

Alec Stone Sweet's "Juridical *Coup d'État*" Revisited: *Coups d'État*, Revolutions, *Grenzorgane*, and Constituent Power

By Theodor Schilling*

A. Introduction

With his "highly suggestive,"¹ "thought-provoking"² paper, *The Juridical Coup d'État and the Problem of Authority*,³ Stone Sweet initiated an ongoing debate. The paper was the object of immediate comments by three eminent legal scholars⁴ and of a response to them by Stone Sweet.⁵ Most recently, Corrias has developed on its basis a theory of constituent power now.⁶ The present article will mostly deal with those aspects of Stone Sweet's paper on which Corrias has relied.

As Stone Sweet's title indicates, his paper is in two parts. In the first part, in which his analysis is based to an important degree, though not exclusively, on Kelsen's theory of the *Grundnorm*,⁷ Stone Sweet undertakes to define the juridical *coup d'état* of which he goes on to describe three instances. In doing so, he forcefully reminds us, from a comparatist's point of view, of the awesome power of courts of last instance and of constitutional courts to transform a legal system. In the second part, he discusses the constitutional dynamics set in motion by such a transformation, especially the problem of the authority of those courts to overlook the adoption of that transformation by other actors. This second part

* Professor of Law at Humboldt University at Berlin; Visiting Professor at Abai Kazakh National Pedagogical University, Almaty.

¹ Neil Walker, *Juridical Transformation as a Process: A Comment on Stone Sweet*, 8 GERMAN L.J. 929, 929 (2007).

² Luigi Corrias, *The Legal Theory of the Juridical Coup: Constituent Power Now*, 12 GERMAN L.J. 1553, 1553 (2011).

³ Alex Stone Sweet, *The Juridical Coup d'État and the Problem of Authority*, 8 GERMAN L.J. 915 (2007).

⁴ See, e.g., Walker, *supra* note 1; Gianluigi Palombella, *Constitutional Transformations vs. "Juridical" coups d'État. A Comment on Stone Sweet*, 8 GERMAN L.J. 941 (2007); Wojciech Sadurski, *Juridical Coups d'état – all over the place. Comment on "The Juridical Coup d'état and the Problem of Authority" by Alec Stone Sweet*, 8 GERMAN L. J. 935 (2007).

⁵ Alex Stone Sweet, *Response to Gianluigi Palombella, Wojciech Sadurski and Neil Walker*, 8 GERMAN L.J. 947 (2007).

⁶ Corrias, *supra* note 2.

⁷ Stone Sweet, *supra* note 3, at 915.

reflects his empirical rather than normative interest in the juridical *coup d'état*⁸ and contains—in the view of some of his commentators,⁹ which I share—the principal points of interest in Stone Sweet's paper. Their comments therefore refer mainly to that second part. In contrast, the first part, which is mostly analytical, perhaps did not get the attention it requires. Indeed, against some aspects of this analysis I have grave reservations which I shall explain in this contribution. As it is exactly on this analysis that Corrias has based his theory,¹⁰ to refute it, as I shall try to do, requires, I maintain, one to revisit the original paper.

I propose first to deal with Stone Sweet's definition of a juridical *coup d'état* as exemplified by the three instances discussed by him and by another court decision. I shall then touch on the question of authority. Finally, to answer Corrias, some words on the relation between juridical *coups d'état* and constituent power will not be amiss.

B. Stone Sweet's Definition of a Juridical *Coup d'État*

It is common ground, I think, that a *coup d'état*, or a revolution, is characterised by some kind of rupture,¹¹ between the pre-revolutionary *status quo ante* and the post-revolutionary *status quo post*. Terminological differences apart, much of the relevant discussion deals with the question of what exactly constitutes such a rupture. Stone Sweet defines a juridical *coup d'état* as “a fundamental transformation in the normative foundations of a legal system through the constitutional lawmaking of a court.”¹² By “fundamental transformation” he means that both the constitutional law produced by the transformation and the way the legal system operates henceforth demonstrably and fundamentally diverge from the intention of the founders.¹³ “It will also imply a breach of the pre-revolutionary separation of powers orthodoxy.”¹⁴ By “constitutional lawmaking of a court” he means “the modification of the constitution through adjudication A *juridical*

⁸ See *id.* at 926.

⁹ Walker, *supra* note 1, at 932.

¹⁰ See Corrias, *supra* note 2.

¹¹ The expression is used, for example, by Hans Lindahl und Simeon McIntosh. See Hans Lindahl, *The Paradox of Constituent Power*, 20 *RATIO JURIS* 485, 493 (2007); SIMEON MCINTOSH, *KELSEN IN THE GRENADA COURT: ESSAYS ON REVOLUTIONARY LEGALITY* 90 (2008); see also Christoph Möllers, *Pouvoir Constituant—Constitution—Constitutionalisation*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 169, 171 (Armin von Bogdandy & Jürgen Bast eds., 2d ed. 2009) (“[It is] a rupture that finds its institutional correspondence . . . in the US in the Revolutionary War of Independence.”)

¹² Stone Sweet, *supra* note 3, at 915.

¹³ Stone Sweet, *supra* note 3, at 916.

¹⁴ *Id.*

coup d'état constitutes a particular type of lawmaking, one that alters the Basic Norm and a Rule of Recognition."¹⁵

These short quotations from Stone Sweet's paper suffice to reveal a certain indeterminacy of the object of the "fundamental transformation," or rupture. Indeed, to the question of what is claimed to be transformed, Stone Sweet appears to give three widely differing answers. The first answer follows from his definition of the juridical *coup d'état*. According to this definition, it is the normative foundations of a legal system which are being transformed. The second answer is this: "First, we must be able to infer, reasonably, that the constitutional law produced by the transformation would have been rejected by the founders had it been placed on the negotiating table. Second, the outcome must alter—fundamentally—how the legal system operates, again, in ways that were, demonstrably, unintended by the founders."¹⁶ Here, the object of transformation appears to be the constitution as originally intended by the founders. The third answer—given in his response—is this: "In addition to founding documents, the analyst could also read relevant judicial rulings, and academic treatises and commentaries, as indicators of the best opinion of the state of the law at any point in time prior to the candidate *juridical coup d'état* under consideration."¹⁷ Here, the object of transformation is the constitution as it has developed at the time of the candidate *coup*.¹⁸ Note that Stone Sweet's second and third answers reference the "fundamental transformation" to the constitution itself—at different stages of its development—and not to its normative foundations. Under these answers, therefore, a juridical *coup d'état* as understood by Stone Sweet implies a deviation by the court from substantive law. A fourth possible object of transformation, not discussed by Stone Sweet, is the constitution as it fictitiously would have developed if the court, instead of engaging in the *coup d'état*, had reached a different decision.

1. The Distinction Between the Normative Foundations of a Legal System and Its Constitution

1. Stone Sweet's three different answers as to the object of the transformation appear to indicate that he does not really distinguish between the normative foundations of a legal system and its constitution. While he claims that "[a] 'normative foundation' is a precept of a system's higher law. Although there are differences between Kelsen's conception of a *Grundnorm* and Hart's notion of a *Rule of Recognition*, a *juridical coup d'état* is a judicial

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Stone Sweet, *supra* note 5, at 950.

¹⁸ In this sense, see Corrias, *supra* note 2, at 1569 ("[S]ometimes courts go so far in their interpretation that they radically change what until then counted as 'established interpretation.'").

decision that changes both,”¹⁹ he does not say what he means by “constitution.” At least in those legal systems that are endowed with a written constitution—all systems looked at by Stone Sweet in his paper belong to that category—the two concepts should be kept separate.

For Kelsen, the *Grundnorm* is the basic norm which defines the legal system. It commands that the respective historically first constitution in the system—the constitution which emerged from the most recent revolution (in the legal sense²⁰)—be obeyed; “[i]n short: One ought to behave as the constitution prescribes.”²¹ This command also covers all later amendments to the historically first constitution as well as all laws enacted under it, as long as the historically first constitution is respected in those amendments and enactments. However, the *Grundnorm* is not an actual norm. Rather, it is necessarily presupposed by everybody who treats the legal system created under the historically first constitution as valid law, i.e. everybody who considers its norms binding. According to Kelsen, without that presupposition the bindingness of the norms of that system cannot be explained.²²

Stone Sweet sees all that. He even quotes a sentence from Kelsen which uses the term “presupposes.”²³ Still, in his analysis he repeatedly equates, or confuses, the *Grundnorm* with the constitution.²⁴ One particularly clear example of this equation which permeates Stone Sweet’s whole article has been quoted above.²⁵ In another example, Stone Sweet speaks of an “endogenous change in a legal system’s *Grundnorm* . . . accomplished through adjudication.”²⁶ But under Kelsen’s theory, such a change would be a contradiction in terms: For Kelsen, the presupposed *Grundnorm* is not part of the legal system, and developments of the latter therefore cannot lead to a change in it, whether endogenous or otherwise. Rather, a change of the *Grundnorm* necessarily leads to a different system.

The equation between normative foundations and the constitution of a legal system does not necessarily taint Stone Sweet’s analysis of the juridical *coup d’état* as his definition of

¹⁹ Stone Sweet, *supra* note 3, at 915.

²⁰ The meaning of that concept has been exemplified by Adolf Julius Merkl. See Adolf Julius Merkl, *Die Rechtseinheit des österreichischen Staates*, 37 ARCHIV DES ÖFFENTLICHEN RECHTS 56 (1918).

²¹ HANS KELSEN, REINE RECHTSLEHRE 204 (2d ed. 1960).

²² HANS KELSEN, REINE RECHTSLEHRE 66–67, (1st ed. 1934).

²³ Stone Sweet, *supra* note 3, at 916.

²⁴ This confusion of constitution and *Grundnorm* did not go unnoticed. See Palombella, *supra* note 4, at 942 (“the constitution (or to follow Stone’s wording, the *Grundnorm*) . . .”).

²⁵ See *supra* text accompanying note 15.

²⁶ Stone Sweet, *supra* note 3, at 916.

the latter is quite independent of Kelsen's theory. Rather, his references to the normative foundations may well be treated as mere cases of *falsa demonstratio*.²⁷ But it obscures an important distinction. There are two possible "accomplishments" of revolutionary or *coup d'état* adjudication: Judgments can change the *Grundnorm*, and with it the legal system (but in that case, it is better to speak of the presupposition of a new *Grundnorm*); this is what Kelsen calls a revolution (in the legal sense). Alternatively, judgments can change the constitution (even fundamentally) while maintaining the legal system.

2. Stone Sweet quotes three examples of juridical *coups d'état*. It will be best to consider those cases to decide whether they represent, in accordance with Stone Sweet's first answer, illustrations of court-engineered changes in the *Grundnorm* or rather, in accordance with his second and third answers, transformations of the respective constitutions. On the way, we shall discuss what Kelsen means by "manner" in his discussion of a revolution.

Stone Sweet's first example is the German Federal Constitutional Court's (FCC) decision in *Lüth*.²⁸ To summarize briefly, in this decision the FCC subordinated private law to the basic rights enumerated in the German Basic Law, i.e., the constitution, with large consequences for its own power of review of civil cases. Stone Sweet's second example is the jurisprudence of the French Constitutional Council (CC) in the 1970s²⁹ incorporating the rights enumerated in the preamble of the French constitution of 1946 and referred to in the preamble of the actual French constitution of 1958 into the dispositive part of the latter, with important consequences for the CC's power to review parliamentary acts *ex ante*. In his third example Stone Sweet focuses on the European Court of Justice's (ECJ) decisions introducing the direct effect of some EEC Treaty provisions³⁰ and the supremacy of EEC law over domestic law.³¹ He argues that the ECJ thereby "replaced the Member States' blueprint of the legal system with its own."³² Indisputably, all three examples have led to profound transformations of the legal systems concerned. But did they change their normative foundations?

²⁷ See, e.g., Palombella, *supra* note 4, at 942.

²⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 7 (198), 1958 (Ger.).

²⁹ Stone Sweet, *supra* note 3, at 919.

³⁰ Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. 1, 12.

³¹ Case 6/64, Flaminio Costa v E.N.E.L., 1964 E.C.R. 585.

³² Stone Sweet, *supra* note 3, at 924.

3. In support of his contention that a juridical *coup d'état* changes the *Grundnorm*, Stone Sweet quotes Kelsen: "Decisive [sc. for a revolution] is only that the valid constitution has been changed or replaced in a manner [in the German original: *auf eine Weise*] not prescribed by the constitution [that was] valid until then."³³ Stone Sweet stresses that this is just the case of a juridical *coup d'état* which he claims is characterised by a constitutional court delegating to itself new jurisdictional authority, in a manner not prescribed by the constitution. But it appears that Stone Sweet is fundamentally misunderstanding Kelsen. Decisive for Kelsen is the *manner*, i.e. the form of the change of the constitution. In contrast, the aspect stressed by Stone Sweet concerns the substance of the decision and not its "manner" as understood by Kelsen. Indeed, the juridical *coup d'état* is exactly characterised by the fact that the court does act in the manner described by the constitution, i.e. by a judicial decision. This even constitutes its distinction from a "revolutionary" *coup d'état*: that it is "accomplished . . . under an exercise of power that—as a matter of form if not substance—has been properly delegated to the judicial authority."³⁴

Indeed, the juridical *coup d'état* as defined by Stone Sweet is a subset of substantively wrong court decisions.³⁵ Of course, in every legal system such decisions are inevitable. Every legal system must take account of their possibility. In dealing with them, the choice is between justice in the individual case and legal certainty. The first would make the validity of a judgment dependent on its substantive correctness and therefore deny validity to a substantively wrong judgment, much as Stone Sweet advocates for the cases of juridical *coups d'état*. Under the aspects of legal certainty, in contrast, it is preferable to recognise even a substantively wrong judgment as valid. All developed legal systems, by providing for the possibility of a judicial remedy against judicial decisions on questions of law, have opted for legal certainty; by providing for that possibility, the law makes it clear that even a substantively wrong judgment is an act of the State which is—at least provisionally—valid.³⁶ Therefore, if such a judgment becomes final it cannot be said that it is contrary to the law. While in principle the law had provided for a different outcome, subsidiarily it is prepared to accept any result the court may reach. That acceptance follows implicitly but necessarily from the fact that judgments of whatever content can become final.³⁷

³³ Stone Sweet, *supra* note 5, at 948.

³⁴ Walker, *supra* note 1, at 929.

³⁵ For reasons of convenience, I shall follow Stone Sweet's terminology though not without misgivings: For Kelsen, a *coup d'état* is a subset of a revolution. See KELSEN, *supra* note 21, at 213. Stone Sweet's *coup d'état*, by contrast, is, as we shall see, in no Kelsenian sense a revolution.

³⁶ See Adolf Julius Merkl, *Justizirrtum und Rechtswahrheit*, 45 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 452 (1925).

³⁷ *Id.* at 378; cf. KELSEN, *supra* note 21, at 272–73.

All this applies *mutatis mutandis* to courts against whose decisions there is no remedy.³⁸ While such courts are still bound by substantive law, there is no sanction provided for in the case they deviate from that law. It can therefore be said that such courts are bound only in their conscience, i.e., that their obligation to respect the law is not a legal but a moral obligation.³⁹ Institutions which are bound by law but not subject to legal control (a subset of which are courts against whose decisions there is no remedy) have been dubbed, *Grenzorgane* (borderline institutions) mostly in Austrian academic discourse.⁴⁰ Characterising the duty of such institutions to respect the law as a (mere) moral duty makes it especially clear that for them to neglect that duty has no legal consequences. A decision of a *Grenzorgan* is legally valid irrespective of whether it has decided the case in conformity with substantive law or not.⁴¹

II. *Stone Sweet's First Answer*

1. We can now return to Stone Sweet's first answer and consider whether the courts whose decisions he quotes as examples of juridical *coups d'état*—all of them *Grenzorgane*—have indeed thereby changed the normative foundations of their respective systems. It is submitted that in the German and French cases they obviously have not. From a Kelsenian point of view—as the *Grundnorm* is a Kelsenian concept, it is appropriate to follow Kelsen—this is self-evident as both the FCC and the CC decided in the manner described by their respective constitutions, i.e. by judicial or quasi-judicial decisions after judicial proceedings. It also corresponds to what happened, or rather did not happen, on the ground. Concerning the CC, nobody ever doubted that it was (and is) still the 1958

³⁸ Those courts are also the specific subject of the “deep structural question” raised by Stone Sweet as to “whether the constitutional delegation to the judge includes substantive constraints on the judge’s decision-making.” Stone Sweet, *supra* note 3, at 916.

³⁹ See ALFRED VERDROSS, *VÖLKERRECHT* 24 (2d ed. 1950). Another interpretation is that while following the law leads to an ideal decision, to deviate from the law leads to a still possible decision. See KELSEN, *supra* note 21, at 274. But see James W. Harris, *Kelsen's Concept of Authority*, 36 *CAMBRIDGE L.J.* 353, 358 (1977). Yet another is that while a court *may* only decide according to the law, it *can* also decide differently. Theodor Schilling, *Artikel 24 Absatz 1 des Grundgesetzes, Artikel 177 des EWG-Vertrags und die Einheit der Rechtsordnung*, 29 *DER STAAT* 161, 169–70 (1990).

⁴⁰ The notion was coined by Verdross. See VERDROSS, *supra* note 39, at 25. I am grateful to Ewald Wiederin and Markus Vasek for this information. A *Grenzorgan* has the position of the “second organ” in Stone Sweet’s generic definition of an authority conflict, the other organ being the constituent or constituted powers. Stone Sweet, *supra* note 3, at 919.

⁴¹ See Merkl, *supra* note 36, at 379. According to Friedrich Koja, the question “*et quis custodiat ipsos custodias*” can be answered, in the case of a *Grenzorgan*, only by referral to the “open society of constitutional interpreters,” a notion coined by Peter Häberle. See Friedrich Koja, *Der Begriff der Allgemeinen Staatslehre*, in *STAATSRECHT UND STAATSWISSENSCHAFTEN IN ZEITEN DES WANDELS: FESTSCHRIFT FÜR LUDWIG ADAMOVICH ZUM 60. GEBURTSTAG* 244, 274 (Bernd-Christian Funck et al. eds., 1992); Peter Häberle, *Die offene Gesellschaft der Verfassungsinterpreten*, 1975 *JURISTENZEITUNG* 297 (1975). A close enough American equivalent would be the phrase “marketplace of ideas,” coined by William Brennan in his concurring opinion to *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965).

constitution of the Fifth Republic which applied even if its contents may have changed. *Pace Stone Sweet*,⁴² nobody appears ever to have spoken, in this context, of a Sixth Republic. Indeed, in the meantime, the French (derivative) constituent power has ratified the changes wrought by the CC.⁴³ Basically, the same applies to Germany. Insofar as authors have spoken, supposedly tellingly, of revolutionary changes wrought by the FCC's decision⁴⁴ they obviously have spoken metaphorically.

In the case of the ECJ's jurisprudence, it is submitted, one should distinguish between *van Gend en Loos* on the one hand and *Costa v. E.N.E.L.* on the other. According to Kelsen, there was no revolution in *Van Gend en Loos* as the ECJ decided in a procedure provided for under the EEC Treaty. This formalistic point apart—as we shall see, it does not hold absolutely—*van Gend en Loos* did not create, or presuppose, a new *Grundnorm* for the EEC system. It is true that in that judgment the ECJ spoke of the Community as a new legal order of international law.⁴⁵ However, that characterisation was unexceptional even at that time; the Community in fact had been founded through treaties under international law, and the description as a “legal order” of a treaty system providing for its own authorities for law-making and deciding cases was in no way far-fetched. Consequently, before and after *van Gend en Loos* EEC law had to be respected according to the ancient international law maxim of *pacta sunt servanda*, because the EEC Treaty had been concluded according to the relevant provisions of the Member States' constitutions which had to be respected according to their proper *Grundnormen*. And exactly the same applies to *Pupino*⁴⁶ quoted by Corrias, although in the meantime, as we shall see, the *Grundnorm* of EEC (EU) law had effectively, if limpingly, changed.

Still, from a quite different perspective, Lindahl⁴⁷ sees *van Gend en Loos* as an exercise of constituent power by the ECJ because of the circularity of the latter's reasoning and the rupture he claims that circularity indicates. He sees circularity in this claim by the ECJ: “The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States.”⁴⁸ According to Lindahl,⁴⁹ “the claim that the Treaty is more than an ordinary treaty

⁴² Stone Sweet, *supra* note 3, at 922.

⁴³ See 1958 Const. 61-1 (Fr.).

⁴⁴ Stone Sweet, *supra* note 5, at 949.

⁴⁵ Case 6/64, Flaminio Costa v E.N.E.L., 1964 E.C.R. 585.

⁴⁶ Case C-105/03, Criminal Proceedings Against Maria Pupino, 2005 E.C.R. I-5285.

⁴⁷ Lindahl, *supra* note 11, at 493.

⁴⁸ Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. 1, 12.

under international law only holds if one presupposes that the functioning of a common market is not of 'direct concern' only to the states but also to individuals, that is, only if one presupposes that the Treaty is not an ordinary treaty under international law."

I do not wish to dispute that there is a certain circularity in the ECJ's reasoning. But it is very doubtful whether circularity of reasoning can be equated, as such, to rupture and thereby to a revolution or *coup d'état* and the exercise of constituent power. Rather, it appears that a certain circularity of reasoning is inherent in every decision under law.⁵⁰ Every such decision requires "*eine ständige Wechselwirkung, ein Hin- und Herwandern des Blicks*"⁵¹ (a constant interplay, a repeated change of the perspective) between the legal norm under which a set of facts is to be subsumed and the latter. This "*Hin- und Herwandern des Blicks*," which is recognised in German *Methodenlehre*,⁵² insists that, to a certain extent, the legal norm on which a decision is based is only created during the making of that decision. Therefore, circularity of reasoning in a court decision cannot, without more, indicate a rupture and thereby the exercise of constituent power by that court.

Concerning *van Gend en Loos* I am not convinced that the circularity involved in that decision goes beyond what is inevitable in legal decisions. That the EEC Treaty, and the common market, were of direct concern not only to the Member States but also to their citizens was clearly shown, already at the time of the ECJ's decision, by the institution of the regulation (now in Art. 288 (2) TFEU) which was, and is, directly applicable in all the Member States, and by the preliminary ruling procedure (now in Art. 267 TFEU) quoted by the Court in *van Gend en Loos*, and therefore was at the very least well arguable on the basis of the original EEC Treaty. So the argument that that Treaty was nothing but "an agreement which merely creates mutual obligations between contracting States," as Lindahl renders the "acquired' reading,"⁵³ was really no more compelling than the opposite position taken up by the ECJ in *van Gend en Loos*. To underpin Lindahl's argument requires a circularity equivalent to that used by the ECJ.

⁴⁹ Lindahl, *supra* note 11, at 493.

⁵⁰ See Arthur Kaufmann, *Über den Zirkelschluß in der Rechtsfindung*, in *FESTSCHRIFT FÜR WILHELM GALLAS ZUM 70. GEBURTSTAG AM 22. JULI 1973*, at 7 (Karl Lackner, Heinz Leferenz, Eberhard Schmidt, Jürgen Welp & Ernst A. Wolff eds., 1973).

⁵¹ KARL ENGISCH, *LOGISCHE STUDIEN ZUR GESETZESANWENDUNG* 15 (1963).

⁵² See, e.g., MARTIN KRIELE, *THEORIE DER RECHTSGEWINNUNG* 197–205 (2d ed. 1976); Friedrich Müller, *JURISTISCHE METHODIK* 168 (3d ed. 1989); MARIJAN PAVCNIK, *JURISTISCHES VERSTEHEN UND ENTSCHEIDEN: VOM LEBENSACHVERHALT ZUR RECHTSENTSCHEIDUNG. EIN BEITRAG ZUR ARGUMENTATION IM RECHT* 79–103 (1993).

⁵³ Lindahl, *supra* note 11, at 493.

To sum up, in all cases discussed it is perfectly clear that the *Grundnorm*, understood as not an actual but a presupposed norm, was not changed. After *Lüth* in Germany, after 1980 in France, after *Van Gend en Loos* as well as *Pupino* in the EEC/EU it was perfectly clear that the identities of the respective constitutions, as opposed to their contents, were still the same. The respective *Grundnormen* still ordered to obey, respectively, the German Basic Law—the constitution of 1949—the French constitution of 1958, the EEC Treaty of 1957 on the basis of *pacta sunt servanda* and the EU Treaty as an independent source of law as developed by the ECJ since its 1964 judgment in *Costa v. E.N.E.L.* What arguably had changed, and even fundamentally, were the contents of those constitutions, with large impact on the legal systems constituted by them. Thus Stone Sweet's first answer does not appear to be correct; in those cases he quotes as juridical *coups d'état* the courts did not change the formative foundations of the respective legal system. His claim that "[t]he old [Basic] Norm and the old Rule [of Recognition], once overthrown, cannot provide the normative basis for the way the new legal system evolves after the *coup*,"⁵⁴ if applied to his three examples, is simply bewildering.

2. On the face of it, *Costa v. E.N.E.L.* cannot be a revolution in the Kelsenian sense as that decision has been issued in the manner prescribed by the pre-existing constitution (the EEC Treaty), i.e. by judicial decisions. However, such an argument would overlook the deeper reasons of Kelsen's argument, i.e. that there is an alternative source for the authority of courts to decide cases contrary to substantive law.⁵⁵ But those reasons have their limit: There cannot be an alternative source authorising the courts to presuppose a new *Grundnorm* as a constitution providing for such an authorisation would necessarily abandon itself. Indeed, only "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 characterised as a coup."⁵⁶ The ECJ in *Costa v. E.N.E.L.*, as we shall see, explicated its task outside the range of the rules of the game and asserted new, previously un-conferred powers for the future.

Indeed, in contrast to *van Gend en Loos*, *Costa v. E.N.E.L.*, it is submitted, did presuppose a new *Grundnorm*. Still, the revolution in *Costa v. E.N.E.L.* does not lie in the ECJ's finding of the supremacy of EEC law over Member State law as such no more than it lay, one year before, in the finding of direct effect of EEC Treaty provisions in *Van Gend en Loos*. Both aspects, evidently, dramatically changed the content of the EEC "constitution"—the EEC Treaty—compared with possible contrary decisions, and thereby qualified as *coups d'état* within the meaning of Stone Sweet but they did not change the identity of that Treaty. The

⁵⁴ Stone Sweet, *supra* note 3, at 917.

⁵⁵ See *supra* notes 37–38 and accompanying text.

⁵⁶ Palombella, *supra* note 4, at 941 (emphasis added).

revolution rather lay in the fact that in *Costa v. E.N.E.L.* the ECJ, deviating from its *Van Gend en Loos* judgment of just one year before, did not see the Community legal system any longer as a new system of public international law but rather the EEC Treaty as an independent source of law.⁵⁷ With that decision, the ECJ effectively disrupted, from its point of view, the link connecting the origin of the Community system to the pre-existing Member State systems thereby providing for the rupture which characterises a revolution.⁵⁸ By claiming autonomy for the Community legal system the ECJ also claimed that the EEC Treaty had to be obeyed not according to the ancient international law maxim of *pacta sunt servanda* but in its own right. This stance could only be justified, according to Kelsenian theory, by the presupposition of a corresponding *Grundnorm*. By categorically claiming autonomy for the Community legal system, the ECJ has put that system on a revolutionary basis. As any revolution, it is, at the same time, illegal from the point of view of the system or systems overthrown by the revolution, a fact of life to be accepted from the point of view of an external observer and the basis of a new legal system from the proper point of view of the revolution.⁵⁹

Costa v. E.N.E.L. can be compared to a rather exotic and somewhat paradoxical decision which, to my mind, is the very embodiment of a juridical revolution. The case of *The Republic of Fiji v. Chandrika Prasad*⁶⁰ is paradoxical because the Fiji Court of Appeal there proceeds to a juridical revolution in order to deny a factual military revolution which had declared the pre-revolutionary Fiji constitution to be abrogated and to uphold, or reinstate, the pre-revolutionary *status quo ante*.⁶¹ The Court of Appeal of Fiji was called upon to decide, in a civil case, the preliminary question whether the pre-revolutionary Fiji constitution was still the highest law of the land. For the Court of Appeal, the decisive point was whether the military revolution had been effective. To answer that question, the court applied a very demanding set of rules on effectivity. As the revolutionary government could not satisfy the Court of Appeal that its revolution had been effective, the court concluded that the old Fiji constitution was still in force.

The Court of Appeal, while underlining that its judges were sitting as judges of a Fiji court, called its jurisdiction supra-constitutional but declined to discuss the theoretical basis for exercising it. This indication must mean that the Court of Appeal's competence was based

⁵⁷ Cf. Lindahl, *supra* note 11, at 493 n.5.

⁵⁸ See sources cited *supra* note 11.

⁵⁹ Cf. Stone Sweet, *supra* note 5, at 949.

⁶⁰ Republic of Fiji Islands v. Prasad, [2001] FJCA 2; Abu0078.2000s (Mar. 1, 2001), available at <http://www.paclii.org/fj/cases/FJCA/2001/2.html>.

⁶¹ For more detailed commentary on this decision, see Theodor Schilling, *The Court of Justice's Revolution: Its Effects and the Conditions for Its Consummation. What Europe Can Learn from Fiji*, 27 EUR. L. REV. 445, 455–57 (2002).

on a law of Fiji which, as supra-constitutional law, must have been judge-made. The same applies to the substantive law it applied, i.e. the set of rules on effectivity. To apply such a law which it had created as it were *ex nihilo* and therefore revolutionarily, and to expect it to be obeyed by, among others, the revolutionary rulers, as indeed it was, the Court of Appeal clearly had to presuppose a corresponding *Grundnorm*. Like the ECJ in *Costa v. E.N.E.L.*, by referring to its “supra-constitutional jurisdiction,” it explicated its task outside the range of the rules of the game.

3. The cases we have discussed put into evidence what I have claimed above: That *Grenzorgane* can leave the path of juridical orthodoxy in two very different ways. The more radical one is the revolution. A juridical revolution, being a revolution by a body set up under the pre-revolutionary constitution and therefore normally bound to follow that constitution, is characterised by the court stepping outside those bonds and outside the legal system defined by the pre-revolutionary *Grundnorm*. Still, such a revolution, as any revolution in the legal sense only, may be virtually invisible, i.e. does not necessarily lead to results different from those reached under the pre-revolutionary constitution. It is, to use a biological metaphor, a change in the genotype rather than in the phenotype of a legal system. The more obvious way for a court to deviate from substantive law is, by definition, the *coup d'état*—a visible, fundamental transformation of the legal system that changes its phenotype rather than in its genotype. That difference between Stone Sweet's *coup d'état* and a juridical revolution in the legal sense is well demonstrated by *Costa v. E.N.E.L.*: The *coup d'état* part of that decision—the ECJ's insistence on the superiority of all EEC law over all domestic law—is immediately visible and went into the face of what the Member States' governments had pleaded before the court.⁶² However, this did not prevent the Member State courts from accepting these features of the EEC (now: EU) law by basing them, in their application to the respective Member State, exactly on a command by the latter's constitution.⁶³ In contrast, the revolution—the ECJ's insistence on the autonomy of the Community legal order—had no immediate effect and is even today not consummated, i.e. not accepted by at least some of the Member States and their constitutional courts. Indeed, here the revolutionary and the pre-revolutionary systems coexist, as it were. They are applied by different courts which are not hierarchically connected, i.e. which are both *Grenzorgane*. As long as those courts try to avoid differences between their respective jurisprudence, there is no need for a showdown between those systems.⁶⁴

⁶² To give an extra-judicial example of a (mere) *coup d'état*: Hitler's *Machtergreifung* was no revolution. While it changed the working of the institutions of the Weimar Republic fundamentally, it did not change its *Grundnorm*: You shall obey the Weimar Constitution and all laws created in a manner prescribed by it, including the *Ermächtigungsgesetz*.

⁶³ See Trevor Hartley, *The Constitutional Foundations of the European Union*, 117 L.Q. REV. 225, 243 (2001); see also BverfG, July 6, 2010, docket number 2 BvR 2661/06 (Ger.), available at JURIS.

⁶⁴ Schilling, *supra* note 62, at 463.

III. Stone Sweet's Second and Third Answers

1. The enquiry into Stone Sweet's first answer was in terms of the correctness of his presuppositions. The enquiry into his two remaining answers is of a completely different nature. It is the enquiry into whether it can be said that the respective courts, by handing down the decisions Stone Sweet considers as juridical *coups d'état*, acted somewhat improperly by deciding as they did, because they deviated thereby from the will of the founders or the best opinion of the state of the law and at the same time arrogated additional power to themselves.

Let us deal with Stone Sweet's second answer first. The two points he made in this proposition—that the constitutional law produced by the transformation would have been rejected by the founders and that the outcome alters fundamentally how the legal system operates in ways unintended by the founders—can be treated, for present purposes, (largely) together. While they deal respectively with the substantive and the procedural law of the constitution, their reliance on the founders' original intent is the same.⁶⁵ Stone Sweet's originalist approach is not self-evident in Europe where the concept of the founders as secular saints generally does not ring true.⁶⁶ On the one hand, it clearly is not adequate in that type of system that is prevalent in Europe where a constitution can be understood as a "living instrument"⁶⁷ and in which the FCC, considering the case law of the ECJ, can say that *Rechtsfortbildung* (in the FCC's translation, further development of the law sc. by the courts) was always part of jurisprudence in Europe.⁶⁸ On the other hand, the historical interpretation which, within Europe, comes closest to the originalist approach is seen, traditionally, as only one of several different methods of interpretation which are to be applied concomitantly. Also, the historical interpretation generally asks less for the ideas of the "founders" which are seen as only the draughtsmen of the future constitution (although the *travaux préparatoires* certainly play a role in interpretation) but for the ideas of the legislator, i.e. in the case of a historically first constitution, the constituent power.⁶⁹ In a democratic society, this is normally the people. To take Stone Sweet's French example: While we may know, with a sufficient degree of certainty, what de Gaulle and his advisors wanted when they drafted the constitution of the French Fifth Republic, we have no exact

⁶⁵ Under a different aspect, Walker sharply distinguishes between those two cumulative criteria. See Walker, *supra* note 1, at 930.

⁶⁶ See *id.*

⁶⁷ See *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 31 (1978). See also *Hinds v. Attorney General of Barbados*, [2002] 1 A.C. 854, 870 (P.C.) [870] ("As it is a living, so must the Constitution be an effective, instrument.").

⁶⁸ See, e.g., BVerfG, July 6, 2010, docket number 2 BvR 2661/06 (Ger.), available at JURIS.

⁶⁹ On the doubts connected with the concept of legislative intent, see, for example, Daniel Greenberg, *The Nature of Legislative Intention and Its Implications for Legislative Drafting*, 27 STATUTE L. REV. 15 (2006).

idea of what the French people's intention was when enacting that constitution. *La volonté générale* is always an abstraction and notoriously difficult to ascertain in a concrete case.

But even the will of the "founders" is not so easily ascertained. While it may be true that they had a certain idea of what the substantive law of the constitution was supposed to be, it is also true that the "founders" of the Fifth Republic provided for the institution of a *Conseil constitutionnel* which even then had certain traits of a constitutional court. More than 150 years after John Marshall's decision in *Marbury v Madison*,⁷⁰ any diligent drafter of a constitution must have known that the institution of such a court held the strong possibility that it might issue rather unexpected decisions. Therefore, the drafters that instituted the CC must be taken to have accepted whatever decisions the latter might reach.⁷¹

Stone Sweet's third answer, i.e. to look at the constitution as it has developed at the time of the candidate *coup* takes up the above criticism. The problem with it, from what must be supposed to be Stone Sweet's point of view, is that under it, at least two of his three examples of juridical *coups d'état* cease to be such *coups*. The *Lüth* judgment was, as Stone Sweet himself relates,⁷² foreshadowed by both doctrinal writings⁷³ and court decisions.⁷⁴ Also in the case of the ECJ, at least the judgment in *Costa v. E.N.E.L.* had been foreshadowed by doctrinal writings.⁷⁵ Under Stone Sweet's third answer, the only possibility to claim that the FCC's and the ECJ's decisions constituted *coups d'état* is to claim that the foreshadowing writings and decisions were not indicators of "the best opinion of the state of the law." But this surely would be an extraordinary yardstick: That

⁷⁰ 5 U.S. (1 Cranch) 137 (1803).

⁷¹ This argument, of course, is similar to the one we encountered above when discussing the authority of courts to deviate, in their decisions, from substantive law. See *supra* text accompanying note 37.

⁷² Stone Sweet, *supra* note 3, at 920.

⁷³ See, e.g., Hans Carl Nipperdey, *Gleicher Lohn der Frau für gleiche Leistung*, 3 RECHT DER ARBEIT 121 (1950).

⁷⁴ See, e.g., Bundesarbeitsgericht [BAG] [Federal Labor Court] Dec. 12, 1954, ENTSCHEIDUNGEN DES BUNDEARBEITSGERICHTS [BAGE] 1 (185) (Ger.); Bundesarbeitsgericht [BAG] [Federal Labor Court] Jan. 15, 1955, ENTSCHEIDUNGEN DES BUNDEARBEITSGERICHTS [BAGE] 1 (258) (Ger.).

⁷⁵ See, e.g., Hans Peter Ipsen, *Das Verhältnis der europäischen Gemeinschaften zum nationalen Recht*, in AKTUELLE FRAGEN DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS: GEMEINSCHAFTSRECHT UND NATIONALES RECHT, NIEDERLASSUNGSFREIHEIT UND RECHTSANGLEICHUNG: EUROPARECHTLICHES KOLLOQUIUM 1–27 (1965). The address was given five days before the judgment in *Costa v. E.N.E.L.* was handed down. Although it is rather doubtful whether this address has, as the speaker used to claim, decisively influenced the ECJ, it doubtlessly shows that the latter's decision was no bolt from the blue.

every deviation by a constitutional court from “the best opinion,” if it involves structural elements, constitutes a *coup d'état*.⁷⁶

Finally, the requirement that a juridical *coup d'état* presupposes a fundamental change in the way the legal system operates involves a certain sleight of hand. The decisions discussed have altered the way those systems operate less in contrast to the ultimately unknowable intentions of the respective constituent powers nor, as just discussed, in contrast to the legal situation immediately before their issuance than in contrast to fictitious different decisions. In other words, they have altered that way less in relation to the past which in some cases had already anticipated them to a certain degree at least⁷⁷ but in relation to an alternative future. They therefore are best seen as directional decisions, as sudden jumps forward in the otherwise slow and placid development of legal systems of which they “change,” i.e., determine the way in which those systems will operate henceforth. That perspective tallies Stone Sweet’s interest in *coups d'état* as “critical junctures.”⁷⁸ But it makes it urgent to try and find whether there is a distinction between such *coups* and other (seminal) decisions.

2. Sadurski in his comment on Stone Sweet’s paper correctly underlines that an analysis of the question in terms of *coups d'état* can add something new to the “ongoing discourse on the grounds and legitimacy of judicial review” only if Stone Sweet’s distinction between “exercises of judicial creativity . . . which apply fundamentally to the substance, and those which are structural . . . and in particular enhance the position of courts” is plausible.⁷⁹ As he and other commentators have remarked, it is not. On the one hand, the distinction between a juridical *coup d'état* and a merely interpretative decision is one of degree,⁸⁰ and such *coups* are “all over the place.”⁸¹ This indicates that there are no clearly defined or definable attributes by which to distinguish a juridical *coup d'état* from any other court decision. On the other hand, “any novel decision on substance (implying . . . a second-order decision about the court’s competence) is at the same time a structural decision.”⁸² Neither can there be a good reason for a supreme or constitutional court to refrain from an interpretation it deems correct just because that interpretation happens to add to its

⁷⁶ For a wholly different yardstick on the somewhat similar question of whether the European Court of Justice is acting *ultra vires*, see BVerfG, July 6, 2010, docket number 2 BvR 2661/06 (Ger.), available at JURIS (“[T]he Court of Justice has a right to tolerance of error.”).

⁷⁷ See *supra* notes 75–78 and accompanying text.

⁷⁸ Stone Sweet, *supra* note 3, at 927.

⁷⁹ Sadurski, *supra* note 4, at 937.

⁸⁰ Walker, *supra* note 1, at 93132; Sadurski, *supra* note 4, at 939; Cossias, *supra* note 2, at 1569.

⁸¹ Sadurski, *supra* note 4, at 935; Cossias, *supra* note 2, at 1569.

⁸² *Id.* at 938.

powers (and generally by the same token to its workload). *Marbury v. Madison* is a good example. In this long and well-reasoned judgment, John Marshall never comes around to discuss the questions whether his judgment enhances the powers of the court, and if so, whether this should have any bearing on his decision. The answer to the first question, it is submitted, is obviously affirmative whereas the answer to the second question must be negative. To hold otherwise would mean to invent a presumption against the admissibility of any interpretation enhancing the courts' powers.

3. According to Stone Sweet, if the statement "constitutions that confer upon a court the power of constitutional review impose no meaningful *substantive* constraints on the exercise of that court's review authority"⁸³ were true, the null proposition according to which a juridical *coup d'état* is a theoretical impossibility would be valid. On the one hand, it is not quite clear to me what Stone Sweet means by "theoretical impossibility" of a juridical *coup d'état*. As we have seen, both juridical revolutions and decisions that, by deviating from substantive law, amount to a fundamental transformation of the legal system itself are possible. The fact that at least two of Stone Sweet's three examples of juridical *coups d'état* do follow a possible interpretation of substantive law of course does not exclude the theoretical possibility of decisions which do not so follow. On the other hand, Stone Sweet appears to see it as a necessary consequence of the null proposition that it "make[s] no sense to ask if the court ever decided a case wrongly, as a matter of substantive law,"⁸⁴ which, according to him, would mean the end of Continental legal science. This claim is easily refuted if one accepts Merkl's and Kelsen's theory that while courts can decide against substantive law, they still ought to follow it;⁸⁵ substantive constraints exist even if they are not legally enforceable against *Grenzorgane*. For legal science that means that while it should accept a court's decision as lawful irrespective of its contents, there is no reason whatsoever not to discuss vigorously whether the court ought to have decided otherwise. Indeed, that is exactly what is going on quite naturally all the time.⁸⁶ Seen ex post facto, Stone Sweet appears to agree: "The *juridical coup d'état* can be institutionalized . . . with transformative effects on law and politics," and "mainstream doctrine, at least, is likely to follow, at least eventually."⁸⁷

A thought experiment may further show, in contrast to what Stone Sweet appears to claim,⁸⁸ that a vigorous discussion of a court decision is not necessarily an indication of a

⁸³ Stone Sweet, *supra* note 5, at 948.

⁸⁴ *Id.*

⁸⁵ See *supra* notes 39–42 and accompanying text.

⁸⁶ This is also the answer to Stone Sweet's question why European doctrinal authorities spend a great deal of time asking whether important decisions have been decided correctly. See Stone Sweet, *supra* note 5, at 948.

⁸⁷ Stone Sweet, *supra* note 3, at 917.

⁸⁸ *Id.* at 917, 927; Stone Sweet, *supra* note 5, at 951.

juridical *coup d'état*. If we suppose, as Stone Sweet does,⁸⁹ that the courts, instead of engaging in what Stone Sweet considers a *coup d'état*, had taken the opposite decisions, those fictitious decisions, by definition, could not qualify as juridical *coups d'état*. But it is not difficult to imagine very similar, or even the very same, doctrinal discussions raging in case the respective courts had decided in opposite ways: Has private law indeed priority over the German constitution? Is there indeed no protection of human rights against the legislator in France? What could have become of the (fictitiously) rather anaemic EEC if the ECJ had accepted (or decreed) the direct effect of EEC Treaty provisions and the superiority of that Treaty over domestic law? It is a curious and, it is submitted, misguided approach to see a vigorous ongoing academic discussion of a seminal decision as proof, or at least as an indication, that the latter constitutes a juridical *coup d'état*.

C. The Question of Authority

Of special interest to Stone Sweet is the question of the constitutional courts' authority. It is less the question of their authority to perform a juridical *coup d'état*⁹⁰ than the question of their authority to ensure that their decisions be respected in first line by other courts. Indeed, he claims that in each of his three cases the respective courts "radically expanded the scope of [their] own authority . . . while generating a set of fundamental authority conflicts."⁹¹ It is this "while" which requires discussion.

Descriptively, Stone Sweet finds that in his three examples, which can be treated, up to a point, in parallel, the *Grenzorgane* largely lack such authority because they have no definite position in the judicial hierarchy (with the possible exception of the FCC⁹²). That finding should be uncontroversial with the important proviso, however, that it does not apply to the case actually decided by the *Grenzorgan* (if any). Decisions in those cases generally have the full authority of *res judicata*, if necessary backed up by another *Grenzorgan*⁹³ or a court within the hierarchy. Translated into the terminology of the present contribution, this lack of authority simply indicates that there is in the respective legal systems not just one *Grenzorgan* but a plurality of them which are not subjected to legal control and therefore cannot be constrained, by legal means, to follow the *coup d'état*. One may doubt the wisdom of such a constitutional arrangement⁹⁴ but it has *prima facie* nothing to do with

⁸⁹ Stone Sweet, *supra* note 5, at 952 n.6.

⁹⁰ That question is raised by Corrias. See Corrias, *supra* note 2, at 1565–66.

⁹¹ Stone Sweet, *supra* note 3, at 919.

⁹² Stone Sweet, *supra* note 3, at 922.

⁹³ See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 31, 1990, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 159 (195–96), 1990 (Ger.).

⁹⁴ See, e.g., Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT'L J. CONST. L. 44 (2007).

the question of the authority to see a juridical *coup d'état* respected. Rather, it applies to all decisions, without exception, of a *Grenzorgan* in a system which encompasses also other *Grenzorgane*. It therefore is disputable that the juridical *coup d'état* and the constitutional courts' lack of authority to see it respected are intimately connected. Insofar however as the *coup d'état* created a wider jurisdiction for the *Grenzorgane*, it may have caused their lack of authority to become more visible⁹⁵ and thereby arguably may have demonstrated that these consequences had not been contemplated by the "founders." The important point here is that it is not the juridical *coup d'état* that creates authority questions.⁹⁶

Here the parallelism between the three cases discussed by Stone Sweet ends. In the case of the FCC whose lack of authority is the least pronounced—if it exists at all—one could even claim, turning Stone Sweet's argument on its head, that the undisputed⁹⁷ possibility of a constitutional complaint against decisions of all other courts including civil ones shows that the "founders" envisaged a development like *Lüth*.⁹⁸ In the case of the CC, it was less the juridical *coup d'état*, i.e., the arrogation of the power to gauge projects of law against fundamental rights that made the CC's lack of authority clearly visible. Indeed, the CC always had, and still has, the undisputed authority to prevent a project of a law from being promulgated, irrespective of the grounds on which it bases its decision. Rather, it was its effort to avoid, by issuing binding interpretations of such a project,⁹⁹ an excessive control of the legislature. Therefore, insofar as it can be said that an expansion of the scope of authority of the CC made its lack of authority more visible, that expansion was less the submission of legislative acts to a control as to their compatibility with the human rights of the preamble of the 1946 constitution than the development of the concept of binding interpretations. As the other high courts of France, the Court of Cassation and the Council of State, are *Grenzorgane* themselves, they cannot be compelled to accept these supposedly binding interpretations. The CC's authority here can only be persuasive.

⁹⁵ See Stone Sweet, *supra* note 3, at 927 ("[T]he *coup d'état* exacerbated the [authority] problem, making its emergence inevitable.") Still, "visibility" appears more accurately to describe what is going on than "emergence."

⁹⁶ See Corrias, *supra* note 2, at 1560.

⁹⁷ Sweet Stone, though, claims that "the individual complaint has been transformed" by the FCC's *coup d'état*. Stone Sweet, *supra* note 3, at 920.

⁹⁸ Strictly speaking, the "founders" were not involved. The constitutional complaint was first provided for by the Act establishing the Federal Constitutional Court. Gesetz über das Bundesverfassungsgericht [BVerfGG] [Federal Constitutional Court Act], Mar. 12, 1951, BGBl. I at 243 (Ger.). And it was inserted into the constitution only by the 19th Act for Amending the Basic Law. Gesetz zur Änderung des Grundgesetzes [Law Amending Basic Law], Jan. 29, 1969, BGBl. I at 97 (Ger.).

⁹⁹ See Stone Sweet, *supra* note 3, at 923. The CC has continued that practice under the new procedure of the *question prioritaire de constitutionnalité*. See, e.g., Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-25DC, Sept. 16, 2010, J.O. 16847 (Fr.).

Finally, the lack of authority of the ECJ is intimately connected with the whole structure of the EU and its court system. Indeed, quite independently of the ECJ's juridical *coup d'état*, it was and is politically intended by the Member States to deny the ECJ the possibility to review domestic decisions.¹⁰⁰ This fact makes the day-to-day ignoring of ECJ requirements as to how domestic courts should proceed to solve cases under EU law possible.¹⁰¹ That said, the results of the ECJ's *coups d'état*, i.e., direct effect of some Treaty provisions and supremacy of EU law appear to be accepted, *grasso modo*, by the Member State courts. Indeed, under the aspect of the ECJ's authority there appears today to be no difference between, say, the direct effect of regulations, expressly provided for since 1957 in what is now Art. 288 (2) TFEU and therefore undisputed, and the direct effect of other instruments of EU law which have been variously seen as the result of juridical *coups d'état* by the ECJ. In telling contrast, the ECJ's attempt at a true juridical revolution in *Costa v. E.N.E.L.* is still resisted as a matter of principle by at least some of the Member States' courts.¹⁰²

It follows that the authority of constitutional courts, or the lack of it, to enforce respect for their *coups d'état*, while of interest descriptively, is not causally connected to the *coups d'état* themselves. Rather, it is a consequence of the respective constitutional arrangements of a system. Even where the authority is clearly lacking, like in the EU, obedience to the results of the *coup* is not uniformly denied. In other case, like in France, a *coup d'état* may be apt to bring a lack of authority to the fore.

D. Juridical *Coup d'État* and Constituent Power

In his enquiry into "constituent power now," Corrias accepts the definition of the juridical *coup d'état* according to Stone Sweet's first answer—a juridical *coup d'état* changes the normative foundations of a legal system—basically as a given.¹⁰³ Especially, he never questions whether that definition can serve as an appropriate basis for a theory of constituent power. As I shall try to demonstrate, it patently cannot.

Corrias confronts Stone Sweet's juridical *coup d'état* with the Separation and Primacy Theses as developed by Sieyès.¹⁰⁴ By Separation Thesis, he means that originary

¹⁰⁰ Certain inroads into that *domaine réservé* of the Member States appear to be made in the context of the EU's accession to the European Court of Human Rights with the possibility of the prior involvement of the European Court of Justice. STEERING COMMITTEE FOR HUMAN RIGHTS, REPORT TO THE COMMITTEE OF MINISTERS ON THE ELABORATION OF LEGAL INSTRUMENTS FOR THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 5 (2011), available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_MeetingReports/CDDH_2011_009_en.pdf.

¹⁰¹ See Stone Sweet, *supra* note 3, at 926.

¹⁰² See, e.g., Schilling, *supra* note 61, at 450–53.

¹⁰³ Corrias, *supra* note 2, at 1554–57.

¹⁰⁴ Corrias refers to Emmanuel-Joseph Sieyès's WHAT IS THE THIRD ESTATE ? (1963). Corrias, *supra* note 2, at 1558.

constituent and constitutional (constituted) powers are strictly separate; the constituent power is outside the legal system created by it—the creator is necessarily outside his creation—while the constituted power is within. By Primacy Thesis he means that the constituent power has primacy over the constituted power. Those theses, while presented by Sieyès to great effect, are nothing specific to him. They are also, for example, part of Kelsen's theory; indeed, as Corrias notes, Sieyès' view on constituent power is generally accepted in constitutional theory. However, Sieyès' insistence on the nation as the only possible constituent power belongs rather to political science, especially democratic theory,¹⁰⁵ than to legal analysis where this view is disputed at best. Kelsen for one does not accept it. For him, the historically first, i.e. the revolutionary constitution is enacted by a single usurper or a group of whatever composition¹⁰⁶, not necessarily a nation. And of course, history as well as current developments in many countries show that this sober legal analysis coincides with political reality.¹⁰⁷

Corrias maintains “that the juridical coup calls into question Sieyès' view on constituent power”¹⁰⁸—because its subject is not the nation but a court—and “provides us with a new and non-dualistic framework to grasp this relationship and the authority problem involved.”¹⁰⁹ Aiming at showing that neither the Separation Thesis nor the Primacy Thesis are tenable, he takes as his point of departure “that courts sometimes trigger revolutionary changes of a legal order,”¹¹⁰ i.e., create a new legal order.¹¹¹ While I agree, I should deny, as set out above, that Stone Sweet's and Corrias's cases are examples of such changes. As we shall see, that difference matters. At this point it is to state that Corrias's efforts to refute Sieyès' theses are based on the one point of those theses which is not generally accepted in legal analysis, i.e. the revolutionary subject, a court instead of the nation.

1. Referring to the aforementioned cases, Corrias maintains that the respective courts had, as it were, borrowed their authority from the pre-*coup* constitutions: “While giving a new meaning to a legal text, they tried to make it seem as if this meaning was already part of

¹⁰⁵ See, e.g., Möllers, *supra* note 11, at 185–88.

¹⁰⁶ See Kelsen, *supra* note 22, at 65.

¹⁰⁷ It is a different question whether a basic law enacted by a usurper merits the term “constitution.” On this question, see Möllers, *supra* note 11, at 171. Möllers refers to Article 16 of the *Déclaration des Droits de l'homme*. *Id.*

¹⁰⁸ Corrias, *supra* note 2, at 1560.

¹⁰⁹ *Id.* at 1561.

¹¹⁰ *Id.* at 1560.

¹¹¹ *Id.* at 1557.

the text.¹¹² For him, therefore, the juridical *coup* is of a paradoxical nature. I am not convinced. Such a *coup* seems paradoxical only if it is misconstrued as a revolutionary act. When one realises that the juridical *coup d'état* is nothing but an (arguably) substantively wrong, but nevertheless valid, decision authorised by the extant constitution¹¹³ and on a different reading simply a novel interpretation of the latter, there is nothing whatsoever paradoxical in such a decision. Rather, the courts simply do what they always do: They construe, sometimes perhaps in a misguided way, the law in force, i.e. in the cases considered, the constitution.

Corrias compounds what I see as his error by equating the paradox he perceives in juridical *coups d'état* with a similar paradox he perceives in political revolutions. The revolutionary authority, he claims, has to link up, "one way or another . . . with what was already authoritative. The birth of a new legal order cannot be justified without referring (to a minimal degree) to the authorities overthrown."¹¹⁴ Now, without the caveat "to a minimal degree" that claim would be paradoxical indeed. But this caveat simply means, if I understand Corrias, that the place where the revolutionary constitution is to apply, i.e. the territory and the people of the revolutionary State will be the same as those of the pre-revolutionary State. While this claim probably is correct in most cases, it is categorically different from the courts' claim in juridical *coups d'état* that they simply apply the pre-*coup* constitution.

It is instructive to look instead at those court cases which intended a real juridical revolution in the legal sense. Here, the supposed paradox is no more. The Fiji Court of Appeal does not claim to decide on the basis of any Fiji constitution. It expressly states that its jurisdiction is supra-constitutional.¹¹⁵ Similarly, the ECJ, in *Costa v. E.N.E.L.*, simply states that the EEC Treaty is an independent source of law, thereby referring to unnamed circumstances from without which, lying beyond the order constituted by that source, caused it to be.¹¹⁶ This absence of the paradox is easily explained: A court that claims,

¹¹² *Id.* at 1565. But Stone Sweet argues that "in the three cases identified, the judges did not bother themselves much with legal text or precedent." Stone Sweet, *supra* note 5, at 951. In any case, this kind of supposed paradox is inherent at least in all decisions in hard cases. See András Jakab, *What Makes a Good Lawyer? Was Magnaud Indeed Such a Good Judge?*, 62 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 275, 279 (2007).

¹¹³ See *supra* notes 39–42 and accompanying text.

¹¹⁴ Corrias, *supra* note 2, at 1566.

¹¹⁵ Republic of Fiji Islands v. Prasad, [2001] FJCA 2; Abu0078.2000s (Mar. 1, 2001), available at <http://www.paclii.org/fj/cases/FJCA/2001/2.html>.

¹¹⁶ Lindahl points to a different, temporal, paradox: The act—the judgment—originates a community through the representation of its (fictitious earlier) origin. See Lindahl, *supra* note 11, at 496. But it is submitted that a revolution in its legal sense does not necessarily—or even regularly—originate a community in this paradoxical way. Rather, a revolution exclusively in its legal sense is best conceptualised as a *creatio ex nihilo*. The Fiji Court of Appeal had no reason to originate a Fiji community; it existed already. *Costa v. E.N.E.L.* did not originate a European people which, for the most part, to this day has never heard of it. Hannah Arendt's conception of a

expressly or impliedly, to decide under a new legal order and therefore under a new *Grundnorm* cannot at the same time claim to decide under the pre-revolutionary constitution. The Fiji Court of Appeal could not claim on the basis of the pre-revolutionary constitution that that constitution was still in force. The ECJ could not claim on the basis of *pacta sunt servanda* that the EEC Treaty was an independent source of law. Such a court is indeed in a position similar to that of a political revolutionary movement: While the new constitution ordinarily applies to the same state as the old one, the umbilical cord to the pre-revolutionary *Grundnorm* is cut. This is the rupture Lindahl, following Arendt, has identified as the characteristic of a revolution.¹¹⁷

2. The next question raised by Corrias, i.e. when can it be said that a *coup d'état* has been successful, does not arise, as such, from my point of view for *coups d'état*. It is concomitant with the question of when any novel interpretation of a constitution or indeed of any law can be said to be achieved. It does arise, however, for juridical revolutions. Here, indeed, everything depends on the attitude of other actors. The Fiji Court of Appeal's revolution could only be achieved because the Fiji revolutionary powers abided by its decision. The ECJ's revolution in *Costa v. E.N.E.L.* will only be consummated once the constituent powers of the EU's Member States, or their constitutional courts, ratify it.¹¹⁸

3. Somehow, Corrias never seems to come around to deal with his declared subject: What does the possibility of a juridical *coup d'état* tell us about the relationship between original constituent and constituted power? At the very end of his article, he claims that "[t]he interconnectedness of constituent and constituted power that [he] ha[s] stressed presupposes their ultimate independence."¹¹⁹ Based on Kelsen's theory, I shall try to give two very short answers to Corrias's subject, distinguishing, as I must, between a juridical *coup d'état* and a juridical revolution. The first answer concerns the juridical *coup d'état*. A constitutional court is instituted, generally by the (original or derivative) constituent power, to protect the constitution but generally is not subject to further legal control, i.e. it is a *Grenzorgan*. This role, perhaps paradoxically, in fact allows the court, under the authority of the constitution, to interpret and to revise the latter in any way it thinks fit as long as it respects the forms provided for by the constitution.¹²⁰ In such a case, "the spectre of

revolution may be a useful tool to discuss political revolutions, and indeed the self-constitution of a society. It does not contribute anything to the discussion of a revolution in the legal sense only.

¹¹⁷ Lindahl, *supra* note 11, at 495.

¹¹⁸ See Schilling, *supra* note 60, at 458–62. From his different perspective, Lindahl requires that "individuals identify themselves as market citizens." Lindahl, *supra* note 11, at 495, 498.

¹¹⁹ Corrias, *supra* note 2, at 1570.

¹²⁰ Indeed, Woodrow Wilson called the United States Supreme Court "a kind of Constitutional assembly in continuous session." HANNAH ARENDT, ON REVOLUTION 200 (2d ed. 1990).

juridical supremacy over constitutional development”¹²¹ indeed materialises. But, as such interpretations or revisions do not touch the genotype of the constitution, the only thing they tell us about the relationship between constituent and constituted powers is that constitutions may develop in ways not foreseen by the constituent power and that this may be due to acts of constituted powers.¹²²

The second answer concerns the juridical revolution. Such a revolution, or its possibility, tells us nothing at all about the relationship between constituent and constituted powers except that sometimes a constituted power may make itself into a constituent power. Indeed, in engaging in a revolution, the court necessarily abandons its role as a constituted power under the pre-revolutionary constitution and recreates itself as a constituent power. It abandons the *Grundnorm* binding it to the pre-revolutionary constitution in favor of a *Grundnorm* ordering obedience to a revolutionary, court-made or court-defined constitution—in my two examples, the Court of Appeal of Fiji’s supra-constitution and the ECJ’s autonomous EEC Treaty. Therefore, while the image of the court’s grasping a new authority is indeed indicative of a rupture with the extant constitution and thereby of a juridical revolution, that grasping does precisely not coincide with the court’s being grasped by the pre-revolutionary system.¹²³ Rather, by engaging in a revolution, the court leaves its role under the pre-revolutionary constitution. As stated above, the achievement of such a revolution depends on the attitude of other actors. If there are other *Grenzorgane*, they may simply ignore the revolution, making it, at most, into a limping revolution. This is basically what appears to happen between the ECJ and the FCC concerning the revolution in *Costa v. E.N.E.L.*. If there are no other *Grenzorgane*, a revolution by what used to be a *Grenzorgan* under the pre-revolutionary constitution can only be reversed by a (counter-)revolution, presumably by another constituent power, for instance the military (here again a constituted power would make itself into a constituent one)¹²⁴ or the people. Sieyès’ normative conception under which it is the people who ought to act as constituent power however does not enter into this legal equation at all.

4. Of course Kelsen’s is only one theory; it can be said that under another theory a *coup d'état* as defined by Stone Sweet and developed by Corrias is indeed the act of a constituent power. Because of his many references to Kelsen’s theory, I doubt that this is the position of Stone Sweet himself. But it appears to be the position of Corrias who, perhaps surprisingly in a professor of legal philosophy, seems largely to ignore those

¹²¹ Stone Sweet, *supra* note 5, at 952.

¹²² See also *supra* notes 33–42 and accompanying text.

¹²³ See Corrias, *supra* note 2, at 1569.

¹²⁴ The Fiji Court of Appeal case provides an example for the opposite process. See *Republic of Fiji Islands v. Prasad*, [2001] FJCA 2; Abu0078.2000s (Mar. 1, 2001), available at <http://www.pacii.org/fj/cases/FJCA/2001/2.html>.

references.¹²⁵ The question thus arises whether the model of Stone Sweet and Corrias, liberated from its connection to Kelsen's theory, allows us better to understand what is going on. This question need not concern Stone Sweet whose interest appears to be mostly in the further developments engendered by *coups* which of course can stand as a description of a specific type of judicial decisions. But it must concern very much Corrias whose interest is exactly in the theoretical importance of the *coup d'état*.

So where does Corrias's theory lead us? It assumes that a juridical *coup d'état* is an exercise of constituent power. As Corrias accepts that such *coups* are all over the place,¹²⁶ so, apparently, must be constituent power. The other side of the coin is that under that theory, the courts' constituted, i.e. constitutional, power cannot include the power to issue a decision that can be characterised as a *coup*, i.e. a decision which deviates from the hitherto established meaning (if any) of substantive law either by design or error. On the one hand, that is a step back behind Merkl and Kelsen to a theory that considers every decision which is not concordant with substantive law (however defined) as revolutionary and therefore as illegal and presumably as void under the pre-revolutionary constitution.¹²⁷ On the other hand, when every innovative decision of a court involves a paradox and becomes a revolution¹²⁸ (and here, finally, the elephant in the room must be acknowledged: Who is to decide authoritatively whether a decision is innovative if there is no higher court, and what happens if no authoritative decision is possible?), the legal system itself is degraded to a sequence of revolutions. If one adds that according to Corrias such innovative decisions are not necessarily normatively wrong,¹²⁹ exactly because of the insistence that only a decision in accordance with substantive law is permissible under the constitution the law as guiding principle for court decisions loses every contour. Such a theory of law can only be called chaotic.¹³⁰

Such a theory also blurs important differences. Under it every major court decision can be seen as a revolution—because which major decision is not controversial or disputed between different interests? But it appears not constructive to lump together quite regular

¹²⁵ The only (three) references by Corrias to Kelsen are in quotations from Stone Sweet. Stone Sweet, *supra* note 3, at 916.

¹²⁶ See Corrias, *supra* note 2, at 1569.

¹²⁷ See Merkl, *supra* note 37, at 375 ("In principle, no action based on an error can be imputed to the State. The apparently erring judge is, in his error, not a judge, i.e., a person applying the law and an organ of the State but a private person. But this need not be the last word.").

¹²⁸ *Contra* Merkl, *supra* note 20, at 206.

¹²⁹ See Corrias, *supra* note 2, at 1560.

¹³⁰ *Chaos Theory of Law* is the title of at least two legal articles. Sudjito, *Chaos Theory of Law*, 18 MIMBAR HUKUM (2006); Andrew W. Hayes, *An Introduction to Chaos and Law*, 60 UMKC L. REV. 751 (1992). Here the term is used in an entirely non-technical sense.

events like innovative court decisions, which according to all evidence do not change the foundations of a legal system but are incorporated by it, with extraordinary events like a military *coup* abrogating the old constitution, a referendum accepting a new constitution by popular vote or, yes, a court decision expressly breaking with a former *Grundnorm* and thereby creating a new legal system. To my mind it is preferable by far to stick to the traditional view, not even contemplated by Corrias, according to which courts are obliged legally or, in the case of *Grenzorganen*, at least morally to follow the substantive law but the constitution envisages that courts may fail in their duty and still accepts such less than perfect decisions as valid—and without more, the elephant has left the room. Indeed, as reported above,¹³¹ that is the yardstick the FCC applies to decisions of the ECJ, and also the yardstick commonly applied by legal science when discussing court decisions.

E. Conclusion

For a good part, what I have just said has anticipated this conclusion. That part of Stone Sweet's paper which I have discussed—his analysis of the *coup d'état* under the aspect of the transformation of the normative foundations of a legal system—does not stand up to closer scrutiny. Rather, a *coup d'état* as defined by Stone Sweet is just one category of arguably substantively wrong but otherwise regular court decisions which, though under some aspects special, should not be equated with a revolution. This is so under the theory that he himself has chosen, i.e. Kelsen's but also independent of it. This conclusion leaves untouched Stone Sweet's description of the *coup d'état* as a category of judicial decisions with certain common traits which may provoke certain common consequences. His project to discuss those consequences for the legal systems concerned therefore stands. In contrast, Corrias's enterprise to redefine "constituent power now" on the basis of Stone Sweet's analysis of the *coup d'état* is doomed to failure as it relies exactly on those aspects of that analysis which cannot stand. While Sieyès' primarily normative approach to the question of the revolutionary subject has no proper place in a legal analysis, his separation theory holds good also there: The originary constituent power is categorically different from the constituted powers. The latter certainly can transform themselves revolutionarily into originary constituent powers but rarely do. To stress the interconnectedness of constituent and constituted powers and their imminent coincidence in the way Corrias does can be characterised as a chaos theory of law which also quite simply fails to describe what is going on in the courts and in doctrinal analysis.

¹³¹ See *supra* notes 75–78 and accompanying text.

