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Jurisprudence of Successful Treason: Coup d'Etat & Common Law

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Nothing succeeds like success; and this is particularly true of revolutions.[1]

But Treason is not own'd when tis descry'd;
Successfull Crimes alone are justify'd.[2]

Introduction

Orderly transfer of power contemplated by the constitutional order is the exception rather than the norm in most post-colonial societies. A change of government often issues from the threat or use of force against the incumbent regime, a phenomenon designated as a coup d'etat.[3] Coup d'etat is "the most visible and recurrent characteristic"[4] of the political experience of post-colonial societies, and "its endemicity shows no sign of foreseeable abatement."[5] Since an incumbent regime forms part of the constitutional order, its extra-constitutional overthrow is not only illegal but amounts to the high crime of treason.[6]

A successful coup d'etat raises some complex legal questions. Are perpetrators of coups d'etat guilty of treason? Should (or can) they be tried and punished for the high crime? Does the constitutional order survive a coup d'etat? What is the constitutional foundation of a regime born of a coup d'etat? What is the source of validity, legitimacy, and legislative power of an extra-constitutional order? Can the courts validate usurpation of state power? These and other related questions have long occupied political scientists and sociologists.[7] For scholars and practitioners of law, these are not questions of mere academic interest. Often in the wake of coups d'etat, courts in common law jurisdictions are called upon to resolve issues of the survival of the constitutional order and the validity,

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1. Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284, 325 (Rhodesia App. Div.) (Beadle, C.J.).

2. John Dryden, *The Medall: A Satyre Against Sedition*, *in* 1 POEMS OF JOHN DRYDEN 250, 259 (James Kinsley ed., 1958).

3. WEBSTER'S NEW TWENTIETH CENTURY UNABRIDGED DICTIONARY 418 (2d ed. 1979), defines "coup d'etat" as "a sudden, forceful stroke in politics; especially, the sudden, forcible overthrow of a government."

4. SAMUEL DECALO, COUPS & ARMY RULE IN AFRICA: MOTIVATIONS & CONSTRAINTS 1 (2d ed. 1990). By one count there were 232 coups d'etat in the world between 1945 and 1978, and all but 11 of these were in post-colonial societies. EDWARD LUTTWAK, COUP D'ETAT: A PRACTICAL HANDBOOK 190-207 (2d ed. 1979).

5. BEN O. NWABUEZE, CONSTITUTIONALISM IN THE EMERGENT STATES 219 (1973).

6. Treason is "the offense of attempting by overt acts to overthrow the government of the state to which the offender owes allegiance." BLACK'S LAW DICTIONARY 1501 (6th ed. 1990).

7. *See, e.g.*, Charles H. Kennedy & David J. Louscher, *Civil-Military Interaction: Data in Search of a Theory*, 26 J. ASIAN & AFR. STUD. 1 (1991); DECALO, *supra* note 4; THE POLITICAL DILEMMAS OF MILITARY REGIMES (Christopher Clapham & George Philip eds., 1985); Kim Q. Hill, *Military Role and Military Rule*, 11 COMP. POL. 371 (1979); Gwyn Harries-Jenkins & Charles C. Moskos, Jr., *Trend Report: Armed Forces and Society*, CURRENT SOCIOLOGY, Winter 1981, at 1; Robert W. Jackman, *Explaining African Coups d'Etat*, 80 AM. POL. SCI. REV. 225 (1986); Arturo Valenzuela, *A Note on the Military and Social Science Theory*, 7 THIRD WORLD Q. 132 (1985); THE ARMED FORCES IN CONTEMPORARY ASIAN SOCIETIES (Edward A. Olsen & Stephen Jurika eds., 1985); ARMIES AND POLITICS IN LATIN AMERICA (Abraham F. Lowenthal & J. Samuel Fitch eds., 1986).

legitimacy, and legislative power of usurper regimes.[8] This article aims at a critical examination of judicial responses to coups d'etat in post-colonial common law jurisdictions.

Existing literature on the subject[9] suffers from various shortcomings. First, much of this literature is dated. The last article dealing with this issue was published in 1986; much has happened since. Second, most of the literature focuses on a single jurisdiction, or a selected few jurisdictions, and thus fails to discern the recurring themes in common law jurisprudence dealing with coups d'etat. Third, most of this literature, like the courts in common law jurisdictions, fails to make a distinction between the validity and the legitimacy of extra-constitutional regimes, a distinction that is pivotal in formulating an appropriate judicial response to successful coups. Fourth, while many scholars recommend what they consider to be the appropriate judicial response to constitutional ruptures, other possible responses are not explored and evaluated. This article aims to remedy these shortcomings by surveying all post-colonial common law cases dealing with the aftermath of coups d'etat and evaluating all options available to a court when confronted with a successful coup.

The first part of this article is a survey of all known judicial responses to coups d'etat in post-colonial common law settings. The cases included

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8. Extra-constitutional regimes in post-colonial civil-law settings do not consider their legitimacy and validity open to judicial or international question. This is particularly true in Latin America where the Estrada Doctrine posits that foreign states cannot affect the legitimacy of an incumbent regime by withholding recognition, even if the regime is of extra-constitutional origin. Jurisprudentially, the doctrine rests on the premise of unfettered state sovereignty and implies that success is the only yardstick of validity of illegal usurpation. *See* Philip C. Jessup, Editorial Comment, *The Estrada Doctrine*, 25 AM. J. INT'L L. 719 (1931); BURN H. WESTON ET AL., INTERNATIONAL LAW & WORLD ORDER 954-55 (2d ed. 1990); BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 422-23 (1991).

9. *See, e.g.*, Stanley A. de Smith, *Constitutional Lawyers in Revolutionary Situations*, 7 W. ONTARIO L. REV. 93 (1968); BEN O. NWABUEZE, JUDICIALISM IN COMMONWEALTH AFRICA: THE ROLE OF THE COURTS IN GOVERNMENT 154-90 (1977); NWABUEZE, *supra* note 5, at 219-56; Anthony M. Honore, *Reflections on Revolutions*, 2 IRISH JURIST 268 (1967); Claire Palley, *The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary*, 30 MOD. L. REV. 263 (1967); R.W.M. Dias, *Legal Politics: Norms Behind the Grundnorm*, 26 CAMBRIDGE L.J. 233 (1968); J.M. Eekelaar, *Principles of Revolutionary Legality*, *in* OXFORD ESSAYS IN JURISPRUDENCE 23 (A.W.B. Simpson ed., 2d ed. 1978) [hereinafter Eekelaar, *Principles*]; John M. Finnis, *Revolutions and Continuity of Law*, *in id.*; R.S. Welsh, *The Function of the Judiciary in a Coup d'Etat*, 87 S. AFR. L.J. 168 (1970); F.M. Brookfield, *The Courts, Kelsen, and the Rhodesian Revolution*, 19 U. TORONTO L.J. 326 (1969); J.M. Eekelaar, *Rhodesia: Abdication of Constitutionalism*, 32 MOD. L. REV. 19, 22-23 (1969) [hereinafter Eekelaar, *Rhodesia*]; J. W. Harris, *When and Why Does the Grundnorm Change?*, 29 CAMBRIDGE L.J. 103 (1971) T.C. Hopton, *Grundnorm and Constitution: The Legitimacy of Politics*, 24 MCGILL L.J. 72 (1978); LESLIE WOLF-PHILLIP, CONSTITUTIONAL LEGITIMACY: A STUDY OF THE DOCTRINE OF NECESSITY (1979); Mark M. Stavsky, *The Doctrine of State Necessity in Pakistan*, 16 CORNELL INT'L L.J. 341 (1983); Farooq Hasan, *A Juridicial Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'Etat in Common Law*, 20 STAN. J. INT'L L. 191 (1984); Deiter Conrad, *In Defense of the Continuity of Law: Pakistan's Courts in Crises of State*, *in* PAKISTAN IN THE 80S: LAW & CONSTITUTION (Wolfgang Peter Zingel & Stephanie Zingel Ave Lallemant eds., 1985); Simeon C.R. McIntosh, *Legitimacy, Validity and the Doctrine of Necessity: The Case of Andy Mitchell and Others Considered*, 10 W. INDIAN L.J. 127 (1986).

are from Pakistan, Ghana, Southern Rhodesia (now Zimbabwe), Uganda, Nigeria, Cyprus, Seychelles, Grenada, Lesotho, Transkei, and Bophuthatswana. In each case, the article identifies the context of the constitutional crisis and examines the judicial response, including the doctrinal posture, rhetorical style, and evidentiary bases of the judicial pronouncements.

Although these different coups unfolded in diverse contexts and resulted in regimes with varied political agendas, the courts validated all incumbent usurper regimes with one exception. Hans Kelsen's theory of revolutionary legality furnished the primary doctrinal vehicle to reach this result. While there was extensive doctrinal cross-pollination among the different jurisdictions, enunciation of the doctrine lacked uniformity. While some courts adopted Kelsen's proposition that efficacy of a coup bestows validity in an unadulterated form, others modified this with or substituted it by doctrines of state necessity, implied mandate, and public policy. Kelsen's language permeates the judicial pronouncements; the courts insist that their decisions are grounded in legal principles and not in political and personal expedience. Following Kelsen, they fail to distinguish between legitimacy and validity of a legal order, using the terms interchangeably. The evidence invoked to justify findings of efficacy of coups d'etat by different courts is remarkable for its paucity and diversity, with the evidence of choice being self-serving affidavits by public officials under the control of usurpers and judicial notice of facts designated as being notorious.

The second part of the article evaluates all the options available to a common law court when confronted with a successful usurpation of political power through a coup d'etat. First, the article identifies salient features of the non-legal context within which courts are forced to fashion responses to successful coups. The article then evaluates the four possible judicial responses: validation and legitimation of usurpation, strict constitutionalism, resignation of office, and declaration of the issue to be a nonjusticiable political question. It is proposed that declaring the validity and legitimacy of a regime born of a coup d'etat a nonjusticiable political question is the most appropriate judicial response because it is doctrinally consistent and principled, morally sound, politically neutral, and institutionally prudent. The article argues that the legitimacy of a usurper regime is a political and moral issue to be resolved through the political processes of a society, and that the validity of a successful coup d'etat is a meta-legal question which belongs to the province of legal theory. As such, both the legitimacy and validity of a regime born of a successful coup d'etat fall outside the jurisdiction and competence of the courts. Designation of these as nonjusticiable political questions will insulate the courts from turbulent politics, deny the usurpers judicially pronounced validity and legitimacy, and facilitate the survival of the courts and the rule of law.

I. Common Law Jurisprudence of Successful Treason

This section embodies a survey of all known cases of judicial determination of the validity of coups d'etat in a post-colonial setting. The cases are presented in chronological order to highlight doctrinal cross-pollination between various jurisdictions.[10]

A. The *Dosso* Case: Pakistan 1958

1. The Context

A prolonged political crisis in Pakistan came to a head in 1958 as the general election, scheduled for February 1959, threatened the non-representative political elite with a loss of power.[11] To forestall this eventuality, on October 7, 1958, President Iskandar Mirza issued a proclamation in which he abrogated the Constitution, dissolved the National and Provincial Assemblies, declared martial law, and appointed the Commander-in-Chief of the army as the Chief Martial Law Administrator.[12] The President then issued the Laws (Continuance in Force) Order, whereby all laws were to remain in force and the country was to be governed "as nearly as may be in accordance with the late Constitution" subject to the unfettered legislative capacity of the martial law regime.[13] While the declared objective of the coup was to "devise a Constitution more suitable to the genius of the Muslim people"[14] and return to democracy "but of a type that people can understand and work,"[15] the real motive was to forestall initiation of representative democratic governance.[16]

2. The Judicial Response: Triumph of Kelsen

Four consolidated criminal appeals afforded the Supreme Court of Pakistan the opportunity to examine the validity of the coup d'etat in *State v.*

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10. Post-colonial common law jurisdictions treat case law and authoritative texts of other common law jurisdictions as persuasive authority. The cases reviewed are rife with citations to each other and to relevant English and American cases.

11. For details of the political and constitutional context in which the coup d'etat took place, see MOHAMMAD WASEEM, POLITICS AND THE STATE IN PAKISTAN 116-52 (1989); AYESHA JALAL, THE STATE OF MARTIAL RULE: PAKISTAN'S POLITICAL ECONOMY OF DEFENSE 194-276 (1990).

12. HERBERT FELDMAN, REVOLUTION IN PAKISTAN: A STUDY OF THE MARTIAL LAW ADMINISTRATION 1 (1967). The proclamation of martial law read, *inter alia*:

> My appraisal of the internal situation has led me to believe that a vast majority of the people no longer have any confidence in the present system of Government. . . . The Constitution . . . is full of dangerous compromises so that Pakistan will disintegrate internally if the inherent malaise is not removed. To rectify them, the country must first be taken to sanity by a peaceful revolution . . . . [T]he Constitution is sacred. But more sacred . . . is the country and the welfare and happiness of its people.

Id. at 214.

13. This section of the Order is quoted in State v. Dosso, 1958 P.L.D. S. Ct. 533, 540-41 (Pakistan).

14. Proclamation of October 7, 1958, *reprinted in* FELDMAN, *supra* note 12, at 214.

15. October 8, 1958 broadcast of General Ayub, *quoted in id.* at 4.

16. WASEEM, *supra* note 11, at 246.

Dosso.[17] The Chief Justice, author of the main opinion, considered it "necessary to appraise the existing constitutional position in the light of the juristic principles which determine the validity or otherwise of law-creating organs in modern States."[18] The Court turned to Hans Kelsen's theory of revolutionary legality, which it termed "one of the basic doctrines of legal positivism, *on which the whole science of modern jurisprudence rests*,"[19] and adopted the proposition that the efficacy of a coup d'etat is the basis of its validity.[20] The Court held that the coup d'etat, "having been successful[,] . . . satisfies the test of efficacy," and has become a "basic law creating fact."[21] Therefore, the Laws (Continuance in Force) Order, "*however tran-*

17. 1958 P.L.D. S. Ct. 533 (Pakistan). The appeals concerned proceedings and convictions under the Frontier Crimes Regulation, Act III of 1901, a holdover from the colonial administrative scheme for the tribal areas, which two different High Courts in 1957 had struck down as violating the due process and equal protection provisions of the 1956 Constitution. The issue before the Court was whether the writs issued by the High Courts had abated in light of the abrogation of the 1956 Constitution.

18. *Id.* at 538.

19. *Id.* (emphasis added).

20. The Court summarized Kelsen's position on the relationship between a constitution and revolution:

> [A] jurist . . . [must] presuppose the validity of historically the first Constitution whether it was given by an internal usurper, an external invader or a national hero or by a popular or other assembly of persons. Subsequent alterations in the Constitution and the validity of all laws made thereunder is determined by the first Constitution . . . . It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order . . . . [A] change is, in law, a revolution if it annuls the Constitution and the annulment is effective.

Id. at 538-39.

21. *Id.* at 540. The Court explained the metamorphosis of the crime of treason into a valid legal order:

> If the attempt to break the Constitution fails[,] those who sponsor or organize it are judged by the existing Constitution as guilty of the crime of treason. But if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success . . . . *Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change.*

Id. at 539 (emphasis added).

According to the Court, a coup d'etat brings about

> no change in the corpus or international entity of the State and the revolutionary government and the new constitution are, according to International Law, the legitimate government and valid Constitution of the State. Thus a victorious revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution.

Id.

The Court underscored the amoral posture of the doctrine of revolutionary legality:

> [F]rom a juristic point of view *the method by which and the persons by whom a revolution is brought about is wholly immaterial.* The change may be attended by violence or it may be perfectly peaceful. It may take the form of a coup d'etat by a political adventurer or it may be effected by persons already in public positions. *Equally irrelevant in law is the motive* for a revolution, inasmuch as a destruction of

sitory or imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and the correctness of judicial decisions has to be determined."[22] In the aftermath of a successful coup, "the national legal order must for its validity depend upon the new law-creating organ,"[23] and "[e]ven Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new constitution."[24] Therefore,

> [u]nder the new legal Order any law may at any time be changed . . . and . . . there being no restriction on the [coup makers'] law-making power . . . [the fundamental rights] test to determine the validity of the laws and fetters on the power of the legislature to make laws have both disappeared.[25]

It is important to note that the Court, deciding the case only twenty days after the coup, did not refer to any evidence which formed the basis of its determination that the coup was efficacious.

The *Dosso* judgment, termed "a *carte blanche* for treasonable conduct"[26] by one commentator, is a landmark in common law jurisprudence regarding the validity, legitimacy, and legislative capacity of extra-constitutional regimes. It provided the first express transformation of Kelsen's theories of constitution and revolution into a judicially pronounced common law doctrine of revolutionary legality. Before *Dosso,* the doctrine of state necessity had furnished common law courts with the framework to validate extra-constitutional acts of lawful regimes.[27] But the recognition

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the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends.

Id. at 538 (emphasis added).

22. *Id.* at 540 (emphasis added).

23. *Id.* at 539.

24. *Id.* Shahabuddin, J., also relied on Kelsen for his position on the status of the courts and the new order:

> According to the Proclamation which is not and cannot be called or permitted to be called in question[,] as well as in actual effect[,] the late Constitution stands abrogated, and the new order under which the Courts are exercising their respective jurisdictions at present takes its place with regards to the matters to which it relates.

Id. at 546.

Amiruddin Ahmad, J., also cited Kelsen for the proposition that "the continued laws receive their validity exclusively from the new order, subject to limitations put by the new order." *Id.* at 569. Cornelius, J., dissented on "certain points," *id.* at 548, but did not question the authority of Kelsen.

25. *Id.* at 541. According to the Court, the unfettered legislative power of the new regime implied that "there is no such thing as a fundamental right," and "[u]nless therefore the [coup maker] expressly enacts the provisions relating to fundamental rights, they are not a part of the law of the land and no writs can issue on their basis." *Id.* at 541. The Court held that the writs issued by the High Courts, the subject of the appeals, had abated. *Id.* at 542.

26. Hasan, *supra* note 9, at 217.

27. For the historical evolution of the doctrine in English law, see Glanville Williams, *The Defense of Necessity,* 6 CURRENT LEGAL PROBS. 216 (1953). For the development of the doctrine in the United States, see Stavsky, *supra* note 9, at 347-54. Only three years before *Dosso,* Pakistan's Supreme Court had itself used the doctrine of state necessity to resolve a constitutional crises in Special Reference by His Excellency the Governor-General, 1955 P.L.D. F. Ct. 435 (Pakistan) [hereinafter *Governor-General's Case*]. The

of usurpation of extra-constitutional power by the doctrine of state necessity came with narrowly circumscribed limits regarding who could exercise such powers, to what ends, and for how long. In the *Governor-General's Case*, the Pakistani court had itself limited the doctrine to acts taken by the existing lawful sovereign,[28] confined the scope of extra-constitutional power to acts immediately necessary for the preservation of the state,[29] and limited its duration to the period necessary to recreate appropriate constitutional legislative organs.[30]

As discussed below, common law courts relied upon *Dosso* whenever they felt the need to bestow judicially pronounced legitimacy upon coups d'etat. The doctrine of revolutionary legality is attractive to both coup instigators and sympathetic courts because it unfetters the legislative capacity of extra-constitutional regimes and cloaks such regimes with legitimacy simply on the basis of the success of the underlying treason.

B. The *Matovu* Case: Uganda 1966

1. The Context

Uganda's first constitutional crisis grew out of the ethnic diversity and conflict that was compounded by the colonial legacy of centralization and underdevelopment.[31] After the first post-independence elections in April

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crisis arose from the dissolution of the constituent assembly and assumption of extra-constitutional emergency powers by the Governor-General. In a three-to-two decision, the Court upheld the Governor-General's assumption of extra-constitutional power, resting the decision on the doctrine of state necessity. *Id.* at 520-22.

28. *Id.* at 485.

29. *Id.* at 486. The Court expressly stated that the extra-constitutional power "cannot extend to matters which are not the product of the necessity, as for instance, changes in the constitution which are not directly referable to the emergency." *Id.*

30. *Id.* Once the constitutional legislative organ was in place, it could determine the validity of the exercise of emergency powers. *Id.* at 521. Cornelius, J., said in his dissent that the doctrine of necessity is "recognised but only in relation to matters falling within the *police powers of the State* . . . but it is clearly very far removed from the power of interference with constitutional instruments." *Id.* at 511 (emphasis in original). In Attorney-General v. Ibrahim, 1964 C.L.R. 195 (Cyprus), the Cypriot Supreme Court laid down the following prerequisites to invoke the doctrine of necessity: "(a) an imperative and inevitable necessity or exceptional circumstances; (b) no other remedy to apply; (c) the measure taken must be proportionate to the necessity; and (d) it must be of a temporary character limited to the duration of the exceptional circumstances." *Id.* at 265. In Hassan v. State, 1969 P.L.D. Lah. 786 (Pakistan), the Court construed the doctrine of necessity restrictively to assert jurisdiction of civil courts over acts and orders of martial law authorities in defiance of express martial law regulations.

31. Uganda's estimated population of 11 million is divided among twenty-one major ethnic groups, and the country is the geographical junction of four diverse African language families. DECALO, *supra* note 4, at 153. For analyses of ethnic diversity and conflicts, see CONFLICT RESOLUTION IN UGANDA (Kumar Rupesingle ed., 1989); UGANDA: THE DILEMMA OF NATIONHOOD (G.N. Uzoigwe ed., 1982); SAMWIRI RUBARAZA KARUGIRE, A POLITICAL HISTORY OF UGANDA 144-69 (1980). Decalo's description of Uganda's political evolution is not atypical of most post-colonial societies:

> The political evolution of Uganda is essentially the history of the tug-of-war between Bugandan separatism and the idea of a Ugandan nation; between modern political authority based upon non-Baganda regional ethnic alliances and the concept of the supremacy of the kabaka and traditional authority.

1962, two parties, the Ugandan People's Congress led by Milton Obote and the Kabaka Yekka led by Daubi Ocheng, formed a coalition government, but the coalition remained unstable.[32] The Kabaka Yekka members of the cabinet, through a motion in the National Assembly, called for investigation of corruption charges against Prime Minister Obote, the ministers of planning and defense, and Colonel Idi Amin, the second-in-command of the armed forces.[33] In response, on February 26, 1966, the Prime Minister, with the support of the military, assumed full powers of government, suspended the National Assembly, and abrogated the 1962 Constitution.[34] On April 15, 1966, the National Assembly was reconvened hastily to approve a new constitution that provided for an executive presidency and a unitary state. Opposition to these developments prompted Obote to declare martial law on May 20, 1966.[35]

2. *The Judicial Response: Kelsen and* Dosso *Found "Irresistible and Unassailable"*

On August 11, 1966, Michael Matovu, a Buganda county chief, was served with a detention order under provisions of Article 31(I) of the 1966 Constitution. Matovo filed a habeas corpus application, arguing that the detention order violated the fundamental rights provisions of section 28 of the 1962 Constitution, which remained the supreme law of the land. This furnished the High Court of Uganda with the opportunity to examine the validity of the new regime in *Uganda v. Matovu*.[36]

In a unanimous decision, the Court first rejected the regime's plea that the new oath of allegiance administered under the new Constitution precluded the Court from inquiring into the validity of that Constitution.[37] The Court also rejected the plea that "the court had no jurisdiction to enquire into the validity of the Constitution because the making of a constitution is a political act and outside the scope of the functions of

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Intertwined with this struggle are center-periphery, Catholic-Protestant, civil-military, and personality competitions.

Id. at 150.

For details of the context of the 1966 coup, see *id.* at 150-55. *See also, e.g.*, AMII OMARA-OTUNNU, POLITICS & THE MILITARY IN UGANDA, 1890-1985 (1987); JAN JELMERT, UGANDA: A MODERN HISTORY (1981); ALI A. MAZRUI, SOLDIERS AND KINSMEN IN UGANDA: THE MAKING OF A MILITARY ETHNOCRACY (1975); AMII OMARA-OTUNNU, POLITICS AND THE MILITARY IN UGANDA 1890-1985 (1987); A.G.G. GINGYERA-PINYCWA, APOLO MILTON OBOTE AND HIS TIMES (1978).

32. DECALO, *supra* note 4, at 152-53.

33. *Id.* at 154.

34. *Id.* at 155.

35. *Id.*

36. 1966 E. Afr. L.R. 514 (Uganda). For comment on the case, see ANNUAL SURVEY OF COMMONWEALTH LAW 1967 82-83 (H.M.R. Wade ed., 1968).

37. The Court stated that both the 1962 and 1966 oaths spoke of "the Constitution," and

> since it is the duty of the judges of this court to do right to all manner of people in accordance with the Constitution . . . as by law established, it must follow as the night follows the day, that it is an essential part of the duty of the judges of this court to satisfy themselves that the Constitution of Uganda is established according to law and that it is legally valid.

the court."[38] The Court relied expressly upon and quoted extensively from both Kelsen and *Dosso*, which it found "irresistible and unassailable."[39] The Court designated the events from February 22 to April 1966 as "law creating facts appropriately described in law as a revolution,"[40] because "there was an abrupt political change, not contemplated by the existing Constitution, that destroyed the entire legal order and was superseded by a new Constitution, . . . and by effective government."[41] Resting its holding expressly on Kelsen and *Dosso*, the Court said:

> Applying the Kelsenian principles, which incidentally form the basis of the judgment of the Supreme Court of Pakistan in the above [*Dosso*] case, our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity. The 1966 Constitution, we hold, is a new legal order and has been effective since April 14, 1966, when it first came into force.[42]

While the *Dosso* court did not feel obliged to refer to any evidence to support its holding of efficacy of the coup, the *Matovu* Court referred to "a large number of affidavits sworn to by a large number of officials, the purpose of which is to prove to the satisfaction of the court that the new Constitution is efficacious and that it has been accepted by the people since it came into force."[43] The Court also relied upon its extrapolation of international law principles to examine the validity of an extra-constitutional regime. The Court held that "[a]lthough the product of a revolution, the [1966] Constitution is none-the-less valid in law because in international law revolutions and *coups d'etat* are the recognized methods of changing governments and constitutions in sovereign states."[44] *Dosso* had said this much, but *Matovu* emphasized that because Uganda was "a well-established independent state, the question of its recognition since the installation of the new Head of State by other nations is of considerable importance,"[45] and noted that "recognition has been accorded to the new Government by all foreign countries with which Uganda deals."[46] Accord-

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Matovu, 1966 E. Afr. L.R. at 530.

38. *Id.* at 527. After examining American case law on the subject, the Court concluded that the question of the validity of a constitution is not a non-justiciable political question. *Id.* at 530-34.

39. *Id.* at 535-38. The Court also quoted with approval the statement of James Bryce that "Knots which the law cannot untie may have to be cut by the sword." *Id.* at 537 (citation omitted).

40. *Id.* at 515.

41. *Id.*

42. *Id.* at 539.

43. *Id.* The Court noted that the affidavits "have not been in any way challenged or contradicted . . . there is not before us any evidence to the contrary." *Id.*

44. *Id.* at 537.

45. *Id.* at 539.

46. *Id.* Curiously, the Court also said that "the question of the recognition of the new Head of State of Uganda by foreign nations is not strictly within the scope of this enquiry." *Id.* at 540.

ing to the Court, the validity of the 1966 Constitution rested on satisfying four "cardinal" requirements in international law:

1. That there must be an abrupt political change, i.e. a *coup d'etat* or a revolution.
2. That change must not have been within the contemplation of an existing Constitution.
3. The change must destroy the entire legal order except what is preserved; and
4. The new Constitution and Government must be effective.[47]

In upholding the Emergency Powers Act of 1963, under which the Emergency Powers (Detention) Regulations of 1966 had been enacted, the Court adopted Kelsen's language, stating that "[l]aws which derive from the 'old order' may remain valid under the 'new order' 'only because validity has expressly or tacitly been vested in them by the new constitution'; '. . . only the contents of these [old] norms . . . remain the same, not the reason of the validity.'"[48] The Court dismissed the habeas corpus application accordingly.

C. The *Madzimbamuto* Case: Southern Rhodesia 1968

1. The Context

The Unilateral Declaration of Independence (UDI) on November 11, 1965, by the white minority government created a constitutional crisis in Southern Rhodesia.[49] At the time, Rhodesia was governed under the 1961 Constitution whereby it remained a British colony but enjoyed extensive self-rule under a white minority regime. Independence required assent of the British Parliament and the Constitution envisaged a gradual advance towards majority rule.[50] The Constitution also contained a declaration of rights including the right of appeal to the Privy Council.[51] Specially entrenched provisions of the Constitution, including the declaration of fundamental rights, separation of powers, and security and tenure of judges of the High Court, could be amended only by a referendum of the four major racial groups.[52]

Along with the UDI, the minority government promulgated a new constitution.[53] The new constitution departed from the 1961 Constitution in two significant respects. The provisions for eventual majority rule were omitted and the entrenched clauses could now be amended by the legisla-

47. *Id.* at 534.
48. *Id.* at 538.
49. For constitutional history of Southern Rhodesia, see CLAIR PALLEY, THE CONSTITUTIONAL HISTORY & LAW OF SOUTHERN RHODESIA 1888-1965 (1966). *See also* Dias, *supra* note 9; Welsh, *supra* note 9, at 169-72.
50. ROBERT BLAKE, A HISTORY OF RHODESIA 333-34 (1977); ZIMBABWE: A COUNTRY STUDY 39-44 (Harold D. Nelson ed., 2d ed. 1983) [hereinafter ZIMBABWE]; Welsh, *supra* note 9, at 169-70; NWABUEZE, *supra* note 9, at 162.
51. BLAKE, *supra* note 50, at 333-34; Welsh, *supra* note 9, at 169-70.
52. Welsh, *supra* note 9, at 170.
53. Madzimbamuto v. Lardner-Burke, 1966 R.L.R. 756, 777 (Rhodesia Gen. Div.).

ture.[54] The government also changed the manner of appointment to the judiciary, the structure of the High Court, and abolished the right of appeal to the Privy Council.[55] The Governor reacted swiftly to the UDI by dismissing the Cabinet from office and calling upon on all public servants, including the judiciary, not to assist the UDI but to carry on with their normal tasks and to assist in maintaining law and order.[56] On November 16, 1965, the British Parliament enacted the Southern Rhodesia (Constitution) Act of 1965, which removed and reverted to Britain all the legislative powers of the Rhodesian legislature.[57] By this time, however, the extra-constitutional regime effectively controlled the government, including both the civil service and the military.[58]

2. *The Judicial Response: Nothing Succeeds Like Success*

For some time, the courts avoided the issue of the legality of the UDI and the 1965 Constitution.[59] The courts finally confronted the issue in *Madzimbamuto v. Lardner-Burke*,[60] a case which some have termed, "[m]ana for jurisprudes."[61] The government had detained two political activists under the 1961 Constitution just prior to the UDI. On the expiration of the state of emergency in February 1966, the government continued their detention under Regulation 47(3), which derived its authority from the 1965 Constitution. The detainees challenged the legality of their detention and, by implication, that of the UDI and the 1965 Constitution.

The General Division of the High Court rejected the regime's position that it was a de jure government by virtue of its effective control of the country and the complete overthrow of the old order.[62] The Court saw no

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54. ZIMBABWE, *supra* note 50, at 45-48.

55. Madzimbamuto v. Lardner-Burke [1968] 2 S. Afr. L.R. 284, 425 (Rhodesia App. Div.); Madzimbamuto v. Lardner-Burke (2), [1968] 2 S. Afr. L.R. 457, 461-62 (Rhodesia App. Div.); Dhlamini v. Carter (2), [1968] 2 S. Afr. L.R. 464, 466 (Rhodesia App. Div.); Regina v. Ndhlovu, [1968] 4 S. Afr. L.R. 515, 537.

56. Governor's announcement is quoted in full in Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284, 303 (Rhodesia App. Div.).

57. NWABUEZE, *supra* note 9, at 163, 208-09.

58. Brookfield, *supra* note 9, at 329.

59. *See* Palley, *supra* note 9, at 269-75, for a review of cases where the courts avoided confronting the issue.

60. 1966 R.L.R. 756 (Rhodesia Gen. Div.).

61. Palley, *supra* note 9, at 263.

62. *Madzimbamuto*, 1966 R.L.R. at 756. Goldin, J., said that "this court is sitting . . . '*in medias res*' . . . [consequently] the submission . . . that a successful revolution is now 'a law-creating fact,' is based on confidence and not reality . . . . [T]he court is not entitled to speculate concerning the future and must consider the present position on the facts before it." *Id.* at 863. He then offered a sobering assessment of the balance of power between the usurpers and the courts:

> There is no substance in the submission that by refusing to give effect to measures of this [revolutionary] government, those responsible for the [revolution] . . . would by order of court revert to . . . constitutional Government . . . . [I]t would be completely unrealistic to even assume that the present situation can be altered by a decision of this court.

difficulty in accepting Kelsen's doctrine of revolutionary legality[63] and approved of *Dosso*.[64] But the Court distinguished the situation at hand on the ground that Rhodesia was not a sovereign independent state.[65] The Court held that the "1965 Constitution is not the lawful constitution . . . and the Government of this country set up under it is not the lawful government."[66] However, the Court upheld the actions of the extra-constitutional regime on the basis of the doctrine of state necessity by one judge[67] and on the basis of "the doctrine of public policy" by the other.[68]

On appeal, five judges of the Appellate Division delivered their judgments on January 29, 1968.[69] Two of the judges held that the regime was a "de facto government" which could lawfully do anything which its predecessor could lawfully have done under the 1961 Constitution.[70] Two of them held that the regime had acquired "internal de jure status" and was entitled to do anything which the 1965 Constitution permitted.[71] The fifth judge held that the regime had neither de facto nor de jure status because it had not usurped the functions of the judiciary, and the High Court remained a court constituted under and deriving its authority from the 1961 Constitution. On grounds of necessity, however, he held that an

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Id. at 866.

63. *See id.* at 782-88. However, the doctrine applied only to "the normal situation where one has a state which is already a sovereign independent state changing its form of government or its constitution by a successful internal revolution, whether peaceful or otherwise." *Id.* at 788 (Lewis, J.). The doctrine "can only apply where the revolution has not only succeeded internally but has also had the effect of successfully untying the apron-strings of sovereignty of the mother state. An obvious example of such a revolution is to be found in the American War of Independence." *Id.* at 790 (Lewis, J.).

64. Along with *Dosso*, the Court referred to similar events in Zanzibar, Ghana, and Nigeria, accompanied by the remark that "in each of those countries . . . the change of its Constitution or form of government by means of a revolution was entirely its own affair, and *the successful overthrow of the old order brought with it lawful status to the new regime.*" *Id.* at 790 (Lewis, J.) (emphasis added). Regarding *Dosso*, the Court wondered "*[n]on constat* that the learned judges would have reached the same decision if Pakistan had been still tied to British sovereignty at that time." *Id.*

65. *Id.* Consequently, the Rhodesian court did not have the option exercised by "the [*Dosso*] court [that] 'joined' the revolution which destroyed and replaced the existing order." *Id.* at 862 (Goldin, J.).

66. *Id.* at 848 (Lewis, J.).

67. Lewis, J., held that:

> [T]he Government is, however, the only effective government of the country, and therefore on the basis of necessity and *in order to avoid chaos and a vacuum in the law*, this court should give effect to such measures of the effective government, both legislative and administrative, as could lawfully have been taken by the lawful government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order.

Id. at 848 (emphasis added).

68. *Id.* at 867 (Goldin, J.). He also described it as "'the doctrine of the public good or the public safety' . . . or the 'good of the state.'" *Id.* (citations omitted). The judge found that "the fact that no state has given Southern Rhodesia recognition . . . either de facto or de jure, is not crucial or even relevant to the discussion." *Id.* at 857.

69. *See* Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284 (Rhodesia App. Div.).

70. *Id.* at 290 (Beadle, C.J.); *id.* at 416 (Jarvis, A.J.A.).

71. *Id.* at 361 (Quenet, J.P.); *id.* at 376 (Macdonald, J.A.).

act of the regime may be upheld as long as it did not defeat the rights guaranteed by the 1961 Constitution.[72]

Chief Justice Beadle, who declared himself to be a positivist,[73] reviewed "the status of the present Government,"[74] guided by Kelsen, *Dosso*, and *Matovu*, which "show clearly enough that success alone is the determining factor."[75] Mindful of the efforts of Britain to undermine the UDI, he concluded that while the UDI regime was "a fully de facto Government in the sense that it is in fact in effective control of the [State's] territory and this control seems likely to continue,"[76] it was clear that "[a]t this stage . . . it cannot be said that it is yet so firmly established as to justify a finding that its status is that of a de jure Government."[77] He declined to apply the doctrine of state necessity on the grounds that it "is so imprecise in its application,"[78] and he refused to apply the fundamental principle that "nobody may take advantage of a necessity of his own making."[79] The distinction between de jure and de facto regimes led the Chief Justice to, in Eekelaar's phrase, "split[ ] the Grundnorm:"[80]

> The present Government has effectively usurped all the governmental powers under the old Grundnorm, but has not yet succeeded in setting up a new Grundnorm in its place . . . until the present Government has achieved the status of a de jure government, and the revolutionary Grundnorm becomes the new Grundnorm, it must govern in terms of the old Grundnorm . . . . [T]herefore . . . the present Government . . . can now lawfully do anything which its predecessor could lawfully have done, but until its new constitution is firmly established, and has thus become the de jure constitution of the territory, its administrative and legislative acts must conform to the 1961 Constitution.[81]

Justice Quenet was more forthright in his acceptance of "Kelsen's the-

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72. *Id.* at 422 (Fieldsend, A.J.A.).

73. *Id.* at 326-27.

74. *Id.* at 313.

75. *Id.* at 318. "[A] successful revolution which succeeds in replacing the old *Grundnorm* (or fundamental law) with a new one establishes the revolutionaries as a new *lawful* government." *Id.* at 315.

76. *Id.* at 359.

77. *Id.* He had earlier elaborated the difference between a de facto and a de jure government:

> The difference between the two types of government is the degree of certainty with which one can predict the likelihood of the regime continuing in 'effective control.' The difference between the two types of government may be narrowed down to the difference between 'seems' and 'is' likely because a Government which 'is' likely to continue in effective control could be said to be 'firmly established.' *The difference here then is the difference between 'seems' and 'is,' a difference purely of the degree of certainty with which the future can be predicted.*

Id. at 320 (emphasis added).

78. *Id.* at 330.

79. *Id.*

80. J.M. Eekelaar, *Splitting the Grundnorm*, 30 MOD. L. REV. 156 (1967). *See also* Eekelaar, *Rhodesia, supra* note 9, at 19.

81. Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284, 351-52 (Rhodesia App. Div.). Regulation 47(3) was found to be ultra vires of the Emergency Powers Act, of 1960, and thus of the 1961 Constitution. *Id.* at 360.

ory as applied in the Pakistani and Ugandan cases,"[82] and concluded that "the present Government is the country's de facto government; it has, also, acquired internal de jure status; its Constitution and laws (including the measures here in question) have binding force."[83] According to Justice Macdonald, "So far as a municipal court is concerned a de facto government is a de jure government in the sense that it is the only lawmaking and law-enforcing government functioning *'for the time being'* within the state."[84] Consequently, because "[t]he 1965 Constitution is the de facto constitution under which the de facto government operates . . . [it] is the de jure constitution."[85] Justice Fieldsend, who believed that a court "is not a creature of Frankenstein which once created can turn and destroy its maker,"[86] did not accept that judges could sit "to determine whether the constitution under which [the Court] was created has disappeared. Nor can [the Court] continue to exist to enforce some other constitution."[87] While his position was that "the present authorities . . . are a fully neither de facto, nor a de jure government and this Court remains a Court constituted by and deriving its authority from the 1961 Constitution,"[88] he recognized the need for limited recognition of certain acts of the present authorities on the grounds of necessity.[89]

Upon appeal, the Judicial Committee of the Privy Council rejected the concepts of de facto and de jure as inappropriate in dealing with the legal position of a usurper and held that while the legitimate government was trying to regain control it was impossible to hold that the usurper regime was for any purpose a lawful government.[90] *Dosso* and *Matovu* were accepted as valid though not applicable to Rhodesia.[91] Consequently, the

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82. *Id.* at 368. While judges "perform the judicial function they must give effect to the laws and the constitution of the effective government." *Id.* at 365.

83. *Id.* at 375.

84. *Id.* at 415-16.

85. *Id.* at 416.

86. *Id.* at 430.

87. *Id.* at 429.

88. *Id.* at 443-44.

89. *Id.* at 444. In upholding a law on grounds of state necessity, a court must be satisfied that:

> (a) any administrative or legislative act is directed to and reasonably required for the ordinary orderly running of the country;
> (b) the just rights of citizens under the 1961 Constitution are not defeated; and
> (c) there is no consideration of public policy which precludes the Court from upholding the act, for instance if it were intended to or did in fact in its operation directly further or entrench the usurpation.

Id.

90. Madzimbamuto v. Lardner-Burke, [1968] 3 All E.R. 561, 573-74, 578 (P.C.).

91. According to Lord Ried,

> Their lordships would not accept all the reasoning in these [*Dosso* and *Matovu*] judgments but they *see no reason to disagree with the result* . . . . It would be very different if there had been still two rivals contending for power . . . because that would mean that by striving to assert its lawful right *the ousted legitimate government was opposing the lawful ruler.*

Id. at 574 (emphasis added). The distinction made between a legitimate and a lawful ruler by Lord Ried is useful, as will be discussed in part III.E.ii, *infra.* Recognition of *Dosso* stemmed from the Court's view that "[i]t is a historic fact that in many countries

Council held that "the determination of the High Court of Southern Rhodesia with regards to the validity of [the UDI regime] . . . [was] erroneous."[92]

The Rhodesian High Court was quick to react to this rebuff. In *Regina v. Ndhlovu*,[93] it portrayed the Privy Council's approach as unrealistic and legalistic,[94] and held that "the present Government [of Rhodesia] is *now* the de jure government and the 1965 Constitution the only valid constitution . . . . The judgment of the Judicial Committee of the Privy Council is not binding on the present High Court of Rhodesia."[95] This holding rested on Beadle's view that it could now be predicted with reasonable certainty that the British government would not, in the foreseeable future, succeed in unseating the UDI regime. Consequently, the character of the Court had "undergone a transmogrification, as it were,"[96] and it was no longer sitting under the 1961 Constitution which had been "annulled by the efficacy of the change."[97]

D. The *Sallah* Case: Ghana 1970

1. The Context

On February 24, 1966, the armed forces of Ghana staged a coup d'etat and toppled the government of President Nkrumah.[98] Two days later, the military, by proclamation, suspended the 1960 Constitution, dismissed the President, dissolved the national assembly, and established the National Liberation Council as the new sovereign authority with power to legislate

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. . . there are now regimes which are universally recognized as lawful but which derive their origins from revolutions or *coups d'etat*. The law must take account of that fact." *Id.*

92. *Id.* at 578. The Council noted: "Beadle, C.J., frequently invokes 'political realities.' It is difficult to avoid saying that in so doing he departs from the terms of his judicial oath since he appears to prefer 'political realities' to the law." *Id.* at 670.

93. [1968] 4 S. Afr. L.R. 515 (Rhodesia App. Div.).

94. *Id.* at 517-23.

95. *Id.* at 535-37 (emphasis added). The Court had already stated, while denying a death penalty appeal to the Privy Council, in Dhlamini v. Carter, [1968] 4 S. Afr. L.R. 445 (Rhodesia App. Div.) that "no judgment of the Judicial Committee of the Privy Council would be of any value inside this territory." *Id.* at 465-66. The Prime Minister and the Minister of Justice had filed affidavits to the effect that the UDI regime would not in any way recognize, enforce or give effect to any adverse decision of the Privy Council and would forbid and prevent its officers from doing any act which would assist or enable any person to bring an appeal from the Appellate Division. Beadle, C.J., said that in light of the regime's posture any adverse decision of the Privy Council "would be a mere *brutum fulmen*," and "merely an academic exercise." Madzimbamuto v. Lardner-Burke, [1968] 4 S. Afr. L.R. 457, 462. The denial of the right to appeal led Fieldsend, J., to resign from the court on March 4, 1968. Young, J., resigned on August 12, 1968. Fieldsend was appointed the first Chief Justice of Zimbabwe after that country's independence and the establishment of one-person-one-vote majority rule.

96. *Ndhlovu*, [1968] 4 S. Afr. L.R. at 522.

97. *Id.* at 532.

98. For details of the political context, see generally TREVOR JONES, GHANA'S FIRST REPUBLIC 1960-66: THE PURSUIT OF THE POLITICAL KINGDOM (1976); ROBERT PINKNEY, GHANA UNDER MILITARY RULE 1966-69 (1972); SIMON BAYNHAM, THE MILITARY AND POLITICS IN NKRUMAH'S GHANA 153-203 (1988).

by decree.[99] The proclamation contained a continuation in force provision.[100] In 1969, the military rule was terminated and civilian rule was established under a new Constitution. The transitional provisions of the new Constitution provided for, among other things, the termination of any office "established" by the National Liberation Council.[101]

E.K. Sallah was appointed in October 1967 to a managerial post at the Ghana National Trading Corporation (GNTC), a corporation established under the Statutory Corporations Act of 1961, and re-established under the new Statutory Corporations Act of 1964. On February 21, 1970, the new civilian government dismissed Sallah, under the transitional provisions of the 1969 Constitution. He challenged the validity of his dismissal before the Ghana Court of Appeals in *Sallah v. Attorney-General*.[102]

2. *The Judicial Response: "Remote" and "Doctrinaire" Kelsen Rejected*

It is significant to note that this was the first instance of judicial determination of the validity of a coup d'etat undertaken after the extra-constitutional regime had expired. The Attorney-General, relying on Kelsen, argued that the 1966 coup d'etat, due to its success, had destroyed not only the existing Constitution but also the entire legal order and established a new legal order.[103] He argued that, with the suspension of the 1960 Constitution, the Act that established the GNTC also lost its validity and lapsed.[104] It regained its validity only by virtue of the Proclamation of February 26, 1966.[105] Similarly, all public offices in Ghana stood abolished by virtue of the successful coup d'etat, and were "established" anew by the Proclamation of February 26, 1966.[106] Consequently, Sallah's office could be terminated as it fell within the purview of the transitional provisions of the 1969 Constitution.[107] The majority of the Court spurned the government's reliance upon Kelsen. The Court felt that it "will not derive much assistance from the foreign theories,"[108] and that the

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99. NWABUEZE, *supra* note 5, at 229.

100. The provision read in part:

> [A]ny enactment or rule of law in force in Ghana immediately before the 24th of February 1966 shall continue in force and any such enactment or rule of law may by decree of the National Liberation Council be revoked, repealed, amended (whether by addition, omission, substitution or otherwise) or suspended.

Id. at 229.

101. For a full text of the provision, section 9(1) of Schedule A of the Constitution of 1969, see *id.* at 230.

102. Unreported opinion delivered on April 20, 1970, *reprinted in* 2 S.O. GYANDOH, JR. & J. GRIFFITHS, A SOURCEBOOK OF THE CONSTITUTIONAL LAW OF GHANA 493 (1972), *summarized in* 1970 CURRENT CASES (Ghana) 55; case comment in ANNUAL SURVEY OF COMMONWEALTH LAW 1970 49 (H.M.R. Wade ed., 1971).

103. GYANDOH & GRIFFITHS, *supra* note 102, at 494, 504-05.

104. *Id.*

105. *Id.*

106. *Id.* at 497, 504-05, 508.

107. *Id.* at 494, 504-05.

108. *Id.* at 505 (Sowah, J.).

> experience of the world teaches one that there is often considerable divergence between theory and practice; between the process of authorship and judicial adjudication. The literature of jurisprudence is remote from the immediate practical problems that confront judges called upon to interprete [sic] legislation or indeed to administer any law.[109]

The Court declined to designate the coup d'etat a valid revolution. Instead, it proffered the view, "What happened in Ghana on 24 February 1966 was just the beginning of a revolution which culminated in the promulgation of the 1969 Constitution which annulled or revoked the 1960 Constitution."[110] Archer, J.A., rested his rejection of Kelsen in the difficulty of locating the new *grundnorm*:

> Suppose we apply this [Kelsen's] juristic reasoning to the present case, it follows that when the proclamation suspended the Constitution of 1960, the old Basic Norm disappeared. What was the new Basic Norm? Was it the proclamation? It was not because it was not a constitution. How then do we trace the Basic Norm? Is the Basic Norm the people of Ghana who supported the armed forces and the police or is the Basic Norm to be detected from the armoured cars at Burma Camp?[111]

For the majority, the question was one of statutory interpretation: whether the members of the Constituent Assembly wanted the word "establish" to embrace not only offices created for the first time by the extra-constitutional regime, but also old offices retained by virtue of the Proclamation? Apaloo, J.A., answered the question in the following way:

> 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, in my opinion, subversive of their intention to interprete [sic] their declared will by reference to any such theory.[112]

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109. *Id.* at 509 (Apaloo, J.A.). Characterizing the Kelsenite line of argument as "highly artificial," Apaloo, J.A., said:

> I cannot believe that with the known pragmatism that informs judicial attitudes 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.

Id. at 508-09. Sowah, J.A., was similarly insistent on irrelevance of theories of law:

> [O]ne 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 age? I do not think so.

Id. at 505.

110. *Id.* at 495 (Archer, J.).

111. *Id.*

112. *Id.* at 509. Sowah, J.A., declared 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." *Id.* at 506.

The majority found that Sallah's office had been established in 1961, not by the extra-constitutional regime, and declared his dismissal invalid. Anin, J.A., however, adopted Kelsen's view as espoused by the attorney-general, and opined that by virtue of the 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—a veritable octopus whose tentacles covered the whole gamut of executive, legislative, and powers of the state."[113] He took the position:

> 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.[114]

Any evaluation of *Sallah* must consider the fact that serious allegations of personal bias were raised against two of the five judges who heard the case.[115] Moreover, the case arose in a context "beclouded with deep emotion" because over five hundred public officers had lost their jobs with the enforcement of the provision in question which formed part of the regime's "widely advertised" anti-corruption drive and which was "viewed with disfavor by many."[116] Sallah and the two judges belonged to minority

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113. *Id.* at 499.

114. *Id.* Anin, J.A., also reminded the Court that the majority in Gbedemah v. Awoonor-Williams, decided on December 8, 1969, had taken judicial notice of the "notorious fact" that the National Liberation Council had suspended the 1960 Constitution and vested in itself all executive, legislative and judicial powers of the state; had recognized that conferral of judicial power on the courts "was subject to any law that the National Liberation Council might choose to pass. Thus it would be accurate to say that judicial power was exercised by the courts during the years of the National Liberation Council on sufferance;" and had held that "no Decree which was passed by the National Liberation Council could have been struck down by the courts as unconstitutional." *Id.* at 499. *See* Gbedemah v. Awoonor-Williams (unpublished opinion of the Supreme Court) (delivered Dec. 8, 1969), *reprinted in* GYANDOH & GRIFFITHS, *supra* note 102, at 442. Siriboe, J.A., indicated at the judgment conference that he too would dissent, but did not deliver his judgment. *See Statement By President After Judgment, reprinted in* GYANDOH & GRIFFITHS, *supra* note 102, at 511. One does not know whether he too was persuaded by Kelsen's theories. *See also* S. K. Date-Bah, *Jurisprudence's day in Court in Ghana*, 20 INT'L & COMP. L.Q. 315, 321 (1971).

115. A motion by the defendant sought disqualification of Apaloo and Sowah, JJ.A., Attorney-General v. Sallah, S.C. Motion No. 1/1970, unreported, *reprinted in* GYANDOH & GRIFFITHS, *supra* note 102, at 487, *summarized in* 1970 CURRENT CASES (Ghana) 54, S.C. The allegation against Apaloo, J.A., was that he was a close personal friend of Sallah, and it was alleged that Sowah, J.A., had an interest in the matter since his brother-in-law was also affected by the legislation in question. Affidavits, testimony of witnesses, and Sallah's own testimony about his long-standing friendship with Apaloo, J.A., supported the allegations. A new five-member bench was impaneled to decide the motion. In a four-to-one decision the Court found that on the evidence adduced there was no real likelihood of bias by the two judges. *See also* E. A. Osew, *Legal Bias and the Reasonable Man*, 3 REV. GHANA L. 145 (1971) (analyzing whether the *Sallah* Court was right in holding that the mere fact of a relationship between a party and a judge did not disqualify the latter in law).

116. Osew, *supra* note 115, at 157.

tribes who opposed the majority tribal group of the regime.[117] These factors raise questions about the weight of personal, political, and tribal considerations in the final decision.

E. The *Lakanmi* Case: Nigeria 1970

1. The Context

On January 15, 1966, some army officers attempted a coup d'etat in Nigeria which resulted in the death of the Prime Minister and some other members of the cabinet.[118] The remaining federal cabinet and the acting President turned over the administration of the country to the General Officer Commanding of the Army, General Aguiyi-Ironsi. The military regime suspended the provisions of the Constitution dealing with the executive and legislature and declared that, while the Constitution "shall have the force of law throughout Nigeria,"[119] the military government "shall have power to make laws . . . with respect to any matter whatsoever,"[120] and that "this Constitution shall not prevail over a decree, and nothing in this Constitution shall render any provision of a decree void to any extent whatsoever."[121] The jurisdiction of the courts was ousted from reviewing any act or order of the military regime.[122] On July 29, 1966, there was another coup d'etat in Nigeria and the new military regime continued to govern by decree.[123]

2. The Judicial Response: Usurpers Defied

Before 1970, the Nigerian Supreme Court had faced the question of the nature of the usurper regime on two occasions. In *Boro v. Republic*,[124] the Court implicitly recognized the military regime as a lawful government but took the position that the regime was not a creature of any new source of

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117. *Id.*

118. For the political context of the 1966 constitutional crisis of Nigeria, see generally WILLIAM D. GRAF, THE NIGERIAN STATE: POLITICAL ECONOMY, STATE, CLASS AND POLITICAL SYSTEM IN THE POST-COLONIAL ERA (1988); LARRY DIAMOND, CLASS, ETHNICITY AND DEMOCRACY IN NIGERIA: THE FAILURE OF THE FIRST REPUBLIC (1988).

119. Constitution (Suspension and Modification) Decree No. 1, 1966, *quoted in* Abiola Ojo, *The Search for a Grundnorm in Nigeria—The Lakanmi Case*, 20 INT'L & COMP. L.Q. 117, 120-21 (1971).

120. *Id.*

121. *Id.* at 121.

122. The ouster of jurisdiction was coupled with the inapplicability of constitutional provisions: "For the avoidance of doubt, it is hereby declared that the validity of any order . . . or of any other thing whatsoever done . . . [by the military regime] shall not be inquired into any court of law, and accordingly nothing in the [individual rights] provisions . . . of the Constitution . . . shall apply . . . ." Section 2 of Decree 45 of 1968, *quoted in* Lakanmi v. Attorney-General, 1971 U. Ife L.R., 201, 206 (Nigeria).

123. General Aguiyi-Ironsi was arrested and Colonel Gowon took over control of the country. Gowon himself was deposed on July 29, 1975. The next head of state, General Rumat Mohammad, was assassinated during an abortive coup on February 13, 1976; he was succeeded by General Obasanjo. A Constituent Assembly was convened in October 1977 and adjourned on July 5, 1978, having completed its work on a Draft Constitution prior to a return to civilian rule in October 1979, some thirteen years after the formation of the "interim government."

124. 1967 Nigerian Monthly L.R. 163 (decided Dec. 5, 1966).

authority, because "[f]ollowing the events of mid-January, 1966, the former civilian government of Nigeria *handed over power* to the military authorities, and the government of Nigeria *became* the Federal Military Government."[125] In *Council of the University of Ibadan v. Adamolekun*,[126] the Court termed the change in government a "military take over of the Government of Nigeria,"[127] which nevertheless "keeps the Constitution of the Federation alive subject of course to the suspension and modifications made by the Decree."[128] The Court took the position that it was not inquiring whether the military regime "could legislate by Edict but only whether . . . the [particular] Edict is inconsistent with the Constitution of the Federation."[129]

The question of validity and legislative capacity of the extra-constitutional regime was squarely confronted in *Lakanmi v. Attorney-General*.[130] The issue was whether military decrees could legally keep the courts from reviewing orders issued by tribunals of inquiry established by the military regime.[131] The Court rejected the government's position that "what took place in January 1966 was a revolution and the Federal Military Government is a revolutionary Government . . . . It accordingly has an unfettered right . . . to rule by force and by means of Decrees . . . ."[132] The government argued that it was relying upon Kelsen's theory of revolutionary legality as espoused by *Dosso* and *Matovu*.[133] The Court did not question Kelsen's position and acknowledged the merit of *Dosso* and *Matovu*, but distinguished them from the situation in Nigeria. In *Dosso* and *Matovu*, the existing Constitutions were nullified and new legal orders introduced, which was an "abrupt political change" tantamount to a revolution. However, in Nigeria, necessity dictated an "agreed" partial suspension of the Constitution and the formation of an "interim Military Government,"[134] which in turn effected the transfer of power from the old to the new order.

The decision of the Court turned on the question of whether the military takeover of 1966 was a revolution, which created a new legal order and bestowed unfettered legislative power upon the extra-constitutional

125. *Id.* at 166 (emphasis added).
126. [1967] 1 All N.L.R. 213 (Nigeria) (decided Aug. 7, 1967).
127. *Id.* at 221.
128. *Id.* at 223.
129. *Id.* at 224.
130. 1971 U. Ife L.R. 201 (Nigeria).
131. The specific issue in the case concerned a conflict between the Forfeiture of Assets (Public Officers and other Persons) Validation Decree, No. 45 of 1968, and the non-suspended sections of the 1963 Constitution providing for protection of fundamental human rights and the establishment and jurisdiction of the superior courts.
132. *Lakanmi*, 1971 U. Ife L.R. at 212.
133. *Id.* at 212.
134. *Id.* at 214-17. The Court characterized the "invitation" by the Council of Ministers to the head of the Army in the following manner: "your men have started a rebellion, which we fear may spread; you have the means to deal with them. We leave it to you to deal with them and after this, return the administrative power of the Government to us." *Id.* at 215. The purported meeting of the Council of Ministers, which itself was unconstitutional, was validated on the ground of necessity. *Id.* at 214.

regime. The Court said that the 1963 Constitution remained the fundamental and operative norm against which the courts could measure acts of the "interim Military Government."[135] Although the Court recognized that extra-constitutional acts of a regime could be validated on the ground of necessity, it found no necessity for limiting the courts' jurisdiction, or the passing of ad hominem decrees in this case, and held the decrees invalid.[136]

The Court found the decrees invalid on two grounds. First, preclusion of judicial review violated the separation of powers guaranteed by the Constitution.[137] Second, in specifically naming individuals against whom orders were issued, the decrees constituted ad hominem laws, thus violating the fundamental principle that only a court can find a person guilty.[138]

The Court's decision is vulnerable to criticism as it rests on the dubious assumption that the Prime Minister was alive when the remaining cabinet decided to turn the government over to the military.[139] As Abiola Ojo points out, "In the absence of the Prime Minister or of a duly appointed acting Prime Minister, there was no one competent under the Constitution to call a valid meeting of the Cabinet," hence the gathering that decided to "voluntarily" hand over the government to the military was not the Cabinet as recognized by the 1963 Constitution.[140] Furthermore, the Court "chose a singularly inappropriate and unpopular measure on which to challenge the authority of [the military] government."[141] The decree in question was intended to appropriate gains of widespread corruption in Nigerian public life, a measure backed by considerable popular support. Consequently, the decision led to "the impression that fraud is being encouraged by legal technicalities."[142]

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135. The Court rested its "interim government" holding upon General Aguiyi-Ironsi's broadcast of January 16, 1966, in which he claimed that, "The Government of the Federation of Nigeria having ceased to function, the Nigerian Armed Forces have been invited to form an interim military government . . . . This invitation has been accepted. . . ." *Id.* at 214.

136. *Id.* at 217-22. The Court said:

> The necessity must arise before a decree is passed ousting any portion of the Constitution. In effect, the Constitution still remains the law of the country and all laws are subject to the Constitution excepting so far as by necessity the Constitution is amended by a Decree. This does not mean that the Constitution of the country ceases to have effect as a superior norm. From the facts of taking over . . . the Federal Military Government is an interim government of necessity . . . .

Id. at 217.

137. *Id.* at 218-19.

138. *Id.* at 222.

139. *Id.* at 214. The Court recognized that if the Prime Minister was dead "the situation might have been different." *Id.*

140. Ojo, *supra* note 119, at 127. By its statement that "[i]t must be accepted that the Council of Ministers validly met at the time," *Lakanmi*, 1971 U. Ife L.R. at 214, the Court appears to imply that necessity validated the otherwise unconstitutional meeting.

141. *Laws and Super Laws*, NEW NIGERIAN, May 12, 1970, *quoted in* Ojo, *supra* note 119, at 135.

142. *Id.*

3. The Aftermath: Rebuke and Capitulation

The military regime reacted sharply and quickly to the *Lakanmi* decision and to the holding that "the Federal Military Government is not a revolutionary government."[143] The judgment of April 24, 1970, was followed on May 9, 1970, by the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970, which reasserted the unfettered and unlimited legislative competence of the military regime; in explicitly Kelsenite language, it declared that the events of January and July 1966 were

> revolution[s] . . . [that] effectively abrogated the whole pre-existing legal order in Nigeria . . . involved an abrupt political change which was not within the contemplation of the Constitution . . . [and] established a new government . . . with absolute powers to make laws . . . . No question as to the validity of any Decree or any Edict . . . shall be entertained by any court of law in Nigeria . . . . [A]ny decision . . . by any court . . . which has purported to declare . . . the invalidity of any Decree . . . is . . . null and void and of no legal effect whatsoever as from the date of the making thereof.[144]

The Supreme Court felt constrained to capitulate in the face of this express rebuke by the usurper regime. In *Adejumo v. Johnson*,[145] the Court acknowledged the validity of Decree No. 28 and, by implication, that of the military regime.[146] Interestingly, the Court said that Decree No. 28 "establishes and otherwise confirms *the already existing ouster of the jurisdiction of courts of law* . . . ."[147] By saying that the new Decree was only declaratory in nature, the Court in effect said that *Lakanmi*, *Boro*, and *University of Ibadan* were all wrongly decided.

The aftermath of *Lakanmi* is very instructive for any study that aims at identifying suitable judicial responses to successful coups d'etat. It clearly demonstrated the practical limitations a court confronts when faced with

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143. *Lakanmi*, 1971 U. Ife L.R. at 217.

144. Decree No. 28 of 1070, *reprinted in* D.O. AIHE & P.A. OLUYEDE, CASES & MATERIALS ON CONSTITUTIONAL LAW IN NIGERIA 258-59 (1979). *See also* A. G. Kairibi-Whyte, *Federal Military Government (Supremacy & Enforcement of Powers) Decree No. 28 of 1970*, 1 NIGERIAN J. CONTEMP. L. 284 (1970).

145. [1972] 1 All N.L.R. 159 (Nigeria).

146. For discussion of *Adejumo*, see Abiola Ojo, *Public Law, the Military Government & the Supreme Court*, *in* SUPREME COURT OF NIGERIA 1956-1970 90, 102-04 (A. B. Kasunmu ed., 1977). For text of the underlying case in Lagos High Court, see AIHE & OLUYEDE, *supra* note 144, at 237-40.

147. *See* Ojo, *supra* note 146, at 103. Ojo, who is very critical of the *Lakanmi* decision, calls the decree "legitimately expected" and "obvious," Ojo, *supra* note 119, at 134, and quotes with approval a newspaper remark that "the Supreme Court took its stand on a banana skin. And not surprisingly, it has been helped to slip." *Id.* at 135. The Nigerian courts did not forget the aftermath of *Lakanmi*. When the question of the validity of a subsequent coup d'etat, that of December 31, 1983, came before the Nigerian Court of Appeal, it held that decrees of the usurper regime were the "*grundnorm* or fundamental law of Nigeria as of today." Nigerian Union of Journalists v. Attorney-General, 1986 L.R.C. Const. 1,8 (Nigeria). The court refused to follow *Lakanmi*, saying "[w]e are concerned with the law as it is, not as it ought to be." *Id.* at 9. The complete ouster of jurisdiction of courts from examining the validity of decrees and edicts of the usurper regime was upheld. *Id.* at 13. *See generally* TOYIN FALOLA & JULIUS IHONVBERE, THE RISE AND FALL OF NIGERIA'S SECOND REPUBLIC, 1979-84 (1985).

the fait accompli of usurpation. The usurper's monopoly of coercive power allows them to ignore any adverse pronouncement by the judiciary or even to browbeat it into submission.

F. The *Jilani* Case: Pakistan 1972

1. *The Context*

The extra-constitutional regime in Pakistan validated by *Dosso* remained in power for eleven years.[148] Following prolonged civil disobedience, the President resigned and handed over the administration of the country to the military on March 25, 1969.[149] That same evening, the military proclaimed martial law and abrogated the 1962 Constitution.[150] The military's refusal to recognize the results of general elections held in December 1970 led to a civil war and dismemberment of the country in December 1971.[151] On December 20, 1971, the military handed over the government to the party which had won the election in the remaining part of the country.[152] Due to the constitutional void, the civilian government took over as a martial law regime.[153]

2. *The Judicial Response: Kelsen Renounced and Substituted by the Doctrine of Implied Mandate*

Two pending criminal appeals, consolidated as *Jilani v. Government of Punjab*,[154] furnished the opportunity to test the validity of the 1969 coup d'etat. The Supreme Court held the assumption of power by the military an illegal usurpation.[155] The Court, after an extensive analysis of Kelsen and *Dosso*, renounced the doctrine of revolutionary legality and expressly

148. For political and constitutional developments in Pakistan between 1958 and 1969, see generally LAWRENCE ZIRING, THE AYUB KHAN ERA: POLITICS IN PAKISTAN 1958-1969 (1971); HERBERT FELDMAN, FROM CRISIS TO CRISIS: PAKISTAN 1962-1969 (1972).

149. ZIRING, *supra* note 148, at 112-13.

150. FELDMAN, *supra* note 148, at 271.

151. WASEEM, *supra* note 11, at 285-92. *See also* KHALID B. SAYEED, POLITICS IN PAKISTAN: THE NATURE AND DIRECTION OF CHANGE 65-83 (1980) (analyzing causes of Pakistan's disintegration).

152. WASEEM, *supra* note 11, at 305. For a detailed account of the transfer of power, see STANLEY WOLPERT, ZULFI BHUTTO OF PAKISTAN: HIS LIFE AND TIMES 170-71 (1993).

153. WASEEM, *supra* note 11, at 310-11.

154. 1972 P.L.D. S. Ct. 139 (Pakistan). The legislative capacity of the military regime had come up before the Lahore High Court in Hassan v. State, 1969 P.L.D. Lah. 786 (Pakistan) (decided June 30, 1969). The Court found that the outgoing President had transferred the powers of government to the military for the constitutional purpose of "'restoring and saving the country from internal disorder and chaos' and to 'ensure that administration resumes its normal functions to the satisfaction of the people.'" *Id.* at 808. Therefore, the 1962 Constitution was preserved and everyone, including the martial law regime was subject to it. *Id.* at 810-11. Martial law regulations aimed at the ouster of jurisdiction of civil courts were declared void. *Id.*

155. *Jilani*, 1972 P.L.D. S. Ct. at 183-85. The Court argued that the military was simply called upon to discharge their "*legal* and *constitutional responsibility*... to defend the country [and] ... to save it from internal disorder and chaos." *Id.* at 183-84. Declaration of martial law and abrogation of the 1962 Constitution went beyond these terms of reference. *Id.*

overruled *Dosso*.[156] The Court advanced several reasons why it considered *Dosso*'s adoption of Kelsen improper. First, the *Dosso* ruling of efficacy of the coup was premature when the regime found to be "effective" one day was overthrown the next.[157] Second, Kelsen's is a descriptive theory of law, not a normative principle of adjudication.[158] Third, validity of an extra-constitutional regime flows not from successful assumption of power but from habitual obedience by the citizens.[159] Fourth, since the theory of revolutionary legality presupposes the primacy of international law over municipal law, that theory is of little use to domestic courts.[160] Finally, the Court noted that the main author of *Dosso* was involved with drafting the very martial law order which was at issue in the case.[161]

The Court acknowledged the role judicial pronouncements play in bestowing legitimacy to extra-constitutional orders: "However, [sic] effective the Government of a usurper may be, it does not within the National Legal Order acquire legitimacy unless the Courts recognize the Government as de jure."[162] The Court also recognized that the Courts do not

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156. *Id.* at 162-83.

157. *Id.* at 161.

158. Both the interpretation and application of Kelsen by *Dosso* came under attack:

> Kelsen's theory was, by no means, a universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence .... [Kelsen] was only trying to lay down a pure theory of law as a rule of normative science consisting of "an aggregate or system of norms." He was propounding a theory of law as a "mere jurists' proposition about law." He was not attempting to lay down any legal norm or legal norms which are "the daily concern of Judges, legal practitioners or administrators."

Id. at 179 (Hamoodur Rahman, C.J.).

159. As the Court put it:

> It was, by no means, [Kelsen's] purpose to lay down any rule of law to the effect that every person who was successful in grabbing power could claim to have become also a law-creating agency. His purpose was to recognise that such things as revolutions do also happen but even when they are successful they do not acquire any valid authority to rule or annul the previous grund-norm until they have themselves become a legal order by habitual obedience by the citizens of the country. It is not the success of the revolution, therefore, that gives it legal validity but the effectiveness it acquires by habitual submission to it from the citizens.

Id. at 180 (Hamoodur Rahman, C.J.).

160. *Id.* at 181. The Court went on to say:

> [Kelsen] overlooked that for the purposes of International Law the legal person is the State and not the community and that in International Law there is no "legal order" as such. The recognition of a State under International Law has nothing to do with the internal sovereignty of the State, and this kind of recognition of a State must not be confused with the recognition of the Head of a State or Government of a State. An individual does not become the Head of a State through the recognition of other States but through the municipal law of his own State.

Id. (Hamoodur Rahman, C.J.).

161. *Id.* at 246-47. On the question whether Chief Justice Munir, due to his involvement with the coup d'etat was in principle precluded from sitting in judgment on its validity, Yaqub Ali, J., commented: "I can only venture to observe that no one was more deeply initiated in judicial propriety than the learned Chief Justice." *Id.*

162. *Id.* at 229 (Yaqub Ali, J.).

have a free hand in this regard.[163] By the time *Jilani* was decided, the military regime had fallen and had been replaced by an elected government. Because the elections of 1970, on which the validity of the succeeding elected government rested, were held under a framework pronounced by the military regime, the Court felt compelled to give legal effect to certain acts of the illegal usurper regime.[164] The Court employed the doctrine of implied mandate, first enunciated by Hugo Grotius, according to which courts may validate certain necessary acts of a usurper done in the interest of preserving the state because the lawful sovereign would have also wanted these acts to be undertaken.[165] Furthermore, relying upon Lord Pearce's dissent in the Privy Council decision in *Madzimbamuto v. Lardner-Burke*,[166] the Court pronounced a catalog of four independent grounds of "condonation" of acts of an illegal usurper regime:

> (1) all transactions which are past and closed, for, [sic] no useful purpose can be served by reopening them, (2) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order, (3) all acts which tend to advance or promote the good of the people, (4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of, in our case, the objectives mentioned in the Objectives Resolution of 1954.[167]

The cogently argued critique of Kelsen remains a major contribution of *Jilani*. It forced other jurisdictions to re-examine the theory of revolutionary legality. But the Court's combined use of the doctrines of implied mandate and state necessity, notwithstanding the Court's insistence that this was "a principle of condonation and not legitimation,"[168] makes the

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163. The interface of extra-constitutional political reality and judicial review was acknowledged:

> May be, that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and the Courts will not recognize its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers.

Id. at 243 (Yaqub Ali, J.).

164. *Id.* at 204-05.

165. *Id.* at 205. *See also* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [THE LAW OF WAR & PEACE], Bk. 1, Ch. 4, § 15 (Francis W. Kelsey trans., 1925).

166. [1968] 3 All E.R. 561 (P.C.).

167. *Jilani*, 1972 P.L.D. S. Ct. at 207. The Objectives Resolution, adopted by the first constituent assembly in 1949, contains the guiding principles for the constitution of the country. The Resolution envisaged a representative government, a federal system with extensive provincial autonomy, guaranteed fundamental rights, the rule of law, and an independent judiciary.

168. *Id.* at 207. Expressly excluded was

> any act intended to entrench the usurper more firmly in his power or to directly help him run the country contrary to its legitimate objectives . . . [and] anything which seriously impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity.

decision vulnerable to criticism. First, condoning wrongdoing is an executive function not within the purview of the judiciary. Second, the rule of decision, fashioned by Grotius, came from an era of absolute monarchies before constitutional representative governance, rule of law, and separation of powers were established. Finally, the inclusion of the omnibus provision—"all acts which tend to advance or promote the good of the people"—is troublesome. Besides being very close to constructs like "peace and good government," traditionally used to denote unfettered legislative power of sovereign legislatures, it does not provide any verifiable standard of "good of the people" and is silent as to who shall judge the same. This provision opened the door for the Court to use this construction to bestow unfettered legislative capacity on a military regime five years later.

G. The *Liasi* Case: Cyprus 1975

1. The Context

On July 15, 1974, a coup d'etat took place in Cyprus.[169] Greek military officers, who were in Cyprus for service in the Cyprus National Guard, led and organized the coup in collaboration with the National Guard and an outlawed paramilitary organization.[170] The elected President was forced to flee, and the coup makers installed one Nicolaos Sampson as President of the Republic.[171] The coup prompted the invasion of Cyprus by Turkey on July 20, 1974.[172] There was a cease-fire agreement on July 23, 1974.[173] That same day, the usurper President resigned and the President of the House of Representatives assumed the duties of the President. During the eight days that the usurpers held office, a number of public officials were removed from their jobs and others appointed in their place.[174] Some police constables whose service was terminated by an officer appointed by the usurpers challenged their dismissal in *Liasi v. Attorney-General*.[175]

2. The Judicial Response: Success Plus Popular Acceptance and the Doctrine of De Facto Organ

The applicants' plea that their termination "was an act non-existent in law and without any legal effect whatsoever as made by a person acting in usurpation of power,"[176] turned on whether the coup d'etat regime had legal validity. On this question "both parties agree[d] as to the legal position"[177]

Id.

169. For the background and context of the coup, see HALIL IBRAHIM SALIH, CYPRUS: THE IMPACT OF DIVERSE NATIONALISM ON A STATE (1978); R.R. DENKTASH, THE CYPRUS TRIANGLE (1982); CYPRUS: A COUNTRY STUDY (Eric Solsen ed., 4th ed. 1993).

170. SALIH, *supra* note 169, at 88.

171. *Id.*

172. *Id.* at 91.

173. CYPRUS: A COUNTRY STUDY, *supra* note 169, at 43.

174. Liasi v. Attorney General, 1975 C.L.R. 558 *passim* (Cyprus).

175. *Id.* at 568.

176. *Id.* at 571.

177. *Id.*

in that the Deputy Attorney-General "made clear the position of the state . . . that the *sub judice* decision is legally non-existent and illegal as emanating from . . . the act of a public authority, which in itself was legally non-existent."[178]

The Court, whose search for applicable principles took it as far back as Roman Law, advanced the following proposition:

> According to the case law and legal theories, two are the basic tests whereby a *coup d'etat* is legalized. The first, the substantial test, is popular acceptance, even if a tacit one, of the change and the legal values thereby invoked and the second, the formal test, is the legalization of the "*Coup d'Etat* Government" through the recognition of its actions by the next lawful Government.[179]

Examining the "real facts and circumstances of the *coup d'etat*," the Court noted that violence accompanied the coup, resulting in many dead and injured; a curfew was imposed and kept in place; and strong resistance was offered by state agencies and the people.[180] The Court opined:

> According to the generally accepted principles of Law, it was indispensable, that *further to the submission there would have been active acceptance, or a persistently long and conscious silence* under the appropriate conditions, and there were not existing appropriate conditions for an opportunity to be given for manifesting, if it would have ever been manifested, a conscious recognition, or a tacitly manifested respect of the *coup d'etat*.[181]

The Court held that the coup failed to meet the substantial test of legality: "The violently imposed will did not manage to inspire the respect and the obedience to the values which it invoked and called upon society as a whole to recognize."[182] As for the formal test, i.e., recognition of actions of a usurper regime by the subsequent lawful government, the Court noted that the lawful government had reinstated many public officials dismissed by the usurpers and the legislature had enacted the coup d'etat (Special Provisions) Law, 1975 (No. 57 of 1975), which expressly provided that "the *coup d'etat* and the '*coup d'etat* Government' had no legal basis whatsoever."[183] The Court thus held that the usurper regime

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178. *Id.* Furthermore, by consent "an extensive study by the Deputy Attorney-General on the Legal Consequences of the coup d'etat" was placed before the Court, and "a number of facts of public nature were declared as agreed upon by counsel or were proved by documents put in by consent." *Id.*

179. *Id.* at 573.

180. *Id.*

181. *Id.* at 574 (emphasis added).

182. *Id.*

183. *Id.* The Court quoted the reasoning accompanying the Bill:

> [T]he intention of the Bill was the restoration of the lawful order which was disturbed as a result of the coup d'etat by applying according to the Topar Doctrine of the principle of constitutional order and the nonrecognition, according to the Stimson Doctrine of illegal situations created as a result of illegal violence in the course of the coup d'etat . . . . [Precedents for similar legislative action were found] in France by the Ordinance of the 9th August, 1944, "in relation to the acts of the government of Vichy and in Greece by the constituent act 58/1945 in relation to the enactments during the time of the

failed the formal test too.

The Court then considered whether the doctrine of the de facto organs applied to the case. This doctrine, which is prompted by "reasons of social order and stability . . . [and is] combined with the legal principle that 'common misconception creates law,'"[184] provides that acts of a de facto, though illegal, public organ be deemed valid if it constitutes "a plausible appointment . . . [and does] not suffer from such an illegality so as to be rendered as non-existent in law."[185] The "plausible appointment" is to be tested on an objective standard of "whether in the opinion of a reasonable and prudent man, under the circumstances, in which in the particular case the appointee was exercising his duties, it was possible and reasonable to be taken that he was legally possessing the capacity of the organ."[186]

The Court held that the element of plausibility was lacking because appointment of the Police Chief who dismissed the applicants constituted "a local extension of usurpation of power and overthrow of the constitutional order."[187] Moreover, because the circumstances of the illegal appointment "were known to everyone," the case falls within an exception to the de facto organ doctrine, namely that the doctrine "does not apply where the circumstances responsible for the legal defect, are known to everybody."[188]

Both the fact that the short-lived usurper regime had already fallen and the fact that the new regime had also joined the petitioner's plea to designate the coup d'etat illegal, made this an easy case to decide. While *Jilani* had only implied some desirable modifications of Kelsen's doctrines, *Liasi* introduced the "popular acceptance" test for legalization of a coup d'etat. But, as discussed below, this only exacerbated the evidentiary problems for a court attempting to determine the success of a coup d'etat and further confused the separate issues of legitimacy and validity of a legal order.

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enemy occupation and by the constituent acts as from 1.8.1974 to 7.8.1974 and of the Fourth resolution of the Fifth Revisional Assembly [of Greece] in relation to the enactments and acts during the time of the dictatorship from 21.4.1967 until 23.7.1974."

Id. at 574-75.

184. *Id.* at 576 (citation omitted).

185. *Id.* (citation omitted).

186. *Id.* (citation omitted). In establishing that the doctrine of de facto organs is not unknown to the English common law, the Court cited Adams v. Adams, [1970] 3 All E.R. 572, 589, and R. v. Bedford Level Corporation, [1805] 6 East 356 ("An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.").

187. *Liasi*, 1975 C.L.R. at 576.

188. *Id.* at 577.

H. The *Bhutto* Case: Pakistan 1977

1. The Context

Following the repudiation of revolutionary legality by *Jilani*, Pakistan started its first experiment with representative democracy under a Constitution adopted in 1973.[189] However, the experiment was short lived. Following charges of organized rigging of the general elections of early 1977, mass protests and civil disobedience ensued. On July 5, 1977, the military declared martial law, removed and detained the Prime Minister and dissolved the Parliament. Mindful of the holding of *Jilani* and Article 6 of the 1973 Constitution, which designated subversion of the Constitution as treason, the military regime took the position that "the Constitution has not been abrogated. Only the operation of certain parts of the Constitution has been held in abeyance."[190] Detention of the Prime Minister under Martial Law Order No. 12 of 1977, was challenged before the Supreme Court in *Bhutto v. Chief of Army Staff*[191] as a violation of fundamental rights guaranteed by the Constitution.

2. The Judicial Response: Constitutional Deviation Dictated by Necessity

The Supreme Court admitted the petition for hearing in defiance of express ouster of jurisdiction from martial law orders. As an expression of its disapproval, the regime removed the Chief Justice within two days of admission of the petition.[192] The petitioner urged the Court to follow *Jilani*, and to designate the coup an illegal usurpation. The regime, besides pointing to the ouster of jurisdiction and the suspension of fundamental rights by the Laws (Continuance in Force) Order, 1977,[193] relied on Kelsen to argue that the proclamation of martial law had brought a new legal order into being, and this new legal order, even if it were only temporary, had displaced the former legal order.[194] While the Court

189. For details of political and constitutional developments from 1969 to 1977, see WASEEM, *supra* note 11, at 239-361; SAYEED, *supra* note 151, at 84-112.

190. Announcement of the Chief Martial Law Administrator, *quoted in* Bhutto v. Chief of Army Staff, 1977 P.L.D. S. Ct. 657, 714-15 (Pakistan). He added, "I hold the judiciary of the country in high esteem . . . . However, . . . if and when Martial Law Orders and Martial Law Regulations are issued, they would not be challenged in any Court of law." *Id.*

191. 1977 P.L.D. S. Ct. 657 (Pakistan).

192. The Laws (Continuance in Force) (Fifth Amendment) Order, 1977, revoked the 5th and 6th Constitutional Amendment Acts insofar as they amended Article 179 of the Constitution. As a result, Yaqub Ali, C.J., was retired. *See Pakistani Military Ruler Ousts the Chief Justice*, N.Y. TIMES, Sept. 23, 1977, at A5. Justice Yaqub Ali had proffered a scathing denunciation of coups d'etat in his concurring opinion in *Jilani*, and was rewarded with appointment as the Chief Justice by the elected government upon the retirement of Hamoodur Rahman. The Constitution was later amended to give him an extraordinary extension of tenure.

193. The Laws (Continuance in Force) Order, 1977 (CMLA Order No. 1 of 1977), *amended by* CMLA Orders Nos. 2-6 of 1977, *reprinted in* Leslie Wolf-Phillips et al., *The Islamic Republic of Pakistan*, *in* 13 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 123-33 (Albert P. Blaustein & Gisbert H. Flanz eds., 1986) (edition superseded).

194. According to the regime, "the *grundnorm* of the old Legal Order, as provided by the 1973 Constitution, has given way to a new *grundnorm*," and the transition to the new

refused to resurrect *Dosso* and rejected the argument that "effectiveness of the political change [is] the sole condition or criterion of its legality,"[195] it also declined to follow *Jilani* and hold the coup d'etat an illegal usurpation.[196] While recognizing its own inability to determine "the factual correctness or otherwise of the several allegations and counter allegations made by the parties against each other,"[197] the Court, after considering "the total *milieu* in which the change [was] brought about,"[198] concluded that the coup d'etat was "an extra-constitutional step, but obviously dictated by the highest considerations of State necessity and welfare of the people,"[199] and christened the new legal order "a phase of constitutional deviation dictated by necessity."[200] While insisting that "the 1973 Constitution still remains the supreme law of the land, subject to the condition that certain parts thereof have been held in abeyance,"[201] and that "the superior Courts continue to have the power of judicial review,"[202] the Court held that the legislative capacity of the military regime included the "power to amend [the 1973 Constitution]."[203] This, coupled with the validating "acts which tend to advance or promote the good of the people,"[204] amounted to bestowing unfettered legislative power on the extra-constitutional regime, and ignored the traditional limits of the doctrine of necessity which the Court claimed it was applying.

Qaisar Khan, J., however, was of the view that due to the success of the coup, a "de facto new Legal Order" had displaced the 1973 Constitution completely, and the Judges of the Supreme Court by taking a new oath of office prescribed by the military regime "have conceded the de facto existence of the new Legal Order."[205] Quoting Kelsen and *Madzimbamuto*

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order "has not been brought about by any means recognised or contemplated by the 1973 Constitution," and therefore, "it constitutes a meta-legal or extra-Constitutional fact, attracting the doctrine of 'revolutionary legality.'" *Bhutto*, 1977 P.L.D. S. Ct. at 671.

195. *Id.* at 692. Kelsen's theory was criticized for "exclud[ing] from consideration sociological factors of morality and justice," because according to the Court "validity of the *grundnorm* has an ethical background . . . an element of morality is built in it as part of the criterion of its validity." *Id.*

196. *Id.* at 706. The Court reasoned that *Jilani* applies only to situations where there is no necessity for extra-constitutional assumption of power, which was not the case with the 1977 coup. *Id.* at 708.

197. *Id.* at 693.

198. *Id.* at 692. This was defined as "the objective political situation prevailing at the time, its historical imperatives and compulsions; the motivations of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed." *Id.* at 692-93.

199. *Id.* at 703. In reaching this determination the Court relied primarily on, and quoted extensively from, a speech made by the chief of the army on the day of the coup. *Id.* 703-04.

200. *Id.* at 716.

201. *Id.* at 715.

202. *Id.* at 716.

203. *Id.*

204. *Id.*

205. *Id.* at 742. The Chief Justice, author of the main opinion, however, took the position that taking of the "fresh oath" did not preclude the Court's examination of "the validity of the new Legal Order;" rather, "it only indicates that the superior judiciary, like the rest of the country, has accepted the fact, which is even otherwise also

extensively, he argued, "The municipal Courts have always to enforce the laws of the de facto Government as it is such a Government which can enact law, can appoint Judges and can enforce the execution of law."[206] He concluded that because the Court "derives its jurisdiction from the new Legal Order," it cannot assert jurisdiction in defiance of provisions of the new order.[207]

The "phase of constitutional deviation" sanctioned by *Bhutto* lasted over eight years; martial law was lifted on December 30, 1985. As for the survival of judicial review, the Supreme Court in *Bhutto v. State*,[208] held that once a regime had been validated by the doctrine of necessity, its individual actions had to be construed as being necessary if they reasonably fell within the categories enumerated in *Bhutto*, and the executive had broad discretion in this regard. The military regime made a clean break with even the minimal limitations upon its legislative capacity implied by *Bhutto* by promulgating the Provisional Constitutional Order, 1981 [PCO], whereby the earlier pretense of keeping the 1973 Constitution alive though in abeyance was dispensed with.[209] This was prompted by Quetta High Court's invalidation of the Constitution (Amendment) Order, 1980 (P.O. No. 1 of 1980), which ousted jurisdiction of superior courts to question proceedings or orders of military courts and tribunals.[210] The PCO expressly provided:

> Notwithstanding any judgment of any court, including any judgment in respect of the powers of the courts relating to judicial review, any court, including the Supreme Court and a High Court, shall not . . . make an order relating to the validity or effect of any Order . . . made by the Chief Martial Law Administrator or a Martial Law Administrator or of anything done, or action taken, or intended to be done or taken, thereunder.[211]

This blanket ouster of the courts' jurisdiction was coupled with the requirement that all superior court judges take a new oath of office pledging fidelity to the PCO[212] and inviting only selected judges to take the new oath.[213] Furthermore, the military regime expressly assumed the power to

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evident, that on the 5th of July 1977, a radical transformation took place in the pre-existing Legal Order." *Id.* at 674.

206. *Id.* at 743.

207. *Id.* at 740, 748.

208. 1978 P.L.D. S. Ct. 40 (Pakistan).

209. For complete text of the PCO, see Wolf-Phillips et al., *supra* note 193, at 149-58.

210. Suleman v. President Special Military Court, 1980 N.L.R. Civ. Quetta 873 (Pakistan). The Court said that attempts to take away the power of the superior courts to judge the existence of necessity warranting the actions of the military regime signal "the stage where doubts would be cast as to the continued validity of Constitutional deviation." *Id.* at 888. Significantly, the Court said that "the interim Government is not entitled to make basic changes in the Constitution so as to alter the fundamental structure of the Constitution." *Id.* at 891.

211. Wolf-Phillips et al., *supra* note 193, at 156.

212. For text of the new oath, see *id.* at 157.

213. Those not invited and those who refused to take the oath, in all nineteen judges, automatically lost their office. This included the author of the main *Bhutto* opinion, Anwarul Haq, C.J. *See* Della Denmon, *Pakistan: Crack Down on the Courts*, FAR E.

amend the Constitution at will.[214] The PCO thus "sealed the defeat of the Court's constitutional endeavors."[215]

I. The *Valabhaji* Case: Seychelles 1981

1. The Context

Upon gaining independence, Seychelles adopted the Independence Constitution of 1976, which provided for a parliamentary form of government. On June 5, 1977, a coup d'etat deposed the constitutional government. The coup leaders charged that the deposed President intended to alter the Constitution and postpone until 1984 elections due in 1979.[216] A Proclamation by the coup leaders on June 13, 1977, suspended the Constitution and vested the power to make laws by decree in France Albert Rene, the ex-Prime Minister, who the coup makers installed as President. Another Proclamation on June 28, 1977, revoked the constitution and replaced it with one that eliminated the parliament and transferred unfettered legislative powers to the President. The extra-constitutional regime formulated another Constitution in 1979. This regime purported to become the constitutional government in 1981 by elections deemed to have endorsed the new constitution. Free multi-party elections were not held until July 1993.[217]

2. The Judicial Response: Kelsen Rehabilitated

Valabhaji v. Controller of Taxes[218] furnished the Seychelles Court of Appeal the opportunity to examine the validity of the usurpation. The appellant, who had been served notices of amended assessments of income tax under the Income Tax Decree of 1978, argued that the Decree, and in effect all legislation enacted in Seychelles in 1977 and 1978 by the President as the sole legislative authority, was unconstitutional. The attorney-general, representing the State, relied on the application of Kelsen in *Dosso* and *Matovu* to propose, "When a Government in power has effective control with the support of a majority of the people and is able to govern efficiently that Government should be recognized as legal."[219] The attorney-general also reminded the court of de Smith's admonition, "Legal theorists have no option but to accommodate their concepts to the facts of political life. Successful revolution sooner or later begets its own legal-

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ECON. REV., Apr. 3, 1981, at 14; MIR KHUDA BAKASH MARRI, A JUDGE MAY SPEAK 71-120 (1990).

214. *See* Article 16, PCO, *reprinted in* Wolf-Phillips et al., *supra* note 193, at 156 ("The President as well as the Chief Martial Law Administrator shall have, and shall be deemed always to have had, the power to amend the Constitution.").

215. Conrad, *supra* note 9, at 124.

216. For a brief account of the coup, see ANNUAL SURVEY OF COMMONWEALTH LAW 1977 61 (J. M. Finnis ed., 1979).

217. *See* L.A. TIMES, July 27, 1993, World Report, at 1.

218. Civil Appeal No. 11 of 1980, Seychelles Court of Appeals, (Unreported opinions of Hogan, P., Lavoipierre, J.A., and Mustafa, J.A., on file with the author), *summarized in* 7 COMMONWEALTH L. BULL. 1249 (1981).

219. *Valabhaji*, Civ. App. No. 11 at 9 (opinion of Haynes, P.).

ity."[220] The Court's survey of "judicial consideration in recent years" of "abrupt changes in Government," demonstrated that there was "some variety of opinion," but that "frequently the differences lie more in the assessment of fact or the application of principle to fact than in the substance of the principles themselves."[221] The Court found:

> Throughout the decisions and the relevant literature there is an acceptance of the need to preserve the fabric of society. . . . *If the State and society are to survive, a gulf cannot be permitted to open between what the executive arm and the judiciary believe to be the legal basis of authority in the country.* the 'grund' norm as it has been called.[222]

Review of the case law and scholarly literature led the President of the Court, Sir Michael Hogan, to conclude:

> Central to nearly all thinking on this subject is the belief that sovereignty ultimately depends on consent or acceptance by the people, manifested by obedience to the precepts of those claiming authority. Most of the disputes have turned on whether that acceptance had been established or at what point it had been established, but *once firmly established there appears to have been little dispute as to its consequences* . . . . Acceptance, consent or its equivalent *remains a touchstone.*[223]

Hogan, P., then raised the question: "How is [consent] to be ascertained?"[224] After noting the diversity of positions on this central issue,[225] he concluded that, "whether the term chosen is success or submission, consent or acceptance, efficacy or obedience there appears to be a consensus or at least a strong preponderance of opinion that *once the new regime is firmly or irrevocably in control it becomes a lawful or legitimate government and entitled to the authority that goes with that status.*"[226] He then dealt with the

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220. *Id.* at 10 (quoting STANLEY A. DE SMITH, CONSTITUTIONAL & ADMINISTRATIVE LAW 76 (4th ed. 1981)).

221. *Valabhaji,* Civ. App. No. 11 at 10 (opinion of Hogan, P.).

222. *Id.* at 10-11 (emphasis added). But compare Justice Fieldsend's rejection of the proposition that "the repository of one part of the sovereign power must acquiesce in the illegal assumption of power by the repository of the other part." Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284, 428 (Rhodesia App. Div.).

223. *Valabhaji,* Civ. App. No. 11 at 12 (opinion of Hogan, P.) (emphasis added). After considering Hamoodur Rahman, C.J.'s statement in *Jilani,* that the "de facto sovereign . . . could become de jure only by 'election or ratification' by the people . . . [and that the] physical force he possesses can never by itself give him the legal right," Hogan, P., commented: "Whether that statement can be reconciled with the facts of history must depend on the measure and weight given to the expression 'by itself.'" *Valabhaji,* Civ. App. No. 11 at 12 (citing Jilani v. Government of Punjab, 1972 P.L.D. S. Ct. 139, 174 (Pakistan)).

224. *Id.* at 13.

225. According to Hogan, P.,

> *Elections, held under fair conditions, probably provide the most convincing proof, but . . . regimes have been accepted as legitimate even when they lacked that authentication. Obedience, when manifest, has also been recognized as a form of ratification.* Hamoodur Rahman, C.J., in *Jilani* suggested it should extend over a period but experience indicates that, on occasion, it has been so widespread and complete as to leave no doubt as to its existence virtually from the outset.

Id. (emphasis added).

226. *Id.* (emphasis added).

timing of validity and legitimacy of a usurper regime and asked, "But what about the interval if any, before it is firmly established and is merely en route to that position?"[227] Relying on the American case of *Williams v. Bruffy*,[228] he held that "when a regime is firmly established and accepted as legitimate this legitimation is extended back to cover legislation exacted by the regime from the inception of its control."[229] He noted that the Court had the advantage of not having to decide this case "*in mediis rebus*," but after an interval of some four years, "during which the new revolutionary regime has enjoyed unchallenged authority and maintained stable and effective government in the Seychelles, with little or no interruption in the ordinary life of its citizens. But, even if I did not have the benefit of this hindsight I believe I would have come to the conclusion from the smoothness and efficacy of the revolutionary transition that the new regime had by the 28th June 1977 received such widespread and unqualified acceptance and consent that it was already a legal authority at that time."[230]

The Court ultimately held that the decrees enacted in 1977 and 1978, including the Income Tax Assessment Decree of 1978, were valid and enforceable because the extra-constitutional regime had acquired legitimacy and validity.[231]

J. The *Mitchell* Case: Grenada 1986

1. The Context

Grenada became an independent state in 1974, with a Constitution that provided for a parliamentary system and fundamental human rights.[232] The Constitution also established a Supreme Court of Grenada and the

227. *Id.*

228. 96 U.S. 176 (1878).

229. *Valabhaji*, Civ. App. No. 11 at 14 (opinion of Hogan, P.). While Hogan, P., spoke of legitimacy, and opined that the tenure of a revolutionary regime cannot be divided into legitimate and illegitimate portions, *id.* at 13-14, *Williams* confined itself to validity. *Williams*, 96 U.S. at 186 ("The validity of . . . [the de facto government's] acts, both against the parent state and its citizens or subjects, depends entirely on its ultimate success.").

230. *Valabhaji*, Civ. App. No. 11 at 14 (opinion of Hogan, P.).

231. *Id.* Lavoipierre, J.A., concurred with the opinion of Hogan, P., on the ground that "[t]he *coup d'etat* did not meet any opposition and . . . there has been a stable and effective government." *Id.* at 3 (opinion of Lavoipierre, J.A.). Mustafa, J.A., considered the criticisms directed at Kelsen by *Jilani* and *Bhutto* and was "not convinced that these criticisms seriously impair the validity of Kelsen's doctrine." *Id.* at 11 (opinion of Mustafa, J.A.). Insisting that "in dealing with such situations, . . . pragmatism must inform any judicial attitude," he was "satisfied that the successful coup or revolution had acquired effectiveness through habitual submission to it by the people of Seychelles." *Id.* at 15. Noting that the petitioner acknowledged that the 1979 Constitution, itself a product of the 1977 coup, was valid, Mustafa, J.A., said that "a coup Government which continues in office and existence must be viewed as a whole, and if it has become legitimate and valid, then such legitimacy relates back to its inception, that is, it becomes legitimate and valid *ab initio*. . . . I do not think such a Government can be divided into legitimate and illegitimate portions." *Id.* at 16.

232. For the constitutional history of Grenada, see SIR FRED PHILLIPS, WEST INDIAN CONSTITUTIONS: POST-INDEPENDENCE REFORMS 21-22 (1985); Mitchell v. Director of Public Prosecutions, 1986 L.R.C. Const. 35, 41-50 (Grenada).

West Indies Associated States and the right to appeal to the Privy Council. On March 13, 1979, the New Jewel Movement, a leftist political party, staged a coup d'etat against the notoriously corrupt Prime Minister Sir Eric Gairy, and assumed power as the People's Revolutionary Government (PRG).[233] The PRG suspended the Constitution, although the Queen remained the Head of State, and the Governor-General remained in office.[234] The PRG also took all executive and legislative power and abolished appeals to the Privy Council, and established new superior courts.[235] Existing laws continued in force, except as amended or repealed by the PRG.[236]

On October 19, 1983, following dissension within the PRG, the Prime Minister and other Ministers were killed, and General Austin, head of the army, assumed power, declaring himself Chairman of a Revolutionary Military Council (RMC).[237] Six days later, armed forces of the United States and some Caribbean states invaded Grenada and arrested members of the RMC.[238] Following the cessation of hostilities on October 31, 1983, the Governor-General issued a proclamation whereby he assumed executive control of the government of Grenada.[239] By another proclamation, the Governor-General declared a state of emergency, assumed legislative powers, declared continuation of all laws in force before October 19, 1983, subject to modifications, and retained the judicial system created by PRG.[240] On November 9, 1984, the Governor-General promulgated the Constitution of Grenada Order 1984, which brought the 1973 Constitution back in force except as amended by the Governor-General.[241] Following new elections, the new legislature enacted Act No. 1 of 1985, "to confirm the validity of laws made during the period between March 1979 and November 1984 [when the Constitution of Grenada was suspended]."[242]

In August 1984, 19 leaders of the RMC were charged with murder and were bound over to stand trial before the High Court of Grenada. In a pretrial motion, the defendants challenged the legal existence, constitutionality, and validity of the High Court. They claimed that the High Court formed part of the judicial system which the PRG had created in a

233. *Mitchell*, 1986 L.R.C. Const. at 46.
234. *Id.* at 46-47.
235. *Id.*
236. *Id.*
237. *Id.* at 47.
238. For analyses of international legal issues involved in this intervention, see John Quigley, *The United States Invasion of Grenada: Stranger than Fiction*, 18 U. MIAMI INTER-AMERICAN L. REV. 271 (1986-87); Symposium, *The United States Action in Grenada*, 78 AM. J. INT'L. L. 131 (1984).
239. Proclamation by the Governor-General, published in an Extraordinary issue of the Grenada Government Gazette, Vol. 101, No. 49 of October, 31, 1983, *reprinted in* PHILLIPS, *supra* note 232, at 21-22.
240. *See id.* at 22-39; *Mitchell*, 1986 L.R.C. Const. at 48.
241. *Id.* at 49.
242. People's Laws, Interim Government Proclamations & Ordinances, Confirmation of Validity Act, 1985, *reprinted in Mitchell*, 1986 L.R.C. Const. at 49-50.

manner contrary to the 1973 Constitution and was hence invalid. Furthermore, they claimed the Governor-General's confirmation of the PRG judicial system was also an unconstitutional usurpation of legislative power. Finally, insofar as Act No. 1 of 1985 purported to accord validity to PRG's judicial system legislation and the Governor-General's later confirmation of the same, it constituted an amendment of deeply entrenched provisions of the Constitution by way of ordinary legislation.[243]

2. *The Judicial Response: Kelsen Modified-Effective Control Plus Popular Support*

In the High Court, Chief Justice Sir Archibald Nedd started with the question: "Did the PRG establish its own *grundnorm*?"[244] He answered the question in the negative because PRG's Declaration of Revolution had pledged an early return to constitutional rule and its changes in the judicial system were minor.[245] However, because the PRG had overthrown a repressive, though constitutional, regime, "There is no doubt that the revolution was a popular one and welcomed by the majority."[246] Thus, it was not "a usurper in the *Jilani* sense but rather a usurper in the sense [of] . . . the Seychelles [*Valabhaji*] case . . . that is to say with a right to have his acts validated or condoned by the application of the doctrine of necessity."[247] The Court held that "the situation at the time of the seizure of power and the effectiveness of the rule . . . [while] the PRG held power go to make valid and/or legitimate acts of the PRG."[248] The Court further ruled that the High Court was legal and valid and had jurisdiction to hear and determine the indictments preferred against the accused. The Court based this determination on grounds of necessity. Because the pre-revolutionary court, the West Indies Associated States Supreme Court, had ceased to function in Grenada in the wake of the coup, it was a matter of public necessity that the PRG should have instituted its own system of courts.[249] The Governor-General's actions were likewise validated.[250] Consequently, the High Court, though admittedly extra-constitutional,

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243. For the defendants' position and relief sought, see *id.* at 95-96.

244. Mitchell v. Director of Public Prosecutions, 1985 L.R.C. Const. 127, 137 (Grenada High Ct.).

245. *Id.* at 138-48. The Court quoted with approval the holding of *Bhutto* that "the theory of revolutionary legality can have no application or relevance to a situation where the breach of legal continuity is of a purely temporary nature and for a specified limited purpose." *Id.* at 149.

246. *Id.* at 143.

247. *Id.* at 150-51.

248. *Id.* at 152. While the Court noted that the conclusion in usurpation cases "always rested on the circumstances or if you prefer it, the facts which were applied to the principle," *id.* at 157, its factual findings underlying the holdings were the result of judicial notice and as Nedd, C.J., put it "*because I was a part of the system and I know.*" *Id.* at 146 (emphasis added).

249. *Id.* at 146, 152. The rule of decision was summarized to hold that acts of a usurper may be

> validated . . . or legitimated according to the circumstances obtaining at the time which should include the acceptance by the people of his acts, the existence of an urgent and pressing need for the act done and of a proper motive by

was nevertheless valid and had jurisdiction over the matter on grounds of public necessity.

On appeal, Haynes, President of the Court of Appeals, held that, while he was unable to find that the PRG had ever attained de jure status,[251] the High Court was "temporarily" valid on grounds of state necessity, until such time as the current government took appropriate steps to reinstate the Court contemplated by the 1973 Constitution.[252] Peterkin, J., concurred with both conclusions.[253] Liverpool, J., concurred with validation of the High Court on grounds of necessity,[254] but also held that the PRG had become "legitimate or lawful government."[255]

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which the acts are being activated plus the absence of any alternative means of achieving the desired end.

Id. at 152.

250. *Id.* at 157.

251. Mitchell v. Director of Public Prosecutions, 1986 L.R.C. Const. 35, 74 (Grenada).

252. *Id.* at 94. In order to determine the nature and scope of the doctrine of state necessity, Haynes, P., conducted an extensive survey of the English case law, adoption of the doctrine in other common law jurisdictions, and the practice in France, Greece and Italy. *Id.* at 76-88. He then listed the requisite conditions for the application of the doctrine:

> (i) an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the constitution, for immediate action to be taken to protect or preserve some vital function to the State; (ii) there must be no other course of action reasonably available; (iii) any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that; (iv) it must not impair the just rights of citizens under the constitution; (v) it must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.

Id. at 88-89. As for the duration of the temporary legality, Haynes, P., said: "[U]ntil either effective steps shall have been taken to resume the State's participation in the pre-revolution Supreme Court or constitutional legislation shall have been passed . . . to establish another Supreme Court in its place. Of course it is assumed the Government will act with reasonable despatch." *Id.* at 94.

253. *Id.* at 116. His grounds for denying de jure status rested on the fact that the revolution was referred to as a period of transition, the Constitution was suspended but never abolished, the Governor-General was retained, and "the PRG failed to publish or establish any form of Constitution of its own, nor did it ever canvass the approval of the people of Grenada in any form of elections." *Id.* at 118.

254. *Id.* at 109.

255. *Id.* at 116. While Liverpool, J., lamented the fact that in the case "neither side thought it fit to swear to and file an affidavit as to facts," *id.* at 109, his review of the case law led him to hold that "when a government in power has effective control with the support of a majority of the people and is able to govern efficiently, that government should be recognized as legal." *Id.* at 115. He expressed the position that, "sovereignty, or revolutionary legality, or de jure status, by whatever name it is called ultimately depends on consent or acceptance by the people . . . which is manifested by the obedience to the precepts of those claiming to exercise authority over them." *Id.* Accordingly, he found that: "The acceptance of the PRG by the people who gave obedience to it, the smooth functioning of Government, the recognition of that Government by innumerable countries and institutions, the imposition and collection of taxes without resistance, altogether establish there was unqualified support for the PRG." *Id.* at 116. This led him to hold that "the regime of the PRG was firmly in control of the country throughout its tenure of office and could be regarded as having become a legitimate or lawful government." *Id.*

To determine the "twin questions of the legitimacy of a revolutionary regime and/or the validity of any of its 'laws,'" Haynes, P., noted that the PRG was recognized by many states, but opined that "such recognition could and did not *per se* confer de jure status on the regime."[256] He then undertook an exhaustive though cautious review of Kelsen, *Dosso*, and its commonwealth progeny.[257] He found "the right principles of revolutionary legality . . . from a distillation" of these cases, but he "modified or qualified or amplified [them] for application here in Grenada or in the Caribbean as a whole."[258] He listed four conditions for a revolutionary regime to become valid and legitimate:

> (a) the revolution was successful, in that the Government was firmly established administratively, there being no other rival one; (b) its rule was effective, in that the people by and large were behaving in conformity with and obeying its mandates; (c) such conformity and obedience was due to popular acceptance and support and was not mere tacit submission to coercion or fear of force; and (d) it must not appear that the regime was oppressive and undemocratic.[259]

Characterizing each of these conditions as "a question of fact,"[260] Haynes, P., found that, while the PRG met the first two conditions,[261] there was insufficient proof of popular acceptance and support.[262] He

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256. *Id.* at 51. This position was premised on the position that "Rules or practices of international law cannot decide the internal legitimacy or otherwise of the Government of a State. That is a matter for the municipal law applicable in that State." *Id.*

257. *Id.* 53-71. The caution stemmed from his view:

> [W]e must bear in mind that they [the Commonwealth Cases] are not binding on this Court. They can be persuasive only . . . . We must not assume that the principles of law any of them adopted . . . are right . . . . We must . . . satisfy ourselves that they are right and acceptable to Caribbean jurisprudence. For an approach and result acceptable in Pakistan or in Uganda or in Cyprus or in Rhodesia or in the Seychelles might well not be socially acceptable to our regional society. *Caribbean political interests and public policy might well be involved and affect judicial conceptualization* . . . .

Id. at 50-51 (emphasis added).

258. *Id.* at 71. According to Haynes, P., the revolutionary legality cases "can and should be able to guide Caribbean judges in the formation of *principles of revolutionary legality judicially sound and at the same time consistent with our political democratic ideology.*" *Id.* (emphasis added).

259. *Id.* at 71-72. For Haynes, P., the rationale to modify Kelsen's formula was that "Court[s] should not take an approach which might encourage power-seeking politicians or over-ambitious army officers to believe that, if by force of arms they can grab and retain governmental power for a few years, their government will become consequently lawful and legitimate." *Id.* at 72.

260. *Id.*

261. *Id.* at 73. Haynes, P., was "prepared to regard as a notorious fact that there was no sustained or effective or organized behavioral opposition to the regime." *Id.* at 51.

262. *Id.* at 74. He emphasized that "the legitimacy of the regime was not really in issue between the parties in the Court below. But the Chief Justice did and we felt we had to consider it, and, at least, state our view on the relevant law." *Id.* at 75. He elaborated on the last two conditions:

> A revolutionary regime should not be accorded legitimacy by this Court unless it is satisfied that, on the whole, the regime had the people behind it and with it. Legality should be achieved only if and when the people accept and approve, for in them lies political sovereignty and the Court so finds. This approval they

rejected the High Court's determination that "the revolution was a popular one and welcomed by the majority of the Grenadans,"[263] because there was insufficient evidence from which to infer popular support.[264] He was neither "prepared to infer [legitimacy] from the mere length of time [in power]," nor infer it from "the Governor-General's recognition and continuation of most of the laws promulgated by the [PRG] regime and/or from Parliament's 'confirmation' of their 'validity' and like continuance."[265] He wondered, "[I]f the revolution had popular support, why the substantial delay in going to the people for a mandate to rule?"[266] This led him to conclude that "mine is not a judgment that the regime never actually became a de jure government . . . . It is only a finding that, on the limited material before us, I feel that I cannot find that it did . . . ."[267] The appeal was nevertheless dismissed because the High Court was found to be temporarily valid on grounds of state necessity.[268]

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may give *ab initio* or subsequently. Length of time might or might not be sufficient to infer it. It might be expressed or tacit approval. But it is that which should give legitimacy to a successful and effective revolutionary regime. The support of a real majority is sufficient. This should be shown by its majority vote at a general election or a referendum or a majority percentage at polls. In Court it can be proved by agreed statements of fact (as in *Valabhaji*) or by affidavits (as in *Matovu*). And these modes are not exhaustive. If a Constitution was abrogated, a new one should be substituted forthwith as happened in both those cases.

Id. at 72.

263. *Id.* at 73 (quoting Nedd, C.J.).

264. *Id.* at 73. Haynes, P., noted that insufficiency of proof was "not surprising since no Counsel invited this Court to reach a conclusion of legitimacy. It was not a part of anybody's case." *Id.* He was not prepared to accept that Nedd's position rested on judicial notice of notorious facts, and said that the Chief Justice "might well have been expressing a personal opinion only." *Id.*

265. *Id.* at 73-74.

266. *Id.* at 74.

267. *Id.* at 75.

268. *Id.* at 94. The defendants then appealed to the Privy Council, which, in an opinion by Lord Diplock, dismissed the appeal for want of jurisdiction. Mitchell v. Director of Public Prosecutions, 1986 L.R.C. Const. 122 (P.C.). Lord Diplock reasoned that jurisdiction of the Privy Council to hear appeals required recourse to the Constitution of Grenada as currently in force, and the absolute and unambiguous terms of People's Law No. 84 of 1979, as confirmed by the 1985 Act, did not confer such jurisdiction. *Id.* at 123-25. Before the murder trial could get underway, the defendants filed another constitutional motion arguing that the recognition of the High Court in *Mitchell* was confined to criminal and civil matters and constitutional issues required a separate constitutional court. The defendants further argued that the temporary period for which validity of the High Court was recognized in *Mitchell* had expired. The Court of Appeal rejected both these arguments in Mitchell v. Director of Public Prosecutions, 1987 L.R.C. Const. 127 (Grenada). After an extensive review of the doctrine of necessity as developed by common law courts, the Court said that its previous decision in *Mitchell* on the continuing recognition of the High Court imposed no limitation on the jurisdiction of that court and there was no other court with jurisdiction over constitutional matters in Grenada. *Id.* at 140-51. The Court said that *Mitchell* Court "expected that the need for continued legality and recognition of the High Court would cease within a reasonable time . . . . What is a reasonable time to discharge any obligation will depend on all the circumstances of the case existing at the time when the obligation was imposed and on possible supervening relevant events." *Id.* at 139. After noting that following recommendations of the Constitution Commission, the gov-

K. The *Mokotso* Case: Lesotho 1988

1. The Context

Lesotho gained independent status in 1966, by virtue of the Lesotho Independence Act 1966, enacted by the British Parliament.[269] A Westminster model Constitution took effect on October 4, 1966, which provided for a sovereign democratic kingdom, a bicameral parliamentary system, and protection of fundamental human rights which formed part of the entrenched provisions of the Constitution. The first general elections were held on January 27, 1970, which resulted in the defeat of the incumbent Prime Minister, Chief Jonathan. Chief Jonathan's response was to nullify the elections, suspend the Constitution, proclaim a state of emergency and assume dictatorial powers while retaining the King as a figurehead.[270] For the next 16 years this extra-constitutional regime remained in power and became notorious for abuses of political and individual freedoms. On January, 20, 1986, the Lesotho Paramilitary Force (LDF) staged a coup d'etat. While the King remained in office, the LDF established a Military Council. The King, acting on the advice of the Military Council, assumed all executive and legislative authority. Existing laws were to remain in force unless inconsistent with Orders of the Military Government and the courts were to retain their jurisdiction.[271]

In *Mokotso*, the plaintiffs, who alleged that the military regime had denied their freedom of association guaranteed by the 1966 Constitution, challenged the validity of the military regime and sought a declaration that regimes established by both the 1970 and 1986 coups were unlawful.[272]

2. The Judicial Response: Pure Kelsen Rehabilitated

The High Court of Lesotho, in a 168-page opinion by Cullinan, C.J., started with an acknowledgment that both the 1970 and 1986 coups were extra-constitutional and proceeded to inquire whether they could be validated under any legal principles.[273] The Court first examined Kelsen's theory of revolutionary validity and summarized it as "the old truism, noth-

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ernment was engaged in negotiations with other countries in the region to revive the pre-1979 court, the Court found that "necessity has continued and is continuing up to the present time . . . so that the [High] Court shall continue to be valid and beyond challenge." *Id.* at 151.

269. For a general introduction to the history and politics of Lesotho, see JOHN E. BARDILL & JAMES H. COBBE, LESOTHO: DILEMMAS OF DEPENDENCE IN SOUTHERN AFRICA (1985); GABRIELE WINAI-STROM, DEVELOPMENT & DEPENDENCE IN LESOTHO: THE ENCLAVE OF SOUTH AFRICA (1978); Richard F. Weisfelder, *The Basotho Nation-State: What Legacy for the Future?*, 19 J. MOD. AFR. STUD. 221, 247 (1981).

270. For an exhaustive study of the 1970 coup, see B.M. KHAKETLA, LESOTHO 1970: AN AFRICAN COUP UNDER THE MICROSCOPE (1972). For constitutional developments since 1970, see James S. Read, *Revolutionary Legality in Lesotho: A Fresh Look at Constitutional Legitimacy*, 1991 J. AFR. L. 209.

271. *See* Mokotso v. King Moshoeshoe II, 1989 L.R.C. Const. 24, 54-56 (Lesotho).

272. *Id.* at 56-57. The Court termed the plaintiffs as a "farmer," a "tailor" and an "accountant" who "describe themselves as politicians." *Id.* at 39.

273. *Id.* at 83-86.

ing succeeds like success."[274] The Court then surveyed the application of Kelsen,[275] and the doctrine of State Necessity,[276] in different jurisdictions. The Court concluded that, while the doctrine of state necessity was well-established, its application indicates "confusion as to identifying where the necessity lies in each case."[277] The major problem identified was that, although some courts "point to the necessity facing the Court, rather than the necessity, if any, which gave rise to the unconstitutional action in the first case . . . [others] seem . . . to place more emphasis upon the necessity giving rise to the unconstitutional action."[278] Finding that "the true test is that of the necessity, if any, which faces the court,"[279] i.e., that of avoiding a legal vacuum and chaos and preserving the fabric of society, the doctrine was held to be "appropriate to the case of a national emergency during the administration of a lawful government."[280] While the doctrine applies to "the unconstitutional assumption of power by a constitutional authority, where such action is taken to preserve rather than to destroy the old legal order," after a successful revolution "[t]he likelihood is there, as the clash of arms throughout the course of history establishes, that there never will be any return, at least not to the old legal order as such."[281] The Court concluded:

> In brief the question for the Court . . . as far as the doctrine of necessity is concerned, is not whether to validate [unconstitutional] assumption of power, for in truth it cannot do so on the basis of necessity, but whether to validate the subsequent invalid but necessary actions of the power-assuming authority, in order to preserve the fabric of society . . . . Thus to speak of the doctrine operating to validate a new regime, rather than its action, is . . . in essence to apply the doctrine of the successful revolution.[282]

The Court then turned to Kelsen and observed that "[t]o deny Professor Kelsen's theory of the successful revolution is simply to turn one's back on the course of history."[283] The Court examined the criticisms leveled against Kelsen by *Sallah*, *Jilani*, *Bhutto* and *Mitchell*, and countered that these cases failed to recognize that while a revolution requires acceptance to be deemed effective,[284] acceptance does not mean that the new order has to be popular, but simply involves "acquiescence . . . submission . . .

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274. *Id.* at 90.

275. *Id.* at 91-97. Cases examined included *Dosso*, *Matovu*, *Madzimbamuto*, *Sallah*, and *Valabhaji*.

276. *Id.* at 97-118. Cases examined included the *Governor-General's*, *Ibrahim*, *Madzimbamuto*, *Lakanmi*, *Jilani*, *Bhutto*, and *Mitchell*.

277. *Id.* at 118.

278. *Id.* at 120.

279. *Id.*

280. *Id.* at 121.

281. *Id.*

282. *Id.* at 123.

283. *Id.* at 124. Cullinan, C.J., noted that Kelsen's works have been translated into more than sixteen languages, *id.* at 91, and that "Kelsen lent his name to the doctrine: there are other advocates. Nonetheless as the leading advocate he bears the brunt of fashionable criticism, a fashion which seemingly finds some origin in the judicial dilemma." *Id.* at 124.

284. *Id.* at 127.

obedience . . . [and] acceptance."[285] The Court then fashioned the test of legitimation:

> A court may hold a revolutionary Government to be lawful, and its legislation to have been legitimated *ab initio,* where it is satisfied that (a) the Government is firmly established, there being no other government in opposition thereto; and (b) the Government's administration is effective, in that the majority of the people are behaving, by and large, in conformity therewith.[286]

The Court placed the burden of proof of legitimacy on the new regime.[287]

The Court then considered the question of a court's "jurisdiction or competence to decide on the legitimacy of a revolutionary regime."[288] After reviewing the treatment of the question in *Madzimbamuto,* the Court concluded:

> Whether therefore the Judge is appointed under the old or the new legal order, the situation is equally anomalous. One is called upon to pronounce that the source of his authority has lost its validity, the other to pronounce that the source of his authority never had any validity. I do not see that the necessary inquiry is inconsonant with the particular judicial oath: on the contrary, the oath binds the judicial conscience in the most difficult of circumstances. If, as a result of such inquiry the particular Judge finds his position untenable, then that is also a matter for the judicial conscience. But there can be no disclaimer of jurisdiction: there can be no recusal. Decide he must.[289]

Applying the test of legitimation first to the 1970 coup d'etat, the Court took "judicial notice" of "the notorious fact" that the coup was successful.[290] The Court cited and quoted with approval two unpublished cases which held that the 1970 coup had proved to be a successful revolution establishing a lawful government.[291] In view of this prior judicial rec-

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285. *Id.* at 130-31 (quoting Ivor Jennings, *Jilani* and *Valabhaji*). The Court noted that this proposition finds its origin "in the most reliable of all authorities, the course of history." *Id.* at 131.

Cullinan, C.J., explained the proposition further:

> *[T]he people may well accept without necessarily approving* . . . . If they decide to accept the new regime, *even if that decision is based on weakness or fear, such a decision may not be gainsaid.* The Judge's . . . function . . . goes no further than giving effect to the will of the people. Ultimately it is the will of the people, however motivated, which creates a new legal order and the Court must recognize this fact and give effect thereto.

Id. at 132 (emphasis added). Cullinan, C.J., expressly rejected the last two prongs of the *Mitchell* test that require conformity to be the result of popular support and not the result of submission to coercion and that the regime not be oppressive and undemocratic. *Id.* at 129.

286. *Id.* at 133.

287. *Id.* at 132 ("No presumption of regularity can operate in the regime's favor: indeed there must be a presumption of irregularity.").

288. *Id.* at 133.

289. *Id.* at 139.

290. *Id.* at 140.

291. *Id.* at 140-42. The cases cited are Moerane v. R., C. of A. (CRI) No. 1 of 1975 (unreported) and Khaketla v. Prime Minister, Civ. App. Nos. 145 & 187 of 1985 (unreported).

ognition, and the operation of stare decisis, the Court did not consider any further discussion necessary.

Turning to the 1986 coup, the Court found that since the government was firmly established and functioning effectively, it was the lawful government.[292] The Court first insisted that "[i]t is the people, not this Court, who in reality by their acceptance have conferred legality upon the Government."[293] In making the determination of the efficacy of the coup d'etat, the Court relied on an affidavit by the Attorney-General stating that the government has effective control, its laws are enforced and obeyed, and decisions of Courts are enforced.[294] The Court proceeded to take "judicial notice" of "notorious facts," which included the fact that the government is in effective control; that it has adopted a "formidable body of legislation;" that it has facilitated effective functioning of the judiciary; that the rule of law is firmly established; "that the vast majority of the people are behaving in conformity with the Government's administration;" and "that peace and stability now reign."[295]

The Court then assessed the popularity of the revolution.[296] It again took judicial notice of facts which included: the government's promotion of health and education, establishment of peace and stability and jubilation in the streets after the people had heard news of the coup d'etat.[297]

L. The *Matanzima* Case: Transkei 1988

1. The Context

Prior to 1976, Transkei formed part of the Republic of South Africa.[298] In 1976, it was granted independence by the Status of Transkei Act 100 of 1976.[299] The Act gave the legislative assembly of Transkei the power to adopt a Constitution for the new state. Such a Constitution was adopted and came into effect on the day of independence, October 26, 1976.[300] The Constitution, which envisaged a parliamentary form of government, provided for a non-executive President, elected for seven years by the National Assembly, who acted on the advice of the Executive Council which consisted of the Ministers of State.[301] Parliament, consisting of the

292. *Mokotso*, 1989 L.R.C. Const. at 144.
293. *Id.* at 164.
294. *Id.*
295. *Id.* at 164-66.
296. This inquiry is strange in light of the Court's view that "*popularity of a revolutionary regime may be contributory to, but not essential to its acceptance by the people.*" *Id.* at 168 (emphasis added). Again, "popularity . . . is not the issue." *Id.* at 131-32. Though the Court acknowledged that "it was such popularity and acceptance by the people . . . which influenced the Judges in deciding to remain in office, or to accept office." *Id.*
297. *Id.* at 161-68.
298. Matanzima v. President of the Republic of Transkei, [1989] 4 S. Afr. L.R. 989, 990 (Transkei Gen. Div.). For the general commentary on the history and politics of Transkei, see ROGER J. SOUTHHALL, SOUTH AFRICA'S TRANSKEI: THE POLITICAL ECONOMY OF AN "INDEPENDENT" BANTUSTAN (1983).
299. *Matanzima*, [1989] 4 S. Afr. L.R. at 990-91.
300. *Id.* at 991.
301. *Id.*

President and the National Assembly, was the sovereign legislative authority.[302] The National Assembly consisted of the five Paramount Chiefs, seventy Chiefs representing enumerated districts, and seventy-five elected members.[303] The judicial power was vested in an "independent" judiciary.[304]

On September 24, 1987, the military forced the resignation of eight cabinet ministers, announced that Prime Minister George Matanzima had fled the country, and formed a "caretaker" government.[305] The Transkei National Independence Party, whose government had been removed and which still commanded a substantial majority in the National Assembly, elected Miss Stella Sigcau as its leader.[306] On October 8, 1987, she became Prime Minister and a new cabinet was appointed.[307] On December 30, 1987 the Commander of the Transkei Defense Forces declared martial law, suspended the Constitution and removed the government.[308] He announced that the country would be run by "an interim government" consisting of a Military Council supported by an appointed Council of Ministers.[309] The next day martial law was lifted.[310] On January 5, 1988, a decree was published in the Government Gazette which provided, among other things, that

> the executive and legislative authority . . . is vested in the President and he shall exercise such authority on the advice of the Military Council . . . . [E]very instrument signed by the President shall be counter-signed by a member of the Military Council . . . . The President shall by decree make laws . . . and may amend or repeal any law . . . . No court of law shall be competent to inquire into or to pronounce upon the validity of any decree. No action or other legal proceeding, whether civil or criminal, shall be instituted in any court of law against (a) the President; [and] (b) any officer or member of the TDF . . . by reason of any action taken or thing done in order to effect the military takeover of power on 30 December 1987.[311]

The deposed Prime Minister moved the High Court of Transkei to declare the decree null and void and to direct the President to summon the Parliament into session in accordance with the Constitution in *Matanzima*.[312]

2. *The Judicial Response: Kelsen Unmodified*

In deciding whether or not the present Military Government and its Decrees were legally valid, the Court turned to the Lesotho case of

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302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.* at 992.
311. The Decree is reproduced in full in *id.* at 992-94.
312. *Id.* at 990.

Mokotso, one it thought was "very much in point."[313] It noted that the Order at issue in *Mokotso* was so similar to the Decree in question in *Matanzima*, "that it seems likely that the latter was modeled on the former for guidance."[314] Relying on the discussion in *Mokotso* of cases concerning extra-constitutionality, the Court found that, when faced with a similar problem, judges in other countries have either invoked the doctrine of revolutionary legality or the doctrine of State necessity, "although in some instances there seems to have been a tendency to merge the two doctrines."[315] The Court found Cullinan, C.J.'s reasoning in *Mokotso* that came "down very firmly on the side of doctrine of revolutionary legality . . . convincing."[316] The Court considered the *Mokotso* test, but preferred "to formulate [the *Mokotso* test] in what is perhaps a more positive manner . . . ."[317] The Court then stated:

> A revolutionary Government becomes lawful and its legislations legitimated *ab initio* when (a) it is firmly established, there being no real danger that it will itself be ousted from power, and (b) its administration is effective, in that the people, by and large, have acquiesced in and are behaving in conformity with its mandates.[318]

The Court then dealt with the petitioner's argument that before a revolutionary government could claim to be "firmly established," it should have to show that it "is likely to continue" in power, and that, since the military regime claims that it is an "interim government" and intends to return the country to civilian rule in due course, it by definition is not "likely to continue" in power.[319] The Court noted that Beadle, C.J.'s distinction between de facto and de jure governments proffered in *Madzimbamuto*, upon which petitioner's argument relies, had been criticized by the Privy Council. It then opined that the Rhodesian judge "had in mind not the possibility that a revolutionary Government might voluntarily relinquish power but the possibility that it might be forced out of power."[320] The Court concluded that "if a revolutionary Government is so entrenched that the only way in which it can reasonably be expected to

313. *Id.* at 994.

314. *Id.* at 994-95.

315. *Id.* at 996.

316. *Id.* The Court sought to buttress its choice of doctrine by noting that counsel for both sides "founded their main submissions on the basis that the doctrine of revolutionary legality should be invoked by this Court, although they differ in one respect as to its meaning." *Id.*

317. *Id.* at 997. The Court also summarized its understanding of Kelsen's theory:

> If the [coup d'etat] attempt fails, the old *grundnorm* and legal order remain valid. If, however, it succeeds, then the old *grundnorm* and the laws derived from it loose validity and the new *grundnorm* comes into existence. The revolution, however, cannot be said to have succeeded unless the people are, by and large, behaving in accordance with the new legal order it purports to introduce, that is to say, unless this legal order also becomes efficacious.

Id. at 996.

318. *Id.* at 997.

319. *Id.*

320. *Id.* at 998.

lose office is if it voluntarily relinquishes power, that fact in itself proves that it is indeed 'firmly established.'"[321]

The Court proceeded to apply its two prong test of legitimation. It held that the regime was "firmly established" because "there is no evidence whatsoever that any group of persons is trying to oust the Government from power, let alone any evidence to suggest that there is any danger that the Government may be forced out of power."[322] As to whether the regime was "effective," the Court refused to put credence in the applicants' affidavits which referred to strikes by postal workers, nurses, and medical employees to establish a lack of public acceptance of the regime.[323] Instead, the Court favored the answering affidavits, which claimed that the strikes resulted from conditions of service inherited from the deposed government.[324] The Court cited affidavits by heads of each governmental department averring that there had been no opposition among public servants or members of the public to the new regime, and that the regime's decrees had been given effect and the general administration of each department had proceeded smoothly.[325] Finally, the Court took judicial notice of the "plain fact" that there had been no sign of civil disobedience or rejection by the people of the new government.[326] This judicial notice lead the Court to answer the "effectiveness" question in the affirmative and to be "satisfied that we can properly find that the Military Government is a lawful Government and that the laws that it has introduced have validity *ab initio*."[327]

M. The *Banda* Case: Bophuthatswana 1989

1. The Context

On February 10, 1988, sections of the military of Bophuthatswana attempted a coup d'etat.[328] The President and Cabinet were taken into custody and forced to resign their posts. Some military bases and the broadcasting center were occupied and a new President and Cabinet were

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321. *Id.*
322. *Id.*
323. *Id.* at 998-99.
324. *Id.* at 999. The Court found:

> [T]he fact that isolated strikes have occurred would in no way justify the inference that the people who went on strike have not acquiesced in the present administration; *a fortiori*, such fact would not justify any inference that the people, by and large, are not behaving in accordance with mandates of the Military Government.

Id.
325. *Id.* The Court added, "[b]ut even apart from their averments, we, as a Court, cannot ignore the plain fact that at no stage since the *coup d'etat* has there been any sign of civil disobedience or of rejection on the part of the people of the Military Government." *Id.*
326. *Id.*
327. *Id.*
328. State v. Banda, [1989] 4 S. Afr. L.R. 519, 520 (Bophuthatswana Gen. Div.). For a general commentary on the history and politics of Bophuthatswana, see JEFFERY BUTLER ET AL., THE BLACK HOMELANDS OF SOUTH AFRICA: THE POLITICS AND ECONOMIC DEVELOPMENT OF BOPHUTHATSWANA AND KWAZULU (1977).

appointed.[329] The South African military intervened, subdued the coup makers, and reinstated the deposed government.[330] Sando Johannes Banda, the leader of the attempted coup, and 194 others were brought to trial on the charge of high treason.[331] The defense objected on the grounds that the indictment disclosed no offense against the accused.[332] Professor John Dugard, appearing for the defendants before the Supreme Court of Bophuthatswana, argued that the crime of high treason by definition can only be committed against a state possessing *majestas* (sovereignty).[333] Since Bophuthatswana was a creation of the South African legislature as part of the Pretoria regime's policy for the separate development of racially defined sections of the South African population (apartheid), it lacked the capacity of statehood in international law and consequently the attribute of sovereignty.[334]

2. The Judicial Response: Failed Coup d'Etat is Treason

The threshold issue of the case was whether a court established by the Constitution of Bophuthatswana was precluded from inquiring whether Bophuthatswana was a sovereign state. Friedman, J., could not "find any authority or logical reason precluding [him] from considering" the issue.[335] In order for the state to succeed on the charge of high treason, he wanted to "be satisfied that an integral part of the offence, namely that the State possesses sovereignty or *majestas*, has been proved by the State .... I must decide where the quality of *majestas* resides."[336] The Court relied on *Madzimbamuto*[337] and various South West African (Namibia) cases[338] for this position.

The Court first reviewed the constitutional history of the creation of Bophuthatswana. It noted that Bophuthatswana became a sovereign independent state on December 6, 1977, by an act of the legislature of South Africa.[339] On the same day the legislative assembly of Bophuthatswana promulgated the Republic of Bophuthatswana Constitution Act 18 of 1977.[340] Thus, Bophuthatswana became sovereign and independent;

329. *Banda*, [1989] 4 S. Afr. L.R. at 520.
330. J. D. van der Vyer, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 9 (1991).
331. *Banda*, [1989] 4 S. Afr. L.R. at 520.
332. *Id.* at 521.
333. *Id.*
334. *Id.* at 521.
335. *Id.* at 527.
336. *Id.*
337. Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284 (Rhodesia App. Div.).
338. *See, e.g.*, R. v. Christian, 1924 A.D. 101, 105, 108 (the court examined the status of the government in South West Africa to determine whether it had the requisite internal sovereignty to convict the accused on the charge of high treason, with the burden of proof being on the State).
339. *Banda*, [1989] 4 S. Afr. L.R. at 522-23. According to the Court, South Africa, being a sovereign state, had the right to dispose of its territory as it pleases, including allocating it to a specific group of people. *Id.* at 524-25.
340. *Id.* at 523.

its parliament having unfettered legislative powers and over which the Republic of South Africa "cease[d] to exercise any authority."[341] Furthermore, section 1(1) of the Constitution provided that "Bophuthatswana is a sovereign independent State . . . ."[342] Finally, the Court cited as "weighty permissive authority,"[343] *S v. Marwane*,[344] in which the Appellate Division of South Africa recognized, accepted, and applied the principle of sovereign independence of Bophuthatswana. This Court concluded that "according to law of this country and that of South Africa, Bophuthatswana is an independent sovereign State having *majestas*."[345]

Curiously, the Court did not stop the inquiry there, but instead agreed with the defense counsel's position that "the fact that [the] Constitution declares in Section 1 that Bophuthatswana is a sovereign and independent state is not conclusive proof of [its] statehood," and that "*whether or not Bophuthatswana is a State* for the purposes of the crime of high treason must be determined by international law."[346] This position is problematic on three counts.

First, the inquiry started as one to determine whether the State "possessed *majestas* or sovereignty."[347] A simple reference to the Constitution under which the Court sits should resolve this inquiry. After the international law divergence, the Court itself came around to the same conclusion at the end of the opinion: "These provisions [of the Status Act and the Constitution] are clear and unambiguous and I must apply them. It would be incorrect and contrary to legal principle to disregard the clear declaration of the sovereignty of Bophuthatswana . . . ."[348] What would have been the implication of a contrary holding? The Court would have questioned the validity of the Constitution to which it owed its very existence.[349] Such a position has been characterized as a "judicial 'revolution' against the Constitution."[350]

Second, the inquiry purported to determine "where the quality of *majestas* resides."[351] This is a legitimate inquiry for a court to undertake, as it would involve a judicial decision on the distribution of sovereignty, or separation of powers, within a particular state under a particular constitutional order. But this was not a problem in this case and the Court never

341. *Id.*
342. *Id.* at 524.
343. *Id.* at 526.
344. [1982] 3 S. Afr. L.R. 717 (South Africa App. Div.).
345. *Banda*, [1989] 4 S. Afr. L.R. at 526.
346. *Id.* at 526 (emphasis added).
347. *Id.* at 527. "For the purpose of deciding on the objection, I need only consider the element of *majestas* . . . ." *Id.* at 521.
348. *Id.* at 550.
349. As one commentator put it, Friedman, J.'s "predicament was that Professor Dugard's submissions required him to judge himself out of a job." Rosalind H. Thomas, *'Through the Looking Glass' - The Status of Bophuthatswana in International Law*, 6 S. AFR. J. ON HUM. RTS. 65, 76 (1990).
350. D. J. Devine, *Banda's Case 1989: The Implications For the Municipal Law of Bophuthatswana*, 107 S. AFR. L.J. 184, 187 (1990).
351. *Banda*, [1989] 4 S. Afr. L.R. at 527.

actually undertook any such inquiry. Third, the Court collapsed the municipal law status and international law status of a state and its sovereignty. The two statuses do not necessarily coincide. The former is determined by the municipal law of the state in question while the latter is guided by the rules of international law. The quintessence of the defense's challenge was the question of statehood; the question of sovereignty arises only after the question of statehood has been settled. However, the Court dealt with sovereignty first, and took an affirmative determination of this issue as being determinative of the statehood question as well. Finally, having determined that Bophuthatswana is sovereign, the international law inquiry was disingenuous in light of the Court's position that "[t]he law[s] of this country must take predence [sic] over international law, where they are in conflict."[352]

Turning to the issue of statehood, the court examined the two traditional schools of recognition: the constitutive school, which holds that recognition alone exclusively confers international personality on a state and makes it a subject of international law;[353] and the declaratory school, which holds that states become subjects of international law the moment they acquire the essential features of statehood independent of the will or actions of other states.[354] The Court adopted the position of the declaratory school and proceeded to ascertain whether Bophuthatswana conforms to essentials of statehood as enumerated by the 1933 Montevideo Convention on Rights and Duties of States.[355] The Court determined that the essential attributes of statehood were met: a permanent population; a defined territory; an independent government and the capacity to enter

352. *Id.* at 528. As for international legal instruments, Friedman, J., said:

> [T]his Court can consider and take judicial notice of international conventions such as the Covenant of the League of Nations, the United Nations Charter, and the Mandate for South West Africa. By doing so, it must not be construed that I regard these Charters and Mandates as being part of the law of this country, or *in any way binding* on me. I have *a discretion* whether to apply them or not. I must, however, *apply the law of this country in the final analysis.*

Id. (emphasis added).

353. *See* Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605 (1941); LASSA OPPENHEIM, INTERNATIONAL LAW (H. Lauterpacht ed., 8th ed. 1955); HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (1947); GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 91-92 (2d ed. 1970).

354. *See* JAMES L. BRIERLY, LAW OF NATIONS 39 (Sir Humphrey Waldock ed., 6th ed. 1963); TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION WITH SPECIAL REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES (L. C. Green ed., 1951); WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW 19-20 (A. Pearce Higgins ed., 8th ed. 1924); MICHAEL B. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 53-68 (5th ed. 1984); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (1979); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 201, 202(1) (1987).

355. The Court noted that "[t]he constitutive theory is positivistic in nature .... The declaratory theory on the other hand is a natural law doctrine . . . ." *Banda*, [1989] 4 S. Afr. L.R. at 531 (citation omitted). The Court found that "the fact of non-recognition is immaterial .... No good reason exists and indeed little is to be gained by denying recognition to a functioning government." *Id.* at 544-47.

into relations with other states.[356] It concluded that Bophuthatswana "is therefore a sovereign State, not only according to the law of this country . . . but also according to the principles of customary international law."[357]

The Court rejected defendants' plea that an entity does not qualify as a state, notwithstanding that it has the essential attributes of statehood expounded in the Montevideo Convention, if its creation is "a result of a violation of a peremptory norm of international law (*jus cogens*)."[358] Relying upon the Charter and resolutions of the United Nations, the defense argued that the creation of Bophuthatswana was unlawful because it issued from a policy of racial discrimination and apartheid and constituted denial of self-determination.[359] The Court responded that Resolutions of the General Assembly do not have the force of law and "they certainly do not form part of the law of this country."[360] The right of self-determination of the people "is ensured by being citizens of the State of Bophuthatswana."[361] The Court concluded that Bophuthatswana did possess *majestas*, and the perpetrators of a failed coup d'etat could rightfully be tried for the high crime of treason.

II. The Options Available to a Court when Confronted with Successful Coups d'Etat

When a judiciary established under the constitution survives a coup d'etat, it is faced with the question of the validity of the usurper regime. Theoretically, any court called upon to address this question, has four options available to it:

(i) validate the usurpation of power;

(ii) declare the usurpation unconstitutional and hence invalid;

(iii) resign, thereby refusing to adjudicate the legality of the demise of the very constitution under which the court was established; or

(iv) declare the issue a nonjusticiable political question.

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356. *Id.* at 539-44.

357. *Id.* at 544.

358. *Id.* This theory of recognition, which rests on the premise that statehood depends on recognition, goes further in asserting that the right to recognize has been relinquished by the international community to the United Nations. Thus the act of recognizing an entity, in the sense of affording it the condition of statehood, is now a collective matter. *See* JOHN DUGARD, RECOGNITION & THE UNITED NATIONS (1987); van der Vyer, *supra* note 330, at 9. According to Dugard, "the practice of the United Nations on the subject of non-recognition seems to be premised on the violation of peremptory norms rather than on the failure to meet the conditions of statehood." DUGARD, *supra*, at 132.

359. *Banda*, [1989] 4 S. Afr. L.R. at 544-45.

360. *Id.* at 545. The court pointed out that these Resolutions are frequently disregarded by members of the United Nations. *Id.*

361. *Id.* The defense's reliance on GUR Corp. v. Trust Bank of South Africa Ltd., [1986] 3 All E.R. 449 (Eng. C.A.), where the Court held that the Republic of Ciskei is "a subordinate body set up by the Republic of South Africa to act on its behalf," *id.* at 466, and therefore is not an independent state, was rejected on the ground that the House of Lords treated an executive certificate of the British Foreign Office addressing the issue as binding on them. *Banda*, [1989] 4 S. Afr. L.R. at 547-49.

This section explores the suitability of each of these options to facilitate recommendations about desirable judicial responses towards coups d'etat in post-colonial societies. Before this examination, it is important to take note of the context within which the encounters between coups d'etat and judiciaries unfold. The article proceeds with the premise that all constitutional adjudication is "applied politics."[362] This premise is a basic one when one focuses upon constitutional adjudication in the midst of and pertaining to political upheaval not contemplated by the constitutional order.

> The life of the law has not been logic: It has been experience. The felt necessities of the time, the prevalent moral and political theories, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[363]

Consequently, any examination of, and prescription about, constitutional adjudication that is not informed by the social and political context of the exercise remains deficient. Before examining the options available to a court when confronted with a coup d'etat, this article considers some important contextual features within which the interface of coups d'etat and the judiciary takes place in post-colonial settings.

A. A Note on the Context of the Coup d'Etat/Judiciary Interface

Conventional understanding about constitutional jurisprudence generally takes for granted some basic features of the political culture drawn from the historical experience of Western Europe and colonial settler states. These include a substantial measure of ethnic unity, linguistic uniformity, cultural homogeneity, political stability, and representative governance. All these lead to an assumption of general consensus about the constitutional order and legitimacy of the political order. Constitutional adjudication, consequently, is rendered less problematic in that judicial review of conduct of the political organs of the state proceeds within generally agreed parameters.

The socio-political context in the post-colonial settings, however, does not accord with the conventional understanding. First, as the territorial boundaries of the states are often the result of arbitrary colonial policies, they do not correspond with any natural ethnic, linguistic, religious, or cultural demarcations and, consequently, realization of the concept of a nation-state remains elusive.[364] Second, a remarkable feature of these

362. Felix Frankfurter, *The Zeitgeist & the Judiciary, reprinted in* LAW & POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913-1918 3, 6 (Archibald MacLeish & E. F. Princhard, Jr. eds., 1962).

363. OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1909). Compare Harold Laski's designation of Kelsen's pure theory of law as "an exercise in logic and not in life." de Smith, *supra* note 9, at 93.

364. This has led some to designate post-colonial settings "state nations." Arnold Hughes, *The Nation-state in Black Africa, in* THE NATION-STATE: THE FORMATION OF MODERN POLITICS 122 (Leonard Tivey ed., 1981). *See also* Walker Connor, *Nation-Building or Nation-Destroying?*, WORLD POL. Oct. 1971-July 1972, at 319; BASIL DAVIDSON, THE BLACK

societies is their underdevelopment, in which pockets of prosperity exist amidst pervasive structural underdevelopment.[365] Third, the institutions of the state, typically inherited from colonial times, are overdeveloped relative to the civil society, and the coercive apparatuses of the state are overdeveloped relative to other state agencies.[366] Fourth, institutionalized representative government remains the exception rather than the rule, and the state is typically allied with a particular class, region, ethnicity, religion or linguistic group to the exclusion of others.[367] All these factors contribute to a lack of consensus about the constitutional frameworks. Thus, the legitimacy of the political order remains elusive. The judicial institutions, located as they are in the midst of this context, cannot exist without being affected by it.

It is important for this inquiry to maintain a distinction between a revolution and a coup d'etat. Most legal scholars and courts tend to treat all political changes not contemplated by the constitution in the same light and use the terms revolution and coup d'etat interchangeably.[368] This uniform treatment rests upon a formalistic legal posture. Revolutions involve the "rapid tearing down of existing political institutions and building them anew on different foundations."[369] This envisages a complete metamorphosis that affects both civil society and the entire state; the transformation is so pervasive that legitimacy of the new order is completely autonomous of the processes and institutions of the old order. The content of the legal order and the structure of judicial institutions are typically changed.[370]

MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE (1992); ANTHONY D. SMITH, THE ETHNIC ORIGINS OF NATIONS (1986); ANTHONY D. SMITH, NATIONAL IDENTITY (1991); ANOUAR ABDEL-MALEK, NATION & REVOLUTION: VOLUME 2 OF SOCIAL DIALETICS (1981).

365. *See, e.g.*, SAMIR AMIN, ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDEVELOPMENT (Brian Pearce trans., 1974); SAMIR AMIN, IMPERIALISM & UNEQUAL DEVELOPMENT (Brian Pearce trans., 1977).

366. *See, e.g.*, Malori J. Pompermayer & William C. Smith, Jr., *The State in Dependent Societies: Preliminary Notes, in* STRUCTURES OF DEPENDENCY (Frank Bonilla & Robert Girling eds., 1973); Hamza Alavi, *The State in Post-Colonial Societies: Pakistan and Bangladesh*, NEW LEFT REV., July/Aug. 1972, at 59; CLIVE Y. THOMAS, THE RISE OF THE AUTHORITARIAN STATE IN PERIPHERAL SOCIETIES (1984). Of course, in many post-colonial societies authoritarian tendencies predated colonialism. *See* KARL A. WITTFOGEL, ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER (1957); PERRY ANDERSON, LINEAGES OF THE ABSOLUTIST STATE (1974).

367. *See, e.g.*, SAMIR AMIN, UNEQUAL DEVELOPMENT: AN ESSAY ON THE SOCIAL FORMATIONS OF PERIPHERAL CAPITALISM (Brian Pearce trans., 1976); MAHMOOD MAMDAMI, POLITICS AND CLASS FORMATION IN UGANDA (1976); THOMAS CLIVE, THE RISE OF THE AUTHORITARIAN STATE IN PERIPHERAL SOCIETIES (1984).

368. *See, e.g.*, HANS KELSEN, GENERAL THEORY OF LAW AND STATE 117 (Anders Wedberg trans., 1961) [hereinafter KELSEN, GENERAL THEORY]; HANS KELSEN, PURE THEORY OF LAW 209 (Max Knight trans., 1967) [hereinafter KELSEN, PURE THEORY].

369. Claude E. Welch & Mavis B. Taintor, *Introduction, in* REVOLUTION AND POLITICAL CHANGE 2 (Claude E. Welch, Jr. & Mavis B. Taintor eds., 1972).

370. *See generally* REVOLUTIONS: A COMPARATIVE STUDY (Lawrence Kaplan ed., 1973); STAN TAYLOR, SOCIAL SCIENCE AND REVOLUTIONS (1984).

A coup d'etat, on the other hand, typically aims only at capturing political power extra-constitutionally. Only that part of the Constitution which bears on the formation of political organs of the state is subverted.[371] The functional framework of the state, the judicial branch, and the wider legal order are typically kept in place.[372] As a result, the legitimacy of the new regime is not completely autonomous of the pre-existing processes and institutions. In all the cases examined above, the judiciary survived the coups d'etat that destroyed the executive and legislative organs of the state. Beyond letting it survive institutionally, the judiciary was allowed to determine the validity of the new regime, even in the face of express preclusion of such review contained in proclamations and decrees of usurper regimes.[373] Usurpers appear to recognize that judicial pronouncements about the nature and merits of the change and quantum

371. *See* HANNAH ARENDT, ON REVOLUTION 27 (1963); Finnis, *supra* note 9, at 48 ("[i]n a mere *coup d'etat* only the rules governing the succession of persons to legal office are affected; the rules concerning the powers and hierarchy of the offices themselves are unaffected."). Karl Olivecrona's reading of revolutions is similarly non-formalistic, and in the tradition of Scandinavian realism, presented largely in terms of psychology:

> New leaders step in and proclaim that they have 'assumed power'. . . . They begin to issue laws and administrative decrees. To succeed they need, of course, organization and a special political and psychological situation in the country . . . . But in actual fact, the revolutionaries make use of much of the foundations of the old order. Most of the law is left as it is; only the constitution is put aside . . . . [But] the respect for the previous constitution may easily be transferred to the new one . . . . A new constitution, enacted without reference to an old constitution, therefore, needs no other justification than its being willed by the people.

KARL OLIVECRONA, LAW AS FACT 104 (2d ed. 1971).

372. Typically the very first act of usurpers after assuming power following a coup d'etat is to proclaim that, except for a few specified ones, the laws of the land will remain in force, and the state will function as far as possible in accordance with the old Constitution. *See, e.g.*, Laws (Continuation in Force) Order, 1977 of Pakistan, *in* Wolf-Phillips et al., *supra* note 193, at 123-24. Fieldsend, J., however, saw in this fact a problem for the usurpers:

> In order that a de facto Government be set up it is necessary that all the powers of sovereignty or government should be actually exercised by the body purporting to be a de facto Government . . . . The usurper of a government constituted under a written Constitution must take the responsibility of replacing the legitimate Court and its Judges—yet a further illegal act before he can be said to have usurped all powers of sovereignty. To hold otherwise is merely to assert that the repository of one part of the sovereign power must acquiesce in the illegal assumption of power by the repository of another part.

Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284, 427-28 (Rhodesia App. Div.).

373. For example in Rhodesia, the usurper regime first acquiesced in the refusal of the judges to take a new oath of office and then in the examination of the validity of UDI notwithstanding Decrees to the contrary. *See* Palley, *supra* note 9, at 269-70. Macdonald, J.A., accurately noted the importance of judicial posture for any usurper regime: "Indeed, it was only the uncertainty which existed in regards to the attitude of the High Court which cast doubt upon the status of the Government." *Madzimbamuto*, [1968] 2 S. Afr. L.R. at 412. In Pakistan, while Proclamation of Martial Law of July 5, 1977, expressly precluded judicial review of the validity or conduct of the usurper regime, the regime acquiesced in the Supreme Court's decision to engage in this inquiry in *Bhutto*. *See supra* note 192 and accompanying text; Stavsky, *supra* note 9, at 380.

of their legislative capacity have an impact on the legitimacy of the new regime, because words like "law" and "legality" function as titles of honor,[374] and in common-law settings, "For all practical purposes a legal system or a constitution is valid when the judges have unambiguously accepted it as valid. To this extent the constitution is what the judges say it is."[375] Securing judicial recognition appears to be the key to gaining political legitimacy. Given the social respect enjoyed by the judiciary, recognition by courts of the old order furnishes a source of credibility for usurper regimes. Those in power "know only too well the advantage which the seal of legality carries."[376] The usurper's need for legitimacy and judicial recognition implies that the courts may not be entirely powerless when confronted with a coup d'etat and may be in a position to secure concessions in exchange for judicial recognition.

This, however, must be tempered by the fact that in the aftermath of a successful coup d'etat, judges "who have been used to placing a 'check' on legislative excesses and a judiciary that had always seen itself as a potent and effective 'control' on the other organs of government are now confronted with a *fait accompli* expressed in Decrees and Edicts."[377] Coups are typically carried out by, or with the support of, the military establishment of the state. Because the military enjoys a preponderance, even a monopoly, of coercive power in the society, it can enforce its will on any section of the state or civil society while it remains relatively immune from countervailing pressure from any other quarter. Consequently, notwithstanding the usurpers' desire for judicial recognition and hence the motivation to placate the judiciary, the options available to the judiciary are quite limited. The judiciary does not have the ability to enforce any judgment against the usurpers, while the usurpers have the power to abolish the courts or replace "uncooperative" judges.[378] Following a coup d'etat, a court

> owes its existence to and derives its authority . . . from the fact that the present de facto Government which is in full control of the government of the country, knowing that the Court as such has not 'joined the revolution,' has none the less permitted it to continue and exercise its functions as a court, and has authorized its public officials to enforce the Court's judgments and orders.[379]

The implication is that after a coup d'etat the very power of the courts in terms of enforceability of judgments rests substantially on the support of the usurpers.

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374. ALF ROSS, ON LAW AND JUSTICE 31 (1959). *See also* THE MILITARY AND THE PROBLEM OF LEGITIMACY (Gwyn Harries-Jenkins & Jacques van Doorn eds., 1976).

375. de Smith, *supra* note 9, at 104.

376. Dias, *supra* note 9, at 233.

377. Ojo, *supra* note 146, at 101.

378. For a long list of cases where the executive successfully interfered with the security and independence of the judiciary in many countries, see Claire Palley, *Rethinking the Judicial Role: The Judiciary and Good Government*, ZAMBIA L.J., No. 1, 1969, at 2-5.

379. Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284, 330 (Rhodesia App. Div.) (Beadle, C.J.).

Notwithstanding the insistence of judges that their own political opinions are irrelevant,[380] pronouncements of legal recognition of coups d'etat are "fundamentally political judgments dressed in legalistic garb."[381] Because "[t]he decision to accept a revolutionary regime as lawful is more obviously a choice between competing values than is the case with ordinary judicial decisions,"[382] the personal profiles of judges become important. This raises some critical questions about the personal posture of the judges towards coups d'etat. Given the socio-economic context of the societies in question, a number of factors may contribute towards this posture: the ethnic, provincial, tribal, linguistic, religious, or class background; the educational and employment record; the security of tenure; the personal relations with the deposed leaders or the usurpers; and the identification with declared or real objectives of the coup. Public information and discussion in the literature about these factors is scant,[383] precluding any systematic analysis and concrete conclusions. But this absence of complete and reliable information should not lead us to pretend that this problem does not exist. In discussing the merits of the options available to a court confronting the issue of validity of usurpation, one should, to the extent possible, account for the impact of the personal factor on different options.

B. Option One: Validation/Legitimation of Usurpation

Of the options available to a court when confronted with a coup d'etat, the one most courts in the post-colonial common-law settings have adopted is validation/legitimation of coups d'etat and recognition of unfettered legislative capacity of the usurpers. This option is riddled with

380. *See, e.g.*, State v. Dosso, 1958 P.L.D. S. Ct. 533, 538 (Munir, C.J.); Uganda v. Matovu, 1966 E. Afr. L.R. 514, 530, 535 (Uganda) (Udoma, C.J.); *Madzimbamuto*, [1968] 2 S. Afr. L.R. at 326-28 (Beadle, C.J.); *id.* at 364-65 (Quenet, J.P.); *id.* at 384-86 (Macdonald, J.A.); R. v. Ndhlovu, [1968] 4 S. Afr. L.R. 515, 520-22, 528-35 (Rhodesia App. Div.) (Beadle, C.J.); *id.* at 538-42 (Quenet J.P.); Mokosto v. King Moshoeshoe II, 1989 L.R.C. Const. 24, 139 (Lesotho) (Cullinan, C.J.).

381. de Smith, *supra* note 9, at 94.

382. Dias, *supra* note 9, at 233.

383. For an example regarding the involvement of Munir, C.J., with the usurpers just before the *Dosso* decision, see *supra* note 161 and accompanying text. All judges of the Rhodesian superior courts belonged to the white settler minority and thus may have been sympathetic to the objectives of UDI. *See* Palley, *supra* note 9, at 263 (designates the *Madzimbamuto* decision as a "pre-eminently a political decision . . . of loyalist, moderate and 'responsible' members of the European ruling elite."). The personal relations of two judges with the appellant in the *Sallah* which led to motions to disqualify. *See supra* note 115 and accompanying text. Yaqub Ali, C.J., who had been given an extraordinary extension of service by the Constitutional regime, was removed by the usurpers two days after the application challenging usurpation was accepted for hearing in *Bhutto*. *See supra* note 192 and accompanying text. Nedd, C.J., a beneficiary of the judicial reorganization by the usurpers, readily accorded them de jure status, while the Court of Appeals found that the evidence was insufficient to hold so and even accused Nedd of expressing personal opinions. *See supra* note 264. One potential source of information in this context are memoirs of judges, but they are often self-serving. *See, e.g.*, MUHAMMAD MUNIR, HIGHWAYS AND BYE-WAYS OF LIFE (1978) (a spirited defense of his decision in *Dosso*).

such theoretical, doctrinal, institutional, and moral problems that it is the least suitable option for a court.

The jurisprudential puzzle inherent in coups d'etat is "how acts of violence can give rise to 'binding' rules."[384] Confronted with coups d'etat, judges are "[p]itched into a legal no-man's land, they are expected to make authoritative pronouncements on the 'right' interpretation of political facts, and to justify their interpretation by referring to pre-existing authoritative norms."[385] As the review of case law above demonstrated, when faced with intermittent coups d'etat, Commonwealth courts "swallowed Kelsen hook, line and sinker,"[386] or used his theory of revolutionary legality, in pure or modified forms, as a rule of decision, notwithstanding Kelsen's position that "[t]he ideal of an objective science of law and State, free from all political ideologies, has a better chance for recognition in a period of social equilibrium . . . . [and] in the Anglo-American world, where . . . political power is better stabilized than elsewhere . . . ."[387] Supporters of Kelsen have charged that the courts "misrepresented Kelsen's positivist Pure Theory and its concept of *Grundnorm* in order to disguise from observers, and perhaps from themselves, the profoundly political nature of their actions."[388] The problem, however, is two-fold: First, Kelsen's theory is inherently flawed and, second, it was misinterpreted and misapplied by the courts. Because Kelsen's theory forms the doctrinal core of the validation/legitimation option, a critical examination of the theory is necessary.

1. Kelsen and Coup d'Etat

Kelsen's theory of revolutionary legality grows out of the discontinuity of law paradigm, which seeks to answer when and under what circumstances one legal system ceases to exist and a new one is created in its place.[389] Kelsen's response is that the "State and its legal order remain the same only as long as the constitution is intact or changed according to its own provisions."[390] Kelsen holds that this "principle of legitimacy . . . fails to hold in the case of a revolution,"[391] because "it is never the constitution merely but always the entire legal order that is changed by a revolution,"[392] with the result that all norms of the old order are "deprived of

384. OLIVECRONA, *supra* note 371, at 66.
385. de Smith, *supra* note 9, at 104.
386. *Id.* at 103.
387. KELSEN, GENERAL THEORY, *supra* note 368, at xvii.
388. Hopton, *supra* note 9, at 73.
389. KELSEN, GENERAL THEORY, *supra* note 368, at 218-21, 368-69.
390. *Id.* at 368-69. A corollary being the proposition that legal norms "remain valid as long as they have not been invalidated in the way which the legal order itself determines." *Id.* at 117.
391. *Id.* at 117. For Kelsen the term revolution, "also covers the so-called *coup d'etat.* A revolution . . . occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way . . . . 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 order in a way which the former had not itself anticipated." *Id.* at 117-18.
392. *Id.* at 118.

their validity by revolution and not according to the principle of legitimacy."[393] In the wake of a coup d'etat, "*Every jurist will presume that the old order—to which no political reality any longer corresponds—has ceased to be valid* . . . ."[394] If the revolutionaries "succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates *actually behave, by and large, in conformity with the new order,* then this order is considered as a valid order."[395] In his "attempt to make explicit *the presupposition on which these juristic considerations rest,*" Kelsen finds that

> the norms of the old order are regarded as devoid of validity because the old constitution and, therefore, the legal norms based on this constitution, the old legal order as a whole, has lost its efficacy; because the actual behavior of men does no longer conform to this old legal order. . . . *The principle of legitimacy is restricted by the principle of effectiveness.*[396]

Kelsen's theory assumes the identification of the state with the legal order, with their foundations rooted in the constitution. As his theory rests upon the "*operative premise* . . . that the positive and deliberate destruction of the foundation of the legal order *presumes the intention to found a new state, a new sovereignty,*"[397] it precludes any distinction between a revolution and a coup d'etat. While he recognizes that coups d'etat do not result in actual replacement of the legal system, and "only the constitution and certain laws of paramount political significance" are suppressed, while "[a] great part of the old legal order 'remains' valid,"[398] he is constrained to treat their legal implication as being the same as those of a revolution. This places his theory out of step with the reality of coups in post-colonial societies that do not aim at destruction of the entire legal order, but only at usurpation of political offices.

a. Kelsen's formal juridical conception of the state is fallacious

Kelsen's postulates rest on a narrow, formalistic, and juridical conception of the state, whereby concepts of "state," "legal order," and "constitution" become fused. It is this fusion which leads to statements that the state and its legal order remain the same only as long as the constitution is intact or changed according to its own provisions.[399] Kelsen's is "a highly restrictive

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393. *Id.*

394. *Id.* (emphasis added).

395. *Id.* (emphasis added). Leaving no doubt that success is the only criteria of validity, Kelsen says that "If the revolutionaries fail . . . their undertaking is interpreted . . . as an illegal act, as the crime of treason . . . ." *Id.*

396. *Id.* at 118-19 (emphasis added). *See also* Hans Kelsen, *The Pure Theory of Law: Part II,* LAW Q. REV., Jan. 1935, at 517, 519.

397. Simeon C. R. McIntosh, *Continuity and Discontinuity of Law: A Reply to John Finnis,* 21 CONN. L. REV. 1, 5 (1988) (emphasis added).

398. KELSEN, GENERAL THEORY, *supra* note 368, at 117; KELSEN, PURE THEORY, *supra* note 368, at 209-10.

399. KELSEN, GENERAL THEORY, *supra* note 368, at 364; KELSEN, PURE THEORY, *supra* note 368, at 209-10. Kelsen views the state as a purely legal phenomenon; not something apart from its legal or normative order. KELSEN, GENERAL THEORY, *supra* note 368, at 181-82. Rather, it is the centralized legal order—a metaphorical expression, a figura-

view of the State as the expression of the logical completeness and inner consistency of the system of legal norms."[400] This conception of the state as a structure of legal norms is a purely juristic and formal one. It fails to take account of those social factors that condition the nature of particular states and legal orders in specific settings, and reflects legal positivism's lack of philosophical concern with moral questions that are at the very heart of the issue of legitimacy of any legal order or a state.

The nature of a particular state cannot be determined in isolation from civil society.[401] Formal juridical conceptual divisions between the state and civil society, and the corresponding division between the public and the private spheres, only mask the mutually conditioning relationship between the two. The nature of the civil society conditions the forms that the state assumes within its midst, and the state, in turn, conditions the civil society by its very existence, structure, and functions. Furthermore, the function of the state is not exclusively a coercive one. Ideological and normalizing functions are the primary functions of a modern state, whereby the state and civil society necessarily overlap. The concept of the state is open-textured, making it susceptible to a multiplicity of usages.[402] Any purely juristic explanation of the state is, therefore, an unavoidably abstract postulation of the quintessential form of the state of which actual states are particular manifestations. Even if one begins with the premise that a sovereign state exists "where there is an authority [in a defined territory], which fixes the norms of all law, and beyond which, in the search for the origin of such norms, we cannot go,"[403] the concept of a state remains a theoretical construct; a formal conclusion one may draw about a society in a defined territory where certain conditions obtain. However, the society, loosely defined as a group of human beings living and working together for the satisfaction of their mutual wants,[404] remains indispensa-

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tive description of specific relations between the various public organs and offices constituted by a normative order. *Id.* at 189. The state acts only through these public organs and offices, and it is the legal order that both declares in general terms which individuals are qualified to perform various functions, and the procedures by which particular individuals are made organs. *Id.* at 195. Thus, if the constitution establishes the organs of the legal order and the norms that regulate their behavior, as Kelsen posits, then his theory of the constitution is also his theory of the state and the legal order. The normative order that constitutes the state and the legal order is itself constituted by the constitution. *Id.* at 258.

400. KENNETH H. F. DYSON, THE STATE TRADITION IN WESTERN EUROPE 9 (1980).

401. My position on the relationship between the state and civil society, which rejects any rigid compartmentalization between the two, is drawn from ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell-Smith eds. & trans., 1971); JURGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarty trans., 1975); ANTONIO GRAMSCI, SELECTIONS FROM CULTURAL WRITINGS (David Forgacs & Geoffrey Nowell-Smith eds., William Boelhower trans., 1985); MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977).

402. DYSON, *supra* note 400, at 2. *See also* 1 MICHEL FOUCAULT, HISTORY OF SEXUALITY: AN INTRODUCTION 82-85 (Robert Hurley trans., 1980).

403. HAROLD J. LASKI, STUDIES IN LAW AND POLITICS 238 (1932).

404. *See* SHLOMO AVINERI, HEGEL'S THEORY OF THE MODERN STATE 134 (1972).

ble to one's understanding of the nature of the state. Kelsen's theory of the state and revolution remains blind to this imperative.

While examining Kelsen's identification of law with the state and of the state with coercion, it is helpful to refer to the critique of Kelsen's discontinuity thesis advanced by J. M. Finnis.[405] For Finnis, legal systems are not simply systems of rules, but sequences, or successive sets of rules, ever changing and cohering in what society accepts as a continuous system not by virtue of any perennial *grundnorm* or rule of recognition, but as a function of the existence of society itself, which is an organic structure responding to laws of growth, change, and decay analogous to those governing the individual organism. Consequently, he argues that "a revolution is neither a necessary nor a sufficient condition for anything that should be described as a change in the identity of the state or the legal system."[406] Accordingly, both the state and the legal system can be deemed to survive a revolution without implying the invalidity of all of a revolution's dispositions in areas conventionally regulated by law.[407] However, Finnis argues that justice has other demands, so that "sometimes the character of a revolution is such that allegiance to the revolutionary order of society is unreasonable," and the reasonableness that forms the basis of his society-oriented, non-formalistic approach, is "the reasonableness of justice and *philia politike*, which demand legal coherence and continuity and respect for acquired rights."[408] In order to appreciate Finnis' continuity of law thesis, it is important to bear in mind that for him the central meaning of law is of an authoritative common ordering of a community that facilitates the realization of the common good.[409] While he concedes

405. Finnis, *supra* note 9.

406. *Id.* at 75. The central question Finnis raises is, "Does every illegal or 'unconstitutional' act, of the sort that would usually be called a *coup d'etat*, amount to a change in the constitution and thus in the identity of the legal order? Or is there a class of *coups d'etat* that, while illegally supplanting legal officials, nevertheless leave the constitution, in Kelsen's sense, intact?" *Id.* at 45. A similar position is that of Joseph Raz, who states that:

> [N]either the 'constitutional continuity' of the new laws nor their content are necessary or sufficient conditions for establishing the continuity or lack of continuity of legal systems. Legal systems are always legal systems of complex forms of social life, such as religions, states, regimes, tribes, etc .... The identity of legal systems depends on the identity of the social forms to which they belong. The criterion of identity of legal systems is therefore determined not only by jurisprudential or legal considerations but by other considerations as well, considerations belonging to other social sciences.

JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 188-89 (1970).

407. Accordingly, "it is usually reasonable to accept the new rules of competence and of succession of rules proposed by the successful revolutionaries who have made themselves masters of society [while] ... adher[ing] to the 'general principle' ... [of] the validity of the remaining bulk of the legal system." Finnis, *supra* note 9, at 76.

408. *Id.* at 76.

409. JOHN M. FINNIS, NATURAL LAW & NATURAL RIGHTS 276-77 (1980). He sees these basic common goods as objective values in the sense that every reasonable person must assent to their value as objects of human striving. *Id.* at 205. For the list of Finnis' basic goods, see *id.* at 205-09. Finnis' position has been correctly characterized as being a

that "stipulations of those in authority have presumptive obligatory force,"[410] he argues that if a ruler uses authority to make stipulations "against the common good, or against any of the basic principles of practical reasonableness, those stipulations altogether lack the authority they would otherwise have *by virtue of being his.*"[411]

While for Kelsen the law is always concerned with coercion,[412] for Finnis it is primarily aimed at facilitating the realization of the common good.[413] The central difference between the two is that, while Kelsen equates the legal order with the state,[414] Finnis identifies the legal order with the society.[415] Although Finnis correctly points out the Kelsenian fallacy of focusing on the state to the exclusion of society, Finnis' own fallacy lies in his focus on the society to the exclusion of the state. The position of this article is that recognition of the essentially interlinked and interdependent nature of the state and civil society is indispensable to the appreciation of the distinction and tension between the concepts of the legitimacy and the validity of a legal order. As discussed below, this distinction is critical to formulating an appropriate judicial response to coups d'etat.

b. Kelsen proffers a theory of law not a rule of decision

It is charged that "Kelsen's theory is betrayed, *on its own terms*, if it is put to normative use as a practical principle for guiding judicial decision and action."[416] While "[p]art of the problem lies in Kelsen's own obliqueness,"[417] this is primarily because Kelsen's doctrine is not capable of judicial application, the *grundnorm* being simply a "hypothesis."[418] Kelsen has himself contributed to this confusion. On the one hand, he takes the position that jurisprudence is not a source of law,[419] but on the other, he asserts that "[w]hat sociological jurisprudence predicts that the courts will

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"restatement of natural law." LORD LLOYD OF HAMPSTEAD & M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 136 (5th ed. 1985).

410. FINNIS, *supra* note 409, at 359.

411. *Id.* at 359-60.

412. KELSEN, GENERAL THEORY, *supra* note 368, at 15-29; KELSEN, PURE THEORY, *supra* note 368, at 33-42, 54, 62.

413. FINNIS, *supra* note 409, at 276-77.

414. KELSEN, GENERAL THEORY, *supra* note 368, at 368-69 ("[T]he state and its legal order remain the same only as long as the constitution is intact or changed according to its own provisions.").

415. Finnis, *supra* note 9, at 69 ("[T]he continuity and identity of a legal system is a function of the continuity and identity of the society in whose ordered existence in time the legal system participates.").

416. John M. Finis & B. C. Gould, *Constitutional Law, in* ANNUAL SURVEY OF COMMONWEALTH LAW 1972 53-54 (H.M.R. Wade ed., 1973).

417. HAMPSTEAD & FREEMAN, *supra* note 409, at 330.

418. Eekelaar, *Rhodesia, supra* note 9, at 22-23.

419. KELSEN, GENERAL THEORY, *supra* note 368, at xiv, 163. "The science of law has to know the law—as it were from the outside—and to describe it. The legal organs, as legal authorities, have to create the law so that afterwards it may be known and described by the science of law." KELSEN, PURE THEORY, *supra* note 368, at 72.

decide, normative jurisprudence maintains that they *ought to decide*."[420] The later statement has led to the understanding that Kelsen's theory "implies that a judge is under a legal duty . . . to accept successful revolutions . . . [and] this duty is not outweighed by any general legal duty of constitutional loyalty."[421] The problem is that the adoption of Kelsen's theory by judges does away with the essential distinction between judges and legal theorists.[422] It disregards the fact that "accounting for or explaining such continuity or discontinuity is not an empirical task of identifying the continuance or discontinuance of individual (positive) rules of law, but is more appropriately conceptual in nature."[423]

John Finch rightly asserts that misconceptions of Kelsen's theory are attributable, among other things, "to a confusion of the two senses of the word constitution . . . . In particular, the constitution in the positive legal sense has been taken for the basic norm, which it is not."[424] The courts that adopted Kelsen's theory to validate coups d'etat generally treated *grundnorm* and the constitution synonymously. This facilitated treatment of Kelsen's position about the theoretical concept of *grundnorm* as directly applicable to the status of the constitution.

In Kelsen's theory, however, there is a sharp distinction between the two. The *grundnorm* is the reason for the validity of the constitution as seen by legal science; it is not the constitution itself. The *grundnorm* lies outside positive laws and their norms; it is a presupposition of them made in the interest of legal science. And even though presupposed, the *grundnorm* has no independent status; it always refers to a specific constitution. Furthermore, the *grundnorm* is not prescribed by Kelsen's "pure theory." To prescribe it would be to make laws, and "pure theory" cannot create a law on its own account; only those authorized to do so by the legal system can do that. Kelsen's "pure theory" is concerned only with intellectual coherence in legal analysis. It is a descriptive theory, not a prescriptive principle of law.[425] Kelsen refers to the *grundnorm* as the "constitution

420. KELSEN, GENERAL THEORY, *supra* note 368, at 172 (emphasis added). At other times Kelsen is emphatic: "Never, not even in the earliest formulations of the Pure Theory of Law did I express the foolish opinion that the propositions of the Pure Theory of Law 'bind' the Judge in the way in which legal norms bind him." Hans Kelsen, *Professor Stone and the Pure Theory of Law*, 17 STAN. L. REV. 1128, 1134 (1965).

421. Harris, *supra* note 9, at 132.

422. For example, Harris, a proponent of Kelsen's, defends the revolutionary legality cases by saying: "The judges in Pakistan, Uganda and Rhodesia *were acting properly in the role of legal scientists* when they found that the revolutionary regimes were legal, because they were confronted with very strong evidence that, whatever decision they reached, the revolutions would be successful." *Id.* at 132 (emphasis added).

423. McIntosh, *supra* note 397, at 6.

424. JOHN D. FINCH, INTRODUCTION TO LEGAL THEORY 112 (3d ed. 1979).

425. Failure to recognize this distinction leads judges (for example, those deciding *Madzimbamuto*) to see

> [t]he *Grundnorm* itself as granting validity rather than as being a reflection of the Courts' granting validity. They equated the validity *presupposed* of a constitution because of the *Grundnorm* with the validity *bestowed* on a constitution by its acceptance by the Court, never realizing that, whichever constitution is accepted, legal science automatically assumes there is a *Grundnorm*. In this way,

in the legal-logical sense" as opposed to the "constitution in the positive legal sense,"[426] and insists that these are distinct concepts, and any interpretation that would collapse the two "is without any foundation in my writings."[427]

The confusion of *grundnorm* and constitution permitted judges in the cases reviewed above to present themselves as impartial, even scientific, fact-finders, objectively discovering and predicting efficacy. Such activity, however, is alien to the enterprise of "pure theory," which aims to describe the post-decision situation and thus cannot take part in making that decision. A decision finding efficacy as a basis of validity is an act of norm-creation, not a presupposition of legal science. Acts of norm-creation, as Kelsen notes, may quite legitimately be politically inspired, constrained only by the need to rest the validity of the norm thus created on a higher norm.[428] However, when the norm to be created is the constitution itself, the highest positive norm, it follows logically that the requirement of a higher norm is absent. At this point, the decision is entirely political,[429] and therefore outside the province of adjudication.

Grundnorm is a hypothesis, presupposed in juristic thinking to serve certain logical purposes. It must not be identified with any real norm or socio-political phenomenon. The *grundnorm* is only a postulate of reason—a Kantian transcendental—and accords no ontological status to the legal order it supposedly validates.[430] Even if the basic norm is a necessary condition of our knowledge that valid norms exist, it is not itself a "real" norm. The basic norm, lacking specific content, is nothing but a presupposition of any legal order, subject only to the condition that the order is an effective, actual legal order.[431] Being a hypothetical postulate of reason, the *grundnorm* cannot establish the legal order's validity, for it is only after we have identified an actual legal order as valid that we presuppose a basic norm.[432] But in his formal hierarchy of norms, Kelsen places the *grundnorm* above the constitution. Though the constitution, written or unwritten, is recognized as the "highest level of positive law," it is itself validated by the presupposed *grundnorm*.[433] The troubling implication is that if the constitution, though the "highest level of positive law," is not in fact the highest norm, then the constitution's validity may be questioned

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> they disguised the overtly political nature of their actions. Their political decision to bestow validity was seen as inevitable as a result of being presented in the guise of jurisprudential interpretation. The *logical* necessity of the Pure Theory was enlisted in support of *political* necessity.

Hopton, *supra* note 9, at 83-84.

426. Kelsen, *supra* note 420, at 1141.

427. *Id.*

428. *See, e.g.*, Hans Kelsen, *Science and Politics*, 45 AM. POL. SCI. REV. 641, 654 (1951).

429. *Id.*

430. For Kant's influence on Kelsen, see Alida Wilson, *Is Kelsen Really a Kantian?*, *in* ESSAYS ON KELSEN (Richard Tur & William Twining eds., 1986).

431. Lloyd L. Weinreb, *Law as Order*, 91 HARV. L. REV. 909, 934 (1978).

432. *See id.* at 932-33. According to Weinreb, the presupposition of a basic norm is an ontological inference from an observed fact to an unobserved fact.

433. KELSEN, PURE THEORY, *supra* note 368, at 118.

like that of any subordinate law within the legal system.[434] Resolution of this dilemma lies in the province of legal theory, not in adjudication. Consequently, Kelsen's theory cannot rightfully be used as a rule of decision in a court of law.

c. The relationship between efficacy and validity is problematic

The relationship between efficacy and validity posited by Kelsen remains elusive and problematic. The courts, in line with commentators, have understood Kelsen to ground the validity of a norm or legal order in its efficacy.[435] Kelsen, however, insists that there is no direct cause and effect relationship between the two, and that "the efficacy of the legal order is only the condition of validity, not the validity itself."[436] Contrary to Kelsen's formulation that "validity is conditioned by the efficacy in the sense that a legal order as a whole just as a single norm *loses* its validity if it does not become by and large effective,"[437] and his "call[ing] attention to the fact that a legal norm becomes valid *before* it can be effective,"[438] the post-colonial judicial practice first makes a factual finding of efficacy and then bases validity upon such a finding. Furthermore, the criteria of efficacy forwarded by Kelsen is profoundly imprecise: "A legal order is regarded as valid, if its norms are *by and large* effective (that is, actually applied and obeyed)."[439] The imprecision leaves open a wide area for judicial politics. As the survey of the case law demonstrates, the courts used different tests based on different evidentiary materials to decide the question. This singular lack of consistency lends credence to Dias' position that "[t]he truth of the matter is that effectiveness is only what the judges choose to regard as such; which places considerable power in their hands."[440]

When Kelsen observes: "The validity is a quality of law; the so-called efficacy is a quality of the actual behavior of men and not, as linguistic usage seems to suggest, of law itself. The statement that law is effective means only that the actual behavior of men conforms with the legal norms,"[441] he admits that efficacy depends on "those very sociological fac-

434. This conclusion accords with Kelsen's position that only the *grundnorm's* validity is not open to question. *Id.* at 201-05.

435. *See* JULIUS STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 103-04 (1964).

436. Kelsen, *supra* note 420, at 1139 (citation omitted). Kelsen explains that

> [p]ositing (*Setzung*) of the norms and efficacy (*Wirksamkeit*) of the norms are "conditions of validity"; efficacy in the sense that the established legal norms must be by and large obeyed and, if not obeyed, applied; otherwise the legal order as a whole, just as a single norm, would lose it[s] validity. A condition is not identical with that which is conditioned.

Id. at 1139-40.

437. *Id.* at 1140.

438. *Id.*

439. KELSEN, PURE THEORY, *supra* note 368, at 212.

440. Dias, *supra* note 9, at 254. In this regard judges do not so much "find" efficacy as they contribute towards it. For example, the judges in the UDI cases "kept cementing effectiveness [of the coup] layer by layer until it reached a point at which they could look back on their own handiwork and treat it as an objective fact." *Id.* at 253.

441. KELSEN, GENERAL THEORY, *supra* note 368, at 39-40. Kelsen adds, "thus validity and efficacy refer to quite different phenomena." *Id.* at 40.

tors which he so vehemently excluded from his theory of law."[442] This in turn raises methodological and evidentiary issues about any judicial determination of "actual behavior" of people. As the survey of case law demonstrates, courts have primarily relied upon judicial notice of so-called notorious facts and self-serving affidavits from agents of the usurpers to reach conclusions of the efficacy of coups. Evidentiary problems are compounded where courts undertake determination of the efficacy of the new legal order shortly after a coup d'etat because it invariably involves venturing predictions of future behavior,[443] a task well beyond judicial competence.

There is also the problem of exclusion of reasons and quality of submission and conformity. Kelsen portrayed this as a methodological problem: "We are not in a position to say anything with exactitude about the motivating power which men's idea of law may possess. Objectively, we can ascertain only that the behavior of men conforms or does not conform with the legal norms."[444] This raises serious ethical and moral questions because "not only effectiveness but also conformity to morality and justice is among the very springs of [*grundnorm*'s] being and continued life."[445] Even if judges had no legal obligation to take into account the ethical and moral dimensions of the problem, "they are no more exempt from moral obligations than other officers of state in revolutionary situations. Indeed,

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442. R.W.M. DIAS, JURISPRUDENCE 413 (3d ed. 1970).

443. For example, Harris believes that judges can "discover" which legal norms are, by and large, effective at any given time:

> [F]irst, by recording what commands, permissions and authorizations (stipulating sanctions) have been issued (and not repealed) by a person or body purporting to act as legislator; secondly, by recording (*or predicting*) occasions on which the stipulated sanctions have been (*or are likely to be*) applied by persons purporting to act as state officials; thirdly, by recording (*or predicting*) acts of disobedience, that is, acts specified as conditions for the application of stipulated sanctions to the actor. If there is a socially significant ratio between the official acts and the acts of disobedience, *and it can be predicted that this ratio will continue to obtain for a reasonable length of time*, the meaning-contents of the commands, permissions and authorizations are by and large effective norms.

Harris, *supra* note 9, at 124 (emphasis added).

444. KELSEN, GENERAL THEORY, *supra* note 368, at 40. Belonging to the traditional paradigm of science, the Kelsenian search for efficacy in the "actual behavior of men" ignores the epistemological limitations of observed behavior as a key to understanding human action. For critiques of traditional understanding of the philosophy and epistemology of science and social science and of behavioralism in particular, see RICHARD J. BERNSTEIN, THE RECONSTRUCTION OF SOCIAL & POLITICAL THEORY (1976); ANTHONY GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD (1976); THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); JURGEN HABERMAS, KNOWLEDGE & HUMAN INTERESTS (Jeremy J. Shapiro trans., 1971). Human "action is intrinsically meaningful; it is endowed with meaning by human intentionality . . . . [I]n focusing on action, we can and we must speak of its subjective meaning, the meaning it has by virtue of the meaning-endowing intentional act of a human consciousness, as well as its objective meaning." BERNSTEIN, *supra*, at 65. Accounting for the motivations of behavior is critical when conclusions about the behavior determine rights and obligations of the rulers and the ruled. *See generally* ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURES & CONTRADICTION IN SOCIAL ANALYSIS (1979); RICHARD BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM (1983).

445. Dias, *supra* note 9, at 255.

moral obligation may weigh more heavily on them than on any other group of officers."[446] Kelsen is rightly criticized for making law and the state a composite of definitional fiats.[447] Law, to be worthy of fidelity, must be something more than mere force.[448] Law is not simply order; it must correspond to the demands of justice, morality, and agreed notions of what ought to be. To achieve this end, the teleology of state and law must be linked up with the fundamental project of philosophy: the human good and happiness.[449]

Similarly, the Kelsenian teleology of efficacy and validity must be linked up with motivations and compulsions of general compliance with successful usurpations. It is "not so much whether morality or justice should count, but what counts as morality and justice."[450] Ignoring this question lends credence to the charge that "political quitism is the core of Kelsen's attitude."[451] After all:

> [E]ven if one admits that a judge *qua* judge ought to accept the laws of a successful revolutionary regime, this legal duty may, in particular cases, be outweighed by other extra-legal duties. It may be outweighed by a political duty not to give support to an immoral regime or by a personal moral duty to observe a judicial oath. A revolutionary upheaval is just the sort of situation where being a good judge may have to give way to being a good citizen or a good man.[452]

Following the lead of *Jilani*, some courts rejected Kelsen's equation of efficacy with validity on the ground that it excludes from consideration "sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new Legal Order."[453] Other courts modified Kelsen's efficacy test to ensure that submission of the people was the result of "popular acceptance"[454] and the coup d'etat's "moral content,"[455] "not

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446. de Smith, *supra* note 9, at 104-05.

447. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 631 (1958).

448. In Fuller's words:

> Law, as something deserving loyalty, must represent a human achievement; it cannot be simple fiat of power or a repetitive pattern discernible in the behavior of state officials. The respect we owe to human laws must surely be something different from the respect we accord to the law of gravitation. If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark.

Id. at 632.

449. Paul Ricoeur, *The Political Paradox*, *in* LEGITIMACY AND THE STATE 251 (William Connoly ed., 1984).

450. Dias, *supra* note 9, at 255, *citing* Ronald M. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 1001 (1965-66).

451. Honore, *supra* note 9, at 272.

452. Harris, *supra* note 9, at 127.

453. Mitchell v. Director of Public Prosecutions, 1986 L.R.C. Const. 35, 67 (Grenada) (quoting Bhutto v. Chief of Army Staff, 1977 P.L.D. S. Ct. 657, 692 (Pakistan)).

454. Liasi v. Attorney-General, 1975 C.L.R. 558, 573 (Cyprus).

455. *Bhutto*, 1977 P.L.D. S. Ct. at 704.

mere tacit submission to coercion or fear of force."[456] Tests of validation were modified to require that "it must not appear that the [usurper] regime was oppressive and undemocratic."[457] While the early cases, following Kelsen, had considered motivation of usurpation irrelevant, later cases took the position that "[t]he legal consequences of such a change must . . . be determined by a consideration of the total milieu in which the change is brought about, including the motivation of those responsible for the change,"[458] and "the reason why the old constitutional government was overthrown and the nature and character of the new legal order."[459] It was further opined that each one of these considerations "raises a question of fact."[460] But these modifications do not place the theory of revolutionary validity on a more sound footing. The evidentiary problems remain, as the *Mitchell* Court was prepared to admit.

More importantly, these consideration go towards the moral content of the right of a regime to govern and the obligation of fidelity of the governed. As such, these issues are political/moral in nature and go to the question of legitimacy, which remains beyond the purview of judiciaries and belongs in the political processes of the society at large. Since legitimacy of a revolutionary regime is not a legal issue susceptible to adjudication,[461] the modified conditions of efficacy cannot be considered questions of fact to be pleaded and proven by the parties to the case. The error is to see the issue of legitimacy as a legal issue, hence the search for a rule of law to resolve the question. The modified conditions are not legal standards; rather, they are standards of political discourse for evaluating the legitimacy of an extra-constitutional order.

2. *The Doctrine of State Necessity Is Not Applicable to a Coup d'Etat*

Some cases relied upon the doctrine of state necessity to validate and legitimize coups d'etat, but such reliance is doctrinally inappropriate. While common law has long recognized the doctrine, given its extra-constitutional nature, its application has been traditionally circumscribed by carefully demarcated preconditions.[462] The preconditions to the application of the doctrine are: "(a) An imperative and inevitable necessity or exceptional circumstances; (b) no other remedy to apply; (c) the measure taken must be proportionate to the necessity; and (d) it must be of a temporary character limited to the duration of the exceptional circumstances."[463] In

456. *Mitchell*, 1986 L.R.C. Const. at 72 (Haynes, P.).
457. *Id.*
458. *Bhutto*, 1977 P.L.D. S. Ct. at 721.
459. *Mitchell*, 1986 L.R.C. Const. at 67 ("Was the motivation mere power grabbing or was it a rebellion for example against oppression or corruption or ineptitude? And is the new legal order a just one?").
460. *Id.* at 42.
461. *See infra* part III.E.2.
462. For the evolution of the doctrine in common law, see Williams, *supra* note 27; Stavsky, *supra* note 9, at 342-63. *See also* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989).
463. Attorney-General v. Ibrahim, 1964 C.L.R. 195, 265 (Cyprus).

its classic formulation, the doctrine may be invoked only by the lawful sovereign,[464] and validated acts must be "directed to and reasonably required for ordinary orderly running of the State; . . . [and] not impair the rights of citizens under the lawful . . . Constitution."[465] As such, the doctrine of state cannot be used to validate a coup d'etat. It was only by stretching the doctrine out of shape that it was turned into an instrument that validated usurpation.

The courts in *Madzimbamuto* and in *Jilani* saw fit to combine the doctrine of necessity with the so-called doctrine of implied mandate. This doctrine, borrowed from Hugo Grotius, allows courts to validate necessary acts of an usurper because the lawful sovereign would have wanted these acts to be done in the interest of preserving the state.[466] The doctrine of implied mandate was proffered at a time of absolute monarchies, before the era of constitutional governance, separation of powers, and independent courts,[467] and as such is not worthy of judicial recognition by any self-respecting modern court. Traveling further along this road, *Bhutto* rendered meaningless any distinction between the doctrine of necessity and the theory of revolutionary legality when it used the doctrine to validate unfettered legislative capacity of the usurper regime, including the power to amend the Constitution.[468] Another device used by the courts to do away with the traditional limitations on the application of the doctrine is to focus not on the necessity which prompted the extra-constitutional action, but on the necessity that faces the court after the fact to "validate such action in the public interest, indeed as a matter of public policy."[469] Sir Jocelyn Simon's observation that "public policy is the very essence of the doctrine, whether one calls it 'necessity' or 'implied mandate' or anything else,"[470] is closer to the actual practice. This in turn raises two critical problems. One, such dilution of the doctrine makes judicial practice vulnerable to the charge that imprecision of the doctrine leads to judicial usurpation of legislative functions.[471] Two, this permits the judges to bring into play, without acknowledging it, their personal biases and

464. *Governor-General's Case*, 1955 P.L.D. F. Ct. 435, 486 (Pakistan).

465. Madzimbamuto v. Lardner-Burke, [1968] 3 All E.R. 561, 579 (P.C.) (Lord Pierce).

466. Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284, 348 (Rhodesia App. Div.). The court also consulted works of Victoria, Suarez, Lessius, Pufendorf, and Coccejus. *Id.* at 349-50; Jilani v. Gov't of Punjab, 1972 P.L.D. S. Ct. 139, 205 (Pakistan).

467. *See, e.g.*, Palley, *supra* note 9, at 276, n.72 ("It is clear from the context of their remarks that they were proffering lessons in the art of survival.").

468. Bhutto v. Chief of Army Staff, 1977 P.L.D. S. Ct. 657, 712 (Pakistan).

469. Mokotso v. King Moshoeshoe II, 1989 L.R.C. Const. 24, 120 (Lesotho). *See also* Madzimbamuto v. Lardner-Burke, 1966 R.L.R. 756 (Rhodesia Gen. Div.). "I base my conclusion on the doctrine of public policy, the application of which is required, justified and rendered unavoidable in these circumstances, by necessity." *Id.* at 867 (Gordon, J.) In line is Hamoodur Rahman, C.J.'s position in *Jilani*, that "recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself." *Jilani*, 1972 P.L.D. S. Ct. at 206.

470. Adams v. Adams, [1970] 3 All E.R. 572, 587.

471. For example, Beadle, C.J., took the position that the doctrine of necessity

preferences.[472]

Perceptive critics have long held that application of the doctrine of necessity "requires a judgment of value, an adjudication between competing 'goods' and a sacrifice of one to the other. The language of necessity disguises the selection of values that is really involved."[473] Even where a judge personally finds the motivations of usurpation laudable, his legal obligation to enforce the constitution remains.[474] To permit judges to decide such basic questions as the rightful rulers on the basis of personal preference does away with even a pretense of rule of law. In view of the admonition that necessity is "[t]he tyrant's plea, [to] excus[e] his devilish deed,"[475] and the fundamental principle of the doctrine of necessity that "nobody may take advantage of a necessity of his own making,"[476] its use is best limited to extra-constitutional actions by a lawful government taken in response to emergencies and designed to protect rather than subvert the constitutional order.

3. International Law Does Not Validate Coups d'Etat

One line of reasoning adopted by some of the courts to validate usurpation through coup d'etat is to refer to the principles of state recognition in international law and find municipal courts obligated to follow dictates of international law.[477] This line of reasoning implies an uncritical adoption

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is so imprecise in its application that if the Court had to judge the validity of "all" the present government's legislation by this yardstick it would in effect be usurping the function of the legislature, because it would then be charged with the authority of determining not merely whether one particular controversial measure was valid, but with the general authority to review the whole field of governmental legislation and to decide in its discretion which individual measure was necessary in the public interest and which was not. This is a legislative, not a judicial function.

Madzimbamuto, [1968] 2 S. Afr. L.R. at 330.

472. *See, e.g.*, Claire Palley's criticism that in the UDI cases the use of necessity and public policy permitted the Rhodesian judges, all belonging to the minority white establishment, without consciously evaluating their choice, to prefer social order over individual liberty and validate the unlawful and morally repugnant white minority regime. Palley, *supra* note 9, at 281-83.

473. Williams, *supra* note 27, at 224.

474. As Fieldsend, J., put it:

There may be pressing and convincing reasons for Judges as individuals to accept what an executive has done to overthrow an established order in the name of the public good, but, in my view, a court constituted on one constitutional basis cannot legally support the unconstitutional overthrow of the foundation upon which it is founded.

Madzimbamuto, [1968] 2 S. Afr. L.R. at 430.

475. JOHN MILTON, PARADISE LOST, bk. 4, lines 393-94 (photo. reprint 1973) (1667).

476. *Madzimbamuto,* [1968] 2 S.A.L.R, at 330.

477. Most notably in *Dosso,* Munir, C.J., said that "a victorious revolution or a successful *coup d'etat* is an internationally recognized legal method of changing a Constitution." State v. Dosso, 1958 P.L.D. S. Ct. 533, 539 (Pakistan). In *Madzimbamuto,* Beadle, C.J., could see "no reason why an international law definition should not be used by a municipal court, because it would seem that if a government conformed to an accepted international law definition of either a de jure or a de facto government, then *a fortiori* it should be recognized as such by a municipal court." *Madzimbamuto,* [1968] 2 S. Afr. L.R. at 314. In *Matovu,* Sir Udo Udoma, C.J., said: "Although the product of a revolu-

of the extreme monistic view of the primacy of international law expounded by Kelsen.[478] This view of Kelsen is logically independent from his analysis of domestic legal systems,[479] and involves the proposition that all norms of a domestic legal system are subordinate to those of international law. The validity of the *grundnorm* itself is therefore no longer presupposed, but is determined by a positive norm of international law which

> [a]uthorizes an individual or group of individuals, on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm, thus, legitimizes this coercive order. . . as a valid legal order . . . regardless of whether the government came to power in a 'legitimate' way . . . or by revolution.[480]

There are numerous problems with using this proposition as a rule of decision. Irrespective of its merits, it is a theory of law and the interrelationship between systems of law, and not a principle of law that could serve as a *ratio decidendi.* The theory is extreme because it is possible to uphold the primacy of international law in a general sense[481] without obligating domestic courts to validate usurpation of state power. The theory is morally repugnant because it equates might with right. It is contrary to the traditional practice of British courts of following customary international law only if not in conflict with domestic statutory law or prior decisions of final authority.[482] The British practice, in turn, is in line with the general practice that "as between the international legal order and a particular national order, primacy may simply be determined by the legal order which has the question before it."[483] Finally, even if it were conceded that international law binds a municipal court in the matter, there is no logical reason why international legal principles other than rules of recognition should not be taken into account. The right of self-determination[484] and

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tion, the Constitution is none-the-less valid in law because in international law revolutions and *coups d'etat* are recognised methods of changing government and constitutions of sovereign states." Uganda v. Matovu, 1966 E. Afr. L.R. 514, 537 (Uganda).

478. KELSEN, GENERAL THEORY, *supra* note 368, at 367-68; KELSEN, PURE THEORY, *supra* note 368, at 214-15, 333-44.

479. KELSEN, GENERAL THEORY, *supra* note 368, at 388; KELSEN, PURE THEORY, *supra* note 368, at 214-15; Kelsen, *supra* note 420, at 1151-52; Joseph G. Starke, *The Primacy of International Law, in* LAW, STATE AND INTERNATIONAL LEGAL ORDER: ESSAYS IN HONOR OF HANS KELSEN 312-13 (Salo Engel ed., 1964).

480. KELSEN, PURE THEORY, *supra* note 368, at 215.

481. For example, Starke suggests two spheres of primacy distinguished from Kelsen's position: First, that municipal tribunals in general give preference to international law when in conflict with municipal law; and, second, that states should respect international law above national interest. Starke, *supra* note 479, at 308.

482. LASSA OPPENHEIM, INTERNATIONAL LAW 39 (H. Lauterpacht ed., 7th ed. 1952); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 43 (4th ed. 1990).

483. STONE, *supra* note 435, at 119.

484. *See generally* Daniel Thurer, *Self Determination, in* 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 470, 470-75 (1985); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW (1977); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE (1982).

other principles enshrined in the Universal Declaration of Human Rights[485] and International Covenant on Civil and Political Rights[486] would certainly come into play in a situation where normal constitutional process is undermined and the submission and fidelity of a people is sought on the basis of monopoly of coercive force.

The cases surveyed are remarkable for the complete lack of consistency in the application of international legal norms and practice of states in adjudication of validity of coups d'etat. First, there is a division between those who find international law relevant to the issue and those who do not. Second, among those who think international law is relevant, some find the theory and principles of international law applicable while others find the practice of recognition of the state and/or government by other states relevant. Among those who consider the practice of recognition relevant, some find recognition or lack thereof determinative of the issue; others find that it is not.

To conclude, the validation/legitimation option does not have firm doctrinal legs to stand on. By furnishing judicially pronounced legitimacy to extra-constitutional orders, the courts augment the effectiveness of usurpation and thus contribute to the fragility of constitutional governance. By failing to distinguish force from law, this option erodes the ideal of the rule of law and diminishes the prestige of the courts.

C. Option Two: Strict Constitutionalism

Confronted with a coup d'etat, one option available to a court is to take the road of strict constitutionalism, i.e., follow the principle that "a court which derives its existence from a written constitution cannot give effect to anything which is not law when judged by that constitution."[487] The advantages of this choice are numerous. Besides being doctrinally safe, strict fidelity to the constitution will furnish consistency to judicial responses to the question of validity of usurper regimes. By denying any judicially pronounced stamp of approval, the courts would impede attainment of effectiveness and legitimacy by extra-constitutional regimes. Such a determination will implicitly legitimize resistance to the usurper regimes, which in turn may induce the body politic to strive for restoration of the constitutional order. Finally, fear of judicial rebuke may deter would-be adventurers from subverting the constitutional order, and thus

485. G.A. Res. 217 A, U.N. Doc. A/810, at 71 (1948). Article 21 (3) of the Declaration states: "The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." *Id.* at 75.

486. Entered into force, March 23, 1976. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967). Article 1(1) of the Covenant reads: "All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." *Id.* at 53.

487. Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284, 432 (Rhodesia App. Div.) (Fieldsend, J.).

promote stability.[488]

The option of strict constitutionalism, however, is not without serious shortcomings. First, there is the issue of doctrinal validity of fidelity to a constitutional order that has been destroyed and replaced as a matter of fact. Doctrinal consistency is of little value if the resulting judicial pronouncement is completely out of step with the political reality. This is why common law has long recognized the imperative to give at least limited recognition to a de facto, though extra-constitutional, regime. This is clearly evident in the English law of treason,[489] the American War of Independence cases,[490] and the American Civil War cases.[491]

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488. As Fieldsend, J., stated: "Nothing can encourage instability more than for any revolutionary movement to know that, if it succeeds in snatching power, it will be entitled *ipso facto* to the complete support of the pre-existing judiciary in their judicial capacity." *Id.* at 430.

489. The earliest example of this recognition is the Statute of Treason 1351, of which Coke said that "this Act is to be understood of a king in possession of the crown and kingdom," and "the other [king] that hath right and is out of possession is not within this Act." 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 7 (photo. reprint 1985) (1817). *See also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 77-78 (photo. reprint 1979) (1769). Of course, a qualification was that the "king in possession" must be securely, not merely temporarily, in possession, and must enjoy the support or acquiescence of the bulk of the people. FOSTER, CROWN CASES 403 (3d ed. 1809). Hawkins adds a corollary that the Act obligates the citizen to fight for the de facto king against the de jure oustee. 1 WILLIAM HAWKINS, PLEAS OF THE CROWN, ch. 17, § 16 (P. R. Glagerbrook ed., 1973). *See generally* Anthony M. Honore, *Allegiance and the Usurper*, CAMBRIDGE L.J. 214 (1967); Alan Wharam, *Treason in Rhodesia*, CAMBRIDGE L.J. 189 (1967).

490. *See* Respublica v. Chapman, 1 U.S. 1, 53 (1781) (in this case, heard while the war of independence was in progress, the court recognized the regime born of rebellion as the de jure government); Ware v. Hylton, 3 U.S. 199 (1796); M'Ilvaine v. Coxe's Lessess, 8 U.S. 209 (1808); Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. 99 (1830) (these cases, heard after the peace treaty of 1783, held that in the case of a successful revolution the validity of the new government's laws dates back to the day the revolution first broke out).

491. *See* Texas v. White, 74 U.S. 700 (1868).

> ([T]he new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a de facto government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid . . . . [T]his is true of the actual government of Texas, though unlawful and revolutionary, as to the United States.

Id. at 733 (Chase, C.J.). *See also* Thorington v. Smith 75 U.S. 1 (1869) (holding that a contract for the payment of Confederate notes, made during the Civil War, should be enforced. "[T]his currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States . . . ."); Horn v. Lockhart, 84 U.S. 570 (1873) (holding that acts of Confederate states are valid so far as they did not impair or tend to impair the supremacy of the Union); First Nat'l Bank of Wash. v. Texas, 87 U.S. 72 (1874) (concurring judge stating that legislative act of a Confederate state is valid if passed for the ordinary administration of its powers and duties as a State); Sprott v. United States, 87 U.S. 459 (1874) (recognizing that acts of the States in rebellion must be upheld in the interest of civil society where such government is a necessity); Baldy v. Hunter, 171 U.S. 388 (1897) (holding that Georgia statute which authorized guardians to invest their trust funds in Confederate bonds was valid); United States v. Home Insurance Co., 89 U.S. 99 (1875) (holding that corporations created under Confederate state have power

There is also increasing judicial recognition that, in a proper context, to make the letter of the law yield to political realities does not necessarily mean a diminution of the rule of law. The most cogent example of this phenomenon in the context of post-colonial common law settings, i.e., all ex-colonies of Britain, is the status of the Statute of Westminster of 1931.[492] The Statute, enacted to confer full legislative capacity upon legislatures of self-governing dominions, provides:

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that Dominion has requested, and consented to, the enactment thereof.[493]

This statute, which furnished the basis of decolonization of the British Empire, gives rise to an acute divergence between legal logic and political reality. The English doctrine of parliamentary sovereignty implies unfettered legislative power.[494] Consequently, an act of the Parliament cannot bind future parliaments,[495] and therefore, any statute is by definition revocable.[496] Logically then, the correct legal position is that the Statute of Westminster can be revoked by the British Parliament, restoring the Parliament's legislative capacity over the ex-colonies, and thus nullifying their independent sovereign status.[497] Does recourse to logic and formal legal

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to sue in the Federal courts where the acts of incorporation had no relation to the rebellion); Johnson v. Atlantic Gulf & W. Indian Transit Co., 156 U.S. 618 (1894) (upholding the validity of a Confederate law passed during the Civil War under the "settled Doctrine that the acts of the rebellious states in their individual capacities . . . so far as they did not tend to impair the supremacy of the national authority or the constitutional rights of citizens are treated as valid.").

492. Statute of Westminister, 1931, 22 Geo. 5, Ch. 4 (Eng.).

493. *Id.* § 4.

494. "Parliament . . . has, under the English Constitution, the right to make or unmake any law whatever." A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39 (10th ed. 1959). "This doctrine of the legislative supremacy of Parliament is the very keystone of the law of the constitution." *Id.* at 70.

495. "Acts of parliament derogatory from the power of subsequent parliaments bind not." BLACKSTONE, *supra* note 489, at 106. *See also* J.D. van der Vyer, *Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights*, 99 S. AFR. L.J. 557, 561 (1982).

496. "Acts which are in their nature revocable cannot by strength of words be fixed and perpetuated . . . . For a supreme and absolute power cannot conclude itself, neither can that which is in nature revocable be made fixed." Sir Francis Bacon, *Maxims in the Law, reprinted in* 7 THE WORKS OF FRANCIS BACON 369 (J. Spedding ed., 1870-75); Sir Francis Bacon, *The Historie of the Raigne of King Henry the Seventh, reprinted in* 6 THE WORKS OF FRANCIS BACON 160 (J. Spedding ed., 1870-75) *quoted in* van der Vyer, *supra* note 495, at 561; "[N]o Act of Parliament can effectively provide that no future Act shall interfere with its provisions." Vauxhall Estates Ltd. v. Liverpool Corp., [1932] 1 K.B. 733, 743; "[T]he legislature is unable, according to our constitution, to bind itself as to the form of subsequent legislation; it is impossible for Parliament to say that in a subsequent Act of Parliament dealing with this subject matter shall there never be an implied repeal." Ellen St. Estates Ltd. v. Minister of Health, [1934] All E.R. 385, 390 (Eng. C.A.).

497. Another logical route culminating in the same legal position is that because legislative powers of ex-colonies derive ultimately from a British statute of Order in Council, there was never a complete transfer of power but only a delegation of authority. So even a constitution adopted by a member of the Commonwealth may be regarded as owing "its force of law, in the last resort, to the Parliament of the United Kingdom." KENNETH C. WHEARE, CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH

doctrine end the inquiry? Can an act of the British Parliament nullify the independent sovereign status of, say, India or Nigeria? As this "would be politically impossible, even if legally valid,"[498] English case law has acknowledged that repeal of this statute "is theory and has no relation to realities,"[499] and hence "[l]egal theory must give way to practical politics."[500] The imperative of a successful coup d'etat may be similar.

Any court inclined to adopt strict constitutionalism must address the question of whether a court, when it chooses to continue to sit after the usurpation, remains the "old" court under the "old" constitution. The issue was directly and exhaustively addressed in *Madzimbamuto*, where the contending arguments were forwarded. Fieldsend, J., took the position that, "[a] court created by a written Constitution can have no independent existence apart from that Constitution; it does not receive its powers from the common law and declare what its own powers are; it is not a creature of Frankenstein which once created can turn and destroy its maker."[501] Beadle, C.J., rejected the view that the court continued to be a 1961 Constitution court resting on the simple fact that its orders were not enforced by "any remnant of a government governing under the 1961 Constitution," but by "the officials of the present de facto Government."[502] The proposition is very strong that the authority of a court, even in normal times, is a de facto authority flowing from the effective power in the state for the time being. When judges continue to sit

> after they had found as a fact that as a result of successful revolutions the old constitutions had been effectively overthrown and replaced by new constitutions, they, by continuing to sit, accepted the new constitutions, and when they held that the new constitutions were de jure constitutions they gave these decisions sitting under the new constitutions.[503]

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100 (1960). A new Act of Parliament can reverse the whole process. In fact, as an assertion of legal nationalism designed to demonstrate that the constitution is rooted in native soil, some ex-colonies adopted new constitutions in a manner unauthorized by the pre-existing constitution. STANLEY DE SMITH, CONSTITUTIONAL & ADMINISTRATIVE LAW 75 (4th ed. 1981).

498. SIR JAMES FAWCETT, THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW 106 (1963).

499. British Coal Corp. v. Rex, [1953] All E.R. 139, 146.

500. Blackburn v. Attorney-General, [1971] 2 All E.R. 1380, 1382 ("Freedom once given cannot be taken away.").

501. Madzimbamuto v. Larder-Burke, [1968] 2 S. Afr. L.R. 284, 430 (Rhodesia App. Div.).

502. *Id.* at 330.

503. Regina v. Ndhlovu, [1968] 4 S. Afr. L.R. 515, 522 (Rhodesia App. Div.). *See also* Luther v. Borden, 48 U.S. 1 (1849). Taney, C.J., said:

> Judicial power presupposes an established government capable of enacting laws and enforcing their execution and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court and be incapable of pronouncing a judicial

Judges who continue to serve under the new regime do so at the sufferance of the new rulers, and as such, can do no less than acknowledge the de facto status of the order they serve. The determination of de facto status in this context may be based on the question of whether the regime is maintaining the courts and enforcing their orders and judgments. For the courts to assume the power to decide whether an extra-constitutional order is legitimate and valid, is to regard the issue as merely legal. This creates a fundamental contradiction. Under the new order, the courts are the agents of the new order. Since the latter cannot derive its validity from its own agent, they therefore lack the power to determine the validity of that order. Courts lack the power to determine their own existence since they come into being not on their own, but rather, upon the legal order willing them so. It is beyond question that the new regime, being successful, would have the power to disband the old system of courts and institute its own system.[504] So, when the old courts continue to sit under the new regime, we must indulge in the presumption that they do so at the sufferance of the new regime. In this respect, they might be viewed as courts of the new order deriving their validity from the new order, and not the other way around.

The proposition that a court which derives its existence from a constitution cannot give effect to anything that is not law when judged by that constitution[505] is of little utility in the post-usurption situation because the question about the legal bedrock of a court sitting after a successful coup d'etat is not susceptible to any logical answer. Does it remain a court under the violated constitution or is it a court under the new order? Instead of becoming entangled in this chicken-egg question, the merits of strict constitutionalism should be judged on the basis of practical considerations. One must start with an acknowledgment that historically all constitutions have an extra-constitutional origin, and that periodic demise of constitutional orders remains a political fact.[506] However, "law is the law[;]

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decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power.

Id. at 39.

504. This fact led Eekalaar to the following position:

It is sheer folly for a court, in the face of success and effectiveness of a new regime, to declare the old constitution and the laws based upon it still in force on the ground that they have not been nullified in a manner anticipated by the old order itself; for it remains a simple matter for the revolutionary regime to dismiss the judges, or disband the courts and institute its own judicial system and install new judges.

Eekelaar, *Principles, supra* note 9, at 41.

505. *Madzimbamuto*, [1968] 2 S. Afr. L.R. at 432 (Fieldsend, J.).

506. Courts cannot but recognize the lesson of history:

The Constitution as a matter of fact is logically prior to the constitution as a matter of law . . . . No constitution, therefore, can have its source and basis in the law. It has of necessity an extra-legal origin, for there can be no talk of law until some form of constitution has already obtained de facto establishment by way of actual usage and operation. When it is once established, but not before,

[b]ut politics are politics."[507] In the aftermath of a coup d'etat, it is important to remember that "[i]t is a fundamental principle that a judge cannot make an order, either in a civil case or in a criminal case, which he knows will be a mere *brutum fulmen* because it cannot be put into effect."[508] In the final analysis, a court "derives its real authority from the fact that the governmental power recognizes it as a court and enforces its judgments and orders."[509] Strict constitutionalism in the face of successful usurpation is unlikely to induce the usurpers to relinquish power. A more likely result is a rebuke of the court's pronouncement by the usurpers. They may choose to abolish the existing court or simply ignore its directives, in which case the judges may feel obliged to resign. In either scenario, the usurpers would get the opportunity to pack the court with subservient and sympathetic judges. The fact that most coups d'etat were validated by the courts, as the above survey demonstrated, may be evidence that judges are guided by these practical considerations. The few instances where the courts refused to validate the usurpation, the courts were either beyond the reach of the usurpers or were rebuked by the regime.

In refusing to validate the UDI regime in Rhodesia, the Privy Council had nothing to lose and everything to gain. Being a British court, it was

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> the law can, and will, take notice of it. Constitutional facts will be reflected with more or less accuracy in courts of justice as constitutional law.

GLANVILLE WILLIAMS, SALMOND ON JURISPRUDENCE 101 (11th ed. 1957). According to de Smith, "[l]egal theorist have no option but to accommodate their concepts to the facts of political life. Successful revolution sooner or later begets its own legality .... Thus, might becomes right in the eye of the law." DE SMITH, *supra* note 497, at 76-77. After noting that this is the lesson of the English Revolution of 1688 and the rebellion of American colonies, de Smith quickly added: "It offers a description, not a prescription. It does not dictate what attitude judges and officials ought to adopt when the purported breach of legal continuity takes place." *Id.* at 77.

507. de Smith, *supra* note 9, at 110.

508. Ndhlamini v. Carter, [1967] 4 S. Afr. L.R. 378, 383 (Rhodesia App. Div.) (Lewis, J.). *See also* Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284, 457, 462 (Rhodesia App. Div.) (Beadle, C.J., opined that because of the attitude of the UDI regime, an adverse decision of the Judicial Committee of the Privy Council "would be a mere *brutum fulmen*... merely an academic exercise ... [Mrs. Madzimbamuto had] no statutory right to compel the Board to embark upon an inquiry the outcome of which was bound to be a mere *brutum fulmen*."). Munir, C.J., discussing the decision of the Federal Court of Pakistan in the *Governor-General's Case* said:

> The mental anguish caused to the judges by these cases [was] beyond description .... [N]o judiciary elsewhere in the world had to pass through what may be described as a judicial torture. [If the court had found against the Governor-General] there would have been chaos in the country .... [Who could say that] the coercive power of the State was with the court and not with the Governor-General .... At moments like these public law is not to be found in the books; it lies elsewhere, *viz*, in the events that have happened.

de Smith, *supra* note 9, at 98. *See also* Prentis v. Atlanta Coast Line Co., 211 U.S. 210, 226 (1908) ("A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." (Holmes, J.)); Rola Co. (Austl.) Ltd. v. Commonwealth, 69 C.L.R. 185, 199 (1944) ("If a body which has power to give a binding and authoritative decision is able to take action so as to enforce that decision, then, but only then, ... all attributes of judicial power are plainly present." (Latham, C.J.)).

509. Regina v. Ndhlovu, [1968] 4 S. Afr. L.R. 515, 526 (Rhodesia App. Div.).

safely outside the purview of the UDI regime. Furthermore, its decision was guided not by legal doctrines of continuity of law, but by unquestioning fidelity to the British government's position about the issue, as reflected by the Southern Rhodesia Act 1965 and the Southern Rhodesia (Constitution) Order in Council 1965.[510]

More significant, however, is the response of the Rhodesian Court to the Privy Council's position. In *Regina v. Ndhlovu*,[511] the Court declared that the decision of the Judicial Committee was not binding on the courts of Southern Rhodesia; that the 1965 Constitution had become the de jure Constitution; and that the UDI government had become the lawful government.[512] In *Jilani*, by the time the successful coup d'etat was declared an unlawful usurpation on April 20, 1972, the usurper regime had already fallen four months earlier.[513] Nevertheless, the Court, combining the doctrine of implied mandate with the doctrine of state necessity, and calling it "a principle of condonation and not legitimation," validated many acts of the usurper regime "notwithstanding their illegality in the wider public interest."[514] In *Liasi*, the Cypriot court declined to validate the 1974 coup d'etat, but only after the short-lived coup had been suppressed.[515] Moreover, the restored constitutional government, which had by legislation characterized the coup as being without legal basis, joined the petitioner in seeking a judicial declaration of invalidity of the coup. Similarly, the *Mitchell* Court refused to validate a usurper regime that had already fallen.[516] Still the court, itself a product of the usurper regime, invoked the doctrine of necessity to validate both its own existence and its jurisdiction.

The only case where an incumbent usurper regime was refused validation by the courts was the *Lakanmi* case of Nigeria.[517] The response of the regime was swift and unequivocal. Within two weeks of the *Lakanmi* decision, the new order by decree declared itself a revolution that had effectively abrogated the entire pre-existing legal order and expressly voided the *Lakanmi* decision.[518] In the face of this express rebuke, the Nigerian court saw it fit to capitulate, as evidenced by its holdings in *Adejumo*,[519]

510. The later provided that, among other things, "any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorized by Act of Parliament is void and of no effect." Madzimbamuto v. Lardner-Burke, [1968] 3 All E.R. 561, 562 (P.C.).

511. [1968] 4 S. Afr. L.R. 515 (Rhodesia App. Div.).

512. *See supra* notes 94-97 and accompanying text.

513. This fact prompted the remark that "it cannot be forgotten that the court declared Yahya Khan an usurper only after he was no longer in the saddle. The courts have yet to dismount a leader on horseback." Kamal Azfar, *Constitutional Dilemmas in Pakistan*, *in* PAKISTAN UNDER THE MILITARY: ELEVEN YEARS OF ZIA-UL-HAQ 64 (Shahid Javed Burki & Craig Baxter eds., 1991).

514. Jilani v. Gov't of Punjab, 1972 P.L.D. S. Ct. 139, 154 (Pakistan). *See also supra* notes 164-67 and accompanying text.

515. *See supra* note 174 and accompanying text.

516. *See supra* notes 256-65 and accompanying text.

517. *See supra* notes 130-38 and accompanying text.

518. *See supra* note 144 and accompanying text.

519. *See supra* notes 145-47 and accompanying text.

notwithstanding its passionate espousal of the principles of separation of powers and inherent autonomy and power of the judiciary in *Lakanmi.*

The other example of a decisive rebuke by usurper regimes of an assertive judiciary is the Provisional Constitutional Order (PCO) of Pakistan in 1981.[520] This Order expressly reproved assertions of independence by the superior courts, immunized the actions of the usurpers from judicial review, and required judges of the superior courts to take a new oath pledging fidelity to the new regime.[521] Judges who refused to take the new oath, and those "not invited" to do so, lost their offices.[522] In all, nineteen judges, including the Chief Justice of the Supreme Court, lost their offices.[523] Strict constitutionalism in the face of a successful coup d'etat, therefore, only heightens "the gap between omnipotence in theory and impotence in fact."[524]

D. Option Three: Resignation of Office

Another option available to judges, when asked to adjudicate the legality of a coup d'etat, is to resign.[525] Characterizing the decision to stay in office as "a political decision,"[526] advocates of resignation argue that "if they continue in office their real or apparent acknowledgment of the authority of the new regime will clothe it with the valued prize of legitimacy."[527] When faced with usurpation of power, whether a judge should stay or resign "is a matter of personal choice . . . a matter of judicial conscience."[528] Justices Fieldsend and Young in Rhodesia,[529] Justices

520. *See supra* note 209 and accompanying text.

521. *See supra* notes 209-15 and accompanying text.

522. Denmon, *supra* note 213, at 14.

523. *Id. See also* Conrad, *supra* note 9, at 166.

524. Regina v. Ndhlovu, [1968] 4 S. Afr. L.R. 515, 521 (Rhodesia App. Div.) (Beadle, C.J.). The limits of judicial power were recognized by the High Court of Andhra Pradesh in India, when it observed:

> Preservation of democratic values, or for that matter, the ideal of good government, is not the function or prerogative of the judiciary alone. It is, and ought to be the concern of all the three wings—nay of all concerned. The entire burden cannot be shifted to the shoulders of the judiciary. Its shoulders are not strong or broad enough to bear all that burden.

Harinadhababu v. Ramarao, 1991 L.R.C. Const. 69, 99 (India).

525. *See, e.g.*, de Smith, *supra* note 9, at 108; R. S. Welsh, *The Constitutional Case in Southern Rhodesia*, 83 LAW Q. REV. 64 (1967).

526. de Smith, *supra* note 9, at 108.

527. *Id.* at 105.

528. *Ndhlovu*, [1968] 4 S. Afr. L.R. at 532.

529. Fieldsend gave the following reason for resigning on March 4, 1968:

> It is my view that to continue in office under the present circumstances, particularly in the light of the Government's declared intention not to recognize any right of appeal to the Privy Council, amounts to accepting the abandonment of the 1961 Constitution, both as an enforceable standard by which to judge and as the source of authority of this Court. For the reasons advanced in my judgment in the Constitutional Case, I cannot accept this abandonment, with all it entails, and accordingly I am not able to continue as a member of the Court.

Welsh, *supra* note 9, at 179. Fieldsend, J., had earlier taken the position that "[i]t may be a vain hope that the judgment of a court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce

Anwarul Haq and Marri in Pakistan,[530] and the entire Supreme Court of Fiji in 1987[531] exercised this option.

In light of the futility of a ruling adverse to the usurpers, the option of resigning has some advantages. First, it signals the fidelity of the judges to the constitution under which they held office and reinforces the technically unassailable principle that "a court which derives its existence from a written constitution cannot give effect to anything that is not law when judged by that constitution."[532] Second, resignations would deny the usurpers judicially pronounced validity and legitimacy. Finally, resignations can serve as an unmistakable signal to the body politic that the usurpers have gone beyond the law and that the pretense of preserving the legal order is just that, and one to which the judiciary will not be a party.[533]

These advantages, however, are tempered by some contrary considerations. First, resignation of office is a heavy personal burden to be placed on the judges simply because the usurpers have indulged in extra-constitutional conduct. Second, it is doubtful that the body politic needs a drastic act like resignation of judges to alert them to the fact that the coup d'etat is extra-constitutional. The resignations may well encourage others to defy the usurper regime, but this fact should not obligate judges to resign,

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in illegality." Madzimbamuto v. Lardner-Burke, [1968] 2 S. Afr. L.R. 284, 430 (Rhodesia App. Div.). Young, J., made the following statement in open court on August 12, 1968:

> If . . . the authority of the Privy Council is not acknowledged in this country, then it is equivalent to a rejection of the authority of the High Court and in my view the only course open to a judge of the High Court is to withdraw from the bench. It is a matter of judicial conscience . . . . There can be no suggestion that my resignation or that of any other judge must lead to a breakdown of law and order. On the contrary, for a judge appointed under the 1961 Constitution to enforce a law that subverts that Constitution is, in my judgment, to overthrow the law of the country. If order is to be maintained under some new system of law then it must be done by judges appointed by those responsible for the creation of the new system.

Welsh, *supra* note 9, at 182.

530. Both declined to take the new oath required by the military regime in 1981 and, as a consequence, lost their positions. *See* Denmon, *supra* note 213, at 14.

531. On May 14, 1987, the armed forces of Fiji overthrew the newly elected government in a coup d'etat and suspended the 1970 constitution. Richard N. Kiwanuka, *On Revolution and Legality in Fiji*, 37 INT'L & COMP. L.Q. 961, 961-62 (1988). The governor-general refused to recognize the usurpers, assumed executive control, and dissolved the Parliament. *Id.* at 963. The supreme Court denounced the coup as illegal and admitted a petition by the overthrown government seeking restoration of the constitutional government. Bavadra v. Attorney-General, [1988] L.R.C. Const. 13 (Fiji). The governor-general's attempts to restore parliamentary democracy were thwarted by a second coup on September 26, 1987. The usurpers declared Fiji a republic and the governor-general was obliged to resign his commission. Kiwanuka, *supra*, at 964. The Supreme Court judges "who had sworn allegiance to the Queen and the 1970 Constitution, refused to transfer it to the [usurper] regime . . . . [But eventually they] . . . vacate[d] their chambers, thus making room for a new judiciary which was subsequently appointed." *Id.*

532. *Madzimbamuto*, [1968] 2 S. Afr. L.R. at 432 (Fieldsend, J.).

533. For example, Eekelaar believes that the Rhodesian judiciary "underestimated the impact" resistance by resignation "on their part might have had on the political strength of the usurpers." Eekelaar, *Rhodesia*, *supra* note 9, at 32.

since encouraging political action is not a part of the judicial function. Third, resignation by judges may add to instability, increase "the likelihood of developing anarchical chaos,"[534] and prejudice "their peaceful tasks of protecting the fabric of society in maintaining law and order."[535] Fourth, remaining in office will prevent the usurpers from packing the courts with sympathetic and/or incompetent judges.[536] To allow the usurpers an opportunity to appoint judges subservient to them would have two negative results: (1) any continuing check on the conduct of the regime will be eliminated; and (2) confidence of the citizens in the judicial system will erode, and orderly administration of justice will be jeopardized.

While the legitimacy and validity of a regime born of a successful coup d'etat is outside the purview of judicial determination, the judiciary retains the important role of reviewing the functioning of a usurper regime. A constitutional rupture does not mean, ipso facto, unfettered legislative capacity for the extra-constitutional regime. Here, it is essential to distinguish a constitutional rupture from discontinuity of law.[537]

A coup d'etat typically suppresses only that part of a constitution that deals with political organs of the state; the rest of the constitution and the larger legal system is expressly left in place. Where coups d'etat do not directly affect the jurisdiction of the courts, or when the continuation of

534. Hasan, *supra* note 9, at 236. Macdonald, A.J., used this as a rationale for recognizing the UDI regime as the legitimate regime: "Cooperation between these three departments is essential if orderly government is to be established and maintained. The refusal by any one of these departments to co-operate with the other two can, at best, lead to grave uncertainty and at worst to anarchy." *Madzimbamuto*, [1968] 2 S. Afr. L.R. at 410.

535. Regina v. Ndhlovu [1968] 4 S. Afr. L.R. 515, 533 (Rhodesia App. Div.) (Beadle, C.J.). According to Beadle, the first duty of the judges was, "whatever the political battle," to "keep out of the main area of dispute" and to "carry on their peaceful tasks of protecting the fabric of society in maintaining law and order," provided, of course, their independence is not tampered with. *Id.* With obvious, though not explicit, reference to the statement of Young, J., on his resignation, Beadle, C.J., remarked that "[a] soldier may desert from the battlefield, secure in the knowledge that there are others who will remain and who will see that the battle is won, but this does not justify his desertion." *Id.* at 534.

536. *See* Palley, *supra* note 9, at 269, for a discussion that the Rhodesian judges, particularly Beadle, C.J., considered this factor determinative in deciding to remain in office. *See also* de Smith, *supra* note 9, at 105.

537. Such a distinction was expressly made in Bhutto v. Chief of Army Staff, 1977 P.L.D. S. Ct. 657 (Pakistan), though the Court made limited use of the distinction in its substantive holding. The Court said:

> [I]f it is assumed that the old Constitution has been completely suppressed or destroyed, it does not follow that all the judicial concepts and notions of morality and justice have also been destroyed, simply for the reason that the new Legal Order does not mention anything about them. On the contrary, I find that the Laws (Continuation in Force) Order makes it clear that, subject to certain limitations, Pakistan is to be governed as nearly as may be in accordance with the 1973 Constitution, and all laws for the time being in force shall continue. These provisions clearly indicate that there is no intention to destroy the legal continuity of the country, as distinguished strictly from the Constitutional continuity.

the nature and scope of jurisdiction is confirmed, the courts then remain creatures of the pre-rupture legal order, and any formal "continuation in force" provision, being merely declaratory in character, does not change the identity or the jurisdiction of the courts.[538] Thus, since the judiciary maintains some power to control the new regime, it is important that the judges remain in office.

Even where the usurpers reconstitute the courts, require new oaths, and alter the courts' composition and jurisdiction, the courts are not necessarily rendered impotent to review the conduct of a usurper regime.[539] In these situations, the important distinction between judicial power and jurisdiction becomes relevant.[540] The very fact that the courts exist bestows upon them an inherent power to determine the law and inquire into their own jurisdiction. Even where a court confronts a legal impasse, in that the constitutional order that brought it into existence has been successfully and completely subverted, it may rightfully invoke the doctrine of state necessity as a source of its power and continuing jurisdiction to review the exercise of legislative power by a usurper regime.[541] Even where a usurper regime requires a new oath of office, the position remains unchanged. If the nature and function of the courts are understood in terms of the aggregate legal system rather than in terms of a particular political constitution, a new oath does not preclude judicial review of legislative powers of an extra-constitutional regime. Typically, the new oaths administered by usurper regimes include the duty to uphold the law(s).[542]

Id. at 706.

538. *See, e.g.*, Khan v. Anwar, 1976 P.L.D. S. Ct. 354, 373-75 (Pakistan) (standing for the proposition that the identity of the high courts remained the same though the constitution under which they were established was abrogated and a new constitution came in force).

539. "It may be that the court's mere presence exercises some check on a usurper who prefers to avoid a confrontation with it." *Madzimbamuto*, [1968] 2 S. Afr. L.R. at 430 (Fieldsend, J.).

540. According to the Supreme Court of Pakistan:

> [J]udicial power is inherent in the Court itself. It flows from the fact that it is a Constitutional Court and it can only be taken away by abolishing the Court itself. . . . This power, it is said, is inherent in the judiciary by reason of the system of division of powers itself under which . . . the Legislature makes, the executive executes, and the judiciary construes, the law.

State v. Zia-ur-Rehman, 1973 P.L.D. S. Ct. 49, 69-70 (Pakistan).

541. There is no logical reason why the judiciary is any less entitled than the executive to assume extra-constitutional powers under the doctrine of state necessity in order to bridge legal chasms and effect a transition to legality. The superior courts of Cyprus, Malta, and Grenada adopted this route when confronted with constitutional breakdowns. *See* Attorney-General v. Ibrahim, 1964 C.L.R. 195 (Cyprus); Mitchell v. Director of Public Prosecutions, 1986 L.R.C. Const. 35 (Grenada); Archbishop Joseph v. Prime Minister, (Constitutional Court of Malta 1985) (unreported), *summarized in* 11 COMMONWEALTH L. BULL. 44 (1985).

542. For example, in Pakistan the new oath prescribed by the usurper regime under Supreme Court Judges (Oath of Office) Order, 1977 (Presidential Order No. 9 1977 of September 22, 1977) simply adopted the wording of the oath in the 1973 Constitution and deleted references to the Constitution: "I will discharge my duties, and perform my functions, honestly, to the best of my ability and faithfully in accordance with *the Constitution of the Islamic Republic of Pakistan and* the law . . . ." (Italicized words were deleted).

Even otherwise, the general duty to uphold the law must be viewed as a legal reservation implicit in any oath sworn by a member of the judiciary. This express or implied duty to uphold the law opens the door for the courts to adopt continuity-of-law approaches. This, in turn, facilitates the search for legal principles of appropriate conduct by public officials developed over time in the legal culture of the society relevant to test the scope of legislative powers of an extra-constitutional regime.[543] Such active judicial oversight is essential to protect the minimal basic rights of citizens against the arbitrary and repressive exercise of power by usurper regimes during the period when the larger questions of legitimacy of the new order are determined by the political process. Any meaningful judicial oversight, however, presupposes that judges eschew incentives to resign and remain in office.

E. Option Four: Declare the Legitimacy and Validity of a Coup d'Etat a Nonjusticiable Political Question

The political question doctrine of nonjusticiability stems from the very opinion of Chief Justice Marshall which gave birth to the practice of judicial review.[544] Even as he claimed for the courts the power to review the acts of other branches of government, Marshall acknowledged some limitations on that power:

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[545]

In *Luther v. Borden*,[546] the Court further developed the doctrine in a context relevant to this study. In that case, which arose in the wake of the Dorr Rebellion of 1842, the legitimacy of the charter government of Rhode Island was disputed and the Court was asked to decide whether the rebellion had been justified.[547] The Court declined to make such a decision. While the Court recognized that the Constitution mandates a particular form of government for the states, it insisted that only the political branches of government could enforce the constitutional mandate in question.[548] Because the President had accepted the charter government at the time of the Dorr Rebellion, the Court would not reach an inconsis-

543. In this inquiry a court may find useful the distinction drawn between "rules" and "principles" by Dworkin and Eekelaar. *See* Ronald M. Dworkin, *Is Law a System of Rules?*, 35 U. CHI. L. REV. 14 (1967); Eekelaar, *Principles, supra* note 9, at 30-37. Principles to be identified may be ones whose "authority lies outside the four corners of the positivist legal system." *Id.* at 34. The origin of these principles may be found "not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over a time." Dworkin, *supra*, at 41.

544. *See* Marbury v. Madison, 5 U.S. 137 (1803).

545. *Id.* at 170.

546. 48 U.S. 1 (1849).

547. *See id.* at 20-38.

548. *Id.* at 42.

tent result.[549]

A succinct enunciation of the doctrine was proffered by the Court in *Baker v. Carr*.[550] The common law courts in other jurisdictions are familiar with the doctrine, and in some of the cases reviewed above the courts considered the doctrine, although they declined to follow it.[551] The judicial abdication envisaged by this doctrine has two conceptual components: constitutionally mandated limits and self-imposed prudential limits.[552] Critics of the political question doctrine primarily caution against accepting lightly the idea that under a written constitution, any part or provision thereof is not justiciable.[553] Since the focus of the present study is on the justiciability of a coup d'etat after the constitutional order has been successfully subverted, this article explores the realism, functionality and prudence of judicial abdication in the face of a coup d'etat.[554]

1. Realism and Prudence Warrant Judicial Restraint

In ascertaining the suitability of the political question doctrine to the constitutional crises engendered by a coup d'etat, the test forwarded by the

549. After noting that the President had expressed his willingness to support the charter government with military force, Taney, C.J., concluded: "[C]ertainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government." *Id.* at 44. Concerns about problems of proof associated with any determination of legitimacy of a government played an important part in the decision. A court's capacity to find the requisite facts and problems of consistency if the outcome of such cases depended on jury findings of fact particularly concerned the Chief Justice. *Id.* at 40-43.

550. 369 U.S. 186 (1962). The court said:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

551. In other common law jurisdictions, "[t]here are simply categories of questions, some but not all of which have a strongly political flavor, which they [the courts] have decided, for historical or policy reasons, to treat as non-justiciable." STANLEY DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 273 (2d ed. 1968).

552. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962).

553. *See, e.g.*, Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 72 (1978). For other criticisms, see Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595 (1987); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1985); Louis Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524 (1987).

554. For arguments about realism and functionality of the doctrine, see Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); J. Peter Hulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988); B. O. NWABUEZE, JUDICIALISM IN COMMONWEALTH AFRICA: THE ROLE OF THE COURTS IN GOVERNMENT 37-43 (1977).

Supreme Court in *Baker v. Carr*, combined with Alexander Bickel's articulation of the rationale for the doctrine, is very helpful. According to Bickel:

> Such is the foundation, in both intellect and instinct, of the political-question doctrine: The Court's sense of lack of capacity, compounded in equal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally . . . the inner vulnerability, self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.[555]

In the aftermath of a successful coup, all these considerations come into play. First, there is the strangeness of the issue and its intractability to principled resolution. A coup d'etat, by definition, is a political event not contemplated by the constitution which destroys the pre-existing constitutional order. If a court decides to proceed with adjudication of the legality of a coup d'etat, it may either apply the law of the pre-existing constitution or seek extra-constitutional rules of decision. Any attempt to judge the coup by the dictates of the destroyed constitution raises institutional, theoretical, doctrinal, and practical problems as discussed in part II.C. Institutionally, the court is faced with a dilemma whether it is a court under the "old" constitution or one under the "new" de facto legal order. Theoretically, the court is faced with the meta-legal question of the relationship between constitutional facts and constitutional law. The doctrinal impasse and the futility of strict constitutionalism was discussed above.[556] The alternative of adopting extra-constitutional doctrines and principles has its own problems, as demonstrated by the survey of the case-law in part I.

While most courts validated coups d'etat, there was a singular lack of doctrinal consistency. The courts vacillated between the pure theory of revolutionary legality; the modified theory of revolutionary legality; the restricted doctrine of necessity; the unrestricted doctrine of necessity; the doctrine of implied mandate; the public policy doctrine; and various combinations thereof. Utterly lacking any measure of continuity, the contradictory pronouncements render the courts vulnerable to the charge that they were politically timid, personally expedient, intellectually dishonest, and that they were making policy determinations clearly not within judicial discretion. Such a dismal judicial record warrants judicial abdication on grounds of nonjusticiability, rather than additions to the doctrinal maze. If one appropriately recognizes that there is "no neat rule of thumb available to Judges during or immediately after the 'revolution' for the purposes of determining whether the old order survives,"[557] it becomes "clearly desirable to keep the courts out of the main area of dispute, so that, whatever be the political battle, . . . the courts can carry on their peaceful tasks of protecting the fabric of society and maintaining law and

555. BICKEL, *supra* note 552, at 184.
556. *See supra* part II.C.
557. DE SMITH, *supra* note 497, at 77.

order."[558]

Second, there is the problem of ascertaining facts which is compounded by the lack of judicially discoverable and manageable standards. This is most apparent in the findings of efficacy of extra-constitutional regimes. Some courts pronounced the usurpation efficacious without even taking the trouble of pointing out any facts warranting such a determination. Others based this determination on self-serving affidavits furnished by the usurpers or other public officials under the control of the usurpers. The evidentiary method of choice remains judicial notice of notorious facts. Determining facts in the midst of political upheavals and characterizing socio-political situations and human behavior patterns unassisted by opinions of disinterested and trained analysts is a hazardous task in any context. This becomes inexcusable when courts venture along this path, knowing quite well that their "factual" pronouncements are pregnant with far-reaching political implications. Furthermore, sudden changes of facts in the course of political upheaval can lead to embarrassment of the court. For example, the regime that won the stamp of validity based on efficacy in *Dosso* was itself overthrown within a day of the court's pronouncement.[559] The sharp difference between the High Court and the Court of Appeals in *Mitchell* regarding "notorious facts" suggests that, in the guise of judicial notice, personal preferences and value choices of the judges were in play.

Third, there is the problem of the sheer enormity and momentousness of the issue which may tend to unbalance judicial judgment. Coups d'etat are typically highly charged and volatile socio-political events, often accompanied by violence and civil strife. Such contexts are ill-suited for considered and coolheaded judicial inquiry and pronouncements.

Lastly, there is the potential embarrassment for the courts of the usurpers' disregard of any adverse pronouncements. As the aftermath of the *Lakanmi* opinion in Nigeria and the PCO in Pakistan demonstrate, usurper regimes having a monopoly of coercive power will not tolerate any rebuke or hindrance by the judiciaries. Nullifying judicial decisions by decree, removal of judges, restructuring of the courts, appointment of sympathetic judges, and requiring new oaths pledging fidelity to usurpers are all options available to, and availed by, the usurpers when confronted with judicial challenges. In view of all these factors, the political question doctrine of nonjusticiability provides the courts with the most prudent and realistic option when confronted with the question of the validity of a coup d'etat.

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558. Madzimbamuto v. Lardner-Burke, [1968] 3 All E.R. 561, 582 (P.C.) (Lord Ried).

559. President Mirza abrogated the Constitution and proclaimed martial law on October 7, 1958. *Dosso*, which validated the new order, was announced on October 27, 1958. That very evening, three senior generals informed the president of the army's decision that he relinquish his office and leave the country. The president complied. *See* MOHAMMAD AYUB KHAN, FRIENDS NOT MASTERS: A POLITICAL AUTOBIOGRAPHY 75 (1967).

2. *The Legitimacy of a Coup d'Etat Is a Political/Moral Question and Its Validity a Meta-Legal One*

The proposition of nonjusticiability of coups d'etat also rests on a fundamental conceptual distinction between legitimacy and validity of a legal order. Nearly all the cases in this survey treated legitimacy and validity as conceptually identical, often using the expressions interchangeably. While there is an overlap of lexical definitions,[560] the two concepts are fundamentally distinct—a distinction crucial to an appropriate judicial response to coups d'etat. The pervasive judicial practice to collapse legitimacy and validity into one is rooted in an uncritical adoption of Kelsen. Besides calling his hypothesis of validity "the principle of legitimacy,"[561] Kelsen argues:

> The bare fact that an individual (or a group of individuals) is in a position to enforce a certain pattern of behavior is not a sufficient ground for speaking of a relation of domination such as constitutes a state .... The domination that characterizes the state claims to be legitimate and must actually be regarded as such by rulers and [the] ruled. The domination is legitimate only if it takes place in accordance with a legal order whose validity is presupposed by the acting individual.[562]

"Legitimacy is the foundation of [state] power exercised ... both with a consciousness on the government's part that it has a right to govern and [a corresponding] recognition by the governed of that right" resulting in an obligation of fidelity.[563] As such, legitimacy invokes questions of politics and morality that must be resolved through the political processes of the society. These questions are not legal in nature and must not be subjected to adjudication.

Validity, on the other hand, refers to the binding nature of a norm, which is derived from its conformity to a higher order norm, like a constitution. As such, validity is a legal question subject to adjudication. A clear distinction between legitimacy (right/obligation) and validity (legality) is critical to fashion an appropriate response to successful usurpation. The problem of legitimacy concerns the justness of the state or the legal order as a whole and is not primarily about establishing criteria for identifying or validating particular laws. No court has the authority to determine whether the state and the legal order that it serves is legitimate. That would be tantamount to the court creating itself. The courts, as agencies

560. Legitimacy means lawfully begotten; the condition of being in accordance with and sanctioned by the law. Validity means having legal force, binding under the law. *See* WEBSTER'S NEW TWENTIETH CENTURY UNABRIDGED DICTIONARY 1035, 2017 (2d ed. 1979).

561. KELSEN, GENERAL THEORY, *supra* note 368, at 117.

562. *Id.* at 187-88.

563. *See* Dolf Sternberger, *Legitimacy, in* 9 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCE 244 (David L. Sills ed., 1968). *See also* PATRICK RILEY, WILL AND POLITICAL LEGITIMACY (1982); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990). Tyler traces compliance with the law to such normative considerations as legitimacy, *id.* at 64; procedural fairness, *id.* at 102; and the citizenry's right to a voice in decisions that affect them, *id.* at 178.

of the state, sit more as justificatory, rather than adjudicatory, organs when confronted with questions bearing upon the very legitimacy of the state.[564] But a court can examine the validity of a norm by testing it against the dictates of the constitution, whether written or otherwise.

While Kelsen, for whom "[j]ustice is an irrational ideal,"[565] associates the phenomena of obligation and right with processes of law and legality, he fails to root the link between standards of legality and principles of obligation in critical morality. Kelsen's theory is a source-based, formal theory of validity that would qualify any effective regime as a valid legal order and, by definition, a legitimate one. Because for Kelsen the normative response to law is linked primarily to effectiveness, his theory leaves open not only the question of justification but every other conceivable problem concerning the difference between law and naked force. Kelsen's theory remains inadequate and incomplete as a theory of legitimacy in that it does not concern itself with a definition of law and the state which would make meaningful the obligation of fidelity to law.[566] The validity of a norm or legal order depends, for Kelsen, on its pedigree (driven from the *grundnorm*) or power/efficacy ("by and large effective").[567] It is beyond question that the existence of an effective order is a prerequisite to any critical value judgment on which the case for obligation of fidelity depends. Where the very existence of a legal order is in question, or conversely, where the issue is which of the two or more competing legal orders should be given effect by the courts, the key empirical issue is the measure of effective control of a legal order. But any answer to this question does not necessarily bear on the question of whether that legal order is a legitimate one.

Legitimacy is a two-faceted problem: how can the state justifiably make demands of obedience on its citizens, and what is the rationale underlying the individual's obligation to obey the state. Any discussion of legitimacy invokes the principal questions of modern political philosophy—problems concerning political obligations, rights of subjects against

564. *See* PHILIP SOPER, A THEORY OF LAW 112-25 (1984).

565. KELSEN, GENERAL THEORY, *supra* note 368, at 13. According to Kelsen, "[w]hat it all comes to, essentially, is the insight that there is not just one single morality, 'the' morality, but rather that there are many moral systems . . . . The thesis rejected by the pure theory of law . . . [is that there is] an absolute morality, i.e., one which holds good at all times and places." Hans Kelsen, *Law and Morality, in* ESSAYS IN LEGAL AND MORAL PHILOSOPHY 92 (Peter Heath trans., 1973).

566. On the problem of the obligation to obey, see generally ANTHONY D. WOOZLEY, LAW AND OBEDIENCE (1979); JOHN A. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS (1979); JOSEPH RAZ, THE AUTHORITY OF LAW (1979); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973); Rolf Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3 (1981); J.L. Mackie, *Obligations to Obey the Law*, 67 VA. L. REV. 143 (1981); Thomas R. Flynn, *Collective Responsibility and Obedience to the Law*, 18 GA. L. REV. 845 (1984); Kent Greenawalt, *Promise, Benefit and Need: Ties That Bind Us to the Law*, 18 GA. L. REV. 727 (1984); William McBride, *The Fetishism of Illegality and the Mystification of "Authority" and "Legitimacy"*, 18 GA. L. REV. 863 (1984); Frances Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA L. REV. 929 (1984).

567. Kelsen, *supra* note 420, at 1144.

the government, citizens' rights to political participation, and the proper scope of governmental action. Legal systems, in order to impose obligations while avoiding a total collapse into pure force, must be able to claim that their rules are just.[568] As this essentially involves political/moral criteria, the question of legitimacy resides in the political processes of the society, which is never resolved for all times. Legitimacy of a state or a legal order, by definition, is an open-ended question to be perpetually raised and answered. As such, it eludes the jurisdiction and competence of the judiciary.[569] The judiciary, being an agent and instrument of the state and the legal order, lacks the jurisdiction to question the legitimacy of its principal. Institutionally, it does not possess the yardsticks necessary to fashion responses to essentially open-ended political/moral questions.

The validity of a norm, on the other hand, may be a legal question, amenable to adjudication. But the parameters of this exercise need to be clearly demarcated. For example, Harris classifies the different senses in which the adjective 'valid' may be used to qualify a legal norm: whether it (i) conforms to a higher order; (ii) is a consistent part of a normative field of meaning; (iii) corresponds with social reality; and (iv) has an inherent claim to fulfillment.[570] However, this article's position is that validity is a legal question only in the first sense. The other three senses are theoretical, meta-legal, and political questions.

Conformity with a higher norm is the usual sense in which the term validity is used in common law, as when a rule is found not to be in conflict with the constitution that furnishes the higher norm. Kelsen uses the term in the second sense, i.e., that of a norm being a consistent part of a normative field of meaning, with the *grundnorm* furnishing the ultimate foundation. This, however, is a theory of validity, not a rule of decision to

568. *See* Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103 (1981). *See also* Yash Ghai, *The Rule of Law, Legitimacy and Governance*, 14 INT'L J. SOC. L. 179 (1986). *Cf.* Rober L. Holmes, *State-Legitimacy and the Obligation to Obey the Law*, 67 VA. L. REV. 133 (1981).

569. *Cf.* Ali Khan, *A Legal Theory of Revolutions*, 5 B.U. INT'L L.J. 1 (1987) (a recent attempt to fashion criteria for judicial determination of legitimacy of a revolution). According to Khan, a revolution is legitimate if the new rule of succession prescribed by the usurpers is accepted by the community, and the usurper regime "legitimizes itself" under the new succession rule. *Id.* at 22. It is hard to see how this "theory of law, which examines the analytical and normative significance of succession rules for understanding the legitimacy of a revolution," *id.* at 4, can "provide a basis for courts to determine the legitimacy of a revolution." *Id.* at 28. The theory does not instruct the courts how to determine acceptance by the community. Neither does it explain why after a usurper regime "legitimizes itself" under the new succession rule accepted by the community, any issue is left over for adjudication as opposed to judicial acknowledgment. As the survey of the cases above demonstrates, issues of legitimacy and validity of coups d'etat are presented to the courts typically before any new rule of succession is enunciated. In this situation Khan's theory implies a wait-and-see posture for the courts. My submission is that the wait-and-see posture and subsequent judicial acknowledgment of the political resolution of the legitimacy issue is best achieved by using the political question doctrine of justiciability.

570. Harris, *supra* note 9, at 113. *See also* G.C. Christie, *The Notion of Validity in Modern Jurisprudence*, 48 MINN. L. REV. 1049 (1964); GEORGE H. VON WRIGHT, NORM AND ACTION, 194-200 (1963); ALF ROSS, DIRECTIVES AND NORMS 104-05 (1966).

adjudicate validity. As a theoretical question, it belongs to the legal theorist and not a court of law.

The post-colonial courts have often used validity in the third sense, i.e., in the sense of correspondence with social reality, and have interpreted Kelsen to be doing the same, notwithstanding Kelsen's insistence that effectiveness and validity be distinguished.[571] This is a meta-legal assumption about the relationship between social reality (efficacy) and validity (legality) of norms. As a meta-legal assumption, it is available to the legal scholar, not to a court of law.

Lastly, the question whether a norm has an inherent claim to fulfillment is not a question of validity at all. It is a question of legitimacy to be answered by political/moral criteria,[572] and as such is outside the purview of judicial determination. Consequently, validity of a norm is a legal question subject to adjudication only where there is a higher order norm, i.e., a constitutional order in place. Because a successful coup d'etat, by definition, destroys the constitutional order, its validity is not a justiciable legal question.

The question of validity of a successful coup involves meta-legal assumptions about the relationship of law with social reality. In other words, meta-legal assumptions about the relationship between constitutional facts and constitutional law. Meta-legal inquiry properly resides in the province of legal thought, not in judicial practice. Legitimacy of any regime is a political/moral issue and validity of a successful coup d'etat is a meta-legal question. As such, both legitimacy and validity of a successful coup d'etat are beyond the jurisdiction and competence of the judiciary. This is the most important rationale for courts to invoke the political question doctrine of nonjusticiability when confronted with a successful coup d'etat.

Conclusion

Courts in post-colonial common law settings are often confronted with questions not contemplated by the constitutional order. This situation is the product of extra-constitutional assumption of political power through coups d'etat, which are endemic in these settings. The *fait accompli* of a successful coup d'etat, coupled with the usurper's desire for judicially pronounced legitimacy, presents courts with a complex dilemma. With the status of the constitutional order in doubt, the choices available to the courts are neither obvious nor unproblematic. Unfortunately, when confronted with a successful coup, most courts have opted for the worst

571. *See, e.g.*, KELSEN, GENERAL THEORY, *supra* note 368, at 40, 119, 169-71; KELSEN, PURE THEORY, *supra* note 368, at 10, 78, 211-14; Kelsen, supra note 420, at 1139-40; Hans Kelsen, *On the Pure Theory of Law*, 1 ISR. L. REV. 1, 2 (1966).

572. Kelsen would agree that this is not a criteria of validity of a norm because "[t]he pure theory desires to present the law as it is, not as it ought to be; it seeks to know the real and possible, not the 'ideal,' the 'right' law." KELSEN, PURE THEORY, *supra* note 368, at 106.

choice, namely, validation and legitimation of extra-constitutional usurpation.

Turning variations of an inherently flawed theory of revolutionary legality into rules of judicial decision, these courts have held that the success of usurpation is the source of its validity and legitimacy. The judicial validation and legitimation of coups rests on an indefensible doctrinal foundation. Kelsen's theory of revolutionary legality, which animates the conceptual contours of the validation/legitimation option, is based on abstract meta-theoretical assumptions not available to a court of law. Based on a formal juridical conception of the state, this theory is immune from the moral and sociological dimensions of the question of legitimacy, and thus fails to distinguish between force and law. While basing validity of usurpation on its efficacy, this theory fails to furnish any criteria to measure and evaluate efficacy. Thus, it allows judges to present their political choices as results of principled adjudication. The experience of the post-colonial societies shows that the validation/legitimation option encourages would-be adventurers, undermines constitutional governance and the rule of law, contributes to political instability, and diminishes the power and prestige of the judiciary.

A few courts have taken the high road of strict constitutionalism and have held successful coups to be illegal and invalid usurpations. The failure of these courts to take into account the gulf between constitutional law and political reality resulted in quick and decisive rebukes from the extra-constitutional regimes. The result was drastic curtailment of the power, independence, and jurisdiction of the courts. A few judges opted to resign their offices rather than submit to the will of the usurpers. While this option is morally laudable, it only resulted in providing usurpers with the opportunity to pack the courts with sympathetic judges.

This leaves the doctrine of nonjusticiability of political questions as the only feasible option for courts when confronted with successful coups d'etat. This course of action is dictated by both theoretical and prudential considerations. Questions of legitimacy and validity of successful usurpation are outside the jurisdiction and competence of courts of law. Legitimacy involves the rationales for the right to govern and the corresponding duty to obey. This involves political and moral questions which can be resolved only through the political processes of the society. By their very nature, these issues lie beyond the competence and jurisdiction of courts of law. Validity of successful usurpation involves the theoretical question of the relationship between constitutional fact and constitutional law. This is essentially a meta-legal question, which can be resolved only by an extra-legal choice concerning the nature of law itself. Courts of law, being instruments of particular legal orders, lack the competence and jurisdiction to resolve meta-legal questions.

The historical and structural reasons that make coups d'etat a pervasive means of transfer of political power in post-colonial societies are beyond the power of courts of law. Faced with a successful coup, the best that the courts can do is to deny judicially pronounced legitimacy to the

usurpers without jeopardizing the very existence of the courts. Designating the legitimacy and validity of successful coups nonjusticiable political questions is the best means of achieving this objective. Insulation of the courts from extra-constitutional political conflicts is the best means of ensuring survival of the rule of law while the political processes of the society resolve the question of an appropriate political and legal order.