prediction is unfortunately still being held up by what must be recognised as technically correct reasoning, but reasoning which is commercially unacceptable.

CONCLUSIONS

If the recommendations of the Jenkins Committee were in operation then Introductions Ltd. would have been able to enforce a promise by the bank to lend the money and the bank would not have faced its rather unfortunate position. Shareholders would be able to seek relief against the directors for breach of duty if the company suffered losses and in this regard may be no worse off than their Australian counterpart under section 20 (2) (b), although a specific right to sue would be both a deterrent to directors and a clearer indication to the courts of the nature of the complaint.

Whilst it may be argued that the development of society economically has resulted in the need to remove such doctrines as the doctrine of ultra vires and the doctrine requiring outsiders to have knowledge of the company's public documents, and similar nineteenth-century doctrines, it must be remembered that most companies are still supported to a large extent by individual shareholders. Therefore some protection, it is suggested, is still needed; as was stated in evidence before the Jenkins Committee, if a person decides to invest in a company, he wants to know what sort of business it is authorised to run. Such a desire would be completely defeated if directors were able to change willy-nilly the nature of the business of a company in which these people have invested. The director should be made liable if losses are sustained in such cases but the business of the company should be allowed to proceed with as few limitations as possible. The approach adopted by the Jenkins Committee is one to be commended but a specific provision to allow shareholders to recover damages from the director who may have exceeded the powers of a company without their consent might conveniently be added to maintain the common law position.

R. BAXT.

JURISPRUDENCE'S DAY IN COURT IN GHANA

What is the legal effect of a coup d'État on a legal system? This could well be an examination question in jurisprudence set in an academic institution, but this became a question that had to be resolved by the highest court of Ghana in order to settle a far from academic constitutional dispute. It is intended in this article to examine the legal merit of the Ghanaian Court of Appeal's decision in the case of E. K. Sallah v. The Attorney-General for and on behalf of the Government of Ghana. This case is an offspring of the

74 Unless it could be said to have had actual knowledge of the restriction in powers. Courts " (1947) 63 L.Q.R. 461, 481.
1 I.e., the Court of Appeal sitting as the Supreme Court by virtue of s. 8 of the Transitional Provisions of the 1969 Constitution.
recent political history of Ghana. On February 24, 1966, the Government of ex-President Kwame Nkrumah was toppled in a military coup d'état. The army and police, who assumed the business of governing Ghana, formed a body called the National Liberation Council for this purpose. The National Liberation Council suspended the 1960 Republican Constitution of Ghana under which Dr. Nkrumah had operated. The legal implications of this action became a relevant issue in the case mentioned above.

But for the ingenious jurisprudential submissions made on behalf of the Government, the Sallah case might have been a fairly straightforward case of constitutional interpretation. However, because of the Ghanaian Attorney-General’s submissions, a consideration of jurisprudential thought became necessary for the decision in the case. In spite of this, it cannot really be said of any of the judgments in the case that it provided “manna for jurisprudences.” 5 Jurisprudences who might have hoped to find in these judgments profound analytical discourses on the legal effect of a coup d'état on a country’s pre-existing legal system are likely to be somewhat disappointed. For the majority of the judges found the jurisprudential submissions of the Attorney-General irrelevant and misleading, while the judgment of the dissenting judge who accepted the Attorney-General’s argument was bereft of any references to jurisprudential works and cannot be said to contain any sustained jurisprudential discussion.

The constitutional provision on which the dispute in this case was centred is section 9(1) of the Transitional Provisions of the Ghanaian Republican Constitution of 1969 which are contained in Schedule A to the Constitution. The provision reads as follows:

Subject to the 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.

The plaintiff was appointed a manager in the Ghana National Trading Corporation, a State trading corporation, in October 1967. The Ghana National Trading Corporation had originally been established in 1961 by an executive instrument 4 issued under the authority of the Statutory Corporations Act 1961. 5 A new Statutory

5 Cf. Claire Palley, “The Judicial Process: UDI and the Southern Rhodesian Judiciary” (1967) 30 M.L.R. 263. The author of this article describes as “manna for jurisprudences” a Rhodesian case in which the legal effect of the Rhodesian Unilateral Declaration of Independence was exhaustively discussed.

4 E.I. 203.

5 Act 41.
Corporations Act was passed in 1964 and a new legislative instrument was issued under its authority continuing the existence of the GNTC as a body corporate. At the time of the coup d'État in February 1966, therefore, the GNTC was an already established legal entity.

On February 21, 1970, the plaintiff received a letter from the Presidential Commission which informed him that his appointment with the GNTC had been terminated in accordance with section 9(1) of the Transitional Provisions of the Constitution which is set out above. The plaintiff challenged the view that his post fell within any of the three categories of posts mentioned in section 9(1). He therefore sued the Attorney-General for and on behalf of the Government of Ghana for a declaration that, on a true and proper interpretation of section 9(1) quoted above, the Government was not entitled to terminate his appointment.

The plain meaning of the words used in section 9(1) of the Transitional Provisions seemed to support the plaintiff's view of the correct interpretation to be put on those words. It was to circumvent this result of reading the disputed provision in its plain meaning that the Attorney-General invoked Kelsen's theory of the legal effect of revolutions and coups d'État on legal systems to support his plea that the word "establish" in section 9(1) should be given a "technical meaning."

According to Kelsen's jurisprudential system, a legal system consists of manifold hierarchically arranged norms or legal rules, all of which have one ultimate source, namely, the Grundnorm. A legal system is thus like an inverted collapsible pyramid with the Grundnorm as the foundation rock. The Grundnorm is the ultimate norm from which all subordinate norms in the legal system derive their validity. If one takes away the Grundnorm, then the inverted pyramid collapses for lack of support. Since Kelsen believes that the legal effect of a coup d'État is the destruction of the Grundnorm, this means that, in his eyes, the legal effect of a coup d'État is to remove the bottom rock of the collapsible inverted pyramid and thus to send the whole structure crashing down.

Therefore, the Attorney-General argued, in Kelsenite terms, that the February 1966 coup d'État destroyed the Grundnorm of the previously existing legal order, namely the 1960 Republican Constitution, and, by so doing, destroyed the whole of the old legal order. Within the Kelsenian system, "legal order" does not mean merely "the Constitution of a State" as Archer J.A. seemed to think in this case. It means the whole legal system—the whole hierarchy of legal norms. Here is what Kelsen himself says:

From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new legal order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the Constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order "remains" valid also within the frame of the new order. But the phrase "they

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6 Act 232.
7 L.I. 395.
remains valid" does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which were introduced under the old constitution "continue to be valid" under the new constitution, this is possible only because validity has expressly or "tacitly" been vested in them by the new constitution.

The Attorney-General based himself on this legal analysis. He argued that with the suspension of the 1960 Constitution, the Act that established the GNTO should be regarded as having lapsed. It lost its validity and only regained its validity from the Proclamation of February 26, 1966. In the light of this analysis, he urged that the word "establish" should be given the technical meaning of "deriving legal validity from."

Before discussing the reactions of the Court of Appeal, sitting as the Supreme Court, to this argument, it would be appropriate first to clarify the issue of what legal authority the passage quoted from Kelsen above has in the Ghanaian legal system. It will be remembered that it is a rule of the English common law that passages from textbooks, even on positive rules of law, have no inherent legal authority unless they are contained in so-called books of authority, such as Blackstone's Commentaries (1765) or Coke's Institutes (1628–41). It used even to be the rule that living authors could not be cited by name although the absurd rigidity of this rule has now been relaxed. Living authors may now be cited by their name and counsel can adopt passages from their books as counsel's own argument. But such adopted arguments have no inherent legal authority and cannot authoritatively bind any court in the common law system. They stand or fall by their intrinsic merit. Thus, the persuasive value of the passage from Kelsen is limited to its inherent force and merit. It has none of the artificial weight that attaches to passages in judicial decisions and in the so-called books of authority.

It seems to the present writer that the legal merit of a legal argument can be assessed in at least two different ways: it may be by reference to a yardstick of analytical excellence or by reference to a sociological yardstick. By this is meant that the merit of a legal argument may be appraised, not only in terms of logicality, but also in terms of the social desirability of the consequences flowing from such legal argument. Thus, though Kelsen's jurisprudential theory may be a neat, tautly-argued analytical system that cannot easily be faulted on logical grounds, so far as its internal consistency is concerned, nonetheless before such a logical system is applied to the solution of an actual case, the judges are entitled to consider, and indeed it is their duty to consider, whether, in addition to its logicality, the consequence of applying the Kelsenite viewpoint is socially desirable or not. This approach one may characterise as that of

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9 See per Archer J. in Esson v. Attah & Ors. (1968) C.C. 125
10 Cf. Paton & Sawer, "Ratio Decidendi and Obliter Dictum in Appellate Courts" (1947) 63 L.Q.R. 461 at 481.
sociological jurisprudence, as distinct from the purely analytical jurisprudence epitomised in Kelsen’s work. It is an attitude that is to a certain extent reflected in Justice Holmes’ aphorism that “The life of the law has not been logic: it has been experience.” 11

It is the purpose of the present writer to review how the judicial function was exercised in response to the Attorney-General’s submissions. It is believed that the Attorney-General’s argument raised two distinct issues: the first related to the legal effect of a coup d’Etat on a country’s pre-existing legal system; the second was whether such legal effect was relevant to the interpretation of section 9 (1) of the Transitional Provisions. So far as the resolution of the first issue is concerned, the will and intention of members of the Constituent Assembly were completely irrelevant. The members’ ignorance of Kelsen’s theory of revolution could not add to or detract from the correctness or incorrectness of the Kelsenite analysis. A disagreement with the Attorney-General on this issue has to be founded on an analysis of the legal effect of a coup d’Etat which indicates that legal systems survive coups d’Etat and that, juristically speaking, there is no break in the continuity of legal systems upon the occurrence of such events.

Assuming, without admitting, that Kelsen’s analysis is correct and that, therefore, all public offices in Ghana were automatically abolished on February 24, 1966, it would follow, since these public offices no longer existed as of February 24, 1966, that all these offices could be said to have been “established” by the NLC Proclamation of February 26, 1966. In other words, that they were created anew by the Proclamation. Thus the Kelsenite analysis, if correct, has a bearing on the interpretation of section 9 (1) of the Transitional Provisions. It is on this second issue of the relevance of the Kelsenite analysis to the task of constitutional interpretation that the will and intention of members of the Constituent Assembly become important. Did the members realise when using the word “establish” that it could embrace, not only offices created for the first time by the NLC, but also offices created by the NLC in substitution for offices bearing identical names under the old legal order?

To this question, Apaloo J.A. provides the following answer:

I believe members of the Constituent Assembly approached and performed their task as practical men of business guided by the experience of our recent past and informed by an understanding of ordinary English words. I cannot accept that in using the word “establish” in section 9 (1) they had in mind any juristic theories on the principle of legitimacy. If that be right it would be subversive of their intention to interpret their declared will by reference to any such theory.

Sowah J.A. reaches a similar conclusion. He declares that “It is a fundamental rule of interpretation whether the subject-matter be a Constitution or an Act that words and phrases must be interpreted to convey the meaning of those who drafted them.”

The viewpoint of these two judges is thus the reasonable one that words in a constitution must be interpreted according to the meaning intended to be given them by the framers of the constitution,

irrespective of whether other meanings are capable of being put on those words.

The viewpoint adopted by Apaloo and Sowah J.J.A., namely, that the Constituent Assembly could not have had Kelsen’s analysis in mind when using the word “establish,” meant that they did not find it necessary to discuss the merits of the first issue involved in the Attorney-General’s submission. In other words, they did not find it necessary to find an express answer to the question: “What is the legal effect of a coup d’Etat on a country’s legal system?” The judgments of the two learned judges therefore do not contain much “manna for jurisprudes” on that issue. But this is not a criticism that would worry Apaloo J.A., who expressed scant respect for jurisprudence and legal philosophy, so far as their utility in the judicial task of interpretation was concerned. He affirmed that “The literature of jurisprudence is remote from the immediate practical problems that confront judges called upon to interpret legislation or indeed to administer any law.” Of the Attorney-General’s Kelsenite arguments he said:

This contention seems to me highly artificial and I cannot believe that with the known pragmatism that informs judicial attitude towards questions of legislative interpretation, the Attorney General can have thought an argument such as this was likely to carry seasoned judicial minds. We should fail in our duty to effectuate the will of the Constituent Assembly if we interpreted the Constitution not in accordance with its letter and spirit but in accordance with some doctrinaire juristic theory.

So far so good. Having dismissed the Kelsenite analysis as not likely to have been in the contemplation of members of the Constituent Assembly, Apaloo and Sowah J.J.A. proceed to interpret the word “establish” in its ordinary English meaning and to hold that the plaintiff’s office was not established by the NLC’s proclamation. However, the fact that the antipathy shared by Apaloo and Sowah J.J.A. to the alleged doctrinaire juristic approach precluded them from undertaking a thorough discussion of the merits and demerits of the Kelsenite analysis was regrettable. Apart from their reasoning based on the Constituent Assembly’s intention, the learned judges also supported their rejection of the Attorney-General’s submissions with arguments which implied rejection of the Kelsenite analysis on its merits, but their judgments nowhere contain express reasons why the Kelsenite analysis of the effect of a coup d’Etat is wrong.

For instance, Apaloo J.A. asserted that the effect of the NLC Proclamation of February 26, 1966, was to permit the continued existence of offices in the public services. He argued that to permit a thing to continue was to acknowledge its prior existence and that it was an abuse of language to say that the person or body who permitted its continuance in fact created it. Similarly, Sowah J.A. argued as follows:

It seems to me a far-fetched interpretation to say that by these words, the National Liberation Council was re-establishing or creating anew all the laws of Ghana including the common law and customary law. The true interpretation is that those laws in existence should continue subject, of course, to subsequent decrees that might be promulgated.
These views of Apaloo and Sowah JJ.A. are based on an implied belief in the continuity of legal systems. They are founded on the implied assumption that *coup d'Etat* do not affect the continuity of legal systems. This may be a view of the legal effect of *coup d'Etat* which is preferable to Kelsen's, nonetheless we have to be convinced of this through argument. This is what the judgments of the two judges fail to provide.

It is an abuse of language to describe the NLC as having created anew or "established" offices that already existed before February 24, 1966, only if one accepts that these public offices were not automatically terminated by the *coup d'Etat*. This is why the present reviewer believes it to have been necessary for the learned judges of the Court of Appeal to have appraised Kelsen's analysis on its merits and either accepted it or rejected it. The fact that it was alleged to be theoretical and foreign\(^{12}\) was not of itself a sufficient reason for rejecting the analysis on its merits. Since counsel had adopted the Kelsenite argument, it deserved a refutation on its merits. It was not satisfactory for such refutation to be done *sub silentio*. It would have been more instructive for readers of the judgments to have had the learned judges' express reasons for thinking the Kelsenite analysis incorrect.

The basic attitude of Apaloo J.A. was that Kelsen's analysis was irrelevant, but Sowah J.A. attempted to do more and to impugn the validity of the analysis on the basis that:

One is entitled to ask whether theories propounded by the great jurists ranging from the time of Plato, Marx and to Hans Kelsen are immutable and of general application and whether those theories must necessarily fit into the legal scheme of every country and every age? I do not think so.

This may very well be so, but it is too general a reason for the rejection on its merits of Kelsen's specific theory of the legal effect of a *coup d'Etat*. General jurisprudential theories may not always fit the facts of specific legal systems, but the relevant inquiry that had to be made by the learned judge in this case was why it was incorrect to say that the *coup d'Etat* of February 24, 1966, had destroyed the *Grundnorm* of the previous legal order and consequently the whole of that legal order.

Critical readers of the judgments of the two learned judges would want to know whether they accept the Kelsenite view of how a legal system is structured, but think that a legal system can survive the destruction of its *Grundnorm*, or whether they totally reject the Kelsenite view of the source of the ultimate validity of rules in a legal system. It would have been possible for the learned judges to argue that there is a policy interest in maintaining continuity in legal systems and consequently that whatever is the true ultimate source of the legal validity of rules within a legal system, it is socially desirable, and practical necessity demands, that the law should hold that all rules within a legal system, except those specifically abrogated, survive *coup d'Etat*. Such an argument, though pragmatic, has jurisprudential undertones. It is an argument founded

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\(^{12}\) Sowah J.A. declared: "It seems to me we will not derive much assistance from the foreign theories."
on an attitude to law urged by certain of the so-called sociological jurists. This attitude requires legal arguments to be measured by the yardstick of what is socially desirable.

However, the judges’ failure to articulate their reasons for thinking the Kelsenite analysis wrong means that we are kept guessing as to why they thought the analysis incorrect. Archer J.A., on the other hand, discussed the Kelsenite analysis on its merits before rejecting it. The chief difficulty that he felt in applying the Kelsenite analysis to the Ghanaian legal system after February 1966 was in locating the new Grundnorm. He declared that the new Grundnorm was not the NLC Proclamation of February 1966 because this was not, in his opinion, a constitution. A constitution, he considered, had to be predictable, but the Proclamation had the quality of unpredictability because the executive and legislative powers of the NLC were limitless. With respect, it is thought that this is a rather strange conception of what may be considered a constitution. The Proclamation was clearly a constitutional document. It did not embody all the constitutional rules in force during the NLC interregnum, but then hardly any constitutional instrument ever contains all the constitutional law of a country. The Proclamation was the basic constitutional instrument of NLC Ghana because the legal validity of the NLC’s acts and Decrees stemmed from it. It was thus the Grundnorm.

Be that as it may, Archer J.A.’s judgment shows that he shares the intuitive feeling of the other majority judges for preserving the continuity of legal systems. The main drawback of the Kelsenite analysis is that it is capable of resulting in the creation of a legal vacuum in a country. Since the destruction of the Grundnorm of the old legal order need not be done contemporaneously with the positing of a new Grundnorm, the theory admits of the possibility of there being a hiatus in the legal system. Presumably, for instance, between February 24, 1966 and February 26, 1966, when the new Grundnorm was promulgated, there was a legal vacuum in which all legal acts were at the time invalid. This is surely a legal consequence to be avoided and it may be that the learned majority judges were influenced by such factors in reaching their refutation of the Kelsenite analysis, although none of the judgments contain arguments refuting Kelsen’s analysis on its merits, which are convincing enough.

The present author is persuaded by the arguments based on the need to preserve the continuity of legal systems and to prevent the possibility of the creation in legal systems of inconvenient legal vacuums or hiatuses of lawlessness to believe that the Kelsenite analysis of the legal effect of revolution leads to socially undesirable consequences. The chief value of Kelsen’s general jurisprudential system is that it provides a useful mode of analysing how a legal system works. It is true that an examination of legal systems usually reveals hierarchically arranged norms. But 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 validity. To such practical lawyers therefore, it would seem
that the subordinate norms in a legal system can survive the destruction of the Grundnorm. 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.

Only one judge, Anin J.A., was persuaded by the Kelsenite argument. In an opinion based on Kelsen’s view, though there is nowhere any express reference to Kelsen, he held that with the February 1966 coup d’Etat “the old legal order founded on the 1960 Constitution yielded place to a new legal order under an omnipotent, eight-member, military-cum-police sovereign.” Consequently all public offices founded on this old legal order were automatically abolished. In the opinion of the learned judge, it was because of paragraph 5 of the Proclamation that most of these abolished public offices were confirmed in existence during the NLC days. The paragraph provided that “any person holding any office in any of those services (on the eve of the coup) shall continue in office subject to any enactments in force after that date by virtue of this Proclamation.” Anin J.A. affirmed that:

Notwithstanding the fact that public offices which were in existence prior to the coup bore practically the same names before as after the coup, the true legal position is that these public offices and services were the creation of the National Liberation Council and they existed by virtue of, and in pursuance of, this Proclamation and in certain specific cases, in pursuance of subsequent N.L.C. Decrees.

On the whole, then, it would seem that jurisprudence’s day in court in Ghana was not a particularly favourable one for jurisprudence. The majority judges were determined not to allow themselves to be deflected by a jurisprudential theory from giving the provision in dispute its ordinary English meaning. In so far as this determination stemmed from a desire to effectuate the will of the Constituent Assembly, it was justifiable. In so far, however, as it was based on the assumption that the Kelsenite analysis was mistaken, it is believed that the learned judges did not set out convincing enough reasons why the analysis was wrong, although the present author himself believes the analysis to be unacceptable.

S. K. DATE-BAH.

PARENTAL AUTHORITY—FRENCH STYLE

By the Law of June 4, 1970 (Loi No. 70–459; J.O. 5 juin, p. 5227) title IX of the Civil Code “De la Puissance Paternelle” has been repealed and replaced by a new set of rules which under the title of “L’autorité parentale” came into force on 1 January, 1971.

Parental authority denotes the sum total of rights and duties imposed by the law on parents (or persons acting in loco parentis) in respect of the person and property of the child. It arises either ex lege in consequence of procreation or by grant from the court. In

13 Siriboe J.A., who at the judgment conference had indicated that he would dissent, did not deliver his judgment. The legal effect of his failure to deliver his judgment is left out of this account.