Doctrines of Convenience: Judicial Review Following Periods of Extra-Legality

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Overview

With the rise of constitutionalism as the dominant global paradigm for national governance, governments find themselves today under great pressure to adhere to a formalized set of procedures and precepts laid out in their respective constitutions.[1] Any radical departure from these norms, such as the unconstitutional seizure of state authority by an outside party or one of the state's own constituent parts, can deal a staggering blow to perceptions of government or regime legitimacy, both among the national population, and among skittish international investors and allies.[2] Likewise, the existence of human rights standards, membership guidelines for international organizations and treaty obligations,[3]

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* The author would like to thank Dr. Tom Ginsburg, Prof. Lisa Bernstein, Prof. Mila Versteeg, Nilesh Sinha, Anna Khan and, in particular, Dr. Marianella Paz for sharing their generous support and ideas throughout this process.

1 CASS SUNSTEIN, WHAT CONSTITUTIONS DO 241 (2001); *see also* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 179 (1960) ("[The reason for constitutions] is that all men in the pursuit of immediate aims are apt—or, be- cause of the limitation of their intellect, in fact bound—to violate rules of conduct which they would nevertheless wish to see generally observed. Because of the restricted capacity of our minds, our immediate purposes will always loom large, and we will tend to sacrifice long-term advantages to them."); and discussion in A.C. Pritchard and Todd Zywicki, *Finding The Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C.L. REV. 409, 447-49 (1999).

2 Robert Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 580-81 (2004).

3 The charters of many international agreements and associations such as the OAS (*See* Article 21 of the Inter-American Democratic Charter), the British Commonwealth, and the African Union (*See* Megan Shannon, et. al, T*he International Community's Reaction to Coups,* APSA 2012 ANNUAL MEETING

alongside the ubiquitous presence of global media, mean that states are increasingly likely to have their actions (even during emergencies) subsequently scrutinized either by actual courts or else in the court of international public opinion. However the stakes of such considerations are high, and can include loss of aid revenue and expulsion from international organizations.[4] Despite this risk, unconstitutional power grabs and coups are by no means uncommon, as we have recently seen in places like Mali, Egypt and Central African Republic.[5]

PAPER6) all offer guidelines and indications for suspending member states following unconstitutional interruptions or seizures of power. As a result, countries seized through coup d'état, and whose governments are unable to offer sufficient justification, can soon find themselves cut off from receiving necessary aid as befell the "revolutionary government" of Mali in 2012.

4 Since 1993, the U.S. government has maintained a policy of expressly forbidding the distribution of national funds to "finance directly any assistance to any country whose duly elected Head of Government is deposed by military coup or decree." [Section 513, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1993)

5 While it is perhaps worth noting that, during the Cold War, the occurrence of military coups peaked, particularly among the non-NATO/non-Warsaw Pact countries of Africa, Eurasia and Latin America. In the year 1964 alone there were twelve such coups, replacing the governments of more than 10% of those countriesin existence at that time, and that's excluding any number of failed coups and abortive attempts – discovered and undiscovered—that likewise may have taken place. It has been argued that the frequency and success of such constitutional disruptions have been declining. The last decade as a whole, has brought about only 10 successful "strikes of state" worldwide. (*See* Jonathan M Powell and Clayton L. Thyne, *Global Instances of Coups from 1950 to 2010: A New Dataset*, 2011 JOUR. PEACE RESEARCH 249-259). Yet, lest we be too soon to self-congratulate, I would argue that much of this is the result of new developments in "framing" and on the heightened need for, and availability of, justifications as a result of geopolitical changes. The importance of complying with constitutional procedures at the domestic level, in order to preserve its international credibility was relatively low. Prior to the fall of the Soviet Union in 1991, any government that arose by force could usually count on receiving support and legitimacy from one of the two superpowers. That is to say, during the Cold War, when Fidel Castro overthrew Fulgencio Batista, an ally of the

Modern constitutions are expected to fulfill several crucial roles in a society: setting up a structure for governance, clearly defining the responsibilities and authorities of various state actors, and limiting governmental power vis-à-vis the population through the creation of enumerated rights. Prior to the rise of constitutionalism as a nearly universal[6] characteristic of government globally, sovereign actions undertaken by a government had no agreed upon national framework with which to be subsequently compared and legitimacy was but a secondary consideration to feasibility. During this period, "necessity" was approached primarily as a common law defence to legitimize illegal acts undertaken by individuals,[7] not actual states for whom "might" was assumed to make "right."[8] Thus, while the state held considerable freedom of action, it was the individual that was beholden to the mandates of the law.

U.S., the new regime found a ready friend in the Soviet Union. Meanwhile, when Pinochet overthrew the left-wing Allende regime in Chile, this new regime now would be supported by the United States and the Western powers. With this predictable tit-for-tat system firmly in place governments during this period faced a far easier path to legitimacy: a path paved by geopolitical rivalries and well lit by ideological platitudes. The end of this system have complicated the ease, and heightened the importance, with which a nascent coup-arising government can hope to secure the requisite international legitimacy for rule.

6 *See* STEPHEN HOLMES, PASSIONS AND CONSTRAINT 135 (1995) (discussing how "[a] constitution disempowers short-sighted majorities in the name of binding norms"); JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 93 (2001) (describing constitution-making as "a nation's struggle to lay down and live out its own fundamental political commitments over time").

7 As of January 2013 only the United Kingdom, New Zealand, Canada, Saudi Arabia and Israel have not ratified some variety of written constitution, to function as their basic law.

8 For the classic example of 19th Century Necessity Defence *see Regina* v. *Dudley* and Stephens, 14 Q.B.D. 273 (1884); or, for a more general overview: Simon Gardner, *Instrumentalism and Necessity*, 6 OXFORD J. LEGAL STUD. 43 (1986).

By formalizing institutional relationships and clearly delineating the boundaries of what shall be acceptable behavior on the part of governments, written constitutions seek to raise the potential risks and transaction costs associated with any government actions that fall outside of those predefined constitutional parameters.[9] Constitutions accomplish this by compounding the perceived illegitimacy of acts that fall clearly outside the established working of the state, and, by extension, raising troubling specters of possible eventual penalties on those actors involved, should the constitutional norm eventually be re-established. And yet, constitutions are at their core pre-commitment devices[10] whose drafters seek to bind the future to the present, cognizant of the fact that subsequent governments and even popular majorities may someday seek to violate those very norms, rights, and procedures established at the time of the constitution's founding. For such a system to function, it is necessary to have bodies capable of monitoring events in real time, likewise

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9 Beyond formalizing intra-governmental institutional relationships and enshrining basic individual rights, constitutions can often hold an important status within the national culture, and are likewise likely to contain important national credos and arguments for collective identity that go some way towards creating a proper raison d'état for the country as a whole. Indeed, it is within these very countries, those where commitment to constitutional government is more or less engrained, that revolutions, coup d'état and other upheavals are most traumatic as this interruption of regular governmental process effectively invalidates the constitution and – by extension the legitimacy of the state itself. (For more on this *See* generally, Mark Stavsky, *The Doctrine of State Necessity in Pakistan*, 16 CORNELL INT'L L.J. 341 (1983)).

10 *See* generally Jon Elster, *Majority Rule and Individual Rights*, *in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 175, 187-89 (Stephen Shute & Susan Hurley eds., 1993) (discussing how majority rule can infringe upon individual rights owing to momentary interest and how constitutionalism acts as a restraint on majority rule); Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 195-96 (Jon Elster& Rune Slagstad eds., 1988) (describing the relationship between democracy and constitutionalism in historical perspective).

reconciling often messy realities with the legal abstractions of the constitution itself: a task that usually falls to a national judiciary.[11]

Yet, when in extremis, the crises with the greatest potential for long-term constitutional derailment such as revolutions, power grabs or coup d'état still take place. Judiciaries in developing common law democracies have routinely failed to condemn such acts.[12] Instead, it has been common for standing high courts to bend over backwards, contorting both the law and their own positions to provide some semblance of ex-post-facto validation for those responsible. By invoking various necessity and legitimacy doctrines, many of them ancient, or highly theoretical, courts serve up precooked justifications to absolve state actors (or those actors who have become the state) from ever being brought to task for having done so.[13]

In fact, not until quite recently, has a national judiciary actually stood its ground in condemning a successful unconstitutional seizure of power while that government itself remained in force.[14] In 2001,

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11 *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 661 (2011) (observing that "[j]udicial review is commonly portrayed as the fail-safe mechanism by which constitutional commitments become practically binding").

12 Recent history is rife with examples of such failures: Nigeria and Uganda in 1966, Rhodesia in 1968, and Pakistan itself has during the last 60 years become a veritable revolving door of coups and judicial validations. (*See*, for example, Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup D'Etat& Common Law*, 27 CORNELL INT'L L.J. 49 (1994) at 102)

13 *See*, generally, Mahmud Tayyab, *Praetorianism & Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan,* 4 UTAH L. REV. 1225 (1993).

14 It can be argued that in the case of *Madzimbamuto* v. *Lardner-Burke*,(1978) 3 WLR 1229 in Rhodesia/Zimbabwe, where the supreme court of the land was in fact the British Privy council these criteria were met but likewise a differentiation can be drawn based on it not being, technically, the court of that country. Likewise, there are cases where judiciaries did fail to validate a coup

Marine Commodore Bainimaram sought to justify his recent seizure of state authority in Fiji via coup arguing that his overthrow of the state had been justified by necessity.[15] The Supreme Court of Fiji, refused to accept this argument, declaring both his actions and his current authority illegitimate. The Commodore stepped down and, for a time, there was a return to constitutional normalcy. Yet five years later Bainimaram was back in power again following a second successful putsch in 2006.[16] This time, when the court attempted to declare his actions unconstitutional he was prepared.[17] The Fijian judiciary was dissolved and the Commodore remains in place to this day. So what lessons can we learn from this Tale of Two Fijis?

When governments are functioning from a place of legitimate authority there is likely to be an opportunity to assure constitutionality ex ante, perhaps by pushing through a constitutional amendment or even easing in through a creeping coup, minimizing potential risks or scandals. The type of constitutional questions likely to require judicial review as to constitutional legitimacy after-the-fact,

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once the propitiators of the constitutional violation were no longer in control of the government. Examples can be found in: *Jilani* v. *Government of Punjab*,1972 PLD SC 139; *Liasi* v. *Attorney-General*, 1975 CLR 558 (Cyprus), *Mitchell* v. *Director of Public Prosecutions*,1986 LRC (Const.) 35 (Grenada).

15 *The Republic of Fiji* v. *Prasad*, [2001] FJCA 1.

16 *Qarase v Bainimarama* (unreported, Court of Appeal, Fiji, 9 April 2009, No ABU0077 of 2008S, Powell, Lloyd and Douglas JJA), available at http://www.nswbar.asn.au/circulars/2009/apr09/fiji.pdf.

17 In April of 2010, Bainimaram announced the immediate implementation of the aptly-named "Revocation of Judicial Appointments Decree" which dissolved all judicial appointments made under the suspended Fijian Constitution. New High Court judges were appointed six weeks later. Subsequent decrees that followed would likewise bar the courts from addressing issues surrounding the legality of the recent interruption of constitutional rule, or to address potential human rights consequences stemming from it. (*See* generally, Amnesty International's Report on Fiji available at: http://www.amnesty.org/en/region/fiji/report-2010).

particularly within the context of the developing world, are often those that involve serious constitutional violations such as coups and illegitimate governmental seizures of authority. In my view, such seizures can best be understood as belonging to one (or more) of the following three separate modalities.

(1) An "auto-coup" where the executive unconstitutionally seizes power and authority constitutionally delegated to other bodies such as the judiciary or parliament.

(2) A "creeping coup" where an executive sequentially expands the scope of its power chipping away at other authorities via tactical consolidation and systematic undermining and erosion of other governmental authorities but falling short of outright seizure.

(3) A "coup d'état" where a non-executive body or group, often military, seizes control by force or threat of force from the previous executive.

The first two modalities represent situations where some previously established, or otherwise, legitimate authority oversteps constitutional boundaries placed upon it by the national Constitution or fundamental law. By having violated its constitutional role, often at the expense of another branch of government such as a legislature, the legitimacy of this previously lawfully empowered state actor is compromised, as can be, by extension, that of the government as a whole. At one extreme you might have a situation like the 2009 Fijian coup wherein the national executive was declared illegitimate by the judiciary following a coup and the acting executive simply dismissed Parliament, dissolved judicial appointments and suspended the Constitution:[18] essentially an auto-coup on the heels of a coup d'état.

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[18] UNITED NATIONS SECURITY REPORT #4 (2009), available at

While the primary focus of this paper, and most of the examples we will be dealing with are anchored to the third modality, the earlier two are likewise worth touching upon. In part, this is because they offer an example of state actions most easily justifiable through the necessity doctrine: situations where the actors themselves have some claim to legitimacy in principle, even if not in scope.

It bears noting that while I have categorized these modalities as being entirely separate, and think them best understood as such, in many cases a particular incident or scenario may involve more than one modality over a given period of time or else an external perception to that effect. At times this can represent multiple coups or attempted coups, as well as potential countercoups during the same short period of significant destabilization.[19] Likewise, coup leaders themselves are often quick to justify their extra constitutional actions as having in fact been a defense of the constitutional paradigm against some prior executive overreach.[20] In cases where such arguments prove successful they can go some way towards validating the new regime.[21]

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http://www.securitycouncilreport.org/update-report/lookup-c-glKWLeMTIsG-b-5108563.php?print=true,explaining how the rebirth of Fijian democracy would prove short lived, as in 2006 another coup would topple the government, again led by Commodore Bainimarama. Once again, in 2009 the Appellate Court would rule the move unconstitutional although this time the government was ready. The following day President Ratu Josefa Iloilo announced over a national radio broadcast that he has abolished the constitution, assumed governance and was rescinding all judicial appointments. Soon after, he would reappoint Bainimarama as president.

19 *The Republic of Fiji* v. *Prasad,* [2001] FJCA 1.

20 Marc Lacey, *Leader's Ouster Not a Coup, Says the Honduran Military*, THE N.Y. TIMES, July 1, 2009.

21 Helene Cooper and Marc Lacey, *In a Coup in Honduras, Ghosts of Past U.S. Policies,* THE N.Y. TIMES, June 29, 2009.

In short, national governments will often find it preferable to seek a way to justify their interruptions by pressuring national judiciaries to subsequently interpret their actions as having been constitutionally legitimate the entire time, even if they ran contrary to the letter of the law.[22] This allows for some semblance of a return to normalcy, while maintaining the existing institutions and protocols in place.[23] After all, scrapping a constitution outright (as was recently done in many of the Arab Spring countries)[24] can be a painstaking and laborious process, and while public opinion may demand it following some seminal event or truly popular revolution, should circumstances otherwise permit it coup leaders may seek to minimize interruption by merely shuffling the pieces around the chessboard: rather than fundamentally changing the game.

Name Your Necessity Doctrine: Kelsen, Grotius, Bracton et al.

Perhaps unsurprisingly, the various doctrinal justifications through which national courts will often seek to validate constitutional violations after-the-fact have proven to be both highly

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22 Farooq Hassan, *Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup d'état in the Common Law*, (1984) 20 STAN. J. INT'L L. 191, 240–241 (describing judicial acceptance of the validity of a coup as "a uniquely valuable source of credibility for the revolutionary government." Although it is true that refusing to accept the validity of the coup government may produce unrest, "it seems more likely that the acceptance of revolution as a viable means of governmental transformation would facilitate rather than foreclose the likelihood of additional takeovers of the same type.

23 Charles Sampford and Margaret Palmer, *Strengthening Domestic Responses to the Erosion of Democracy and to Coups D'état*, 2005 COUNCIL ON FOREIGN RELATIONS26 (where: "*Genuine revolutions may justify a finding that the old legal order has vanished. However, coups are not about getting rid of the old order but taking it over.*")

24 Daniel Lansberg-Rodriguez, *Four Arab Democrats and a Constitutional Scholar Walk Into a Bar*, FOREIGN POLICY, May 6, 2013.

inconsistent[25] and somewhat incestuous. Much as coups themselves occur in self-perpetuating cycles[26] – wherein each incoming violation seemingly increases the statistical likelihood that a future violation will take place – so too do specific justification doctrines of choice seem to emerge and repeat themselves based on regional, cultural and historical factors.[27]

For our purposes, this current cycle can be said to have begun in Pakistan in 1955, when the Lahore High Court granted legal legitimacy to the dissolution of Parliament by the fledgling nation's Governor General.[28] Since then, over a dozen commonwealth countries have -- at one time or another -- relied on some combination[29] of the Doctrine of Necessity,[30] vaguely Grotian conceptualizations of implied mandate,[31] and Kelsen's Pure Theory[32] of

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25 *Supra.* n.13.

26 *Supra.* n.12.

27 *Id.*

28 *Reference by His Excellency the Governor-General*, PLD 1955 F.C. (Pak.) 435 ("Reference") where guided by Bracton the Governor-General's labels dissolution of the Constituent Assembly as having been made "under the stress of necessity... in order to avert an impending disaster and to prevent the State and society from dissolution', but urged that 'since the validity of these laws is founded on necessity, there should be no delay in calling [a new] Constituent Assembly."

29 *Supra.* n.9 at 364.

30 A note on terminology: When referring to "doctrines of necessity" (in the lower case) or "necessity doctrines" I am referring to a collective bundle of commonly invoked doctrinal justifications used to justify violations of the existing constitutional order. Meanwhile, The Doctrine of Necessity (capitalized) refers to the specific doctrinal justification predicated in part by sayings of Cicero and Henry de Bracton and Grotius, and the first justification used for coup validation in Pakistan in 1955.

31 *See generally* HUGO GROTIUS, THE LAW OF WAR AND PEACE, DE JURE BELLI AC PACIS (F. Kelsey trans., 1925) explaining how usurpers can never becoming legitimate, as that is a right attached only to the rightful sovereign, but whose acts of Government can have binding force, conditional on whether the lawful ruler *would* prefer that the measures be enacted in order to avoid the utter

institutional legitimacy alongside precedents of similar violation / justification cycles in their own or other commonwealth countries. In nearly every case where the offending government remained in power and the court itself was within that government's reach, the court would find some platitude through which to justify the unjustifiable.[33]

Being a mechanism that often relies heavily on sound bites: snippets of doctrine taken out of context, ancient legal maxims, and contorted or oversimplified versions of more nuanced ideas; the roots of the phenomenon are remarkably easy to trace. Each new iteration of the practice facilitates not only further constitutional breakdowns in the specific country affected but rather – through the importation of doctrines and precedence from one part of the commonwealth to the next – the vicious cycle has kept perpetuating with withering effects upon the tenability of democratic governance.[34] By bypassing the existing constitutional framework state actors may facilitate short-term solutions but they also create precedents that can weaken governmental legitimacy for a very long time.

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confusion and anarchy among his subjects. As such the fount of the law remains corrupt but the law itself may be valid.

32 Kelsen was a positivist and his pure theory is likewise a positivist theory. It seek to define "what is law" in conceptual sense free of value judgments as to its legitimacy or inherent justice or injustice. At the heart of this theory lies the idea of a *"Grundnorm"* the base from which a legal system derives its validity. In Kelsen's conceptualization a successful *coup d'etat* or revolution can create a new "Grundnorm", and efficaciousness in being externally regarded as a new order, in turn legitimizes it and validates it as a new legal order. *See* generally HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945). See also HANS KELSEN, PURE THEORY OF LAW (2nd ed., 1967) and F.M. Brookfield, *The Courts, Kelsen and the Rhodesian Revolution,* 19 U. TORONTO L. JOUR.326, 329 (1969).

33 *Supra.* n.12.

34 *See* Appendix I, and also, for example, *The State* v. *Dosso,* PLD 1958 S. Ct. (Pak.) 533, *Madimbamutov Lardner-Burke,* (1968) 2 S.A. 284.

Defining Necessity

The inherent tension between doing one's duty and doing what is necessary is of course nothing new. It is a deep and timeless theme in our collective history. As far back as the Old Testament, the book of Jonah describes desperate sailors throwing their precious cargo out to sea, so as to lighten a foundering ship during a terrible storm.[35] In the prevailing centuries, captains of state have often invoked similar justifications to instances where fundamental laws, or even sacred national values, have been likewise sacrificed either due – as in Jonah – to actual necessity, or, more often, as a result of internecine power struggles or personal ambitions.

In a sense, the doctrine of state necessity is a logical continuation of the more well-known and uncontroversial defence of necessity in criminal law. Within the common law legal tradition otherwise criminal acts can be deemed justifiable (and by extension irreproachable) if a defendant is able to prove that greater harm would have occurred had the accused strictly adhered to the law in that specific case.[36] The stakes are a bit higher however, since such considerations often apply to state actors, claiming to have acted under color of law, and currently positioned at the highest levels of government: individuals for whom the actions in question, if not legitimized, may be sufficient to compromise the integrity and validity of the state itself.

The use of "State Necessity" as a justification for illegal acts (although not specifically for coup validation) dates back much further

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35 *See* Jonah 1:4–5, New American Standard Bible.

36 With one classic example being the man who trespasses on private land to avoid being attacked by an animal.

within the common law tradition. Following the Jacobite revolution of 1715, Whig parliamentarians postponed parliamentary elections, and extended their own mandates, through an emergency measure known as the Septennial Act of 1716. As justification they invoked the "*saluspopuli*" maxim.[37] A doctrine of state necessity was likewise strongly implied during the 19th Century United States Supreme Court Case *Texas* v. *White*[38] (1868) a post-Civil War case in which certain limiting acts undertaken under the auspices of the then – confederate governments – were allowed to continue in force afterwards despite them not having a clear constitutional justification for such.[39] While they were patently illegitimate, as the rebels had never been in a constitutionally legitimate position to be making law, the necessity of acquiescing to those laws was deemed sufficiently compelling by the Supreme Court.

Later, during the early 20th Century, several civil law European States, suffering under the uncertainties caused by the two World Wars, and the onerous rise of fascist movements during the inter-bellum period, began declaring "state of emergencies" unconstitutional. The first state to do so was Switzerland. In 1914, the Swiss Parliament gave over absolute power to the executive governors: although the national Constitution did not actually allow for such a transfer.[40] This *Droit de nécessitéetétat d'exception* persisted until 1921.[41] In 1939, with the advent of the Second World War, the executive once again seized

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37 *Supra.* n.34.

38 BENJAMIN STRAUMANN, CONSTITUTIONAL THOUGHT IN THE LATE ROMAN REPUBLIC, HISTORY OF POLITICAL THOUGHT 282, Vol. XXXII. No. 2. (2011).

39 *Id.*

40 Anna Khakee, *Securing Democracy? A Comparative Analysis of Emergency Powers in Europe,* POLICY PAPER NO. 30, GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES (2009), at 19.

41 *Id.* at19-20.

power, although this time they would prove unwilling to give it back until it was wrestled away via popular referendum and protests in 1950.[42] To various degrees Norway and France, underwent similar experiences during this time, with the proto-doctrine of necessity being invoked so as to validate actions undertaken without explicit constitutional grounding – and at times with begrudging acquiescence by other powers.[43] In contrast, countries such as Germany, Greece, Hungary, Poland, Portugal, and Spain have very well defined constitutional parameters as to how the country may function during a state of emergency. Though certain constitutional protections and procedures are temporarily suspended they have enacted careful stipulations as to the extent, authority and potential duration of such measures.[44]

Modernity has made such situations no more cut and dry. Take for example the situation in Cyprus[45], which, in 1964, was a country deeply and passionately divided between its majority Greek and minority Turkish populations. Upon achieving independence in 1960, as a way of diffusing feelings of ill will, the government had been deliberately set up in such a way so as to require the active participation of government positions, explicitly set aside only for members of the Turkish Cypriot minority. Yet when the relationship and cooperation between the two groups broke down, the Turkish Cypriots began to deliberately withdraw from the system: creating a constitutional crisis which effectively paralyzed the government.[46]

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42 *Id.*
43 *Id.*at 18.
44 *Id.*at 11-22.
45 *Supra.* n.9.
46 See *Attorney General of the Republic* v. *Mustafa Ibrahim and Others,* 1964 Cyprus L. Reports 195.

In response, the Greeks moved to adjust the system unilaterally, in an attempt to reconcile the de facto workings of the government during the Turkish boycott with the processes required under the national Constitution. This was unconstitutional on its face, but the nation's constitutional court subsequently acquiesced to the government's argument that the move had been necessary, and justifying the decision through an appeal to the Doctrine of Necessity.[47]

More recently, the former kingdom of Nepal has entered into what appears to be a type of infinitely looping over reliance on the Doctrine of Necessity. It has regularly appealed to the said doctrine so as to legitimize repeated failures among its collapsed institutions through meeting deadlines for formalizing constitutional norms.[48] To date this has meant repeatedly extending the term of what should have been a temporary constituent assembly and prolonging the enforcement of what was meant to be a short-term transitional constitution.[49]

Coup Validation

The theoretical justification of what would eventually become the Doctrine of State Necessity (at least as regards its current troublesome, coup validating incarnation) is usually attributed to a series of cases undertaken by the Pakistani Judiciary beginning soon

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47 *Id.*

48 Punjita Pradhan, *Nepali Parties Agree to Extend CA Term for Fourth Time*, available at http://news.xinhuanet.com/english2010/world/2011-11/28/c_131275270.htm.

49 *Into the Wild,* May 28th 2012, available at http://www.economist.com/blogs/banyan/2012/05/nepal-without-constitution.

after the country's initial independence.[50] In 1955's Khan case, and several subsequent ones, the Pakistani Supreme Court, spearheaded by Chief Justice Muhammad Munir, first hinted at the existence of such a doctrine in dicta, although the case itself would be decided based on other technicalities.[51] Around the same time a Special Reference was requested by the acting Pakistani leadership soon after and it was this decision, commonly referred to as "*the Governor General's case*", that first delineated the idea of the Doctrine of State Necessity as a coup validation device.[52]

These and subsequent cases would likewise draw on one or more doctrines at given times, as well as precedents from as far away as the United States.[53] In Pakistan with its troubled history of coups, these arguments would repeat themselves many more times including the period of General Zia's coup against the Bhutto government, and more recent constitutional violations by General Musharraf.[54] In Pakistan, as in other countries, certain justifications might be seen to ebb and wane in popularity for a time but with the court's eventual findings being rarely in doubt.[55]

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50 *Supra.* n.9.

51 *See* generally *Federation of Pakistan* v. *Moulvi Tamizuddin Khan,* PLD 1955 F.C. (Pak.)240.

52 Soon after, the Pakistani High court would depart from their earlier reliance upon classical Doctrine of Necessity –which assumes a state actor seizing extraordinary authority during a crisis – to the more coup-friendly Kelsen theory in *State* v. *Dosso*, PLD 1958 S. Ct. (Pak.) 533.

53 *Supra.* n.9.

54 *See Begum Nusrat Bhutto* v. *Chief of Army Staff,* PLD 1977 SC 657 and *Tikka Iqbal* v. *Federation of Pakistan & Ors.*, PLD 2008 SC 178.

55 *Supra.* n.12where: "Although these different coups unfolded in diverse contexts and resulted in regimes with varied political agendas, the courts validated all incumbent usurper regimes with one exception."

Early on, Mr. Munir and his fellow progenitors of the doctrine predicated their argument for The Doctrine of Necessity primarily on maxims: Henri the Bracton's belief that "necessity makes lawful what is otherwise unlawful" and the Latin maxim *salus populi est suprema lex*.[56] This maxim, while often misattributed to the Twelve Tablets – fundamental laws of ancient Rome that functioned as a type of pseudo-constitution—actually seems to have originated with Cicero.[57] The phrase is used within the context of delineating the particular responsibilities of Roman consuls, rather than as an overarching suggestion for the proper scope of governance.[58] Yet the maxim itself would subsequently make the rounds among important legal scholars and common law theorists of the enlightenment and industrial eras such as John Locke,[59] and John Selden, casting an outsized shadow over the prospect of constitutional integrity in much of the developing world.[60]

The other maxim invoked under the Munir judgments was by 13th Century British jurist Henry de Bracton.[61] Bracton's argument "that which is otherwise unlawful, necessity makes lawful, and necessity makes a privilege which supersedes the law"[62] has likewise proven to be an important source of justification, not only within the

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56 Translation: "The welfare of the people is the supreme law"

57 *Supra.* n.38.

58 *Id.*

59 John Locke uses this as the epigraph in his *Second Treatise on Government* and refers to it as a fundamental rule for government.

60 *Supra.* n.38.

61 Bracton was a 13th Century British jurist who, among other things, defended supreme papal authority over secular affairs and recommended that criminal trials be undertaken "by ordeal" (wherein the defendant would hold red-hot iron or be thrown bound into a lake under the premise that a just god would protect the innocent).

62 HENRICUS DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 231.

cannon of regular criminal law but likewise – at the state level – particularly for the initiations of dictatorships and states of emergency.[63]

Although not invoked in the earliest cases of the Munir court, Grotius, would soon become the third standard fount for justifying doctrines.[64] While Grotius was steadfast in his belief that though a force which overthrows the sovereign can never be legitimate, some of its actions *can* be legitimate, provided they are actions that the sovereign itself would have preferred had it remained in power.[65]

Under this line of reasoning, for example, while the acts of a usurper are tolerated and their laws can be obeyed to avoid anarchy, the act of usurpation itself remains unlawful.[66] In some cases this conceptualization can have advantages over the more commonly invoked, Bractonian variant, since it does not presuppose an underlying modicum of legitimacy for the actors.[67] Grotius might excuse overreach in terms of scope, as in the case of the *Governor General*, but actual revolution – that is to say the legitimacy of actors, not acts – falls outside his purview.

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63 See generally, *Special Reference by His Excellency the Governor-General,*1955 PLD FC 435; S. A. de Smith, *Constitutional Lawyers in Revolutionary Situations,*7 WEST ONTARIO L. REV. 72 (1968).

64 *See,* for example, *Madzimbamuto* v. *Lardner-Burke,*[1968] 2 S Afr LR 284 and *Jilani* v. *Government of Punjab,* 1972 PLD SC 139.

65 *Supra.* n.12.

66 *Id.*

67 Mark Stavsky, *The Doctrine of State Necessity in Pakistan*, 16 CORNELL INT'L L.J. 341 (1983):*"The only advantage of Grotius' theory is that it was designed for application in a revolutionary context. The doctrine of state necessity was not. The theory freely admits that the successful revolutionary government is, in fact, usurping lawful authority. Like necessity, however, it equally undermines constitutional rule."*

A more modern rationalization, and one of similar consequence to the invocations of the doctrine of necessity at the state level comes to us from, what is known as Hans Kelsen's "pure"[68] theory of institutional legitimacy. In contrast to Grotius, Kelsen does not dismiss the idea of revolution out of hand rather stating that, if sufficiently "efficacious", a revolution can be lawful.[69] This theory justifies the usurper's control of power where it can be established that it was for the benefit of the larger community. It is fundamentally based on the principles that as long as there is acquiescence by the citizens, and the *de jure* administration is effective then the Courts have to evaluate the evidence and grant legitimacy to the usurper's claim. However, there always remains the test of efficacy to be applied by holding a general election.[70]

So What Should Courts Do?

For a judiciary faced with a clear and present disruption of the constitutional order to survive the inevitable pro-validation onslaught of a national government requires a great amount of commitment and courage. In many cases they may be threatened with dismissal, or even physical harm.[71] Likewise, they may fear the destructive chaos and social breakdown should they refuse and the government remain illegitimate.[72] As we have seen, given these pressures and the myriad justifications available, courts have generally always opted for

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68 The "purity" of the theory is actually quite crucial to its proper understanding – an issue that has let to its systematic, and perhaps deliberate, misapplication in the past. Kelsen is discussing these issues in terms of theoretical constructs that, even to him, may have limited applicability in the much messier environment of real world events.

69 HANS KELSEN, PURE THEORY OF LAW (2nd ed., 1967).

70 *Supra.* n.12.

71 *Id.*

72 *Id.*

validation[73], except in situations where the affected government has either already been toppled, or if the court itself is able to put a distance between itself and the usurper government in question.

In his watershed analysis for the Cornell Law Review in 1994, Tayyab Mahmud traced in considerable detail many specific cases where judicial coup validation had taken place, or else been attempted, and eventually rejected by a national court.[74] Mahmud argues convincingly that the lack of doctrinal consistency through which these decisions (see chart) were decided, and the predictable outcomes involved in cases where the offending government remained in power, evidenced the extent to which judiciaries were *"politically timid, personally expedient, intellectually dishonest...making policy determinations clearly not within judicial discretion."*[75]

That said Mahmud is clearly cognizant of the poor alternatives confronting judiciaries during these situations. Courts can either (a) rationalize some type of validation mechanism for the *de facto* rulers (b) refuse to validate and risk dissolution or perhaps even physical

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73 *Id.* where "Of the options available to a court when confronted with a coup d'etat, the one validation/legitimation legislative capacity of the usurpers. This option is riddled with such theoretical, suitable option for a court.

74 *Id.* discussing the four possible judicial responses: validation and legitimation of usurpation, strict constitutionalism, resignation of office, and declaration of the issue to be a non-justiciable political question.

75 *Id.* where: "While most courts validated coups d'etat, there was a singular lack of doctrinal consistency. The courts vacillated between the pure theory of revolutionary legality; the modified theory of revolutionary legality; the restricted doctrine of necessity; the unrestricted doctrine of necessity; the doctrine of implied mandate; the public policy doctrine; and various combinations thereof. Utterly lacking any measure of continuity, the contradictory pronouncements render the courts vulnerable to the charge that they were politically timid, personally expedient, intellectually dishonest, and that they were making policy determinations clearly not within judicial discretion."

harm and persecution, (c) resign *en masse*, or (d) declare the matter non-justiciable *ex ante*. It is this latter option which Mahmud considers most desirable because it: "keep[s] the courts out of the main area of dispute, so that, whatever be the political battle, . . . the courts can carry on their peaceful tasks of protecting the fabric of society and maintaining law and order."[76]

Yet while Mahmud's theory has proven highly influential, it has its detractors. Sampford and Palmer assessed Mahmud's options and found them incomplete.[77] While agreeing with Mahmud as to the inherent weaknesses of the first three options, the authors discarded the idea of injusticiability, suspecting that it would weaken the relevance of the court as a body and deprive the people of judicial review in the moment when they would be most certain to need it.[78] To them, such a policy would underplay the role of repeated coups within a single country and help reinforce the vicious cycle "created and reinforced by each succeeding coup".[79] Writing in 2005, their work was informed by the successful judicial recalcitrance of the Fijian court in 2000, although not by the less successful second iteration were the court had been dissolved.[80] In this view, a situation, where the judiciary would deliberately set itself up to not rule on "political questions" such as government legitimacy following a disruption of the constitutional order is a serious betrayal of the role of the judiciary[81] –

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76 *Id.*

77 *Supra.* n.23.

78 *Id.*

79 *Id.*; J. Fieldsend in *Madzimbamuto* v. *Lardner-Burke,* [1968] 2 S Afr LR 284.

80 *Id.*

81 *Supra.* n.23 at 31-32 where: "My own unequivocal and uncompromising view is that the legal and ethical duty of the Pakistan Supreme Court, like other judiciaries in democracies (even flawed democracies), is simple. It is to do justice according to law. Doing justice would, at the very least, involve clearly stating that the oath Musharraf demanded was illegal and the most outrageous contempt

and the judiciary's ruling of illegality in this respect can serve as a crucial trigger for the ultimate stakeholders, the people, to take action[82] and do much to ameliorate many of the potential collective action issues that might otherwise occur.

Sampford and Palmer also suggest that any decisions as to constitutional validity following a breakdown of the constitutional order should be undertaken by a supreme court which is both appointed by the old regime, and beyond the grasp of the new one.[83] They likewise place a great deal of importance into the fact that the Fijian Supreme Court was physically located away from Fiji itself, and thus ostensibly out of reach from potential repercussions on the part of the commodore and his cadre.[84]

In their view, this system might be exported to other common law systems with a history of coup/coup validation cycles such as

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of court, that it was a nullity with no binding force because it had been extracted through the threat of force, the dismissals of judges who had not taken it was illegal, any dismissal of them would be illegal, and any purported replacements were not judges. It also would mean pointing out the illegality and criminality of any orders given by Musharraf. Courts should then go through the very simple legal analysis involved: Musharraf was threatening many people with violence (including lethal violence) if they did not submit to his criminal orders; the army had no duty to follow his orders; the army had a duty to protect citizens and officials from his criminal acts; if Musharraf did not surrender to the nearest police officer and it was not possible to effect an arrest, self-defense would allow his being shot on sight. There is no room for compromise on this analysis.

82 A. O. Ekpu, *Judicial Response to Coup d'état: A Reply to Tayyab Mahmud (from a Nigerian Perspective),* 13 ARIZ. J. INT'L & COMP. L. 1 (1996) at 11.

83 *Supra.* n.23.

84 During the Court of Appeal in Fiji in *The Republic of Fiji* v. *Prasad,* [2001] FJCA 1, and *Qarase v Bainimarama*(unreported, Court of Appeal, Fiji, 9 April 2009, No ABU0077 of 2008S, Powell, Lloyd and Douglas JJA): judges were drawn from around the South Pacific. A similar example can be found in For example, the Privy Council in *Madzimbamuto* v. *Lardner-Burke,* [1968] 3 All ER 561; [1969] 1 AC 645 which was in England.

Pakistan. While offering comparatively little in terms of what specifically such a body might look like, we are told that it might consist of judges who have escaped, retirees abroad, ambassadors, and—if necessary—even foreigners. After all, was not the 2001 Fiji court of appeals composed mostly of Australian and New Zealand judges?[85] While an interesting theory, there is an extent to which, functionally, this would be able to work in practice.

Even if outside the physical grasp of an illegal regime, court-members are likely to leave behind loved ones, property and acquaintances whose safety and well being could still be used to coercive effect by a government sufficiently intent on doing so. Furthermore, while adding some extra pre-coup groundwork on the part of a prospective coup leader, such a system would certainly create incentives for unconstitutional movements to simply secure necessary support from the external court *ex ante*, something which might even being rendered easier given the individuals' distance from the center of government. Being foreigners the judges in the Fiji cases were somewhat shielded from this, but barring the island nation's tiny size and the particulars of its history would this model be likely to flourish elsewhere?

The scientific method demands that a successful experiment be both observable and replicable. While the 2001 Fiji case can be observed as having had a good outcome in that the Government whose authority it was questioning chose to abide by what was –from its perspective-- an unfavorable decision, that case was itself unusual in many ways, and may not prove to be easily imitatable. First of all, the respondent was not seeking to overturn a conviction imposed by a

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85 *Id.*

revolutionary court, an unconstitutional detainment or taxes levied by a usurping power as has generally been the case, but supposedly sought only the Court's confirmation that the country's 1997 Constitution remained in force. Secondly, due to its limited population, and the regional paradigm of intrastate cooperation common to the South Pacific League many Appellate court justices are citizens of other jurisdictions (most commonly New Zealand or Australia) but this is not only for constitutional matters but for everything, and has long been the way that courts have been set up. The same was the case in the *Madzimbamuto* case where, given the slow departure from colonization, the Britain-based Privy Counsel's jurisdiction over such matters was a matter of long standing and thus universally understood (if not necessary palatable) among necessary institutional actors and quite likely, much of the population as a whole.[86]

Perhaps most importantly, the government may have been unready for the decision *ex ante*, and acquiesced in part due to its own mobilization problems, a mistake it would not repeat. While it cannot be denied that the subsequent Fijian auto-coup, dissolving the Court and the Constitution, came with a heavy price tag, and proved seriously damaging both to the country's international reputation and its relationships abroad (in short order it was expelled from both the Pacific League and the Commonwealth) the government survived and remains in place at the time of this article's writing.

Sampford and Palmer likewise overlook the extent to which the Fijian court's steadfastness (to say nothing of its existence) were products of specific idiosyncratic particulars of the island nation itself. Had it not been for its tiny size, recent postcolonial history and

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[86] *Supra.* n.23 at 34.

underlying ethnic tensions traditionally moderated from without, could we expect the same result? And, if not, would such a model be exportable to countries with a more robust internal judicial tradition like Pakistan or xenophobic internal dialogue as in Zimbabwe? One can easily imagine, that a court packed with expatriots and foreigners, different from the courts that generally resolve domestic issues, might be seen as less legitimate by the general population and be open to accusations of imperialist intrigue by the new regime.[87]

As such, if we return to the idea of constitutions as normative documents set up to unacceptably raise the transaction costs associated with government actions deemed to be illegitimate *ex ante*, then the system worked. Yet is this really the best we can hope for?

Options (Mahmud)	Pros	Cons
Constitutional Adherence	Integrity of the State is maintained	Risk of personal backlash, court dissolution, further unconstitutional acts
Coup Validation	Can minimize disruption to the state overall by allowing judicial and other bodies to continue to function	Integrity of the state and the court greatly compromised moving forward
Mass Resignation	Disassociates the judiciary with the current regime, preserves reputation of justices, publically undermines regime	Highly disruptive, hard on individual judges
Declaring the validity and legitimacy of a regime born of a	Separates the court from the political turmoil while still allowing it to preserve certain functions	Lessens the importance of the court overall and its relevance when most needed

[87] *See* for example Graham Davis, *77 Reasons the Cobbers Should Get a Grip,* available at http://www.grubsheet.com.au/?p=3516.

coup d'état a non-justiciable political question (Mahmud)		
External Coup Courts (Sampford & Palmer)	Separates the court from direct coercion or threat of physical harm.	May undermine the institutional credibility of the court in the eyes of the population

Yet to these I would add another possibility. One idea might be to amend existing constitutions in coup-prone common law jurisdictions, so as pre-establish how the constitution can be scrapped and under what circumstances. This might be something along the lines of the emergency provisions in constitutions such as Germany's, which essentially sets a two tiered approach to constitutional norms, so, should a crisis invalidate the normal workings of state there might remain something of a constitutional safety net with which to regulate the current crisis and assure an eventual return to order.[88] Likewise, by addressing issues such as the applicability of State Necessity (confining it, say, only to elected and established authorities) this might serve to limit its destructive use in future: at least insofar as it might limit the most jarring of the three modalities discussed above.

Finally, to shield against what has historically been the rampant misuse of the Kelsen Doctrine it might be possible to add a "right to resist" proviso, by amendment, into the constitution which empower the population to ignore, frustrate or even openly attack the governmental order or regime, often set up elsewhere within the same constitution, under certain predefined circumstances.[89] As Tom

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88 See generally, Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World's Constitutions,*60UCLA L. REV1184 (2013).

89 *Id.*

Ginsburg, Mila Versteeg and I discussed in a recent piece for the UCLA Law Review[90]:

> *"The constitutional right to resist "can represent a fundamentally democratic and forward-looking tool that constrains future government abuse, empowers the national citizenry, and acts as an insurance policy against undemocratic backsliding. It is no coincidence, for example, that the state constitutions of the German Länder adopted a right to resist after World War II, while the right for all Germans to "resist any persons seeking to abolish this constitutional order" was later enshrined in the West German Federal Constitution.[91] Similarly, a number of Eastern European countries adopted a right to resist when writing their new democratic constitutions in the early 1990s[92] when committing to a new democratic future that would avoid repetition of their repressive past."*[93]

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90 *Id.*

91 GRUNDGESETZFÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. II, art. 20(4) (Ger.) (amended to 2010), *translated in* DEUTSCHER BUNDESTAG: BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat et al. trans., 2010) ("All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.").

92 *See, e.g.*, Ústavnízákon č. 2/1993 Sb., Ústava České Republiky [THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS AS PART OF THE CONSTITUTIONAL ORDER OF THE CZECH REPUBLIC], December 16, 1992, art. 23 (amended by Const. Act. no. 162/1998), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: THE CZECH REPUBLIC (Albert P. Blaustein & Gisbert H. Flanz eds., Gisbert H. Flanz trans., 1993) ("Citizens have the right to resist anybody who would do away with the democratic order of human rights and fundamental freedoms, established by this Charter, if the actions of constitutional bodies or the effective use of legal means have been frustrated."); ÚSTAVA SLOVENSKEJREPUBLIKY [CONSTITUTION] Oct. 1, 1992, art. 32 (Slovk.), *translated in* CONSTITUTION OF THE SLOVAK REPUBLIC, CONSTITUTIONAL COURT OF THE SOVAK REPUBLIC, "The citizens shall have the right to resist anyone who would abolish the democratic order of human rights and freedoms

Unfortunately, history has shown that a regime (or revolutionary movement) sufficiently ambitious and well positioned to overwhelm such norms, and intent on doing so, is likely to do so suddenly. And in practice constitutions seem better suited at constraining illegitimate acts *ex ante* than they are at attempting to put the genie back in the bottle after-the-fact. As such, constitutions work best within a political culture of restraint, where national peer pressure and strong institutions curtail certain actions from even being considered, and create collective action problems that disincentivize unconstitutional behaviors on part of state actors. Yet when circumstances require such rebottling, the primary mechanism available for doing so will generally be the national judiciary,[94] which, given the inherent power imbalance between courts and an acting executive – particularly during the aftermath of a power grab - can in practice prove ill-suited for the task.[95]

Much like the oft-overlooked "purity" of Kelsen's theory itself, in practice, constitutions are for most part squarely anchored within a

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set in this Constitution, if the activities of constitutional authorities and the effective application of legal means are restrained."

93 *See* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 303 (2003) (noting how Polish Constitutional Court Justice Lech Garlicki observed that after the fall of communism, there were "several hopes as to the functions to be fulfilled by the new constitutional instruments: to demonstrate a clear rejection of the communist past, to create legal foundations of the new democratic order, to describe and confirm the new identity of the nation").

94 *See generally:* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 661 (2011).

95 *Supra.* n.12 where: "notwithstanding the usurpers' desire for judicial recognition and hence the motivation to placate the judiciary, the options available to the judiciary are quite limited. The judiciary does not have the ability to enforce any judgment against the usurpers, while the usurpers have the power to abolish the courts or replace "uncooperative" judges.

world of theoretical legal abstraction. And as they have become longer, more detailed and specific with time, the likelihood of their explicit provisions being ignored or passed over has likewise grown. It follows that we should no longer design them with a presumption of immortality, and should instead include provisions encompassing the eventuality of their potential overthrow, abuse or suspension; if possible spreading the constitutionally predefined reactions across multiple institutions including various ministries, the courts and the population themselves. Acknowledgement of the brutal realities and risks facing most modern states is crucial if these governing documents are to serve their stabilizing function in future. Hence establishing measures that would frame subsequent considerations *ex ante* would represent a powerful step in the right direction.

Conclusion

This article has attempted to survey several of the problematic rationalization mechanisms relied upon by judiciaries to validate large-scale interruptions in the constitutional order within developing common law democracies after the fact. We have likewise shown the extent to which eventual validation can to a large extent be presupposed by usurping powers stemming, as it appears to do, from the pressures exerted upon judiciaries themselves, rather than on the niceties of applicable legal norms. In this sense the specific arguments for justification have essentially become irrelevant. They are more so a means to an end rather than a reasoned consideration of the actual events and circumstances in play.

With this in mind, we have assessed various existing suggestions for cushioning the pressures that all too often strip judiciaries of their institutional independence, an asset that is presupposed during the

constitutional construction phase and that is absolutely necessary if the actuality is to reflect design within the context of the workings of state.

By moving more towards models where the constitution itself, presupposes these potential problems, we can add an extra set of limitations upon what can be judicially justified after-the-fact: adding a second enforcement mechanism for maintaining the constitutional order through the actions of both non-judicial institutions and via people themselves. The existence of such a device would arm judiciaries faced with these problems with a potential shield against regime coercion and do so in a way that is predictable *ex ante* so that we might hope to see fewer successful coups in future. In the end, a constitution is only as strong as the degree to which it is respected by choice, and the extent to which it has institutions strong and independent enough to push back against unconstitutional threats on constitutional grounds. Failing that, a constitution is not even a paper tiger: it's just paper.

Appendix I

Country and Year	Case Name	Seizing Regime still in Power?	Judiciary in Country	Reasoning	Gov. Action Validated?
Pakistan 1954	State v. Kahn	Yes	Yes	Constitutional Technicalities	Yes
Pakistan 1955	Special Reference no. 1 of 1955 (Governor General's Case)	Yes	Yes	"Saluspopulisuprema lex"; Doctrine of Necessity	Yes
Pakistan 1958	State v. Dosso	Yes	Yes	Kelsen	Yes
Cyprus 1964	Attorney General of the Republic of Cyprus v Ibrahim	Yes	Yes	Doctrine of Necessity	Yes
Ghana 1966	Sallah v Attorney General	Yes	Yes	Doctrine of Necessity	Yes
Nigeria 1966	Ex parte Matovu	Yes	Yes	Doctrine of Necessity / Gortius	Yes
Uganda 1966	Uganda v. Commissioner of Prisons	Yes	Yes	Kelsen*	Yes
Rhodesia/ Zimbabwe 1968	Madzimbamuto v. Lardner-Burke	Yes	No	Kelsen, Doctrine of Necessity	Yes
Nigeria 1970	Lakanmi and Ola v. A.G	Yes	No	Doctrine of Necessity	NO
Pakistan 1972	Asma Jilani v. Government of Punjab	No	Yes	Kelsen invalid, Dosso precedent reversed	NO
Lesotho 1975	Matsubane Putsoa v Rex	Yes	Yes	Kelsen	Yes
Pakistan 1977	Bhutto v Chief of Army Staff	Yes	Yes	Necessity (Kelsen may be valid but did not apply)	Yes
Seychelles 1978	Taxes v Ramniklal Valabhaji	Yes	Yes	Kelsen	Yes
Granada 1985	Mitchell v Director of Public Prosecution	Yes	Yes	Kelsen, Doctrine of Necessity	Yes
Fiji 1987	Chandrika v. Prassad	Yes	No	Doctrine of	Yes

				Necessity	
Lesotho 1988	Mokotso v. Republic of Lesotho	Yes	Yes	Kelsen	Yes
Transkei 1988	Matanzima v President of the Republic of Transkei	Yes	Yes	Kelsen	Yes
Pakistan 2000	Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan	Yes	Yes	Doctrine of Necessity	YES
Fiji 2001	The Republic of Fiji v. Prasad	Yes	No	Doctrine of Necessity and Kelsen rejected.Rejected	NO
Fiji 2009	Qarase v Bainimarama	Yes	No	Doctrine of Necessity and Kelsen rejected.Rejected	NO
Nigeria 2010	Legislative justification of unconstitutional authority (no cases yet)	N/A	N/A	Doctrine of Necessity	N/A
Nepal 2010	Legislative justification of unconstitutional authority (no cases yet)	N/A	N/A	Doctrine of Necessity	N/A
Nepal 2011	Legislative justification of unconstitutional authority (no cases yet)	N/A	N/A	Doctrine of Necessity	N/A