DISTINGUISHING LEGALITY AND LEGITIMACY OF COUP D'ÉTAT: LOOKING BEYOND KELSEN

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1. Introduction

Political history is replete with various types of extra-constitutional transformation of governmental power, coup d'état being the commonest one.[1] All states in Latin America, most of the states in Africa, many states in Asia, and some of the European states have experienced at least one coup d'état. Military take-over of power is a continuing threat for budding democracies, and this threat is supposed to remain out there for indefinite future to come.[2]

The matter of coup invariably ends up being probed by courts of law in some form or other. Facing such a question, apex courts of different countries took diverse routes at different junctures of history, thereby giving rise to an incoherent set of principles regarding determination of legitimacy of coups.[3] This paper argues that the incoherency of determining principles in coup-d'état cases are attributable, at least partly, to the misconstruction and

[1] Starting from early Roman, Athenian and Greek city-states, continuing throughout the medieval ages, coup d'état got its final expression in post-colonial states after the Second World War. Eric Carlton mentions the story of ouster of the emperor Commodus by one of the most distinguished generals of Rome Petrinax as early as in 192 A. D.—Petrinax himself being ousted and killed in a counter-coup in 193 A. D. *See generally* ERIC CARLTON, THE STATE AGAINST THE STATE: THE THEORY AND PRACTICE OF THE COUP D'ÉTAT (1997) (focusing on the coup d'état using examples from classical Athens, republican Rome, Mughal India, Egypt, Japan, and Iran).

[2] Steven R. David thinks that "coups are likely to persist in the third world as long as power is concentrated in a narrow elite that succeeds in denying meaningful political participation to the people." STEVEN R. DAVID, THIRD WORLD COUPS D'ÉTAT AND INTERNATIONAL SECURITY 6 (1987).

[3] In a study on Pakistan, Ghana, Southern Rhodesia (now Zimbabwe), Uganda, Nigeria, Cyprus, Seychelles, Grenada, Lesotho, Transkei, and Bophuthatswana, Tayyab Mahmud found that courts adopted as diverse principles as 'doctrine of efficacy' propounded by Hans Kelsen, 'doctrine of necessity,' 'doctrine of implied mandate,' 'doctrine of public policy' and so on. *See* Tayyab Mahmud, *Jurisprudence of Successful treason: Coup D'état and Common Law*, 27 CORNELL INT'L L. J. 49 (1994).

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conflation of the concepts of 'legality' and 'legitimacy.' The courts have failed to strike a balance between the strict formalism of legality and the practical realism of legitimacy. The courts either spoke the language of strict constitutionalism ignoring the reality of the coup altogether, or saw things through the prism of pure theory of law unconnected with the mores of the society in question. A pragmatic coupling of the concepts of legality and legitimacy, appreciating what they share and how they differ, would enable them to devise a coherent set of principles applicable in coup related cases.

In most coup cases, the doctrine of efficacy[4] propounded by Hans Kelsen, a champion legal theorist and rational political thinker, figured prominently.[5] Therefore, any discussion on the principles of decision and courts' role in deciding the validity of a coup will remain incomplete without discussing Kelsen. The very first case determining the status of a coup was solely based on Kelsen's theory, and it was because of the apparent strength of his commonsensical rational arguments that his theory attracted such attention of the court.[6] Yet, in the discussion that follows, I argue that Kelsen's formula suffers from a number of basic flaws, including total abnegation of the legality-legitimacy divide. These separate but related concepts were not duly

[4] In literature, this doctrine is widely mentioned as the "doctrine of revolutionary legality." But I argue that such a nomenclature is inappropriate and misleading because on the one hand Hans Kelsen himself did not use the term; on the other hand, the doctrine does not deal with "revolution" in its ordinary sense. His doctrine of efficacy attributes legality (based on efficacy) not only to a revolution having mass support and just cause of changing society, but also to military coup d'états having no such valid cause.

[5] The doctrine was featured in Pakistan (*State v. Dosso*, 1958 P.L.D. Sc.), Uganda (*Uganda v. Motovu* 1966 E. AFR. L.R. 514), Southern Rhodesia (Madzimbamuto *v. Lardner-Burke* 1966 R.L.R. 756, Rhodesia Gen. Div.), Cyprus (*Liasi v. Attorney General*, 1975 C.L.R. 558), Seychelles (*Valabhaji v. Controller of Taxes*, Civil Appeal No. 11 of 1980, Seychelles Court of Appeals (unreported)), Grenada (*Mitchell v. Director of Public Prosecutions,* 1986 L.R.C. CONST. 35), and Lesotho (*Mokotso v. King Moshoeshoe II,* 1989 L.R.C. CONST. 24). For details on these cases, see Mahmud, *supra* note 3.

[6] The case of *State v. Dosso* (1958 PLD Sc.) of Pakistan was the first reported case, where the Supreme Court of Pakistan relied on Hans Kelsen's doctrine of efficacy in accepting legitimacy of the first ever coup d'état in Pakistan's history. For the overall Kelsenian approach, *see* HANS KELSEN, GENERAL THEORY OF LAW AND STATE (New York, Russel and Russel, 1961).

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distinguished by the courts in approving or rejecting Kelsen's theory. Therefore, the divide between a jurisprudent's concept of "legality" and a political thinker's concept of "legitimacy" left a missing link in the coup jurisprudence, resulting in some of the incoherency of principles in coup-related judgments. In fact, in a coup situation, the court is to decide the incumbent government's legitimacy as much as the legality of the coup itself. A decision therefore has to take both facts into consideration.

This paper is divided into four parts. The first part presents Hans Kelsen's formula of determining the validity of a coup with special emphasis on Kelsen's conception of legitimacy. The second part deals with Carl Schmitt's formula of determining legitimacy, and analyses it in comparison to Kelsenian formula. The third part discusses how social and political scientists conceptualize the concept of legitimacy. The fourth part tries to critically analyze these different approaches to legitimacy to see if they can be harmonized for building a coherent theory for determining validity of coup cased taking into perspective both legal formality as well as political reality.

2. Hans Kelsen and the Doctrine of Efficacy

Hans Kelsen suggested that in a situation of coup d'état, the decisive factor is to see whether "the old legal order ceases, and the new order begins to be efficacious."[7] If the new order replaces the older one, in the sense that the people "*actually behave*, by and large, in conformity with the new order," Kelsen thinks, "then this [new] order is considered as a valid

[7] *Id.* at 118.

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order."[8] The sole emphasis on "the legal order factor" alone misses other factors, including the ethical, political and historical justification for the coup. This purely legal order based determination of legitimacy is, of course, the characteristic feature of Kelsenian jurisprudence.

The efficacy of the new legal order is so central and autonomously decisive of the validity in Kelsenian theory that the context of the coup is totally irrelevant. Whether the old order was changed in an illegitimate way, violent way, through a social movement of the people having history of deprivation or in an abrupt one-stop uprising of a military with no justifiable cause are issues that do not feature in Kelsen's formula.[9] To Kelsen, whatever may be the reason behind the change of the order, and whoever changes it, and whatever means and methods were used, the change qualifies as a "revolution" since it succeeds in changing the order. Kelsen writes, "A revolution, in this wide sense (in the sense that a revolution also covers the so-called coup d'état) occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way that is in a way not prescribed by the first order itself."[10] For Kelsen, the illegitimate way is, by virtue of its efficacy, a law-creating factor—a legal formality that gives rise to a new valid order. Although illegal according to the now non-existent old order, efficacy of the new order is the new legal formalism that sets a new standard of legitimacy by itself.

2.1 Conflation of Legality and Legitimacy

It is noticeable that even when Kelsen speaks of "legitimacy," he is in fact speaking about legality. For example, when he writes: "It cannot be maintained that, *legally,* men have to

[8] *Id.*
[9] Kelsen, *supra* note 6, at 117.
[10] *Id.*

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behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of *legitimacy* is restricted by the principle of effectiveness,"[11] he defines legality in terms of factual legitimacy alone. When it comes to legitimacy of individual actions within that order (as distinguished from the legal order itself), they must conform to norms of that order. Thus, legality is derived from legitimacy, and vice versa. Therefore, in his theory, legality and legitimacy do not have separate existence; they are like two sides of the same coin.[12]

2.2 Conflation of Legality and Legitimacy Is Not Accidental in Kelsenian Theory

The conflation of legality and legitimacy in Kelsenian jurisprudence is not something accidental; rather it derives from the central thesis of Hans Kelsen's "Pure Theory of Law."[13] In his theory, a state is all about its legal order. In other words, legal order is constitutive of state. The separate existence of legality and legitimacy is possible only if one accepts the state-law duality, where state is a social organization that creates the law and where a state and government can exist in a lawless condition. However, Kelsen denies the state-law duality. In his view, the state is actually the personification of its national legal order, and the state-law dualism is theoretically indefensible. He writes: "The state as a legal community is not something apart from its legal order, any more than the corporation is distinct from its constitutive order. . . . Since we have

[11] *Id.* at 119.
[12] LARS VINX, HAN'S KELSEN'S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY 3 (2007).
[13] Kelsen devoted his whole intellectual life in propounding and defending the "pure theory of law," a pure science of law independent of any consideration of values, morality, ethics, justice or any other social or political considerations. Kelsen developed this extreme scientific approach to law in his famous books GENERAL THEORY OF LAW AND STATE and PURE THEORY OF LAW. Apart from these two books, he wrote a number of pieces defending his theory and responding to his critics, including H. L. A. Hart, Hersch Lauterpacht, Alf Ross, R.T.E. Letham, J.M. Eekelaar, J.M Finnis, and Julius Stone—to name a few of his renowned critics.

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no reason to assume that there exist two different normative orders, the order of the "state" and "its" legal order, we must admit that the community we call "state" is "its" legal order."[14]

Thus, Kelsen unequivocally holds that the problem of state and the problem of legal order are identical. In this logic, every problem of a state is actually a problem of its legality. Therefore, in Kelsenian formula, there is no scope for an interpretation where an extra-legal step is "illegal but legitimate;" nor can there be an occasion to be declared as "legal but illegitimate." His formula is precise and simple: "if the old order ceases, and the new order begins to be efficacious. . . . then the order is considered as a valid order. . . . If the revolutionaries fail, if the order they tried to establish remains inefficacious, then their undertaking is interpreted . . . . as an illegal act, as the crime of treason."[15] Therefore, in Kelsen's cosmology, efficacy brings legitimacy, i.e. legality.

In the light of above formulation, a coup d'état is either legal or illegal depending on its efficacy. As far as the validity of a coup is concerned, ethics, politics or morality in the ultimate analysis amount to nothing, according to Kelsen; what matters is efficacy. Interestingly, efficacy is all about politics of the coup. This is an ironic position for a theorist who devoted his whole intellectual life constructing a "pure" theory of law. An author rightly comments that "[Kelsen] seeks to constrain politics by law but ends in a position whereby the political, free of all legal constraints, seems to dictate decisions as to what the law is."[16]

2.3 Kelsen's Theory Betrays His Politics

[14] Kelsen, *supra* note 6, at 182.
[15] *Id.* at 118.
[16] David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?* 91: 1 AM. POL. SCI. REV. 121, 129 (1997).

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It is not the case that Kelsen favors authoritative governments—the sort of government that coups d'état generally bring into power. Ironically, his doctrine of efficacy is the single most rational argument that has been utilized by courts in ascribing legitimacy to coups.[17] His political writings devoutly defended democracy and liberal constitutionalism. He personally contributed to the drafting of the Austrian constitution of 1920, and served in the Austrian constitutional court for a while. His active participation in favor of protecting democracy during the crisis of Weimar Republic before Nazi-takeover and his departure from Germany after the takeover amply speak about his ideological position.[18] Yet, he is marked in the post-colonial countries, unfortunately so, as a champion defender of coups d'état.

Is Kelsen victim of his theory? Did his insistence on extreme legalism and pure scientific rationalism lead him to the dead end? Was efficacy the only rational explanation of a coup situation vis-à-vis his grundnorm theory? The answer to all these questions seems to be a 'yes.' Since his pure theory does not discriminate things on morality (rather on legality i.e. legitimacy), both saints and sinners who bring in the change gets equal legitimacy. Had he been flexible in his theory by leaving some exceptions to the "purity" and legal formalism, he would do justice to his politics. One way to make such flexible concession would be to see legitimacy as an exception to legality, rather than basing legality solely on legitimacy. That could perhaps put his theory in good light, and could also help determine the status of coup d'états in a principled and coherent manner.

3. Carl Schmitt: A Different Approach to the Legality-Legitimacy Relationship

[17] Mahmud, *supra* note 3.
[18] Vinx, s*upra* note 12, at 15; Dyzenhous, *supra* note 16, at 122.

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Diametrically opposed to Kelsenian effort to construct a pure theory of law, Carl Schmitt, a contemporary of Kelsen and his noted intellectual rival, propounded a theory based on pure realism. His theory of law does nor constrain politics at all. Schmitt thinks that the "limits set by legalism are in substance no limits at all."[19] Schmitt, the foremost legal theorist of his time, consistently maintained that legitimacy is absolutely determined by political reality, not by the legal process. It seems that Kelsen's explanation on legitimacy of coup is consistent with Schmitt's overall approach, whereas that explanation was not consistent with his own overall approach about politics and law. On the other hand, Schmitt's legal theory conforms to his overall approach to law and politics.

Participating in the high-voltage constitutional dispute between the Reich and Prussia (where Kelsen also indirectly participated and took a position opposite to Schmitt) during the coup-like situation in late Weimar, Schmitt argued that in a political issue like the exercise of power by the Reich president, whether done legally or illegally, could not be decided by the court. He favored the concept of a "total state," and contended that such a state gets weaker by the bindings of legality. To Schmitt, "Sovereign is he who decides on the exception."[20] Therefore, legitimacy of an incumbent regime is beyond the legal process in Schmittian formula.

Although he made his observations on legality-legitimacy in a different context (a coup-like, though not a concrete coup situation), it is useful for our purpose to see how he discards legality in the affairs of the government when the political reality warrants stamp of legitimacy

[19] Dyzenhaus, *supra* note 16, at 127.
[20] *Id.* at 126.

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to a political action. Schmitt maintains that rule of law, legality and constitutional formalities are inherent weaknesses for a state because those who are enemies of the state in claiming legitimacy can utilize legal formalities.[21] In place of rule of law, he favors rule of strong man who can establish a stable state. He argues strongly in his book *Legality and Legitimacy* in favor of a strong presidential government for Germany. Schmitt writes, "The sovereign is the highest legislator, judge, and commander simultaneously. He is also the final source of legality and the ultimate foundation of legitimacy."[22] Therefore, the reality of the chaotic situation of a parliamentary democracy prevailing in the-then Germany convinced him that a government with legitimacy could have a claim over a government that makes hollow demand of legality.

Schmitt terms legality as a fiction, and legitimacy as the reality. He writes, "Today, however, the normative fiction of a closed system of legality emerges in a striking and undeniable opposition to the legitimacy of an instance of will that is actually present and in conformity with law. This is currently the decisive contradiction."[23] It seems like Schmitt is answering to Kelsen's "normative fiction" of legality by strongly arguing in favor of legitimacy, and at the same time making a clear distinction between legality and legitimacy. It is noticeable that whereas Kelsen considered legitimacy as the autonomous means of determining validity only in case of an extra-constitutional coup, Schmitt argues that legitimacy is the autonomous means of legality in all cases. It is a state of extreme anti-legalism. For sure, Schmitt's approach

[21] This prophecy of Schmitt was proven right when Hitler came to the power of Germany by legal means. But surprisingly, instead of condemning such a situation, immediately after Nazis took over the power of Germany Schmitt joined Hitler's party and accepted the position of Prussian Attorney General. *See* John McCormick's Introduction to CARL SCHMITT's LEGALITY AND LEGITIMACY xxii (London: Duke University Press, 2004).
[22] CARL SCHMITT, LEGALITY AND LEGITIMACY 5-6 (Jeffrey Seitzer ed. & trans., Duke University Press, 2004).
[23] *Id.* at 6.

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invites any strong power-hunter to come into power and remain in power with absolute guarantee of legitimacy.

Schmitt's anti-legalism finds its final expression in the following passage, where he discards parliamentary system in favor of authoritarian one:

> Legality" here has the meaning and purpose of making superfluous and negating the legitimacy of either the monarch or the people's plebiscitarian will as well as of every authority and governing power, whether in form that provides its own foundation or one claiming to be something higher. If in a system words like "legitimacy" or "authority" are used, then they are only an expression of legality and derived from it. . . . Here both legitimacy and legality are traceable to a single legitimacy concept, whereas legality is in direct opposition to legitimacy.[24]

Therefore, in the battle of legality and legitimacy, Schmitt's vote goes in favor of absoluteness of legitimacy. He condemns the legal position that renders every rebellion and countermeasure an injustice and legal violation.[25] He thinks that the claim of legality by a democratic government is fake, since a partisan government can never ensure equal participation or "equal chance" which is a precondition of democracy. If legality argument is taken seriously, the putative legal government is actually illegal because of the mismatch between what a democratic government promises and what it delivers. In such a normative vacuum, Schmitt's final verdict is that "when things really have gone that far, it ultimately comes down to who holds the reins of power at the moment when the entire legality is thrown aside and when power is constituted on a new basis."[26] In the conclusion of his book, Schmitt finds that a plebiscitary legitimacy can be the single most justification of the government that comes into power.

[24] *Id.* at 9.
[25] *Id.* at 30.
[26] *Id.* at 36.

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If we extrapolate the above account of legality-legitimacy debate to a concrete coup situation, we can glean the conclusion that in Schmittian theory it is power that determines the legitimacy of a coup. Schmitt's theory would render all coups d'états legitimate and legal at the same time. That is not because a new legal order is created by the coup, rather because legal order cannot catch the ruler who is sovereign. Schmitt's solution would render the determination of a coup easier and would establish a coherent set of principles, but for a bad reason. However, he expressly denied courts' authority of deciding such an issue because of being a political question.[27]

While Schmitt and Kelsen reach the same conclusion regarding legality of a coup, they do so for totally different reasons. Kelsen finds efficacy as a stamp of legality only in case of overall change of a legal order. He does not say that it is an exception to his pure theory of law. Rather he rationalizes it as a part of his pure theory itself. On the other hand, Schmitt considers power and efficacy alone to be determiners of legality in all circumstances. His politics and legal theory are realistic though morally suspect, and a validity of coup easily fits into it; whereas Kelsen's otherwise pure theory has hard time accommodating the reality of coup into his otherwise normative theory of law.

4. What Gives Legitimacy to a Regime in Practice?: Social Scientific Perspectives

The issue of legitimacy of regimes, including a post coup regime, is a recurring theme in the analyses of social and political scientists. There is agreement on the fact that legitimacy is crucially important for all types of regimes, from naked tyranny to pluralist ones, more so for

[27] Dyzenhaus, *supra* note 16, at 126.

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those instituted extra-legally. A government benefits from being legitimate, since it makes the governance easy by minimizing the cost of governance.[28] It also ensures effective rule, and maximizes political obligation.[29] Max Weber mentioned that willingness of the subjects to submit to an order emanates from their belief in the legitimacy of the government. Lack of legitimacy of a civil government is identified as one of the reasons why many coups occur and subsequently military governments enjoy legitimacy.[30] Nordlinger, in particular, thinks that legitimacy of a pre-coup civil government is critically important in determining the legitimacy/illegitimacy of a post-coup military regime.[31]

That said, the meaning of legitimacy for a political/social scientist is not identical to the notion of legitimacy for legal scientists, like Kelsen and Schmitt. Different political and social thinkers suggest different definitions and criteria for ascertaining the legitimacy of an extra-legal regime. The insights from their discussions and debates have potentials to illuminate judges in devising a coherent set of principles in deciding coup-related cases.

4.1 Belief

Carl Joachim Friedrich defined legitimacy as a matter of belief, by most men of the regime, in the good title of the ruler to rule.[32] As the belief system changes from time to time in a society, different reasons are attributed for legitimacy—divine right, heredity, prescription, charisma,

[28] Peter G. Stillman, *The Concept of Legitimacy,* 7:1 POLITY 32, 43 (1974).
[29] CARL JOACHIM FRIEDRICH, MAN AND HIS GOVERNMENT: AN EMPIRICAL THEORY OF POLITICS 239-40 (New York: McGraw-Hill Book Company Inc. 1963).
[30] Paul Brooker mentions that both Finer and Nordlinger think that legitimacy of civil government reduces opportunity of coup for the military. *See* PAUL BROOKER, NON-DEMOCRATIC REGIMES: THEORY, GOVERNMENT AND POLITICS (2000).
[31] *Id.* at 73.
[32] Friedrich, *supra* note 29, at 234. Lipset and Easton's definition of legitimacy is also similar to Friedrich's. *See* Stillman, *supra* note 28, at 34 n. 8.

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performance of the rulers in terms of prosperity, security, national freedom etc. These are factors that entrench people's belief in a government. Despite rise and fall of such factors, according to Friedrich, "will of the people won out in the long run, and by the middle of the twentieth century the prevalent legitimacy is thus democratic legitimacy."[33] Due to scientific knowledge and progress of the society, people no longer believe in legitimacy based on heredity or charisma any more. According to Friedrich's definition, if most of the people believe in the good title of a given ruler, the regime gets legitimacy.

According to this definition, a coup may get legitimacy if most of the people believe that the coup makers have good title to rule the country, either because the previous government failed to rule the country because of being corrupt, inefficient, or any other reason. A good title of coup makers can be proved in two ways. First, through gaining support of the people through plebiscite, like Napoleon Bonaparte did; Second, by drastic change of the people's beliefs through propaganda, indoctrination etc.[34] For Friedrich, it is immaterial why people would believe in the good title of the ruler, it is sufficient if they do so.

4.2 Values

Peter G. Stillman discards Friendrich's democratic approach to legitimacy for several reasons. Firstly, legitimacy sometimes depends on foreign governments more than its own people. Secondly, sometimes it depends on prescription, heredity and divine right more than what people believe or not; Thirdly, Friedrich's definition like Kelsenian definition ignores values and

[33] Friedrich, *supra* note 29 at 235.
[34] *Id.* at 239-40.

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morality altogether—whether the government is just, constitutional or peaceful.[35] Stillman reminds that Napoleon's regime is not regarded as legitimate even though he held plebiscite and election to show popular support.[36]

Stillman thinks that: "Legitimacy is the compatibility of the results of governmental output with the value patterns of the relevant systems." In such an approach, legitimacy does not depend on the popular support, or people's belief, rather on whether what government does is compatible with the values and *nomos* of the society. A revolution with popular support can become illegitimate based on its outcome; on the other hand, a coup d'état can become legitimate if its output conforms to the value of the society. Stillman writes, "For instance, a military government, established by a coup d'état, might be legitimate in Libya. In the United States, however, such a government, regardless of its actions, would almost surely be illegitimate simply because the Constitution is so highly valued by the American people".[37]

If we take Stillman's view seriously, a government cannot be fully legitimate because every society has multiple values, and different sections of the people believe in totally different sets of those values. Hence, legitimacy is bound to remain a matter of degree. In Stillman's definition, "legitimacy is not a dichotomous attribute—either present or absent, a government as either legitimate or illegitimate. Legitimacy, rather, varies along a continuum."[38] Even once legitimate, a government may lose its legitimacy due to the change of values of the society.

[35] Stillman, *supra* note 28 at 35-36.
[36] *Id.* at 38.
[37] *Id.* at 41.
[38] *Id.* at 43.

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Although Stillman takes issues with Friedrich's definition, his approach has its own flaws. He does not make it clear what happens when a military government happens to retain power against the values of the society? When Stillman says that he means by "values" the normative priorities, civic and political culture, does he mean the norms and culture entrenched in the constitution, or some new culture that suddenly springs up subsequent to or consequent to a coup? As he emphasizes on a governmental output alone, and not on the birth-story of the government, his theory fails to take into account realities of life that may have required temporary suspension of values for the greater welfare of citizens.

Friedrich and Stillman represent two schools of thought regarding legitimacy of a government.[39] One sees legitimacy as a matter of belief, making it contingent upon success or failure in ensuring people's acknowledgment; and the second sees it as a matter of socially established norms, such as constitutional norms. Mentioning these two broad tendencies, Rodney Barker makes this pragmatic observation: "We all like to think that popular fury and ethical dissatisfaction coincide both with each other and with our preferences and values. But it is necessary to recognize that whatever our aspirations and aversions, there will be legitimate regimes, in the sense of regimes whose subjects accord them legitimacy, which offend our political principles."[40] This differentiates what a society believes and values from what a society is pragmatically faced with.

4.3 Legal Rules, Beliefs, Values, and Consent

[39] Popular acceptance as a basis of legitimacy is also supported by LIPSET (POLITICAL MAN), EASTON (A SYSTEM'S ANALYSIS OF POLITICAL LIFE) AND KELSEN (GENERAL THEORY OF LAW AND STATE). ROBERT PAUL WOLFF (IN DEFENCE OF ANARCHISM), WILSON C. MCWILLIAMS (ON POLITICAL ILLEGITIMACY) AND JOHN SAHARR (LEGITIMACY IN THE MODERN STATE) support the ideological conformity. *See* Stillman, *supra* note 28.

[40] RODNEY BARKER, POLITICAL LEGITIMACY AND THE STATE 42 (1990).

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David Beetham in his well-written book "The Legitimation of Power" opined that neither public opinion nor conformity to social values alone is sufficient in conferring legitimacy to a government. He expressly discards popular opinion as a basis of legitimacy by objecting to Max Weber's definition, "Legitimacy is a belief in legitimacy." Beetham maintains that following Weber, many social scientists did the same mistake.[41] He has two objections against the Weberian definition: First, the definition misrepresents the relationship between legitimacy and people's belief. That a government is legitimate is not because people believe it to be so, rather because it can be justified in terms of their beliefs. Moreover, making legitimacy a matter of belief ignores the aspect of legality involved.

According to Beetham, legal rules, people's beliefs and values and consent cumulatively make a power legitimate. A government is legitimate to the extent that it conforms to legal rules, and those legal rules represent shared beliefs and values of the people, and the people have expressed their consent to it. Therefore, legitimacy is a matter of degree—not an all or nothing affair.[42]

Although Beetham nicely explains the above theory of legitimacy throughout his book, he is reluctant to use it in determining the legitimacy of a coup. He employed only four and a half page of his book[43] explaining the legitimation process of a coup, although it is the main issue of his book. However, the gist of his conclusion on a coup legitimacy is as follows: while the legitimacy of a political regime must rest on a tripod—first, valid authority according to constitution; second, achieving those ends that the earlier government failed to achieve; and

[41] DAVID BEETHAM, THE LEGITIMATION OF POWER 11-12(1991).
[42] *Id.* at 19-20.
[43] *Id.* at 232-36.

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third, mechanism of the expression of consent—a military rests only on the strength of the second, its performance. Beetham terms it as "a tripod supported on one leg." According to Beetham, such a government has two weaknesses: "[First,] it cannot be justified in terms of a recognizably valid source of authority. The second is that it is not subject to any public legitimation in terms of expressed consent."[44]

Although the first reason is recognizable, Beetham does not explain why a military regime should not be subject to *any* public legitimation. He seems to have taken for granted his position that under coup regime an election is *sans* free choice. S. E. Finer also subscribes to the view that military regime cannot fully legitimize their power, and thinks that in a plebiscite "we are not called on to endorse anything. We are merely called to attest a fact. Whatever our private opinions of these regimes, we have to recognize that the state of society makes them inevitable."[45] However, he confined this comment to only those countries "where the military are so powerful than the civilian forces that the military are bound to dominate."[46] So, Finer, unlike Beetham, does not deny plebiscite as a legitimating factor altogether. He also thinks that weak public attachment to civilian institution works as the greatest bulwark of legitimacy for a military regime.

Beetham seems to deny the legitimating force of antecedents to the coup, when he says: "it is one thing to justify a coup d'état retrospectively, and it is quite another to secure legitimacy on an ongoing basis." The fact remains that antecedents to coups play a vital role in ascertaining legitimacy and legality of a coup.

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[44] *Id.* at 233-34.
[45] S. E. FINER, THE MAN ON HORSEBACK: THE ROLE OF THE MILITARY IN POLITICS 234 (New York: Frederick A. Praeger, 1962).
[46] *Id.*

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Beetham concluded that "what it (military regime) can never acquire is legitimacy." Since he maintained elsewhere in his book that legitimacy is a matter of degree, his conclusion using an absolute negative "never" is surprising. He could leave legitimacy contingent on particular contexts in which coups take place. Although Beetham himself did not feel applying his general legitimacy theory to coup situations, one would suggest that a true application of his theory could be helpful in determining the legitimacy of coups.

5. Combining Socio-Political and Legal Factors in Assessing Legitimacy of Coup

The distinctive feature of David Beetham's approach is that he tried to combine socio-political and legal aspects in his theory of regime legitimacy. This approach is a point of departure from common trends of ignoring by one discipline the insights offered by other disciplines on legitimacy of regimes. In Kelsenian theory, we see absolute focus being concentrated on pure legality ignoring socio-political aspects. Similarly, in socio-political approaches of regime legitimacy we find a total absence of consideration of legality in assessing legitimacy. A third group of writers even think that legitimacy is an exaggerated, and of less important, issue in this case.[47] Przeworski, for example, argues that a military regime is not affected or threatened by lack of popular legitimacy. In his words, "Some authoritarian regimes have been illegitimate since their inception, and they have been around for fifty years."[48] Some writers discarded

[47] Christopher Clapham & George Philip, *The Political Dilemmas of Military Regimes* (CLAPHAM & PHILIP ed., THE POLITICAL DILEMMAS OF MILITARY REGIMES 3 (1985).
[48] PAUL BROOKER NON-DEMOCRATIC REGIMES: THEORY, GOVERNMENT AND POLITICS 101 (2000) (quoting Przeworski).

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"legitimacy" as a concept worthy of discussion, since they find all sorts of regimes, including democratic ones, as necessarily illegitimate.[49]

The solution seems to be in combining socio-political and legal aspects of regime legitimacy. Besides Beetham, Edward Luttwak's nuanced insights on ex-post-facto legitimation remarkably combine considerations of legality and legitimacy. Although like Beetham he was also very parsimonious in discussing the legitimacy issue in his book *Coup d'état: A Practical Handbook,* he has expressed a balanced view on legitimacy. He thinks that the issue of legality is not that important in some countries, while in others the attitude is more legalistic. By defining a coup d'état as "by definition illegal," he writes, "but whether this illegality matters, and whether it is possible to counteract its effects, will depend on the total political environment of the country in question."[50] According to Luttwak, the illegality of the earlier regime can be a legitimating factor for the military regime, despite the fact that coup was an extra-constitutional measure. He also mentions the claim of necessity and the declaration of a future election date as legitimating factors. Recognition by the foreign powers has also important legitimating implications in some cases, if not in all cases.

Paul Brooker in his book *Non-Democratic Regimes: Theory, Government and Politics* mentions four legitimating factors. They are: (1) election or plebiscite. Such process of legitimation can be traced back to Napoleon Bonaparte who enabled himself remaining in

[49] Robert Paul Wolff thinks that even a democratic government fails to ensure autonomy of all individuals in the society when they come in conflict with the authority of state. For example, minority peoples' rights are not always secure on the face of majority's tyranny. Therefore, he suggests that so far as legitimacy is concerned, two courses are open: (1) to treat all governments as illegitimate, and (2) to submit to whatever form of government is there if it is beneficent for the society. ROBERT PAUL WOLFF, IN DEFENCE OF ANARCHISM 69-71 (1998).
[50] EDWARD LUTTWAK, COUP D'ÉTAT: A PRACTICAL HANDBOOK 172 (1979).

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power by claiming to represent the people. Of course, many renowned thinkers opined that in spite of plebiscite, Napoleon's regime was illegitimate.[51] (2) Ideological Legitimation. That is, a claim that the unconstitutional ruler has a right to rule, for example, a dictatorship claiming to work as the vanguard of Arab nationalism or African socialism. (3) Legality, i.e. framing a new constitution or amending a constitution that recognizes their rule; (4) Patriotism by claiming that they came to power in response to a crisis that was paralyzing the country, such as, political chaos, economic downturn, or external threat.[52]

The abovementioned approach combines socio-political as well as legal factors in assessing legitimacy of regime. Such multifactor assessment of legitimacy relieves the courts from circular assessment of "egg or chicken" argument of legality and legitimacy, as we have seen in Kelsenian approach. Apart from legality, the multifactor approach takes into account election/plebiscite, change of constitution, implied consent, value-conformity, idelism of patriotism, higher performance on economic and security fronts, international recognition, and so on. Such an approach can take care of harmonizing the legal world and the real world. The gulf of gap between legal world and the legal world must be addressed through a set of coherent principles developed by combining different aspects of coup situation. While socio-political world is volatile, the legal world needs to focus on formalization, which is the characteristic feature of the legal world. What is necessary is an inter-disciplinary and multifactor approach to assessing legitimacy of a coup regime, which can bring about a set of coherent jurisprudential principles for coup related cases.

[51] *See* Melvin Richter, *Toward a Concept of Political Illegitimacy: Bonapartist Dictatorship and Democratic Legitimacy,* 185 (1982).
[52] Wolff, *supra* note 49, at 107-112.

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So far, the judges have adopted purely legal approach in coup cases, more precisely the Kelsenian approach. This approach takes into account the efficacy of the "new legal order" alone in determining legitimacy. Socio-political and historic factors and antecedents are not necessary elements in Kelsenian formula. Moral questions remain totally ignored. The single factor test of Kelsenian theory ignores multiple questions while putting sole emphasis on legal order. Efficacy did not provide legitimacy to Louis XVI in France in 1789;[53] nor did Hitler enjoy legitimacy despite his efficacy. They have lost legitimacy because of their conducts.

In coup-prune countries, the military proceed to usurp power because they know that people value other things, like economic prosperity, security, law and order, etc. Therefore, the court must consider other components, not only because people's beliefs are linked to these components, but also because they are the pragmatic criteria for consideration. Courts do not work beyond society; rather they do so in socio-cultural milieu in which they are located. Courts' decisions must take full interest in what fits into the particular mould of the society in issue. Societal issues are as important as legalistic consideration of legal order.

Joseph Raz rightly said that there is no universally accepted procedure of instituting governments. Historically, monarchy, oligarchy, democracy, and even dictatorship all existed as legal polities. Therefore, a single type of government/legal order does not fit into all societies. Legitimacy of government is to be decided on moral grounds as well, not because no legal rule is relevant but because "legal rules" are not in dispute in such a case. What is at dispute is the applicable "legal system," and such a question is the domain of morality.[54] In addition, morality

[53] Friedrich, *supra* note 29, at 234.
[54] Joseph Raz, *Of Lawful Governments*, 80: 4 ETHICS 303 (1970).

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refers to the belief system in an existing social and political reality. Therefore, David Beetham's multifactor approach to legitimacy is what we need. When courts strive to determine legitimacy in this term, I think, a consistent pattern of pragmatic principles for determining a coup situation will emerge.

6. Why Looking Beyond Kelsen Is Necessary

Kelsen was a great jurist of the 20th Century. His pure theory of law brought worldwide fame for him, so did his *doctrine of efficacy*, which happens to be a logical component of his pure theory.[55] But his theory, specially the doctrine of efficacy, faced more criticism than admiration. So far as the doctrine of efficacy is concerned, the following points indicate that Kelsen's approach is not the best in determining coup cases:

(1) His doctrine of efficacy is couched in absolute terms; either that the usurpers must inevitably remain illegitimate and face the charge of treason, or become absolutely legitimate irrespective of the context in which they came to power, how they have behaved while in power, and how long they remained in power.[56] His formula makes a one-factor test, i.e. efficacy of the new legal order, without making legitimacy conditional upon other factors, such as morality of the coup, efficacy of the governance, or welfare of the people. The military junta

[55] Graham Hughes called Kelsen the formative jurist of the 20th century. No writer writing on the concept of law could ignore Kelsen after he propounded his pure theory, and his influence on Scandinavian jurists like Alf Ross and Olivecrona, South American jurists like A. S. de Busmante y Montoro, and of course Euro-American jurists like H.L.A. Hart and numerous others is undeniable. Albert A. Ehrenzweig quotes Montoro saying that Kelsen's pure theory is "representative of the most important doctrine in the philosophy of our time . . . . one offering intrinsically the greatest findings and contents of truth." And in another statement Montoro said, "Kelsen is doubtless the greatest and most successful forger of the science of law as an autonomous, strict and cultural study." *See* Hans Kelsen and Albert A. Ehrenzweig, *Professor Stone and the Pure Theory of Law,* 17:6 STAN. L. REV. 1129 (1965). J. W. Haris has written that as far as logical consistency is concerned, Kelsen's theory is the best. *See* J. W. Haris, *When and Why Does the Grundnorm Change?,* 29:1 C. L. J. 112 (1971).

[56] J.M. Eeklaar, *Principles of Revolutionary Legality* (A.W.B. SIMPSON ed., OXFORD ESSAYS ON JURISPRUDENCE 42 (SECOND SERIES)(Oxford: Cleardon Press, 1973).

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can keep the masses quiet on gunpoint, masquerading it as efficacy of the order; and Kelsen will be happy to award legitimacy, once efficacious. Nor does his formula see legitimacy as a matter of degree, as cogently argued by Beetham and Friedrich.

(2) His doctrine of efficacy, like his other works, is consistently criticized for noteworthy confusions and contradictions.[57] First, he conflated revolution and coup d'état, although these are very different phenomena. Writers on social movement and extra-constitutional transformation of power opine that these two concepts have different sociological and methodological differentia. Secondly, the efficacy-validity relationship can be found in a host of different formulations in his writings—at times holding that if, by and large, effective the new regime gets validity; at other times asserting that that "the efficacy of the total order is a *condition*, not the *reason* for the validity of its constituent norms."[58]

Kelsen made his formula more confusing in every new attempt to make it clearer. For example, when he wrote "Professor Stone and the Pure Theory of Law," his clarifications came with more contradictions. Kelsen tried to clarify his position answering to Julius Stone's pressing criticisms about efficacy in the following manner: "A condition is not identical with that what is conditioned . . . . The validity is conditioned by the efficacy in the sense that a legal order as a

[57] Julius Stone writes, "his whole idea of the basic norm still remains shrouded in mystery." See, Julius Stone, *Mystery and Mystique in the Basic Norm*, 26:1 MOD. L. R. 35 (1963). Stanley L. Paulson writes, "In his voluminous writings, Kelsen addresses the question of relationship between legal norms and legal propositions with a bewildering variety of statements." See Stanley L. Paulson, *Constraints on Legal Norms: Kelsen's View in the "Essays,"* 42:4 U. CHI. L. REV. 774 (1975).
[58] These two positions can be found in Kelsen, *supra* note 6, at 118-119.

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whole just as a single norm loses its validity if does not become largely effective. I call attention to the fact that a legal norm becomes valid before it can be effective."[59]

Kelsen conflated state and its legal order as well, with the effect that once legal order is changed, the old government loses its validity. Rather than holding extra-constitutional regime illegitimate, he unequivocally makes the constitutional old order illegitimate. His monistic view of state/legal order relation is not accepted by, as he admits himself, modern political science and jurisprudence.[60] J.M Finnis, for example, argues that "a revolution (in Kelsenian sense) is neither a necessary nor a sufficient condition for anything that should be described as a change in the identity of the state or the legal system."[61]

(4) His doctrine of efficacy is an anomaly to his overall pure theory of law. He thinks that an action derives its validity and force from legal norm. In other words, legitimacy derives from legality. However, when it comes to coup-d'état, he reverses the role of legality and legitimacy. In other words, in case of coup, legality derives from legitimacy.

(5) Kelsen ignores morality in determining the validity of a coup. He was unequivocal in holding that legal norms can have any kind of content and "a social order that is not moral may nevertheless be legal."[62] Of course, some authors think that Kelsen has not escaped moral judgments in formulating his theory, though he tried hard. His theory is full of implications on

[59] Hans Kelsen & Albert A. Ehrenzweig, *Professor Stone and the Pure Theory of Law,* 17:6 STAN. L. REV. 1140 (1965).
[60] Kelsen, *supra* note 6, at 182.
[61] J.M.Finnis, *Revolutions and the Continuity of Law*, (A.W.B. SIMPSON ed., OXFORD ESSAYS ON JURISPRUDENCE 75 (SECOND SERIES)(Oxford: Cleardon Press, 1973).
[62] Kelsen, *supra* note 6, at 63.

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values, though he did not admit it.[63] From a fair reading of his works though, the allegation that Kelsen ignored morality is more correct. Kelsen writes, "The jurist ignores morality as a system of valid norms, just as the moralist ignores positive law as such a system."[64]

(6) For the sake of consistency of his theory, Kelsen ignored a whole gamut of legitimating factors of a coup, such as, historical and sociological considerations, the moral and political justifications, policy-oriented considerations, and so on.

Apart from these particular shortcomings of his doctrine of efficacy, his pure theory of law from which the doctrine emerged is also not generally accepted as an accurate theory of law,[65] mainly because it patently ignored sociological, historical and moral factors.

7. Conclusion

In determining the status of coup d'états, courts excessively relied on Kelsen's principle of efficacy. The system of legitimacy based on a single factor test of efficacy, without considering all relevant socio-politico-legal factors, is extremely limiting. The separation of disciplines and their approaches is nowhere more evident than in explanation of regime legitimacy by legal theorists, sociologists, political scientists, and so on. While social and political scientists underestimate legality, legal scientists seem to focus solely on legal order. Social scientists concentrate mostly on the pre-coup situations trying to understand why a coup happens and

[63] Julius Cohen, *The Political Element in Legal Theory: A Look at Kelsen's Pure Theory*, 88:1 YALE L. J. (1978) ; Vinx, *supra* note 12.
[64] Kelsen, *supra* note 6, at 374. Julius Cohen writes that the absence of moral component from the test of validity is the result of his effort to separate law and morals. *Id.* at 14, n. 44.
[65] The Chief Justice Hamoodur Raqhman of Pakistan in *Asma Jilani Case* held, "Kelsen's theory was by no means a universally accepted theory, nor was it a theory which could claim to have become a basic doctrine of modern jurisprudence." Leslie Wolf-Philips, *Constitutional Legitimacy: A Study of the Doctrine of Necessity,* 1:4 THIRD WORLD Q. 113 (1979).

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how, while the legal scientists mainly confine their analysis on post-coup situation ignoring the antecedents. Because of these interdisciplinary discords, a complete set of principles in coup related cases did not emerge.

In fulfilling the vacuum, courts must concede that coup is an exception; and an exceptional situation requires an exceptional treatment. In addition, a coup situation necessitates differentiation between legitimacy and legality. While one can lead to the other, these two concepts are not synonymous, though Kelsen projected them as such. The courts must also seriously bring into equation the socio-political aspects of the given society;[66] all possible variables of legitimacy such as legal, political, social, historical and moral factors must be weighed in.

The court may construct a full theory of coup legitimacy going beyond Kelsenian doctrine of efficacy. The legitimacy can be shown as a matter of degree; it may be adjudged legitimate conditionally, such as making it subject to plebiscite, election or future performance. While a coup d'état is undeniably a violation of legality, it happens to be a reality at the same time. A pragmatic solution, considering the salience of moral issues vis-à-vis maintainability of the moral stricture in a given condition, can pave a new way to developing a set of criteria for principled determination of the legitimacy of a coup.

[66] Richard Folk suggests such a solution in a nicely written piece on legality and legitimacy issues at international level. *See* Richard Falk, *Legality and Legitimacy: The Quest for Principled Flexibility and Restraint,* 31 REV. INT'L STUD. 33 (2005).

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