THE GRUNDNORM AND THE CONSTITUTION: IS THERE A NIGERIAN CONCEPT OF THE GRUNDNORM?

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Abstract

Traditional constitutional theory holds that the constitution is the foundational law of every legal system, the ultimate source of legality of all other laws, institution, offices and actions in every state. When Hans Kelsen propounded his pure theory of law, he was not unmindful of this basic constitutional creed, and neither did he dispute it. He however posited that every legal system consists of a hierarchy of norms at the apex of which is the grundnorm. Over the years, legal scholars had commented on Kelsen's theory of the grundnorm. These comments had been influenced by the respective commentator's understanding of Kelsen's postulation. Particularly in the Nigerian firmament, various eminent jurists and academics had made various divergent comments on the signification of the grundnorm, even though each claimed to be applying Kelsen's theory. Similarly, judges at the top echelon of Nigeria's judicial architecture

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had presumed to pronounce 'authoritatively' on the concept of the grundnorm. Quite worrisome is the fact that these pronouncements do not tally with Kelsen's enunciation of the concept of the grundnorm. This paper therefore proceeded to examine various divergent views in juxtaposition with Kelsen's original theory. In the course of this work, it became glaring to the writers that misconceptions of this theory appears to be prevalent in Nigeria unlike with authorities from outside our shores, thus leading one to wonder whether Nigerians had, consciously or unconsciously embarked on a re-formulation of Kelsen's theory or otherwise adopted a peculiarly Nigerian concept of the grundnorm? Ultimately, the paper canvasses the view that the only correct signification of the concept of the grundnorm is that assigned to it by Hans Kelsen, the originator of the concept.

Key words: Grundnorm, Constitution, Nigerian Concept of grundnorm.

1. Introduction

A discernible trend which has provided much perturbation to the present writer and which should be of concern to perspicacious observers of socio-legal developments in Nigeria is the proclivity of Nigerians to assign peculiar connotation to hitherto settled concepts and to thereby introduce confusion of thought. One such case is the expression

"doctrine of necessity" as was applied by the Nigerian Senate in the constitutional imbroglio that emanated from the health challenge of then President, Umaru Musa Yar'dua. Nigerians from all walks of life, thanks to the Senate, now know about the doctrine, but unfortunately, it is a distorted knowledge.[1] Another is the term "republic. Nigerians now count a "fourth republic" even though there was no republic between the Second Republic (1979-1983) and the current republican dispensation (1999- Date).[2] The current paper is however concerned with yet another misconception. This time, it has to do with the theory of the well-known Austrian jurist and author, Hans Kelsen, concerning the issue of the grundnorm.

This paper, presented in seven sub-heads, exposes various conception of the grundnorm pervading the Nigerian judicial firmament and evaluates them in the light of the works of Hans Kelsen and a selection of international scholars, with a view to a better appreciation of the concept. Ultimately, the paper argues that writers and commentators on the grundorm, within the shores of Nigeria or elsewhere, have an obligation to use

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1 The doctrine of necessity is traditionally a "defence for a non-constitutional act", a rationalization of an action for which no express constitutional authority exists but which is considered necessary as the only plausible course of action to avert an imminent danger to the life of the nation. Given the provisions in Sections 143 and 144 of the 1999 Constitution, there was really no need for a resort to the doctrine of necessity in the Yar'Adua case except that the relevant authorities refused to implement the constitutional provisions.

2 See e.g C. U. Okoboh, "Violation of Federalism in the Fourth Republic" [2006] (4) *Igbinedion University Law Journal*, 247.

the term in the same way as the originator of the term uses it, in order to avoid confusion of thought.

Let it be noted from the onset that this is not a general evaluation of Kelsen's theory, hence we do not feel obliged to accept or reject Kelsen's postulations nor do we expect anyone to take a position on the merit or otherwise of Kelsen's theory, rather the paper insists that whosoever takes upon himself the task of discussing Kelsen's theory of the grundnorm must demonstrate an accurate understanding of the concept, an understanding which must be in accord with Kelsen's usage of the term.

2. The Genesis of the Problem

On Thursday 31st January, 1985, at the University of Benin, the Honourable Justice Kayode Eso, then a serving Justice of the Supreme Court of Nigeria, delivered a memorial lecture in honour of the late Justice Chukwunweike Idigbe. The lecture which was delivered as part of the convocation ceremonies of the University has proved to be a memorable one indeed. Under the caption: "Is There a Nigerian Grundnorm?"[3] The erudite and highly revered judge and jurist set for himself the following questions: "Whether there is a Nigerian grundnorm *in fact*?" Whether *it does* exist;" and if it does, "Wherein does *it lie*, again, in fact?"[4]

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[3] *Nigerian Grundnorm* (Lagos: Nigerian Law Publications Ltd, 1986) 33.

[4] *Ibid*. 35

Before proceeding to answer his own questions, Eso deemed it necessary to explain the concept of the grundnorm. Says he: "…it would be right, I think especially as one would wish to adopt his interpretation of the expression, to understand Kelsen's idea of a grundnorm."[5] His Lordship defined a norm as a hypothetical proposition[6] and then proceeded to assert thus:

> Then the original norm must be all-important. The original norm, the highest factor in a hierarchy of norms, the mathematician's H.C.F.: is the "Grundnorm". The grundnorm therefore must have no rule behind it. It is the *fonsetorigo*, the final norm.[7]

He adds that "…once we get to a point where we can no longer find a higher authority, that authority, where our inquiry stops in this grand hierarchy of authorities, is the grundnorm."[8] Further down the line, he noted that constitution itself is not the grundnorm, rather, "the Grundnorm is the presupposition that the constitution ought to be obeyed".[9]

Thereafter, Justice Eso embarked on a review of various stages of Nigeria's existence from pre-colonial era, up to the then prevailing military regime. For each era, Eso would 'locate' the

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5 *Ibid*. 34

6 Not all norms are hypothetical propositions though, as Eso would later acknowledge.

7 *Ibid* 36.

8 *Ibid* 37.

9 *Ibid* 44.

grundnorm in some law or institution in the polity, such as the traditional chiefs, the Executive or the Judiciary.[10]

With all due respect, we are of the opinion that the learned jurist, who must have been a student or soul mate of Professor Holland, judging by his frequent outbursts of unexplained Latin expression,[11] fell into multiple errors. In the first place, his assertion that "… that authority, where our enquiry stops… is the Grundnorm"[12] is erroneous or deceptive. By substituting the word 'authority' for Kelsen's 'norm', His Lordship wittingly or unwittingly laid the foundation for his subsequently regarding the grundnorm as an institution or organ of government.

Besides, his work suffers from self-contradiction, or if one may paraphrase a terminology from the field of Administrative Law, the lecture has "error manifest on face of the paper." If the highest authority is the grundnorm, where is the logic in positing that the constitution is not the grundnorm only to go ahead and locate the grundnorm in the judiciary or the executive? Between each of the organs and the constitution, which one is higher? Or presumably he did not consider the

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[10] *Ibid* 39-71: This approach has been criticized for introducing a notion of "shifting" or "splitting" grundnorm. See Akinola Aguda. *The Judicial Process and the Third Republic* (Lagos: F&A Publishers Ltd, 1992) 96.

[11] See e.g Thomas Erskine Holland. *The Elements of Jurisprudence, 13th ed.* (New Delhi: Universal Law Publishing Co. Pvt Ltd, 1924 (2010 Reprint). Over 20% of the textbook appears in unexplained Latin.

[12] See foot note 9 above.

constitution to come within the ambit of 'authority'?[13] Moreover, it beats the imagination as to how an institution of government will qualify as a "hypothetical proposition."[14]

3. A Refutation of Confusion

One man who was very disturbed by Eso's postulation is another eminent jurist, the Honourable Dr. Akinola Aguda. Commenting on the issue of grundnorm, he charges that: "Some confusion has been brought into the whole issue by some of our jurists whose opinion one cannot and must not lightly throw overboard. One such jurist is the Honourable Justice Kayode Eso of the Supreme Court."[15] According to Aguda, Eso appears to have a concept of the term 'grundnorm' different from Kelsen's idea of it.[16] After reproducing relevant passages from Kelsen's words, Aguda returns to Eso and says;

> With all due respect, it is extremely difficult how any Judiciary can turn itself into the grundnorm of a legal order, unless of course 'grundnorm' is given a meaning quite different from what Kelsen gives it, which Eso was entitled to do.[17]

We submit that Aguda was justifiably worried about Eso's postulation. However, we do not agree that Eso was entitled to

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[13] This lends credence to our suspicion that he deliberately used "authority" in the context of "institution or agency".

[14] Kayode Eso, *Nigerian Grundnorm*, Ibid. 35 see foot note 7 above.

[15] Akinola Aguda *The Judicial Process and the Third Republic* (Lagos: F&A Publisher Ltd (1992).

[16] *Ibid.*

[17] *Ibid.*92

assign a meaning to the term 'grundnorm' different from the one Kelsen gives it. Concerning Aguda's final submission on the issue, it is a matter for regret that he eventually fell into similar errors as Eso had done, specifically the errors of self-contradiction and of assigning a meaning to the 'grundnorm' other than that which Kelsen gives it.

He quotes Kelsen copiously because he wants "Kelsen to speak for himself", since Aguda did not want to fall into the class of the many who had misunderstood and misapplied Kelsen's theory.[18] Among the passages from Kelsen that Aguda reproduced is the following:

> Ultimately we reach some constitution which is the first historically and that was laid down by an individual usurper or by some kind of assembly. The validity of this first constitution is the last presupposition, the final Postulate upon which the validity of all other norms in our legal order depends… That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order.[19]

In spite of the foregoing, Aguda still concludes that "Surely, if one were faithful to Kelsen's analysis, the undisputable grundnorm of the Nigerian legal order is the constitution and

[18] *Ibid*. 86
[19] *Ibid*. 85

nothing else."[20] What a way to be faithful to Kelsen's analysis indeed! As if that were not enough, Aguda posited that the grundnorm of the Nigerian legal order was the 1979 Constitution as modified by Decree No. 1 of 1984 and some other decrees of the Armed Forces Ruling Council (AFRC) from time to time, which effectively amend the Constitution. This, to us, appears to be another case of "shifting grundnorm."[21] If this were correct, what was the point in trying to locate the historically first constitution? Is the 1979 Constitution Nigeria's historically first constitution? Besides, Aguda overlooked the legal implication of the military takeover of government on 31st December, 1983 and the Babangida Coup of 27th August 1985. Is it not precisely because these amounted to legal revolutions that the military governments appropriated the power to amend and modify the constitution? Recall that Kelsen specifically dealt with the impact of revolutions on the grundnorm.[22] If the 1979 Constitution was ever the grundnorm, it could not have remained so after it had been effectively overthrown from its pole position by the military. On the strength of these considerations, we are constrained to conclude that Aguda, like Eso, had decided to give the term "grundnorm" a meaning different from the one Kelsen gives it.

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[20] *Ibid*. 93

[21] AbiolaOjo, *Constitutional Law and the Military Rule in Nigeria*. (Ibadan: Evans Brothers Ltd, 1987) 109-110. Perhaps a "drifting grundnorm" would better qualify Aguda's position.

[22] Hans. Kelsen, *General Theory of Law and State* (Havard: Havard University Press, 1946) 118-119. Cited in MDA Freeman, *Lloyd's Introduction to Jurisprudence 8thedn* [London: Sweet & Maxwell, 2008] 337-338

4. From Confusion to Controversy

Since Eso delivered his memorable lecture, several other notable scholars, apart from Aguda, have reacted to it, exhibiting varying degrees of disagreement and for a variety of reasons as well. Abiola Ojo, for instance disagreed with the idea of a shifting grundnorm within the same legal order. For him, judicial decisions are merely norms within a hierarchy of norms, but can never be the basic norm. Since Nigeria was then under military rule, he concluded that to search for the grundnorm outside the Supreme Military Council, or the expression of its power as declared in decrees, was an exercise in futility.[23]

Also disagreeing with Justice Eso, Owolabi pointed out that to equate the grundnorm with the authority of any of the three arm of government would violate the principle of constitutional supremacy.[24]

Some other commentators have towed the path of Abiola Ojo in associating the grundnorm with the constitution. Thus for Niki Tobi, it consisted of the Constitution (Suspension and Modification) Decree No. 17 of 1985, the unsuspended

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[23] Abiola Ojo. *Loc. Cit.*

[24] A. A. Owolabi, "The Search for Nigerian Grundnorm" cited in T. F. Yerima, "Searching for Grundnorm of the Nigeria Legal Order; Re-appraising the Divergent Views" [2006] (1)(2) Ahmadu Bello University Journal of Private and Comparative Law 157.

provisions of the 1979 Constitution and any other decree which directly relates to the total package.[25]

Ameze Guobadia adopts a different approach. For this amazon of Nigeria's juridical firmament, the grundnorm "may be found in the constitution." Relying as it were on Section 14(2) of the 1979 Constitution, she associated the grundnorm with the concept of sovereignty and came to the conclusion that in the prevailing military setting, sovereignty was vested in Armed Forces Ruling Council (AFRC) while in a civilian setting it vested in the general will of the people and not in the constitution.[26]

Guobadia may be right in her ascription of sovereignty, but her association of sovereignty with grundnorm raises an issue. The AFRC is the military equivalent of a Presidency-cum-Parliament combination in the civilian dispensation, so why should sovereignty lie in the AFRC in a military dispensation? Presumably, a military oligarchy could be likened of an absolute monarch in Austinian command theory. If this is the case then, Guobadia is correct in her treating the military era different from the civilian era, but then she would be wrong in equating sovereignty with the grundnorm for that would be contrary to Kelsen's theory, unless Guobadia intended to present a concept of the grundnorm different from Kelsen's. If that were her intention, she should have spelt it out clearly.

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[25] Niki Tobi, "The Legislative Competence of the Armed Forces Ruling Council" [1990](1)(4) Justice, 40 cited in Yerima, Op.cit.

[26] "Is the Grundnorm Elusive in Nigeria Jurisprudence?" cited in Yerima, op.cit.

It is perhaps relevant at this juncture to note that, in obvious response to his critics, Kayode Eso in a later forum wrote: "In so far [sic] as Kelsen's grundnorm is concerned, the grundnorm in a written constitution is not the parliament (the law giver), not even the constitution, but it is **that the constitution ought to be obeyed**" [emphasis mine].[27] Again, like Guobadia, he treats the military era differently, but however insists that "our search for the grundnorm lies outside the AFRC or its decrees (which is Austinian positivism)"[28]

Itse Sagay, who as Dean of Law, hosted the now controversial Lecture by Kayode Eso, in his contribution to the raging debate also relied on Section 14 (2) of the 1979 Constitution and came to the conclusion that:

> It is quite clear that the grundnorm of Nigeria is the consent or will of the people. This may be expressly or impliedly manifested. In this regard the constitution is merely a manifestation of this will or consent at any particular point in time… and such a manifestation will therefore change as the general will of the people determine.[29]

Sagay's view, which ensures that the grundnorm remains unchanged as the will of the people at all times, regardless of

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[27] Kayode Eso, "The Nigerian Grundnorm – A Critical Appraisal" (1990) (1) (2) Justice, 40.

[28] *Ibid*. The AFRC is the legal successor of the SMC of Abiola Ojo's submission. See footnote 23 above.

[29] Itse Sagay, "The Authority – An Insight into the Nigerian Legal and Political Order" (1999) Liberty 25.

whether under military regime or civilian dispensation, receives the full endorsement of another scholar, Timothy Yerima.[30] In the concluding part of his essay on the issue, Yerima asserts that most, if not all, Nigerian scholars had reached a common ground to wit: "That the general will or the common will or the consent of the people is the grundnorm of the Nigerian legal order.[31] He therefore recommended that "we better accept the general will or the common will of the people as the grundnorm of the Nigeria legal order both under past military and civilian administrations and the present Nigeria's fledgling democracy".[32]

But really? Is there really a consensus among Nigerian scholars? And if there is such a consensus, is it in conformity with Kelsen's theory? Or have Nigerian scholars, by consensus, conceptualized the grundnorm to the exclusion of its creator? Curiously enough, each of them claim to base his or her submissions on the theory of Hans Kelsen.

In addressing the foregoing questions, we submit that whatever consensus there is exists only in the mind of Yerima. A consensus that 'conveniently' excluded the views of Professor Abiola Ojo, Honourable Justice Dr. Akinola Aguda and Justice Niki Tobi, all of whom Yerima considered in his article? What of the following submission from some other Nigerian scholars:

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30 T. F. Yerima. Op. Cit See footnote 24.

31 *Ibid*. 178.

32 *Ibid*.

> "…the constitution which was adopted by the Nigerian people as their Supreme Law, Basic Law or Grundnorm…" [33]
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> In a military government the organic, fundamental Supreme Law or grundnorm of Nigeria is:
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> (i) The Constitution (Suspension and Modification) Decree;
> (ii) Any Decree amending; and
> (iii) Unsuspended sections of the Constitution of the Federal Republic of Nigeria.[34]

With all due respect, Yerima's "consensus among Nigerian scholars" does not exist in reality.[35] Moreover, the presumption of "the will of the people" in favour of every constitution, however and by whosoever established, is dubious or at best debatable. Guobodia, having recounted the process that led to the emergence of successive Nigeria constitutions, remarked as follows: "This state of affairs has been known to engender a feeling of alienation from the

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[33] Ebere Osieke, "The Role of the Military in Governance and Development" (41st Annual Conference of Nigerian Association of Law Teachers, Faculty of Law, University of Jos, June 2005). Also, see Chris C. Wigwe, *Jurisprudence and Legal Theory* (Accra: Readwide Publishers, 2011) 179 for a similar view.

[34`] Ese Malami: *The Nigeria Constitutional Law* (Lagos: Princeton Publishing Co., 2006) 63.

[35] It appears as if Yerima was anxious to have the last word on the debate and foreclose further intervention, hence he rushed to "find" a consensus where none existed.

constitution as demonstrated by flagrant disregard of constitutional provisions, the insincere manipulations of the letters as well as the outright abuses of the spirit of the three constitutions of 1960, 1963 and 1979."[36]

5. Misguided Judicial Pronouncements

There is yet another angle to the controversy. Our courts have on a number of occasions made declaratory statements concerning the grundnorm. Two instances will suffice for our present discourse; viz

> In so far as the Government of Nigeria is still under military rule, by virtue of Decree No. 1 of 1984 (the enabling Decree) the Grundnorm or the organic law in Nigeria are:
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> (a) Decree No. 1 of 1984 or any Decree
> (b) Unsuspended provisions of the 1979 Constitution."[37]
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> The Constitution being the organic law, the grundnorm and the Supreme Law of the land may restrict the operation of this principle of separation of powers.[38]

Judicial pronouncements such as above have often been relied upon as authority for the assertion that "the constitution is the

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[36] Amaeze Guobadia, Nigeria: *The Legal Dynamics of Her Constitutional Development* (Lagos: Nigerian Institute of Advanced Legal Studies, 1994) 5.

[37] *Military Government of Ondo State v Adegoke Adewumi* (1988) 3NWLR (pt. 82) 55.

[38] *Attorney-General of Abia State & 34 Ors v. Attorney-General of the Federation* (2003) 1 SC (pt.II) 1, 62

grundnorm". However those who rely on such pronouncement fail to consider whether the statement was a necessary or material part of the judgement in the case, in other words, whether it was, or formed part of the *ratio decidendi* of the case or was merely an *orbiter dictum*.[39] In the latter case of *Attorney-General of Abia State & 35 Ors v. Attorney-General of the Federation,* the statement was not part of the *ratio* as it did not feature in the lead judgment. Moreover, of the seven justices who sat over the case, only Igu JSC mentioned 'grundnorm' in his opinion.

More fundamentally however even if all seven justices in a case decide or purport to decide that the constitution is the grundnorm, such decision would still amount to *orbiter* or, worse still, be of no legal significance. The point here is that the issue of what is the grundnorm of the Nigerian legal order is not a justiciable issue. It is not a type of question which a court is competent to decide because the issue can never properly arise in any judicial inquiry. It can never be the basis for determining the rights and obligations of litigants. Courts are established to adjudicate and pronounce on law and facts: the grundnorm is neither law nor fact; it is an extra-legal presupposition or hypothesis,[40] a contrivance of Kelsen's mental fecundity. Courts do not entertain academic or

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[39] On *ratio decidendi*, see OsitaNnamaniOgbu, *Modern Nigerian Legal System 3rd ed*. (Enugu: SNAAP Press Ltd 2013) 140-1560.

[40] Hans Kelson, "Professor Stone and the Pure Theory of Law" (1965) (17) *Stanford Law Review* 1128: M.D.A. Freeman, *Lloyd's Introduction to Jurisprudences* 8thed (London: Sweet & Maxwell, 2008) 309.

hypothetical questions:[41] an inquiry into the grundnorm is a purely academic exercise.[42] Courts function to uphold the supremacy of the constitution not to question its validity: the sole function of the grundnorm is to validate, or rationalize the validity of the constitution.[43]

While it is competent for judges, whether serving or retired, to make extra-judicial statement as part of a scholarly discourse generally, it is erroneous for a judge sitting in judicial capacity to purport to determine what is, or is not the grundnorm. To do so is to unwittingly put the validity of the constitution from which the court draws its authority in issue, and no court is competent to do so.[44]

6. Setting the Record Straight About the Grundnorm

Thus, far, our reference to Kelsen has been mostly as reproduced by scholars and jurists whose work we have considered. Thus is to underscore the fact that those writers had Kelsen's work with them, which makes it all the more perplexing how and why they got it wrong. Could the problem be that Kelsen is a philosopher with a profound faculty for

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41 B. O. Nwabueze, *The President Constitution of Nigeria* (London: C. Hurst & Co., 1982) 315-316; *Maryland Casualty Co. v. Pacific Coal & Oil Co.* 312 US 270 (1941)

42 J. M. Eledigo, *Jurisprudence* (Ibadan: Spectrum Law Publishing, 1994 (2004 reprint) 92.

43 Freeman, *Op cit* 336; Kristna Cufar, "How Does The Grundnorm Fare? Towards a Theory Less Pure" http//Cadmus.eui.eu/handle1814/59113 access 25 April 2020 at 2.50pm

44 For a court to embark on such enquiry would either result in self-annihilation or being caught up in the n*emojudex* rule.

abstract cogitation while those scholars and jurists approached his theory with a pragmatic mindset, seeking to reduce the grundnorm to a tangible or palpable object?

In the remainder of this section, we attempt to present a better understanding of Kelsen's theory on the grundnorm.

Kelsen visualizes the legal order as consisting a hierarchy of norms, each norm deriving validity from another norm directly above it. Using the execution of a condemned criminal as an example, he explains that executioner's action would be described as legally valid because there is a legal norm that the execution ought to be performed. This in turn would rest on the another legal norm that the judge who determined the case ought to hand down such sentence, and so on until we reach the level of the constitution under which the law that the judge applied in the case was made. Hence,

> If we ask the reason for the validity of the constitution… we may perhaps, discover an older constitution: that means the validity of the older constitution; that means the validity of the existing constitution is justified by the fact that it was created according to the rules of an earlier constitution by way of a constitutional amendment in this way we eventually arrive at a historically first constitution that cannot have been created in this way and whose validity therefore, cannot be traced back to a positive norm created by a legal authority; we arrive, instead, at a constitution that became valid in a

> revolutionary way, that is, either by breach of a former constitution or for a territory that formerly was not the sphere of validity of a constitution and of a national legal order based on it… if we ask for the reason for the validity of the historically first constitution, then the answer must be (if we leave aside God or "nature") that the validity of this constitution – the assumption that it is a binding norm – must be presupposed if we want to interpret (1) the acts performed according to it as the creation or application of valid general legal norms…[45]

He therefore insists that, to understand the nature of the grundnorm, one needs to bear in mind that it refers: (a) directly to a specific constitution that had been created by custom or statutory fiat, and (b) indirectly to the coercive order created in accordance with that constitution. He explains that it is the grundnorm that furnishes the rationale for the validity of both the constitution and the coercive order founded on it. This grundnorm is not the product of' free invention' nor is it an arbitrary presupposition, rather it is a presupposition "that one ought to behave according to this specific constitution"[46]

In the light of the foregoing, we venture to posit some clarifications on the subject under discussion. Firstly, the grundnorm is not the constitution. A misunderstanding on this

[45] Kelsen, *Pure Theory of Law* (1967) referred to in Freeman *op. cit 341- 346*
[46] *ibid*. Kelsen actually used the phrase "basic norm" in the passage.

score had already begun during Kelsen's life time, hence he clarified that:

> I have always … clearly distinguished between the basic norm presupposed in juristic thinking as the constitution in a legal-logical sense [the grundnorm] and the constitution in a positive legal sense [the actual constitution], and I have always insisted that the basic norm… is not a norm of positive law, that is, not a norm… created by a real act of will of a legal organ, **but a norm presupposed in juristic thinking**.[47]

Similarly, the grundnorm cannot be a decree, or a combination of decrees and the constitution.[48]

The grundnorm is not the Judiciary, nor the Executive, nor the Legislature nor the AFRC nor any institution or combination of institutions created under the constitution.[49]

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47 Kelsen, *op. cit*. see footnote 41: R.W.M. Dias *Jurisprudence* 4th ed (London: Butterwords, 1976) 500

48 Such would qualify as the constitutional framework of a military regime. See Elegido, Ibid. 90

49 J. G. Riddall, *Jurisprudence* (London: Butterworths, 1991 (1995 reprint) 109.

The grundnorm is not a positive law;[50] it is a metal-legal, transcendental, hypothetical presupposition,[51] but the constitution is a positive law, a legal instrument which depends for it validity on the grundnorm.[52]

The grundnorm is not the general will or common will of the people.[53]Kelsen disapproves of this line of reasoning hence he writes that the doctrine of the grundnorm is not a doctrine of recognition as is sometimes erroneously believed.[54]

A grundnorm cannot be amended or revised: it either stands or fails. A grundnorm is valid because it establishes a legal order that is effective. Once the legal order it establishes loses its efficacy, the grundnorm becomes moribund, dies off, or is

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50 "Only a nonpositive law can be the ultimate norm of a legal system, only it does not presuppose another norm from which it drives its normativity. The nonpositive law is the basic norm." Joseph Raz, "Kelsen's Theory of the Basic Norm" https//academic.oup.com/ajj/article-pdf/19/1/94/6653260/ajj-19-94.pdf, accessed 25 April 2020 at 10.26am; Andrei Mamor. "The Pure Theory of Law" *The Standford Encyclopedia of Philosophy* (Spring edn, 2016) <https://plato.standord.edu/archives/ spr2016/entries/ lawphil-Theory> Accessed 25 April 2020 at 4.10pm

51 Hans Kelsen, "The Pure Theory of Law "in Freeman, *Lloyds Introduction to Jurisprudence* 346 also see Annesha Kar Gupta, "Grundnorm of Kelsen" https://www-researchgate.net/publication/337402676. accessed 25 April 2020 at 3.30pm.

52 Joseph Raz "Kelsen's Theory of the Basic Norm": https://academic-oup..com/ajj/article-pdft/19/19/1/94/6653260/ajj-19-94,pdf, accessed 25 April 2020 at 10.25am.

53 Mridishi Swarup "Kelsen's Theory of Grundnorm" https://scholar google.com/scholar? Access 25 April 2020 at 3.30pm

54 Joseph Raz op. cit.

superseded by a new grundnorm which ushers in a new legal order.[55]
The grundnorm is not an arbitrary presupposition. It must be a presupposition based on the facts or circumstances culminating in the establishment of the legal order.[56]

The grundnorm is a norm hierarchically 'located' above the constitution.[57] Where the extant constitution is not the historically first constitution, the theory requires that the chain of authority be traced back to the historically first constitution, or failing that, to a revolutionary break in the link, since a revolution establishes a new grundnorm.[58]

The grundnorm is a proposition, not fact or set of facts, but a presupposition informed by a fact or facts relative to the historically first constitution or post-revolutionary constitution.[59]

The grundnorm is always an "ought proposition".[60] This salient point seems to have eluded most Nigerian commentators. Of all those referred to in this work, Eso,[61] Adaramola[62] and

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55 Hans Kelsen *General Theory of Law and State* (1946) in Freeman, op. cit. 337.

56 Kelsen, *The Formation of a Constitution* [1986] in Freeman, op. cit 337

57 *Ibid*, Swarup, *op. cit*, Funso Adaramola, *Jurisprudence 4thed* (Durban, S. A: Lexis Nexis Butterwords, 2008) 131

58 Kelsen, *General Theory of Law and State*, in Freeman, op. cit 337.

59 *Ibid*. 336

60 *Ibid*.

61 "Is There a Nigeria Grundnorm?" 44

62 *Op. cit*. 129

Elegido[63] made reference to it. However, Adaramola's formulation suffers from the defect of being anchored on the will of the people. Elegido's formulation of the grundnorm is preferable, especially bearing in mind that 1999 Constitution was promulgated into existence by Decree No. 24 of 1998.

The grundnorm is also known as the basic norm.[64] In ordinary parlance we usually refer to the constitution as the basic law.[65] Many commentators proceed into error by indiscriminately inter-changing "basic norm" with "basic law" as if they mean the same thing. This is wrong, '*unKelsenic'* and a recipe for confusion and misconception.

A survey of Kelsen's works indicates that he used the word "constitution" in four different contexts, hence:

(a) Constitution in the legal-logical sense. This is the initial hypothesis, "presupposed in juristic thinking", which validates the historically first constitution. The ascription of 'constitution' and 'legal' to it is by virtue of logical deduction.[66]

(b) Constitution in the positive legal sense is the instrument or framework that establishes the organs of

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[63] *Op. cit*. 92 "One ought to behave as the decrees enacted by the AFRC formed after the August 27, 1985 Coup prescribed".

[64] 'Grundnorm' is not an English word whereas 'basic norm' is English. The latter should better be understood as the translation of the former

[65] It is illuminating to note that the official designation of the Constitution of Germany is "German Basic Law"

[66] Kelsen, "Professor Stone and the Pure Theory of Law" (1965) Freeman, *Lloyds Introduction to Jurisprudence 8th ed* 339-340.

government and validates or legalizes every other norm, law or institution of the legal order.[67]

(c) Constitution in the material sense is the "highest level of positive law, "the positive norms which regulate the creation of general norms. It may be written, unwritten or partly written.[68]

(d) Constitution in the formal sense is "a document called 'constitution' which, as written constitution, may contain not only norms regulating the creation of general norms (that is, legislation) but also norms concerning other politically relevant subjects…"[69]

Note that 'b', 'c' and 'd' correspond to what we generally know as constitution. In fact, 'c' and 'd' are aspects of 'b'. Kelsen however clearly declared that the grundnorm or basic norm is referable to 'a' only.[70]

7. Recommendations and Conclusion

Several leading Nigerian scholars and jurists have espoused divergent views as to the meaning of the concept, grundnorm. These divergent views generally depict a lack of proper understanding of Kelsen's theory of the grundnorm. In contrast, the foreign authorities consulted in the course of preparing this article have generally shown a better understanding of the theory. Grundnorm is a term invented or created by Hans Kelsen, hence the only legitimate meaning of the term must be the meaning assigned to it by Kelsen himself.

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67 *Ibid*.

68 Kelson, *The Pure Theory of Law* (1967) Cited in Freeman *op. cit* 348.

69 *Ibid*

70 See footnote 63 above.

Our leading scholars and eminent jurists should be more painstaking in their study and presentation of legal concepts such as the grundnorm, more so as any error on their part would most certainly mislead countless number of their audience – lawyers, students and the general public alike. By the same token, judges should refrain from pronouncing on legal concepts not material to the determination of the case before them.