Succeeding at Succeeding: Revolutions, Courts and the Limits of Legality

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I INTRODUCTION

"[A] little rebellion, now and then, is a good thing", wrote Thomas Jefferson to James Madison, "and as necessary in the political world as storms in the physical".[1] Mohandas Gandhi agreed but preferred revolutions of the non-violent variety. He believed that "a non-violent revolution is not a programme of seizure of power. It is a programme of transformation of relationships, ending in a peaceful transfer of power".[2] Mao Zedong, as his reputation might suggest, considered violence indispensable:[3]

> ... a revolution is not a dinner party, or writing an essay, or painting a picture, or doing embroidery; it cannot be so refined, so leisurely and gentle, so temperate, kind, courteous, restrained and magnanimous. A revolution is an insurrection, an act of violence by which one class overthrows another.

Abraham Lincoln, confronted by the secession and purported revolution of seven Confederate states, [4] nevertheless declared that citizens had a "revolutionary right to dismember or overthrow" any existing government "[w]henever they shall grow weary".[5]

Immanuel Kant, alternatively, held a cynical regard for revolutions:[6]

> Perhaps a fall of personal despotism or of avaricious or tyrannical oppression may be accompanied by revolution, but never a true

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1 Letter from Thomas Jefferson to James Madison regarding rebellion, succession and democracy (30 January 1787) as cited in HA Washington (ed) *The Writings of Thomas Jefferson: Being His Autobiography, Correspondence, Reports, Messages, Addresses, and Other Writings, Official and Private* (Taylor and Maury, Washington DC, 1853) at 104–111.

2 Raghavan Iyer (ed) *The Moral and Political Writings of Mahatma Gandhi: Truth and Non-Violence* (Clarendon Press, Oxford, 1986) vol 2 at 443.

3 Mao Tse-Tung "Report on the Investigation of the Peasant Movement in Hunan" in Committee for the Publication of the Selected Works of Mao Tse-Tung and Central Committee of the Communist Party of China (eds) *Selected Works of Mao Tse-tung* (Foreign Languages Press, Peking, 1965) vol 1 23 at 28 (footnotes omitted).

4 Peter J Parish *The American Civil War* (Eyre Methuen, London, 1975) at 67–69 and 34–107. The states in question were South Carolina, Mississippi, Georgia, Florida, Alabama, Louisiana and Texas.

5 Abraham Lincoln, President of the United States "Lincoln's First Inaugural Address" (Washington DC, 4 March 1861) (emphasis omitted).

6 Immanuel Kant "Beanwortung der Frage: Was ist Aufläung?" in F Gedike and JE Biefter (eds) *Berlinifche Monatsfchrift* (Berlin, 1784) vol 4 at 481–494 (translated ed: Lewis White Beck (translator) *Foundations of the Metaphysics of Morals and What is Enlightenment* (2nd ed, Prentice-Hall, New Jersey, 1997) at 84).

> reform in ways of thinking. Rather, new prejudices will serve as well as old ones to harness the great unthinking masses.

What a revolution is and what it should be has been a matter of intractable political and ethical debate between major figures in modern history and philosophy. No general declaration can fully describe the righteousness, wrongfulness, justifiability or repugnancy common to all revolution. Context is everything. The merits of an insurgency are bound to the context of its occurrence and the context of discussion. Some revolutions are good and some are bad. The only possible universal account of revolutions is that they happen and happen often. Most societies are born from revolution, whether through popular uprising, coup d'état, colonisation or conquest. Most die in the same way. And sometimes, courts have to step in to clear the mess.

Common law courts have faced numerous challenges to the decrees of usurpers. A valid and judicially enforceable decree reflects directly upon the nature of the entire legal order, with legislative authority usurped by the insurgent party. The prior constitutional structure is substituted for its revolutionary equivalent.[7]

Revolutionary cases of this kind were common during the 20th century. Hereditary and imperialist claims to power lost moral appeal in favour of democracy, fascism, nationalism and communism.[8] The spectre of revolution continues to be pervasive in the global political landscape today. A military coup d'état has left Egypt with its third constitutional structure in as many years, with the overthrow of President Mohammed Morsi catalysing a tragic descent into civil disorder.[9] The Commonwealth has proved exceedingly vulnerable. Freedom from the British imperial yoke has left Commonwealth countries with arbitrary territorial boundaries that conflict with natural cultural, ethnic, linguistic and religious demarcations.[10] This environment arising out of historically contingent colonial policy has rendered the realisation of stable nation-statehood elusive. These conditions are exacerbated by chronic underdevelopment, excessively powerful institutions of state coercion and the absence of institutionalised democracy.[11] Consequently, challenges to the legitimacy of the political order frequently occur.[12]

This article evaluates the principles that should guide courts when revolutionaries defy the legal order. I argue that normative values such as personal liberty and democratic rights are necessary considerations in the

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7 See *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC).

8 Ali Khan "A Legal Theory of Revolutions" (1987) 5 BU Int'l LJ 1 at 1.

9 See Mohamed A El-Khawas "Egypt's Revolution: A Two-Year Journey" in John Davis (ed) *The Arab Spring and Arab Thaw: Unfinished Revolutions and the Quest for Democracy* (Ashgate Publishing, Farnham, 2013) 113 at 113–151; and see John Davis "The Unfinished Revolutions: Evaluating the Winners and Losers" in John Davis (ed) *The Arab Spring and Arab Thaw: Unfinished Revolutions and the Quest for Democracy* (Ashgate Publishing, Farnham, 2013) 251 at 259–261.

10 Tayyab Mahmud "Jurisprudence of Successful Treason: Coup d'Etat & Common Law" (1994) 27 Cornell Int'l LJ 49 at 101.

11 Mahmud, above n 10, at 102.

12 See Mahmud, above n 10, at 102.

courts' adjudicative process. First, a broad legal definition of revolution will be provided before assessing the importance of the judiciary's role in determining the legal validity of a revolution. Secondly, the article critiques established judicial approaches to revolutionary legality. Typically, courts have either strictly applied the pre-existing constitution or adopted the efficacy of the rebellion as the sole determining factor for legal authority. The former approach leads to logical absurdity while the latter ignores the revolution's contextually specific moral aptitude. Both approaches allow the courts to avoid assessing the moral legitimacy of the revolutionaries or the deposed government. Moreover, courts that support efficacy rely upon an erroneous interpretation of Hans Kelsen's positivist jurisprudence in order to ground a supra-constitutional jurisdiction. Finally, this article promotes the judicial approach where normative values beyond efficacy have been applied. Courts can and should appeal to the supra-constitutional moral consensus of the community in order to evaluate the validity and legitimacy of a purported revolution. Contextual morality is pertinent and theoretically justified.

The political reality of a revolutionary environment characteristically involves conflict, political controversy and civil upheaval. The political pressure placed on judges, including threats to financial and personal security, may weigh heavily against the adoption of a principled approach. The political consequences of revolution automatically raise objections concerning judicial impartiality. The composition of the Ghana Court of Appeal in *Sallah v Attorney-General*,[13] for example, was questioned because of the alleged personal bias of two judges.[14] The judges belonged to minority tribes that politically opposed the majority tribal group of the usurping regime.[15] Before proceeding, it is important to note that while personal or political concerns may interfere in a court decision, this does not dilute the value of advocating for a principled adjudicatory method. Given the harsh realities of revolution, it may be unrealistic to expect courts to always decide on principled grounds. Nonetheless, this article attempts to provide an ideal normative approach for courts trying to do the right thing.

13 *Sallah v Attorney-General* CA, 20 April 1970, reprinted in SO Gyandoh and J Griffiths (eds) *A Sourcebook of the Constitutional Law of Ghana* (Faculty of Law, University of Ghana, 1972) vol 2 at 483 as cited in Mahmud, above n 10, at 66.

14 *Attorney-General v Sallah* SC Ghana Motion No 1/1970 reprinted in Gyandoh and Griffiths, above n 13, at 487, as cited in Mahmud, above n 10, at 68.

15 Mahmud, above n 10, at 68–69.

II DEFINING REVOLUTION

From the perspective of legal science, a revolution (as defined by Hans Kelsen) occurs:[16]

> ... whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself.

For Kelsen, a constitutionally "prescribed" action is lawful. A revolution replaces the old legal order with the prescribed constitutional framework of the now sovereign usurper. What was lawful becomes unlawful.

It is irrelevant whether the revolution is violent, peaceful, "effected through a movement emanating from the mass of the people, or through action from those in government positions".[17] Equally inconsequential is "the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends".[18] For the purposes of the juristic definition, the factual circumstances are wholly immaterial.

The assumption of sovereignty by Victorian Britain over the polities of Māori iwi, hapū and whānau, for example, was revolutionary.[19] For the Treaty of Waitangi signatories, the extent of British governance extended far beyond the authorisation given.[20] For non-signatories, the established British coercive legal authority nullified and replaced existing tribal constitutional architecture.[21] The revolutionary substitution of the same British imperial authority was later completed by s 21(1) of the Constitution Act 1986. Absolute sovereignty was transferred from London to Wellington in an unconstitutional fashion and the Crown in right of New Zealand emerged as a separate legal entity. New Zealand's Parliament now asserts the legislative sovereignty that Diceyan orthodoxy assigns to the United Kingdom Parliament. This is despite the fact that the New Zealand Parliament was established via British legislation.[22] While this revolution was peaceful, the same cannot be said for every revolution. The United States' tumultuous liberation from Britain in the American Revolutionary War serves as a violent counterpoint,[23] as does the ongoing and increasingly tragic civil war

16 Hans Kelsen and Anders Wedberg (translator) *General Theory of Law and State* (Harvard University Press, Cambridge (Mass), 1945) at 117.

17 At 117.

18 *State v Dosso* [1958] PLD 533 (SC Pak) at 538.

19 FM (Jock) Brookfield *Waitangi & Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 2006) at 15.

20 See Treaty of Waitangi 1840 and Te Tiriti o Waitangi 1840 as cited in Treaty of Waitangi Act 1975, sch 1; and Brookfield, above n 19, at 15. See generally Margaret Mutu "Constitutional Intentions: The Treaty of Waitangi Texts" in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13.

21 See Brookfield, above n 19, at 15.

22 Brookfield, above n 19, at 123; and New Zealand Constitution Act 1852 (15 & 16 Vict c 72).

23 See generally John Ferling *Almost a Miracle: The American Victory in the War of Independence* (Oxford University Press, New York, 2007).

in Syria. Revolutions, while sharing similar legal elements, encompass an expansive range of political and historical conditions.

III THE SIGNIFICANCE OF THE COURTS

A court facing a challenge to the established constitution must decide whether a revolution has occurred and whether it is acceptable to grant validity to the insurgent regime. Courts decide the foundation of the legal order from which legislative authority stems over an entire jurisdiction. A judicially enforced revolution transforms the law. There is no more important legal scenario.

Judges, however, do not control the purse strings or the guns. The state pays judicial salaries, maintains court buildings and implements judicial orders. Through control of the military, the state also has access to the prevailing coercive power in society.[24] Successful revolutionaries are able to overthrow the state structure with superior military and financial clout. During a revolution, the courts are at the mercy of a dominant usurper, who commonly subsumes control of both the executive and legislative functions of government.[25] They rely on the usurper for functionality and survival. If the courts refuse to accord the regime validity, they can simply be disregarded, especially when the usurper remains immune from credible antagonistic pressure from other quarters.[26] Politically speaking, a revolution is a revolution, whether the courts accept this or not.

Furthermore, revolutionaries, who are already willing to destroy constitutional systems, are unlikely to give due deference to judicial authority. Bothersome judges can be threatened or replaced, or the judicial system can be dismantled entirely. After the Supreme Court of Nigeria declared that the usurping Federal Military Government was "not a revolutionary government", the junta promulgated a decree reaffirming their unlimited legislative authority. [27] Additionally, it declared that the "revolution[s] ... effectively abrogated the whole pre-existing legal order in Nigeria". [28] It "involved an abrupt political change ... not within the contemplation of the Constitution" and "established a new government ... with absolute powers to make laws".[29] The Supreme Court capitulated in the face of this foreboding rebuke and upheld the validity of the decree with the effect of legitimising the entire regime. [30] The practical impact of revolutionary cases, therefore, is tempered by revolutionary power to intimidate the judiciary into submission.

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24 Mahmud, above n 10, at 104.

25 John Hatchard and Tunde I Ogowewo *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth* (Commonwealth Secretariat, London, 2003) at 14.

26 Mahmud, above n 10, at 104.

27 *Lakanmi v Attorney-General* (1971) U Ife LR 201 (SC Nigeria) at 217 as cited in Mahmud at 72.

28 Federal Military Government (Supremacy and Enforcement of Powers) Decree No 28 of 1970 as cited in Mahmud at 72.

29 Federal Military Government (Supremacy and Enforcement of Powers) Decree No 28 of 1970 as cited in Mahmud at 72.

30 *Adejumo v Johnson* [1972] 1 All NLR (Part 1) 159 (SC Nigeria) at 168.

The opposite approach of narrowing the focus to a regime's hard power is unhelpful. The importance and reputation of the judiciary extends beyond their relative coercive authority. Even revolutionaries want a functioning state. This requires a stable justice system. The unique expertise and socio-political status of the judiciary is difficult to qualitatively replace. It is seldom in the best interests of insurgents to liquidate the courts,[31] a strategy that will only aggravate the likelihood of anarchic civil breakdown and the potential terminus of the usurping regime entirely.[32]

Judicial validation also confers legal and political legitimacy upon a regime. The legitimising effect fulfils a "psychological-cum-political need of a regime which is obviously seeking to promote its own stability".[33] It is therefore rare for revolutionaries to threaten the personal security and liberty of judges.[34] The Court of Appeal of Fiji's refusal to validate the decrees of an interim military regime in *Republic of Fiji v Prasad*[35] triggered the junta's voluntary relinquishment of power and Fiji's return to civilian democratic rule.[36] Despite being temporary, with Commodore Frank Bainimarama leading a permanent coup in 2006,[37] the residual prestige and influence of an independent judiciary, even during revolution, must be appreciated. What the court says matters. What principles, therefore, should the courts apply in revolutionary cases?

IV TRADITIONAL APPROACHES TO REVOLUTIONARY LEGALITY

Necessity

The distinction between revolutionary and non-revolutionary action is often difficult to draw. Whether a revolution replaces the legal order in a way not constitutionally "prescribed" is an exercise in constitutional interpretation. This process is plagued by reasonable judicial and societal disagreement about what the constitution requires.[38] In revolutionary cases, courts have to determine whether an action actually breaches the constitution. There is considerable academic debate, for example, about whether the Glorious Revolution of 1688 was a revolution or merely a constitutionally anticipated

31 See Hatchard and Ogowewo, above n 25, at 14.

32 Farooq Hassan "A Juridicial Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'Etat in the Common Law" (1984) 20 Stan J Int'l L 191 at 236.

33 At 234.

34 Hatchard and Ogowewo, above n 25, at 14.

35 *Republic of Fiji v Prasad* [2001] NZAR 385 (CA Fiji).

36 George Williams "The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji" (2001) 1 OUCLJ 73 at 73.

37 See generally Jon Fraenkel "The Fiji coup of December 2006: who, what, where and why?" in Jon Fraenkel and Stewart Firth (eds) *From Election to Coup in Fiji: The 2006 campaign and its aftermath* (Australian National University Press, Canberra, 2007) 420 at 420–444.

38 For example, the debate regarding the constitutionality of criminalising homosexual sodomy between consenting adults in the United States Supreme Court: see *Bowers v Hardwick* 478 US 186 (1986); and compare *Lawrence v Texas* 539 US 558 (2003).

coup d'état within the monarchy.[39] Although this affords the benefit of hindsight, a court amidst political upheaval faces the unpleasant task of determining constitutionality while pertinent political events unfold. In addition, contextual circumstances are relevant. The New Zealand Governor-General, for example, may constitutionally dissolve Parliament,[40] whereas in other countries such radical executive interference would assault the constitutionally enshrined separation of powers.[41]

Commonwealth courts routinely source usurper actions within the constitution, despite the existence of express provisions in the relevant constitutions that point to the contrary. A specific example is where the courts have adopted the "doctrine of necessity": an overriding principle which sanctions the abrogation of the legal order where it prevents an anarchic vacuum or is necessary to maintain order, stability and the rule of law in emergency circumstances.[42] Necessity is therefore an implied constitutional mandate to act unconstitutionally so as to preserve the constitution itself. The alternative is the complete revolutionary overthrow of the legal system.

In *Re Manitoba Language Rights*, the Supreme Court of Canada evoked necessity to temporarily suspend a constitutional requirement that required all laws to be enacted, printed and published in English and French.[43] With virtually all Manitoban laws in English only, the Supreme Court had no choice but to invalidate legislation en masse.[44] Rather than expose Manitoba to a legal vacuum arising from this bulk invalidation, the Court invoked necessity to temporarily suspend the invalidation so that each law could be re-enacted, reprinted and republished bilingually by the legislature.[45]

The Supreme Court of Canada's decision was logical and blameless but the application of necessity elsewhere in the Commonwealth has been suspect. In *Bhutto v Chief of Army Staff*, the Supreme Court of Pakistan validated the military suspension of the Constitution on the basis of returning Pakistan to stability and order.[46] A coup d'état occurred after civil disobedience in response to allegations of systematic vote rigging in the 1977 election. The Court held that the coup was not a revolution. After

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39 HWR Wade "The Basis of Legal Sovereignty" (1955) 13 CLJ 172 at 188; and contrast with Brookfield, above n 19, at 16.

40 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 741.

41 See delineation of government branches in US Const arts I–III.

42 *Re Manitoba Language Rights* [1985] 1 SCR 721 at 758–768; The doctrine originated in *R v Stratton* (1779) 1 Doug KB 239, 99 ER 156 (KB) and has been applied in numerous jurisdictions, see *Special Reference No 1 of 1955* PLR 1956 WP 598 (FC Pakistan); *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35 (CA Grenada) at 88-89 per Haynes P; *Texas v White* 74 US 700 (1868) at 580-581 per Chase CJ; *Horn v Lockhart* 84 US 570 (1873); *Madzimbamuto* (PC), above n 8, at 740 per Lord Pearce dissenting; and *Attorney-General v Mustafa Ibrahim* [1964] CLR 195 (CA Cyprus).

43 Manitoba Act 1870, s 23.

44 *Re Manitoba Language Rights*, above n 42, at 747.

45 At 767–768.

46 *Bhutto v Chief of Army Staff* [1977] PLD 657 (SC Pak) at 715–716.

contemplating the "total milieu" of the regime change,[47] the Court determined that the military takeover was "an extra-constitutional step, but obviously dictated by the highest considerations of State necessity and welfare of the people".[48] The usurpation was "a phase of constitutional deviation dictated by necessity".[49] The Court relied heavily on a "solemn pledge" delivered by the chief of the army, General Mohammad Zia-ul-Haq, who promised that all available resources would be dedicated to fostering the necessary conditions to restore constitutional democracy within as short a time frame as possible.[50] Ultimately though, martial law lasted until 1985, with the General ruling as an authoritarian president until his death in a 1988 plane crash.[51]

In my opinion, the court in *Bhutto* misappropriated the doctrine of necessity to escape the fundamental and politically controversial decision about the legal order's ultimate validity. Approving the blatantly unconstitutional acts of a military junta through necessity was disingenuous and dangerous in light of the political and legal prestige emanating from judicial validation. Given judicial approval, it is no wonder that Zia-ul-Haq was able to retain power for so long. The *Manitoba* case provides a more appropriate use of necessity to retrospectively validate unconstitutional acts *after* the constitution had been restored. The question in *Bhutto* should have been whether the military had nullified the legal order, regardless of their actual, apparent or avowed intent. To adopt necessity as a substitute for revolutionary validity is to risk overlooking political reality and the explicit abrogation of the constitution.

Additionally, the test for necessity does not cover revolutionary circumstances:[52]

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

Validity based on necessity will also be temporary and "effective only during the existence of the necessity".[53] When these circumstances no longer

47 At 692 (emphasis omitted).
48 At 703.
49 At 716.
50 At 703–704 and 723.
51 Ian Talbot *Pakistan: A Modern History* (Palgrave Macmillan, New York, 2005) at 262 and 284.
52 *Mitchell v Director of Public Prosecutions*, above n 42, at 88-89 per Haynes P.
53 At 89.

apply, obedience to the constitution must be restored.[54] The purview of necessity is therefore strictly limited to extraordinary and temporary contexts. This article seeks to question the approach that courts should take when necessity cannot be applied. Are normative values relevant where the usurpation represents a permanent challenge to constitutional continuity?

Strict Constitutionalism

A popular view is to deny the court's jurisdiction to validate a revolutionary's law-making power. To impart revolutionary validity, a court must exercise a supra-constitutional jurisdiction by invalidating the constitution from which they derive their jurisdiction.[55] This seems logically incoherent as a court is fundamentally bound to the constitution under which it was created.[56] A court has no business inquiring into its validity just as "a stream cannot rise higher than its source".[57] Instead, judges must continuously reject revolutionary challenges in favour of upholding the established legal order. A court does not have an "independent existence apart from [its] constitution ... it is not a creature of Frankenstein which once created can turn and destroy its maker".[58]

To achieve full legal recognition under strict constitutionalism, a rebel regime must completely usurp all three branches of government and establish their own judiciary to uphold their constitution.[59] Judge Magrath of the United States Federal Court made this point emphatically in Charleston, South Carolina. In 1860, when South Carolina seceded from the Union, he refused to enforce the secessionist legal order and declared the "Temple of Justice closed".[60] After a few months, with the Confederacy configured, Judge Magrath reopened the "Temple of Justice" as a Confederate District Court.[61] Instead of betraying the Court's origin, the Judge stepped down from the bench before taking a judicial position under a different, revolutionary, constitution.

Strict constitutionalism has garnered significant judicial support, notably in the United States Supreme Court decision of *Luther v Borden*[62] and dissenting judgments in *Madzimbamuto v Lardner-Burke* at both domestic appellate level and at the Privy Council.[63] The latter cases concerned a revolution led by Ian Smith in Southern Rhodesia, now Zimbabwe. The 1961 Constitution envisaged that the British colony would gradually transition to majority democratic rule.[64] To protect the politically privileged white minority and prevent the political equality of black

54 At 89.
55 Williams, above n 36, at 73.
56 See Brookfield, above n 19, at 23–24.
57 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 258 per Fullagar J.
58 *Madzimbamuto v Lardner-Burke* [1968] 2 SA 284 (R AD) at 430 per Fieldsend AJA dissenting.
59 Brookfield, at 24.
60 At 24.
61 At 24.
62 *Luther v Borden* 48 US 1 (1849) at 39–40.
63 *Madzimbamuto* (PC), above n 7, at 732 per Lord Pearce dissenting.
64 RWM Dias "Legal Politics: Norms Behind the Grundnorm" (1968) 26 CLJ 233 at 234.

Rhodesians, Smith took control of the government and promulgated the Unilateral Declaration of Independence and a new constitution.[65] The strict constitutionalist approach of Fieldsend AJA and Lord Pearce, dissenting, allows courts to reject the authority of an oppressive regime regardless of the possessed coercive power.[66] This approach further allows for consistent and constitutionally loyal judicial responses to usurpation and avoids interference with the political sphere. Moreover, the Court averts recurrent insurgent challenges by removing avenues to revolutionary validity and implicitly legitimises any counter-revolutionary movements motivated to return the state to the pre-existing constitutional structure.[67] In contrast, where strict constitutionalism has been rejected in Pakistan, the courts have encountered persistent constitutional defiance partly, in my opinion, as a result of a "carte blanche" authority given to usurpers by judicial willingness to sanction illegitimate regimes.[68]

Regardless of its theoretical muscle, strict constitutionalism discords with political reality. A judiciary's utmost recalcitrance in response to revolutionary authority is devoid of any respect for reality and represents a failure to acknowledge explicit overhauls in sovereignty. Strict constitutionalism also produces absurdity. If an absolute monarch is killed without leaving provision for succession, the law will obligate the court to maintain that the monarch is still lawfully in power.[69] The court would become an accomplice to an emerging legal lacuna.

In order to avoid a possible lacuna, many courts have exercised a supra-constitutional jurisdiction because reality demands that they "must decide".[70] In *Madzimbamuto* (PC), Lord Reid declared that:[71]

> It is an historical fact that in many countries ... there are now régimes 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.

This is an appeal to realpolitik instead of principle but it contains a certain degree of pragmatic power. Brookfield agrees. He argues that the acceptance of the supra-constitutional jurisdiction by Commonwealth appellate courts, in conjunction with the rule that superior courts are "necessarily the judges of the limits of their own jurisdiction", indicates the existence of supra-constitutional authority.[72] Reality compels judges to adjudicate in situations of radical constitutional transformation, such as New Zealand's harmonious

65 At 234–235.

66 But note Fieldsend AJA and Lord Pearce accorded temporary validity to the Smith regime under the doctrine of necessity: *Madzimbamuto* (R AD), above n 58, at 434–435, 439 and 445–444; and *Madzimbamuto* (PC), above n 7, at 740.

67 Mahmud, above n 10, at 120.

68 Hassan, above n 32, at 216–217 (emphasis omitted).

69 JM Eekelaar "Principles of Revolutionary Legality" in AWB Simpson (ed) *Oxford Essays in Jurisprudence: (Second Series)* (Clarendon Press, Oxford, 1973) 22 at 30.

70 *Madzimbamuto* (PC), above n 7, at 724 per Lord Reid.

71 At 724.

72 Brookfield, above n 19, at 32; and see also *Jilani v Government of the Punjab* [1972] PLD SC 139 (Pakistan SC) at 261 per Sajjad Ahmad J.

transition to sovereignty through the Constitution Act 1986. It would be inconceivable for them to do otherwise.[73]

Nevertheless, just because courts have awarded themselves jurisdiction does not mean they were correct in doing so. A court may define its complete legislative authority as extending over the entire world but that does not give rise to an enforceable global jurisdiction. The same reasoning applies for the supra-constitutional jurisdiction, which extends beyond the court's readily apparent purview. A supra-constitutional jurisdiction requires a supra-constitutional justification. Brookfield and Lord Reid, with respect, blindly adhere to a position without principle, endangering the legitimacy of the court. Courts risk not having a justifiable approach at all if they cease analysis at a declaration that they "must decide". In fact, there is no reason why a court "must decide" in any case. Realpolitik may even fortify strict constitutionalism. Adjudicating using a theoretically sound framework is arguably preferable to making a decision with intense political ramifications, especially given a court's traditional position of political neutrality.

This attitude has encouraged some commentators to regard revolutionary validity as inherently non-justiciable. [74] However, the enforcement of any law, whether statutory or common law, and however trivial, directly reflects upon the validity of the legal order from which that law is derived. Declaring the issue non-justiciable compels the court to completely abdicate its function, as arbitrating any case effectively decides who holds supreme law-making authority. In *Vallabhaji v Controller of Taxes*, for example, the decree in question for the Seychelles Court of Appeal was merely an income tax provision. Nonetheless, the Court was unequivocally forced to determine revolutionary validity.[75] In 1987, such considerations provoked the entire bench of the Supreme Court of Fiji to simultaneously resign, rather than continue to adjudicate in the circumstances.[76]

The appropriate judicial response, therefore, is either strict constitutionalism or a *theoretically justifiable* supra-constitutional jurisdiction. There are two possible justifications for the latter approach. First, to avoid the futility and farce of the strict constitutional approach, it seems reasonable to constrain the valid authority of a ruler to the period in which they are in effective power.[77] This is the principle of effectiveness, though, in my opinion, courts have failed to recognise this particular justification for its utilisation. Alternatively, a court could appeal to normative morality-assessing principles that extend beyond the four corners of their constitution. I will discuss these in turn.

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73 Brookfield, above n 19, at 32.

74 Mahmud, above n 10, at 135–138.

75 *Vallabhaji v Controller of Taxes* [1981] CLB 1249 (CA Seychelles) as cited in *Republic of Fiji v Prasad*, above n 37.

76 Mahmud, above n 10, at 128, n 531.

77 Eekelaar, above n 69, at 30.

Effectiveness

The predominant supra-constitutional test for revolutionary validity is the effectiveness of the regime: "[n]othing succeeds like success; and this is particularly true of revolutions."[78] In the Pakistani case of *State v Dosso*, the decision where the test originated, Muhammed Munir CJ argued that:[79]

> ... if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged ... by reference to its own success.

The Pakistani President had annulled the 1956 Constitution and declared martial law because the upcoming democratic elections threatened the socio-economic power of the ruling class.[80] With the Laws (Continuance in Force) Order proclaiming the "unfettered legislative capacity of the martial law regime",[81] the Court was asked to determine whether the 1956 Constitution was still legally enforceable.[82] The Court held that the President had overthrown and replaced the Constitution because the people were in general conformity with the regime's orders, to the exclusion of the pre-existing constitution:[83]

> ... the Laws Continuance in Force Order, however transitory or imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and the correctness of judicial decisions has to be determined.

Dosso has been termed "a carte blanche for treasonable conduct".[84] It eventually transpired that the Chief Justice was deeply involved in the drafting of the Laws (Continuance in Force) Order.[85] Moreover, the regime collapsed the very day after the decision was handed down.[86] Nevertheless, the approach proliferated with branches extending throughout the Commonwealth.

A unanimous High Court of Uganda in *Uganda v Commissioner of Prisons, ex parte Matovu* validated a regime based on its efficacy.[87] The Prime Minister, with military support (including from future dictator Idi Amin), illegitimately dissolved the 1962 Constitution and assumed complete

78 *Madzimbamuto* (R AD), above n 58, at 325 per Beadle CJ.
79 *State v Dosso*, above n 18, at 539.
80 Mahmud, above n 10, at 54; see; and see also Alan Gledhill *Pakistan: The Development of its Laws and Constitution* (2nd ed, 1967, Stevens and Sons, London) at 101.
81 Mahmud at 54; and see also Gledhill, above n 80, at 106–107.
82 Mahmud, above n 10, at 54–55.
83 *State v Dosso*, above n 18, at 540.
84 Hassan, above n 32, at 217 (emphasis omitted).
85 Muhammad Munir "The Days I Remember" *Pakistan Times* (Pakistan, 11 November 1968) as cited in *Jilani*, above n 72, at 246–247.
86 At 163 and 177.
87 *Uganda v Commissioner of Prisons, Ex parte Matovu* [1966] EA 514 (HC Uganda) as cited in Mahmud, above n 10, at 58–59.

powers of government.[88] A new constitution was promulgated. The Court, upholding the validity of the regime's constitution, found *Dosso* "irresistible and unassailable".[89] The revolutionary acts were a "law creating facts" because the "abrupt political change ... destroyed the entire legal order", which was, in turn, "superseded by a new Constitution ... and by effective government".[90] Four fundamental requirements were said to satisfy the requirements for revolutionary legality:[91]

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

In *Madzimbamuto* (R AD), Beadle CJ declared that "a successful revolution which succeeds in replacing the old Grundnorm (or fundamental law) with a new one establishes the revolutionaries as a new *lawful* government".[92] The British Parliament had enacted the Southern Rhodesia Act 1965 and the Southern Rhodesia Constitution Order 1965 (made pursuant to the 1965 Act) to vest all legislative authority over Southern Rhodesia in Westminster.[93] However, the Smith regime had effective control of the government, including the military.[94] On appeal, the Privy Council majority accepted *Dosso* and *Matovu* as valid authority but deemed them inapplicable to Southern Rhodesia.[95] The Smith regime was held to be ineffective because the previous lawful ruler, the British Empire, was still attempting to regain control.[96] It would be counter-intuitive, the Court suggested, for an ousted government striving to re-establish authority to be, theoretically, treasonously opposing the new lawful ruler.[97]

Effectiveness means control. The actual acceptance or approval of the populace is irrelevant. If the majority generally conforms to revolutionary norms, whether out of social approval, coercion or fear of retribution, then that legal order is valid. Commonwealth courts have therefore been extremely willing to give a mark of official approval to oppressive usurpers. In *Vallabhaji*, Hogan P held that:[98]

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88 Mahmud, above n 10, at 58.
89 *Ex parte Matovu*, above n 87, at 535–538 as cited in Mahmud, above n 10, at 59.
90 *Ex parte Matovu*, above n 87, at 515, as cited in Mahmud, above n 10, at 59.
91 *Ex parte Matovu*, above n 87, at 534, as cited in Mahmud, above n 10, at 60 (emphasis omitted).
92 *Madzimbamuto* (R AD), above n 7, at 315 per Beadle CJ.
93 SA de Smith "Southern Rhodesia Act 1965" (1966) 29 MLR 301 at 302–303.
94 Mahmud, above n 10, at 61; and see generally FM Brookfield "The Courts, Kelsen, and the Rhodesian Revolution" (1969) 19 UTLJ 326.
95 *Madzimbamuto* (PC), above n 7, at 725 per Lord Reid.
96 At 725.
97 At 725.
98 *Vallabhaji v Controller of Taxes*, above n 75 as cited in *Republic of Fiji v Prasad*, above n 35, at 407.

> ... whether the term chosen is success or submission, consent or acceptance, efficacy or obedience, there appears to be a consensus or at least a strong preponderance of opinion that once the new regime is firmly or irrevocably in control it becomes a lawful or legitimate government and entitled to the authority that goes with that status.

In this case, the revolutionary regime had been in power for several years and had "enjoyed unchallenged authority and maintained stable and effective government in the Seychelles, with little or no interruption in the ordinary life of its citizens".[99]

A time lapse likewise works to the advantage of revolutionaries. In *Mokotso v HM King Moshoeshoe II*, the High Court declared that a coup d'état that had occurred three years earlier was successful.[100] The amount of legislation that had passed, the peaceful context in which the regime functioned, and the conformity of the vast majority of the population with the usurper's laws were relevant considerations.[101] The coup itself, Cullinan CJ argued, was extremely popular because it overthrew a particularly repressive regime.[102] Regardless, a regime would be lawful if the population eventually acquiesced, even if it was repressive.[103]

Effectiveness was also invoked in Nigeria, [104] Transkei, [105] and Bophuthatswana.[106] A legal order will be replaced when a revolutionary authority secures political control. Success is the only criterion: "[t]he first duty of a revolutionist is to get away with it".[107]

This approach is morally inadequate. Control can be established through oppression, prejudice and even genocide, so long as the citizens obey. The test encourages regimes to be as repressive as possible to quell any dissent that might give the court reason to deny validity. A dead person cannot be a counter-revolutionary. If judicial assertions about freedom, rights and justice are to be more than rhetoric, morally repugnant compliance with tyrannical insurgency must be avoided.

Implied Bargains and Court Packing

Nevertheless, reliance on effectiveness has been justified in several ways. First, Ogowewo and Hatchard contend that willingness to provide

99 *Vallabhaji*, above n 75, at 14 per Hogan P as cited in *Republic of Fiji v Prasad*, above n 35, at 407.

100 *Mokotso v HM King Moshoeshoe II* [1989] LRC (Const) 24 (Lesotho HC).

101 At 164–167 per Cullinan CJ; and see also *Makenete v Lekhanya* [1993] 3 LRC 13 (Lesotho CA) at 58–59 where the Court endorsed the validity of the revolutionaries that toppled the relevant regime in *Mokotso*.

102 *Mokotso v HM King Moshoeshoe II*, at 167.

103 At 132–133.

104 *Attorney-General of the Federation v Guardian Newspapers Ltd* [1999] 9 NWLR 187 (SC Nigeria) as cited in Venkat Iyer "Courts and Constitutional Usurpers: Some Lessons from Fiji (2005) 28 Dal LJ 27 at 43; and *Lakanmi*, above n 27.

105 *Matanzima v President of the Republic of Transkei* [1989] 4 SA 989 (Tk GD).

106 *Mangope v Van der Walt* [1994] 3 SA 850 (BGD).

107 Marty Jezer *Abbie Hoffman: American Rebel* (Rutgers University Press, New Brunswick, NJ, 1993) at 165.

imprimatur arises through "implicit bargain".[108] Judges validate regimes in exchange for retaining their office and privileges. Rebels, in return, receive legal recognition.[109] In Pakistan, for example, General Pervez Musharraf dismissed 14 Supreme Court Justices, including the Chief Justice, for refusing to take a replacement oath of office swearing allegiance to military rule.[110] In this form, "implicit bargaining" is basically economic duress. Judges are forced to protect their personal and financial security.

A comparatively selfless rationale on the part of the judiciary supports validating a regime in order to protect the public from future abuses of power. As in Pakistan, obstinate judges may be dismissed and replaced with sympathetic counterparts. Judicial packing of this kind would eliminate an essential check on the regime's oppressive actions. With an accommodating judiciary, arbitrary rule could proceed unhindered.[111]

Conversely, failing to restrain future misconduct and declaring revolutionary validity for the sake of stability is counter-productive.[112]

> Nothing can encourage instability more than for any revolutionary movement to know that, if it succeeds in snatching power, it will be entitled *ipso facto* to the complete support of the pre-existing judiciary in their judicial capacity.

In any case, usurpers are reluctant to dismiss judges or pack the court, given the authoritarian impression this gives to the common citizen and the international community. Further, the courts retain the trump card to validate a usurper's rule. Interfering with the judiciary would be self-acknowledgement of illegitimacy and risks alienating whatever semblance of popular support a regime might hold.[113]

V THEORETICAL AND NORMATIVE APPROACHES TO REVOLUTIONARY AUTHORITY

The Pure Theory of Law

The courts have found an alternative theoretical justification in Hans Kelsen's *Pure Theory of Law*, which provides a general conception for the ultimate validity of any given law. For Kelsen, an effective revolution — where the population behaves in general conformity with the usurper's authority — is necessary for the revolution to be considered valid.[114] Conformity does not require complete, homogenous compliance. Every society contains a level of antagonism towards the established constitutional framework. General obedience is sufficient for a revolutionary order to

108 Hatchard and Ogowewo, above n 25, at 14.
109 At 14–15.
110 At 14–15.
111 Hassan, above n 32, at 241–243.
112 *Madzimbamuto* (R AD), above n 58, at 430 per Fieldsend AJA dissenting.
113 See Dias, above n 64, at 258.
114 Kelsen *General Theory*, above n 16, at 118.

replace its predecessor as the basis of law-making authority.[115] The Constitution of Nigeria 1979, which explicitly sought to protect the State from revolution,[116] was nevertheless invalidated by a military coup in 1983.[117] The revolution was effective so the Constitution was replaced, irrespective of its content.

The approach is justified by reference to what Kelsen terms the "Grundnorm" (basic norm) — the original legal norm that confers validity on the laws of a given society. Every legal system is a pyramid of norms. X-rule is valid because it was created under the authority of Y-statute. Y-statute derives its validity from the existing constitution. The constitution derives its validity from a previous constitution. Ultimately we reach the historically first norm, the Grundnorm, which is the "final postulate, upon which the validity of all the norms of our legal order depends".[118] Every Grundnorm is valid because it embodies the self-evident presupposition that "[o]ne ought to behave according to the actually established and effective constitution".[119] The Grundnorm provides justification for a coercive legal order on the basis that said order is effective and generally obeyed. Otherwise, the legal system would have no discernible valid origin. The Grundnorm allows a jurist or legal scientist to trace the fundamentally supreme reason for a law's validity. Thus, after a revolution:[120]

> Every jurist will presume that the old order — to which no political reality any longer corresponds — has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognized as valid norms.

Accordingly, in *Dosso*, the Court acknowledged Kelsen's theory as "one of the basic doctrines of legal positivism, on which the whole science of modern jurisprudence rests".[121] The test of efficacy was applied and the revolution had become a "basic law-creating fact".[122] Similarly, in *Madzimbamuto*, the Appellate Division was explicitly guided by "Kelsen's theory as applied in the Pakistani and Ugandan cases".[123] In *Mokotso*, the Lesotho High Court described the theory as "the old truism, nothing succeeds like success",[124] before observing that "[t]o deny Professor

115 Hans Kelsen and Max Knight (translator) *The Pure Theory of Law* (University of California Press, Los Angeles, 1967) at 212–213.
116 Constitution of the Federal Public of Nigeria 1979, s 1(2).
117 See generally Toyin Falola and Julius Ihonvbere *The Rise and Fall of Nigeria's Second Republic: 1979-84* (Zed Books, London, 1985) at 228–231.
118 Kelsen *General Theory,* above n 16, at 115.
119 Kelsen, above n 115, at 212.
120 Kelsen, above n 16, at 118.
121 *State v Dosso,* above n 16, at 538.
122 At 540.
123 *Madzimbamuto* (R AD), above n 58, at 368 per Quenet JP.
124 *Mokotso,* above n 102, at 90 per Cullinan CJ.

Kelsen's theory of the successful revolution is simply to turn one's back on the course of history."[125]

However, these applications misappropriate the theory. For Kelsen, it is the legal scientist, not the sitting judge, who presupposes the Grundnorm. Commonwealth courts have assumed that the theory is one that "judges, qua judges, can apply".[126] The alternative position is that the Grundnorm is merely a hypothesis and is incapable of judicial application.

Jurisprudence is not a source of law but an independent objective analysis of the legal system:[127]

> The science of law has to know the law—as it were from the outside—and to describe it. The legal organs, as legal authorities, have to create the law so that afterward it may be known and described by the science of law.

The courts mistakenly assume that the Grundnorm, an entirely theoretical construct, is identical to the actual constitution, a collection of positive, legally enforceable rules. The Grundnorm, rather than the constitution, is the reason for the constitution's validity from the perspective of legal science. Courts must apply the constitution but the Grundnorm lies outside the positive norms that the courts utilise on a day-to-day basis. The theory is an externally descriptive presupposition, not a judicially applicable prescription.[128]

The failure to recognise this essential distinction leads judges to see "the Grundnorm itself as granting validity rather than as being a reflection of the Courts' granting validity".[129] The validity of a constitution presupposed through the Grundnorm is not the same as the validity bestowed on a constitution by its judicial acceptance.[130] A court's decision is part of the framework that the legal scientist observes to presuppose the Grundnorm. By accepting or rejecting revolutionary validity, for whatever reason, the courts provide evidence as to the regime's efficacy in terms of the *Pure Theory of Law*. The reaction of the court is fundamental to whether a revolution can be described as efficacious. The judiciary has significant influence over popular acceptance of a regime and thereby helping to create the conditions upon which a new Grundnorm can be presupposed. Further, denying the validity of a promulgated edict will mean that usurper law is not being enforced and the regime is clearly not effective. The court's decision, in any case, logically precedes the presupposition of the Grundnorm. It is theoretically impossible for a court to decide whether a regime is effective on Kelsenian principle because what the court says is fundamental to the quality of that very effectiveness.[131] Thus, Fieldsend AJA, dissenting in *Madzimbamuto* (R

125 At 124.
126 Brookfield, above n 19, at 25.
127 Kelsen *Pure Theory*, above n 115, at 72.
128 Mahmud, above n 10, at 111–112.
129 TC Hopton "Grundnorm and Constitution: The Legitimacy of Politics" (1978) 24 Mcgill LJ 72 at 83.
130 At 84.
131 Eekelaar, above n 69, at 29–30.

AD), correctly maintained that the Court could not determine the Smith regime's validity because of the very fact that the judiciary was still intact and authoritative.[132]

To clarify this point it is helpful to reflect upon HLA Hart's theory of law-making authority. To Hart, rules are legally valid if they derive from an "ultimate rule of recognition". This is the foundational validity of a legal system originating from the observable fact that judges, officials and others act in accordance with that legal system's precepts.[133] The primary difference between Kelsen and Hart is that, for Kelsen, validity stems from a hypothetical presupposition whereas Hart relies upon the actual practice of officials. Similarly, Hart's theory clearly demonstrates that a court is the inappropriate body to determine revolutionary legality. A court's decision is elementary to whether lawful validity exists. Dias has therefore strongly criticised the Southern Rhodesian Judiciary in the aftermath of *Madzimbamuto* for repeatedly validating the Smith regime. The Courts kept "cementing effectiveness layer by layer until it reached a point at which they could look back on their own handiwork and treat it as an objective fact".[134] Court decisions in revolutionary cases are inextricably linked to whether the ultimate rule of recognition exists or whether a new Grundnorm is presupposed.

The consequence of the mistaken judicial utilisation of efficacy as a sole test has been to divorce adjudication from considerations of contextual morality. This is contrary to Kelsen's mission. The *Pure Theory of Law* is positivist. It presents a universal test for what the law is, not what it should be in particular circumstances. Normative considerations from philosophy, politics and sociology are deliberately excluded.[135] Nonetheless, Kelsen recognised that the law was part of social human sciences and ordered with normative elements in mind. His theory is shielded from morality only so it can build an ideologically pure framework for legality and not because morality plays no part in contextually specific circumstances. The theory is a universal presumption that provides a framework upon which moral conceptions of validity can legitimately be imparted by courts in individual circumstances.[136]

Normative Approaches and Sociological Jurisprudence

Perhaps recognising the inadequacy of the Kelsen-inspired approach, several courts have dismissed *Dosso*. These courts have rejected strict constitutionalism and refused to limit themselves to efficacy alone. Instead, further normative considerations have been invoked.

132 *Madzimbamuto* (R AD), above n 58, at 427–428 and 431–432.

133 HLA Hart *The Concept of Law* (Clarendon Press, Oxford, 1961) at 112–113.

134 Dias, above n 64, at 253; and see *R v Ndhlovu* [1968] 4 SA 515 (R AD).

135 Hans Kelsen "The Pure Theory of Law" (1934) 50 LQR 474 at 482–485.

136 See Mohammed Enesi Etudaiye "The Pure Theory of Law and the Fragile New Democracies of the Developing World" (2007) 33 CLB 217 at 218–224.

Ironically, this approach emerged in Pakistan, with the Supreme Court in *Jilani v Government of the Punjab* overruling its earlier decision in *Dosso*:[137]

> Kelsen ... continues to be grievously misunderstood. He was only trying to lay down a pure theory of law as a rule of normative science consisting of "an aggregate or system of norms". He was propounding a theory of law as a "mere jurists' proposition about law". He was not attempting to lay down any legal norm or legal norms which are "the daily concerns of Judges, legal practitioners or administrators".

The Court criticised *Dosso* for failing to assess the conduct of the usurper.[138] The Court recognised:[139]

> ... [S]uch things as revolutions ... happen but even when they are successful they do not acquire any valid authority to rule or annul the previous 'grund-norm' until they have themselves become a legal order by habitual obedience by the citizens of the country. It is not the success of the revolution, therefore, that gives it legal validity but the effectiveness it acquires by habitual submission to it from the citizens.

Citizens therefore have to actually submit to the regime, rather than merely be under its control. Similarly, in *Bhutto*, the Supreme Court of Pakistan rejected that "effectualness of the new [revolutionary] regime provides its own legality".[140] The approach was illegitimate because it excluded "all considerations of morality and justice from the concept of law and legality".[141]

In Cyprus, after a coup d'état and an invasion by Turkish forces, the President of the House of Representatives took executive control and dismissed a number of public servants. Several of the dismissed police constables challenged the validity of their dismissal and, by extension, the regime.[142] A basic tenet of legalising a coup d'état, said the Supreme Court of Cyprus, was popular acceptance of the change, even if tacit.[143] The "violently imposed" regime failed this test because it "did not manage to inspire the respect and the obedience to the values which it invoked and called upon society as a whole to recognize".[144] The Court therefore went beyond the approach to *Jilani* to require popular acceptance.

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137 *Jilani*, above n 72, at 179.
138 At 177.
139 At 183.
140 *Bhutto*, above n 46, at 688.
141 At 688 per Anwarul Haq CJ; and see also 692 and 721.
142 *Liasi v Attorney-General* [1975] CLR 558 (SC Cyprus).
143 At 573.
144 At 574.

The high watermark for normative values is the Court of Appeal of Grenada's decision in *Mitchell v Director of Public Prosecutions*. According to Haynes P, Kelsen's theory is logical and tautly argued. Nonetheless:[145]

> ... [B]efore such a logical system is applied to the solution of an actual case the judges are entitled to consider, and indeed it is their duty to consider, whether, in addition to its logicality, the consequences of applying the Kelsenite viewpoint are socially desirable or not.

Haynes P termed this approach "sociological jurisprudence" before holding that the requisite efficacy had to be based upon general obedience derived from the consent and approval of the populace, rather than from fear or oppression.[146] Further, the new regime could not be oppressive and undemocratic.[147]

Most recently, the Court of Appeal of Fiji in *Republic of Fiji v Prasad* required that conformity "must stem from popular acceptance and support as distinct from tacit submission to coercion or fear of force".[148] The Interim Military Government (IMG) had taken power and suspended the 1997 Constitution before eventually handing power over to the new Interim Civilian Government (ICG). This was a response to civil breakdown stemming from George Speight's attempted coup d'état in 2000.[149] Convincing though not conclusive evidence of popular support would be a democratic election.[150] Furthermore, the revolution still had to be successful in that it destroyed the possibility of the previous order regaining power.[151] Revolutionary governments therefore have to satisfy two grounds:[152]

1. Exclusive control over the country's inhabitants and territory; and
2. The Fijian people's general conformity with the regime's dictates in such circumstances that their acquiescence could safely be inferred.

First, the IMG and ICG had quelled civil disobedience and mutinous sentiment in the armed forces.[153] However, even though the administration of government was running smoothly, efficacy was not established.[154] A rival power, the lawful government under the 1997 Constitution, was ready

145 *Mitchell*, above n 42, at 56 per Haynes P.
146 At 56.
147 At 74.
148 *Republic of Fiji v Prasad*, above n 35, at 413.
149 Iyer, above n 104, at 48–49.
150 *Republic of Fiji v Prasad*, above n 35, at 413.
151 At 412–413.
152 At 412–413.
153 At 413.
154 At 414–416.

and willing to resume office – a fact emphasised by their willingness to participate in the litigation process and to assert their authority to govern.[155]

Affidavits also confirmed that the ICG was not popularly accepted. Widespread public opposition, including from religious institutions, unions, human rights organisations and victims of alleged police racial prejudice, countered the regime's efficacy claims.[156] The Court concluded that a significant proportion of people still believed the 1997 Constitution embodied the aspirations of the Fijian people.[157]

However, the Court refused to adopt the *Mitchell* requirement that the regime must not be oppressive and undemocratic.[158] While acknowledging modern emphases on human rights, including their recognition in the 1997 Constitution, the Court was not willing to test "whether the new regime acknowledges basic human rights".[159] The Court followed Brookfield in arguing that principles of morality and justice were relevant to legitimacy but not legality.[160] A regime may be "unquestionably legal" but lacking in objective moral legitimacy.[161] Brookfield, accepting Kelsen's efficacy test, isolates the regime's moral status as a legitimacy ground that courts cannot explore.[162] As Cullinan CJ argued in *Mokotso*:[163]

> It may well be that, to use Professor Kelsen's words, 'the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order', because the new regime is popular and because it is not oppressive or undemocratic. But that ... is not the test. Throughout the course of history there have been regimes, indeed dynasties, holding sway for many years, indeed centuries, whose rule could not be said by any manner of means to be popular and could even be described as oppressive: but who is there to say that a new legal order was not created with their coming and going?

This argument's weakness has already been canvassed. While I do not wish to dispute that regimes may be legal despite the repression they inflict, the determination of Kelsenian legality is solely the province of legal science, not the judge acting in his or her judicial capacity. Moreover, the specific distinction drawn between human rights and the normative assessment of efficacy in *Prasad* is incongruous. Popular support and human rights are both normative values that equally reflect upon legitimacy

The remaining problem, as with efficacy, is that the courts have failed to enunciate any principled theoretical justification for adopting normative principles. The supra-constitutional jurisdiction still has no

155 At 413-414.
156 At 414; and Iyer, above n 104, at 57.
157 *Republic of Fiji v Prasad*, above n 35, at 414.
158 At 411.
159 At 412.
160 At 411; and Brookfield, above n 19, at 28.
161 Brookfield, above n 19, at 28.
162 At 38.
163 *Mokotso*, above n 100, at 129–130.

source. Sociological jurisprudence may provide greater respect for the autonomy of individuals but this alone does not justify adjudication beyond the scope of the court's jurisdiction. Normative considerations are especially uncertain because such values are contained within norms deriving their validity from the challenged Grundnorm. In New Zealand, human rights, including electoral rights, are codified in the New Zealand Bill of Rights Act 1990 or sourced in the common law.[164] The constitution cannot provide principles for situations where the constitution no longer applies. Revolutionary legality is legality *instead* of, not *because* of, the constitutional structure. The court must look beyond the Grundnorm to source justification for applying the efficacy principle and further normative considerations.

VI A SUPRA-CONSTITUTIONAL JURISDICTION

Dworkinian Principles

The issue for the court is that "[t]he only rules properly considered 'law' are those deriving from the vanquished basic norm."[165] The exercise of a supra-constitutional jurisdiction means adopting principles sourced outside of that Grundnorm. My submission is that the work of Ronald Dworkin can be extended to solve this problem. In an everyday context where a judge is faced with a problem not covered by an identifiable rule or law, that judge has a discretion that must be exercised in accordance with legal "principles".[166] Principles are distinguishable from rules because of their discretionary nature. When a rule covers a case, such as the statutory definition of murder, it must be applied unless a recognised exception can be found. Principles, alternatively, do not bind the court and, as a result, can be accorded different weight. Relevant values can be balanced and countervailing principles can co-exist rather than "eat away" at each other.[167] In *Henningsen v Bloomfield Motors Inc*, for example, the Court considered several divergent principles:[168]

> ... *(i)* that no man shall profit from his own wrongdoing; *(ii)* that courts will not permit themselves to be used as instruments of injustice; *(iii)* that freely negotiated contracts are to be enforced; *(iv)* that, in the absence of fraud, one who chooses not to read a contract before he signs it cannot later relieve himself of its burdens; and *(v)* that an automobile manufacturer is under a

164 See, for example, s 12 of the New Zealand Bill of Rights Act 1990, which confers a general adult right to vote; and see *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.

165 Eekelaar, above n 69, at 30.

166 Ronald M Dworkin "The Model of Rules" (1967) 35 U Chi L Rev 14 at 25–29, 37–39 and 45; and see also Eekelaar, above n 69, at 31.

167 Eekelaar, above n 69, at 30.

168 *Henningsen v Bloomfield Motors Inc* 161 A 2d 69 (NJ 1960) at 84–86 as cited in Eekelaar, above n 69, at 31; and see also Dworkin, above n 166, at 24.

> special duty with regard to the construction, promotion, and sale of his products.

These principles have different degrees of generality and weight. The generality of a hypothetical set of facts to which a principle applies can differ dramatically from the general (in terms of the court facing the possibility of causing injustice) to the precise (in terms of the car manufacturer manufacturing cars).[169] Once these facts occur, principles dictate what consequences can arise. This consideration is subject to infinitely variable weighting and discretion according to the relative importance of each value in the circumstances. The car manufacturer's special duty will be strict because the specific circumstances in which it applies are important, whereas the required enforcement of freely negotiated contracts will be comparatively weak when it conflicts with the principle that courts cannot cause injustice.[170]

Over time, principles may become directive enough to be considered rules in their own right and are therefore incorporated into the Grundnorm.[171] Principles may even be codified. Protections against double jeopardy and retroactive penalty are now enshrined in the New Zealand Bill of Rights Act.[172] This does not, however, remove their residual principled quality if the Grundnorm were to disappear. Some rights may be so "inherent and fundamental to democratic civilised society" that "[c]onventions, constitutions, bills of rights and the like respond by recognising rather than creating them."[173]

Crucially in the present context, Dworkin claims that principles originate "not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time".[174] They are not identified by reference to a particular Grundnorm and there is no positive legal test by which the relative importance of one principle can be asserted over another in a given context.[175] For example, principles stated by some judges have more authority and influence than others. The presence of authority — an intangible quality — is determined by respect for the judge's learning, their clarity of language and the acceptance that what they write generally constitutes good sense.[176] This allows lawyers and courts to invoke statements of authority from judges outside of the jurisdiction in which they work.[177] The court in *Prasad*, for example, weighed the relative authority of decisions from the United States, Southern Rhodesia, the Privy Council, Lesotho, Grenada, Pakistan, Uganda and Seychelles before adopting a normative approach.[178]

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169 Eekelaar, above n 69, at 31–32.
170 At 32.
171 At 33–34.
172 Section 26.
173 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [30].
174 Dworkin, above n 166, at 41.
175 Eekelaar, above n 69, at 34.
176 At 34.
177 At 34.
178 *Republic of Fiji v Prasad*, above n 35, at 405–411 and 416.

Some sources of authority are so remote that the assumption that formal constitutional rules prescribe their use inflates Kelsen's Grundnorm concept beyond all coherence.[179] Certain textbook writers and academics have established authority of their own, even in courts from other countries. The Supreme Court of the United Kingdom recently cited Bruce Harris of the University of Auckland as authority for the "third source" of executive action.[180] Another example is where revolutionary cases routinely adopt the theory of Hans Kelsen. In *Burmah Oil Co v Lord Advocate*, a case concerning the right to compensation for compulsory property destruction in circumstances of state emergency, the Court was influenced by John Locke, a pre-eminent 17th century political theorist.[181] It is beyond the limits of any conceivable Grundnorm for courts to be able to assess the authority of an Antipodean academic, an Austrian positivist and a philosopher, who died three centuries ago. Further, some judges have devised solutions for novel problems without reference to any authority, established principle or rule at all. Lord Denning MR's "right to work" falls within this category.[182] The Grundnorm cannot conceptually authorise this.

Dworkinian principles therefore award the courts its supra-constitutional jurisdiction. Normative principles can be justifiably invoked because they derive their authority from outside any conceivable constitutional structure. These values can be utilised to safeguard individual liberty from arbitrary exercise of state power, despite a lacuna in constitutional continuity. This corresponds with increasing international expectations regarding the satisfaction of certain universal standards of justice, democracy and human rights.[183]

As with *Henningsen*, the courts have discretion to balance a variety of relevant principles according to their relative contextual merit. These may include positive liberties (such as electoral rights), negative liberties (such as freedom from discrimination), normative tests of legality like popular acceptance, and even the *Dosso* requirement of efficacy. The difference is that efficacy no longer provides an automatic passage to validity. Efficacy becomes one of several equally valid relevant considerations. Efficacy, for example, may never be sufficient where a regime uses chemical weapons on its own citizens. Coercive state power alone does not oblige a court to legitimise a usurper.[184] In *Koroi v Commissioner of Inland Revenue,* Gates J deplored the use of the effectiveness doctrine alone: "[t]he usurper might rule, but that is not a basis for according lawfulness."[185] Alternatively, efficacy may outweigh a usurper's repressive tendencies when the regime

179 Eekelaar, above n 69, at 35.

180 *R (New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51, [2013] 1 WLR 2358 at [28] citing BV Harris "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225.

181 *Burmah Oil Co v Lord Advocate* [1965] 1 AC 75 (HL) at 117 per Viscount Radcliffe.

182 *Nagle v Feilden* [1966] 2 QB 633 (CA) at 646; and Eekelaar, above n 69, at 35.

183 International Covenant on Civil and Political Rights GA Res 2200A, XXI (1966).

184 Khan, above n 8, at 17.

185 *Koroi v Commissioner of Inland* Revenue [2003] NZAR 18 (Fiji HC) at 32.

has held sway for "many years, indeed centuries".[186] This would prevent absurd results and would accord with the principle that a court will not make orders in vain.[187] Relevant principles and their weight depend entirely on context.

Consequently, the distinction between legitimacy and legality disappears. Legality under a supra-constitutional approach is simply the common sense principle of effectiveness, whereas legitimacy incorporates equally valid principles such as equal treatment, autonomy and self-determination. Contextually appropriate principles will predominantly reflect the values applied by courts in their everyday capacity, irrespective of whether the values are traditionally regarded as concerns of legality or legitimacy. The potential corollary is that considerations of equality and basic standards of justice will be equally pertinent as an efficacy test. Conversely, some principles may be endemic to certain jurisdictions. In New Zealand or Fiji, adequate provision for the political representation of indigenous peoples may be thrown into the mix.[188]

It is important to note that courts are not deciding legality in the Kelsenian sense, where effectiveness is considered the sole determinate. Instead, they can enforce the laws of a regime when this is considered appropriate after relevant principles are balanced. Efficacy is but one value that may apply. Efficacy does not lead to the presupposition of a new legal order but may provide evidence for a legal scientist to conclude that the Grundnorm has in fact shifted. A court's supra-constitutional decision about the new revolutionary order is based upon principle.

Source of Principled Authority

Care must be taken to avoid falling into the same pitfall as Brookfield regarding the supra-constitutional jurisdiction. As discussed, Brookfield argues the courts' exercise of supra-constitutional jurisdiction is a good reason for accepting that the supra-constitutional jurisdiction exists.[189] Just because the courts have decided to act in a particular way does not mean they are right to do so. Judicial adoption of principle sourced outside of the Grundnorm, however accepted this approach may be, does not validate the existence of the supra-constitutional jurisdiction. An underlying theoretical source for the adoption of principle must be found.

In this regard, TRS Allan has argued that principles derive from pre-legal, and thus pre-Grundnorm, conditions:[190]

> ... the fundamental rule that accords legal validity to Acts of Parliament is not itself the foundation of the legal order, beyond which the lawyer is forbidden to look. The fundamental rule, however it should properly be characterised, derives its legal

186 *Mokotso*, above n 100, at 130.
187 Eekelaar, above n 69, at 30.
188 See generally Iyer, above n 104, at 46–48 on Fijian racial issues.
189 Brookfield, above n 19, at 32.
190 TRS Allan "The Limits of Parliamentary Sovereignty" [1985] PL 614 at 615.

> authority from the underlying moral or political theory of which it forms a part. ... Legal questions which challenge the nature of our constitutional order can only be answered in terms of the political morality on which that order is based.

Similarly, Dworkin argues that any theory of law must identify:[191]

> ... a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community.

The common morality of the people provides a supra-constitutional jurisdiction to adopt the Dworkinian principle. On this basis, a revolutionary regime that purports to entirely abolish democracy or fundamentally hamper human autonomy would ostensibly run afoul of community morality. It would therefore forfeit any legal validity.[192] In *Jilani*, the judges perhaps suggest that the sovereignty of Allah and the Islamic faith is an overarching principle guiding the validity of Pakistan's Grundnorm.[193] From a secular perspective, pre-political norms can also be enforced as principles. These can be sourced in the people, who as a group are inevitably subject to state power.

In social contract theory, for example, legal validity arises not from control or efficacy but from the hypothetical consent of the people. In order to escape the anarchy and unfairness of a pre-political "state of nature", the people collectively contract into a coercive legal system.[194] The people relinquish direct political authority in exchange for rights protection and a functioning system of justice.[195] When Jean-Jacques Rousseau wrote that "[m]an is born free; and everywhere he is in chains",[196] he meant that citizens deliberately enslave themselves into a collective mass in order to protect their individual liberty from the social inequality of the "state of nature".[197] This collective mass, incidentally, is the body that exercises protective coercive power. It is a mass of citizens, who collectively coerce themselves according to the dictates of the general will of that self-same collective mass — a democracy.[198]

John Rawls, alternatively, argues "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a

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191 Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1977) at 126.

192 Allan, above n 190, at 621.

193 *Jilani*, above n 72, at 182 per Hamoodur Rahman CJ.

194 John Locke *Two Treatises of Civil Government* (JM Dent & Sons Ltd, London, 1924) at 118–124.

195 At 158-160; and see also Robert Nozick *Anarchy, State, and Utopia* (Basic Books, New York, 1974); and see generally David Boucher and Paul Kelly (eds) *The Social Contract from Hobbes to Rawls* (Routledge, London, 1994).

196 Jean-Jacques Rousseau "Contrat social" in Bernard Gagnebin, Marcel Raymond and Robert Derathé (eds) *Œuvres completes* (Bibliothèque de la Pléiade, Paris, 1964) vol 3 (translated ed: Christopher Betts (translator) *Discourse on Political Economy and The Social Contract* (Oxford University Press, New York, 1994) at 45).

197 At 54–55; and see also Nicholas Dent (ed) *Rousseau* (Routledge, Abingdon, UK, 2005) at 127–129.

198 At 56–58; and see also Dent (ed), above n 197, at 130–133.

similar scheme of liberties for others".[199] The justification for this comes from the pre-political "original position".[200] Here, citizens are placed behind a "veil of ignorance", which shields them from knowing their place in society.[201] Acting purely in self-interest, the individuals accord basic liberties and democratic principles equally as a prophylactic against the risk of ending up as the worst off in society once the veil is removed.[202] This is the single rational approach to take. Coercive state authority is only justified when rights are protected and a system of justice exists. Presumably, a functioning system of justice requires a permanent, impartial judicial body that resolves disputes and protects liberty from states abuses. An errant usurper, therefore, faces a judiciary authorised to uphold the common morality of the people.

This is but one potential foundational theoretical argument for the application of normative principle to revolutionary cases. Here, respect for the collective political morality of the community is a judicially applicable basis of legality. It is not, like the *Pure Theory of Law*, a presupposition for the legal scientist. Upholding principles in revolutionary cases is upholding the will of the people. The Appellate Division in *Madzimbamuto* with pre-Grundnorm principle in mind, could therefore have acknowledged the common morality of the black majority in evaluating the validity of the regime that sought to deprive them of basic democratic rights. Efficacy, control, social acceptance, habitual obedience, democracy, justice, the rule of law, human rights and other considerations will undoubtedly hold relevance — of divergent intensity — for a court asked to determine the ultimate question in law. The court's job in the circumstances is to correctly balance competing principles to reflect the community's pre-political morality, whatever that may be.

VII CONCLUSION

Legal questions of revolutionary validity require debate about the ultimate political source of authority in society. Courts must consider threats to their personal security alongside issues concerning the nature and success of a revolution and the respect accorded to normative values. Boundaries between law, politics and history are blurred when courts seek to balance stark political reality with legal dilemmas. The situation is undeniably difficult for a court, with political bias and self-interest often clouding the reasoning behind decision-making.

This article has, nevertheless, critiqued three dominant approaches to revolutionary legality. First, courts that adopt a strict constitutional perspective divorce their decisions from political reality to the point of absurdity. Secondly, judicial application of Kelsen's efficacy test as the sole

199 John Rawls *A Theory of Justice* (Harvard University Press, Cambridge, MA, 1999) at 53.
200 At 118.
201 At 118; and see generally at 102–168.
202 Will Kymlicka *Contemporary Political Philosophy: An Introduction* (2nd ed, Oxford University Press, Oxford, 2002) at 65.

determinate for legal validity represents a fundamental misunderstanding of the distinction between a legal scientist and a judge. Further, it tolerates the coercive authority of morally repugnant usurpers over an entire jurisdiction. Finally, the most ethically sound approach is that adopted by courts that consider normative considerations beyond efficacy. Even here, the lack of theoretical justification for a supra-constitutional jurisdiction has been problematic.

This article has therefore proposed a broad, general and principled justification for the exercise of a discretionary supra-constitutional jurisdiction in revolutionary cases to be applied despite the politically volatile factual matrices of particular contexts. This supra-constitutional jurisdiction is found in principles logically prior to the positive legal framework. They derive from the pre-political common morality of the people and can justifiably be implied into the adjudicative process. Competing principles are accorded divergent intensity of weight depending on their relative importance in given circumstances. This approach corresponds with modern theory regarding the political basis of coercive state power and aligns with increasing reliance on universal standards of justice, democracy, equality and autonomy. Courts, even in the darkest of circumstances, have a justified and ethical pathway through which the rights, dreams and aspirations of citizens are upheld, even against the most repressive of regimes and revolutionaries.