

**Juridical Coups d'état – all over the place. Comment on
“The Juridical Coup d'état and the Problem of Authority”
by Alec Stone Sweet**

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There is a strong temptation to take the metaphor of “coup d'état” too seriously and follow it up by showing that it is not all that accurate. Normally we speak of a coup d'état, at least in a democratic setting, when there is an illegitimate capture of the existing power structures by a group that has no mandate (normally, electoral) to rule. So the coup d'état used in its proper locus, that is, in the description of the political power-capture, has both normative and descriptive content: (1) normatively, it has usually a condemnatory color; (2) descriptively, it identifies a change of the ruling group within more-or-less unchanged authority structures. None of these ingredients applies to the intriguing and thought-provoking analysis offered by Alec Stone Sweet: (1) juridical coups d'état are clearly not condemned by him: at least he tells us that his analysis is purely descriptive rather than normative; (2) juridical coups d'état result in fundamentally altered authority structures: indeed, it is, for Stone Sweet, their main definitional feature. So taken pedantically, the metaphor of coup d'état is singularly inadequate for Stone Sweet's purposes.

But of course, one should not be pedantic, and the temptation to labor the metaphor should be resisted: like any metaphor, it may be good in some respects and bad in others, and in one respect at least in the present discussion it is certainly good, namely that it adds a certain dramatic flavor to Stone Sweet's analysis, thus stimulating reflection better than different, more aseptic language, would do. And yet I wish to dwell on the metaphor just for a moment because, as we know, metaphors are not innocent, and the language used may tell us something about the attitude of the speaker. It is hard to dispel the impression that Stone Sweet, notwithstanding his protests to the contrary, has a certain negative attitude towards the decisions he dubs juridical coups d'état; there is a sense of usurpation, illegitimacy and unfoundedness there, and if the metaphor of coup d'état adds a

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certain dramatic effect to this impression, there would be nothing puzzling about it. Not, at least, if Stone Sweet were not the prominent comparative constitutionalist that he is, and if we did not have the benefit of knowing his views on some of the cases he discusses here, presented earlier in his more comprehensive writings on the subject of constitutional adjudication in Europe. In his *Governing with Judges*, having described the outcome of the 1971 decision of the Conseil constitutionnel (the decision dubbed now as *coup d'état*), Stone Sweet concludes: "Thus, for the first time, and against the wishes of de Gaulle, his agents, and other political parties in 1958, France has both an effective bill of rights and an effective constitutional court".¹ Stone Sweet was very prudent there not to display any admiration for this consequence, just as he is prudent now not to express any open disapproval for the "coups d'état". And yet, in the eyes of an average reader there is, I submit, a difference in the inevitable evaluative vectors attached to both these descriptions. To be clear about the point I am making: I am not imputing any inconsistency between these two accounts by the same author but rather am warning that concepts such as "coup d'état" or "effective bill of rights with an effective constitutional court" are not exactly neutral, no matter how much the speaker protests that he is not engaging in any value judgments.

Before moving on to my main point about Stone Sweet's analysis, I wish to put on the table one marginal concern which his discussion raises: not fundamental perhaps but significant enough, I believe, to be flagged here. There is a certain problem of confirmation - or falsification - with the hypothetical test which he erects for the juridical coup d'état: that such a coup results in a new dispensation in the allocation of authority which would have been rejected by the founders of a given constitutional system. This is the problem which we routinely have with all counterfactual tests: how to ascertain the intentions and expectations of the founders? Sometimes it can be done with a reasonably high degree of confidence - Stone Sweet's description of the founders of the Fifth Republic seems to be compelling - but very often we do not have the benefit of relying on any explicit statements, declarations, announcements, travaux préparatoires etc. which would give us a reliable insight into the founders' intentions. But an even more fundamental question is, why should it matter? Indeed, it may well be the case that the founders would not want, or should not have wanted, that their specific intentions regarding the details of the separation of powers should prevail over the changed views as to the institutional structures of rights protection. There is a distinction, popular in the theory of constitutional interpretation, between specific "application" intentions and intentions to enact a general principle ("enactment" intentions) the specific meaning of which is to be conferred upon the constitutional provision by future lawmakers (including, the lawmaking courts). Ronald Dworkin

¹ ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 41 (2000).

describes this distinction as “between what some officials intended to say in enacting the language they used, and what they intended – or expected or hoped – would be the consequence of their saying it”²: the former counts but the latter does not, in ascertaining legislative (or constitution-makers’) intentions. Admittedly this distinction works better for abstract constitutional rights than for provisions on the separation of powers, but the boundary is not watertight. Suppose the framers were concerned mainly about designing a structure for the most effective possible pattern of rights protection, and in time the incorporation of rights into the constitution (France), or the “horizontalization” of rights (Germany) is found to be the best application of this broad, abstract intention. Does it necessarily run against the constitution-makers’ intentions?

But my central observation related to Stone Sweet’s analysis is this. While his analysis of the three cases which constitute his main evidence of judicial coup d’état is convincing and no doubt fully accurate, the whole idea rests on a rather strict distinction between those exercises of judicial creativity – judicial activism, if one prefers the word – which apply fundamentally to the substance, and those which are structural, that is, which affect the structure of authority, and which upset the constitutionally established position of different branches of government, and in particular, enhance the position of courts (including of specialized constitutional courts). It is these latter, but not the former, cases of exercise of judicial creativity which amount to “judicial coups d’état” for Stone Sweet. The centrality of the substantive/structural distinction for Stone Sweet’s analysis is obvious: in its absence, the decisions discussed by Stone Sweet would be just a subset of “judicial activism” or judicial creativity –decisions about which we may disagree whether they were warranted by the constitutional bases in their respective legal system, but this disagreement would be just a routine dispute caused by any novel judicial choice. Analysis in terms of coups d’état would not add anything new to an ongoing discourse on the grounds and legitimacy of judicial review.

So the structural/substantive discussion is central to the analysis; the question is, is it plausible? I have my doubts. To put it briefly, any decision which is novel in the substantive sense – which is path breaking in taking a decision which some people who are reasoning in good faith may believe is not authorized by the constitution, is at the same time structural because it implies an assertion that the court has the competence not only to decide that which it has actually decided but also, more generally, in the sphere in which it has entered. There is no sustainable distinction between a first-order decision about the substantive choice made by the court and the second-order decision about whether the field to which the choice belongs is

² RONALD DWORKIN, “*Comment*” in A MATTER OF INTERPRETATION, 116 (ANTONIN SCALIA, 1997). Also see RONALD DWORKIN, A MATTER OF PRINCIPLE 48-50 (1985).

one within which the court can take any decision in the first place. And if this is the case, any novel decision on substance (implying, as it does, a second-order decision about the court's competence) is at the same time a structural decision – and can be seen, with a lower or higher degree of hyperbole, as a juridical coup d'état.

An example will help clarify the point just made. In his paper, Stone Sweet alludes en passant to the US Supreme Court's decision *Griswold v. Connecticut* (en passant, because he is really concerned with legal systems where judicial constitutional review is exercised by specialized constitutional courts, and also because *Griswold* is for Stone Sweet a case in which the categorization in terms of coups d'état is problematic). But precisely because it is problematic for Stone Sweet, it is interesting to consider it for a moment: why would one find it an uncertain case, from the point of view of Stone Sweet's analysis? *Griswold* is normally depicted as a paradigmatic illustration of judicial activism, US-style: as a case which goes far beyond the constitutional provisions, and "finds" hitherto invisible choices (in that case, the right to privacy) in the constitution, notwithstanding the absence of textual bases for such choices. Stone Sweet points to the reasoning of Justice Douglas (writing for the majority) who, in Stone Sweet's words "[sought] so tortuously to avoid the charge that he has fundamentally revised the U.S. Constitution" (which is, as we know, what all judges say when they engage in activist, dynamic review of statutes under the constitution). He could have added the celebrated dissent by Justice Black who said "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not."³ And also that of Justice Stewart: "It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not".⁴ They make two assertions, respectively, about the meaning of the constitutional provisions, and about the limits of judicial competence, which directly confront the majority opinion written by Justice Douglas, even though in Douglas the former assertion (about the substance of the Constitution) is explicit, and the latter (about judicial competence) only implicit.

What is the meaning of the decision, from the point of view of our substantive/structural distinction? At first sight, the matter is obvious: the decision is about "substance" only; it identifies a new right, inferred from the constitutional "penumbra." The inference may be right or wrong, and people may (and do) disagree about it, but the substantive rightness or wrongness of the court's decision (the argument might go) is neither here nor there from the point of view of the structural issues of legal authority. But this is not so; it would be deeply counter-

³ *Griswold v. Connecticut*, 381 U.S. 479 (1965), 508. (Black J. dissenting)

⁴ *Id.*, 531-32. (Stewart J. dissenting).

intuitive to claim that decisions such as *Griswold* do not affect structural grounds of judicial authority. They do, and do so very importantly and directly. This is because, to reassert the point just made, *Griswold* can be read not only as saying that in US law there is a constitutional right to privacy which substantially restricts the states' rights to legislate in the field of morality. It can also be read as saying that the Supreme Court (and all other appellate courts) has the authority to question and invalidate democratic decisions of state legislatures (as was the case in *Griswold*) on issues characterized as belonging to the constitutional right of privacy, as interpreted by the Supreme Court. In fact, and this is the main point I am making, the first and the second reading are indistinguishable from each other. It is not as if the Court proceeded in two steps: first staked its claim to authority in a given area (a second-order choice) and only then determined what its substantive view on the matter is (a first-order choice), but rather the latter step necessarily and inevitably involves the first step, and so any substantive decision is at the same time a structural one.

The same type of argument can be made with respect to those constitutional courts which occupy the central place in Stone Sweet's analysis, that is, specialized institutions conducting abstract constitutional review of legislative acts. Rather than referring to one of the three courts discussed by Stone Sweet let me mention a court from a region which I have studied at some length, Central Europe. When the first Hungarian Constitutional Court (considered to be one of the most activist in the world) took some of its most famous decisions, say on the death penalty (which it found unconstitutional notwithstanding the absence of any constitutional textual basis for this finding)⁵ or on the constitutionality of the "vetting" ("lustration") law meant to remove former collaborators with the Communist security service from public office,⁶ was it moving simply in a substantive realm or also in the structural field? None of these decisions seems to be "structural" in the way Stone Sweet depicts "the structural" in the three decisions he discusses, and yet each such decision established or reinforced the court's competence in the field where its authority had been previously denied or contested or at the very least untested.

What follows from this comment? If I am correct, whenever a court establishes a novel rule or principle – a rule or principle which, under at least some established conventions of constitutional interpretation, cannot be inferred from the constitution – and uses it to displace the choice of another branch of government, it commits a minor (or sometimes, a major) coup d'état. The juridical coups d'état used by Stone Sweet as exemplifications of his thesis strike us perhaps as different

⁵ Decision 23/1990 of 31 October 1990 discussed in Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* 100-101, 131-133. (2005).

⁶ Decision 60/1994 of 22 December 1994 discussed in, *Id.*, 242-43.

because the structural implications are much more visible, on their face. But structural reconfiguration of authority takes place whenever a court has the last word on issues on which it disagrees with the legislature – and the legislature cannot or does not want to prevail over the court's choices. And if all judicial activism collapses into a series of minor or major coups d'état, then the specificity or distinctness of coups d'état such as performed by the three courts in the cases discussed by Stone Sweet is called into question.