Constitutional Transformations vs. "Juridical" *coups d' État*. A Comment on Stone Sweet

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The category of a juridical *coup d'État* that Alec Stone Sweet elaborates certainly promises to open up important debates and to enrich our knowledge of a constitutional system's functioning. In a sense, the category is called upon to fit some of the received ideas about a *coup d'État sans phrase*. The illegitimate seizure of the existing power structures, or the revolutionary re-location of vital institutional competences which removes the previous division of powers, would be part of the more traditional concept. Although there is not room for a theory of a *coup d'État* to be outlined here, according to the common view, when a *competent* power acts within the limits of its conferring rules, explicates its own tasks within the range of the rules of the game, without asserting a new, previously un-conferred - power for the future, this would be unlikely to be characterized as a *coup*. A *coup*'s act of subversion must be shown to have altered the nature of the authorized powers or the procedures channelling the proper functioning of the system, or should at least have replaced the legitimate holders of the institutional power with new actors unauthorized to do so. Therefore, the question arises as to whether and how the juridical *coup* changes the system for the future, introducing a discontinuity which not only threatens the previous existing separation of powers, but subverts and undermines it to the extent that it would take another transformation of the same import to return to the previous system.

One of the merits of Alec Stone's article is its ability to penetrate this problematic realm with clarity, armed with a stipulative (and challenging) definition about what counts as a *coup d'État* under the juridical mode.

The *juridical* definition narrows the field, with reference to both the agent and the action: thus, the judicial branch can be the proper agent-cause and only those

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actions properly matching the institutional nature of judicial decisions are held to be necessary requisites for a juridical *coup d'État* to occur.

If we turn to Kelsen, we find his definition slightly different: what counts as a *coup*, and the revolutionary endeavour's success, is not so much the agent-action couple but the field of relevance. From the juridical perspective, Kelsen writes, it makes no difference whether the *coup* originates in a violent action by the people, or in a usurpation of power by the government or anything else. What counts, juridically speaking, is that the constitution is changed partially or totally, and a new constitution thus generated becomes the valid foundation of the legal order. A second trait is the one recalled by Stone Sweet, i.e. the replacement of the authority to whom law making is delegated (e.g. from a monarch to a parliament).[1]

It is difficult to clearly conclude whether a *coup d'État* can be considered as such under the strict categorization of the *juridical* mode proposed by Alec Stone, which refers to the action of a delegated power (judicial, ordinary or specialised) and to its effect of *Grundnorm* change. For this to result, the apparent obstacle is not the authorized character of the relevant power, but rather, as I see it , the legal order's self containment and coherence.

Let me give an example. Should the question arise about the "constitutionality" of ordinary legislation, where a constitution does *not* delegate constitutional control to a different organ (like a Tribunal), the legislative authority would be in the same position as a last instance Tribunal, since both are capable of final authority, in the sense of not being challengeable *res judicata*. According to Kelsen, objectively, that constitution thus authorizes two different modes of law making depending on which authority route we pursue, with one of them freed from following special constitutional provisions about procedure or substance of the legislation.[2]

Similarly, a question can be raised whether from the *juridical* perspective, . within the *juridical* sphere, the decision of a Constitutional Court can be illegitimate, when it is not juridically challengeable. In fact, even if such a decision is criticised by some (or many) as contrary to the constitution, if it is *effective*, it can hardly be qualified as a *coup d'État* under the definition, i.e. signalling a change in the authority basis of the constitution. Instead, from a structural perspective, given the priority of the dynamic over the static profile, the constitution, (or to follow Stone's wording, the *Grundnorm)*, had authorized the Constitutional Court's assessments

[1] HANS KELSEN, REINE RECHTSLEHRE (1960). See particularly V, 34, f and V, 35, l.

[2] *Id*.

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and interpretation to prevail over those of anyone else. This means that no change in the constitution took place.

Of course, this structural feature is coupled, as a matter of fact, with the further recognition that "conformity" cannot be discerned as an epistemic reality, because it is itself an authoritative creation, authorized only to delegated organs (and so unauthorized to others). It is perhaps of the same kind as ordinary judges' acts of will, in Kelsen's terms. In this hypothesis, it is exactly within the *juridical* realm that the change does not register. Admittedly it may be there, however, according to perspectives different from that of the legal order.

I cannot exclude that Stone's reasoning might be considered an attempt to bridge the different perspectives, mainly the juridical and the others (including the political), by referring the adjective "juridical" to the agent-action nature of the *coup*, not to its field of relevance and of visibility. And, of course, the issue is not a minor one, since it concerns the possible contrast between jurisdiction and democracy, and the Court's lack of legitimacy to alter the *Grundnorm*, through its formally interpretive power. In other words, *quis custodiet custodes?* Stone Sweet does not engage in this discussion, however, because his method insists upon being descriptive, and he is unwilling to offer a normative appraisal of the value of the Courts' job in the path-breaking cases in Germany, European Communities and France that he mentions as indicative of the juridical *coup d'État*.

We might recognize that shifts and changes in the Constitutional meanings have been produced in the Courts' interpretive outcomes over decades. Change of great import can be measured, partly through a step by step process, partly through milestone innovations. The Constitutions have changed deeply. The point made by Stone Sweet is that some times they have been changed by a *coup d'État*, where the *custodes* have failed to control themselves.

In the preceding lines I have raised some questions about the difficulty of recognizing and specifying a strict category of *coup d'État* within the *juridical* sphere. Yet, I am sensitive to the need to control the slippery slope of interpretive power. Despite his powerful and often convincing thesis as to the deeply interpretive character of law, I remain uneasy with Dworkin's claim that resorting to formal constitutional amendment procedures may prove both expensive and pragmatically unnecessary given that the XIV Amendment (in the US Constitution) provides an unlimited source of rights, innovation and protection.[3]

[3] RONALD DWORKIN, LIFE'S DOMINION (1993), 127 .

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Although I am sympathetic to the idea of drawing a clear institutional line between interpretation and something else, as a proponent of such line-drawing, perhaps the idea of a juridical *coup d'État* here is made too dependent on some epistemological premise, such as faith in objectivity: to what extent an observer can descriptively show both shifts in meanings and departure from the *Grundnorm* in such a way as to distinguish this from mere interpretation?

The suggested criterion does not hinge upon an institutional and historical reconstruction in the short or medium run, and does not purport to draw upon external factors. Rather, it relies upon a different and more "semantic" view, one which focuses on the irrational and arbitrary character of the decision. The related indicator refers to a meaning unintended by the founding fathers and independent of the premises laid down in the original constitution.

Legal and constitutional theory have widely considered the problematic nature of this kind of semantic certainty. Therefore, it remains generally disputable that such criteria can be sufficient to identify the kind of revolutionary cleavage which is aligned with the *coup d'État*. In some memorably trenchant dissenting opinions Antonin Scalia has defined more than one majority decisions as totally unfounded and unintended (i.e., revolutionary) in the US Constitution. Admittedly, we can readily appreciate the qualitative shift in *Lüth*, or *Costa*, or *Griswold*. Still it might be open to debate whether similar features (and comparable effects on *the Grundnorm)* might be traced back to some other decisions, in Germany, in the EU, in France, in Italy, in the United States. We might be exposed to an inflation process which would end up debasing the very currency of a *coup d'État*.

Moreover, although what really counts is the objective import of a decision, the difficulties for the legal observer are greater because the Court normally shows the contrary in its often conflicting (i.e., inter-subjectively contested) understandings of the import of its own precedents. What is more, the court invariably asserts a claim to *correctness* (based on text, doctrine and precedent) and argues through a reasoned reconstruction which boils down to a self perception of appropriateness and truth. This, then, shows another problematic feature of the juridical *coup d'État,* i.e. that the Court does not claim for itself any authority it does not already possess under the existing constitution. This is an unsurprising, and perhaps – in the denial of agency by the beneficiary - hypocritical, feature of legal 'discovery' but one nevertheless that sits uneasily with the idea of a *coup.*

Furthermore, aside from its controversial nature, the additional question arises whether an alleged "wrong" interpretation is a sufficient condition, absent any other conditions, to structurally shift authority. In Stone Sweet's article, the shift of authority is indicated by the departure from the founding fathers' meaning. Thus,

the structural controversy about the transfer of power over law- making to the Court can only be resolved through the struggle between meanings - that is to say, the struggle over the substantive content of the constitution. I suspect that, the legal perspective and focus on the Courts alone might prove, if not always, sometimes too narrow to understand whether a change in the constitution *has* occurred (and thus a shift of power).

The struggle over meanings normally shows how the change in constitutional interpretation establishes itself and takes roots through the cooperation of many concurrent factors. Some of those factors are required, as Kelsen instructs us, for the decision itself to be effective (i.e. compliance by the institutional organs in all the branches of State's hierarchies), but, more importantly, some other factors are those whose absence would make it unlikely for a single decision to permanently "amend" the constitution. By focusing on those factors, constitutional theory can purport to describe how constitutional transformations occur, [4] or how "constitutional moments"[5] come to be legitimated as new acts of popular sovereignty. In these schema, a Court decision becomes just one of the indicators, along with popular elections, Presidential nominations, etc., in a ongoing process, which triggers, supports and concludes the constitutional transformation. In cases where this hypothesis could be proven, a radical transformation of the meaning of the constitution (e.g. outside article V, in US constitutional theory), given its democratic pedigree, might nevertheless *not* import a shift of authority of law making to the Court. Thus, it might be interesting to consider whether the *juridical coup* is more aptly understood as part of a wider and multi-perspective frame of the analysis of constitutional transformations.

[4] Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution,* 87 VIRG. L. REV. 1045 (2001).

[5] Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV., 1737 (2007).