"Revolutionary Legality": The Coup d'Etat of 1962 and the Burmese Military Regime

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Introduction

The issue of "revolutionary legality" came to prominence soon after the end of the Second World War. With the retreat of colonialism after the war, there emerged a number of new states, some of which were built in haste and on uneasy alliances between autonomous or semi-autonomous regions. Perhaps inevitably, the political disunity and immaturity of many of these new states gave rise to instability and, in some cases, to dramatic political upheaval in the form of military coups.

Commencing in the 1950s, domestic courts were called upon to consider the validity of the laws of revolutionary governments and the legality of the new regimes themselves. This paper is concerned with the latter issue and not the former. In a number of the decided cases both issues were considered, but by resort to different doctrines or principles. It might be, for example, that during a period of emergency a new government is installed, or executive power is assumed or laws are passed.

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1 The term "revolutionary legality" has been used by the courts and legal writers in the context of consideration of the de jure status of governments installed after a coup d'etat or revolution: see for example Mitchell v DPP [1986] LRC (Const) 35 at 115; Eekelaar JM, Principles of Revolutionary Legality, in Simpson AWB ed, Oxford Essays in Jurisprudence, Clarendon Press, Oxford 1973, at 22.

2 Koskenniemi states: "The legitimacy of colonial rule had by that time [the 1960s and 1970s] lapsed at home and abroad. Progressive application of Articles 1(2) and 55 of the UN Charter soon made it an anachronism in international relations. The additional push to national self-determination created by the practice since the passing of the decolonisation declaration by the UN General Assembly in 1960 [UNGA Res. 1514(XV) 14 Dec 1960] of speaking about it in terms of a 'right' of a 'people' may not have been necessary to achieve what had already been decreed by politics – namely the entry into statehood of some hundred former colonial territories": Koskenniemi M, National Self-determination Today: Problems of Legal Theory and Practice, (1994) Vol 43 ICLQ 241 at 241.

3 In Mokotso v HM King Moshoeshoe II [1989] LRC (Const) 24 at 124, it is noted that between 1958 and 1971 there were 22 coups d'etat on the Continent of Africa alone.
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contrary to the terms of the constitution. In those circumstances, as well as in circumstances following a coup, the courts have accepted the need to recognise some laws passed on the basis of the doctrine of necessity.\(^4\) That is because unless there is such recognition there will be a legal vacuum and a break down in law and order. In *Madzimbamuto v Lardner-Burke*,\(^5\) which involved a challenge to the legality of the unilateral declaration of independence in Rhodesia on 11 November 1965 by the Ian Smith government, and of the validity of the 1965 constitution and of certain laws passed pursuant to it, Lord Pearce stated:

> The principle of necessity or implied mandate is for the preservation of the citizen, for keeping law and order, rebus sic stantibus, regardless of whose fault it is that the crisis has been created or persists."\(^6\)

Similarly, in referring to the doctrine of necessity, in *Mitchell v DPP* (A Grenadan case), Haynes P stated:

> "the Courts will recognize unconstitutional enactments as valid where a failure to do so would lead to legal chaos and thus violate the constitutional requirement of the rule of law."\(^7\)

However, the courts have made it clear that recognition of the validity of laws under the doctrine of necessity is not the same thing as recognising the legitimacy or legality of the new regime itself. In *Madzimbamuto* at first instance,\(^8\) both Lewis and Goldin JJ held that the 1965 constitution and the Smith government were not lawful, but that the doctrine of necessity required that effect should be given to emergency power

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\(^4\) A recent example is the decision of the Supreme Court of Pakistan handed down on May 12, 2000 (at the time of writing neither an unreported nor reported decision was posted on the Web). CNN's Islamabad Bureau Chief, Hannah Bloch and Reuters, reported that the "Chief Justice Irshad Hassan Khan, ruling on several petitions filed by Sharif's [the deposed Prime Minister] Pakistan Muslim League, said that "state necessity" compelled General Pervez Musharraf to suspend the constitution and take over the country on October 12 [1999]". However, the Supreme Court added the proviso that an election should be held within three years "to return the country to democracy": <http: //www.cnn.com/2000/ASIANOW/south/05/12/pakistan.sharif.02/>.

Bloch further reported on 26 May that Musharraf stated that he would abide by the Supreme Court's ruling: http:////south/05/25/musharraf.pakistan.01/

\(^5\) [1969] 1 AC 645.

\(^6\) Id, at 740.

\(^7\) [1987] LRC (Const) 127 at 134.

\(^8\) [1966] RLR 256
regulations that had been passed by that government and which had authorised the detention of the appellant’s husband. In *Jilani v Government of the Punjab*, Yaqoob Ali J, in drawing the distinction between the legality of the usurping regime and the validity of its laws, was terse:

A person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law making. Maybe, that on account of his holding the coercive apparatus of the State, the people and the courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal, and Courts will not recognise its rule and act upon them as *de jure*. As soon as the opportunity arises, when the coercive apparatus fails from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would-be adventurers.9

By its terms, the doctrine of necessity assumes a temporary state of emergency, that the earlier constitution is preserved and that the laws are not intended to strengthen the usurper.10 In other words, the doctrine of necessity cannot be applied in order to validate an unconstitutional assumption of power by an extra-constitutional body.11 The doctrine accords *de facto* but not *de jure* recognition of the new regime.12

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10 For a survey of the case law and literature in relation to the doctrine of necessity in the present context, see *Mitchell v DPP* [1986] LRC (Const) 35 at 76-94. See also per Lord Pearce in *Madzimbamuto* at 740-742, where his Lordship set out the qualifications to the doctrine of necessity as outlined in the text above. In *Bhutto v The Chief of Staff, Pakistan Army and Federation of Pakistan* PLD [1977] SC 657, where the doctrine of necessity was applied, the court stated: “this is not a case where the old legal order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a temporary period and for a specified and limited objective namely, the restoration of law and order and normalcy 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.” In relation to that case, see below n 133 and related text
11 *Mokotso v HM King Moshoeshoe II* [1989] LRC 24 at 118-123.
12 See *Madzimbamuto v Lardner-Burke* [1968] 2 SA 284; *Mitchell v DPP* [1986] LRC (Const) 35 at 69. Compare the views expressed by Lord Reid in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 723-724 as to the use of the terms *de facto* and *de jure* in the context of municipal law. See also *Makenete v Lekhenya* [1993] 3 LRC 13 at 47-48.
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Where, on the other hand, the issue is the legality of a new regime that has permanently displaced the old legal order by unconstitutional means, different principles will apply. In those circumstances, there is either an abrogation or disregard of the earlier constitution. Under the umbrella of "revolutionary legality", the courts have considered the circumstances in which a revolutionary government should be accorded recognition. In so doing, in a number of the decisions the courts have taken the view that it is an issue to be determined by reference to principles of domestic rather than of international law. Nevertheless, in the evolution of this area of the law, each court has borrowed from and has quite evidently been persuaded by the decisions in other jurisdictions. In addition, as is evident from the decisions discussed in this paper, in formulating tests for revolutionary legality, the case law is reflective of a paradigm shift from an emphasis on the imperative of state autonomy to a growing concern for recognition of human rights norms. On that basis, considerations such as popular support and oppression have been included in a determination of whether recognition should be accorded to a new regime.

In *Jilani*, Hamoodur Rahman CJ stated that the "physical force" that the usurper possesses "can never by itself give him the legal right to convert his *de facto* claim into a *de jure* claim". As is explained below, one of the primary considerations in determining legality of the regime is the "efficacy of the change". However, there has been some uncertainty as to how that is measured and, among other things, the extent to which effectiveness involves considerations of popular support and whether or not the government uses coercion or force in order to achieve its objectives. Another consideration is the circumstances of the revolution, such as the nature of the replaced regime and the motives of the new regime. That consideration is encapsulated in what the courts have called "the total milieu". This paper traces the development of the law as reflected in the decided cases and the literature. The paper then considers the question of revolutionary legality in

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13 See, for example, *Attorney-General of the Republic v Ibrahim* (1964) Cyprus LR 195 at 231; *Madzimbamuto v Lardner-Burke* 1968 (2) SA 284, at 377; *Mitchell v DPP* [1986] LRC (Const) 35 at 71; *Makenete v Lekhanya* [1993] 3 LRC 13 at 48.
14 See below, Part 4.1 and related text.
16 See *Mitchell v DPP* [1986] LRC (Const) 35 at 58.
17 See below, n 134 and 157 and related text.
the context of the military regime in Burma,\(^\text{18}\) which came to power following a coup d'etat in 1962.

Given the autocratic nature of the present regime in Burma and the lack of independence of the judiciary and its control by the military rulers,\(^\text{19}\) it is perhaps not surprising that the question of revolutionary legality does not seem to have been considered by the Burmese courts. However, on the assumption that the regime will ultimately collapse, under any new legal order the courts may be called upon to address the issues of the legality of the old regime and its implications for the validity of the previous constitutions. If, as suggested in this paper, the regime in Burma does not meet any test for legality, it follows that the 1947 constitution remains intact. As is noted below,\(^\text{20}\) that constitution enshrines a right to secession of certain States of the Union. That issue is likely to be of particular concern to the people of Shan State,\(^\text{21}\) given the

\(^{18}\) Preference is here given to the name 'Burma', rather than 'Myanmar' which was adopted by the military regime in 1989, ostensibly to embrace "all indigenous nationalities". This is a distortion of history. Although 'myanma' and 'bama' are the same word, young Burmese nationalists in the 1930s called their movement the Doh-bama Asaiione [our Burma Association] to reflect their preference for 'Bama' as the name of the country. The reason, they said, was "the nationalists always paid attention to the unity of all the nationalities...many different nationalities live in this country...[t]herefore, the nationalists did not use the term myanma naing-ngan but bama naing-ngam": A Brief History of the Doh-bama Asaiione, Government Publication, Rangoon, 1976 cited in Buenlong L, Seng Tien: Shanland and Its People: a brief introduction, Vol 4, 1999, at 103-105.

\(^{19}\) For example, under the 1974 Constitution, unlike the 1947 Constitution, Myint Zan states that the “constitutional interpretation and review of State actions ...were the exclusive roles of the Legislature (Pyithu Hluttaw). Assuming arguendo, the Council of People’s Justices [CPJ] had the power to interpret the Constitution, such power would not have made the CPJ deviate, in anyway, from the wishes of the Pyithu Hluttaw and the Party since all CPJ members were also Pyithu Hluttaw and Party members": Myint Zan, Judicial Independence in Burma: No March Backwards Towards the Past, (2000) 1 APLPJ 5 at 24. In the period from 1962 to 1974 and 1988 onwards the independence of the judiciary is, without an actual effective constitution, questionable. Myint Zan states that the judiciary is totally controlled by the military: at 38.

\(^{20}\) See below n 34 and related text.

\(^{21}\) The 1947 Constitution gives a right of secession to the Karenni and the Shan States, two of the several States which make up the Union of Burma. The question of secession is of particular interest to the people of the Shan State. The Shan State covers an area of 155,801 square kilometers (the size of England and Wales) and lies on a plateau: Buenlong, n 18 above, at 103. The Shan people are of the Tai race (sometimes spelt "Dtai" or, across the border in Southern China, "Dai"). They are related to the Thais and the Laotians, whose borders they share: Buenlong at 106-107. The Tai peoples, descending from
way in which the Union was formed and the persecution of the Shan, and other ethnic minorities, under the present regime.

In view of the relevance of issues such as the "effectiveness" of the revolutionary government and the "total milieu" of the revolution, in considering the legality of the military regime in Burma, it is necessary first to address the historical background to, the circumstances of, and the internal reaction to the coup, as well as aspects of the record of the new government.

**Burma: Before and After the Coup**

Any analysis of revolutionary legality in Burma will be assisted by an examination of the background to the formation of the Union of Burma on 4 January 1948. As will be seen, that history indicates that the present military regime does not reflect the aspirations of the Union, including the spirit of federation, in which independence was obtained from Britain.


Silverstein notes that while under the broad terms of the Constitution two States are eligible to secede (the Shan and the Kayah or Karenni State), in effect only the Shan State is eligible, as "it alone contains a powerful and articulate minority which is seriously considering the question of secession": Silverstein J, "Politics in the Shan State: The Question of Secession from the Union of Burma", in Htoo Myint, *The Shan State Secession Issue*, Taunggyi April 4 1957, at 43 (translated by Khernsai Jaiyen & Friends, The Shan Human Rights Foundation, Thailand). Maung Maung (see n 21 below), also conceded as much, stating: "The Shan State is better placed. Its population is large, its territories are large and, in some areas, rich": "But", says Maung Maung, "the Sawbwas and the Shan leaders fully appreciated that wisdom lies in Union": Maung Maung, *Burma's Constitution* (2nd ed), The Hague, 1961, at 192. For example, suggests Maung Maung, U Nu (see n 33 below) had explained the wisdom of Union to the Shan leaders - that in "modern times isolation has grown obsolete, and how nations and peoples alike are interdependent": at 192. Today, albeit under different rule to that of U Nu, according to Mya Maung, "the Union of Burma is isolationist, xenophobic and totalitarian (also known as the three Rs: repressive, reclusive and retrogressive)"; Mya Maung, *Totalitarianism in Burma: Prospects for Economic Development*, Paragon House, New York, 1992 at 215.

On 27th January 1947, the “Atlee-Aung San Agreement” was signed between Britain and Burma, providing for independence for Burma within one year. To achieve independence, U Aung San, the Burmese independence leader, knew that he required the support of the autonomous states. However, the leaders of the Frontier Areas, including the Shan, were concerned to protect their national identity and independence, and hence were wary of being thrown into the “Burmese cart”. In February 1947 a historic conference took place between U

23 Bogyoke [General] Aung San is known as the independence hero of Burma and the father of Daw Aung San Suu Kyi (see below, n 75 and related text).
24 The Frontiers Areas comprise the Shan States and the tribal areas in the mountainous fringes of the country. It is clear that the British and, during the second world war, the Japanese recognised that the Shan and the other people of the Frontier Areas as separate peoples: See Htoo Myint, n 21 above; Chao Tzang Yawnghwe, The Shan of Burma: Memoirs of a Shan in Exile, Kefford Press, Singapore, 1987 at 84. According to Guyot under Japanese occupation, “notable too was the fact that the Burmese units were forbidden to enter the Shan hills”: Guyot DH, The Political Impact of the Japanese Occupation of Burma, Yale University PhD, 1966 at 215-216. However, on the return of the British in Burma in 1945, Burman intellectuals such as Maung Maung, were of the view that the Shan were “kept away from the Burmese by the British rulers” under a divide and rule policy: Maung Maung, n 21 above, at 191.
In relation to Dr Maung Maung, he is the only civilian president of Burma under the military regime, for a brief period in August-September 1998. As this period coincided with the student uprising, he became the brunt of student satire. His political involvement is not surprising as he was considered to be the “lifelong disciple of Ne Win” (Mya Maung, at n 21 above, at 211) and was his “official biographer”: Kin Oung, Who Killed Aung San?, White Lotus, Thailand, 1993 at 69. He was a jurist trained at Utrecht and Yale and his work “Burma’s Constitution” is an important and rare thesis of legal history of Burma. While Huxley believes that he “was sincere in both his life-long socialism and his wish to reverse the most damaging changes introduced by the English” (Huxley A, The Last Fifty Years of Burmese Law: E Maung and Maung Maung, LAWASIA Journal, 1996, at 16), Kim Oung states (at 70) that “he was willing to sacrifice his erstwhile academic credentials to become a sycophant.” According to Myint Zan Maung Maung was an adherent and supporter of the “Burmese Way to Socialism”, which is “anything but Fabian”. Fabian socialism was Huxley’s description of Maung Maung’s brand of socialism. Zan states further, “[a]mong many others, it [the Burmese Way to Socialism] legalises one party rule. It crushed all opposition. It transformed what was hitherto a strong, independent and one of Asia’s most respected judiciaries in the 1940s and 1950s into a tool of the sole ruling party”: Myint Zan, Comment on Fifty Years of Burmese Law: E Maung and Maung Maung by Andrew Huxley in LAWASIA (1996-1997), In Camera 1998, Deakin University Law School Magazine, at 39.
25 The Karen were also suspicious of the Burmans because many of them were slaughtered during the Japanese invasion of the delta: Toomey RUL, A Comparative Study of the Coups d’état by General Sarit of Thailand and General Ne Win of Burma, The American University, M.A., 1969. History. Modern, at 33.
Aung San, other Burman leaders, the Shan and other Frontier Areas leaders. The outcome of the conference became known as the "Panglong Agreement". The Agreement (and more particularly the "Panglong Spirit") enshrined the right to self-government and autonomy of the Shan State, and the right to autonomous status for other members of the Frontier Areas, including the Kachin and Chin peoples.

**The Constitution of the Union of Burma (1947)**

Despite the assassination of Aung San and his interim cabinet on 19 July 1947, the constitution of the Union of Burma was drafted by consensus among the Barmar ("ethnic Burmans" who comprise approximately two-thirds of the population) and most of the ethnic minorities, including the Shan, Rakhine, Kayin (Karen), Mon, Kachin, Chin, Karenni and Pa-O. It took effect, in conjunction with independence from the British, on 4 January 1948. It provided a federal system of government and for separation of powers "framed on a pre-war model derived from British precedents."

The Shan, Kachin and Kayah (Karenni) States were accorded the highest status of 'Union State'. This categorisation was given to those people who possessed "unity of language, different from the Burmans; unity of culture; community of historical traditions; community of economic interests; a measure of economic self-sufficiency; a fairly large population; a defined geographical area with a character of its own; and the desire to maintain its distinct identity as a separate unit." Each Union State was to have its own constitution, an elected legislature and a Governor. It would enjoy a large measure of

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27 The 'Spirit of the Panglong', noted in the minutes of the meetings during the Conference, is upheld by many Shan as the true promise of a free homeland for the Shan: Serk Y, *The Four Noble Principles and Six Objectives*, at 70-75; Smith M, at n 22 above, at 79.
29 Forward by JS Furnival cited in Maung Maung, at n 21 above, at xi.
30 The second status was that of an 'Autonomous State' and the third status was that of 'National Area'.
Unusually for a federation, the constitution provided for an express right of secession to the Shan and Karenni (Kayah) States.

1958: Party Split and Grievances

However, by 1957, on the eve of the 10th Anniversary of independence, there was growing dissatisfaction among the member states of the Union. Fears resurfaced that the death of Aung San would weaken the pledge to uphold the interests of the ethnic minorities. Leaders of the Shan State began to consider their option to secede in accordance with Chapter X of the constitution. At the same time, U Nu announced that

32. Maung Maung, n 21 above, at 167. The Chins could have requested the grant of statehood, but they “satisfied themselves with a promise given by Bogyoke Aung San that they would get all assistance from the Union Government in developing their hills”: Maung Maung, at 169. As to the Karen, see n 34, below.

33. The right to secession is set out in Chapter X, ss 201-204 of the constitution. It is unusual because it “prescribes in detail the procedure necessary for secession”, whereas the Constitutions of the former Soviet Union and Yugoslavia provided only for a right of secession: see Duchacek I, Nations and Men: International Politics Today, Holt, Rinehart and Winston, New York, 1966, at 93.

34. This right of secession did not extend to the Kachin State, as it incorporated Bhamo and Myitkyina from Burma proper: per section 178 of the Constitution. Similarly, section 181(10), as amended by the Constitution Amendment Act 1951, which constituted the Karen State, does not extend Chapter X rights of secession to the Karen State. According to Maung Maung, “the reason is obvious. The State itself was built after insurrection and bitterness. What has cost so much to create must not be lost”: Maung Maung, n 21 above, at 192.

35. On December 28, 1956 the Shan State Unity Party (SSUP) voted for secession from the Union. But not all the people of the Frontier Areas agreed. Some felt that the Union was essential for constructive independence. Furthermore, there was concern amongst socialist and communist factions that upon secession the Princes would rule their dominions again. Also, if Shan State did secede, it was unclear how Shan State would be administered: Htoon Myint, n 21 above, at 12. On the other hand, the pro-Unionists were nonetheless qualified as to the extent of their cooperation and were adamant that it be on equal terms: see speech of Tin Aye, then Chairman of the Shan Peoples Freedom League, contained in AFPFL Bulletin, 6 February 1947, cited in Htoon Myint: see n 21 above.

In relation to Htoon Myint of Taunggyi, according to Khemsai Jaiyen and Friends (eds and translators), he was “one of the most prominent founder members of the Shan People’s Freedom League (SPFL), and also one of the most influential Shan politicians of all time”: in Htoon Myint, n 21 above, at 1. Htoon Myint was placed in detention in 1962 and, in 1994, it was reported that he was still under close surveillance: Shan Human Rights Foundation, The Shan Case, at n 26 above, at 42.

36. U Nu has been aptly described by Myint Zan as “the first and only democratically elected Prime Minister of Burma”: Myint Zan, n 19 above, at 14.
there would be a policy of no more States within the Union, which fuelled discontent among the Mons, Chins and Arakanese. In early 1958, the ruling Anti-Fascist People's Freedom League split into two factions.

U Nu was perceived to be failing to unite the country, while the Army Chief of Staff, General Ne Win, was strengthening his Tatmadaw (the armed forces), which were becoming disgruntled with the civilian government. Moreover, senior army officials had been displaced, creating further unrest in the Tatmadaw. In a surprise move, in 1958 General Ne Win was nominated by the Parliament to serve as caretaker Prime Minister. He appeared to carry out this role with “laudable success”, however it may be that his approach at that time was calculated to lay the foundations for the coup to come.

n 47. Myint Zan writes: “The late U Nu was Prime Minister of Burma from 1948 to 1956, 1957 to 1958, and from 4 April 1960 to 1 March 1962. He was overthrown and arrested in the military coup of 2 March 1962 and was detained from that day to 27 October 1966.” Following some 11 years in foreign exile, U Nu returned to Burma on 29 July 1980. During the 1988 democratic uprising, on 9 September 1988 U Nu “again declared himself to be the ‘legal Prime Minister’”: Myint Zan, at 14 n 47. U Nu refused to withdraw his declaration as the legitimate government of Burma and “was put under house arrest on 29 December 1989. U Nu was released from house arrest on 23 April 1992. He died in Rangoon on 14 February 1995”: Myint Zan, n 19 above, at 14 n. 37 Section 199 of the Constitution provided for the admission of new States. 38 Kin Oung, n 24 above, at 71; Toomey, n 25 above, at 46-57. 39 Kin Oung, n 24 above, at 71; Maung Maung, n 21 above, at 213-217. 40 Smith notes that “having briefly tasted power once before ... Ne Win and the army strong men were simply anxious for more”: Smith, n 22 above, at 197. Toomey, in comparing the coup d'états in Burma and Thailand, stated: “When a military organisation conquers an enemy the legal question of legitimacy often becomes blurred and initially quite unimportant. The crucial question is what is its intentions in relation to its external neighbours? As a result, the greatest fear of the military in attempting to execute a coup is an attack by an external enemy who reacts to the coup d'état as a preliminary step towards war. Foreign relations before and after a coup is of utmost importance to the military leaders who do not want other nations to misjudge their intentions.... Military regimes tend to exercise the right to govern and legitimise themselves once they have seized power and are compelled to destroy other diverse political groups who also contend for political power. Legitimisation of authority is a slow process involving the people’s acceptance of the government”: Toomey, n 22 above, at 8-9. In relation to the coup of 1962, Taylor states that at the time the ouster of the civilian government was not seen “to be a particularly momentous event. Foreign observers saw the coup as a reassertion of the disciplined government of the 1958-60 caretaker period, and therefore primarily as an attempt to restore order in an increasingly chaotic political situation”: Taylor RH, The State in Burma, C Hurst and Co, London 1987, at 291.
1960 fresh elections were held. U Nu was elected in a landslide victory.\footnote{Maung Maung, n 21 above, at 132.}

**The Coup d'Etat of 1962**

On 2 March 1962, General Ne Win and the leaders of the Tatmadaw seized power. Toomey states in his 1969 thesis:

The coup d'état was executed at an opportune time. All the politicians were in Parliament and the ethnic leaders were attending the conference with U Nu. They were all arrested and confined to army camps outside of Rangoon. Both chambers of the Parliament were dissolved, and the new state councils were created with military executives in charge of command. ... The 1962 coup d'état abrogated any concessions for a revised federal system of government. \footnote{Toomey, n 25 above, at 63-64.}

There is some doubt as to whether, following the coup of 1962, the military regime purported to abolish that constitution and, if it was "abolished", whether, somehow, it was subsequently "resurrected".\footnote{Lintner suggests that the 1947 Constitution was abrogated following the coup: B Lintner in his *Foreword* to I Sargent (former Mahadevi of Hsipaw), *Twilight over Burma: My Life as a Shan Princess*, University of Hawaii Press, 1994, at xxiii - xxiv. In 1989 General Saw Maung, the Chairman of the SLORC (see below Part 2.7), stated that there were, then, two constitutions in Burma, that of 1974 (see below Part 2.5) and the Constitution of 1947: SLORC press conference of 9 June 1989, cited in Weller M (ed), *Democracy and Politics in Burma: The National Coalition Government of the Union of Burma*, 1993, at 12. Also, following the 1990 elections, it is reported that the elected representatives accepted the continuing validity of the 1947 Constitution: Weller, at 12. In any event, it is here argued that on principles of revolutionary legality, the 1947 Constitution remains in force. Huxley, writing in 1988 and considering the "status quo ante" to which a democratic Burma could return, stated: "Theoretically, Burma could restore the substantive law and legal institutions that prevailed at any of the following dates: 1988, 1970, 1959, 1947 or 1884. Which of these options will be a realistic possibility if Burma ever does return to legality?": Huxley, n 24 above, at 9. It is not clear what the restorative significance of Huxley's reference to the years "1970, 1959" is. However, his observation that: "Present day Burma has an aching gap in its constitutional, legal and political discourse. How might it be filled after SLORC? What kind of justifications of legality might Burma return to?" is a clear contention shared by 'Burma watchers' today: at 19. The answer suggested in this paper is that there is no question of 'return' as such: the only valid constitution has been and remains the Constitution of 1947, until such time as it is validly amended or repealed.}
secrecy created by the military regime. In any event, on 5 March, the Revolutionary Council invested General Ne Win, as Chairman of the Revolutionary Council, with full legislative, judicial and executive powers of State. On 30 March the Supreme Court and High Courts were abolished and a new “Chief Court” was established.

The official reason for the coup was “the greatly deteriorating conditions of the Union” and the “danger posed to the very existence of the Union by [Shan] secessionists plotting to dismember it.” However, even those who sought merely to redress the imbalance of power were silenced. For example, a Shan Sawbwa, Chao Shwe Thaike was involved in the movement for constitutional reforms in order to bring about a genuine federation. In the not-so-bloodless coup, his son Sai Myee was killed, while Chao Shwe Thaike himself was detained on 2 March 1962 and died in Insein Gaol in November 1962. Other Shan leaders, including the well-respected Sawbwa Sao Kya Seng of Hsipaw, were detained the day before the coup, never to be seen again.

A new official party, the Burma Socialist Program Party (BSPP) came into being at this time, and Ne Win embarked upon a program he styled as the “Burmese Way to Socialism”. In effect, he had installed a one-party military regime with military tribunals and courts and operated without a constitution. As Smith states: “Ne Win’s reforms resulted in an army dominated state that owed more to decidedly twentieth

44 Taylor, n 40 above, at 294.
46 Kin Oung, n 24 above, at 71.
47 Chao Tzang Yawnghwe, n 24 above, at 110.
48 The term ‘Sawbwa’ is a Shan word for ‘Prince’.
49 Chao Shwe Thaike is the father of Chao Tzang Yawnghwe: n 24 above. The Shan Sawbwas were campaigning for a “looser federalised form of constitution, with power shared equally between the minority states and the Burman majority areas” so as to guarantee greater self-government for each nationality: Smith, n 22 above, at 195.
50 Though the coup has been described as bloodless, that is clearly incorrect: Kin Oung, n 24 above, at 71; Smith, n 22 above, at 197.
51 Chao Tzang Yawnghwe, n 24 above, at 229.
52 It is widely believed that they were murdered: Sargent, n 43 above, at xxiii; Smith, n 22 above, at 197.
century forms of political repression than to any uniquely Burmese socialist Arcadia.”

1962 to 1988: The Period of Isolation

In July of 1962, “student unrest broke out... when it became clear that the military this time was not in for a brief ‘caretaker’ period, as in 1958-60, but that they had seized power with the intention of holding onto it.” In 1964, the Law to Protect National Unity was promulgated, banning all political parties except the Burma Socialist Program Party. In 1973, laws were drafted for the holding of a national referendum on a newly drafted constitution, and for elections for the Pyithu Hluttaw (People’s Congress) and the People’s Council. On 15 December 1973, a “much disputed” national referendum returned a 90 percent “yes” vote to the Constitution of the Socialist Republic of the Union of Burma (formally adopted on 4 January 1974) that enshrined a unicameral Congress and a one-party system. Again, in the mid-1970s, student unrest led to 74 demonstrators being wounded and 1,800 students arrested.

The new unitary structure “put an end to all discussion to rights of autonomy, secession or independent political representation.” The 26 years between 1962 and 1988 were referred to by Smith in the following terms:

It was as if the country had entered a 26-year sleep walk. As Ne Win gave full vent to his latent xenophobia, Burma overnight became one of the most isolated and hermetically sealed countries in the world.

The 1988 Uprising

The situation in Burma immediately prior to the 1988 uprising was described by Professor Yozo Yokota, Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar, as follows:

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53 Smith, n 22 above, at 199.
54 Kin Oung, n 24 above, at 73.
55 As to the doubts as to the validity of the 1973 referendum, see Smith, n 22 above, at 199 and 460 n 4.
56 Kin Oung, n 24 above, at 74.
57 Smith, n 22 above, at 200.
58 Smith, n 22 above, at 200. Mya Maung similarly describes these 26 years: “From 1962 to 1988, the polity of Burma was a totalitarian nightmare state under a single-party military dictatorship, while its economy was a centralised command economy of the Sino-Soviet type”: n 21, at 215.
By 1988, widespread dissent and demonstrations began in reaction to two factors, firstly, the suppression of all civil and political rights since the 1962 overthrow of the constitutional Government; and secondly, the economic failure caused by the Burmese Way to Socialism. 59

From March to June 1988, there was a series of violent clashes between students and workers and the military. Hundreds of civilians were arrested. Many were severely wounded or died from ill-treatment in detention, while others were summarily or arbitrarily executed. 60 On 21 June 1988, the Government imposed a ban on all public gatherings. 61

On 23rd July 1988, General Ne Win resigned as party leader, promising economic reform and the holding of a referendum to end one-party rule and institute a multi-party system. An extraordinary Party Congress elected U Sein Lwin62 as Ne Win's successor, igniting nation-wide protests on 8 August 1988. 63

The 8th August uprising occasioned an outpouring of rage, suffering and humiliation the like of which had been endured for the past 26 years. 64 The military response was, as Ne Win commented in his final speech to the people, “when the army shoots, it shoots to kill”. 65 One commentator describes this suppression as rule by ‘thoke-thin-ye’; that is the removal of rivals “by complete elimination in order to wrest the crown and

60 Weller, n 43 above, at 367.
61 Weller, n 43 above, at 367.
62 Mya Maung states that Sein Lwin was known as Ne Win's lifelong executioner and more commonly as the "Butcher of Burma". Sein Lwin remained in power for seventeen days (26 July – 12 August): Mya Maung, n 21 above, at 68. Sein Lwin was succeeded by Dr Maung Maung (refer to n 24 above).
63 Mya Maung, n 21 above, at 59. "8/8/88" (the "Four Eights Affair"). Although most of the massacres occurred on 9 August 1988. 8/8/88 is significant for two reasons: first, for ease of commemoration and, second, it has a co-incidental association with the year 888 of the Burmese Era (1526AD). "Three Eights" marked the beginning of the Second Ava Dynasty established by the Shan ruler, Tho Han Bwar and the "beginning of an era of ruthless suppression, death, and destruction in the chronicles of the Burmese Kings": Mya Maung, at 60.
64 See, generally, Mya Maung, n 21 above, at 47-91.
65 Kin Oung, n 24 above, at 78.
ascend the throne". In the wake of the uprising, over 3,000 people were killed and over 10,000 students and civilian activists fled into the mountains. All educational institutions were closed.

The State Law and Order Restoration Council (SLORC)

On September 18, a "fake" coup was led by General Saw Maung, ostensibly to save the "Minmeht Naing-Gan" (Kingless Country) from the "abyss" and "for the good of the people, according to law". According to Military Intelligence Chief Khin Nyunt, a Communist Party of Burma (CPB) conspiracy to "destabilise and take over State power" was to blame for the events of 1988. Smith states that most foreign diplomats considered the allegations as "clear evidence of a dangerously paranoid mind", adding that it was evident that the conspiracy was a decoy "to justify in one historic sweep the military coup, the bloodshed and the subsequent arrest of thousands of democracy activists".

The State Law and Order Restoration Council (SLORC) was set up under the chairmanship of the Chief of Staff, Senior General Saw Maung. The Pyithu Hluttaw, the Council of State and other governmental bodies were dissolved. Saw Maung became Prime Minister, Minister of Foreign Affairs and Minister of Defence. In the face of the continuing student-led uprising and international pressure, free elections were promised by

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66 Kin Oung, n 24 above, at 68.
67 Weller, n 43 above, at 367.
68 Smith, n 22 above, at 371.
69 Mya Maung, n 21 above, at 82. According to Mya Maung the military coup was the "culmination of a methodical creation of anarchy by the Anti-Strike Committee of the ruling military elite": at 83. See also, below, n 205 and related text. Smith states that "the 1988 coup simply reasserted the army's existing control": Smith, n 22 above, at 200.
70 Mya Maung, n 21 above, at 84.
71 Lieutenant-General Khin Nyunt became Secretary No 1 of SLORC (now S.1 of SPDC and Chairman of the Burma's Foreign Affairs Policy Committee). Mya Maung states that Khin Nyunt is generally considered to be the powerful epigone of Ne Win and has been called "the Prince of Evils" or "Enforcer of the Rule of Force". However, Ne Win is still regarded as the "A- hpai Gyi" (Great Father) holding the strings and formulating SLORC's policies and actions: Mya Maung, n 21 above, at 165, 200, 211. See also, below, n 205 and related text.
72 Smith, n 22 above, at 365.
73 Smith, n 22 above, at 365. He notes that "the CPB's presence was minimal and undoubtedly at its lowest ebb since 1948": at 371.
The BSPP reconstituted itself as the National Unity Party (NUP) and was backed by the military. Its main opposition were the National League for Democracy (NLD) and the League for Democracy & Peace (LDP).

The NLD was led by former General Tin U and Daw Aung San Suu Kyi, the daughter of U Aung San. However, Aung San Suu Kyi was banned from campaigning on the grounds that she maintained unlawful association with insurgent organisations and she was placed under house arrest. Numerous other political leaders, including most of the important opposition to SLORC, were also arbitrarily detained and many of them remain so today. By the end of July 1989, over 6,000 NLD supporters had been arrested.

The 1990 Elections and Beyond
Two months before the election, it was reported that “SLORC began launching rigorous relocation and eviction programs to disperse and disorient voters in major urban centres, similar to the style of Pol Pot or the Khmer Rouge.” On 27 May 1990, the general elections were held. The NLD won 392 of the 485 seats in Parliament, while the NUP, despite having some expectations of success, won only 10 seats. SLORC’s response was to refuse the release of Aung San Suu Kyi. Khin Nyunt stated that the SLORC was the legal government, “recognised by the UN and countries of the world” and that any attempt by the NLD to form an interim government would be dealt with forcefully.

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74 See Smith, n 22 above, at 419ff. Smith suggests that this is consistent with the military regime’s practice of “going through various political motions but never once [letting] go the reins of power”: at 420.
75 Silverstein, in Weller, n 43 above, at 5.
76 Though she was formally released from house arrest on 10 July 1995, she remains under close surveillance. In September 2000, she was again isolated under de facto house arrest. According to Kin Oung, “her very presence was a threat to Ne Win himself: since 1962, he had tried to popularise the myth that he was Aung San’s comrade-in-arms who had inherited the army from the slain founder of the Tatmadaw. Now, Aung San’s own daughter was openly challenging Ne Win and his totalitarian rule”: Kin Oung, n 24 above, at 79.
77 Yokota, in Weller, n 43 above, at 367.
78 Smith, n 22 above, at 366.
79 Mya Maung, n 21 above, at 178.
80 Weller, n 43 above, at 10.
81 Mya Maung, n 21 above, at 182.
Since the elections, Amnesty International, the United Nations, Asia Watch, the UNHCR, and Burmese, Karen and Shan human rights and dissident groups have been monitoring the actions of SLORC. It is clear that the atrocities have continued. A spurious change of name of the regime from SLORC to SPDC (State Peace and Development Council) in 1997 did nothing to alter the behaviour of the regime. In an Interim Report of 4 October 1999 on the situation of human rights in Myanmar prepared by the Special Rapporteur of the Commission of Human Rights, Mr Rajsoomer Lallah QC made particular reference to the plight of ethnic minorities. He stated:

In the ethnic areas, the policy of establishing absolute political and administrative control brings out the worst in the military, and results in killings, brutality, rape and other human rights violations which do not spare the old, women, children or the weak.

It is estimated that approximately two million people inside Burma have been forcibly removed from their homes, while approximately one million ethnic Burmans have been relocated and forced into labour, in order to make more land available for the regime's business projects. Another one million people

82 In the course of a debate in the British House of Commons on 5 April 2000, it was recognised that though there had been changes in name from SLORC to SPDC, the regime was essentially the same. Mr Leigh MP referred to the "Orwellian change of name" from the State Law and Order Restoration Council to the State Peace and Development Council (Hansard, House of Commons, 5 April 2000, Column 206 WH), while Mrs Cheryl Gillan MP stated that although General Ne Win had officially retired, "he retained influence behind the scenes": Id, column 213WH. In a separate debate in the House of Lords on 11 December 1997, Baroness Park of Monmouth noted that the regime had "recently changed its title but not its spots" (Hansard, House of Lords, 11 December 1997, Column 360), while on 25 March 1998 the Earl of Sandwich referred to the SPDC as "a new euphemism for the junta": Id Column 1300. In the same debate, Viscount Slim stated: "I am not taken in by the renaming of SLORC to the State Peace and Development Council. It has a rather sinister and more permanent ring than SLORC had": Id, Column1302.


84 Hansard, British House of Commons, 5 April 2000, Column 201WH, 213WH. The United Nations estimates that between 300,000 to 400,000 Burmese refugees have fled into neighboring countries: 211WH.

85 Weller, n 43 above, at 19, 280-282, 351-355, 380. In 1997 an unprecedented class action was brought in the United Stated District Court in Doe v Unocal Corp (963 F Supp 880 [1997]) seeking injunctive, declaratory and
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from the ethnic minorities, who comprise over forty percent of Burma's population, have also been forced to relocate. Their freedom is severely restricted and their treatment is brutal. Their livestock is usually confiscated and their villages burned to the ground. Many areas are then mined to prevent villagers from returning. According to reports from Thailand, there are now over 300,000 internally displaced peoples in the Shan State, over 200,000 in the Karen and Karenni States, over 50,000 Shan and 15,000 Karenni refugees in Thailand and over 400,000 Karen and Karenni who are hiding in the jungle along the Thai-Burma border. Special Rapporteur Yozo Yakota also reported that, 250,000 Muslim Rakhine (also known as Rohingyas) have fled to Bangladesh since 1988.

It is against this historical background that the principle of revolutionary legality and its application to Burma is here examined.

**Revolutionary Legality: The Case Law**

As previously noted, this paper is concerned not with the question of the validity of the laws of a revolutionary government, which may or may not be valid under the doctrine compensatory relief for alleged international human rights violations perpetrated by the defendants; joint venture companies and SLORC, the latter acting as an agent for the joint venture. The Plaintiffs alleged, inter alia, that: "SLORC soldiers forced farmers to relocate their villages, confiscated property and forced inhabitants to clear forests, level the pipeline route, build headquarters for pipeline employees, prepare military outposts and carry supplies and equipment." Also the Plaintiffs alleged that "there are also reports of rape and gang-rape by SLORC officials guarding women during periods of forced labor." The matter was part heard and is scheduled for a second hearing which is still pending. It was held at the first hearing stage that SLORC was entitled to sovereign immunity, but relief could be available in tort as against the remaining defendants.


87 Hansard, House of Commons, n 84 above; see below, n 191 and related text. See also Weller, n 43 above, at 19; and generally The Shan Human Rights Foundation, *Uprooting the Shan, 1996*; and *Dispossessed*, 1998, n 86, above.

88 Report on the Situation of Human Rights in Maynmar, Prepared by Professor Yozo Yokota, Special Rapporteur of the Commission of Human Rights, in Accordance with Commission Resolution 1992/58, 17 February 1993, in Weller, n 43 above, at 384. The National Coalition Government of the Union of Burma (formed by members of parliament who fled to the Burmese-Thai border, to hold in trust the mandate arising from the 1990 elections) estimate the figure to be over 300,000: see Weller, n 43 above, at 18.
of necessity, but with the question of the legality of the new regime itself. The questions of how and when a new regime becomes lawful have been addressed in both international case law and the legal literature. In providing answers to those questions, the courts have referred to a doctrine of "successful revolution" or, more commonly, "revolutionary legality".

Revolutionary legality has resonated as a topic of hot debate since the jurisprudential sparring between Hans Kelsen and Julius Stone in the 1960s. Though, as one commentator writes: "...this is not an area into which only academics may enter: the jurisprudence which has emanated from the Commonwealth, over a period of some 30 years [now 40 years], is particularly illustrative of the problems facing a court in a situation of constitutional breakdown." Nevertheless, the starting point for any discussion of this area of the law is the writings of Hans Kelsen.

Reliance by the earlier courts on Kelsen

The foundation cases of the 1950s and 1960s commence with a consideration of the writing of Kelsen, as reflected in his works *The Pure Theory of Law* (1967) and *The General Theory of Law and State* (1945), where he expounded his theory of law and (most relevant to the present debate) the application of that theory where a party seizes power through a coup d'etat. A coup d'etat takes place, according to Kelsen "whenever the legal order of a community is nullified and replaced by a new

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89 As to the doctrine of necessity in the context of revolutions, see above Part 1 "Introduction".

90 See per Cullinan CJ of the High Court of Lesotho in *Mokosoto v HM King Moshoeshoe II* [1989] LRC (Const) 24 at 118.

91 See, n 1 above.


order in an illegitimate way, that is in a way not prescribed by the first order itself".95

What then would make a coup d'état or revolution, "understood in the most general sense,"96 valid? Kelsen stated that "according to the basic norm of national legal order, the government which creates effective general and individual norms based on an effective constitution is the legitimate government of the state."97 Kelsen described "an effective constitution" as "a constitution in conformity with which statutes, and judicial and administrative decisions in conformity with statute, are in fact made."98 According to Kelsen, it is also sufficient that obedience to the constitution be "by and large effective."99 It will be seen that as the case law evolved, legitimacy was seen to hinge on the question of what is meant by the term "effective".

In an endeavour to formulate a criteria for revolutionary legality, the judges in a number of cases in the 1950s and 1960s, including the oft-quoted The State v Dosso and Another,100 Uganda v Commissioner of Prisons, ex p Matovu,101

96 Kelsen, n 95 above, at 117.
98 'The Function of a Constitution', in Essays on Kelsen, n 94 above, at 115
99 'The Function of a Constitution', n 98 above, at 116; or, as expanded by Kelsen, "by and large obeyed and if not obeyed, applied; otherwise the legal order as a whole just as a single norm, would lose its validity...": 'Reply to Professor Stone', n 92 above, at 1139-1140. Dias observed that "Kelsen drew no distinction between effectiveness, which makes people obliged to obey, and effectiveness which makes them feel under an obligation to do so. A usurper may by force and fear achieve the former, but not the latter, which, as judicially acknowledged, is the kind of effectiveness required by Kelsen": Dias, n 94 above, at 366. Kelsen explained, however, that "...the basic norm does not 'guarantee' the efficacy of the legal order; it does nothing to make this order effective": 'Reply to Professor Stone', n 92 above, at 1142.
100 (1958) 2 Pakistan Supreme Court Rep. 180; (1959) 1 P.L.R. 849. On 29 February 1956 the Constituent Assembly of Pakistan adopted the Constitution Bill under which the country was to become the Islamic Republic of Pakistan. The Governor-General, Major-General Iskander Mirza was elected President designate of the Republic. The Islamic Republic of Pakistan formally came into existence on 23 March 1956. President Mirza, despite having formally assented as Governor-General to the Constitution Bill, on 7 October 1958 abrogated the 1956 Constitution, dismissed the Central and Provincial Governments, dissolved the National Provincial Assemblies, abolished political
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...and Madzimbamuto v Lardner-Burke, were "much inspired or perhaps misled by Kelsen's Pure Theory of Law." In those parties and established martial law. On 27 October 1958, however, decisions were reached in four criminal appeals, including The State v Dosso and Anor. The cases concerned the determination of whether writs crucial to the imprisonment of the appellants had abated under the Law's Continuance in Force Order, 1958 promulgated by the President on 10 October 1958.

On 22 February 1966, Dr Milton Obote, the Ugandan Prime Minister, declared that he had assumed full powers of government. This followed allegations of corruption by the then opposition of senior Government ministers, including Colonel Idi Amin, who was second in charge of the Armed Forces (Idi Amin later became President and Chief of the Armed Forces, from 1971-79 following a military coup on 25 January 1971). On 2 March 1966, Dr Obote assumed the powers and functions of the Vice-President. On 15 April 1966, the National Assembly (by fifty-five votes to four) "repealed" the 1962 Independence Constitution, adopted a new Constitution, and ratified Dr Obote as the first President under the 1966 Constitution. On 11 August 1966, the Applicant, Motovu, a Buganda county chief was served with a detention order, issued under provisions of the 1966 Constitution. He filed a habeas corpus application on the ground that the detention order was contrary to the fundamental rights provisions contained in the 1962 Constitution.

Smart, n 93 above, at 951. The central feature of Kelsen's theory is that the law is a system of norms. Norms are like commands. The system of norms is structured in a hierarchy, at the helm of which is the Grundnorm (basic or grounding norm). Kelsen explains his theory of norms in his paper "The Function of a Constitution", in Essays on Kelsen, n 98 above. It may be helpful to describe the Grundnorm or basic norm as like the 'will of the people', upon which norms or a system of commands (and also "permissions and authorisations"); "Reply to Professor Stone", n 92 above, at 1137) are formulated. These commands are binding or valid on the presupposition that it is authorised by the basic norm, or 'will of the people', that one 'ought' to behave in a certain way. The physical embodiment of the 'will of the people' is usually found in the "historically first constitution". Thus, the basic norm "refers directly to a particular constitution that has in fact been laid down, whether created by custom or by formal statement": "The Function of a Constitution", at 115. All norms, or commands, created under the basic norm are validated by the acceptance of the presupposition that it is authorised by the basic norm. Therefore, Kelsen concludes, "the function of a constitution is the grounding of validity": "The Function of a Constitution", at 119. The idea that the judges were perhaps 'misled' arises from Kelsen's own insistence that his Pure Theory of Law does not "oblige or authorise anybody to do anything": "Reply to Professor Stone", n 92 above, at 1134. Kelsen sought, in his Pure Theory to isolate law from its sociological value-laden constructs and develop a pure science of law. Kelly surmises that "for the ruthlessly limited purposes of the pure theory, one kind of law is just as good as another; both are simply multiple staircases of norms": Kelly JM, A Short History of Western Legal Theory, Clarendon Press, Oxford 1992, at 387. Kelly also lucidly describes the angst one feels on an initial reading of Kelsen's legal 'ought' and system of norms: "This reduction of law is so extreme and so drastic, its purging of everything except form is so complete, that it is hard to come to terms with it at first acquaintance": at 387.
earlier cases, the application of Kelsen's Pure Theory by the courts was absolute. It was held that the regime, having replaced the old legal order, created its own new basic norm (Grundnorm). This was satisfactorily effected "simply by overthrowing the existing government and constitution and introducing a new constitution which is generally accepted and adhered to." 

In *Ex parte Matovu*, Chief Justice Udo Udoma set out four criteria whereby a new order could be recognised as replacing an old order:

1. that there must be an abrupt political change, ie, a coup d'etat or a revolution;
2. that change must not have been within the contemplation of an existing constitution;
3. the change must destroy the entire legal order except what is preserved; and
4. the new constitution and government must be effective.

In considering these requirements, the Court held:

...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.

Similarly, in *Dosso*, Muhammed Munir CJ opined that a "...victorious revolution or a successful coup d'etat is an internationally recognised method of changing a constitution".

104 For example, Udo Udoma CJ, Sheridan and Jeffreys Jones JJ in *Matovu* stated: "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...could only appropriately be described in law as a revolution...": 1966 EA (U) 514 at 535-7.

105 Smart, n 93 above, at 953.

106 [1966] EA (U) at 514 at 543.

107 [1966] EA (U) 514 at 539.

108 [1958] 2 PSCR 180 at 184
Therefore, on those authorities, central to the validity of the revolutionary government is "effectiveness", measured by "success" or a "victorious" revolution\textsuperscript{109}, judged purely from a "military, tactical, political or physical point of view."\textsuperscript{110}

**The Privy Council's Qualification to the Kelsen-inspired Approach**

The decision of the Privy Council in *Madzimbamuto v Lardner-Burke*\textsuperscript{111} stands apart from the earlier cases. First, it is a decision "from the highest judicial pinnacle"\textsuperscript{112} in the Commonwealth, which, if not regarded as binding\textsuperscript{113}, is nonetheless persuasive. Second, the Privy Council qualified the test of 'effectiveness'. The case involved a challenge to the legality of the unilateral declaration of independence in Rhodesia on 11 November 1965 by the Ian Smith government and, in particular, to the detention of Madzimbamuto pursuant to emergency regulations passed by the Smith government.

Lord Reid concurred with Muhammed Munir CJ, in *Dosso*, that "the essential condition to determine whether a constitution has been annulled is the efficacy of the change."\textsuperscript{114} However, the Privy Council held that "efficacy" was limited by the existence of a rival government "trying to regain control". In


\textsuperscript{110} Cullinan CJ in *Mokostso and Others v HM King Moshoeshoe II and Others* [1989] LRC (Const) 24 at 125. See below, n 147 and related text.

\textsuperscript{111} [1969] 1 AC 645.

\textsuperscript{112} The Privy Council was so described by Haynes P of the Grenada Court of Appeal in *Mitchell v DPP* [1986] LRC (Const) 35 at 63.

\textsuperscript{113} Rhodesia declared that the Privy Council's authority was no longer binding on their courts. In the case *R v Ndhlou and Others* 1968 (4) S.A. 515 (R.A.D.), which immediately followed the Privy Council decision in *Madzimbamuto*, Beadle CJ at 526-7 said: "....any order of the judicial Committee of the Privy Council would...be a brutum fulmen in Rhodesia, not simply because of the fact that the present Government said that they would not enforce its orders, but because it was no longer in the same hierarchy of courts as the present Rhodesian Court, and thus in the view of the Rhodesian Court had no jurisdiction in the matter." Stated more cynically: "...the Privy Council had given a decision which might or might not have been correct according to the law of the United Kingdom, but which had as much relevance to the true position in Rhodesia as a decision of the man in the moon": Professor Hahlo cited in Welsh R, *Function of Judiciary in a Coup d'etat* (1970) SALJ 168 at 184. Welsh was critical of Hahlo's approach, which had no regard for the illegality of the takeover government.

\textsuperscript{114} *The State v Dosso* [1958] 2 PSCR 180 at 185, cited by Lord Reid in *Madzimbamuto* [1969] 1 AC 645 at 725.
delivering the majority judgment, and in referring to the earlier cases, Lord Reid stated:

It would be very different if there had been still two rivals contending for power. If the legitimate government had been driven out but was trying to regain control, it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right the ousted legitimate government was opposing that lawful ruler. 115

Lord Reid concluded:

In their Lordships' judgment that is the present position in Southern Rhodesia. The British government acting for the lawful Sovereign is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed.... Their lordships are therefore of the opinion that the usurping government now in control of Southern Rhodesia cannot be regarded as the lawful government. 116

The majority of the Privy Council concluded that there could be neither de facto nor de jure recognition in circumstances where a usurper has gained control but the legitimate government was trying to regain power.117 In a minority judgment, Lord Pearce considered that de facto recognition should be accorded and, in upholding the emergency laws, applied the doctrine of necessity.118

It would appear that the Privy Council's decision hinged on the "certainty" of the opposition's defeat before a successful coup d'état could be said to have achieved legality. As one commentator observed: "If the facts had allowed the legitimate constitution to have been pronounced dead with certainty, the Privy Council appeared to approve the doctrine which would allow legitimacy to be conferred upon the usurpers."119 On that

115 Madzimbamuto Note 114
116 Note 114
117 The view that the concept of de facto recognition is inappropriate where there is a rival for power is, perhaps, odd; at least where, as here, the Smith government was firmly in control. On that basis, if there is no recognition of the laws of the usurping government, there is potentially a legal vacuum.
view, the Privy Council seems to have maintained adherence to the basic tenet adopted in the earlier cases; that is, that legality flowed merely from the fact of a successful grab for power. The qualification as to whether or not there was a rival for power seemingly going only to the question of whether the usurpation of power was complete.¹²⁰ Lord Reid stated:

Their Lordships would not accept all the reasoning in these judgements [ie Matovu and Dosso] but they see no reason to disagree with the results. The Chief Justice of Uganda (Sir Udo Udoma CJ) said: “The Government of Uganda is well established and has no rival."¹²¹

Wolf-Phillips states that Lord Reid’s statement “would appear to lend support to the [earlier] judgments”, adding, however, that his comment “is somewhat imperspicuous” (ie. “obscure”).¹²² On the other hand, in Mitchell v DPP,¹²³ Haynes P, in referring to the judgment of Lord Reid, stated that he was:

inclined to the view that His Lordship was there and then just noting the tests of revolutionary legality applied in these two cases by the Courts. He was not, even tacitly, expressing any approval or disapproval of those tests, although not disagreeing with the decision.

Whatever may be the appropriate interpretation of the majority decision in Madzimbamuto, it is clear that the Privy Council was of the view that while there exists an effective, legal rival for power, de jure recognition should not be given to the new government. In other words, the fact of effective control alone was not sufficient.

In any event, subsequent decisions of the courts, while still applying the test of “effectiveness” in determining revolutionary legality, have looked to broader criteria in measuring whether the new regime is in fact “effective”, including issues such as popular support and whether or not it has to resort to force in order to gain effective control of its people.

¹²⁰ In Mokotso v HM King Moshoeshoe II [1989] LRC (const) 24 at 92, Cullinan CJ of the High Court of Lesotho stated: “The situation in Rhodesia was to some extent unique, in that, unlike the case of most modern-day revolutions or coups d’etat, within the Commonwealth, the revolution in Rhodesia took place before a grant of independence by the Parliament of the United Kingdom. In brief, the revolution was not ultimately successful.”¹²¹ [1969] 1 AC 645 at 725.
¹²² Wolf-Phillips, n 109 above, at 57.
¹²³ [1986] LRC (Const) 35 at 63.
The shortcomings of, and Departure from, the Kelsen-inspired Approach

The cases that adopted a pure Kelsenian approach would appear to support any government that was successful “judged from a military, tactical, political or physical point of view” and effective “judged by the measure of submission by the people to the revolution.” In effect, it is a strict application of Kelsen, whereas Dias observed:

Kelsen drew no distinction between effectiveness, which makes people obliged to obey, and effectiveness which makes them feel under an obligation to do so. A usurper may by force and fear achieve the former, but not the latter, which, as judicially acknowledged, is the kind of effectiveness required by Kelsen.

According to Wolf-Phillips, the case law amounts to “a betrayal of Kelsen” because Kelsen’s theory was put to “normative use as a practical principle for guiding judicial decision and action”. Kelsen clearly stated that “the ought-propositions of the science of law describing the law do not oblige or authorise anybody to anything”.

Yet, as Eekelaar observed in 1973: “four Commonwealth tribunals have held that the very fact that the old constitution has been inflicted a mortal wound not only frees its successful slayers from its restraints but entitles them to judicial recognition as being legitimate and therefore, it seems, to legal immunity with respect to their revolutionary acts.” Presumably, such an approach would deem any government valid, including the most malignant regimes of the twentieth century.

124 Per Cullinan CJ in Mokotso [1989] LRC (Const) 24 at 125 - following a comprehensive overview of the case law since Dosso.
125 Dias, n 94 above, at 366.
126 Wolf-Phillips, n 109 above, at 3, 21. Wolf-Phillips states: “No one would be more satisfied than Kelsen if the Asma Jilani Case and the Begum Bhutto Case prove to have provided the funeral rites for the Dosso Case and the Commonwealth cases that attempted to justify revolution by jurisprudential sophistry”: at 38.
127 Kelsen, “Reply to Professor Stone”, n 92 above, at 1134.
128 The tribunals were the Supreme Court of Pakistan, the High Court of Uganda, the Appellate Division in Rhodesia, and the Judicial Committee of the Privy Council.
129 Eekelaar, n 119 above, at 22.
In any event, fourteen years after the decision in *The State v Dosso*, the same court overthrew the doctrine of "condonation". In *Asma Jilani v Government of Punjab*, the Chief Justice Hamoodur Rahman of the Supreme Court of Pakistan, citing Julius Stone, stated:

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 norms which are 'the daily concern of Judges, legal practitioners or administrators'...

His purpose was to recognise that such things as revolutions do also happen but even when they are successful they do not acquire any authority to rule or annul the previous 'general norm' until they have themselves become a legal order by habitual obedience by the citizens of the country. It is not the success of the revolution, therefore, that gives it legal validity but the effectiveness it acquires by habitual submission to it from the citizens.

In the same case, Yaqub Ali J opined:

It must be remembered in this connection that, however effective the government or usurper may be, it does not within the national legal order acquire legitimacy unless the Courts recognise the Government as *de jure*. 131

Similarly, five years later in *Bhutto v The Chief Staff of the Army and Federation of Pakistan*, Anwarul Haq CJ, reading the judgment of the court, stated that revolutionary legality could not be judged on the sole criterion of effectiveness, as contemplated by Kelsen's pure theory of law, "because by making effectiveness of the political change as the sole condition or criterion of its legality, it excludes from consideration sociological factors of morality and justice, which contribute to the acceptance or effectiveness of the new Legal Order." 133 The Court concluded:

131 Id at 220.
133 Note 132, at 692.
The legal consequences of such a change must therefore 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.  

In addition to the rejection of the proposition that Kelsen's theories prescribed legal norms, the significance of these cases lies in the conclusion that revolutionary legality can not be assessed on the narrow criteria of effectiveness in the sense of mere adherence to the laws of the new regime. On the other hand it is unclear what broader criteria should be applied, although in Bhutto reference is made to "sociological factors of morality and justice" and to the need to consider the "total milieu" in which change is brought about. It was left to later courts to explain and develop these broader requirements.

The Broader Approach in Mitchell

In Mitchell v DPP the appellants had been charged with murder. They challenged the competence of the High Court of Grenada to hear the charge, on the grounds that it had been established by the People's Revolutionary Government (the PRG), a regime that had seized power in 1979 but was overthrown in October 1983. In that month an assumption of power by a "Revolutionary Military Council" was, in turn, replaced by a government composed of the Governor-General, following an invasion of Grenada by forces of the United States and some Caribbean States. The Governor-General issued a number of proclamations, by virtue of which several of the laws of the PRG were continued in force, including that which established the High Court. The appellants argued that the Court had not been legally established and that the only court that could legally try them was the court established by the pre-revolution 1967 constitution.

The High Court in Mitchell found that the Court was validly constituted, but principally on the basis of the doctrine of necessity. Nevertheless, Haynes P, in particular, considered the broader question of the legality of the PRG itself. In a considerably shorter judgment, Liverpool JA also addressed

134 Note 132.
135 [1986] LRC (Const) 35.
136 Note 135, at 46ff.
that question. In the course of his judgment, Haynes P, after reviewing the case law and the literature, formulated a four-element test of revolutionary legality:

...I would hold that for a revolutionary government to achieve *de jure* status, that is, to become internally a legal and legitimate Government, the following conditions should exist: (a) the revolution was successful, in that the Government was firmly established administratively, there being no other rival one; (b) its rule was effective, in that the people by and large were behaving in conformity with and obeying its mandates; (c) such conformity and obedience was due to popular acceptance and support and was not mere tacit submission to coercion or fear or force; and (d) it must not appear that the regime was oppressive and undemocratic.

In my view unless all four of these conditions exist no Court in a democratic country should pronounce a revolutionary regime legitimate. Every one of them (a), (b), (c) and (d) raises a question of fact. ¹³⁷

Haynes P added:

I do not think these are unduly stringent conditions, (a) and (b) can exist without popular acceptance and support, because of submission to force or fear of it or weakness. This Court should not take an approach which might encourage power-seeking politicians or over-ambitious army officers to believe that, if by force of arms they can gain and retain governmental powers for a few years, their government will become consequentially lawful and legitimate. We must bear in mind the warning of Fieldsend, A.J., in *Madzimbamuto v Lardner-Burke* that 'nothing can encourage instability more than for any revolutionary movement to know that if it succeeds in snatching power it will be entitled *ipso facto* to the complete support of the pre-existing judiciary in their judicial capacity. It may be a vain hope that the judgment of a court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality.' Hence the importance of conditions (c) and (d).... A revolutionary regime should not be accorded legitimacy by this Court unless it is satisfied that, on the whole, the regime had

¹³⁷ Note 135 at 71-72.
the people behind it and with it. Legality should be achieved only if and when the people accept and approve (the new regime) for in them lies political sovereignty, and the Court so finds. 138

Haynes P concluded that in the present case the revolutionary government was not legal, as the requirements set out in elements (c) and (d), above, had not been established. In drawing that conclusion, he considered that each of the specified elements raised a question of fact and that, accordingly, the court should act only on the facts or evidence before it.139 It was noted that there was no affidavit evidence nor any agreed statement of facts in relation to issues raised by elements (c) and (d). While, in the court below,140 Nedd CJ concluded that there was popular acceptance of the regime, Haynes P stated that the Chief Justice "was relying either on his own personal opinion or was taking judicial notice of the facts as 'notorious facts'."141 Haynes P stated that the former is not evidence of the fact and questioned whether there could be judicial notice of the facts presently in issue:

I do not think this Court can properly act on a bare statement of fact or opinion of popular support, however credible and knowledgeable the source is and whatever is the basis of it. Proof of the fact by judicial notice may be admissible. But the weight to be given to it is another matter. I would hold that what is needed here is proof of particular facts or circumstances from which the court itself can infer popular support. In my view the proof here was insufficient. 142

Liverpool JA, the other member of the Court of Appeal to consider the issue of revolutionary legality, was brief in his analysis and general in his statement of principle:

In my view when a government in power has effective control with the support of a majority of people and is able to govern efficiently, that government should be recognised as legal. 143

He added:

138 Note 135 at 72.
139 Note 135 at 72-73
140 [1985] LRC (Const) 127, at 143.
141 [1986] LRC (Const) 35, at 73.
142 Note 141.
I am of the view that sovereignty, or revolutionary legality, or *de jure* status, by whatever name it is called, ultimately depends on the consent or acceptance by the people in the particular country under consideration which is manifested by the obedience to the precepts of those claiming to exercise authority over them.  

Liverpool JA held that in the present case there was no other contesting legal authority and stated that he had “heard nothing which could lead me to any view other than that the regime of the PRG was firmly in control of the country throughout its tenure of office and could be regarded as having become a legitimate or lawful government.”  

The foundation for that conclusion is unclear. In his brief judgment, Liverpool JA does not explain what is meant by “effective control” and “consent or acceptance by the people”. As to the latter, though he says that it may be manifested by the “obedience” of the people, it begs the question as to how that obedience might be achieved. He does not state how, in the present case, it was evident that there was acceptance by the people. Liverpool JA’s approach seems to suggest that a court may make a finding of legality on the basis that there is no factual evidence one way or the other, in turn suggesting that the greater the fear engendered by the regime, and the more submissive the people, the more likely that there will be a finding of revolutionary legality.

**The Step Backward in the Lesotho Cases**

In 1988 and 1992, the Lesotho High Court and the Lesotho Court of Appeal, respectively, considered the legality of successive coups; the first in 1986 and the second in 1990. In the High Court in *Mokotso and Others v HM King Moshoeshoe II and Others*, the applicants challenged the restriction on their right to free association, which had been guaranteed under the pre-revolution constitution, and the legality of the new

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144 Note 143.
145 Note 143 at 117.
146 Note 143 at 73. See also per Nedd CJ at [1985] LRC (Const) 127, at 143. Smart, is inclined to the view that *Mitchell v DPP* “represents a move away from the purely objective criteria of success and control, and subtly alters the nature of the judicial function in a situation of constitutional breakdown - to decide whether a regime is (or was) popular may entail a far more subjective approach”: Smart, n 93 above, at 957.
government itself. Cullinan CJ, in upholding the validity of the new government, resurrected Kelsen and, with some qualification, reverted to the approach adopted in the earlier cases.

He commenced by explaining that Kelsen, in referring to the question of 'effectiveness' of the new legal order, was not, however, using the word in the "narrower sense" as referring to the "military, tactical, political, or physical success in unseating those in power."\(^{148}\) Rather, he considered that Kelsen was using the term in a wider sense, as meaning that a revolution "would have to acquire the acceptance of the people, before it could be said to be effective."\(^{149}\) Cullinan CJ endorsed that broader interpretation and, after also referring to the decision in *Jilani*, stated:

> I observe that a revolution cannot be 'successful' unless there is 'habitual submission to it from the citizens', and here I do not necessarily equate 'submission' by the citizens with the revolution's popularity as such. If the citizens do not submit, how can the revolution be said to be successful?\(^{150}\)

It is not clear what Cullinan CJ meant by "acceptance of the people". He rejected the criteria of "popular" support suggested in *Mitchell*, stating that acceptance may be "evident from the 'obedience' or 'submission' or 'acquiescence' of the people" and added:

> If the judge is satisfied that that the new regime is firmly established and there is no opposition thereto, and that the people are acting by and large in conformity with the new legal order, signifying their acceptance thereof, for whatever reason, I do not see that the judge can hold that regime to be other than legitimate. Clearly the mandate in the matter lies with the people, in whom resides the ultimate source of power in the state.... The people make their choice in the matter, if they decide to accept the new regime, even if that decision is based on weakness or even fear, such decision may not be gainsaid.\(^{151}\)
Given that interpretation of “acceptance”, it is difficult to see how the “broader” approach to effectiveness advocated by Cullinan CJ is materially different from the “narrower” measure of effectiveness as signifying military or physical success of the revolution.

However, Cullinan CJ seems to leave other factors open for consideration. He suggests that a judge “should not be blind to a new regime’s unpopularity, or any other factor affecting issues of morality or justice,” though he then adds that he does “not see that they are necessarily vital considerations.”152 He further states that he “would agree [with Haynes P in Mitchell] that the will of the people must be apparent”153 and that “the burden of proof of legitimacy must always rest upon the new regime,” there being no presumption of regularity: “indeed there must be a presumption of irregularity.”154 Cullinan CJ concluded that the test to be applied is as follows:

A court may hold a revolutionary government to be lawful, and its legislation to have been legitimated ab initio, where it is satisfied that (a) the government is firmly established, there being no other government in opposition thereto; and (b) the government’s administration is effective, in that the majority of the people are behaving, by and large, in conformity therewith. 155

The 1992 decision of the Lesotho Court of Appeal in Makenete v Lekhanya156 followed a further coup in 1990. The appellant was a minister under the former regime and sought an order that his dismissal be set aside, on the basis that his appointment could be validly terminated only by the King. It was held that the fact of a successful coup caused the appellant’s office to fall away.

The Court in Makenete expressly adopted the test for revolutionary legality set out in Mokotso, with one qualification. In circumstances where it is not clear that there has been acceptance of the new order, Ackermann JA, delivering the judgment of the court, adopted the view expressed in Bhutto157

152 Note 147 at 131.
153 Note 147 at 132.
154 Note 147.
155 Note 147 at 133.
157 See above, n 134 and related text.
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."\textsuperscript{158}

What further matters may be considered under the heading of "total milieu" was not directly discussed.\textsuperscript{159} However, the Court of Appeal noted that the lower court had found as "notorious facts" that the administration of the new government was "firmly established" and "effective" and that it was "a notorious fact that the new Government quickly achieved popularity."\textsuperscript{160} While Ackermann JA noted that the latter consideration "was not necessarily the criterion",\textsuperscript{161} it seems that it may be part of the consideration of the "total milieu".

Nevertheless, the decisions of the Lesotho courts are clearly a step backward. Ultimately, it appears that under the suggested test of validity, "effectiveness" and "acceptance" are measured by reference to relatively narrow criteria. As stated by Cullinan CJ in \textit{Mokotso}:

\begin{quote}
The people make their choice in the matter. if they decide to accept the new regime, even if that decision is based on weakness or even fear, such decision may not be gainsaid.\textsuperscript{162}
\end{quote}

Certainly, that approach offers encouragement to the courts to wash their hands of the matter and suggests that they have no overriding role in protecting the rights of citizens through upholding the rule of law. In \textit{Makenete}, the Court at least touches on the duties of the courts. Ackermann JA states: "I agree that it is one of the most fundamental duties of the court to protect the constitution and to protect individual rights from being unlawfully encroached by the government." But in the next sentence, as though by way of a solution to that dilemma, he merely adds that "the onus of proving that a government is

\textsuperscript{158} [1993] 3 LRC 13 at 56 [emphasis added].
\textsuperscript{159} In \textit{Mitchell}, Haynes P referred to the considerations of why the old government was overthrown and the nature and character of the new legal order. He added: "Was the motivation mere power grabbing or was it rebellion for example against oppression or corruption or ineptitude? And is the new legal order a just one?": at 67.
\textsuperscript{160} [1993] 3 LRC 13 at 58-59.
\textsuperscript{161} Note 160 at 59.
\textsuperscript{162} [1989] LRC (Const) 24 at 131-132.
entitled to recognition as lawful ... lies on the government claiming such recognition ...".¹⁶³

A Review of the Case Law – Future Directions

It can be seen that the courts have not agreed on a single test of revolutionary legality nor on the meaning of "effectiveness" as a measure of legitimacy. The older cases and, with some qualification, the Lesotho cases, adopted a Kelsen-inspired positivist approach. The practical effect of that approach is that the courts "take what comes" in the way of revolutionary governments. In a paper on revolutionary legality delivered as early as 1969,¹⁶⁴ Eekelaar saw the need "of salvaging this area of investigation from total extinction by the operation of positivist dogmatism."¹⁶⁵ His suggested solution was a Dworkin-inspired approach of substituting rules for a list of principles¹⁶⁶ by which prima facie illegal acts may be sought to be justified, including the principle "that a court will not permit itself to be used as an instrument of injustice", and the principle that "government should be by the consent of the governed, whether voters or not".¹⁶⁷ He was of the view that such principles "can be applied even to override the enacted law of an effective legal system."¹⁶⁸

Some of the more recent cases that have dealt with revolutionary legality reflect the same concern as Eekalaar over the strictures of the Kelsen-inspired approach. In particular, in referring to the need to look at the broader issues of popular support, as in Mitchell and to "sociological factors of morality and justice", as in Bhutto,¹⁶⁹ those cases at least implicitly recognise Eekalaar's suggested principles.

¹⁶³ [1993] 3 LRC 13 at 65.
¹⁶⁴ See, above, n 119. The paper was first delivered at the University College of Rhodesia in 1969.
¹⁶⁵ Eekelaar, n 119 above, at 39.
¹⁶⁶ Eekelaar suggests that principles "have a dimension which rules lack. This is one of weight. Courts are not bound to apply a principle in the same way as a rule; they weigh them against other principles. Countervailing principles do not 'eat away' at a principle as exceptions do to a rule. They exist alongside it": Eekalaar, n 119 above, at 31.
¹⁶⁷ Eekelaar, n 119 above, at 38-39.
¹⁶⁸ Eekelaar, n 119 above, at 38-39.
¹⁶⁹ As Dias commented, "...in whatever way effectiveness of the Grundnorm is measured, Kelsen's theory has ceased to be 'pure' at this point. For effectiveness would seem to depend on those very sociological factors which he so vehemently excluded from his theory of law." He adds that it "seems clear.
"Revolutionary Legality": The Coup d'Etat of 1962 and the Burmese Military Regime

In assessing revolutionary legality, those principles, and the approach adopted in Mitchell, may gain greater prominence with the increasing influence of international human rights norms.

The Influence of International Human Rights Norms

The influence of international human rights norms on the domestic laws of States has been noted by Steiner. Steiner also notes that this influence has arisen despite the concern for non-intervention in the affairs of sovereign states:

The entire human rights movement amounts to ... an 'intervention' as demonstrated by the broad recognition of how deeply that movement has eroded the concept of domestic jurisdiction. All human rights influence the distribution and exercise of power in a country, from the prohibition of torture (limiting the means that a government can use to suppress opposition) to the vote (which, if freely exercised by all, would radically transform government and economy in many states).

That view recognises the paradigm shift over the past fifty years, from a primary concern of states for state autonomy, as doubtless was the case at the time of the decisions concerning revolutionary legality in the 1950s and 1960s, to a wider acceptance of the importance of international human rights norms. For example, a Kelsen-inspired approach that is based on simple notions of the effectiveness of the new order reflects of a primary concern for State autonomy. Even under that approach, however, the consideration must be borne in mind that all legitimate governments owe their existence to the

some enquiry into political and sociological factors has to precede, or at least is implicit in, the adoption of a particular Grundnorm as the criterion of validity": Dias, n 94 above, at 364.


171 Steiner, n 170 above at 999 n 7.

172 In Agora: US Forces in Panama [1990] 84 AJIL 503 at 505 n 3, Farer notes that "the most casual study of the preparatory work and of state behavior in the immediate aftermath of the Charter demonstrates as conclusively as anything of this nature can be demonstrated that the defence of human rights was very much a subordinate concern of the initial UN membership."

173 See Steiner & Alston, n 170 above at (v) and 998.
will of the people. The force of that shift is demonstrated by the fact that, increasingly, there is recognition that human rights norms are of such importance that, in certain circumstances, even multilateral armed intervention may be warranted. In relation to the 1989 United States invasion of Panama, D'Amato took the view that "human rights law demands intervention against tyranny." D'Amato defined "tyranny" as occurring "when those who have monopolistic control of the weapons and instruments of suppression in a country turn those weapons and instruments against their own people." He added:

If the international law of human rights springs from the people, and not the elites that run governments, then so much the worse for the nonintervention treaties invented by the latter for their own self-interest.

In articles published at the same time as that of D'Amato, Nanda and Farer each disagreed with D'Amato as to the validity of unilateral interference in the affairs of another State, other than where there is an issue of self-defence. However, Nanda noted the developing importance of international human rights norms. He stated:

I am in agreement with Professor D'Amato's position that human rights spring from the people and not from

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174 For example, art 21(3) of the Universal Declaration of Human Rights provides: "The will of the people shall be the basis of the authority of government." See also Eekalaar at n 119 above and related text.
175 As noted in Barcelona Light and Power Co [1970] ICJ 3, at 32, fundamental human rights obligations can not ever be abrogated unilaterally, as they are obligations erga omnes.
176 For example, the United Nations retrospectively accepted the NATO intervention into Kosovo for grave human rights abuses: see United Nations Press Release GA/9595 of 20 September 1999.
177 D'Amato A, The Invasion of Panama was a Lawful Response to Tyranny, [1990] Vol 84 AJIL 516, at 519.
178 Note 177. D'Amato gives the example of where no less than "groups of thugs" have "machine-gunned their way into power, murdering the existing democratic rulers": at 519-520.
179 Note 177 at 522.
governing elites...human rights cannot be left to the whim of governing elites, including those of the United States. The content of human rights guarantees must be universal, and must not depend upon the views of leaders who decide to project power (U.S., Soviet, Chinese, etc.) to enforce their own interpretations of human rights. ¹⁸¹

He added:

I agree with Professor D’Amato’s point that tyrannies are illegitimate, given the modern evolution of human rights law. ¹⁸²

**Revolutionary “Illegality” in Burma – International Condemnation**

“Burma has the most corrupt regime on the planet.” ¹⁸³

In a report to the United Nations Commission on Human Rights in 1998, Special Rapporteur on human rights in Myanmar, Mr Rajsoomer Lallah QC, highlighted the systemic nature of the atrocities carried out against Burma’s minorities by the military regime:

the Special Rapporteur is deeply concerned about the serious human rights violations that continue to be committed by the armed forces in ethnic minority areas. The violations include extra-judicial and arbitrary executions (not sparing women and children), rape, torture, inhuman treatment, forced labour and denial of freedom of movement. These violations have been so numerous and consistent over the past years as to suggest that they are not simply isolated or the acts or individual misbehaviour by middle and lower-rank officers but are rather the result of policy at the highest level entailing political and legal responsibility. ¹⁸⁴

In a further report on 4 October 1999, Mr Lallah QC advised that:

¹⁸¹ Nanda, n 180 above, at 497. See also Farer, n 152 above, at 507 n 6.
¹⁸² Nanda, n 180 above, at 498.
¹⁸³ Mr Andrew Miller, Member for Ellesmere Port and Neston, Hansard, British House of Commons, 5 April 2000, Column 206WH. This observation was made during a bipartisan debate on Burma in the House of Commons, in which members from both sides of the House spoke in strident terms of the atrocities committed by the Burmese military regime.
¹⁸⁴ Report cited in Id, Column 203WH.
...the situation is worsening. Repression of civil and political rights continues and intensifies whenever there is any form of public protest or any form of public political activity. Repressive laws are still used to prohibit and punish any exercise of the basic rights of freedom of thought, expression, assembly and association, in particular in connection with the exercise of legitimate political rights. This regime of repression puts the right to life, liberty and physical integrity – when it is not simply violated – permanently at risk. The rule of law cannot be said to exist and function, as the judicial system is subject to a military regime and serves only as handmaiden to a policy of repression. 185

In relation to the issue of forced labour, it is evident that both children and adults are used for that purpose.186 The International Labour Organisation (ILO) has condemned the regime’s widespread use of slave labour as a “crime against humanity”.187 In an unprecedented move against one of its own member-states, the ILO arranged a discussion at its June 2000 conference that could result in an appeal to its other 174 states to review their relationship with Burma. 188

The long history of atrocities committed by the military regime in Burma and the internal resistance to the regime has been acknowledged recently in both the British House of Commons and the United States Congress. In a considered debate held in the British House of Commons on 5 April 2000189, the criticisms of the regime came from members from both sides of the House and were uniformly strident. In the course of the debate, the Minister of State, Foreign and Commonwealth Office Mr Keith Vaz stated: “I have not attended many debates in the House on which there has been such unanimity.”190 Mr Vaz further stated:

186 See Interim Report, n 185 above.
187 House of Commons debates, n 183 above, Column 203WH, 206WH, 211WH.
188 Note 187, Column 219WH.
189 The atrocities in Burma were the subject of an earlier debate in the House of Lords, in March 1998: see Hansard, 25 March 1998, Column 1293ff.
190 House of Commons Debates, n 183 above, Column 207WH.
The Burmese regime's brutal policies, including torture, rape, forced labour, forced relocations and arbitrary executions, towards ethnic minorities have led to the exodus of hundreds of thousands of people across Burma's borders into neighbouring countries.

...The appalling suffering of ethnic minorities in Burma is a symptom of a wider malaise – the subjugation of a nation by military despots who continue to ignore the people's democratic choice.”191

Mr Vaz added:

The plight of the Burmese ethnic minorities flows from the wider political and human rights situation in Burma, which remains ... appalling. The human rights violations by the regime are among the worst in the world. In addition to the atrocities that I have mentioned, Amnesty International and the International Committee of the Red Cross estimate that there are 1,500 political prisoners in Burma. There is no democracy there, despite democratic elections in 1990. 192

Mr Vaz concluded that “Burma’s record is an affront to the United Nations principles that it has undertaken to uphold.”193

The United States Congress on 16 May 2000 also held a debate, specifically as a “tribute to Burma’s citizens who 10 years ago defied all risks and elected Daw Aung San Suu Kyi”.194 The US Congress issued a “Senate Concurrent Resolution 113 – Expressing the Sense of the Congress in Recognition of the 10th Anniversary of the Free and Fair Elections in Burma and the Urgent Need to Improve the Democratic and Human Rights of the People of Burma”. In referring to the Committee on Foreign Relations a resolution that the United States “should sustain current economic and political sanctions against Burma as the appropriate means to secure the restoration of democracy.

191 Note 190, Column 217WH.
192 Note 190, Column 218WH.
193 Note 190, Column 219WH.
human rights, and civil liberties in Burma," the Congress cited in the following terms a number of the ongoing abuses in that country:

  Whereas in 1988 thousands of Burmese citizens called for a democratic change in Burma...

  Whereas these demonstrations were brutally repressed by the Burmese military, resulting in the loss of hundreds of lives...

  Whereas on May 27, 1990, the National League for Democracy (NLD) led by Daw Aung San Suu Kyi won...

  Whereas the Burmese military rejected the results of the elections...

  Whereas 48,000,000 people in Burma continue to suffer gross violations of human rights, including the right to democracy, and economic deprivation under a military regime...

...  

  Whereas the United Nations General Assembly and Commission on Human Rights have condemned in nine consecutive resolutions the persecution of the religious and ethnic minorities and the political opposition, and the SPDC's record of forced labor, exploitation, and sexual violence against women; Whereas the United States and the European Union Council of Foreign Ministers have similarly condemned conditions in Burma and officially imposed travel restrictions and other sanctions against the SPDC; Whereas in May 1999, the International Labour Organisation (ILO) condemned the SPDC for inflicting forced labor on the people and has banned the SPDC from participating in any ILO meetings.

  Whereas the 1999 Department of State Country Reports on Human Rights Practices for Burma identifies more than 1,300 people who continue to suffer inhuman detention conditions as political prisoners in Burma...."\textsuperscript{195}

The Response of the Regime

In a rare interview with ASIAWEEK on 17 December 1999, Secretary No. 1 of SPDC, Major-General Khin Nyunt spoke (or as more aptly put by ASIAWEEK, went "on the defensive")

\textsuperscript{195} Note 194.
about the political and economic situation in Burma.\footnote{ASIAWEEK, 17 December 1999 Vol. 25 No. 50.} The product of the interview can be summarised in two statements by Khin Nyunt: first, that "there are no political prisoners in our country" and, second, that the government is "still in the process of building a democracy" which the people will enjoy "[o]nce the constitution is completed". Since 1993, the National Convention established by SLORC has held Plenary Sessions to draft a State constitution.\footnote{For example: The Basic Principles and Detailed Basic Principles laid down by the National Convention Plenary Sessions up to 30 March 1996, Rangoon, Myanmar.} To date the constitution is not complete, nor has any opportunity been given to the people to make submissions to the Convention.\footnote{See Weller, n 43 above, at 253-261, in particular at 261.}

In relation to the reports of UN Special Rapporteur, Rajsoomer Lallah, Khin Nyunt complained that "[h]e was pushed onto us....we were not consulted. So what we find is that he has not been to the country and he has taken all the information from people who oppose us." Perhaps SPDC Foreign Minister U Win Aung's categorical statement that "[w]e fully subscribe to the human rights norms enshrined in the Universal Declaration of Human Rights" is more revealing of a penchant for rhetoric which is at odds with the regime's behaviour.\footnote{Burma Net News (electronic mail service), No. 1357, Sept. 27, 1999 cited in Myint Zan, n 19 above, at 37. Yokota notes that "The Union of Myanmar is not a party to the International Covenant on Civil and Political Rights and its Optional Protocol nor to the International Covenant on Economic, Social and Cultural Rights, nor is it a party to the 1951 Convention relating to the Status of Refugees or to the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment": cited in Weller, n 43 above, at 319.} As Myint Zan indicates, any conflict with the views of the regime is explained away as "a geographical divide in the understanding of this problem."\footnote{See, for example, the view expressed by Dr Kyaw Win, Burmese Ambassador of the United Kingdom: see Myint Zan, n 19 above, at 37.} In other words, it is a matter of "Asian values". This "divide" is illustrated in relation to the restriction of movement placed on Aung San Suu Kyi. Khin Nyunt explained that "some terrorist groups...could even endanger Daw Aung San Suu Kyi's life." However, what is clear is that the regime does not want Aung San Suu Kyi to meet with insurgent groups. Such liaisons are considered to be "Subversive Acts".\footnote{UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, 12 January 1993: Decision No. 8/1992 (Myanmar), cited in Weller, n 43 above, at 363. See also, above, n 76 and related text.}
Finally, Khin Nyunt stated that he was "not worried, because I have a clear conscience that I am trying to do my utmost for the good of the country."

**Internal Opposition to the Regime**

It is clear that there has been continual, if sporadic, internal opposition to the various military and military-dominated regimes since 1962. Rev. Martin Smyth MP, of the British House of Commons, notes that the minorities in Burma "have been fighting for independence for almost 50 years, mostly against the backdrop of a bloody civil war with the current regime." In 1998, in the House of Lords, Lord Alton of Liverpool stated:

> Burma is beset by two struggles – one is the struggle for democracy, personified by the bravery of Aung San Suu Kyi, and the other is the struggle of abused peoples struggling for self-determination.

The struggle for self-determination is a united struggle by the ethnic nationalities of the Union of Burma. For instance, on 15 January 1997, some 111 delegates and observers from over 16 ethnic national organisations, including, for example, the Shan Democratic Union (SDU), Wa National Organisation (WNO), Karen National Union (KNU) and the Arakan Liberation Party (ALP), gathered for a seminar at Mae Tha Raw Hta in the base area of the Karen National Union (KNU). Many of these organisations are the civilian counterparts to their various armies, such as the 15,000-strong Shan State Army (SSA), the 10,000-strong Karen National Liberation Army (KNLA) and the 20,000-strong United Wa State Army (UWSA).

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202 House of Commons debates, n 183 above, Column 211WH. Rev Martin Smythe is a member of the House of Commons. See also per Mrs Cheryl Gillan at Column 214WH. (Editor's comment: If Smythe means the SLORC/SPDC government(s) by his term "the current regime" it should be noted that they came to power in 1988, not "fifty years ago". [Myint Zan])

203 Hansard, House of Lords, 25 March 1998, Column 1293. The Earl of Sandwich, also of the House of Lords said "the opposition movement in Burma is formidable and it now extends to monasteries, universities and many other institutions which are being persecuted": Id, Column 1302.


205 The Nation, Thailand, 11 December 1999. It must be noted that the army sizes are estimates only - as Smith states in relation to one group, his experience is that they are somewhat reticent about discussing "troop strength": n 22 above, at 395. For a comprehensive account of the ethnic struggle and insurgency in Burma, see generally Smith, n 22 above.
In Mae Tha Raw Hta, the leaders of the various ethnic organisations resolved, inter alia, to carry out the democratic changes in accordance with the will of the people of Burma; to demand the dissolution of the SLORC's sham National Convention; to demand that SLORC cease its military operations and oppression against the ethnic nationalities and other resistance organisations; to support the people's movement led by Daw Aung San Suu Kyi for democracy; to strengthen the country-wide coalition body of the ethnic nationalities, the National Democratic Front (NDF); and to raise the level of mutual understanding support and co-operation between the ethnic nationalities and pro-democracy forces.

Without doubt, the ethnic organisations and the armed resistance forces form a formidable anti-state force to the Burmese military regime. Taylor's commentary that these forces "pose no major threat" to the government as they exist "on the periphery of the state and are unable to agree among themselves on a single course of action", is in stark contradiction to the more revealing observation that "the state devotes a great deal of attention to trying to eliminate them".206

Implications of the Atrocities of and the Resistance to the Regime

Against the background of the atrocities committed by the military regime in Burma, and the on-going internal resistance to it, it is suggested that on no acceptable test could the regime claim revolutionary legality. Certainly, on the test suggested by Haynes P, it could not be said that there has been "no other rival", or that there has been "popular acceptance" without "coercion or fear or force". Certainly the regime is "oppressive and undemocratic." Against the backdrop of international human rights norms, it clearly fails. It is difficult to imagine how the regime could discharge the onus of establishing the criteria for legitimacy, as specified in the Lesotho cases.

Even under the test suggested in the Lesotho cases, because of the existence of strong opposition and in view of the demonstrated lack of acceptance of the regime by the people,207 again it is doubtful that legitimacy could ever be established. In any event, in Bhutto, which along with Asma Jilani marked the

207 Makenete, at 58.
departure by the courts from a reliance on Kelsen’s pure theory of law, it was noted that revolutionary legality could not be judged by the sole criterion of effectiveness as contemplated by Kelsen, as “it excludes from consideration sociological factors of morality and justice, which contribute to the acceptance or effectiveness of the new Legal Order.”

**Conclusion**

Burma’s era of “terror and repression” has spanned almost forty years. By its acts over that period of one-party rule, the regime has abandoned all constitutional structures, has continually silenced any opposition and, above all, has continued to apply ruthless and inhuman means to achieve its ends – supposedly in the interests of the maintenance of the “Union”.

International pressure against the regime is mounting. If and when it collapses, the doctrine of revolutionary legality may be called into play by the domestic courts in assessing the legality of the old regime. That, in turn, has implications for constitutional validity and, in particular, whether the 1947 constitution remains in force. If the regime is illegal, it follows that there has been no valid abrogation or repeal of the constitution that was in place prior to the 1962 coup d’etat.

It is made clear by the existing case law that any determination of revolutionary legality is a matter for the domestic courts. In *Attorney-General of the Republic v Ibrahim*, it was stated that “the mission of the supreme judicial organ in any State is to lay down authoritatively its own law and not (automatically) to apply the law of any other state, though past precedents anywhere are always of great help.” Adopting that dictum, in *Mitchell v DPP* it was stated:

Principles of revolutionary legality acceptable to the judiciary in Pakistan or in Uganda or in the Seychelles might need to be modified or qualified or amplified for application here in Grenada or in the Caribbean as a whole.

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209 See *Doe v Unocol*, n 85 above, and related text.
210 (1964) Cyprus LR 195 at 231.
211 *Mitchell v DPP* [1986] LRC (Const) 35 at 71.
Haynes P then stated that he found “the right principles of revolutionary legality” from a distillation of what was said, cited and decided in the earlier cases and “consistent with our political democratic ideology”.\(^{212}\) Certainly, each court has borrowed from and has quite evidently been persuaded by the decisions in other jurisdictions. It may be that in time a common principle will emerge. While all of the decided cases have come from common law jurisdictions, any likely alternative approach appears to be a resort to principles of international law.

The growing influence of international human rights norms has been noted above. They may well be influential in the development of more or less common domestic law principles. In time clear principles of international law relating to this area may emerge.\(^{213}\) In the meantime, given that the nature and composition of any post-junta court has obviously yet to be settled, there is a degree of speculation involved in assessing the likely approach that will be adopted by some future Burmese court.\(^{214}\) In \textit{Mitchell}, Haynes P agreed with de Smith that there is “no neat rule of thumb available to judges during or immediately after the ‘revolution’ for the purpose of determining whether the old order survives wholly, in part or not at all.”\(^{215}\) Nevertheless, given the democratic ideals of the present opposition in Burma and the international interest in the region, the influences that will come to bear on any new Burmese legal order are likely to include ‘democratic ideology’ and international human rights norms.\(^{216}\) Certainly, the test set out by Haynes P in \textit{Mitchell} is most consistent with an adherence to those ideals.

In any event, it is suggested that under any test, other than one based on a strict application of the Kelsen-inspired approach to revolutionary legality, a finding of legality could

\(^{212}\) \textit{Mitchell}, Id at 71
\(^{213}\) See above, n 181 and 182 and related text.
\(^{214}\) See generally Myint Zan, n 19 above.
\(^{215}\) Id at 69, 71. See also de Smith SA, \textit{Constitutional and Administrative Law}, 3\textsuperscript{rd} ed, at 66.
\(^{216}\) The latter question imports considerations of whether the doctrine of incorporation or the doctrine of transformation will be utilised in determining the impact of international law in Burma As to the doctrines of incorporation and transformation, see, generally, R Jennings and A Watts eds, \textit{Oppenheim's International Law}, Vol 1, 9\textsuperscript{th} ed 1992, at 54; I Brownlie, \textit{Principles of Public International Law}, 4\textsuperscript{th} ed 1990, at 24; O'Connell DP, \textit{International Law}, 2\textsuperscript{nd} ed 1970, at 40-41.
not be accorded to the present Burmese regime. Under such a strict Kelsen-inspired approach any regime, no matter how it obtained and exercised power, would receive recognition. Such an approach is becoming increasingly unacceptable in the modern world. Once any of a range of other matters pertinent to Burma is taken into account in the formulation of a test for revolutionary legality - such as the fact of the existence of a rival for power, the clear lack of popular acceptance, the use of coercion and force, extreme human rights abuses and the lack of freedom of association and of democracy - it is clear that the Burmese military regime would be found wanting.

It is perhaps ironic that one of the official motives for the 1962 coup was fear of secession from the Union by the Shan State. A finding of revolutionary illegality would restore the 1947 constitution and the right to secession that is enshrined in that constitution. In any event, clearly there will be no return to the spirit of Union that occurred at the juncture of independence in 1947 without the “Spirit of Panglong” being resurrected, and without the Shan and other ethnic minorities being given a voice in their future.

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217 See, above, n 47 and related text.
218 Smith, n 22 above, at 79. Smith adds: “Without a political moratorium and a new Panglong, the conflicts will inevitably continue”; at 424. Similarly, the Burma Lawyers’ Council states: “In Burma, so long as democratic rights for all people and equal rights for all the ethnic nationalities cannot be provided for in the constitution and the government and the people do not respect and obey the constitution, the suppressions and the civil war will not really cease and there will occur human rights violations repeatedly in the long run”: ‘Legitimacy to Rule and Human Rights Violations’, (July 20 1994), Journal of Constitutional Affairs, Burma Lawyers’ Council, Thailand, 70 at 75. As to the Panglong Agreement and the ‘Panglong Spirit’, see above n 26 and 27 and related text.