AHWOI'S article Kelsen, the Grundnorm and The 1979 Constitution1 must prove disturbing to legal scholars in general and constitutional law scholars in particular. In that article Ahwoi attempts to provide a Kelsenite account of the "process of promulgation" of the 1979 Constitution of Ghana. The major thesis of the article is that as the 1979 Constitution "was promulgated in a way anticipated by the pre-existing legal (AFRC) order, there was therefore no revolution in the Kelsenite sense and thus no change of the basic norm" (pp. 159-160). The 1979 Constitution he states, owes its validity to AFRCD 24, its promulgating decree and ultimately to the AFRC (Establishment) Proclamation. Therefore it can not be considered as the fundamental law of Ghana. He suggests that the basic and fundamental law of Ghana is AFRCD 24 and ultimately, the Proclamation (p. 160).

I would like to examine this thesis from two points of view. First, from the point of view of Kelsen's theory of law, the principles of which Ahwoi employs in his analysis. The question is whether the account Ahwoi offers is plausible within a Kelsenite theory of law at all. Second, I would want to consider the justification for the account. Even though the account Ahwoi offers is descriptive in that he only claims to use the principles of Kelsen's positivism to explicate the process of promulgation of the 1979 Constitution, Ahwoi does offer a justification for his account. He tells us that the interpretation he gives is justified by judicial practice. The question is: assuming Ahwoi's interpretation can be defended within Kelsen's theory of law, would it be a good account to give of our legal system, of judicial practice, of the way in which the community views the constitution?

Ahwoi states that Kelsen's basic norm "resembles his historically first constitution" (p. 139). He also states that Kelsen "suggests that the basic norm is the historically first constitution" (My emphasis) (p. 141). For Ahwoi then, Kelsen uses the basic norm in two distinct senses:

1. as a presupposition

2. to refer to an existing concrete, historically first constitution
Thus he says "the form of the basic norm as a transcendent allogical presupposition is always the same . . . But the contents of the basic norm as the historically first constitution may differ" (My emphasis) (p. 145). It is inaccurate to identify the basic norm with the historically first constitution. The reason is that the basic norm cannot be a positive norm as the historically first constitution may be. The basic norm is only a Presupposition. The two senses in which Ahwoi claims Kelsen uses the term cannot be distinguished as such for it is only as a presupposition of validity that the basic norm refers to the historically first constitution. The validity of this historically first constitution is presupposed as Ahwoi rightly points out. However, it is the formulation of this presupposition that is the basic norm and not the historically first constitution.2 Kelsen did say that considered as the basic fact of law creation, “the basic norm could be described as the constitution in a logical sense of the word," but this, “in contradistinction to the constitution in the meaning of positive law”3; the constitution in a logical sense as distinguished from the historically first constitution. How can one claim in Kelsen’s theory of law that the basic norm of the Ghanaian legal order resembles the Establishment Proclamation, a positive norm which for Ahwoi is the historically first constitution or that the basic norm is in fact, this Proclamation?

This confusion of the basic norm with the historically first constitution also comes out clearly in the way in which Ahwoi shifts meaning from one to the other as if the two were interchangeable. Referring to the 1979 Constitution, he states that its validity cannot be presupposed as it is dependent on another norm of the system (pp. 146-147). This is meant as an explanation for why the 1979 Constitution cannot be considered as the historically first constitution, as the validity of the historically first constitution cannot be traced back to a positive norm. In the same breath however, Ahwoi states . . . “it (the 1979 Constitution) is a positive legal norm of the system, but the uniqueness of the basic norm is that it does not owe its validity to any other norm of the system” (ibid.). This seems to explain why the constitution cannot be the basic norm. But how does the justification for why the 1979 Constitution cannot be the historically first constitution support why that Constitution cannot be the basic norm? For even if one accepted that the 1979 Constitution was the historically first constitution, one could not go on from there to make the further statement that the 1979 Constitution was the basic norm. Therefore even if one could presuppose the validity of the 1979 Constitution, it would still not be the basic norm. The “uniqueness” of the basic norm is not because it is presupposed to be valid as Ahwoi says; for the historically first constitution is also presupposed to be valid. The basic norm is unique in that it is only the meaning of an act of thinking; it exists only in juristic consciousness as a presupposition of validity.

Even though Ahwoi does recognize that the basic norm is a non-positive norm and emphasizes this point throughout his article, his identification of the historically first constitution with the basic norm is inaccurate under Kelsen’s theory and confuses thought. To be true to Kelsen’s theory of law one must make a clear distinction between the two norms.

The second issue I find troubling concerns the basic norm of the Ghanaian legal order as formulated by Ahwoi. This basic norm states that:
Coercive acts ought to be applied only under the conditions and in the way determined by the "fathers" of the constitution or the organs delegated by them, i.e. the AFRC (Establishment) Proclamation (p. 149.).

Section 18 (2) of the Transitional Provisions of the 1979 Constitution states however that "Upon the coming into force of this Constitution the Armed Forces Revolutionary Council (Establishment) Proclamation, 1979 shall cease to have effect." The puzzle is how can the constitution (an inferior norm by Ahwoi) destroy the ultimate norm which supposedly gives it validity? How can the constitution abrogate the historically first constitution that the basic norm must refer to? These are strange questions for anyone to ask within Kelsen’s theory of law—an inferior norm that destroys the historically first constitution from which its validity derives and declares itself supreme, a normative system without a basic norm? If the norms of the constitution and the legal order in general are to be interpreted as legal norms, then there must be a basic norm for the system; for the constitution as positive law cannot in "Kelsen’s theory provide for its own validity. But if that basic norm as a result of section 18 (2) cannot be Ahwoi’s formulation, then what is the basic norm of the Ghanaian legal order?

An awareness of these problems must account for Ahwoi’s refusal to acknowledge that the 1979 Constitution did in fact repeal the Proclamation. He refers to the act of repeal as a "purported repeal," as if by so calling it the fact would change. He is determined not to recognize the constitution’s repealing power with regard to the Proclamation, therefore he says: “As far as the Proclamation is concerned, its validity terminated in a way anticipated by itself . . .” (p. 163). Yet even this interpretation, assuming it was right, does not answer the question: what then is the basic norm of the Ghanaian legal order? For on Ahwoi’s own terms, that basic norm cannot be as he formulated earlier because he concedes that the Proclamation cannot be “revived to challenge the Constitution in any claim to supremacy” (ibid). It is strange that Ahwoi does not discuss the effect of this “purported repeal” on his formulation of the Ghanaian basic norm. He tells us that AFRCD 24 is a norm higher in the hierarchy of norms than the Constitution because this is the norm from which the Constitution derives its validity. Can one formulate a basic norm for the Ghanaian legal order in such a way that it refers to AFRCD 24? Ahwoi does not make this move and it is right that he does not. AFRCD 24 cannot be considered as the historically first constitution for the same reasons that the 1979 Constitution in Ahwoi’s interpretation cannot be a candidate for this position – AFRCD 24, just as the 1979 Constitution owes its validity to a positive norm of the system.

Yet the basic norm must refer directly to a specific constitution. As Kelsen states:

“Only if this basic norm, referring to a specific constitution is presupposed, that is, only if it is presupposed that one ought to behave according to this specific constitution—only then can the subjective meaning of a constitution-creating act and of the acts created according to this constitution be interpreted as their objective meaning, that is as objectively valid norms, and the relationships established by these norms as legal relations.”4
The basic norm must refer to a specific constitution. What in the Ghanaian legal order can this constitution be if it cannot be the Proclamation and it is not AFRCD 24?

Ahwoi does not accept that this constitution can be the 1979 Constitution. For even though the constitution declares itself supreme law, repeals the Proclamation and is the reason for the present validity of the norms of the legal order, to say that it is the historically first constitution will undercut Ahwoi’s thesis and will question some of the assumptions underlying Kelsens’ theory of law. It is also interesting that a Kelsenite theory of law cannot adequately explain the continuing existence of norms like AFRCD 24 whose superior validating norm is no more. This is because for Kelsen, the continuing existence and hence the validity of such superior norms are important if laws created on their basis still exist and are valid. It is important to note that the Proclamation is not only a superior norm but in Ahwoi’s understanding, the ultimate norm whose validity is presupposed by the basic norm. To abrogate this norm is to destroy the basic norm—the reason for the validity and the unity of the entire legal order. It is any wonder then that to keep within the “principles of Kelsenite positivism” Ahwoi invokes the “spirit” of the repealed Proclamation?

The point is that if one accepted that the 1979 Constitution would be the "specific constitution" that the basic norm of the Ghanaian legal order would refer to, one would then be saying that a revolution or an illegal change was not a necessary condition for there to be change in the basic norm. Thus one would be saying that there was discontinuity in the legal order (on account of the change in the basic norm) in spite of the fact that the order in force had been replaced in a way anticipated by the old legal order. But this is incoherent within Kelsen's theory of law. Alternatively one could reinterpret the facts to have them fit a Kelsenite mould.

This would greatly distort analysis as we have shown above. But we can do better. We can simply say that the facts shown by the process of promulgation of the 1979 Constitution are recalcitrant to a Kelsenite analysis of law; that positivism cannot provide a good account of this process. This raises the question of justification which I will consider in the next section.

Ahwoi states that the account he offers, describes judicial practice in its interpretation of the norms of the constitution (pp. 161-67). In this section, I will question some of the assumptions underlying Kelsen’s theory of Law. The question is: assuming that Kelsen's theory could be used to explicate the process of promulgation of the 1979 Constitution, would the account derived therefrom offer justification for the way in which our courts relate to the 1979 Constitution, of the way in which the community thinks about that constitution? If we had to give an account of why the 1979 Constitution was law, and how it became law, would we be Kelsenite in our approach?

For Kelsen, the fact that the validity of all norms could be traced to one ultimate norm, the basic norm meant that these norms belonged to the same legal order and constituted a unity. He states: “If several norms all receive their validity from the same basic norm, then—by definition—they all form part of the same system.”5 The point
However, the mere fact that one norm derives validity from another and validity for these norms can be traced to a basic norm does not mean they both belong to the same system. As Hart explains:

“... until the question of membership is settled by the independent test of recognition, we cannot discover whether one of the laws does derive its validity from the other .... The criterion of membership of laws in a single system is therefore independent of and indeed presupposed when we apply the notion of one law deriving validity from another.”

Unless we recognize the crucial distinction between questions of system identity and questions of validity, one is led as Hart demonstrates to very wrong and absurd conclusions; for the relationship of “validating purport” as Hart describes it, “may hold either between laws of different systems or between laws of the same system.” One only needs an “unconstitutional” act to break the chain of validity between a metropolis and its colony so as to recognize the separate identity of their respective legal orders, as Ahwoi suggests, if we fail to make this distinction. This is not to say that the legal order in Ghana after the promulgation of the 1979 Constitution was the same as or different from the one brought into effect by the AFRC Proclamation. I only mean to point out that to establish the identity of the system one would need to do more than simply establish the fact that validity of the 1979 Constitution can be traced to a norm of the legal order under the AFRC regime. The ability to establish relationships of validity between norms is not a sufficient condition for these norms to belong to one system.

Another problem with Ahwoi’s Kelsenite account lies in its failure to realize the community’s basic understanding of law. The officials of the legal system do recognize the constitution as the supreme law. They also accept the fact that the constitution was promulgated by AFRCD 24 and thus in a sense derives its validity from decree. The assertion of these two statements however need involve no contradiction. Section 1 (2) of the Constitution which declares the Constitution to be supreme law is not inconsistent with AFRCD 24. Thus, even though the constitution derives its validity from AFRCD 24, the statement that AFRCD 24 and not the Constitution is the basic and fundamental law of the country sounds ridiculous (see Ahwoi, pp. 163-164). It strikes one as an odd statement to make because our notions of "fundamental law" are not exhausted by that conception of validity that AFRCD 24 embodies. AFRCD 24 provides a source of validity for the Constitution which is only procedural. Yet when one says of a particular law that it is basic, fundamental, one means to go beyond assertions of procedural validity. When one describes something as fundamental, one means that it is able to capture the essence of the object it relates to. A Constitution is fundamental law because it seems to express or provide the best articulation of a community’s self-understanding—a community vision of the best community.

Therefore if one were to ask why the 1979 Constitution was law, a reference to AFRCD 24 only would be incomplete as an answer. It would be incomplete because the notion of law used in regard to the Constitution is not captured by AFRCD 24. To establish the "lawfulness" of the constitution one may have to inquire into why the community accepts
it as law. It is important to note that if this same question had been asked about a particular statute, a reference to the power conferring law under which it was made would have been a good and sufficient answer. It is important to make these clear distinctions to avoid absurd conclusions.

All this speaks to a practical understanding of law; an understanding that seeks to make theory coherent with the facts. Thus one can provide an account of the way in which the 1979 Constitution became law which will not only be good descriptively but will justify the sense in which the community conceives of the constitution as law.

FOOTNOTES

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7. Ibid., at p. 319.