An Analysis of the Supreme Court of Pakistan's Application of Kelsen's *Grundnorm* Theory to Validate Military Regimes in Pakistan

Behwal Asad Rasul[ϕ]

[ϕ] Behwal Asad Rasul is a graduate of the LL.B. (Hons) programme of the University of London International Programmes. He holds an LL.M. in Corporate Law, Commercial Law & Trade from the University of Illinois, College of Law and is currently practicing at a corporate and intellectual property law firm in Illinois, United States. This paper was authored as coursework for his LL.B. (Hons) degree. He can be reached at behwalrasul@gmail.com.

Abstract

Hans Kelsen's Pure Theory of Law is possibly one of the highest expressions of legal positivism and its impact on judicial decision making throughout the world is incalculable. This article will analyse the Supreme Court of Pakistan's use of Kelsen's grundnorm theory to provide de jure recognition to the establishment and operation of military regimes in the country. After briefly expounding Kelsen's theory, a few seminal cases will be examined to see whether the application of Kelsen's theory was in accord with the philosophical tenets of its author. It will be argued said that courts have not interpreted Kelsen consistently and they have been at variance with many lucid explanations of his theory. The wind of change which started blowing in the recent past, where an emboldened judiciary has finally begun freeing itself from the exclusive influence of foreign jurisprudential theories to fully develop the jurisprudential potential of the 1973 Constitution, will be highlighted as a welcome change in attitude of the superior Courts of Pakistan.

Introduction

Kelsen in his Pure Theory of Law used the word *grundnorm* to denote the basic norm, order, or rule that forms an underlying basis for a legal system and at the same time the foundation of the objective validity of all its rules.[1] The legal framework of a state contains legal norms connoting 'oughts'; they prescribe what people in certain situations ought to do or ought not to do. The legal norms differ from moral 'oughts' and are therefore neither limited by bounds of morality, nor found with their foundation in ethical principles.[2] As per Kelsen, a legal norm can only be validated through a higher norm. The *grundnorm*, being the highest norm, essentially validates all existing norms and hence validates the entire legal system.[3]

This article will analyse the Supreme Court of Pakistan's use of Hans Kelsen's *grundnorm* theory to provide *de jure* recognition to the establishment and operation of military regimes in the country.

After briefly expounding Kelsen's theory, a few seminal cases will be examined to see whether the application of Kelsen's theory was in accordance with the philosophical tenets of its author. It will be argued that some of Kelsen's ideas were misconstrued and therefore the results cannot be directly attributed to his theory. On the other hand, it will be claimed that one of the main reasons behind the Supreme Court's misconstruing of Kelsen is that the *grundnorm* theory presents an essential ambiguity that opens the door for multiple viable, if incorrect, interpretations and applications of it in different political contexts.

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[1] Hans Kelsen, 'General Theory of Law and State' (Anders Wedberg translation, Harvard University Press) (1945).
[2] Hans Kelsen, *Professor Stone and the Pure Theory of Law* (1965) 17(6) Stanford Law Review 1128, 1129.
[3] Kelsen (n 2) 1144.

A. Overview of the *grundnorm* theory

In the intellectual climate that has been dominating in Europe since the beginning of modernity, each science progressively claimed autonomy from the overarching control of religion that had characterized the Middle Ages.[4] In the legal domain one of the preeminent expressions of this change is called 'legal positivism',[5] whose main aim was to free legal reasoning from the constraints of moral theology and socio-political influences. Morality was perceived as bringing in elements of subjectivity and lacking objective standards of judgment, and any influence of morality on the law was more or less openly rejected by legal positivism. One of the contemporary representatives of positivism is Hans Kelsen, who in his work took the principle of independence of law from morality to new heights.[6]

One of the consequences of the separation of law and morality is that no value judgement can be passed on the means that lead to the establishment of a new legal system. It is clear from these premises that the theory may prove particularly useful in times of institutional crisis and regime change. In the event of a successful revolution it is possible for the *grundnorm* to change and give birth to a new legal order. The only condition, which logically follows from Kelsen's theory, is that this is only possible if all the laws based on the old *grundnorm* are discarded, not when just a handful are altered and the

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[4] Bernhard Callebaut, *The University in a Fragmented World. A contribution from the Sophia University Institute* (2017) 22(1-2) Journal for Perspectives of Economic, Political and Social Integration 111, 114 - where he reports a summary of Niklas Luhmann's sociological analysis of modernity in his book 'Theory of Society' (1991).

[5] One good example is Austin's construction of the law as a coercive command.

[6] Kelsen (n 2) 1128-1130.

remaining stay unchanged. According to Kelsen:

> *'if the old order ceases and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order.'*[7]

Kelsen's *grundnorm* thesis was used most prominently alongside the doctrine of necessity by judicial bodies of various countries at various times to validate revolutions in the form of coups.[8] The history of Pakistan illustrates this well. The next chapter will illustrate Supreme Court of Pakistan's use of Kelsen to validate military regimes in different moments of its history.

B. The *grundnorm* as applied by the Supreme Court of Pakistan

Pakistan has been a victim of several military coups. The Pakistani judiciary has been inconsistent and uncertain with their position regarding such military take-overs and has conveniently switched its stance from safeguarding the fundamental elements of the constitution to validating the military takeovers. Two fundamental questions arise: the first in regard to the extent of the establishment of martial laws was done against the Constitution and produced unconstitutional acts of governance. The second is more specific and

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[7] Kelsen (n 1) 118.
[8] *See e.g.*, the judgement of the Supreme Court of Rhodesia in *R v Ndhlovu*, 1968 (4) SA 515 (RAD) and the decision of the Supreme Court of Uganda in *Uganda v Commissioner of Prisons, Ex parte Matovu* [1966] EA 514.

deals with the reasons given by the Supreme Court in validating a coup. A detailed answer to the first question is beyond the scope of the present article; for the purpose of this paper, it will be simply taken for granted that the establishment of martial laws in the country was beyond constitutional legality and gave therefore rise to the need to justify the legality of the newly established regime.

1. Ayub Khan's coup

The first occurrence of the judiciary validating of a military coup was in 1958 in the case of *State v. Dosso.*[9] On 7th October 1958, President Iskander Mirza declared the 1956 constitution to be abrogated and proclaimed a coup administered by General Ayub Khan. Following this, Iskandar Mirza issued a Laws (Continuance in Force) Order,[10] subject to which the coup would govern the country. This essentially meant that the previous law was still valid, the reason being the order was declared 'before' the enforcement of the coup. However, Munir C.J. declared that in light of Kelsen's theory a successful revolution had come into being with the issuance of LCFO (new legal order). Hence, it was the current law which was to be abided by; yet, as General Ayub never abrogated the Constitution, neither could he replace one *grundnorm* by another. Following this decision the courts around the Commonwealth started using Kelsen's theories to validate coups.[11] In order to understand whether the courts have made proper use of Kelsen's theory it is absolutely necessary to give a brief summary of the famous answer Kelsen gave to Professor Julius Stone's analysis of the limitation of the Pure Theory of Law. In

[9] *The State v. Dosso and others* (1958) PLD SC 533 (Pak.).
[10] President's order no. 1 of 1958 (hereafter LCFO) Gazette Extraordinary, 10 Oct. 1958.
[11] *R v Ndhlovu* and *Ex parte Matovu* (n 8).

a famous book published in 1964,[12] Stone pointed out two main causes of the apparent aptitude of Kelsen's theoretical tenets to be used by Courts across the globe when called upon to deal with revolutionary systems' legality. The first is that Kelsen seemed to believe that the Pure Theory of Law was not just one legitimate jurisprudential theory, but the ultimate one, and that it should be used not only by those engaging in analytical jurisprudence, but also by judges and lawyers. The second is that the claimed 'purity' of Kelsen's positivistic theory provided a tool for legal analysis that was neutral to the demands of ethics and justice; consequently, the theory could usefully be employed to justify dictatorial and tyrannical regimes. In the words of Professor Stone:

'Insofar as the charge [that his theory favours totalitarianism] is an attack on his relativist approach to justice, it is a rather different matter, and probably needs no other answer than that of the pot to the kettle. Absolutism of values has historically, even down to modern totalitarianism, been at least as fertile a source of intolerance and inhumanity as even the extremest [sic] relativism.'[13]

At a deeper level Stone exposed the ambiguity of the main tenet of Kelsen's theory, the *grundnorm*. In particular he pointed out that Kelsen appears to present the *grundnorm* as an 'extra-legal' and 'intra-legal' entity at the same time, thus creating the confusing impression that if the grundnorm is 'intra-legal' then any change in the constitution of a legal system coincided with a change in the *grundnorm*.[14] This interpretation would surely explain why apex courts across the globe, when faced with the dilemmas of revolutionary legality, could find in Kelsen's theory a useful

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[12] Julius Stone, *Legal System and Lawyers' Reasoning* (Universal Law Publishing: Delhi, 2nd Reprint 2004).
[13] Julius Stone (n 12) 122.
[14] Julius Stone (n 12) 124, Question 3.

jurisprudential tool to allow victorious rebels to don the cloak of legality.

Kelsen explained, in a famous reply to professor Stone the following year,[15] that as a jurist he would simply try to convince anyone of the soundness of his theory, but that in this he was not alone, as he maintains that the purpose of any legal scholar was to influence lawyers' reasoning and judicial decision making.[16] With regard to the allegation that purity meant relativism of values, Kelsen explicitly reiterated his view that his liberal political opinions had nothing to do with the purity of his legal theory, thus offering very little refutation to his opponent's claim.[17] With regard to Stone's last allegations, Kelsen contended that his theory was misinterpreted and he never intended what the courts derived from them and he quoted one of his earlier statements:

'…the ought-propositions of the science of law describing the law do not oblige or authorize anybody to do anything.'[18]

In essence, Kelsen explained that there is a clear distinction in his whole theory between *Rechtssatz* (propositions about the law) and *Rechtsnorms* (legal norms). Only the second are prescriptive, whereas the first ones are merely descriptive.[19] Finally, clarifying the function of the *grundnorm,* Kelsen explained that it allows us to distinguish between the command of a gangster from that of a revenue officer. Both are commands backed by an effective coercive sanction, but only the second is a legal norm, because the *grundnorm* provides for its objective validity:

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[15] Hans Kelsen (n 2).
[16] Hans Kelsen (n 2) 1134.
[17] Hans Kelsen (n 2) 1135.
[18] Hans Kelsen (n 2) 1134.
[19] Hans Kelsen (n 2) 1132-35.

'The function of the basic norm is not to make it possible to consider a coercive order which is by and large effective as law, for - according to the definition presented by the Pure Theory of Law - a legal order is a coercive order by and large effective; the function of the basic norm is to make it possible to consider this coercive order as an objectively valid order.'[20]

From Professor Kelsen's explanations offered above, it is clear that the use of Kelsen made by the Supreme Court of Pakistan was at least superficial. The abrogation of the constitution (which as mentioned above had never really happened during the process of General Ayub Khan's coup[21]) does not automatically imply the birth of a new *grundnorm*. Paradoxically maybe, the Supreme Court in Dosso provided that further step of legitimation after which one could really claim that now there is a new legal system operating in the country, and therefore a new *grundnorm* could be stated to exist.

2. The Martial Law Regulation of 1971

Another landmark Supreme Court's decision dealing with the same area of law was pronounced in the Asma Jillani's case,[22] where two courageous women, Miss Asma Jilani, Mrs Zarina Gohar filed cases against the military rulers for the release of, respectively, her father and her husband under Article 98 of the Constitution of Pakistan 1962. The detention of Malik Ghulam Jilani and Althaf Gohar had been made under the Martial Law Regulation No.78 of 1971. Once again the court was called upon to decide on whether the Martial Law Regulation had superseded the 1962 Constitution, and

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[20] Hans Kelsen (n 2) 1144.
[21] This seems the most logical consequence of the LCFO (n 10)
[22] *Asma Jilani v. Government of Punjab* (1972) PLD SC 139.

the precedent laid down in Dosso weighed heavily on the bench.

The Court noted that, the legal-philosophical atmosphere where the Dosso case was decided was, as Professor Hamid Khan states:

'[one where] the doctrines of legal positivism... were such firmly and universally accepted doctrines that the whole science of modern jurisprudence rested upon them... [and it implied] that any abrupt political change not within the contemplation of the constitution constitutes a revolution, no matter how temporary or transitory the change...'[23]

However, the Supreme Court this time departed from the basic principles laid down by the *Dosso case* and took a different approach. It rejected the claim that legal positivism was a universally accepted doctrine and held that the court was under no obligation to follow it, since it was a theory like many others in jurisprudence.

This remark seemed to have opened the way for a decision based on the application of Pakistani born constitutional values and legal theories, but this did not prove to be the case.

In fact, after stating that the court was free not to follow Kelsen, the bench moved on to construe the Objectives Resolution as the *grundnorm* of Pakistan, which makes *Allah* (God) the legal sovereign and grants men the power to choose their ruler (who would take public opinion into consideration and be accountable to them while they ruled) within the boundaries defined by Allah. In the case, Yaqub Ali J. stated:

'...after a change is brought about by a revolution or coup

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[23] Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford UP) (3rd edn, 2017) 252.

d'etat the state must have a constitution and subject itself to that order… Kelsen, therefore, does not contemplate an omnipotent President or Chief Martial Law Administrator sitting high above society and handling his behests downwards.'

It is suggested that the view of Yaqub Ali J. reflects Kelsen's theory more accurately than the position held in Dosso, insofar as it mirrors Kelsen's claim that the subjective meaning of the act of command, even if backed by coercively effective sanctions (as in the case of the acts of a Chief Martial Law Administrator), can only find its objective validity thorough the 'ought' provision given by the *grundnorm*. Having identified the commands of Allah laid down in the Objectives Resolution as the implicit limitations of any command emanating from the authority, it is clear that the Chief Martial Law Administrator was also bound by them, if his acts were to have any objective validity in Kelsenian terms. This case shows that the Supreme Court had evolved in its understanding of the *grundnorm* doctrine, and it gave a new dimension to the doctrine of necessity.

After the case, Pakistan moved out of military rule and a new Constitution was enacted in 1973.[24] Before considering the next Supreme Court's case, it is essential to examine the articles of the Constitution of 1973 to see how far they go against martial laws.

3. Provisions against the establishment of military regimes in the Constitution of 1973

Under Article 244, every member of the Armed Forces takes an oath[25] that

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[24] Constitution of the Islamic Republic of Pakistan 1973.
[25] Constitution 1973 (n 24) sch 3.

'I will bear true faith and allegiance to Pakistan and uphold the constitution of the Islamic Republic of Pakistan which embodies the will of the people, I will not engage myself in any political activity whatsoever'.

Whereas, Article 245 highlights the functions of Armed Forces, that they defend Pakistan against external aggression or threat of war, under the directions of the Federal Government. Article 190 states that, all executive and judicial authorities throughout Pakistan shall act in aid of Supreme Court (not vice versa). Moreover, Article 232 deals with Proclamation of Emergency on account of war, internal disturbance etc., where Clause 1 elaborates it by stating that:

'if the President (and not the Army chief) is satisfied that a grave emergency exists in which, the security of Pakistan, or any part thereof is threatened by war or external aggression or by internal disturbance, beyond the power of a provincial Government to control, he may issue a proclamation of emergency' (note that the word emergency is used and not martial law).

Furthermore, Article 237 deals with Parliament which may make laws of indemnity, etc. This means that nothing in the Constitution will prevent the Parliament from making any law indemnifying any person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan. However, the Parliament of Pakistan has never indemnified anyone for acts done by the military chief.

Finally, Article 6 is of utmost importance here, as it deals with high treason. Clause 1 of the article states that

'any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance the constitution by use of force or show

of force or by any other unconstitutional means shall be guilty of high treason'.

Whereas, Clause 2[26] further widens the ambit by stating that

'any person, aiding or abetting the acts mentioned in clause 1 shall likewise be guilty of high treason'.

Furthermore, Clause 3 says that

'an act of high treason mentioned in Clause 1 or Clause 2 shall not be validated by any court including the Supreme Court and a High Court'.

Therefore, the articles are evidence that the Constitution does not provide any lacuna or loophole whatsoever which may give room to the military to takeover. In fact, the Armed Forces are under the government and should act in aid of civil power when called upon to do so.

4. Zia Ul Haq's coup

When Zia Ul Haq abrogated the Constitution and declared himself Chief Martial Law Administrator in 1977, Nusrat Bhutto filed a petition against it.[27] Relying on the Asma Jillani's case, she said Zia was incapacitated to impose Martial Law under Articles 244 and 245 of the 1973 Constitution. Additionally, his act amounted to treason under Article 6 of the Constitution (discussed above). However, the decision given was in line with the Dosso case claiming that with

[26] Constitution (Eighteenth Amendment) Act 2010, s 4(i) (with effect from April 19, 2010).

[27] *Begum Nusrat Bhutto v Chief of the Army Staff and Federation of Pakistan* (1977) PLD 657 (Pak).

Laws (Continuance in Force) Order[28], a new *grundnorm* was established through an unconstitutional revolution. Also, the Doctrine of Necessity had once again come into play. Chief Justice Anwar Ul Haq, affirmed that the situation prevailing in the country was a mature case for invoking the state of necessity. He therefore, once again had recourse to the doctrine of necessity, wherein:

'the Armed Forces of Pakistan, headed by the chief of staff of the Pakistan Army, General Zia Ul Haq intervened to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster. It was undoubtedly an extra-constitutional step, but obviously dictated by the highest consideration of State necessity and welfare of the people.'[29]

The inability of the judges of the Supreme Court to stand against the military dictator in the Nusrat Bhutto case was a major step backward in the understanding and application of Kelsen's *grundnorm*, which was once again used a mere tool of political expediency irrespective of its jurisprudential content.

5. The Musharraf era

The last instance of a military coup in Pakistan occurred in 1999 when the then Chief of Army Staff General Pervez Musharraf seized power and deposed Prime Minister Nawaz Sharif from office. The legitimacy of the coup came under judicial scrutiny in the case of *Syed Zafar Ali Shah v. General Pervez Musharraf.*[30] The Supreme Court held, apparently following Dosso and Nusrat Bhutto's

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[28] Laws (continuance in Force) (Fifth Amendment) Order 1977, PLD 1977 Central Statutes 441.
[29] *Begum Nusrat Bhutto v Chief of the Army Staff* (n 27).
[30] *Syed Zafar Ali Shah v General Pervaiz Musharraf* (2000) PLD 869 (Pak.).

decisions, that a new *grundnorm* had been established although the Constitution was held in abeyance and only certain provisions were suspended. Chief Justice Irshad Hasan Khan noted that General Pervez Musharraf had proclaimed himself as the chief executive of Pakistan and remarked that,

> '*since particularly, he is performing the functions of the prime minister, he holds the position of Chief Executive in the scheme of the Constitution and the criticism on this aspect is uncalled for.*'[31]

It is pertinent to notice here that the court may have acted as the catalyst for that very *grundnorm* change it purported to have observed. The decision in fact meant that no further challenge was made to the new regime for a few years and therefore a new, by and large effective, valid legal system was established.[32]

However, things changed in the subsequent case of Sindh High Court Bar Association v The Federation Of Pakistan,[33] which became a milestone in the legal-constitutional history of Pakistan. For the first time, the judiciary directly backed away from validating the military's engagement into politics. The court held that all measures taken by General Musharraf on 3 November 2007, when the military ruler declared the state of emergency in the wake of growing protests regarding his holding the offices of President and Chief of Army Staff at the time, to be unconstitutional and void *ab initio*. It was further held that there were no such circumstances that could warrant the imposition of emergency in the country as described in the Constitution. In considering the cases of Begum Nusrat Bhutto and Syed Zafar Ali Shah, it is interesting to note that the Supreme Court treated both the cases on the same level. The court denounced how In

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[31] Syed Zafar Ali Shah v General Pervaiz Musharraf (n 30).
[32] Kelsen (n 1).
[33] *Sindh High Court Bar Association v. Federation of Pakistan* (2009) PLD (SC).

both those instances, the Supreme Court had validated the extra-constitutional steps taken by the Army. Both General Zia and General Musharraf were authorized to make laws and amend the Constitution. It seems obvious that in both cases, the Supreme Court had no other intention but to allow the Generals to rule for long periods. During these periods, the institutions were stopped from performing their due functions, while the Constitution was not allowed to work in its true spirit. However, with the decision in *Sindh High Court Bar Association v The Federation of Pakistan*, a new era had probably began for Pakistan, where the Supreme judiciary would not any longer be ready to use foreign born jurisprudential theories to justify military take-overs. The new scenario is one where Kelsen's theory goes back to its legitimate place, jurisprudential analysis, whereas fundamental legal choices regarding the constitutional structure of Pakistan will be made in the light of the will of the people of Pakistan as expressed by its legitimate representatives. There have been since incidents like the *Memogate* scandal[34] and the US raid of May 2, 2011, on Usama Bin Laden's compound which could have generated the conditions for an Army takeover.[35] But democracy was not derailed and today in 2019, Pakistan witnesses the third consecutive democratically elected government ruling the country according to the Constitution.

As evident from the aforementioned discussion, until 3rd November 2007, the judiciary had never been removed *en masse*. It had always been expected to build the bridge, and allow the newly established military dictator to make a fresh start. The Supreme Courts's attitude was subservient to the establishment for a long time:

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[34] 'Government and Army in Collision Course' *The Dawn*, 23 December 2011 <https://www.dawn.com /news/ 682544> accessed 10 April 2019.

[35] Reuters, Pakistan Faces Pressure after Bin Laden killed near its capital, *The Dawn*, 24 May 2011 <https://www. dawn.com/ news/625506> accessed 10 April 2019.

it decided important cases against the Articles of the Constitution and, in doing so, either twisted or misinterpreted Kelsen's *grundnorm* doctrine. This has caused uncertainty. Although the *Asma Jillani*'s case altered the basic principle laid down in *Dosso*, it was later seen to be restored in the case of *Begum Nusrat Bhutto v. Chief Of Army Staff*. Surely, the Supreme Court deserves applause on the decision it made in the case of *Sindh High Court Bar Association v. Federation of Pakistan*. However, it must be kept in mind that, Iftikhar Chaudhry J. was on the bench that had validated General Musharraf's coup only a few years before, and endorsed the judgment without adding separate notes of his own. Nevertheless, the change in attitude and the increased confidence of the Pakistani judiciary was shown in a conversation the then Chief Justice Iftikhar Chaudhry had with a delegation of National Defence University at the Supreme Court. He was quoted as saying that:

'[from now onwards] any action of the Armed Forces taken without a direction by the Federal Government will be unconstitutional, illegal, void ab initio and consequently of no legal effect.'[36]

Today, the Armed Forces as well seem to have learned from the mistakes of their predecessors. It is evident that all the key stakeholders of the country have re-evaluated their roles, and have confined them to their constitutional roles. Fortunately, enough, they have realized that this has in fact become the State's necessity.

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[36] Nasir Iqbal, Interpreting Constitution SC's job: Action by army without govt nod illegal: CJ, *The Dawn*, 13 November 2011 <https://www.dawn.com/news/672881/ interpreting-constitution-scs-job-action-by-army-without -govt-nod-illegal-cj>

Conclusion

Several arguments can be made against the soundness of the use of Kelsen's theory which the Supreme Court made while justifying military dictatorships in Pakistan.

The most obvious one, which has been already pointed out above, is that the apex court failed to perceive that in providing legitimacy to the coup it was adding one of the missing elements required by Kelsen for a new system to be created and a new *grundnorm* to come into existence, namely the 'by and large' effectiveness of the new laws.[37] It is argued that if the Supreme Court had refused to obey the new ruler, it could hardly been maintained that the new system was 'by and large' followed, due to the importance of the highest judicial institution of the country.

Moreover, it is argued that the Supreme Court only applied Kelsen correctly in the Asma Jillani case where it clearly stated, as Kelsen also maintains, that his theory is just one among many competing jurisprudential positions and not the only one.

On a subtler logical ground, the judiciary is a constitutional institution whose existence is subject to the existence of the Constitution. With the Constitution gone, and a new system created, the judiciary should have declined to decide the case in favour of the present ruler, as it would be no longer capable of validating a coup, since its jurisdiction comes to an end with the Constitution.

Finally, on a closer look at the *grundnorm* theory in Kelsen, it is clear that the military dictator laws are not necessarily valid according to the Pure Theory of Law. Kelsen never intended to suggest that whoever comes to power is the law – famous in this

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[37] Kelsen (n 2) 1144.

regard is the gangster's command versus the revenue officer's order. As seen in the abovementioned discussion, Kelsen intended that even the highest state institutions were never superior to the law. In deciding such cases, the courts have the discretion to choose which theory to apply or not to apply; if Kelsen's theories were still unclear or led to unjust conclusions, they could have chosen another or simply applied the existing constitutional framework's principles. The 1973 Constitution clarified that martial laws were unconstitutional, and any such acts amounted to treason. Even then, the country experienced martial laws by General Zia and General Musharraf.

Thus, it can be said, that courts have not interpreted Kelsen consistently and they have been at variance with many lucid explanations of his theory. A wind of change has started blowing in the recent past, where an emboldened judiciary has finally began freeing itself from the exclusive influence of foreign jurisprudential theories to fully develop the jurisprudential potential of the 1973 Constitution. A new approach seems to be in the making where, to quote the words of Justice Khawaja in *District Bar Association Rawalpindi v Federation of Pakistan*:

'*sixty-five years after independence, … we unchain ourselves from the shackles of obsequious intellectual servility to colonial paradigms and start adhering to our own peoples' Constitution as the basis of decision making on constitutional issues.*'[38]

[38] Justice Khawaja in *District Bar Association Rawalpindi v Federation of Pakistan* PLD 2015 SC 401, para 24.

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