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Revolution versus Usurpation: the Doctrine of Revolutionary Legality Reexamined

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1. Introduction

After 190 years of direct and indirect British rule, Indian sub-continent achieved independence in 1947. Two new independent countries emerged in the map of the world—India and Pakistan. India enacted its constitution in November 1949. Since then, India adopted and practised democracy as the fundamental way of its political life. On the other hand, Pakistan took long nine years for enacting its first constitution. Moreover, before it started its formal democratic journey through a national election, the constitution itself was abrogated, and martial law was proclaimed throughout the country on 7th October, 1958.

Unfortunately, this undemocratic and unconstitutional act of proclaiming martial law abrogating the constitution got the seal of legitimacy from the apex court of Pakistan. The court based its judgment upon a 'Principle of Legitimacy' propounded by Hans Kelsen, which now goes by a fancy nomenclature, namely, 'the Doctrine of Revolutionary Legality.' The doctrine, once successfully applied by the apex court of Pakistan, gained wholesale application in many post-colonial countries across the

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world in the situations of coups, revolutionary takeovers, or proclamations of martial law alike.[1]

In Pakistan, the legitimacy thus enjoyed by the first martial law regime paved the way for further proclamations of martial law there. Till now, Pakistan went through four martial law regimes. Two of these martial law proclamations happened before its separation with its hitherto eastern wing, now called Bangladesh. Bangladesh, though in 1971 started its journey with a pledge to maintain democracy as its fundamental principle and as its political system,[2] could not block the ghost of martial law, and hence, experienced martial law twice that disrupted its democratic journey. Bangladesh experienced martial law regimes first in 1975 and another in 1982. This paper discusses on these two martial law situations, and two other martial law situations that our people experienced before 1971. And on the background of these four situations, this paper argues that a revolution can be, and therefore should be, discriminated with a usurpation, and that the doctrine of revolutionary legality cannot be applied to both situations alike.

This paper further argues that a coup is different from a revolution. Again, proclamation of martial law itself is neither a coup, nor a revolution. Judiciaries of different countries so far conflated these very distinct ideas as though they were the same,

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[1] The doctrine was made a basis for judgments approving the legitimacy of a coup in Pakistan (*State v. Dosso*, 1958 PLD SC), Uganda (*Uganda vs 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), to name a few. For details on the above cases, see Tayyab Mahmud, "Jurisprudence of Successful treason: Coup D'etat and Common Law", in 27, *Cornell International Law Journal*, 1994.

[2] See "Preamble" to the Constitution of the People's Republic of Bangladesh.

and justified these different phenomena based on the same legal doctrine. In this connection, it is important to examine the true content of the so-called doctrine of revolutionary legality, and the context in which Kelsen launched his 'Principle of Legitimacy.'

This paper is divided into three sections. The first section defines revolution, coup d'état and martial law, and clarifies their contradistinctions. The second section discusses theoretical aspects of the doctrine of revolutionary legality, and its vices. The third section examines the situations prevailing in 1958 and 1969 in Pakistan, and that in Bangladesh in 1975 and 1982 before the proclamations of martial law. Then, it analyses whether a situation of revolution existed in those four situations that would warrant the application of the doctrine of Revolutionary Legality. In conclusion, we sum up how the Kelsenian doctrine is unfit in assessing the legitimacy of a coup, martial law and revolution.

2. Understanding Revolution, Coup d'état and Martial Law

2.1 Properties of a Revolution

A revolution is one of the species of 'social movement.'[3] It is a continuum of a long and complicated social process of contention and protest. Theorists think that at the extreme end of the spectrum, social movements and political protests turn into revolutions.[4] As a species of social movement, a revolution contains the general characteristics of a social movement; additionally, it has some special characteristics that distinguish revolution from other species of a social movement. What are those general and special characteristics?

[3] Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics* (New York: Cambridge University Press, 2009), p. 157.
[4] Ibid., p. 24.

James Defronzo, in his *Revolutions and Revolutionary Movements* defines 'social movement' as: "a persistent and organized effort on the part of a relatively large number of people either to bring about or to resist social change."[5] From this definition, we can infer the following properties of a social movement: (1) an organized effort; (2) which is not only organized but also persistent; (3) the effort of a relatively large number of people; that means, a protest by a few people does not constitute a social movement; and (4) the aim of the effort must be to bring about or resist social change; an effort to change only a regime, but not the society, is not a social movement.

Sidney Tarrow's definition of social movement contains similar characteristics. Tarrow defines social movements as "collective challenges, based on common purposes and social solidarities, in sustained interaction with elites, opponents and authorities."[6]

If we combine the above two definitions, we find two general attributes of a social movement:
First, a social movement has a broad aim to bring social change. The change may be small at policy level, or it may be as broad as the total restructuring of the society itself.

Second, it involves organized efforts of a large number of people, who share common grievances, and engage in continuous and sustained interaction. That is, a social movement is not a snapshot approach to social change.

Along with the above two attributes, a revolution has some special features. As Defronzo writes, "a revolutionary movement is a social movement in which participants are organized to *alter*

[5] James Defronzo, *Revolutions and Revolutionary Movements*, (Boulder, Colorado: Westview Press, 2007), p.7.
[6] supra note 3, p.4.

drastically or *replace totally* existing social, economic, or political institutions."[7] (emphases supplied). Similarly, Samuel P. Huntington defines, "A revolution is a rapid, fundamental, and violent domestic change in the dominant values and myths of a society, in its political institutions, social structure, leadership, and government activity and policies."[8] So, to qualify as a revolution, a social movement must aim at drastic social, economic or political change. The French revolution, the Bolshevik revolution, and the communist-led Chinese revolution belong to this category of movement. According to Huntington, even an independence movement does not qualify as a revolution if it does not involve change in social structure of the either community involved.[9]

Some theorists emphasize that it is the magnitude of movement in time and space that transforms a movement into a revolution. Although it begins as a movement with certain policy goals, it evolves into a collaborative effort of diverse groups with diverse policy goals into a movement of overthrowing the state.[10] At such a stage, a movement becomes a revolution. Others hold that social movements transform into revolutions when the element of 'power struggle' is added to the social movements. In the words of Tilly, "the difference between movement cycles and revolutions is that, in the latter, multiple centers of sovereignty are created, turning the conflict between challengers and the polity into a struggle for power."[11]

So, for the purposes of our analyses in this paper, we will assume the presence of a revolution, when (1) there is a continuous, organized effort of a relatively large number of people

[7] supra note 5, p.8.
[8] Samuel P. Huntington, *Political Order in Changing Societies*, (New Haven, Connecticut: Yell University press, 1968), p.4.
[9] Ibid.
[10] Jack A. Goldstone, in Supra note 3, p.158.
[11] supra note 3, p.25.

at the beginning; (2) the aim of the people involved is to bring about drastic social change; and (3) at the final stage, the magnitude and diversity of participation and action are such that it aims at overthrowing the government in power. So, all revolutions are social movements, but not vice versa.

2.2 Properties of a Coup d'état

A Coup d'état is a "forceful seizure of the machinery of a state government."[12] It is a one-stop affair, and does not involve a systematic movement like revolution. The main aim of a coup is to change the leadership, not the society. It is done in the particular interest of coup leaders, not in the general interest of the people. As Alan Wells writes, "On a simplistic level, a coup occurs because a group of military officers decides to stage one. They may be reacting to a long-term or short-term crisis or none at all….As Miller argues, they may fall into situations that are totally unstructured, a series of happenstances when decisions by a man pushing his own interests may be critical."[13] In modern political science, a coup d'état is defined as:

> a stroke of state; a seizure of power by a group using the permanent employees of the state…to capture and paralyze the nerve ends of continuing government. The coup d'état is distinguished from a revolution in that it does not aim to alter the social and political structure, but merely to substitute one ruling group for another.[14]

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[12] Alan Wells, "The Coup d'état in Theory and Practice: Independent Black Africa in the 1960s," in *American Journal of Sociology*, Vol. 79 No. 4, p.871.
[13] Ibid., p.884.
[14] Basil Blackwell,*The Blackwell Encyclopedia of Political Institutions*, (Oxford, 1987) p. 158.

In modern democracy, a coup carries with it a stigma of illegality. It is seen as "the very antithesis of political progress."[15] Alexis de Tocqueville, upon the eighteenth Brumaire of Louis Bonaparte, wrote,

> Force overturning law, trampling on the liberty of the press and of the person, deriding the popular will, in whose name the Government pretends to act—France torn from the alliance of free nations to be yoked to the despotic monarchies of the Continent—such is the result of the coup d'état.[16]

So, the properties of a coup, as appears in the scholarly opinions, are: (1) it is an unstructured and exceptional event, not a systematic process like a revolution; (2) a coup does not aim for broader social change; rather it mainly aims at regime change. Of course, sometimes revolutions and coups coincide when coups are used by revolutionaries as a means of executing their final blow on their targeted regime; and (3) in modern times, coups are seen negatively, particularly, as a deviation from democratic norms.[17]

If we compare properties of a revolution and properties of a coup, it becomes clear that a coup is quite different from a revolution, at least ideally. One author nicely summed up as

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[15] Jens Bertelson, "Making Exceptions: Some Remarks on the Concept of Coup d'etat and its History" in *Political Theory*, Vol. 25 No. 3, June 1997, p.338.

[16] Ibid., p.339.

[17] Even during early 19th century, a coup d'état was marked as "usurpation"—a pejorative epithet to mean illegitimate overtaking of state power. Although Napoleon Bonaparte famously tried to legitimize his power, after the coup, through a series of plebiscites, he could not enjoy legitimacy till his death. The inherent illegitimacy haunted him so much so that he always kept himself busy in warfare up to his final defeat. See, Melvin Richter, "Toward a Concept of Political Illegitimacy: Bonapartist Dictatorship and Democratic Legitimacy" in *Political Theory*, Vol. 10, No. 2, (May 1982), pp. 185-214, and Paul Brooker, *Non-Democratic Regimes: Theory, Government and Politics* (New York, Saint Martin's Press, 2000).

follows, "Apart from the breadth of participation, another distinction between a coup and a revolution is that the former is assumed to involve change only in the top stratum of the government, whereas the latter involves change that upsets society as a whole."[18] Similarly, Walter Laqueur's insight, as quoted by Utomi, on the distinction is worth registering here for the purpose of clarity. Laqueur writes, "The frequent upheavals in which one ruling clique replaces another, merely substituting one king, colonel or courtier for another, without otherwise affecting the system of government or fabric of society, cannot be considered revolutions."[19]

2.3 Properties of Martial Law

A martial law signifies the suspension of the ordinary law of a country, and imposition of special laws by the military government. Professor Willoughby, in his *the Constitutional Law of the United States*, gives three meaning of 'martial law' as follows:

> (1) Military Law proper, that is, the body of administrative laws created by the Congress for the government of the army and navy as an organized force; (2) the principles governing the conduct of military forces in time of war, and in the government of occupied territory; and, (3) Martial Law in the strict sense, or that law which has application when the military arm does not supersede civil authority but is called upon to aid it in the execution of its civil functions.[20]

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[18] Habibul Hoque Khondker, "Bangladesh: Anatomy of an Unsuccessful Coup" in *Armed Forces and Society*, Vol. 3, Issue 1, (Oct. 1986), p. 127. The author attributes the authorship the above mentioned distinction to Gunner Heckcher. See, Gunner Heckcher, *The Study of Comparative Government and Politics* (London: George Allen and Unwin Ltd., 1957), p. 162.

[19] Patrick Utomi, "Legitimacy and Governance: One More Year of Military Rule in Nigeria" in *A Journal of Opinion*, Vol. 14 (1985), p. 42.

[20] Justice Khairul Houque of the High Court Division of Bangladesh in the Fifth Amendment Case (Writ Petition No.6016 of 2000) refers to the definition of

In all the three cases, the military acts in the aid of the civil authority in order to restore peace and order on the occasion of riots, rebellion, internal strife, or any kind of serious disorder in the military or in the country. But after the Second World War, in many post-colonial developing countries including Pakistan and Bangladesh, the term "Martial Law" has acquired a new meaning.[21] In the current usage, martial law means the promulgation and administration of special law by the military authority totally or partially suspending the ordinary law and the civil administration, subjecting them to military power.[22]

As martial law suppresses the ordinary law of the realm, in modern times, it is seen as a gross violation of the rule of law. In the famous 5th Amendment case, the Supreme Court of Bangladesh refers to the following opinion of Blackstone:

> Martial law is built on no settled principles, but is entirely arbitrary in its decisions, and is in truth no law, but something indulged rather than allowed as law, a temporary excrescence bred out of the distemper of the State and not any part of the permanent and perpetual laws of the kingdom.[23]

The judiciaries of the civilized nations consistently asserted for long that martial law does not even possess any characteristics of law. For example, Lord Halsbury held: "It is by this time a very

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martial law by Professor Westel Woodbury Willoughby, *The Constitutional Law of the United States.* (Second Edition) Vol. III, p. 1586.

[21] Sheikh Hafizur Rahman Karzon and Abdullah Al- Faruque, "Martial Law Regimes: Critically Situating the Validity of the Fifth and Seventh Amendments," in *Bangladesh journal of Law,* Vol 2:2 (1998) pp. 152-192.

[22] M.E. Bari, "The Imposition of Martial Law in Bangladesh, 1975: A Legal Study," in *The Dhaka University Studies,* Part-F, Vol. 1:1 (1989), p. 59.

[23] *Bangladesh Italian Marble Works Ltd Vs Bangladesh and Others,* 14 BLT Special Issue (2006) HCD, p. 63.

familiar observation that which is called "martial law" is no law at all. The notion that "martial law" exists by reason of the proclamation- an expression which the learned counsel has more than once used–is an entire delusion."[24]

In the background of the imposition of martial law in Rhode Island after the Dorr Rebellion in late 19th century, Teney C.J. of the US Supreme Court held: "Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it."[25]

So, from the above discussion, we find the following properties of "Martial Law": (1) it is a special kind of law imposed by the military; (2) Such kind of law is imposed at the cost of ordinary law at least, and the supreme law at worst; (3) although generally imposed by the military after a coup d'état, sometimes it can be imposed (as the parliament of Rhode Island did in the US after the Durr rebellion in 1849) in a part of the country not preceded by a coup; and (4) in approved sense, it can be imposed in times of emergency to help civil authority restore the order of the country.

From the above discussion, it can be said that martial law itself is neither a revolution, nor a coup. Martial law is about law, not about any movement, or seizure of power. At best, it can be said that revolutionary governments and coup leaders take resort to martial law as a strategic weapon for suppressing a counter-revolution or a counter-coup, or popular uprisings against the new regime. In this sense, martial law can be a means of a coup or revolution, and this paper argues that in the absence of other properties of a revolution or coup, imposition of martial law itself does not constitute a coup or revolution.

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[24] Tilonko V. Attorney-General of Natal (1907) AC 93. See, ibid., p. 93.
[25] Ibid., p.97.

3. Doctrine of Revolutionary Legality in Theory

Hans Kelsen, a leading legal theorist of the 20th century, in his famous treatise *General Theory of Law and State* discussed on 'revolution' and 'coup d'état' for explicating how a total legal order is changed by them. In so doing, he consciously conflates a revolution and a coup. After explaining that the validity of legal norms is 'time-specific,' in so far as the period of operation is clearly mentioned by the constitution and the laws, Kelsen mentions that sometimes the time-frame does not work. And it is so in case of a revolution/coup. In such exceptional situations, Kelsen thinks that the legality is not determined by the normal rules, rather by the exceptional rules. He writes:

> This principle (normal legitimacy), however, holds only under certain conditions. It fails to hold in the case of a revolution, this word being understood in the most general sense, so that it also covers coup d'états. A revolution, in this wide sense, 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. It is in this context irrelevant whether or not this replacement is affected through a violent uprising against those individuals who so far have been the "legitimate" organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated.[26]

[26] Hans Kelsen, *General Theory of Law and State*, 20th Century Legal Philosophy Series, Vol. 1. (New York: Russel and Russel, 1961), p. 117.

Although as a means of changing legal order through unconstitutional means, both revolution and coup d'état have the same effect, the conflation had had serious impact in practice. From our analysis on the properties of a revolution and a coup d'état, it appeared that due to the existence of perennial grievances and valid causes, a revolution is seen as a positive means of changing the society; whereas, a coup d'état, which is more a seizure of power for personal gains, with no clear ideals and shared conviction, is seen as a negative act. Since apparently Kelsen's theory put a coup on par with a revolution, so in practice, the context in which Kelsen made this conflation was totally ignored. Kelsen did not intend to develop a theory for legitimizing a revolution or a coup, rather he attempted to exemplify how untimely transformation of regime does take place, and a new legal order begins in fact. Being a rationalist, Kelsen reflected on facts and pragmatic effects, not on legality or idealism that undergirds a coup or a revolution at the first place.

Kelsen's main thesis is that a change of legal order happens by way of efficacy of the new regime as a whole corresponding to the total loss of efficacy of the old regime. Kelsen writes that if efficacious, a coup or revolution not only enjoys legitimacy itself, but also becomes supreme law-creating fact. Based on his celebrated 'Grundnorm Theory of law', which presupposes that all law derives its validity from a higher norm, ultimately leading as a point of reference to a fundamental norm or "grundnorm" at the apex point of the pyramidal structure, Kelsen argues that if a revolution becomes successful, it becomes a new grundnorm. By way of example, he writes:

> Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to

> introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behavior the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behavior of individuals is interpreted as legal or illegal……If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then their undertaking is interpreted, not as legal, a law creating fact, as the establishment of the constitution, but as an illegal act, as the crime of treason, and this is done according to old monarchic constitution and its specific norms.[27]

This theory of efficacy was later on misused by the courts of different countries irrationally for legitimizing all sorts of illegitimate take-over of state power. The misapplication happened partly because the courts have not taken Kelsen's theory into consideration in its totality, and partly because they have not examined in reality whether 'efficacy' was gained by the new order in fact or not before attributing legitimacy to an unconstitutional regime.
The theoretical aspects, which the courts ignored, are as follows:

(1) Not taking the theory in its totality

For a fuller understanding of Kelsen's theory of revolutionary legality, it is prerequisite that we understand what he means by 'efficacy,' and what relationship 'efficacy' and 'validity' hold, in his concept. For Kelsen, the new norm becomes efficacious when,

[27] Ibid., p.118.

> the norms of the old order are regarded as devoid of validity because the old constitution and, therefore, the legal norms based on this constitution, the old order as a whole, has lost its efficacy; because the actual behavior of men does no longer conform to this legal order. Every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole.[28]

So, if the old legal order "as a whole", or "the total legal order" does not become inefficacious, a new order cannot become legitimate. Thus, conferring legitimacy to an unconstitutional regime in spite of the relative effectiveness of the old regime shall be regarded in this paper as a "misapplication of the Kelsenian doctrine of efficacy."

(2) Thinking 'efficacy' as the reason of validity

According to Kelsen, efficacy does not confer validity. In Kelsen's words, "Efficacy is a condition of validity; a condition, not the reason of validity. A norm is not valid because it is efficacious; it is valid if the order to which it belongs is, on the whole, efficacious."[29] Kelsen thinks that validity is a quality of law, which makes it binding; whereas, efficacy is the actual behavior of man conforming to the law. So, for Kelsen, efficacy is the evidence of validity, not the reason of it.

Therefore, the verdict of a court declaring an unconstitutional seizure of power as valid merely on the basis of efficacy is a "misapplication of his theory." The following comment of Kelsen makes it clear:

[28] supra note 26, pp. 118-19.
[29] Ibid., p. 42.

> Seeing that the validity of a legal order is thus dependent upon its efficacy, one may be misled into identifying the two phenomena, by defining the validity of law as its efficacy, by describing the law with "is", and not by "ought" statements…….The efficacy of law belongs to the realm of reality and is often called the power of law. If for efficacy we substitute power, then the problem of validity and efficacy is transformed into the more common problem of "right and might"…though law cannot exist without power, still law and power, right and might, are not the same.[30]

Unfortunately, in practice, Kelsen's theory has been applied as though he propounded a theory of the transformation of power by might, not as of right.

(3) Basing the judgments on unsubstantiated "efficacy"

Efficacy is a fact, not a norm. So, to base something on efficacy, one must first collect enough evidence to conclude that the fact of efficacy is there. Kelsen writes,

> The efficacy of law consists in the fact that men are led to observe the conduct required by a norm by their idea of this norm. A statement so understood is a statement about actual behavior……The only connotation attached to the term "efficacy" of law in this study is therefore that the actual behavior of men conforms to the legal norms.[31]

Here it is important to question as to what the measurement of 'actual behavior' is, and who will measure it? Kelsen thinks that the measurement of efficacy can be, and must be done through

[30] Ibid., p.121.
[31] Ibid., p.40.

objective observation.[32] In this case, the fallacy lies in the fact that often the 'explicit behavior' does not mean reflect the 'actual behavior,' since power precedes consent. That is to say, people behave conforming to the norm not because they consent to it; rather it is the power itself that enforces consent.[33] Apart from this delicate aspect, in practice, while conferring legitimacy, the courts hardly collected enough evidence of 'efficacy.' Since hasty generalization of efficacy is foreign to Kelsenian theory, a conclusion based on such generalization must be seen as a "misapplication of Kelsen's theory."

(4) Misgivings of the Kelsenian doctrine

Apart from the misapplications of Kelsen's theory that caused harms to many nations, Kelsen's theory itself has some very dangerous misgivings. They are discussed below:

(a) Conflating revolution and usurpation

Although Kelsen conflated revolution and coup for a particular purpose, in practice it was accepted uncritically and without any debate as to its propriety.

Among the three properties of revolution we indicated earlier, two are absent in Kelsen's definition of revolution. What Kelsen was talking about was the change of a legal order, not that of a social order. Again, Kelsen's revolution does not require organized movement by a relatively large number of people in pursuance of a common goal, rather it is sufficient if some Generals, or in the worst case, as it happened in Bangladesh in 1975, some junior officers wish and succeed in overthrowing the legitimate government. On the other hand, as Kelsen's main emphasis is on

[32] Ibid.
[33] supra note 15, p. 342.

the successful seizure of power, insensitive of who seized the power, why they seized the power, or how was it seized, his definition of revolution would best exemplify a coup, rather than a revolution in modern times.

A combined definition of revolution and coup, as Kelsen did, blurs the distinction between a revolutionary and a usurper. John Locke, back in 1690, in his *Two Treatises of Government* distinguished between the rebellion and usurpation as: "Rebellion is one when any one by force takes away the established Legislative of any Society which they who are in power being likeliest to do, whereas usurpation is a change only of Persons but not the Forms and Rules of the Government."[34] So, revolutionaries take over the state power for changing the social structure and policy, whereas a usurper does it in personal or particular interest. This important distinction could be an important *ratio decidendi* in conferring legitimacy or denying it.

(b) Inviting anachronism and anarchism

Kelsen's theory of the seizure of power, no matter even if it is "in an illegitimate way" as a means of ordaining a new order, is anachronistic, since such a theory reminds us of pre-democratic societies and the political practices of absolutism. His formulation of the 'principle of legitimacy' is insensitive of the democratic norms and due process of political transformation. Such a concept of revolution is also anarchistic, since it invites anyone to seize power, who can overthrow a regime and can ensure efficacy by whatever means, even though with no general aim of changing social or political structure.

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[34] John Locke, *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1967), p.434.

(c) Efficacy-validity confusion

Although Kelsen discussed the issue of efficacy-validity relationship on a number of occasions for clarification, the relationship still remained ambiguous. For a hints of confusion, we can refer to the following comment of Kelsen "The statement that a norm is valid and the statement that it is efficacious are, it is true, two different statements. But although validity and efficacy are two entirely different concepts, there is nevertheless a very important relationship between the two."[35] Although Kelsen explicitly described the relationship not to be that of cause and effect, there is enough scope so to construe from his formulation of the efficacy-validity relationship elsewhere in his book. Critics of Kelsen consistently criticized him for "it is precisely Kelsen's own writings which are the source of the more basic confusions."[36] Graham Hughes categorically mentioned that Kelsen's effort to keep validity and efficacy aloof was "doomed to failure."[37] As dangerous as it could be, this confusion led the courts to draw unwanted conclusions in many post-colonial countries.

We consider the whole idea of measuring 'validity' of norms with reference to 'efficacy' as bizarre. It is because of its inherent virtues and essence that a law becomes valid, not for its effectiveness or failure in practice. As the Pakistan Supreme Court in Asma Jilani case held that it is through judicial recognition and legislative enactment in a legitimate way that a law becomes valid, not by reason of, or for the presence of 'efficacy' as a fact.

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[35] supra note 26, pp. 41-42.
[36] Julius Stone, "Mystery and Mystique in the Basic Norm," in *The Modern Law Review*, Vol. 26, No. 1 (Jan., 1963), p. 50.
[37] Graham Hughes, "Validity and the Basic Norm," in *California Law Review*, Vol. 59, No. 3, A Tribute to Hans Kelsen (May, 1971), p. 698.

4. Doctrine of Revolutionary Legality in Practice

In practice, the ominous doctrine of revolutionary legality has been quite pernicious to many democracies. It was applied in validating many coups, usurpations and proclamations of martial law in disguise of revolution across the globe. 'Revolution' in its true sense of the term was utterly absent in many cases that got legitimacy through the so-called 'doctrine of revolutionary legality.'

The doctrine was first applied in Pakistan in 1958 in the famous *State vs Dosso* case. The seal of legitimacy accorded by this case to the first Martial Law proclamation in Pakistan misapplying Kelsen's theory became a worldwide precedent for usurpers.[38] After the second martial law in Pakistan that, *inter alia*, expedited its separation from its eastern wing, a different bench of the same Supreme Court of Pakistan in1972 (in *Asma Jilani vs. State of Punjab*) held that the doctrine cannot be the basis of conferring legitimacy to usurpers. What is common though in both judgments was that the court assumed the Kelsenian doctrine as well-framed and well-accepted, at the first place.[39]

In Bangladesh, although no case clearly recognized or negated the propriety of the doctrine until 2005, in a number of cases during the martial law regimes, the courts virtually accepted the doctrine in negating the supremacy of the constitution over martial law proclamations,[40] and in approving the legitimacy of the usurpers as law givers.

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[38] Amirul Islam, "Status of an Usurper: A Challenge to the Constitutional Supremecy and Constitutional Continuity in Bangladesh," in *The Chittagong University Journal of Law*, Vol. 2, 1997, p.12.

[39] T.K.K. Iyer, "Constitutional Law in Pakistan: Kelsen in the Courts," in *The American Journal of Comparative Law.* Vol. 21, 1973, p. 762.

[40] For example, in Halima Khatun vs Bangladesh (30 DLR 1978 SC p. 207), the court held that the Constitution of Bangladesh became subservient to martial law

It is only in 2005 that the Supreme Court of Bangladesh in the famous 5th Amendment case[41] discarded the legitimacy of martial law regimes by holding that the doctrine of revolutionary legality cannot be applied for legitimizing the illegitimate act of proclaiming martial law. Interestingly, the Bangladesh Supreme Court in this case, by way of example, discussed on what forceful transformations of state power can be counted as revolutionary one and which not. This is a positive development. But in so doing, the court did not develop the conceptual threshold of the distinction between a revolution and a coup/martial law. Again, the court saw transformation of power from purely legal parlance, not from socio-political parlance.

We argue here that the transformation of power is first and foremost a political issue as much as it is a legal issue. If considered in this way, we can come out of Kelsenian fallacy, and can identify whether the unconstitutional steps are justifiable or not, based on grievances and injustices that must exist in a pre-revolutionary society to justify an unconstitutional take-over. Seen from this perspective, it is not the post-revolutionary efficacy what makes an unconstitutional take-over legitimate, rather it is the antecedents to the take-over that qualify a seizure of power either as a revolution or usurpation.

Let us now examine whether conditions prevailing in Pakistan and Bangladesh were politically ripe enough for conferring the unconstitutional grabbing of power a seal of legitimacy in the name of 'revolution.'

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proclamation. The same ratio decidendi followed in *Haji Joynal Abedin vs. State* (30 DLR 1978 HCD 371), and *State vs. Haji Joynal Abedin* (32 DLR 1980 AD 110).

[41] *Bangladesh Italian Marble Works Ltd Vs. Bangladesh and Others* (BLT Special 2006 HCD 1).

4.1 Antecedents to the First Martial Law in Pakistan

In 1947, Pakistan became independent with two wings—east and west—intercepted by the Indian territory of thousand miles. The eastern wing opted to become a part of Pakistan based only on commonness of religion with its western counterpart. Apart from religion, people of these two parts were different in their geographical, cultural, linguistic, and socio-economic characteristics. The western wing started to treat East Pakistan as their colony from the very beginning. This delayed the constitution-making of Pakistan.[42] Although after a long bargaining between East and West Pakistan the constitution was enacted in 1956, it was enacted more to suit the West Pakistan's interest.[43] The people of the eastern wing thought that once democratic election held, and their representatives were on the policy making table, they could make things right.

A national election was proposed to be held in February, 1959. The prospect of this election frightened the military, the bureaucracy, the neo-capitalists and the feudal elites, who had been holding power since 1947 virtually without any accountability. Being now anxious of their exploitation being exposed, they "worked hand in hand in the conspiracy to frustrate the democratic processes in Pakistan." [44]

Mr. Iskander Mirza, the first President of Pakistan under the 1956 Constitution, unilaterally made a Proclamation on October 7, 1958 declaring that the constitution had been abrogated, the legislative assemblies dissolved, and that a 'martial law' would operate throughout the country which was to be administered by the army chief General Ayub Khan.[45]

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[42] supra note 22, p.28.
[43] Moudud Ahmed, *Bangladesh: Constitutional Quest for Autonomy (1947-1971), (*Dhaka:UPL, 1991), p. 51.
[44] Ibid.
[45] supra note 40, p. 761.

The Dosso Judgment:

On the 6th day after the proclamation, the criminal appeals in Dosso came up for hearing in the Supreme Court of Pakistan, which, among other things, involved the question of legitimacy of the martial law. For the first time in the known history, the Chief Justice of Pakistan, Mr. Munir invoked the Kelsenian doctrine of efficacy, and in the judgment delivered on the 16th day after proclamation, the court held that: "the revolution having become successful, it satisfied the test of efficacy, and became basic law creating fact."[46] After getting the seal of legitimacy from the court on 23rd day of October 1958, even before having any chance of celebration, Iskander Mirza was deposed and exiled by Ayub Khan, who now became the President of Pakistan through another efficacious revolution!

Was it a revolution?

If we look at the antecedents to the first martial law, we can conclude that there was no organized effort on the part of the people, nor any broad aim for social change on the part of usurpers, rather the seizure of power was for personal gains. It did not fulfill even minimum criteria of a revolutionary situation for such a take-over. If there had been any grievance, it was the grievance of the people, not that of the President. The President himself cannot launch a revolution against the constitution.

It was a situation of coup since the authority proclaiming martial law had coercive apparatus at its hands, and the unconstitutional step was backed up by the military. The claim of its being efficacious was totally hollow, since no survey of 'actual behavior' of the people was made, and the time was too short to make such a conclusion about efficacy. If it were efficacious, how could Ayub Khan destroy that 'efficacious new order' within 24

[46] supra note 39, p. 158.

hours of its success being certified?[47] The judgment in Dosso thus epitomizes the misgivings and misapplications of the ominous doctrine.

4.2 Antecedents to the Second Martial Law in Pakistan

The dictatorship of Ayub Khan lasted till 1968. This 10 year period of his rule increased socio-economic disparities between East and West Pakistan, augmented frustration and a sense of deprivation among the people of East Pakistan, and made a solid foundation for East-West break-up. In the mean time, on June 8, 1962, Ayub proclaimed a new constitution for Pakistan, and assumed the Presidency of the country. In 1965, through a rigged election, he got re-elected by the 80,000 basic democrats of his liking, who only had the right to vote in elections.

In 1966, the major political party of East Pakistan, Awami League, started its '6 Point Movement' for democracy and an equitable constitution for Pakistan that would guarantee, among other thing, the autonomy of East Pakistan. The Ayub government, without heeding to those claims, started oppressing the movement-supporters and the Awami League leaders. The government filed the infamous *Agartala Conspiracy Case* against the main movement leaders (charging them for treason), including the party president Sheikh Mujibur Rahman. Later on, students, workers, and the people of all walks of life in East Pakistan joined in a mass upsurge in demand of the release of leaders and for enacting a just constitution for the country.

To assuage the movement, Ayub Khan called a round-table conference in West Pakistan for resolving the impasse created by the mass upsurge and for a talk on constitutional issues. But such a conference would be futile without participation of the leaders of

[47] *Asma Jilani Vs. State of Punjab*, PLD 1972, p. 117.

East Pakistan, who were in jail. And thus, Ayub Khan was compelled to withdraw the conspiracy case, and release the leaders.[48]

According to the understanding reached at by Ayub Khan and Sheikh Mujibur Rahman at the round-table, East Pakistani leaders prepared a draft Amendment Bill for changing the constitution of 1962 as required, and handed it over to Ayub Khan. Four days after Ayub received the draft, he decided, instead of inviting East Pakistani leaders for negotiation on the bill, to hand over the governing wheel to the army violating the constitution made by himself.[49]

On March 24, 1969, Ayub Khan, another President of Pakistan like Mirza, wrote a letter to General Yahya Khan, the Army Chief, inviting him to take over the power "to save the security and integrity of the country."[50] He wrote that the proposed amendments would "liquidate the central economy of the country and break up Pakistan into bits and pieces."[51] On such an invitation, Yahya Khan abrogated the constitution of 1962, dissolved the National Assembly, and proclaimed Martial law throughout the country on March 25, 1969.

Can it be called a revolution?

The initiative of the seizure of power came not from the people, nor even from the army, rather did it come from the President of the country. So, it was neither a revolution, nor a coup proper. The antecedents were ripe for a revolution by the people of East Pakistan, not for the President or the military of West Pakistan. The proclamation of martial law in the above circumstances is just

[48] supra note 44.
[49] Ibid
[50] Ibid, p.174
[51] Ibid p. 173.

another example of unconstitutional transfer of state power with ulterior motives, i.e. depriving the people of their right to framing their own constitution. If the President felt that the situation was beyond his control, under the constitution, he had the option to proclaim emergency, or to resign from his office, in which case the Speaker of the Parliament could run the country according to the constitution.[52] Under the constitution of 1962, there was no scope for the President for making such an invitation and transfer of power, or for the Army Chief for making such a proclamation of martial law and assuming the power.

Perhaps Ayub Khan was led by the assumption that, like the first Martial law, the Second Martial law would also get the seal of approval from the court by virtue of the Kelsenian doctrine. But this time, the court in *Asma Jilani case* held that the doctrine can not be the basis for justifying such a totally unconstitutional act. Although the court refrained from misapplying the doctrine in this case, the misgivings of the Kelsen's theory as applied in the Dosso case supposedly encouraged usurpers at the first place to proclaim martial law that had become a trademark of Pakistani politics ever since its independence in 1947. It continued until the East-West break up in 1971 and beyond.

4.3 Antecedents to the First Martial Law in Bangladesh

The first national election of Pakistan was held in 1970 under the supervision of the second martial law authorities of Pakistan. In this election, Awami League of East Pakistan won majority seats sufficient to form the central government of Pakistan, and enact its constitution. But the West Pakistani leaders instead of transferring power to the elected party imposed a treacherous war upon the unarmed people of Bangladesh. Bangladeshi people realized that there was no other way than to fight for an independent

[52] supra note 48, per Justice Hamoodur Rahman.

Bangladesh. Under the leadership of Bangabandhu Sheikh Mujibur Rahman, the majority leader of Awami League, people fought for nine months, and achieved independence with the sacrifice of three million of its people.

The new government, under the leadership of Bangabandhu Sheikh Mujibur Rahman, enacted the constitution of Bangladesh within a year of its independent existence. But it had to face manifold obstacles and challenges— caused by the dismal economic condition because of the perpetually discriminatory policies adopted by West Pakistan, the war-torn infra-structure, anti-liberation forces being still active in conspiracies, the greed of the neo-opportunist civil and military bureaucrats, corrupt politicians and armed radical groups. According to an ILO report, during 1973-74, 78.5 per cent people lived below 'absolute poverty' line, and 42.1 percent below 'extreme poverty' line.[53] Many people died out of starvation at that time. In spite of being frustrated and disillusioned about their dream country in such a condition, people at the same time recognized the realities of a war-torn poor country. To improve the condition, Bangabandhu decided to bring drastic change in his party as well as in the constitution of the country. On January 25, 1975, by the 4th amendment of the Constitution, the country was transformed from parliamentary type to presidential type of government; and on June 7, 1975, Bangabandhu reshuffled his party, and with a vision of country-wide activism for national progress, established Bangladesh Krishak Sramik Awami League. The 4th amendment thus established a one-party system in Bangladesh. The whole idea was, as reveals from his speeches during the launching of this major design from January 1975 to August 15, that let us work for

[53] Lawrance Lifshultz and Kai Bird, "Bangladesh: Anatomy of a Coup," in *Economic and Political Weekly* (Dec., 1979), Vol. 14, No. 49. Pp. 1999-2000+2003-2014.

nation-building, let us increase production, eliminate corruption, lead the country to progress, and leave politics for future. According to the observers, within a few months before the coup of August 15, 1975, the graph of progress was clearly on the sight.[54]

Although people decided to wait for the positive change thus started, some junior officers in the military decided to not. At connivance with Moshtaque Ahmed, a shrewd and insidious minister of Bangabandhu government, 6 junior officers led by Major Farook, Major Rashid and a few other expelled military officers, with 300 men under their command, killed Bangabandhu and all his family members except his two daughters who were abroad. It was a brutal killing of around 40 people of Bangabandhu's family and relatives. Lawrance Lifshultz writes, "The motives for the coup were attributed to be a combination of personal grudges held by certain of the officers against Mujib and his associates, together with a general level of frustration at the widespread corruption which came to characterize Mujib's regime."[55]

After the coup, Khondaker Mushtaque Ahmed named himself as the President of Bangladesh, and declared martial law throughout the country.

Was it a revolution?

What happened in Bangladesh was a typical post-colonial phenomenon of the third world countries. In different research, it has been found that a post-colonial, newly independent country is very vulnerable to a coup. Once independence is achieved, it is a

[54] Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman*, (Dhaka: UPL, 1983), 1-282.
[55] supra note 54.

matter of time to have one.[56] It generally happens because of economic fragility, internal conflict and failure to build up political control structure.[57] Along with the above noted elements, Bangladesh has also inherited the misgivings of a tradition of unconstitutionality and usurpation from its predecessor, Pakistan. The coup and massacre of August 15, 1975 was an act of treason[58], not a revolution. The antecedents did not warrant a revolution, rather it warranted stability for building up a solid economy. Neither the people, nor most of the senior military officers shared the attitude of the coup leaders. History indicates that it was more about private vengeance. The coup leaders had no broad ideology of social change. The imposition of martial law was an indication of their moral bankruptcy, which was utilized to save themselves from the outrage of the people. The coup leaders never got acceptance from the people, and had to leave Bangladesh within a few months for good. Khandaker Moshtaque had also to leave after 83 days of his regime. Still the misgivings of Kelsen's theory persuaded the judges of Bangladesh Supreme Court to consistently uphold martial law proclamations over the constitution of the country in many reported cases.

4.4 Antecedents to the Second Martial Law in Bangladesh

On November 7, after a series of coups and counter-coups within military, Major General Ziaur Rahman, (who was the Deputy Chief of Army Staffs on August 15, 1975, and instead of the full knowledge that a coup was in the offing against Bangabandhu Sheikh Mujibur Rahman had not stopped the killer Majors[59],) now became the Chief Martial Law Administrator first,

[56] supra note 12.
[57] Ibid.
[58] supra note 23.
[59] Anthony Mascarenhas, *Bangladesh: A Legacy of Blood,* (London: Hodder and Stoughton, 1986), p. 54.

and after a while the President of Bangladesh. Zia lifted the martial law in 1979, and became President through an election later on. However, in the course of history, he was also killed on May 30, 1981 by a group of army officers in Chittagong. As the Army Head Quarter at Dhaka was not involved in that local coup, the Chief of Army Staff, Lt. General Hossain Mohammad Ershad, decided not to take power. Rather, as per constitutional procedure, he let the Vice President Abdus Sattar to take the charge of the country as the Acting President.

The Acting President Abdus Sattar got re-elected as the President in the ensuing election.[60] During his Presidency, economic, political and law and order situations were in turmoil.[61] After 128 days of his term as President, the Chief of Army Staffs, Hussain Mohammad Ershad intervened, and had the President invite him to take over the power. On March 24, 1982, Ershad promulgated martial law throughout the country, dissolved the cabinet and the parliament, and suspended the constitution. He assumed the post of Chief Martial Law Administrator, and selected Ahsanuddin Chowdhury, a civilian as the President.

Was it a revolution?

The proclamation of martial law by Ershad was neither a revolution, nor a coup proper. He did not even assume the Presidency of the country. But what he did was a totally unconstitutional affair. As per the constitution, if President Abdus Sattar failed to run the country, he could simply resign. In that case, Vice President could fill up the vacuum. Even in absence of or unwillingness of the Vice President, constitutionally the Speaker of Parliament could work as the Acting President. There is also the provision of proclaiming emergency to tackle a difficult situation

[60] supra note 21.
[61] Ibid

of internal strife or severe economic crisis. So, what happened in 1982 was a replication of how Ayub Khan transferred power to the army barrack in 1969 by inviting Yahya Khan to assume power. The antecedents fell far short of being an ideal pre-revolutionary situation. Thus, the Frankenstein of the misgivings and misapplication of the Kelsenian doctrine, once set off in *Dosso*, came back again and again in some disguise or other.

5. Conclusion

Revolutions are timeless, and are indeed necessary from time to time. A revolution has its own force and virtue, and the legitimacy of a revolutionary government is often self-evident. If we look at the antecedents to great revolutions, we find that the injustices committed to, and the grievances suffered by, the people were such that a drastic change in the society had been a demand of the day. In such a situation, mass people remain as active force behind the movement, not mere passive consenters to the change after it has been brought about by a few ambitious army brasses. Great revolutions like Bolshevik revolution or Cuban revolution enjoyed legitimacy not merely because of its efficacy, rather principally because of its antecedents. Liberation war of Bangladesh was rightly pointed out by Honorable Justice ABM Khairul Huq as a revolution in the 5th Amendment case, since its antecedents were sufficient to establish its validity as a ripe time for a revolutionary transformation.

On the other hand, a coup or a martial law proclamation cannot enjoy the legitimacy of a revolution at its own strength. Sometimes, they can be a great means of revolution if they happen to occur as a natural sequence of a justifiable long struggle. In our analysis of the coups and martial law situations of Pakistan and Bangladesh, we found that the antecedents were not sufficient enough to warrant a revolution. If the very preconditions of a

revolution were absent, how can such a situation be assessed through a doctrine of 'revolutionary' legality?

In our consideration, the very term 'doctrine of revolutionary legality' is misleading. It gives an erroneous impression that Kelsen was devising a theory to show how a revolution gets its legitimacy. Whereas, truth is that Kelsen did not use this term in his book, nor was he discussing on how a coup or a revolution gets validity. His main purpose was to show how a total legal order can get changed untimely, and enjoys legitimacy in practice.

Of course, we do not endorse to Kelsen's doctrine of efficacy as it is formulated in his book *General Theory of Law and State*. Because it is insensitive to the ideals of democracy and rule of law, and tends to offer the same legitimacy to a just revolution and an illegal usurpation, saints and sinners alike. Can Bolshevik revolution and the usurpation of power by the Burmese military enjoy the same legitimacy? The present military government of Myanmar, although efficacious, has insufficient antecedents to claim legitimacy. But if we accept Kelsen's principle, it becomes legitimate for being efficacious.

So, we are convinced that Kelsenian doctrine is basically flawed in correctly assessing the legitimacy of different kinds of unconstitutional transformation of power. We are similarly convinced that the legitimacy of a revolution cannot be assessed merely based on its subsequent efficacy, and that its antecedent history and justifications must be taken into account. Whether a single principle can or cannot assess the legitimacy of as diverse phenomenon as martial laws, coups and revolutions remains a moot question. As revolutions are inevitable from time to time, the future researchers should strive at finding out appropriate theories and standards for properly assessing the revolutionary legality. In this endeavor, it must be kept in mind that revolutions are about social change, not mere change of legal norms.