

# **UNCONSTITUTIONAL LEGALITY**

*The Doctrine of State Necessity and Revolutionary Change*

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**A thesis submitted for the degree of  
Doctor of Philosophy in Law**

**Michaelmas 2025**

# Acknowledgments

This research journey has been made possible by the considerable academic, moral, and personal support I have received over the years. My first and deepest thanks are owed to my supervisor, Pavlos Eleftheriadis, for his invaluable guidance, generosity with his time, and enduring and genuine interest in this project. I am also grateful for the insightful discussions and helpful comments provided by my examiners, Lars Vinx and Paul Yowell, as well as by my confirmation and transfer assessors, Timothy Endicott and Tarun Khaitan.

I am grateful to the Educational Institute of Moral and Social Education 'Efthymiou Christopoulou' and to the Faculty of Law of the University of Oxford for funding my research.

There are more people to whom I owe thanks than I can possibly acknowledge on a single page. I am deeply grateful to my family for their unwavering support throughout the years. I am also indebted to my friends and colleagues who read and commented on parts of my research, especially Dimitris Moragiorgas and Georgios Karantzios. Finally, I have been fortunate to share this journey with good friends whose companionship and support have meant a great deal to me: Srinandini Mukherjee, Lingchen Huang, Abdalrhaman Koko, Saba Ishrat, Pierfrancesco Lapolla Losasso, and Zhihao Chen.

*To the loving memory of my grandmother  
Evangelia Peftina*

# Abstract

The thesis explores the apparently paradoxical phenomenon of unconstitutional legality. This is a state of affairs in which acts that contravene constitutional provisions are treated by courts and other legal officials as legally valid, either temporarily or permanently. The thesis examines two principal doctrines through which courts have legally validated such acts: the doctrine of state necessity and the doctrine of revolutionary legality.

The first three chapters focus on the doctrine of state necessity, examining how courts in various jurisdictions conferred legal validity to unconstitutional actions undertaken to preserve the state or avert constitutional collapse. These chapters trace the evolution of the doctrine from its early roots in executive-prerogative powers and to an extra-legal natural-law principle of necessity to its eventual legal formalisation. The thesis proposes a theoretical reconfiguration of the doctrine of state necessity based on the concept of equity as its most coherent and normatively defensible conceptual and theoretical foundation.

The following four chapters turn to the problem of revolutionary change, understood as any constitutional change in violation to the written constitution. Through the analysis of case law from across various legal systems, the thesis explores how courts have invoked the doctrines of successful or acclaimed revolution to determine whether they should grant legal recognition to constitutions that have been overthrown and replaced with new ones. The thesis proceeds with the examination of the theoretical grounds presented in these decisions, based primarily in Hans Kelsen's *Pure Theory of Law* and its principle of effectiveness. It further assesses how revolutionary changes seem to challenge the supremacy and continuity of constitutional law, questioning whether revolutions destroy or transform and coexist with pre-existing legal orders. The thesis concludes by outlining a jurisprudence of revolutionary change, a 'law of revolutions', which seeks to ground unconstitutional changes to the constitution within a broader legal and theoretical framework.

Overall, the work seeks to illuminate how the study of deviations from constitutions offers important insights into the inner workings of legality and to the nature and dynamics of constitutional authority.

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# Introduction

1. Constitutional law occupies a special place in the vast majority of modern legal systems. It is codified in a written document that establishes the fundamental rules of government and sets out the basic rights protected in a legal system. It takes primacy over any conflicting law or legal act, allowing in most liberal jurisdictions a highest court or, in some cases, any judge to strike down or set aside unconstitutional actions of the legislature or the executive. The constitution is also 'entrenched' in that it can be amended following a special procedure requiring increased political majorities. These combined features place it at the apex of its legal system: it is the supreme law and is understood as being, indeed, the very foundation of the legal system.<sup>1</sup> Constitutionality is thus intertwined with legality, in the sense that violations of the constitution are, *ipso facto*, violations of the law. When we look at that connection more closely, however, we see that unconstitutionality is not always 'illegality'. In several cases, supreme courts have held that, under certain conditions, some actions might be lawful even though they run contrary to the constitution, while other times they might even be constitution-changing. This is a question that has not attracted the attention it deserves in relation to its implications for our understanding of constitutional law and the legal

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<sup>1</sup> Robert Schütze, 'Constitutionalism (s)' in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (2019) 48-49; Pinelli Cesare Hasebe Yasuo, 'Constitutions' in Mark Tushnet, Fleiner Thomas, Saunders Cheryl (ed), *Routledge Handbook of Constitutional Law* (Routledge 2013); Stephen Gardbaum, 'The Place Of Constitutional Law in the Legal System' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012); Victor Ferreres Comella, Tom Ginsburg and Rosalind Dixon, 'The Rise of Specialized Constitutional Courts' in *Comparative Constitutional Law* (Edward Elgar Publishing 2011).

order. Two closely related cases from Pakistan serve as exemplary examples of the constitutional and jurisprudential questions raised.

2. The Constituent Assembly of Pakistan spent the first seven years after independence working towards producing the first constitution of Pakistan. In the meantime, it operated as an interim legislator, promulgating what it called 'constitutional acts' in order to amend the standing Acts of the British Parliament and enable a new set of institutions to take shape.<sup>2</sup> Such 'constitutional acts' functioned as its basic law until the enactment of the new constitution.

3. Several such 'acts' were passed, instituting a series of state institutions, including the Supreme Court of Pakistan. However, none received 'assent' from the Governor-General, a colonial office representative of the Crown still existing under those Acts of the British Parliament. When the Governor-General raised this point before a court of law, the Supreme Court agreed that such assent had been strictly required and it thus declared all constitutional acts enacted by the Constituent Assembly *ab initio* invalid. In effect, a great part of the legal system that had developed since independence disappeared. To prevent the resulting constitutional and legal chaos, the Supreme Court came back with a new decision, allowing the Governor-General to retrospectively validate the constitutional acts notwithstanding their conflict with Pakistan's basic law on the basis of the '*law of civil or state necessity*'.<sup>3</sup>

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<sup>2</sup> These being the 1935 Government of India Act and the 1947 Indian Independence Act.

<sup>3</sup> *Reference by His Excellency the Governor-General F.C. (1955) 7 P.L.D. 435.*

4. How is it possible that a court can recognise as lawful laws and government acts that conflict with the constitution, the supreme law of the land? Can there be an acceptable level of unconstitutionality within the legal order? If so, what are the limitations of this doctrine? How can the role of the constitution as the supreme and fundamental law of the legal order be preserved?

5. Three years later, the first President of Pakistan under the new Constitution declared the Constitution's abrogation and the imposition of Martial Law. He dissolved, the legislature and dismissed the government. This was a successful coup. Six days later, the Supreme Court would hear a case that concerned the violation of certain rights under the recently declared as abrogated Constitution. The Court decided that the President's actions amounted to a 'revolution' that replaced the old constitution and legal order with a new one. In this way, the President's proclamation now constituted the lawful constitution of Pakistan, which courts had to take account.

6. What changed between these two decisions so that the former constitutional violation performed by the Constituent Assembly was incurable, but the latter violations of the President constituted a constitution-changing event generating a new valid constitution? How is it the case that an unlawfulness of the most fundamental type leads to legally valid outcomes?

7. This thesis will examine the question of *unconstitutional legality*, namely whether and how unconstitutional actions can be lawful and constitution-changing, and, if so, what is the legal framework governing those dynamics. It examines those jurisprudential questions by examining a series of seminal court decisions ranging from Cyprus, Pakistan, Greece, Nigeria, Canada, the U.S., the U.K., Uganda, Rhodesia, Ghana,

Seychelles, Grenada, Lesotho and Fiji. The thesis focuses on the theoretical aspects of those questions, critically examining the arguments and theories presented in these cases and in the academic discussion developed around them. The objective is to offer a sound theoretical account for constitutional departures and unconstitutional changes to the constitution, and to draw the implications of this discussion for the understanding of constitutions and law.

8. There are broadly two groups of cases. In the first, judges regarded as temporarily lawful—or perhaps legalised—certain actions that seemed to conflict with the constitution on the basis that they were necessary for the preservation of the state and the legal order and to prevent its collapse. These actions were deemed to be valid notwithstanding their unconstitutionality on the basis of a ‘principle’ or ‘law’ of ‘state necessity’, which will be summarily called throughout this thesis the ‘doctrine of state necessity’ (or ‘doctrine of necessity’ for short). In the second group are cases where courts dealt again with some unconstitutional events, only this time they did not regard them as only temporarily valid but as establishing new lawfulness by being constitution-changing on the basis that they were ‘revolutionary’. They include instances of overthrow of governments (*coup d’état*), declarations of independence, and any reformation of the constitution against its rules of change. I will be using the term ‘revolutionary change’ generically to cover all those cases in which there is an unauthorised change to the constitution.

9. By ‘constitution’ in this thesis is meant that part of law that sets down as legal rules or principles the supreme criteria for legal validity within a legal order. The ‘supremacy’ of the constitution means that the rules of the constitution enjoy some form

of primacy over other rules in the same legal order, in the sense that lower rules cannot conflict with higher rules, or that, if they do, they should be regarded as invalid and may be ignored by state officials and particularly by judges sitting in judgment.

10. In countries with written constitutions, the rules reflected in the constitutional text are entrenched, in that they can only be changed following a special procedure. Thus, any violation of the rules contained within the constitutional document is a violation of the rules of change of the constitution and thus of the rules determining the supreme criteria for legal validity. Written constitutions tie the supremacy of constitutional law to any rules included in the constitutional document.

11. On the other hand, unwritten constitutions are limited only to those rules directly regarded as setting the supreme criteria for the validity of laws. Thus, for example, if it is accepted that *whatever* the British Parliament enacts is valid law, then the only rule of constitutional law in the UK, under this definition, is that of *parliamentary sovereignty*.<sup>4</sup> Most of the present thesis revolves around the jurisprudence and case law of countries with codified constitutions, particularly as regards the doctrine of state necessity. However, parts of the thesis, and particularly the part concerned with revolutions, also apply to countries with an unwritten constitution, to the extent that they possess constitutional law under the criteria defined above. If

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<sup>4</sup> This is the traditional concept of parliamentary sovereignty articulated by A. V. Dicey, *The Law of the Constitution* (Oxford University Press 2013) 27 [40]. Dicey additionally identified the rule of law as the other foundational principle of the British Constitution. Though it is doubtful that the traditional notion of parliamentary sovereignty is subject, that is, restricted, to the rule of law, ongoing developments and contemporary academic arguments point towards the opposite direction, see N. W. Barber, *The United Kingdom Constitution: An Introduction* (Oxford University Press 2021) 56-92. My reference to the traditional concept here is purely to offer an example of what counts as constitutional law under my definition, without taking stance on where parliamentary sovereignty stands today.

they do, the same questions, problems and concerns arise as those with written constitutions. Hence, a revolutionary change in the UK would be any change to parliamentary sovereignty not inferred through parliamentary sovereignty.

12. Although the doctrine of state necessity shares many features with the broader field of emergency law and the legal responses to emergencies, the two should not be conflated. In part, cases that fall under the concept of 'state necessity' may be seen as a distinct type of grave emergency arising from the strict application of constitutional provisions in a way that threatens the collapse of state institutions and the legal order itself. By contrast, emergency law encompasses a wide range of threats to significant public interests, such as threats to national security posed by terrorism, or to public health during a pandemic. Responses to such emergencies may be regulated at multiple levels – criminal, administrative, constitutional and international - through a variety of legal instruments,<sup>5</sup> including derogation and suspension clauses,<sup>6</sup> enabling laws,

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<sup>5</sup> Anna Jonsson Cornell and Janne Salminen, 'Emergency Laws in Comparative Constitutional Law – The Case of Sweden and Finland' (2018) 19 *German Law Journal* 219; Victor V Ramraj and Menaka Guruswamy, 'Emergency Powers' in *Routledge Handbook of Constitutional Law* (Routledge 2013); Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (vol 3, International Litigation in Practice, Martinus Nijhoff Publishers 2012); Rainer Grote, 'Regulating the State of Emergency The German Example' (2003) 33 *Israel Yearbook on Human Rights* 153; Joseph B Kelly and George A Pelletier Jr, 'Theories of Emergency Government' (1966) 11 *South Dakota Law Review* 42. Historically, emergency law was well developed during the Roman Republic, famously with the creation of the institution of dictatorship and with the placement of various checks and balances, see Marc De Wilde, 'Roman Dictatorship in The French Revolution' (2021) 47 *History of European Ideas* 140; Gregory K. Golden, *Crisis Management during the Roman Republic: The Role of Political Institutions in Emergencies* (Cambridge University Press 2013); Benjamin Straumann, 'Constitutional Thought in the Late Roman Republic' (2011) 32 *History of Political Thought* 280; Andrew Lintott, *The Constitution of the Roman Republic* (Oxford University Press 1999).

<sup>6</sup> See Amanda L. Tyler, 'Suspension as an Emergency Power' (2009) 118 *Yale Law Journal* 600; Trevor W Morrison, 'Suspension and the Extrajudicial Constitution' (2007) 107 *Columbia Law Review* 1533; David L Shapiro, 'Habeas Corpus, Suspension, and Detention: Another View' (2006) 82 *Notre Dame Law Review* 59.

provisions for emergency executive or legislative powers, exception-making legal rules and defences.<sup>7</sup> In contrast, the doctrine of state necessity is invoked only to exceed a constitutional limitation when no such legal mechanism exists. It therefore always operates contrary to the constitutional text and thus appears as a *contra constitutionem* doctrine.

13. Moreover, academic discourse on emergency law is particularly concerned with whether responses to emergencies must always remain within the sphere of law. Some scholars argue that emergencies may justify measures based on their political or moral legitimacy, even against law.<sup>8</sup> This debate echoes Carl Schmitt's critique of liberalism's, in his view, futile attempt to subject emergency responses – and the executive more broadly – to the rule of law,<sup>9</sup> understood as general and pre-established legal rules

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<sup>7</sup> Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Routledge 2017) 8-13.

<sup>8</sup> Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2021) 19 *International Journal of Constitutional Law* 1498; Clement Fatovic and Benjamin A. Kleinerman, 'Introduction: Extra-Legal Measures and the Problem of Legitimacy' in Clement Fatovic and Benjamin A. Kleinerman (eds), *Extra-Legal Power and Legitimacy* (University of Oxford 2013); Eric A Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford University Press 2011); Victor V Ramraj, 'Emergency Powers and Constitutional Theory' (2011) 41 *Hong Kong Law Journal* 165; Victor V Ramraj, *Emergencies and the Limits of Legality* (Cambridge University Press Cambridge 2008); Oren Gross and Fionnuala Ní Aoláin (eds), *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006); David Dyzenhaus, 'Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order' (2005) 27 *Cardozo Law Review* 2005; George P. Fletcher, 'Black Hole in Guantánamo Bay' (2004) 2 *Journal of International Criminal Justice* 121; Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1.

<sup>9</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press 2005).

defining the conditions, terms, content and scope of emergency measures,<sup>10</sup> together with adequate checks and balances for their observance.<sup>11</sup> This thesis does not engage with that debate, namely the question of what constitutes an appropriate response to emergencies and whether liberalism can indeed realise its aspiration of subordinating the executive to the rule of law even in times of emergency or a ‘state of exception’.

14. Nevertheless, this thesis contributes to the debate indirectly to the extent that, in at least a particular kind of ‘emergency’ identified as ‘state necessity’, it argues that constitutional law possesses both theoretical and doctrinal foundations capable of accommodating departures from the letter of constitutions without undermining the fundamental principles of constitutionalism and, by extension, those of what Schmitt’s critique terms ‘liberalism’. The thesis aligns with the view that law cannot be reduced to a mere collection of general norms applied mechanically to corresponding sets of facts. Judicial reasoning grounded in the doctrines, principles and traditions that permeate a legal community – what I term ‘*juristic thinking*’ – forms an inseparable part

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<sup>10</sup> ‘The whole theory of the *Rechtsstaat* rests on the contrast between law which is general and already promulgated, universally binding without exception, and valid in principle for all times, and a personal order which varies case to case according to particular concrete circumstances’, Carl Schmitt, *The Crisis of Parliamentary Democracy* (Ellen Kennedy tr, MIT Press 1988) 42, and also in Carl Schmitt, *Legality and Legitimacy* (Jeffrey Seitzer tr, Duke University Press 2004) 3-6 and in Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2008) 176 ‘the bourgeois *Rechtsstaat* culminates in the conformity of the entire state life to *general judicial forms*’. Schmitt traces the modern articulation of the rule of law idea to John Locke, *Second Treatise of Government* (Cambridge University Press Cambridge Univ. Press 1980) 17, para 22, who writes: ‘freedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man’.

<sup>11</sup> ‘[I]n a race between the executive and the judiciary, the judiciary will mostly arrive too late’, Carl Schmitt, *Legality and Legitimacy* (Jeffrey Seitzer tr, Duke University Press 2004) 32.

of the legal phenomenon. Consequently, Schmitt's identification of law solely with general rules, and the criticism that follows from it, is, in this respect, misplaced.

15. The general argument advanced throughout the thesis is that deviations from the letter of constitutions, as well as revolutionary changes, are integral aspects of the phenomenon of law that must not be ignored. Rather, they can shed light on our understanding of constitutions and of law itself. The thesis places particular emphasis on the fact that the questions raised in such cases were treated by the courts as legal questions, for which legal arguments about unconstitutional legality are presented in court that are clearly intelligible and occasionally even persuasive. This practice, I argue, is not extraordinary or irrational, and the best theory of the constitution and of constitutional law should be able to accommodate what appears to be exceptional, extraordinary or 'extra-legal'. Ultimately, this discussion can be seen as an invitation to a different understanding of constitutional law, one that goes beyond conventional understandings of the constitution as an order of rules.

16. The structure of the thesis is as follows. Chapters 1, 2 and 3 examine the doctrine of state necessity, while Chapters 4, 5, 6 and 7 address the problem of revolutionary change.

17. Chapter 1 explores the main features of the doctrine of state necessity as it developed through a series of seminal cases from various jurisdictions, with particular attention to the nature and foundations of the doctrine. Chapter 2 analyses the legal basis of the doctrine, identifying two broad grounds within the case law and arguing that both provide inadequate foundations. Chapter 3 seeks to offer an alternative theoretical basis for the doctrine of necessity grounded in the concept of equity or

epieikeia, arguing that the equity tradition provides a stronger foundation for the doctrine while respecting the constitution's role as supreme law.

18. Chapter 4 turns to the problem of revolutionary change by examining a range of cases from different countries. It identifies two 'doctrines of revolution' emerging from these cases and outlines the distinct jurisprudential questions each raises. Chapter 5 investigates the theoretical foundation of the doctrine of successful revolution through the works of Hans Kelsen and considers the jurisdiction of courts to determine questions of revolutionary change. It argues that the doctrine of successful revolution is a plausible application of Kelsen's theory, but that its merits, like those of the revolutionary jurisdiction of courts, must be assessed in light of the revolution's impact on the legal order. Chapter 6 considers the impact of revolutionary change, in particular whether revolutions destroy the entire legal order and replace it through the substitution of the constitution. It is argued that the consequences of revolutions cannot be jurisprudentially predetermined, but depend on what I describe as the *juristic thinking* prevailing within each community. On that basis, a theory of legal continuity is proposed. Finally, Chapter 7 addresses the question of revolutionary legality: how revolutionary change can be distinguished from constitutional violations that fall short of altering the constitution, and whether there can be any law governing unconstitutional constitutional change. I advance a theory of constitutional change linked to the legitimacy and legality of constitutions and set out limits to revolutionary change using the concept of *juristic thinking* developed in the preceding chapter.

# Chapter 1: The Doctrine of State Necessity

Even though the Constitution is deemed to be a supreme law limiting the sovereignty of the legislature, nevertheless, where the Constitution itself cannot measure up to a situation which has arisen, [...] then [...] according to the doctrine of necessity the legislative power [...] [must] be exercised for the benefit of the people.

Judge Triantafyllides, 1964 *Ibrahim*<sup>12</sup>

19. The supremacy of constitutional law and the adherence to the rule of law are normally communicating vessels.<sup>13</sup> In modern constitutional states, state organs are instituted by the constitution and exercise their functions in accordance with and limited by its rules.<sup>14</sup> Yet there are several cases where adherence to constitutional requirements could prove perilous for the state and ultimately destructive to the rule of law.<sup>15</sup> On such occasions of great need, supreme courts in various jurisdictions justified emergency measures as legally valid notwithstanding their unconstitutionality based on the ‘principle’ or ‘law of state necessity’.<sup>16</sup>

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<sup>12</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964)* 1 C.L.R. 195, 234.

<sup>13</sup> Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2000) 74 *Southern California Law Review* 1307.

<sup>14</sup> This is known as the negative aspect of constitutionalism, see N. W. Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) 2.

<sup>15</sup> Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional' (2003) 112 *Yale Law Journal* 1011, 1015.

<sup>16</sup> Case law and academic literature use the terms ‘law’, ‘principle’ or ‘doctrine of necessity’ rather interchangeably, even though each connotes a slightly different meaning. The term ‘principle’ was used by courts in early decisions to refer to a particular legal rule, whereas ‘doctrine can be perceived as an evolved statement of facts that can be derived from an empirical observation and analysis, hence has an aspect of generalisation’, Constantinos. Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas 2015) 10. In this chapter, I use the term ‘doctrine’ as a reference to a certain position or set of beliefs about the existence of some law and how some types of cases

20. In this chapter, I discuss the doctrine of necessity and how it has been invoked in the field of constitutional law. I identify cases of unconstitutional exercise of executive or legislative power that supreme courts condoned by invoking the doctrine of state necessity. I also examine how the doctrine developed through these cases, by critically discussing the legal grounds offered by courts. I especially focus on how the doctrine of necessity was legally justified rather than being merely dismissed as a case of constitutional violation or constitutional revolution.

21. The law of necessity brings forth fundamental questions of constitutional theory, such as the limits of constitutional legality, how constitutions should be interpreted in cases of constitutional deadlocks or grave emergencies, and what should be the role of the executive, the legislature and the judiciary. The reader will notice that, despite the different legal systems, the arguments raised had stellar similarities and relied to a great extent upon each other's jurisprudence. For this reason, a common law on the doctrine of necessity can be said to have formed through inter-judicial dialogue during the last century.

### **I. Central features**

22. The function of the doctrine of necessity is to temporarily turn what would otherwise be unlawful into something lawful.<sup>17</sup> This can refer to either legislation or executive acts of the government. As long as the circumstances of necessity last, some

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should be decided. Likewise, I use the term 'doctrine of (state) necessity' as a generic reference to all those cases in which the courts recognised laws and acts conflicting with the letter of the constitution as temporarily valid on the basis that they were necessary to maintain the existence and function of the institutions of the state and the legal order.

<sup>17</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964) 1 C.L.R. 195, 209.*

unconstitutional acts may be treated *as if* they were constitutional, provided they meet certain tests provided by the doctrine of necessity itself. The general idea of a state of necessity has been defined by courts on various occasions. In the *Governor-General's*, the court held that the doctrine could be properly invoked when the extreme urgency and imminence of the situation required it,<sup>18</sup> while in *Ibrahim* when there is 'an imperative and inevitable necessity or exceptional circumstances' and there is 'no other remedy to apply'.<sup>19</sup>

23. In practice, the doctrine of necessity has been generally invoked when adherence to the rules of the constitution results in a constitutional deadlock and in circumstances when the available institutions do not have recourse to an effective response within the constitution. When that occurs, the doctrine provides that it is within the powers of a court to allow temporary transgressions from constitutional restrictions and consider lawful – or perhaps 'legalise' the otherwise unlawful acts of the government or the legislature.

24. As the measures involved in these cases are temporary, they are not meant to permanently replace the constitution. They are designed to apply only until the state of necessity ceases. If these extraordinary rules are re-instituted and become permanent under a new constitution, then they stop being derived from the doctrine of necessity. The Cypriot supreme court established that 'the measure taken must be proportionate to the necessity' and 'of a temporary character limited to the duration of the exceptional

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<sup>18</sup> *Reference by His Excellency the Governor-General F.C. (1955) 7 P.L.D. 435, 485.*

<sup>19</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964) 1 C.L.R. 195, 265.*

circumstances'.<sup>20</sup> In agreement with these limitations, the Pakistani Supreme Court subjected its effect to the continuation of the necessity and required the existence of a causal link between the measures undertaken and the restoration of constitutional normalcy.<sup>21</sup> Therefore, the powers exercised under the doctrine of necessity are subject to judicial review on the grounds of a proportionality test.

25. The doctrine of necessity does not grant the power to amend the constitution, though case law has not always been consistent on this point. In the *Governor-General's* case, it was decided that the 'emergency legislative power [...] cannot extend to matters which are not the product of the necessity, for instance, changes in the constitution which are not directly referable to the emergency'.<sup>22</sup> This suggests that changes to the constitution are not, at first instance, permitted, with the unclear caveat that they may be 'directly referable to the emergency'. In a later decision, the Supreme Court of Cyprus took a similar approach. When the parliament attempted to change the constitution, the Court refused to condone it under the doctrine of necessity, declaring that it wasn't satisfied that an immense necessity was demonstrated. It asserted that the doctrine was only to be used as a means for the 'protection of constitutional order' and not for 'bypassing limitative provisions of the Constitution'.<sup>23</sup> In a different case, later, when the parliament tried again to pass a constitutional amendment, the Court condoned the changes by finding an interesting middle ground. The Court said that the amendments

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<sup>20</sup> Ibid.

<sup>21</sup> *Reference by His Excellency the Governor-General F.C. (1955) 7 P.L.D. 435, 486.*

<sup>22</sup> Ibid 436.

<sup>23</sup> *President of the Republic v. House of Representatives S.C. (1986) 3 C.L.R. 1439, 1460.*

were lawful but only temporarily; when the state of necessity ceases, they must either be validated under the normal constitutional process or cease to have an effect.<sup>24</sup>

26. A final issue is whether the powers under the doctrine of necessity can be invoked and exercised by a certain institution of the state, *i.e.* the executive, or by any institution. This may have implications for how the source of the powers under the doctrine, and hence its basis, is to be understood. In the *Governor-General's* case, it was the Governor-General, the highest executive official, who sought to retrospectively validate most of the defective constitutional acts enacted by the Constituent Assembly. The Supreme Court of Pakistan asserted that the invocation of necessity falls under the duties of the Head of State to prevent the state from total collapse. This was a controversial move, as the Governor-General was then competing with the powers of the Constituent Assembly, and the basic law bestowed the power to enact (and thus validate) constitutional acts solely to the Constituent Assembly.<sup>25</sup> Meanwhile, in *Ibrahim*, it was the legislature that acted. But that does not mean that only the legislature could take action. Instead, the Cypriot supreme court saw the matter as falling under the authority and responsibilities of the state as a whole, and thus both '[t]he Government and the Legislature are empowered and bound to see that legislative

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<sup>24</sup> *Koulounti a.o. v. House of Representatives a.o. S.C. (1997)* 1 C.L.R. 1026, para 16.

<sup>25</sup> This was recognised by the supreme court in *Usif Patel v. Crown F.C. (1955)* 7 P.L.D. 387, 388., when the Governor-General attempted for the first time to retrospectively validate the unconstitutional acts. The Constituent Assembly has been dissolved earlier by the Governor-General, thus leaving no alternative for an immediate response. It was the legality of this dissolution, after all, that was the subject matter of the *Governor-General's* case.

measures are taken in ensuring proper administration where was has been provided for under the constitution, for the purpose, has ceased to function'.<sup>26</sup>

27. In the cases examined, courts primarily relied on an axiomatic and principle-based approach. Particularly in the early jurisprudence, they initiated with the premise that the 'salvation of the people is the supreme law' to justify the acceptance of a 'law' of necessity. As the case law progressed, necessity was treated as a legal principle in its own right, analogous to the necessity defence met in other legal fields, and took the form of a judicial-made 'doctrine'.

28. In this chapter, I will trace the development of the doctrine of necessity in a series of seminal decisions in Greece, Pakistan, Cyprus, Nigeria and Canada, with further references to English and American case law. I will argue that each case brings a different aspect of the doctrine of necessity to the surface. The first decisions in Pakistan and Cyprus elaborated the grounds and content of the doctrine, whereas later decisions drew its connection to the rule of law. The discussion will prove essential to the examination of the basis of the doctrine in the next chapter.

## **II. Greece: Early elements of constitutional deviations**

29. Among the earliest cases of court-justified constitutional violations during an emergency can be found in Greece in the early 20<sup>th</sup> century. The Greek Constitution at the time included emergency clauses in case of war, but these only allowed for the suspension of certain individual rights and the establishment of extraordinary courts.<sup>27</sup>

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<sup>26</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964) 1 C.L.R. 195, 227.*

<sup>27</sup> The state of emergency could be declared in case of war and 'external dangers', or in case of 'threat to public order and to the safety of the country from internal dangers' (Art. 91). The

They did not interfere with the separation of powers and did not allow the executive to enact legislation under any circumstances. Despite that, the Greek governments would frequently overstep their constitutional boundaries during emergencies by enacting 'legislative decrees'. These were acts by which the executive was promulgating new laws without the participation of the parliament, in violation to the Constitution.

30. The Greek Government issued a series of legislative decrees amidst the urgencies arising during World War I (1914-1918).<sup>28</sup> The constitutionality of the legislative decrees would be first contested before the Supreme Civil and Criminal Court (hereinafter Supreme Court) in case 274/1917. The case concerned the unconstitutional prolongation of emergency criminal legislation by the government beyond its sunset clause. Unlike the prevalent tendency of the judiciary to avoid addressing claims of unconstitutionality during the war, the Supreme Court engaged directly with the question.<sup>29</sup> It confirmed that the legislative decrees were contrary to the separation of powers enshrined in the Constitution and that they did not find any support in its provisions. Nevertheless, it held that constitutional boundaries can be superseded when necessity so demands. It invoked the 'social axiom' that the salvation of the people is the supreme law to justify the executive decrees, holding that:

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suspended articles referred, among others, to the right to personal freedom (art. 5), the freedom of association (art. 10) and assembly (art. 11), the inviolability of home (art. 12), the freedom of the press (art. 14) and the judicial process for political crimes and crimes conducted via the press (art. 95).

<sup>28</sup> Also referred to as 'mandatory decrees', see Nicolaos Saripolos, *Ellinikon Sintagmatikon Dikaion [Greek Constitutional Law]* (Ant. N. Sakkoulas 1912) 178.

<sup>29</sup> Akritas Kaidatzis, *O Dikastikos Elechos ton Nomon Sthn Ellada (1844-1935) [The Judicial Review of Laws in Greece (1844-1935)]* (Sakkoulas 2016) 331.

...the executive power, based on the fundamental social axiom of *Salus Populi suprema lex esto*, has not only the power but also the obligation by its authority alone to surpass its constitutional limits and issue mandatory legislative decrees when the common salvation demands it...<sup>30</sup>

31. The Court explicitly upheld executive acts which were acknowledged to be in contradiction to the provisions of the Constitution. It used the axiom as an unwritten constitutional principle that could form the legal basis of the legislative decrees. This transformation of a historical dictum into a constitutional rule constitutes a judicial novelty; the Court did not have a precedent in mind. The validity of the legislative decrees was contingent on the satisfaction of certain conditions, namely: a) the existence of an emergency and b) the inability of the legislature to make a prompt response. It also held that the legislative decrees must eventually be validated by the parliament, thus deferring the review of these requirements (i.e. the existence of the emergency and the necessity of the decrees) to the legislature.

32. The decision of the Supreme Court was followed consistently in subsequent case law<sup>31</sup> and was adopted by the Council of State.<sup>32</sup> The Council of State maintained that the issuance of legislative decrees was beyond judicial review and was to be determined

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<sup>30</sup> Supreme Court 274/1917. Translation and emphasis mine.

<sup>31</sup> Anastasios-Ioannis Metaxas, *To Dikaion tis Anagkis kai i Diastasis tis Nomologias Simvouliou tis Epikratias kai Ariou Pagou [The Law of Necessity and the judicial conflict between Council of State and the Supreme Civil and Criminal Court]* (2nd edn, Eurasia 2017) 187. It was followed during the Greek-Turkish War (1919-1922) and up until World War II. In 1917 a decree suspended for one year the constitutional provisions regulating the judicial branch, particularly those related to the life tenure of judges, see Nicolaos Saripolos, *Ellinikon Sintagmatikon Dikaion [Greek Constitutional Law]* (Ant. N. Sakkoulas 1912)28) 195.

<sup>32</sup> For example, see Council of State 566/1936, which held that: ‘...the issuance of mandatory laws constitutes a *deviation from the constitutional legality, able to be justified only from the emergency* and covered under the responsibility of the Government...’ Translation and emphasis mine.

solely by the legislative or the executive branch.<sup>33</sup> It changed this position in 1945 when it held that the ‘urgent necessity’ required for the government to issue decrees contrary to the constitution no longer existed after the war.<sup>34</sup> It is worth noting that the Council distinguished the legislative decrees from the decrees that altered the constitution (constitutive decrees). The latter could not be held valid after the restoration of the constitutional order, as that would entail the parallel existence of contradictory sources of constitutional law: the constitution and the various constituent decrees. This is an important idea, as it confines the unconstitutional exercise of power to the enactment of ordinary law, thus differentiating it from constitutional revolutions.

33. Invocations to *salus populi* and necessity would cease after the 1952 Constitution allowed the government to issue legislative decrees when it was necessary to deal with exceptionally urgent matters.<sup>35</sup> In this way, the constitution incorporated the existing *contra-constitutionem* practice.<sup>36</sup> The law of necessity would make an indirect reappearance in Greece for the first time after World War II during the 2008 economic crisis. The minority opinion in a decision of the Council of State argued that the

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<sup>33</sup> See Council of State 2094/1953, 1997/1955, 1046/1959; Supreme Court 71/1955. The Supreme Court always rejected to review emergency resolutions and legislative decrees even before art. 35 para 2.

<sup>34</sup> Council of State 13/1945.

<sup>35</sup> Art. 35 par. 2.

<sup>36</sup> The power to issue legislative decrees was still abused, with their number surpassing many times that of ordinary legislation. See Anastasios-Ioannis Metaxas, *To Dikaion tis Anagkis kai i Diastasis tis Nomologias Simvouliou tis Epikratias kai Ariou Pagou [The Law of Necessity and the judicial conflict between Council of State and the Supreme Civil and Criminal Court]* (2nd edn, Eurasia 2017)31) 152-153, who demonstrates an analogy of 1 to 1.4 between ordinary legislations and legislative decrees on average for the years 1953-1966.

imposition of an extraordinary tax was legally valid, notwithstanding its contradiction to the letter of the constitution, for reasons of 'public interest' and financial need which the constitution did not foresee.<sup>37</sup> The judges did not elaborate further on this argument, nor did they offer a broader theory to ground their opinion, which was criticised as an attempt to (re-) introduce a state of exception in contemporary jurisprudence.<sup>38</sup>

34. The early development of the law of necessity in Greece was important in three ways. First, it provided a legal formalisation for unconstitutional emergency measures, through invocations of principles. Secondly, for setting conditions for the lawful invocation of such an exception. Thirdly, for having the judiciary as the protagonist in deciding the legality of unconstitutional emergency measures (even if only to a certain degree). These three will form the constitutive characteristics of the doctrine of necessity that will develop internationally in subsequent cases. Its influence will be imminent in Cyprus, where the law of necessity found its most widespread application and was shaped into a doctrine.

### **III. Pakistan: The doctrine's formation and deformation**

#### ***a) The Governor-General's case: the formulation of the doctrine of necessity***

35. The law of necessity played a pivotal role in Pakistan's constitutional history, which is marked by consecutive overthrows of its governments and suspensions of its

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<sup>37</sup> Council of State 693/2011.

<sup>38</sup> Konstantinos Yanakopoulos, 'To Dimosio Simferon Ipo to Prisma tis Oikonomikis Krisis [The Public Interest Under the Prism of Economic Crisis]' (2012) 1 Efimerida Dioikitikou Dikaiou, 104-105.

constitutional order.<sup>39</sup> The factors that would ultimately lead to the development of the law of necessity go as far back as the early days of the country's independence.

36. Under the 1947 Indian Independence Act, a Constituent Assembly (CA) would produce a constitution that would replace the 1935 Government of India Act as its basic law.<sup>40</sup> In the meantime, the two Acts would function as a provisional constitution, while the CA would also undertake the role of an interim legislature.<sup>41</sup> Furthermore, the primary administrative authority still rested with the Governor-General, an office representative of the British Crown and authorised with broad legislative and executive powers.<sup>42</sup> Two of the most notable powers of the Governor-General were the dismissal of any provincial government at will and the granting of royal assent to any legislation as a prerequisite to its validity.<sup>43</sup>

37. Due to various political events and disagreements over the religious or secular orientation of the future Constitution, the CA took about seven years to agree on a draft Constitution. During this time, it enacted several constitutional amendments that,

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<sup>39</sup> 'Although [Pakistan] was established with a parliamentary system of government, the military has seized power four times since 1947, ruling directly and indirectly for more than half the life of the Country', Paula R Newberg, *Judging the state: Courts and Constitutional Politics in Pakistan* (Cambridge University Press 2002) 9. See also Khan Faqir and Fakhru Islam, 'Study of the Emergency Rule in Pakistan, 2007' (2016) 21 *Pakistan Perspectives*, 129.

<sup>40</sup> Art. 8 par. (3) of the 1947 Indian Independence Act.

<sup>41</sup> Art. 8 par. (1) of the 1947 Indian Independence Act.

<sup>42</sup> '[...] the first Governors-General held an unusually wide array of powers that weakened the rest of government. From the start, Pakistan's Constituent Assembly struggled to assert its preeminence as a legislature and its predominance as a constitutive body [...]' Paula R Newberg, *Judging the state: Courts and Constitutional Politics in Pakistan* (Cambridge University Press 2002) 19.

<sup>43</sup> Art 5 and 6 of the 1947 Indian Independence Act.

among many things, curtailed many of the powers of the Governor-General, most notably the power to dismiss the Ministers of the Government.<sup>44</sup> Ultimately, the revised report of the Basic Principles Committee was approved by the CA on the 21<sup>st</sup> of September 1954, and the draft Constitution would be announced three months later, on the 25<sup>th</sup> of December.

38. However, a day before the announcement of the draft Constitution, the Governor-General, Malik Ghulam Muhammad, issued a proclamation by which he dismissed the CA on the grounds that it was no longer representative of the will of the people and that, due to its excessive delay in framing a Constitution, it was no longer able to function, concluding that the 'constitutional machinery has broken down'.<sup>45</sup> This was supported by the concern that the excessive delay of the CA has turned it into a perpetual legislator,<sup>46</sup> that could not face elections nor be dissolved.<sup>47</sup> The true reasons had more to do with the fact that the draft Constitution, in line with the previous

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<sup>44</sup> The hasty manner by which this amendment passed was criticized by some as a 'constitutional coup', see Hamid Khan, *Constitutional and Political History of Pakistan* (3rd edn, Oxford University Press 2017) 78.

<sup>45</sup> *Federation of Pakistan v. Tamizuddin Khan*, P.L.D. 1955 FC 240, 251.

<sup>46</sup> See Leslie Wolf-Phillips, 'Constitutional Legitimacy: A Study of the Doctrine of Necessity' (1979) 1 *Third World Quarterly* 97, 98.

<sup>47</sup> Indeed, the 1947 Indian Independence Act did not foresee what would happen in case the CA could not or would not decide upon a Constitution. Since the CA would function as a legislator in the meantime, it created a valid danger with no constitutional way out. The same did not happen in other former colonies: India, under the same Act, drafted its new Constitution by 1949, only 2 years after gaining its independence.

constitutional amendment acts, revised the powers of the Governor-General to fit the far more reserved duties of the President in a parliamentary system.<sup>48</sup>

39. The President of the dissolved CA filed a petition in the Chief Court of Sind for a writ of *mandamus* to restrain the government from giving effect to the proclamation, and a writ of *quo warranto* to invalidate the appointment of some ministers to the federal government under section 223-A,<sup>49</sup> challenging the proclamation as unconstitutional and *ultra vires*. The Federal Government, *inter alia*, contested the Court's jurisdiction to issue such writs, since any constitutional provision passed by the CA requires the assent of the Governor-General to be *valid*.<sup>50</sup>

40. In its decision, the Chief Court granted the writs, holding that the 'necessity of assent was retained in the Government of India Act in respect of the federal legislation', not the CA in exercising its constitutional-making powers as a sovereign body.<sup>51</sup> The Government then appealed the decision to the Federal Court, which found that, contrary to the Chief Court's decision, the *Governor-General's* assent was a condition for the validity even of constitutional laws made by the CA.<sup>52</sup> As a result, the constitutional

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<sup>48</sup> The draft Constitution provided that the President would only act with the advice of the appropriate minister unless discretion is expressly provided in the Constitution (art. 43 [3]), such as the grant of pardons (59) or the appointment of the prime minister that in his opinion could secure a vote of confidence (61).

<sup>49</sup> Section 223-A of the Government of India Act was enacted by the 1954 Government of India (Amendment) Act, postulating that: 'Every High Court shall have [...] to issue [...] writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* or any of them'.

<sup>50</sup> Under art. 6 par. (3) of the 1947 Indian Independence Act: 'The Governor-General [...] shall have full power to assent in His Majesty's name to any law of the Legislature [...]'.  
<sup>51</sup> *Moulvi Tamizuddin Khan v. Federation of Pakistan Sind H.C. (1955) 7 P.L.D. 96, 104.*

<sup>52</sup> *Federation of Pakistan v. Moulvi Tamizuddin Khan F.C. (1955) 7 P.L.D. 240, 306.*

law amending the Government of India Act was invalid, and therefore the Court lacked jurisdiction to grant the writs sought.

41. This victory for the Governor-General, however, had horrendous legal implications. In the period of seven years, the CA passed forty-six constitutional amendments, none of which received the assent of the Governor-General.<sup>53</sup> For this reason, not only Section 223-A but all the other forty-five constitutional laws were found to be *ab initio* void. The consequences of finding so many enactments to be null were devastating for the government of Pakistan.<sup>54</sup> These constitutional laws constituted the basis of several judicial decisions, the creation of state organs, the enactment of legislation, and acts of the Governor-General himself.<sup>55</sup> The Governor-General quickly issued an Emergency Powers Ordinance<sup>56</sup> by which he sought to retrospectively validate the constitutional laws (not including section 223-A). According to the 1947 Indian Independence Act, however, the power to enact constitutional legislation was

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<sup>53</sup> The reason for such omission is both because the CA regarded itself as a sovereign body that requires no such assent when passing constitutional laws, and also to exhibit an element of 'autochthony', see Peter W Hogg, 'Necessity in a Constitutional Crisis' (1989) 15 *Monash University Law Review* 253, 260.

<sup>54</sup> Yet they were by no means unexpected. Indeed, The High Court warned about the implications that such a finding would have: 'If every one of these Acts were held invalid for want of assent, the consequences are bound to be disastrous,' *Moulvi Tamizuddin Khan v. Federation of Pakistan Sind H.C. (1955) 7 P.L.D. 96, 14251* 142.

<sup>55</sup> 'The decision of the Federal Court presented the country with a constitutional crisis of a greater magnitude than when the Governor General had dissolved the Constituent Assembly. [...] Even provincial legislatures were deemed to have been illegal [...]. In fact, the entire legal and administrative system was on the verge of collapse', Hamid Khan, *Constitutional and Political History of Pakistan* (3rd edn, Oxford University Press 2017)44) 86.

<sup>56</sup> Emergency Powers Ordinance, No. IX of 1955 under art. 42 of the 1935 Government of India Act.

recognised solely to the CA and not to the Governor-General. In *Usif Patel v. The Crown*, the Federal Court took the view that any validation with retrospective effect is tantamount to legislation, and 'legislation you cannot validate what you cannot legislate upon'.<sup>57</sup> Consequently, it held that a retroactive validation of the constitutional laws by the Governor-General would constitute an exercise of the constitutional power that only the CA can exercise and hence declared the Ordinance *ultra vires* and invalid.

42. Faced with the danger of a complete collapse of the legal system (the constitutional laws and all the other laws and institutions based on them), the Governor-General made a Reference to the Federal Court,<sup>58</sup> enquiring whether there was 'any provision in the Constitution or any rule of law applicable to the situation by which the Governor-General could by order or otherwise declare that all [...] acts done under those laws should be valid and enforceable [...]'.<sup>59</sup> To provide an escape from the impossible situation created by its previous decisions, the Federal Court resorted to the 'principle of civil or state necessity'.

43. The essence of this principle, according to the Court, is that it allows an act that would otherwise be illegal to become legal if the extremeness and imminence of the situation dictate it. The necessity is linked to the preservation of the constitution and the prevention of the dissolution of the state and society. By a slight majority (three-

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<sup>57</sup> *Usif Patel v. Crown F.C. (1955) 7 P.L.D. 387, 388.*

<sup>58</sup> Under art. 213 of the 1935 Government of India Act.

<sup>59</sup> Reference By His Excellency The Governor-General (under section 213 of the Government of India Act, 1935), Special Reference No. 1 of 1955.

two),<sup>60</sup> the Federal Court held that the Governor-General had indeed the power to validate the laws listed in the 1955 Emergency Powers Ordinance temporarily and until their validation is ultimately decided and enacted by the CA.

44. Three questions are pertinent: First, who may invoke the principle of civil and state necessity; second, what is the nature of the powers granted; and third, what are the limits of the principle of necessity. The decision does not explicitly address all of these questions and is scarce in detail. Yet, from the way the doctrine was argued for, we may identify its main features and provide some answers.

45. First, the invocation of necessity falls under the duties of the Head of the State to prevent the state from a total collapse. The unconstitutional acts are meant to be undertaken by the highest executive authority of the state, which is seeking to validate actions exercised *ultra vires*. Indeed, the government partially based its claim (which the Court adopted) on the position of the Governor-General as head of the state and as a representative of the King, linking the extra-constitutional power with the prerogative power of the sovereign,<sup>61</sup> and on maxims such as *salus populi suprema lex* and *salus reipublicae est suprema lex* (the safety of the state is the supreme law). These imply that the deviations from the written constitution are in service of the fundamental goals of

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<sup>60</sup> In his dissenting opinion, Justice Cornelius argued that a state of necessity may justify restrictions to the rights of citizens, but it cannot legitimize 'interference with constitutional instruments', *Reference by His Excellency the Governor-General F.C. (1955) 7 P.L.D. 435, 510-511*.

<sup>61</sup> Though at the closing of his opinion, Judge Munir emphasized that such references to the 'Crown' and the 'King' are only meant as legal abstractions and that they should in no way be misunderstood as entailing a dependency on or authority of the United Kingdom towards Pakistan, *ibid* 488.

the state<sup>62</sup> and are aimed at protecting instead of subverting or replacing it, as would be the case of a coup or a revolution.

46. Secondly, the extra-constitutional powers granted by the principle of necessity are temporary. They are effective only during the interim period of necessity, and their fate is ultimately decided by the organ(s) constitutionally empowered as such. They are, therefore, different in nature and do not substitute constitutional powers. The basis of justification of the former is purely the necessity of the circumstances, and, thus, they diminish when necessity ceases. This also means that their effectiveness is not only related to the affirmation of the necessity but is also subject to the reinstatement of the constitutional order as soon as possible.<sup>63</sup> A perpetual rule under the principle of necessity would contrast its temporary nature and would, subsequently, undermine its legitimacy.

47. Thirdly, the decision does give some slight indications of the content of the extraordinary powers. Judge Munir states that the 'emergency legislative power [...] cannot extend to matters which are not the product of the necessity, for instance, changes in the constitution which are not directly referable to the emergency'.<sup>64</sup> As the emergency in this situation is the legal lacuna created by the lack of assent to the constitutional laws passed by the CA, the extraordinary powers should extend only to the temporal validation of these illegally enacted acts. It would thus be reasonable to

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<sup>62</sup> Mark M Stavsky, 'The Doctrine of State Necessity in Pakistan' (1983) 16 Cornell International Law Journal 341, 368

<sup>63</sup> *Reference by His Excellency the Governor-General F.C. (1955)* 7 P.L.D. 435, 486.

<sup>64</sup> *Ibid* 436.

assume that the Governor-General had no power to amend these acts or enact new ones (even with a temporary effect). On the other hand, it does not follow that all the other constitutional laws could be validated by the Governor-General; that would only be the case if every single one of them is linked to the danger of state collapse. If section 223-A, for instance, is not part of such a necessity (as it was not included in the Ordinance), the same could also be true for other acts of the CA.

48. The next important question is how the Court justified the legal basis of the doctrine of necessity. We can identify two approaches that, even though the Court presented them as a single argument, should be distinguished.

49. First, the doctrine of necessity derives from the prerogative powers of the head of the state, which, in this case, is linked to the Governor-General being a representative of the Crown. Judge Munir referred to cases such as the confiscation by the British Government of private property during WWI under the maxim *salus populi suprema lex*,<sup>65</sup> and the forfeiture of Lord Baltimore's charter of Maryland and the grant of it to another Governor.<sup>66</sup> In his opinion, all these cases share a common trait: that what was

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<sup>65</sup> The Court primarily relied on *Re An Arbitration Between Shipton, Anderson & Co and Harrison Brothers & Co D.C.* (1915) 3 K.B. 676 and on *Attorney-General v. De Keyser's Royal Hotel UKHL* (1920) 1 A.C. 508. In the latter case, Lord Moulton would recognize that the Crown enjoyed 'wide prerogative powers as to taking or using the lands of its subjects for the defence of the realm when the necessity arose', but only 'in circumstances where the rule *salus populi suprema lex* was clearly applicable'.

<sup>66</sup> See George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence: Chiefly Concerning the Colonies, Fisheries, and Commerce of Great Britain; Collected and Digested, from the Originals in the Board of Trade and Other Depositories* (Burlington [Vt.]: C. Goodrich 1858) 65-66.

supposed to be illegal has been rendered legal in light of the immediate necessity that justified the exercise of the prerogative power of the monarch.

50. Secondly, the principle of civil or state necessity constitutes an implied rule that is 'part of the common law of all civilized States and which every written Constitution of a civilized people takes for granted'.<sup>67</sup> The principle under this approach constitutes an unwritten law at a (*supra*) constitutional level that allows the head of the state to engage in otherwise unconstitutional acts to preserve the constitutional order. An example offered by Judge Munir is the succession of Charles II and William III to the British Crown by an unconstitutionally constituted Parliament justified by the necessity of the situation.<sup>68</sup> Furthermore, Judge Munir drew analogies from the extraordinary powers recognised to an Army Commander during Martial Law,<sup>69</sup> and the necessity defence recognised in common law for private persons.<sup>70</sup> He then expanded<sup>71</sup> *a fortiori* these instances of necessity to constitutional law, to include the exercise of

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<sup>67</sup> *Reference by His Excellency the Governor-General F.C. (1955) 7 P.L.D. 435, 478.*

<sup>68</sup> In reference to Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (J. Butterworth and Son 1820) 68; Frederick William Maitland, *The Constitutional History of England* (Cambridge University Press 1908) 283-286.

<sup>69</sup> *Reference by His Excellency the Governor-General F.C. (1955) 7 P.L.D. 435, 483.*

<sup>70</sup> *Ibid* 485. Judge Munir referred to the deposition of Lord Pigot, Governor of the Settlement of Madras in East Indies, by private individuals on the information that he violated the Constitution of Mandras. In his address, Lord Mansfield argued that the defendants must be acquitted if the takeover of the government was dictated by an extreme and imminent necessity to cease its illegal activity. He noted that this can happen to India, where there is no superior authority to apply to, but not in England (presumably because the Monarch constitutes such a superior authority).

<sup>71</sup> This expansion was criticized by Judge Cornelius in his minority opinion: 'Such extraordinary powers are generally confined to matters affecting the property and the persons of individual subjects. [...] [B]ut it is clearly very far removed from the power of interference with constitutional instruments' *ibid* 511.

extraordinary powers (in this case legislative) by a state organ (the Head of the State) in emergencies caused by factors beyond war. He thus passed from the law of 'natural necessity' to the 'law of civil and state necessity'.

51. The second approach would come to be the prevalent one in subsequent case law, both in and outside Pakistan. This comes as no surprise, as the disputable recognition of prerogative powers to the Governor-General<sup>72</sup> would soon come to an end with the enactment of the first constitution and the replacement of his office with that of a constitutionally instituted President. It fits better with the non-monarchical character of many constitutional states that would come to invoke the principle of necessity, and that would even come to include unconstitutional acts undertaken by other entities, public or private, instead of the Head of State.

***b) Subsequent deformation under the principle of effectiveness***

52. The next constitutional crisis would indicate some boundaries to the doctrine of necessity and its difference from constitutional coups. Interior Minister Major General Iskander Mirza deposed the Governor-General and became the President of Pakistan after the promulgation of the new constitution by the CA in 1956. Two years later, President Mirza abrogated the constitution by a Proclamation, dissolved the National Assembly, dismissed the Government, and declared Martial Law. Only six days later, the Supreme Court would hear *State v. Dosso*,<sup>73</sup> a case that concerned the alleged

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<sup>72</sup> Which was another point raised by Judge Cornelius against the majority opinion: 'The case might have been different if the Governor-General were not, as must be held on the authorities, a mere constitutional head. If he were a political sovereign, he might have claimed such powers as, for instance, the King of England was advised that he could exercise', *ibid* 515.

<sup>73</sup> *The State v. Dosso S.C. (1958) 10 P.L.D. 533.*

violation of certain rights under the 1956 Constitution. To reach a decision, the Court had to first determine whether the 1956 Constitution was still in force and, accordingly, the legal validity of the President's regime. Judge Munir, in an opinion much-criticised for misreading Hans Kelsen's theory of law,<sup>74</sup> held that the 'revolution' replaced the former constitutional order with a valid new one based on it being effective (doctrine of effectiveness),<sup>75</sup> and as such, the abrogated constitution was no longer in force.<sup>76</sup> Ironically, President Mirza was usurped by General Ayub Khan on the very day of the judgment, making Judge Munir's affirmation of the regime's efficacy even more questionable.

53. In 1962, Ayub Khan enacted a new constitution and held power as President of the Republic of Pakistan until 1969. Due to nationwide disapproval of his policies, and particularly because of the growing unrest in East Pakistan, Ayub Khan handed over power to General Yahya Khan,<sup>77</sup> who declared Martial Law, abrogated the 1962 Constitution, and ruled by Provisional Constitutional Order until the secession of East

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<sup>74</sup> 'The judgment in *Dosso's* case [...] was a retrogressive one, and set the clock back in the constitutional development and strengthening', Hamid Khan, *Constitutional and Political History of Pakistan* (3rd edn, Oxford University Press 2017) 122.

<sup>75</sup> Kelsen himself never described efficacy as the sole condition for validity and was firmly against a normative view of his theory. In his own words: '[T]he essence of my view of the relationship between validity and efficacy of legal norms is that "the efficacy of the legal order is only the condition of validity, not the validity itself" and "[N]ever, not even in the earliest formulation 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' in Hans Kelsen, 'Professor Stone and the Pure Theory of Law' (1964) 17 *Stanford Law Review* 1128, 1134.

<sup>76</sup> 'In short, Munir argued that if the coup d'état is successful, it is lawful', Yasser Kureshi, *Seeking Supremacy: The Pursuit of Judicial Power in Pakistan* (Cambridge University Press 2022) 56.

<sup>77</sup> Under the 1962 Constitution, which Ayub Khan himself framed, the Speaker of the National Assembly should act as President in case the seat of the latter becomes vacant.

Pakistan in 1971.<sup>78</sup> Only then, after Yahya Khan lost power, would the validity of his regime be scrutinised by the Supreme Court in the *Asma Jilani v. Government of Punjab* case.<sup>79</sup>

54. The Court overturned the *Dosso* judgment, rejecting every premise in Judge Munir's opinion. More interestingly, it refused to validate Yahya Khan's regime by use of the law of necessity. The military rule was held to be legally null, but validity was granted to a set of acts and transactions on the basis of 'condonement'. It recognised as valid those acts and transactions that would be valid if made under the 1962 Constitution, or those which would promote the good of the people.<sup>80</sup>

55. In the Court's view, the difference between the principle of necessity from that of condonement is one of legitimisation: whereas the former recognises the laws and acts passed as legal, the latter only grants them with *ex-post* validity notwithstanding their overall illegality, merely on the basis of their present value.<sup>81</sup> It's better to say that the doctrine of condonement and the doctrine of necessity follow different rationales. In the doctrine of necessity, the reason for legalising the unlawful measures rests on their actual need to preserve the legal order and to prevent an important harm to the public interest. In the doctrine of condonement, the invalid acts are not legalised

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<sup>78</sup> Khan Faqir and Fakhrul Islam, 'Study of the Emergency Rule in Pakistan, 2007' (2016) 21 *Pakistan Perspectives* 39) 131.

<sup>79</sup> *Asma Jilani v. Government of the Punjab S.C. (1972)* 14 P.L.D. 139.

<sup>80</sup> *Ibid* 206-207.

<sup>81</sup> As Kureshi notes, the Court did not reject the doctrine of necessity altogether; it simply held that Yahya Khan's regime did not meet its requirements, Yasser Kureshi, *Seeking Supremacy: The Pursuit of Judicial Power in Pakistan* (Cambridge University Press 2022) 73, n 49.

because they are necessary or because their invalidity would harm the public good. Instead, it's because their invalidity rests solely on the general illegality of the regime. Their illegality is merely a side effect; they would otherwise be lawful if conducted under a lawful regime. Furthermore, their legalisation does not pose any threat to the rule of law (other than curing their illegality), while their nullification would lead to the frustration of many private interests.

56. Whatever limitations to the doctrine could be inferred from the *Dosso* and *Asma Jillani* cases, they would soon be lost in the 1977 *Bhutto* case. The restoration of constitutional order in 1971 was short-lived. In 1977, General Zia-ul-Haq, amidst massive and violent social unrest after allegations of electoral fraud, imposed Martial Law and suspended the 1973 Constitution, which was passed shortly after the fall of Yahya Khan at the end of martial law.<sup>82</sup> The leader of the Pakistani People's Party, Zulfikar Ali Bhutto, was arrested, and his wife, Nusrat Bhutto, appealed the detention and challenged the legality of the Martial Law.<sup>83</sup> This time, the Supreme Court did not seek to validate the coup through Kelsen. Instead, it acknowledged the necessity of the intervention of the Armed Forces to restore public order and avoid further bloodshed. Furthermore, it held that the constitution was not abrogated but only partially (and temporarily) suspended, since the Courts and the President of Pakistan were still in function.<sup>84</sup> The interference of the army was viewed as a temporary act to ensure that

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<sup>82</sup> Leslie Wolf-Phillips, 'Constitutional Legitimacy: A Study of the Doctrine of Necessity' (1979) 1 *Third World Quarterly* 9746) 116.

<sup>83</sup> *Begum Nusrat Bhutto v. Chief of Army Staff S.C. (1977) 19 P.L.D. 657.*

<sup>84</sup> The judgment was positively received, at that time, for upholding the 1973 Constitution and not casting it away as in 1958. Furthermore, the fact that the Court even proceeded with the

free and fair elections would be held as soon as possible. Consequently, the Court justified these acts based on the principle of necessity.<sup>85</sup>

57. The deviations from the established doctrine of necessity were severe. The Court problematically used the principle to legitimise a military intervention despite the existence of functional state organs with the constitutional duty to deal with extraordinary circumstances. Unlike the *Governor-General's* case, there was no constitutional deadlock that prevented the state organs from taking the necessary measures. Furthermore, as hastily as it affirmed the efficacy of the regime in *Dosso*, so did it now proclaim the temporary character of General Zia's military intervention, which ultimately proved to be one of the most resilient military regimes in Pakistan's history. Moreover, contrary to its former decision, the Court included the 'power to amend' the constitution in the set of powers recognised under the principle of necessity, a phrase which was used by General Zia as a *carte blanche* to alter the Constitution in any way he wished, even without connection to necessity.<sup>86</sup> But most importantly, against what the Supreme Court had set out as a prerequisite for the invocation of the

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hearing of the case, contrary to the Martial Law which prohibited any judicial review of the ordinance, has been seen as a brave move, see Mark M Stavsky, 'The Doctrine of State Necessity in Pakistan' (1983) 16 *Cornell International Law Journal* 341(62) 385. Upholding a law that excludes judicial review is, of course, paradoxical. As Newberg puts it, 'To circumvent the awkward contradiction of validating an order that nullified the authority of the validating body, he [the Chief Justice] simply ignored its most basic provision' see Paula R Newberg, *Judging the state: Courts and Constitutional Politics in Pakistan* (Cambridge University Press 2002) 166, 168.

<sup>85</sup> Viewing these acts as necessary and therefore valid, the Court refused to invoke condonement, see Leslie Wolf-Phillips, 'Constitutional Legitimacy: A Study of the Doctrine of Necessity' (1979) 1 *Third World Quarterly* 97, 119.

<sup>86</sup> Hamid Khan, *Constitutional and Political History of Pakistan* (3rd edn, Oxford University Press 2017) 331.

principle in its previous decision, these actions were not undertaken by the Head of State. This is a substantial deviation from the doctrine as set in the *Governor-General's* case, where important arguments and references to case law were based on his status as Head of State.<sup>87</sup>

58. The Court did not justify these changes. Though it stated that the doctrine has been accepted in several precedent cases, it wasn't as detailed in elaborating on its prerequisites or its limitations. Invoking the aforementioned maxims, it concluded that 'the authorities inducted into power on account of State necessity and the principle of *salus populi suprema lex* are fully entitled to administer the country and exercise *supra-Constitutional* powers for this purpose'.<sup>88</sup> What truly happened is that the law of necessity was intermixed with the doctrine of effectiveness espoused in *Dosso*, blurring the distinction between constitutional revolution.<sup>89</sup> This confusion would be passed down to other jurisdictions in the future, when, upon determining the legality of a revolutionary regime, courts would resort to both the effectiveness test and the invocation of necessity.<sup>90</sup>

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<sup>87</sup> Mark M Stavsky, 'The Doctrine of State Necessity in Pakistan' (1983) 16 *Cornell International Law Journal* 341, 376.

<sup>88</sup> *Begum Nusrat Bhutto v. Chief of Army Staff S.C.* (1977) 19 *P.L.D.* 657, 705(83) 705, emphasis mine.

<sup>89</sup> Also see Constantinos. Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas 2015) 67.

<sup>90</sup> Examples include the *Mitchell v Director of Public Prosecutions* (First Instance and Appeal) cases in Grenada ([1985] LRC [Const.] 127 and [1986] LRC [Const.] 35 respectively) and *Madzimbamuto v Lardner-Burke* (first Instance, Appeal and Privy Council) cases in Southern Rhodesia ([1966] RLR 756 [Rhodesia Gen. Division], [1968] 2 S.A. 284 [Rhodesia Appeal Division], [1968] 3 All E.R. 561 [Privy Council] respectively). In Grenada, the doctrine of necessity was invoked to temporarily legalize institutions (including the deciding supreme court) created

59. This swift change to the doctrine would be preserved in subsequent case law. Political normalcy was relatively restored after the death of Zia in 1988 until General Pervez Musharraf interfered in 1999, suspending the Constitution and declaring a state of emergency. In *Zafar Ali Shah v. General Pervez Musharraf*,<sup>91</sup> the Court reaffirmed its previous decision in *Bhutto* and legalised the military intervention as necessary to prevent a collapse into chaos. The Constitution was again held to be the supreme law of the country, albeit in partial suspension under the state of necessity. Interestingly, it held that amendments to the Constitution were lawful to the extent that they did not alter its salient features. What seemed to be the beginning of the formulation of a Basic Structure Doctrine that would stand as a limitation to the doctrine of necessity soon lost its impetus. Nine years later, in the *Pakistan Lawyers' Forum v. Federation of Pakistan* case,<sup>92</sup> the Supreme Court held that a constitutional amendment that was restoring the President's power to dissolve the parliament, as well as an act allowing the President to simultaneously hold the office of the Chief of Army Staff, were valid,

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when a revolutionary regime was in power and after it collapsed. Necessity was used in combination with effectiveness to justify the legitimacy of the regime due to its efficacy, through a selective reading of the *Jilani* case that, in truth, reflected the *Dosso* case ([1985] LRC [Const.] 127, 150-151). In Southern Rhodesia, the courts had to decide whether a recent coup constituted the new legitimate government. The Court of First Instance found that the government was not yet effective in the Kelsenian sense, and thus not legitimate. Nevertheless, it proceeded to uphold its actions as it was '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' ([1966] RLR 756, 848). Thus effectiveness was implemented in the form of the doctrine of necessity. Most of the discussion in the Court of Appeal and Privy Council centred around the matter of the effectiveness of the revolutionary government.

<sup>91</sup> *Zafar Ali Shah v. Pervez Musharraf* S.C. (2000) 52 P.L.D. 869.

<sup>92</sup> *Pakistan Lawyers Forum v. Federation of Pakistan* S.C. (2005) 57 P.L.D. 719.

allowing for the 'salient features' of the constitution to 'evolve' as the political system of Pakistan adjusts to novel circumstances.

60. That would be the last invocation of the doctrine by the judiciary. After the defeat of Musharraf's party in the 2008 elections,<sup>93</sup> political normalcy was once again restored and the doctrine of necessity, which dominated the jurisprudence of Pakistan for almost its entire history, seems to have finally been left aside. In 2012, the Supreme Court dismissed the 'malignant doctrine of necessity' as now being 'buried',<sup>94</sup> and again, in 2019, the Special High Court rejected the claim that Musharraf's actions were legal under the principle of necessity.<sup>95</sup> Commenting on the early decisions that led to its adoption, the Court concluded that: 'Had the hon'ble Superior Judiciary, at that time, not invoked the Doctrine of Necessity, and had proceeded against usurpers, abrogators, subvertors, the Nation would not have seen this day at least, where an officer in uniform repeats this offense'.

61. Pakistan's case law demonstrates an unfortunate journey of the law of necessity. It shows how necessity may be initially invoked as a formulated deviation from normalcy based on existing (though scarce) doctrine, yet abandons, bit by bit, its early premises to accommodate more radical departures from the constitution. The reason

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<sup>93</sup> Khan Faqir and Fakhru Islam, 'Study of the Emergency Rule in Pakistan, 2007' (2016) 21 *Pakistan Perspectives* 39) 145.

<sup>94</sup> Syed Yousaf Raza Gillani v. Assistant Registrar, SC and other, Intra Court of Appeal 1/2012 Order, Martin Lau, 'Contempt of Court Case Part IV: Selected Cases: Pakistan' (2010) 16 *Yearbook of Islamic & Middle Eastern Law* 489, 501.

<sup>95</sup> *The Federal Government of Pakistan v General (R) Pervez Musharraf Special Court (2019) I.H.C.* 208.

behind this change is the corrosion of the law of necessity by the doctrine of effectiveness. The law of necessity was initially formulated as a special power exercised by the head of the state, parallel to that of the prerogative powers of a sovereign monarch, and (or rather: or) as a legal rule inherent to all legal orders. In the first case, it constitutes a justification for the exercise of a special (prerogative) power. In the second, it is an unwritten rule with a legalising effect, in a way parallel to how necessity is invoked in private, criminal, or international law. Thus, in its nature, it is a defence used to legalise interventions in the constitutional order. This latter approach to the law of necessity would be subsequently adopted and developed in greater detail by the Supreme Court of Cyprus.

#### **IV. Cyprus: Necessity as a constitutional alternative**

62. The Republic of Cyprus gained its independence from the British Empire in 1960 as a unitary bi-communal State with the Greek-Cypriot and the Turkish-Cypriot communities. At the time, the Greek-Cypriot Community constituted about 77% of the total population, while the Turkish-Cypriot Community constituted 18%. Mistrust and animosity were widespread between the two communities, and the future of the island was largely affected by the intervention of the United Kingdom, Greece, and Turkey. The Cypriot 1960 Constitution was the result of major compromises<sup>96</sup> between these three states, which undertook the role of guarantor powers to achieve a sustainable

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<sup>96</sup> Constantinos Kombos and Athena Herodotou, '(Un-) Constitutional Amendments: The Cypriot Paradigm' (2019) 25 Eur Pub L 305, 307.

unitary state.<sup>97</sup> In its 199 Articles,<sup>98</sup> the Constitution detailed strict provisions for the function of the state that would ensure the protection of the Turkish-Cypriot minority and its participation in the legislative, executive, and judicial branches.

63. Under the Cypriot Constitution, the President of the Republic should be Greek, while the Vice-President should be Turkish (art. 1). The legislative power was to be exercised by the Communal Chambers and, primarily, by the House of Representatives (art. 61), a body whose members should be elected at 70% by the Greek Community and 30% by the Turkish Community. The members of the Communal Chamber should also be elected from amongst their members by the Greek and the Turkish Communities respectively (art. 86). The Supreme Constitutional Court was composed of a Greek, a Turkish, and a neutral judge and had the exclusive jurisdiction to hear questions on constitutional matters (art. 133 par. 1). The High Court of Justice, which functioned as the highest appellate court (art. 154), was also composed of two Greek judges, one Turkish and one neutral President (art. 153).

64. Not only was the Constitution profoundly strict, but it was also very rigid. It included a series of entrenched clauses that regulated all the important aspects of the state. Under art. 182, 48 out of the 199 articles, which included the aforementioned art. 61, 86, and 133 para 1, constituted the Basic Articles of the Constitution which 'cannot, in any way, be amended, whether by way of variation, addition or repeal' while any otherwise permitted amendment 'shall be made by a law passed by a majority vote

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<sup>97</sup> Achilles Emilianides, 'Accession of the Republic of Cyprus to the EU, the Constitution and the Cypriot Doctrine of Necessity' (2007) *Cyprus Yearbook of International Relations* 65, 68.

<sup>98</sup> 186 articles excluding the transitional provisions.

comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and at least two-thirds of the total number of the Representatives belonging to the Turkish Community'. This strictness and rigidity of a non-autochthonous<sup>99</sup> constitution that introduced a novel order to the country would soon prove to be formidable.

65. In 1964, after a series of violent conflicts between the Greek and Turkish communities, the Turkish Cypriots withdrew from the House of Representatives, the Turkish Vice-President vacated his office, and the Turkish judges and neutral Presidents of the Constitutional Court and the Supreme Court resigned.<sup>100</sup> Appointment of new judges was impossible, as art. 133 par. 1 and 2 of the Constitution mandated the participation of the (Turkish) Vice-President in the process, and the two Highest Courts became inoperable, with the Supreme Constitutional Court having not heard a case for 14 months.<sup>101</sup> Furthermore, since the Turkish Cypriots no longer participated in the House of Representatives, no new legislation could be enacted. In short, without the participation of one of the two communities, the state could no longer perform its basic functions, nor could the Constitution be amended due to the entrenched or unamendable provisions.

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<sup>99</sup> The people of Cyprus did not participate to the Zurich and London Agreements of 1959, where the structure of its Constitution was decided between the UK, Greece and Turkey. See Achilles Emilianides, 'Cyprus' in Gerhard Robbers (ed), *Encyclopedia of World Constitutions* (Facts on File 2007) 240.

<sup>100</sup> Georghios M. Pikis, *Constitutionalism - Human Rights - Separation of Powers: the Cyprus Precedent* (vol 4, Martinus Nijhoff Publishers 2006) 28.

<sup>101</sup> More than 400 cases were awaiting trial by the time Law 33 was enacted on 9 July 1964, see *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964)* 1 C.L.R. 195, 249.

66. There was no alternative provided by the Constitution for such a turn of events,<sup>102</sup> leaving the legislature to choose between following the letter of the Constitution, which would result in constitutional paralysis, or resorting to extra-constitutional emergency legislation that would enable the state to function.<sup>103</sup> Opting for the latter, the legislature passed, in the absence of the Turkish-Cypriot members of the Parliament, and without the promulgation by both the President and Vice-President, Law 33/1964 concerning the 'Administration of Justice'. Under this legislation, the jurisdiction of the Supreme Constitutional Court and the High Court of Justice would be exercised by a (new) Supreme Court (art. 3 para 1).

67. The constitutionality of this law would soon be challenged before the Supreme Court in the landmark 1964 *Ibrahim* case. The case concerned three appeals filed by the Attorney-General against decisions of District Judges that granted bail to Turkish Cypriots charged with participating in warlike undertakings and use of armed force against the Government. The defendants contended that the Supreme Court lacked jurisdiction to hear the appeals and to decide questions on constitutional matters since Law 33/1964 violated the Constitution in the aforementioned ways. The Attorney-General did not contest the factual truth of these arguments but invoked the 'law of necessity for the preservation of fundamental services in the State' to justify them.<sup>104</sup>

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<sup>102</sup> Achilles Emilianides, 'Cyprus' in Gerhard Robbers (ed), *Encyclopedia of World Constitutions* (Facts on File 2007)97) 68.

<sup>103</sup> Constantinos Kombos and Athena Herodotou, '(Un-) Constitutional Amendments: The Cypriot Paradigm' (2019) 25 Eur Pub L 305, 305-306, 309.

<sup>104</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964) 1 C.L.R. 195, 208*12) 208.

68. The Court acknowledged that the enactment and promulgation of the law were not in accordance with the constitutional requirements but found that such deviation was justified under the 'law of necessity'.<sup>105</sup> It developed a series of requirements that need to be satisfied for the application of the law of necessity: a) an imperative and inevitable necessity or exceptional circumstances, for which b) no other remedy is possible; c) the remedy must be proportionate to the necessity, and, finally, d) be temporary, limited to the duration of the exceptional circumstances.<sup>106</sup>

69. The question asked in the *Governor-General's* case emerges once more: how was the 'law of necessity' justified? Though the Court accepted in principle that 'in the absence of a Proclamation of Emergency' there can exist no state of emergency in Cyprus, it remarked how this only shows 'how far from reality some of our constitutional provisions can now be found'.<sup>107</sup> The Court did not make clear whether the law of necessity was to be understood as an overriding unwritten principle derived from the Cyprus Constitution or, instead, a rule of natural law existent in every legal order. Judge Josephides interpreted the Constitution as including the doctrine of necessity as an 'implied exception to particular provisions [...] in order to ensure the very existence of

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<sup>105</sup> For an enumeration of the central points of the decision, see Georghios M. Pikiis, *Constitutionalism - Human Rights - Separation of Powers: the Cyprus Precedent* (vol 4, Martinus Nijhoff Publishers 2006) 31.

<sup>106</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964)* 1 C.L.R. 195, 265. These requirements were adopted and followed in subsequent cases, see among others *Messantou v. Cyprus Broadcasting Corporation S.C. (1972)* 3 C.L.R. 100; *Theoderides a.o. v. Ploussiou S.C. (1976)* 3 C.L.R. 319; *Christou v. Republic S.C. (1982)* 3 C.L.R. 195.

<sup>107</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964)* 1 C.L.R. 195, 215.

the State'.<sup>108</sup> On the other hand, Judge Triantafyllides viewed the law of necessity more as a *supra-legal* power, as the 'authority of acting in a manner not regulated by law but required, in prevailing circumstances, by supreme public interest, for the salvation of the State and its people'.<sup>109</sup>

70. Several points are of interest. First, the Court emphasised the fact that the Constitution was not the product of the 'sovereign will of the people of Cyprus' and yet it binds their sovereign will by unamendable provisions.<sup>110</sup> The necessity principle thus seems to be reinforced by an argument from autochthony, as we could call it, that undermines the authority of the Constitution in favour of the House of Representatives on the ground that the latter better reflects the sovereign will of the people in matters of necessity.<sup>111</sup> That would perhaps insinuate a connection between the principle of necessity and the exercise of sovereign (constituent) power.

71. Secondly, the Court further relied on the idea that the Constitution was contingent on the observance of certain basic premises, to a 'fundamental theme' of the 'constitutional structure' that, in this case, was the participation and cooperation in the government of both the Greek and Turkish Cypriots.<sup>112</sup> Discontinuance of this cooperation results in a situation that is unforeseen by the Constitution and, hence, may be dealt with outside of its provisions. A third line of the Court's argument was what we

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<sup>108</sup> Ibid 265.

<sup>109</sup> Ibid 231.

<sup>110</sup> Ibid 232-234.

<sup>111</sup> Ibid 234.

<sup>112</sup> Ibid 226.

could call a ‘purposive argument’. It means that the Constitution is to be understood as having ‘the preservation of the State and the welfare of the people’ as its fundamental purpose.<sup>113</sup> This argument is very closely related to the ‘absurdity argument’, i.e. that the Constitution cannot be construed to require the demise of the State.<sup>114</sup> As such, the Court reasoned that the law of necessity provides a way out of ‘the absurd corollary [...] that a State, and the people, should be allowed to perish for the sake of its constitution’.<sup>115</sup>

72. Lastly, the Court refrained from recognising a blank validity to all the provisions of Law 33; instead, it left open the question of whether provisions that were not challenged in that case could be defended as being ‘necessitated by the “recent events”’,<sup>116</sup> thus confining the doctrine of necessity to an *ad hoc* examination. This was in clear contrast to how the doctrine of necessity was approached by the Supreme Court of Pakistan, even in the *Governor-General’s* case. Yet this position would be revised in subsequent case law, firstly in *Polycarpus Ioannides v. The Police*<sup>117</sup> and then, even more explicitly, following the 1974 Turkish invasion and the *de facto* division of the island, in

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<sup>113</sup> Ibid 237.

<sup>114</sup> On a similar thought, M. S. Paulsen argues that the ‘Constitution is not a suicide pact; and, consequently, its provisions should not be construed to make it one’ in Michael Stokes Paulsen, ‘The Constitution of Necessity’ (2003) 79 Notre Dame Law Review 1257.

<sup>115</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964)* 1 C.L.R. 195, 237.

<sup>116</sup> Ibid 268.

<sup>117</sup> *Polycarpus Ioannides v. The Police (1973) S.C. (1973)* 2 C.L.R. 125.

*Nicolaou a.o. v. Nicolaou a.o.*,<sup>118</sup> where the Court would hold that ‘for the application of the Law of Necessity, not every specific legislation is reviewed’.

73. *Ibrahim* established the doctrine of necessity as an integral part of the Constitution of Cyprus, to an extent far greater and long-lasting than what has been in most countries. Yet, the Supreme Court did not view necessity as a limitless justification for the legislature. In 1986, the House of Representatives attempted to amend the Constitution by giving the right to vote to those who have attained the age of eighteen and by ceasing to hold by-elections for the filling of a vacancy in a seat in the House of Representatives. The provisions were subject to amendment according to the Constitution (they were not ‘basic’), but required a majority from both communities, and only reliance on doctrine of necessity could provide a way out. However, in its decision<sup>119</sup> the Supreme Court was not satisfied that a need stemming from an immense necessity was demonstrated,<sup>120</sup> particularly since such an amendment would permanently affect both communities.<sup>121</sup> The minority further argued that, due to their permanent character, even partial amendments to the Constitution could not be saved by the law of necessity under any circumstances. It reaffirmed that the doctrine was only used as a means for the ‘protection of constitutional order’ and not for ‘bypassing

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<sup>118</sup> *Nicolaou a.o. v. Nicolaou a.o. (No. 2) S.C. (1992) 1 C.L.R. 1338, 1363.*

<sup>119</sup> *President of the Republic v. House of Representatives S.C. (1986) 3 C.L.R. 1439.*

<sup>120</sup> ‘[T]here must be a clear separation of the general necessity from the specific necessity since the former would otherwise become possible to justify any measure and any situation’, Constantinos. Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas 2015) 175.

<sup>121</sup> Georghios M. Pikis, *Constitutionalism - Human Rights - Separation of Powers: the Cyprus Precedent* (vol 4, Martinus Nijhoff Publishers 2006) 37.

limitative provisions of the Constitution'.<sup>122</sup> This minority view echoes the old Greek jurisprudence previously mentioned, which distinguished between legislative and constituent decrees.

74. That precedent would be subsequently revised in the 1992 *Nicolaou v. Nicolaou* judgment.<sup>123</sup> The case concerned the constitutionality of Law 95/1989, which modernised family law through amending the non-basic article 111 of the Constitution. The Law was limited to matters of adjudication of family law disputes and the relations between spouses among Greek Cypriots, and introduced civil marriage. The Court was divided equally: five of the ten judges supported that the law of necessity could justify constitutional amendments, especially in light of the fact that the Turkish-Cypriot community's legal rights were not affected by this law, while the other half of the Court argued against it, maintaining that the doctrine of necessity becomes redundant if constitutional amendments are possible. In the lack of a majority for either opinion, the law was deemed valid by virtue of the presumption of constitutionality.<sup>124</sup>

75. The *Nicolaou* judgment was later reaffirmed in the 1997 *Kolountis* decision on the constitutionality of the Second Amendment of the Constitution (Law 106 (I)/1996). Interestingly, the Court noted that the law of necessity only temporarily suspends the constitutional provisions that mandate the participation of the Turkish Cypriots; all laws on the basis of the law of necessity remain unconstitutional, and once the state of

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<sup>122</sup> *President of the Republic v. House of Representatives S.C. (1986) 3 C.L.R. 1439, 1460.*

<sup>123</sup> *Nicolaou a.o. v. Nicolaou a.o. (No. 2) S.C. (1992) 1 C.L.R. 1338, 125.*

<sup>124</sup> Under this presumption, a law is constitutional unless the Court is satisfied beyond reasonable doubt that it violates a constitutional provision.

necessity ceases, they must either be validated or cease to have an effect.<sup>125</sup> In this way, the Court avoided the argument of ‘permanency’ that was invoked against allowing constitutional amendments in the previous cases.

76. Since 1989, nine additional amendments to the Constitution of Cyprus have been passed by the House of Representatives.<sup>126</sup> However, there has never been an amendment of a basic rule of the Constitution, and this seems to be the current limit of constitutional amendment. Since changing the basic articles is not a power provided by the Constitution under any circumstances, their amendment would require the exercise of *supra*-constitutional power, and so far, the law of necessity is not recognised as being such by the Supreme Court’s case law.<sup>127</sup>

77. Yet, even these amendments have been criticised as deviating from the thresholds set in the 1964 *Ibrahim* case, for *de facto* weakening the rigid character of the

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<sup>125</sup> *Koulounti a.o. v. House of Representatives a.o. S.C.* (1997) 1 C.L.R. 1026, para 16.

<sup>126</sup> Law 106(I)/1996; Law 115(I)/1996; Law 104/2002; Law 127(I)/2006; Law 51(I)/2010; Law 68(I)/2013; Law 130(I)/2015; Law 69(I)/2016; Law 93(I)/2016.

<sup>127</sup> This hard distinction between preserving the existing constitutional order, even in a state of suspension, and subverting it has been recently reiterated in the Fijian case *Prasad v. Republic of Fiji* [2001] NZAR 21; [2001] 1 LRC 665. The Government had previously taken unconstitutional emergency measures to face a coup attempt. The High Court found that the acts were unconstitutional but upheld them under the doctrine of necessity. It held that ‘Necessity cannot be resorted to in order to justify or support the abrogation of the existing legal order. The doctrine is only valid to protect, not to destroy’ and thus ‘the Constitution, previously temporarily on ice or suspended, would re-emerge as the supreme law [...] The doctrine could be used to give substance to a new extra-constitutional regime’ ([2001] NZAR 21, 74).

Cypriot Constitution<sup>128</sup> and for lacking temporary character.<sup>129</sup> Against this criticism, some scholars have pointed out the need for the State to function in the modern age instead of being held as a ‘hostage to its Constitution in perpetuity’;<sup>130</sup> that the doctrine of necessity should be construed to mean that ‘the stability of the Republic’ is its primary purpose;<sup>131</sup> and that, ultimately, the constitutional amendments should be regarded as a response to vital needs of the State instead of as a response to an emergency.<sup>132</sup>

78. Cyprus presents a unique case. Whereas the doctrine of necessity in other jurisdictions functioned momentarily to escape from an urgent deadlock or blockage, in Cyprus it developed as a stabilising principle, striking the balance between allowing the State to function and preserving the salient features of the Constitution: its bi-communalism. The development of the doctrine was not at all times consistent,<sup>133</sup> nor were its theoretical aspects transparent. The extent of the judicial review (*ad hoc* vs in general), the nature of the law of necessity (an implied exception, a constitutional rule, or a (natural) law existent in any constitutional order), and its relation to the written

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<sup>128</sup> See Christis Lottides, *To Sintagma tis Kipriakis Dimokratias, i Poliplokotita tou kai i Anepitihis Prospathia Anatheorisis tou to 1963 [The Constitution of the Republic of Cyprus, Its Complexity and Its Unsuccessful Revision Attempt in 1963]* (Sakkoulas 2009) 135.

<sup>129</sup> See Savvas Pappasavvas, ‘Elements of Constitutional Law’, in Savvas Pappasavvas, ‘Elements of Constitutional Law’ in Evangelos Vasilakakis and Savvas Pappasavvas (eds), *Elements of Cyprus Law* (Sakkoulas 2002) 130-133.

<sup>130</sup> Constantinos Kombos and Athena Herodotou, ‘(Un-) Constitutional Amendments: The Cypriot Paradigm’ (2019) 25 *Eur Pub L* 30596) 317.

<sup>131</sup> Achilles C Emilianides, *Constitutional Law in Cyprus* (Kluwer Law International BV 2019) 50.

<sup>132</sup> Polyvios G Polyviou, *Cyprus: a Study in the Theory, Structure and Method of the Legal System of the Republic of Cyprus* (Chryssafinis & Polyviou 2015) 98-99.

<sup>133</sup> Constantinos. Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas 2015) 178.

Constitution (whether it allows for its amendment, under which conditions and what would be their fate once the state of necessity ceases) were all questions that were addressed gradually and sometimes amidst great controversy. Yet for all its shortcomings, the doctrine of necessity was implemented successfully in that it managed to preserve the continuation and functionality of the Cypriot legal order without overthrowing its constitution.

## **V. Nigeria: Necessity in defence of the rule of law**

79. Nigeria gained its independence from the British Empire in 1960, first with the enactment of the Independence Constitution of the Federation of Nigeria, and secondly with the 1960 Nigeria Independence Act. The Queen of Great Britain would remain the Head of State until the Nigerian Parliament passed the 1963 Constitution, by which the monarchy was abolished and the country became a republic. The constitution was explicitly the supreme law of the land, and any other inconsistent law would be void.<sup>134</sup> The constitution was based on the Westminster system, with a President acting as head of the state, while primary power rested with the prime minister, who enjoyed the confidence of the majority of the House of Representatives<sup>135</sup>. The Supreme Court of Nigeria constituted the final judicial authority.<sup>136</sup>

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<sup>134</sup> Chapter 1 Section 1 of Act No. 20 of 1963.

<sup>135</sup> Chapter 6, section 87 (1) and Chapter 5 section 68 (5b) of Act No. 20 of 1963.

<sup>136</sup> Chapter 8, part 1 of Act No. 20 of 1963.

80. The lifetime of that Constitution, as with many other former British colonies in Africa,<sup>137</sup> would prove to be short. On 15 January 1966, mutinous soldiers led by two officers attacked several important cities in an attempt to seize power, killing several senior politicians, army officials, and, most importantly, the prime minister. As a response to the escalating military situation, the Nigerian Armed Forces took over control of the government. The head of the Armed Forces announced the partial suspension of the Constitution, including the offices of the President, the ministers of the government and regional governors, and even the Federal Parliament. In short, all the central executive and legislative organs of the state were suspended apart from the judiciary, and a 'Military Government' was formed.<sup>138</sup> The next day, the Federal Military Government promulgated Decree No. 1,<sup>139</sup> the first of the many that would follow. The Decree armed the military government with essentially limitless legislative power and modified the Constitution so that it wouldn't prevail over any such decree. In other words, it placed the Federal Military Government beyond any constitutional boundary. That would be challenged four years later by the Supreme Court in the Lakanmi case.

81. The case concerned an application for an order of *certiorari* made to the High Court of Western State to remove an order made by the Tribunal of Inquiry into the assets of public officers of the Western State for the purpose of being quashed. The order

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<sup>137</sup> See Samuel Fury Childs Daly, 'The Portable Coup: The Jurisprudence of 'Revolution' in Uganda and Nigeria' (2021) 39 *Law and History Review* 737.

<sup>138</sup> Abiola Ojo, 'The Search for a *Grundnorm* in Nigeria—the Lakanmi Case' (1971) 20 *International & Comparative Law Quarterly* 117, 120.

<sup>139</sup> Constitution (Suspension and Modification) Decree No. 1, 1966.

was issued under an Edict<sup>140</sup> that prohibited public servants accused of corruption, as well as persons related to them or acting on their behalf, from disposing of any of their properties, nor making any withdrawals from their bank accounts. The High Court rejected the application on the grounds that, among others, the order of the Tribunal could not be challenged by the courts.<sup>141</sup> Pending the appeal, the Federal Military Government proceeded with the enactment of three further decrees,<sup>142</sup> as sweeping as the previous ones, that validated any act that had been done by the Tribunal of Inquiry so far (Decree No. 45), including the order made against the applicant of that case, and ousted the jurisdiction of any court to challenge their validity, even prohibiting any proceeding already pending in court or on appeal. Consequently, the Court of Appeal accepted the state counsel's grounds that the order has been, for all purposes, validated and the proceedings abated by and since the promulgation aforementioned Decrees.<sup>143</sup>

82. What would seem to be a hopeless case took a surprising turn in the Supreme Court. The Court declared Decree No. 45 invalid for being contrary to the 1963 Republican Constitution and thus allowed the appeal.<sup>144</sup> It did so by holding that the

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<sup>140</sup> Section 13 (1) of Edict No. 5 of 1967 of the Western state.

<sup>141</sup> According to section 21 of Edict No. 5 of 1967, 'No defect whatsoever in anything done by any person [...] shall affect the validity of the thing so done or [...] shall be entertained in any Court of law'.

<sup>142</sup> These were the Investigation of Assets (Public Officers and other Persons) Decree No. 37 of 1968, Investigation of Assets (Public Officers and other Persons) (Amendment) Decree No. 43 of 1968 and Forfeiture of Assets, etc. (Validation) Decree No. 45 of 1968.

<sup>143</sup> Abiola Ojo, 'The Search for a Grundnorm in Nigeria—the Lakanmi Case' (1971) 20 *International & Comparative Law Quarterly* 117138) 120.

<sup>144</sup> *E.o. Lakanmi & Ors V. The Attorney-general (West) & Ors SC (1970) 5 Nigerian Lawyer's Quarterly* 133.

1966 events did not amount to a revolution but only to a partial suspension of the Constitution, in order to allow the formation of an interim (and hence temporary) military government. The constitution was still in force, and any deviation conducted by the military government was to be justified only on the basis of the 'doctrine of necessity'.<sup>145</sup> In other words, if a decree could not be shown to arise out of necessity, then it could not prevail over the constitution and would, thus, be void. The Court viewed Decree No. 45 as an intrusion into the sphere of the judiciary that could not be justified on the grounds of necessity and thereby nullified it.

83. Extraordinarily, the very same doctrine that was invoked to bypass constitutional constraints in Pakistan's jurisprudence (on which the Nigerian Supreme Court relied) was now utilised to revive constitutional limits that would otherwise inevitably be deemed as having been long left behind. The Court used the doctrine of necessity to legalise the transfer of state power by the Council of Ministers and the Vice-President to the General Commander of the Nigerian Army. In this way, it kept these acts inside the broader domain of constitutional law by avoiding declaring Decree No. 1 of the Military Government as a revolutionary act. This choice is better understood in light of the 1958 *Dosso* case in Pakistan, whose equation of an effective coup to that of a valid new legal order by invoking Kelsen rippled through Africa through the 1966 *Matovu*

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<sup>145</sup> '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', *ibid* 152.

case in Uganda<sup>146</sup> and subsequently allowed many supreme courts to offer a legal stamp to military usurpers.<sup>147</sup>

84. The Court seemed to base the doctrine of necessity both on the inability of constitutions to predict all emergencies and on the power of the executive, in this case of the President, to take any necessary action in the face of an emergency.<sup>148</sup> It thus seemed to combine both Cyprus' 'implied rule' and Pakistan's early 'prerogative powers of the executive' approach. Apart from some swift mentions of two common law cases and the *Ibrahim* case in Cyprus, the Court did not bother itself too much with the legal basis of the doctrine of necessity. Though it surely must have been aware of Pakistan's respective case law, it made no reference to it. We may suppose that this is due to the unfortunate fate of that early case law, and because it was overshadowed by the *Dosso* case. Instead, the Court seemed to regard necessity as an already established principle, and its main focus was to argue that the 1966 events did not constitute a revolution.

85. Thus, Nigeria presents a remarkable case where the doctrine of necessity was ultimately invoked in order to circumvent rather than broaden the powers of the

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<sup>146</sup> *Uganda v. Commissioner of Prisons ex parte Matovu* (1966) 1 EA 514.

<sup>147</sup> 'For years to come, the legitimacy of many African governments would turn on Udoma's use of this term', *i.e.* that the 'new constitution was legal because it was the product of a "revolution"', Samuel Fury Childs Daly, 'The Portable Coup: The Jurisprudence of 'Revolution' in Uganda and Nigeria' (2021) 39 *Law and History Review* 737(137) 751. Udoma was the Nigerian Chief Justice of Uganda at the time.

<sup>148</sup> 'We think it wrong to expect that constitution must make provisions for all emergencies. No constitution can anticipate all the different forms of phenomena which may beset a nation. Further, the executive authority of the Federation is vested in the President by section 84 of the Constitution and we think in a case of emergency he has power to exercise it in the best interest of the country, acting under the doctrine of necessity', *E.o. Lakanmi & Ors V. The Attorney-general (West) & Ors SC* (1970) 5 *Nigerian Lawyer's Quarterly* 133, 150-151(144) 150-151.

government, by negating a claim of revolution and bringing it back under the rule of law. Of course, it goes without saying that what a court rules and what a military regime is willing to accept are two different things. Unsurprisingly, a few days later, the Government promulgated another Decree by which it declared itself a revolutionary government that had abrogated the pre-existing legal order in accordance with and to the extent provided by Decree No. 1.<sup>149</sup> Yet it remains a courageous example of judicial resistance,<sup>150</sup> as well as a showcase of the versatility of the doctrine of necessity.

## **VI. Canada: Necessity as an aspect of the rule of law**

86. Manitoba joined the Confederation of Canada as a province under the 1870 Manitoba Act. The difficult co-existence between the English-speaking and the French-speaking population in the area ultimately led to the adoption of section 23 of the Act, under which, among others, '[T]he Acts of the Legislature shall be printed and published in both those languages'.<sup>151</sup> Over the next two decades, the French-speaking population became a minority as the English-speaking population grew rapidly. In 1890, the

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<sup>149</sup> 'The Court's verdict in the Adejumo case was sequel to the promulgation by the FMG of [...] Decree No. 28 of 1970, barely two weeks after the decision in the Lakanmi case. Thus, it adopted and went on to retain the plain fact jurisprudence in the interpretation of military decrees in much the same way as the courts in apartheid South Africa did with apartheid laws', Hakeem O. Yusuf, 'Calling the Judiciary to Account for the Past: Transitional Justice and Judicial Accountability in Nigeria' (2008) 30 *Law & Policy* 194, 212.

<sup>150</sup> The 'ruling [...] amounted to a defense of civilian democracy: it established that the military cabal that had ruled Nigeria for the four years prior was illegal, and its decrees were fallible', Samuel Fury Childs Daly, 'The Portable Coup: The Jurisprudence of 'Revolution' in Uganda and Nigeria' (2021) 39 *Law and History Review* 737(137) 737. Others criticized it for legitimizing the military coup, see Suzannah Linton and Firew Kebede Tiba, 'Judges and Rule of Law in Times of Political Change or Transition' in M. Cherif Bassiouni and others (eds), *The Global Community Yearbook of International Law and Jurisprudence: Global Trends: Law, Policy & Justice Essays in Honour of Professor Giuliana Ziccardi Capaldo* (Oxford University Press 2013) 219.

<sup>151</sup> The provision was identical to that of section 133 of the 1867 Constitution Act.

Manitoba Government passed the Official Language Act, by which, henceforth, ‘the Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language’, which shall also be used exclusively in court proceedings. Although this Act was held by county courts as contradictory to the aforementioned constitutional provision,<sup>152</sup> these decisions were ignored, and Manitoba continued enacting unilingual statutes.<sup>153</sup>

87. The constitutionality of a whole body of statutes was questioned in 1981, after Bilodeau, a motorist charged with speeding, argued that the statute providing Manitoba’s highway speed limits was null for being enacted exclusively in English.<sup>154</sup> The majority of the Manitoba Provincial Court and subsequently of the Court of Appeal rejected Bilodeau’s argument and affirmed the conviction on the ground that section 23 of the 1870 Manitoba Act was directory<sup>155</sup> instead of mandatory.<sup>156</sup> However, the

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<sup>152</sup> The Act was ruled *ultra vires* in *Pellant v. Hebert St. Boniface Co. Ct.* (1892) 12 R.G.D. 242 and again as unconstitutional in *Bertrand v. Dussault St. Boniface Co. Ct.* (1909) 77 D.L.R. (3d) 445 until the question was re-stated much later in *R. v. Forest Man. Co. Ct.* (1976) 74 D.L.R. (3d) 704.

<sup>153</sup> The decisions were ignored most likely because the constitutional matter was only dealt as a preliminary question and because they were delivered by county courts. Furthermore, only after *R. v. Forest* was delivered and gained publicity were the other two cases published, leading some to believe that they were simply overlooked instead of intentionally disregarded, see Robert W Kerr, 'The Remedial Power of the Courts After the Manitoba Language Rights Case' (1986) 6 Windsor Yearbook of Access to Justice 252, 254.

<sup>154</sup> *Bilodeau v. A. G. Man.* (1981) 5 W.W.R. 393. *Man. C.A.* (1981) 5 W.W.R. 393.

<sup>155</sup> The Courts were aware that the ‘chaos that would result from declaring Section 23 as mandatory or imperative would be monumental’ and considered this to be an argument in favour of the directory nature of the section since ‘the Legislature could not have intended widespread chaos’, *ibid* par 17, 18.

<sup>156</sup> The Courts initially questioned either the validity of section 23 or the mandatory nature of the provision.

dissenting judge in the Court of Appeal took the view that the section was indeed mandatory, and the validity of the statute could only be sustained on the grounds of necessity to the acts enacted before the Supreme Court decided on section 23 in *Forest v. Attorney-General of Manitoba*<sup>157</sup> in 1979.<sup>158</sup> The judge did not elaborate in detail on the doctrine of state necessity invoked; he considered that declaring all laws between 1890 and 1979 as null would be 'lacking in judicial appreciation',<sup>159</sup> resulting in chaos that is not acceptable.<sup>160</sup>

88. Consequently, Bilodeau appealed the decision to the Supreme Court of Canada. The Federal Government, realising the wider consequences that the decision of the Supreme Court would bear, directed a reference seeking an advisory opinion on the constitutionality of all the unilingual Manitoba statutes. In its 1985 Reference, the Court held the imperative character of the requirement of section 23 is inescapable; therefore, the unilingual enactments of the Manitoba Legislature are invalid and of no effect.<sup>161</sup> The Court acknowledged the existence of several common law doctrines that could save many rights and obligations recognised under these otherwise invalid statutes, such as

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<sup>157</sup>*Forest v. Attorney-General of Manitoba Man. C.A. (1979) 4 W.W.R. 229.*

<sup>158</sup> But '[S]ince that date the invalidity can no longer be excused', *ibid* par 45.

<sup>159</sup> *Ibid* 49.

<sup>160</sup> *Ibid* 38.

<sup>161</sup> *Re Manitoba Language Rights (1985) 1 S.C.R. 721, 747.*

the *de facto* doctrine,<sup>162</sup> the *res judicata* doctrine,<sup>163</sup> and the mistake of law doctrine.<sup>164</sup> However, the limited and uncertain scope of these doctrines could not provide a solution to wider problems caused by the invalidity of the statutes.<sup>165</sup> The invalidity of all the statutes passed exclusively in English meant that laws regulating contracts, property, the labour industry, and the judiciary would be without effect. Even the legality of the Legislature of Manitoba itself would be questioned, since the participation of citizens of both sexes, the reduction of the age limit to 18, and the increase of the size of the body from 24 to 57 members were all amendments passed by laws enacted only in English.<sup>166</sup>

89. To avoid the chaos that would emerge from such a legal vacuum, the Supreme Court relied on the 'principle of the rule of law', which it endorsed as a fundamental to the Constitution of Canada.<sup>167</sup> It distinguished two aspects of the rule of law. The first is that of an antithesis to arbitrary power, whereby the law is supreme over the state and private individuals. The second is that it 'requires the creation and maintenance of an

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<sup>162</sup> Under this doctrine, the Court can recognise as valid acts performed by officials despite lacking legal authority, see *O'Neil v. Attorney-General of Canada* (1986) 26 S.C.R. 122, 130.

<sup>163</sup> The doctrine prevents reopening cases already litigated in courts despite being grounded on invalid laws.

<sup>164</sup> Under this doctrine, the recovery of payments under invalid laws, such as tax laws, is precluded, see *Eadie v. Township of Brantford* (1967) S.C.R. 573.

<sup>165</sup> Peter W Hogg, 'Necessity in a Constitutional Crisis' (1989) 15 *Monash University Law Review* 253-255.

<sup>166</sup> *Re Manitoba Language Rights* (1985) 1 S.C.R. 721, 747, 748.

<sup>167</sup> The rule of law as a constitutional principle was implicitly recognized in the Preamble of the 1867 Constitution and explicitly in the Preamble to the 1982 Constitution of Canada.

actual order of positive laws which preserves and embodies the more general principle of normative order' endorsed in Western democracies.<sup>168</sup> Nullifying all unilingual Manitoba laws since 1890 would violate that second aspect of the rule of law,<sup>169</sup> yet this is only the result of adhering to its former aspect by applying the 'supreme law'. Thus, what was extraordinary in this case was that these two sides of the rule of law happened to conflict.

90. The Court decided to fulfil both of these duties. On one hand, it invalidated all the statutes concerned, but on the other hand, it preserved the rule of law by granting temporary validity and effect to all statutes that cannot be saved under any of the other doctrines. The Court set a minimum period necessary for the translation, re-enactment, and publishing of the laws concerned, after which all remaining unilingual laws will be permanently annulled.<sup>170</sup> The decision of the Court was in effect a partial suspension of the language rights provided in section 23. Its partial dimension is evident in that section 23 did not apply to all unilingual laws published up to that point, but remained a binding legal rule for all other cases. It functioned as the legal basis for the Court's decision to have the unconstitutional laws re-enacted at the soonest possible time and to mandate that any future Manitoban law be published in both languages.

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<sup>168</sup> *Re Manitoba Language Rights* (1985) 1 S.C.R. 721, 749, with further references to W. I. Jennings, J. Locke and J. Raz among others.

<sup>169</sup> For the same reason it rejected the possibility of leaving the matter of the invalid statutes to be dealt with by the Legislature, since that would be in contrast with the Court's duty to protect and preserve the Constitution, see *ibid* 753.

<sup>170</sup> In the aftermath, that period was extended.

91. The Supreme Court of Canada used the ‘rule of law’ principle in a way very similar to how the Supreme Court of Cyprus used the doctrine of state necessity. The Cypriot Court was well aware of the doctrine of state necessity, which it discussed at great length. It asserted that the doctrine of state necessity aims at ensuring the rule of law by justifying otherwise illegal acts of the government during an emergency.<sup>171</sup> The Court referred to the jurisprudence of Pakistan, the U.S., Southern Rhodesia, and Cyprus to infer the general principle that courts may give effect to ‘laws in contravention of express constitutional provisions’<sup>172</sup> where failure to do so would result in turmoil and violation of the rule of law. It thus regarded it not as a law beyond the constitution but rather as derived from the principle of the rule of law.<sup>173</sup>

92. In this way, the Court came to identify in rationale, content and effects the principle of the rule of law with the ‘law of state necessity’. For the judges, ‘it is clear that the reasons for applying the state necessity doctrine pertain to a concern with the rule of law’.<sup>174</sup> Moreover, both are invoked to permit temporary departures from constitutional provisions in order to prevent the rupture and collapse of the state and the legal order. The only reason the Court described the doctrine it applied as the ‘rule of law’ rather than ‘state necessity’ was that it considered the latter applicable only when a state of necessity had already materialised, whereas, in *Manitoba*, the Court was taking

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<sup>171</sup> *Re Manitoba Language Rights* (1985) 1 S.C.R. 721, 758.

<sup>172</sup> *Ibid* 761.

<sup>173</sup> *Ibid* 766.

<sup>174</sup> *Ibid* 761.

preventive measures to avert such a situation.<sup>175</sup> Similarly, the Court distinguished its case from the *Governor-General's* on the basis that, in the former, it was the judiciary, not Parliament or the legislature, that took the initiative to provide a remedy, which, in the Court's view, marked a difference from the doctrine of state necessity.<sup>176</sup>

93. These differences are minimal and unsupported by the doctrine of state necessity itself. Although the facts in *Ibrahim* were indeed particular, there is no reason to conclude that the doctrine of state necessity applies only ex post, while the 'rule of law principle' may operate pre-emptively. Likewise, there is no basis for assuming that the doctrine of state necessity applies solely to acts of the legislature and the executive but not to those of the judiciary. In any event, there appears to be no substantive distinction between the two doctrines, and *Manitoba* should be regarded as another instance of the doctrine of state necessity.

## VII. Conclusions

94. Four general observations can be made about the preceding analysis of the case law. First, there is a clear correlation between the invocation of necessity and a constitution's inability to provide solutions due to its silence, rigidity or inflexibility.<sup>177</sup>

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<sup>175</sup> 'The question in *Ibrahim*, supra, was whether a temporary unconstitutional law, enacted in order to meet the exigencies of a state of emergency, could be valid. The question in the present Reference is quite different. Here, the Court is concerned with whether unconstitutional laws can be given temporary validity in order to avoid a state of emergency. It is the Court which must take steps to avoid the deleterious consequences of the Manitoba Legislature's persistent failure to observe the Constitution. In *Ibrahim* the Court simply condoned the measures taken by the Parliament of Cyprus in response to a necessitous situation arising out of circumstances beyond its control. Thus, *Ibrahim* is not directly applicable to the circumstances of the present case', *ibid* 763.

<sup>176</sup> *Ibid* 765.

<sup>177</sup> For the meaning of constitutional silence and rigidity, see Chapter 1.

This is particularly evident in cases where necessity is invoked to resolve constitutional deadlocks. In *Ibrahim*, the Supreme Court of Cyprus noted that the constitution had been made 'fixed and immovable',<sup>178</sup> dependent on the cooperation of the two communities, without which no alternative existed. In the *Governor-General's* case, the vague definition of the Governor-General's powers,<sup>179</sup> together with the limited regulation of the Constituent Assembly under the 1946 Indian Independence Act, provided the background that would give rise to the doctrine of necessity. The constitution made no provision for what should occur if the Assembly failed to produce a constitution promptly, nor for its dissolution or the holding of elections in such an event. On the one hand, there was constitutional silence on crucial matters; on the other, there was the ambiguity surrounding the nature and powers of the Governor-General, whose role oscillated between that of a sovereign and a constitutional figure.

95. Secondly, the doctrine of necessity is highly versatile. It has been invoked as the executive's right to assume legislative powers during an emergency (Greece); as a means of escaping a constitutional deadlock (Pakistan); as a temporary substitute for a constitution (Cyprus); as a defence of the rule of law (Pakistan and Nigeria respectively); and even as an aspect of the rule of law itself, by temporarily filling a legal vacuum (Canada).

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<sup>178</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964) 1 C.L.R. 195, 20812) 208.*

<sup>179</sup> Anne Twomey, *Discretionary reserve powers of heads of state*, in Anne Twomey, 'Discretionary Reserve Powers of Heads of State' in Harshan Kumarasingham (ed), *Constitution-making in Asia: Decolonisation and State-building in the Aftermath of the British Empire* (Routledge 2016) 57.

96. Thirdly, the legal basis of the doctrine of necessity ranges from an unwritten constitutional principle to a rule of natural law, or a manifestation of the executive's inherent or prerogative powers. In its early development, the doctrine was understood by the superior courts as deriving from the executive's power to rescue the state from imminent danger, a remnant of the sovereign's prerogative powers. In later cases, however, necessity became increasingly autonomous and was interpreted as a legal principle in its own right, either inherent to constitutions as a rule of natural law or inferred through interpretation. This evolution reflects the gradual formalisation of the law of necessity, transforming it from a socio-political maxim into a legal doctrine.

97. Finally, despite the difficulties in justifying the doctrine of necessity within a constitutional framework, the courts could not disregard its practical, and at times imperative, significance. Generally, they adopted a pragmatic stance, treating the existence of the exception as virtually beyond dispute; what remained contested were the circumstances of its applicability and the extent of the powers it conferred. The doctrine of necessity could not simply be dismissed as a constitutional breach. Whether this position withstands criticism, and whether the legal foundations offered by the judges are convincing, will be considered in the following chapter.

## Chapter 2: Theoretical Foundations of the Doctrine of State Necessity

98. In the previous chapter, I examined the development of the doctrine of state necessity in a series of seminal decisions. This chapter examines the theoretical foundations of the doctrine through the grounds presented by the judges in these decisions, and primarily in the *Governor-General's* and *Ibrahim* where the legal basis of the doctrine was discussed, as subsequent decisions referred to them. We can distinguish two main theories.

99. In the first, the powers under the doctrine pertain to the role of a particular institution, specifically the head of the executive. In that sense, it derives *eo ipso* from the authority and prerogative powers this institution enjoys. I will call this the 'prerogative-executive powers' ground. In this approach, a state of necessity constitutes the factual circumstances for the activation or lawful use of those powers.

100. In the second, the legal basis of the doctrine is a legal (or even constitutional) principle, in the sense of an unwritten law, not necessarily tied to any particular institution. I will call it the 'principle of necessity' ground. In this approach, the doctrine of necessity reflects some kind of law under which unlawful acts can be temporarily considered lawful when certain conditions are met. The judges in the *Governor-General's* case relied on both grounds, while the judges in *Ibrahim* only on the latter.

### I. The Prerogative-Executive Powers Ground

101. In the *Governor-General's* case, the Court decided that the exercise of powers under a state of necessity falls under the duties of the head of state to prevent its total collapse. The doctrine's function, so understood, is to expand the powers of the highest

executive authority, enabling it to undertake legislative actions that would otherwise be *ultra vires*. The position of the Governor-General as a representative of the Crown rather than merely that of a constitutional head of the executive apparently aided this argument. Indeed, the government in part claimed (and the Court agreed) that as a representative of the King,<sup>180</sup> the Governor-General possessed extra-constitutional prerogative powers that amount to a sovereign.

102. There are two ways of interpreting this argument: one is that there is an unwritten legal principle that grants exclusively to the executive the power to exceed constitutional or other legal boundaries during a state of necessity; the other, more radical one, is that the executive possesses some inherent powers, above and outside law, that it may exercise during a state of necessity. Both variations, I argue, should be rejected as baseless and inadequate.

103. As mentioned in the previous chapter, the Supreme Court of Pakistan referred to the prerogative power justifying necessary measures when the salvation of the people requires it, in adherence to the maxim *salus populi suprema lex* ('the safety of the people is the supreme law'). It is a maxim that often accompanied invocations to the doctrine of necessity, and so it is worth briefly reviewing its origins and history.

**a) *Salus Populi Suprema Lex Esto***

104. The maxim was first coined by Cicero in his *De Legibus*, where he sets out his law code for the Consuls, the highest executive officials: 'In military service let them have

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<sup>180</sup> It is emphasised in the decision that references to the 'Crown' and the 'King' are only meant as 'legal abstractions' and that they should in no way be misunderstood as entailing a dependency on or authority of the United Kingdom towards Pakistan, *Reference by His Excellency the Governor-General F.C. (1955) 7 P.L.D. 435, 488*.

the highest right; let them obey no one. *Let the safety of the people be the highest law for them*'.<sup>181</sup> The passage clearly referred to the capacity of the Consuls as army commanders, and it is unlikely that Cicero meant to place the Consuls above the law; it is perhaps best understood as reflecting a moral principle guiding their conduct.<sup>182</sup> In that regard, it's similar to the *senatus consultum ultimum*, a senatorial decree urging the Consuls to take any measure necessary to defend the republic. The decree most likely had no legal effect as the senate had no power to suspend the law. It was rather a declaration of moral support towards the Consuls to act even extra-legally, if need be, for the good of the Republic.<sup>183</sup>

105. *Salus Populi Suprema Lex* came to signify a guiding principle for the duties and proper exercise of the powers of government, and was eventually related to the office of

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<sup>181</sup> Marcus Tullius Cicero, *"On the Republic" and "On the Laws"* (David Fott tr, Cornell University Press 2014) 181, emphasis mine.

<sup>182</sup> Professor Straumann argues that to interpret the maxim as an invitation for the consuls to act illegally or unconstitutionally would be inconsistent with another norm Cicero sets out earlier in his work, that just as the laws govern the magistrates, so do the magistrates govern the people: On the contrary, he suggests that the term 'leges' in the context of *De Legibus* is used by Cicero to denote not the (popular) legislation, but the laws that can 'neither be removed nor abrogated' and are 'not thought out by human intellects' nor are a 'some resolution of peoples, but something eternal that rules the whole universe through the wisdom of commanding and prohibiting'. Therefore, he adopts the view that the phrase corresponds to a universal, natural law that reflects a high moral principle that precedes the constitutional order. See Benjamin Straumann, 'Constitutional Thought in the Late Roman Republic' (2011) 32 *History of Political Thought* 280, 288.

<sup>183</sup> See Andrew Lintott, *The Constitution of the Roman Republic* (Oxford University Press 1999) 89; Gregory K. Golden, *Crisis Management during the Roman Republic: The Role of Political Institutions in Emergencies* (Cambridge University Press 2013) 106-109; J. A. Crook, Andrew Lintott and Elizabeth Rawson (eds), *The Cambridge Ancient History: Volume 9: The Last Age of the Roman Republic, 146-43 BC* (The Cambridge Ancient History, vol 9, 2 edn, Cambridge University Press 1994) 84-85.

the sovereign. Hobbes identified the 'Safety of the People' to be the ultimate duty of the sovereign, asserting that 'Safety' is not to be merely understood as 'Preservation' but rather as encompassing 'all other Contentments of life', giving a much broader guiding dimension to the dictum.<sup>184</sup> John Locke regarded *Salus Populi* as a fundamental rule of governance, linked with the power of the executive to act in 'discretion, for the public good, without the prescription of the law, and sometimes even against it'.<sup>185</sup> Though this suggests that the maxim was indeed understood as legitimising acts in violation of the law, it doesn't follow that the source of that power lies with the executive. Instead, it is the 'safety of the people' itself that legitimises unlawful conduct and can be equally used against the executive, if necessary. During the French Revolution, the axiom was used to justify extraordinary means in times of crisis against the King, among others. '*Salut Public*' was invoked by the Jacobins upon crucial political and revolutionary events, including the September massacres, the execution of Louis XVI, the formation of key political entities such as the Convention, the tribunals and the Committee of Public Safety.<sup>186</sup>

106. The ultimately made its way into the jurisprudence of modern constitutional states. It was invoked to justify unconstitutional changes in the early stages of the formation of the Greek state after the 1821 Greek War for Independence. The first three

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<sup>184</sup> Thomas Hobbes, *Leviathan, Or, The Matter, Forme and Power of a Commonwealth Ecclesiastical and Civil* (Simon & Schuster Simon & Schuster 1997) 205.

<sup>185</sup> John Locke, *Second Treatise of Government* (Cambridge University Press Cambridge Univ. Press 1980) §158, 160.

<sup>186</sup> Marc De Wilde, 'Roman Dictatorship in The French Revolution' (2021) 47 *History of European Ideas* 140, 151.

Greek Constitutions remained largely ineffective due to the chaotic circumstances during the war.<sup>187</sup> The first two were implicitly regarded as inapplicable, but the third, the 1827 Constitution, was formally sidelined on the grounds of the political and military emergency. The 1827 Constitution guaranteed the separation of powers and the protection of a range of fundamental rights. However, the Greek Governor, the highest executive organ at the time, requested from the Parliament the suspension of the Constitution, claiming it was impossible to exercise power effectively under the constitutional guarantees.<sup>188</sup> Though the Greek Parliament had no constitutional power to suspend the Constitution,<sup>189</sup> it accepted the Governor's request on the grounds that *'the salvation of the nation is the highest of all Laws'*.<sup>190</sup> As discussed in the previous chapter, the maxim was later used in the early Greek case law to legalise unconstitutional administrative acts *necessary* during emergencies. At this point, however, the maxim was understood as a principle of law without awareness or reference to its origins and relation with sovereign authority, and was ultimately identified in later case law with the principle of necessity. In Cyprus, the judges invoked it in the early case law as a dictum to reinforce the principle of state necessity, virtually

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<sup>187</sup> See Konstantinos Chrysogonos, *Sintagmatiko Dikaio [Constitutional Law]* (2nd edn, Sakkoulas 2014) 70.

<sup>188</sup> The Governor invoked the 'great necessity' that mandates the formation of the provisional government 'which appears to me as the only one which can protect our country from the imminent dangers that the present crisis threatens it...'. *Arhia tis Ellinikis Palligenesias [Archives of Greek Palingenesias]* (vol 4, Publication of the Library of the Greek Parliament 1973) 3-4.

<sup>189</sup> Ioanis Aravantinos, *Ellinikon Sintagmatikon Dikaion [Greek Constitutional Law]* (vol 1, Paligenesia 1897) 236 n. 33.

<sup>190</sup> *Arhia Tis Ellinikis Palligenesias* *Arhia tis Ellinikis Palligenesias [Archives of Greek Palingenesias]* (vol 4, Publication of the Library of the Greek Parliament 1973) 4. Emphasis mine.

without distinguishing it as a separate concept. Even in Pakistan, the distinction was not clearly drawn.

**b) Criticism of the prerogative-executive powers ground**

107. As mentioned in the previous chapter, the Court in the *Governor-General's* case invoked the *salus populi* maxim by citing common law cases such as the confiscation by the British Government of private property during WWI<sup>191</sup> and the forfeiture of Lord Baltimore's charter of Maryland and the grant of it to another Governor.<sup>192</sup> What was common between these cases was that an illegality was rendered lawful in light of the immediate necessity that justified the exercise of the prerogative power of the British Monarch. However, these and other cases on which the Court relied concerned criminal responsibility or the infringement of private rights from martial law, not the exercise of legislative powers and not against a constitutional background. Without undermining the importance of interfering with private rights or condoning criminal actions, no assumption for independent '*supra legal*' powers of the executive is necessary. Various other doctrines within criminal and public law can likewise justify such actions.<sup>193</sup>

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<sup>191</sup> The Court primarily relied on *Re An Arbitration Between Shipton, Anderson & Co and Harrison Brothers & Co D.C. (1915) 3 K.B. 676* and on *Attorney-General v. De Keyser's Royal Hotel UKHL (1920) 1 A.C. 508*. In the latter case, Lord Moulton would recognise that the Crown enjoyed 'wide prerogative powers as to taking or using the lands of its subjects for the defence of the realm when the necessity arose', but only 'in circumstances where the rule *salus populi suprema lex* was clearly applicable'.

<sup>192</sup> See George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence: Chiefly Concerning the Colonies, Fisheries, and Commerce of Great Britain; Collected and Digested, from the Originals in the Board of Trade and Other Depositories* (Burlington [Vt.]: C. Goodrich 1858) 65-66.

<sup>193</sup> Such as the defence of necessity as will be later discussed.

108. On the other hand, the Supreme Court of Pakistan did refer to constitutional cases where *salus populi* and necessity were invoked, such as the succession of Charles II and William III to the British Crown by an unconstitutionally constituted parliament.<sup>194</sup> However, these were not understood as being based on the exercise of prerogative powers but on a principle of (state) necessity existing within common law. In addition, similar invocations of necessity were made in democratic states where no extra-constitutional (prerogative) executive powers were recognised. For instance, during the American Civil War, Lincoln took a series of measures contrary to the Constitution<sup>195</sup> and exercised legislative powers bestowed only on Congress.<sup>196</sup> Lincoln deemed certain acts as falling under his constitutional duties as President. For others that were explicitly illegal, he relied on subsequent authorisation by Congress:

These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a *public necessity*, trusting then, as

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<sup>194</sup> In reference to Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (J. Butterworth and Son 1820) 68; Frederick William Maitland, *The Constitutional History of England* (Cambridge University Press 1908) 283-286. These cases will be later discussed at greater length.

<sup>195</sup> Lincoln suspended many constitutionally protected rights including free speech, private property, and the writ of *habeas corpus*, and was little concerned by constitutional boundaries: 'Perhaps to say that Lincoln disregarded the Constitution is too polite a way of putting it. One should say instead that he seriously violated it; or even that he destroyed it...' George Kateb, *Lincoln's Political Thought* (Harvard University Press 2015) 139.

<sup>196</sup> 'Apart from calling up the militia, most of his acts were not explicitly authorized by any specific statute. Indeed, a few of his actions were apparently contrary to express statutory language or appeared to violate explicit constitutional commands' Daniel A Farber, *Lincoln's Constitution* (University of Chicago Press 2003) 115.

now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.<sup>197</sup>

109. This is an example where the executive exercises unconstitutional powers on the basis of necessity without asserting independent legal authority for those powers. This is further supported by the fact that these measures are then subjected to ratification by a legislative organ. Similar examples can be found in civil law systems. The abovementioned case of the Greek Governor requesting from the Greek Parliament the suspension of the Constitution on the grounds of the ‘salvation of the people’ serves as a good example. Once again, superseding constitutional boundaries required joint decision-making in some way by the executive and the legislature.

110. It’s worth reiterating that the Court in the *Governor-General’s* case did not distinguish, as I do, the *prerogative-executive powers* ground from the *principle of necessity* ground. By not doing so, it obfuscated two entirely different approaches to the relationship between executive powers and constitutional legality. If *salus populi* has any legal significance, it does not stem from the prerogative powers of the Crown or generally from the executive. Instead, it reflects the principle that extraordinary measures are justified when the common good is under serious threat – the principle of necessity.

111. Apart from the misunderstood use of *salus populi* and necessity, two further reasons against the prerogative-executive powers ground can be put forward. First, even if the executive did historically possess such powers, these would no longer fit its role

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<sup>197</sup> ‘Message to Congress in Special Session’ (July 4, 1861) see Don. E. Fehrenbacher (ed), *Abraham Lincoln, Speeches and Writings 1859-1865* (Literary Classics of the United States Inc. 1989). Emphasis mine.

as a constitutional organ of the state.<sup>198</sup> Unsurprisingly, the prerogative-executive powers ground was only raised in Pakistan and only in this judgement, even though the doctrine of state necessity would be invoked many times in the history of Pakistan. After all, the office of the Governor-General was soon replaced by that of the President once the first constitution was finally promulgated a year later, severing its link to royal authority.

112. Secondly, the prerogative-executive powers ground would be inadequate as a general basis for being too narrow. In many other cases, both within and outside of Pakistan, the powers under the doctrine of necessity were not exercised by the executive but by other officials as well, primarily by the legislature. An additional ground would thus be necessary to explain the invocation of the doctrine in all other cases, and there would be no reason not to consider the latter as the general ground of the doctrine. For all these reasons, the prerogative-executive powers ground is bound to be rejected.

## **II. The principle of necessity ground**

113. An alternative approach to the doctrine of necessity is to ground it upon a legal principle in the sense of an unwritten law: the principle of (state) necessity. This was a thesis already presented in the *Governor-General's* case (jointly with the *prerogative-executive powers* argument), and more fully and richly elaborated in the *Ibrahim* case.

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<sup>198</sup> This was a point raised in the minority opinion, arguing that the Governor-General was a constitutional organ and therefore bore no prerogative powers: 'The case might have been different if the Governor-General were not, as must be held on the authorities, a mere constitutional head. If he were a political sovereign, he might have claimed such powers as, for instance, the King of England was advised that he could exercise', *Reference by His Excellency the Governor-General F.C. (1955) 7 P.L.D. 435, 515*.

114. In the *Governor-General's* case, as mentioned in the previous chapter, it was asserted that the principle of civil or state necessity constitutes an implied rule that is 'part of the common law of all civilised States and which every written Constitution of a civilised people takes for granted'.<sup>199</sup> It constitutes an unwritten law allowing otherwise unconstitutional acts to preserve the constitutional order, analogous to the extraordinary powers recognised under martial law<sup>200</sup> and to the necessity defence recognised in common law for private persons.<sup>201</sup> The military and criminal law concepts of necessity were thus expanded *a fortiori* to constitutional law cases, justifying emergency measures during peacetime.<sup>202</sup>

115. In *Ibrahim*, it was in broad terms similarly understood as an 'implied exception [...] in order to ensure the very existence of the State'<sup>203</sup> and as the 'authority of acting in a manner not regulated by law but required, in prevailing circumstances, by supreme public interest, for the salvation of the State and its people'.<sup>204</sup> As discussed, the judges in *Ibrahim* offered a greater variety of arguments. Some were particular to the context

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<sup>199</sup> Ibid 478-479.

<sup>200</sup> Ibid 483.

<sup>201</sup> Ibid 485.

<sup>202</sup> Which was criticised in the minority opinion: 'Such extraordinary powers are generally confined to matters affecting the property and the persons of individual subjects. [...] [B]ut it is clearly very far removed from the power of interference with constitutional instruments' *ibid* 511.

<sup>203</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964) 1 C.L.R. 195, 265.*

<sup>204</sup> Ibid 231.

of the Cypriot Constitution and have a smaller comparative and theoretical value.<sup>205</sup> The main arguments rested: a) on an analogy from the defence of necessity, and b) on the existence of a distinct constitutional doctrine.

116. On the first, the law of necessity functions as an 'implied exception' in direct analogy to the defence of necessity recognised predominantly in criminal law,<sup>206</sup> in a way similar to the *Governor-General's* case. The Court argued that the (criminal law) defence of necessity is an instance of a general legal principle that runs through the whole of the law,<sup>207</sup> and can be likewise applied in constitutional law to legalise unconstitutional actions.

117. On the second, the Court argued that the law of necessity is a constitutional law doctrine, arising from the nature of constitutions and from principles such as *salus populi suprema lex*. In support of this argument, it cited invocations of the law of necessity by the Greek Supreme Administrative Court<sup>208</sup> and the Supreme Civil and

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<sup>205</sup> For example, one argument rested on the fact that the guarantor powers (UK, Greece and Turkey) drafted the Constitution, which was therefore not the product of the 'sovereign will of the people' though it was rendered largely unamendable (ibid 232-234). This is a rather unhelpful argument that can be interpreted in various ways. One is to understand it as undermining the authority of the non-autochthonous Constitution, making it a sort of 'softer' law. Another is to understand the doctrine of necessity as the expression of the 'sovereign will of the people' that wasn't voiced when the Constitution was drafted, in which case the doctrine is no longer part of the standing constitutional law but an exercise of 'constituent' (and thus revolutionary) power.

<sup>206</sup> Ibid 209-211.

<sup>207</sup> 'In England, where there is no written constitution, this problem would not, strictly speaking, arise, but the defence of necessity is part of the common law which has been incorporated in section 17 of our Criminal Code as a complete defence in criminal cases' ibid 260.

<sup>208</sup> '[...] it could be accepted, in case this was indispensably and imperatively necessary and unavoidable, that such governments were entitled to regulate, even in deviation from the Constitution, matters related to the primary purposes for which they were called to govern,

Criminal Court<sup>209</sup> to legalise unconstitutional emergency acts of the government during WWII. The constitutional doctrine approach was reinforced by additional arguments. The Court argued that the constitution is to be understood as having ‘the preservation of the State and the welfare of the people’ as its fundamental purpose.<sup>210</sup> This *purposive argument* was aided by an *absurdity argument*, namely that the constitution cannot be construed in a way that leads to its demise. As such, the Court reasoned that the law of necessity provides a way out of ‘the absurd corollary [...] that a State, and the people, should be allowed to perish for the sake of its constitution’.<sup>211</sup> Finally, the Court suggested that the constitution was contingent on the observance of certain basic premises, to a ‘fundamental theme’ of the ‘constitutional structure’ that, in this case, was the participation and cooperation in the government of both the Greek and Turkish Cypriots.<sup>212</sup> Discontinuance of this cooperation results in a situation that is unforeseen by the constitution and, hence, may be dealt with outside of its provisions.

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namely the restoration of law and order and public security [...], Decision 13/1945 of the Supreme Administrative Court of Greece, as translated in *ibid* 235.

<sup>209</sup> ‘In accordance with the theory which recognizes the law of necessity, based on the *maxim salus populi suprema lex*, the executive power may, on its own responsibility, do acts of constitutional effect, by which a provision of the constitution is suspended, amended or repealed, but under certain circumstances, that is if it exists a state of war or revolution, an urgent necessity for their doing and it is impossible to regulate the position by lawful authority. An act of constitutional effect made by the government at a time of necessity, in contravention, however, of the constitution, remains unconstitutional, but it has to be applied and the courts cannot refuse to apply it on the ground that it is not made in accordance with the constitution’ Decision 86/1945 of the Supreme Civil and Criminal Court of Greece, as translated in *ibid* 237-238.

<sup>210</sup> *Ibid* 237.

<sup>211</sup> *Ibid*.

<sup>212</sup> *Ibid* 226.

118. From the above, we can derive two core features of the doctrine of necessity as a legal principle:

- a) It constitutes *law* as opposed to the mere recognition of a state of facts or other extra-legal political or moral justification. The doctrine of necessity entails certain legal conditions and limitations, and the judiciary can exercise judicial review to check adherence to those legal conditions and limitations.
- b) It is part of the written constitution or constitutional law in general, not a supra-constitutional principle. Its legal basis is related to the constitution, if not outright arising interpretively from it. As a result, its exercise must somehow respect constitutional authority in that it cannot be used to put aside entirely the constitution or replace it with a new one. The doctrine of necessity *must* have limitations. This is important in differentiating it from constitutional revolutions, in which there is reasonably no need to justify the unauthorised constitutional change upon the 'standing' or 'old' constitution.

119. In the next sections, I will examine the arguments resting on necessity as a defence and as a constitutional doctrine, and whether they satisfy or contradict these three core features.

### **III. Necessity in Law and the Analogy with the Defence of Necessity**

#### ***a) Necessity: concept and origins***

120. Rules of any kind may be expressed in an uncompromising language. But there might be circumstances of utmost need that render strict compliance with rules grossly disproportionately harmful, and thus practically impossible even if feasible. In such cases, a plea is made to set aside those rules temporarily until normal conditions are restored. This is the plea of necessity.

121. The exception-making concept of necessity is not a legal invention. At its core, it reflects the common-sense idea that exceptional circumstances of great practical need might justify an extraordinary course of action. To use an ordinary-life example, it makes perfect sense not to show up in my scheduled meeting if I unexpectedly have to run to the hospital, or to delay showing up by taking a longer route if the original route has flooded and is dangerous to cross. On one hand, there is an expectation based on how the circumstances generally stand, and on the other, an extraordinary case that falls outside these expectations and practically compels me to act differently. When this is true, I consider that my obligation to act according to what is ordinarily required is lifted.

122. Similar notions exist across various disciplines outside of law and seem to have theological origins. Its roots in Christianity can be traced back at least to 12th-century canon law and the *Concordia Discordantium Canonum* by the Benedictine monk Gratian, which was used to mitigate the application of religious obligations in cases of dire need.<sup>213</sup> Similarly, in Islam, necessity (*darurah*) permits exceptions to actions that would otherwise constitute sin (*haram*): ‘But if one is forced by necessity without willful

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<sup>213</sup> See Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (vol 3, International Litigation in Practice, Martinus Nijhoff Publishers 2012) 63-65. Similar concept is found in Jewish law, where it was recognised that authorities could act against ordinary law when its application would lead to ‘unacceptable results’, see Oren Gross, ‘Violating Divine Law: Emergency Measures in Jewish Law’ in Clement Fatovic and Benjamin A. Kleinerman (eds), *Extra-Legal Power and Legitimacy: Perspectives on Prerogative* (Oxford University Press 2013), with further references to Neil S. Hecht and Emanuel B. Quint, ‘Exigency Jurisdiction Under Jewish Law’ (1978-1980) 9 *Dine Israel* 27; Aron M. Schreiber, *Jewish Law and Decision-Making: A Study Through Time* (Temple University Press 1979); Christine Hayes, ‘The Abrogation of Torah Law: Rabbinic Taqqanah and Praetorian Edict’ in Peter Schäfer (ed), *The Talmud Yerushalmi and Graeco-Roman Culture* (vol 1, Tübingen 1998) 646-656.

disobedience or transgressing due limits, then he is guiltless' (*Quran*, al-Baqarah, 2:173).<sup>214</sup> In its broader sense, it is even more ancient. Necessity was deified by the ancient Greeks as the Orphic goddess *Ananke*, worshipped along with *Bia* (Force).<sup>215</sup> In the *Republic*, Plato describes *Ananke* as the mother of *Fates*, whose control over the course of events could not be altered, even by the gods.<sup>216</sup> Similarly, in *Protagoras*, Plato attributes to the lyric poet Simonides of Ceos the saying: 'Necessity not even gods can resist'.<sup>217</sup>

123. The religious, political and social significance of necessity found quickly its counterpart in law. In his essay 'The Defence of Necessity',<sup>218</sup> Glanville Williams examines how the concept of necessity has been invoked since antiquity to justify the 'peculiar exigency' against 'the general rule'. Necessity is often associated with practical need, particularly when it presents the only –or vastly more reasonable– alternative to the prescribed rule. For example, while the general rule prohibits damaging another's property, it would be justifiable to do so if one's life is in danger, such as when escaping a fire. Law is replete with such cases, and Glanville observes that the entire legal system can be understood as grounded in 'social necessity'.<sup>219</sup> The critical question is whether

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<sup>214</sup> Mohammad Hashim Kamali, *Shariah and the Halal Industry* (Oxford University Press 2021) 103.

<sup>215</sup> Pausanias, *Description of Greece* 2.4.6.

<sup>216</sup> *Republic* 617c.

<sup>217</sup> *Protagoras* 345d, translation mine.

<sup>218</sup> Glanville Williams, 'The Defence of Necessity' (1953) 6 *Current Legal Problems* 216.

<sup>219</sup> *Ibid* 217.

such a reasonable need justifies violating rules or creating new ones in contemporary law.

**b) Necessity in contemporary law: legally formulated necessity**

124. Written laws set rules applicable to a broad set of cases, governing how one ought to act, how an institution is meant to function, what the powers of the government are, etc. The generality of laws may be counterbalanced in different ways: a) through precise wording in statutes, b) by including qualifications for the application of rules, restricting them to a certain class of cases, and c) by allowing deviations from those rules through exception-making rules. This third category best approximates the contrast between the general rule and the peculiar exigency, and not surprisingly, it's the form in which necessity has made its way in law. The formulation of necessity as an exception-making legal rule can be found today in most legal fields and is similar even between common law and civil law systems.

125. The most paradigmatic and explicit is in the form of a defence against a wrongful act, best exemplified in criminal law. Initially used as a cluster concept to justify acts committed under self-defence or duress,<sup>220</sup> the modern common law defence of necessity is recognised in limited cases when a crime is committed to prevent much greater harm.<sup>221</sup> While the act is voluntary, the circumstances compel it, rendering it

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<sup>220</sup> 'For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion', William Blackstone, *The Oxford Edition of Blackstone's: Commentaries on the Laws of England: Book I: Of the Rights of Person* (Oxford University Press 2016) 88.

<sup>221</sup> See *R v. Martin* (1989) 88 Cr. App. R. 343, 13; *R v. Shayler CA* (2001) 1 W.L.R. 2206. In the criminal law of most continental systems, there is a necessity defence that precludes the wrongfulness of the action *per se*. In Anglo-American law, it is not clear whether the defence may constitute a justification (i.e. preclude wrongfulness) or only an excuse (i.e. be wrongful even though the actor

blameless. In this sense, necessity constitutes the paradigmatic justification for committing a crime,<sup>222</sup> with many other defences representing specific applications of this principle.<sup>223</sup> Similar formulations of the criminal law defence of necessity can be found in the Penal Codes of Germany,<sup>224</sup> France,<sup>225</sup> Spain,<sup>226</sup> Italy,<sup>227</sup> and Greece,<sup>228</sup> to name only a few. A similar notion applies in private law, particularly in tort law, where it can be invoked to avoid or limit liability if the defendant's actions are deemed necessary to prevent greater harm –especially when protecting their own life or property.<sup>229</sup>

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is not held responsible). See George P Fletcher, *Rethinking Criminal Law* (Oxford University Press 2000) 759, 762, 788-792, who also traces the emergence of the necessity defence in both continental and Anglo-American systems.

<sup>222</sup> Malcolm Thorburn, 'Criminal Law as Public Law: Police Powers and Justifications' in R. A. Duff and Stuart P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2010) 32.

<sup>223</sup> English courts have been cautious in adopting a general necessity defence, fearing it could lead to lawlessness. Instead, they often employ the necessity defence indirectly through similar defences (such as duress) or through statutory interpretation (by ruling out the case as falling within the intended scope of the rule), see Peter R. Glazebrook, 'The Necessity Plea in English Criminal Law' (1972) 30 *The Cambridge Law Journal* 87.

<sup>224</sup> See Section 34 of the German Criminal Code, where necessity precludes the wrongfulness of an act committed under an imminent danger, provided that the protected interest 'substantially outweighs the one interfered with'

<sup>225</sup> Art. 122-7 of the French Penal Code.

<sup>226</sup> Art. 20 (5) of the Spanish Criminal Code.

<sup>227</sup> Art. 54 of the Italian Penal Code.

<sup>228</sup> Art. 25 of the Greek Penal Code.

<sup>229</sup> Common law cases where necessity has been invoked include battery, trespassing, false imprisonment and medical care, see Jenny Steele, *Tort Law: Text, Cases, and Materials* (Oxford University Press 2010) 61.

126. A similar formulation of necessity is found in public international law as a basis for exception from state responsibility. Recognised as reflecting a rule of international customary law<sup>230</sup> and codified in the ILC Articles on State Responsibility,<sup>231</sup> a state of necessity justifies breaching an international obligation when it is the only way for a state to safeguard an essential interest against a grave and imminent peril. Necessity is distinct from *force majeure*, where an irresistible 'force' beyond the control of the subject makes compliance with an international obligation materially impossible.<sup>232</sup> In contrast, the wrongful act in a state of necessity is voluntary. Furthermore, necessity is distinguished from self-defence, as it does not require a prior offence (such as the threat or use of force) or, indeed, any prior breach of an international obligation.<sup>233</sup>

127. Necessity as an exception also appears in a distinct but related form when it functions as a measure to constrain or to license permissible interference with a human right or a duty of the state.<sup>234</sup> Examples can be found in human rights law and humanitarian law. For instance, under the European Convention on Human Rights, a

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<sup>230</sup> See Attila Tanzi, 'State of Necessity' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008).

<sup>231</sup> Art. 25 of the International Law Commission's Draft Articles for the Responsibility of States for Internationally Wrongful Acts (2001).

<sup>232</sup> Art. 23 of the International Law Commission's Draft Articles for the Responsibility of States for Internationally Wrongful Acts (2001).

<sup>233</sup> Roberto Ago, 'Addendum to the Eighth Report on State responsibility' (1980) II [1] Yearbook of International Law Commission 13, 14-15.

<sup>234</sup> It's less explicit because the relationship between the general rule and the exception-making necessity appears to be reversed. As a defence, the general rule is that something is not lawful, and necessity makes it lawful. As a constraint, the general rule is that something is lawful, up to the point that it is not necessary.

government must demonstrate that an intervention in the freedom of speech is ‘necessary within the democratic society’.<sup>235</sup> Here, necessity is used as a constraint to an existing power to interfere: the interference is not permissible *unless* practically compelling. In international humanitarian law, a fundamental principle is that of *military necessity*, which operates as a balancing principle in conflict with most rules of humanitarian protection.<sup>236</sup> Under this principle, measures necessary to achieve legitimate military objectives are permitted, even if they cause harm and destruction.<sup>237</sup> It is used as a measure to determine the extent of permissible military actions.

128. A third form of necessity as an exception-making rule is as a derogation clause. Such clauses introduce an exception by wholly or partially suspending other legal rules, often enabling others in their place. They may or may not include the word ‘necessity’ in their provisions, but their similar exception-making function justifies including them under the same umbrella concept. They are most often found in constitutional documents (for instance, as a ‘declaration of emergency’) and international treaties. Most written constitutions around the world include derogation clauses that can be used in case of an emergency to suspend constitutional rights and grant extraordinary

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<sup>235</sup> Article 10 of the European Convention of Human Rights.

<sup>236</sup> Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving

the Delicate Balance' (2010) 50 Virginia Journal of International Law 795, 798.

<sup>237</sup> Lawrence Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 Israel Law Review 225, 230.

powers and procedures to the institutions of the state.<sup>238</sup> In the same vein, Art. 15 of the European Convention on Human Rights allows contracting states to derogate from non-absolute (i.e. derogable) rights to the extent necessary 'in time of war or other public emergency'.

129. This is not meant to be an exhaustive categorisation, but it serves to show how the concept of necessity as a basis for exception has been incorporated into law. In these formulations, it constitutes a legal rule, where its scope and limitations are legally defined, and, in that aspect, it is not different from other legal rules.

***c) Criticism of the doctrine - defence of necessity analogy***

130. Among these different manifestations of the core idea of necessity, the judges in the *Governor-General's* case and *Ibrahim's* case focused on the first, the defence of necessity. This is understandable as the defence of necessity is in itself broad and common in various fields of law, and courts have invoked it even when it was (and variously remains) an unwritten legal norm. For these reasons, it appears very closely related to the doctrine the courts sought to apply in these two constitutional cases. However, closer examination reveals that the analogy is false and inadequate to ground the doctrine.

131. First of all, the analogy with the criminal or private law defence overlooks the distinct ways in which the doctrine of necessity operates in constitutional law. The defence analogy only captures the exception-making function when there are provisions prohibiting certain acts. But this is only one function of the doctrine, and of rather

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<sup>238</sup> 'Over 90% of all constitutions today include clauses allowing for the declaration of a state of emergency', Tom Ginsburg and Mila Versteeg, 'The Bound Executive: Emergency Powers During the Pandemic' (2021) 19 *International Journal of Constitutional Law* 1498, 1506.

limited scope. In most cases, the doctrine is used not to legalise constitutionally prohibited acts, but to undertake and exercise legislative and executive powers. Unlike the defence, it can be used to generate new legal powers, rights and obligations, and establish new institutions.<sup>239</sup> Its central function is not defensive but active, not as an exception-making rule but as a power-conferring one; in effect, as a source of law.

132. For the same reason, there is no analogy with the use of necessity as a measure to constrain or to license an action, nor as a suspending derogation clause. It differs from the former in that it is not invoked to allow the exercise of existing legislative and executive powers, but to acquire ones not previously held. It differs from the latter in that, as is the argument against the defence analogy, creating exceptions to existing constitutional rules is only one small part of how the doctrine of necessity is used. As a result, these analogies fail to cover the extent to which the doctrine operates.

133. The over-generalising aphorism that necessity turns legal ‘what would otherwise be illegal’<sup>240</sup> proved instrumental in obscuring these crucial differences between the doctrine of necessity and the other legal formulations of necessity. In this way, it has been overlooked that acting in violation of a legal rule is not identical to acting without legal authority. A private agent who arbitrarily assumes public authority in times of distress may be excused from punishment under criminal law for such conduct, but that is not enough to grant legal authority to their actions or make them binding on others.

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<sup>239</sup> The very Supreme court of Cyprus was created under the doctrine of necessity.

<sup>240</sup> *Reference by His Excellency the Governor-General F.C. (1955) 7 P.L.D. 435, 483; The Attorney-General of the Republic v. Mustafa Ibrahim and Others S.C. (1964) 1 C.L.R. 195, 237.*

What is required is not only the removal of wrongfulness but also the creation of new laws.

#### **IV. The radical concept of necessity**

##### ***a) Radical necessity and law***

134. The preceding section outlined how the concept of necessity manifests today across multiple legal fields in various forms. In its modern expression, it often appears as a legal rule introducing a narrowly defined exception. However, the concept's origins lie in a more *radical* understanding, where necessity justifies exceptions to the law itself. Ancient legal maxims reflect this radical notion: *necessitas vincit legem* (necessity overcomes law), *necessitas est lex temporis et loci* (necessity is the law of time and place), and the most striking, *necessitas non habet legem* (necessity has no law). Modern applications of necessity, while shaped under the particular considerations fitting each legal field, still echo this foundational idea.

135. Important legal thinkers throughout history have discussed a *radical* notion of necessity. Its basis is not in (positive) law; if anything, it runs against (positive) law. It arises from a fundamental need, a vital public interest whose protection and preservation justifies transgressing legal boundaries.

136. This *radical* notion of necessity has a long tradition in international law, where it was initially used in a looser sense as a justification for the use of force (*jus ad bellum*). Alberico Gentili described necessity firstly in a relative sense as what is 'ordinarily called necessary'.<sup>241</sup> This broader notion also forms the basis of the right to self-defence. But

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<sup>241</sup> Alberico Gentili, *De Jure Belli Libri Tres (On the Law of War in Three Books)* (John C. Rolfe tr, first published 1594, translation from the edition of 1612, Oxford University Press 1924) 58.

Gentili was careful to distinguish it from the narrower ‘true and absolute necessity’. This is the necessity in the *radical* sense that ‘forms an exception to every law’,<sup>242</sup> the ‘just and unavoidable necessity [that] makes anything lawful’.<sup>243</sup> Hugo Grotius endorsed Gentili’s approach to necessity as the proper justification for initiating war<sup>244</sup> and linked it to the *last resort principle*, which holds that states should resort to force only when no alternative remains.<sup>245</sup>

137. These ideas reflected a natural-law understanding of the concept of necessity that pervaded international law theory. It aligned with the view, widespread in the 19<sup>th</sup> century, that states have certain ‘fundamental rights’ that stem from their independent existence.<sup>246</sup> Chief among these was the right of existence and self-preservation, which some theorists viewed as taking precedence over any other right of a foreign State.<sup>247</sup> Accordingly, actions necessary for self-preservation were considered inherently lawful.

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<sup>242</sup> Ibid 58 and 60.

<sup>243</sup> Ibid 351.

<sup>244</sup> Hugo Grotius, *De Jure Belli ac Pacis Libri Tres (The Rights of War and Peace)* (first published 1625, reprinted from the 1738 English translation, Liberty Fund 2005) 1102.

<sup>245</sup> Jens David Ohlin and Larry May, *Necessity in International Law* (Oxford University Press 2016) 31.

<sup>246</sup> H. Wheaton, *Elements of International Law* (8 edn, Little, Brown 1866) 60-61; William Edward Hall, *A Treatise on International Law* (2 edn, Clarendon Press 1884) 42; Amos Shartle Hershey, *The Essentials of International Public Law and Organization* (Macmillan 1912) 144.

<sup>247</sup> H. B. Jacobini, 'The Right of State Existence in International Law' (1950) 30 *The Southwestern Social Science Quarterly* 277, 278. See also Alejandro Alvarez, 'The State's Right of Self-Preservation' (1918) 3 *Louis L Rev* 113, 119, who quotes the German jurist Joseph Kohler declaring that ‘the relations between States are governed most frequently by the law of necessity. The State which has to fight for its existence acts rightly when it infringes the rights of other States, even the rights of neutrals, for its existence is in jeopardy’.

The right to self-preservation was thus understood as parallel to, or as an aspect of, the law of necessity.<sup>248</sup>

138. We can already observe the close relationship between self-preservation, necessity and state sovereignty. Interestingly, this relation appears to be circular: for a state to exist independently, it must possess the authority to take any measures necessary for its self-preservation, and it has the authority precisely because it is independent. The supremacy of the state lies in its power to take all the measures necessary for its self-preservation, and, conversely, the power to do so stems from the state's supremacy. Thus, the law of necessity is the source of sovereignty, and sovereignty, in turn, justifies the law of necessity. This is because the state's independent existence is understood both as a fact and a fundamental right. It can be seen, more abstractly, that the relation between the factual aspect and the right aspect is not only interconnected but also supplementary in the absence of the other. Thus, the revolutionary right for an independent state (the right for self-determination) exists even though the state, as a fact, doesn't. In contrast, the right of non-intervention, self-defence, necessity in the stricter sense, and so forth, are there to preserve the factual aspect of the state.

139. Though *radical* necessity lost support since the 20<sup>th</sup> century, it still echoes in necessity's various legal formulations. For instance, its most direct formulation in international law is that of an exception to state responsibility, which, as mentioned in

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<sup>248</sup> Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press 1963) 42. In contrast, see Roberto Ago, 'Addendum to the Eighth Report on State responsibility' (1980) II [1] Yearbook of International Law Commission 13, 17.

the previous section, justifies breaching an international obligation when it is the only way for the State to safeguard an essential interest against a grave and imminent peril. The origins of this provision can be traced to appeals to the *radical* necessity. An early historical example is the 1832 appropriation of the property of British nationals by the Portuguese government, in violation of a relevant treaty. The Portuguese government argued that its actions were justified by the urgent necessity of securing resources to maintain internal order. The British Government recognised the validity of the plea of necessity.<sup>249</sup> As noted by one of the legal advisors to the British government, the Portuguese government's actions would indeed be justified under circumstances of pressing necessity:

[F]or I do not apprehend, that the Treaties between this Country and Portugal are of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, *which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.*<sup>250</sup>

140. The defence of necessity in criminal law similarly appears to have an initial connection with a broader and more radical concept of necessity. A notable early example is the 1842 case of *United States v. Holmes*.<sup>251</sup> After a shipwreck, the captain and some crew members on a leaking lifeboat decided to throw most of the male passengers overboard to prevent the boat from sinking. The district attorney argued that:

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<sup>249</sup> Roberto Ago, 'Addendum to the Eighth Report on State responsibility' (1980) II [1] Yearbook of International Law Commission 13

<sup>250</sup> Lord McNair, *International Law Opinions* (vol II, Cambridge University Press 1956) 231, emphasis mine.

<sup>251</sup> *United States v. Holmes C.C.E.D. Pa. (1842)* 26 F. Cas. 360 1 Wall Jr. 1.

‘Where, indeed, a case does arise, embraced by this “law of necessity”, the penal laws pass over, such case in silence; *for law is made to meet but the ordinary exigencies of life*. But the case does not become “a case of necessity”, unless all ordinary means of self-preservation have been exhausted’.<sup>252</sup>

This argument does limit necessity to a legal defence mitigating criminal responsibility, but comes with broader implications about law and its relation to emergencies.

141. Now, radical necessity also appeared in constitutional law through the invocation of a great public interest that justifies legal transgressions. We have already discussed the invocations of *salus populi* and its use by the supreme courts to condone unconstitutional acts when necessary during an emergency. Though the seminal cases of Pakistan and Cyprus developed the judicial doctrine of necessity, there were earlier invocations of radical necessity during some important political events. One needs to look no further than English Law to find such examples.

142. William Blackstone gives two different accounts of the necessity exception for private and public law. He outright refuses that necessity can justify interference with private property, ‘not even for the general good of the whole community’.<sup>253</sup> Yet in public law, Blackstone considers the concept of necessity in the radical sense, ‘*the*

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<sup>252</sup> Ibid 13. Also see *R v Dudley and Stephens DC (1884) 14 QBD 273*.

<sup>253</sup> ‘Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament’, William Blackstone, *The Oxford Edition of Blackstone's: Commentaries on the Laws of England: Book I: Of the Rights of Person* (Oxford University Press 2016) 94. He also accepts the grounds of necessity only exceptionally to justify corporal and capital punishment: ‘The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the *highest necessity*’, *ibid* 91, emphasis mine.

*necessity of the thing, which supersedes all law*'.<sup>254</sup> He uses two examples. First, the laws enacted by the Convention Parliament in 1660, including the restoration of King Charles II, even though it was unconstitutionally assembled without being summoned by the Monarch.<sup>255</sup> Second, the meeting of the parliament in 1688 during the Glorious Revolution, again without the King's summoning on the apprehension that King James II abdicated, from which followed '*ex necessitate rei* [from the necessity of the thing], that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again'.<sup>256</sup>

143. Blackstone does not treat these cases as a *de facto* legalisation or as an unlawfulness ignored due to political exigency, but as reflecting a genuine legal principle that arises from the necessity of having a government. This principle, he reasons, would take effect any time the throne is vacant due to *absolute necessity*.<sup>257</sup> Its basis does not lie in the state,<sup>258</sup> but is intrinsic to the legal order and any violation of

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<sup>254</sup> Ibid 101.

<sup>255</sup> Even the King's later validation of the convention parliament's acts was legally very controversial: '[.] it was at that time a great doubt among the lawyers, whether even this healing act made it a good parliament; and held by very many in the negative: though it seems to have been too nice a scruple', *ibid*.

<sup>256</sup> *Ibid*.

<sup>257</sup> Ibid 102.

<sup>258</sup> Blackstone was indeed critical on how invocation to the public good, and specifically the salvation of the people, could be used to justify the arbitrary exercise of power. Commenting on the prevention of claims being raised in courts against certain public services of the Commissioners of Sewers under Henry VIII, Blackstone notes: 'The pretence for such arbitrary measures was no other than the tyrant's plea, of the necessity of unlimited powers in works of evident utility to the public, 'the supreme reason above all reasons, which is *the salvation of the king's lands and people*', William Blackstone, *The Oxford Edition of Blackstone's: Commentaries*

the fundamental laws or of the social contract between the people and the government will justify resorting to it:

leaving to future generations, whenever *necessity and the safety of the whole* shall require it, *the exertion of those inherent (though latent) powers of society*, which no climate, no time, no constitution, no contract, can ever destroy or diminish.<sup>259</sup>

144. This latent power that is brought to the surface by necessity bears the closest resemblance to the modern doctrine of necessity shaped in the *Governor-General's* and *Ibrahim's* decisions. It is not limited to condoning illegal acts but operates as a source of legal validity in the absence of a constitutional alternative. It is intrinsic to every legal order, as it arises from the most fundamental societal needs, and ultimately the very existence and survival of the state. Whether this can be an appropriate basis for the modern doctrine of necessity will be considered next.

***b) Criticism of the radical concept of necessity as a basis for the doctrine of necessity***

145. The radical concept of necessity offers an ultimately natural law theory of the doctrine of necessity, as a principle inherent in all constitutional orders, which allows constitutional transgressions when necessary. This aligns both with the wide powers conferred and the universality of its adoption by different legal systems. A natural-law account would thus seem to be fitting.

146. However, introducing the radical notion of necessity into law has devastating implications for constitutional legality. First, it introduces a source of legality that is

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*on the Laws of England: Book III: Of Private Wrongs* (Oxford University Press 2016) para 75, emphasis mine.

<sup>259</sup> William Blackstone, *The Oxford Edition of Blackstone's: Commentaries on the Laws of England: Book I: Of the Rights of Person* (Oxford University Press 2016) 159, emphasis mine.

independent of the constitution and inevitably above the constitution, resulting in a *supra-constitutional* doctrine. Secondly, it follows that it is not susceptible to (constitutional) limitations. Both points run against most of the core features of the doctrine of necessity stressed out earlier, namely: a) that its constitutional character and its distinction from constitutional revolutions are guaranteed, b) that it allows for deviations from the constitution without subverting it, and c) that there must be judicially reviewable limitations to it. I will elaborate on these points in turn.

147. Introducing the radical concept of necessity into law is incompatible with the constitution's widely accepted role as the supreme law within the legal order. The content of the doctrine would be that one must do whatever is necessary – and be justified in doing so. This not merely introduces an exception to the application of the constitution, but makes its contingent upon (the non-existence of) necessity. If constitutional legality fails, then the law of necessity takes its place.

148. In addition, since in every actual state of necessity the principle of necessity would override constitutional rules, this ultimately means that the constitution is no longer the supreme law. Instead, the principle of necessity becomes the law that sets the ultimate criteria of validity, able to both sideline the constitution and generate legally valid powers and obligations. That this runs against how the courts described the doctrine in the *Governor-General's* and *Ibrahim's* case is clear. It would also leave open serious questions regarding the legitimacy of the doctrine, as it introduces a shift from the model of the constitutional state, achieved under the widespread adoption of constitutionalism, to that of a necessity state.

149. Furthermore, adopting the radical necessity would render any limitations to the doctrine inconsistent with its underlying justification. If necessity is a supra-constitutional law, there would be no inherent reason to restrict it from justifying any kind of transgressions, such as introducing constitutional changes, granting powers to non-state actors or requiring the measures to be temporary. If such actions are deemed necessary, they would be justifiable. Once the radical necessity is accepted as the doctrine's basis, no boundary can be drawn. The result of abandoning inherent limitations to the doctrine is that the entire legal order turns out to be determined by, derived from, and ultimately subjected to, the doctrine of necessity. As long as what is necessary may change, the same can be true for any condition or limitation on the doctrine of necessity. Consequently, any limits set by courts are contingent and, therefore, insignificant as they add nothing to the 'necessity test', which turns out to be the sole criterion for its application and scope.

150. These outcomes can be seen in the later abuse of the doctrine in Pakistan, where its use resembled more a radical-based necessity that knew no limits. In the 1977 *Bhutto* case, the Supreme Court invoked the doctrine of necessity to legalise a coup by the armed forces to restore peace and avoid 'bloodshed',<sup>260</sup> severing its relation to the head of the state (or the government in general). Furthermore, contrary to its previous decisions, it explicitly recognised the power to amend the constitution, which was used as a *carte blanche* by the military usurper to reshape the constitution freely.<sup>261</sup> The Court

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<sup>260</sup> *Begum Nusrat Bhutto v. Chief of Army Staff S.C. (1977) 19 P.L.D. 657.*

<sup>261</sup> Hamid Khan, *Constitutional and Political History of Pakistan* (3rd edn, Oxford University Press 2017) 331.

clearly took the view at this point that the doctrine of necessity is above the constitution: ‘the authorities inducted into power on account of State necessity and the principle of *salus populi suprema lex* are fully entitled to administer the country and exercise *supra-constitutional powers* for this purpose’.<sup>262</sup> Subsequent adherence to this interpretation reduced the doctrine into a legal stamp for military regimes that, in all but name, usurped the constitution.<sup>263</sup>

151. A *radical* doctrine of necessity would blur its distinction from constitutional revolutions, particularly for the judges who understand revolutions as bringing a discontinuity to the legal order. According to this view, successful unconstitutional acts rupture the continuity of the legal order in such a way that the validity of the new constitution and all the laws of the new legal order are independent of the previous one and, hence, it’s unbound by any formal limitations – a fresh start.<sup>264</sup> This theory inspired the doctrine of effectiveness, according to which acts in violation of the constitution (*i.e.* ‘revolutionary’) turn into lawful when they have become *de facto* effective. Courts adopting the radical reading of the doctrine of necessity conflated or confused it with the doctrine of effectiveness.

152. The confusion began in Pakistan, when the Supreme Court in *Dosso* legalised the abrogation of the constitution by the President and its replacement by a new one on the

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<sup>262</sup> *Begum Nusrat Bhutto v. Chief of Army Staff S.C. (1977) 19 P.L.D. 657, 70583) 705*, emphasis mine.

<sup>263</sup> *Zafar Ali Shah v. Pervez Musharraf S.C. (2000) 52 P.L.D. 869*.

<sup>264</sup> Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 117; John Finnis, *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press 2011) 407.

basis that it was 'effective'.<sup>265</sup> In *Bhutto*, the Court did not follow *Dosso* and applied the doctrine of necessity, even though there was a coup that sidelined the constitution, on the obscure basis that the constitution would only be 'temporarily' suspended rather than abrogated. This gave the green light in subsequent cases to maintain the rhetoric that the constitution remained the supreme law of the land, albeit suspended (!).<sup>266</sup> This confusion would be passed down to other jurisdictions in the future, when, upon determining the legality of a revolutionary regime, courts would resort to and combine both the doctrines of effectiveness and necessity.<sup>267</sup>

153. The point raised is that an account based on a radical principle of necessity – in essence, a necessity test based on which anything can be considered lawful- results in

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<sup>265</sup> *The State v. Dosso S.C. (1958) 10 P.L.D. 533.*

<sup>266</sup> See *Zafar Ali Shah v. Pervez Musharraf S.C. (2000) 52 P.L.D. 869*; *Pakistan Lawyers Forum v. Federation of Pakistan S.C. (2005) 57 P.L.D. 719.*

<sup>267</sup> Examples include the *Mitchell v Director of Public Prosecutions* (First Instance and Appeal) cases in Grenada ([1985] LRC [Const.] 127 and [1986] LRC [Const.] 35 respectively) and *Madzimbamuto v Lardner-Burke* (first Instance, Appeal and Privy Council) cases in Southern Rhodesia ([1966] RLR 756 [Rhodesia Gen. Division], [1968] 2 S.A. 284 [Rhodesia Appeal Division], [1968] 3 All E.R. 561 [Privy Council] respectively). In Grenada, the doctrine of necessity was invoked to temporarily legalize institutions (including the deciding supreme court) created when a revolutionary regime was in power and after it collapsed. Necessity was used in combination with effectiveness to justify the legitimacy of the regime due to its efficacy, through a selective reading of the *Jilani* case that, in truth, reflected the *Dosso* case ([1985] LRC [Const.] 127, 150-151). In Southern Rhodesia, the courts had to decide whether a recent coup constituted the new legitimate government. The Court of First Instance found that the government was not yet effective in the Kelsenian sense, and thus not legitimate. Nevertheless, it proceeded to uphold its actions as it was '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' ([1966] RLR 756, 848). Thus effectiveness was implemented in the form of the doctrine of necessity. Most of the discussion in the Court of Appeal and Privy Council centred around the matter of the effectiveness of the revolutionary government.

limitless power that trivialises the constitution and conceals a doctrine of revolutionary legality. Whereas the ground offered by the analogy from the defence of necessity is insufficient, the ground offered by radical principle of necessity is unrestrained. In the next chapter, I will argue that an alternative basis that avoids these pitfalls can be found in the concept of equity. Before that, I will conclude this chapter by taking a moment to consider whether having a doctrine of necessity is a worthy pursuit at all.

## **V. Conclusions: Should There be a Doctrine of Necessity?**

154. The preceding discussion is likely to alarm constitutional lawyers about the dangers of espousing the doctrine of necessity. The doctrine appears to put at risk the foundations of constitutional legality and the supremacy of the constitution. Practically, it is difficult to define and limit, making it malleable and prone to abuse. Normatively, its associated risks make it undesirable; it seems to undermine the rule of law and, ultimately, to bypass the legal order when its guarantees are most needed. After all, is it not more realistic to view the doctrine of necessity as a desperate attempt by judges to maintain a semblance of legality for actions so unconstitutional that any other recognised legal doctrine cannot justify them? While these concerns have merit, they misunderstand the true implications and value of the doctrine.

155. First, it would be false to assume that it is the doctrine that leads to the adoption of unconstitutional measures. This conflates cause and effect. In reality, the development of the doctrine often follows as a response to unconstitutional acts that are deemed inevitable. In cases of genuine necessity, the executive is compelled to act. Neither Pakistan nor Cyprus nor Canada could afford to remain without a functioning legal order. The doctrine of necessity emerges as an effort to develop a theory for this legal singularity.

156. This leads to the second point: the doctrine of necessity ultimately aims to preserve legal limitations. By providing a legal framework for permissible unconstitutional acts, the doctrine seeks to delineate the boundaries within which governments may deviate from the constitution. This becomes clearer when contrasted with the alternative approach that views such unconstitutional acts as a constitutional revolution that ruptures the continuity of the state. Compared to the doctrine of effectiveness, the doctrine of necessity seeks to draw some hard lines of permissible transgressions that are somehow still 'within' the constitution. The alternative is to simply abandon the standing constitution – at least within the context of the theory of legal discontinuity.

157. The doctrine of necessity, then, is based on the assumption that a transgression can, to some extent, be justified, and the real challenge is determining its limitations. Therefore, the doctrine of necessity is best understood as a compromise between strict adherence to constitutional restrictions and the unrestricted powers allowed under the doctrine of effectiveness. However, its significance in setting boundaries to what might otherwise be an unchecked acceptance of extra-legal power should not be underestimated. The limitations introduced by the doctrine represent a final attempt by the judiciary to defend the rule of law. This perhaps surprising claim can be seen in the *E.o. Lakanmi* case in Nigeria<sup>268</sup> examined in the previous chapter, in which the Court used the doctrine of necessity to ground its jurisdiction under the still valid constitution to review the military decree, finding them to be *ultra vires* null! Astonishingly, the same

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<sup>268</sup> *E.o. Lakanmi & Ors V. The Attorney-general (West) & Ors SC (1970) 5 Nigerian Lawyer's Quarterly 133.*

(distorted) reading of the doctrine used to bypass constitutional constraints in Pakistan was used in Nigeria to revive them.

158. The third point is that the assumption that transgressions from the constitution can be justified to some extent is a valid one. Even if one puts aside the doctrine of effectiveness, inaction in a state of necessity can result in significant harm to both society and the legal order, ultimately undermining constitutional legality itself. One cannot defend the constitution by allowing it to become inoperable through strict adherence. Such an approach might preserve legal formality, but it does so at a substantial cost to the rule of law. Ultimately, the doctrine of necessity is so interlinked with the rule of law that they can be viewed as two sides of the same coin.

159. This is best exemplified in the *Manitoba Language Rights* case in Canada,<sup>269</sup> in which the Court held that ‘courts will recognize unconstitutional enactments as valid where a failure to do so would lead to legal chaos and thus violate the constitutional requirement of the rule of law’.<sup>270</sup> The doctrine of necessity was thus understood by the Court as nothing less than an application of the rule of law principle, and therefore necessary for the preservation of the constitutional order. In the Court’s own words:

The doctrine of necessity is not used in these cases to support some law which is above the Constitution; it is, instead used to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution.<sup>271</sup>

160. The doctrine of necessity and the rule of law share to some extent the same virtues. When properly applied, they serve the same goal of ensuring a functional society

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<sup>269</sup> *Re Manitoba Language Rights* (1985) 1 S.C.R. 721.

<sup>270</sup> *Ibid* 766.

<sup>271</sup> *Ibid*.

that respects legality. Contrary to what may seem apparent, the doctrine of necessity ultimately operates in service to the rule of law.

161. For all these reasons, the doctrine of necessity is normatively valuable as a safeguard to the rule of law. However, for this to work properly, the doctrine must address two key challenges: a) identify a sound basis and b) determine its limitations. These two elements must be interconnected: its limitations must logically stem from its foundational principles, otherwise the limitations appear to be arbitrary and susceptible to indefinite expansion. So far, the doctrine has failed to meet these challenges. Its foundation has been built on false analogies or doctrines of supra-constitutional effect, rendering it overly vague and granting an all-encompassing license for possibly any unconstitutional action. In the following chapter, I will offer a different approach aimed at meeting those challenges.

## Chapter 3: Equity and Necessity

ἔστιν δὲ ἐπιεικὲς τὸ παρὰ τὸν γεγραμμένον νόμον δίκαιον<sup>272</sup>

Aristotle, *Rhetorics* 1374a29-30

162. Let us recapitulate the discussion so far. State necessity refers to the need to preserve the functioning of the state and the constitutional order, preventing their collapse. Under the doctrine of state necessity (or simply the doctrine of necessity), officials may temporarily depart from constitutional limitations in order to safeguard the existence and operation of the state and the legal order. Such situations typically arise when adherence to constitutional rules itself threatens serious harm to the public good. One example is a constitutional deadlock, where key state organs are rendered constitutionally paralysed and can no longer perform their functions in the face of some complex crisis. Another is when a significant body of laws is found to be unconstitutional, and setting these laws aside or declaring them null and void would have devastating consequences.

163. In Chapter 1, I discussed a series of seminal cases in which judges invoked the doctrine of necessity to justify certain constitutional transgressions aimed at preventing the rupture or collapse of vital state institutions or bodies of law. In these cases, judges grappled with the challenge of identifying a satisfactory basis for the doctrine of necessity, as well as establishing limits to distinguish it from an unauthorised ('revolutionary') alteration of the constitution. Among the most significant were the 1954 *Governor-General's* case in Pakistan and the 1964 *Ibrahim* case in Cyprus. In these

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<sup>272</sup> '[Equity is] the sort of justice which goes beyond the written law', Aristotle, *Rhetorics* (Rhys Roberts tr, Oxford University Press 2009) 1374a29-30.

judgments, the courts relied on an ambiguous 'law' or 'principle' of state necessity, together with various maxims, to legitimise such unconstitutional actions.

164. In Chapter 2, I examined the doctrinal foundations of state necessity as developed in this case law, identifying two broad bases: (a) *the prerogative or executive powers* ground, and (b) *the principle of necessity* ground. I argued that the first is inadequate, while the second is problematic insofar as it draws analogies from the necessity defence in other fields or implies a radical notion of necessity that contradicts the principles of constitutionalism. I emphasised two challenges that any coherent theory of state necessity must address: first, the identification of a sound theoretical foundation; and secondly, the formulation of proper limitations that distinguish necessity from revolutionary constitutional change.

165. In this chapter, I will argue that cases of state necessity can be understood as part of an evolution of the tradition of equity, or *epieikeia*. Since antiquity, equity has been invoked to justify departures from general rules where strict adherence to them would cause great harm and clearly contradict their intended scope of application. I will contend that this tradition has endured implicitly within modern law and legal interpretation, and that the doctrine of necessity can similarly be seen as a manifestation of the equity tradition. My suggestion is that, in modern jurisprudence, equity may be understood in a refined sense as a particular legal value, the weight of which, in circumstances such as those arising from a state of necessity, outweighs that of legal certainty. In the final section, I will outline the implications of this view for the doctrine of necessity.

## I. The Equity Tradition

166. Extraordinary circumstances of great need might justify extraordinary actions. This is the core of the idea of necessity described earlier in this paper. In law in general, this arises when the application of legal rules leads, under special circumstances, to great harm to a (public) interest. As mentioned, this problem may be addressed in multiple ways, namely by properly defining in statute its scope of application, and by introducing exceptions (e.g. a defence) or derogation clauses. A state of necessity of the kind examined arises when none of these solutions is available in a constitutional case. Sometimes the statute could have included an exception, but it did not. In other cases, the situation is so complex or extraordinary that it could not have been foreseen in statute. Either way, the law turns out to be over-inclusive; what might ordinarily be good law may be vastly damaging in special circumstances. The tension between law's generality and the peculiar case is identified and addressed by the ancient idea of equity or *epieikeia*. I will argue that a proper formulation of this principle can provide a sound basis for the doctrine of necessity.

### a) *Equity: concept and origins*

167. Equity or *epieikeia* is an interpretive approach used to prevent unjust outcomes that might arise from the strict application of general legal rules. It serves as a corrective where the law, due to its general nature, proves insufficient.<sup>273</sup> As Tasioulas comments, '[t]he equity tradition presupposes [that judges should exercise discretion] where the

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<sup>273</sup> See William Blackstone, *The Oxford Edition of Blackstone's: Commentaries on the Laws of England: Book I: Of the Rights of Person* (Oxford University Press 2016) Introduction, para. 61, who quotes Hugo Grotius, *De Jure Belli ac Pacis Libri Tres (The Rights of War and Peace)* (first published 1625, reprinted from the 1738 English translation, Liberty Fund 2005) Book II, ch. 16, para. 16, who himself refers to Aristotle.

rigorous application of a law yields a sufficiently grave injustice in the circumstances of a particular case or where such an injustice would arise because of a "gap" in the law'.<sup>274</sup> The idea traces back to Aristotle.<sup>275</sup> In *Nicomachean Ethics*, Aristotle argues that the equitable (*epiekes*) is just, though not in the sense of being 'legally just'. Instead, it is a correction of errors that arise from the generality of the law and which, if applied without exception, would lead to unjust results.

The reason is that all law is universal but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, *the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing*, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission—to say *what the legislator himself would have said had he been present, and would have put into his law if he had known*. Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality.<sup>276</sup>

168. It is important to note that the correction is needed not because the law is flawed, but because the 'nature of the thing', meaning the unusualness of the case, demands it.<sup>277</sup> The law is appropriately general as it is designed to govern various aspects of its

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<sup>274</sup> John Tasioulas, 'The Paradox of Equity' (1996) 55 *The Cambridge Law Journal* 456, 456.

<sup>275</sup> The term also appears in Plato, but without a clearly legal connotation, see Renato Beneduzi, *Equity in the Civil Law Tradition* (Springer 2021) 7-8.

<sup>276</sup> Aristotle, *Nicomachean Ethics* (David Ross tr, Oxford University Press 2009) 1137b12-28. Emphasis mine.

<sup>277</sup> The exception to the rule confirms the rule, in the sense that 'the exception exemplifies an implicitly understood limitation upon the otherwise universally valid rule', Wolfgang Von Leyden, *Aristotle on Equality and Justice: His Political Argument* (Springer 1985) 96.

subject matter. It could not and should not be more specific, '[f]or when the thing is indefinite the rule also is indefinite'.<sup>278</sup> The rule is meant to be adaptable, even though it is expressed in general terms, allowing it to remain just even in exceptional cases.<sup>279</sup> Acting in equity is, therefore, truly acting in the spirit of justice, even if it means deviating from the letter of the law.<sup>280</sup> Respecting legality while deciding against the strict text is possible because the judge is adhering to the rule's purpose, which justifies going beyond its ordinary meaning.<sup>281</sup> The equitable correction is ultimately a 'realization of the law's ends'.<sup>282</sup> The pith of the idea of equity, as R. Shiner aptly put it, is that 'the mien of universality worn by the written law is misleading'.<sup>283</sup>

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<sup>278</sup> Aristotle, *Nicomachean Ethics* (David Ross tr, Oxford University Press 2009).

<sup>279</sup> '[Equality] is, in the last analysis, an "indefinite standard" made to fit the circumstances of a particular case in itself indefinite', Anton-Hermann Chroust, 'Aristotle's Conception of Equity (Epieikeia)' (1942) 18 *Notre Dame Law* 119, 124.

<sup>280</sup> Similarly in another work, Aristotle calls equity 'the sort of justice which goes beyond the written law' (*ἔστιν δὲ ἐπιεικὲς τὸ παρὰ τὸν γεγραμμένον νόμον δίκαιον*), Aristotle, *Rhetorics* (Rhys Roberts tr, Oxford University Press 2009) 1374a29-30.

<sup>281</sup> '[T]he adjudicator is not departing from existing law or freely enacting new law, but rather fulfilling the genuine purpose of the legal rule whose rigorous application would produce an injustice', John Tasioulas, 'The Paradox of Equity' (1996) 55 *The Cambridge Law Journal* 456, 464.

<sup>282</sup> '[...] the Aristotelian view implies that equity has a fundamentally remedial character that is necessitated by the nature of law as law, and that equitable correction of law is essential to the realization of the law's ends', Paul B Miller, 'Equity as Supplemental Law' in Dennis Klimchuk, Irit Samet and Henry E. Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020) 95.

<sup>283</sup> Roger A. Shiner, 'Aristotle's Theory of Equity' (1993) 27 *Loyola of Los Angeles Law Review* 1245, 1252.

169. Following Aristotle, Thomas Aquinas connects equity with the protection of public welfare, justifying superseding the letter of law when its strict application would harm it:

Since then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed. For instance, suppose that in a besieged city it be an established law that the gates of the city are to be kept closed, this is good for public welfare as a general rule: but, it were to happen that the enemy are in pursuit of certain citizens, who are defenders of the city, it would be a great loss to the city, if the gates were not opened to them: and so in that case the gates ought to be opened, contrary to the letter of the law, in order to maintain the common weal, which the lawgiver had in view.<sup>284</sup>

170. The passage highlights the tension between the general language in which law is expressed and its true ‘intended’ meaning. The text is being deviated from for the sake of the common welfare, but that welfare is understood as aligning with how the legislator intended the law to apply. Implicit in this idea is the assumption that the legislator could not have intended something that goes against the common good. The ‘manifest harm’ that would result from strict adherence to the letter of the law is taken as evidence ‘that the lawgiver intended otherwise’.<sup>285</sup> This maintains a connection between positive law and the underlying reasons for which it was enacted. The law’s requirements are not seen as conclusively fixed or separated from the lawmaker’s

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<sup>284</sup> Thomas Aquinas, *Summa Theologiae* (2nd rev edn, Literally translated by Fathers of the English Dominican Province 1920) I-II, q. 96, a. 6.

<sup>285</sup> *Ibid.*

intended application, at least on a fundamental level.<sup>286</sup> As Aquinas adds: ‘He who follows the intention of the lawgiver, does not interpret the law simply’.<sup>287</sup>

171. Aquinas is quick to emphasise that an equitable approach should be employed only when there is an imperative need for a remedy. Law is authoritative and must be observed without being subject to judgments on its merits. The letter of the law is overridden only when its strict adherence would result in ‘peril’ – a state of necessity which ‘brings with it a dispensation, since *necessity knows no law*’.<sup>288</sup> In line with Aristotle’s view, acting out of necessity does not admit an error in law; rather, it acknowledges that the letter of the law was never intended to apply in such extreme cases.<sup>289</sup>

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<sup>286</sup> Likewise, Grotius describes equity as an ‘inconsisten[cy] with the Design and Intention’, Hugo Grotius, *De Jure Belli ac Pacis Libri Tres (The Rights of War and Peace)* (first published 1625, reprinted from the 1738 English translation, Liberty Fund 2005) Book II, ch. 16, para. 26.

<sup>287</sup> Thomas Aquinas, *Summa Theologiae* (2nd rev edn, Literally translated by Fathers of the English Dominican Province 1920) I-II, q. 96, a. 6.

<sup>288</sup> Ibid. Emphasis mine.

<sup>289</sup> ‘He who in a case of necessity acts beside the letter of the law, does not judge the law; but of a particular case in which he sees that the letter of the law is not to be observed’, *ibid.* P. Yowell notes that Aquinas avoids an apparent inconsistency found in Aristotle’s formulation of the problem. Aristotle maintained that the law is correctly expressed in general terms and that a correction consists on what the legislator would have said had he considered the case. Since the law consists of general statements, it cannot be the case that the legislator could ever make a more detailed rule. See Paul Yowell, ‘Legislation, Common Law and the Virtue of Clarity’ in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011) 105.

### ***b) Equity in legal interpretation***

172. The principle that law should not be interpreted in a way that frustrates its intended meaning has evolved judicially over time into various canons of interpretation.<sup>290</sup>

173. English jurisprudence traditionally recognises three canons of statutory interpretation: the literal rule, the golden rule, and the mischief rule.<sup>291</sup> These so-called ‘rules’ reflect differing levels of emphasis on purposive considerations when determining the meaning of law.<sup>292</sup> This is how the transition from the literal to the golden and the mischief rule can be understood through the lens of equity. Though the ‘clear’ meaning of the text exemplifies the rule,<sup>293</sup> considerations of equity come into play when that would lead to an ‘absurdity or inconsistency’.<sup>294</sup> In addition, whether a meaning is ‘clear’ cannot be determined without a pre-understanding of the context of the rule, which is found by looking at the overall reason for which the rule was legislated. Thus, every interpretation must include considerations beyond those readily revealed by the text that compromise its rigidity and allow its meaning to adjust according to its intended function. The mischief rule represents a further shift toward a

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<sup>290</sup> William H Loyd, ‘Equity of a Statute’ (1909) 58 *University of Pennsylvania Law Review* 76, 78-79.

<sup>291</sup> Michael Zander, *The Law-Making Process* (6 edn, Cambridge University Press 2004) 130.

<sup>292</sup> Similar maxims of interpretation exist in civil law jurisdictions, see Stefan Vogenauer, ‘Statutory Interpretation’ in Jan M. Smits (ed), *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* (Edward Elgar Publishing 2006) 684-685.

<sup>293</sup> *R v. Judge of the City of London Court* (1892) 1892 273, 293.

<sup>294</sup> ‘or inconvenience so great as to convince the Court that the intention could not have been to use [the words] in their ordinary signification’, *Hill v. East and West India Dock Co* (1884) 9 448, 464-465.

purposive approach to statutory interpretation.<sup>295</sup> While the statutory text remains the foundation of legal interpretation, the need to complement it is acknowledged, as ‘for [...] the law-makers could not possibly set down all cases in express terms’.<sup>296</sup>

174. Purposive interpretations reflect considerations of equity by drawing from the rationale of the legal rule embedded in the text. Blackstone, discussing equity, writes: ‘But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering *the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it*’.<sup>297</sup> Similar approaches to legal interpretation have been adopted in many jurisdictions, recognising the duality between the text and its underlying meaning, often referred to as the *spirit of the law* or the *ratio legis*.<sup>298</sup> The extent to which courts rely on such interpretations varies, but there is a common

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<sup>295</sup> Diggory Bailey and Luke Norburry (eds), *Bennion on Statutory Interpretation* (7th edn, LexisNexis 2017) 341-351.

<sup>296</sup> These steps are not made in chronological order. The mischief rule was firstly explicitly expressed in the very old *Heydon's Case* (1584) 76 637, 24b. The rule was set by Sir Edward Coke, whose views of the mischief were interlarded with the concept of equity. He writes: “Equitie” is a construction made by the judges, that cases out of the letter of a statute, yet being with the same mischiefe, or cause of making of the same, shall be within the same remedie that the statute provideth: and the reason hereof is, for that the lawmakers could not possibly set downe all cases in expresse terms’, Sir Edward Coke, *Commentary upon Littleton* (First Part of the Institutes of the Laws of England) 21.24.b.

<sup>297</sup> William Blackstone, *The Oxford Edition of Blackstone's: Commentaries on the Laws of England: Book I: Of the Rights of Person* (Oxford University Press 2016) Introduction, para. 61, emphasis mine.

<sup>298</sup> William S Blatt, 'The History of Statutory Interpretation: A Study in Form and Substance' (1984) 6 *Cardozo Law Review* 799, 800.

understanding that ‘unreasonable’ meanings should be avoided.<sup>299</sup> For instance, the absurdity doctrine in the US echoes the same considerations expressed in equity regarding the generality of law and the need to give effect to its intended meaning or purpose.<sup>300</sup>

175. Equity and its various manifestations provide a foundation for the non-application or alternative application of laws through recourse to the idea of legislative purpose or intention. This is evident in the connection between equity and absurdity, which, although somewhat vague<sup>301</sup> or broad<sup>302</sup> in meaning, ultimately signals a significant discrepancy between the apparent and intended meaning of the law.<sup>303</sup> How

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<sup>299</sup> See Cass R Sunstein, 'Problems with Rules' (1995) 83 *California Law Review* 935, 986. For the relation between absurdity and the presumption of a rational legislator, see Thomas Bustamante, 'On the Argumentum ad Absurdum in Statutory Interpretation: Its Uses and Normative Significance' in Christian Dahlman and Eveline Feteris (eds), *Legal Argumentation Theory: Cross-Disciplinary Perspectives* (Springer Netherlands 2013) 27-32. For the purposive approach in continental systems, see Gerard Carney, 'Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions' (2014) 36 *Statute Law Review* 46, 54. For a critical approach, see John F. Manning, 'The Absurdity Doctrine' (2002) 116 *Harvard Law Review* 2387.

<sup>300</sup> '[W]hen faced with a sharp divergence between an enacted rule and its background intention or justification, the justices have assumed that Congress expressed itself clearly but imprecisely and that Congress surely would have adjusted the statute's wording had it anticipated the particular question at issue', John F. Manning, 'The Absurdity Doctrine' (2002) 116 *Harvard Law Review* 2387, 2400.

<sup>301</sup> John Willis, 'Statute Interpretation in a Nutshell' (1938) 16 *Canadian Bar Review* 1, 13.

<sup>302</sup> Absurdity has been described as 'any extreme departure from commonly accepted principles of morality, philosophy, politics, or convenience', E Russell Hopkins, 'The Literal Canon and the Golden Rule' (1937) 15 *ibid* | Cited Pages 689, 693.

<sup>303</sup> Ruth Sullivan, *Statutory Interpretation* (2 edn, Irwin Law 2007) 216. The concept of absurdity and its relation to intended meaning in legal interpretation is also ancient. H. Grotius argues that absurdity is evidence that there is an 'Original Defect in the Will', as 'no Man is to be supposed to intend Things that are absurd', Hugo Grotius, *De Jure Belli ac Pacis Libri Tres (The Rights of War*

this discrepancy may justify departing from written law can also be seen in the doctrine of *evaluative legal gaps*.

**c) Equity in the theory of evaluative legal gaps**

176. Lawyers speak of legal gaps in two senses. In the first sense, a gap is identified by looking at the *normative status* of an action: is doing *x* permitted, required, or prohibited? If one cannot determine which of these three mutually exclusive options is true, then there is a *normative gap*. This is the type of gap legal philosophers often discuss when debating whether law is ‘complete’, meaning free of gaps.<sup>304</sup> If one cannot determine which of the three values for *x* is true, or if more than one value is true, then there is a gap. As a result, indeterminacy regarding the normative status of an action may (arguably) arise because the law is unclear (vagueness), contradictory (conflicts) or absent (silence). In all these cases, the law fails to provide guidance on what ought to be done (the *normative status*), and this constitutes the ‘gap’.

177. In the second sense, lawyers speak of gaps in an evaluative sense, regardless of whether normative gaps exist (*evaluative gaps*).<sup>305</sup> The underlying assumption is that a law should apply when the case *falls within its intended scope of application*. If it does,

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*and Peace*) (first published 1625, reprinted from the 1738 English translation, Liberty Fund 2005) Book II, ch. 16, para. 22.

<sup>304</sup> Hans Kelsen, 'On the Theory of Interpretation' (1990) 10 *Legal Studies* 127; H. L. A. Hart, *The Concept of Law* (Oxford University Press 2012) 252; Ronald Dworkin, 'No Right Answer' (1978) 53 *New York University Law Review* 1, 2; Joseph Raz, 'Legal Reasons, Sources and Gaps' in *The Authority of Law: Essays on Law and Morality* (2 edn, Oxford University Press 2009) 70-71.

<sup>305</sup> I use the term ‘evaluative gaps’ to emphasise that they are the product of a value judgement. There is no commonly agreed terminology and many times writers speak of ‘legal gaps’ indistinguishably. Other terms include ‘axiological gaps’, see C.E. Alchourron and E. Bulygin, *Normative Systems* (Springer Vienna 1971) 107, or ‘gaps in the legislative scheme’, see Ruth Sullivan, *Statutory Interpretation* (2 edn, Irwin Law 2007) 120.

it is *relevant* to what the law was intended to regulate. The term ‘gap’ is used to denote an *omission* in law to regulate a set of cases by *relevant* legal norms. Evaluative gaps arise when a) there is no *relevant* law applicable to the case (non-regulation); or b) there is a *relevant* law that does not apply to the case (under-inclusiveness); or c) there is an *irrelevant* law that applies to the case (over-inclusiveness).

178. For example, there may be no law regulating liability for accidents involving self-driving cars (non-regulation), or the applicable law might have been designed for conventional cars (over-inclusiveness), or there may be a law addressing accidents involving autonomous machines that does not extend to cars (under-inclusiveness). Evaluative gaps may not only stem from legislative oversight (e.g. a failure to regulate an existing set of cases) but also when a novel and unforeseen set of cases arises. For instance, is the US President Commander in Chief of the Air Force when the Constitution, written in 1787, only mentions the ‘Army and Navy’? Should rules for remote transactions originally designed for the slower communication of the postal service apply to transactions made via newly invented telephones?

179. Whether evaluative gaps can lead to normative gaps varies across jurisdictions and depends on the type of evaluative gaps in question. A persistent challenge lies in distinguishing evaluative gaps from mere value judgments about how the law *ought to be* but *is not*. Kelsen criticised the theory of evaluative gaps as merely reflecting the judge’s disapproval on grounds of policy or morals.<sup>306</sup> However, the theory of evaluative

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<sup>306</sup> ‘If in certain cases one nevertheless speaks of a ‘gap’, this does not mean, as the expression misleadingly suggests, that a decision is logically impossible for want of a norm. Rather, it simply means that the decision granting or rejecting a claim, while logically possible, is felt to be too impractical or too unjust by the official called upon to take the decision, that is, called upon to

gaps rests on the idea that there is a special type of value judgment that is not rooted in moral-political considerations. Instead, it derives from the degree of relevance of some facts with the law's intended scope of application – what can be called the criterion of 'relevance'.<sup>307</sup> When this criterion is not met, the judge needs to deviate from the strict letter of the law in order to apply it correctly. In other words, evaluative gaps should be addressed in the same way as normative gaps, with judges resolving them by expanding (reading in) or narrowing (reading down) the scope of legal rules.<sup>308</sup>

180. The theory of legal gaps stems from a historical and theoretical framework aimed at limiting judicial interpretation. It presupposes that the legislative text sets certain boundaries that ordinary statutory interpretation cannot overstep. Recognising and filling legal gaps is seen as something extraordinary, more akin to a legislative function than a judicial one. While identifying and addressing legal gaps is indeed unusual, the

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apply the statute. Indeed, the decision is felt to be so impractical or so unjust that the official is inclined to assume that the legislator did not consider this case at all and that, if he had, he would have decided it differently than it would have to be decided on the basis of the statute. [...] The so-called 'gap', then, is nothing but the difference between the positive law and a system held to be better, more just, more nearly right', Hans Kelsen, 'On the Theory of Interpretation' (1990) 10 *Legal Studies* 127, 133.

<sup>307</sup> C.E. Alchourron and E. Bulygin argue that 'axiological' gaps exist when a solution is provided by law but is inadequate because the legislator did not make a distinction between cases that she should have (or made more distinctions than she should). If the legislator had considered the neglected property, the solution for the case would be different. This is called the 'hypothesis of relevance', C.E. Alchourron and E. Bulygin, *Normative Systems* (Springer Vienna 1971) 107.

<sup>308</sup> In many continental systems, evaluative gaps are distinguished from ordinary expansive or restrictive interpretation in that the former goes beyond the linguistic limits of the text. Furthermore, dealing with evaluative gaps that require reading down statutes is described as a two-staged mechanism. By applying the 'criterion of relevance', judges first create a normative gap which then has to be filled through an analogical interpretation of a law or a legal principle (*analogia legis* or *analogia iuris*). See for the matter Claudia Irti, 'A Short Introduction to The Problem of Legal Gaps' (2014) 29 *Tulane European and Civil Law Forum* 157, 170 and ft 67.

difference between this and ordinary interpretation aimed at resolving vagueness is largely one of degree.

181. First, determining the scope of the legislative text is the essence of statutory interpretation in all cases. For instance, deciding what constitutes 'labour or service' and whether it includes 'priests' is an inquiry into what falls under that term. Narrowing the definition of 'labour' to mean 'manual labour' is only considered extraordinary if it would be surprising, given the context, to interpret it that way. In this sense, identifying an expansive or narrowing interpretation as extraordinary is necessary to distinguish it as a gap-filling interpretation, thereby maintaining the distinction between legal gaps and vagueness-solving interpretation.

182. Secondly, the theory of legal gaps, and normative gaps specifically, is based on a misleading conception of law as a set of rules that correspond, almost in a one-to-one manner, with a set of cases. In reality, legal rules have a broad scope with grey areas, often overlapping with other legal rules and always overlapping – in agreement or in conflict – with general principles of law to various degrees. Even when judges cannot identify a legal rule tailored to a particular case, they can generally resort to more general legal rules and principles.<sup>309</sup> Limiting a certain area of law to a particular list of

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<sup>309</sup> This is even more prominent in common law systems. As Lord Donaldson of Lynton MR observed in *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, [1989] 2 FLR 376, at 30 and 385: 'the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and insofar as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges. It is not a legislative function or process that is an alternative solution the initiation of which is the sole prerogative of Parliament. It is an essentially judicial process — and, as such, it has to be undertaken in accordance with principle.'

written rules is exceptional and requires the enactment of special closure rules,<sup>310</sup> such as the *nullum crimen sine lege* principle in many criminal law systems.<sup>311</sup> Legal interpretation both defines the scope of legal norms and determines which norms are applicable and how they should apply. There is no ‘gap’ in the sense that a case falls outside the law, but rather in the technical sense that a case is not explicitly regulated by a legal rule in a one-to-one manner. Normative gaps can therefore only be understood as gaps in a *prima facie* sense, where an answer to a legal question is not explicit in the legal text, but a conclusion can still be reached.<sup>312</sup>

183. The theory of legal gaps can thus be understood as identifying special cases of legal interpretation, along with arguments for its limitations. Normative gaps address the interpretive challenges that arise when there is a lack of explicit and clear regulation, while evaluative gaps deal with the difficulties stemming from the general nature of law and its resulting over-inclusiveness or under-inclusiveness. It is therefore easy to see how the considerations within the theory of legal gaps align with those of the equity tradition, offering essentially the same approach in cases where the law is judged to be overinclusive and should not apply.

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<sup>310</sup> Closure rules are rules that take effect when no other rule is applicable, resulting in complete systems. That ‘everything not prohibited is allowed’ is such an example.

<sup>311</sup> Under this principle, one can only be charged and punished for a crime if there is a pre-existing (*previa*) written (*scripta*) and well-defined (*certa*) law (*lege*) prohibiting the act. Gap-filling interpretation is not allowed (*lege stricta*). As a result, there can be no normative gaps in criminal law, even if there are evaluative gaps.

<sup>312</sup> An *ultima facie* gap would mean that a judge should decide that a case cannot be solved based on law and refrain from making a decision. As mentioned, this does not seem possible with the contemporary understanding of law, which is not limited to a collection of legal rules.

**d) The 'legislative intent' in equity**

184. The doctrines examined above revolve around a perceived tension between the language in which a law is expressed and its intended meaning. In some cases, this tension arises from a legislative error that could have been avoided had the rule been framed differently. In others, it stems from the inherent generality of language, whose open texture inevitably leads to unintended outcomes. When such outcomes reach an extreme, equity intervenes to restore the law's meaning to what was 'intended' by the legislator.

185. It may be tempting to associate such references to 'intention' with the modern and much-debated concept of legislative intent in statutory interpretation, that is, the meaning the legislature sought to convey through the text of a statute.<sup>313</sup> However, this would be a mistake, as it is evident that 'intended meaning' or 'the legislature's meaning' refers instead to a reasoned assessment of the law's rationale and sensible application. In Aristotle's words, equity's 'existence partly is and partly is not intended by legislators'.<sup>314</sup> Accordingly, equity may take the form of a counterfactual argument based on what the legislature would have intended; in case law, it has often appeared as a

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<sup>313</sup> Mark Greenberg, 'Legal Interpretation and Natural Law' (2020) 89 *Fordham Law Review* 109, 112; Andrei Marmor, *Interpretation and Legal Theory* (Hart Publishing 2005) 133; Jeremy Waldron, 'The Dignity of Legislation' (1995) 54 *Maryland Law Review* 633, 645-648; Antonin Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) *Duke Law Journal* 511, 517; Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 313, 364; Frank H Easterbrook, 'Statutes' Domains' (1983) 50 *The University of Chicago Law Review* 533, 547.

<sup>314</sup> '[N]ot intended, where they have noticed no defect in the law; intended, where they find themselves unable to define things exactly, and are obliged to legislate universally where matters hold only for the most part', Aristotle, 'Rhetorics' in Jonathan Barnes (ed), *The Complete Works of Aristotle* (vol 2, Princeton University Press 1991) p. 48, 1374a19-1374b23.

presumption that the legislature's 'intent' is reasonable and just.<sup>315</sup> It is therefore not concerned with uncovering any 'actual' intentions of the legislature, nor with resolving ambiguities by appealing to such purported factual assessments.

186. Naturally, this assessment must take into account the subject matter of the law in order to determine whether its application in particular circumstances would indeed be 'absurd'. For example, we may now consider absolute monarchy to be 'absurd', but that does not mean a judge living under a monarchical constitution who shares that view should strike it down as 'inequitable'. Equity is not a free-standing moral standard operating as a barrier against unjust laws. It must be remembered that equity functions as a corrective to the generality of the law. Within this understanding, its role is to prevent a grossly 'unjust' outcome from an otherwise 'just' rule. Equity corrects the law by reference to how it generally operates and how that operation is frustrated in a highly specific and exceptional situation. Therefore, equity cannot run counter to what the legislature actually intended to establish.<sup>316</sup>

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<sup>315</sup> As articulated in *Waugh v. Pedneault* (1948) 1949 WWR 1 14, 15 'The Legislature cannot be presumed to act unreasonably or unjustly, for that would be acting against the public interest. [...] Words used in enactments of the Legislature must be construed upon that premise. That is the real "intent" of the Legislature.'

<sup>316</sup> This 'basic' intent has been pointed out by many writers discussing the role of the legislature's intention in legal interpretation: 'It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make', Joseph Raz, *Between Authority and Interpretation: On the theory of Law and Practical Reason* (Oxford University Press 2009) 265. 'The reasoning and action of the legislator is [...] unintelligible unless the law he makes is the law that he intends to make', Richard Ekins, 'Legislative Intent in Law's Empire' (2011) 24 *Ratio Juris* 435, 457. 'As a matter of political theory, any conception of judging rooted in the related premises of legislative supremacy and the faithful agent theory is, quite simply, unintelligible without an underlying conception of legislative intent' John F. Manning, 'Textualism and Legislative Intent' (2005) 91 *Virginia Law Review* 419, 427.

***e) Equity today: its nature and content***

187. So far, we have discussed the concept of equity as it was understood by various philosophers and jurists throughout history. How does this ancient concept of equity fit within modern law? We have seen that the underlying idea endures and manifests in various forms of legal interpretation, such as the absurdity doctrine, the golden rule, the mischief rule, and, in civil law systems, the theory of evaluative gaps. Could we say that, as reflected in these examples, equity forms a general principle of legal interpretation? Could we go further still and suggest that, by virtue of its generality, it constitutes a principle of natural law, inherent in all states, under which judges may nullify extremely unjust applications of written law?

188. Equity reflects the value lawyers place on reasonableness. Judges seek to understand the legal import of statutes, cases and other sources of law in order to determine what the law requires in a particular case. They operate within a linguistic and social understanding of legal texts, reflecting on these against the backdrop of their legal tradition, legal principles, common sense, and the conviction that, having taken all these parameters into account, they have reached the 'correct' interpretation of the law. Equity reminds us that the law's content is not confined to a linguistic proposition; that legal rules carry with them the broader considerations that led to their creation and rationale; and that legal rules, like any message, are interpreted within the context of the reasons underlying their enactment and operation.

189. With these thoughts in mind, I argue that it is simpler and more accurate to view equity neither as a contingent interpretive principle nor as natural law, but as a particular approach to understanding what written law is. This approach sees written law as encapsulating and reflecting the priorities, aims and values of the political

decision under which it was created. Adhering to written law presupposes that the basic premises and fundamental ideas underpinning the decision for its enactment continue to hold true.

190. This is not only true of law but of all kinds of decisions. For example, my decision to take a shorter route by driving across the bridge would no longer stand if, upon reaching it, I found that the bridge had collapsed. I would regard these circumstances as so fundamentally different that they fall outside my original decision, as aliud. Similarly, written law rests on fundamental premises. The words set out in a statute retain the essential rationale, values and purposes of the political decision that produced it. Law cannot be applied in a manner that undermines those values, because one follows written law only to the extent that it still corresponds to the premises of the political decision it reflects.

191. Accordingly, the general presumption regarding constitutions is that they are designed not to fail but to establish a functional legal order that promotes, rather than subverts, the particular values each constitution embodies. In interpreting them, those values must be taken into account. Equity, in this sense, is the understanding of law together with the premises of the political decision underlying its enactment.

192. Yet equity is only one value in law, the other being legal certainty and the risk that arises from departing from what is understood within the legal community to be the clear and explicit meaning of written law. In most cases, the values of legal certainty, of not upsetting expectations, and of avoiding the dangers that come with making law more flexible and open to interpretation, outweigh the value of equity. This explains why the logic of equity tends to surface in cases of 'absurdity', or when strict adherence

to the law would lead to grossly disproportionate, unexpected or unreasonable outcomes. In such instances, the general expectation that law should not cause great harm to the public interest or lead to the collapse of central functions of the state is subverted. In those circumstances, equity prevails.

193. I believe this approach was reflected in the *Ibrahim* judgment, particularly in the idea that the constitution depends on preserving a basic structure and fundamental theme, thus making exceptions justifiable when their application would otherwise undermine them. The equity approach can provide a theoretical foundation for this claim and can be extended as a basis for the doctrine of necessity in constitutional law.

## **II. Equity and the Doctrine of State Necessity**

194. A state of necessity under an equity approach constitutes a situation where the application of the written constitution runs contrary to its fundamental rationale, values and purposes. These said values lie at the core of constitutional rules and have legal significance; the constitution cannot be applied in a way that undermines them, even if that would be according to its letter. Thus, actions protecting said values against the letter of the constitution are justified because they do not violate its meaning, once that is interpreted in light of its rationale. Instead, those values, like legal norms themselves, impose a legal duty and authority to safeguard the constitutional order.

195. Aquinas' example illustrates the relationship between law and the state of necessity. The law mandates that the gates of a besieged city remain closed for the sake of public welfare. However, the law's purpose is defeated if the gates remain shut when the city's defenders, who are being pursued, attempt to re-enter. Following the letter of the law in this situation would cause significant harm to the public good – the very good

the law was intended to protect. For this reason, Aquinas argues that the law should not apply – or, more precisely, that it was never intended to apply in such circumstances. Equity corrects the interpretation of the law. This example parallels cases when the doctrine of necessity is employed to prevent damaging adherence to the letter of the constitution. In such cases, state officials rightly conclude that this cannot be what the law truly requires. The application of the constitution can only lead to its detriment if it is interpreted without consideration of its underlying purposes.

196. Let's take the *Ibrahim* case to illustrate how this works. The constitutional paralysis in Cyprus could have been avoided if there had been a derogation clause for the event of a deadlock between the two communities. The doctrine of necessity served to address a legislative omission, effectively acting as the missing derogation clause. Framed in these terms, the problem appears to be an error in the constitutional design. The absence of a derogation clause within the Cypriot constitution, however, could also be interpreted as requiring adherence to bi-communality under any circumstances, even if these result in constitutional paralysis. This is the conclusion if constitutional rules are taken to be only as written.

197. The alternative, under the equity approach, is to interpret those rules against the background of its fundamental values. The provisions enshrined in the Cypriot constitution were designed to ensure the bi-communal nature of the state and the peaceful co-existence between the different ethnic groups. Various compromises to majority rule were made to achieve this goal, such as fixed bi-communal participation in government, parliament and the judiciary and the entrenchment of the constitution, made unamendable in its greater part. The rationale behind all these arrangements was

to promote and protect the bi-communality of the state, elevating it to one of its most fundamental values. As a state value, however, bi-communality presupposes the existence and functionality of the state. A paralysed state cannot fulfil this or any other constitutional commitments. The constitutional arrangements were necessarily made on the assumption that the legal order would remain functional. To apply these provisions to the detriment of the constitutional order would be applying them to their detriment. With an equitable reading, it's those very rules that impose a duty for the state to act on the surface extra-constitutionally. Consequently, acts justified under the doctrine of necessity are not unconstitutional, even though they deviate from the ordinary application of constitutional rules.

198. In this way, the equitable approach offers a basis for the doctrine of necessity. Additionally, from this basis follow certain limitations. As the constitution remains the source of authority for the emergency measures, it cannot be suspended, abrogated or changed. The actions undertaken must be instrumental in returning to the conditions that will permit the constitution to operate as normally envisaged. It does not matter if they are necessary; that may justify extra-constitutional actions under some other doctrine, such as a revolutionary change. But the doctrine of necessity is a rule-of-law doctrine, employed as a last resort to safeguard the *standing* constitutional order. The equity approach draws this connection between the doctrine and the constitution by making the former as being derived from the latter in the way described above. Thus, under this approach, the doctrine of necessity and the constitution are intermingled.

199. Furthermore, the measures undertaken must not only be connected with resolving the state of necessity, but also do so in a way that promotes, and does not

undermine, said constitutional values. For example, it would not be possible to justify under the doctrine of necessity the exclusion of the Turkish Cypriots and the unilateral permanent transformation of the state into a single-community one. Changes such as these would run contrary to fundamental elements of the Cypriot constitution, and hence could not be supported under equity. It is essential for the doctrine that the constitution remains operative at a fundamental level, guiding executive action and restricting the scope of constitutional transgressions. In this way, a separating line between the doctrine of necessity and constitutional revolution or violation can be drawn.

200. This interpretation of the *Ibrahim* decision applies *mutatis mutandis* to the other cases mentioned. The 1954 *Reference to the Governor-General* case of Pakistan, like the 1964 *Ibrahim* case of Cyprus, involved a case that the constitution had not anticipated, where strict adherence to its provisions would have disproportionately harmful consequences for the public interest. The same applies to the *Re Manitoba Language Rights* case in Canada, where compliance with a requirement designed to protect the language rights of two communities would have caused severe damage to the entire state of Manitoba. In all these cases, the common criterion of preventing 'far greater harm' – found both in the defence of necessity and the 'law of state necessity' – stems from the problem of highly unintended consequences arising from strict adherence to the letter of the law.

201. However, although equity offers a closer connection to the standing constitution, such a generalised use risks collapsing into the radical doctrine of necessity with little meaningful distinction. As noted, the tradition of equity has always been tempered by

a concern for legality and the legal certainty that legality secures, which is reflected in its exceptionally narrow use to correct 'absurd' applications of the law. In modern constitutional systems, where constitutional arrangements provide careful and detailed regulation of the exercise of state power and the powers of state institutions, a broad use of equity as a corrective mechanism would undermine adherence to those constitutional regulations. For this reason, the doctrine of state necessity is best understood not as a general doctrine permitting constitutional deviation in response to undesirable constitutional outcomes, but as a narrower doctrine directed against self-destructive applications of the constitution, in much the same way as the absurdity doctrine developed along similarly restrictive lines.

202. More specifically, the doctrine of state necessity is most defensible in the contexts exemplified by the original *Governor-General* and *Ibrahim* cases, namely where key institutions of the state are paralysed or where an essential part of the legal order becomes inoperable or void as a consequence of the written constitution itself. In such situations of constitutional impasse, where adherence to constitutional rules results in the inoperability of the constitution or the legal order, the justificatory value of equitable intervention is considerably clearer and outweighs its associated risks. Cases of constitutional impasse are therefore sufficiently narrow in scope, limited in their potential dangers, and significant in their role in preserving the legal – and, by extension, constitutional – order, that they should be regarded as the principal justifiable application of the doctrine. At the same time, distinguishing such cases from broader situations of political necessity or constitutional emergency would preserve the distinct character of the doctrine and help guard against the abuses and doctrinal

distortions that emerged in later decisions, which conflated it with a doctrine of revolutionary constitutional change.

203. For these reasons, it is argued that the doctrine of state necessity should be reformulated as a narrower doctrine confined to cases of constitutional paralysis and clearly distinguished from general doctrines of constitutional emergency and broader concepts of legal necessity. Understood in this way, the doctrine of state necessity constitutes a constitutional doctrine developed within, though not reducible to, the theoretical and conceptual tradition of equity.

### **III. Conclusions**

204. The doctrine of necessity amounts to a singularity in constitutional law. It makes the seemingly paradoxical claim that the state may act unconstitutionally yet lawfully. I sought to offer a sounder theoretical basis that fits modern constitutional states. I discussed the concept of necessity and distinguished its formalised version, typically used as a defence against illegality, from its *radical* form, which supposedly transcends legal boundaries. I argued that both versions offer inadequate and problematic grounds for the doctrine of necessity. Nevertheless, I maintained that the doctrine is both necessary and desirable, as it ultimately protects the rule of law in circumstances of grave constitutional crisis.

205. In place of traditional concepts of necessity, formalised or radical, I suggested that equity is the best account. Under this approach, the doctrine of necessity constitutes an alternative application of the constitution, not an extra or supra-constitutional action. Though permitting deviations from the ordinary application of constitutional laws, the doctrine does not constitute an instance of ‘unconstitutional

legality'. I argued that this is best guaranteed by revising necessity into a more narrow doctrine of state necessity applicable specifically in cases of constitutional impasse of the kind that appeared in *Governor-General, Ibrahim* and *Manitoba Language Rights*. This revision achieves a much better defined doctrine, whose application to deviate from constitutional provisions is justifiable on the basis of its more limited risks and indispensable need to re-enable the normal operation of the legal order.

206. The equity approach serves two aims: to provide a basis that does not undermine constitutional supremacy and the rule of law, and to establish certain limitations that follow directly from its foundations. These limitations set clear boundaries between what can and cannot be justified under the doctrine of state necessity. Naturally, maintaining those boundaries and applying them correctly in each case cannot be predetermined by any theoretical model. It is the duty of the judiciary to make good use of the theory. My suggestion is that equity offers a stronger theory, well suited to the modern constitutional state. Its application to the doctrine of necessity provides a fresh perspective on the nature of constitutional legality, through an appreciation of the more abstract elements of constitutions. At times, it will not be possible or desirable to maintain those boundaries or to operate under the doctrine of state necessity. In such cases, a course of unconstitutional measures may be pursued, often involving an authorised, 'revolutionary' change to the constitution. The question of revolutionary legality and its related problems will be examined in the next and subsequent chapters.

## Chapter 4: Doctrines of Revolution

### I. Revolutionary Change and Legality

207. Constitutions, whether written or unwritten, contain the rules of law that define the legislative, executive, and judicial authorities of a country and the manner in which these authorities exercise their powers. In other words, constitutions set out the rules and principles governing the fundamental structure of political power: the state. In modern times, constitutions have assumed an elevated role, as they establish legal boundaries for the exercise of legislative and executive authority, thereby becoming the law that governs the very institutions responsible for making, unmaking, and executing the law. Modern constitutions thus bring the idea of legality – the notion that a conduct has the force of law only if it satisfies certain pre-set legal criteria – into the public domain. They purport to make constitutional legality the foundation of legality as a whole.

208. Within this framework, revolutions appear as anomalies. The term ‘revolution’ can be used in many ways, referring broadly to any drastic and far-reaching change, whether social, cultural, scientific, or political. In the context of constitutional law, however, ‘revolution’ has a narrower meaning, referring to those events that, though in violation of the constitution, are ultimately regarded as lawful and constitution-changing, especially (but not exclusively) when the changes are of great magnitude. For example, the unlawful replacement of a government through a coup may eventually be recognised by courts and other state institutions as having established the lawful government; or the overthrow of an absolute monarchy by a popular uprising and the establishment of a democratic state may ultimately be accepted as the new lawful constitution, even though the change was achieved in violation of the existing legal

framework. This transition, from conduct regarded as unlawful because unconstitutional to conduct regarded as lawful or law-creating, is what I will refer to as revolutionary change. Its 'revolutionary' character lies precisely in its unlawfulness, or at least its violation of the constitution then in force.

209. Expressed in these terms, revolutions are problematic in at least two ways. First, they appear to produce lawfulness out of legal violation. Second, the violation concerns the constitution itself, which is regarded as fundamental and as providing the ultimate criteria for the validity of all laws. Yet revolutionary changes have occurred in every country at some point in history. As Lord Reid observed:

It is an historical fact that in many countries [...] there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or coups d'état. *The law must take account of that fact.*<sup>37</sup>

210. The law must take account of revolutionary changes because they are facts, and law must accord with facts. Law cannot be a myth; it must be alive and possess the normative force it claims to have. If it loses that force, if it has been permanently displaced, it is no longer regarded as law. Conversely, recognising the existence of a legal order begins with observing the fact that a community acknowledges it as law and accords it the normative force it purports to have. This reflects the fundamental relationship between law and fact.

211. But in what ways should the law account for revolutionary changes to constitutions? Two fundamental questions arise.

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<sup>37</sup> *Madzimbamuto v Lardner-Burke PC* (1969) 1 A.C. 645, 724.

First: When and how does a revolutionary change occur, that is, when does something unlawful because unconstitutional become lawful or constitution-changing? Can there be legal rules or principles that regulate the process of forming a new constitutional order and perhaps even its content? Can courts adjudicate such matters? In other words, can there be a law of revolutions?

Second: What are the implications of revolutionary change for the rest of the legal order? Do the laws of a legal order derive their authority from constitutional law or from state officials in such a way that the fall of one brings down the other? Does the entire legal order cease to exist, or do its laws remain valid despite, and even during, revolutionary change? In other words, can there be law in revolutions?

212. The two questions are interconnected. A positive answer to the second makes a positive answer to the first possible. If law persists through revolutions – if some laws remain unaffected by revolutionary changes – then legality is only partially disrupted, and there is no reason why law could not also regulate revolutionary change itself. In this sense, a revolution is, as Karl Olivecrona described it, ‘only one step in the long development of law’, for the change is inferred within an ‘already existing system of law’ and limited in scope.<sup>318</sup> A revolution is therefore not the end of one legal order or the beginning of another, but merely one significant event within a continuing legal evolution. Laws can survive and even constrain revolutionary change, because an unconstitutional alteration of the constitution does not necessarily affect the rest of the

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<sup>318</sup> Karl Olivecrona, *Law as Fact* (Oxford University Press 1939) 73.

legal order. This approach presupposes a particular structure of the legal system, one in which laws, including constitutional law, can endure despite a breach of constitutional legality. Perhaps laws remain valid as long as they retain their normative force, a 'habit of obedience' that shows revolutionary change has left them intact. Or perhaps there exists a legal principle, or a set of laws more fundamental than constitutional law, that survives the fall of the constitution and allows revolutionary change under certain conditions, expanding the boundaries of the legal order beyond constitutional law – legality beyond constitutionality.

213. The second question can also be approached through a negative answer to the first: the rejection of the possibility of a law of revolutions, and therefore of any law within revolutions. Revolutions would then be understood as the starting points of legal orders, as historical events that establish new constitutional regimes. Constitutions themselves would represent the ultimate or original legal principles, from which, as John Salmond put it, 'all others are derived, but which are themselves self-existent'.<sup>319</sup> Hence, every constitution must have an extra-legal origin,<sup>320</sup> since no law can precede the constitution of its own legal order. If constitutional law is the 'fundamental law' – the law that establishes the legal order and serves as the ultimate 'reason of validity' for all other laws – then revolutionary change falls outside the realm of law altogether. Without constitutional legality, there is no legality; whatever happens during a revolution is beyond legal evaluation. There can be neither a law of revolutions nor a law in revolutions. Law reappears only *ex post*, once the change is complete and a new

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<sup>319</sup> John W. Salmond, *Jurisprudence* (4th edn, Stevens and Haynes 1913) 125.

<sup>320</sup> *Ibid* 108.

constitution is in force. The event of revolution can be traced only indirectly, through the observation of legal discontinuity, that is, through the identification of a gap between two valid legal orders existing at different points in time.

214. The most influential theory adhering to this latter approach is Hans Kelsen's Pure Theory of Law. Three of its fundamental assertions are that: (a) domestic laws constitute a hierarchical system of legal norms with the constitution at its foundation; (b) the constitution is a unitary set of legal rules, unified and made valid by a presupposed and non-derived basic norm (*grundnorm*), which imposes a duty to obey it, such that a violation of part of the constitution constitutes a violation of the whole; and (c) the general efficacy of a legal system is a condition for its validity, that is, for its legal existence. Based on these assertions, Kelsen understands the continued existence of a legal order as depending on the continued existence or lawful change of its constitution, and, conversely, any change made in violation of the constitution as constituting a revolution. The following passages from the *Pure Theory of Law (PTL)* and *General Theory of Law and State (GTLS)* capture Kelsen's account of revolutions and revolutionary change:

*A revolution in the broader sense of the word (that includes a coup d'état) is every not legitimate change of this constitution or its replacement by an other constitution. From the point of view of legal science it is irrelevant whether this change of the legal situation has been brought about by the application of force against the legitimate government or by the members of that government themselves, whether by a mass movement of the population or by a small group of individuals. Decisive is only that the valid constitution has been changed or replaced in a manner not prescribed by the constitution valid until then. Usually a revolution abolishes only the old constitution and certain politically important statutes. A large part of the statutes created under the old constitution remains valid, as the saying goes; but this expression does not fit. If these statutes are to*

be regarded as being valid under the new constitution, then this is possible only because they have been validated expressly or tacitly by the new constitution.<sup>321</sup>

Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. *If they 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.* It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal.<sup>322</sup>

215. Kelsen's account takes no position on how revolutions are conducted or justified. The necessary and sufficient condition is simply that a revolutionary change has occurred, and it has occurred when the former constitution is no longer, by and large, obeyed (that is, when it ceases to be efficacious) while a new one is being followed. A constitution loses its efficacy when there is a successful constitutional change contrary to its own procedures. Moreover, since legal orders are hierarchical systems of legal rules, the termination of the former constitution results in the collapse of the entire legal order. Consequently, there is no room for law to regulate the process of revolutionary change; there exists only a sequence of legal orders, each wholly separate and independent from the others.

216. Kelsen's account of revolutions proved highly influential for judges adjudicating in the aftermath of coups and declarations of independence. Beginning with Pakistan and followed by other common law countries, judges assumed the role of determining whether a revolutionary change had occurred and whether the post-revolutionary regime was valid, based on whether the 'revolution' had been 'successful' in ending the

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<sup>321</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 209. Emphasis mine.

<sup>322</sup> Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 119. Emphasis mine.

efficacy of the previous constitutional order and in establishing a new one.<sup>323</sup> In doing so, judges translated the abstract postulates of the Pure Theory of Law into a living doctrine and made revolutionary change a matter for judicial determination.

217. The case law, together with the accompanying jurisprudential literature, offers a rich and nuanced discussion of the idea of revolutionary legality. In this chapter, I will focus on the cases in which courts undertook to determine the validity of revolutionary regimes and the questions arising from them (the so-called ‘revolution cases’). In the next two chapters, I will discuss the jurisprudential analysis of this case law and the central theoretical concepts it engages. In the final chapter, I will propose an alternative account of revolutionary change that addresses the shortcomings of the existing approaches.

218. The case law on revolutionary legality developed through the adoption and criticism of Kelsen’s jurisprudential writings. From this, two partially conflicting doctrines emerged:

219. *The Doctrine of Successful Revolution*. This doctrine, articulated and adopted in the first wave of judgments, follows Kelsen’s account of the hierarchical structure of legal systems and understands revolutions as the termination of one legal order and the creation of another on the basis of its effectiveness. Under this doctrine, the validity of a revolutionary change is determined by a test of efficacy, or, more precisely, control, of the revolutionary regime. A revolutionary government becomes lawful once it acquires

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<sup>323</sup> For a discussion on the influence of Kelsen in these cases, see Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Martinus Nijhoff Publishers 2004), particularly 225-230.

effective control over the state machinery and the territory, and is able to impose its will without effective challenge from the former government or any rival authority. Once this test is met, the revolution is deemed to have succeeded in terminating the previous legal order and establishing a new one in its place, creating a new constitution and a lawful revolutionary government.

220. *The Doctrine of Acclaimed Revolution*: This doctrine developed gradually as a critique of the doctrine of successful revolution during the second wave of revolution cases. Under this approach, a revolutionary change occurs only when it enjoys popular support, expressed by at least a majority of the population. Legality thus follows from legitimacy: without general acclaim, revolutionary regimes cannot attain legitimacy and therefore cannot be recognised by courts as lawful.

221. In the following pages, I will trace the development of these two doctrines through the jurisprudential reasoning of the judges. In the final section, I will summarise the key ideas and issues emerging from this body of case law and consider how they fit into the broader discussion of revolutionary legality.

## **II. The Doctrine of Successful Revolution**

### ***a) Establishing the doctrine: 1958 Dosso (Pakistan) and 1966 Matovu (Uganda).***

222. The judicial application of the *Pure Theory of Law* to determine a revolutionary change began in Pakistan with the *Dosso* case. By 1958, two years after the enactment of its first constitution since independence, Pakistan was experiencing intense political turmoil marked by rapid governmental changes, rampant corruption, regional conflicts, and widespread dissatisfaction with the civilian leadership. On 7 October 1958, the President of Pakistan, Iskander Mirza, declared that the government and political

system had become ineffective and corrupt and issued a proclamation that formally abrogated Pakistan's 1956 Constitution.<sup>324</sup> The proclamation dissolved the parliament and provincial legislatures, dismissed the government, and declared martial law. All political parties were banned, and the fundamental rights provided by the 1956 Constitution were suspended. Three days later, the President promulgated the *1958 Laws Continuance in Force Order*, with its proclaimed effect being the validation of laws, other than the 1956 Constitution, that were in force before the proclamation. After only twenty days, the Supreme Court of Pakistan, in the context of four criminal appeals that touched upon rights under the (now abrogated) 1956 Constitution, undertook to decide the legal impact of the coup.<sup>325</sup>

223. The Court adopted Kelsen's account of the structure of the legal order as a hierarchical system of legal norms and emphasised the importance of constitutional continuity for the continuity of the entire legal system. Echoing Kelsen, it held that a revolution, in the legal sense, is any unlawful change to the constitution, by which not only the constitution but the whole legal order loses its validity. The validity of all laws thereafter is to be determined not by reference to the 'annulled' constitution but by reference to the revolution and the new constitution it establishes. A revolution is successful in bringing about the end of one legal order and the beginning of another

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<sup>324</sup> Paula R Newberg, *Judging the state: Courts and Constitutional Politics in Pakistan* (Cambridge University Press 2002) 69-72.

<sup>325</sup> *The State v. Dosso S.C. (1958) 10 P.L.D. 533.*

when the change is 'efficacious', meaning that the inhabitants of the country, by and large, conform to the new regime.<sup>326</sup>

224. Importantly, the Court interpreted the efficacy test as reflecting a principle of international law, according to which a revolutionary change of government and constitution does not alter the corpus or international identity of the state, provided that its territory and population remain substantially the same. Continuity in the identity of the state is thus secured not on the basis of its constitution but on the basis of international law, effectively turning 'a victorious revolution' into 'an internationally recognised legal method of changing a Constitution'<sup>327</sup> and thereby 'legitimising' the revolutionary government.

225. The *Dosso* judgment was a landmark case in the common law world for establishing the doctrine of successful revolution through an application of Kelsen's theory of law. Its implication was that revolutions could acquire legal validity through judicial endorsement, provided that they were unopposed or had effectively seized control of the state and were therefore 'successful'. On this basis, the Court held that the President's 'revolution' had effectively replaced the former legal order with a new one, the *Laws (Continuance in Force) Order 1958* being recognised as the new constitution of Pakistan.

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<sup>326</sup> Ibid 540.

<sup>327</sup> Ibid 539.

226. The doctrine of successful revolution would be explicitly adopted a few years later by the High Court of Uganda in the 1966 *Ex parte Matovu*.<sup>328</sup> The case arose in Uganda against the backdrop of the suspension of the 1962 Constitution by Prime Minister Milton Obote in early 1966. The suspension took place amidst a constitutional crisis involving the then non-executive President of Uganda and (ceremonial) King of Buganda, and his eventual exile.<sup>329</sup> Following these events, Obote declared himself President and, bypassing constitutional procedures, introduced on April the 1966 Constitution, fundamentally altering Uganda's governmental structure, shifting from a parliamentary to a presidential system with executive authority held by the President (Obote himself),<sup>330</sup> and abolishing the federal structure that had granted autonomy to kingdoms such as Buganda.<sup>331</sup>

227. Michael Matovu, a Buganda County Chief, became one of the prominent detainees during this upheaval. He was first arrested on 22 May 1966, under the *Deportation Act*. On 23 May 1966, the government proclaimed a state of emergency in Buganda, later ratified by the National Assembly through the Emergency Powers Act

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<sup>328</sup> *Uganda v. Commissioner of Prisons ex parte Matovu* (1966) 1 EA 514.

<sup>329</sup> For the historical context, see G. W. Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to Present* (Law Africa Publishing 2010) 94-104.

<sup>330</sup> Along with the effect of curtailing judicial power and the separation of powers formerly guaranteed under the 1962 Constitution, Ben Kiromba Twinomugisha, 'The Role of the Judiciary in the Promotion of Democracy in Uganda' (2009) 9 African human rights law journal 1, 2.

<sup>331</sup> 'Obote defended this as an act of decolonization' since he viewed the 1962 Constitution as a colonial instrument, see Samuel Fury Childs Daly, 'The Portable Coup: The Jurisprudence of 'Revolution' in Uganda and Nigeria' (2021) 39 Law and History Review 737, 749.

and the Emergency Powers (Detention) Regulations.<sup>332</sup> Though Matovu was briefly released on July 16, 1966, he was immediately re-arrested and re-detained under the newly established emergency laws.<sup>333</sup> On 6 September 1966, Matovu filed an application for a writ of habeas corpus, arguing that his detention was unlawful. The application, however, extended to the legality of the emergency law under which Matovu was detained, and which was grounded in the new 1966 Constitution introduced in violation of the 1962 Constitution.

228. The case raised several significant questions, such as the jurisdiction of the High Court to rule on the legality of the 1966 Constitution and the justiciability of the question and the applicability of the ‘political question doctrine’, but the core issue became whether the 1966 Constitution was a legally valid constitution.<sup>334</sup> This meant the Court had to evaluate whether Obote’s actions, though extra-constitutional, had resulted in a constitutional (revolutionary) change.

229. The High Court of Uganda invoked the ‘Kelsenian principles’, which largely correspond to the abovementioned quotes from Kelsen, to find that the 1966 Constitution was the product of a revolution, and that, due to its extra-legal origin, it

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<sup>332</sup> J. Oloka-Onyango, 'Ghosts and the Law', 26 <<https://ssrn.com/abstract=2691895>> accessed 23 June 2025.

<sup>333</sup> The same happened with five members of the Cabinet who were re-arrested under the emergency laws after they were successful in obtaining a writ of *habeas corpus* on the basis that their (initial) arrest and detention violated their rights under the 1962 Constitution, see *Grace Ibingira v AG (1966)* EA 306.

<sup>334</sup> It's worth noting that the Court bypassed several procedural errors and *locus standi* issues on the basis of which it could have rejected the application before entering into the substance, for a discussion see J. Oloka-Onyango, *When Courts Do Politics: Public Interest Law and Litigation in East Africa* (Cambridge Scholars Publishing 2017) 46-47, 57-58.

created a new legal order. Guided by the reasoning in the *Dosso* case, the Court asserted that the 1966 Constitution, though a product of a revolution, was nonetheless valid 'because in international law revolutions and coups d'état are the recognised methods of changing governments and constitutions in sovereign states'.<sup>335</sup> Accordingly, the Court recognised Obote's new constitutional order as lawful. Unlike in *Dosso*, the Court referred to affidavits to support its judgment that the new regime is efficacious and 'accepted by the people'.<sup>336</sup> The court did not elaborate on what it means by 'acceptance', namely, whether that includes an endorsement or approval of the regime by the people, or simply a passive attitude of non-resistance. This would prove to be important in later revolution cases where popular acceptance would be elevated into a condition for recognising the validity of revolutionary regimes.

***b) The limits of the efficacy test: the 1966-1969 Madzimbamuto and Ndhlovu cases (Rhodesia).***

230. Around the same time, another adoption of the doctrine of successful revolution was marked in a more famous and rather controversial series of cases in Rhodesia following the Unilateral Declaration of Independence (UDI) of 1965. Prior to the declaration, Southern Rhodesia was governed by the 1961 Constitution granted by Britain, which retained ultimate sovereignty. In particular, the British Government retained certain residual powers, and the British Parliament preserved a limited right to pass legislation where the Constitution is violated by the local legislator.<sup>337</sup> The

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<sup>335</sup> *Uganda v. Commissioner of Prisons ex parte Matovu* (1966) 1 EA 514, 537.

<sup>336</sup> *Ibid* 539.

<sup>337</sup> T. C. Hopton, 'Grundnorm and Constitution: The Legitimacy of Politics' (1978) 24 McGill Law Journal 72, 73.

constitution guaranteed the protection of a set of rights and freedoms and provided a right to appeal to the Privy Council.<sup>338</sup> Political power was firmly in the hands of the white minority, and governance was structured around a racial hierarchy that excluded the black majority from meaningful political participation. The 1961 Constitution maintained this structure, providing limited franchise rights to Africans, but continuing to guarantee white dominance in the legislature and civil service.

231. Amidst the global tide of decolonisation in the 1950s and early 1960s, the British government made it clear that independence for Southern Rhodesia would only be granted on the basis of majority rule (including the non-white population) and protection of minority rights. The local government of Southern Rhodesia, led by Prime Minister Ian Smith, opposed these conditions and demanded 'independence before majority rule'. Negotiations with Britain failed, and, in November 1965, the Smith government declared unilateral independence, proclaiming Rhodesia a sovereign state and promulgating a new Constitution. The 1965 Constitution created a new Rhodesian legislature, abolished the right to appeal to the Privy Council, but preserved sitting judges in office. The British government immediately declared the UDI illegal, retracted authority to Her Majesty in Council by promulgating the *Southern Rhodesia Act 1965* and the *Southern Rhodesian Constitutional Order 1965*, and imposed sanctions. At the same time, however, it instructed the judiciary to remain in office and continue its function to prevent a widespread disruption.

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<sup>338</sup> H. H. Marshall, 'The Legal Effects of U.D.I. (Based on *Madzimbamuto v. Lardner-Burke*' (1968) *International & Comparative Law Quarterly* 1022, 1023.

232. In this context, Daniel Madzimbamuto, a prominent political activist, was detained by the Smith regime under emergency regulations in 1965. These regulations were issued under the authority of the 1961 Southern Rhodesian Constitution, but the detention was extended multiple times under the new 1965 Constitution by the Rhodesian government that was now declared illegal by Britain. Stella Madzimbamuto, Daniel's wife, challenged the detention on the grounds that the post-UDI government was illegal and therefore any laws or detentions issued under its authority lacked legal validity. The judges thus found themselves in the difficult position of having to determine the validity of the Declaration of Independence, the legality of the Rhodesian government and of the 1965 Constitution. In this case, we have three judgments in total: from the High Court, the Court of Appeal and the Privy Council.

233. The government argued before the High Court in terms reminiscent of Kelsen that 'a legal order ceases to have validity when it loses efficacy' and is replaced by a new one that becomes efficacious.<sup>339</sup> In the alternative, it argued that if not the *de jure*, the current government was the *de facto* government and some of its acts were thus legitimate. In combination with this argument, it claimed that enforcing the regime's laws was necessary for the public order and therefore should be recognised as lawful through the doctrine of necessity.<sup>340</sup> It contented that laws made 'for the preservation of peace or the maintenance of law and order or for general good government' are legal, even if the government itself is not, for the 'rejection of this is to refuse to face reality,

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<sup>339</sup> *Madzimbamuto v Lardner-Burke HC (1966) 1 R.L.R. 756, 756-757.*

<sup>340</sup> *Madzimbamuto v Lardner-Burke, N.O. and Anor., Baron v. Ayurem N.O. and ORS. HC (1966) 1 R.L.R. 756*

resulting in confusion, chaos and offending against the view that there cannot be a vacuum in the law'.<sup>341</sup>

234. The High Court refused to apply the doctrine of successful revolution. It differentiated the application of the doctrine to independent states from colonies. In the former case, such as in *Dosso*, the doctrine legalises unlawful changes to the constitution that pose no questions of sovereignty. In colonies, however, the doctrine's implication would be to grant independence from an external sovereign, and, for that, it would need to be shown that the revolution is not only efficacious internally but that it has also severed ties with the external sovereign. Since the external sovereign, the UK government, was still asserting control over Rhodesia, the Court wasn't satisfied that independence had been gained (yet).<sup>342</sup> The Court would have to wait rather than speculate about the future, irrespective of who is more likely to succeed.<sup>343</sup>

235. Nevertheless, the High Court recognised the legal validity of the government's laws (and hence the detention orders) due to the need to avoid a legal vacuum and preserve legal order on the grounds of necessity, which it termed 'doctrine of public

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<sup>341</sup> Ibid 770.

<sup>342</sup> 'As the facts did not shew that Britain had abandoned the contest to put down the revolution and had the potential ability to end it, it could not be said that the tie of sovereignty in Britain had been finally and successfully severed and, until this was achieved, it could not be said that the 1965 Constitution or the Government set up thereby was lawful', *Madzimbamuto v Lardner-Burke HC (1966) 1 R.L.R. 756, 757*.

<sup>343</sup> *Madzimbamuto v Lardner-Burke, N.O. and Anor., Baron v. Ayurem N.O. and ORS. HC (1966) 1 R.L.R. 756, 863*.

policy'.<sup>344</sup> The doctrine was not articulated on the basis of the Pakistani and Cypriot cases of necessity that we examined in previous chapters, but on authorities discussing the duties against a rebellious 'de facto' government, such as Grotius and American Civil War cases. Theoretically, the difference with the doctrine of effectiveness is that the government has the onus of proving the necessity of the particular measure under consideration. In practice, it made little difference as the Court held the declaration of emergency to be valid due to its connection with maintaining law and order, regardless of any subordinate motive to aid the rebellion.

236. The appeal judges dealt with the same arguments but reached different positions. Two judges took the view that the regime was only a 'de facto government',<sup>345</sup> another two that the regime acquired a 'de jure' status,<sup>346</sup> and a final judge that it could be neither de jure nor de facto, but that its measures could be recognised as valid due to their necessity.<sup>347</sup>

237. Firstly, this time there was a more explicit reference to the Kelsenian idea of change of the *grundnorm* in revolutions, though again with multiple references to

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<sup>344</sup> The doctrine of public policy is 'when necessity requires to give effect to powers exercised by persons whose authority is not derived from a lawful constitution, in circumstances where only such persons have effective control in and over the state', *ibid* 873.

<sup>345</sup> Beadle, C.J. and Jarvis, A.J.A. at *Madzimbamuto v Lardner-Burke, N.O. and Another, N.O., Baron v. Ayurem N.O. and ORS. AC (1968) 2 S.A.L.R. 284*, 352 and 422 respectively.

<sup>346</sup> Quenet J.P. and Macdonald, J.A. at *ibid* 375-376 and 415-416 respectively.

<sup>347</sup> Fieldsend, A.J.A. at *ibid* 443-444.

international law doctrines.<sup>348</sup> Beadle C. J. employed Kelsen's concept of the basic norm to reach the same test of efficacy as that used in the doctrine of successful revolution in the cases of Pakistan and Uganda. He asserted that a revolution is successful when its regime is 'firmly established'.<sup>349</sup> However, even though the 1961 Constitution was no longer efficacious, the new regime had yet to become efficacious, as its survival was still uncertain. As such, no regime satisfied all the conditions required to be a valid legal order. The Chief Justice found himself within the gap of a (yet uncertain) transition phase between two *grundnorms*. Thus, in the absence of a *grundnorm*, the Justice concluded that there was only a *de facto* government, a government that, though usurping the powers of the lawful government, exercises them effectively and whose powers must be recognised out of necessity to protect public order. In fact, the *de facto* government 'can do anything which the Government it usurped could have done', though until it becomes efficacious, 'its administrative and legislative acts must conform to the 1961 Constitution'.<sup>350</sup> The Justice adopted here the questionable solution of 'splitting the *grundnorm*', meaning that the court should continue to apply the defunct old constitution provisionally and until the new one is established.<sup>351</sup> This solution to

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<sup>348</sup> With extensive discussion of authorities such as Grotius and Suarez on the lawfulness of acts undertaken by usurpers. Furthermore, various points suggest that the judges confused the *grundnorm* with the constitution, see *ibid* 416.

<sup>349</sup> *Ibid* 315.

<sup>350</sup> *Ibid* 351-352.

<sup>351</sup> *Ibid*, derived from J. M. Eekelaar, 'Splitting the *Grundnorm*' (1967) 30 *The Modern Law Review* 156.

the ensuing void between two legal orders in the Kelsenian understanding of revolutions will be discussed later.

238. In turn, the Chief Justice found that the Court's own jurisdiction also rests on the *de facto* basis, specifically from the fact that its judgments are enforced by the *de facto* government.<sup>352</sup> Remember, one of the peculiarities of this case was that the judges were authorised to maintain their office by both the Smith and the British government. As a result, the continuation of the operation of the courts could not betray its allegiance; its authority could be attributed to either the 1961 or the 1965 Constitution. Surprisingly, the *de facto* argument rejects both alternatives in an effort to prevent the court from 'joining the revolution'.<sup>353</sup>

239. The other two judges, Quenet J. P. and Macdonald J. A., held that the government was a *de facto* government that acquired internal *de jure* status. They argued that where a conflict of allegiance arises, as in the present case, it is resolved solely on the territorial basis, i.e. the state of Rhodesia, within which the *de facto* government is the only actual government. As such, so far as municipal courts are concerned, 'a *de facto* government is a *de jure* government in the sense that it is the only law-making and law-enforcing government functioning "for the time being" within the state'.<sup>354</sup> At the background of this argument is the view that courts owe allegiance to whoever happens to function as

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<sup>352</sup> '[T]he Court can only be regarded as deriving its authority from the fact that the present *de facto* Government allows it to function and allows its officials to enforce its orders.', *Madzimbamuto v Lardner-Burke, N.O. and Another, N.O., Baron v. Ayurem N.O. and ORS. AC (1968) 2 S.A.L.R. 284, 330-331.*

<sup>353</sup> *Ibid* 330.

<sup>354</sup> *Ibid* 415.

the (*de facto*) government. The effects of this approach are practically indistinguishable from those of the doctrine of successful revolution. They maintain the *de facto/de jure* government terminology purely due to the colonial status of Rhodesia, while granting full legal authority to the revolutionary regime.

240. The fifth judge, Fieldsend A.J.A., approached the court's duties as inseparably connected with the constitutional system under which it is instituted so that it cannot consider for itself a new, different foundation for its own existence.<sup>355</sup> Under a written constitution, the judiciary has no independent existence, not even in common law; it is not a 'creature of Frankenstein which once created can turn and destroy its maker'.<sup>356</sup> In the context of this case, the Court had no basis which entitled it to hold that its source of authority, i.e. the constitution, was altered.<sup>357</sup> Since it has not been replaced by the usurping government, it should consider that it remains and operates on the basis of the 1961 Constitution and Her Majesty's government. The continuation of the court's function cannot be regarded as a tacit compliance and acceptance of the rebellious regime. In particular, since the judiciary has not been usurped (e.g. by establishing its own courts or by appointing its own judges), Fieldsend took the view that the government could not even be regarded as a *de facto* government, as it has not exerted control over the judiciary.

241. Fieldsend balances between two different (and contradicting) theses, something that the Privy Council will also do later. On one side is the outright rejection of courts'

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<sup>355</sup> Ibid 430.

<sup>356</sup> Ibid.

<sup>357</sup> Ibid 426-427.

capacity to assess the effectiveness of a rebellious government and its implications for the constitutional order, and on the other the rejection of the efficacy of the Smith regime. However, the latter is a consideration that the court can only make if it thinks itself capable of entertaining questions of revolutionary legality. If it is immaterial for a court whether a rebellious government has taken over, since it must always decide according to the constitution under which it is created, then why should it matter if the Smith government has not been (yet) successful in taking full control? This shows that, regardless of the original source of a court's authority, judges cannot altogether ignore political realities and decide based on a constitution they find obsolete – a central tenet of the doctrine of effectiveness.

242. Nevertheless, Fieldsend was not lacking pragmatism. Though he refused to legalise the regime *per se*, he was willing to recognise the validity of certain measures on the basis of 'public policy required by absolute necessity' for the protection of public order and the rights under the 1961 Constitution.<sup>358</sup> In essence, the judge came close to the High Court's decision, but formulated the doctrine of 'public policy' or 'necessity' as entailing substantive restrictions, along the lines of the *Ibrahim* case in Cyprus,<sup>359</sup> particularly for the protection of constitutional rights.

243. Overall, the Court concluded that the Proclamations of Emergency were valid, even though the particular detentions under consideration were not by being *ultra vires*

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<sup>358</sup> Ibid 419-420.

<sup>359</sup> To which case it made explicit reference, see *ibid* 433-435.

as they had to be reassessed on each renewal, which the Government proceeded to do and initiated a new series of detentions.

244. The final episode took place in the Privy Council. The judges were more concerned with the doctrine of necessity rather than the doctrine of successful revolution. No reference to Kelsen or his theoretical principles was made, and *Dosso* and *Matovu* were regarded as inapplicable simply on the basis that the UK Government was taking steps to regain control and there was no certainty that the revolution would succeed.<sup>360</sup> Not persuaded that the Smith government established an efficacious regime, the Privy Council held unanimously that the UDI was invalid and that the British Crown remained the sovereign of Southern Rhodesia. Furthermore, it rejected the argument that the Smith government could be considered a *de facto* (or, much more, *a de jure*) government, finding the doctrine inapplicable in domestic cases.

245. Lord Reid, delivering the majority judgment, also rejected the applicability of the doctrine of necessity on the grounds that no legal vacuum would ensue since legislative power was still held by Her Majesty in Council and could be validly exercised.<sup>361</sup> In contrast, Lord Pearce, dissenting and in agreement with Fieldsend A. J. A., accepted the principle of necessity or ‘implied mandate’ for acts done by those in control without

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<sup>360</sup> *Madzimbamuto v Lardner-Burke PC* (1969) 1 A.C. 645, 725.

<sup>361</sup> ‘[T]he power to make laws is transferred to Her Majesty in Council with the result that no purported law made by any person or body in Southern Rhodesia can have any legal effect, no matter how necessary that purported law may be for the purpose of preserving law and order or for any other purpose’, *ibid* 729.

lawful authority to the extent that they are required for the orderly running of the state, do not infringe constitutional rights, and do not help the usurpation.<sup>362</sup>

246. The decision of the Privy Council would be shortly afterwards criticised by the Rhodesian courts in the 1968 *Ndhlovu* for requiring a degree of certainty that is 'unrealistic'.<sup>363</sup> At this point, it found it possible to 'predict with certainty that sanctions will not succeed in their objective of overthrowing the present Government',<sup>364</sup> therefore satisfying the efficacy test. Applying the doctrine of successful revolution espoused in the Pakistan and Uganda cases, the Court held the 1965 Constitution to be efficacious and therefore valid.<sup>365</sup> It should be noted that the Privy Council left this possibility open since it did not disagree with the way in which *Dosso* and *Matovu* were decided, implicitly upholding the doctrine of successful revolution.

247. In conclusion, the doctrine of successful revolution holds that a revolutionary regime becomes lawful once it has effectively taken control of the state and is able to enforce its decisions. The efficacy test is based on the criterion of control, which must be dominant and unchallenged by any significant opposition. The duration of the regime is not a decisive factor, although it may serve as evidence of its effectiveness. The

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<sup>362</sup> 'The principle of necessity or implied mandate is for the preservation of the citizen, for keeping law and order, *rebus sic stantibus*, regardless of whose fault it is that the crisis has been created or persists', *ibid* 740.

<sup>363</sup> *R. v. Ndhlovu and Others AC (1968) 4 SALR 515, 530.*

<sup>364</sup> *Ibid* 532.

<sup>365</sup> That the judges were considering the 1965 Constitution to be efficacious was already becoming evident in previous cases, such as in *Dhlamini v. Carter* [1968] 2 S.A. 445, 464, in which the Appeal Court refused an exercise of the prerogative of mercy to the British Monarch, holding that now lay with the Rhodesian executive.

legitimacy of the regime is immaterial, and there appear to be no restrictions on the constitutional changes it may introduce. Courts, applying this doctrine, may adjudicate on the lawfulness of the regime and regard their own authority as deriving from the revolutionary government, provided they determine it to be the lawful one.

### **III. The Doctrine of Acclaimed Revolution**

248. A new wave of revolution cases began to move away from Kelsenian terminology and introduced the acceptance of the revolutionary regime by the people as a relevant, important, or even determining factor in establishing its lawfulness. Some judges went further still, incorporating moral considerations by requiring that the new regime be democratic and respect human rights.

#### ***a) Against Kelsen: 1966 Sallah (Ghana), 1972 Asma-Jilani and 1977 Bhutto (Pakistan).***

249. An early but unelaborate rejection of Kelsen's applicability appeared in *Sallah v The Attorney-General of Ghana*.<sup>366</sup> In 1966, Ghana experienced a coup that led to the suspension of the 1960 Constitution and the establishment of the National Liberation Council (NLC). Section 9(1) of the Transitional Provisions of the Constitution of 1969 provided for the termination of appointment of offices 'established' by the Council in 1966. Under it, some public servants, including Sallah, had their appointments terminated. Sallah was appointed manager of the Ghana National Trading Corporation (GNTC), which was established originally in 1961 and re-established in 1964. Since the GNTC was established two years before the Council, he should not be regarded as falling under Section 9 (1) under the plain meaning of its words. The case would be one of

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<sup>366</sup> *E. K. Sallah V. The Attorney-General for and on behalf of the Government of Ghana Const. S. C. (1970) Case no. 8 of 1970 (unreported).*

ordinary constitutional interpretation (and a rather easy one) hadn't the Attorney-General raised a 'Kelsenian' argument for the government. The effect of a legal coup, said the Attorney-General à la Kelsen, is to destroy the old *grundnorm* and the relying legal order and replace it with a new one. Any law that is valid after a coup derives from the new *grundnorm*, and either expressly or tacitly re-enacted. The 1966 coup destroyed the old legal order; thus, every office remaining in force should be regarded as being 'established' by the NLC, thereby falling under Section 9 (1).

250. The argument is particularly interesting when considered within the logic of Kelsen's analysis of the structure of a legal system. It represents one of the rare instances in which the second central question of revolutionary legality is raised directly, namely, what the effects of a revolutionary change are on the rest of the legal order, and to what extent such change impacts the validity of laws not directly targeted by the revolution. However, this jurisprudential question was left unaddressed by the judges, who either avoided it or dismissed it as irrelevant. Some judges relied instead on the original intent of the framers of Section 9, who were undoubtedly unaware of Kelsen's work and were referring to entities established prior to the NLC. Others dismissed the importance of the jurisprudential issue altogether, considering the 'Kelsenian' arguments to be mistaken, unhelpful, or artificial.

251. Even if Kelsen's analysis were flawed, it nonetheless raises an important question that demands reasoned engagement: Do revolutions disrupt the continuity of a legal order? If they do not, upon what does the continued existence of pre-revolutionary laws rest, if not on the new constitution? A rejection of Kelsen's position on this issue

requires an alternative doctrine of legal continuity, which, unfortunately, the judges failed to articulate.<sup>367</sup>

252. A more thorough criticism of the use of Kelsen's theory came from none other than the country that introduced the doctrine of successful revolution. In the 1972 *Asma Jilani* case,<sup>368</sup> the Supreme Court of Pakistan got the opportunity to overrule its decision in *Dosso*. Asma Jilani, a political activist, challenged her detention under the Martial Law declared by General Yahya Khan, who had abrogated the 1962 Constitution after he was handed over power in 1969 and ruled until 1971. The Court refused to recognise Yahya Khan's regime as lawful on the basis that it was effective, held the abrogation invalid, and upheld the rights enjoyed by Jilani under the 1962 Constitution. Its central criticism against *Dosso's* judgement can be summarised as follows: a) that it misunderstood Kelsen, who did not intend to lay down rules of law to be applied by courts but was merely propounding a theory of law as 'mere jurists' proposition about law';<sup>369</sup> b) that within Kelsen's theory, effectiveness is merely a condition and not the reason for the validity of a legal order;<sup>370</sup> c) that the 'principle of effectiveness' from the international point of view cannot be applied domestically, as that would unjustifiably assume the primacy of international law over domestic law.<sup>371</sup> In any case, even if a

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<sup>367</sup> For a similar criticism, see S. K. Date-Bah, 'Jurisprudence's Day in Court in Ghana' (1971) 20 *International and Comparative Law Quarterly* 315, 320-323.

<sup>368</sup> *Asma Jilani v. Government of the Punjab S.C. (1972) 14 P.L.D. 139.*

<sup>369</sup> *Ibid* 179.

<sup>370</sup> *Ibid* 179, 242.

<sup>371</sup> *Ibid* 181.

*grundnorm* had to be identified, said the Court, that would lie in what would be an ‘unalterable principle of sovereignty’ essentially of the people, to which the whole state acts as a trustee rather than being the cornerstone of the legal order.<sup>372</sup> Yahya Khan’s regime could be considered lawful since ‘the people had [not] by and large, knowingly accepted the Government [...] and by habit given obedience [...]’ and thus the *grundnorm* did not change.<sup>373</sup> Hesitantly, the Court at this point seemed to suggest popular acceptance as a relevant factor for the legality of a revolutionary change.

253. A few years later, the Pakistani Supreme Court went a step further in introducing moral qualifications for recognising revolutionary regimes as lawful, in contrast to the *Dosso* approach. Amid a severe political crisis in 1977, another coup took place in Pakistan, this time led by General Zia-ul-Haq. Zia dissolved parliament and dismissed government officials, declared martial law, and detained Prime Minister Bhutto. Bhutto’s wife petitioned for his release on the grounds that Zia’s actions violated the 1973 Constitution. The Pakistani Supreme Court refused to legitimise Zia’s regime based on the reasoning in *Dosso*. It criticised Kelsen’s theory on the grounds that ‘by making effectiveness of the political change as the sole condition or criterion of its legality, it excludes from consideration sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new Legal Order’.<sup>374</sup> The Court also found Kelsen’s theory unsuitable for cases in which the breach of legal continuity is of

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<sup>372</sup> Ibid 182, literally of ‘God’.

<sup>373</sup> Ibid 229.

<sup>374</sup> *Begum Nusrat Bhutto v. Chief of Army Staff S.C. (1977) 19 P.L.D. 657, 692,*

a 'purely temporary nature and for a specified limited purpose', which, it argued, should be characterised as a constitutional deviation rather than a revolution.<sup>375</sup>

254. Interestingly, the temporary nature of the constitutional violation – normally a limiting condition under the doctrine of necessity – was treated as evidence against the existence of a constitutional revolution, which, by definition, must be permanent. Indeed, as will be discussed in the next chapter, Kelsen's theory cannot distinguish between small-scale or temporary violations of the constitution and large-scale or permanent ones; in his framework, all constitute *grundnorm*-destroying constitutional revolutions.

255. The criticism of Kelsen's application in *Asma Jilani* and *Bhutto* undermined the growing international reliance on the efficacy test. Although both judgments rejected the doctrine of successful revolution as unjustified, neither offered an alternative doctrine of revolutionary legality. The key principles that can be drawn from these decisions are that: (a) the lawfulness of a revolutionary change cannot be determined solely on the basis of the new regime's effectiveness; (b) the criteria for determining the lawfulness of a revolutionary regime are not universal but depend on the socio-political context and legal tradition of each legal order; (c) moral and political considerations regarding the regime's legitimacy are relevant; and (d) specifically, the legal authority of the state is not inherent but derives from some conception of popular sovereignty, which, in concrete terms, consists in some form of acceptance or consent of the revolutionary regime by the people. These two judgments marked the beginning of a

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<sup>375</sup> Ibid 693.

new approach in which popular acceptance emerged as an additional, and even decisive, criterion for determining the legality of a revolutionary change.

***b) Introducing ‘popular acceptance’: 1981 Controller of Taxes (Seychelles) and 1986 Mitchell (Grenada).***

256. A first example is offered in Seychelles. Shortly after the country's independence, there was a bloodless coup in 1977 that abrogated its Constitution. In the following year, the new regime issued decrees levying taxes. In *Vallabhaji v Controller of Taxes*,<sup>376</sup> a taxpayer claimed that he should not have been assessed for tax under the regime's decrees on the basis that it had illegally usurped power. The Court of Appeal upheld the validity of the decrees, holding that the regime became lawful via its acceptance by or consent of the people. The Court considered relevant that the regime has remained in office for a sufficient period of time and that it enjoyed ‘unchallenged authority’ through a stable and effective governance. But even without such duration, the Court held it would reach the same conclusion regarding the regime's lawfulness due to its ‘widespread and unqualified acceptance and consent’.<sup>377</sup> The consent can be express or ‘implied’, apparently by the willingness of the people to abide by the laws of the revolutionary regime. Popular acceptance was thus expressly introduced, at the very least, as a separate or supporting basis for the legality of the revolution. In subsequent judgments, the popular acceptance would be elevated into an almost necessary or determining criterion.

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<sup>376</sup> *Controller of Taxes v Ramniklal Valabhaji CA (1981) 7 CLB 1249 (Digested).*

<sup>377</sup> *Ibid.*

257. This shift became explicit in the *Mitchell v DPP* judgement in Grenada. Grenada gained its independence from the British Empire in 1947, but opted to remain within the Commonwealth, retaining Queen Elizabeth as the head of state, represented locally by the Governor-General. In 1979, Maurice Bishop, leader of the Marxist New Jewel Movement, successfully launched a bloodless coup against the government of Grenada, suspended the 1973 Constitution and established the People's Revolutionary Government of Grenada (PRG). The new regime replaced the court system, but retained the Queen as head of the state as well as the Governor-General. In October 1983, Bishop and members of the government were killed, and the head of the armed forces of Grenada assumed power. Shortly after, US forces and some Caribbean states invaded Grenada and arrested the military leaders. The Governor-General issued proclamations by which he assumed executive power, declared a state of emergency and, in the following year, restored the 1973 Constitution. Elections were held in December 1984, and the new Parliament of Grenada enacted the 1985 Confirmation of Validity Act, by which it attempted to retrospectively validate the laws made by the revolutionary regime and during the emergency period.

258. It is within this context that *Mithcell* arose. The arrested military leaders were charged with murder but challenged the High Court's jurisdiction on the basis that it had been established under the PRG and in a manner contrary to the 1973 Constitution. Moreover, they argued that the 1985 Confirmation of Validity Act was unlawful as it amounted to a change to the 1973 Constitution by ordinary legislation contrary to its provisions.

259. The High Court held that the Court was indeed unlawful under the 1973 Constitution, yet nevertheless valid and possessed of jurisdiction under the doctrine of necessity. The Court of Appeal similarly upheld the temporary validity of the court on the same basis, pending the reinstatement of the lawful government and the re-establishment of the lawful court under the 1973 Constitution. What is particularly noteworthy is that the Court refused to recognise the validity of the revolutionary regime, despite the fact that it had remained in power for nearly four years.

260. First, the Court acknowledged that the revolutionary regime was recognised internationally as the *de facto* government of Grenada and that, unlike in *Madzimbamuto*, it exercised effective control without challenge from the lawful government.<sup>378</sup> However, unlike the judgments in *Dosso* and *Madzimbamuto*, the Court was not satisfied that the regime's success justified its lawfulness. Returning to the reasoning in *Matovu*, it noted that the Ugandan Court had relied on affidavits not only as evidence of the regime's effectiveness but also of its acceptance by the people.<sup>379</sup> Because of this apparent reference to popular acceptance, the Grenada Court interpreted *Matovu* as introducing a political doctrine of popular sovereignty as a contributing factor to revolutionary legitimacy.<sup>380</sup>

261. Secondly, the Court reviewed the rejection of Kelsen's theory in *Sallah* (Ghana), *Asma Jilani* and *Bhutto* (Pakistan), and *Controller of Taxes* (Seychelles), contrasting

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<sup>378</sup> *Mitchell and Others v Director of Public Prosecution and Another CA* (1986) LRC (Const) 35, 51-52.

<sup>379</sup> See above, para 229.

<sup>380</sup> *Mitchell and Others v Director of Public Prosecution and Another CA* (1986) LRC (Const) 35, 61.

these with the judgments in *Dosso* (Pakistan) and *Madzimbamuto* (Rhodesia). From this body of case law, Haynes P. identified several ‘principles’.

262. The first was the ‘principle of strict constitutionalism’.<sup>381</sup> The meaning of this principle appears to be that an unconstitutional and illegitimate regime remains unlawful regardless of its success or duration.<sup>382</sup> The only example of strict constitutionalism offered was the Privy Council’s judgment in *Madzimbamuto*, which, according to Haynes P., refused to recognise the legality of a revolutionary government that had achieved internal success, on the grounds that the British sovereign continued efforts to exercise legislative power and regain control, albeit without resort to force.<sup>383</sup>

263. This, however, is a rather inaccurate interpretation of the Privy Council’s decision. The Privy Council did not hold that the usurper’s regime was and would remain illegal simply because it was unconstitutional. Such reasoning would have made the issue straightforward and rendered any reference to the efficacy test unnecessary. As we have seen, the Privy Council’s position, shared by the domestic courts of Rhodesia, was that the success of the Smith government’s revolution was, at the time, still uncertain. The determining factor remained the question of the revolution’s success. There appears, therefore, to be no genuine case law supporting ‘strict constitutionalism’.

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<sup>381</sup> Ibid 53.

<sup>382</sup> Ibid 71.

<sup>383</sup> Ibid 63.

264. The second principle the Court identified was the one based on Kelsen's writings, corresponding to what I referred to as the 'doctrine of successful revolution'. And the third principle is 'the concept of the political sovereignty of the people in a democratic state'.<sup>384</sup> Although the meaning of 'political sovereignty' was not clarified, its implication in the context of revolutions was that lawfulness can be achieved only when and if 'the people' accept and approve the new regime<sup>385</sup> – a test of *popular acclaim* rather than mere *acceptance*. Haynes P. supported this final principle and formulated his doctrine of lawful revolutionary change under the following five conditions, all of which must be satisfied:

(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*.<sup>386</sup>

265. The innovation here was the introduction of additional moral qualifications, namely that the revolutionary regime must not be oppressive or undemocratic. Haynes P. was under no illusion that judges could resist a usurper or restore legality merely by refusing to recognise the regime as lawful on account of its oppressiveness. Rather, he expressed the hope that such judicial refusal might serve as a deterrent. This is a practical consideration, not a theoretical argument. At best, it may be justified to the

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<sup>384</sup> Ibid 53.

<sup>385</sup> Ibid 72.

<sup>386</sup> Ibid 71-72, paragraphs and emphasis mine.

extent that it aligns with the test of popular acceptance, which itself rests on the vague notion of 'political sovereignty'. The determining factor, therefore, is whether the regime enjoys the support of the people, that is, that the people do not challenge the regime and that their compliance is not the result of coercion:

*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 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.*<sup>387</sup>

266. *Mitchell's* introduction of 'popular acclaim' would not be adopted with all its moral qualifications, but it will still be influential in later cases in Lesotho and Fiji.

***c) A return to Kelsen? 1989 Mokotso (Lesotho)***

267. Most narrow is the *Mokotso* judgment in Lesotho, in which popular acclaim was conflated with the test of efficacy. Lesotho gained its independence in 1966 as a parliamentary constitutional monarchy. In 1970, the Prime Minister was defeated in the first general elections, and proceeded to usurp power, suspend the Constitution and assume dictatorial powers. The unpopular regime remained in power until 1986, when the military forces staged a coup resulting in the King assuming legislative and executive power. When a challenge against the new government for violation of rights under the 1966 Constitution was filed, the High Court had to determine the constitutional status quo of the past governments.<sup>388</sup> It held the 1970 coup had established a valid legal order due to its longstanding effectiveness. It also held the government following the 1986

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<sup>387</sup> Ibid 72.

<sup>388</sup> *Mokotso and Others v HM King Moshoeshoe IT and Others HC (1989) LRC (Const) 24.*

coup to be lawful, due to the ‘notorious fact’ that it was in effective control and faced no opposition. ‘The efficacy of the change’, the Court added, ‘was marked by the acceptance of the people, which acceptance was spontaneously popular, unqualified and widespread’.<sup>389</sup>

268. As in *Mitchell*, the Court placed the ‘will of the people’ at the centre of the creation of a new legal order and, consequently, of revolutionary legality.<sup>390</sup> However, it interpreted ‘acceptance’ differently from ‘approval’, in a way that effectively reduces acceptance to efficacy. The Court observed that the people may accept a regime out of weakness or fear, with popularity being merely a contributing factor. What seems to serve as the decisive factor, then, is the absence of opposition and the formation of a ‘habit of obedience’ in the Austinian sense,<sup>391</sup> rather than any psychological or moral commitment by the people.<sup>392</sup> Put differently, the people’s will is inferred solely from general conformity to the rule of the new regime, regardless of the motivation behind it. In this way, the Court conflates efficacy and acclaim, reverting to the doctrine of successful revolution. Nevertheless, the Court went on to suggest that the new

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<sup>389</sup> Ibid 166.

<sup>390</sup> Ibid 132.

<sup>391</sup> John Austin, *The Province of Jurisprudence Determined* (2 edn, first published 1832, Cambridge University Press 1995) 170, ‘in order that a

given society may form a society political, the bulk of its members must be in a *habit of obedience* to a certain and common superior’, who is sovereign, directly influenced by J. Bentham, see *A Fragment on Government* (1776) Chapter I, para 10.

<sup>392</sup> *Mokotso and Others v HM King Moshoeshoe IT and Others HC (1989) LRC (Const) 24, 133.*

government's widespread popularity, even at the international level, was a contributing factor to its legality.

269. Treating international popularity as a relevant factor is problematic. It implies that the lawfulness of a revolutionary regime depends, at least in part, on its recognition by other states, which confuses the domestic-law approach with that of international law. The Court was most likely influenced by Kelsen's writings, which, as will be discussed in the next chapter, offered an international-law account of revolutionary change. However, Kelsen's reasoning rested on the assumption of a monist view of the legal system, which places international law above domestic law. The Lesotho Court expressed no such view. Moreover, if the legality of a government is said to rest on the will of its own people, it is difficult to see how its international popularity could have any legal relevance.

***d) Effectiveness and popular acclaim: the formulation in the 2001 Prasad cases (Fiji)***

270. A different and rather clearer formulation of the *Mitchell* test would be offered in the Fijian case *Prasad v. Republic of Fiji*.<sup>393</sup> The background to the case lies in a series of constitutional crises that culminated in a coup attempt in 2000. On 19 May 2000, armed rebels stormed the Parliament and took the Prime Minister, Cabinet members, and government MPs hostage, demanding changes to reassert indigenous Fijian dominance. The rebels declared the abrogation of the 1997 Constitution and appointed their own President and ministers. In response and due to ongoing civil unrest, the lawful President declared a state of emergency on 27 May and appointed an acting Prime

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<sup>393</sup> *Prasad v. Republic of Fiji and Another* (2001) 1 LRC 665.

Minister. However, as the crisis deepened, the President resigned. The commander of the Fiji military forces assumed control of the executive and promulgated decrees abrogating the 1977 Constitution and forming an interim military government (IMG). He then handed over power to a civil caretaker administration.

271. Within this context, an Indo-Fijian farmer whose property was seized during that period, sought a declaration by the High Court that the 1977 Constitution remained in force and that the state of emergency, the decree for the abrogation of the 1977 Constitution and the IMG government were illegal.

272. The High Court ruled that the 1977 Constitution had not been abrogated and remained in force. The Court approached the matter of revolutionary change distanced from the Kelsenian approach of the previous cases. It acknowledged that the operation of a constitution might be terminated by 'extra-constitutional occurrences' and, echoing *Mitchell's* test of popular acclaim, suggested that judges may readily uphold a successful revolution when there is 'clear acceptance, jubilation and acclaim'.<sup>394</sup> It cited approvingly *Mitchell's* criteria of popular acceptance, including placing the onus of proof on the government. It did not dismiss the possibility of revolutionary change without acclaim but placed it under the different ground of the 'doctrine of effectiveness'. What this doctrine entails was not explained, and no references to the previous *revolution cases* were made. It only stated that it would 'take some time, perhaps over months if not a year or two, before it could be established with certainty'.<sup>395</sup> Arguably, the difference between the 'doctrine of effectiveness' envisioned

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<sup>394</sup> Ibid 690.

<sup>395</sup> Ibid 689.

by the High Court and the doctrine of successful revolution is that, in the former, the judge will not recognise a revolutionary regime as valid solely on the basis of the successful unconstitutional takeover of the government, but will continue upholding the constitution for a sufficient duration of time until it is satisfied that the revolutionary regime has established itself.

273. In the present case, the High Court held that there was no revolutionary change because the military commander acted with the intention to intervene only temporarily in order to restore law and order and then hand over power to civilian administration.<sup>396</sup> Instead, it upheld the President's declaration of emergency and the military commander's intervening acts as lawful under the doctrine of necessity.<sup>397</sup> It distinguished sharply the doctrine of necessity from revolutionary change in that the former can only justify temporary suspensions for immediate crises, not validate a constitutional overthrow or the creation of a new regime.<sup>398</sup> Accordingly, it held that there was no necessity for the interim government, thus 'inviting' it to ensure smooth handover to a lawfully appointed prime minister.<sup>399</sup>

274. Greater clarity on the criteria of the doctrine of effectiveness would be provided by the Court of Appeal. On the matter of its jurisdiction, it took explicitly the position that a court can and must decide upon revolutionary changes, even if it is created under a written constitution. However, it refused to offer a theoretical basis for exercising what

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<sup>396</sup> Ibid 691-692.

<sup>397</sup> Ibid 684.

<sup>398</sup> Ibid 687.

<sup>399</sup> Ibid 692.

it called 'supra-constitutional jurisdiction', satisfied that other courts have done so in similar cases (e.g. in *Madzimbamuto*).<sup>400</sup> The Court proceeded to disagree with the ruling of the High Court that the Commander had no intention of abrogating the Constitution, thereby rejecting the applicability of the doctrine of necessity.<sup>401</sup>

275. The Court of Appeal then went on to examine whether the events following the President's decree and the interim military government could be regarded as a revolutionary change to the legal order. The Court departed explicitly from Kelsen's theory and the doctrine of successful revolution, considering them to be too 'rewarding' to usurpers and outdated in light of the international developments on human rights.<sup>402</sup> It endorsed the Privy Council's judgment in *Madzimbamuto* as the main authority on the matter, even though that judgment did not recognise the Smith government as the lawful one despite its having controlled the institutions of Rhodesia for three years by the time the case was heard. The Court's treatment of *Madzimbamuto* as an authority contrary to the doctrine of successful revolution appears rather misplaced. As discussed above, the Privy Council did not reject the reasoning in *Dosso* and *Matovu* but instead found those cases inapplicable to situations in which a revolutionary regime seeks independence rather than merely a constitutional change. After all, the fact that the effectiveness of the Smith regime was challenged by the British government's reassertion of control falls squarely within the logic of the doctrine of successful revolution; it is simply an argument against the regime's success.

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<sup>400</sup> *Republic of Fiji and Another v Prasad* (2001) 2 LRC 743, 759.

<sup>401</sup> *Ibid* 762.

<sup>402</sup> *Ibid* 763.

276. Examining the ‘doctrine of effectiveness’, the Court engaged in a survey of the cases in Rhodesia, Seychelles, Grenada and Lesotho. Interestingly, the existence of popular ‘discontent’ and, problematically, ‘international approval’ were considered as relevant factors, evidently influenced by *Mokotso*.<sup>403</sup> Furthermore, it approached the test of efficacy with a certain degree of flexibility, holding that it may vary from one country to another and from its general context. The criterion of popular acceptance (express or tacit), for instance, will become less and less relevant the longer the revolutionary regime endures. In contrast to the Grenada judgment, it did not regard the democratic character of the regime as necessary for its recognition as the lawful government. It held the *legitimacy* of a regime as distinct from its *legality*.<sup>404</sup> In turn, the Court formulated the efficacy test within the Fijian context under the following nine heads:

(a) The burden of proof of efficacy lies on the de facto government seeking to establish that it is firmly in control of the country *with the agreement (tacit or express) of the population as a whole*.

(b) Such proof must be to a high civil standard because of the importance and seriousness of the claim.

(c) The overthrow of the Constitution must be *successful in the sense that the de facto government is established administratively* and there is no rival government.

(d) In considering whether a rival government exists, the inquiry is not limited to a rival wishing to eliminate the de facto government by force of arms. It is relevant in this case that the elected government is willing to resume power, should the Constitution be affirmed.

(e) The people must be proved to be behaving in conformity with the dictates of the de facto government. *In this context, it is relevant to note that a de facto government (as occurred here) frequently re-affirms many of the laws of the previous constitutional government (eg criminal, commercial and family laws) so*

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<sup>403</sup> Ibid 768.

<sup>404</sup> Ibid.

*that the population would notice little difference in many aspects of daily life between the two regimes. It is usually electoral rights and personal freedoms that are targeted. As one of the deponents said, civil servants such as tax and land titles officials worked normally throughout the coup and its aftermath. Their functions were established and needed no ministerial direction. We derive little proof of acquiescence from facts of that nature.*

(f) Such conformity and obedience to the new regime by the populace as can be proved by the de facto government must stem from *popular acceptance and support as distinct from tacit submission to coercion or fear of force.*

(g) *The length of time in which the de facto government has been in control is relevant. Obviously, the longer the time, the greater the likelihood of acceptance.*

(h) Elections are powerful evidence of efficacy. It follows that a regime where the people have no elected representatives in government and no right to vote is less likely to establish acquiescence.

(i) Efficacy is to be assessed at the time of the hearing by the court making the decision.<sup>405</sup>

277. The points discussed help clarify how the Court diverges from the doctrine of successful revolution. Popular acceptance becomes a crucial, if not the central, factor in recognising the legality of a revolutionary regime. Even the regime's duration is treated merely as a strong indication of its acceptance rather than as a separate ground for its recognition. Its factual dimension, its 'success', is necessary but not sufficient; the government remains illegal, even if it exercises effective administrative control, until popular acceptance is achieved.

278. However, the Court does not clarify the status of the displaced government during this interim period. Is it to be regarded as the lawful government, despite having lost control, solely because it retains popular endorsement? Or does this period represent a legal vacuum in which no lawful government exists, apart from a *de facto* but illegal one? The doctrine of successful revolution, insofar as it follows Kelsen,

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<sup>405</sup> Ibid 770, paragraphs and emphasis mine.

provides a clear answer: efficacy is always necessary. Ultimately, the Court of Appeal was not persuaded that there was popular support for the interim civilian government and therefore concluded that it had not attained the status of a lawful government.

#### **IV. Conclusions**

279. The preceding study highlights the central questions that arise when determining the occurrence of revolutionary change. Drawing on Kelsen's *Pure Theory of Law* as their starting point, the courts developed what can be identified as two doctrines for determining the lawfulness of a revolutionary regime: the *doctrine of successful revolution* and the *doctrine of acclaimed revolution*. The former recognises a revolutionary change as lawful from the moment the revolutionary regime has successfully gained control over the state mechanisms and the country, and no longer faces effective opposition. The latter introduces moral qualifications to this test, particularly the element of 'popular acclaim', which serves as either a contributing or necessary factor for the legality of a revolution.

280. The first thing to note is that no court rejected the possibility of revolutionary change. None adopted the view referred to in *Mitchell* as 'strict constitutionalism'. On the contrary, it was evident from *Dosso* and explicitly affirmed in *Madzimbamuto (Privy Council)* that revolutionary change is a fact which 'law must take account of'. As noted at the beginning of this chapter, this reflects the fundamental relationship between law and fact: that law must, to some extent, align with facts, and that facts can, in turn, give rise to law. This establishes what can be called the *principle of effectiveness*, which has both a negative and a positive dimension.

281. *Negative Principle of Effectiveness*: Legal orders and their laws exist only if they are, by and large, followed. A constitution that has become inoperative – meaning it has generally and persistently lost its function – is no longer valid. In short, law must accord with facts.

282. *Positive Principle of Effectiveness*: The effective and enduring operation of a regime ultimately establishes a new legal order, even if its origins are revolutionary and even if it maintains power through force. In short, facts make law.

283. All courts appeared to accept both the negative and the positive aspects of the principle of effectiveness. The difficulty in determining revolutionary change did not lie in justifying a departure from constitutional legality, this concern arose only in relation to justifying their own jurisdiction, but rather in the fact that courts often had to make their determination *mediis rebus*, either while the revolution was ongoing or relatively soon after. The precise moment at which a court should declare a revolutionary government to be lawful was the truly controversial issue. The only judgment that came close to rejecting the positive principle of effectiveness was *Mitchell*, not on grounds of constitutional legality but on the condition that the new regime must enjoy popular support and be democratic. No other court adopted this position, and it remains unclear to what extent these moral conditions were intended to be necessary even once a regime became longstanding. The criterion of ‘popular acceptance’ was, in practice, partially conflated with effectiveness, since both rely on evidence of popular compliance. Even in *Mitchell*, the Court acknowledged that popular acceptance could be ‘tacit’.

284. The principle of effectiveness is, without a doubt, what Kelsen was asserting in his works, rather than any doctrine defining the point of revolutionary change in greater

detail. Despite the criticism directed at Kelsen, the courts did not adopt a radically different approach. The divide between the doctrines of successful revolution and popular acclaim revolves mainly around differing interpretations of what constitutes 'success'. Hence, in *Mokotso*, the Court interpreted Mitchell's 'popular acceptance' factor as part of the revolution's 'success': 'If the citizens do not submit, if they are in revolt, how then can the revolution be said to be successful?'.<sup>406</sup> *Dosso* became controversial because it recognised the regime as lawful only a few days after the revolution and without recourse to evidence, in effect 'legalising' it. The main criticism against the doctrine of successful revolution is that it was applied when 'success' was not yet sufficiently clear.

285. It was perhaps the direct transformation of a theory of jurisprudence into a judicial doctrine that made the revolution cases unnecessarily questionable. Theories of law, and the Pure Theory of Law in particular, were not written with judicial application in mind. Kelsen sought to formulate principles that, in his view, expressed general truths observed in most legal systems. The extent to which a legal theory holds true in a particular jurisdiction, and how it aligns with that jurisdiction's existing laws and legal traditions, can vary considerably. A mistake that became evident in later decisions was the failure to acknowledge the role of constitutional theory in this debate. This is a mistake also found in the academic literature, which focuses more on the merits or demerits of applying a Kelsenian approach than on appreciating the contribution that constitutional principles can make to the matter.

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<sup>406</sup> *Mokotso and Others v HM King Moshoeshoe IT and Others HC (1989) LRC (Const) 24, 125.*

286. The criticism raised against Kelsen in the later cases stems from the realisation that courts should look to the source of a legal order's authority, which they often referred to cryptically as 'the will of the people'. As will be seen in the next chapter, Kelsen's pursuit of theoretical 'purity' prevented him from addressing how a new legal order becomes effective or why people begin, 'by and large', to follow the norms of a new government. There is no reason for a court to adopt the same restriction, since courts inevitably engage in sociological considerations when assessing the 'effectiveness' of a revolutionary regime, even when adhering strictly to the doctrine of successful revolution. The courts' mistake was not in adopting a doctrine inspired by Kelsen, but in doing so without sufficient justification within the framework of constitutional theory. The problem of revolutionary legality is as much, if not more, a problem of constitutional theory as it is of legal theory.

287. The failure to address revolutionary change within a constitutional theory framework led to the weak theoretical foundations of the doctrine of popular acclaim. Although later courts appeared to reject the doctrine of successful revolution, they could not reach agreement on the degree of legitimacy required for a new government to be considered lawful. This divergence of opinion can partly be attributed to the vagueness of the concept of 'the will of the people'. Some courts interpreted it as requiring the people's positive and uncoerced approval (as in *Mitchell*), others as mere submission (as in *Mokotso*), and others still as significant in the early stages of a revolution but gradually diminishing in importance (as in *Prasad*). A theory that unites jurisprudence and constitutional law is therefore needed to establish firmer conditions for revolutionary change.

288. A final point to note is the importance courts placed on the basis of their own jurisdiction when dealing with questions of revolutionary legality. How can a court, whose authority derives from a constitution, declare that the constitution is no longer in force? Do judges owe allegiance to the constitution under which they were appointed?

289. In part, this reminds us that it may be appropriate for domestic courts to decide cases in ways that do not fully align with legal theory, even where legal theory offers guidance. Courts, as public institutions, may be constrained by considerations inherent to their legal and constitutional traditions, which limit their range of available options. Already in *Matovu*, and later in *Madzimbamuto*, *Asma Jilani*, and *Bhutto*, judges referred to their role and their judicial oaths as factors influencing which doctrine of revolution was appropriate. The latter two Pakistani cases emphasised that Pakistan's legal system is grounded in the principles of the Quran, making Western legal theories such as Kelsen's less suitable. A different public official, subject to different duties, might have reached a different conclusion. Although legal theories strive for universality, this is not guaranteed. Jurisprudential correctness is not the only factor guiding a court's choice of doctrine; *fittingness* also matters. A court that conceives of itself as existing solely within a particular constitutional framework would be incapable of issuing a ruling that denies its own existence. Hence:

It is not part of a court's legal function to repudiate the legal and constitutional system under which it was appointed, or to involve itself in the construction or justification of a new and different foundation for its own existence.<sup>407</sup>

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<sup>407</sup> *Madzimbamuto v Lardner-Burke, N.O. and Another, N.O., Baron v. Ayurem N.O. and ORS. AC* (1968) 2 S.A.L.R. 284, 430.

290. However, the court's role may also be limited for reasons that are jurisprudential, which can be analysed through legal theory. This concerns the identification of the court's own basis of legality when determining the lawfulness of the constitution under which it was created.

A court cannot derive its authority from a piece of paper on which may be written the provisions of some defunct or suspended constitution. In normal times a Court originates either from an effective constitution, as was the case of the High Court before the revolution, or from a special statute, as is the case of many of the English Courts, or perhaps from existence from time immemorial, as was the case of the old English Court of Arundel; but it derives its real authority from the fact that the governmental power recognizes it as a court and enforces its judgments and orders. Ultimately, it must always derive its authority from recognition by the governmental power and from the fact that the governmental power enforces its orders.<sup>408</sup>

291. The passage highlights the dilemma surrounding a court's basis of present authority when it must decide that its constitution is no longer in force. Underlying this dilemma is the assumption that the law under which the court was constituted (the abrogated constitution) remains the continuous source of its present authority. Consequently, the termination of the constitution would also bring about the termination of the court's existence and its powers.

292. This notion of continuous legal derivation lies at the heart of the problem of revolutionary legality, extending beyond the judiciary to the question of legal continuity as a whole. It implies that once the constitution is terminated, the entire legal system, along with all its laws, loses its validity, since they derive their validity continuously from the constitution under which they were created. The validity of this idea, and its implications for revolutionary change, will be examined in the following chapter.

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<sup>408</sup> Ibid 329-330.

## Chapter 5: Theoretical Foundations of Revolutionary Legality and Jurisdiction

### I. Foundations of the doctrine of successful revolution: Kelsen's *Pure Theory of Law*

#### a) *The doctrine and the questions of unconstitutional legality*

293. The early revolution cases examined in the previous chapter build the doctrine of *successful revolution* on the jurisprudential work of Hans Kelsen, as is particularly reflected in his *Pure Theory of Law*<sup>409</sup> (*PTL*) and *General Theory of Law and State*<sup>410</sup> (*GTLS*). Kelsen gives an account of what transpires to the legal order when an unconstitutional change of the constitution (which he generally calls 'revolution') takes place.<sup>411</sup> His account is founded on the idea that the legal order is structured as a hierarchical system of legal norms with the constitution at its apex, the validity of which is presupposed.<sup>412</sup> This presupposition may be formulated as a norm of the kind that 'one ought to obey the constitution', which Kelsen terms the basic norm (*grundnorm*).

294. The systemic and hierarchical characteristics of legal orders have important consequences. First, because of the systemic nature of the legal order, all its norms are interrelated. Changes to the constitution must therefore occur only in accordance with the constitutional norms that govern amendment procedures. If they do not, the continuity of the legal system is broken, and a new constitution, and thus a new

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<sup>409</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967).

<sup>410</sup> Hans Kelsen, *General Theory of Law and State* (Routledge 2017).

<sup>411</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 209.

<sup>412</sup> Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press 2007) 39-41

*grundnorm*, must be assumed to account for the change. Second, owing to the hierarchical character of the legal order, any unlawful change to the constitution affects the validity of all legal norms. Once the old *grundnorm* is destroyed, all norms hierarchically subordinate to it – that is, the entirety of the legal system – lose their validity.

295. The systemic and hierarchical understanding of legal orders has two major implications for revolutions. First, any unconstitutional constitutional change constitutes a revolution, and any revolution occurs when the constitution is altered unlawfully. Secondly, any unconstitutional change affects – and ultimately destroys – the entire legal order, even when the revolution targets only a limited part of the constitution. As a result, Kelsen’s account of revolution renders constitutional change legally unbound: during the interim between two legal systems, there is no law, since no *grundnorm* can yet be presupposed. The revolutionary government is therefore free to establish any laws it wishes. Moreover, no legal norms from the former order survive the revolutionary change. The norms of the old legal order can appear to retain their validity only if they are expressly or tacitly reenacted under the new constitution.

296. The first revolution cases examined in the previous chapter invoked Kelsen’s ideas to formulate the doctrine of successful revolution. This doctrine builds upon Kelsen’s conception of the hierarchical and systemic structure of the legal order and its implications for revolutionary change. It further identifies the moment of revolutionary change as the point at which the revolutionary regime successfully seizes control of the state and is able to enforce its mandates without effective resistance from the lawful government. It is precisely this aspect of the doctrine that has drawn criticism for being

too accommodating to usurpers and has motivated the emergence of the rival doctrine of acclaimed revolution.

297. However, Kelsen's influence extends beyond defining *when* a revolutionary change occurs to explaining *what its implications are*. In this respect, the doctrine of acclaimed revolution does not differ. Kelsen's account is reflected in the actions of revolutionary regimes that declare which laws shall remain in force following the abrogation of the constitution. This can already be seen in Pakistan's first revolution case, *Dosso*. Following the annulment of the 1958 Constitution, the President promulgated the *Laws (Continuance in Force) Order 1958*, which declared valid all laws that had been in force before the Proclamation, except for the abrogated Constitution itself. The Order also reinstated the jurisdiction of all courts, including that of the Supreme Court. Clearly, the view was that the old laws did not survive the annulment of the 1958 Constitution on their own, but required reenactment. This aligns precisely with Kelsen's thesis that revolutionary change destroys the entire legal order rather than only some of its norms. Moreover, the Order made it easier for the Supreme Court to justify its jurisdiction in *Dosso*: by recognising the validity of the new regime and the Order, the Court provided itself with a new legal basis of authority. All that remained was for it to determine that the revolution had successfully established a new legal order.

298. It appears then that the doctrine of successful revolution offers a complete account of revolutionary legality by providing an answer to the following crucial questions:

- 1) When does a revolutionary change take place?

Answer: When the old regime loses its efficacy and a new one becomes efficacious. This occurs when the revolutionary government has successfully taken control of the state without a potent challenger.

2) Is there law governing revolutionary change (law of revolution)?

Answer: No, revolutionary change is beyond legal restrictions and subject only to its success. Furthermore, within the context of Kelsen's theory, revolutionary change is not truly a change of one and the same legal order but a sequence of separate events consisting of the destruction of one legal order and the creation of a new one. No law bridges the transition between the two legal orders.

3) What are the implications of revolutions for the rest of the legal order? Do some laws survive (law in revolution)?

Answer: Revolutionary change destroys not only the parts of the legal order targeted by the revolution but the whole legal order. The post-revolution legal order is an entirely new legal system, independent and legally disconnected from the previous one.

4) What is the basis of the courts' jurisdiction in deciding questions of revolutionary change?

Answer: Courts' jurisdiction lies in the constitution in force at the time of the decision. If the court is not satisfied that a revolutionary change has successfully taken place, it retains its jurisdiction under the old constitution, which therefore remains in force. If the court is satisfied that a revolutionary change has successfully occurred, its jurisdiction derives from the new constitution, on the assumption that the new constitution confers judicial authority upon it. What

happens in a situation where the old constitution is no longer in force but the new one has yet to become efficacious is unclear. Since no legal order would be in force, it would follow that no court has jurisdiction; in fact, that no court exists at all.

299. Critics of the doctrine of successful revolution have sought to provide alternative answers to one or more of these questions. For instance, the doctrine of *acclaimed revolution* diverges on the first question (the *when* question) and, to some extent, on the second (the question of legal restrictions to revolutionary change). However, insofar as the doctrine of successful revolution claims to be derived from Kelsen, critics have aimed to show that his theory is either inapplicable, misunderstood, or incorrect. The arguments raised in this regard have significance beyond challenging Kelsen himself, as they reveal important considerations that any legal theory of revolutionary legality must address.

300. In this chapter, I will focus on the main criticisms directed against the doctrine of successful revolution and its connection to Kelsen's *Pure Theory of Law*. I will argue that, contrary to the views of many commentators, the doctrine of successful revolution does not distort Kelsen's theory, even though his theory was never intended for judicial application. I will also demonstrate that, to the extent the doctrine builds upon the PTL, it contains inherent limitations. In the second section, I will examine another major criticism of the revolution cases more generally, namely, the basis of courts' jurisdiction to determine the validity of their own constitutions. I will outline possible approaches to jurisdiction, both within and beyond the constitution. Building on these points, the

following chapter will address the remaining two questions of unconstitutional legality: the *law of* and the *law in* revolutions.

**b) The Pure Theory of Law project**

301. It is useful to note certain fundamental features of the PTL at the outset. The PTL is a theory of positive law – that is, law created through human conduct (an ‘act of will’),<sup>443</sup> as opposed to morality-based or religion-based natural law. Moreover, it is intended to be a descriptive theory, meaning that its aim is to know and describe law as an existing social phenomenon.<sup>444</sup> This has several implications for Kelsen’s methodology and for the nature of his theory.

302. Firstly, it means that the *PTL* is not morally normative, it does not say *how the law should be* but how the *law is*.<sup>445</sup> Secondly, the PTL is not legally normative either: its statements are not legal rules and do not bind judges. They are theoretical abstractions made by the legal theorist in their effort to understand and describe law – they are sentences of the science of law.<sup>446</sup> Thirdly, the PTL concerns itself only with existing legal orders, meaning orders that are, at a minimum, ‘by and large effective’.<sup>447</sup> This is because the *PTL*’s subject of study is law as an existing social phenomenon.<sup>448</sup> The legal

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<sup>443</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 4-5. Hans Kelsen, ‘Professor Stone and the Pure Theory of Law’ (1964) 17 *Stanford Law Review* 1128, 1151.

<sup>444</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 1, 30-31.

<sup>445</sup> *Ibid* 1.

<sup>446</sup> *Ibid* 70-75; Hans Kelsen, ‘Professor Stone and the Pure Theory of Law’ (1964) 17 *Stanford Law Review* 1128, 1134.

<sup>447</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 11.

<sup>448</sup> *Ibid* 70.

theorist observes and articulates the principles that describe such systems, just as the natural scientist observes and theorises about natural phenomena. Fourthly, because it is concerned with describing a social phenomenon, the PTL is not confined to any particular jurisdiction but seeks to articulate universal principles – principles that hold true for all existing systems of positive law. Fifthly, this description is made without recourse to other disciplines, such as sociology, psychology, political theory, or morality. According to Kelsen, these are alien elements that are neither necessary nor appropriate for understanding and describing law. Taking them into account, he argues, obscures the nature of law by conflating it with those other disciplines, whereas excluding them ensures the methodological purity of legal science.<sup>419</sup> Achieving such methodological purity is a central aim of Kelsen's project.

303. The nature of Kelsen's project determines the kind of answers it can offer. As a descriptive theory of positive law, it does not provide guidance on how judges should decide cases. Its purpose is to describe its object – law – and to make explicit what *juristic thinking* holds implicitly. Its success depends on whether it succeeds in offering an account that coheres with legal understanding, particularly with regard to revolutions and their impact on legal orders.

**c) *The basic norm (grundnorm)***

304. Within the PTL, law consists of norms. A norm is a stipulation that something 'ought' to happen, which means a directive commanding, authorising, permitting or forbidding something.<sup>420</sup> Like moral norms, legal norms regulate human behaviour.

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<sup>419</sup> Ibid 1, 75.

<sup>420</sup> Ibid 4.

What distinguishes legal norms from other kinds of norms is that a sanction is attached to them in case of disobedience; they are coercive norms.<sup>421</sup>

305. Yet not all coercive norms are legal norms. Legal norms are both coercive and 'binding'.<sup>422</sup> Kelsen asserts that unlike statements about facts, which can only be true or false, norms can only be 'valid' or 'invalid': that is, either binding or not binding. When, then, is a norm binding? Anyone issuing a norm believes that the person subject to it 'ought' to comply. Both a gangster demanding money and a tax official collecting taxes believe that their respective norms 'ought' to be obeyed. This is an 'ought' only in a 'subjective' sense, i.e. from the point of view of the one who issues the norm. What distinguishes the tax official from the gangster is that the former's directive is regarded as an 'ought' not only by the tax official but also by the taxpayer and all society at large.<sup>423</sup> Its meaning is considered as binding in the 'objective sense' and thus 'objectively valid' *as law*.

306. A foundational tenet of Kelsen's theory is that norms derive their validity solely from other norms, never from facts. For Kelsen, 'ought' and 'is', norms and facts, belong to two entirely different domains so that an 'ought' can never be inferred solely from an 'is'.<sup>424</sup> A norm is objectively valid (or simply 'valid') if and only if there exists another, 'higher', legal norm authorising it. The command of a gangster lacks any valid authorising, or 'higher', norm, whereas the tax official's command is issued under the

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<sup>421</sup> Ibid 33.

<sup>422</sup> Ibid 44.

<sup>423</sup> Ibid 7.

<sup>424</sup> Ibid 193.

authority of a tax law. Thus, the subjective meaning of the gangster's act – its purported 'ought' – does not correspond to its objective meaning; it is not binding, and therefore 'invalid'. By contrast, the tax official's act possesses an objectively valid 'ought', and is thus binding.

307. Accordingly, Kelsen's legal scientist investigates the validity of a norm by tracing its derivation from higher norms in what may be described as a chain of validity. Ultimately, the legal scientist reaches a set of legal norms that regulate the creation of general legal norms but are not themselves subordinate to any others. These ultimate norms constitute the constitution in the 'material' sense.<sup>425</sup> Any reference to 'constitution' in the discussion that follows refers to this material constitution.

308. At this point, three seemingly contradictory claims emerge: (a) that all valid legal norms – binding in the 'objective sense' – must derive their validity from higher legal norms; (b) that the norms of the constitution are 'ultimate' norms in the sense that they do not derive their validity from any higher legal norms; and (c) that the norms of the constitution are nevertheless valid legal norms, binding in the 'objective sense'. How can these claims be reconciled?

309. Kelsen's answer is that the legal scientist must necessarily *presuppose* a basic norm (*grundnorm*), whose function is to interpret ultimate legal norms as valid.<sup>426</sup> Put

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<sup>425</sup> "Constitution" is understood here in its material sense, that is, we understand by constitution the positive norm or norms which regulate the creation of general legal norms' *ibid* 222 and also in Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 124-125. This is contrasted with the constitution in the formal sense, which is codified in a document and may contain other legal norms beyond those authorising the creation of general legal norms.

<sup>426</sup> Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 194-195.

simply, the content of the *grundnorm* is that ‘the norms of the constitution ought to be obeyed’. By being presupposed, the *grundnorm* constitutes an exception within positive law: it is neither posited nor derived from any other norm. Its role is to make it possible to interpret the norms of the legal order as oughts in the objective sense—that is, as binding upon all.

310. It is important to note that, for Kelsen, the *grundnorm* is presupposed, not created, by the legal scientist; its existence arises from the mere fact that there exists a hierarchical order of coercive norms that is, by and large, obeyed.<sup>427</sup> The presupposition of the *grundnorm* serves to explain the normativity of this order,<sup>428</sup> that is, why people obey and regard its norms as binding upon them, given the principle that an *ought* can only be derived from another *ought*.<sup>429</sup>

311. The *grundnorm* is intended to perform several functions.<sup>430</sup> First, it explains the normativity of law. The *grundnorm* is the reason for the validity of a legal order: it

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<sup>427</sup> ‘The basic norm which is the reason for the validity of a legal order, refers only to a constitution which is the basis of an effective coercive order. Only if the actual behavior of the individuals conforms, by and large, with the subjective meaning of the acts directed toward this behavior—if, in other words, the subjective meaning is recognized as the objective meaning—only then are the acts interpreted as legal acts’, Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 46-47.

<sup>428</sup> And of any other order of norms, such as a moral order, see *ibid* 8.

<sup>429</sup> This explanation thus serves legal-technical purposes, and is not a moral explanation. The subject has been confusing and widely debated. J. Raz suggested that Kelsen’s *grundnorm* is a concept of ‘justified normativity, see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 2009) 122. See contrary Alida Wilson, ‘Joseph Raz on Kelsen’s Basic Norm’ (1982) 27 *The American Journal of Jurisprudence* 46.

<sup>430</sup> For a critical exposition of the functions of the *grundnorm*, see Michael Freeman, *Lloyd’s Introduction to Jurisprudence* (9 edn, Sweet & Maxwell 2014) 258-263.

renders the constitutional norms valid, and from them follows, in a chain, the validity of all other norms within the legal order, from the most general laws to the most specific legal acts. Its presupposition allows for the interpretation of the ultimate norms of a legal order as an ought in the objective sense.<sup>431</sup> In essence, it functions as a norm that authorises the original constitution-makers or, in the case of customary law, the original norm-creating act.

312. From this follows a second important function of the *grundnorm*: it secures the unity of the legal order. Without the *grundnorm*, the chains of validity would terminate at constitutional norms that lack any connection to one another. The *grundnorm* 'is the common source for the validity of all norms that belong to the same order'.<sup>432</sup> It thus binds the constitutional norms, and consequently the entire legal order, into a single, coherent system of legal norms.<sup>433</sup>

313. Thirdly, the *grundnorm* establishes the logical unity of the legal system in that it is free from contradiction.<sup>434</sup> Norms with contradictory content can certainly be issued by norm-creating authorities, but, as Kelsen argues, because the cognition of law seeks to understand its subject matter meaningfully, it proceeds on the assumption that conflicts between norms must be resolved through interpretation. The *grundnorm*

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<sup>431</sup> Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press 2007) 41.

<sup>432</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 195.

<sup>433</sup> *Ibid* 31, 205.

<sup>434</sup> *Ibid* 205-208. Kelsen revised the position that the *grundnorm* incorporates the principle of non-contradiction in his posthumously published work Hans Kelsen, *General Theory of Norms* (Oxford University Press 1991) 211-225.

confers objective meaning only upon a normatively meaningful act and, for this reason, according to Kelsen, it makes such conflict-resolving interpretation necessary.

**d) *The principles of legitimacy and effectiveness***

314. The legal system is not static; new legal norms may be created or abolished, and even constitutional norms can be altered. The *grundnorm* does not specify whether or when such changes are permitted; it merely requires that the constitution be obeyed. Accordingly, changes to the norms of the legal order, including constitutional norms, remain consistent with the *grundnorm* so long as they are valid under the constitution itself. As long as constitutional change occurs in accordance with the constitution's own rules, the principle of legitimacy holds: legal norms remain valid until their validity is terminated according to the procedures established within the legal order.<sup>435</sup>

315. If, however, a change within the legal order contradicts the norms of the constitution, those constitutional norms can no longer be interpreted as objectively binding. Consequently, the basis for presupposing the *grundnorm* is lost. A new *grundnorm*, one that allows the unconstitutional change to be interpreted as valid, must then be presupposed. Since the old *grundnorm* was the foundation of the legal order's validity, the ultimate 'ring' in the chain, its demise necessarily brings down all legal norms whose validity depended upon it, that is, all norms of the 'old' legal system. The principle of legitimacy thus ceases to apply.

316. Kelsen refers to the relationship between the *grundnorm* and its actual observance as the principle of effectiveness. This principle holds that a legal order as a whole remains valid for as long as it is, by and large, efficacious – that is, for as long as

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<sup>435</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 209.

the actual conduct of its subjects conforms to its norms.<sup>436</sup> A legal order is considered efficacious when its norms are not significantly violated, or when sanctions are generally imposed in cases of violation. This principle distinguishes the description of existing legal orders from those that no longer exist or that never did. The method of identifying validity solely through derivation from higher norms in a chain of validity would be insufficient for this purpose.

317. Referring to the requirement of effectiveness as a 'principle' should not create the impression that it is an additional axiom within the PTL. It follows directly from the function of the *grundnorm* as a presupposition for the interpretation of a particular social reality.<sup>437</sup> The *grundnorm* enables the 'science of law', whose aim is to know and describe law as a social phenomenon. It is presupposed to make possible the interpretation of norms as binding, since, under the *ought/is* distinction, the mere fact of obedience cannot itself explain their normative force. Although the presupposition of the *grundnorm* is not a fact, it is made only because, as a matter of fact, there exists human behaviour that treats legal norms as objectively valid. If no such practice exists, there is no reason to presuppose a *grundnorm*.

318. For the same reason, if social reality changes such that the old constitutional norms are no longer followed while new ones are, the old *grundnorm* loses the foundation on which it can be presupposed, and a new *grundnorm* must be adopted. As

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<sup>436</sup> Ibid 210.

<sup>437</sup> [...] a normative order loses its validity when reality no longer corresponds to it, at least to a certain degree. The validity of a legal order is thus dependent upon its agreement with reality, upon its "efficacy", Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 120.

Kelsen explains, 'the change of the basic norm follows the change of the facts that are interpreted as creating and applying valid legal norms.'<sup>438</sup> Since the *grundnorm* is, as noted, the basis for the validity of the legal order, its termination necessarily entails the loss of validity of all norms within that order. Hence, the so-called principle of effectiveness as a condition for the validity of legal orders is merely a consequence of the function of the *grundnorm* as a presupposition required for the cognition of law.

### **e) Revolutions**

319. It is through these combined features of the *grundnorm* that Kelsen's position on constitutional revolutions can be understood. The continuous validity of a legal system, and of all its constituent norms, depends on the continuous validity of the *grundnorm*. Since the *grundnorm* remains valid for as long as the constitutional norms do, legal continuity persists so long as the constitution's norms remain unchanged or are altered in the manner anticipated by the constitution itself. Any unauthorised change to the constitution results in the termination of the existing *grundnorm* and, consequently, the termination of the entire legal order. For this reason, any unconstitutional alteration of the constitution constitutes a 'constitutional revolution' in Kelsen's terms, irrespective of the scale or substance of the norms unlawfully changed.

320. That the *grundnorm* 'follows the change' of the law-creating and law-applying facts means that one can assess a change in the *grundnorm* only after determining that social practice has shifted regarding which norms are being obeyed. At first glance, this appears to produce a circularity. If the presupposition of the *grundnorm* is truly necessary to interpret norms as 'objectively valid', and if such interpretation is in turn

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<sup>438</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 210.

necessary for those norms to qualify as legal norms, how can the legal scientist identify the relevant norms before the *grundnorm* is presupposed?<sup>439</sup>

321. It would seem, therefore, that the *grundnorm* is not genuinely needed to interpret a given norm as an 'ought' in the objective sense, and thus as 'law', since only after such interpretation is made can the *grundnorm* be presupposed. As a result, the *grundnorm* cannot offer the jurist any forward-looking guidance as to when a legal order becomes objectively valid. The relationship between validity and the *grundnorm* is in fact reversed: subjects do not obey legal norms because a *grundnorm* authorises them; rather, a *grundnorm* is presupposed because subjects obey those legal norms. The *grundnorm*, in this sense, is retrospective: it looks backwards.<sup>440</sup>

322. What, then, is the criterion for determining that a given norm is 'objectively valid' if not the *grundnorm*? This question does not arise within an existing and efficacious legal order, since in such a context the existence of the *grundnorm* and the validity of legal norms are established through the systemic connection of each norm to the chain of validity that ultimately leads back to the *grundnorm*. However, when a change of *grundnorm* occurs, the question becomes crucial, as it determines when a new *grundnorm* may be presupposed.

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<sup>439</sup> For arguments for circularity, see Julius Stone, *Legal System and Lawyer's Reasonings* (Stanford University Press, 1964) 129-130; Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford University Press 1980) 102.

<sup>440</sup> 'Kelsen's project deals only with existing legal systems: he enters in medias res to explain how it is that we are able to understand effective legal norms as imposing obligations' Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (Bloomsbury Publishing 2015) 116.

323. The practical importance of this question is evident in the doctrine of successful revolution, under which courts have held that the *grundnorm* or legal order is replaced by a new one once a revolution succeeds. Their interpretation of the PTL was that the new regime's effectiveness in exercising control serves as the test for determining the change of the *grundnorm*. Two key questions therefore arise: (a) Is efficacy the sole factor for determining both the destruction of a *grundnorm* and the presupposition of a new one? and (b) How is efficacy to be measured?

*Efficacy as a sufficient factor for the validity of a new legal order*

324. Critics of the doctrine of successful revolution have argued that the courts misinterpreted Kelsen by treating efficacy as both a necessary and sufficient condition for the validity of a legal order, and thus for the presupposition of a new *grundnorm*.<sup>441</sup> The first part of this criticism finds support in several passages from Kelsen. As has been emphasised earlier, Kelsen maintains a strict separation between the validity of a norm, which is an ought, and its effectiveness, which is an 'is', a fact.<sup>442</sup> This distinction means both that a norm can be valid before it becomes effective,<sup>443</sup> and that norms can be effective without being (objectively) valid. Efficacy and validity coincide only when a norm is 'not obeyed by anybody anywhere';<sup>444</sup> in such a case, it ceases to be valid, and

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<sup>441</sup> J. M. Eekelaar, 'Splitting the Grundnorm' (1967) 30 *The Modern Law Review* 156, 34-42; Constantinos. Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas 2015).

<sup>442</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 10-11.

<sup>443</sup> Hans Kelsen, 'Professor Stone and the Pure Theory of Law' (1964) 17 *Stanford Law Review* 1128, 1140, 'I call attention to the fact that a legal norm becomes valid before it can be effective. A court has to apply only a valid statute. Hence if a court applies a statute immediately after it has been enacted by the legislator it applies legal norms which are *not yet* effective, which become effective by their application.'

<sup>444</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 11,

efficacy thus constitutes merely a minimum condition of validity. Kelsen makes this clear in relation to legal systems when he states that ‘the efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms’.<sup>445</sup>

325. However, this should not be understood to imply that there are factors additional to the effectiveness of the legal order. It must be remembered that the *grundnorm* is not *created* but *presupposed*, and that its presupposition is not obligatory. The *grundnorm* is neither an observable fact nor something that flows from facts. It is presupposed only if and when one, a ‘legal scientist’, chooses to interpret a coercive order normatively, as an order of norms that are objectively binding. Its presupposition is therefore an interpretative device, made necessary by the distinction between *ought* and *fact*. The *grundnorm* is not a legal rule that can be enacted or written down, and for this reason, it can have no requirements beyond the effectiveness of the legal order. ‘Effectiveness’ serves as shorthand for the idea that the raw materials of a legal order are present, that there exists a subject matter upon which basic norms can operate. The basic norm functions to fill the conceptual gap needed to understand law not merely as a collection of factual instances of obedience and coercion (what Kelsen terms the ‘sociological’ approach to law), but as an order of *oughts*.

326. Kelsen himself says:

*As soon as the old constitution loses its effectiveness and the new one has become effective, the acts that appear with the subjective meaning of creating or applying legal norms are no longer interpreted by presupposing the old basic norm, but by presupposing the new one.*<sup>446</sup>

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<sup>445</sup> Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 119.

<sup>446</sup> *Ibid* 210, emphasis mine.

The emphasised first sentence, ‘as soon as...’, indicates a relationship of cause and effect: on one side stands the efficacy of an order of norms, and on the other, the presupposition of a new *grundnorm*. Kelsen suggests no additional requirement beyond this. The presupposition of the *grundnorm* rests on the factual condition that an order of norms is obeyed and enforced. The ‘interpretation’ that these acts of obedience and enforcement are valid follows inevitably for the legal scientist, who cannot determine the existence of the *grundnorm* ‘arbitrarily’.<sup>447</sup>

327. The same point can be seen indirectly from another passage in Kelsen, where he identifies ‘lasting effectiveness’ as the determining factor distinguishing a legal order from the order of a robber gang. In considering why a *grundnorm* should not be presupposed for the community of a robber gang operating within a state’s territory, Kelsen explains that it is ‘because this order does not have the lasting effectiveness without which no basic norm is presupposed’.<sup>448</sup> However, he adds that the community of robbers would be regarded as a legal order ‘if it is effective within this territory in such a way that the validity of any other coercive order of this kind is excluded’.<sup>449</sup> Applying the same reasoning to a revolutionary group competing with the established state regime, we can argue that the ‘community’ of revolutionaries would be regarded as establishing a legal order once its norms become more effective than those of the former order. Thus, the test of (lasting) efficacy appears to encompass both the necessary and sufficient conditions for a change of the *grundnorm*.

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<sup>447</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 201.

<sup>448</sup> *Ibid* 47, emphasis mine.

<sup>449</sup> *Ibid* 48.

328. Perhaps one reason to resist the efficacy test arises from the subjective–objective distinction of the ‘ought’ that Kelsen draws to differentiate between the commands of the gun robber and those of the tax officer, since both are ‘effective’ but in different ways. What distinguishes them? Based on Kelsen’s reasoning, one might be tempted to suggest that the difference lies in the existence of a higher norm, namely, that the tax officer’s command is authorised by a tax law, whereas the robber’s is not. Yet this explanation is unsatisfactory for two reasons: (a) gangs too may act under ‘higher norms’ when they follow the commands of their leader, and (b) there are legal norms that lack any higher norm because they are ultimate norms (for example, the norms of the constitution), and thus a *grundnorm* must be presupposed to account for their already-observed ‘objective’ validity.

329. Finally, since Kelsen rejects interpreting the presupposition of the *grundnorm* as conveying any moral or political merit of the legal order, or even as implying acceptance of its norms by its subjects,<sup>450</sup> the claim that a norm is an ‘ought’ in the objective sense means nothing more than that it forms part of a system of norms possessing enduring effectiveness.<sup>451</sup> This is the concept of validity that Kelsen employs when understanding norms as objectively binding through the presupposition of the *grundnorm*. Accordingly, the efficacy test, so far as it confers validity upon a revolutionary regime

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<sup>450</sup> Ibid 218, fn 83.

<sup>451</sup> See also Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford University Press 1980) 134; J. W. Harris, ‘The Basic Norm and the Basic Law’ (1994) 24 Hong Kong Law Journal 207, 228.

by considering only the regime's effectiveness, does not amount to a misinterpretation of Kelsen.

#### *How is efficacy measured*

330. Kelsen defines efficacy in broad and somewhat indeterminate terms. A legal order is efficacious if its norms are, by and large, obeyed, or if sanctions are imposed when they are not.<sup>452</sup> Understandably, Kelsen does not specify the precise degree of efficacy required. It is clear that violations of law do not threaten the general efficacy of a legal system so long as they remain within socially acceptable limits. It is equally clear that a legal order whose norms are largely disregarded can no longer function as a coercive system, and therefore, a *grundnorm* can no longer be presupposed. Between these two extremes lies a grey area in which the lawful regime may struggle against a revolutionary one to maintain control of the legal order. Further complications arise, however, when we consider *what* is measured to determine the efficacy of a legal order and *how* it is to be measured.

331. First, is the efficacy of all legal norms to be treated as equal in weight? Does disobedience of constitutional norms count in the same way as disobedience of the rules of contract or copyright law? Intuitively, we understand violations of constitutional

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<sup>452</sup> Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 39, 61, 120. Efficacy, for Kelsen, means that the norms are primarily applied by the organs rather than being obeyed by the subjects, since primary obligations become legal only because they can be sanctioned if they are disobeyed. Hence: 'As far as by law we understand the genuine, primary legal norm, law is efficacious if it is applied by the organ - if the organ executes the sanction. And the organ has to apply law precisely in the case where the subject "disobeys" law: this is the case for which the sanction is stipulated,' *ibid* 62.

norms to carry far greater significance than violations of ordinary law.<sup>453</sup> We also understand revolutions not as instances of mere illegality, but as unlawful changes that affect the fundamental structure of the constitution. (Whether this understanding can be reconciled with Kelsen's theory will be discussed below.) The social gravity of the constitutional norms being violated appears to be a relevant factor in assessing their impact on the overall efficacy of the legal system.

332. One way to make sense of this is to view efficacy as the expression of institutional authority within a legal order, the authority responsible for creating and enforcing law. A government that can no longer impose its mandates or has been usurped suffers a direct attack on that standing institutional authority. A legal order loses its efficacy when its law-making and law-applying institutions lose control.

333. Secondly, can efficacy be measured as an aggregate? Can we assess the general efficacy of a legal order as a ratio between compliance and violations? Even if such measurement were desirable, it would only be possible if compliance and violations could be quantified, and this is impossible in most cases. For instance, the enjoyment of rights is continuous: one does not experience freedom of speech only when winning a case against censorship, but each time one expresses an opinion or publishes an article. Perhaps we could limit the effects of law to instances of enforcement and regard legal norms as applied only when institutions such as courts enforce them. Yet this would ignore compliance altogether and reduce law to mere sanctions. More problematically, it would render our measure of efficacy meaningless, as we would then

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<sup>453</sup> Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford University Press 1980) 204-205.

count only cases of enforced sanctions as compliance. How, then, are we to count violations? As sanctions whose enforcement has failed? That would already presuppose that a violation has occurred, which would in turn require another criterion for measuring violations independently of institutional action. Clearly, violations cannot be defined solely through institutional practice, since that would limit them to instances where institutions fail to enforce the law. Quantifying compliance and violations as discrete units is therefore impossible. Instead, the measure of efficacy depends on the general capacity of a legal order to command compliance and on the relative social significance of violations compared to overall compliance.

334. From this follows a third observation: the imposition of sanctions entails an element of prediction. How soon after a violation must a sanction be enforced, or, more broadly, how soon must order be restored? A legal order cannot be said to have lost its efficacy unless one can confidently predict that it is no longer capable of enforcing sanctions within an expected timeframe. This requires evaluating the present condition of the state: its ability to command the police or armed forces, maintain a functioning judiciary, and so forth. Because it rests on prediction, the imposition of sanctions for violations is not a mere factual assessment.

335. These observations show that the doctrine of successful revolution is a coherent development of Kelsen's theory for judicial application. The efficacy of a legal order may be understood in terms of the degree of control exercised by the (lawful) government. Assessing control is not a simple observation of facts; it requires a reasoned judgment of at least three variable factors: (a) the social significance and extent of constitutional

violations; (b) the social significance of their persistence; and (c) the capacity of the lawful government to maintain or regain control within a foreseeable period.

336. In short, the efficacy test that can be inferred from Kelsen is that the breach with the former constitutional order must be substantial and widespread enough to demonstrate signs of endurance, as opposed to a situation of ongoing revolutionary conflict in which no dominant political authority has yet been firmly established. The efficacy test cannot indicate a precise breaking point between the old and new legal orders, since it depends on numerous variables contingent on the social context of each case.

337. That being said, nothing in Kelsen's theory supports the idea that a usurpation of power becomes successful immediately upon the declaration of a constitution's abrogation, as the Court held in *Dosso*. The efficacy condition set out by Kelsen refers instead to a minimum threshold required for a valid legal order. In this respect – which is the most controversial – the doctrine of successful revolution extends beyond the PTL.

***f) Theory and doctrine: jurisprudence in courts?***

338. An objection often raised against the doctrine of successful revolution is that the PTL is a descriptive legal science and therefore cannot be used normatively by judges to decide cases. This argument appears in both academic literature<sup>454</sup> and, as discussed earlier, in the Pakistani cases *Asma Jilani* and *Bhutto*. It is indeed correct that Kelsen's theory was not intended for judicial application. It is a theory, not a doctrine. Its aim is

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<sup>454</sup> F. M. Brookfield, 'The Courts, Kelsen, and the Rhodesian Revolution' (1969) 19 University of Toronto Law Journal 326; Tayyab Mahmud, 'Jurisprudence of Successful Treason: Coup d'Etat & (and) Common Law' (1994) 27 Cornell International Law Journal 49, 106, 111-113.

to provide an accurate account of the legal phenomenon, based on the premise that law can be described as a system of norms without reference to 'alien' elements such as politics or morality. The PTL presents itself as a scientific, rather than a normative, project. At one point, Kelsen explicitly states that the propositions of the PTL are not legal rules that in any way 'bind' judges;<sup>455</sup> rather, they are statements about law.

339. The difference between theory and doctrine becomes clear in the distinct ways in which the element of efficacy is treated by Kelsen and by the courts. As seen in the conclusions of the previous chapter, Kelsen's concept of efficacy is best understood as a principle of effectiveness encompassing two senses: a negative sense, according to which no legal order can be valid unless it is generally efficacious, and a positive sense, according to which an effective order of norms gives rise to a valid legal order once the *grundnorm* is presupposed.

340. Within Kelsen's framework, the principle of effectiveness functions as a hermeneutic tool. Since the PTL seeks to describe existing legal orders, it must identify the conditions under which a legal order can be said to exist. The *grundnorm* ceases to operate when the legal order loses its efficacy, simply because there is no corresponding normative practice for the presupposition of a basic norm to rest upon. This relationship between *grundnorm* and efficacy belongs to Kelsen's scientific inquiry into the structure of the legal order; it is not, in itself, a rule of law.

341. By contrast, courts have used effectiveness as a rule of law, determining the point at which a revolutionary regime becomes lawful. As a legal norm, it not only enables

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<sup>455</sup> Hans Kelsen, 'Professor Stone and the Pure Theory of Law' (1964) 17 Stanford Law Review 1128, 1134.

courts to decide upon the validity of revolutionary regimes but also imposes a duty on them to identify the necessary and sufficient criteria for recognising their lawfulness.

342. As a theory, the principle of effectiveness simply recognises that laws cannot exist merely as words on paper; they must be living instruments, regarded as binding standards, followed and enforced. It explains the reality that legal orders rise and fall, and that, at times, unlawfulness itself can serve as the basis for constitutional change. A theory provides an account of existing doctrines and practices: if constitutions can change through revolutionary means, it is because courts, governments, or other decision-making bodies have acted accordingly. When a theory explains how courts behave during revolutions, it does so because there exist certain doctrines that courts follow, which acknowledge revolutionary change as a legitimate mode of constitutional transformation.

343. As a result, there exists a reversed relationship between theory and doctrine: accepting a theory entails accepting a doctrine that aligns with it. This may occur for two reasons. First, if one accepts that the general premises of a theory, or its explanatory power in other contexts, are reflected in one's domestic law, then it is consistent to accept its conclusions as well, unless a compatible alternative can be found. Thus, if a German judge accepts the propositions of the *Pure Theory of Law* as an accurate reflection of the German legal system, that is, as correct not only as a general description of law but also as a true account of German law in particular, then it would be consistent to accept its implications for revolutionary change.<sup>456</sup>

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<sup>456</sup> I disagree at this point with Harris, who argued that the *PTL* has 'social suggestive force for judges' because legal science has to be a socially useful activity and would be pointless otherwise,

344. A second reason for transforming theory into doctrine is that doctrines are regarded as correct through a combination of their correspondence with facts and with moral ideas. We understand, for example, that freedom of speech may be understood and protected differently in France than in the United States, and that doctrines are formulated not only on the basis of sound moral reasoning but also in accordance with a particular legal tradition and social context. We do not create doctrines in a vacuum; we aim for them to reflect social realities rather than fiction. Therefore, if one considers the *Pure Theory of Law* to accurately express certain fundamental truths about the nature of law and legal orders, this provides a strong reason for developing doctrines consistent with it.

345. Judges who invoked Kelsen did not appear to appreciate the distinction between theory and doctrine. Nonetheless, the criticism they have faced, based on the claim that a theory has no place in judicial reasoning, is misplaced. A theory seeks to provide an accurate description of legal phenomena, and jurists rely on such descriptions in the formulation of doctrines. A judge who accepts the PTL as a true description of their domestic law is logically bound by its implications if consistency matters. There is a feedback relationship between theory and doctrine: doctrine is shaped by theory, just as theory relies upon and may be inferred from doctrine.

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see James W. Harris, 'When and Why Does the *Grundnorm* Change?' (1971) 29 *The Cambridge Law Journal* 103. If judges were ignoring, say, the hierarchy of legal rules or the systemic elements of the legal order, Kelsen's theory would not be pointless but incorrect. Whatever guiding function jurisprudence can offer is not because it aims to be a socially useful activity, but because it seeks to explicate some truths. It becomes useful only if and when it is useful for judges to seek such truths.

## II. Jurisdiction in revolutions: Can courts determine revolutionary change?

346. The central puzzle regarding a court's jurisdiction in matters of constitutional legality is straightforward to grasp. In countries with a written constitution, judges are appointed by and derive their authority from that constitution. How, then, can a court determine the demise of its own constitution without ipso facto undermining its own existence and competence as a court? The court would seem, as Fieldsend A.J.A. once remarked, to resemble 'a creature of Frankenstein which once created can turn and destroy its maker'.<sup>457</sup> The seemingly paradoxical jurisdiction of a court to adjudicate matters of revolutionary legality therefore demands closer examination.

347. Before proceeding, two preliminary issues must be clarified. First, it is essential to distinguish between the court's jurisdiction and judges' individual moral duties. When faced with a revolutionary change, judges may choose to remain in office or to resign.<sup>458</sup> They may feel morally compelled to resign out of loyalty to the lawful government, adherence to their judicial oath, opposition to what they regard as an illegitimate or unjust regime, or for other personal reasons. The present discussion, however, is not concerned with the moral duties of individual judges on the eve of a revolution, but with the question of whether, and on what basis, the judiciary as an institution retains legal authority to inquire into and adjudicate questions of revolutionary change.

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<sup>457</sup> *Madzimbamuto v Lardner-Burke, N.O. and Another, N.O., Baron v. Ayurem N.O. and ORS. AC* (1968) 2 S.A.L.R. 284, 430.

<sup>458</sup> Various commentators suggested that the judges in the revolution case should have resigned, see Stanley A de Smith, 'Constitutional Lawyers in Revolutionary Situations' (1968) 7 *Western Ontario Law Review* 93, 108.

348. Secondly, a separate argument against the courts' jurisdiction has been advanced on the basis of what is known as the political question doctrine. According to this doctrine, judicial review is precluded where the issues at stake raise questions that are predominantly political rather than legal and are therefore more appropriately resolved by the executive or the legislature than by the judiciary.<sup>459</sup> The doctrine is generally recognised by courts, although its scope has often been narrowly construed and its soundness questioned by academics, particularly on the ground that many political questions involve legal dimensions and many legal questions carry significant political implications, making the distinction between the two difficult or even arbitrary to draw.<sup>460</sup>

349. The doctrine was invoked in both *Matovu*<sup>461</sup> and *Madzimbamuto* (Privy Council)<sup>462</sup> to challenge the justiciability of questions concerning the validity of

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<sup>459</sup> The essence of the political question doctrine was articulated in the same case that established judicial review in the U.S., *Marbury v. Madison* S.C. (1803) 5 U.S. 137, 170: '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'.

<sup>460</sup> The literature on the political question doctrine is voluminous, and the debate is still hot. See among many: Curtis A Bradley and Eric A Posner, 'The Real Political Question Doctrine' (2023) 75 *Stan L Rev* ; John Harrison, 'The Political Question Doctrines' (2017) 67 *American University Law Review* 457; Tara Leigh Grove, 'The Lost History of the Political Question Doctrine' (2015) 90 *New York University Law Review* 1908; Jesse H Choper, 'The Political Question Doctrine: Suggested Criteria' (2004) 54 *Duke Law Journal* 1457; J Peter Mulhern, 'In Defense of the Political Question Doctrine' (1988) 137 *University of Pennsylvania Law Review* 97; Louis Henkin, 'Is There a "Political Question" Doctrine?' (1976) 85 *The Yale Law Journal* 597.

<sup>461</sup> *Uganda v. Commissioner of Prisons ex parte Matovu* (1966) 1 *EA* 514, 530-534.

<sup>462</sup> *Madzimbamuto v Lardner-Burke* PC (1969) 1 *A.C.* 645, 670.

revolutionary governments, but in both cases its applicability to the particular circumstances was rejected.

350. I believe that the political question doctrine is entirely inappropriate in matters of revolutionary legality when the issue before the court concerns the validity of the constitution. The validity of the constitution constituted a preliminary question in all revolution cases, since whether the constitution remained the law of the land determined the outcome.<sup>463</sup> A court that chooses to enforce certain laws does not remain neutral on this question but instead gives it a positive answer, for in doing so it recognises that the constitution under which those laws are in force is, in fact, valid.

351. Furthermore, the political question doctrine could apply equally in both directions. By the same logic, it could prevent a court from identifying usurping, treasonous, or unlawful regimes. Why should examining the validity of an original constitution be considered any more political than examining the validity of a revolutionary one, especially given that the original constitution was, in all likelihood, once revolutionary itself? Indeed, one could press the point further and argue that all constitutional review would face a similar fundamental obstacle, since it ultimately involves determining which constitutional laws should count as valid.

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<sup>463</sup> My argument refers to those laws whose validity is dependent upon their lawful enactment. I do not assert that all legal rules are valid *only if* derived, directly or indirectly, from a valid constitution, as there may be legal rules that come to be regarded as lawful even if they do not trace back to a certain constitution. This is further discussed in the next chapter.

352. In sum, it cannot be the case that courts blindly enforce a document, a statute, or a governmental act without *ipso facto* acknowledging that the constitution from which their validity derives continues to possess the legal authority it claims to have.

**a) Possible approaches to jurisdiction**

353. I will begin by outlining the possible grounds and approaches to courts' jurisdiction. It is useful to distinguish broadly between constitutional and extra-constitutional jurisdiction. A court possesses constitutional jurisdiction if it derives its authority from a (valid) constitution, whereas it possesses extra-constitutional jurisdiction if its authority is derived from a source outside the constitution.

354. There can be three versions of constitutional jurisdiction, depending on (a) whether the existence of the court is tied to the constitution under which it was originally created, and (b) whether the constitution is understood as a unitary set of rules, such that a revolutionary change to one part of it entails a change to the whole

355. The first version may be described as fixed constitutional jurisdiction. It roughly corresponds to what was referred to in the previous chapter as *strict constitutionalism*.<sup>464</sup> Under this approach, a court established by a constitution either cannot adjudicate upon the validity of that constitution or must always find it to be valid.<sup>465</sup> Any attempt by a court to declare its constitution invalid would lead to a kind of absurdity, since the court would thereby acknowledge that it no longer possesses

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<sup>464</sup> Tayyab Mahmud, 'Jurisprudence of Successful Treason: Coup d'Etat & (and) Common Law' (1994) 27 Cornell International Law Journal 49, 120.

<sup>465</sup> 'A court which derives its existence and jurisdiction from a written constitution cannot give effect to anything which is not law when judged by that constitution', Fieldsend A.J.A. in *Madzimbamuto v Lardner-Burke, N.O. and Another, N.O., Baron v. Ayurem N.O. and ORS. AC* (1968) 2 S.A.L.R. 284, 432.

jurisdiction and, consequently, cannot issue any valid determination at all. As a result, strict constitutionalism denies that courts have jurisdiction to decide matters of revolutionary change. This approach is consistent with the ideas that the existence of a court is tied to its original constitution and that the constitution forms a unitary set of rules.

356. The second version may be termed alternating constitutional jurisdiction. Under this approach, courts derive their jurisdiction solely from the constitution currently in force. In this model, the question of a court's jurisdiction coincides with the question of which constitution is valid, and thus with the question of the legality of the revolutionary change itself. In other words, the constitution that the judiciary recognises as valid is the same constitution from which it derives its jurisdiction.<sup>466</sup> This version is consistent with the idea that the constitution is a unitary set of rules, but not with the idea that a court remains tied to its original constitution.

357. The third version may be termed independent constitutional jurisdiction. In this model, courts continue to derive their jurisdiction from the original constitution, which remains in force insofar as its provisions are unaffected by revolutionary change – that is, insofar as they are not the target of the revolution. This approach presupposes that revolutionary change does not *ipso facto* affect the entire constitutional order. It is therefore inconsistent both with the view that the constitution is a unitary set of rules and with the idea that the judiciary's existence depends on the continued validity of the original constitution.

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<sup>466</sup> Unless the constitution then in force has deprived the court of its jurisdiction, in which case the solution is similar to that of strict constitutionalism.

358. The second broad approach is to seek the legal grounds of jurisdiction outside the constitution, that is, in an extra-constitutional jurisdiction. We can distinguish three general types, depending on whether jurisdiction is recognised as *ad hoc* or as based on a legal principle beyond the constitution, and on whether the court's decisions are enforced by the *de facto* government.

359. The first type may be called *ad hoc social-consent jurisdiction*. Under this approach, courts derive their jurisdiction to decide matters of revolutionary change from the consent of the community to have such matters adjudicated by a court. The court's authority lies in the community's recognition of its jurisdiction and, consequently, of the legal force of its decisions.

360. The second approach may be described as *common-law* or *natural-law jurisdiction*. Under this approach, courts derive their authority from the common law rather than from a constitutional instrument, at least when adjudicating during periods of revolutionary change. This presupposes that the common law continues to remain valid both during and after a revolution. A similar approach, particularly applicable to non-common-law jurisdictions, is to view the court's authority as deriving from a natural-law principle that preserves rule-of-law institutions amid revolutionary upheaval.

361. The third approach may be termed *de facto jurisdiction*. It resembles the *ad hoc social-consent* model in that the court's jurisdiction depends on some form of endorsement, but it differs in that this endorsement arises from the fact that the government, whether lawful or revolutionary, enforces the court's decisions and thereby recognises its authority. This approach will generally overlap with the *alternating*

*constitutional jurisdiction* model, except in cases where the court must decide *in medias res*, when the revolutionary government has not yet established a valid constitution.

362. The table summarises the approaches outlined above:

Constitutional Jurisdiction	Extra-constitutional jurisdiction
<p>Fixed constitutional jurisdiction:</p> <p>Jurisdiction derives exclusively from the original Constitution. There is no jurisdiction over revolutionary change.</p>	<p>De facto jurisdiction:</p> <p>The court preserves its jurisdiction to the extent that the (<i>de facto</i>) government enforces its decisions.</p>
<p>Alternating constitutional jurisdiction:</p> <p>Jurisdiction is derived from either the original constitution or the revolutionary constitution.</p>	<p>Ad hoc social consent jurisdiction:</p> <p>Courts derive their jurisdiction by acceptance of their authority by the community.</p>
<p>Independent constitutional jurisdiction:</p> <p>Jurisdiction under the original constitution is preserved as long as it is not targeted by the revolution.</p>	<p>Common-law/Natural-law jurisdiction:</p> <p>Courts derive their jurisdiction upon revolutionary change from common law or natural law.</p>

***b) How courts justified their jurisdiction***

363. As seen in the previous chapter, the courts in the revolution cases were aware of this puzzle and attempted to resolve it in various ways. The courts generally asserted constitutional jurisdiction, and those influenced by Kelsen’s *Pure Theory of Law* found a theoretical basis for adopting the model of *alternating constitutional jurisdiction*,

which allowed them to overcome the limitations of the more orthodox *fixed constitutional jurisdiction*. However, judges at times advanced arguments suggesting an extra-constitutional basis for jurisdiction, and such reasoning became increasingly explicit as the Kelsenian approach declined in influence.

364. In *Dosso*, where Kelsen and the doctrine of successful revolution were first invoked, the Court reasoned, following Kelsen, that victorious revolutions destroy the old legal order in such a way that the validity of all surviving laws depends on the new constitution. Accordingly, '[e]ven Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new constitution'.<sup>467</sup> In *Matovu*, the Supreme Court of Uganda followed *Dosso*'s Kelsenian reasoning, but went further by holding that although it was bound by oath to show allegiance to and adjudicate under the established constitution, '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'.<sup>468</sup> This suggested that the Court considered itself to have a duty to assess the constitution's validity even under the original constitution, indicating a form of *independent constitutional jurisdiction*.

365. In *Madzimbamuto*, the High Court judges, after refusing to recognise the legality of the revolutionary change, held that they remained in office under the Governor's instruction to 'maintain law and order and to carry on with [their] normal task'.<sup>469</sup> The

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<sup>467</sup> *The State v. Dosso S.C. (1958) 10 P.L.D. 533, 539.*

<sup>468</sup> *Uganda v. Commissioner of Prisons ex parte Matovu (1966) 1 EA 514, 530*

<sup>469</sup> *Madzimbamuto v Lardner-Burke, N.O. and Anor., Baron v. Ayurem N.O. and ORS. HC (1966) 1 R.L.R. 756, 810-811.*

Court of Appeal initially referred to *Dosso* and *Matovu* as precedents for addressing the status of overthrown governments.<sup>470</sup> It later expanded its reasoning by linking its jurisdiction to the enforcement of its decisions by the de facto government, thereby supporting what we have termed de facto jurisdiction. The reasoning is particularly notable, and it is worth citing the full passage:

A court cannot derive its authority from a piece of paper on which may be written the provisions of some defunct or suspended constitution. In normal times a Court originates either from an effective constitution, as was the case of the High Court before the revolution, or from a special statute, as is the case of many of the English Courts, or perhaps from existence from time immemorial, as was the case of the old English Court of Arundel; but *it derives its real authority from the fact that the governmental power recognizes it as a court and enforces its judgments and orders*. Ultimately it must always derive its authority from recognition by the governmental power and from the fact that the governmental power enforces its orders. If it was not so recognised, and its orders not so enforced, its proceedings would have no more authority than a “mock trial” deciding academic questions of law. If the entire constitution under which a court is created disappears or is completely suspended, the court created under it must also disappear or be suspended along with that constitution. [...] Strange as the conception might be, it cannot be said that the Court owes its present existence to or derives its present authority from the old 1961 Constitution. It owes its existence to and derives its authority to-day 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.<sup>471</sup>

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<sup>470</sup> *Madzimbamuto v Lardner-Burke, N.O. and Another, N.O., Baron v. Ayurem N.O. and ORS. AC (1968) 2 S.A.L.R. 284, 313*. The judge’s personal convictions and willingness to remain in office despite the revolutionary change were seen as a distinct matter: ‘It seems to me that at any one time in any one place there can only be one correct law. That law cannot vary with the political views of the individual Judge who “declares”™ it. This, of course, is by no means the same thing as saying that the Judge, having declared the law as he finds it to be, or even before so declaring, must necessarily remain in office and apply that law. Here his personal views may play a part, because in certain circumstances the Judge may decide that rather than continue as a Judge and apply such law he will go. So long, however, as he continues to sit as a Judge he must declare the law as it “is”, and not as it “was”, or as what he thinks it “ought” to be.’ *ibid* 327.

<sup>471</sup> *Ibid* 329-330.

In his dissent, Fieldsend A.J.A. outright rejected that a court created in terms of a written constitution has jurisdiction to recognise as *de jure* or *de facto* any government other than the one constitutionally appointed.<sup>472</sup> The Privy Council did not endorse this view, expressing its agreement with how *Dosso* and *Matovu* were decided and therefore of the courts' jurisdiction in deciding so.<sup>473</sup> When a court has to determine the status of a new regime, it 'must decide'.<sup>474</sup>

366. In later cases, courts more explicitly grounded their jurisdiction on an extra-constitutional basis. In *Mokotso*, the Court expanded on the Privy Council's dictum in *Madzimbamuto* to suggest an extra-constitutional jurisdiction on the ground that 'the preservation of the nation demands that someone must decide'.<sup>475</sup> Although nothing further was said, this statement clearly shows that the Court invoked the *salus populi* principle – originally associated with the doctrine of necessity – as a kind of natural-law foundation for its jurisdiction. What the Court implied was that the moral and political

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<sup>472</sup> 'It is my firm conviction that a court created in terms of a written constitution has no jurisdiction to recognise, either as a *de jure* or *de facto* government any government other than that constitutionally appointed under that constitution. If it were to do so it would only be declaring that it was incompetent to give a decision because its *raison d'être* had disappeared. This would be an absurdity', *ibid* 431.

<sup>473</sup> *Madzimbamuto v Lardner-Burke PC* (1969) 1 A.C. 645, 717, 725.

<sup>474</sup> *Ibid* 724.

<sup>475</sup> 'Whether, therefore, the judge is appointed under the old or the new legal order, the situation is equally anomalous. One is called on 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*', *Mokotso and Others v HM King Moshoeshoe IT and Others HC* (1989) LRC (Const) 24, 139. Emphasis mine.

importance of having a judiciary capable of determining the legality of a revolutionary regime provided sufficient justification for its authority.

367. The detachment of judicial jurisdiction from the constitution became even more evident in *Prasad*. In that case, the High Court did not elaborate on the basis of its jurisdiction, but it was clear that it regarded the judiciary as unaffected by the revolution and as owing no allegiance even to the regime that had established it: ‘A judge is expected to act at all times impartially, fairly, with integrity, and to uphold all the laws of the land, independently of the regime existing at the time of his or her appointment’.<sup>476</sup> The Court of Appeal, however, explicitly declined to ‘discuss a theoretical basis for exercising *this supra-constitutional jurisdiction*’.<sup>477</sup> Although it did not explain what ‘supra’ meant, it is clear that the Court did not consider its authority to derive from any constitution.

### ***c) Theoretical foundations of jurisdiction in revolutions***

368. In this subsection, I will outline some preliminary arguments that may support several of the approaches to the court’s jurisdiction in revolution cases discussed above. The theoretical foundations of judicial authority in general lie beyond the scope and purpose of this section.

#### *Fixed and alternating constitutional jurisdiction*

369. The *fixed* and *alternating constitutional jurisdiction* models share the underlying idea that a court’s authority is tied to the presently valid constitution and that courts possess jurisdiction only to the extent that the constitution confers it. They differ,

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<sup>476</sup> *Prasad v. Republic of Fiji and Another* (2001) 1 LRC 665, 691. Emphasis mine.

<sup>477</sup> *Republic of Fiji and Another v Prasad* (2001) 2 LRC 743, 759. Emphasis mine.

however, in that the former links the present to the past, binding the court to its original constitution.

370. *Fixed constitutional jurisdiction* appears to have the dominant and foundational principles of constitutionalism on its side. The vast majority of modern liberal democracies define explicitly and with relative precision the scope and nature of the powers and duties of courts within their written constitutions. This was also true in all the revolution cases discussed. If the constitution provides the basis for courts' jurisdiction under ordinary circumstances, why should it be otherwise in times of revolution? Fixed constitutional jurisdiction therefore stands as the default approach, and any deviation from it bears the burden of providing an alternative justification.

371. Such an alternative, without denying that the authority of courts rests on a constitution, is provided by the *alternating jurisdiction* model. This model was adopted by courts invoking the doctrine of successful revolution, which itself draws on Kelsen's *Pure Theory of Law*. As a result, several commentators have argued that Kelsen's theory enables courts to assert a form of revolutionary jurisdiction. It has been claimed that Kelsen's distinction between the *grundnorm* and the constitution places judges in a position 'above the constitution', allowing them to assess its validity.<sup>478</sup> Conversely, it has been argued that a non-Kelsenian approach would exclude the doctrine of successful revolution from the judicial toolkit by treating the constitution as the ultimate authority within the legal order.<sup>479</sup>

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<sup>478</sup> Amitpal C. Singh, 'Republic of Fiji v Prasad: Revolutionary Legality and the Taxonomy of Legal Change' (2022) 22 Oxford University Commonwealth Law Journal 117, 135.

<sup>479</sup> Ibid 136.

372. Both claims are mistaken, insofar as they conflate two distinct questions: first, the substantive question of identifying the criteria by which a constitution is or remains valid; and second, the jurisdictional question of identifying a basis of judicial authority, other than that of the constitution itself, that would allow a court to determine the constitution's validity.

373. Firstly, a Kelsenian approach to revolutions (if one reads the PTL as offering guidance for judicial decision-making at all) provides an answer to the substantive question but not to the jurisdictional one. Kelsen's systemic and hierarchical account of legal systems aligns with constitutionalism: the validity of court decisions depends on the existence of higher norms, such as statutes or the constitution itself, that confer decision-making authority on the courts. The legal norms created by a court, that is, its decisions, are subordinate to the norms that empower it and therefore subordinate to the constitution. Within this hierarchical structure, it is impossible for a court validly to declare its own constitution invalid, since doing so would necessarily render its own decisions invalid as well, given that they presuppose the constitution's validity.<sup>480</sup> Thus, if anything, a Kelsenian approach favours the so-called 'strict constitutionalism' position to jurisdiction.

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<sup>480</sup> Harris seems to have been missing this point when he says that there is nothing illogical for a judge to determine the change the *grundnorm* and the rules conferring him adjudicative power, see James W. Harris, 'When and Why Does the Grundnorm Change?' (1971) 29 The Cambridge Law Journal 103, 127. For Harris, the only question for judges is the moral one, i.e. whether they should be loyal to the original constitution. But within the Kelsenian logic something problematic, if not outright illogical, does emerge, as there must be some higher norm surviving the revolution to allow judges maintain their jurisdiction. After all, judges are part of the legal system which is being destroyed.

374. Of course, it may seem paradoxical that a Kelsenian approach could guide a court in determining when a constitution has lost its validity, while simultaneously depriving it of the jurisdiction to make that determination. Yet, paradoxical as it may appear, this is theoretically sound. If the PTL is correct and a constitution has indeed lost its efficacy, then the court itself has ceased to exist as a legal institution capable of deciding anything. At that point, under the PTL, there are no legal institutions at all. The PTL is not a theory of adjudication; it is a theory of law's structure and validity. It may therefore identify criteria of validity that extend beyond the scope of what a court can legitimately assess.

375. Conversely, even if a Kelsenian approach did provide a foundation for revolutionary jurisdiction, it would not be the only possible one. As outlined earlier, various tentative models of extra-constitutional jurisdiction exist. It is worth recalling that the strongest advocates of a law more fundamental than the positive constitution were never positivists, but natural-law theorists. And although Kelsen's influence in the second half of the twentieth century has been considerable, constitutions have risen and fallen for centuries before his time. There must therefore be something non-Kelsenian that led judges after the American and French revolutions to disregard the old laws and embrace the new.

376. Moreover, the very opposition drawn between a Kelsenian approach and constitutionalism is misplaced. Nothing within constitutionalism denies that revolutions can ultimately produce valid constitutional orders, since the very origins of modern constitutionalism lie in such revolutions. It is also crucial not to conflate the doctrine of successful revolution with the principle of efficacy. It is the former, not the

latter, that is specifically ‘Kelsenian’ and controversial, because it anchors revolutionary change at the moment when the usurping regime becomes ‘successful’ in securing control of the state. The principle of efficacy, by contrast, expresses a more fundamental claim: that law must have some connection to reality in order to be regarded as valid, and that a law which loses its capacity to guide behaviour ceases to be law at all.<sup>481</sup> Whether courts can take account of the fact of revolutionary change, interpret it as having legal significance, and identify a basis of authority to make a corresponding judgment is not something that can be determined *ex definitione* by whatever conception of constitutionalism one adopts.

377. That being said, the model of *alternating constitutional jurisdiction* offers the only viable option for a court that seeks to ground its authority in a constitutional source while adhering to the idea of the constitution as a unified and inseparable set of laws. This model does not derive from the PTL, but it is not incompatible with it, nor is it incompatible with constitutionalism. A court that determines its original constitution has lost validity is effectively acknowledging that it too has lost its prior identity and now exists as a new court reconstituted under a new constitution.

378. The *alternating constitutional jurisdiction* model is problematic for two main reasons: (a) it may rely on a highly fictional premise, and (b) it is confined to two mutually exclusive options: either the old constitution is valid, or the revolutionary one

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<sup>481</sup> See Chapter 7, and the distinction I draw between the positive and negative aspects of the principle of efficacy. Of course, the principle of efficacy becomes ‘Kelsenian’ if combined with an understanding of legal orders as a hierarchical system of legal norms with a constitution at its basis in the way described in *PTL*. But the principle of efficacy, on its own, entails no such commitment.

is. First, when asked to decide, a court does not in fact determine the validity of the regime; it merely recognises it as a pre-existing legal fact, one that precedes the court's own existence. Moreover, the court must assert that it continues to exercise authority under the new constitution, even when this is far from evident. Second, the alternating jurisdiction model encounters difficulty when the court must decide in *media res*, while the revolution is still underway and although the old regime has clearly lost efficacy, the new one has not yet secured it. This difficulty is not merely theoretical but practical: a court adhering strictly to this model should in such circumstances recognise that it has no jurisdiction.

*Independent constitutional and extra-constitutional grounds of jurisdiction*

379. All grounds of jurisdiction, except for the *fixed* and *alternating* constitutional jurisdiction, share a fundamental premise: that there exists a jurisdiction-conferring law independent of the constitutional law targeted by the revolution, and that this law remains in force despite the revolutionary change. This idea is incompatible with the conception of law as a unified legal system resting on a single, unitary constitution. Instead, it points to a more horizontal model of law, in which laws, though interconnected in various ways, can nonetheless retain independent validity. Within this horizontal model, revolutions alter the legal order gradually and organically, in continuity with the community's evolution, rather than through the abrupt, discontinuous break from the past described in Kelsen's account.

380. Social-consent and common law jurisdiction were implicitly encouraged by the courts in the revolution cases and more explicitly supported by academics. Honoré suggested that, in a revolution, a judge's legal authority could be derived not from any particular constitution but from the 'acquiescence of the population in submitting their

disputes' to the courts.<sup>482</sup> As he acknowledges, this view strikes a blow to constitutionalism, or at least to that version of constitutionalism which seeks to establish the constitution's monopoly on legal validity.

381. Common or natural law jurisdiction has also found support, somewhat paradoxically, among those who generally regard the Kelsenian approach to revolutions as dangerous.<sup>483</sup> One proposed solution for courts that find themselves in a legal void during a revolution is to invoke the doctrine of state necessity as the basis for their jurisdiction. This was essentially the path taken by the High Court in *Madzimbamuto*. Of course, the doctrine of necessity cannot be invoked if the court simultaneously holds that the original constitution has lost its validity through ineffectiveness, since the whole purpose of the doctrine is to operate within the boundaries of the existing constitutional order. If the court nevertheless invokes it, it is relying on what we described in Chapter 4 as 'radical necessity': a supra-constitutional natural law principle that turns whatever is necessary into law. This would indeed be hazardous, as it renders the distinction between what is constitutional and legal, and what is unconstitutional and illegal, meaningless.

382. The soundness of an extra-constitutional approach must ultimately be evaluated alongside the soundness of a theory of unconstitutional legality, since such a theory must address these fundamental implications for our understanding of constitutional

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<sup>482</sup> A. M. Honoré, 'Reflections on Revolutions' (1967) 2 *Irish Jurist* 268, 276.

<sup>483</sup> 'The very fact that the courts exist bestows upon them an inherent power to determine the law and inquire into their own jurisdiction', Tayyab Mahmud, 'Jurisprudence of Successful Treason: Coup d'Etat & (and) Common Law' (1994) 27 *Cornell International Law Journal* 49, 130.

law and its place within the structure of the legal order. For this reason, the discussion of the court's jurisdiction must ultimately be resolved in light of the final pair of questions concerning revolutionary change, namely, whether there can be a 'law of revolutions' and what implications revolutions have for the rest of the legal order. These questions form the focus of the next chapter.

***d) Should courts decide upon revolutionary change? Jurisdiction as a way of legitimation.***

383. The final question, before turning from the issue of the court's jurisdiction, is a normative one: should courts assume the role of determining matters of revolutionary change? Should there even exist a doctrine of 'revolutionary legality' available to courts, allowing usurpers the opportunity to have their regimes recognised by the very institutions tasked with upholding legality? No criticism of the revolution cases has been as frequently repeated as the claim that courts grant usurpers' regimes the valuable stamp of legality, and thereby a measure of legitimacy.

384. This criticism, however, rests on a fundamental misunderstanding of legality that must be clarified. Ordinarily, legality is identified with constitutional legality. When lawfulness is conferred in accordance with constitutional law, it carries the legitimacy of the constitution itself and upholds the values of the rule of law. Revolutionary legality, by contrast, openly acknowledges its unlawfulness in the sense of violating the constitutional order. It admits that it represents, first and foremost, a breach of law and a claim of authority not beyond but against the established source of lawfulness. Hence, it neither seeks nor can it possess the legitimacy that accompanies constitutional legality.

385. For this reason, the claim advanced by revolutionary legality is greater and more demanding than a claim brought under the doctrine of state necessity. Although revolutionary legality lacks the legal constraints that the doctrine of necessity purports to impose, it presses a claim to authority without the support of the legitimacy that derives from the standing constitutional order. Because of this, the ‘stamp of legality’ that courts confer in revolution cases carries little or no legitimacy in itself (whereas, under the doctrine of necessity, it does), since the central virtue of legality – its constitutionality – is absent.

386. A court recognising revolutionary lawfulness might appear to attest to the regime’s legitimacy only if the doctrine of revolution it applies incorporates legitimacy-based criteria. The more the court engages in evaluating a regime’s legitimacy, the more a positive judgment amounts to a judicial endorsement of that legitimacy. In such cases, it would indeed be fair to say that courts legitimise usurpers. Paradoxically, however, this risk arises only when the doctrine of revolution adopted includes legitimacy-related elements. The doctrine of successful revolution, which has been the main target of this criticism, contains no such criteria. Under this doctrine, a court merely confirms that the revolutionaries have established effective control of the state. The court thereby grants no more legitimacy than brute effectiveness already confers. By contrast, if the court employs a morally richer doctrine of revolution, a positive finding would indicate that the court is satisfied that the regime possesses certain moral qualities.

387. One might object that some legitimacy must still be conferred simply by recognising a revolutionary government as ‘lawful’. Yet when courts assert that effective control alone suffices to establish lawfulness, they reduce the concept of legality to mere

obedience to power. By equating *legality* with *might*, they strip it of legitimacy. In short, the thinner the criteria of revolutionary legality, the less legitimacy the courts can be said to recognise.

### **III. Conclusions**

388. The doctrine of successful revolution was built upon Kelsen's work but did not directly derive from it. In transforming theory into doctrine, courts inevitably made certain choices. Given the sophistication of the PTL, it offers answers to questions that the doctrine of acclaimed revolution leaves unresolved. Yet, at its most controversial point – that is, the point at which the efficacy test is deemed satisfied – the doctrine went beyond Kelsen's own account. However, contrary to widespread criticism, it represents a closer reflection and application of Kelsen's principles than is often recognised. This is partly because Kelsen's own work contains ambiguities in key concepts, such as the precise meaning of efficacy and the level of efficacy a legal order must possess in order to be valid. Kelsen's theory is more reserved, articulating not a judicial tool but a principle which, despite substantial criticism, has never been seriously disputed: that law must maintain some connection to reality (what Kelsen called *efficacy*) meaning that it must actually have the normative effect it claims to have in guiding human behaviour. In articulating this (negative) principle of efficacy, Kelsen faces no real opposition.

389. Whether courts are capable of determining the validity of their constitutions and of recognising as valid a new, revolutionary constitution raises complex and important questions. Contrary to the claims of many commentators, I have sought to show that Kelsen's theory does not promote revolutionary jurisdiction. Courts adhering to Kelsen's account of legal systems were ultimately compelled to justify their jurisdiction

by reference to the revolutionary constitution. This becomes the only viable option once one is committed to a strict and narrow conception of law as a hierarchical system of legal norms grounded in a single constitution. Such an approach, however, has significant shortcomings, which became evident in later cases as courts gradually sought extra-constitutional justifications for their jurisdiction. These extra-constitutional explanations were, however, theoretically weak, relying more on dicta and pragmatic reasoning than on coherent theoretical foundations. Their soundness depends directly on the theory of unconstitutional legality one adopts: a theory that must provide extra-constitutional grounds of lawfulness establishing both the lawfulness of the revolutionary regime and that of the courts themselves. It is to this question that we now turn in the next chapter.

## Chapter 6: The Impact of Revolutionary Change

390. In the previous chapter, I argued that the doctrine of successful revolution is a viable doctrine grounded in Kelsen's PTL. The doctrine builds on Kelsen's articulation of the principle of efficacy, the generally uncontested principle that, for a legal system to exist, its laws must actually be obeyed. I also addressed the question of revolutionary jurisdiction, that is, the judiciary's source of authority in determining questions of revolutionary legality. I outlined various possible approaches, broadly dividing them into constitutional and extra-constitutional ones. Constitutional jurisdiction has the advantage of tracing the judiciary's authority back to a (written) constitution, consistent with the modern understanding of constitutionalism.

391. Its most viable version, however, which I termed *alternating constitutional jurisdiction* and which was favoured by the judges in the early revolution cases, rests on unstable foundations. It assumes that the legal basis of an institution created under the original constitution continues under the revolutionary one on the counterfactual assumption that it has been validly reconstituted. Moreover, its jurisdiction overlaps substantially with its own determination of which constitution is valid. As a result, it leaves a jurisdictional gap in cases where no constitution is presently in force. It therefore provides an unsatisfactory and incomplete basis for revolutionary jurisdiction.

392. An alternative approach, either an extra-constitutional jurisdiction or a constitutional jurisdiction based on a non-unitary constitution, identifies a source of authority that is distinct from and superior to the constitution, thereby departing from dominant ideas in constitutional law. A central obstacle to recognising a basis for

revolutionary jurisdiction, and by extension for a law governing unconstitutional constitutional change, lies in the perceived impact of revolutionary change itself. The Kelsenian view holds that a revolution destroys the legal order, along with all its norms, and replaces it with a new one, thereby leaving no legal space for an intermediate 'revolutionary' law. Consequently, before a law of revolutions can be conceived, it is necessary to examine whether revolutions in fact entail the destruction of the legal order together with its constitution.

### **I. Do revolutions destroy the legal order?**

393. The courts that adopted the doctrine of successful revolution relied on a Kelsenian concept of constitutional revolution. Kelsen himself defined a revolution as 'every not legitimate change of [the] constitution or its replacement by another constitution'.<sup>484</sup> The use of 'or' in this definition is misleading, since within Kelsen's theory every unlawful change of the constitution is *ipso facto* a replacement of the existing constitution with a new one.

394. What is described as a 'change' consists of two otherwise independent events that may occur either in sequence or simultaneously: first, the existing constitution loses its validity, and secondly, a new constitution becomes valid.

395. The second step may or may not occur; if it does not, the outcome is the termination of one constitution without the creation of another. In such a case, there is no standing constitution and, consequently, no legal order, only a legal void. This conclusion follows necessarily from the fact that the validity of the entire legal order is

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<sup>484</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 209.

derived from a set of historically first constitutional norms, unified through the *grundnorm*. The constitution performs this role as it serves as the *reason of validity* for all the norms within the legal order.<sup>485</sup> Therefore, there can be no law outside or beyond the constitution, and, as a result, no law governing revolutions or revolutionary jurisdiction.<sup>486</sup>

396. At the core of Kelsen's theory lies his identification of the constitution with the *identity* of the legal system, where *identity* is understood as the set of all legal norms whose origin and validity can be traced in an unbroken chain to a historically first constitution. Consequently, any break in the legal continuity of the constitution results in a break in the continuity of the legal order. Conversely, it would appear that there can be no discontinuity in the legal order, no disconnection from the constitution as the source of validity for a given set of legal norms, unless some illegality is committed in the process.

397. The first question to examine, therefore, is whether revolutionary changes truly have the implications for the legal order that Kelsen's theory attributes to them, and whether such implications accord with reality and with common understanding. Kelsen's identification of legal discontinuity with legal-order discontinuity has been

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<sup>485</sup> Technically, it is the *grundnorm* that is the source of legal validity, but as discussed in the previous chapter, the *grundnorm* does not have a distinct content from the constitution and its sole function is to presuppose its validity, leaving the constitution as the ultimate rules of law in the legal system.

<sup>486</sup> Although the idea of a unitary constitution as the foundation of the legal order is presented in the form articulated by Kelsen, it is also a concept widely shared within constitutionalism in most contemporary constitutional democracies. Accordingly, the discussion of the implications of revolutionary change for the legal order and of the role of the constitution applies more broadly to constitutionalism as a whole.

widely criticised for indiscriminately equating every unauthorised constitutional change with a law-destroying revolution, and for failing to account for legal discontinuity in cases of lawful devolution.

398. First, the magnitude of the implications Kelsen attributes to revolutionary change seems exaggerated. While one can imagine the total collapse of a legal order amid widespread chaos and the breakdown of all state mechanisms, revolutionary situations in practice – particularly the kinds of revolutionary constitutional changes discussed here – rarely disrupt society, legal institutions, or recognised legal relations to that extent. In coups, for example, some of the highest government officials may be forcibly replaced, and certain constitutional violations may occur, but the remainder of the legal and social order typically remains largely unaffected and functional. In broader revolutions, even those approaching the scale of civil war, local administration and private law relations often continue to operate, even if neither the old constitution nor any revolutionary one can be said to be fully efficacious. Courts may still function, and day-to-day life may persist to some degree, with individuals continuing to follow the law and regulate their affairs accordingly.<sup>487</sup> The legal order cannot reasonably be regarded as having been terminated, even when parts of public law are in disarray or under serious violation.

399. Secondly, a well-known criticism addresses the PTL's inability to distinguish between minor and major unconstitutional constitutional changes, treating both as having the same implications. Under this view, even small unauthorised constitutional

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<sup>487</sup> Similarly, see J. M. Eekelaar, 'Principles of Revolutionary Legality' in A. W. B. Simpson (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1973) 41.

changes amount to a change of the *grundnorm* and, consequently, of the entire legal order. The unlawful replacement of a head of government – a coup d'état – is treated as seriously as a full-scale revolution that fundamentally transforms the political system. Once a breach of constitutional rules amounts to a change, the entire legal order is deemed to have been extinguished, even though in reality only a few constitutional provisions are affected, and the new legal order may look almost identical to the old one.

400. Kelsen is fully aware of this discrepancy, yet he still insists that all legal norms that appear to have survived must be regarded as having been tacitly re-enacted under the new legal order.<sup>488</sup> This implication cannot be avoided within Kelsen's framework.<sup>489</sup> As others have pointed out, a successful coup necessarily entails a change to the rules of succession, which itself constitutes a violation (and therefore a change) of the rules governing constitutional change, thereby breaking the continuity of the *grundnorm*.<sup>490</sup>

401. In fact, the point can be taken further: not only unlawful constitutional changes but any unauthorised alteration of a legal norm within the legal order would, on this view, amount to a (revolutionary) change of the *grundnorm*. Whenever a change cannot

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<sup>488</sup> Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 118.

<sup>489</sup> Simeon C. R. McIntosh, 'Continuity and Discontinuity of Law: A Reply to John Finnis' (1988) 21 *Connecticut Law Review* 1, 32. Kelsen even seems to regard its counterintuitiveness as an illuminating feature rather than a problem for his theory, Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 118.

<sup>490</sup> See John Finnis, 'Revolutions and Continuity of Law' in A. W. B. Simpson (ed), *Oxford Essays in Jurisprudence* (1973) 408-412.

be traced back to the *grundnorm* through an unbroken chain of valid legal norms, a new *grundnorm* must be presupposed.<sup>491</sup> Since the content of the *grundnorm* corresponds to the constitution in force, any unauthorised change to a legal norm within the legal system that cannot be traced back to the constitution would have to be regarded as altering the constitution itself and, therefore, its *grundnorm* – a complete constitutional revolution.

402. By this logic, the recognition of any unlawful administrative act or private contract as legally valid would break legal continuity as much as the French Revolution did.<sup>492</sup> Kelsen was conscious of the difficulty in accounting for unlawful actions conducted by state officials and tried to address it through the doctrine of ‘normative alternatives’.<sup>493</sup> Under this doctrine, lower norms, even if unlawfully constituted, may still be valid by other higher norms, as in the case of a presumption of legality that confers validity to all acts of administrative organs until such acts are declared to be invalid by a court of law. Whether such a validity-granting norm exists, however, is a contingent matter. Though it may be explicitly endorsed in certain legal fields, such as

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<sup>491</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 210.

<sup>492</sup> By recognising validity to an unlawful administrative act or private contract, there is a violation and therefore a ‘change’ to the respective higher legal norms regulating the legality of administrative acts or private contracts. The legal theorist will need to either assume a new higher norm authorising the unlawful act/contract, which itself will need to be authorised by other higher legal norms until one reaches a new ultimate legal norm or a changed constitutional norm; or, the legal theorist can regard the new higher norm as an ultimate norm directly authorised by the *grundnorm*. In either case, legalising the unlawful act alters the content of the *grundnorm* in some way. Thus, the continuity of the legal order is broken by any unlawful change within the legal system, since any legal norm must trace back to an ultimate norm and any change within the group of ultimate norms amounts to a change of the *grundnorm*.

<sup>493</sup> Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press 2007) 78-80.

in administrative law, it is far from certain whether it would be endorsed in other legal fields, such as in constitutional law. If generalised, an 'normative alternative' presumption for violations of constitutional law could eradicate the whole concept of constitutional revolution, as any seemingly unconstitutional change to the constitution could be logically re-constructed as an *ex post* validated unlawful norm by an alternative validity-granting norm.<sup>494</sup> On the other hand, excluding the doctrine of 'normative alternatives' from constitutional law would be question begging. Still, it would seem implausible that a revolution occurs every time a constitutional rule of procedure in parliament or government is misapplied, thereby collapsing the entire legal order. Such a conclusion would trivialise the very meaning of a revolutionary break, suggesting that even the smallest breach of law inflicts the gravest – and indeed fatal – damage on the legal order.

403. The second line of criticism observes that not all discontinuities in legal orders result from unauthorised constitutional change. A new legal order may also arise from another through a lawful process. The example most commonly cited is that of a lawful devolution.<sup>495</sup> Many former British colonies attained independence not through a revolutionary breach of law but by virtue of an Act of Parliament.<sup>496</sup> The Kelsenian

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<sup>494</sup> A similar approach to accommodate revolutionary changes of the constitution under a grundnorm of international law is discussed at the end of this chapter.

<sup>495</sup> Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford University Press 1980) 102-103; John Finnis, 'Revolutions and Continuity of Law' in A. W. B. Simpson (ed), *Oxford Essays in Jurisprudence* (1973).

<sup>496</sup> Indian Independence Act 1947; Ghana Independence Act 1957; Federation of Malaya Independence Act 1957; Trinidad and Tobago Independence Act 1962; Barbados Independence Act 1966; Gambia Independence Act 1964; Belize Act 1981.

analysis, however, does not appear to accommodate discontinuity in the case of lawful devolution, since there remains an unbroken chain of valid legal norms tracing from the parent legislature to the devolved legislature. Consequently, the new legal system never truly becomes independent but continues to exist as a sub-system<sup>497</sup> within the original legal order.

404. As long as the source of authority of the new legal order remains rooted in the parent legal order, it would seem that the parent legislature could, at least *de jure*, revoke the independence-granting statute and reabsorb the sub-system into the parent legal order. So long as the validity of all laws can be traced back to the parent legislature, no genuine change in the source of authority of the legal system has occurred.

405. Another example, in which a similar line of reasoning applies, is that of an absolute monarch granting a constitution. As in cases of lawful devolution, there appears to be a self-imposed legal restraint by a sovereign legislature through which a new and ostensibly independent source of legal authority is created.<sup>498</sup> However, no matter how binding these legal restraints claim to be, they still originate from the same sovereign power they purport to have limited, severed from, or abolished. How can there be an irreversible transition to a new and independent legal order when the authority for this change derives from the original sovereign, in the same way as any

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<sup>497</sup> Or 'partial' legal order in Kelsen's terminology, Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 326.

<sup>498</sup> I offer this constitutional-law account of lawful devolutions for the purposes and jurisprudential questions examined within the context of this chapter. Of course, lawful devolutions can only in part be expressed as a self-limitation of the parent legislature. A proper description of the event also accounts for the creation of the new legal order with its own distinct legal relations with other states and with its nationals.

other act of legislation? It seems that a change in sovereignty through an act of the sovereign is not a true change at all; some form of illegality must occur to produce a genuine 'break' from the past and to establish a new source of legal authority.

406. Indeed, there have been instances in which, during the process of gaining independence, some form of illegality was deliberately committed to trigger a revolutionary break and sever ties with the authority of the parent legislature.<sup>499</sup> As discussed in the previous section, one reason Pakistan's Constituent Assembly refrained from seeking the Governor-General's assent for any of its interim legislation was to impart an element of autochthony to the process, reflecting its self-perception as a sovereign body.<sup>500</sup> Yet it would be implausible to suggest that all states which emerged through a process of lawful devolution never actually became de jure independent. Moreover, it would be entirely superfluous to make the legal independence of a legal order depend on the occurrence of some symbolic act of disobedience, while maintaining that an independence-granting statute is incapable of achieving the same result.

407. We can identify two approaches that attempt to avoid these unsatisfactory conclusions in the context of lawful devolutions by introducing an element of discontinuity. The first emerges from the Hart-Ross debate on the (non-)reflexivity of constitutional rules of change and has been examined, in the context of lawful

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<sup>499</sup> See John Finnis, 'Revolutions and Continuity of Law' in A. W. B. Simpson (ed), *Oxford Essays in Jurisprudence* (1973) 414 and the references therein.

<sup>500</sup> Peter W Hogg, 'Necessity in a Constitutional Crisis' (1989) 15 *Monash University Law Review* 253, 260.

devolutions, by J. Finnis. Its central claim is that self-referring (reflexive) constitutional rules of change, such as amendments to the constitutional rule governing amendments, entail a contradiction. Therefore, legislative acts purporting to impose irrevocable self-limitations, as in the granting of a constitution or the granting of independence to a regional order, conceal a 'break' in the chain of validity and, accordingly, a break in the continuity of the legal order.

408. The second approach, developed by J. W. Harris as a reconstruction of Kelsen's theory, advances a modified understanding of the principle of efficacy. It argues that a change in the source of validity of a legal order (in Kelsenian terms, the *grundnorm*) can be inferred from 'confident predictions' that, in the event of conflict between the parent and the devolved constitution, the latter will prove to be the efficacious one.

409. The purpose of these alternative approaches and reconstructions is to explain how the 'source' of a legal order may change with the transformation of its lawmaking institution, even when no illegality is committed, thus producing the effects of a revolutionary change without an actual revolution. Closer examination of these approaches helps to clarify the real triggers of revolutionary change and their implications for the continuity of the broader legal order. Specifically, it will be argued that the problem of (non-)reflexivity demonstrates that laws do not rest their continuous validity upon, or derive it from, higher legal norms. Accordingly, the constitutional rules which, in the Kelsenian framework, function as the highest legal norms are not the foundation of the continuing validity of the rules of the legal order. Revolutionary changes therefore do not *ipso facto* affect the rest of the legal order. Rather, the impact of revolutions depends on how their legal implications are

interpreted by the legal officials within each community, a process I will refer to as *juristic thinking*.

410. Though the discussion draws once again from Kelsen's work, it is not intended as a response to Kelsen specifically, but rather to the broader underlying problems that arise when examining the relationship between constitutional law and the legal order in the context of revolutionary change. Kelsen's writings incorporate many widely accepted ideas, shared even by those who do not subscribe to the PTL. Hart, in *The Concept of Law* and in his other writings, provides a similar analysis of the phenomenon of revolutions to that offered by Kelsen.<sup>501</sup> Where the two appear to diverge, special attention will be given to those differences. My overall approach, however, is to connect the many elements of truth in the arguments of these legal philosophers and to consider the theory of unconstitutional validity to which their analyses point.

## **II. Break without illegality I: The doctrine of non-reflexivity of constitutional rules of change**

### ***a) The problem of reflexivity***

411. To act lawfully is to adhere to the law, to act in accordance with, in obedience to, on the basis of, or in derivation from,<sup>502</sup> (a rule of) law. Validity means that a legal rule exists *as law*, that it has the effect it purports to have, and that applying the law involves giving it the weight it is accorded.<sup>503</sup> In the contemporary legal positivist

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<sup>501</sup> 'My explanation [of revolutions] will be very much the same as that given by Kelsen in his *General Theory of Law and State*', H. L. A. Hart, 'Lon L. Fuller: The Morality of Law' in *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) 362.

<sup>502</sup> Here I treat those terms as synonymous.

<sup>503</sup> The term 'validity' is sometimes used ambiguously, see Hans Kelsen, 'On the Basis of Legal Validity' (1981) 26 *American Journal of Jurisprudence* 178, 180-183; Georg Henrik Von Wright,

understanding of law in general, and for Kelsen in particular, legality and validity are largely identified in such a way that every, and only, instance of legality produces valid law,<sup>504</sup> except for the basic or ultimate norm.<sup>505</sup> Accordingly, any given legal rule traces its validity to another legal rule, and ultimately to the one from which it originates.

412. Within that understanding, Alf Ross drew attention to the problem of self-referring, or reflexive, constitutional rules of change.<sup>506</sup> Ross argues that there is a logico-legal impossibility for a constitution to amend itself entirely in accordance with its own provisions. Specifically, the constitutional rule of change cannot change itself. In part, Ross's position stems from an 'alleged logical theorem according to which self-referring sentences are devoid of meaning'.<sup>507</sup> He considers legal sentences to be such

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*Norm and Action: A Logical Enquiry* (Routledge 1963) 194-200; George C Christie, 'The Notion of Validity in Modern Jurisprudence' (1963) 48 *Minnesota Law Review* 1049; Joseph Raz, 'Legal Validity' (1977) *ARSP: Archiv für Rechts-und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy* 339, 339-343.

<sup>504</sup> And there is also a broader common intuition among lawyers that what defines and differentiates what is legal from what is extra-legal is that the former originates in law, whereas the latter is not. Hence, there is often hesitance to count concepts such as the *grundnorm* or the *rule of recognition* or *sovereignty* as 'legal' in the same way that a legal rule is. For example, Hart presents the 'case' for calling the rule of recognition 'law' in that it provides criteria for the identification of other rules of the system, and it is this function that makes itself 'worth calling "law"', H. L. A. Hart, *The Concept of Law* (Oxford University Press 2012) 111. There is an apparent uneasiness in categorising the theorised basis of a legal system 'law' rather than 'pre-legal' or 'political fact', clearly because, unlike statutes, for example, it is not itself based in law.

<sup>505</sup> This is, after all, what motivates identifying some normative basis for even the fundamental rules of a legal system, while at the same time trying to avoid an infinite regression to more and more fundamental normative bases.

<sup>506</sup> Alf Ross, *On Law and Justice* (Oxford University Press 2019) 96-99.

<sup>507</sup> Alf Ross, 'On Self-Reference and a Puzzle in Constitutional Law' (1969) 78 *Mind* 1, 4.

propositions, and believes that self-referring provisions would result in logical circularity.

413. More compellingly, Ross argues that there is a contradiction in asserting that the new, post-amendment constitution derives from, or is valid because it is derived from, the old one. 'Any such derivation,' Ross writes, 'presupposes the validity of the higher norm and thus its continued existence',<sup>508</sup> and therefore it cannot derive from a norm that it contradicts. An independence-granting statute is an example of a reflexive law, as it alters the parent state's constitutional rule of change by removing the emerging state from its legal competence. Thus, if reflexive laws are impossible, every such constitutional amendment is either legally void or, if its effects are real, conceals a constitutional revolution.

414. It is easy to overlook the underlying idea of legal derivation on which Ross's argument is based. Hart, for instance, did not perceive any such contradiction. He argued that the original and amended constitutional rules simply refer to different points in time: once the new rule takes effect, the former ceases to do so, and there is no moment in which both coexist for a contradiction to arise. The kind of contradiction Ross identified, however, concerns the fact that the original legal norm continues to serve as the reason for the validity of the new rule. Although the original rule is no longer 'in effect', it nevertheless persists as the *source* of the new rule's validity. For this reason, Ross understood the higher norm from which the new norm is derived as remaining in 'continuous existence'. If validity is conceived as flowing through an

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<sup>508</sup> Alf Ross, *On Law and Justice* (Oxford University Press 2019) 97.

unbroken chain of legality, it appears logical to assume that a legal norm is and remains valid only insofar as it forms part of a chain of presently valid legal norms.

415. The example Ross provides illustrates his argument concerning the continuous existence of higher or deriving legal norms. Consider, as Ross suggests, an absolute monarch who grants a 'free constitution'. If the validity of the new constitution rests on the monarch's act, then the new constitution derives its legal authority from the absolute powers of the monarch. The new constitution is legally binding because the monarch's powers are legally binding, even if the only remaining legal rule of the monarch is to obey the new constitution. Furthermore, since the monarch's powers remain the ultimate constitutional norm, or as Ross puts it, 'the ultimate presupposition of the system',<sup>509</sup> there is nothing to prevent the monarch, in legal terms, from revoking the new constitution. The new constitution can be irrevocable only if it does not derive from the monarch's powers and instead replaces the monarch as the ultimate source of the legal order.

416. This concept of legal derivation is central to understanding the idea of the 'continuous existence' of higher norms and the problem of reflexivity. At its core lies a question concerning the basis of authority of a new constitution:<sup>510</sup> under whose authority are the self-imposed restrictions binding on the monarch? If they are binding by virtue of the monarch's own authority, then their bindingness is merely a façade – it

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<sup>509</sup> Ibid 98.

<sup>510</sup> We leave aside this point, a related classical question in constitutional theory, namely how a sovereign entity (e.g. an absolute monarch or 'the people') can bind itself via a constitution when it's the very nature of sovereign power to be unrestricted.

is the monarch binding the monarch – and they remain revocable. If they are not binding on the basis of the monarch’s authority, then the act of ‘granting’ the constitution is itself a façade, since the authority of the new constitution neither derives from nor is genuinely connected to the monarch’s act of granting.

417. If the constitution derives its authority from the monarch, then the exercise of constitutional powers is, in fact, an exercise of delegated monarchical powers. Conversely, if that is not the case, and the new constitution does not derive its validity from an original sovereign, it becomes unclear what the legal significance or function of a constitution-granting or independence-granting act actually is. If the validity of the new constitution is independent of the parent sovereign or legislature, then the granting act is redundant and devoid of legal implications. The situation is therefore identical to that of a constitutional revolution in the Kelsenian sense, where a new legal order is created *ex novo*, entirely severed from the laws of the previous legal order.

418. This is precisely the conclusion Ross reaches when he argues that self-amending constitutional norms do not truly follow an amendment process but are, in fact, revolutionary acts. This conclusion arises from the problem of authority outlined above and its implications for reflexive constitutional norms of change. As Ross puts it, ‘the legislature cannot be conceived of as being constituted by law’,<sup>511</sup> apparently because this would confuse the creator with the creation: how can the legislature be established by the very law it creates? The problem recalls the myths of primordial gods in ancient

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<sup>511</sup> Alf Ross, *On Law and Justice* (Oxford University Press 2019) 97.

religions, who created both themselves and the world. There must, therefore, be distinct levels of authority, one higher and one lower, one deriving and the other derived.

419. In the same way, Ross concludes that a 'statute cannot state the conditions for its own amendment',<sup>512</sup> and the same must apply to constitutions. If an amendment is nevertheless made, there are two possibilities. First, it may be a genuine amendment whose authority no longer derives from the pre-amendment constitution. In that case, it is a revolutionary act, being 'legally discontinuous'. Second, it may be a non-genuine amendment, whose authority continues to stem from the pre-amendment constitution and is therefore revocable, much like in the case of the absolute monarch. Hence, to suggest, as Hart does, that the pre- and post-constitutional states refer to different points in time is not a satisfactory solution, since validity by derivation depends on an ever-present connection with the past.

420. Nevertheless, there is something clearly counterintuitive about this conclusion. Most lawyers would agree with Hart that what matters is that the higher legal norm is valid at the time the subordinate norm is created, and that although the two are connected by derivation, the validity of the old and new legal norms should be assessed separately. In other words, the 'intertemporal' dimension of validity underlying Ross's problem of reflexivity should be rejected. There is nothing contradictory, for instance, in an absolute monarch granting an irrevocable, self-restricting constitution, provided that it lies within the monarch's powers to do so. Similarly, there is nothing contradictory in a constitution regulating its own process of amendment. After all, self-

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<sup>512</sup> Ibid.

referential constitutional provisions that entrench amendment procedures are relatively common and are treated by politicians and judges as determining which amendment procedures are valid and which are not.<sup>513</sup> In short, they are regarded as binding legal rules, and dismissing such constitutional amendments as an ‘alegal’ or ‘magical’ act, with the resulting constitutional change described as a ‘merely factual social-psychological change’ that ‘cannot be expressed rationally’<sup>514</sup> sounds implausible.<sup>515</sup>

421. A reasonable escape from this unsatisfactory analytical approach is to broaden our presupposition of a basic norm, to ‘fall back upon an even more fundamental ideology for legitimizing an amendment’,<sup>516</sup> to assume that there is a legal principle or basic rule that incorporates changes made in accordance with self-referring provisions. Ross suggests a modified basic norm formulated as follows: ‘Obey the authority instituted by [the constitutional rule of change], until this authority itself points out a successor’<sup>517</sup> and so on. Kelsen similarly (though not considering this problem) offers an

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<sup>513</sup> HLA Hart, ‘Self-referring Laws’ in *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) 175-176.

<sup>514</sup> Alf Ross, *On Law and Justice* (Oxford University Press 2019) 98-99, a position which he later abandoned in Alf Ross, ‘On Self-Reference and a Puzzle in Constitutional Law’ (1969) 78 *Mind* 1, 6-7.

<sup>515</sup> Similar problems from the idea of legal derivation arise when considering the legal implications of a repealing law. Once a law has been repealed, do all the legal norms derived from it *eo ipso* lose their validity? If not, where does their validity rest, now that their original legal basis has been terminated? It may be the case that the repealing act will specify whether its effects are retroactive and, possibly, which laws should or should not remain in force. But there are numerous times in which this is not the case, yet the effects of a repealing act are regarded as a matter of interpretation rather than as an automatic and inescapable conclusion stemming from the derivative nature of legal rules.

<sup>516</sup> Alf Ross, *On Law and Justice* (Oxford University Press 2019) 99.

<sup>517</sup> Alf Ross, ‘On Self-Reference and a Puzzle in Constitutional Law’ (1969) 78 *Mind* 1, 24.

account of continuity in which the *grundnorm* sits behind a positive rule of international law rather than the domestic constitution,<sup>518</sup> and thus a 'legal order remains the same as long as its territorial sphere of validity remains essentially the same, even if the order should be changed in another way than that prescribed by the constitution, in the way of revolution or *coup d' état*'.<sup>519</sup>

422. Finnis, going a step further, formulates an even broader 'general principle of the practical and theoretical understanding of law' upon which, if it is adopted in a particular legal order, rests the validity of legal rules once validly created. Accordingly, 'while the general principle refers to the power-conferring law as existing, this reference is to the existence of the power-conferring law at the time (past) of the creation of the rule in question'.<sup>520</sup> In this way, reflexive rules are possible and a revolutionary change need not impact other legal norms, when this 'general principle' is accepted as the basis for the legal validity of all laws in place of the power-conferring norms under which they were created.

423. However, these theoretical solutions leave unaddressed a concept that lies at the heart of both the problem of reflexivity and the issue of legal-order discontinuity in

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<sup>518</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 214-217.

<sup>519</sup> Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 220-221.

<sup>520</sup> John Finnis, 'Revolutions and Continuity of Law' in A. W. B. Simpson (ed), *Oxford Essays in Jurisprudence* (1973) 423-425. Finnis advocates adopting this principle, in the greatest part, due to its moral value, for it 'presupposes, expresses, and realizes (or secures) the most general and basic function of 'the law' – namely, to relate the past and the present by providing a present guide to actions which take place and have effect in the future'. Raz advocated for a similar understanding on the basis that it is explicating a widely shared understanding among legal officials.

every revolutionary change. This is the idea of *continuous legal derivation*, which holds that legal derivation operates in such a way that the validity of a legal norm depends on an ongoing connection with a valid power-conferring rule or principle of law. Before turning to alternative legal bases for the continuous validity of laws, we must first examine whether the idea of continuous legal derivation is sound at all. Some consideration of its origins is necessary before we can assess its validity.

***b) The idea of continuous legal derivation and a horizontal model of the legal order***

424. The idea of continuous legal derivation appears to be a remnant of a Benthamian and Austinian understanding of laws as commands issued by a sovereign to its subjects. A central argument against Austin's command theory of law is that it fails to account for the non-reductive nature of laws, which remain valid even after their source of creation, i.e. the sovereign lawmaker, has died or ceased to exist.<sup>521</sup> It also fails to explain how the sovereign lawmaker can be bound by law. If laws are commands, their validity depends on the continuous existence of their source, the commanding sovereign.

425. One of the major achievements of Kelsen's and Hart's theories, in contrast to Austin's, lies in separating the validity of laws from their creator by relocating the source of their continuing validity in an abstraction: a *grundnorm*<sup>522</sup> or a *rule of recognition*.<sup>523</sup>

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<sup>521</sup> H. L. A. Hart, *The Concept of Law* (Oxford University Press 2012) 62-66.

<sup>522</sup> 'The "existence" of a positive norm – that is to say, its "validity" – is not the same as the existence of the act of will, whose objective meaning the norm is. A norm can be valid, even if the act of will whose meaning the norm is, no longer exists', Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 10.

<sup>523</sup> [...] the consequent continuity of legislative authority, which is such a salient feature of a modern legal system, could not be expressed in the simple terms of habits of obedience, but required for its expression the notion of an accepted rule under which the successor had the right

Yet it seems that something of the command theory of law still persists in the concept of legal derivation or reason of validity. Within this concept, a legal rule, like a command, remains valid only as long as the reason for its existence continues to exist in some form. In Kelsenian terms, each higher legal norm appears to generate its own sub-system of subordinate legal norms.

426. What reason remains for retaining this idea if law is no longer understood as a command? The connection between the validity of a given legal norm and a higher norm arises from the positive nature of law, or at least that part of law which is positive. Whether a regulation made by a public body is valid will depend on its connection, or 'derivation', from a higher norm. The idea of legal derivation is therefore essential to positive law. However, accepting the idea of legal derivation does not entail accepting the idea of *continuous* legal derivation, as long as law is not conceived as something akin to a command.

427. By contrast, an alternative suggestion is to understand legal derivation as conveying only a *condition*, rather than a *reason*, for legal validity. The existence of an authorising higher norm, and the absence of a prohibiting higher norm cancelling it, are conditions for the valid creation of legal rules. Yet the *reason* for validity need not differ from the reason for the validity of the legal order as a whole. The key lies in separating the 'reason' or 'source' of validity from the conditions of validity. The reason for validity refers to the basis on which a legal norm is presently valid as law, while the conditions of validity are those factors, including higher legal norms, that determine

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to legislate before actually doing so and receiving obedience', H. L. A. Hart, *The Concept of Law* (Oxford University Press 2012) 75.

the valid creation, change, or termination of laws. Consequently, chains of validity are not sequences of interdependent legal norms but series of valid legal changes. The constitution is the supreme law in the sense that it sets the conditions for the valid alteration of law, which are binding on law-making institutions, particularly the legislature. However, it is not the fundamental law in the sense of establishing the validity of the entire legal order, with all other laws deriving from it. The validity of constitutional laws, like that of any laws, depends on their common acceptance within a community, whether through coercion, submission, or acclaim.

428. Law need not be understood as being fundamentally composed of individuated entities, such as 'legal rules', which function, when they are higher norms, as sub-sources of validity within a system of laws. The difficulties associated with the problem of reflexivity suggest that we should adopt a simpler understanding of law as a complex of jural relations that cannot be reduced to a synthesis or aggregate of basic legal elements, rules or norms, that validate one another. The futility of such an attempt can also be seen in the impossibility of individuating legal rules, that is, of identifying what counts as a single and complete legal rule or norm beyond what is written in the provisions of a statute. To use the example discussed earlier, a criminal or private law exception to a rule on the grounds of necessity may be regarded either as a standalone exception-making rule (a 'defence') or as part of the description defining the scope of the legally prohibited or mandated behaviour. Our choice between these alternatives usually depends on how the exception is formulated in the statute or expressed in judicial decisions.

429. This demonstrates that we speak of law in terms of rules, principles, and norms merely as a way of articulating the diverse ways in which law regulates human conduct, without implying that law actually consists of a collection of distinct rules, principles, and norms. In other words, we should not allow this way of speaking to mislead us into viewing law as a vertical, tree-like structure of validity. Once we shift to this horizontal understanding of law, issues of reflexivity no longer arise, and theoretical devices such as Ross's modified basic norm or the general principles suggested by Kelsen and Finnis become redundant attempts to preserve the problematic notion of continuous legal derivation.

430. Important implications follow from this understanding of legal derivation. First, the basis for claiming that a revolution or *coup d'état* must necessarily affect the entire legal order is removed, since the source of validity does not rest on the constitution, and therefore its demise does not *eo ipso* affect the validity of other legal rules. This, in turn, provides a foundation for the continuity of the judiciary and thus for the existence of a revolutionary jurisdiction. Secondly, a change in the source of authority of a legal order, as in cases of lawful devolution or the granting of a new constitution, can occur through a legal process. We can now reinforce Hart's response that no contradiction arises, because the validity of a given legal rule does not depend on another. This preliminary, though still incomplete, conclusion can be further developed by considering the second approach to addressing the problem of lawful devolution through the principle of efficacy.

### III. Break without illegality II: Shift of authority through the principle of efficacy

431. A different way to introduce a change to the source of a legal order without creating legal discontinuity can be drawn from Harris's attempt to accommodate lawful devolutions within Kelsen's theory through the condition of efficacy. Since efficacy forms the basis for presupposing the *grundnorm*, Harris argued that one should consider not only past evidence but also 'confident predictions' about which constitutional norms will prove efficacious.<sup>524</sup> Thus, in situations of turmoil where it is possible to presuppose different foundations for a legal order (for instance, the parent constitution versus a new constitution), the legal theorist can select the appropriate basic norm on the basis of its predicted efficacy. A similar reasoning can be discerned in *Madzimbamuto* (Court of Appeal), where the judges refused to recognise the Smith government as efficacious, even though it operated as the de facto government, because of the ongoing efforts of the British government to regain control. The ability to predict with confidence which of the opposing sides would ultimately prevail implicitly became the test for determining efficacy during Rhodesia's transition to independence.

432. I think that it is correct to approach the problem through the efficacy condition, but in a different and more explicit manner. Specifically, the test should clarify the actual reasons for which one can make confident predictions about the future efficacy of a constitution. What was it, precisely, that led Harris to think he could confidently predict which constitution, the parent or the devolved, would prove efficacious if conflict arose? If today the British Parliament attempted to revoke the 1947 *Indian*

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<sup>524</sup> J. W. Harris, 'The Basic Norm and the Basic Law' (1994) 24 *Hong Kong Law Journal* 207, 229.

*Independence Act* and reassert its sovereignty over India and Pakistan, it is certain that such an attempt would be entirely ignored by the officials of both states. The reason is that the British Parliament has long ceased to be regarded, in official practice, as a source of legal authority, regardless of the lawful process through which the former colonies achieved independence. The efficacy of the devolved legal orders already possesses a 'local root' in the consciousness of their law-applying officials.

433. My suggestion, therefore, is that the acceptance of laws by officials forms part of their efficacy. Efficacy is not determined solely by observing actual conformity through official practice, nor must one wait for an opportunity for such conformity to arise in order to test the efficacy of a legal rule. Laws are efficacious, for the purposes of gaining or maintaining legal validity, when officials accept them as such and consciously accord them the legal weight they purport to have.

434. Accordingly, the relevant question in a lawful devolution is whether it has successfully replaced the parent legislature with the devolved legislature as the ultimate lawmaking authority within the *juristic thinking* and sphere of official acceptance of the devolved order. In such a case, the rule 'whatever the parent legislature enacts is law' will have lost its efficacy, as it is no longer regarded as a presently valid source of law, whereas the rule 'whatever the devolved legislature enacts is law' will come to represent the ultimate lawmaking authority. The point is that ultimate norms are defined by the criterion of efficacy, not by tracing the remotest norm within an unbroken chain of validity.

435. This point can be further illustrated through a change even more implicit than a lawful devolution: a revolution with no visible effects. Imagine that an absolute

monarch delegates lawmaking power to a parliament and refrains from enacting new laws, so that all subsequent laws are enacted solely by the parliament. At some later stage, the parliament issues a 'declaration of constitutional revolution', proclaiming that henceforth legislative power shall rest solely with the parliament and not the monarch. Following this declaration, the parliament continues to legislate, and the monarch raises no objection.

436. Has a break in the continuity of the legal order occurred in this example? All the norms of the legal system that existed before the revolution remain efficacious, and all the norms enacted by the parliament after the declaration are just as valid as before. The difficulty with the traditional Kelsenian efficacy test is that it can apply only to norms that can be directly tested through observable conformity to prescribed behaviour. The efficacy of higher norms can only be tested indirectly, through the efficacy of their subordinate norms. However, if a subordinate norm can be attributed to two equally possible yet mutually exclusive higher norms, such as the monarch and the parliament in this example, to which of them should its efficacy be ascribed? To one, or to both?

437. This hypothetical difficulty was evident in *Madzimbamuto*, where the courts were perplexed by the fact that they continued to apply much of the same law as before the Smith government took power. As a result, it was impossible to determine, merely by observing which laws were being applied, whether the British government or the Smith regime was the efficacious authority.

438. This problem is resolved when efficacy is assessed not only in terms of actual practical conformity but also by examining which laws officials regard as valid. In

Kelsenian terms, in a lawful devolution the rule ‘whatever the parent legislature enacts is law’ loses its efficacy, while the rule ‘whatever the devolved parliament enacts is law’ becomes efficacious; hence, there is a change in the *grundnorm*. In this sense, there is always an element of ‘illegality’ in lawful devolutions, since the parent constitution loses its efficacy within the devolved community through what may be described as *official neglect*.

439. Similar reasoning can be applied to Hart’s theory. Finnis considers Hart’s rejection of reflexivity, discussed in the previous section, as creating a difficulty for his own approach. Like Kelsen, Hart understands the rule of recognition to change in a revolution due to a ‘break’ in its continuity. As in Kelsen’s model, any surviving elements of the ‘old’ legislation are regarded as validated by the new rule of recognition, through some clause in the new legal order that refers *eo nomine* to the enactments of the previous legislature.<sup>525</sup> Since lawful devolutions involve no unlawful change, why should

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<sup>525</sup> ‘At the end of the period of development we find that the ultimate rule of recognition has shifted, for the legal competence of the Westminster Parliament to legislate for the former colony is no longer recognized in its courts. It is still true that much of the constitutional structure of the former colony is to be found in the original statute of the Westminster Parliament: *but this is now only an historical fact, for it no longer owes its contemporary legal status in the territory to the authority of the Westminster Parliament*. The legal system in the former colony has now a ‘local root’ in that the rule of recognition specifying the ultimate criteria of legal validity no longer refers to enactments of a legislature of another territory. The new rule rests simply on the fact that it is accepted and used as such a rule in the judicial and other official operations of a local system whose rules are generally obeyed’, H. L. A. Hart, *The Concept of Law* (Oxford University Press 2012) 120, emphasis mine. Furthermore, ‘In any full description of the criteria used by the courts after the *revolutionary break* in ascertaining the law, *the old legislation would have to be specifically mentioned eo nomine*. Had there been no revolution, it would have been identified by reference to the general provision qualifying the unbroken succession of legislators. After the revolution, therefore, the validity of the old legislation comes to rest on a different rule of recognition from before.’, H. L. A. Hart, ‘Lon L. Fuller: The Morality of Law’, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) 362-363, emphasis mine.

there be a break in the succession of rules such that the new ultimate rule of recognition becomes 'whatever the devolved legislature enacts is law' rather than 'whatever the parent legislature enacts is law'? For Finnis, 'there seems no reason to call this change from one rule of succession of rules to another "a break", except the assertion that rules of succession of rules cannot be regarded as reflexive',<sup>526</sup> an assertion which Hart rejects.

440. Finnis's contention that there is no 'break' in a lawful devolution if reflexivity is accepted is correct, but this poses a problem for Kelsen rather than for Hart. Unlike Kelsen's *grundnorm*, which is a presupposition resting on the ultimate norm within a chain of validity, a lawful and reflexive change to the rule of recognition does imply a change to the ultimate norm. Since the rule of recognition is a matter of present fact, it is the official acceptance of that rule as the ultimate rule of a legal order that establishes it as such, regardless of whether its origin is lawful or unlawful.<sup>527</sup> It may therefore occur that a regional order gradually drifts away from the central authority until the 'break' point, when officials begin to recognise their local legislature as the ultimate source of authority for their laws, even if no illegality has yet occurred to make the 'break' visibly manifest. The 'break' consists precisely in the fact that officials no longer regard the

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<sup>526</sup> John Finnis, 'Revolutions and Continuity of Law' in A. W. B. Simpson (ed), *Oxford Essays in Jurisprudence* (1973) 418.

<sup>527</sup> H. L. A. Hart, *The Concept of Law* (Oxford University Press 2012) 106-108. A rule is necessarily ultimate if it is the last one in a chain of validity, and Hart uses this example to demonstrate the ultimacy of the rule of recognition. But since the rule of recognition is a matter of fact of the official acceptance, its position within a logically identifiable chain of validity is not the determining factor. It may well be the case that the origins of the present rule defining the lawmaker are forgotten or no longer regarded as important; for this reason, the ultimacy of the 'rule of recognition' rests not necessarily on its ultimacy in a chain of legality of legality but on its ultimacy as a criterion of validity because it is accepted as such in a conscious way by officials.

parent legislature as the ultimate norm of the legal order.<sup>528</sup> As with a revolution that produces no immediate visible effects, the criterion of efficacy can help identify such changes when ultimate norms are determined not by logical derivation through chains of validity, but by the actual legal weight they are accorded within the juristic conscience of officials.

441. Hence, any regional community gains independence not when it begins to regard itself as a 'distinct society with its own accepted power structure and its own intelligible commonweal',<sup>529</sup> but when it replaces the parent legislature with its own local legislature as the ultimate lawmaking authority, or at least when it treats the acts of its local legislature as a superior criterion of validity to those of the parent legislature. After all, there may be societies that consider themselves distinct yet continue to submit to a central legal authority, just as there may be societies that see themselves as sharing a common good while existing within separate legal orders. Societal identity, in itself, has no legal consequences. A revolutionary break occurs not when a society recognises its distinct identity, but when it shifts from one basis of lawmaking authority to another. In Rhodesia, this shift took place when the Smith Government asserted its authority independently of the British Crown, and the Rhodesian community recognised that authority and ceased to obey the laws of the British Crown.

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<sup>528</sup> As Hart says: 'though the composition, mode of enactment, and structure of the local legislature may still be that prescribed in the original constitution, its enactments are valid now not because they are the exercise of powers granted by a valid statute of the Westminster Parliament. They are valid because, under the rule of recognition locally accepted, enactment by the local legislature is an ultimate criterion of validity'. Ibid 121.

<sup>529</sup> John Finnis, 'Revolutions and Continuity of Law' in A. W. B. Simpson (ed), *Oxford Essays in Jurisprudence* (1973) 429.

442. Thus, by a different route, we reach conclusions similar to those of the previous section. Authorised constitutional changes are not determinative of continuity. Legal ultimacy, discontinuity, and sources of legal authority are not established by logically tracing the remotest legal norm in a chain of validity, if such tracing is even possible. Rather, in line with common experience and with the phenomena of lawful devolutions and revolutions, it is more accurate to consider what is presently regarded and accepted as valid by a community and its officials. I have referred to this conscious acceptance as the *juristic thinking* within a community, which constitutes the ultimate basis for the validity of its laws. This concept will supplement the conclusions of the previous section and provide a framework for understanding the impact that revolutionary changes may have on the rest of the legal order.

#### **IV. The impact of revolutions: *Juristic thinking* and revolutionary change**

443. In section (a), we developed an argument rejecting the idea of continuous legal derivation. The argument was as follows: (a) chains of validity are best understood as chains of valid legal changes; (b) power-conferring norms operate as conditions for the validity of those changes;<sup>530</sup> and (c) the reason for the validity of laws does not lie in the power-conferring norms under which they were created. In section (b), we took a different route, focusing on the principle of efficacy as a criterion of validity on which laws can ultimately be said to rest. The suggestion was that the efficacy test requires more than observing that the external behaviour of officials corresponds to the contents

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<sup>530</sup> I refer to power-conferring norms as conditions for validity in the sense developed for the present argument; I do not mean that power-conferring norms can be accurately and completely described as conditions for all purposes, as they also possess a forward-looking dimension as authorisations.

of legally prescribed norms;<sup>531</sup> one must also consider the actual acceptance of a law as presently valid by officials, and the weight they assign to certain situations or facts as events with legal implications. I refer to this stance and perspective of officials on legal events as *juristic thinking*, which is broader than and distinct from official practice.

444. *Juristic thinking* is the shared understanding within a community of what its law is, how it develops, and how it is ascertained in particular situations. It encompasses what is accepted as law, what is recognised as a law-changing event, and how the content of law is determined through the formulation of legal doctrines. Juristic thinking differs from official practice in that the latter concerns the observable actions of law-applying organs, whereas the former focuses on the reasoning and justification underlying those actions. It reflects the legal meaning that officials ascribe to law-related facts, explaining why legal officials within a given community have developed and adhere to their particular legal traditions and how they interpret them.

445. For example, while courts in both the United States and Germany uphold the principle of freedom of speech, the scope and nature of its protection differ significantly between the two legal systems. German judges understand the concepts of freedom and its legitimate limitations within a democratic society differently from their American counterparts, due to the distinctive doctrines, principles, legal traditions, and dialogues

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<sup>531</sup> For a similar observation in a different context, see H. L. A. Hart, 'Kelsen's Doctrine of the Unity of Law' in Stanley L. Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford University Press 1998) 556-557, 'A 'pure theory' of imperatives that ignored such facts and circumstances surrounding the issue and reception of orders, and restricted itself to the characterization of the relationships between the contents of orders and the description of actions, would necessarily be incompetent to settle the question whether any person had obeyed a particular order'.

that shape their respective legal communities of judges, lawyers, and citizens. These differences reflect divergences in their *juristic thinking* regarding the notion of freedom of speech and its implications.

446. Juristic thinking is dominated by state officials, not because they are its only participants but because the broader community defers to them. The community, to varying degrees, entrusts the knowledge of what the law is, how it develops, and how its doctrines are formed to the legal community, a sub-community whose most pivotal members are judges.<sup>532</sup> Such deference does not entail an unconditional grant of power; in most modern democracies, the community expects and demands that the law be developed and applied *justly* and *correctly*.<sup>533</sup> A useful analogy is that of a patient deferring her treatment to a doctor and to the established standards of best practice within the medical community. The patient retains certain expectations regarding how the doctor's discretion is to be exercised and what values the doctor and the medical

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<sup>532</sup> For a similar idea to which I agree, see John Bell, 'Legal Revolutions and the Continuity of Public Law' in Elspeth Attwooll (ed), *Shaping Revolution* (Aberdeen University Press 1991) 121, 'In identifying the rules, or even in acknowledging the existence of a "legal revolution", it may suffice that the influential group within the legal community accept it, and the rest will take the lead from them, but that depends on the structure of the legal community within a specific legal system'. Bell adheres to the view of Simpson that law 'consists of a body of practices observed and ideas received by a caste of lawyers', which are 'accepted and acted upon within the legal profession' and which provide 'guidance in what is conceived to be the rational determination of disputes'. My idea of *juristic thinking* is broader than the professional practice of lawyers, both in including broader political ideas that touch upon law, and in including non-lawyers to some extent.

<sup>533</sup> This can be seen even in countries such as the UK that have no codified institution binding their legislature, which appears to possess 'omnipotent' lawmaking power. 'But this "omnipotent" power', Loughlin notes, 'could be exercised only through established forms and defined procedures, and generally only in accordance with some basic understanding of the 'proper' uses of such power. The establishment of such formalities indicates the formation of a constitutional regime', Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004) 22.

profession are to take into account in determining and developing accepted medical practice. Likewise, individuals defer to the legal community of state officials and lawyers.

447. As with medical practice, the broader community also participates in *juristic thinking*, to varying degrees depending on the subject matter, particularly by shaping the values that law serves and by setting the limits of what law can and should do. Breaching those limits can give rise to revolutionary movements which, though unlawful, generate new lawfulness once they are established within *juristic thinking* as a method of changing law. In this way, both *might* and *justice* can become *right* to the extent and in the manner that *juristic thinking* accords them such weight.

448. Accordingly, the implications of certain unlawful changes to the constitution depend entirely on how they are understood within the *juristic thinking* of that society, whatever factors may shape that thinking. In some communities, and at certain times, the prevailing juristic understanding may regard the laws enacted by a monarch as valid only during his lifetime, in the manner of personal commands.<sup>534</sup> In most societies, however, *juristic thinking* has historically treated laws as retaining their validity regardless of changes to lawmaking institutions or processes, even when such changes are revolutionary. Legal theory cannot predetermine the magnitude, form, or

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<sup>534</sup> It's most likely to see a gradual change in the *juristic thinking* of the connection between the head of the government, the state, and the legal order. Loughlin suggests that the separation of the state from the person of the British monarch was realised in the 14<sup>th</sup> century when the coronation oath of the period required kings to swear to maintain unimpaired the rights of the crown, see *ibid* 20.

consequences of an unconstitutional alteration of the constitution, for these are wholly contingent on how the *juristic thinking* of the society interprets them.

449. The preservation of laws after a revolutionary change is not dependent on accepting some principle of legal continuity justified by its moral or practical value, as Finnis suggested. That presupposes that legal orders are otherwise destroyed by revolutions. The lesson drawn from the study of revolutionary change is that law, by its nature, exhibits continuity and structure unlike that implied by the concept of continuous legal derivation. Indeed, the continuity of laws may become so deeply embedded over time that no meaningful connection can be drawn between a legal order and any specific conception of community 'identity' at a given moment. Rather, the legal phenomenon as a whole represents an aspect of the collective consciousness of a community concerning its political structure, power relations, and, most fundamentally, the terms of coexistence among its members, expressed through an ongoing dialogue that I have called '*juristic thinking*'.

450. Finnis follows Raz's subordination of legal systems to broader political or social systems, linking the continuity of a legal system to the continuity of the political or social system in which it operates.<sup>535</sup> Within this framework, Raz does not provide an account of the identity of 'non-momentary systems', where the issue of continuity arises, stating that he does not wish to 'trespass on other fields'.<sup>536</sup> He does, however, maintain

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<sup>535</sup> 'The identity of legal systems depends on the identity of the social forms to which they belong', Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford University Press 1980) 189.

<sup>536</sup> *Ibid* 188.

that ‘constitutional (dis)continuity’ does not necessarily entail the (dis)continuity of a legal system, unless perhaps the unconstitutional changes are of ‘great importance’.<sup>537</sup> Yet there is no reason to assume that unconstitutional changes of great importance should affect the continuity of the legal order. The French Revolution, for instance, fundamentally transformed France’s constitutional structure, but there was no automatic or ipso facto termination of laws other than those directly targeted by the revolution. The French legal order continued to exist despite the complete overhaul of its public law.

451. Likewise, Finnis concludes that ‘the 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’.<sup>538</sup> Yet it is unclear how the ‘identity’ of a society can be determined in a way that is useful for addressing jurisprudential questions about the continuity of its laws. For Raz, the term ‘identity’ of a legal system refers to a ‘set of normative statements’ that together constitute ‘a complete description of a legal system’.<sup>539</sup> Finnis, however, does not clarify what notion of ‘identity’ he employs when referring to legal systems. Among jurists generally, and particularly in Kelsen’s work, the term ‘identity’ is used to reach useful answers to legal questions. In domestic law, a different identity of legal systems reflects a different source of validity for a legal order;

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<sup>537</sup> ‘The identity of legal systems depends on the identity of the social forms to which they belong’, *ibid* 189.

<sup>538</sup> John Finnis, ‘Revolutions and Continuity of Law’ in A. W. B. Simpson (ed), *Oxford Essays in Jurisprudence* (1973) 428.

<sup>539</sup> Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford University Press 1980) 187.

in international law, the continuous identity of a state determines the continuity of the rights and obligations that the state enjoys under international law.<sup>540</sup> What exactly is meant by ‘identity’ beyond such uses, in a way that connects meaningfully to the problem of legal continuity, remains unclear.<sup>541,542</sup>

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<sup>540</sup> Aristotle was among the first to engage with the question of state continuity, enquiring whether acts of a state can still be attributed to it after its transition from one constitution to another (e.g. from oligarchy to democracy): ‘[O]n what principle shall we ever say that the state is the same, or different?’. Aristotle distinguished the ontological question of whether the state remains the same from the legal-normative question of whether it is bound to honour previous obligations and agreements. For Aristotle, the state is the partnership of citizens in a constitution, thus ‘when the form of the government changes [...], then it may be supposed that the state is no longer the same’. However, he adds that ‘[i]t is quite another question, whether a state ought or ought not to fulfil engagements when the form of government changes’, a question which he, unfortunately, does not resolve. See Aristotle, ‘Politics’ in Jonathan Barnes (ed), *The Complete Works of Aristotle* (vol 2, Princeton University Press 1991) 1276a6-1276b15.

<sup>541</sup> To add to the confusion, the term ‘identity’ is sometimes used to refer to the legal order, but other times to the state. For example, Barber uses the concept of ‘identity’ to refer to the state and its connection to state responsibility, rather than the ‘identity’ of the legal order, see N. W. Barber, *The Constitutional State* (Oxford University Press 2010) 139-141. But unless one follows Kelsen’s thesis of identity of the state with the legal order, the two can be defined differently. An important confusion arises from not making clear what the term ‘identity’ refers to in each context: the legal order, the state, or the society?

<sup>542</sup> See Li-kung Chen, ‘The Continuity of a Legal System’ (2023) 86 *The Modern Law Review* 364, who, though conscious of the difficulties in determining a social identity at any point, still uses a concept of ‘identity’ for the legal system without clarifying what it conveys. For instance, Chen refers to the succession of legal systems as the change to a ‘new aggregate of laws or officials’ (ibid 389), though at the same time, ties the continuation of a legal system to the belief of officials that the system constitutes a continuation from a previous ‘momentary’ system. If so, a change only to the belief is sufficient for the change in the identity of continuity of a legal system without any actual change in the ‘aggregate’ of its laws and officials. That the concept of identity is entirely a matter of official perception is also evident in Chen’s assertion that ‘if there is a clear declaration of a new identity, it certainly counts strongly in favour of discontinuity’ (ibid). It would appear, then, that identity has nothing to do with the content of the legal system but is purely a matter of self-identification. It is hard to see how this notion of identity answers any of the jurisprudential questions relevant to legal continuity, i.e. which laws remain valid after a revolutionary change.

452. At the same time, it appears that the core of the question simply shifts from determining the ‘identity’ of the legal system to determining the ‘identity’ of the society, thereby replacing one difficulty with another. Were the people of the Ottoman Empire one ‘Ottoman’ society, or many? Should these societies be distinguished on the basis of their origin, religion (as in the Millet system of governance), or some other notion of ethnicity or self-identification? Choosing any of these provisional options would still leave unanswered what implications such distinctions would have for jurisprudential questions of legal continuity. The 1821 Greek Revolution, for instance, undoubtedly caused a profound rupture in the social structure and ethnic composition of the regions that gained independence from the Ottoman Empire, yet no legal implications can be inferred from that fact alone; legal continuity was broken only to the extent that the revolution itself sought to bring about change.

453. The ambiguity is evident in Finnis’s claim that the decision of the Rhodesian judges to sever ties with the British legislature merely followed their determination that Rhodesia was, ‘as a matter of fact’, a distinct society.<sup>543</sup> Yet it is impossible to distinguish cause from effect here, for the only reason we regard the Rhodesian judges as having recognised a ‘distinct’ legal and social identity is that they did, as a matter of fact, sever the legal authority of the British Parliament from the Rhodesian legal order.

454. Overall, the nature, structure, and dynamics of a legal order cannot be jurisprudentially pre-defined as a matrix of legal rules and basic norms, since even these most fundamental aspects of law are entirely relative to the legal understanding and

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<sup>543</sup> John Finnis, ‘Revolutions and Continuity of Law’ in A. W. B. Simpson (ed), *Oxford Essays in Jurisprudence* (1973) 429.

tradition developed within each community. Similarly, the impact of revolutionary change cannot be pre-determined, but depends on the significance it is accorded within each community. The effect of a revolutionary change is therefore both relative and a matter of degree, depending on the extent of the change it seeks to introduce. Consequently, it makes no difference whether the constitutional law altered is of greater or lesser importance, for there is no fixed relationship among the various laws within a legal order such that altering one would necessarily transform or terminate another.

### **V. Kelsen's international-law continuity and the futility of the *grundnorm***

455. The idea of legal continuity despite revolutionary change is not entirely foreign to the PTL. In section (a), we briefly noted that Kelsen also offers an account of legal continuity. His view of legal-order discontinuity rests on a monist model of the legal system in which the *grundnorm* is presupposed above the domestic constitution, which serves as the source of all legal norms. It is within this particular model that the implications of legal-order discontinuity in revolutions, as examined so far, arise. This is not the case if we describe the legal system as having its foundation not in domestic law but in international law.

456. In this account, national law is a sub-system of international law, and the validity and change of the constitution, as well as the identity of the state, are based on a positive 'principle of effectiveness' in international law.<sup>544</sup> This principle of effectiveness is no longer a theoretical function of the *grundnorm*, a hermeneutic tool of legal science, but

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<sup>544</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 214-215; Hans Kelsen, *General Theory of Law and State* (Routledge 2017) 121.

rather a positive legal norm of international, specifically customary, law. It may be formulated as follows: 'a government which exercises exclusive and effective control over the population within a certain territory is the legitimate government'.<sup>545</sup> It is within this version that Kelsen articulates what resembles the doctrine of successful revolution later adopted by courts in the revolution cases:

A norm of general international law authorizes an individual or a 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 for the territory of its actual effectiveness as a valid legal order, and the community constituted by this coercive order as a "state" in the sense of international law—regardless of whether the government came to power in a "legitimate" way (in the sense of the previous constitution) or by revolution. According to international law, this power is to be regarded as legal power. *This means that international law legitimizes a successful revolution as a law-creating procedure.*<sup>546</sup>

457. International law can therefore 'legitimize' (precisely 'legalise') a revolutionary change of the constitution and, potentially, regulate its impact on other norms within the national legal order. It is worth recalling that in *Dosso* the Court described the implications of revolutions according to the domestic *grundnorm* version, while at the same time treating the legalisation of the revolutionary government and constitution as grounded in international law: 'thus, a victorious revolution or a successful coup d'état is an internationally recognised legal method of changing a Constitution'.<sup>547</sup> The Court here confuses, or fails to recognise, the distinct theoretical foundations of each

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<sup>545</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 215.

<sup>546</sup> *Ibid.*

<sup>547</sup> 'If the territory and the people remain substantially the same, there is, under the modern justice doctrine, no change in the corpus or international entity of the State and the revolutionary government and the constitution are, according to International Law, the legitimate government and the valid Constitution of the State', *The State v. Dosso S.C. (1958) 10 P.L.D. 533, 539.*

approach to revolutions within Kelsen's theory, since, under the international law *grundnorm*, the loss of validity of all domestic legal norms is not necessarily the only consequence of a revolution. It could simply be that, under international law, parts or even the entirety of the legal system continue to exist after the overthrow of the lawful government. Thus, a theory of continuity that avoids many of the problems previously discussed can easily be constructed.

458. In fact, one can equally imagine further alternative *grundnorms*, including a national *grundnorm* that supports the theory of continuity. This could resemble Ross's modified basic norm mentioned earlier and could be formulated as 'obey the historically first constitution, unless it is changed in an efficacious way by another'.<sup>548</sup> Alternatively, one might hypothesise that the *grundnorm* validates a constitutional custom on which the positive constitution rests as a uniform practice, which can change whenever another uniform and widespread, that is, efficacious, practice arises, such as through a coup.<sup>549</sup>

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<sup>548</sup> That is if we assume that the content of the basic norm can diverge from that of the constitution, meaning that it does not simply make the content of constitutional norms objectively valid, but that it can, additionally, include other rules such as the one suggested for unauthorised changes of the constitution. If not, we can arrive at a domestic-law theory of continuity by assuming the existence of a respective constitutional custom allowing unauthorised constitutional changes.

<sup>549</sup> Since efficacy can determine the end of one legal system and the beginning of a new one, why not presuppose as the ultimate norm not a historically first constitution but a legal principle stating that 'changes in law may occur either in accordance with the (first) constitution or according to the principle of effectiveness'? If we accept that changes to a legal order can occur even when they are unconstitutional, there is no reason to restrict the *grundnorm* to the historically first constitution.

459. We can likewise construct innumerable variations of basic norms that could accommodate different forms of continuity and discontinuity, including partial continuities and discontinuities. A choice among them might have no apparent impact on the validity of the rest of the legal order, as occurs even within the theory of discontinuity, which can be applied in various ways: it might lead to all 'old' laws disappearing, or it might allow all 'old' laws to survive by treating them as tacitly re-enacted. Any outcome can be interpreted in a way that fits the doctrine of discontinuity or other variations of the basic norm. That this choice appears inconsequential<sup>550</sup> undermines the significance of any such account and raises the question of whether the doctrine of discontinuity, being merely one version of the *grundnorm*, and an admittedly counterintuitive and often puzzling one, deserves the level of attention it has received at all.

460. The importance of the legal-order discontinuity version is further diminished by Kelsen's thesis that the choice among possible *grundnorms* is purely ideological. Kelsen maintains that choosing between alternative *grundnorms*, for instance a national versus an international law *grundnorm*, is based on political rather than jurisprudential considerations, and therefore lies outside the scope of legal science.<sup>551</sup> If that is so, then

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<sup>550</sup> Kelsen even goes to the point, citing Max Planck, of comparing it with the principle of relativity established in physics to say that "[...] the two systems of reference and the corresponding ways of looking at things are equally correct and equally justified', hence it is 'impossible, without being arbitrary, to decide between them on the basis of this or that measurement or calculation.'" The same is true of the two legal constructions of the relation between international law and domestic law', Hans Kelsen, 'The Concept of the Legal Order' (1982) 27 *American Journal of Jurisprudence* 64, 82-83.

<sup>551</sup> 'The decision itself lies outside the realm of legal theory and can be arrived at only by means of nontheoretical considerations, for example, those of a political nature', *ibid* 83.

choosing among any possible *grundnorms* is likewise excluded from jurisprudence. The PTL, then, becomes merely a framework outlining various plausible options: one can choose continuity or discontinuity, or both in different combinations, and all these are equally acceptable within the theory.

461. This eliminates whatever guiding importance could be inferred from the PTL, even as a descriptive theory of law. As discussed in the previous chapter, Harris argued that the PTL could still be used by judges in making decisions to the extent that it provides 'clear' solutions to a legal problem. However, if the choice of the content of the *grundnorm* is entirely a political or ideological matter, then all the important questions regarding a constitutional revolution and its implications are political rather than jurisprudential. There are no 'clear' solutions. This, in turn, deprives the PTL of any significance other than providing a methodology for framing the consequences of one or another choice of *grundnorm*.

462. Furthermore, the PTL can be applied in ways that accommodate even those decisions in revolution cases that explicitly rejected it. The judges in *Asma Jilani*, for instance, refused to recognise the 1962–1971 Ayub Khan regime as having disrupted the legal continuity of the 1962 Constitution by replacing it with a new one. Instead, they held that the 1971 Constitution constituted a continuation of the 1962 Constitution, thereby condemning the 1962–1971 regime as merely an unlawful period. A Kelsenian legal theorist could nevertheless interpret *Asma Jilani* as consistent with *Dosso*, viewing it as another constitutional revolution following the fall of Khan's regime, in which the Court, unconstrained by Khan's now non-*efficacious* constitution, was free to determine which rules to treat as valid and which not. The accommodating capacity of the PTL

highlights its deeply descriptive nature and its lack of commitment to any position on the key questions confronting judges, namely, how they should decide here and now. Such questions can, of course, be dismissed within the PTL as matters of ‘ideology’ rather than ‘law’, but that only means that the most important questions, such as which laws are to be held valid, which constitution applies, when a constitution becomes valid, and when a *grundnorm* should be presupposed, are not legal questions under this theory.

463. This, I believe, is the greatest flaw in seeking guidance for revolutions within the PTL. Kelsen’s theory is problematic not because it is a theory as such, but because it can be used to account for virtually any possible variation. Most likely, this is because any decision made by judges regarding the validity of a revolutionary government or the scope of revolutionary change falls within the ‘discretion’ Kelsen grants to decision-making organs of the state. Thus, a Kelsenian jurist could later interpret the judges’ decision in a way consistent with the PTL. The PTL has immense descriptive capacity: it can explain both discontinuity and continuity, treat revolutionary governments as either lawful or unlawful, and portray legal systems as either entirely dependent on their constitutional law or as deriving validity from international law. Within the international law model, nothing prevents one from positing, for instance, a rule of customary international law under which revolutionary governments become lawful only if democratic or morally good, or a customary rule that preserves legal continuity for all domestic laws even after revolutionary change. Although the PTL may initially appear to provide a strict account of revolutions with severe consequences for legal orders, it can in fact be applied to explain virtually every kind of legal practice.

Consequently, jurists seeking guidance in the PTL will find their efforts futile, since all the key questions must be answered before the PTL can generate any implications.

## **VI. Conclusions**

464. Revolutions appear paradoxical when legality is equated with constitutional legality. Kelsen's Pure Theory of Law offered a theoretical framework for interpreting revolutionary change as existing outside any legal system, based on commonly shared and deeply rooted ideas about legal derivation. Most critics have rightly identified several problems with Kelsen's account. In this chapter, I have sought to address what I consider an important underlying idea in Kelsen's theory and jurisprudence more generally, which has not received the attention it deserves. I have called this the idea of continuous legal derivation. Rejecting this idea resolves the problems that arise from Kelsen's notion of legal-order discontinuity and refines our understanding of the nature of law and the legal order. I have argued that the implications of revolutionary change and legal validity are best understood through the concept of *juristic thinking*: the shared understanding among legal officials within each community of what the law is and how it is ascertained, reflecting the community's established legal traditions and doctrines.

465. By rejecting the notion that revolutions destroy the legal order, we are left with a legal space within which the revolutionary jurisdiction of courts and a law of revolutions can exist. However, nothing has yet been said about whether such a law of revolutions can be identified in legal practice, or what guidance it might provide in revolution cases. In the next chapter, I will examine the questions that arise in relation to a law of revolutions: when a revolutionary change occurs, why it occurs, and whether any limitations can be inferred from constitutional theory and practice.

# Chapter 7: Law of Revolutions

## I. When is there a revolutionary change?

### a) *Revolutionary claim and social equilibrium*

466. We have approached the concept of revolutionary change as a change in law contrary to what the constitution anticipates. This reflects the classical understanding of revolutions as instances of unlawfulness or a series of unlawful events that are eventually recognised as lawful or as law-creating. Within this broad category, we have discussed a series of cases ranging from the overthrow of a government (*coup d'état*) to the unconstitutional change of the form of government and other important state institutions (*revolution* in the ordinary sense of the word), including the unlawful establishment of a new legislature and government in separation from the centralised one (*war of independence*). We have not differentiated between changes brought about by violent or peaceful – but still illegal –<sup>552</sup> means, nor between those that enjoy popular support and those imposed by a small group of people. What is jurisprudentially common among these cases is that they seek to bring a change to the legal order in a manner that transcends the established constitutional framework. Since constitutional law sets the supreme criteria for legal validity within a legal order, the unconstitutional validity brought by a revolutionary change necessitates the identification of additional criteria for legal validity.

467. Unconstitutional validity appears as a contradiction in terms. Either the constitution performs its function in setting the supreme criteria of validity, or it does not. It might be tempting to treat the revolution cases and all historical instances of

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<sup>552</sup> Thus, the revolutions are distinguished from cases of lawful devolution and lawful grant of constitution by an (absolute) monarch.

revolutionary change as facts that simply disprove the purported superiority of constitutions. In this view, by attempting to set legal boundaries to the political, constitutionalism pursued a goal that is practically unfeasible and theoretically fictitious. Hence, some may argue that we should not try to reconcile two contradictory tensions: the subjection of the political to law on one hand, and the observed fact that lawfulness can be produced through constitution-violating revolutions on the other. And since we cannot deny facts, it is the tenets of constitutionalism that we must abandon.

468. Yet it is also generally true that constitutionalism has largely achieved its aims in placing the political realm under the authority of law.<sup>553</sup> Modern democracies conceive their governments and legislatures as operating within the legal framework established by their constitutions.<sup>554</sup> The legislature enacts laws in accordance with constitutionally recognised procedures, which also define the criteria for identifying who the legislature is in the first place. The same applies, to varying degrees, to all state organs. Just as it is a fact of the legal phenomenon that unconstitutional actions can give rise to new constitutional laws, so too it is a fact in many legal orders that constitutions fulfil their function as the supreme criteria of validity.

469. I will argue that both the idea that constitutions establish superior criteria of validity and the idea that constitutions can change in a revolutionary manner can be reconciled. A useful way to understand how this is possible is by juxtaposing

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<sup>553</sup> Pinelli Cesare Hasebe Yasuo, 'Constitutions' in Mark Tushnet, Fleiner Thomas, Saunders Cheryl (ed), *Routledge Handbook of Constitutional Law* (Routledge 2013) 12-14.

<sup>554</sup> Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016) 45.

revolutionary change with lawful constitutional amendments. In the previous chapter, I discussed at greater length the problem of reflexivity as it arises in cases where a lawmaking body imposes constitutional limitations upon itself (for example, in lawful devolutions). I argued that reflexive, self-binding constitutional amendments are valid once we abandon the notion of *continuous legal derivation* of validity, thereby allowing for phenomena such as the irrevocable grant of independence or the creation of a 'free constitution'. In this way, I aimed to refute Ross's claim that self-amending constitutional provisions involve some form of 'magical' or 'alegal' act.

470. The academic discussion surrounding the problem of lawful devolutions has primarily focused on examining and demonstrating how the act granting independence can be binding upon the parent legislature that enacts it. However, the argument I advanced in the previous chapter also maintained that the independence-granting statute is binding upon the community to which independence is granted. Such acts set out the conditions and procedures under which independence is conferred; in many cases, they also regulate the constitution-making bodies of the emerging legal order. This was the case with Pakistan's Constituent Assembly, whose functions and operations as both a constitution-making body and an interim legislature were regulated by the *1947 Indian Independence Act*.

471. A question, however, arises naturally: if adhering to the process outlined in the independence-granting act leads to the same kind of separation from the parent legislature that could be achieved through revolution, why should a revolutionary change not be preferred? The same question may be asked more generally of constitutional change: if a revolutionary change is a readily available means of effecting

valid constitutional transformation, what prevents a government from introducing the same constitutional changes not through the prescribed amendment process, but through a revolutionary act?<sup>555</sup>

472. The discussion in the previous section cannot directly answer this question. All doctrines of revolution, and the related debate from Kelsen onwards, have focused on whether and when an unlawful government or constitutional change becomes lawful. Within this backward-looking approach to revolutions, courts have adopted the efficacy test as the guiding tool for recognising revolutionary change as lawful, although they have at times supplemented it with additional legitimacy-based criteria. It might seem reasonable to suggest that, similarly, the choice between lawful and revolutionary change is determined by a test of predicted efficacy: that the process of constitutional amendment is followed when a government would not be efficacious in bringing about change through revolutionary means. While this test may hold some truth in certain cases where a revolutionary path was contemplated and dismissed as unattainable, it would fundamentally conflate constitutional violations with revolutionary change.

473. Specifically, it would fail to explain on what basis courts strike down laws and government acts as unconstitutional when, in such cases, governments remain largely efficacious and the laws or acts in question are often generally followed before being declared unconstitutional (and thus have already met the 'efficacy' test). Courts frequently declare laws and acts unconstitutional long after they have been efficacious,

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<sup>555</sup> Parallel questions are raised in the context of constitutional referendums, see Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012) 130-131.

without the government's efficacy being considered relevant. The obvious point is that efficacy alone cannot serve as an indicator unless accompanied by an awareness that the law or act was deliberately unconstitutional and carried out with the intention of bringing about revolutionary change. Revolutionary change begins, first and foremost, as a challenge to the established constitutional framework to the extent that it seeks to transcend it. No constitutional violation would ever be regarded as anything beyond that unless it were performed with a declared revolutionary claim – a statement acknowledging the act's unconstitutionality and asserting an intention to implement it despite that fact.

474. The *revolutionary claim* is, in itself, a claim of legal authority, just as the constitutionality of a law or act serves as a basis for legal authority. The source of a constitution's authority is controversial: it may be argued that it must meet a certain moral threshold, enjoy express popular support, or align with divine law. Yet it is sufficient to acknowledge that a constitution is effective and performs its intended function when people adhere to it and live under its rules. Even if disapproved of or regarded as unjust, a constitution that is nonetheless observed demonstrates that it has achieved a *social equilibrium*, i.e. a balance among competing social forces, and has established the conditions for peaceful civil coexistence. A constitution that meets this minimum condition can be said to possess the legal authority it purports to have, serving as the framework that regulates state institutions and the exercise of state power within a society. A constitution that fails to meet this requirement is a *failed constitution*, and its government a *failed government*. By contrast, a constitution that attains this status satisfies the criteria of a constitution recognised within its community as valid.

475. Accordingly, the content of the *revolutionary claim* is that a change can be brought against what the constitution anticipates (a) without breaching *social equilibrium* or, if it does, (b) by being able to restore it or establish one under new terms.

476. A revolutionary change in case (a) refers to a situation in which the transformation occurs peacefully, with the explicit or tacit consent of the people and the agreement of the government. It may also refer to a case in which the established constitution has failed and *social equilibrium* is already severely disrupted or ruptured, as in situations of civil unrest or civil war. In the latter case, the purpose of revolutionary change is to restore *social equilibrium*.

477. Case (b), by contrast, refers to situations in which the events leading to revolutionary change are not peaceful but involve conflict with those seeking to preserve the constitutional *status quo*. Such conflict may arise between governmental and non-governmental actors, or among any combination of them. As a result of this conflict, *social equilibrium* is ruptured. If the revolutionary change succeeds, *social equilibrium* will either be restored to its previous state, where the same group of people is once again brought into conditions of civil coexistence, or reconstituted on new terms, creating a new community. The latter includes cases of independence, secession from a central authority, or the division of a unified state.

478. The basis of revolutionary change, I argue, is the same as the basis of the constitution: the *social equilibrium* it achieves in establishing a condition of civil coexistence. Revolutionary change occurs when an illegal act is carried out under a revolutionary claim that is in fact supported by, or succeeds in achieving, *social equilibrium*.

479. That constitutions are highly contingent upon *social equilibrium* is perhaps best illustrated by their role in setting limits on majoritarian rule, particularly for the protection of minority rights. Limitations on majoritarian rule are puzzling not only because they appear undemocratic, but also because they function as a form of self-limitation without an obvious source. For example, what prevents the majority from overriding minority rights at will, or from amending the constitution without the constitutionally required supermajority? Recourse to ideas such as ‘popular sovereignty’, which holds that the legal authority of the constitution ultimately rests with the body of the *demos*,<sup>556</sup> cannot provide a satisfactory answer, since that concept alone does not prevent the majority from deciding solely on its own.

480. The same tension appears in the theory related to popular sovereignty, which distinguishes the power to amend the constitution from the power to create it. According to this theory, the latter power, known as the constituent power, is an expression of popular sovereignty or of the ‘people’,<sup>557</sup> traditionally understood to be unrestrained by legal limitations<sup>558</sup> and therefore capable of designing the constitution

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<sup>556</sup> An idea that was born and became prominent in the French Revolution project, see Yeh Jiunn-rong Dupré Catherine, ‘Constitutions and Legitimacy Over Time’ in Mark Tushnet, Fleiner Thomas, Saunders Cheryl (ed), *Routledge Handbook of Constitutional Law* (Routledge 2013) 46. For the emergence of the concept in England and America, see Edmund S. Morgan, *Inventing the people: The Rise of Popular Sovereignty in England and America* (WW Norton & Company 1989).

<sup>557</sup> Yaniv Roznai, ‘The Boundaries of Constituent Authority’ (2020) 52 *Connecticut Law Review* 1381, 1385.

<sup>558</sup> Following the classic conception of sovereignty as the ‘absolute and perpetual power of a commonwealth’, see Jean Bodin, *On Sovereignty: Four Chapters from the Six Books of the Commonwealth* (Cambridge University Press 1992) 1; for Rousseau, an expression of the ‘general will’ Jean-Jacques Rousseau, *The Social Contract and The First and Second Discourses* (Yale University Press 2002) 174

in any way it chooses.<sup>559</sup> However, the theory holds that once the constituent power has been exercised and a constitution has come into force, it falls into inertia. The body that holds sovereignty, namely the sovereign 'people', withdraws into the background and is replaced by a constitutionally constituted and limited body of people.<sup>560</sup> From that point onwards, the will of the 'people' can only be expressed, inferred, and exercised according to the rules of the constitution.<sup>561</sup>

481. This mysterious withdrawal of the sovereign 'people' and of the constituent power has no basis other than to allow constitutions to perform their function. The continued existence of popular sovereignty, or of any sovereignty understood as a legally unbound and supreme law-creating authority, is incompatible with constitutional law, which is a set of rules and arrangements legally binding on all entities within a legal order, including the 'people'.<sup>562</sup> Yet it remains unclear what prevents the majority from deciding as the 'sovereign people' rather than as the 'constituted people', or when it should be regarded as deciding in that capacity. Similar concerns arise in the context of referendums, which are often presented as expressions of the will of the sovereign 'people', as opposed to that of the 'constituted people', that is, the voting body.

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<sup>559</sup> Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2012) 130.

<sup>560</sup> For different variations of the theory of popular sovereignty, see Lars Vinx, 'The Incoherence of Strong Popular Sovereignty' (2013) 11 *International Journal of Constitutional Law* 101, who distinguishes between a 'strong' and a 'weak' popular sovereignty.

<sup>561</sup> Mark Tushnet, 'Constitution-making: an introduction' (2012) 91 *Texas Law Review* 1983, 1989.

<sup>562</sup> 'Sovereignty, when taken seriously, is the affirmation of absolutism. It signifies, as all the classical authors of sovereignty knew, the unlimited power to be free of any legal restriction, contrary to any doctrine of constitutional government or indeed the rule of law', Pavlos Eleftheriadis, 'Law and Sovereignty' (2010) 29 *Law and Philosophy* 535, 538.

482. The explanation, I argue, lies in the fact that constitutions secure a *social equilibrium* that would be ruptured if the constitution were not respected. Respect for the constitution is ultimately ensured when it upholds the value of peaceful coexistence. It provides the foundation for stability by offering a commonly understood framework that defines, limits, and guides the exercise of state power.

483. The precise function of a constitution depends on the nature of the state and the community for which it was enacted. It may be the constitution of a federal or a unitary state, of a multicultural or homogenous society, and so forth. Yet in all cases it serves, at a minimum, to preserve social cohesion. For any minority group, it establishes the basic conditions for participation and peaceful cohabitation. Correspondingly, the basis for the majority's respect for constitutional limitations ultimately lies in its appreciation of the terms that make coexistence possible and that, in the most extreme case, prevent civil unrest and civil war.

484. In turn, just as the constitution serves as a guarantee of *social equilibrium*, it can also be changed when such change does not disrupt that equilibrium. A peaceful revolutionary change can take place when it aligns with the conditions for peaceful coexistence and when the risk of departing from the stability and certainty provided by the constitutional framework is not greater than the value of the change. Just as any constitution ultimately becomes valid when its community adheres to and lives under its rules, any revolutionary change can similarly take place under the same conditions.

485. Therefore, there is no theoretically sound basis for eternity clauses<sup>563</sup> or the doctrine of unconstitutional constitutional amendments as a restriction to revolutionary change.<sup>564</sup> The significance of such doctrines, like that of any rule of entrenchment, lies instead in their articulation of the values that are at stake within a society and secured by the constitution to ensure the peaceful coexistence of its members.<sup>565</sup> Consequently, a revolutionary change that challenges values constitutionally or judicially entrenched carries a higher risk of undermining *social equilibrium* and should therefore be subject to stricter scrutiny.

486. Revolutionary change, however, can also occur through violent means and through a breach of social cohesion. Such a breach may be carried out by a small or large group of people, meaning it may take the form of a coup or a revolution in the ordinary sense, with or without popular support. At some point, either soon or after a longer period, civil unrest will end, if it occurred at all.<sup>566</sup> From the moment peace is restored and conditions of coexistence return, the revolutionary change becomes successful, as the new constitution it establishes meets the minimum threshold outlined above to be regarded as valid.

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<sup>563</sup> See Ulrich K Preuss, 'The Implications of "Eternity Clauses": the German Experience' (2011) 44 *Israel Law Review* 429.

<sup>564</sup> See Yaniv Roznai, *Unconstitutional Constitutional Amendments: A study of the Nature and Limits of Constitutional Amendment Powers* (Oxford University Press 2017).

<sup>565</sup> To the extent, of course, that they actually do, that these values are actually the one shared within a society securing its cohesion.

<sup>566</sup> As it might be the case that violence was exercised only against a small group of state officials.

487. The manner in which *social equilibrium* is achieved does not affect the validity of the revolutionary change. It may result from active popular support and participation or from passive acceptance, whether through approval, fear, or coercion. What matters is that adherence to the arrangements introduced by the revolutionary change is preferable to resistance and renewed unrest. A passive stance constitutes continuing acceptance, for the sufficient condition of a successful revolution is that the legal change it seeks to bring about is in fact realised through general compliance.

488. One may object that this approach simply reintroduces the old equation of might with right. Yet there is, I believe, an important difference. What I argue is that what appears as 'might' should not be equated with sheer coercive force. Some degree of acceptance by the community is always required for a revolutionary change, or, in the case of a coup, for a regime to be established, however immoral or reprehensible it may seem. A government that relies solely on coercion to secure compliance will, sooner or later, be overthrown. The legality of a government becomes open to question through the path of revolution only when its people would rather endure the hardships of civil unrest, civil war, or even death than continue to coexist under the terms imposed by that regime. A government, after all, is never merely its leadership or a small ruling group. It necessarily involves the cooperation, support, and participation, to varying degrees, of society as a whole, and in particular of those who constitute the state institutions: the civil administration, the armed forces, and the wider community.

489. For this reason, my argument accommodates both popularly acclaimed and morally virtuous revolutions and tyrannical coups. Throughout history, law has been the domain of both good and bad governments. The only governments to which it has

not belonged are failed governments, those that have been overthrown and have lost control.

490. In conclusion, revolutionary change and constitutional legality remain interconnected, since the validity of both depends on their capacity to secure *social equilibrium*. The constitution continues to serve as the law that establishes the supreme criteria of validity within a legal order, for as long as it meets the minimum threshold of *social equilibrium*. Conversely, a revolutionary change succeeds in altering the constitution when it achieves *social equilibrium* under its new constitutional framework. This account, I suggest, offers a middle ground that reconciles the contemporary understanding of constitutional law as supreme law with the historical reality of unlawful constitutional change.

***b) How judges should decide – An example***

491. Let us now consider an example to illustrate how a judge should decide in a case involving a purported revolutionary change. Suppose that the President of a presidential democracy dissolves the legislature, declares the constitution abrogated, and promulgates a new one under which he is appointed President for life, assuming all central executive and legislative powers. A case is brought before the court alleging an infringement of rights recognised only under the abrogated constitution. The court must therefore decide upon the validity of both the old and the new constitution. The court will first acknowledge the existence of a revolutionary claim, as it is evident that the unlawfulness in this case represents a deliberate challenge to the established constitution with the intention of altering it.

492. The minimum condition for the lawfulness of a revolutionary regime is that people choose not to resist it. Until the moment they do, they recognise it as meeting

the basic requirements necessary to regulate their lives. How widespread and how intense disobedience and resistance must be to be regarded as socially significant is a matter to be determined in each case. As a general rule, a revolutionary change succeeds when it does not disturb the social balance under which people coexist peacefully, or when it succeeds in restoring that balance. Accordingly, a revolutionary government establishes itself as the lawful one once resistance ceases. When a revolutionary government is no longer opposed and people prefer to conform to its laws rather than act against it, it has established the minimum condition necessary to be regarded as the lawful government.

493. In contrast, when the revolutionary government continues to face opposition or when it remains uncertain whether it has achieved *social equilibrium*, judges must declare it unlawful or at least not yet the lawful government. Otherwise, judges would take an active role in either promoting or undermining *social equilibrium*, depending on the direction of their decision. Since judges are part of the established constitutional framework, their duty is to resist unconstitutional constitutional change by default. They must seek to preserve *social equilibrium* unless it has already been ruptured or has already been restored under new constitutional arrangements.

## **II. Legitimacy, Revolutions and Principles of Constitution-Making**

494. In Chapter 5, we identified the emergence of a second wave of revolution cases in which judges sought to incorporate criteria of legitimacy alongside the efficacy test in determining the legality of a revolutionary regime. I referred to this approach as the doctrine of acclaimed revolution. So far, the discussion has focused on the doctrine of successful revolution because of its more developed theoretical foundations in Kelsen's Pure Theory of Law and the generally accepted principle of efficacy. In this section, I

will consider a possible basis for including legitimacy criteria in assessing the lawfulness of revolutionary change. I will argue that such criteria can be found in the practice of constitution-making, and that the same reasoning can apply by analogy to cases of revolutionary change.

**a) *Law in constitution-making***

495. Traditional constitutional theory does not recognise legal rules governing the process of constitution-making. In line with the theory of popular sovereignty mentioned above, it views constitution-making as an exercise of a legally unrestrained constituent power. This is so either because the constitution-making body is regarded as sovereign and therefore unbound by law, or because there can be no pre-constitutional law, since the enactment of a constitution marks the beginning of a legal order.

496. In part, this view reflects the genuinely revisionist character that constitution-making can have. The drafting and enactment of a constitution is often the first act of a community that has undergone significant political restructuring or has gained independence, particularly following a war, thereby asserting a new political identity. Breaking from the previous constitutional order and transcending its legal limits is indeed the very aim of a revolution. It is therefore understandable to conclude that constitution-making cannot be constrained by pre-existing laws. Yet this approach overlooks other important aspects of constitution-making that are subject to rules on which its acceptance as legally valid depends.

497. In particular, the constitutions of many modern democratic states were enacted through specific procedures grounded in the principles of representation and fair voting. A paradigmatic example is the drafting of the United States Constitution by the

Philadelphia Convention of 1787. Delegates were chosen by the state legislatures to provide the Convention with a representative mandate. Once drafted, the Constitution's ratification required approval by popularly elected delegates in at least nine of the thirteen states. A similar process occurred in the creation of the first constitutions of Greece, which were drafted through deliberations of national assemblies composed of delegates elected by regional assemblies representing local communities and revolutionary committees. During the French Revolution, the 1793 French Constitution, drafted by delegates of the National Convention, was not simply enacted but submitted to a national referendum in which each canton voted in primary assemblies. This was an innovation of the time, demonstrating a clear awareness of procedural legitimacy.<sup>567</sup>

498. These principles legitimised the process in a way that was necessary for the adopted constitutional texts to be accepted as legally binding. Constituent assemblies were regarded as possessing constitution-making authority because they were composed of representatives chosen by their communities, because they followed fair and transparent voting procedures, and because their decisions were made according to the principle of majority rule. Moreover, the very notions of process and membership, which allow us to distinguish the constituent assembly as a body from its individual members, necessarily call for a corresponding framework of thought and rules.<sup>568</sup>

499. Not all countries have followed or continue to follow such principles in constitution-making, nor do all regard them as necessary for the lawfulness of their

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<sup>567</sup> For the importance of freedom and equality as revolutionary aims in the American and French Revolution, see Hannah Arendt, *On Revolution* (Penguin Books 1990).

<sup>568</sup> Pavlos Eleftheriadis, 'Law and Sovereignty' (2010) 29 *Law and Philosophy* 535, 543-544.

constitutions. My argument, however, is that in some countries these principles of legitimacy did play such a role and acquired the status of legal criteria for the validity of the constitutions enacted. They form part of the factual reality of the legal phenomenon, which cannot be ignored but must instead be recognised and incorporated into our understanding of constitutions and legality. The concept of *juristic thinking* provides such a foundation.

***b) Juristic thinking and principles of constitution-making***

500. In the previous chapter, I described the legal traditions, principles, and doctrines existing within each community as the *juristic thinking* of that community. Since every society has its own legal history, *juristic thinking* is particular and distinct in each case. Yet many societies share common needs, concerns, and values. Some of these are virtually universal in modern societies because of their fundamental nature, while others are widely shared even if not universal.

501. *Social equilibrium* is one such fundamental social need and value, and it can be understood as a general principle of *juristic thinking*. My argument in the preceding section was that *social equilibrium* is a condition for the validity of both constitutions and revolutionary changes. In making this argument, I sought to present the value that people place on social cohesion as a general foundation of constitutional legitimacy, with direct implications for validity. At this level, legitimacy and legality are intertwined, since *juristic thinking*, within which validity is determined, is shaped by the community's beliefs about which factors are essential for something to count as law.

502. In other words, a community's ideas of legitimacy shape its concept of law, its law-making practices, and its approach to legal interpretation. In some communities, the concept of constitutional law is inseparable from the historical circumstances that

led to the adoption of the constitution and from how its meaning was originally understood. In others, law, even written law, takes on a life of its own once enacted and may be developed and interpreted dynamically in light of various considerations. Different approaches arise from differing assessments of what constitutes the basis of constitutional legitimacy, which becomes the question of what truly counts as constitutional law. Changes in standards of legitimacy transform legal concepts in ways that reflect those standards; thus, even the once legally unconstrained notion of sovereignty can evolve into one that is part of a legally ordered society grounded in respect for fundamental or 'natural' rights.<sup>569</sup>

503. The concept of law and the practice of law-making are shaped by the political, moral, religious, and philosophical ideas that prevail within a community. In some societies, political authority is understood and justified through religion, and the concept of law is therefore closely tied to beliefs about divinity. For the ancient Greeks, there existed a realm of laws ordained by the gods rather than by humans, which could justify a figure such as Antigone in defying the temporal authority of a king. Likewise, an Islamic state founded on the Quran develops a conception of law that derives its authority and, to some extent, its content from the supreme authority of Allah. In *Asma Jilani*, where the Supreme Court of Pakistan overturned *Dosso*, the judges invoked the divine sovereignty of Allah to ground their notion of legal continuity despite revolutionary change, responding to Kelsen's doctrine of discontinuity. What counts as

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<sup>569</sup> 'When the French revolutionaries tried to make sense of the idea of equality and rights in order to destroy the ancient privileges of the landed gentry, they modified sovereignty so that it should be subject to natural rights', Pavlos Eleftheriadis, 'Natural Reason and the Ethical Foundations of European law' (2021) 2 RED 14, 17.

a 'legal' argument and what does not is deeply intertwined with the prevailing beliefs of a community, which in turn are shaped by its social, political, and philosophical concerns and values.

504. Consequently, there is no fixed or jurisprudentially pre-definable boundary separating political, religious, moral, and philosophical ideas from legal ideas. Their interaction occurs within the legal discourse of each community, which determines which materials to treat as legal, which to exclude, and how to interpret and develop them. This is the phenomenon I have called *juristic thinking*. It may be objected that this concept is vague or overly broad. I would agree, but my response is that this is an inevitable reflection of the nature of the phenomenon it describes. It is flexible precisely because the legal reality it captures is diverse.

505. From this perspective, it becomes possible to identify principles of constitution-making that would be inconceivable within a strictly positivist understanding of law. Legal principles of constitution-making can be discerned in each society's established standards of legitimacy and its prevailing social, moral, political, or philosophical beliefs. Some values and needs are so fundamental that they can be generalised as common to all societies. I have argued that *social equilibrium* is such a fundamental need: it forms the basis of legitimacy and, in turn, the essential condition (*conditio sine qua non*) for the validity of a constitution and, by the same reasoning, for revolutionary change. Accordingly, other principles of legitimacy – some more widely shared than others – can likewise function as criteria for the validity of constitutions and constitutional change. Thus, even before a constitution is enacted, one can trace

fundamental legal principles concerning process and, perhaps, certain rights and obligations.

506. In this way, there is a theoretical foundation for the doctrine of acclaimed revolution. A judge may identify the legitimacy principles prevalent within her community and treat them as criteria of legality. The question that arises is how far a judge may rely on those legitimacy criteria and refuse to recognise an 'illegitimate' revolutionary government that has nonetheless gained effective control as the lawful government. As discussed in Chapter 5, most judges who adopted the doctrine of acclaimed revolution did not reject the ultimate primacy of the efficacy test. They accepted that a revolutionary government may still attain lawful status on the basis of its long-standing and widespread efficacy, despite its lack of legitimacy.

### **III. Conclusions**

507. With the above conclusions, we can now answer the crucial questions for revolutionary legality identified at the beginning of Chapter 5 as follows:

1) When does a revolutionary change take place?

Answer: A revolutionary change is an act of constitution-making, as it transcends the established constitutional framework in order to establish new constitutional terms. It consists of two elements. The first is a revolutionary claim, which is a declaration, either explicit or contextually inferred, that the legal change is being made beyond and against constitutional boundaries. The second is the establishment of the constitutional changes themselves, which occurs once peaceful coexistence (*social equilibrium*) is achieved. *Social equilibrium* exists when resistance to the revolution ceases and society pacifies, and accepts and adheres to the new constitutional order.

2) Is there law governing revolutionary change (law of revolution)?

Answer: The legal order and all its laws rest on the *juristic thinking* of a community rather than on a particular constitution-making event or a set of non-legally-derived norms. The legal order is not a vertical system of interdependent legal norms with the constitution at its foundation. Consequently, constitution-making and revolutionary change may be subject to criteria of validity derived from *juristic thinking*, as with any other law. The minimum content of a law of revolutions lies in the criteria for identifying a valid constitution, with the principle of *social equilibrium* being the most important. Additional criteria of constitutional legitimacy may also be found within a society's legal tradition and its prevailing social, political, moral, or philosophical beliefs that have become part of its *juristic thinking*.

3) What are the implications of revolutions for the rest of the legal order? Do some laws survive (law in revolution)?

Answer: Revolutionary change does not necessarily affect any parts of the legal order other than the one it targets. The legal order is a framework of legal concepts that are formed and sustained within *juristic thinking*. The impact of a revolutionary change is therefore relative and depends on how it is understood within the *juristic thinking* of each community.

4) What is the basis of the courts' jurisdiction in deciding questions of revolutionary change?

Answer: Since revolutions do not destroy the legal order, there is no reason to assume that a revolutionary change *ipso facto* affects the existence or jurisdiction of courts.

As the legal order is an aspect of *juristic thinking*, the continued existence of courts depends on their acceptance by the (legal) community.

## Conclusions

508. This thesis has examined the coexistence of law and illegality in constitutional systems termed as ‘unconstitutional legality’. It has sought to explain how legal systems continue to function when the rules of their (written) constitutions are violated on the basis of constitutional necessity or by acts of revolutionary change. Across its chapters, the thesis has moved from the judicial recognition of temporary constitutional departures to the more radical question of how new constitutions can arise from unconstitutional acts. The analysis reveals that legality does not end where constitutions break. Rather, it evolves through an intricate relationship between constitutions, law, and legitimacy.

509. The first two chapters of the thesis demonstrated that courts have historically recognised ‘unconstitutional’ acts as lawful under the doctrine of state necessity. Yet, the doctrine’s foundation proves unstable. It either regresses to ideas of executive supremacy unfitting to the modern constitutional state, relies on inadequate and mistaken analogies with the defence of necessity among various fields of law, or introduces extra-constitutional concepts that subvert constitutional supremacy. The analysis of case law from Greece, Pakistan, Cyprus, Nigeria, and Canada showed that the doctrine of state necessity operates as a judicial tool for preserving the rule of law when the strict application of the letter of the constitution would lead to its collapse. It is thus best seen as a rule of law doctrine seeking to strike a very difficult and somewhat conflicting balance between observing the constitution and preventing the collapse of the constitutional apparatus.

510. Building on this critique, the thesis developed an alternative theoretical and conceptual foundation for the doctrine of state necessity grounded in the tradition of equity or *epieikeia*. This equity-based approach treats lawful unconstitutional acts as interpretive extensions of the constitution rather than violations of it. In state necessity, the constitution undertakes an alternative operation aimed at preserving its fundamental values. Equity allows for the temporary suspension of certain constitutional norms to protect the very values that the constitution embodies, an idea deeply rooted in legal tradition and consistent with the rule of law. In this way, the doctrine of necessity can preserve legality without resorting to extra-constitutionality. Hence, the thesis argued, the doctrine of state necessity is not truly ‘unconstitutional’ legality, but only at a certain –yet still important for the vast majority of cases– level.

511. The later chapters turned to the more radical form of constitutional rupture: revolutionary legality. Here, the question was no longer how legality survives within a constitution but how it can survive beyond one. The study of judicial responses to revolutions revealed the development of two doctrines: the doctrine of successful revolution and the doctrine of acclaimed revolution. The transition from the former to the latter was marked by the adoption and condemnation of Kelsen’s jurisprudential work and his particular thesis that the validity of the constitution and the whole legal order is ultimately a matter of its efficacy. Despite its widespread criticism, the doctrine of successful revolution is consistent with Kelsen’s theoretical framework. However, Kelsen’s theory proves incapable of accounting for the various levels of continuity observed in revolutionary changes. More crucially, the importance widely attributed to legal derivation for the continuous validity of laws proves to be one of the central reasons why unconstitutional legality appears paradoxical.

512. In response, the thesis proposed a theory of *unconstitutional legality* that unites constitutional and revolutionary moments within a single continuum of legality. It argues that constitutions are not the ultimate source of law, but one manifestation of a deeper legal order grounded in collective recognition and acceptance. The theory advances three ideas:

513. First, the impact of a revolutionary change is subject to the *juristic thinking* within a community, meaning the particular understanding of law and its dynamics based on the legal discourse, tradition and pervading ideas of the community.

514. Second, revolutionary change consists of two elements: the revolutionary claim and the achievement of *social equilibrium*. The former reflects the particular challenge a revolutionary change entails to the established constitutional order. The latter the point at which society pacifies, resistance (if existed) ceases, and the community chooses to adhere to the new constitutional order over opposing it. *Social equilibrium* is the fundamental condition of existence of a constitution, for it differentiates a constitution that performs the function it purports to have from those that do not, the 'failed constitutions'. The paramount role of constitutions is to establish and maintain social cohesion, the peaceful coexistence and cohabitation. Any point at which one constitution fails at this and another claims to succeed is a moment of revolutionary change.

515. Third, a law of revolutions and legal principles of constitution-making based on requirements of legitimacy are possible, subject to *juristic thinking*. *Social equilibrium* is a general minimum threshold because it is universally shared among societies, and thus makes its way within *juristic thinking*. But societies have their distinct legal tradition

and concepts of law and of its foundations, and each sets its own minimum criteria of what constitution it accepts as its constitution. Though *social equilibrium* is the defining trait of constitutional validity, the terms under which it is achieved are the terms that its society sets. *Social equilibrium* thus sets a level of legitimacy; on its own, it is the very minimum that a functional constitutional order can have. But through its content, its society can elevate it to higher levels of legitimacy. What is important is that there exists a legal sphere within which even the terms of validity of revolutionary change and constitution-making can be set. Revolutionary legality, therefore, is not the annihilation of law but its reconstitution at a more fundamental level of legality, what might be called *pre-constitutional law*.

516. In conclusion, this thesis advances a unified theory of constitutional legality that accommodates both constitutional adherence and constitutional transgression. It shows that the rule of law is not a static structure but a dynamic process of justification. The persistence of legality through crisis and revolution reveals that law's authority ultimately depends not on unbroken chains of legal validity but on the ongoing willingness of a political community to treat its normative order as binding. Thus, unconstitutional legality is not a contradiction in terms, but an expression of law's resilience and capacity to survive its own negation.

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