A Legal Theory of Revolutions

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I. INTRODUCTION

The twentieth century is an age of revolutions. Traditional structures of authority have undergone substantial transformation, and hereditary claims to an unshared authority have lost their moral and political appeal. In the name of peoples' power, modern revolutions have demolished kingdoms, monarchies, and caliphates—old structures of authority built upon different moral and political foundations. Even where old structures have survived the tides of time, their existence is rather ceremonial. The people are now regarded as the ultimate custodians of power.2

As political and legal principles have changed, so have forms of rebellion. Ideological groups, in the name of peoples' power, use force and violence as deliberate means to destabilize existing political institutions. Military régimes have been established in the name of peoples' power in several developing countries where democratic institutions are weak or non-existent.3 But frequently, these revolutionary governments raised in the name of peoples' power are as much removed from the people as the previous

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1 See generally O. Gierke, POLITICAL THEORIES OF THE MIDDLE AGE (F. Maitland trans. 1900) (Germany 1881) (Gierke examines the political and spiritual foundation of the idea of monarchy and traces the historical and philosophical development of the idea of popular sovereignty). Even though the idea of popular sovereignty is an ancient philosophical axiom, its acceptance as a political principle has been painfully slow. Perhaps, twentieth century revolutionaries have used this principle more frequently, if not more effectively, to deconstruct old institutions of authority. By using the idea of peoples' power, for example, revolutionaries uprooted the Czarist régime in Russia (1917), the Caliphate in Turkey (1924), the Kingship in Egypt (1952), and the Constitutional Monarchy in Libya (1969). More recently, Marcos' despotic régime was overthrown by peoples' power in the Philippines (1986).

2 See infra note 33.

3 In Liberia, for example, a military group killed President Tolbert in a coup on April 12, 1980, and took control of the government under the authority of People's Redemption Council (PRC). IX A. Blaustein & G. Flanz, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, LIBERIA (1985). In Pakistan, on July 7, 1977, the military overthrew the elected government of Mr. Bhutto and established a military régime, "obviously dictated by the highest considerations of State necessity and welfare of the people." Bhutto v. Chief of Army Staff, PLD 1977 S. Ct. 657, 703 (Pak.).
governments which were overthrown—and at times more. While most revolutionary movements claim to adhere to the principle that the will of the people shall be the basis of governmental authority, the phenomenon of peoples' revolutions is often confusing.4

Some scholars argue that a revolution is a fait accompli and judges must legally tolerate what is politically inevitable;5 that a revolution is an unjustifiable political question.6 Others insist that if a revolution is effective, judges may enforce the laws that the revolutionary government prescribes.7 Such arguments confuse a legal order with a mere presence of coercive force. Further, the fait accompli argument fails to separate socially acceptable revolutions from socially unacceptable ones. Not all revolutions are bad. Therefore, a legal analyst must identify criteria which will verify the legitimacy of a revolution. This article presents a legal theory of social approval which identifies such criteria.

In order to determine the legitimacy of a revolution, the principle of social approval focuses upon the critical significance of succession rules. The normative statement that a legislator has the right to make laws "presupposes the existence, in the social group, of the rule under which he has this right." This rule is the succession rule. Thus, succession rules are power-conferring procedures through which successive legislators acquire the legitimate right to make laws.9 Further, these rules identify a body of persons who have the authority to govern or make laws.10 If succession rules are rooted in communal consent, they may provide a legal structure to translate the will of the people into governmental authority. In sum, succession rules constitute the form of government.

The concept of succession rules is useful for understanding the legal definition of a revolution: revolution occurs when a revolutionary group takes possession of the coercive state machinery in violation of the existing

5 T. Franck, Comparative Constitutional Process 22 (1968) "To debate whether revolution is unconstitutional is pointless sophistry and only a political, not a legal answer can be given to the more sensible question whether a revolution must necessarily number among its casualties the normative concept of the rule of law."
6 Id.
7 Id. Franck makes a practical argument that perpetrators of a coup d'état have in each case made strenuous efforts to reestablish constitutional rule, at times more respectable than the one the coup d'état overthrew. He also argues that courts are often creative in finding ways to protect human rights even in extreme cases of de facto military régimes. Id. at 62-140.
8 See infra text accompanying notes 67-68.
11 Id. See also H. Hart, supra note 8, at 58.
succession rules. Hence, a revolution is essentially the repudiation of the existing succession rules.\textsuperscript{11}

The principle of social approval legitimates a revolution if new succession rules that the revolutionary government prescribes are acceptable to the community and the revolutionary government has regularized its authority under the new succession rules. For example, a revolutionary government may repudiate the existing hereditary rules of succession and institute democratic rules under which the executive and legislature would be elected. The revolution is legitimate if new succession rules are acceptable to the community and provided that the revolutionary executive and legislature have regularized their authority—in this case, have been elected—under the new rules.\textsuperscript{12} Thus, the theory of social approval requires that succession rules, which establish the form of government, always be rooted in the will of the people.

This normative requirement of social approval is founded upon two principles derived from the international law of human rights.\textsuperscript{13} First, the universal consensus expressed in the international law of human rights mandates that the will of the people shall be the basis of governmental authority.\textsuperscript{14} Second, all peoples have the sovereign and inalienable right to choose their social and political institutions without outside interference.\textsuperscript{15} Article one of

\textsuperscript{11} See \textit{infra} text accompanying notes 18-23 and 63.

\textsuperscript{12} O. Gierke, \textit{supra} note 1, at 1. It is an ancient rule of popular sovereignty that if a ruler who has attained power in violent conquest or by successful usurpation is to have a good title, an \textit{ex post facto} legitimation of his rulership by the consent of the people is indispensable. \textit{Id.} at 40.

\textsuperscript{13} International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter Covenant on Civil and Political Rights]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter Covenant on Economic, Social and Cultural Rights]. Article 25(b) of the Covenant on Civil and Political Rights also states that the free expression of the will of electors shall be the objective of periodic elections. Article 1(1) of each of the two Covenants reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948) [hereinafter Declaration]; article 21(3) of the Declaration states: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." Since these rights instruments have been universally accepted by an overwhelming majority of states, it may be safely said that under contemporary international law a norm has been established that the will of the people shall be the basis of governmental authority. \textit{See infra} note 25.

\textsuperscript{14} See Declaration, \textit{supra} note 13, art. 21(3).

\textsuperscript{15} Covenant on Civil and Political Rights, \textit{supra} note 13, art. 1(1); Covenant on Economic, Social and Cultural Rights, \textit{supra} note 13, art. 1(1). \textit{See also} Charter of Economic Rights and Duties of States, \textit{infra} note 25, art. 1.
the Covenant on Civil and Political Rights, which has been universally recognized, confers upon all peoples the right to freely determine their "political status." This article of the Covenant establishes that the choice of domestic political institutions must be free from foreign interference. Free determination of the national "political status" further implies the peoples' right to choose their form of government.

One clarification is called for. Though revolutions are shrouded in sociopolitical complexities, political distinctions between different forms of revolutions are not necessary under the theory of social approval. In political theory, a revolution is often distinguished from a coup d'état: a revolution cuts deeper into the existing structure of a society and transforms its sociopolitical institutions. According to Rosenstock-Hussey, a revolution is a new logic; it is a reevaluation of all values. A coup d'état, on the other hand, is a limited political maneuver aimed at changing the existing rulers: it is an indoor sport of the ruling elite and "carries a minimum of unquiet to the people at large." A coup d'état is rarely as profound as a revolution, and certainly not what Trotsky called the "inspired frenzy" of history. The thesis presented here does not, of course, ignore such distinctions. It merely encompasses them in its simplicity.

The theory of social approval is a theory of law, which examines the analytical and normative significance of succession rules for understanding the legitimacy of a revolution. It, therefore, distinguishes a revolution in the legal sense from revolutions in the sociological sense. If a government attains power through existing succession rules, no revolution occurs in the legal sense even if the new government has a revolutionary manifesto and intends to revolutionize the society. For example, if a group of ideologues gains power through the given succession rules and consequently brings about revolutionary changes in socioeconomic structures of society, no revolution in the legal sense takes place even though the new government might be regarded as revolutionary in its sociological impact.

Conversely, if a group of individuals seize power in violation of succession

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16 See Covenant on Civil and Political Rights, supra note 13, art. 1. As of October 23, 1986, 85 states have ratified the Covenant on Civil and Political Rights.


21 L. Trotsky, My Life 287 (1930).

22 In this regard the theory of social approval is similar to Kelsen's theory of efficacy. See infra text accompanying note 63.
rules, a revolution in the legal sense has taken place even if the group intended no changes in the existing socioeconomic system. Hence, a revolution in the legal sense may or may not have a profound sociological impact. The proposed theory of social approval discusses revolutions in the legal sense. It, therefore, does not recognize the distinctions in the sociological sense between a revolution and a coup d'état.\textsuperscript{23}

At the outset, it will be necessary to draw a distinction between internal and external viewpoints of a country's political arrangement.\textsuperscript{24} The internal viewpoint is the expressed will of a society regarding how its own legal and political institutions should be arranged. The external viewpoint, on the other hand, is the judgment of any foreign country which may or may not approve of such legal and political arrangements. This distinction clarifies that a revolution justified from the internal viewpoint may or may not be justified from the external viewpoint. The theory of social approval recognizes the value of external criticism, but does not consider that to be a factor in determining the legitimacy of a revolution. This theory analyzes the legitimacy of a revolution from the internal viewpoint. The internal viewpoint is a legally more defensible criterion because under recognized norms of international law, each society is free to determine its social and political system.\textsuperscript{25}


\textsuperscript{24} H. Hart, \textit{supra} note 8, at 99.

\textsuperscript{25} Covenant on Civil and Political Rights, \textit{supra} note 13, art. 1; Covenant on Economic, Social and Cultural Rights, \textit{supra} note 13, art. 1. See also Charter of Economic Rights and Duties of States, art. 1, G.A. Res. 3281, 29 GAOR Supp. (No. 30) at 50, U.N. Doc. A/9030 (1974) which states: "Every state has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever." One clarification might be helpful. The internal viewpoint of a society is not always static. Almost all societies undergo political transformation. Particularly in the contemporary world, cross-cultural influence is so pervasive that the traditional compartmentalization of socio-political systems is breaking apart. This deconstruction of traditional systems is rather conspicuous in developing countries and has been quickened by the ideological battle between super-powers. In order to secure their areas of influence, rival super-powers attempt to change the internal viewpoint of a target country by providing propagandist literature, money and even guns to local revolutionaries. Because of this extensive external intervention, many developing countries have become confused and morally fragmented. This internal moral chaos, in turn, has bred violence and instability. See generally M. Wolpin, \textit{Militarism and Social Revolution in the Third World} (1981); S. Huntington, \textit{Political Order in Changing Societies} (1968). For a colonial analysis of foreign intervention, see Mill, \textit{A Few Words on Non-Intervention} in \textit{6 Dissertations and Discussions} (W. Spencer ed. 1867). John Stuart Mill has argued that civilized nations have an ethical duty to respect independence of each other, but they may intervene to civilize barbarous societies. Of
Social approval is a theory of legitimacy of revolutions. It is not a theory about revolutionary justice. Socially approved succession rules assure legitimacy, but legitimacy alone does not assure justice. A legitimate government may not always enact just laws and policies; succession rules identify only the source of governmental authority. Other legal and constitutional principles may define the scope of governmental authority. The Congress of the United States, for example, derives its authority from given succession rules. Yet there are other constitutional rules that define and limit its scope of authority. Succession rules do not confer upon a revolutionary government the unlimited power to make any laws. Other legal principles consistent with the concept of most extensive social approval, however, may be used to define the scope of lawmaking authority of a revolutionary government. Further, a revolutionary government may enact laws based on social approval even if they appear to be unjust from the external viewpoint.

course. Mill’s views which were tainted by the then prevailing period of colonialism are unacceptable under the international law of human rights. See, e.g., supra note 13.

In a politically fragmented society it is difficult to determine the internal viewpoint. This difficulty does not, however, diminish the value of the internal viewpoint. For example, in order to justify their intervention, both superpowers, while giving financial and ideological support to revolutionaries (for example, United States’ support to Afghan rebels) always claim that they are promoting or defending the legitimate will of the people.


"By virtue of the principle of equal rights . . . all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development. . . ."

Id.

Although most states agree, at least in principle, that the ultimate basis of governmental authority is the will of the people, there exists no such consensus regarding what constitutes justice. Because of diverse cultural, economic and political circumstances, contemporary societies advance and practice radically different conceptions of justice. Therefore, what is just from the internal viewpoint of a society appears to be unjust from the external viewpoint. Ordinarily, an institutional framework consistent with the needs and aspirations of society will be internally just if most laws are anchored in social approval. Yet social approval does not favor majoritarian laws that violate or ignore the rights of ethnic, religious or political minorities. See generally J. ELY, DEMOCRACY AND DISTRUST 181 (1980) (Ely argues that courts should protect the rights of those groups in society whose needs and wishes are ignored by the elected officials.)

Id. amend. I.

See infra text accompanying notes 30-31.
The principle of social approval focuses upon the legitimacy of the source of authority, recognizing that a society may be composed of diverse racial, cultural and religious groups. If succession rules are designed to secure the approval of only a particular group in the society, there will exist only partial social approval. The principle requires the most extensive social approval of succession rules. For instance, in a highly complex society, it will be consistent with the principle of social approval if the revolutionary government decentralizes authority in a manner that protects the social identity and self-rule of diverse constituent groups.

The principle of social approval further recognizes that a government which derives its authority from communal acceptance remains answerable to the populace. Even when a government is legitimately instituted under socially approved succession rules, the citizens do not alienate their right to recall the government or change the existing succession rules. For, if citizens were to renounce their right to control the source of authority, there is no guarantee that the government would remain responsive to the community.

Social approval rests upon a well-founded political principle that the state power is a rational and contractual organization of force necessary to advance communal interests and values. It is rational in the sense that it

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30 In South Africa, for example, even though the succession rules are democratic insofar as the white minority is concerned, these rules, by excluding the black majority from voting, do not satisfy the principle of social approval. In the United States, on the other hand, now that blacks have the right to vote, the existing succession rules reflect social approval in a more extensive way. See infra notes 31 and 104.

31 Thus, the principle of social approval is consistent with article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 20 GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965), which prohibits states from denying anyone political rights on the basis of race, color, national or ethnic origin.

32 O. Gierke, supra note 1, at 45-46. In the middle ages, there were wide differences of opinion about whether the community retained its sovereignty against a legitimate ruler. Id. at 42-44. Under the international law of human rights, however, the right to recall a government has been firmly recognized. The right to change the existing succession rules is implicit in the Covenant on Civil and Political Rights, supra note 13, art. 1; Covenant on Economic, Social and Cultural Rights, supra note 13, art. 1.

33 The "social contract" theory, debated and developed in the seventeenth and eighteenth centuries, has become the leading twentieth century doctrine of political legitimacy. Under this theory, political legitimacy is derived from the will of the people, and not from "patriarchy, theocracy, divine right, the natural superiority of one's betters, the naturalness of political life, necessity, custom, convenience, psychological compulsion, or any other basis." P. Riley, WILL AND POLITICAL LEGITIMACY 1 (1982) (Riley provides useful critical exposition of and commentary on the works of Hobbes, Locke, Rousseau, and Kant.) See also T. Green, LEC-
efficiently promotes communal goals. It is contractual in the sense that it is rooted in communal acceptance. When succession rules lack social approval, the government not only loses its moral ties with the community, but also its contractual status. In a morally defensible legal system, therefore, the governmental authority always will be founded on social approval. This principle does not change even after a revolution.

In order to provide a comparative context to the principle of social approval, Part II of this article examines the classical theories of revolutions postulated by Hugo Grotius and Hans Kelsen. This examination is warranted because judges in diverse jurisdictions have used these theories to rule upon the internal validity of revolutions. However, the analysis in this part focuses upon the theories and not upon the case law. The article will show that both theories fail to explain the legitimacy of a revolution. Part III explores the legal significance of succession rules to demonstrate that they are the key to understanding the legal meaning of a revolution. The legitimacy of a revolution can be determined by analyzing succession rules as the foundation of a legal order. More than just the legal significance of succession rules is pertinent to legitimacy. The community's moral approval of those rules is equally important to legitimacy. Finally, Part IV discusses the principle of social approval. Central to legitimizing a revolution is the social approval of the new succession rules that the revolutionary government prescribes. This section will set out the formal requirements for legitimizing the revolution under the theory of social approval. Fulfillment of these requirements is a prerequisite for the legal analysis of determining the legitimacy of the revolutionary government. The article will provide a new theoretical framework with which judges can analyze the legitimacy of a revolution. The author's hope is that the theory might discourage the growth of socially unacceptable revolutions that have plagued the twentieth century nation-states.

34 See infra notes 38 and 60.
35 See infra text accompanying notes 112-31.
36 Even though it is beyond the scope of this article to explore international implications of the principle of social approval, states may invoke the principle for determining international responses such as the right to intervention, and the decision to provide military assistance to forces of resistance. See Halperin, American Military Intervention: Is It Ever Justified?, 228 THE NATION 668 (1979). However, the principle of social approval is compatible with article 7 of the Definition of Aggression Resolution, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974), which reaffirms the right of self-determination, freedom and independence of peoples forcibly deprived of that right. Thus the principle of social approval allows foreign states to support "peoples under colonial and racist régimes and other forms of alien domination." Id.
II. Classical Theories of Revolution

Two legal doctrines exist to test the legitimacy of a revolution. Under the Grotian doctrine, a revolutionary government remains unlawful until the previous legitimate rulers are installed. Kelsen's doctrine, on the other hand, legitimizes every efficacious revolution. If the revolution is efficacious, the previous rulers lose their authority. Though both doctrines provide useful insights into understanding the revolutionary phenomenon, both fail in the final analysis to provide satisfactory criteria to determine the legitimacy of a revolution.

A. The Grotian Doctrine

Hugo Grotius argues that a usurper does not possess a right to govern, for no such right exists. The right of government belongs to the lawful sovereign. Grotius further argues, however, that acts of a usurper are binding over the people not because the usurper has a right to rule, but because the lawful sovereign, in order to avoid utter confusion and anarchy, would prefer that laws be obeyed. Obedience must not be given, however, to those acts of the usurper "which have as their purpose to establish him in his unlawful possession."

Grotius relies upon the works of Franciscus Suarez, Francisco Victoria and Lessius for his doctrine of revolutions. He states three rules. First, it is always unlawful to overthrow a ruler who possesses, or has possessed, the right of government. Second, it is detrimental to the existence of the state to totally disobey all laws of the usurper. Third, it is mandatory that the people disbelieve all those laws of a usurper that are designed to entrench usurpation.

38 Id. The Grotian doctrine, under the name of necessity, has been expressly applied during the American Civil War in a series of cases decided by the Supreme Court of the United States. In Texas v. White, 74 U.S. (7 Wall.) 700 (1868), the Court ruled that acts sanctioning and protecting marriage and domestic relations, regulating the conveyance and transfer of property and providing remedies for injuries to persons are lawful under an unlawful government. See also Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873); Thorton v. Smith, 75 U.S. (8 Wall.) 1 (1868). Other cases that have relied upon criteria similar to the ones stated by Grotius are: Madzimbamuto v. Lardner-Burke, [1968] 3 All E.R. 561; Asma Jillani v. Gov't of Punjab, PLD 1972 S. Ct. 139 (Pak.); Bhutto v. Chief of Army Staff, PLD 1977 S. Ct. 657 (Pak.).
39 H. Grotius, supra note 37, at 159.
40 Id.
41 Id.
42 Id.
These rules are rooted in multiple reasoning. For example, both Suarez\textsuperscript{43} and Victoria\textsuperscript{44} have argued that it is a lesser evil to obey the laws of a usurper than to lack all orderly constraint and direction. A usurpation does not create a right to anarchy. Similarly, previous laws do not lose their binding force just because princes possessed of no just title have seized the country.\textsuperscript{45} Lessius\textsuperscript{46} has argued that just laws of a usurper are binding because they derive their validity not from the authority of a usurper, but from natural law.\textsuperscript{47} Thus, a usurper may have an unlawful source of authority, but that does not mean that he lacks the authority to enact just laws for the common good.

Under the Grotian doctrine, even though a usurper is tolerated and his laws are obeyed to avoid anarchy, the act of usurpation itself remains unlawful. The doctrine presupposes that a lawful sovereign must be determined under the prerevolutionary succession rules and that a revolutionary government has no authority to revoke the existing legal and political order. Grotius rules out the legal possibility of altering the existing structure of authority or form of government through a revolution.\textsuperscript{48}

Prudence dictates that long established structures of authority should not be changed for transient causes and by opportunist revolutionaries. But when the existing form of government subjects people to destructive despotism, the people have a right and a duty to throw off the existing institutions of authority and to provide new ones for their future security. This theme animated the American Revolution. Under the Grotian view, one may argue that the American Revolution is still unlawful and that British sovereignty must be restored. Of course, this is an absurd position.

Grotius excludes active rebellion from the domain of legitimacy probably because he believes that a usurper would establish an evil régime.\textsuperscript{49}

\textsuperscript{43} Madzimbamuto v. Lardner-Burke, [1968] 2 S.A. 284, 349 (quoting 3 F. Suarez, De Legibus, ch. 10, § IX). There were two High Court opinions in Madzimbamuto. The first was by the General Division of the High Court, and the second was by the Appellate Division of that court. The defendants appealed the High Court decision to the Judicial Committee of the Privy Council in Great Britain, reported at 3 All. E.R. 561 (1968).


\textsuperscript{45} Id.

\textsuperscript{46} Madzimbamuto, [1968] 2 S.A. at 349 (quoting 2 Lessius, De Justitia et Jure, ch. 29, § 73).

\textsuperscript{47} Proponents of natural law claim that there are certain immutable laws of nature which man can discover by applying the faculty of reason. They further insist that no man-made law is valid if it violates these laws of nature. See W. Friedmann, Legal Theory 117-20 (1967).

\textsuperscript{48} Id. at 119-20.

\textsuperscript{49} Id. Grotius uses the theory of social contract, see supra note 33 and accompany-
Grotius' concern is arguably justified. A total denial of active rebellion, however, seems to suggest that for Grotius, the right of government always belongs to the lawful sovereign under the previous legal order and no revolution can take away this right. A strict interpretation of the Grotian doctrine implies that even if the existing ruler is unjust, he remains the lawful sovereign and, therefore, no usurper should depose a lawful sovereign on grounds of justice.

Though Grotius denies the right of active rebellion, he makes several exceptions which, to a large extent, weaken his thesis. For example, he argues that the people have a right to make war against rulers who derive their sovereign authority from the people and then transgress against the law and the state. The people may not only resist such a sovereign by force, but in case of necessity, may even put him to death. Further, he also admits that the people may use their right of self-defense if the ruler unleashes extreme oppression: "I should hardly dare indiscriminately to condemn either individuals, or a minority which at length availed itself of the last resource of necessity [against atrocious cruelty]."

These generous exceptions, based on notions of natural law to which he strictly adhered, indicate that Grotius does not completely rule out the right of revolution. Some have suggested that he might have denied an explicit right of revolution because at the time of writing De Jure Belli ac Pacis, he lived in France—having fled from Calvinistic upheaval in Holland—under the auspices of a powerful monarch, Louis XIII, to whom he dedicated his work. It is, therefore, understandable that he "did not want to offend the

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50 In several developing countries, governments that remain in power without the peoples' approval become increasingly repressive. See B. Nwabueze, CONSTITUTIONALISM IN THE EMERGENT STATES 222 (1973).

51 W. Friedmann, supra note 47, at 119.

52 Id.

53 H. Grotius, supra note 37, at 138, 148-56. For example, if the authorities issue an order against the law of nature or the commandments of God, the order should not be carried out.

54 Id. at 150.

reigning monarchs of his day by identifying himself with a bold and uncompromising endorsement of popular sovereignty and a doctrine of resistance. 56

The denial of the right of active rebellion is also rooted in Grotius’ rigid notion of sovereignty. In an absolute monarchy, he argues, the people surrender unconditionally all their rights, including the right of resistance. This implies that the people also relinquish their right to change the form of government.57 More importantly, he treats sovereignty as a proprietary right which vests in a sovereign, just like a right over things vests in private persons. By denying that government necessarily exists for the sake of the governed, Grotius embraces a notion of sovereignty which has been widely criticized.58 His view of sovereignty is certainly unacceptable under a stated principle of human rights: that the will of the people shall be the basis of the authority of the government.59

B. Kelsen’s Doctrine of Efficacy

Unlike Grotius, Kelsen does not preclude the right of revolution from the domain of law. An efficacious revolution, Kelsen states, is a lawful revolution.60 A revolution is efficacious if the people behave in conformity with the

56 Id. at 130.
57 But see Tinoco Case (Gr. Brit. v. Costa Rica), 1 INT’L ARB. AWARDS 369 (1923) (“To hold that a [revolutionary] government . . . [enjoying] the acquiescence of the people for a substantial period of time, does not become a de facto government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true.”) Id. at 375; see also 18 AM. J. INT’L L. 147 (1924).
59 See supra note 13. Under the international law of human rights, the government derives its authority from the will of the people. The ruler, therefore, may have to relinquish his office when his claim to governmental authority has lost the peoples’ approval.
60 H. KELSEN, supra note 23, at 117-22. The principle of efficacy is a norm of international law which holds that when the government of a country is overthrown and replaced in a way not contemplated in its constitution, members of the international community do not recognize the new government if the latter is not in effective control of law and order of that country. Hans Kelsen has reformulated this norm of international law into a jurisprudential postulate for the purpose of analyzing the existence and validity of “new legal orders” which come into being through a coup d’etat, or a revolution.

The theory of efficacy was cited with approval in three leading cases to legitimate revolutions in Pakistan, Uganda and Zimbabwe (then Rhodesia). See State v. Dosso, PLD 1958 S. Ct. 533, 538 (Pak.) (on file at Boston University International Law Journal office). (The Supreme Court of Pakistan stated that a revolution is a law-creating event and is legitimate, if efficacious. The court further stated that it is
revolutionary legal order. Total conformity is not required. In every legal
order, a certain antagonism between law and actual human behavior exists;
otherwise, he argues, it is meaningless to say that laws of a legal order
require people to behave as they actually do. If laws of the revolutionary
government are generally obeyed, the new legal order imposed by the
revolutionary government is efficacious. The laws that are disobeyed may
then be lawfully enforced by the use of coercive state machinery.\textsuperscript{61}

Therefore, if the revolution is generally efficacious, the previous structure
of authority loses its lawfulness and the new one which the revolutionary
government provides becomes lawful.\textsuperscript{62} A revolution in the legal sense
occurs only if the new government attains power in violation of previous
constitutional procedures.\textsuperscript{63} Kelsen insists, however, that if the revolution is
efficacious, the previous constitution is nullified.\textsuperscript{64} Further, the theory of
efficacy does not require that the revolutionary government provide new
constitutional procedures to transfer power to successive governments. The
new government is lawful so long as it remains efficacious. Thus, Kelsen's
theory validates self-perpetuation of a revolutionary government.

1. The Basic Norm

Kelsen carefully distinguishes the efficacy of a revolution from the validity
of laws enacted by the revolutionary government. The efficacy of a revolu-
tion is a necessary, but not a sufficient condition for the validity of a
particular law. Efficacy of a revolution is not \textit{ipso facto} a reason why new
laws are lawful. In order to distinguish validity from efficacy, Kelsen postu-
lates the concept of the basic norm.\textsuperscript{65}

\footnote{Irrelevant from a legal viewpoint, whether the usurper is prompted by a highly
patriotic impulse or by the most sordid of ends); Uganda v. Comm'r of Prisoners,
1966 E.A. 514 (in 1966, the higher court of Uganda cited the Dosso case as a
precedent and accepted efficacy as a lawful criterion to legitimate the Ugandan
revolution); \textit{Madzimbamuto}, [1968] 2 S.A. at 284 (In \textit{Madzimbamuto}, the appellate
court of Southern Rhodesia cited both the \textit{Dosso} and the Ugandan cases to legitimate
the unilateral declaration of independence by Ian Smith.).}

\footnote{\textit{Dias, Legal Politics: Norms Behind the Grundnorm,} 26 \textit{Cambridge L.J.} 233
(1968). Dias explains how judges, by relying upon the theory of efficacy, further
entrench the roots of a revolutionary government. For example, in Rhodesia (now
Zimbabwe), judges kept cementing the effectiveness of the Ian Smith régime layer by
layer until they could look back at their own creation to treat it as an objective fact.}

\footnote{\textit{Id.} \textsuperscript{63} “It is in this context irrelevant whether or not this replacement is effected
through a violent uprising against those individuals who so far have been the 'legiti-
mate' organs competent to create and amend the legal order. It is equally irrelevant
whether the replacement is effected through a movement from the mass of the
people, or through actions from those in government positions.” \textit{Id.}}

\footnote{\textit{Id}. at 110-24, 131-34, 369-73, 395-96; \textit{See also Kelsen, On the Basic Norm,} 47
\textit{Calif. L. Rev.} 107 (1959).}
The basic norm is a hypothetical construct that a legal analyst presupposes to trace the ultimate reason for the validity of a particular rule as part of a definite legal system. For example, X-rule is valid because it is created under Y-statute. The Y-statute is valid because it is enacted under the existing constitution. The constitution is valid because it is created under the previous constitution, and so forth. Tracking back the validity of the constitutional lineage, the legal analyst reaches a historically first constitution. To the question why the first constitution is valid, Kelsen answers, it is simply because a legal analyst must presuppose that it ought to be. This presupposition is the basic norm.

Kelsen further argues that if the existing legal order is overthrown by an efficacious revolution, a legal analyst must presuppose a new basic norm that the revolutionary constitution ought to be lawful. This new supposition must be made because the revolutionary constitution breaks the previous chain of validity. Put otherwise, because a revolutionary constitution does not derive its legitimacy from the previous constitution, a legal analyst cannot demonstrate its lawfulness unless he makes a new hypothetical presupposition that the revolutionary constitution ought to be lawful. This is so, Kelsen argues, because no jurist maintains that “even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner anticipated by the old order itself.”

According to Kelsen, the basic norm is distinguishable from the constitution. A constitution is a legal and political document that establishes the form of government, distributes powers between branches of the government, and enumerates fundamental rights and duties. The basic norm is not a normative principle of any particular political, social, or economic import. It is ideologically neutral. It is a juristic fiction that provides the ultimate answer to the question why a revolutionary constitution is lawful.

Kelsen’s concept of the basic norm is unacceptable, if not superfluous. It is unacceptable because it justifies a human event on the basis of a fiction created by a jurist. “Assertions that we ought to comply with the constitution must be supported by argument drawn from social fact and moral principles. There is no other realm of meaning in which such statements can operate, . . . [and the basic norm] must in the end either be devoid of meaning or be a moral maxim.” It is superfluous because if any constitu-

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66 H. Kelsen, supra note 23, at 115.
67 Id. at 118.
68 Id. at 117.
70 H. Kelsen, supra note 23, at 115.
71 Hughes, Validity and the Basic Norm, 59 Calif. L. Rev. 696, 705 (1971). See H. Hart, supra note 8, at 58. Professor Hart’s reformulation of the concept of the
tion given by an efficacious government is valid, there is no need to assume the basic norm.\textsuperscript{72}

2. Efficacy and International Recognition

That an efficacious constitution ought to be obeyed, Kelsen argues, is a rule of international law. "From the standpoint of international law, the constitution of a state is valid only if the legal order established on the basis of this constitution is, on the whole, efficacious."\textsuperscript{73} The argument that an efficacious revolutionary government is generally recognized by the international community is well-founded.\textsuperscript{74}

The international community recognizes an efficacious government on the theory that an internal change in the constitution of a state does not affect the identity and continuity of the state itself.\textsuperscript{75} This rule has developed to save international relations and transactions,\textsuperscript{76} for if international treaties were to become void with every change within states, international legal relations would lose stability. An efficacious government assumes an obligation to defend rights and perform duties of international character. On the sole basis of this participation, however, it does not become a lawful government within the territory it controls.

basic norm, which he prefers to call the ultimate rule of recognition, has clarified to a large extent the obscurity surrounding the meaning of the basic norm. Like the basic norm, the ultimate rule of recognition also provides criteria for the assessment of the validity of other rules. It is ultimate in the sense that its own validity does not depend upon any other rule. And yet, unlike the basic norm, the ultimate rule of recognition is not a juristic fiction; nor is it presupposed as a hypothetical norm. Hart argues that the ultimate rule of recognition can neither be valid nor invalid but is simply accepted by legal officials as appropriate criteria to judge the validity of other rules of the system. \textit{Id.} at 105-06.

\textsuperscript{72} Cf. H. Kelsen, \textit{The Pure Theory of Law} 193 (1967). (Kelsen would argue that the reason for the validity of a norm cannot be a fact. "From the circumstance that something is cannot follow that something ought to be; and that something ought to be cannot be the reason that something is." \textit{Id.}.) For a further explanation of why the basic norm is unacceptable, see H. Hart, \textit{supra} note 8, at 245-46.

\textsuperscript{73} H. Kelsen, \textit{supra} note 23, at 121-22.

\textsuperscript{74} Cf. H. Lauterpacht, \textit{Recognition in International Law} (1968) (Lauterpacht notes that the principle of effectiveness is the predominant and governing principle of recognition). \textit{But see} Honore, \textit{Reflections on Revolutions}, 2 \textit{The Irish Jurist} 268 (1967) (Honore argues that recognition is a political question and states do not recognize a revolutionary government on the sole basis of effectiveness). For example, the international community has not unanimously recognized the effective governments of Israel, South Africa and Kampuchea.

\textsuperscript{75} Tinoco Case (Gr. Brit. v. Costa Rica), 1 \textit{Int’l Arb. Awards} at 369; 18 \textit{Am. J. Int’l L.}, \textit{supra} note 57, at 147.

\textsuperscript{76} K. Marek, \textit{Identity and Continuity of States in Public International Law} 24-25 (1968).
Ordinarily, an individual becomes the lawful sovereign through the municipal law of the state, and his legitimacy is derived from internal constitutional procedures. The validity of the constitution is grounded in internal social and political realities. Even if the international community has recognized an efficacious government, the question remains whether that government is internally legitimate. Efficacy as a norm of international law does not preclude the right of a society to freely determine its form of government, nor does it presuppose its internal legitimacy.\footnote{77}

3. Moral Neutrality of Efficacy

The theory of efficacy has been criticized on the grounds that it amounts to an invitation to revolution\footnote{78} and that it serves as an encouragement to military adventures.\footnote{79} "Nothing can encourage instability more than for any revolutionary movement to know that if it succeeds in snatching power it will be entitled to complete support of the pre-existing judiciary."\footnote{80} This criticism is valid because the theory will legitimize even an unjust revolution executed against the will of the people.

However, one must understand that efficacy is not a moral theory and, therefore, does not claim to distinguish just revolutions from unjust ones. Additionally, efficacy does not evaluate a revolutionary legal order from an external moral viewpoint. The theory is morally neutral in the sense that it

\footnote{77} It is perfectly conceivable that a government recognized in international law remains illegitimate in the eyes of domestic legal order. This duality is easily defensible if we reject the monist view that national and international law constitute a unified legal system. See Hughes, supra note 71, at 708-13. Kelsen has argued that national and international law must be viewed as one unified system and not as a collection of coexisting systems. This unity emerges either from the primacy of national law or from that of international law. Kelsen tends to favor the primacy of international law. See H. Kelsen, supra note 23, at 332-34; J. Stone, Legal System and Lawyers’ Reasonings (1964); Kelsen, supra note 69, at 1128. It is, therefore, understandable that Kelsen emphasizes the critical significance of the principle of efficacy and assumes that a government recognized in international law is also legitimate in national law. Even if Kelsen’s views about the unity of two systems and the primacy of international law are correct, however, it does not follow that efficacy is the most superior rule of international law. There are other principles of international law that may be properly invoked to determine the legitimacy of a government. For example, almost all states accept, at least in principle, that each society may freely determine its socio-political system, and that the will of the people shall be the basis of the authority of government. See Declaration, supra note 13. It may be argued that a revolutionary government that lacks internal approval of the society has a defective title both in national and international law. However, it is tolerated in national law to avoid anarchy and in international law to save treaties and other agreements.

\footnote{78} Asma Jilani v. Gov’t of Punjab, PLD 1972 S. Ct. 139, 172 (Pak.).

\footnote{79} Id.

\footnote{80} Madzimbamuto, [1968] 2 S.A. at 430.
recognizes the plurality of moral systems and varying conceptions of justice. Kelsen believes that there is no absolute morality to which every legal system must conform. "What it all comes to, essentially, is the insight that there is not just one single morality, 'the' morality, but rather that there are many moral systems. . . ." He further states, "[t]he thesis rejected by the pure theory of law . . . [is the contention that there is] an absolute morality, i.e., one which holds good at all times and places."\

Insofar as the theory of efficacy rejects the external moral viewpoint as a relevant factor in determining the legitimacy of a revolution, it is consistent with the principle of self-determination as codified in international legal documents. By rejecting the proposition that every legal order has to conform to some absolute morality, the theory of efficacy reaffirms a recognized international principle that each society should be free to determine its own sociopolitical institutions free from external pressure. It further maintains that a society may alter its institutions not only through existing constitutional means, but if need be, through a revolution. Thus, a revolution does not have to conform to an external morality. There is no one just form of government which holds good at all times and places. Kelsen argues that to the extent there is an absolute morality, it "tends towards an uncritical legitimation of the political coercive order constituting that community."\

Efficacy, however, becomes an unacceptable legal theory when it begins to reject the internal moral viewpoint as well. A strict interpretation of efficacy implies that an efficacious revolution is lawful even if it violates the internal moral viewpoint of a society. Efficacy would legitimize a revolution even if it is socially disapproved. In view of this strict interpretation, the moral neutrality of efficacy slides into moral emptiness. This moral emptiness does not help a legal analyst to meaningfully distinguish between a legal system and a gun-nman situation writ large. A legal system may not exist without effective coercion, but surely effective coercion per se does not constitute a legal system. In its extremity, efficacy includes a notion of effective coercion that appears to be too broad and seems to legitimize a revolution on the sole basis of effective coercion.

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82 Id.
83 See supra note 13.
84 See Covenant on Civil and Political Rights, supra note 13, art. 1; Covenant on Economic, Social and Cultural Rights, supra note 13, art. 1.
85 See also Sumida, The Right of Revolution: Implications For International Law and World Order in Power and Law 130-67 (Barker ed. 1971).
86 Kelsen, supra note 81, at 92. For instance, a religious legal system may preclude any criticism of the system on the basis of an absolute morality.
87 H. Hart, supra note 8, at 18-21.
That a revolutionary government can create a valid domestic legal order on the sole basis of effective coercion, therefore, is a difficult proposition to accept. First, the mere presence of effective coercion is insufficient to explain social and moral dimensions of a legal order.88 Second, it is analytically indefensible to reduce the concept of a legal order to mere effective coercion.89 Third, the principle of efficacy seems to suggest that effective coercion and not the will of the people is the basis of governmental authority. In view of the international law of human rights,90 efficacy per se is an inappropriate criterion to test the legitimacy of a government.

III. THE LEGAL SIGNIFICANCE OF A REVOLUTION

Both Grotius and Kelsen advocate extreme views regarding the legitimacy of revolutions. Grotius maintains that because a revolution attains power by unlawful means, the right to rule must be restored to the previous sovereign. He excludes the legal possibility that the institution of authority may be changed through a revolution. On the other hand, Kelsen insists that every efficacious revolution revokes the legitimacy of the previous government and creates a new legal order whose validity must be judged by new rules given by the revolutionary government and not by the rules of the previous legal order. The theory of social approval presented here provides a synthesis of those two theories.91

In order to fully understand the legal significance of a revolution, we must ask two distinct questions. First, when does a revolution occur in the legal sense? Second, what are the criteria to distinguish a legitimate revolution from an illegitimate one? Both Grotius and Kelsen attempt to answer the second question, but both neglect to fully explore the legal significance of the first. The ultimate answer to legitimacy lies in a careful analysis of the legal definition of a revolution.

A. Succession Rules

A revolution is a contra-constitutional change which occurs whenever an individual or a group of individuals seize power in a way repugnant to the

88 Eekelaar, Rhodesia: The Abdication of Constitutionalism, 32 MOD. L. REV. 19 (1969) (arguing that efficacy, in its amoral formulation, is a new version of the old adage: might is right).

89 J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 203-05 (1970) (arguing that efficacy is an inadequate criterion to explain the existence of a legal system and, therefore, should be abandoned).

90 See Declaration, supra note 13, art. 21(3). A government based on the will of the people may be effective, but every effective government may not be based on the will of the people. Thus, the critical criterion under the international law of human rights is not simply an efficacious government.

91 See infra text accompanying notes 110-38.
lawful procedures provided in the existing legal order. Almost every legal order prescribes specific procedures by which power is lawfully attained; it may further prescribe that power attained through any means other than that provided by law amounts to treason. A revolution is essentially the repudiation of existing succession rules.

A legal analyst, therefore, must focus his attention upon the critical importance of succession rules that constitute the foundation of a legal order. First, succession rules are designed to transfer legislative and executive authority to successive governments. They provide a legal structure to facilitate the transition from one lawgiver to another. An orderly transfer of power through lawful procedures preserves legal and governmental institutions. Second, succession rules explain the continuity of a legal system. A given legal order continues to exist only if successive legislators acquire the right to make laws under the prescribed succession rules. Thirdly, succession rules legitimate the authority of the existing lawgiver. A legislator derives his right to make laws from a distinct rule in the legal system, the succession rule. In other words, his normative claim to make laws presupposes the existence of a succession rule under which he has this right. Only the existence of succession rules explains why laws given by a particular individual or group of individuals are valid.

Finally, succession rules identify the lawgiver. If a legal system does not provide succession rules, a legal analyst will be unable to show why a particular individual or group of individuals are the lawmakers. Thus, any legal analysis that omits to take into account the legal significance of succession rules will fail not only to identify the legitimate government, but will also fail to explain the continuity of the legal system.

John Austin's theory of sovereignty is unacceptable in that it expressly fails to take into account the significance of succession rules. Austin argues that a sovereign is one whom a given community habitually obeys, but the sovereign himself does not render habitual obedience to anyone. The concept of habitual obedience, however, fails to explain the continuity of a

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92 H. Kelsen, supra note 23, at 117.
93 H. Hart, supra note 8, at 53, 57.
94 Id.
95 Id.
96 Id. at 58.
97 Id. at 54.
98 Id. 50-60.
100 J. Austin, supra note 99, at 152-54. Though Austin uses several expressions, such as "title," "claims" to succession and a "legitimate" title, to account for the continuity of a legal system, he does not fully examine the critical significance of succession rules. See H. Hart, supra note 8, at ch. IV.
legal system in two ways. First, the mere fact that a given community has habitually obeyed orders of the previous legislator does not confer on the new legislator any right to succeed. The new legislator does not derive his right to make laws from communal habits of obedience, as such habits of obedience do not confer authority on anyone. Second, it is foreseeable that a community which has habitually obeyed the previous legislator may refuse to obey the new one. The new successor, therefore, cannot derive a right to make laws from a self-serving presumption that his orders are likely to be obeyed.

Additionally, a legislator does not acquire the right to make laws because he has the efficacious state machinery to extract obedience from the populace. Legislators derive their legitimate authority to make laws from succession rules. Only with succession rules can a legal analyst distinguish between coercive orders of a legislator and those of a gunman. The coercive order of a gunman is unlawful, even though he may have the efficacious force to demand obedience, because he cannot invoke a legitimate rule of the system which demonstrates the validity of his order. The coercive order of a legislator, on the other hand, is lawful because his authority rests upon a distinct legal rule, the succession rule.

B. Socially Approved Succession Rules

The mere technical existence of succession rules, one may argue, is sufficient to explain the continuity of a legal system. In South Africa, for example, the existing succession rules may adequately explain the continuity of the apartheid régime even though the majority disapproves of the succession rules. The principle of social approval, however, rejects this mechanistic view of succession rules. If the community at large disapproves of succession rules, the principle of social approval remains unsatisfied. Further, the legal basis of a government is compatible with the international law of human rights only when succession rules are entrenched in social approval.

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101 H. Hart, supra note 8, at 50-60.
102 Id. at 58.
103 Id. at 58-59.
104 Id. at 19; R. Dworkin, supra note 9, at 19.
105 H. Hart, supra note 8, at 19-20.
107 Cf. Cassese, supra note 17, at 102 (Cassese argues that the Covenant on Civil and Political Rights, supra note 13, implements internal political self-determination through the right to choose one’s government freely).
Professor H.L.A. Hart argues that the communal acceptance of succession rules may be more meaningful in a tribal society where the rules by which future chiefs derive their authority to legislate are simple. But in a modern society, he insists, it is absurd to expect the mass of the population to have any clear understanding of the rules that determine a changing body of legislators. The communal acceptance of succession rules in a modern society, however, is not a mere legal fiction. Hart suggests that if succession rules are complex and the people do not understand them, the people would require a full understanding of these intricate procedures only of legal officials. The ordinary citizen would, in effect, manifest his approval of the rules by accepting the results of official operations, such as the method of collecting and allocating revenues, of conducting the electoral process, and of lawmaking procedures generally.

For example, in a monarchical system, the populace knows that the monarch is determined under hereditary rules of succession. Even in the United States where succession rules are complex, citizens understand that legislators are elected even though only legal officials comprehend all procedural details.

People do understand, in a fundamental way, the social significance of complex succession rules even when they do not fully comprehend their legal meaning. Only if the populace continues to show approval of succession rules can a legal analyst make a more meaningful prediction that the legal system will continue to exist. It is legally insufficient, therefore, that only officials be required to understand succession rules, nor is it legally justified that only officials be required to show their approval.

More importantly, the authority of a government is morally defensible only when succession rules are acceptable to the community. It is not enough that a successive legislator is given the legal right to make laws as mandated in the succession rule. To demonstrate that the authority obtained through succession rules is morally defensible, it is necessary to show that the community as a whole understands and approves these succession rules. This is the principle of social approval, and it does not change even after a revolution.

IV. The Principle of Social Approval

According to Hart, "acceptance of a [succession] rule by a society at one moment does not guarantee its continued existence. There may be a revolu-

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108 H. Hart, supra note 8, at 59-60.
109 Id. at 60.
110 Id. at 113-14 (Hart would disagree).
111 See Cassese, supra note 17, at 97 (pointing to the importance of self-determination as the foundation for an acceptable government).
tion: the society may cease to accept the rule. For example, if a monarchy is replaced by a republican constitution under which the sovereign is elected, the old succession rule ceases to exist because the society has accepted the new one. The deposed monarch loses his right to make laws because the succession rule that conferred authority upon him has lost its validity. Thus, even though a revolution is the repudiation of existing succession rules, a revolution is legitimate if the new succession rules that the revolutionary government prescribes are socially approved.

A. Legitimate Revolutions

Under the principle of social approval, a revolution is legitimate if the following conditions are met:

1. the revolutionary government seizes power in violation of the existing succession rule;
2. the revolutionary government prescribes a new rule of succession;
3. the new succession rule is accepted by the community;
4. the revolutionary government legitimizes itself under the new succession rule.

The theory of social approval mandates that revolutionaries establish new succession rules. It further requires that they regularize their authority under these rules. A revolutionary government does not acquire authority to make laws by merely prescribing succession rules; it must put the succession rules into operation. For example, if a revolutionary government has instituted democratic succession rules, it must hold elections to legalize its own authority. If a revolutionary government has failed to regularize its own authority under new succession rules, its legal claim to govern is as defective as would be a government that refuses to prescribe such rules in the first place. A revolutionary government also breaches the principle of social approval if it unduly delays its legitimation under the new succession rules.

Thus, a revolution acquires full legitimacy only if the new succession rules are socially approved and the revolutionary government has regularized its

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112 H. Hart, supra note 8, at 58 (emphasis in original).
113 See supra text accompanying notes 22-23.
114 See supra text accompanying notes 22-23 and 63. This criterion indicates whether a revolution in the legal sense has occurred and thus, establishes the legal existence of the revolution. Because the legitimacy of a revolution presupposes the existence of the revolution, this criterion, therefore, is also included in the criteria of legitimacy.
115 See supra text accompanying notes 93-94 and 102.
116 See supra text accompanying notes 104-09.
117 See supra text accompanying notes 102-03.
118 See supra text accompanying notes 91-103.
authority under these rules. These formal requirements are mandatory, for otherwise a legal analyst will have no legal basis to proclaim the legitimacy of the revolutionary government. For example, if a revolutionary group overthrows an existing dictatorship, the revolution is not legitimate just because the people generally disliked the previous government. Nor is it legitimate just because the revolutionary leadership has personal appeal for the populace.

A legal analyst differentiates between communal acceptance of succession rules and the general popularity of revolutionary leadership. Even if there is strong evidence that the revolutionary leadership is generally liked by the community, the revolutionary government remains under a legal obligation not only to prescribe new succession rules acceptable to the community, but also to regularize its authority under these rules. A mere showing that the revolutionary leadership is generally liked by the community does not satisfy the formal criteria laid down by the theory of social approval. The critical test is whether the existing succession rules are internally approved.

One society, therefore, may legitimately retain the traditional structure of authority when there is internal approval. Another society may reject democratic succession rules even if there is strong external disapproval. After all, each society has a fundamental right to freely determine its social and political order. The principle of social approval should not be equated with mere democratic succession rules. A variety of succession rules can be rationally founded on the principle of social approval.

Social approval, like the theory of efficacy, distinguishes the validity of particular legal rules from the legitimacy of a revolution. If the four conditions of social approval are met, the revolution is legitimate. But this legitimacy is sufficient only to show the validity of succession rules. Other legal rules will be valid under the procedural and substantive criteria laid down by the revolutionary government. Not every legal rule has to have social approval. A revolutionary government may prescribe new procedures to make laws, set new limits on the scope of legislative authority, and provide a new criterion to trace the constitutionality of legal rules.

B. Unlawful Revolutions

Under the principle of social approval, a revolution is unlawful when it usurps power by repudiating socially approved succession rules. A close analysis of succession rules, however, reveals different forms of revolutions which violate the principle of social approval. In order to identify these

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119 See supra text accompanying note 12.
120 See supra text accompanying notes 24-25.
121 Honore, supra note 74, at 272-73 (arguing that if a revolutionary government is fully established, judges are authorized to recognize the exclusive validity of the new regime).
unlawful forms of revolutions, succession rules may be subdivided into two
different categories.

One category prescribes the legal mode of determining a successor. For
instance, the Constitution of Belgium prescribes that a successor to the
Throne will always be in the direct line of natural, legitimate heirs of H.M.
Leopold Georges-Chretien Frederic of Saxe-Cobourg, from male to male
heir, in order of primogeniture, to the perpetual exclusion of women and
their descendants.122 This article of the Belgian Constitution may properly
be called the legal mode of determining a successor. Thus, only that member
of the royal family who meets all the requirements laid down in the constitu-
tion will be the lawful successor to the Throne. Such a successor may be
called the "successor-in-title."123

The other category of succession rules may be called the rule of "de-
volvement contingencies."124 A devolvement contingency is simply a spec-
ified event upon which occurrence the office of the sovereign will pass to the
successor-in-title.125 For example, if the existing sovereign126 dies or abdi-
cates, the successor-in-title may lawfully succeed to the office. A lawful
succession takes place only upon satisfaction of both sets of rules. More
specifically, some event set out in the rule of devolvement contingencies
must occur, and the individual succeeding to the office of the sovereign must
meet all the requirements laid down in the legal mode of succession.

An unlawful revolution occurs, alternatively, either upon the violation of
the legal mode of succession or the rule of devolvement contingencies, or
both. For example, a revolution is unlawful if, upon the occurrence of an
event specified in the rule, the individual succeeding to the office is not the
successor-in-title. If a sovereign is removed for a reason contrary to, or not
specified in, the rule of devolvement contingencies, the revolution is unlaw-
ful even if the individual succeeding to the office is the successor-in-title. For
example, if the rule provides that a sovereign shall not be dispossessed of the
office during his life, even the successor-in-title cannot depose the living

122 Belgium Const. art. 60, para. 1.
123 H. Hart, supra note 8, at 53.
124 This concept, for its explanatory power, has been borrowed from the law of
property, without suggesting that the right to govern or legislate is a property right.
125 U.S. Const. amend. XXV, § 1. "In case of the removal of the President from
the office or of his death or resignation, the Vice President shall become President."
Id. Thus, the death of the President, for example, is a specified devolvement con-
tingency. Upon the President's death, the office shall devolve upon the Vice Presi-
dent. See infra text accompanying notes 127-29.
126 The concept of sovereignty, as used here, does not presuppose that a sovereign
would always be a single individual, nor does it imply that a sovereign has unlimited
legal power. A sovereign is simply a person or persons, determined under the existing
succession rules, who exercise the supreme but not unlimited legislative and execu-
tive authority of a nation-state. See generally H. Hart, supra note 8, at 70-76.
sovereign. A revolution is unlawful, of course, if a sovereign is divested of
his office by an individual other than the successor-in-title and for reasons
contrary to, or not specified in, the rule of devolvement contingencies.

The succession rules of a given legal system may vary in complexity. In a
democratic form of government, an elected successor should be distin-
guished from the contingent successor. In the United States, for example,
the office of the President devolves upon the Vice President “in case of the
removal of the President from office or of his death or resignation.” The
Vice President is, therefore, only a contingent successor to the office of the
President. At the expiration of the tenure, the succession rules require that a
new successor be elected under the given constitutional procedure. In
some legal systems, the contingent successor is authorized to retain the
office only for a short specified period. A new successor is then elected to
the office.

Under democratic succession rules, usurpation may take place in one of
the following ways. First, the contingent successor deposes the head of the
state even though no event specified in the rule of devolvement contingen-
cies has occurred. Second, upon the occurrence of a specified event, the
head of the state is replaced by a person other than the contingent successor.
(It will be an unlawful revolution, for example, if upon the death of the
President of the United States, the Secretary of State declares himself to be
the President by unlawfully excluding the Vice President). Third, the head
of the state refuses to hold elections at the expiration of the term. Fourth, the
head of the state refuses to relinquish the office after he has been lawfully
removed. Fifth, the contingent successor himself perpetrates the death of
the head of the state in order to create a malum fide devolvement contingency.
Needless to say, a revolution is unlawful when an elected sovereign is
deposed in violation of both the legal mode of succession or the rule of
devolvement contingencies.

If a legitimate government makes itself legally irremovable by suspending
or revoking socially approved succession rules, it loses its legitimacy. If
such a government is then overthrown by another government that also
attains power in violation of socially approved succession rules, the new
government is equally unlawful. For example, if an elected government
revokes the democratic succession rules—by which a successive govern-
ment would have attained power—and thus makes itself legally irremovable,
the elected government loses its legitimacy. If the elected government then
is overthrown by the military, the military government does not become
legitimate just because it has overthrown a legally irremovable government.

127 U.S. Const. amend. XXV, § 1.
128 Id. art. II, § 1.
129 France Const. art. 7.
130 Id.
The legitimacy of a revolutionary government is to be determined under the criteria of social approval.

If a revolutionary government is unlawful, the principle of social approval, however, does not grant a right to anarchy. The courts may enforce those laws, whether enacted by the previous government or by the new one, necessary to the existence and functioning of communal life. In order to deal with an unlawful seizure of governmental authority, courts of diverse jurisdictions have relied upon certain legal principles.

First, only those acts, orders and laws of an actual but unlawful government are valid which would also be valid if emanating from a lawful government.\textsuperscript{131} Second, the legislative, executive and judicial acts of a usurper may be respected if they do not impair rights of the citizens, granted under the previous socially approved constitution.\textsuperscript{132} Finally, transactions between private individuals in the ordinary course of life are lawful except when proved to have been entered into with the actual intent of furthering the cause of usurpation.\textsuperscript{133}

C. The Right to Recall a Government

The right to recall a government is an integral part of socially approved succession rules and is imbedded in the principle of social approval. If a government has lost confidence of the community, socially approved succession rules will usually provide a procedure by which, after a specified period and even during the prescribed term, a government can be lawfully recalled. Socially approved succession rules are inherently defective if they lack such a procedure.\textsuperscript{134}

The right to recall a government reaffirms the continual significance of social approval. By instituting a legitimate government, the people do not renounce their control over the government, nor do they alienate their collective right to remove the existing government. The procedural right to recall a government serves an important substantive purpose: if an existing government has failed to promote communal goals or has trampled upon

\textsuperscript{131} Texas v. White, 74 U.S. (7 Wall.) 700 (1868).

\textsuperscript{132} Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873); Bhutto v. Chief of Army Staff, PLD 1977 S. Ct. 657 (Pak.).

\textsuperscript{133} Thorton v. Smith, 75 U.S. (8 Wall.) 1 (1868).

\textsuperscript{134} See Declaration, supra note 13, art. 21(3). Article 21(3) of the Declaration provides that the will of the people shall be expressed in periodic and genuine elections. Article 25 of the Covenant on Civil and Political Rights, supra note 13, also restates citizens' right to vote at genuine periodic elections. These procedures to recall a government reaffirm the principle that the will of the people remains the continual basis of the authority of government. Periodic verification of the will of the people is mandatory under the principle of social approval. See generally Mill, Representative Government, in UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT 312-14 (H. Acton ed. 1910).
fundamental communal rights, the citizens can always exercise their right to recall the government. This right is critical because without such a right, the citizens become defenseless against possible repression. More importantly, a system without lawful procedures to recall a government breeds disorder and encourages insurrections. In order to bring down an otherwise irremovable government, the people may resort to massive demonstrations and armed insurrections which may result in further repression by the government. On the other hand, if they continue obeying the régime, the existing repression then will be institutionalized.

If there are no lawful procedures to recall a government and if citizens are coerced against their will to submit themselves to the authority of an irremovable government, the governmental authority is then reduced to mere force. If an irremovable government tramples upon communal rights, uses harsh and oppressive measures to enforce unjust policies, and revokes all peaceful procedures by which the governmental authority can be lawfully challenged, the principle of social approval recognizes the peoples' collective right of civil disobedience which aims to restore socially approved succession rules. If such a government is ultimately brought down under the sheer necessity of self-defense, the court would be justified in invoking the authority of Hugo Grotius to excuse from criminal liability the act of tyrannicide.

V. Conclusion

The principal purpose of social approval is to identify legal criteria for the legitimacy of a revolution. The classical theories fail to provide such criteria. On one extreme, the Grotian doctrine excludes a revolution as an acceptable means to change the existing form of government. On the other extreme, Kelsen's theory confers legitimacy on every victorious revolution. The contrast between the two is vivid. The Grotian doctrine takes a rigid moral view of sovereignty and excludes the possibility of changing the existing form of government through a revolution even if it is no longer acceptable to the community. Kelsen's theory of efficacy is morally neutral and

135 An example of this occurred before the late Shah of Iran was deposed.
136 This can be said to be the present condition in South Africa, although the beginning of armed insurrection bringing further government repression is becoming apparent.
137 H. GROTIES, supra note 37, at 160-66. To compare modern dictators and Greek tyrants, see generally K. von FRITZ, THE THEORY OF THE MIXED CONSTITUTION IN ANTIQUITY 187-90 (1954) (explaining that most Greek tyrants usurped power with the support of their military guards. First, they used force to effect reforms which were socially disapproved. Second, they made themselves irremovable. "Thus tyranny entered upon a vicious circle from which there was rarely an escape until the system broke down or the tyrant was assassinated"). Id. at 189.
legitimizes every successful change, but in so doing confuses legal order with mere coercion.

The principle of social approval rejects these broad and opposing doctrines, and provides criteria to identify a legitimate revolution. These criteria are derived from the critical significance of succession rules which legitimize the authority of a lawgiver. The principle of social approval recognizes that a revolution in the legal sense occurs only if the revolutionary government attains power in violation of the existing succession rules. The theory, however, requires that the revolutionary government prescribe new succession rules. It further requires that the new government regularize its authority under new succession rules and that these new succession rules be acceptable to the community. This aspect of social approval is rooted in the international law of human rights: the will of the people shall be the basis of governmental authority.

The purpose of the theory of social approval is to provide a basis for courts to determine the legitimacy of a revolution. Employing the guidelines set out in this article, courts have a foundation from which a meaningful jurisprudence of revolution may ensue. If a revolution is legitimate under the principle of social approval, the courts may enforce the laws of the new government. If, however, the revolution does not meet the criteria of the theory of social approval, courts may refrain from legitimizing the revolutionary government.

While courts may enforce laws that protect the rights of citizens and private transactions, they may refuse to enforce laws that further the cause of usurpation. Because the theory of social approval rests upon the legitimacy bestowed in part by the populace, if a dictator is ultimately brought down under the sheer necessity of self-defense, courts may invoke Grotius' authority to excuse from criminal liability the act of tyrannicide. This principle of Grotius is in accord with the theory of social approval, which ensures that the humanitarian aspect of legitimizing a revolutionary government is given paramount consideration.