause and effect can be traced to the law or norm which eventually leads to the sanction.

From that premise, Kelsen states one of the consequences of his analysis which is that the efficacy of law is different from its validity. Therefore, a law or norm may be valid yet not efficacious. He insists that the issue of efficacy of law is not the concern of normative jurisprudence but that of sociological jurisprudence. The combination of both has caused confusion that makes scholars to read efficacy to the issue validity of norm. A law is valid even if not obeyed. For example a proposition that if 'A' commits murder he has to face the wrath of law has nothing to do with the validity of law that penalty awaits those who commit murder if in spite of the crime, 'A' is roaming about as a free man. To avoid that confusion, he recommends as noted earlier that law should be separated from sociology because they are not the same.[14]

His arguments are profound; he explains how they are interconnected and their differences before he concludes. On their interconnectivity, he argues that the sociologist of law depends on the concept of law as defined by normative jurisprudence in order to draw a line between law as a subject and the precincts of general sociology.[15] Similarly, his task is not different from that of normative jurisprudence where he attempts to 'describe and as far as possible to predict the activity of the law-creating and law- applying organs, especially of the courts' by adopting the principle of selection which help him to locate his own area of focus from the myriad of social events.[16] Even, at that, the accuracy of his prediction depends on the authenticity of the view and propositions by normative jurisprudence.[17]

13 Kelsen, *op.cit.* note 7 at 2.
14 Kelsen, *op.cit.* note 1 at 51.
15 *Ibid* at 53-54.
16 *Ibid.*
17 *Ibid.*

Similarly, with regard to differences between them he notes that the sociologist of law seeks causes and effects of actual behaviors which are not only stipulated in the legal norms but exist in natural reality.[18] In contrast, normative jurisprudence considers the condition or consequence of actual behavior by considering the contents of a norm.[19] Again, the propositions of sociological jurisprudence differ from that of the normative jurisprudence when it comes to their significance. This is so because the normative jurisprudence determines how the courts should decide in accordance with the legal norms in force, while, the sociological jurisprudence determines how they do and presume legal norms in force.[20]

3. The Concept of Sanction under the Pure Theory of Law

Kelsen agrees with Austin that sanction is an essential feature of law but he differs with him on how sanction functions in a legal order.[21] For Austin, sanction is 'evil' that a sovereign state employs to command obedience. Thus, he argues that 'every law or rule … is a command. Or, rather, laws or rules, properly so called, are a species of command'.[22] In contrast, Kelsen debunks this thesis as false. He argues:

> 'Austin and his followers characterize law as "enforceable" or as a rule "enforced" by a given authority. By this they mean that the legal order "commands" the individual to act in a certain fashion, and "forces" men in a specific way to obey the commands of the legal order. The specific means by which the law "enforces "the obedience of individuals consists in inflicting an evil called a sanction in case of disobedience. The "coercion" which according to this view

18 *Ibid.*
19 *Ibid.*
20 *Ibid.*
21 Kelsen, *op.cit.* note 1, at 57-66.
22 *Ibid* at 57.

> is characteristic of the law is a psychic one; obedience to the commands of the law is achieved through fear of the sanction. From the standpoint of a strictly analytical method, this formulation is not correct'[23]

According to him, it is doubtful if people obey law due to fear of 'threatened sanction'.[24] He notes that moral or religious motives are to be attributed more for obedience of law than the fear of sanction. In addition, people obey law because the officers who are organs of the community are mandated to apply sanctions if there is a breach of law (delicts).[25] He contends further that even if Austin is correct, he is outside the field of normative jurisprudence since psychic coercion is not a specific element of law and the study of motives that actuate obedience to law is not within the confine of normative jurisprudence who studies the contents of the legal order.[26]

Austin perceives sanction as external action which is outside the law, although it contributes to its validity.[27] Kelsen argues that this is not so because norms are addressed to two entities, the citizens, who must conform to certain conduct or face sanction for delict[28] and also to the officers who are to ensure compliance to law by punishing those who breach the law. Therefore, sanctions are internal mechanisms that are found within the operation of the rules or norms. It is the norms that stipulate sanction as the concomitant effects of certain conditions the most important of which is the delict. [29]

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23 *Ibid.*
24 *Ibid.*
25 Hans Kelsen, *General Theory of Law and State* (1979) 59.
26 Kelsen, *op.cit.* note 1, 57-66.
27 Dias, *op.cit.*, note 6 at 361.
28 A delict is any behavior to which either a criminal or civil sanction has been attached.
29 Dias, *op. cit.*, note 6 at 361; Kelsen, *op.cit.*, note 1at 58, Kelsen noted that 'law is a decree of a measure of coercion, a sanction, for that conduct called "illegal," a delict; and this conduct has the character of " delict" because and only because it is a condition of the sanction'.

4. Hierarchy of Norms

Austin perceives law from one perspective, that is, the 'static aspect' of law.[30] Kelsen agrees with him that law can be static but goes further that law can also be 'dynamic' thus he divides law into two categories.[31] According to kelsen, norms within the 'static' category are valid because of their contents irrespective of how they are created or enacted.[32] Their 'validity can be traced back to a norm under whose content the content of the norms in question can be subsumed as the particular under the general.'[33] For example, the norms like 'don't tell lies' and 'don't be a false witness' are valid because their contents can be traced to another norm prescribing truthfulness.[34] However, Kelsen has doubted the possibility and feasibility of this aspect of natural law '...in view of man's inadequate qualities of will'.[35]

The second category which deals with how law is created and functions is 'dynamic' system of law.[36] The norm here is not valid as a law because of a particular content that can be rationally deducted from a presupposed basic norm, but because it is created according to the pattern set by the presupposed basic norm. Thus, inferior norms are linked to the higher norms in order to acquire their validity. For an example, the order of a magistrate which imposes a fine on a traffic offender who contravened the traffic rules on the highways may be justified by a bye law of the local government but the said bye law

30 Austin, according to kelsen presents a static theory of law because he 'regards law as a system of rules complete and ready for application, without regard to the process of their creation'. *Ibid* at 61.

31 Dhananjai Shivakumar, 'The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology' (1996) 105 *Yale Law Journal*, 1383 at 1385.

32 Kelsen defines norm as the 'provisions which set forth how men ought to behave' Kelsen, *op.cit*., note 1 at 50.

33 R.S. Clark, 'Hans Kelsen's Pure Theory of Law' (1969)22 *Journal of Legal Education*, 170 at 182.

34 *Ibid*.

35 See Natural Law Doctrine and Legal Positivism which forms the Appendix to General Theory of law and State 391, 400.

36 Kelsen, *op.cit*., note 1 at 58.He noted that 'that a study of the statics of law must be supplemented by a study of its dynamics, the process of its creation'.

can only be valid if it was enacted in line with the provisions of the state law and the state law will also be valid if made in accordance with the provisions of the constitution of the country.[37]

5. Status and Validity of the Constitution

That leads us into another inquiry which is on the status and validity of the constitution under the pure theory of law. Constitutions occupy the highest position among the crop of all norms because they regulate other legal norms with respect to how they are created and the extent of their content including the judicial decisions.[38] The implication of this is that the constitution as superior norm provides the reason why the other inferior statutes are valid.[39] It also provides a basis for unity of the legal order in the sense that different statutes are linked to the constitution. Admittedly, the constitution is the basis for validity of other statutes but that doesn't answer the question on what basis does it acquire its own validity?

On this, Kelsen envisages that there is likely to be an old constitution which gives validity to the new constitution provided it is made in accordance with its laid down rules and regulations. Even at that, one curious thing to note in that scenario is that there must be the first historic constitution that was made without reference to any preceding law- creating organ. Such a self creating legal organ is called the basic norm or grundnorm. It is valid not because it can be linked to any positive norm but because it is presupposed to be valid. There has to be presupposition for it to be valid because without this attribute no human act can be interpreted as a legal norm at that stage of norm creation.

37 He uses this illustration to distinguish between efficacy and validity.

38 Kelsen *supra* note 1 at 62.

39 Ibid at 62-62, He noted that 'The relation between a norm of a higher level and one of a lower, for instance that between a constitution and a statute enacted in accordance with it, means also that in the higher norm is found the reason for the validity of the lower; a legal norm is valid because it has come into being in the way prescribed by another norm'.

6. The Effect of Revolution on the Grundnorm

Kelsen argues that an existing legal order or regime can be truncated by a successful revolution which might lead to emergence of a new legal order. He postulates that the 'phenomenon of revolution' can undoubtedly illustrate the consequence of the Basic Norm.[40] He cites an example that if a group of individuals endeavour to take over the government by force, 'in order to remove the legitimate government in a hitherto monarchic state', with the purpose of introducing a republican form of government. If they succeed, in their goal and as a result of the revolution 'the old order ceases, and the new order begins to be efficacious', then the new order which emerged from their revolution is considered as a valid order. This can be so if 'the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order'.[41] This means the people that the new order regulates must obey the order to make it valid. Then he comes with the issue of presupposition again when he highlights the legal effects of the new order. He notes:

> "It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm".[42]

40 See, Hans Kelsen, *General Theory of Law and State* (Harvard ed., 1945) 118.
41 *Ibid.*
42 *Ibid.*

The essence of Kelsen treatise is that grundnorm is susceptible to change at the intervention of a successful revolution.[43] He argues that it is absurd to think otherwise. According to him 'no jurist would maintain that even after a successful revolution the old constitution and the laws based there-upon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself'.[44]

6.1. Application of the Principle

This principle was tested for the first time in 1958 in *State v. Dosso*.[45] The question for determination in that case by the Supreme Court of Pakistan was whether a new legal regime had come into existence which replaced the old regime with the dissolution of the existing democratic institutions,[46] the suspension of the 1956 Constitution[47] and the proclamation of Martial law in the country. In that case, the accused person was tried and convicted of murder under the Frontier Crimes Regulations of 1901.[48] On appeal, the Lahore high court set aside the conviction on the ground that section 11 of the Frontier Crimes Regulations under which he was convicted was contrary to sections 56 and 57 of the 1956 Constitution of Pakistan.

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43 *Ibid* at 117, he noted that a revolution is "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".

44 *Ibid* at 118.

45 (1958) 2 Pakistan S.C.R. 180.

46 National Assembly and both the Provincial Assemblies of East Pakistan and West Pakistan were dissolved, the Cabinet was dismissed and the president of the cabinet declared General Muhammad Ayub Khan, Commander-in-Chief of the Pakistan Army as the Chief Martial Law Administrator.

47 The President promulgated the Laws (Continuance in Force) Order, 1958, the general effect of which was the validation of laws, other than the late Constitution, that were in force before the proclamation, and restoration of the jurisdiction of all Courts including the Supreme Court and the High Courts.

48 The FCR dates back to 1846 when British colonial administration nominated its first political agent in the Northwestern districts and the Punjab. It provides for a special procedure for trials in both the settled districts and the tribal areas. After independence, it has been used to breach human rights of the peoples, see, Noreen Naseer, 'Law, Rights, and the Colonial Administrative System: A Critical Note on the Frontier Crimes Regulation (1901) in the FATA, Pakistan' (2015) *Review of Human Rights* 24-51; Human Rights Commission of Pakistan, 'FCR A bad law nobody can defend' available at <*http://hrcp-web.org/hrcpweb/wp-content/pdf/ff/23.pdf*> (accessed 12 October 2018).

The government appealed to the Supreme Court. However, before the appeal could be heard, the revolution had taken place leading to the suspension of the Constitution, although, the jurisdiction of the judiciary was later restored by the new law.[49] The Supreme Court relied on the pure theory of law to set aside the decision of the Lahore high court on the ground that that the 1956 Constitution had been suspended and displaced with the successful revolution that occurred.

Similarly, in *Uganda v. Commissioner of Prisons, ex p. Matovu,*[50] the 1962 Constitution was suspended by Apollo Milton Obote in February 1962 who staged a coup d'état against the government. The new regime declared a state of emergency and promulgated the Emergency Powers (Detention) Regulations 1966 (1966 law) under which the applicant in the case was detained. In an application for an order of habeas corpus to release the applicant on the ground that the detention order was contrary to the fundamental right protected in section 28 of the 1962 Constitution, the Supreme Court of Uganda held that the 1962 Constitution had been replaced with 1966 new legal regime and on that basis the detention order was valid. It is crucial to note that the Supreme Court did not only rely on Kelsen's pure theory of law but also referred to *Dosso's case* in reaching its decision. The Chief Justice, Sir Udo-Udoma opines:

> "Applying the Kelsenian principle, which incidentally forms the basis of the judgement of the Supreme Court of Pakistan in the above case, our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda, and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the

49 See, the president, *supra* note 47.
50 (1966) E.A. 514.

> Laws of Uganda, it having been deprived of its de facto and de jure validity. The 1966 Constitution, we hold, is a new legal order and has been effective since 14 April 1966 when it came into force."[51]

Indeed, courts from different countries have followed this line of reasoning enunciated by Kelsen that one could not but declare that the principle has become established as an entrenched jurisprudence that could be used to legitimize the usurpation of a democratic government.

In contrast, some judges have taken an iconoclastic view, seeking to find a way of escape from the strict application of the principle in the determination of the so-called revolutionary cases. Pakistan where the principle was first applied in *Dosso's case* was not left alone of this iconoclastic action. The Supreme Court jettisoned the principle 15 years later in *Asma Jilani v. Government of Punjab*.[52] In that case, the writ of petition was filed on behalf of two detainees at the High Courts. Their detentions were ordered under the Martial Law.[53] At the trial, the Government raised a preliminary objection that the petition or application was not competent because the jurisdiction of the High Court to entertain the matter has been ousted by law which was promulgated by the Chief Martial Law Administrator.[54] The high Court upheld the preliminary application, Shafi-ur-Rehman, J relying on *State v. Dosso*, held that the ouster clause was valid and binding and as such, it had no jurisdiction to entertain and decide the petition.

On appeal to the Supreme Court of Pakistan, two important issues were to be determined.[55] First, whether the High Courts had jurisdiction under Article 98 of the 1962 Constitution of Pakistan to enquire into the validity of detention

51 *Ibid* at 539.
52 PLD 1969 LAH 786.
53 This was done under the Martial Law Regulation No. 78 of 1971.
54 It was ousted by clause 2 of the jurisdiction of Courts (Removal of Doubts) Order, 1969.
55 PLD 1972 SC 139.

in view of the ouster clause[56] and two, whether the principle enunciated in *Dosso's case* was correct. On the latter, Supreme Court critically examined the case and concluded that the principle enunciated in *Dosso's case*, is 'wholly unsustainable, and it cannot be treated as good law either on the principle of *stare decisis* or even otherwise'.[57] The court notes that no matter how 'effective the Government of a usurper may be, it does not within the National Legal Order acquire legitimacy' unless its emergence to power is in consonance with the constitution and the courts accords its recognition.[58]

Similarly, with respect to the first question, the court concludes that a usurper is incompetent to make law to oust the power of the court unless its ascendancy to power is in consonance with the constitution. Since the ouster law was made by an illegitimate entity the power of the high court vested by the Constitution cannot be ousted. The court unequivocally declared:

> "Both the Presidential Order No.3 of 1969 and the Martial Law Regulation No.78 of 1971 were made by an incompetent authority and, therefore, lacked the attribute of legitimacy which is one of the essential characteristics of a valid law. The Presidential Order No.3 of 1969 was also invalid on two additional grounds, namely, that it was a Presidential Order, which could not in terms of the Provisional Constitution Order itself amend the Constitution so as to take away the jurisdiction conferred upon the High Court under Article 98 of the Constitution of Pakistan 1962 and that it certainly could not, in any event, take away the judicial power of the Courts to hear and determine questions pertaining even to their own jurisdiction and this power could not be vested in another authority as long as the Courts continued to exist."[59]

56 The Jurisdiction of Courts (Removal of Doubts) Order, 1969.
57 *Asma Jilani* case, *supra*, note 55 at 183.
58 *Ibid*, see 229-230.

The same approach was adopted by the Supreme Court of Nigeria to determine the legal status of the first coup d'état which occurred on January 15, 1966 in *E.O. Lakanmi & Ors v. the Attorney-General (Western State) & Ors.*[60] What happened on that day and the manner the power was transferred to the military government was essential to understand how the Supreme Court of Nigeria maneuvered its way to depart from adopting kelsen theory. On that day, a group of Nigerian military officers led by Major Kaduna Chukwuma Nzeogwu, staged the first coup d'état in the country and attempted to take over the government of the First Republic from the civilians. They killed major cabinet members at both the regions and at the federal level, among whom were the then Premier of the Northern Region and Sarduana of Sokoto, Sir Ahmadu Bello; the Premier of the Western Region, Chief Samuel Ladoke Akintola, Prime Minister of Nigeria, Sir Abubakar Tafawa Balewa and Nigeria's first Finance Minister, Chief Festus Okotie-Eboh.

Since, the coup was foiled and Major Chukwuma Nzeogwu was arrested, the surviving cabinet members made a futile attempt to revivify the civilian government by requesting the leadership of military to comply with section 92 of the Republican Constitution by appointing an acting Prime Minister in lieu of the slain one to head the democratic government. The request was, however, turned do by Major-General Johnson Thomas Umunnakwe Aguiyi-Ironsi, who explained the event of January 15 as a military take-over. He was able to persuade the Ministers to relinquish power to him, thereby truncating the First Republic.[61] Thereafter, he made a broadcast to the nation where on behalf of the military government he suspended the legislative and executive arms of the governments at both regional and federal levels with immediate effect apart from public institutions such as the Judiciary, the Public Civil

59 *Ibid* at 204.
60 (1970) 1 UILR 201.
61 Raymond Mordi, 'Aguiyi-Ironsi: Echoes of January 1966 coup' J(uly 26 2016) the Nation available at < *http://thenationonlineng.net/aguiyi-ironsi-echoes-january-1966-coup/* > (accessed 13 October 2018).

Services, the Armed Forces and the Police Force which were saved from this suspension order.[62] To cap it all, the military government also suspended certain provisions of the then 1963 Constitution of the Federation and promulgated a decree to validate the suspension and to also confer legislative power on the government. [63]

Having explained the historical background which culminated into the transfer of power, it is also important to give a brief fact of the case, for proper understanding of the Supreme Court decision with regard to pure theory of law. In *Lakanmi's case*, the appellants filed an application at the High Court for certiorari to quash the order made by the Chairman of the Tribunal of Inquiry set up under an Edict of the Western State Government[64] which forbade the appellants or their agents and other persons from further dealing with any of their properties without the direction or permission of the Military Governor of the Western State. As a result of this order, the appellants could not withdraw money from their accounts and all rents due on their properties must be paid to the state's sub-treasury, Ibadan, pending the determination of the issues involved in the investigation into their assets.

The High Court dismissed the application and the appellants appealed to the Western State Court of Appeal. Before the appeal could be heard, the Federal Military Government promulgated three successive decrees.[65] One of the decrees repealed the edict under which the order of the Tribunal of Inquiry was made.[66] This could have been a reprieve to the appellants but unfortunately

62 *Ibid.*

63 The Constitution (Suspension and Modification) Decree No. 1, 1966;S1 & 2 of the Decree deal with suspension while s3 provides that "the Federal Military Government shall have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever."

64 Public Officers and Other Persons (Investigation of Assets) Edict No. 5, 1967.

65 They are, Decree No. 37: The Investigation of Assets (Public Officers and Other Persons) Decree 1968, Decree No. 43: The Investigation of Assets (Public Officers and Other Persons) (Amendment) Decree 1968 and Decree No. 45: The Forfeiture of Assets etc. (Validation).

66 Section 14 (1) of Decree No. 37 repealed both Decree No. 51 of 1966 and Edict No. 5 of 1967 as from July 29, 1968.

the decree further provides for validity of all orders or notices made by the courts or the Tribunal of Inquiry before the repeal.[67] As if that was not all, the decree ousts the jurisdiction of the courts to inquire on the legitimacy of anything that was done pursuant to the decree.[68] Consequently, the Western State Court of Appeal held that the order against the appellants was validly made because the subject-matter of the action had been validated by the decree of the federal military government and the power of the court to question anything done under the said decree has been ousted.

On appeal to the Supreme Court, the fundamental issue for determination in the case[69] was whether the first coup d'état which occurred in Nigeria on January 15, 1966 could be regarded as a revolution or a mere "constitutional emergency".[70] If the court decided that it was a revolution, then the order against the appellants will be valid. This is so because although the making of the decree was not in consonance with the 1963 Constitution, but, the new legal order must have emerged and the old legal order truncated with effect that all laws enacted by the Federal Military Government 'would not be subject to judicial review because the old order under the 1963 Constitution would have yielded to the new legal order'.[71]

If, however, it was decided that it was not a revolution, then 'the provision of the old Constitution will apply and the Supreme Court would be able to consider the constitutionality of any law made by the Federal Military Government'.[72] In such a situation, there is likelihood that the order might be

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67 Section 14 (2) of Decree No. 37 provides that the repeal of any enactment or law by this decree shall not affect any order, notice or other document made or thing whatsoever done under the provisions of any enactment or law hereby repealed and every such order, notice ... shall continue or have effect by virtue of this Decree.

68 Section 12 ousts the jurisdiction of the court in challenging the validity of anything done under Decree No. 37 or under any enactment or other law repealed by this decree.

69 *Lakanmi's case, supra* note 60.

70 On discussion of this, see, Abiola Ojo 'The Search for a Grundnorm in Nigeria: The Lakanmi Case' (1971)*20 The International and Comparative Law Quarterly*, 117-136.

71 *Ibid,* at 118.

72 *Ibid.*

declared invalid, and unconstitutional since the law relied upon in making the order was not made in consonance with the 1963 Constitution. The Supreme Court took that approach and punctured the power of the military government to make law. In doing that, it initially addressed the issue of revolution which was essential in determining where the pendulum of justice will shift and held that what happened on January 15, 1966 was not a revolution but a mere transfer of power 'from the old order to the new order'.[73]

The new order according to the court was facilitated by agreement between the old order and new order consummating in partial suspension of the Constitution.[74] The Supreme Court agreed with the submission of the counsel to the appellants that the 'Government came into being by the wishes of the representatives of the people' and that the decision to voluntarily hand over by the surviving ministers was in the best interest of the nation that flows from the existing legal order. It also considered and distinguished cases where pure theory of law has been applied[75] to depart from applying the principle on the basis that in those cases where it was applied, there was an "abrupt political change" which occurred when the new revolutionary government totally abdicated the existing Constitution and replaced it with a new different one unlike an attempt in Nigeria to merge the old existing order with the new one. Thus, the court acknowledged Kelsen theory of revolution and change of government as correct but like what a lower court does when attempting to depart from decision of a superior court,[76] it distinguished *Lakanmi's case* as an exception from the so-called revolutionary cases.

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73 This is so because Major-General Johnson Thomas Umunnakwe Aguiyi-Ironsi persuaded the surviving cabinet members to relinquish power to him and agreement to that effect was entered into. See, Raymond Mordi, *op. cit.* note 61.

74 *Ibid.*

75 Foreign cases like *Dosso case* and *matovu case* in Uganda were considered. Local cases considered were *Ogunlesi & Ors. v. Attorney-General of the Federation* (1970) L.D./28/69 (unreported), *Adamolekun v. The Council of the University of Ibadan* (1967) S.C. 378/1966.

76 Supreme Court of Nigeria is the highest court of the land and decisions of foreign courts are merely persuasive and not binding.

Whether this reasoning is correct or not has been subject of critical analysis by scholars such as Mahmud, Aihe, Ojo, and Elias, among others.[77] The summary of their arguments is that the Supreme Court did not only misapply the fact, it also erred in law in reaching its decision.[78] Misapplication of facts and law emerged from the way the Supreme Court perused and interpreted the so-called invitation by the surviving cabinet members to the military to form an interim government.[79] In an attempt to clothe the invitation with continuity toga, the Supreme Court christened it as 'constitutional contract' without considering the vital question of whether any of the cabinet members has authority to do so. This was a great missing link that occasioned erroneous decision of the court. Abiola Ojo, in a convincing and analytical manner, notes this when he observes that the Supreme Court was acting under false impression that the prime minister was still alive at the time of the meeting because "in the absence of the Prime Minister or of a duly appointed acting Prime Minister, there was no one competent under the Constitution to call a valid meeting of the Cabinet". Consequently, he argues that the so-called meeting of the surviving cabinet members that decided to willingly surrender the government to the military was not proper as they (the surviving Cabinet members) were not recognized by the 1963 Constitution.[80] According to him, to think otherwise is to 'suggest that any group of Ministers could collect themselves together, without a Prime Minister or an acting one to hand over the Government of the nation to any one'.[81] He supports his view with similar

77 See, Tayyab Mahmud, 'Jurisprudence of Successful Treason: Coup d'état & Common Law' (1994)27 *Cornell International Law Journal*, 543; D.O. Aihe, 'Nigerian Federal Military Government and the Judiciary: A Reflection on *Lakanmi v. Attorney-General* (Western State of Nigeria)' (1971)13(4) *Journal of the Indian Law Institute*, 570-580; Ojo, *op. cit* note 70.

78 *Ibid.*

79 *Ibid* at 126, Aihe, *op. cit.*, at 577, Raymond, *op.cit.* note 61.

80 Ojo, *op. cit.*, at 127.

81 *Ibid.*

view by Taslim Elias, an eminent jurist, who describes what happened on that day as a mere routine and not a legitimate meeting of the cabinet.[82] Another point by the Supreme Court in support of the continuity doctrine is the issue of partial suspension of the Constitution by the military government. The Supreme Court concludes that since the military government made it clear that only some sections and not the 1963 Constitution in its entirety would be suspended. Then, it can be assumed that the military government is thus an interim government 'which would uphold the Constitution of Nigeria and would only suspend certain sections as necessity arises'.[83] However, the events that occurred thereafter have shown that that view was erroneous. Immediately, after the Supreme Court declared the decree made by the military government invalid, due to its inconsistency with the 1963 Constitution, the military government fought back to prove that their emergence was revolutionary and was not tied to the 1963 Constitution by promulgating another decree which proclaimed total abdication of the 1963 Constitution, the emergence of a new legal order governed by decrees that were to be promulgated by the military government.[84]

Face with such daring direct legislative onslaught against the Constitution, the Supreme Court could not but succumbed to the wishes of the usurpers as it held in subsequent cases[85] that the new decree was valid.[86] No doubt, it is admitted that the negative implication that flow from subsequent cases after *Lakanmi's case* is that the case was wrongly decided. However, it has been

82 *Ibid*; Elias, Nigeria: The Development of its Laws and Constitution (1967)457. He noted that "In law, what took place was a routine, though polite consultation." It is, therefore, submitted that only a constitutionally constituted Council of Ministers could legitimately commit the nation. There was therefore no lawful handing over of the Government. The fact that the Armed Forces refused to appoint an acting Prime Minister as provided by the Republican Constitution clearly shows that the Federal Military Government did not "assume the continued existence of the Constitution."

83 See Ojo, *op. cit.*, note 70 at 128.

84 See, the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970.

85 See, for example, *Adejumo v. Johnson* [1972] 1 All N.L.R. 159 (Nigeria).

86 The Supremacy decree, *supra* note 84.

argued that the aftermath of *Lakanmi's case* in Nigeria is very significant in the sense that it shows the practical limitations of a court as possible defender of the Constitution 'when faced with the *fait accompli* of usurpation'.[87] The truth is that the 'usurpers' monopoly of coercive power allows them to ignore any adverse pronouncement by the judiciary or even to browbeat it into submission'.[88]

7. Locating the Grundnorm, a Herculean Task!

The question of where grundnorm is located in a particular country has been a controversial question in countries where their democratic governments have been usurped by revolutionary movements or military governments in the past. The reason for this controversy is the complexity of tracing the super norm from which all other norms derive their validity. In Nigeria, for example, attempts have been made by many scholars and jurists to place where the grundnorm of Nigeria resides during the military and civilian regime.

Of course, Justice Kayode Eso was the first to stir up the hornet nest when he posits the idea of a splitting grunnorm as a mechanism to resolve the complexity and difficulty surrounding the location of grundnorm in Nigeria.[89] He notes that 'the Nigerian Grundnorm needs not wait for God dot! But could be discernible in multiple organs'.[90] For this purpose, under the military regime, he states that the grundnorm could be found in the decrees enacted by the Armed Forces Ruling Council (AFRC),[91] and also, in the President of

87 Tayyab Mahmud, *op. cit.* note 77 at 72-73.
88 *Ibid.*
89 Kayode Eso, 'The Nigerian Grundnorm: A critical Appraisal' paper delivered to the NBA in 1989 Kayode Eso, 'The uncertainty in the movement of the Nigerian Groundnorm' in T.O. Elias & M.I. Jegede (eds.), '*Nigerian Essays in Jurisprudence*' 60 at 72-73.
90 *Ibid.* Kayode Eso, The uncertainty at 73.
91 Examples of these decrees will be the Federal Military Government (Supremacy and Enforcement of Powers, supra note 84, the Constitution (Suspension Modification) Decree (1984) No. 1, the Military Government (Supremacy and Enforcement of Powers) Decree, 1984, No. 13 among others.

AFRC.[92] This view is similar in some respect to the argument of Abiola Ojo that the search for a grundnorm under the military regime is to be found in the Supreme Military Council or in the decrees enacted by them.[93] However, both views have been critiqued and found to be wrong and inappropriate because of their inconsistency with pure theory of law.[94]

In addition, Justice Eso also goes further to give example of a grundnorm under the civilian government in Nigeria. This he said could be found in the will of the people and also in the decisions of the courts.[95] However, it is submitted that a critical appraisal of pure theory of law as enunciated by Kelsen will show that these examples are not correct. It is crucial to note that Kelsen is pessimistic on the will of the people or judicial decisions depicting the grundnorm. He takes up Austin on the will of the people and argues that even in some instances where it can be said that legal obligations exist, it is doubtful if 'certain behaviour ever represented the real will of anyone'.[96] Of course, the essence of the grundnorm is that it gives validity to other norms but Kelson insists that norm or law can be binding even if 'all the members

92 Kayode Eso 'The uncertainty, op. cit. note 89 at 74-75.

93 Abiola Ojo Constitutional law and Military Rule in Nigeria (Ibadan, 1987) 110. He noted that 'In the present military administration, the Supreme Military Council (now the Armed Forces Ruling Council, AFRC) is a source of its own legal order. Any search for a grundnorm away from the Supreme Military Council (now AFRC) or the expression of its powers as declared in Decrees is a futile judicial and academic exercise'.

94 See, J.M. Elegido, *Jurisprudence* (Spectrum, Ibadan, 1994) 90. Although, he relied on the earlier position of Justice Eso that grundnorm 'could be discerned in two authorities; one the legislature together with the executive, and the other the judiciary', yet, his critical remarks are still relevant. On that, he noted that 'If we speak of the grundnorm in the sense that Kelsen gave to the term, the legislature-cum-the-executive and the judiciary cannot be the Nigerian grundnorm either in 1960or at any other time. First, they are not "norms" but "institutions" while the grundnorm obviously has to be a norm. Secondly, it is clear that the powers of these institutions are not ultimate, but rather derived from a superior source, namely the Constitution... the decrees of the A.F.R.C., even the fundamental ones, cannot constitute the grundnorm, for even if we agree, as we may, that they constitute an original or ultimate constitution, the original constitution is not the grundnorm.

95 Kayode Eso 'The uncertainty, *op. cit.*, note 89 at 73, he noted that 'the consent of the will of the populace should form the basis of this Grundnorm and that the decisions of the Courts should be obeyed because of the ultimate constitutional norm that coercive acts ought to be applied m accordance with the judge made law and order'.

96 Kelsen, *op. cit.*, note 1 at 55.

of the legislature that enacted it have died'. In such a situation, according to him, 'the content of the statute is no longer the "will" of anyone, at least not of anyone competent' to make it.[97] Thus, with that illustration, he denounces the general argument that the will of the peoples or their representatives who are law makers are represented in the laws they enacted.[98] In the same scenario, although for different reason, judicial decisions could not be grundnorm under the pure theory of law. This is because judicial decisions are not the basic norm but they also derive their own validity from other norms that empower the courts to determine disputes.[99]

Another alternative view canvassed by scholars was that the Constitution of Nigeria was the grundnorm before the military takeover of the civilian government through a successful revolution. Dr. Aguda, Justice Karibi-Whyye and Justice Oputa to mention but a few support this view.[100] There is no need to belabor their arguments. Consequently, a brief reference should be enough. Dr. Aguda posits that 'if one were to be faithful to Kelsen's analysis, the undisputable grundnorm of the legal order is the Constitution and nothing else'.[101] To Justice Oputa, in support of the view, the Constitution is the organic law,[102] while, Justice Karibi-Whyye argues that with the supremacy clause of the Constitution, it is incontestable that the Constitution is the grundnorm.[103] Of course, Dr. Aguda buttresses his argument with an example, when he said

97 Ibid.
98 Ibid at 56 where he noted 'a norm is a rule stating that an individual ought to behave in a certain way, but not asserting that such behavior is the actual will of anyone'.
99 Kelsen, *op.cit.*, note 1 at 63, Kelsen noted that 'The unity of the legal order is achieved by this connection. If one asks the reason for the validity of a judicial decision, the answer runs: the decision containing the individual norm, by which, for example, A is obligated to pay B $1ooo, is valid because the decision came into being by the application of general norms of statutory or customary law that empower the court to decide a concrete case in a certain manner'.
100 Kayode Eso, 'The uncertainty, *op. cit.*, 89 at 72.
101 *Ibid.*
102 *Ibid.*
103 *Ibid.*

that 'before the military seized power on December 30-31, 1983, the undoubted and incontrovertible grundnorm of the Nigerian legal order was the 1979 Constitution'.[104]

Indeed, a careful perusal of this suggestion shows that there is a misconception of what the grundnorm under the pure theory of law is. Thus, the question for consideration is whether the Constitution can be the grundnorm under the pure theory of law! Admitted, the norms of the Constitution according to pure theory of law occupy 'the topmost stratum in the hierarchy of norms'.[105] This is because the pure theory of law adopts the functional definition of 'constitution' which defines constitution as a creative norm 'that determine the creation, and occasionally to some extent the content of the general legal norms which in turn govern' other individual norms such as judicial decisions.[106] In spite of that prestigious status of the constitution under the pure theory of law, the Grundnorm and constitution are two different things.[107] The Grundnorm in pure theory of law encapsulates the reason for the validity of the constitution and not the constitution itself. It posits that because the constitution is a valid norm, it is legally binding on us that we ought to obey its prescriptions.[108] However, as argued by Hopton, 'the prescriptions of the constitution, or any other positive law, are based on certain accepted norms indicating what the rule ought to be'.[109] In that case, the Grundnorm 'lies outside of these laws and their norms'.[110] Thus, it is not another positive law but a presupposition that is configured as a legal theory. That is the reason

104 T.A. Aguda, 'The Nigerian Grundnorm: A critical Appraisal' paper presented at the Annual Conference of the NBA in 1989 at 22.
105 Kelsen, *op.cit.*, note 1 at 62.
106 *Ibid.*
107 T.C. Hopton, 'Grundnorm and Constitution: The Legitimacy of Politics' (1978)24 *McGill Law Journal* 72 at 82.
108 Hans Kelsen, 'The Concept of the Legal Order' (1982)27(1) *American Journal of Jurisprudence*, 64 at 67.
109 Hopton, *op cit.*, note 107 at 82 .
110 *Ibid.*

why Kelsen argued that if at all it will be likened to the constitution, it should be that of 'constitution in the juridical-logical sense' and not 'the constitution of the positive law'.[111]

8. Critique of the Pure Theory of Law

The pure theory of law has been subjected to some of the fiercest criticisms from many scholars and jurists all over the world to the extent that some even doubted its propriety as a valuable construct. Freeman argues that its grundnorm hypothesis offers nothing new to countries where there are stable democracies, although he admitted that 'it can be…a useful guide in countries torn by revolution or other upheaval'.[112] Ironically, the theory is also not universally accepted in those countries affected by revolutions. For example, an attempt by the then Attorney General of Ghana to explain the effect of a successful revolution on the legal system of Ghana using the theory of revolution postulated by pure theory of law was rebuffed by the Court of Appeal sitting as the Supreme Court in Ghana.

In *Sallah v. Attorney General,*[113] the major issue for determination was the legal consequence of the suspension of the 1960 Republican Constitution of Ghana by the National Liberation Council (NLC). A brief background of the case will be relevant for its understanding. The first coup d'état occurred in Ghana on February 24, 1966, when the government of ex-President Kwame Nkrumah was toppled. Consequently, a military government assumed power thereafter under the auspices of a body called the NLC. As usual, the NLC suspended the 1960 Republican Constitution of Ghana.[114] The NLC comprises of members of the security agencies, which include the Ghanaian Army and the Police Service, governed the country between 1966 and 1969. During

111 Hans Kelsen, *op cit*, note 108 at 68.
112 M.D.A. Freeman *Introduction to Jurisprudence* (2008, Sweet & Maxwell) 317.
113 [1970] CC 55.
114 On this coup, see, William Burnett Harvey 'Post-Nkrumah Ghana: The Legal Profile of a Coup' (1966) *Wisconsin Law Review* 1096-1112.

this period, they began a democratic process in the country which culminated into a new civilian era in the country. Elections were conducted and a new government headed by Prime Minister Kofi Abrefa Busia emerged under a new 1969 Second Republican Constitution.

It is also important to explain in brief the facts of the case. Mr E.K. Sallah was appointed as Manager in the Ghana National Trading Corporation (GNTC) in October 1967. The GNTC was a body corporate under the relevant law in Ghana.[115] On 21 February, 1970, the appointment of Mr Sallah as Manager of GNTC was terminated when he received a letter from the Presidential Commission terminating it. The Presidential Commission relied on section 9(1) of the Transitional Provisions of the 1969 Constitution in terminating his appointment.[116] However, Mr Salah contended that the termination was unlawful and unconstitutional because his office did not fall within any of the categories of offices contained in section 9(1) as established by the NLC. He therefore, brought an action in the Supreme Court for a declaration to the effect that on a true and proper interpretation of section 9(1), the government was not entitled to terminate his appointment.

There is no doubt that the literal interpretation of the said provisions supports the submission of the plaintiff but Attorney-General advances Kelsen's pure theory of law on the legal effect of revolutions and coups d'état on the existing

115 It was originally established as a state trading corporation in 1961 pursuant to Executive Instrument 203 that was issued under the authority of the Statutory Corporations Act 41 of 1961. In 1964, a new Statutory Corporations Act 232 was enacted, and a new Legislative Instrument (LI 395) was made, continuing the existence of the GNTC as a body corporate.

116 S9 (1) of the Ghanaian Republican Constitution (Transitional Provisions) provides 'Subject to provisions of this section, and save as otherwise provided in this Constitution, every person who immediately before the coming into force of this Constitution held or was acting in any office established (a) by or in pursuance of the Proclamation for the constitution of a National Liberation Council for the administration of Ghana and for other matters connected therewith dated the twenty-sixth day of February, 1966, or (b) in pursuance of a Decree of the National Liberation Council, or (c) by or under the Authority of that Council, shall, as far as is consistent with the provisions of this Constitution, be deemed to have been appointed as from the coming into force of this Constitution to hold or to act in the equivalent office under this Constitution for a period of six months from the date of such commencement, unless before or on the expiration of that date, any such person shall have been appointed by the appropriate appointing authority to hold or to act in that office or some other office."

legal system in his argument in order to support his[117] plea that the word 'establish' in section 9(1) should be given a 'technical' and not literal meaning.[118] This, he argues, is necessary because of the pure theory of law. He submits that February 1966 coup d'état which led to the suspension of the 1960 Constitution had destroyed the existing legal order. Consequently, the enabling Act that established the GNTC should also 'be regarded as having lapsed'. Thus, it was no longer valid and it 'only regained its validity' from the Proclamation of February 26, 1966.[119]

As noted earlier, the Supreme Court was not persuaded by this jurisprudential analysis. Most of the judges were of the view that the pure theory of law had no relevance to legal system in Ghana and that applying it to interpret indigenous statutes or constitutions will frustrate the will or intention of the draftsmen. In contrast, they opined that the will or intention of the draftsmen must not be sacrificed at the altar of jurisprudence. As a result, most of them eschewed a discussion on merit of this jurisprudential analysis and held that the appointment of Mr Salah was unlawfully terminated.

Apart from the aversion to the foreign origin of the pure theory of law and the view of some judges in *Salah's case* that it has no relevance to Ghana, one critical remark that emerged also from the case against the pure theory of law was the view that after a successful revolution, the existing legal order was totally replaced with the new order to the extent that the old legal order was no longer valid. Date-Bah disagrees with this view, when he argues that 'it is much to be doubted whether practical lawyers who actually operate legal systems are likely to be persuaded that when there is a coup d'état and their country's constitution is abrogated without any new one being immediately substituted for it, all the pre-existing laws are no longer of any

117 This is the viewpoints of Apaloo J.A. and Sowah J.A.
118 Date-Bah, S.K., "Jurisprudence's Day in Court in Ghana" (1971) *International and Comparative Law Quarterly* 315 at 317.
119 *Ibid.*

validity'.[120] He argues further that 'social desirability seems, therefore, to lead to the conclusion that certain rules in a legal system ought to survive the destruction of the Grundnorm of that legal system'.[121] There is no doubt that he is correct but a clear understanding of pure theory of law as it has been explained in this paper will show that it aims at attaining purity by separating law from moral and this makes it to eschew sociological and psychological considerations. The consequence of that omission is that such a result cannot be avoided.

Be that as it may, another problem with the issue of purity is that it has been 'completely discredited' by scholars.[122] Two reasons have been advanced for this criticism. One, is that 'the content of the law cannot be established without regard to the actions and intentions of legal institutions, be they legislative or adjudicative' and the second is that the 'law and its significance cannot be appreciated unless one studies it in its social context, with an emphasis on its actual effects in practice'.[123] As noted earlier, the reason also for this problem has been attributed to the objective of the pure theory of law for purity. On this, Graham Hughes argues that 'Kelsen's quest for unity and symmetry in our knowledge of rule systems leads him into a position with respect to the relationship between law and morals that seems difficult to sustain.[124] Similarly, Elegido accords same reason for this problem when he notes that if pure theory of law is applied to Nigeria most fundamental facts in the history of Nigeria which include the independence of Nigeria will be jettisoned in order to arrive at a single legal system.[125]

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120 *Ibid* at 322-323.

121 *Ibid* at 323.

122 On this, see, Joseph Raz, 'The Purity of the Pure Theory' (1981) 35 *Revue Internationale de Philosophie* 441-459.

123 *Ibid* at 442.

124 Graham Hughes, 'Validity and the basic norm' (1971) 59 *California Law Review* 695 at 713.

125 See Elegido, *op cit,* note 94 at 93. He noted that 'The reason is that the "purity" of his theory forbids him from looking at facts like the political independence of Nigeria since 1960 and the conviction of Nigerian judges from that date that they were not any more under a duty to obey the new enactments of the British Parliament. These are political and psychological facts, but it is absolutely necessary to make reference to them for something as elementary as distinguishing the Nigerian legal system from that of the U.K'.

Another criticism against the pure theory of law is that it fails to provide a universal test that can be used to establish the validity of the norms of all legal systems in the world. It reliance on the first original constitution to achieve this aim has been faulted by Honore who argues that it is difficult to ascertain the legitimacy of the framers of the first constitution. He notes that 'we cannot discover or even sensibly enquire how its framers came to have the right to frame it'.[126]

The implication of Honore's argument is that the validity of the grundnorm its self is questionable. On this, Graham Hughes seems to concur when he argues that 'Kelsen's doctrine of the validity of the basic norm ... has occasioned more doubt than any other part of the pure theory'.[127] In addition, tracing validity of a norm to the basic norm maybe justified if the same condition persists. If not, the exercise might end in limbo. In sum, the problem associated with the issue of validity of the basic norm and its efficacy are so endemic that even 'if, we were to grant or presuppose the validity of the grundnorm, it would still not follow that the ordinary legal norms in force today are valid norms'.[128]

9. Conclusion

This chapter has explained the jurisprudence of pure theory of law. One is fascinated by the rigorous attempts made by Kelsen to distinguish pure theory of law from positive law and to carve a different identity for it in the corpus of jurisprudence. No doubt, this work has done justice to the theory by explaining what it means, how it works through its salient points, how the

126 Tony Honore, *Making Law Bind* (Oxford, 1987) 103. He noted that 'the original constitution of virtually every country was invalid. It was made by people who were not entitled to rule. They seized power by conquest, usurpation or revolution. In Britain, for example, the "original constitution" was made by William of Orange who did not have a good claim to the throne and whose Parliament was not a lawful Parliament. It is only if Might is invariably Right that it can .appear plausible to suppose that the framers of the original constitution were entitled to engage in constitution-making'.

127 Graham Hughes, *op. cit.*, note 123 at 713.

128 Elegido, *op. cit.*, note 94 at 93.

courts have construed it and how the critics have perceived it. It is unfair to denounce the theory as fable with no valuable impacts to the world or to limit its contribution to certain continents where coup d'états are common as means to change government. Stable democratic government or not, the fact is that the theory has something, no matters how minute, to contribute to the legal system of every nation. Kelsen's analysis of hierarchy of norms is awesome. Similarly, his 'ought' hypotheses are scientific and illuminating. They are aimed to profound answer to difficult question of how legal system works.

However, pure theory of law, like other theories, is not a perfect construct. Apart from his exaggerated view of purity of law, Kelsen does not pretend the pure theory of law is infallible as he attempts to refine the theory until his death. Consequently, some of the criticisms against the pure theory of law have been discussed in this chapter. In spite of these criticisms, however, the whole world is enriched with the conception of pure theory of law than if it had not been conceived. The latter could have caused a vacuum in the world of jurisprudence which could have been difficult to fill.