Public Interest Law Journal of New Zealand

(2015) 2 PILJNZ 166

ARTICLE

Exploring Constitutional Legitimacy

AISHWARYA S BAGCHI*

The legitimacy of the New Zealand constitution is generally attributed to its continuous legal devolution from the original British constitution. However, legal continuity cannot be the only source of constitutional legitimacy, since it does not explain how the constitutions of newly independent nations acquire legitimacy under the doctrine of autochthony, or how post-revolutionary administrations are deemed legitimate under the doctrine of effectiveness. Further, it overlooks the fact that judicial invocation of the doctrine of necessity can sustain constitutional legitimacy during coups d'état, despite breaks in continuity. This article argues that legal continuity is merely a mask for more fundamental factors behind constitutional legitimacy, namely social consensus and judicial recognition. Revisiting the theories of Raz, Kelsen and Hart on legitimacy, this article identifies social consensus as the *Grundnorm* behind a constitution. In addition, this article will examine the judicial recognition of a constitution as the source for the *rule of recognition*; that the constitution is the ultimate determinant of legal validity. This article asserts that the New Zealand constitution experiences continuous legitimacy because its democratic framework allows social consensus to guide its pragmatic evolution. The problem of recurring revolutions and coups d'état in countries such as Fiji or Pakistan indicates that social consensus is easily lost in flawed democracies, making the use of force to overthrow governments an easier alternative to legal reform. This article contends that the academic understanding of constitutional legitimacy should be updated so that democracy is considered a prerequisite for constitutional legitimacy across the world.

* LLM (First Class Honours), University of Canterbury. The author wrote this article in her fourth year of undergraduate study towards an LLB/BSc (Economics and Statistics). The author would like to thank Professor Philip Joseph for his feedback and support.

I Introduction

What makes a constitution legitimate? The New Zealand High Court has said that the legitimacy of our constitution lies in its legal continuity—or unbroken legal devolution—from the original British constitution.[1] However, there are several reasons to believe that legal continuity cannot be the only source of constitutional legitimacy. First, legal continuity does not explain how the constitutions of new nations or new legal systems gain legitimacy. Many contemporary constitutions of largely undisputed legitimacy—namely the Constitution of the United States—emerged from revolutions, where legal continuity was clearly (and sometimes deliberately) broken.[2] Secondly, a constitution does not necessarily lose legitimacy when it loses continuity. Judicial recognition may sustain its legitimacy through periods of crisis. This indicates that there are elements of social consensus and judicial recognition that work alongside legal continuity and occasionally replace it as factors determining the legitimacy of a constitution.

This article explores the legal, social and judicial requirements for constitutional legitimacy. It does so by considering a range of constitutional situations—of sound or suspect legitimacy—through the separate lenses of legal continuity, social consensus, and judicial recognition. The key is to extricate from each situation the underlying elements of continuity, consensus, and recognition and ask what their respective roles in the situation say about their relative importance for legitimacy.

The discussion is divided in four parts. Part II contains an overview of the existing works on constitutional legitimacy and highlights the theoretical gaps that this article will address. Part III looks at how a new constitution acquires legitimacy under the doctrine of autochthony in the context of both interrupted and uninterrupted continuity. Part IV analyses how the continuity of constitutions can be interrupted by crises such as social uprisings and coups d'état, and examines how the doctrines of effectiveness and necessity may be used to address the question of legitimacy. Part V contemplates whether democracy is an essential condition for constitutional legitimacy.

While this article draws on the experience of several countries, the central point of comparison remains the New Zealand constitution. Through these comparisons, this article attempts to create a rough formula for constitutional legitimacy. It will be shown that legal continuity is essentially a mask for social consensus and judicial recognition, which are the true determinants of constitutional legitimacy.

II Existing Theories on Constitutional Legitimacy

A *Raz, Kelsen and Hart on legitimacy*

A constitution is the framework of government in a society that has a legal system. It is a framework for the interaction between the branches of government, and between the government and the people. The concept of a constitution as a binding framework for tedted government, now held by the majority of nations, originated with the American and French Revolutions.[3] However, the functionalist sense in which it still exists in England and New Zealand—which is effectively how government works—is older still. Arguably, it

1 *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC) at 212.

2 F M Brookfield "The Constitution in 1985: The Search for Legitimacy" (unpublished paper, University of Auckland, 1985) at 10.

3 KC Wheare *Modern Constitutions* (2nd ed, Oxford University Press, London, 1966) at 3.

existed from the time the organs of government could distinguish between executive orders and law; from the time of the Glorious Revolution of 1688.[4] While there is debate about whether the older sense is still an acceptable meaning of constitution, this discussion will assume that it is. This is because, even under functionalist constitutions, it is possible to distinguish a rule that is legally valid from a rule that is not. As will be seen, this distinction is necessary for the concept of constitutional legitimacy.

What is legitimacy? According to Joseph Raz, something that is legitimate has (legally) justified claims to authority.[5] In other words, something is legitimate when it legally *ought to be*. Does it also have to *be* in fact? Raz claims that legitimate political authorities, such as constitutions, must also be "effective at least to a degree".[6] This sounds sensible; a legal system that no one obeys has no authority.

Using Raz's guidelines, we can say that for a constitution to have legitimacy, the constitution's position in the legal system must be such that:

(a) it has justified claims to being obeyed (*de jure* authority); and

(b) it is in fact obeyed to a certain degree (*de facto* authority).

To understand what justifies a constitution's claim to legitimacy it is useful to look at the theories of Hans Kelsen and HLA Hart on the foundation of the legal system. Kelsen postulated that in a legal system, a rule is legally valid (that is, has *de jure* authority) if it has been authorised by a higher norm that is itself legally valid. If we continue up the "chains of validity",[7] we will ultimately reach the original and empowering core of the system. That empowering core is called the *Grundnorm*. It is important to note that according to Kelsen, the Grundnorm is not the constitution itself, but the norm that says that the constitution must be followed. He wrote: "It is postulated that one ought to behave as the individual, or the individuals who laid down the constitution have ordained. This is the Grundnorm of the legal order".[8]

In addition, Kelsen believed that the legal system as a whole must be effective—that is, obeyed in practice—in order for the Grundnorm to be capable of conferring legitimacy to the constitution. He observed that "efficacy is a condition of validity", but added that it is only "a condition, not the reason of validity".[9] The requirement of effectiveness supplies the element of *de facto* authority to the constitution, while the Grundnorm's position at the core of the legal system provides the *de jure* authority to the constitution, or the reason why it is obeyed.

An alternative to Kelsen's explanation for constitutional legitimacy is Hart's theory of the rule of recognition.[10] A rule of recognition provides the criteria for distinguishing a valid rule from one that is invalid. According to Hart, each legal system has an ultimate rule of recognition. One reaches this rule when, like in Kelsen's theory of the Grundnorm, one exhausts the ability to refer to any other rule to assess the legal validity of the rule in question. The existence of the ultimate rule can be ascertained by reference to actual practice: "to the way in which courts identify what is to count as law, and to the general

4 Elizabeth Wicks *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart Publishing, Portland (OR), 2006) at 17–20.

5 Joseph Raz *The Authority of Law: Essays on Law and Morality* (Oxford University Press, New York, 1979) at 5–6.

6 At 8.

7 At 125.

8 Hans Kelsen and Anders Wedberg (translator) *General Theory of Law and State* (Harvard University Press, Cambridge (Mass), 1945) at 115.

9 At 42.

10 HLA Hart *The Concept of Law* (Oxford University Press, London, 1961) at ch 6.

acceptance of or acquiescence in these identifications".[11] Judicial practice and general acquiescence also make it possible to infer an "internal point of view"[12] on the part of the courts, law-making officials and executive officials that the ultimate rule has *de jure* authority and should be obeyed.

When applying Hart's reasoning to constitutions, it can be concluded that for a legal system to have a legitimate constitution, it must have an ultimate rule of recognition that says that the constitution is the definitive guide to whether a law is valid. That is, if the judiciary and government officials refer to the constitution as a guideline for the validity of other laws and governmental systems, the legitimacy of the constitution is accepted.

Both the Grundnorm and the ultimate rule operate as analytic frameworks that bring a conceptual unity to the legal system, by allowing the validity of every law to be attributed to one basic or ultimate rule. However, there is a noteworthy difference in Hart and Kelsen's respective emphases on *de jure* and *de facto* authority. Hart's approach is empirical: he infers an internal perspective from the *evidence* of official practice that the constitution ought to be obeyed. Kelsen, on the other hand, is purely theoretical: he postulates that the Grundnorm exists as a precondition to the legitimacy of the constitution. Whereas Hart considers habitual obedience or *de facto* authority to be integral to the question of legitimacy, and regards the *de jure* authority as merely a point to be inferred, Kelsen attaches primary importance to the *de jure* authority of the Grundnorm and treats *de facto* authority as a condition, but not the justification. Essentially, the ultimate rule of recognition places a greater emphasis on the *de facto* component of legitimacy, while the Grundnorm ascribes greater importance to the *de jure* component. This discussion will accordingly use the term *Grundnorm* when it seeks to highlight the *de jure* (normative) component of constitutional legitimacy, and use the term *ultimate rule* in connection with judicial and official practice.

A conceptual shortcoming of both the Grundnorm and the ultimate rule, is that the precise nature of either cannot be easily discerned. A critique of Kelsen is that he presupposes the existence of the Grundnorm—his reasoning ends at the statement, "law is valid and binding because the basic norm says so".[13] The question of what counts as the Grundnorm is unclear. The Grundnorm remains a frustratingly elusive and abstract concept to equate with observable reality. Hart leans in the opposite direction. The evidence of the ultimate rule is abundant: judicial decisions and lawmaking in accordance with established procedure are practices that add to the *de facto* authority of the constitution. However, the reason why these officials consider themselves bound is never explored. Hart simply describes the internal perspective as a "political fact".[14] Alf Ross called it "a purely social-psychological fact outside the province of legal procedure".[15] However, describing the ultimate rule as a fact evades the question of why the ultimate rule exists in the first place. There is a dissonance between the theoretical terminology and a proper understanding of the social factors that give rise to the belief that the constitution—and the laws enacted under it—must be obeyed.

11 At 105.
12 At 112.
13 Uta Bindreiter *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine* (Kluwer Law International, The Hague, 2002) at 16.
14 Hart, above n 10, at 108.
15 Alf Ross *On Law and Justice* (Stevens & Sons, London, 1958) at 81.

B Real-life *reasons for the Grundnorm and the ultimate rule*

In New Zealand, the explanation for constitutional legitimacy is legal continuity. In *Berkett v Tauranga District Court*, Fisher J stated that there is "an unbroken chain of constitutional authority for all the legislation" in New Zealand since the assumption of imperial sovereignty in the mid-nineteenth century.[16] The concept of legal continuity is an exercise in Kelsenian reasoning: a constitution is legitimate because a previous constitution or a higher legal authority has legitimised it. From a Hartian perspective, the current ultimate rule of a legal system exists due to proper legal devolution and habitual obedience to it by the law-applying institutions. This has led to a practice of recognising the current constitution as the supreme authority. If the constitution were changed in a way that is unauthorised by a higher or older authority, then the absence of *de jure* authority for the change would render it incapable of legitimacy. Moreover, an enduring change in the framework of government that is not provided for in the constitution shows a loss of actual obedience to the constitution, which would undermine the *de facto* authority of the constitution.

History points to usurpations and revolutionary social uprisings as the main causes for breaks in continuity.[17] This suggests that for legal continuity to exist, there needs to be some sort of social (and perhaps political) tolerance of the constitution precluding social uprisings and usurpations. This is the *socio-psychological fact* referred to by Ross in describing the nature of the ultimate rule.

What is the requisite social attitude? John Locke, whose theory of civil society describes the basis of many modern societies, posited that civil societies arise from a *double agreement*—the first being an agreement to form a society and be bound by the majority in collective decisions; the second being a majority agreement on the form of government to have.[18] It will be argued in subsequent parts that constitutions rely on the existence of the second agreement as the Grundnorm for their legitimacy.

A few points relating to Locke's terminology must be clarified. First, it is misleading to say that a majority of the people of a nation directly establish, support, or change the constitution.[19] As will be seen in the upcoming parts, it is usually a few leaders who decide the contents and development of the constitution. Secondly, the support of a simple majority may not be adequate for the *majority agreement* to succeed, as the "determined hostility of a substantial minority" may impede the majority government.[20] Finally, the term *majority agreement* has connotations of the modern normative standard of democracy, which a seventeenth century writer such as Locke could not have meant. In view of these issues, it is better to describe Locke's second agreement as a *social consensus* in favour of the constitution. For social consensus to exist, it suffices that the large majority of people do nothing more than passively tolerate the institutions established under the constitution.[21]

Other than social consensus, there needs to be an element of governmental obedience to the constitution for the *effective* component of legitimacy to be met. For this, there needs to be a coherent working relationship between the law-making and judicial

16 *Berkett v Tauranga District Court*, above n 1, at 212.
17 Brookfield, above n 2.
18 At 111.
19 Wheare, above n 3, at 52–66.
20 William G Andrews (ed) *Constitutions and Constitutionalism* (2nd ed, D Van Nostrand Company, Princeton (NJ), 1963) at 10.
21 At 10–13.

branches of government. The law-making organs must respect that the judiciary will only apply law that has been enacted in accordance with the substantive or procedural constraints of the constitution, while the judiciary must apply every law that has been enacted in a constitutional manner. Philip Joseph calls this mutual recognition of institutional roles a *collaborative enterprise* between the political (law-making) and judicial organs. The existence of the collaborative enterprise leads to a practice of obedience to the constitution that, according to Hart, provides the evidential basis for a rule of recognition. The judiciary's practice of upholding all constitutionally enacted laws adds to the *de facto* authority of the constitution.[22]

In the upcoming parts, it will be argued that whereas social consensus generates the Grundnorm that accords *de jure* authority to a constitution, collaborative enterprise enables a rule of recognition to evolve around the constitution, endowing it with *de facto* authority. Together, they make the constitution legitimate and render it capable of evolving in a legally continuous manner.

III Acquiring Legitimacy

Not every constitution is authorised by some older constitution. For these constitutions, legal continuity cannot exist at their conception. How do new constitutions gain legitimacy?

A *Autochthony*

Kenneth Wheare discussed the doctrine of autochthony,[23] which, in Joseph's words, explains how "the offspring of an Imperial predecessor might mature, through adolescence, into a fully-fledged constitutional State".[24] Nations with constitutional autochthony are described as being "constitutionally rooted in their own native soil".[25] The reason autochthony is of interest to this discussion is because the idea of a native constitutional *root* seems to imply a different source of legitimacy than mere legal continuity. We will consider what this separate source is.

To see whether a constitution is autochthonous, Marshall suggests three criteria:[26]

> (a) whether all processes of constitutional change are locally operated within the nation;
>
> (b) whether there has been a break in legal continuity in the national constitutional history; and
>
> (c) whether the people, judges and officials regard the constitution as authoritative because of their acceptance of it.

However, not all the criteria need to be satisfied to establish autochthony.[27] In the examples that will be considered under this part, the first criterion is already met. Only the second and third criteria will be of interest.

---

22 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 535.

23 KC Wheare *The Constitutional Structure of the Commonwealth* (Oxford University Press, London, 1960) at ch 4.

24 Joseph, above n 5, at 478.

25 Wheare, above n 3, at 89.

26 Joseph, above n 5, at 480–481.

27 At 480–481.

The significance attached by traditional autochthony theorists to the second criterion—that of a break in continuity—can be best understood with reference to Kelsen. Under Kelsenian theory, a break in legal continuity amounts to a legal revolution. New nations that experience a break in continuity from the colonial legal order can be said to have a new Grundnorm that offers a source of constitutional legitimacy distinct from that of the parent nation. The break with the past is considered important for the distinct identity of the new nation, "endowing the (legally) revolutionary government with legal authority" under a new Grundnorm.[28]

However, it seems perplexing that a break in continuity would provide a Grundnorm when, in general, it leads to the loss of the legitimate authority by disrupting the chain of validity. Marshall has said that far from providing "legal independence", a break in legal continuity does not provide "legal anything; and the only answer to question about an alleged 'new' system's legal root would be that it had no legal root".[29]

This raises the question: if the legal root has been severed, what is the source of constitutional legitimacy? What leads to the formation of the new Grundnorm and its binding authority?

In Ireland, the Constitution of 1937 was formed after a clear break in continuity: it was never ratified by the Dail Eireann, which was the body authorised by the British Parliament. It was instead ratified by a public referendum.[30] This was nationally recognised as generating legitimacy in its own right, so as to override the need for the Constitution to be authorised by the old legal order. Why was that so?

The answer seems to be that ratification by public referendum mirrors Locke's theory of the second agreement of civil society: the majority will that is expressed in a referendum is one of the strongest possible forms of express social consensus. The result of the Irish referendum showed a majority agreement to be bound by the new constitution and supplied the new constitution with the requisite *de jure* authority because it bore the normative, almost contractual, force of mass assent. The Irish Constitution was autochthonously authoritative, due to its strong acceptance by the Irish people.

However, in most cases the social consensus is rarely demonstrated as strongly. The existence of social consensus is often assumed due to the *representative* nature of the framers. For instance, the American Constitution was drafted and signed by the delegates at the Constitution Convention, debated in the federalist papers, and then ratified by (initially) nine of the thirteen state legislatures, before it came into force in June 1788.[31] The general public had no formal avenue to take part in the formation of the Constitution. Albeit, heated public debates in the states of Pennsylvania, Massachusetts, Virginia, and New York considerably influenced the position that the delegates took at the Constitution Convention.[32]

Likewise, in India, the Constitution was ratified when the Constituent Assembly adopted it in November 1949 after breaking continuity by not seeking the assent of the

28 Nelson Koala Mkwentla "The Legal Effect of a Coup d'état on Traditional Constitutional Concepts" (Master of Laws Thesis, Rhodes University, 2001) at 6.

29 G Marshall *Constitutional Theory* (Oxford University Press, London, 1971) as cited in Joseph, above n 5, at 481.

30 Wheare, above n 3, at 91.

31 Steve Mount "Constitutional Topic: The Constitutional Convention" (12 March 2012) US Constitution <www.usconstitution.net>.

32 Pauline Maier *Ratification: The People Debate the Constitution*, *1787–1788* (Simon & Schuster, New York, 2010).

Governor-General.[33] The Assembly was composed of indirectly elected delegates from state legislatures. The Indian public had no direct input in the formation of the Constitution but were given the opportunity to recommend changes to a draft constitution that was released by the Assembly in January 1948.[34] The Assembly debated the public's recommendations before finalising the Constitution.

If one looks for an agreement at the base of the legitimacy of these constitutions, it was the post-debate agreement by the delegates. The recommendations of the people, while influential, were not binding, as they would have been in a referendum. Moreover, the social reality in eighteenth century United States and mid-twentieth century India meant that only the privileged classes would have been capable of meaningful contribution to the constitutional debate. A majority of the public—including women, the oppressed races and castes, the poor, and those who lived outside urban centres—were effectively disenfranchised because of illiteracy, geographical remoteness, or a lack of political clout. These categories of people would have had little voice in the formation of the constitution. Yet, both the Indian and the United States Constitutions claim in their respective preambles that they owe their legitimacy by virtue of being "enacted" or "ordained" by "the People".[35]

Therefore it seems that a lack of express opinion on the part of the majority of the population, and the somewhat patronising view of framers and the privileged (on "the best framework of government for the people"), may suffice as the social consensus giving the initial normative force to a constitution, and that which makes it autochthonous. The problematic implications of having such a broad definition of *consensus* will be explored in Part V when the discussion looks at normative criteria for legitimacy. The only justification for saying that "the People" authorised the Indian and the United States Constitutions is that in both nations, political franchise and participation eventually expanded to encompass categories of people who were initially excluded from the constitutional debate. These people subsequently signalled their acceptance of the Constitution by participating within the established framework to elect new governments.

The third and final criterion of the autochthonous root is a governmental belief in the constitution's *de jure* authority, which prompts governments to act in compliance with the constitution, and in the process affirms the constitution's *de facto* authority. The third criterion relies on the judiciary's enforcement of the constitution. As Raz has explained, the very validity of laws depends on their recognition by the "law-applying organs", namely the courts. This is because it is "the actions of the law-applying organs are those that affect the considerations of the law's subjects".[36] In other words, by upholding the constitution, courts create a habit of constitutional obedience within the legislature and the executive, causing the normative force of social consensus to translate into the *legal* force of the constitution.

In the early days of a constitution that is derived from a break in continuity, there can be no habit of obedience to the constitution. However, if the courts uphold as valid only laws that are constitutionally authorised, what was initially only a moral commitment to obey the constitution at the official level, develops into the habitual practice that is

33 Shivprasad Swaminathan "India's benign constitutional revolution" *The Hindu* (online ed, New Delhi, 26 January 2013).

34 Virendra Singh *Indian Polity with Indian Constitution & Parliamentary Affairs* (Neelkanth Prakashan, New Delhi, 2016) at 16.

35 Preamble to the Constitution of the United States, adopted 17 September 1787.

36 Raz, above n 5, at 88.

evidence of a rule of recognition. It is useful to consider the United States Supreme Court case of *Marbury v Madison* as an illustration of this process.[37] *Marbury* was the first of the constitutional cases in which the Supreme Court ruled that it had the power to judicially review statutes that breached the Constitution. The decision was a judicial signal that the validity of laws would be assessed on the basis of the Constitution agreed to in 1788. The effect of the ruling was to confirm the authority of the Constitution in the minds of the legislature and subsequent judges, prompting them to abide by the Constitution and to enforce it. Had the Supreme Court in *Marbury* chosen to ignore the Constitution and declare the non-complying statute valid, the authority of the Constitution would have undoubtedly suffered and the habit of obedience would have eventually diminished.

Joseph's idea of the collaborative enterprise is founded on the judicial recognition of constitutional law-making. It settles the basis for the on-going relationship between the courts and the law-making branch: as the law-making branch legislates according to the constitution, the judiciary upholds the law. The judicial recognition of valid laws, in conjunction with the reciprocal obedience by the lawmakers to create only valid law, contributes to the body of practice that overall clarifies what the rule of recognition is—that the constitution ought to be obeyed and is in fact obeyed.

B *Autochthony in Australia and New Zealand*

The requirement of a break in legal continuity under the doctrine of autochthony poses a problem for new nations whose constitutions are the product of continuous legal devolution from the constitution imposed by the parent nation. Kelsenian analysis suggests that these constitutions remain part of the legal order of the parent nation, with the Grundnorm for their legitimacy still embedded in the legal order of the parent nation. However, this is contrary to political and social reality. The government and the people of such nations often believe their constitution's legitimacy to have a local, rather than an imperial source. This raises the question: are there any autochthonous sources of legitimacy for legally continuous constitutions of new nations? As Australia and New Zealand fall into this category, it is pertinent to ask if they can claim a locally contained rule of recognition behind the authority of their constitutions.

Peter Oliver's interpretation of the concept of a *sovereign* is analytically useful in this enquiry.[38] It is implicit in Oliver's analysis that sovereignty lies in the entity that is capable of "amending the amending formula".[39] In other words, the sovereign in a legal system is the body that can alter the rule of recognition authoritatively without breaking continuity. As such, the sovereign is the source of on-going legitimacy in the legal system. If the sovereign is a local body, then the nation can claim a local authority for its rule of recognition and constitutional legitimacy.

To see whether a former colony now has a local sovereign, it must be asked whether it can authoritatively provide for a change of its own rule of recognition, or whether it depends on the parent nation to do so.

In 1986, Australia revoked the last vestiges of the United Kingdom Parliament's ability to legislate. But it did not do so unilaterally. Rather, it adopted a procedure of request and consent with the United Kingdom Parliament that the latter would no longer have the

37 *Marbury v Madison* 5 US 137 (1803).

38 Peter Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, New York, 2005) at 12.

39 At 12.

power to legislate for it.[40] So it would appear that it still relied on the authority of its parent nation to change its rule of recognition, and that the Grundnorm still lay in the United Kingdom. However, the Australian Constitution, contained in the Commonwealth of Australia Constitution Act 1900 (Imp), was ratified by referendum by the people of the colonies and enacted by the Imperial Parliament with only very minor changes. Moreover, s 128 of the 1900 Act enables the entire Constitution to be amended by means of referendum. This suggests that ultimately, the ability to "amend the amending formula" rests with the Australian people, so that the source of constitutional legitimacy might be its validation by "popular sovereignty".[41]

To say that the sovereignty lies in the people is congruent with the idea of having a local Grundnorm. It bears the same local normative force that was identified when discussing what legitimises new constitutions with a background of broken continuity.

The fact that in Australia's case the local normative force was generated within the framework provided by the Imperial Parliament does not detract from its *autochthonous* quality, as the normative force is nonetheless of Australian origin.

By this analysis, where does sovereignty lie in New Zealand? In *Berkett*, when asked to justify the validity of an Act of Parliament, Fisher J said:[42]

> ... if one were to start with an assumption of Imperial sovereignty dating from the mid-19th century there would be an unbroken chain of constitutional authority for all the legislation that followed.

It may be argued this reasoning suggests that the alleged *sovereignty* accorded to Parliament is merely the result of the rule of recognition provided by the Imperial Parliament, and therefore not locally determined. When New Zealand gained independence in 1947, it was through the request and consent procedure authorised by the authority of the Imperial Parliament.[43] If this is all that led to the internal viewpoint for the courts that the New Zealand Parliament was the ultimate law-making body, it would amount to recognising the authority of the Imperial Parliament behind Parliament's law-making powers. Speaking at a lecture in 1985, FM Brookfield acknowledged that: [44]

> ... the supremacy and power of [the New Zealand] Parliament rested upon legislation of the United Kingdom Parliament which has never renounced in clear terms – indeed it has never been asked to renounce – its residual power to legislate for New Zealand.

However, this changed a year later when the New Zealand Parliament enacted the Constitution Act 1986. The Act unilaterally extinguished the remnant power of the United Kingdom Parliament to make laws for New Zealand, and further repealed the Statute of Westminster Act 1947, which had given the New Zealand Parliament ultimate law-making powers in the first place. The enactment of the Constitution Act 1986 amounted to an assertion by the New Zealand Parliament that it no longer needed the legal connection to the United Kingdom to justify the legitimacy of its ultimate law-making powers. The New Zealand Parliament was now sovereign not because the United Kingdom said so, but

40 Australia (Request and Consent) Act 1985 (Cth); and Australia Act 1986 (UK).
41 Oliver, above n 38, at 328.
42 *Berkett*, above n 1, at 212.
43 New Zealand Constitution Amendment (Request and Consent) Act 1947. See also the corresponding New Zealand Constitution Amendment Act 1947 (UK) 10 & 11 Geo VI c 46.
44 Brookfield, above n 2, at 9.

because the New Zealand Parliament itself said so. From that point on, the New Zealand Parliament began to enjoy an unquestionably home-grown sovereignty.[45]

Subsequent statements by Fisher J in *Berkett* point to another source of legitimacy:[46]

> The questionable nature of some of the assumptions [purportedly justifying the original proclamations] … has not detracted from the *general recognition* afforded to [the proclamations] since. …
>
> … it is neither necessary nor permissible for a Court to delve back into history to establish the pedigree of the New Zealand Parliament … for the purpose of assessing the validity of a current statute. Once Parliament passes or adopts a statute, the Courts must apply it.

Fisher J implies that the "general recognition" is an overriding factor in relation to any possibility of a breach in legal continuity. This suggests a local acceptance of the New Zealand constitution for what it now represents, and not the pedigree of its initial source of authorisation.

How did the local acceptance materialise in the absence of one identifiable episode of social consensus, as in the case of India, Ireland, or the United States? The democratic nature of the New Zealand constitution means that Parliament is now a reflection of the way New Zealanders provide for their own laws and constitutional arrangements. Therefore, albeit in a more indirect way than in Australia, parliamentary sovereignty is the means by which the New Zealand public decides what their constitution will be. The source of constitutional legitimacy is thus the choices of the New Zealand public as expressed through their elected Parliament. In that sense, New Zealand also has an autochthonous source of legitimacy.

One lesson to take into the next part from the foregoing study of constitutional legitimacy in Australia and New Zealand is that legal continuity is not incompatible with evolving social consensus. Joseph notes how the major constitutional reforms in New Zealand's history have been achieved without breaking continuity and through pragmatic evolution.[47] It is suggested this is possible only because the existing constitutional framework accommodates shifting social consensus through representative government. The upcoming part considers instead those scenarios where legal continuity precludes social consensus, leading to loss of constitutional legitimacy. It will be useful to keep the New Zealand constitutional framework in mind as a point of contrast.

IV Loss of Legitimacy

Occasionally, governments fail to address widespread discontent in society. Often this comes from a lack of provisions for representativeness and accountability in the constitution. This gives those in power the discretion to ignore social consensus. When this happens, it becomes difficult for the people to have their concerns addressed through the legal framework. This leads to a social consensus *against* the government and its framework. Locke's second contract for civil society—the agreement on the form of government—is negated by the first contract—for the government to be bound by majority decisions—as the majority is now against the government. With the loss of social

45 Oliver, above n 38, at 197–201.

46 *Berkett*, above n 1, at 213 (emphasis added).

47 At 139–142.

consensus, the Grundnorm that says that the constitution must be obeyed also ceases to exist, causing the constitution to be stripped of legitimacy.

An example of this is the American Revolution, during which the Thirteen Colonies broke away from the British constitutional arrangement and established their own constitutions, eventually uniting under one Constitution in 1788. While the pre-Revolutionary Colonies had no *constitution* in the modern sense, they did have charters that set the basis for interaction between the British Crown in Parliament and the governments of the individual Colonies.[48] During the Boston Tea Party of 1773, citizens destroyed the tea cargo of the merchant ships to disobey tax law imposed by the British. The leader of the meeting publicly defended their stance as a principled protest to defend their "constitutional"[49] right not to be taxed without representation. Immediately after the Boston episode, there was no clear social consensus against the Imperial government, and attempts were made at recompense. However, the British Parliament continued to legislate to tax the Colonies. When the Colonies formed a Congress and made a petition to the Monarch[50] against British taxation, they were declared "traitors" under a Proclamation of Rebellion.[51] Ultimately, this led to the Revolutionary War that overthrew the existing *constitutions* and gave the Colonies independence.

In view of the fact that the Colonies had initially attempted to invoke their constitutional rights as *Englishmen* in order to promote their claim, it seems that had there been a legal framework in place enabling them to satisfy their demands, the Revolution would never have happened. It was the preclusion of social consensus concerning the legal framework that led to the loss of legitimacy of the British constitutional arrangement in America.

A second example is that of the overthrow of the Egyptian Constitution of 1971 in the Egyptian Revolution of 2011.[52] While the Constitution of 1971 was in force, its human rights content was not enforced due to the existence of Emergency Laws that ran almost incessantly before and after the passing of the 1971 Constitution. The inability to compel the then President, Hosni Mubarak, to lift the emergency rule or establish a more competitive democratic process led to large-scale protests in Egypt in January 2011. After failing to quash protests through moderate violence and attempts at compromise, President Mubarak resigned and the (unconstitutional) Supreme Council took over amidst public celebrations. The revolution eventually led to the removal of office of members of the order under the 1971 Constitution. A new government was elected, led by Mohamed Morsi, which signed into law a new Constitution passed by referendum in December 2012. However, widespread dissatisfaction with the lack of religious freedom under the Morsi government led to further public unrest, and the Morsi government and 2012 Constitution were overthrown in a military coup d'état in July 2013. The leader of the coup, Abdal Fattah

48 Sydney George Fisher *The Evolution of the Constitution of the United States: Showing that it is a Development of Progressive History and not an Isolated Document Struck Off at a Given Time or an Imitation of English or Dutch Forms of Government* (The Lawbook Exchange, New Jersey, 1996) at ch 2.

49 John K Alexander *Samuel Adams: America's Revolutionary Politician* (Rowman & Littlefield Publishers, Maryland, 2002) at 129.

50 The Olive Branch Petition, adopted by the Second Continental Congress (8 July 1775).

51 King George III "Proclamation of Rebellion" (23 August 1775).

52 Editorial "Timeline: Egypt's revolution" *Aljazeera News* (online ed, Qatar, 14 February 2011); Editorial "Egypt's ruling generals to partially lift emergency law" *BBC News* (online ed, United Kingdom, 24 January 2013); and Editorial "Egypt in Transition" BBC News (online ed, United Kingdom, 25 January 2013).

el-Sisi, was subsequently elected President in June 2014 in accordance with a new Constitution passed by referendum in January 2014.[53]

The Egyptian public were unable to compel President Mubarak to reform the processes of government through the legal mechanisms provided in the Constitution of 1971. The Constitution had lost the consensus of the people on how the government was to be run. This led to its eventual overthrow. The subsequent overthrow of the Morsi government and the 2012 Constitution is more difficult to explain solely with reference to social consensus. While there was considerable dissatisfaction with Morsi's religious policies, there was no clear consensus that the Morsi government ought to be replaced. Following the coups d'état, hundreds of protesters who demonstrated against the el-Sisi regime were killed.[54] Morsi supporters continue to be prosecuted on political grounds in Egypt. These are indications that the apparent social consensus in favour of the el-Sisi government may not be genuine, but the result of fear of persecution and a desire to avoid further bloodshed. Time will tell how long the current social consensus will last.

What does this imply about the role of social consensus in endowing a constitution with legitimacy? The answer seems to be that social consensus is a necessary but perhaps not a sufficient condition for legitimacy. Consensus is necessary because it is not just a theoretical concept like legal continuity, but a phenomenon with very practical consequences. A loss of consensus can trigger revolutions that lead to a loss of control by the existing government, often by violence, as seen in Egypt in 2011. Even when the constitution is not overthrown outright, the existence of a social consensus against the government can lead to civil war (for example, as in Syria), and difficulties in enforcing law and order.[55] Thus, social consensus on the form of government is a practical requirement for on-going effective legitimacy. It seems only superficially correct to say that constitutional legitimacy is lost due to the break in continuity. Rather, the break in continuity is the effect of the loss of legitimacy, which in turn is caused by the loss of consensus.

However, social consensus is not a sufficient condition for constitutional legitimacy, because it is possible for a constitution that has *not* lost social consensus to be overthrown through coups. This was seen in el-Sisi's suspension and ultimate replacement of the 2012 Constitution. In such cases, the legitimacy of the new regime is questionable unless the new regime can obtain social consensus in its favour without threats or oppressive means.

The way the judiciary chooses to respond to a revolutionary administration is often the key to determining whether the old constitution has lost its legitimacy, and whether the new order can be deemed to have successfully established its own legal system. There are two ways in which the judiciary can respond: it may recognise the revolutionary administration as legitimate and thereby implicitly overturn the old constitution, or it can regard the current regime as unconstitutional but recognise its laws as temporarily valid, out of a practical need to allow governance. The former stance entails the use of the doctrine of effectiveness, whereas the latter relies on the doctrine of necessity. It will be seen in the ensuing analysis that social consensus is insufficient in itself to retain legitimacy. However, there is a growing judicial tendency to incorporate social consensus in deciding whether the old constitution and legal order has ceased to be legitimate, or whether despite the gap in continuity the old constitution continues to be legitimate.

53 Editorial "Egypt profile—Timeline" *BBC News* (online ed, United Kingdom, 2 July 2015).
54 "Egypt profile—Timeline".
55 See "Signs of civil war in Syria" (2011) 17(38) IISS Strategic Comments 1.

A *Effectiveness*

Under the common law doctrine of effectiveness, courts exercise a supra-constitutional jurisdiction to determine whether a revolution should be given legal recognition, or be deemed "effective".[56]Effectiveness relies on the same Kelsenian rationale as autochthony: that a break in legal continuity could beget its own Grundnorm and legitimise a new legal order.[57] The difference between autochthony and effectiveness is that the former relates to a nation's acquisition of independence and the formation of a new state, whereas the latter applies when a revolution overthrows a constitutional government without causing a change in statehood. If successfully established, effectiveness creates a new Grundnorm on which the revolutionary administration can be declared legitimate, despite the legal discontinuity through which it came to power.

A criticism of the Kelsenian rationale for effectiveness is that it arguably offers undue reward for a break with continuity. The Kelsenian rationale does not distinguish between revolutions with popular support and those perceived as an illegitimate usurpation. Nor does it distinguish between unstable short-lived rebel regimes and stable revolutionary governments. This is problematic because the legitimacy of a constitution over an unstable government is questionable, because it lacks the descriptively *effective* component of legitimacy.

Effectiveness has successfully been established in a handful of cases.[58] The reluctance of courts to deem a revolutionary administration effective may be evidence of an internal viewpoint that they still abide by the old rule of recognition, and feel bound to uphold the government duly established under the old constitution. When the old constitution still enjoys the allegiance of the courts, legal discontinuity means the administration is not recognised as legitimate.

In *Republic of Fiji v Prasad*, the Court of Appeal of Fiji evolved a list of criteria for effectiveness to be established:[59]

> (a) The revolutionary government must be firmly established (that is, there must be no other government – including the previous government – vying for power).
>
> (b) Its administration must be effective, in that the majority of people must be behaving "by and large, in conformity" with the administration.
>
> (c) The conformity and obedience must be due to "popular acceptance and support" and not "tacit submission to coercion or fear of force".
>
> (d) The regime must not be undemocratic or oppressive.

The onus is on the new administration to prove that it is effective, rather than the complainants to prove that it is not.

The first two criteria of effectiveness highlight the importance of factual authority for the legitimisation of the new administration. They address the deficiency in Kelsen's analysis of the new Grundnorm, not distinguishing between stable and unstable regimes. On the other hand, the third and fourth criteria for effectiveness show the relative openness of courts to be guided by social consensus in choosing whether to legitimise the

---

56 George Williams "The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji" (2001) 1 OUCLJ 73 at 80.

57 Mkwentla, above n 28, at 5.

58 See for example *Vallabhaji v Controller of Taxes* [1981] CLB 1249 (CA Seychelles); and *Mokotso v HM King Moshoeshoe II* [1989] LRC (Const) 24 (Lesotho HC).

59 *Republic of Fiji v Prasad* [2001] NZAR 385 (CA Fiji) at 412–413.

new administration. Some courts have said it is their "duty as Judges" to use effectiveness when the overthrow has popular support.[60] This suggests that strong public support for the new order can prompt the judiciary to undergo a voluntary shift of the internal perspective in defiance of the old constitution.

Conversely, when an overthrow of a government lacks the backing of social consensus, courts are unlikely to use effectiveness to legitimise the coup. In these situations, the question of the validity of the laws passed by the new administration is considered under the doctrine of necessity.

B *Necessity*

Part II established Raz's criteria for legitimacy as both *de jure* and *de facto* authority. That was satisfactory for the analysis throughout Part III. However, this part examines whether it is appropriate to relax the criterion of *de facto* authority in order to maintain constitutional legitimacy once continuity is broken.

There is a growing branch of jurisprudence on "the indestructibility of the constitution", which provides that a constitution that has not been overthrown by social rebellion, but merely by an unconstitutional coup, continues to be in force *de jure*.[61] The break in continuity caused by coups or enemy occupations only signals a loss of *de facto* authority, but *de jure* authority (and constitutional legitimacy) remains as long as there is social consensus and judicial recognition behind the constitution.

To understand why *de jure* authority remains, the doctrine of necessity must be considered. Necessity is used following a break of continuity to validate laws that would otherwise lack authority because they are unconstitutional. However, unlike effectiveness, necessity does not operate to overthrow the constitution: it works as an implied exception to the constitution itself.[62] The doctrine is used under the principle *salus populi suprema lex* (the welfare of the people is the supreme law).[63]

The criteria for necessity to be established are:[64]

> (a) Exceptional circumstances not provided in the constitution making it necessary to take immediate action to preserve some vital function of the State.
> (b) The action does not impair the rights of citizens under the constitution.
> (c) The action does not have the sole effect and intention of consolidating or strengthening the revolution or usurpation.
> (d) The action is of a temporary character limited to the duration of the exceptional circumstances.

Necessity is often used by courts during coups to gloss over the possibility of "a vacuum of law".[65] The recognition that the extra-constitutional validation is "of a temporary character limited to the duration of the exceptional circumstances" suggests that even when the judges validate a law under necessity, they retain an internal viewpoint that the constitution is in force *de jure*.

---

60 *Prasad*, above n 59, at 401 as cited in Williams, above n 56, at 89.
61 John Hatchard and Tunde I Ogowewo *Tackling the Unconstitutional Overthrow of Democracies: Emerging Trends in the Commonwealth* (Commonwealth Secretariat, London, 2003) at 35.
62 Joseph, above n 5, at 719.
63 Hatchard and Ogowewo, above n 61, at 20.
64 *Mitchell v Director of Public Prosecutions* [1986] LRC (Const) 35 (CA Grenada) at 88–89.
65 Joseph, above n 5, at 721.

However, Hatchard observes that necessity is often abused by the judiciary to enable a usurping regime to pass valid laws as part of an "implicit bargain".[66] This may be done in order to retain judicial perks and privileges. Ultimately however, "the kow-towing judges ... simply [grow] accustomed to seeing the usurpers as legitimate".[67] This suggests that if necessity is used beyond its scope, there can be an actual shift in the ultimate rule from the previous constitutional government to the new unconstitutional government—which by Hartian analysis is fatal to the legitimacy of the constitution, both *de jure* and *de facto*.

The problem is one of drawing a line between the use and abuse of necessity. In what circumstances can it be said that the use of necessity has kept constitutional legitimacy intact, despite a period of only *de jure* legitimacy? When, instead, must it be conceded that necessity has been abused to the point where the judges have done away with *de jure* legitimacy? With this in mind, this discussion will further examine a few examples of coups and enemy occupations to see what can be said about constitutional legitimacy in these scenarios.

In Pakistan, Musharraf's 2000 military coup led to the resignation of thirteen judges, including the Chief Justice, when they refused to acknowledge the military's laws as anything but unconstitutional. They were replaced by other judges who were willing to use the necessity doctrine. The new judges validated Musharraf's provisional constitutional orders until he amended the Constitution of 1973 to become the *legitimate* President. However, when Musharraf purported to amend the 1973 Constitution without following its provisions, the same judges stepped in and held him to the required procedure. This, it can be argued, implied an unchanged internal viewpoint about the legitimacy of the 1973 Constitution.[68]

It is unclear whether the Constitution remained *de jure* legitimate throughout. It might be tempting to revert to the simpler analysis that legal continuity is the ultimate indicator of whether a constitution is legitimate. This would make Musharraf's re-invocation of the 1973 Constitution ineffective because he did not have the position to do so. But that would imply that the restoration of the 1973 Constitution in 2008 (once Musharraf resigned) was a fresh start for legitimacy, even though it was socially and judicially recognised as *de jure* legitimate throughout the eight-year interval.

There are similar examples where *de jure* legitimacy has been used to infer the on-going legitimacy of constitutions. In Estonia, the Constitution of 1938 was purportedly overthrown by Soviet invasion and control, which lasted for 50 years. However in the end the judges held that the Constitution was *de jure* in force throughout because the "will of the people [was] enshrined" in that document.[69] It had only been suspended. In 1992 there was no longer a need for suspension of the 1938 Constitution, and the Constitution regained legitimacy.[70]

This belief appears to be consistent with the repeated attempts by Estonians to reassert their independence during the period of invasion.[71] However, to say that the

66 Hatchard and Ogowewo, above n 61, at 14–46.

67 At 25.

68 Hatchard and Ogowewo, above n 61, at 15; Lloyd de Vries "Musharraf claims victory in Pakistan" *CBS News* (online ed, USA, 30 April 2002); and Editorial "Pakistan Judges Refuse Oath Demanded By Pakistan's Rulers" *Waycross Journal-Herald* (Georgia, 31 January 2000).

69 Hatchard and Ogowewo, above n 61, at note 83.

70 Eesti Instituut "The State Order of Estonia in its Historical Development: The Declaration of Independence and the Fourth Constitution" Estonica: Encyclopedia about Estonia <www.estonica.org>.

71 Eesti Instituut, above n 70.

constitution was legitimate but not in use for 51 years stretches the limits of whether it is possible for even the internal viewpoint to subsist that long without any actual practice. It might simply have been politically convenient rhetoric to call the 1938 Constitution *de jure* legitimate.

Nonetheless, this view does have support in more recent cases where it appears that the internal viewpoint has subsisted. In the Fijian case of *Koroi v Commissioner of Inland Revenue*,[72] decided one year after the 1999 coup, Gates J held that "[t]he Constitution's very indestructibility is part of its strength."[73] He continued: "Even in an extreme case, where a usurper leaves behind nothing of the past, the original Constitution remains submerged. When the usurper withdraws, it will re-emerge."[74]

In cases since, the Fijian Court of Appeal made it clear that the judiciary still regarded the Constitution of 1997 as being legitimate, and were only validating the laws of the unconstitutional government out of necessity.[75] Staunch dicta like these leave little doubt about the judicial loyalty to the suspended Constitution; arguably they contribute towards the evidence of the *de jure* authority of the Constitution, although the *de facto* authority is long gone.

It is uncertain whether the Fijian judiciary continues to regard the post-coup regimes as invalid, in light of the democratic election of the Bainimarama government in 2014 and the enactment of the 2013 Constitution of Fiji. It is possible that the democratic acceptance of the leader of the coup will signal to the judiciary that there is social consensus behind the new government, and that it is time to *reset* legitimacy in accordance with the 2013 Constitution. If so, the judiciary is likely to stop using necessity to validate the laws and instead, implement the doctrine of effectiveness to legitimise the 2013 Constitution (and every law enacted under it).

The foregoing analysis indicates that the judiciary commonly uses the doctrines of necessity and effectiveness in accordance with the level of public support in favour of the unconstitutional change in government. Where the change is socially supported, the judiciary is usually quick to eschew loyalty to the old constitution and to acknowledge the new government as *effectively* legitimate, even when the new administration may be very young. By contrast, where there is public opposition to the change in government, courts can cling to the old constitution for decadesrecognising the usurping regime's laws as unconstitutional, but temporarily valid due to necessity, until the usurping regime is either overthrown by popular support or it demonstrates that it enjoys popular support through elections.[76] These cases suggest a diminishing focus on *de facto* authority in the analysis of constitutional legitimacy. They also imply that democratic values have become a normative criterion for constitutional legitimacy in the minds of courts. Should there be normative criteria for constitutional legitimacy?

V Normative Requirements for Constitutional Legitimacy

So far, the discussion has largely refrained from using any normative criterion for legitimacy, such as the substance of the constitution. The attitude towards social consensus or judicial recognition has not been to show that they *ought* to be the basis for

72 *Koroi v Commissioner of Inland Revenue* [2003] NZAR 18 (Fiji HC).
73 At 30.
74 At 33.
75 Williams, above n 56, 78–79.
76 Brookfield, above n 2.

constitutional legitimacy, but that objectively they are functional requirements. In this part, the approach will be more value-laden.

The growing body of international law might have opened up new ways of determining constitutional legitimacy. In his analysis of what constituted the rule of recognition, Hart hypothetically considered the effect of the British Parliament declaring that the law of Tsarist Russia was still the law of Russian territory, despite the Russian Revolution.[77] He concluded that it made no difference to the ultimate rule within Russia. However it is possible to argue that, 50 years later, the existence of economic sanctions, the global media, diplomacy between political nations, and a more established international legal system mean that international pressure imposes requirements for constitutional legitimacy. Hart worked in a closed legal system that did not consider external influences to have any bearing on the ultimate rule of recognition. In today's world, the greater reach of international law and diplomatic relations might imply that legal systems are more open to transnational influences. It can be argued that to be legitimate, the constitution of a nation must adhere to certain minimum international standards.

Of course, there is a risk that states will be guided by politics or power dynamics when deciding whether to recognise the constitutional legitimacy of another state. That is clearly not a desirable outcome. One way to create a relatively *non-arbitrary* normative standard for legitimacy would be to use widely respected instruments of international law, for instance the Universal Declaration of Human Rights, which includes the right to participate in government.

How would the incorporation of such a standard affect our judgement on whether a constitution is legitimate? Currently, the value-free definition of social consensus is dangerously broad: it would only hold that the constitution has lost legitimacy if there was a mass scale rebellion. However, even when the public no longer support government under a constitution, they might tolerate the situation out of unwillingness for revolution. As William G Andrews observed: "Tyranny may be preferred to anarchy."[78] According to the value-free definition, the government would still have social consensus behind it, whereas in reality, there would be little participation in the government. Is it still necessary to conclude that the constitution is legitimate?

As was mentioned in the discussion of New Zealand's constitution above, the mark of a successful constitution in the long run is its ability to enable social consensus to *update* the form of government within the legal framework. The examples of successful constitutional governments suggest that the model for such a framework is liberal democracy.

Democracy has a far from perfect track record in terms of ensuring legal continuity. The United States was a democracy prior to 1861, but the American Civil War began in response to the declaration of secession by the southern states.[79] France, too, experienced a number of breaks in legal continuity since the enactment of the French Constitutional Laws of 1875 under the Third Republic, despite the democratic framework of government. The Weimar Republic of Germany was a constitutional republic when Adolf Hitler made his legitimate ascent and suspended the majority of constitutional rights in 1933.[80] New

77 Hart, above n 10, at 116.

78 Andrews, above n 20, at 9.

79 See, for example, Michael E Woods "What Twenty-First-Century Historians Have Said about the Causes of Disunion: A Civil War Sesquicentennial Review of the Recent Literature" (2012) 99(2) Journal Of American History 415 at 436.

80 See Peter C Caldwell *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism* (Duke University Press, London, 1997) at 11–12.

Zealand itself faced a challenge to the legitimacy of the constitution from Māori during the Land Wars of 1845–1872.[81] These examples demonstrate that democracy has experienced and continues to experience considerable challenges in channelling social consensus into decision-making, and maintaining the government's effective authority.

However, as Winston Churchill famously remarked, "democracy is the worst form of government except all those other forms that have been tried from time to time".[82] Since the mid-twentieth century, liberal democracies have enjoyed greater empirical success in avoiding losses of continuity than illiberal or flawed democracies and dictatorships.[83] Therefore, it seems sensible to use the model of liberal democracy as a criterion for constitutional legitimacy.

There are several benefits to using liberal democracy as a criterion. It would make it easier to distinguish between those nations whose constitutions provide for democracy, but in practice manipulate election outcomes. For instance, the Chief Justice of Pakistan had noted that during the reign of the constitutional government prior to Musharraf's coup:[84]

> [A] situation had arisen under which the democratic institutions were not functioning in accordance with the provisions of the Constitution, inasmuch as, the Senate and the … Assemblies were closely associated with the [...] Prime Minister and there was no real democracy because the country was, by and large, under one man rule.

The undermining impact of the type of practices identified by the Chief Justice on constitutional legitimacy in flawed democracies is difficult to quantify—the implication for the overall social structure of the nation is relatively clear. It breeds a culture of "praetorianist rent-seeking", whereby opposing political factions are of the view that to overthrow a government unconstitutionally is a more certain way of achieving their desired ends, than relying on flawed democracy.[85] In the long run, this undermines the *de facto* component of constitutional legitimacy because of the repeated instances of breaks in continuity. It also undermines the *de jure* component, as the executive and the opposing political factions see the constitution as lacking in actual and moral authority. The nominal existence of the constitution is used to create a front of respectability to the rest of the world and conceal the real systematic issues.

Imposing the criterion of liberal democracy would at the very least take away the façade of constitutional legitimacy on the part of governments who subvert the constitutional process. To keep up a respectable front, it is hoped that governments will be more willing to carry out the provisions of the constitution, and develop a system in which social consensus could actually resemble Locke's ideal of a majority agreement on the form of government to have.

Some may criticise this as the imposition of Eurocentric standards on the rest of the world. That is hard to deny. However, the problem with any normative criterion for constitutional legitimacy is that it will be the imposition of one set of views over another.

---

81 See Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) at 17–19.

82 Walter J Raymond *Dictionary of Politics: Selected American and Foreign Political and Legal Terms* (Brunswick Publishing Corporation, Lawrenceville, 1980) at 124.

83 William Anthony Hay "What Is Democracy? Liberal Institutions and Stability in Changing Societies" (2006) 50 Orbis 133.

84 Hatchard and Ogowewo, above n 61, at 21.

85 Conference by the British Institute of International and Comparative Law, the Commonwealth Legal Education Association and King's College London (15 January 2001) as cited in Hatchard and Ogowewo, above n 61, at 13.

In view of the recent empirical success of liberal democracies in maintaining legitimacy through continuity, it is arguably the most suitable normative criterion to incorporate in the definition of constitutional legitimacy.

VI Conclusion

This discussion has attempted to create a descriptive formula for constitutional legitimacy that goes deeper than the usual touchstone of legal continuity. While the idea that social consensus and judicial recognition are the *real world* factors behind constitutional legitimacy is conceptually simple enough, the challenge has been to fit all of these ideas coherently within the concept of a *legal system*.

Attempts to recast consensus and recognition within the framework of Kelsen and Hart's theories suggest that consensus and recognition are part of an extra-legal phenomena—one that creates the *bindingness* of law, and the legitimacy of the constitution.

In considering the autochthonous sources of legitimacy for new constitutions that are the product of broken devolution, it can be seen that *social consensus* roughly equates to the Grundnorm, while *judicial recognition* and its implications for the other organs of government, can be translated into the rule of recognition. But in observing what counts as the social consensus, one finds that it can range from express consensus, to tacit acceptance of the decisions of representative leaders. This leads to an ethical dilemma in deciding how much *consensus* is appropriate for a constitution to gain legitimacy.

For countries like New Zealand, where constitutional legitimacy is sourced in continuity, a healthy democratic process is enough to create a local root to legitimacy in addition to the historic root, since the constitution gradually evolves through pragmatic evolution to reflect the national character. Local acceptance can be channelled through legally continuous means. Continuity in such cases is a mask for the socio-governmental acceptance of the constitution.

The conceptual uncertainties arise when considering how constitutions lose their legitimacy. While the phenomena of constitutions being overthrown due to a loss of social consensus are easy enough to explain using the *conceptual building blocks* of this discussion, the impact on constitutional legitimacy of a break in continuity through a coups d'état is a murky area. Even when suspended, constitutions are ultimately restored. The assertions of the *indestructibility* of their legitimacy in the interim are dubious. This is especially so in instances where the constitution has been suspended, as these are hard to distinguish from instances where the constitution is nominally in operation but subverted in spirit.

Ultimately, the inability to reach satisfactory answers through a value-free analysis leads us to consider normative criteria for constitutional legitimacy. It is suggested that the provably efficient model of liberal democracy should be used as an element for legitimacy. It may be that the concept of the closed legal system on which Hart and Kelsen worked is now out-dated. A more open, international legal system should be introduced where recognition by other nations also contributes towards constitutional legitimacy. That, with its challenges and rewards, might be the subject of a new enquiry altogether.