THE LEGAL EFFECT OF A COUP D' ETAT ON TRADITIONAL CONSTITUTIONAL CONCEPTS

THESIS

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BY

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DECLARATION

I declare that The Legal Effect of a Coup d' etat on Traditional Constitutional Concepts is my own work in design and execution, and that all the sources that have been used or cited have been acknowledged accordingly, and duly reflected in the bibliography.

I certify that this thesis has not been submitted at any other university.

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PREFACE

I would like to thank Mrs. Shirley Maclennan who is now a retired Rhodes University staff member, for her unfailing help and enthusiam.

My heart-felt gratitude is also extended to the centre for Science Development for its financial assistance during the first year of this research, expenses involved in the research were met with their financial assistance during that year.

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A word of gratitude goes to Professor John Grogan for his guidance and encouragement. My greatest indebtedness goes to my Supervisor Professor Plasket for marking and re-marking this work that shall not fall into the dust roads of history and be forgotten.

INTRODUCTION

This thesis deals with constitutional law and other legal subjects such as Jurisprudence and Judicial Review.

One constitution is distinguishable from another by its own provisions. These provisions are usually referred to as either the basic characteristics or features of the particular constitution and these are invariably derived from the basic political philosophy and constitutional arrangements of the particular country. A coup affects these characteristics in different ways. Some automatically disappear as being incompatible with the revolution; some are modified, others are strengthened. The usurpers may choose to set aside the constitution completely and replace it with another, or amend it to suit the new situation, or rule without any constitution.

This often happens amidst the rattle of weapons and the whirr of military engines in and around the capital of a given country on that awesome occasion. This thesis sets out to examine the legal aspects of a coup d' etat. The thesis is divided into six broad sections. Part one will deal with the theoretical background. I shall discuss an overview of Kelsen's pure theory of law. The second part deals with the scope of its application in revolutionary situations and will also touch upon the reason behind the Kelsen's theory as shown by decided cases from country to country.

The third part deals with the essence as well as the significance of the doctrine of necessity to validate unconstitutional acts in the case of a coup d' etat. This discussion is to pave the way for the fourth part which is to explore the position of judges who took oath of office under the old constitution. I am to explain their position after a coup d' etat. The fifth part forms the gist of my research. I shall examine the effect of a coup d' etat on traditional constitutional concepts such as fundamental rights, separation of powers, rule of law and judicial review in the military regime. The sixth part will deal with African experience. I shall include recommendations and conclusions drawn from the Lesotho and Uganda experiences.

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ABSTRACT

This thesis commences with a short biography of Professor Hans Kelsen who was born in Prague in 1881 and died in 1973. Kelsen's Pure Theory of Law is central to this thesis. He has provided a base, that is the theoretical background to this thesis. He has given a broad definition of a revolution that includes a coup d' etat. Kelsen's pure theory of law is a theory of the positive law. Kelsen's basic norm becomes important in the event of a revolution.

I shall consider the application of Kelsen's pure theory of law, that is the scope of its application in revolutionary situations and the reason behind the Kelsenian theory as shown by decided cases from country to country. In Pakistan, Kelsen's theory was accepted and applied in the case of the State v Dosso 1958 PLD 533 SC. The court decided that the revolution had been successful as it satisfied the test of efficacy and thus became a basic law creating fact. In articulating this conclusion, the court relied explicitly on Kelsen's work. In Pakistan, Kelsen's pure theory of law has not been universally accepted. In the case of Asthma Jilani v The Government of the Punjab PLD 1972 SC 139 it was held that the theory

had no application on the facts. In the case of Bhutto v Chief of Staff, Pakistan Army and Federation of Pakistan PLD 1977 SC 670 the court went further. It held that the theory was at odds with the foundations of the Pakistani state. Anwarul Haq CJ stated that the birth of Pakistan is grounded both in ideology and legality and that as a result a theory of law which seeks to exclude these considerations, cannot be made the binding rule of decision in the courts of this country. In Seychelles, Uganda and Grenada Kelsen has been accepted as a basis for legitimacy but in these countries it was clear that the new regime had effective control. In Rhodesia one has a gradual shift from necessity to successful revolution with the passage of time and in Lesotho and South Africa Kelsen seems to have been applied without much question.

Other than the application of Kelsen's theory in the event of a revolution the courts have a second choice when they are called upon to decide on the validity of post revolution law namely the doctrine of necessity. Where this doctrine has been applied, partial recognition occurs where only the act of the revolutionary government are recognised but not the revolutionary government per se because it is necessary to do so in order to maintain or ensure civil order.

The role of the Judiciary in the event of a revolution is very important. The Judges are in a dilemma, whether to resign, whether to remain in office.

A coup d' etat affects the basic characteristics of the particular constitution. These are affected in different ways. Some automatically disappear as being incompatible with the revolution, some are modified while others are strengthened. Among these is constitutionalism which is examined to measure the performance of the rulers after a successful revolution.

The African experience shows the unconstitutional experience of Uganda and the undemocratic experience of Lesotho.

It is recommended that Africa should take unified stand to curb coups.

CHAPTER 1

THEORETICAL BACKGROUND

1.1 HANS KELSEN

At the heart of any discussion on the legal effect of a coup d' etat on traditional constitutional concepts one will find the Kelsenian theory of successful revolution. For this reason, this chapter will commence with a short biography of Professor Hans Kelsen whose pure theory of law is so central to this topic.

The following autobiography is derived from a book written by Derek van der Merwe.

Hans Kelsen was born in Prague in 1881. He died in 1973. In 1906, Kelsen completed a Doctor Juris from the University of Vienna. In 1911 he completed his Habilitationsschrift which gained him admission to the teaching staff of the University of Vienna Law Faculty. In June 1914 he was appointed to a teaching post at the Exportakademie, a University institution in Vienna specialising in international commerce but was called up for military service soon thereafter. At the end of the First World War in 1918, Kelsen was appointed full Professor at the University of Vienna. He consolidated his reputation as an internationally acclaimed Jurist while holding this position.

Kelsen was asked to participate in the drafting of a new Constitution for Austria. The section creating a Constitutional Court was his brain child. The new Constitution became law in 1920.

Kelsen was appointed a Judge of the Constitutional Court in 1921.[1] In a reform of the court in 1930, however, his judicial appointment was terminated. The court reform was the result of politically unpopular decision of the Court, given on Kelsen's advice. Kelsen left Vienna after his dismissal as a Judge in 1930 and accepted a teaching post at the University of Cologne. In 1933 Kelsen became a victim of the persecution of the Jews at the hands of the Nazis, when his services at the university were terminated. He then accepted an invitation to teach at the Institute for International Affairs in Geneva. In 1936 he accepted a chair in international law at the German University of Prague but he left Prague in 1938, returning to Geneva.[2]

1. **Derek van der Merwe, Hans Kelsen – Legal Positivism's Supreme Champion, in Essays on Law and Social Practice in South Africa, Hugh Corder, Cape Town, Juta and Co. 1988 93,95**
2. **Derek van der Merwe at 96**

Kelsen left for the United States in 1940 where he taught at Harvard Law School (on the invitation of Roscoe Pound) on part time basis for two years. He then taught at the University of California in Berkeley in the Department of Political Science. In 1946 his General Theory of Law and State was published there. He received a full professorship in 1945 and remained at the University until his retirement in 1952. He died in California in 1973 at the age of ninety one.[3]

1.2 REVOLUTION: Definition

Kelsen, for purpose of his pure theory of law, says that a revolution occurs whenever the legal order is replaced in an illegitimate way, in a way not prescribed by the former order. It is, in this context, irrelevant whether or not replacement is effected through a violent uprising against the legitimate organs empowered to create and amend the legal oder.[4] It is also irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through the actions of those in government positions or otherwise. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way in which the former did not itself anticipate. In other words then, every illegal change in the constitution of a State is a revolution.[5] At its most basic, therefore, a revolution entails an effective seizure of state power. J.M. Finnis says that a change in the identity of a legal system occurs,

> 'Whether by division of one system into two or by absorption of several into one.'[6]

Kelsen goes on to say that:

> 'A revolution in the broader sense of the word (that includes a coup d' etat) is every not legitimate change of the constitution or its replacement by another constitution. 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 small group of individuals. What is important is that the valid Constitution has been changed or replaced in a manner not prescribed by the Constitution valid until then.'[7]

3. Derek van der Merwe at 96
4. Hans Kelsen, General theory of law and State, Cambridge Mass, Harvard University Press, 1946 (translated by Anders Wedberg) at 115
5. J.M. Finnis, Oxford Essays in Jurisprudence, Oxford, Claredon Press, 1973, (edited by AWB Simpson) at 44
6. J.J. Finnis, at 50-51
7. Hans Kelsen, 'The Pure Theory of Law", London, University of California Press Berkeley 1970 at 209

Muhammad Munir, C.J. gives a relevant definition:

> 'A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change may be attended by violence or it may be perfectly peaceful. It may take the form of a coup d' etat by a political adventurer or it may be effected by persons already in public positions.'[8]

1.3 KELSEN'S PURE THEORY OF LAW

Kelsen considered himself a positivist and his pure theory of law is a theory of the positive law. It gives an answer to the question, what is law? It is concerned solely with that part of knowledge which deals with law, excluding from such knowledge everything which does not strictly belong to the subject-matter law.[9] This theory is concerned to show the law as it is, without legitimising it as just, or disqualifying it as unjust; it seeks the real, the positive law, not the right law. In this sense it is a radically realistic theory of law. The pure theory of law separates the concept of the legal completely from that of the moral norm and establishes the law as a specific system independent even of the moral law.[10]

1.4 NORMS

Kelsen says that those norms which have the character of legal norms and which make certain acts legal or illegal are the objects of the science of law. The meaning of norm is that something ought to be or ought to happen, especially that a human being ought to behave in a specific way. Norm is the meaning of an act by which a certain behaviour is commanded, permitted, or authorized.[11]

Riddal says that

'A norm is thus something to be conformed to.'[12]

It is the existence of the legal norm that distinguishes the order of the official from that of the gangster. A norm can thus be seen as an expression of intention, one individual wills that in specified circumstances another should act in a certain way.[13]

8. The State v. Dosso 1958 PLD at 538
9. Hans Kelsen, The Pure Theory of Law', 1934 (vol 50), Law Quarterly Review at 477
10. (1934) 50 LQR at 482 - 485
11. Hans Kelsen, The Pure Theory of law, Berkeley, Los Angeles London: University of California Press 1970 at 4-5
12. J.G. Riddall, Jurisprudence, Wellington, Butterworths 1991 at 106 – 107
13. J.G. Riddall, at 106 – 107

1.5 VALIDITY

Kelsen says that a norm is valid because it ought to be obeyed and applied. A general legal norm is regarded as valid only if the human behaviour that is regulated by it actually conforms with it, at least to some degree.[14]

According to Kelsen,

> 'A legal order or system consists of a hierarchy of norms, each deriving its validity as a rule of law from some superior norm. If we ask why a constitution is valid, we usually will come upon an older constitution from which its pedigree is drawn. Ultimately, we reach a constitution that is the first historically. The validity of this first constitution is the final postulate upon which the validity of all the norms of a legal order depends.'[15]

A legal system is thus like a collapsible pyramid with the Grundnorm as the foundation rock. The Grundnorm is the ultimate norm from which all subordinate norms in the legal system derive their validity.[16] Thus in any legal system it is only by presuming the validity of the orginal, basic norm (which Kelsen calls the Grundnorm), that the norms that descend from it can be counted as valid.
Hilaire McCoubrey says that

> 'The Grundnorm is the starting-point of any chain of legal norms, the apex of a normative pyramid which, through a long line of connections, authorises that decisions and actions taken in the system at ground level.'[17]

Kelsen says that the Grundnorm must be formulated as follows:

> 'Coercive acts sought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it prescribe.'[18]

This foundation on which other norms are based is referred to by Kelsen as the 'basic norm' (ursprungnorm) or the 'Constitution in the legal – logical sense' (Verpassung in rechtslogischen sinne).[19] Kelsen says that the basic norm 'brings about the unity of the system' and founds the system of the legal order.[20]

14. Hans Kelsen, The Pure Theory of Law, Berkeley, Los Angeles, London: University of California Press 1970 at 11
15. Hans Kelsen, General Theory of Law and State, Cambridge: Massachusetts, Harvard University Press 1946 at 115
16. Mitchell v DPP 1986 LRC (Const.) at 53
17. Hilaire McCoubrey and Nigel D. White, Text Book on Jurisprudence, Great Britain, Blackstone Press Limited 1993 at 133
18. Hans Kelsen, The Pure Theory of Law, Berkeley, Los Angeles, London: University of California 1970 at 200-1
19. Julius Stone, Modern Law Review, (vol.26) 1963 at 35
20. Hans Kelsen, General Theory of Law and State, Cambridge: Massachusetts, Harvard University Press 1946 at 124

Derek van der Merwe says that it should be noted that the Grundnorm is not identical to the constitution, as some commentators would seem to think.[21] Kelsen goes on to say that the higher norm legitimises the lower norm. This higher norm, again, is valid because it was created by an act of will authorised by a still higher norm.

So might one trace the validity of each and every norm of a legal order to higher more general norms. A legal order therefore consists of a hierarchical structure of lower norms and increasingly generalised higher norms. In every instance, the inquirer will eventually arrive at the constitution, whether written or unwritten, of the legal order. This constitution, in the final analysis, contains all the norms in terms of which the creation of all the other norms of the legal order are commended, authorised and permitted.[22] Kelsen deals with the hierarchic structure of legal norms, that is a norm of superior degree determines the act by which the inferior norm is to be made.[23] I can say that the Grundnorm must be all important. The highest factor in a hierarchy of norms, the mathematician's highest common factor is the Grundnorm. The Grundnorm therefore must have no rule behind it. It is the fons et origo, the final norm.

1.6 The function of the Grundnorm:

The function of the basic norm becomes particularly apparent if the Constitution is not changed by Constitutional means, but by revolution.

Hans Kelsen says that 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, or by a small group of individuals. The requirement is that the existing Constitution must be 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.[24] The basic norm is a useful guide in countries where a revolution has occurred. In the aftermath of such unconstitutional change, lawyers have believed that Kelsen's theory of the change of the basic norm was the key to unlock the mystery of the validity of pre and post revolutionary laws.

21. Van der Merwe, at 108
22. Hans Kelsen, The Pure Theory of Law, Berkeley, Los Angeles, London: University of California Press 1970 at 221
23. Hans Kelsen, 'The Pure Theory of Law', Part II, 1935 (vol.51) at 523
24. Hans Kelsen, The Pure Theory of Law, Berkeley Los Angeles, London: University of California Press, 1970 at 209

Hans Kelsen says that 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. Therefore the norms of the old order can no longer be recognised as valid norms. He goes on to say that a new basic norm is pre-supposed. A new norm endowing the revolutionary government with legal authority. If the revolutionaries fail, their undertaking is an illegal act, they can be charged with treason according to the old constitution and its specific basic norm.[25]

Whenever a Coup d' etat is staged it is not in accordance with the principle of legitimacy. It is deliberately contrary to it. In all Coup d' etat situations, there are no pretensions on the part of the plotters to follow the procedure described by the Constitution of a given country. Constitutions provide neither for a transfer of power in a Coup d' etat manner nor for a military government. Perhaps, in an apparent bid to preclude a forcible take over of government, the 1979 Nigerian Constitution provided that:

> 'The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof except in accordance with the provisions of this Constitution.'[26]

Implied in the above provision is first, that government must be run in accordance with the provisions of the Constitution. Second is the attempt to bar forcible take over of government, as it is expressly provided in the Constitution that the electoral process shall be the only recognised manner of changing government. The makers of the constitution perhaps forgot that in a revolutionary situation the law is not to be sought for in the books but in the events that surround us.

To prove that the above Constitutional provision was not an effective remedy to prevent a revolution in the circumstances of Nigeria, in 1983 the army staged a Coup d' etat and gave legal effect to their authority by substituting the old legal order for a new one.[27] Indeed one of the first and obvious casualties in the process of suspending and modifying the older Constitution was the above quoted section which seeks to preclude forcible take over.

If a revolution does not fail, all laws emanating from the new government would not be subject to review because the old order under the pre-revolution Constitution would have yielded to the new legal order. If a revolution fails however, the provisions of the old Constitution will apply and the supreme court would be able to consider the Constitutionality of any law made by the organ that has usurped the power, for example the military government.

25. Hans Kelsen, General Theory of Law and State, Cambridge: Massachusetts, Harvard University Press 1946 at 118.
26. Section 1 (2) of the Constitution of the Federal Republic of Nigeria of 1979.
27. Suspension and Modification Constitution which was a product of the December 31, 1983 Coup d' etat.

CHAPTER 2

KELSEN APPLIED

Revolutions, in the Kelsenian sense, are unfortunately by no means rare occurrences. Not surprisingly, therefore, the law reports of a number of countries provide a range of examples of courts grappling with the problem of when and in what circumstances revolutionary governments should be recognised as lawful. This part of this chapter contains a survey of some of these cases. They illustrate how courts have applied Kelsen's theory in deciding on the status of a revolutionary regime.

2.1 Pakistan .1 Pakistan

The application of Kelsen's pure theory of law was first applied in Pakistan in the case of the S .v. Dosso.[1] On 07 October 1958, the President annulled the Constitution of 02 March 1965 by issuing a proclamation dismissing the central cabinet and the provincial cabinets and dissolving the National Assembly and both the Provincial Assemblies. Martial Law was declared to be in force and General Muhammad Ayub Khan was appointed as the Chief Martial Law Administrator. Three days later the President promulgated the Laws Continuance in Force Order, the effect of which was to validate the laws in force prior to the revolution, other than the Constitution, and confirm the jurisdiction of the Courts.

Dosso and a number of other appellants had been convicted under the Frontier Crimes Regulation 1901. They argued that the sections of the Regulations which provided for referrals of cases to Councils of Elders and which authorised their conviction were void because they conflicted with the Constitution of 1956. The central issue in this case therefore was whether the Constitution of 1956 was still in force.

Muhammad Munir C.J. for the majority defined the issue in Kelsenian terms as follows,[2]

> 'But if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law creating fact because thereafter its own legality is judged not by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. '

1. 1958 PLD 533 SC

2. **The State v Dosso at 539**

The court decided that the revolution had been successful as it satisfied the test of efficacy and thus became a basic law-creating fact. On that basis the Laws Continuance in Force Order, however transitory or imperfect it may be, was held to create a new legal order. It was in accordance with this order that the validity of the laws and the correctness of judicial decisions was to be determined.[3] In articulating this conclusion, the court relied explicitly on Kelsen's work, describing him as a renowned modern jurist[4].

Doubts had been raised in Pakistan itself concerning the correctness of the decision in S.v. Dosso. It was overruled thirteen years later by the Supreme Court itself in Jilani v. Government of the Punjab[5]. This appeal arose out of a judgement of the Lahore High Court, dismissing a petition under Article 98(2)(b)(i) of the Constitution of 1962 challenging the validity of the detention of the father of the petitioner, a Mr Malik Ghulam Jilani. The detainee in this case, was arrested under an order, purportedly made in terms of Martial Law Regulation no. 78 of 1971. The Government raised a preliminary objection that the High Court could not assume jurisdiction in the matter, because of the bar contained in the Jurisdiction of Courts (Removal of Doubts) Order, 1969, promulgated by the Martial Law regime.

The High Court, relying on S.v. Dosso held that the order of 1969 was a valid and binding law and that jurisdiction had been ousted by clause 2 of the order. The Court of Appeal was required to consider whether the doctrine enunciated in S.v. Dosso was correct and even if correct, whether it applied to the facts and circumstances in which Field Marshall Ayub Khan had transferred power to General Agha Muhammad Yahya Khan and whether all legislative and executive acts performed by Khan, including the imposition of Martial Law and the promulgation of Martial Law Regulation and Orders, were illegal.

Harmoodur Rahman C.J. overruled the S.v. Dosso case. It had been argued that Muhammad Munir C.J. in the S.v. Dosso case had not waited to see whether the efficacy element required by Kelsenian theory had, in fact, been attained by the change to which he gave legal recognition. The case was decided within six days of the promulgation of Martial Law and within three days of the promulgation of the Laws Continuance in Force Order. It was therefore premature to decide on efficacy. This was borne out by the fact that the usurper was removed from power the day after judgement was given, placed under house arrest and expelled from the country.[6] He said, for instance:[7]

3. **Dosso at 540**
4. **Dosso at 539**
5. **PLD 1972 SC 139**
6. **Jilani at 163 and at 177**
7. **Jilani at 179**

> '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 jurist's proposition about law. He was not attempting to lay down any legal norm or legal norms which are the daily concern of Judges, legal practitioners or administrators.'

He went on to say that;[8]

> 'His purpose was to recognize that such things as revolutions do also happen but even when they are successful they do not acquire any valid authority to rule or annul the previous grundnorm 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 citizen.'

In rejecting the approach adopted in Dosso, he said that Muhammad Munir C.J. erred in interpreting Kelsen's theory and in applying it to the facts. The principle enunciated in Dosso, could not be treated as good law.[9]

The court decided the orders before it were not only illegitimate but were also incapable of being maintained on the ground of necessity. The detention was illegal and the High Court should have declared the impugned orders of detention to be void and of no legal effect.[10]

Dosso's case was also discussed in the case of Bhutto v Chief of Army Staff.[11] On 17 March 1977, general elections were held in Pakistan. The Pakistan People's Party, led by Prime Minister Zulfika Ali Bhutto, was credited with 155 to 200 elected seats in the National Assembly. The extent of the victory was greater than had been expected. The opposition immediately denounced the elections as rigged. There was widespread rioting in which the deaths of over three hundred people were reported. The Prime Minister held talks with the opposition in an effort to resolve the crisis but to no avail. The armed forces stepped in on 05 July 1977. Proclamations issued by General Muhammad Ziaul Haq, the Chief of the Army Staff, removed the Prime Minister from office, dismissed the Provincial Governors and Ministers, and dissolved the National and Provincial Assemblies but provided for the continued operation of existing laws. Martial Law was imposed throughout the country. The Prime Minister and other leaders of his party were detained under Martial Law Order no. 12 of 1977. Bhutto's wife sought his release on the ground that both the imposition of Martial Law and Martial Law Order no. 12 were unconstitutional, being in breach of the Constitution of 1973.

8. Jilani at 183
9. Jilani at 183
10. Jilani at 208
11. PLD 1977 SC 670

Anwarul Haq C.J. indicated that Kelsen's theory is open to criticism by making the effectiveness of the political change the sole test of its legality. He said that Kelsen's theory does not accommodate sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new legal order. He concluded that the legal consequences of such a change must be determined by a consideration of the total milieu in which the change is brought about, including the motivation of those responsible for the change, and the extent to which the old legal order is sought to be preserved or suppressed[12]. He also held that the theory of revolutionary legality had no application where the breach of legal continuity was of a temporary nature or for a specified limited purpose. That could be better described as constitutional deviation rather than a revolution. It was, he held, improper to apply Kelsen's theory to such a transient and limited change.[13]

He held in dismissing the petition that the court had found that it was possible to validate extra Constitutional action of the Chief Martial Law Administrator not only for the reason that he stepped in to save the country at a time of grave national crisis and constitutional break - down, but also because of the solemn pledge given by him that the period of consultation deviation would be of as short a duration as possible, and that during this period all his energies would be directed towards creating conditions conducive to the holding of free and fair elections, leading to the restoration of democratic rule in accordance with the dictates of the Constitution.[14]

Anwarul Haq C.J. stated that the court expected the Chief Martial Law Administrator to redeem this pledge, which he described as being in the nature of a mandate from the people of Pakistan, who had, by and large, willingly accepted his administration. In similar vein, Muhammad Akram, J. said that,

> 'ours is an ideological state of the Islamic Republic of Pakistan. Its ideology is firmly rooted in the objectives Resolution with emphasis on Islamic laws and concept of morality. In our way of life we do not and cannot divorce morality state. It had no place in our body politics and is unacceptable to the judges charged with the administration of justice in this country.'[15]

2.2 Seychelles

The application of Kelsen's pure theory of law was considered in the case of Controller of Taxes v Ramniklal Valabhaji.[16] This was an appeal against the dismissal of an application to set aside a judgement for the payment of income tax arrears. The validity of the Income Tax Decree of 1978 was challenged. It was argued that the Decree was unconstitutional and invalid because it was inconsistent with the Independence Republican Constitution 1976. A coup d' etat had occurred on 05 June

1977 which had deposed the constitutional government and placed in power Frans Albert Rene to make laws by decree having the same effect as an Act of Parliament.

12. Bhutto at 692 – 693
13. Bhutto at 693
14. Bhutto at 723
15. Bhutto at 733
16. Civil Appeal No. 11 of 1981. The Judgement in this case is not available to me. I have relied on the discussion of the case in Mitchell V. Director of Public Prosecutions 1986 LRC (Const.), 67 - 71

Rene's regime drafted a Constitution in 1979 which was endorsed by elections. Therefore his government had become the constitutional government of the Seychelles. Rene had promulgated the Income Tax Decree.

The court had the advantage of deciding the issue some four years after the coup. During that period the revolutionary regime was not challenged and there had been stable and effective government in the Seychelles, with no interruption in the ordinary life of its citizens. Hogan P. held that the Income Tax Decree of 1978 was valid. He concluded[17]

> 'I see no reason to differ from the view expressed by Garner that when a regime is firmly established and accepted as legitimate this legitimation is extended back to cover legislation enacted by the regime from the inception of its control. For these reasons, I think the Income Tax Assessment Decree (1978) was a valid enactment.'

The Kelsenian theory was thus applied in the Seychelles, in the Valabhaji case.

2.3 Uganda:

On 22 February 1966 the then Prime Minister of Uganda, Dr Milton Obote, issued a statement declaring that in the interests of national stability and public security and tranquility he had taken over all powers of the Government of Uganda. On 24 February 1966 he suspended the Constitution of 1962. On 2 March 1966, he declared that, acting with the advise and consent of the cabinet, the executive authority of government vested in the Prime Minister would henceforth be exercised by the Prime Minister acting in accordance with the advice and consent of the cabinet and that the duties, powers and other functions that were performed or were exercisable by the President or Vice-President immediately before 22 February 1966 would be vested in the Prime Minister and be exercisable by him with the advice and consent of the cabinet.[18] What the Prime Minister had done was unconstitutional. The President and Vice-President could not be removed from their office except by a resolution passed by the votes of not less than two-thirds of all the members of the National Assembly and his usurpation of their powers and functions was not contemplated by the 1962 Constitution.

A state of emergency was declared and the Emergency Powers (Detention) Regulations 1966 were made. On 11 August 1966, the applicant in Uganda v Commissioner of Prisons, ex parte Matovu[19] was served with a detention order and detained. After being detained Matovu, a Buganda Country Chief filed a habeas corpus application based on the ground that the detention order was invalid, as it was contrary to the fundamental rights provisions in section 28 of the 1962 Constitution.

17. Quoted in Mitchell at 70 – 71
18. 1966 EA 514
19. Matovu at 535

The Attorney-General, for the state, relied heavily on Kelsen in his argument. He submitted that a revolution had occurred in law, that consequently the 1962 Constitution was of no force or effect and that the 1966 Constitution was valid in law. Sir Udo-Udoma C.J. reading the judgement of the court said,

> 'These submissions were doubtless unresistable and unassailable. On the theory of law and state propounded by the positivist school of jurisprudence represented by the famous Professor Kelsen, it is beyond question, and we hold, that the series of events, which took place in Uganda from February 22 to April 1966 … Could only appropriately be described in law as a revolution.'[20]

Concluding on the point, the Chief Justice said,'[21]

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

In Matovu's case affidavits were submitted by a large number of officials, the purpose of which was to prove that the new Constitution was efficacious and that it had been accepted by the people since it came into force in April 1966. The contents of these affidavits were not challenged or contradicted. On the strength of this evidence the court found that the new Constitution had been accepted by the people of Uganda. The Chief Justice went on to say,

> 'The 1966 Constitution we hold, is a new legal order and has been effective since April 14, 1966, when it first came into force.'[22]

There was evidence therefore that the people had approved and accepted both the revolution and the 1966 Constitution. On this basis the court introduced the political doctrine of the sovereignty of the people as a factor to be taken into account in applying the doctrine of successful revolution. The application of Kelsen's theory consequently defeated the applicant's case that his detention was unlawful.

2.4 Zimbabwe:

This country was known as Rhodesia until 1980 when it attained independence and was renamed Zimbabwe. The name Rhodesia shall be used in that context. Prior to the Unilateral Declaration of Independence (UDI) in November 1965, Rhodesia was a British colony, enjoying dominion status and its government functioned according to the Constitution of 1961. In terms of this Constitution the achievement of independence required the assent of the British Parliament.

20. Matovu at 535
21. Matovu at 539
22. Matovu at 539

The Constitution envisaged a gradual advance of the African majority then denied significant political rights towards full political power. Britain instituted an unimpeded progress towards majority rule, but the Rhodesian Front Party, headed by the Prime Minister, Mr Ian Smith, resisted it. This issue was the raison d' etre of UDI.[23]

A cluster of cases collected around the issue of the legality of the Smith regime in the years after UDI. Madzimbamuto v Lardner Burke, [24] was the first and the most important of these cases. It was a challenge to the legality of UDI rule and the validity of the 1965 Constitution passed simultaneously with the declaration. Smith and his cabinet had remained in office despite the fact that the Governor of the Colony dismissed them and the British Parliament had on 16 November 1965, passed the Southern Rhodesia Act 1965 declaring Britain's continued responsibility for the territory, and the Southern Rhodesia Constitution Order in Council 1965 which declared all legislative and administrative actions of the rebellious colony null and void. Smith acted on the basis that the 1965 Constitution had superceded the 1961 one. There was no disturbance. The country was run as smoothly and as effectively as before.

In Madzimbamuto the applicant's husband had been detained under emergency regulations made under the 1965 Constitution. The applicant's case, in essence, was that the detention was illegal and unconstitutional under the 1961 Constitution. The case thus raised the question directly, of the legality of the post UDI government. The respondent's main contention was that the Smith government was the only effective one in Rhodesia. The court dismissed the application on the basis of necessity. It held that the Smith government was the only effective government of the country and that in order to avoid chaos and a vacuum in the law effect had to be given to such measures, both legislative and administrative, as could lawfully have been taken by a lawful government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order.[25] The court rejected the respondent's Kelsenian argument that, although the means by which independence had been declared and the 1965 Constitution had been introduced were illegal, the government since 11 November 1965 had become the de jure government through its effective control of the country and the complete overthrow of the old order and that, accordingly, the de jure status of the government had to date back retrospectively to 11 November 1965.

Lewis J. stated that he had no difficulty in accepting the Kelsen doctrine in the normal situation where one had a state which is already a sovereign independent state changing its form of government or its constitution by a successful internal revolution. He referred to events in Zanzibar, Ghana and Nigeria as instances where change of Constitution through a successful overthrow of the old order brought with it a lawful status to the new regime.

23. AJG. Lang, 'Madzimbamuto and Baron's case at First Instance', 1964, Rhodesia Law Journal at 68; D.B. Molteno, The Rhodesian crises and the Courts', 1969, C.I.L. S.A. at 254.
24. 1966 R.L.R. at 756
25. Madzimbamuto at 756

He found that the doctrine would only apply in such a case where the revolution had not only succeeded internally but against all efforts of whatsoever nature of the mother country to suppress it.[26] On appeal, in Madzimbamuto v Lardner Burke,[27] Beadle C.J. held that the Smith government was in complete administrative and legislative control of the country and was continuing to maintain the existing courts of law, whose orders it was enforcing. None of the legislative acts of the United Kingdom had been recognized or enforced in the territory since UDI. There was no other government within the territory competing with it in the exercise of its legislative and administrative powers.[28] He held further, the status of the Smith government was that of a de facto government, in the sense that it was in fact in effective control over the state's territory and that this control seemed likely to continue. But the government was not so firmly established as to justify a finding that it was a de jure government.[29] He also held that the government could lawfully do anything which its predecessor could lawfully have done, but until the 1965 Constitution was firmly established, and it had thus became the de jure Constitution of the territory, its administrative and legislative acts had to conform to the 1961 Constitution. The continued detention of Daniel Madzimbamuto under regulation 47(3) of Various Emergency Powers (Maintenance of Law and Order) Regulations was declared by Beadle C.J. to be unlawful on this basis.

Quenet J.P. held that, in the two years following UDI, the Smith's government had established itself as the country's paramount authority. It was the sole law maker. It maintained the courts and was in exclusive control of the country's administration and of its national forces. There was no doubt that since 11 November 1965 it had been the country's effective de facto government.[30] He held further that during the previous two years the country's internal stability had not been shaken and that, having weathered the initial storm the government had achieved internal de jure status. His decision was that the Smith government was the country's de facto government and that it had also acquired internal de jure status. The continued detention of the first appellant's husband was declared to be unlawful because regulation 47(3) was ultra vires the enabling Act.[31]

MacDonald J.A. held that the government was a de facto government, but that as far as a municipal court was concerned it was also a de jure government, as it was the

only law making and law enforcing government functioning for the time being in the territory.[32] Jarvis A.J.A. held that the government had effective control of the territory which seemed likely to continue, and that legal effect could be given to its legislative measures and administrative acts which were not inconsistent with the 1961 Constitution.[33]

26. 1968 (2) S.A. 284 (A)

27. Madzimbamuto 306

28. Madzimbamuto 326

29. Madzimbamuto 368

30. Madzimbamuto at 332

31. Madzimbamuto 376

32. Madzimbamuto at 416

33. Madzimbamuto at 422

Fieldsend A.J.A who subsequently became the Chief Justice of zimbabwe held that the Smith regime was neither a de facto government nor a de jure government, but the doctrine of necessity provided a basis for the acceptance as valid of certain of their acts.[34] Mrs Madzimbamuto was granted special leave to appeal to the Privy Council.[35]

Her appeal was allowed by a majority. The Privy Council held that however successful the revolution might appear to have been internally, or however effective it appeared to be at the time, the sovereign power was striving to crush the rebellion, albeit without the use of force. As a result, the rebellious regime could not attain de jure status internally, otherwise, there would be two lawful governments co-existing.

In R.v. Ndhlovu[36] the accused were charged with contravening section 48A of the Law and Order (Maintenance) Act. This was an Act passed by the UDI government. The accused objected to the indictment on the basis that the legislature of Southern Rhodesia was not legally empowered to make any laws. They contended that the provisions of section 48A were therefore null and void and the indictment therefore disclosed no offence. Davies J. held that the court did not sit under the 1961 Constitution, that the court was not therefore in the same hierarchy of courts as the Judicial Committee of the Privy Council and the Judicial Committee's judgement in Madzimbamuto was not therefore binding on it.[37] On appeal,[38] Beadle C.J. held that the 1961 Constitution had been annulled by the efficacy of the change. The Appellate Division upheld the findings of Davies J. The Court found further that the 1965 Constitution was the only valid Constitution and that, on the basis of fresh circumstances, the existing government had achieved internal de jure status.

2.5. Ghana

The position in Ghana is illustrated by the case of Sallah v Attorney General.[39] The case arose out of a military coup which had toppled President Nkrumah's government on 24 February 1966. The Coup leaders formed a National Liberation Council to govern Ghana, suspended the 1960 Republican Constitution, and promulgated a

proclamation on 28 February 1966 providing that persons in public or government office on the eve of the coup would continue in office, subject to enactments brought into force after that date by virtue of that proclamation. The plaintiff had been appointed a manager in the Ghana National Trading Corporation (GNTC) in October 1967.

34. Madzimbamuto 422
35. (1968) 3 All E.R. 561
36. 1968 (4) S.A. 207
37. R.V. Ndhlovu and Others 1968(4) S.A. 515 at 532
38. 1968(2) S.A. at 352
39. Constitutional Supreme Court case no. 8 of 1970. The judgement in this case was not available to me. I have relied on the discussion of the case in Mitchell V. Director of Public Prosecutions (1986) (LRC) Const. 64

The GNTC was a state owned trading corporation established under the statutory Corporations Act 1964.

A new Constitution was enacted in 1969. Section 9(1) provided for the termination of appointments of officers appointed by the National Liberation Council in 1966. The appellant, who had been appointed in 1967 to a public office in a corporation established under a statute, had his appointment terminated in February 1970 by virtue of section 9(1).

He challenged the validity of the termination, contending that his office had not been established by the National Liberation Council but by the statute. The Attorney General argued that the coup d'etat of 1966 had destroyed the old legal order, including not only the 1960 Constitution but existing laws, such laws having been re-validated under the Proclamation of 26 February 1966. Therefore the appellant's appointment came under the transitional provision of 1969. The majority of the Court of Appeal rejected the Attorney General's submissions.

Apaloo J.'s basic attitude was that Kelsen's analysis was irrelevant. He expressed scant respect for jurisprudence and legal philosophy as useful in the judicial task of statutory interpretation. He said that the literature of jurisprudence was remote from the immediate practical problems that confronted judges called upon to interpret legislation or to administer any law.[40] In response to the Attorney General's Kelsenite argument, he had this to say:[41]

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

Sowah J. held that he was not going to derive much assistance from foreign theories. He went on to impugn the validity of Kelsen's analysis. He said:[42]

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

40. Referred to in Mitchell at 64
41. Quoted in Mitchell at 64 – 65
42. Quoted in Mitchell at 65

It was a far-fetched interpretation to say that the National Liberation Council was re-establishing or creating anew all the laws of Ghana including the common law and customary law. The true interpretation was that those laws in existence should continue subject of course, to subsequent decrees that might be promulgated. Archer J. also rejected the Kelsenian approach. He had difficulty in locating any new grundnorm after the coup.

Amin J. thought differently. In a judgement based on Kelsen he held that, after the coup in February 1966, the old legal order founded on the 1960 Constitution yielded to a new legal order under an omnipotent, eight member, military cum police sovereign. Consequently, all public offices founded on this old legal order were automatically abolished. He said that notwithstanding the fact that public offices which were in existence prior to the coup bore practically the same names as after the coup, the true legal position was that these public offices and services were the creation of the National Liberation Council and they existed by virtue of, and in pursuance of the proclamation promulgated on 28 February 1966 and in certain specific case in pursuance of subsequent National Liberation Council decrees.

S.K. Date-Bah suggests that the Court of Appeal should not have dismissed Kelsen so casually without a more serious and analytical consideration of his work.[43]

Professor Ben Nwabueze,[44] is of the opinion that the events of 24 February 1966 destroyed the authority of the 1960 Constitution and with it all the laws and offices made or established under it. It is interesting that, while repudiating Kelsen, some of the judges, perhaps unwittingly, still talked of the fall of the first Republic. Does this not import the destruction of the old legal order, or was the first Republic just Dr Nkrumah. He adds that,the fact that a revolution is not a mere change in the personnel of the government is borne out by the fact that it can be staged from within the government, by the ruler himself, as happened in Germany in 1933 when Hitler, as Chancellor, subverted the Constitution to assume absolute powers, or in Uganda in

1966 when Prime Minister Milton Obote abrogated the Constitution and declared himself executive president.

2.6 Grenada:

On 13 March 1979, the New Jewel Movement overthrew the government of Eric Gairy and seized power under the leadership of Maurice Bishop. If formed the People's Revolutionary Government. The 1973 Constitution was suspended. The existing Supreme Court was abolished and the Supreme Court of Grenada was established by People's Law No. 4. People's Law No. 84 abolished appeals to the Judicial Committee of the Privy Council. On 19 October 1983, Maurice Bishop and others were killed when the Revolutionary Military Council seized power.

43. S.K. Date-Bah 'Jurisprudence Day in Court in Ghana (1971) 20 ICLQ 315
44. Professor B.O. Nwabueze, Constitutionalism in the Emergent States, London, Hurst: 1973 at 231 - 232

In Mitchell v Director of Public Prosecutions,[45] the applicants had been charged with murder and were awaiting trial in the High Court of Grenada. They brought an application challenging the competence of the court to hear the charges on the basis that the court brought into existence by People's Law No. 4 had been created in breach of the Constitution and was, accordingly unconstitutional and illegal.

The court held that the situation at the time of the seizure of power by the People's Revolutionary Government and the effectiveness of its rule during four and a half years in power validated the legislative enactments of that government as it was firmly established as legitimate. It held further that this legitimacy extended back to cover legislation enacted by the regime from the inception of control. The application was therefore dismissed. The appellants appealed to the Court of Appeal.[46] Their appeal was dismissed. Haynes P. suggested an approach that should be adopted in dealing with Kelsen's pure theory when he said:[47]

> 'Kelsen's Jurisprudential theory may be a neat, tautly-argued analytical system that cannot easily be faulted on logical grounds so far as its internal consistency is concerned, nonetheless before such a logical system is applied to the solution of an actual case the Judges are entitled to consider, whether, in addition to its logicality, the consequences of applying the Kelsenite viewpoint are socially desirable or not. This approach one may characterize as that of sociological jurisprudence, as distinct from the pure analytical jurisprudence, epitomized by Kelsen's work.'

2.7 Lesotho:

On 20 January 1986 a coup d' etat was effected by the Lesotho Paramilitary Force. In Mokotso v H.M. King Moshoeshoe II and Others,[48] one Thabo Mokotso applied to the High Court for an order that constitutional government and Parliamentary democracy under the Constitution of 1966 should be restored. Cullinan C.J. said that it was a notorious fact that news of the coup d' etat was greeted with jubilation by the people

in the streets of Maseru. He held the revolutionary regime was in effective control. There was no other government or faction in opposition. He observed that it had governed effectively for two and a half years. Kelsen was therefore applied in Lesotho, when the court held the government which came into power on 20 January 1986, was the lawful government of the Kingdom of Lesotho and its legislation had been legitimated ab initio.[49]

45. 1985 LRC (Const) 127
46. Mitchell V. Director of Public Prosecutions 1986 LRC (Const.) 35
47. 1986 LRC at 56
48. 1989 LRC (Const.) 24
49. Mokotso at 147

2.8 South Africa

The Mokotso case was relied on in the case of Matanzima v President of the Republic of Transkei.[50] In this case the court held that a revolutionary government acquired legitimacy when it is firmly established, there being no real danger that it will itself be ousted from power and when its administration is effective in that the people by and large have acquiesced in and are behaving in conformity with its mandates.

In the case of Mangope v van der Walt,[51] the respondents were the joint administrators appointed by the South African Government and the Transitional Executive Council to govern Bophuthatswana for the time being in the place of the applicant who had been the President of the homeland. The applicant sought an order that the appointment of joint administrators of Bophuthatswana was of no force and effect within the territory of Bophuthatswana. The court held that the doctrine of successful revolution was applicable. The administration was effective because the majority of the people were behaving in conformity with the new administration.[52]

2.9 Conclusion

Some of the views expressed in Bhutto's case can be read to mean that, the court called upon to decide the question should take into consideration both the reason why the old Constitutional government was overthrown and the nature and character of the new legal order, was the motivation mere power grabbing or was it a rebellion or example against oppression or corruption or ineptitude? And is the new legal order a just one? In this case there was a total rejection of Kelsen because the very basis of the Pakistan's state does not accommodate that. In Pakistan, therefore, necessity is the only basis on which the usurpation of power will be condoned.

In Seychelles, Uganda and Grenada, Kelsen has been accepted as a basis for legitimacy but in these countries it was clear that the new regime had effective

control. In Seychelles and Grenada enough time had elapsed for Kelsen to be applied safely.

In Rhodesia one had a gradual shift from necessity to successful revolution with the passage of time. In Lesotho and South Africa Kelsen seems to have been applied without much question.

It is submitted that the application of Kelsen results in recognition of a revolutionary government by a municipal court. In the case Madzimbamuto v. Lardner Burke N.O. and Another.[53] MacDonald J.A. held that a municipal court recognises the legality of the only law-making and law enforcing government functioning for the time being within the state. From the point of view of a municipal court a government is either lawful or not lawful.

50. 1989(4) S.A. 989 (T.K.)
51. 1994(3) S.A. 850 (BGD)
52. 1994(3) S.A. at 866
53. 1968(2) S.A. 376 at 415 B-C (A-D)

He recognized the then government as the only existing law-making and law enforcing government within the state of Rhodesia and enforced laws passed in accordance with the 1965 Constitution. Although every Judge in the case came to a different conclusion his idea in this point cannot be assailed.

How long does the unconstitutional regime have to survive before Kelsen can be applied? The duration of time appears to be irrelevant.

The criterion for recognition of the unconstitutional regime was stated in Mitchell v. DPP, where the court of Appeal of Grenada concluded that for a revolutionary government to be considered legal, the revolution should not only be successful and the new government firmly established, but there should be general obedience based on consent and approval rather than fear and the new regime should not be oppressive or undemocratic.[54]

A conclusion can be drawn that where Kelsen has been applied, the government is accorded total recognition and total recognition is accorded to a revolutionary government where that government and the area over which it has effective control is a state according to the criteria of statehood in international law. That means it must have a territory, population and government.[55] Partial recognition occurs where only the acts of the revolutionary government are recognized but not the revolutionary government per se because it is necessary to do so in order to maintain or ensure civil order, and the doctrine of State necessity is applied.

54. Mitchell and Others V Director of Public Prosecutions 1986 LRC (Const) 35
55. J.G. Starke, Introduction to International law, Butterworths: London 1989

CHAPTER 3

THE NECESSITY PRINCIPLE IN CONSTITUTIONAL LAW

3.1 Introduction

In the previous chapter the application of the Kelsenian theory in the event of a revolution was discussed. This chapter discusses the second choice that courts have when they are called upon to decide on the validity of post revolution law.

The doctrine of necessity is commonly applied as a defence in criminal law. Burchell and Hunt say that in criminal law an act to be justified on the ground of necessity, the act has to meet the following requirements:

(a) 'a legal interest of the accused must have been endangered
(b) by a threat which had commenced or was imminent but which was
(c) not caused by the accused's fault and, in addition, it must have been
(d) necessary for the accused to avert the danger, and
(e) the means used for this purpose must, have been reasonable in the circumstances.'[1]

The defence of necessity arises when, confronted with a choice between suffering some evil and breaking the letter of the law in order to avoid it, the accused chooses the latter alternative. Necessity relates to the unlawfulness or otherwise of the accused's act so that where the defence succeeds the accused is acquitted on the ground that his act was justified by the necessity of the occasion.

The doctrine of necessity is not easily applied as shown by those cases dealing with killing in circumstances of necessity. In the case of R. v Dudley and Stephens,[2] in this matter Brooks and the deceased, a seventeen year old boy, were in an open boat in the South Atlantic.

1. Burchell and Hunt, South African Crimininal Law and Procedure Volume I, 1970, Juta And Co Limited, Cape Town at 285
2. (1884) 14 QBD 273

After 20 days in the water, Dudley with Stephen's assent, Brooks objecting, killed the boy and all three fed off his body for four days. They were rescued on the 5th day after the killing, and charged with murder. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be no. They were found guilty of murder. An act of necessity usually results in the infliction of harm upon an innocent person.

3.2 Constitutional Law Position:

The doctrine of necessity is used as a justification for an action otherwise unlawful but necessary to preserve the life of the state or society.[3] On the face of it, the doctrine would appear to be inconsistent with the law. Glanville Williams has put the point cogently:

> 'What it comes to is this, that the defence of necessity involves a choice of other lesser evil. It requires a judgement of values, on adjudication between competing goals and a sacrifice of one to the other. The language of necessity disguises the selection of values that is really involved. If this is so, is there any legal basis for the defence? The law itself enshrines values, and the judge is sworn to uphold the law. By what right can the judge declare some value not expressed in the law, to be superior to the law? How in particular, can he do this in the face of the words of a statute? Does not the defence of necessity wear the appearance of an appeal to the judge against the law'[4]

The doctrine does not operate from outside the law, but is implied in it as an intergral part thereof. The defence of necessity like other defences do not negate the law, it is part of the law.

Glanville Williams adds that the defence of necessity is an implied exception to particular rules of law.[5] It does not abrogate express law, but can only qualify it for the purpose of averting the threatening danger.

3. Mitchell and others v. Director of Public Presecutions and Another 1986 LRC (Const) 127

4. Glenville Williams, 'The defence of necessity' (1953) 6 Current Legal Problems, 216 at 224

5. Glanville Williams at 224

The writer here is indicating that a law does not need an express provision that mentions defences as defences are implied to any prohibition, a legal system has a number of defences and these are known. If the defence of necessity has been raised successfully in court that does not mean that the law has been repealed.

De Smith observed that the necessity must be proportionate to the evil to be averted and acceptance of the principle does not normally imply total abdication from judicial review or acquiescence in the suprression of the legal order. It has been recognised as an implied exception to the letter of the constitution.[6]

The moral attitude is expressed in Cicero's words that it is better to receive than to inflict an injury (Accipere quam facere injuriarum proerstet), and also the moral question whether the end can justify the means. The end can justify the means on three conditions.

(i) 'that the end be good.
(ii) that the means chosen be either purely good or if evil, having less evil in them than on a balance there is of real good in the end.
(iii) That they have more of good in them, or less of evil, as the case may be than any other, by the employment of which the end might have been attained.' [7]

The rationale of the doctrine is that, in an emergency imperilling public order, or public security, the safety of the people is the supreme law. But this supreme law of necessity, the organs of the state are entitled, in the face of such an emergency, to take all appropriate actions even in deviation from the express provisions of the constitution, in order to safeguard law and order and preserve the state and the society.[8] Its application is, however, subject to the following conditions:

(i) 'An imperative necessity arising from an imminent and extreme danger affecting the safety of the state or society;
(ii) Action taken to meet the emergency must be inevitable in the sense of being the only remedy.'

6. De Smith, Constitutional and Administrative Law, (5th ed) London, Pelican Books 1985 at 80
7. Glanville Williams, at 225
8. Glanville Williams, at 225

(iii) it must be proportionate to the necessity, that it must be reasonably warranted by the danger which it was intended to avert;

(iv) it must be of a temporary character limited to the duration of the exceptional circumstances;

(v) the temporary incapacitation of the authority which normally has the competence to act.'[9]

The constitutional history of England shows, the civil war which brought about the defeat, trial and execution of Charles in 1649[10] and also resulted in Glorious Revolution of 1688 which dethroned James II.[11] Chitty refers to both episodes as instances where Parliament assembled in an illegal manner, that is, without the summons of the King. In both these instances the necessity of the case rendered it necessary for the Parliament to meet as they did, there being no King to call them together and necessity supersedes all law.[12]

3.3 The Pakistan cases:

The doctrine of necessity in public law as a principle of revolutionary legality was used in Pakistan. In the case of Special Reference,[13] I shall show an example of the breakdown of the government. During the chaotic opening years of its existence as an independent state Pakistan found itself, in 1955, to be without a legislature at all. The Constituent Assembly that had sat and wrangled since independance had been dissolved and, apparently, there was no legal provision for its reconvention. Meanwhile there was urgent need for certain essential legislation to replace certain earlier enactments found to be invalid.

9. **Professor B.O. Nwabueze, Constitutionalism in the emergent states, London: Hurst, 1973 at 181**

10. Gretchen Carpenter, Introduction to South African Constitutional Law, 1987, Durban, Butterworths: at 39

11. Gretchen Carpenter at 41

12. Chitty, prerogatives of the crown, 182 0 ED at 283-286

13. No. 1 of 1955 (1955) IF CR - 439

The Governor-General, therefore, purported to make provision by proclamation both for the reconstitution of the Constitutuent Assembly and, for the required legislation pending final decision thereon by that Assembly. This exercise of legislative power by the Governor-General was held to be valid by the court. The Federal Supreme Court held that in the special circumstances the Governor-General had the power during the interim period, under the common law of necessity, temporarily to validate those laws and to do so retrospectively. It was held that the Governor-General had acted in order to avert an impending disaster and to prevent the state and society from dissolution.

Cornelius J. and Muhammed Sherif J. returned a minority judgement. They maintained that the common law of necessity is confined to cases where in times of war or other national disaster the executive might interfere with private rights but that it has never been extended to changes in constitutional law.

In the case of Jilani v the Government of the Punjab,[14] the Court of Appeal was required to consider whether the doctrine enunciated in S.V. Dosso was correct and, even if correct, whether it applied to the facts and circumstances in which Field Marshall Ayub Khan had transferred power to General Agha Muhammad Yahya Khan and whether all legislative and executive acts performed by General Agha Muhammad Yahya Khan, including the imposition of Martial Law and the promulgation of Martial law Regulations and Orders, were illegal.

The court decided that the orders before it were not only illegitimate but were also incapable of being maintained on the ground of necessity. The judge conceded that recourse had to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself.

The judge did not accept the view that the doctrine of necessity is for validating the illegal acts of usurper's. The judge was of the opinion that this doctrine can be invoked in aid only after the court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then that the question arises as to how many of the usurpers acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality, in the wider pubic interest.

14. PLD 1972 SC 139

The judge called this a principle of condonation and not legitimisation. The law of necessity can validate or condone only such administrative and legistlative acts as are reasonably required and needed for the orderly running of the state.[15]

It is submitted that the other cases I have read do no raise this notion of condonation. Whenever the doctrine of necessity is applicable it legitimises the acts of usurpers.

It was the existence of exceptional circumstances in the case of Bhutto v. The Chief of Pakistan Army and Federation of Pakistan,[16] that influenced the army to take action in order to protect or preserve some vital function of the State. On 17th March 1977, general elections were held. The Pakistan People's Party won the elections. The opposition immediately renounced the elections as rigged. Protest demonstrations and strikes gradually built up to widespread rioting in which the deaths of 300 people were reported.

Talks between the Prime Minister and the opposition failed. There was no other course of action reasonably available. The armed forces stepped in on 5th July 1977. The aim of the army was to organise free and fair elections which were to be held in October 1977. The court held that the exceptional circumstances prior to 5th July 1977 fully attracted the doctrine of necessity and of the maxim salus populi suprema lex. The action that was taken by the army was regarded as valid.

The court applied the law of necessity. The court held that this was not a case where the old legal order had been completely suppressed or destroyed, but merely a case of a constitutional deviation for a temporary period and for a specific and limited objective, namely, the restoration of law and order and normality in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution.[17]

It was a situation for which the constitution provided no solution and the armed forces had, therefore, to invervene to save the country from chaos and bloodshed to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster.

15. Jilani V. The Government of the Punjab 1972 SC 139
16. PLD 1977 SC 670
17. Bhutto at page 670

It is submitted that the imposition of Martial Law, therefore, stood validated by the doctrine of necessity, and the Chief Martial Law Administrator was entitled to perform all such acts and promulgate all legislative measures. That conduct fell within the scope of the law of necessity.

3.4 The Position in Cyprus:

This can be illustrated by the case of the Attorney-General of the Republic of Cyprus v. Ibrahim,[18] The report of this case is not available to the writer but some account of it is given in the case of Mitchell and others v. Director of Public Prosecutions and another 1987 LCR 127. The Cyprus Constitution of 1960 gave to the Turkish Community 18 per cent of the right to participate in all important offices of the state, executive, legislative and judicial. That meant 18 per cent of all members of the legislative were to be Turks. Their rights were entrenched in the Constitution, some of which could not be amended at all. Article 133.1 provided for a Supreme Constitutional Court composed of a Greek, a Turk and a neutral judge as President with two votes. Article 153.1 provided for a high court of justice composed of two Greek judges, one Turkish judge with a neutral judge as President with two votes.[19]

In 1964, Cyprus was a deeply divided society. The Turkish Cypriots had withdrawn from participation in the machinery of Government. The neutral President had resigned, with no available replacements. The administration of justice was thrown into chaos. For some months Turkish judges did not attend their courts. The Supreme Constitutional Court had not met since August 1963 and by July 1964 over 400 cases were pending. Both the Supreme Constitutional Court and the High Court of Justice had ceased to function.[20]

In July 1964, the House of Representatives, sitting without its Turkish members passed a law to establish a new Supreme Court to exercise the functions previously vested in the Supreme Constitutional Court and the High Court. This law (no. 33 of 1964 title unknown) was inconsistent with important articles of the Constitution and which articles were declared to be unalterable.

18. 1964 CRL 195
19. 1987 LCR at 127
20. Mitchell at 127

Moreover, the Constitution required laws to be promulgated by both the Vice President as well as the President, and to be published in Turkish as well as Greek. This was not done. It was an unconstitutional law, enacted and published in an unconstitutional manner, by an unconstitutionally constituted Parliament.[21]

In August 1964 four persons committed for trial at Assizes were granted bail by a district judge. The Attorney-General appealed to the Supreme Court against this order. Three judges chosen under the 1964 law sat to hear the appeal. Counsel for the respondents took objection to the legality of the proceedings. His objection was that the court had no legal existence and no power to adjudicate as the law creating it was unconstitutional and a nullity. The Attorney-General submitted it was validly enacted on the legal foundation of the law of necessity to preserve the administration of justice, law and order**.** The appeal was allowed and the order for bail set aside.

In his judgement Triantafyllides J, held that the legal doctrine of necessity should be read into the provisions of the written constitution and must be deemed to be part of the scheme of the constitutional order in Cyprus so as to enable the interests of the country where the constitution does not contain adequate express provision for the purpose. The judge went on to say that if the administration of justice could no longer be secured in a manner which would not be inconsistent with the Constitution, then the House of Representatives, elected by the people, should be empowered to take such necessary steps as are warranted, by the doctrine of necessity, in the exigencies of the situation.[22]

Josephides J. said that he was of the opinion that the doctrine of necessity in public law is, in reality, the acceptance of necessity as a source of authority for 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.[23] In such cases salus populi becomes supreme lex.

21. Mitchell at 127
22. Mitchell at 127
23. Mitchell at 127

The judge held that the government had to choose between two alternatives, either to comply with the strict letter of the Constitution that is, cross its arms and do nothing but witness the complete paralysis of the judicial power, which is one of the three pillars of the state, or to deviate from the letter of the Constitution, which had been rendered inoperative by the force of events, in order to do what was imperatively and inevitably necessary to save the judicial power temporarily until return to normal conditions so that the whole state structure could not crumble. [24]

Vassiliades J. reached the same conclusion and stressed the importance of a properly functioning judicial system, for the life of the state, for the existence of the community, and for the daily life of every person living within the territorial boundaries of the Republic.

3.5 The Rhodesian Crisis:

In Rhodesia, on November 5, 1965, a state of emergency was proclaimed by the Governor and emergency regulations were made, under which the Minister of Justice, Mr. Lardner-Burke, ordered one Daniel Madzimbamuto to be detained in prison on the ground that he intended to commit acts in Rhodesia which were likely to endanger the public safety, disturb or interfere with public order or interfere with the maintanance of any essential services. Under the Constitution of 1961, a state of emergency could last only for three months in the first instance, but could be prolonged by a resolution of the legislative assembly.

The three months period of the state of emergency expired on February 4, 1966. The Unilateral Declaration of Independence (UDIi) having been declared, the legislative assembly could not lawfully resolve to prolong the state of emergency. Nevertheless, the officer administering the government, acting under the 1965 Constitution, prolonged the state of emergency and made fresh emergency regulations by virtue of which the detention of Madzimbamuto was continued. His wife in Madzimbamuto v. Lardner-Burker,[25] then instituted proceedings in the High Court of Rhodesia challenging the legality of her husband's continued detention after February 4, 1966.

24. Mitchell at 127
25. 1968 (2) S.A. 284 RAD

The High Court, while affirming the unlawful character of the rebel constitution and government nevertheless upheld as valid the regime's emergency powers and regulations and consequently Madzimbamuto's continued detention under them. The ground for this finding was necessity, which the court held arose from the need to avoid chaos and vacuum in law.

Madzimbamuto's wife noted an appeal to the Appellate Division,[26] Fieldsend A.J. A. held that the necessity relied on was the vacuum which would result from a refusal to give validity to the acts and legislation of the post UDI authorities in continuing to provide for the everyday requirements of the inhabitants of Rhodesia over a period of two years.

If such acts were to be without validity there would be no effective means of providing money for the hospitals, the police, or the courts, of making essential by-laws for new townships or of safeguarding the country and its people in any emergency which might occur, to mention but a few of the numerous matters which require attention in the complex and modern state. Without constant attention to such matters, the whole machinery of the administration would break down, to be replaced by chaos, and the welfare of the inhabitants of all races would be grievously affected.

It was emphasised that the application of the doctrine of necessity to bestow validity upon certain acts of the rebel government was subject to the qualification that:

(a) 'such acts must be directed to and be reasonably required for the ordinary running of the state.
(b) the rights of citizens under the 1961 constitution were not defeated; and
(c) there was no consideration of public policy to preclude the court from upholding such an act, for instance, if it were intended to or did in fact in its operation directly further or entrench the usurpation of power by the rebel government.'[27]

26. 1968 (2) S.A. 284 RAD
27. Madzimbamuto, V. Lardner-Burke 1966 RLR 256

One of the requirements in criminal law for the doctrine of necessity is that the situation giving rise to necessity must not have been caused by the accused's fault. It is submitted that the vacuum in government which threatened chaos in the society was entirely of the making of the rebel government. It was a direct consequence of their illegal seizure of independence. It can scarcely be for them to set up their own wrongdoing as creating a necessity for their continued violation of the law and the Constitution. The blame for the vacuum lies at the door of those who created it through the illegal action of the revolution itself, and it is for them to end the vacuum by returning to constitutional rule.

The doctrine of necessity is subject to the condition that it must be of a temporary character limited to the duration of the exceptional circumstances. Ian Smith was to stay in power for an indefinite period and with no intention to give up political power. A measure of a permanent nature does not meet the requirements for the application of the doctrine. The doctrine envisages that the measures taken must be of a temporary character.

The wife of Madzimbamuto further appealed to the Privy Council. The majority of their lordships of the Privy Council, [28] held that to accord validity to the acts of the rebel regime on the ground of necessity would be to enable the doctrine to override and nullify the legislation (1961 Constitution) of the lawful sovereign, which not only transferred all political power in Rhodesia to the British Government but also declared void any law made, business transacted, steps taken or function exercised in contravention of the legislation.

3.6 The Madras Crisis:

In the case of RV Stratton and others,[29] The report of this case is not available to the writer, but some account of it is given in the Mitchell and others V Director of Public Prosecutions and another 1987 LRC at 127. The accused, formerly members of the Governor's Council of Madras, were charged with unlawfully imprisoning Lord Pigot, the Governor, and unlawfully usurping the power of governing Madras.

28. Madzimbomuto V. Lardner Burke 1969 (1) A.C. 645
29. 21 State Trials 1045.

It appears from the report of the case that Madras, in terms of its Constitution, was governed by a council, presided over by a Governor, who alone had power to summon the Council, and whose presence at sessions thereof was essential to the validity of its proceedings.

The Council was not a merely advisory body. Its decisions, by way of majority vote, were binding, the Governor having merely a deliberative vote, and a casting vote in the event of equality. A dispute having arisen, in connection with certain instructions to be given to the Commander of the garrison, between the Governor, on the one hand, and a majority of the Council, on the other, the Governor adopted the arbitrary and clearly unlawful course of excluding sufficient of the Council members from the proceedings of that body to give him a majority in the remaining rump. Lord Mensfield, compared this arbitrary proceeding to Cromwell's historic purge of the House of Commons.

The question was, whether the illegality of the Governor's conduct justified, in law, the setting up by the accused of their own illegal government. The court held that such justification could rest only on what the judge termed imminent, extreme, necessity which would be present if there was no other remedy to apply for redress. The act must be done with a view of preserving the society and themselves, with intent of preserving the whole. [30]

The accused were convicted, for the evidence disclosed no imminent menace to the maintenance of Madras, or to the lives and property of its inhabitants, such as might justify the accused in resorting to self-help instead of seeking legal redress.

3.7 The Nigerian Crisis:

On 15 January 1966 the Nigerian army staged a coup d'etat. Its operations in the Northern Capital, Kaduna, overthrew the regional government of Sir Ahmedu Bello, who was killed when the soldiers stormed his official residence. In the West and Lagos, the operations were only partially successful.

30. **21 State Trials at 1224**

The head of the Western Regional Government, Chief Akintola, was killed, and the Federal Prime Minister, Sir Abubakan Tafawa Balewa, and his minister of Finance, Chief Festus Ilatic–Ebo, were kidnapped and taken to an unknown destination, where some days later their bodies were discovered by villagers.[31]

In a short but historic speech on January 16, the Acting President, Dr. Nwafor Orizu announced to the anxious nation that he had been advised by the Council of Ministers that they had come to the unanimous decision voluntarily to hand over the administration of the country to the armed forces of the Republic with immediate effect, and expressed the hope that the new administration would ensure the people of stability of the Federal Republic of Nigeria and win their full co-operation. He then called upon the General Officer commanding the armed forces to inform the nation of the policy of the new administration.[32]

The President lacked power under the express provisions of the Constitution to cede sovereignty to the armed forces. Was the hand-over, then, justified by necessity?

The doctrine of necessity requires, not only that the action must be justified by the existence of the exceptional circumstances, but also that the authority competent to take the necessary action must have been temporarily incapacitated. There was in fact such temporary incapacitation of the competent authority, because on 15 January 1966 the army staged a coup d'etat. As a result the Federal Parliament and the regional legislatures could not function. The premiers of both the North and West had been killed in the early hours of January 15. With their deaths all the other ministerial appointments in the two regions were, in accordance with the Constitution, vacated. The army was determined to topple the government.

It is submitted that since the object is to save the state and society from destruction, if this can only be done by abdicating sovereign power to a body best able to achieve the object, then abdication of sovereignty ought to be within the permissible ambit of the doctrine.

31. Abiola Ozo, " The search for a grundnorm in Nigeria," 1971 Volume 20, International and comperative Law Quartely at 120

32. Abiola Ozo at 123

In the case of E.O. Lakanmi Kikelomo Ola v The Attorney General (Western State) and others, [33] the military government passed Decree No. 1 of 1966 which authorised the investigation of the assets of certain public officers. The West Nigerian military government enacted a similar law the following year, which extended to persons other than public officers. That was Decree no. 45 of 1968. The appellants contended that their assets had been wrongly confisticated under Decree No. 45 of 1968 which was invalid and ultra vires the Constitution of the Federation of 1963 because, the Federal Military Government was only an interim Military Government, to which power had been transferred by the old civilian regime only for a limited purpose of restoring law and order and after which power should be handed back to them. The Federal Military Government could only make laws going beyond the purpose of restoring law and order if such laws could be justified under the doctrine of necessity.

The respondent argued that a revolution had occured and that the Federal Military Government, therefore according to the Kelsenian principles, had an unfettered power to rule by decree. The Supreme Court Declared decree No.45 of 1968 invalid as contrary to the Republican Constitution of 1963, thereby allowing the appeal of the appellants.

For the sake of clarity, the ratio decidendi of the judgement in the Supreme Court can be set out as follows. The events of January 15, 1966, did not amount to a revolution but a mere offer or invitation to the armed forces to form an interim military government, making it clear that only certain sections of the 1963 Republican Constitution were to be suspended and the offer was duly accepted by the armed forces. The constitutional interim government which came into being by the wishes of the representatives of the people, and whose object was to uphold the Constitution, could only derogate from that Constitution if the derogation was justified under the doctrine of necessity.

It is submitted that the Nigerian Supreme Court was mistaken in its assessment not only of the factual events but also of the legal situation. The view that government was transferred to the army was misconceived because the 1963 Republican Constitution made no provision for such a transfer of power. The events which transpired between the group of Ministers and the armed forces could not be regarded as a voluntary transfer of power but an unavoidable abdication of power by the remaining ministers left in the cabinet.

33. S C 58/69 OF April 24, 1970

3.8 The Grenada Revolution:

The position in Grenada is demonstrated by the events that took place on 13 March 1979 when the New Jewel Movement, the political party in opposition to the then ruling Grenada United Labour Party staged a coup d' etat while Prime Minister, Sir Eric Gairy, was abroad. [34] Maurice Bishop, the leader of the usurping party dissolved parliament. The ministers of the overthrown Government were excluded from their offices. The usurpers assumed all excecutive and legislative powers. They declared the suspension of the Constitution and that all other existing laws would continue in force. Maurice Bishop called this new administration a People's Revolutionary Government.

There was a second coup d'etat, when on 19 October 1983, Maurice Bishop along with some of his Ministers were murdered. A Revolutionary Military Council then assumed power. Two pieces of legislation were continued in force, that is, the People's Laws no's 14 and 84. The People's Law no 84 of the 10th November 1979 declared that all appeals to the Privy Council were abolished. All criminal indictments were tried by a jury in the High Court created by People's Laws No. 4 and No.14.

During August 1984, Mitchell and others were committed by a magistrate to stand trial for murder before the then High Court of Grenada. They challenged the legal existence, constitutionality and validity of the High Court established by People's Laws No's 4 and 14 of the People's Revolutionary Government. The High Court, they alleged, had no jurisdiction to try them, as all these laws were legally nullities and so void. The only court which could legally try them was the High Court established by the Courts Order 1967, the court in force just before the revolution happened.

The respondents did not deny the unconstitutionality of the court vis-a vis the Constitution of 1973. But, they contended, when the new High Court was constituted, it had validity on the legal foundation of the law of necessity. The necessity, they submitted, was created by the fact that the Supreme Court of Grenada and the West Indies Associated States had ceased to function and had to be replaced to preserve the administration of justice, law and order.

34. Mitchell and Others v Director of Public Prosecutions and Another 1987 LRC (Cont.) 127

The applicants contended that the doctrine of necessity was, in the circumstances, inapplicable and even if it did apply to validate the court, such validity would have expired with the overthrow of the regime. The court held that the doctrine of necessity was capable of application to validate unconstitutional legislation by a constitutional representative government in parliament if the requisite conditions are satisfied. These requisite conditions were stated as follows

(i) 'An imperative necessity must arise because of the existence of exceptional circumstances not provided for in the constitution, for immediate action to be taken to protect or preserve some vital function to the state
(ii) There must be no other course of action reasonably available.
(iii) Any such action must be reasonably necessary in the interest of peace, order and good government; but it must not do more than is necessary or legislate beyond that.
(iv) It must not impair the just rights of citizens under the constitution.
(v) It must not be one, the sole effect and intention of which is to consolidate or strengthen the revolution as such.'[35]

The ruling was that People's Laws No.4 and 14 stood validated on the legal basis of necessity.

3.9 Conclusion:

It is submitted that in the jurisdictions with written constitutions of the Westminster model the courts recognise that the constitution does not and cannot provide for every political situation that might arise. The doctrine of necessity supplements what a legal instrument would have provided to deal with an eventuality it did not contemplate. This is evident from the experience of Rhodesia when Mr. Ian Smith declared Unilateral Declaration of Independence as a result there were two Constitutions for this country with some citizens owing allegiance to the old Constitution while other citizens owed allegiance to the new Constitution.

35. Mitchell and other V. Director of Public Prosecutions and Another 1986 LRC (Cont.) at 88-89

A written constitution is an instrument of government, and the relevant implication in the event of breakdown of the organs it establishes would seem necessarily to be not that anarchy should prevail, which is contrary to the fundamental purpose of any constitution, but that recognition should be accorded to such of the acts of the illegitimate authorities that are necessary at least to preserve a functioning society pending the restoration of constitutional government. Hence some authorities have applied the doctrine of necessity.

The doctrine of necessity has been used to validate unconstitutional administrative and legislative acts done and passed by a constitutional functionary acting completely outside his constitutional powers. In the case of Special Reference,[36] Pakistan was without a legislature. The Governor-General then exercised legislative power. The Federal Supreme Court held that in the special circumstances, the Governor General had the power during the interim period, under the common law of necessity, temporarily to validate those laws and to do so retrospectively. It was held that the Governor General had acted in order to avert an impending disaster and to prevent the state and society from dissolution.

The doctrine of necessity was considered where a wholly unconstitutional body exercised de facto the sovereign executive and legislative powers of the state. In the case of Madzimbamuto v Lardner-Burke,[37] Fieldsend J.A, held that necessity was invoked because there was a vacuum which would result from a refusal to give validity to the acts and legislation of the authorities as the authorities have continued to provide for the everyday requirements of the inhabitants of Rhodesia over a period of two years.

If such acts were not accorded legal validity, there would be no effective means of providing money for the hospitals, the police, or the courts, or making essential by-laws for new townships or of safeguarding the country and its people in any emergency which might occur, to mention but a few of the numerous matters which require attention in the complex and modern state. Without constant attention to such matters, the whole machinery of the administration would break down, to be replaced by chaos, and the welfare of the inhabitants of all races would be grievously affected.

36. Special Reference No.1 of (1955) IFCR 439
37. 1968 (2) S.A. 284 RAD

The doctrine of necessity was used to validate legislative acts by a parliament unconstitutionally constituted. In the case of the Attorney General of the Republic of Cyprus v. Ibrahim, Triantafylides J. held that if the administration of justice could no longer be secured in a manner which would not be inconsistent with the constitution, then the House of Representatives, elected by the people should be empowered to take such necessary steps as are warranted, by the doctrine of necessity, in the exigencies of the situation.

The doctrine of necessity has been used to validate acts by an Army Chief as Chief Martial Law Administrator. In the case of Bhuto, v the Chief of Pakistan Army and Federation of Pakistan,[39] the court applied the law of necessity. Although there was a complete take over by the army, the court held that this was merely a case of a constitutional deviation for a temporary period and for a specific and limited objective, namely, the restoration of law and order and normality in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution.

39. Bhutto V. The Chief of Pakistan Army and Federation of Pakistan PLD 1977 SC 670

CHAPTER 4

THE ROLE OF THE JUDICIARY

The judges are faced with choices after a coup d' etat: whether to resign, whether to remain in office asserting the pre-revolutionary Constitution, deriving their jurisdiction from that Constitution and denying validity to any of the revolutionary actions, whether to remain in office but to co-operate with the new authorities, whether to remain but to apply the doctrine of necessity validating those actions of the revolutionary authorities which the maintenance of law and order dictates, or whether to identify themselves with the new authorities and to sit on courts of the revolution.

J.W. Harris observes that it is not consonant with the role of a judge who has been appointed under one Constitution to accept the authority of any other constitution.[1] The point is that judges are normally considered to be upholders of Constitutions not co-operators in revolutions. Ought not loyalty to the Constitution under which a person was appointed as judge outweigh what the legal science provides? This means that a judge should be bound by the Constitution and not by legal science. The legal science is found in the theory of Kelsen which provides that once the change is efficacious then a revolution is complete. If the revolution is successful, a loyal judge can only resign, whereas a judge who follows legal science can continue with his useful role.[2] Harris contends that Kelsen's theory does not directly authorize a judge to make any particular decision. Kelsen's theory implies that a judge is under a legal duty, a duty consonant with judicial office, to accept successful revolutions. It seems probable that this duty is not outweighed by any general duty of constitutional loyalty. It may, however, like any other legal duty, be outweighed in particular instances by moral or political duties.[3]

There are revolutionary judges who have joined in the overthrow of the old constitutional orders. An example of such revolutionary judges can be illustrated by Judge A.G. Magrath of Charlestown, South Carolina, who, on 7 November 1860 resigned his office and, in what must have been a dramatic ceremony, descended from the bench into the body of the court and formally divested himself of his judicial robes and declared that the temple of justice was now closed. Later on, after playing a prominent role in triggering off the American Civil War, he returned and re-opened the temple of justice as a court of the revolutionary state. This is an example par excellence of a judge joining the revolution.[4]

1. **J.W. Harris, 'When and why does the Grundnorm change" 1971,Cambridge Law Journal at 127**
2. **J.W. Harris, at 127**
3. **J.W. Harris, at 132**
4. **Madzimbamuto v Lardner Burke, N.O. and Another 1968(2) S.A. 284 at 313 RAD**

There were judges and magistrates who remained on the bench throughout the War of Independence until and after the people had accomplished a successful revolution which untied the apron strings binding them to Britain.[5]

The English revolution of 1688 legitimized the Bill of Rights of 1689 and all that followed because it was successful and because the judges accepted bills assented to by the usurper, William of Orange, as authentic Acts of Parliament. The revolution of 1642-49 was accepted by those judges who remained in office after Charles 1's execution as legitimising Cromwellian's legislation, but with the restoration of Charles II in 1660 all became null and void.[6]

Kelsen's thesis is of great assistance when it is presented to a judge who has decided to remain in office after a revolution has been carried and then finds that he is expected to produce respectable legal reasons for staying on and giving effect to the edicts of the new regime. Such a judge usually relies on Kelsenian theory to support his decision to be part of the new regime, as the example discussed below tend to indicate.

4.1 PAKISTAN

In the case of Dosso,[7] Muhammed Munir C.J. dismissed the challenge to the validity of the new order on Kelsenian grounds. The essence thereof was that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order.

4.2 UGANDA

In the case of Uganda v Commissioner of Prisons, Ex parte Matovu,[8] Kelsen was successfully applied. In 1966 Dr. Obote, the Prime Minister, removed the President, suspended the Constitution and procured the adoption, by a procedure not sanctioned by the Constitution, of a new Constitution under which he became President. Matovu, who was placed in preventive detention under emergency regulations because he was feared, applied for habeas corpus on the grounds that his detention was ultra vires the Constitution of 1962. Preventive detention means that one has not committed an offence but the powers that be fear you and to allay such fears one is kept in detention. The application was referred to the Constitutional Court. The court then asked for argument to be addressed to it on the validity of the Constitution itself. The result was that it took judicial notice of the fact that the revolution had been efficacious in so much as the will of the Government was being generally obeyed, and dismissed the application.

5. S.A. de Smith, 'Constitutional Lawyers in Revolutionary Situations' (1968) Western antario Law Review at 93
6. S.A. de Smith at 93
7. 1958 PLD 533 SC
8. 1966 EA 514

The Chief Justice said:

> 'The 1966 Constitution, we hold, is a new legal order and has been effective since 14th April 1966 when it came into force'.[9]

Two points raised in argument are of general interest. First, the Attorney-General had contended that the court had no jurisdiction to entertain an application on the validity of the Constitution itself as this was a non-justifiable political question. The court rejected this contention, though it could have provided an easy escape route. Secondly, the Attorney-General had argued that the judges were precluded by their judicial oaths from questioning the validity of the Constitution under which they were officiating. The court also rejected this contention, though not without some difficulty. Under the Obote Constitution of 1966, the holders of judicial office had not been required to take new oaths of office but were deemed to have done so. On the face of things, then, the judges were stopped from repudiating the regime which they had implicitly acknowledged by remaining in office. But the wording of the judicial oath had not been changed, and under it a judge swore to do right to all manner of people in accordance with the Constitution of the sovereign state of Uganda as by law established. The judges held that this gave them the right to decide which was the Constitution established by law. They did not regard the fact of their continuance in office after the revolution as pointing unequivocally to their acceptance of the legality of the new regime. The position can be clear if after the revolution the judges are immediately required to take new oaths to uphold the new Constitution.

In the event of a revolution if judges resign in protest, their successors may be of so low a calibre that justice may not be done in the courts, whilst on the other hand, if they continue in office their real or apparent acknowledgement of the authority of the new regime will clothe it with the valued prize of legitimacy. Hence it is unusual for the conscientious and introspective judge in a politically volatile society to be impaled on the horns of a painful dilemma.[10]

4.3 LESOTHO

The first post-independence general election of Lesotho had been conducted on 27 January 1970. The opposition party, the Basutoland Congress Party under the leadership of Dr. Ntsu Mokhehle had won the election.

9. Uganda v Commissioner of Prisons, Ex parte Matovu at 539
10. R.S. Welsh, 'The Function of the Judiciary in a Coup d' etat' 1970 S.A.L.J. at 191

The outgoing Prime Minister, Leabua Jonathan declared Lesotho to be in a state of emergency. He said that he and his cabinet took the decision in full consideration of the best interests of the nation. This drastic step had been taken to protect not only the liberty of the individual, but also law and order. He said that the elections had been marred by acts of violence all over the country. He formerly declared a state of emergency and suspended the Constitution pending the drafting of a new one.[11] All the members of the National Executive of the BCP and most of the people who had contested the elections under BCP colours, regardless of whether they had won or lost seats, were arrested.[12]

The High Court of Lesotho was due to open its first session for the year on 2 February, 1970. With the sudden suspension of the Constitution, it became doubtful whether the court would, in fact open. An urgent petition to the High Court for the release of Dr. Ntsu Mokhetle was submitted. The session of the High Court was suspended indefinitely. Mr. Justice Jacobs declared that he preferred to wait and see. He wanted to see whether the revolution was successful or not because there was opposition to it.

The top staff at the law office who came from the Republic of South Africa on secondment had left the country. The sheriff would not serve the summonses issued against the Prime Minister, and the petitioners had to serve them in person.[13]

The decision to suspend court proceedings had been taken because of the continued existence of the High Court and the position of its judges as a result of the revolution that was still going on, and because of the far reaching consequences which orders might be issued and are later found to be useless.

The High Court of Lesotho resumed its functions after the revolution was successful and Mr. Leabua Jonathan was in effective control of the country. Those who resisted Jonathan's coup d' etat were charged with treason and sentenced.[14] Mr. Justice Jacobs adopted the approach in the case of Luther. v. Borden,[15] which states that a court is not a polling booth to decide which government represents the people. The Lesotho judge of the High Court closed the High Court until it was clear who was in effective control of the country. The judge did not want the High Court to be used by the contesting political parties. A polling booth should have decided who has won the election. He did not want the court to be used in the bitter struggle for power and simply locked the court room.

11. B.M. Khaketla, Lesotho 1970: An African coup under the microscope: London: Hurst, 1971 at 210
12. B.M. Khaketla at 210
13. B.M. Khaketla at 210
14. Matsubane Putsoa v. Rex, 1974-1975 Lesotho Law Reports at 201
15. 7 Howard 1 1848

4.4 RHODESIA:

In Madzimbamuto v. Lardner Burke, [16] Beadle C.J. said that the court had never officially regarded the 1965 Constitution as lawful. The judges appointed under the 1961 Constitution had continued to discharge their duties and the officers of the rebel government had duly enforced their judgements and orders. Despite the fact that the High Court had not officially recognized the 1965 Constitution, it would be wholly misleading to assume that the High Court had not recognized any of the acts of the government. So far as the acts of everyday occurrence were concerned, the court had undoubtedly taken cognisance of its acts. The High Court treated such of the administrative and legislative acts of the government as has so far come before it as if they had emanated from a lawful government. [17]

Beadle C.J. went on to explain his approach to the position of the judges and of the High Court as positivist. He warned that the courts should not involve themselves in the political struggle for power and much less should the political predilections of the individual judge be a decisive factor in determining the judgement of the court. The law could not vary with the political views of the individual judge who declared it. A judge's views played a part, because in certain circumstances, the judge decided that rather than continue as a judge and apply such law he would go. So long, however, as he continued to sit as a judge he declared the law as it is and not as it was or as what he thought it ought to be. [18]

In a revolutionary situation, the political views of the judge do not play any more significant a part in determining what the law is than they do in normal times. In normal times, the government may press a statutory measure of which an individual judge strongly disapproves. He may disapprove so strongly that he may not be prepared to apply the statute, and he may as a consequent decide to resign his commission and refuse to sit any longer as a judge, but his disapproval cannot affect the validity of the law. If he decides not to resign but to continue in office, he must apply the law as it is, and not as he thinks it ought to be, and this, no matter how much he may disapprove of it.

If, however, he remained, he would have to apply the new Constitution. He could not remain and declare the law to be as it existed under the old Constitution simply because he was appointed under that Constitution and because he had never accepted the one or any appointment made under it. If an old Constitution has gone completely, it is gone for all purpose and the method of its demise matters not. If a judge remains under the new norm, he must accept that norm and cannot remain and seek to declare the law of a non-existent norm. He has no right to elect which norm he will apply. [19]

16. 1968 (2) S.A. 248 RAD
17. 1968 (2) S.A. at 305

18. 1968 (2) S.A. at 326 B
19. 1968 (2) S.A. at 328

Quenet J.P. considered a submission by the appellant's counsel, who submitted that the life of the Court was co-extensive with that of the 1961 constitution, because the Court was a creation of the Constitution and the judges were appointed in terms of that Constitution. If the 1961 Constitution had in fact come to an end, the judges should quit the bench. This submission raised the issue of whether the judges after the U.D.I. had that right to exercise judicial power. Quenet J.P. observed that neither Her Majesty in Council nor the present Government had interfered with the judiciary as constituted under the 1961 Constitution. On 14 November, 1965 the Governor said it was the judiciary's duty to maintain law and order and carry on its normal tasks. He said that the present government has not attempted to remove the judges from office, it had not placed any obstacle in their way and had given effect to their decisions.

He said that the fact that the judges continued to exercise judicial power did not mean they were sitting as a court under the 1961 Constitution or that they had joined the revolution or made a personal decision to accept the 1965 Constitution. What it did mean was that while they performed the judicial function, they had to give effect to the laws and the Constitution of the effective government. Before assuming office, a judge was required to take the oath of allegiance and also the judicial oath. The judicial oath did not extend the duty set out in the oath of allegiance and the duty of any national born or naturalised citizen, or by a foreign resident in the country. That is so because allegiance is not created by the oath, it exists apart from it and before any oath has been taken.[20]

Macdonald J.A. said that if a court of law anywhere in the world were to insist that only the laws of a government with a legal origin may be obeyed and enforced, it would not be able to function because there is no such government.[21] He said that all governments are extra-legal in origin in the sense that, if the pedigree of any government is examined, it will be found that at some point in time sovereign power had been established by naked force, by conquest, revolution or war. The origin of European Government in Rhodesia and thus of such title as the British Government possessed in Rhodesia conformed to this pattern of extra-legality.

So, too, the source of the present British government's title to govern in Britain can be traced to the glorious revolution of 1688. He said that a sharp distinction is drawn in law between persons who set up a de facto government by revolution and persons who, taking no part in the revolution, obey the laws of the de facto government in pursuance of the duty of allegiance owed to the state. If obedience to the laws of a de facto government were not enjoined by the law, anarchy would likely ensue. In a choice between anarchy and order, the law makes a realistic and sensible choice of order. [22]

20. 1968 (2) S.A. at 365 (RAD)
21. 1968 (2) S.A. at 385 (RAD)
22. 1968 (2) S.A. at 391 (RAD)

The early history of England and the English law relating to the allegiance due to a de facto sovereign explain in large measure the view strongly adhered to by all English jJudges that the judiciary should not meddle in politics. Macdonald J.A. goes on to say that the lesson to be gleaned from the history of English law is that judges should not allow themselves to become embroied in political controversy and in particular should not take part in revolutionary or counter revolutionary activity. If a judge believes that a situation has arisen which in all conscience compels him to participate in revolution or counter revolutionary activity he should leave the bench and not seek to use his position to further his revolutionary or counter-revolutionary designs.

If judges intend to resist unconstitutional change within the state such resistance should precede the threatened change and should not be delayed until after the new Constitution has been set up and a government has commenced to function under it. The role of judges pursuant to their allegiance to the state is to support the government for the time being within the state and to avoid both revolutionary acts before, and counter-revolutionary acts after, revolution.

There is no legal basis on which the courts can give qualified support only to the government of the time being within a state. If such a government is the sovereign power within the state, it is entitled to full support. If it is not the sovereign power, it is not a government and is entitled to no support at all. There is no middle course.

Jarvis A.J.A. [23] considered the Governor's message issued on 11 November, 1965, to be basic as justifying the judges continuing in office. The message included these words.

> 'I call on the citizens of Rhodesia to refrain from all acts which would further the objectives of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order in the country and to carry on with normal tasks. This applies equally to the judiciary, the armed services, the police and public service.'[24]

Jarvis, A.J.A. went on to say that the above should not be construed as an instruction to the judiciary as to the manner in which they should apply the law or as an attempt to interfere with the independence of the judicial discretion. It did, however, place emphasis on the social need to preserve peace, order and good government.

23. Madzimbamuto at 416 (RAD)
24. Madzimbamuto at 421 (RAD)

He said that legal effect should be given to such legislative measures and administrative acts of the government as would have been lawful in the case of a lawful government governing under the 1961 Constitution.[25]

Fieldsend, A.J.A.'s view was that the court was nothing more or less than the court appointed under the 1961 Constitution and saw no basis which entitled it to hold that its source of authority had altered. He concurred with Lewis J. where he said that the judges themselves held office under the 1961 Constitution and derived their functions from that Constitution. He also concurred with Goldin J. where he said that his court derived its origin from and was lawfully constituted under the 1961 Constitution, and the judges thereof continued to hold office and were bound by the oaths taken by them in terms of the 1961 Constitution.[26]

In short there was no overt step taken by the rebel authorities to revolutionize the court or to set up their own court or to appoint their own judges, or to ascertain formally if any of the judges were accepting office on the terms set out in the 1965 Constitution. There was no question of the judges having expressly or tacitly agreed to hold office on any basis other than that of their original commissions. [27]

On Monday 4 March, 1968 Mr. Justice Fieldsend resigned as a judge of the High Court of Southern Rhodesia. His reasons for resigning are written by R.S. Welsh as follows:

> 'To continue in office under the present circumstances, particularly in the light of the government's declared intention not to recognise any right of appeal to the Privy Council, amounts to accepting the abandonment of the 1961 Constitution, both as an enforceable standard by which to Judge and as the source of authority of this court. He said that for the reasons advanced in his judgement in the Constitutional case, he cannot accept this abandonment, with all it entails, and accordingly he was not able to continue as a member of the court.'[28]

On 12 August 1968, Mr. Justice Young resigned his office as a judge of the High Court of Southern Rhodesia. R.S. Welsh quotes him as follows:

> 'The High Court has hitherto functioned as court of the lawful soverign under the 1961 Constitution. The rebel regime has actively acquiesced in this mode of functioning by acknowledging the validity of the High Court orders and by carrying them into execution. The Judgement of the Privy Council, which is the supreme appellate tribunal of the High Court under the 1961 Constitution, becomes the Judgement of the High Court.'

25. Madzimbamuto at 422 (RAD)
26. Madzimbamuto at 422 (RAD)
27. Madzimbamuto at 425 (RAD)
28. R.S. Welsh, 'The Function of the Judiciary in a Coup d' etat' 1970 S.A.L.J. at 179

> 'If, then, the authority of the Privy Council is not acknowledged in this country that is equivalent to a rejection of the authority of the High Court and in my view the only course open to a judge of the High Court is to withdraw from the bench. It is a matter of judicial conscience.
>
> By the action of the Registrar of the High Court in refusing to receive and register the order of the Privy Council, the Judgement of the Privy Council has been repudiated and accordingly I have no alternative but to resign. There can be no suggestion that my resignation or that of any other Judge must lead to a breakdown of law and order. On the contrary, for a Judge appointed under the 1961 Constitution to enforce a law that subverts that Constitution is, in my judgement to overthrow the law of the country. If order is to be maintained under some new system of law then it must be done by Judges appointed by those responsible for the creation of the new system.'[29]

The judiciary stood firm concerning its own position in relation to the rebel government and the 1965 Constitution. Lewis J. after suggestions in argument by Counsel for one of Mr. Smith's ministers that certain dire consequences might befall the court if it took sides in what amounted to a political struggle between the British and Rhodesian governments spiritedly announced that so far as he was concerned, it was the court's duty in every case to try to decide what the law is and to apply that law, irrespective of the circumstances, provided that the court is satisfied that the issue which it is asked to decide has been raised in appropriate proceedings and the Court has the necessary jurisdiction to make the decision. He said that the question of taking sides did not arise. The judge is merely performing the duty which he swore to carry out when appointed as a judge to do right to all manner of people, after the law's and usages of this country, without fear, favour, affection or ill will.

Sydney Kentridge says that the two judges who resigned thought that their oaths meant exactly what they said and they thought that these high-sounding principles namely, the oath, were not intended merely to be quoted at Bar dinners but actually to be acted on by judges.[30]

Sydney Kentridge says that the majority of the judges of Rhodesia were able to uphold Mr. Smith's actions and to validate, internally at least, what he had done. He says that they found excellent legal reasons for it, ranging from their duty to protect and preserve law and order to the international law rules relating to de facto rulers: He said that,

> 'Mr. Justice John Fieldsend and Mr. Justice Dendy Young – names which, I think, should be honoured wherever English – speaking lawyers gather.'[31]

29. R.S. Welsh at 181 to 182
30. Quoted from "The Late Honourable John Richard Dendy Young" (1999) 116 S.A.L.J. at 152-153
31. 1999 S.A.L.J. at 153

In conclusion, it is fitting to refer to Dr. Glanville Williams. He said the defence of necessity involves a choice of the lesser evil. It requires a judgement of value, and adjudication between competing goods and a sacrifice of one or the other. The language of necessity disguises the selection of values that is really involved.[32] Maintenance of law and order was for the Rhodesian judges the supreme good. Legal philosophies justify such an approach. Pound sees law as seeking to maintain the social status quo and the general security, and argues that the chief of human claims in civilized society is the general security.[33] The maintenance of order means securing continuance of the current form of political organisation and power.[34] Accordingly, before choosing order the court should have examined the nature of Rhodesian society. This was dominated by a powerful elite, the ruling white minority, which controlled all government institutions and most of the means of production so that maintanance of order would result in the preservation of this unequal society. The reason for the Unilateral Declaration of Independence was to prevent a gradual improvement in the economic conditions of Africans and to prevent a shift in political power. Because the judges were unaware that they were choosing between conflicting values, they failed to ask themselves fundamental questions. They should have inquired, of whom, by whom, for what purpose and in the context of what entity are we seeking to maintain order?

32. Glanville Williams, 'The defence of necessity' 6 Current Legal Problems 216 at 224
33. 'The end of law' (1914) Harvard Law Review at 195
34. Julius Stone, The Province and Function of Law, Stevens and Sons Ltd, London, 1947, at 494

CHAPTER 5

THE IMPACT OF A REVOLUTION ON SOME CONSTITUTIONAL CONCEPTS:

Some constitutional concepts shall be considered to determine the effect of the revolution on them.

A revolution occurs whenever the legal order is replaced in an illegitimate way, in a way not prescribed by the former order.[1] Every illegal change in the constitution of a state is a revolution.[2] Therefore a revolution is contrary to Constitutionalism, because it is carried out in deliberate, total disregard of the Constitution. The decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way in which the former did not itself anticipate. [3]

I shall examine constitutionalism in order to measure the performance of the rulers after a successful revolution.

The liberal concept of constitutionalism rests on two main pillars namely, limited government and individual rights. [4]

De Smith gives a minimalist definition of constitutionalism as:

> 'The principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content ..... Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.'[5]

1. **Hans Kelsen, General Theory of Law and State, Cambridge: Massachusetts: Harvard University Press 1946, at 115**
2. **J.M. Finnis, Oxford Essays in Jurisprudence, Oxford, Clarendon press: 1973: (edited by A.W.B. Simpson) at 44**
3. **J.M. Finnis, at 44**
4. **Issa G. Shivji, State and Constitutionalism in Africa: A new Democratic Perpective at 3 (This is a paper delivered in Zimbabwe on 22 May 1989)**
5. **S.A. de Smith, 'Constitutionalism in the Commonwealth today', Malay Law Review, Vol. 4 (1962) at 205**

Kelsen believes that the legal effect of a coup d' etat is the destruction of the norm. This means that, in his eyes, the legal effect of a coup d' etat is to remove a foundation stone of the collapsible inverted pyramid and thus to send the whole structure crashing down.[6] I shall examine the effect of revolution, on various constitutional concepts.

5.1 The Legislature:

A revolution will invariably create a new legislative power which does not derive its authority from any provision of the pre-existing Constitution. This is illustrated by events in Lesotho in 1970 and Nigeria in 1966.

The 1966 Lesotho Constitution provided that Parliament could make laws for the peace, order and good government of Lesotho.[7] It defined Parliament as consisting of the King, a Senate and National Assembly. The Senate was composed of traditional Chiefs and the National Assembly was composed of elected members. [8] In 1970 when it became clear that the opposition party led by Dr. Ntsu Mokhehle was winning the general election, the Prime Minister announced that the Constitution had been suspended and the general election nullified.[9] On 10 February 1970, the Lesotho Order no. 1 of 1970 was made by Prime Minister Leabua Jonathan and seven other people whose names were listed in the order. This order created a Council of Ministers.[10] This Council of Ministers was given power to make laws that were to be styled Orders. In this way, the power to make laws shifted from a democratically elected Parliament to an undemocratic Council of Ministers.

On 15 January 1966, the Nigerian Armed Forces took over control of the Federal and the Regional governments. Certain provisions of the Constitution of the Federation and of each region were suspended with immediate effect. The offices of President, Prime Minister, Federal Ministers, and Regional Ministers were also suspended. The Federal Parliament and all the regional Legislatures were similarly suspended [11] by the federal Military Government.

6. Hans Kelsen, at 111
7. Section 55 of 1966, Lesotho Constitution
8. Section 40 of 1966, Lesotho Constitution
9. The Friend, Bloemfontein, 2 February 1970
10. Section 5 of Lesotho Order No. 1 of 1970
11. A. Akinsanya, 'The Machinery of Government during the Military Regime in Nigeria' (1976) Vol. 8 Journal of the Indian Law Institute at 16

It provided in section 3 that the Federal Military Government would have power to make laws for the peace, order and good government of Nigeria or any part thereof with respect to any matter whatsoever.

This meant that the unrepresentative Federal Military Government had unlimited legislative power. A new legislative power was created which did not derive its authority from any provision of the pre-existing Constitution. The conclusion to be drawn from the above examples is that, after a successful revolution, the government which emerges creates its own legal order from which it usually acquires unlimited and absolute legislative powers. Its legislative acts are usually unchallengeable in the court. An exception from the general rule would be the case where there is no change of personnel in the legislature as in Rhodesia after UDI. Professor Ben Nwabueze says that there can be no change of personnel where the revolution is staged from within the government, by the ruler himself, as happened in Germany in 1933 when Hitler, as Chancellor, subverted the Constitution to assume absolute powers, or in Uganda in 1966 when Prime Minister Milton Obote abrogated the Constitution and declared himself executive president.[12]

5.2 A Rigid Constitution

A Constitution is regarded as being rigid where there are special procedures for altering, amending or repealing its provisions or some of its provisions. Constitutions for which no special procedure for amendments are prescribed are known as flexible constitutions.[13] The provisions of such constitutions are not regarded as having any special status and can be amended or repealed like any other law.

In Nigeria, the 1979 Presidential Constitution was rigid. None of its provisions could be amended without a special procedure.[14] The standard procedure for amending a constitution was the requirement of a two thirds majority.

12. Professor B.O. Nwabueze, Constitutionalism in the Emergent States, London, Hurst: 1973 at 231

13. De Smith, Constitutional and Administrative Law, London, The Caucer Press: 1986 at 24

14. Section 9(2) of the 1979 Nigerian Constitution

Other more complicating procedures required not only two-thirds majority of the legislative concerned but also approval by the legislatures of other states or the Federal legislatures as the case may be.[15] The most complicated procedure was that relating to the creation of a new state. This required not only a special legislative majority of two-thirds and the approval of a given number of states but also the consent and approval of the people in the area concerned through a referendum in which at least sixty percent of those eligible to vote approved.[16]

In certain specific cases, alteration of the Constitution requires an even more complicated procedure. These are in respect of the alteration of section 9 itself, section 8 of the Constitution and chapter IV (which deals with Fundamental Rights). Legislation for altering these should not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than a four-fifths majority of all the members of each house, and also approved by resolution of the houses of Assembly of not less than two-thirds of all the States. It was not only that no provision of the 1979 Constitution could be altered by a simple procedure and majority but all the above examples show clearly that constitution was not only rigid, it was cumbersome.

Under the Military rule in terms of Decree No. 1 of 1966[17] and 1984[18], by which the military established their legal authority and control of the country and government, sections of the Constitution which dealt with special procedures for amending were repealed. In 1967 the creation of twelve states was effected by Decrees which did not follow any special or formal procedures. Under military administration, the law provided for only one general mode of exercising legislative powers. For the Federal Military Government, it was provided that the power to make laws would be exercised by means of Decrees signed by the Head of the Federal Military Government. [19]

Since this method was the only one provided for in the Decree, all laws, including the Constitution, were placed on the same level for the purposes of amendment and repeal. As in flexible constitutions, the rigid Constitution of 1979 could therefore be amended like any other ordinary law by the military rulers.

15. Section 9(3) of the 1979 Nigerian Constitution
16. Section 8 of the 1979 Nigerian Constitution
17. The constitution Decree No.1 of 1966
18. Schedule 1, Section1(1), Constitution Decree No. 1 of 1984
19. Section 3(1) and 4(10)of Decree No. 1 of 1984

It is therefore clear from the above, particularly in respect of the simple mode of amending any law including the Constitution, that the Nigerian Constitution under the Military Administration is comparative to, for example, the flexible British Constitution.

5.3 Supremacy of the Constitution:

In Lesotho, under the civilian government, the Constitution was the supreme law. Section 2 of the Constitution[20] provided that the Constitution was the supreme law of Lesotho and if any other law was inconsistent with the Constitution, that other law would, to the extent of the inconsistency, be void. The supremacy of the Constitution was reversed after the 1970 coup d' etat. Section 3 of the Lesotho Order No. 1 of 1970 provided that the existing laws would be construed with such modifications, adaptations, qualifications as would be necessary to bring them into conformity with the provisions of the order. Therefore, supremacy shifted from the Constitution to the law-maker, the Council of Ministers which had suspended the entire Constitution.[21]

In the same way, in Nigeria, section 1 of 1979 Constitution[22] provided that the Constitution was supreme, that its provisions had binding force on all authorities and persons throughout the country and that any other law inconsistent with its provisions would be void to the extent of the inconsistency. In other words, the Constitution prevailed over any other law. The supremacy of the Constitution was reversed by the military rulers. Among the provisions of the 1979 Constitution modified by the military rulers was the supremacy provision.[23] Among the provision of the 1979 a provision was added to it, to the effect that the Constitution would not prevail over a Decree, and that nothing in the Constitution would render a provision of a Decree void to any extent whatsoever.[24] In the case of Lakanmi and another v Attorney General of Western State and others[25], the Western Court of Appeal held that once a Decree was made, as provided for in Decree No. 1 of 1966 , nothing, not even the provision of the Constitution, could derogate there from.

20. Lesotho Independence Constitution 1966
21. Order no. 2 of 1970
22. Section 1 of the 1979 Constitution of the federal republic of Nigeria
23. Schedule 1 Section 1(1) of the 1979 Nigerian Constitution
24. The Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 13 of 1984
25. SC 58/69 of April 24, 1970

5.4 Separation of Powers:

The doctrine of the separation of powers is premised on the proposition that government has three basic branches, the Legislative, the Executive and the Judiciary. It rests on the idea that it is dangerous to liberty to concentrate these three areas and powers in one body or that none of these three branches should exercise the functions of the others. Since a complete separation of powers is neither practical nor desirable for effective government, what the doctrine can be taken to mean is the prevention of tyranny by the confinement of too much power on any one person or body and the check of one power by another. The doctrine of separation of powers is designed not only to prevent concentration of powers but also to design a system of checking one power with another, that is, the principle of checks and balances.[26]

Military administration, by its very nature, is based on a monolithic structure with its attendant concentration of powers. It abhors diffusion of authority and power. The essential requirement of the doctrine of separation of powers is often negated in military administrations. This is particularly so in the case of the Head of a Military Government. At the same time the executive authority of the country is often vested in the same person which authority he may exercise by himself directly or through persons, or authorities subordinate to him. This is a virtual concentration or fusion of important powers and at the highest level of government which situation is not in consonance with the doctrine of separation of powers.

Lakanmi and Another v Attorney General of Western State and Others,[27] provides certain instructive judicial views on the doctrine of separation of powers in a military administration. The issue here was whether the Forfeiture of Assets Decree No. 45 of 1968 which expressly named the appellants in the schedule was a piece of legislation or judicial judgement and therefore void for infringing the doctrine of separation of powers. The Supreme Court held that the doctrine of separation of powers was still the structure of the system of government.

26. O.H. Hood Phillips and Paul Jackson, Constitutional and Adminstrative Law, London, Sweet and Maxwell: 1987 at 13
27. SC 58/69 of April 24, 1970

The Federal Military Government after taking over the government of Nigeria passed Section 3(1) of Decree No. 1 of 1966 which did not confer judicial powers on the Military Government. Decree No. 45 of 1968 was clearly a legislative sentence and the force was spent on the persons named in the scheduled. These named individuals were deprived of their properties without a court hearing, that was an exercise of judicial power. It was believed that the property was acquired by corrupt means.

The Supreme Court quoted a number of cases. In the case of Lovell v United States it quoted the statement of Block J.[28]

> 'Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty or property of particular named persons, because the legislature think them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts.'

One of the main objections to Decree No. 45 of 1968 was that it was directed against certain named individuals with the aim of punishing them or depriving them of their properties. These individuals were not being dealt with as general members of the public for whom laws are passed generally.

It is submitted that where legislation lays down the law and at the same time without any hearing, that law passes judgement against named individuals, such would be regarded as a usurpation of judicial function. Therefore, Ddecree No. 45 of 1968 was a legislative judgement and an exercise of judicial power.

28. (1946) 66 S.C.R. 1079

The doctrine of the separation of powers can, in military regimes, be infringed in respect of judicial power too. Ken Saro-Wiwa, a writer and minority rights activist, and eight companions, all from Ogoniland, River State in the Niger Delta of South-East Nigeria, were hanged at Port Harcourt on 10 November 1996, provoking an international outcry against the military regime of General S. Abacha and proposals for intensified sanctions were made.[29] Saro-Wiwa had campaigned against environmental damage and for greater benefits for the local population from exploitation of the Niger Delta by major oil corporations. He insisted that the charges against him of the murder of four pro-government leaders of the Ogoni people in 1994 were false.

A military tribunal in Port Hartcourt had found Saro-Wiwa and three others guilty on 31 October 1995. All the military tribunal's death sentences were confirmed by the Provisional Ruling Council on 8 November 1995.[30]

The contentious issue was that Saro-Wiwa and his companions were not soldiers who had committed an offence falling within the jurisdiction of the ministry of defence to justify their trial by a military tribunal. He was a civilian. Therefore, the ordinary courts were by-passed in the determination of the allegations against them by setting up a special tribunal. They were tried for committing an offence, namely murder, which the criminal courts of Nigeria were competent to hear. There was no need for a specialist tribunal, namely the military tribunal, as the criminal courts were better equipped than the military tribunal to deal with a murder charge. The military tribunal was ill-qualified. It is submitted that the military tribunal was a substitute of the judiciary.

By creating the special military tribunal, the executive usurped the function of the judiciary. The military tribunal was set up for fear that the judiciary may exercise its independence and uphold its responsibility as the upper guardian of human rights and fundamental freedom.

29. Keesing's record of World Events, Vol. 41 Number 11 of 1995 at 40806
30. Keesing's record of World Events, at 40806

5.5 The Rule of Law:

While the concept of the Rule of Law might not have a settled meaning or content, its one abiding principle is regularity of the law, the idea that man is governed by law and not by the caprice of rulers. As far back as 2000 B.C. the great Greek philosopher, Aristotle had preached that the rule of law is preferable to the Rule of Man, and the English legal philosopher, Bracton asserted that man is governed by either human or divine law and that although the King might not be subject to man, he is subject to God and the law because it is the law that made him King.[31]

Professor A.V. Dicey[32] was the first person to reduce the idea of the Rule of Law to precise legal form.in his lectures on English law at the University of Oxford in 1885. His ideas were premised on the British Constitution. He reduced the term Rule of Law to the tripartite formula that:

(a) 'Every person must be equal before the law.

(a) The rights and duties of British subjects are part of the English Common law and were neither conferred by any statute nor by any special Constitution. Rights, like freedom of movement, speech, religion and association were part of the common law as declared or propounded by the majesty's Courts. The point being sought to be made here is that the liberties and rights of the British subjects are inherent in the tradition of the people as contained in their common custom, that is, the common law.

(b) The Rule of Law excludes arbitrary powers. Discretion is however part of it. However, while discretion is an essence of government, too wide a discretion is not permissible because, otherwise, it might be difficult to draw a line between what is discretionary and what is arbitrary. Every exercise of power must have limits.'

31. Jennings, The Law and the Constitution (London), 1993 at 42-45
32. A.V. Dicey. The Law of the Constitution , Bond R. Clark Ltd: London 1968 at 202

Writers have attempted a definition of the doctrine, Finnis wrote that,

> 'The Rule of Law involves certain qualities of process which can be systematically secured only by the institution of judicial authority and its exercise by persons professionally equipped and motivated to act according to law.'

Its content includes the independence of the judiciary, the openness of court proceedings, the power of the courts to review the proceedings and actions not only of other courts but most other classes by official decisions and the accessibility of the courts to all, including the poor.[33]

A legal system according to Fon Fuller exemplifies the Rule of Law to the extent that its rules are inter alia prospective, not retroactive, and are not in any other way impossible to comply with, that its rules are promulgated, clear and coherent, one with another, that its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules.[34]

F.A. Hayek provides one of the clearest and most powerful formulations on the ideas of the Rule of Law. To him, government in all its actions is bound by rules fixed and announced before hand, rules which make it possible to foresee with a fair degree of certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[35]

In other words any just law is not a mere contrivance borne in mind and kept secret by the ruler to be promulgated only after a person has been seen doing an act and is punished for the act retrospectively. The existence of the law must be known both to the ruler and the ruled. The rule of law seeks to ensure that adjudicators carry out their task in a manner that is procedurally fair.

Professor Wade takes the view that every act of governmental power, that is, every act which affects the legal rights, duties or liberties of any person, must be shown to have strictly a legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order, the court, will invalidate the act, which he can then safely disregard. He therefore said that the Rule of Law demands that:

'(a) all acts must be in accordance with the law to be valid.

33. John Finnis, Natural Law and National rights (Oxford 1980) at 272-3
34. Fon Fuller, The Morality of Law: Yale University Press, 1969: at 50
35. F.A. Hayek, The Road to Serfdom, Chicago, Phoenix Books 1944 at 54

(b) That government activities must be conducted within a framework of defined rules and regulations.
(c) That disputes involving legality of government actions must be decided by courts independent of the government.
(d) There should be no undue privileges and discrimination in society and;
(e) That no one should suffer punishment outside the authority of the law.'[36]

The International Commission of Jurists has on at least three occasions attempted to throw further light on the doctrine. In 1955 in Athens, the Commission declared that the Rule of Law meant that the State, like the governed, must be bound by law; all governments must respect individual rights and provide effective means of enforcing such; that jJudges must adhere to the Rule of Law, and adjudicate without fear or favour.

They must resist attempts from any quarter to jeopardise their independence in the performance of their functions and duties. Lawyers all over the world must guide the independence of their profession and uphold the Rule of Law in the practice of their professions. In order to ensure democracy, legislatures must be freely elected.[37]

In 1959, there was another conference of the Commission in Delhi, India in which the meaning and scope of the Rule of Law were re-examined. The outcome of the deliberations was an extended and enlarged meaning and scope of the concept. The Commission declared that the Rule of Law:

> 'Should be employed not only to safeguard and advance the civil and political rights of the individual in a free society but also establish social, economic, cultural and educational conditions under which his legitimate aspirations and dignity may be realised'[38]

36 ECS Wade and A.W. Bradley, Constitutional and Adminstrative Law, London and New York: Longman Group Limited 1985: at 92
37. International Commission of Jurists, The Rule of Law and Human Rights – Principles and Definitions, 1966 at 43
38. Journal of the International Commission of Jurists, 1959, Vol. 2 at 7

In another conference of the Commission in Lagos, Nigeria 1961, the Commission arrived at a substantially similar definition of the Rule of Law. The Delhi and Lagos meetings not only approbated the juridical and classical meaning of the concept but gave it a new and expanded materialistic meaning, particularly in the context of developing countries of the third world.

The Rule of Law can, therefore, be seen to have metamorphosed from its original conception as a natural law divine concept against which municipal laws are to be measured in the classical Diceyan conception as rights ultimately culminating in the Delhi and Lagos formulae of an admixture of the classical and the materialistic meaning, with greater emphasis on the latter particularly in relation to the third word countries.[39]

Military administration is necessarily a regime of force. Its manner of coming to power is invariably by a forcible subjugation and replacement of a pre-existing order in a way not contemplated by such old order. From whichever angle it is viewed, it is a violation of constitutionalism. Although it is possible to argue that in some countries, the military have been compelled to assume power as a result of the breakdown of constitutionalism, this does not affect the fact of their initial unconstitutional act.

Even the provisions of section 1(2) of the 1979 Constitution to the effect that the Federal Republic of Nigeria shall not be governed, nor shall any person or group of person take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution,[40] was not a sufficient deterrent to the military take-over of 31 December 1983.

Military government has always been a government under the law. Military government is not a system of government in which a despot or a military oligarchy operating above the law exercises absolute power. It is rather a system of government which after coming into existence by overthrowing the existing legal order, replaces it by a new legal order.

39. International Commission of Jurists, the Rule of Law and Human Rights – Principles and Definitions: 1966 at 15

40. 1979 Nigerian Constitution

Accordingly, every military government has always made a Constitution for itself by which the structure of government, powers and functions of governmental organs are spelt out. By so doing legal limitations are placed on governmental institutions and their activities. A good example is the provision to be found in all decrees on the Constitution that a decree needs the signature of the Head of State and Commander-in Chief of the Armed Forces to become law and this is a function he cannot delegate. Although the broad effect of this arrangement is to produce a system of government organised by law, where governmental powers are defined by law, and where it is possible for the military leaders to claim as they do, that they recognize and have regard for the Rule of Law, the truth however is that these arrangements per se are inadequate for a claim to observance of the Rule of Law.

There could be a world of difference between government under law and government under the Rule of Law while it must be appreciated that all the military administration the world over has operated under law, they are still lacking those elements of constitutionalism which keep them away from being governments under the Rule of Law.

Constitutionalism involves not only the proposition that the exercise of governmental powers must be bound by rules but also that the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary.[41]

The nature of military administration does not admit of all these requirements. There can be government under law but certainly not under the Rule of Law.

5.6 On Fundamental Rights:

Every society which is governed by laws must necessarily recognise rights and duties for its citizens. It is irrelevant that these may or may not be in written form. It is recognised, however, that some rights are so important as to be considered fundamental, the reduction of which disqualifies such a society from being rated civilized.

41. SA De Smith, The New Commonwealth and its Constitutions, London, Stevens and Sons: 1964 at 106

They have at the earlier stages been described as divine or natural rights which are part of nature's inalienable gift to human existence.[42] The French Revolution 1798 and the French Declaration of Independence and the American Bill of rights were inspired by this idea of the natural rights of man.[43]

The need for special study of fundamental rights under a military administration does not necessarily imply that in all cases such rights are more denied under a military administration than they are under a civilian administration. What calls for special attention is that the very undemocratic nature of a military administration raises immediate problems for the existence and operation of rights. There have indeed been very dark moments for fundamental rights during the period of civilian administration in many countries.

5.7 The Right to Life:

This is a very important fundamental right. Without it other rights cannot be enjoyed. Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life, liberty and security of person.[44] In Grenada on 19 October 1983, the People's Revolutionary Government was toppled. Maurice Bishop the Prime Minister, along with some of his Ministers and other citizens were killed and power was seized by the army. It constituted itself as the Revolutionary Military Council and promptly imposed a dusk to dawn, shoot on sight, curfew, thereby effectively putting the entire population of Grenada, save for a favoured few, under house arrest for four days.[45]

In Uganda, on 25 January 1971, General Idi Amin ousted President Milton Obote. He had presented himself as a devout Muslim, tolerant of all religious persuasions. There was soon, however, evidence to the contrary as prominent Christians began to disappear without trace.[46]

42. J.W. Harris, Legal Philosophies, London, Butterworths, 1980 at 10
43. Issa G. Shivji, The Concept of Human Rights in Africa, London, Ryan Print: 1989 at 16
44. Article 3 of the Universal Declaration of Human Rights
45. Mitchell and others V. Director of Public Prosecutions and Another 1985 LRC at 138
46. Lorenzo, S. Togni, The Struggle for Human Rights: An International and South African Perspective, Cape Town, Juta 1994 at 120

Ugandans from all walks of life continued to disappear throughout Amin's rule. Many of them were found brutally murdered. These included Wilson Oryma, a cabinet minister's son. Soon after landing at Uganda's Entebbe Airport, he was abducted and killed.[47] A prominent official in the Ugandan Foreign Ministry, Godfrey Kigalla, was seen at a meeting with Idi Amin and two of his bodyguards. His badly mutilated body was found some time later.[48]

Amin then turned his attention to the army where individuals whom he did not trust or like were never seen by their relatives again. In one mass killing, it is said that about 2 000 Obote supporters were executed in cold blood during 1971. Not trusting his fellow Ugandans, Amin hired a number of mercenaries to serve in his forces, many of them from Southern Sudan and Zaire. Many other important Ugandans also disappeared without trace.

In February 1973, an East African medical conference was held in Uganda. As delegates filed in they were told that the conference director's assistant had disappeared without trace.[49] Amin had created an organisation known as the Public Safety Unit (PSU) a sinister security force made up of Amin's loyal followers and headed by Alli Towelli, who later became Deputy Commissioner of Police. Relatives of missing persons could contact the PSU and after payment of substantial bribes to officers of the unit were taken to the corpses of their loved ones.[50]

In the Central African Republic, on the morning of 1 January 1966, Colonel Bokassa, the Chief of Staff in the Ministry of Defence addressed the nation on Radio Bongui, saying among other things, that the government had been taken over by the armed forces.[51] He brooked no opposition and any form of action that seemed to threaten his authority was met with strong and conclusive action. His one-time associate, Alexandra Bonga, Minister of Health, was accused of plotting against him and after securing a quick conviction, Bokassa had him shot. He imprisoned ministers who were popular and might therefore threaten his position.

47. Lorenzo, S. Togni, at 121
48. Lorenzo, S. Togni, at 121
49. Lorenzo, S. Togni, at 121
50. Lorenzo, S. Togni, at 121
51. Lorenzo, S. Togni, at 121

In 1979, he once again came to the world's attention when he had several dozen school children murdered merely because they would not buy school uniform supplied by one of his close supporters.[52]

In Lesotho, after the 1970 coup d' etat fundamental rights were violated at an appalling rate. For instance, Clement Moabi Leepa, a former Deputy Commissioner of Police was killed in a gun battle by members of the Para-mobile Unit, and his corpse was disembowelled and displayed in the charge office of the police station in Maseru.[53]

Nigeria became a republic in 1963 with Nnandi Azikiwe as the first president, but in 1966 a military coup forced him from office. The operations in the Northern capital, Kaduna, were successful in overthrowing the regional government of Sir Ahmudu Bello, who was killed when the soldiers stormed his official residence. The head of the Western regional government, Chief Abintola was killed.

The Federal Prime Minister, Sir Abubakar Tafawa Balewa, and his Minster of Finance, Chief Festus Okotie-Ebo, were kidnapped and taken to an unknown destination, where some days later their bodies were discovered by villagers.[54]

News that the Nigerian regime, had on 10 November 1996, hanged Saro-Wiwa, Beribor ber, Saturday Dobee, Nordu Eawo, Daniel Gbokoo, Berinem kiobel, John Nuate, in defiance of Commonwealth members' appeals, caused a sensation. President Mandela of South Africa abandoned his previous conciliatory attitude and called for Nigeria's expulsion form the Commonwealth. Commonwealth leaders voted for Nigeria's suspension from the organisation, warning that Nigeria could be expelled from the Commonwealth unless there was a return within two years to democratic government and respect for human rights.[55]

52. Lorenzo, S. Togni, at 121
53. B.M. Khaketla, Lesotho, An African Coup under the microscope, London: Hurst 1971 at 271
54. B.O. Nwabueze, Constitutionalism in the Emergent States, London: Hurst 1973 at 197
55. Keesing's record of World events, Vol. 41 Number 11, 1995 at 40806

5.8 Inhuman Treatment:

Article 5 of the Universal Declaration of Human Rights states that:

> 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Coup d' etats provide numerous examples of this right being abused. For instance, in the Central African Republic, Bokassa became drunk with power and the following excesses were of such a nature that the people of the Central African Republic were brutally shocked into realisation of his true nature. One of his biographers explains:

> 'He set out to inflict violence personally on fifty convicted thieves. In July 1972, Bokassa decreed that captured thieves would be mutilated. First offenders would have one ear cut off, second offenders, the other ear, and third offenders the right hand. A thief convicted for the fourth time would be executed publicly by firing squad.'[56]

The United Nations Secretary General protested against these excesses, but Bokassa dismissed Dr. Kurt Waldheim's protests as those of a colonialist and an imperialist.[57]

As regards Lesotho, members of the Basotuland National Party Youth League of Chief Leabua Jonathan organised themselves into armed gangs and visited the homes of people who were known to belong to opposition political parties. These poor people were burned out of their homes, taken out to the veld, beaten up severely to the point of unconsciousness and left there to get away as best they could, or die from exposure. Chief Leabua Jonathan said that reports of these incidents had been exaggerated out of all proportion by political opponents who sought to discredit his government and his party.[58]

56. Lorenzo, S. Tongi, at 126
57. Lorenzo, S. Togni, at 126
58 The Friend, Bloemfontein, 26 February 1970; Rand Daily Mail, Johannesburg, 27 February 1970

Herbert Nqamakele Molahleha, a prosperous businessman of Mafeteng, was arrested with his daughter, Puleng Molahleha. He was made to strip naked in the presence of his daughter who was ordered to look at her father's male organs to see where she had come from. When Nqamakele protested, he was ordered to have sexual intercourse with his daughter, but he told them that was the limit and requested them to shoot him outright. The daughter was then raped by one of the youths in the presence of her father. His feelings at that time, as well as those of the girl, can better be imagined than described. When Nqamekele was finally released he was both mentally and physically affected.[59]

5.9 Rights of Refugees:

South African refugees were also detained by Lesotho Police. During an interview in Comfimvaba, Mr. Masala said that he managed to escape from South African Police in Cape Town and was granted political asylum in Lesotho. When a state of emergency was declared in Lesotho he was detained in Maseru Central Prison without trial. On his release, he had to re-enter South Africa on his way to Botswana and managed to pass a road block manned by South African Police near the Botswana border.

A principal of Lesotho High School, Mr. Sidzamba says from Robben Island, he was granted political asylum in Lesotho. When the state of emergency was declared he was teaching in Masitise high School. He was detained from February 1970 to November 1970 without trial. After his release he was ordered to report every Monday to a police station until November 1971. The reasons for the detention of South African refugees was to please the South African Government. At the time Leabua Jonathan was an ally of the South African Government. He and Banda of Malawi would pay state visits to Pretoria.

These detention of refugees were in total disregard of refugee law. The Universal Declaration of Human Rights in Article 14 provides:

> '1. Everyone has the right to seek and enjoy asylum from persecution.
> 2. This may not be involved in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purpose and principles of the united Nations.'

59. B.M. Kheketla, Lesotho 1970, An African Coup Under the Microscope, London: Hurst 1971 at 197

The protection of African refugees occurs mainly in the context of three conventions applicable to Africa. Theses include the 1951 United Nations Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 OAU Convention governing specific aspects of the refugee problem in Africa.

One should also consider a number of other international instruments which have been adopted in the general human rights area. Relevant to detention of South African refugees in Lesotho is the convention of the Elimination of All Forms Racial Discrimination of 1965. Although the latter convention addressed itself to issues of human rights generally, it was none the less of singular importance to South African refugees who were unwilling victims of racial discrimination.

5.10 Freedom of Association:

Freedom of association implies individual autonomy and choice in the pursuit of objectives. It is a freedom where the individual is free to do whatever he desires, within the limitation of his reason and conscience.

Freedom of association is a vital factor in mental development. Without it, the individual cannot achieve personality or build his character to a point where life becomes rich and meaningful.

The slave, the serf, the kept person, cannot progress adequately along these lines because the sources of personality and character formation are made avid and are starved by external constraint. Only in voluntarism, in the making of personal decision and in assuming upon oneself the burden of the consequences, can human personality and character be fully developed.

In Lesotho, Chief Leabua Jonathan, the Prime Minister, ordered the detention of a number of highly placed civil servants who he suspected were supporters of the opposition.[60] Thereafter, Chief Leabua, in a circular letter to Permanent Secretaries and Heads of Departments, and signed by the Secretary to the Cabinet, issued a general ultimatum to all civil servants who knew they were supporters of the opposition to resign voluntarily, failing which the government would take immediate steps to remove them from the public service. In part the letter said:

60. B.M. Khaketla, at 263

> 'The Prime Minister and Ministers have directed that all civil servants who, during the election and shortly after polling day, showed themselves by word and deed to be opposition supporters be given the opportunity to resign voluntarily forthwith or action would be taken against them.'[61]

When no civil servants resigned the promised action was taken swiftly. Several of those who had been detained were released, and immediately dismissed, losing all their benefits, pensions, gratuities and leave due to them. The vacancies thus created were filled by raw recruits whose only qualification was membership of Chief Leabua's political party.[62]

A Convention of the Council of Europe provides:

> 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interest.'[63]

It is submitted that like-minded individuals desire to form corporations, unions, clubs and groups through which they can effect a better division of labour and better accomplish individual objectives. Politics is an activity to be conducted under rules, that groups in opposition to governmental policies could at the same time be loyal to their country and in agreement with their political opponents on such fundamental matters as fair play, sportsmanship and the basic constitutional structure of the State.

5.11 What is Left of Judicial Review in the Military Regime?

Judicial review has developed to a stage today when one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. In the case of C.C.S.U. v Minister for the Civil Service, the court held that the first ground is illegality, the second irrationality and the third procedural impropriety. Other countries recognise further grounds.[64]

61. The Friend, Bloemfontein, 26 February 1970
62 B.M. Khaketla at 263
63. Article 11 of the Convention for the protection of Human rights and Fundamental Freedoms.
64. Council of Civil Service Unions v Minister for the Civil Service (1985) A.C at 14

In Africa, since independence consistent patterns of governments have been emerging that control directly or indirectly the machinery and levels of executive power subject to no serious judicial supervision. Military dictators like Amin of Uganda, promulgated penalty clauses that carry death penalty for acts that were not capital crimes at the time they were committed, that is, retrospective sentence. They ousted the jurisdiction of the courts and systematically abridged the fundamental rights of the African people. People were kept in prison without accountability to courts of justice. It is a standard provision in all the constitutions operating in democratic countries, that everyone is entitled to a fair hearing and public trial, within a reasonable time by an independent and impartial tribunal established by law. Nonetheless, it is a matter of great regret that despite the above provision it is no longer startling in military administration to find a person held indefinitely in executive custody without accusation of crime or a judicial trial.

In Nigeria several decrees were promulgated which are retrospective in operation and also ousted the operation of the due process provisions of the Constitution by providing that the question whether any fundamental human rights provisions of the Constitution are being or would be contravened by these Decrees shall not be inquired into in any court of law. Examples of such Decrees are Section 4 (2) of State Security Decree No.2 of 1984 which actually suspended chapter IV (Fundamental Rights Provisions) of the 1984 Constitution.

The Federal Military Government Decree No.13 of 1984 lays down that no civil proceedings shall lie or be instituted in any court of law for or on account of, or in respect to any act, matter or thing done or purported to be done under or pursuant to any decree or edict.

The State Security Decree No. 2 of 1984 gave the Chief of Staff, Supreme Headquarters, absolute power to detain anyone for as long as he liked in the interest of state security. Power corrupts and absolute power corrupts absolutely. Only the courts could have relieved the nightmare of unjust laws. What was needed was a show of great determination of the courts to resist attempts by the executive to disarm them by enacting provisions which, if interpreted literally, would confer uncontrollable power upon the executive.

Folarin Shyllon,[65] indicates a clash of mind with mind, that is between progressive minded judges and conservative minded judges. Progressive judges showed determination and resistance in interpreting the Armed Forces and Police Act of 1967 which gave the Inspector General of Police and Chief of Staff of the Armed Forces arbitrary and untrammelled powers to detain anyone in the interest of state security. They followed the settled doctrine of interpreting ouster clauses, namely, that they do not prevent the court from intervening in the case of excess of jurisdiction, and accordingly held that the exercise of power under a decree could be challenged though not the validity of the decree itself.

The conservative judges made a sweeping retreat from the established doctrine of minimising the effect of ouster clauses. An attitude that shattered all assumptions about civil liberties in military administration, conservative judges, more executive minded than the executive, laid down that the distinction between challenging the exercise of power under a decree and challenging the decree itself is not permissible.[66] In Amin's Uganda, the power of judicial review was thrown overboard.

5.12 The independence of the Judiciary:

It is almost universally acknowledged that one of the hallmarks of a democracy is the independence of the judiciary. A judiciary which exists merely to do a government's bidding or to implement government policy provides no guarantee of liberty.

Parliamentary democracy and the rule of law are dependent for their existence on an independent judiciary. The judiciary must be independent at all times, for it is the last hope of the ordinary man. In Liversidge v Anderson,[67] the majority of the House of Lords took a view which they thought reflected the needs of the country in time of war. But Lord Atkin, in a great judgement, vigorously dissented from this view, attesting to the fact that the concept of the independence of the judiciary is valid for all time and place. He declared:

65. Folarin Shyllon, `Freedom, Justice and the Due Process of Law`, People's law, Vol. 2, 1988 at 14
66. Folarin Shyllon, at 15
67. 1942 A.C. 206

> 'I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive.'[68]

Lord Atkin spoke in the great tradition associated with the complete independence of the judiciary. In order to uphold the independence of the judiciary Sir Edward Coke sacrificed his position as Chief Justice of England.[69] In our own time and continent under military administration, Sir Arku Korsah in Ghana similarly lost his position as Chief Justice, and in Amin's Uganda, Benedict Kiwanuka paid with his life.[70]

Some judicial appointments have been made under military rule to the various superior courts which have had adverse effects on the dispensation of justice and also on the desire of capable men and women of calibre and intergrity to join the higher benches of the judiciary. A single erroneous appointment affects the whole system. So, when you have many wrong appointments, the whole system becomes rather corrupted. Appointments to the higher benches of the judiciary should be seen as an opportunity to reward only upright men and women of good character and learning.

5.13 Democracy:

Revolutionary military governments are not democracies. In western terms democracy has gone by the board when a group of officers seize the government, push the Constitution aside and abolish or suspend parties and elections. The counterclaim has, however, been made, as, for example on behalf of the government of Pakistan, that, since the basic concept of democracy is rule by consent, when a government has popular support it is by definition a democracy regardless of its structure. This is a claim to be rejected. A government controlled by the military may be doing an admirable and necessary job, as in attending to corruption, or undertaking land reform in West Pakistan, but it is abusing the terminology to call it a democracy, even though it has the honest intention of creating conditions under which democratic institutions can be restored.[71]

68. Liversidge V. Anderson, 1942 A.C. 22 4
69. Gretchen Carpenter, Introduction to South African Constitutional Law, Butterworths: Durban 1987 at 37
70. Folarin Shylon at 18
71. Rupert Emerson, From Empire to Nation: The Rise to Self-Assertion of Asian and African Peoples, Boston: Beecon Press, 1962 at 283

The notion of a military democracy is in some measure a contradiction in terms. It is not enough to establish a democracy that individual civil liberties are respected. It is necessary in addition that the government must have been freely chosen by the people by means of an election held at fairly frequent intervals under universal adult franchise. However, much a military government may accommodate popular consultation or participation by civilians, however much its policies and actions may meet with popular acceptance or reflect the nation's feelings and sentiments and its love of democracy and freedom, its unrepresentative character alone disqualifies it to be called a democracy. A certain amount of authoritarianism is inseparable from a military government. It is by its very nature a regime of force. The whole orientation of the military is based upon command, unified and hierarchical command, discipline and regimentation, and they would naturally be prone to carry this into government. As a regime of force a military government does not admit opposition.

CHAPTER 6

THE AFRICAN EXPERIENCE

Africa has experienced government above the law and change of government by force of arms, both of which have made human rights violations a common occurrence in the continent. Where the process of change has occurred in a manner not envisaged by the existing legal order, the deviations have been justified on the basis of the Kelsenian theory of fundamental change of the grundnorm to legitimise the new regime. Clearly this approach deviates from constitutionalism.

Constitutionalism involves the proposition that the structure and administration of governmental power, including the mode of change from regime to regime, shall be according to pre-set rules enshrined in the constitution and delimiting the extent and context of executive, legislative and judicial acts. Implicit in this concept is the idea that the reference point for legality or otherwise of a government is the constitution. Thus, arbitrary assumptions or exercise of powers of government represent deviations from the rules.

Professor Stanley de Smith[1] prescribes what he considers to be the ideal content of constitutionalism. That is, government accountable to some entity, frequent elections, based on a wide franchise, free competition for power holding among unlimited numbers of political groupings, a legalistic safeguard for civil liberties, an independent judiciary as adjudicator of disputes. Constitutionalism is a principle which, according to Carl J. Friedrick, begins from the most profound values of humanity and human society. He writes:

> `The first and foremost objective of the constitution is that of protecting the individual member of the political community against interference in his personal sphere of genuine autonomy'[2]

6.1 Uganda

I shall now deal with the unconstitutional experience of Uganda, followed by the undemocratic experience of Lesotho.

1. **S.A. de Smith, `Constitutionalism in the Commonwealth Today` Malay Law Review, Vol. 4 (1962) at 205**
2. **Carl J. Friedrich, `Constitutions and Constitutionalism,` International Encyclopediae of the Social Sciences, 3318 at 319**

Idi Amin of Uganda justified his coup against Obote because of unwarranted detentions, lack of freedom of speech, failure to hold elections and the continued state of emergency. There were also economic grievances such as unemployment, corruption in high places, high prices and taxation. The new regime's first actions were to release political prisoners, lift the state of emergency and establish commissions of enquiry into corruption and mismanagement of public office. In actual fact, however, the constitutional record of Amin's regime was marked by serious deviations from constitutionalism and protection of individual liberties almost from the start.

The regime's legislative record was thus, characterised by draconian and arbitrary measures which matched with the usurpation of absolute powers by the military leadership.

It took a full-scale military invasion by Tanzanian armed forces to dislodge Amin. The withdrawal of financial and technical assistance by world powers which also weakened the regime contributed to his overthrow.

Elections were conducted on 10 and 11 December 1980. Milton Obote won the election, was democratically reinstated as new head of state and the chairman of the military commission became the Vice-President of the new regime.

From its inception the Obote II regime faced stiff opposition. The armed forces became a highly undisciplined instrument of repression, deliberately employed against the population.

There was massive abuse of human rights. Over a quarter million people were detained, tortured or killed in army barracks and illegal detention centres. Hundreds of political detainees were held under the Public Order and Security Act, to die of starvation or torture in military custody. The courts now became an instrument of the executive in political cases.[3] The rural peasant and urban poor bore the brunt of the suffering caused by the repression and poor economy.

The above is Uganda's history of unconstitutionalism and instability. The phenomenon was due to bad past political leaders who were politically bankrupt and lacked a correct political thought.

3. Valerian Ovongi v Attorney General, Constitutional case no. 1 of 1983. Amnesty International report on Uganda for 1986-1989 at 17

The roots of instability can be traced to reckless management of government organs after independence, making for disorderly government and hence, instability. The army was a blunt, mindless instrument made up of uncivilised units.

6.2 Lesotho:

The 1970 coup in Lesotho was of a different character. It was not a case of the military intervening either on behalf of themselves or of some other class of the elite. It was a coup staged by the outgoing government itself. In Lesotho it was the government acting against the people with the backing of foreign interests.

Lesotho, formerly a British colony, is a tiny, rugged kingdom which is completely surrounded by the Republic of South Africa. In 1966 it acceded to independence, and on 30 January 1970, it had its first post-independence election. When it became clear that the opposition party had won overwhelmingly, the Prime Minister, Chief Leabua Jonathan, immediately issued Proclamation No.1 of 1970 declaring a state of emergency. It appears that the Prime Minister on the same date, 30 January, suspended the Lesotho Independence Order 1966 and nullified the general elections. Opposition leaders were arrested and the King was put under house arrest. The outgoing government was able to stage a coup because of the collaboration of the army and the police. In developed countries, the army and the police can refuse to be used by individuals who want to cling to power undemocratically. The army and the police supported an unrepresentative government thereby undermining the right to self determination of the Basotho nation.

Chief Jonathan's refusal to accept defeat in the general elections is the greatest malady of the politics of emergent states. This is characterised by the unwillingness of the rulers to relinquish power. Political offices tend to become life appointments, resulting in a stratification of the society between the underprivileged masses on the one hand and a permanent class of rulers on the other. To perpetuate their rule, the politicians pervert the political and electoral systems, and stifle any kind of opposition.

To be once a president is to undergo a complete personality transformation. An African president feels a kind of demi-god, occupying a pedestal high above and far removed from the rest of his community. He thinks himself as indispensable, a messiah, an incarnation of the state, he feels it inconceivable that he can thereafter be anything else but a president. On 17 May 1997, Mobuto Sese Seko after surrendering power, announced that he was going to retain only the title President.

The power is so intoxicating, the adulation so flattering, and the prestige and grandeur of the office so incredibly dazzling as to be almost irreconcilable with a new life as an ordinary citizen. Hence the temptation to cling to the office for life. Leabua Jonathan was removed from power by the army on 20 January 1986. The 1986 coup d' etat was the overthrow of unrepresentative government to replace it with an unrepresentative military government. On February 1990, the army staged a coup against the army. This was a power struggle where General Metsing Lekhanya was toppled.

In March 1993 general elections were held, which paved the way for a civilian administration. These were won predictably by Dr. Ntsu Mokhehle's Basutoland Congress Party (BCP). King Letsie III announced the dissolution of the BCP government and its replacement by an appointed council. In developed countries when a man wakes up and announces the dissolution of a democratically elected government, he could have been ignored. The best assistance to him in the circumstance would be to send him for mental observation.

Mokhehle's government was, however, eventually reinstated on 14 September 1994 at the request of the President of South Africa, Zimbabwe and Botswana after the Prime Minister had promised to observe a set of conditions imposed by the three leaders.

The African experience has been characterised by a large number of coups. At the heart of these coups is the violation of the right to self-determination of the African people. The notion of self-determination is an important feature of contemporary international law. People have no say in a military administration and the democratically elected government is removed from power. The head of state is no longer the elected man or woman but the man who holds the gun. Government institutions become dominated by soldiers.
Coups have been escalating in the post-independence Africa and the economic problems of Africa have improved since 1960.

There is no observance of fundamental human rights in a military administration. People are deliberately kept outside the sphere of adequate protection and their inalienable right to self-determination is violated by the powers that be. It is recommended that since Africa has the Organisation of African Unity, the role of the OAU should be strengthened to curb coups. The path that was taken by the SADC countries of South Africa, Botswana and Zimbabwe in interfering in Lesotho in 1994 is recommended.

On 25 May 1997, soldiers seized power in Sierra Leone. Nigerian troops were sent in to restore the ousted President Ahmad Tezon Kabbah. Nigeria had an unrepresentative government, she was interfering in Freetown merely to ease her own isolation by the international community. Ghana also sent troops to Sierra Leone to boost the Nigerian forces already in place. Ghana's President Jerry Rawlings said in Accra that the reasons for the 25 May coup in Sierra Leone were unjustifiable. The United Nations expressed its determination to see the departure of the ruling armed forces Revolutionary Council. If the use of international force becomes a last resort and inevitable, then it may have to come to that, United Nations Chief Kofi Annan said in London.

The annual summit of the OAU held in Zimbabwe closed on 4 June 1997 with a promise from its then new Chairman, President Robert Mugabe, that any future coups on the continent would get short shift from the continental body. Mr. Mugabe told reporters after closing the three day gathering attended by 31 Heads of State from the OAU's 53 member countries that future coups will be handled in a harsh way.

For the first time in its existence, the OAU endorsed military intervention when it gave the green light for Ecomog, the Nigerian dominated military arm of the sixteen nation Economic Community of West African States (ECOWAS), to drive out Major Johnny Koromet's Military Council.

The real situation arising across the African Continent is a fast growing demand by the people for a process of democratisation. The wind of democracy is blowing through Africa. We are witnessing a new phase in Africa, where the central demand is a demand for democracy. The last OAU annual summit has condemned coups. The masses of Africa have done away with a one party system to a multi party system.
The ballot box must rule in Africa and the rule by gun must be broken.

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