

Kelsen, Constitutions, Coup d'Etats and Courts

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Orderly transfer of power contemplated by the constitutional order is often the exception rather than the norm in many postcolonial societies. A change of government often issues from the threat or use of force against the incumbent regime by the armed forces of the country, a coup d'etat. Since an incumbent regime forms part of the constitutional order, its extra-constitutional overthrow is not only illegal but amounts to the high crime of treason. A successful coup d'etat raises some complex legal questions. Are perpetrators of coups d'etat guilty of treason? Should (or can) they be tried and punished for the high crime? Does the constitutional order survive a coup d'etat? What is the constitutional foundation of a regime born of a coup d'etat? What is the source of validity, legitimacy, and legislative power of an extra-constitutional order? Can the courts validate usurpation of state power?

Judicial responses to these questions in postcolonial settings have often relied upon Hans Kelsen's theory of revolutionary legality to validate coups d'états. This includes the Dosso Case of Pakistan 1958, the Matovu Case of Uganda 1966, the Madzimbamuto Case of Southern Rhodesia 1968, the Valabhaji Case of Seychelles 1981, the Mitchell Case of Grenada 1986, the Mokotso Case of Lesotho 1988, and the Matanzima Case of Transkei 1988. This essay argues that the use of Kelsen's theory as a rule of decision in judicial evaluation of extra-constitutional usurpation of political power is seriously falwed.

1. Kelsen and Coup d'Etat

Kelsen's theory of revolutionary legality seeks to answer when and under what circumstances one legal system ceases to exist and a new one is created in its place. Kelsen's response is that the "State and its legal order remain the same only as long as the constitution is intact or changed according to its own provisions." (Kelsen 1961: 368-9) Kelsen holds that this "principle of legitimacy . . . fails to hold in the case of a revolution," because "it is never the constitution merely but always the entire legal order that is changed by a revolution," with the result that all norms of the old order are "deprived of their validity by revolution and not according to the principle of legitimacy." (Id.: 117-8) In the wake of a coup d'etat, "[e]very jurist will presume that the old order--to which no political reality any longer corresponds--has ceased to be valid" (Id.: 118) If the revolutionaries "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." (Id.) In his "attempt to make explicit the presupposition on which these juristic considerations rest," Kelsen finds that "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 legal order as a whole, has lost its efficacy; because the actual behavior of men does no longer conform to this old legal order. . . . The principle of legitimacy is restricted by the principle of effectiveness."(Id.: 118-9)

Kelsen's theory assumes the identification of the state with the legal order, with their foundations rooted in the constitution. As his theory rests upon the "operative premise . . . that the positive and deliberate destruction of the foundation of the legal order presumes the intention to found a new state, a new sovereignty," (McIntosh : 5) it precludes any distinction between a revolution and a coup d'etat. While he recognizes that coups d'etat do not result in actual replacement of the legal system, and "only the constitution and certain laws of paramount political significance" are suppressed, while "[a] great part of the old legal order 'remains' valid,"(Kelsen 1961: 368) he is constrained to treat their legal implication as being the same as those of a revolution. This places his theory out of step with the reality of coups in post-colonial societies that do not aim at destruction of the entire legal order, but only at usurpation of political offices.

2. Kelsen's formal juridical conception of the state is fallacious

Kelsen's postulates rest on a narrow, formalistic, and juridical conception of the state, whereby concepts of "state," "legal order," and "constitution" become fused. It is this fusion which leads to statements that the state and its legal order remain the same only as long as the constitution is intact or changed according to its own provisions. Kelsen's is "a highly restrictive view of the State as the expression of the logical completeness and inner consistency of the system of legal norms."(Dyson: 9) This conception of the state as a structure of legal norms is a purely juristic and formal one. It fails to take account of those social factors that condition the nature of particular states and legal orders in specific settings, and reflects legal positivism's lack of philosophical concern with moral questions that are at the very heart of the issue of legitimacy of any legal order or a state.

The nature of a particular state cannot be determined in isolation from civil society. Formal juridical conceptual divisions between the state and civil society, and the corresponding division between the public and the private spheres, only mask the mutually conditioning relationship between the two. The nature of the civil society conditions the forms that the state assumes within its midst, and the state, in turn, conditions the civil society by its very existence, structure, and functions. (See Mahmud) Furthermore, the function of the state is not exclusively a coercive one. Ideological and normalizing functions are the primary functions of a modern state, whereby the state and civil society necessarily overlap. The concept of the state is open-textured, making it susceptible to a multiplicity of usages. Any purely juristic explanation of the state is, therefore, an unavoidably abstract postulation of the quintessential form of the state of which actual states are particular manifestations. Even if one begins with the premise that a sovereign state exists "where there is an authority [in a defined territory], which fixes the norms of all law, and beyond which, in the search for the origin of such norms, we cannot go," (Laski: 238) the concept of a state remains a theoretical construct; a formal conclusion one may draw about a society in a defined territory where certain conditions obtain.

However, the society, loosely defined as a group of human beings living and working together for the satisfaction of their mutual wants, remains indispensable to one's understanding of the nature of the state. Kelsen's theory of the state and revolution remains blind to this imperative.

While examining Kelsen's identification of law with the state and of the state with coercion, it is helpful to refer to the critique of Kelsen's discontinuity thesis advanced by J. M. Finnis. For Finnis, legal systems are not simply systems of rules, but sequences, or successive sets of rules, ever changing and cohering in what society accepts as a continuous system not by virtue of any perennial *grundnorm* or rule of recognition, but as a function of the existence of society itself, which is an organic structure responding to laws of growth, change, and decay analogous to those governing the individual organism. Consequently, he argues that "a revolution 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." (Finnis 1970:75) Accordingly, both the state and the legal system can be deemed to survive a revolution without implying the invalidity of all of a revolution's dispositions in areas conventionally regulated by law. However, Finnis argues that justice has other demands, so that "sometimes the character of a revolution is such that allegiance to the revolutionary order of society is unreasonable," and the reasonableness that forms the basis of his society-oriented, non-formalistic approach, is "the reasonableness of justice and *philia politike*, which demand legal coherence and continuity and respect for acquired rights." (Id.: 76) In order to appreciate Finnis' continuity of law thesis, it is important to bear in mind that for him the central meaning of law is of an authoritative common ordering of a community that facilitates the realization of the common good. While he concedes that "stipulations of those in authority have presumptive obligatory force," he argues that if a ruler uses authority to make stipulations "against the common good, or against any of the basic principles of practical reasonableness, those stipulations altogether lack the authority they would otherwise have *by virtue of being his*." (Finnis 1980: 359-60)

While for Kelsen the law is always concerned with coercion, for Finnis it is primarily aimed at facilitating the realization of the common good. The central difference between the two is that, while Kelsen equates the legal order with the state, Finnis identifies the legal order with the society. Although Finnis correctly points out the Kelsenian fallacy of focusing on the state to the exclusion of society, Finnis' own fallacy lies in his focus on the society to the exclusion of the state. My position is that recognition of the essentially interlinked and interdependent nature of the state and civil society is indispensable to the appreciation of the distinction and tension between the concepts of the legitimacy and the validity of a legal order. This distinction is critical to formulating an appropriate judicial response to coups d'etat.

3. Kelsen proffers a theory of law not a rule of decision

It is charged that "Kelsen's theory is betrayed, on its own terms, if it is put to normative use as a practical principle for guiding judicial decision and action." (Finnis & Gould: 53-4) This is primarily because Kelsen's doctrine is not capable of judicial application, the *grundnorm* being simply a hypothesis. Kelsen has himself contributed to this confusion. On the one hand, he takes the position that jurisprudence is not a source of law, but on the other, he asserts that

"[w]hat sociological jurisprudence predicts that the courts will decide, normative jurisprudence maintains that they ought to decide."(Kelsen 1961: 172) The later statement has led to the understanding that Kelsen's theory "implies that a judge is under a legal duty . . . to accept successful revolutions . . . [and] this duty is not outweighed by any general legal duty of constitutional loyalty."(Harris:132) The problem is that the adoption of Kelsen's theory by judges does away with the essential distinction between judges and legal theorists. It disregards the fact that "accounting for or explaining such continuity or discontinuity is not an empirical task of identifying the continuance or discontinuance of individual (positive) rules of law, but is more appropriately conceptual in nature." (McIntosh: 6)

John Finch rightly asserts that misconceptions of Kelsen's theory are attributable, among other things, "to a confusion of the two senses of the word constitution In particular, the constitution in the positive legal sense has been taken for the basic norm, which it is not." (Finch: 112) The courts that adopted Kelsen's theory to validate coups d'etat generally treated *grundnorm* and the constitution synonymously. This facilitated treatment of Kelsen's position about the theoretical concept of *grundnorm* as directly applicable to the status of the constitution.

In Kelsen's theory, however, there is a sharp distinction between the two. The *grundnorm* is the reason for the validity of the constitution as seen by legal science; it is not the constitution itself. The *grundnorm* lies outside positive laws and norms; it is a presupposition made in the interest of legal science. Even though presupposed, the *grundnorm* has no independent status; it always refers to a specific constitution. Furthermore, the *grundnorm* is not prescribed by Kelsen's "pure theory." To prescribe it would be to make laws, and "pure theory" cannot create a law on its own account; only those authorized to do so by the legal system can do that. Kelsen's "pure theory" is concerned only with intellectual coherence in legal analysis. It is a descriptive theory, not a prescriptive principle of law. Kelsen refers to the *grundnorm* as the "constitution in the legal-logical sense" as opposed to the "constitution in the positive legal sense," and insists that these are distinct concepts, and any interpretation that would collapse the two "is without any foundation in my writings."(Kelsen 1965: 1141)

The confusion of *grundnorm* and constitution permitted judges in the cases mentioned above to present themselves as impartial, even scientific, fact- finders, objectively discovering and predicting efficacy. Such activity, however, is alien to the enterprise of "pure theory," which aims to describe the post-decision situation and thus cannot take part in making that decision. A decision that finds efficacy as a basis of validity is an act of norm-creation, not a presupposition of legal science. Acts of norm-creation, as Kelsen notes, may quite legitimately be politically inspired, constrained only by the need to rest the validity of the norm thus created on a higher norm. However, when the norm to be created is the constitution itself, the highest positive norm, it follows logically that the requirement of a higher norm is absent. At this point, the decision is entirely political, and therefore outside the province of adjudication.

Grundnorm is a hypothesis, presupposed in juristic thinking to serve certain logical purposes. It must not be identified with any real norm or socio- political phenomenon. The *grundnorm* is

only a postulate of reason--a Kantian transcendental--and accords no ontological status to the legal order it supposedly validates. Even if the basic norm is a necessary condition of our knowledge that valid norms exist, it is not itself a "real" norm. The basic norm, lacking specific content, is nothing but a presupposition of any legal order, subject only to the condition that the order is an effective, actual legal order. Being a hypothetical postulate of reason, the *grundnorm* cannot establish the legal order's validity, for it is only after we have identified an actual legal order as valid that we presuppose a basic norm. But in his formal hierarchy of norms, Kelsen places the *grundnorm* above the constitution. While the constitution, written or unwritten, is recognized as the "highest level of positive law," it is itself validated by the presupposed *grundnorm*.(Kelsen 1961: 118) The troubling implication is that if the constitution, though the "highest level of positive law," is not in fact the highest norm, then the constitution's validity may be questioned like that of any subordinate law within the legal system. Resolution of this dilemma lies in the province of legal theory, not in adjudication. Consequently, Kelsen's theory cannot rightfully be used as a rule of decision in a court of law.

4. The relationship between efficacy and validity is problematic

The relationship between efficacy and validity posited by Kelsen remains elusive and problematic. The courts, in line with commentators, have understood Kelsen to ground the validity of a norm or legal order in its efficacy. Kelsen, however, insists that there is no direct cause and effect relationship between the two, and that "the efficacy of the legal order is only the condition of validity, not the validity itself."(Kelsen 1965:1139) Contrary to Kelsen's formulation that "validity is conditioned by the efficacy in the sense that a legal order as a whole just as a single norm loses its validity if it does not become by and large effective," and his "call[ing] attention to the fact that a legal norm becomes valid before it can be effective," (Id.: 1140) the postcolonial judicial practice first makes a factual finding of efficacy and then bases validity upon such a finding. Furthermore, the criteria of efficacy forwarded by Kelsen is profoundly imprecise: "A legal order is regarded as valid, if its norms are by and large effective (that is, actually applied and obeyed)." (Kelsen 1967:212) The imprecision leaves open a wide area for judicial politics. In all the cases that the new regime was deemed to be effective, the courts used different tests based on different evidentiary materials to decide the question. This singular lack of consistency lends credence to Dias' position that "[t]he truth of the matter is that effectiveness is only what the judges choose to regard as such; which places considerable power in their hands." (Dias 1968:254)

When Kelsen observes that "[t]he validity is a quality of law; the so-called efficacy is a quality of the actual behavior of men and not, as linguistic usage seems to suggest, of law itself. The statement that law is effective means only that the actual behavior of men conforms with the legal norms,"(Kelsen 1961: 39-40) he admits that efficacy depends on "those very sociological factors which he so vehemently excluded from his theory of law."(Dias 1970: 413) This in turn raises methodological and evidentiary issues about any judicial determination of "actual behavior" of people. The courts while validating extra-constitutional usurpations primarily relied upon judicial notice of so-called notorious facts and self-serving affidavits from agents of the usurpers to reach conclusions of the efficacy of coups. Evidentiary problems are

compounded where courts undertake determination of the efficacy of the new legal order shortly after a coup d'etat because it invariably involves venturing predictions of future behavior, a task well beyond judicial competence.

There is also the problem of exclusion of reasons and quality of submission and conformity. Kelsen portrayed this as a methodological problem: "We are not in a position to say anything with exactitude about the motivating power which men's idea of law may possess. Objectively, we can ascertain only that the behavior of men conforms or does not conform with the legal norms." (Kelsen 1961: 40) This raises serious ethical and moral questions because "not only effectiveness but also conformity to morality and justice is among the very springs of [*grundnorm's*] being and continued life."(Dias 1968:225) Even if judges had no legal obligation to take into account the ethical and moral dimensions of the problem, "they are no more exempt from moral obligations than other officers of state in revolutionary situations. Indeed, moral obligation may weigh more heavily on them than on any other group of officers."(de Smith: 104-05) Kelsen is rightly criticized for making law and the state a composite of definitional fiats. Law, to be worthy of fidelity, must be something more than mere force. Law is not simply order; it must correspond to the demands of justice, morality, and agreed notions of what ought to be. To achieve this end, the teleology of state and law must be linked up with the fundamental project of philosophy: the human good and happiness.

Similarly, the Kelsenian teleology of efficacy and validity must be linked up with motivations and compulsions of general compliance with successful usurpations. It is "not so much whether morality or justice should count, but what counts as morality and justice."(Dias1968:255 Ignoring this question lends credence to the charge that "political quitism is the core of Kelsen's attitude." After all "[E]ven if one admits that a judge qua judge ought to accept the laws of a successful revolutionary regime, this legal duty may, in particular cases, be outweighed by other extra-legal duties. It may be outweighed by a political duty not to give support to an immoral regime or by a personal moral duty to observe a judicial oath. A revolutionary upheaval is just the sort of situation where being a good judge may have to give way to being a good citizen or a good man."((Harris: 127)

Following the lead of the *Asma Jilani Case* of Pakistan 1972, some courts rejected Kelsen's equation of efficacy with validity on the ground that it excludes from consideration "sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new Legal Order." Other courts modified Kelsen's efficacy test to ensure that submission of the people was the result of "popular acceptance" and the coup d'etat's "moral content," "not mere tacit submission to coercion or fear of force." Tests of validation were modified to require that "it must not appear that the [usurper] regime was oppressive and undemocratic." While the early cases, following Kelsen, had considered motivation of usurpation irrelevant, later cases took the position that "[t]he legal consequences of such a change must . . . be determined by a consideration of the total milieu in which the change is brought about, including the motivation of those responsible for the change," and "the reason why the old constitutional government was overthrown and the nature and character of the new legal order." It was further opined that each one of these considerations "raises a question of fact." But these

modifications do not place the theory of revolutionary validity on a more sound footing. The evidentiary problems remain, as the *Mitchell* Court was prepared to admit.

More importantly, these considerations go towards the moral content of the right of a regime to govern and the obligation of fidelity of the governed. As such, these issues are political/moral in nature and go to the question of legitimacy, which remains beyond the purview of judiciaries and belongs in the political processes of the society at large. Since legitimacy of a revolutionary regime is not a legal issue susceptible to adjudication, the modified conditions of efficacy cannot be considered questions of fact to be pleaded and proven by the parties to the case. The error is to see the issue of legitimacy as a legal issue, hence the search for a rule of law to resolve the question. The modified conditions are not legal standards; rather, they are standards of political discourse for evaluating the legitimacy of an extra-constitutional order.

In sum, the use of Kelsen's theory of revolutionary legality as grounds for judicial pronouncements on the validity of extra-constitutional usurpation of power is seriously flawed.

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