

Juridical Transformation as Process: A Comment on Stone Sweet

Neil Walker*

In his short but highly suggestive paper, Alec Stone Sweet raises and addresses some deeply engaging and important questions about the nature and implications of the involvement of the judicial branch in certain recent fundamental transformations of the legal systems of Western Europe. Basically, he wants to develop and to link two propositions. The first concerns the discovery of a particular sub-category of *coups d' état* which he calls "juridical" (as opposed to "revolutionary") in light of the fact that they are accomplished through adjudication and under an exercise of power that - as a matter of form if not substance - has been properly delegated to the judicial authority under the constitution and the basic norm. The second concerns the type of authority deficit and conflict that is reckoned to flow from such juridical *coups d' état*. He claims that, the judicial organ (self) empowered by the *coup d' état* may not possess the wherewithal to complete the work of transformation it has begun, as it typically lacks the "direct, jurisdictional means of obtaining obedience from a second organ, whose exercise of authority is necessary to render the law made by the first (judicial) organ effective."

I have much sympathy with the general thrust of Stone Sweet's argument. His work has always been remarkable for its insight into the circumstances and practices through which judges emerge as more significant political actors than legal texts or conventional wisdom would countenance, and by his systematically ambitious use of a comparative methodology in order to find the highest pitch and broadest range for his explanations of this phenomenon. The present piece, with its situation of the French and German national examples alongside the European supranational example, is no exception. In the final analysis, however, the paper is in danger of claiming both too much and too little. It is in danger of claiming too much insofar as it may be overconfident in its identification of a distinct category of transformative event - the juridical *coup* - as the axis of explanation. It is in danger

* Professor of European Law at the European University Institute. Email: Neil.Walker@eui.eu.

of claiming too little in that preoccupation with the question of the *coup* threatens to deflect attention from the real meat of the paper – its appreciation of the self-reinforcing dynamic underpinning the problem of judicial authority in conditions of constitutional flux, *regardless* of the precise origins of such flux. Let me briefly develop both of these points.

The key to – and the key difficulty with – the definition of a juridical *coup d'état* lies in the notion of a “fundamental transformation” in the normative foundations of a legal system. Stone Sweet offers two cumulative criteria for defining such a transformation. The first criterion is one of principle, the second of degree or extent. The criterion of principle holds that a transformation is fundamental if we can “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”. The criterion of degree holds that the “outcome must alter – fundamentally – how the legal system operates, again in ways...demonstrably intended by the framers”. Neither of these criteria is free of problems.

The first criterion is explicitly postulated as a counterfactual – “*had it been placed on...the table*”. Nevertheless, Stone Sweet assumes that the harder test incorporates the easier one – that if there is *actual* evidence of rejection by the framers of the later development, as there was quite emphatically in the (French) case of the incorporation of a justiciable Charter of Rights and, to a somewhat lesser extent, in the (German) case of the pervasiveness of constitutional values, then that counts even higher on the scale of persuasion than reasonable inference on the basis of counterfactual reasoning. That is reasonable enough, provided we do not underestimate the methodological problems of identifying and sifting the relevant evidence even where such is a factual record of the framers’ intent¹, and provided, of course, that we do not make the additional, and much harder and more controversial claim, that framers’ intent, or originalism, is the only or best *moral* basis for interpreting the constitution.

Matters become more difficult, however, where direct evidence is lacking and we have to rely exclusively on a counterfactual approach. Absent the best evidence, from what are we to *infer* the likelihood of rejection if the framers had been confronted with the question? Textualism cannot provide the whole answer, since it is precisely the absence of clear textual words that is at the root of the problem. Other evidence might include the general political climate and tradition, though by its nature this is often highly speculative. Or we may look to the broader structure of the constitutional arrangements enacted in the text, which at least has the merit

¹ RONALD DWORKIN, A MATTER OF PRINCIPLE, CH. 1 (1986).

of grounding analysis in the relevant legal materials. Yet if we go down that track, the danger beckons that, while we may end up better informed of the relevant arguments, we may be no clearer as to the right answer. For example, to take European supranationalism - as the one case under inquiry where no direct evidence of framers' intent is invoked - Stone Sweet nevertheless assumes that the counterfactual evidence points to the rejection of any original mandate for the 'constitutional' project of direct effect and supremacy. This is certainly a reasonable position, but it is by no means unassailable. Recently, for instance, the explicitly structural argument that the provisions on the preliminary reference procedure and on the direct applicability of regulations in the Treaty of Rome imply an original template based on supremacy and direct effect has been powerfully restated². The instant point is not to back that argument against Stone Sweet's, but merely to show that the counterfactual approach leaves the matter both of the most appropriate type of evidence to pursue and of its best interpretation more open than is comfortable to serve the purpose of a clear *coup*-identifying criterion.

But perhaps Stone Sweet is making life too difficult for himself. Perhaps he can avoid the vexed and backward-looking question of counterfactuals altogether and rely instead entirely on the second criterion, namely the forward-looking test of "fundamental" alteration in the operation of the legal system. After all, this seems to get to the heart of what we are interested in when we talk about a *coup* - namely the degree and extent of abrupt qualitative change in the working of a system rather than that system's fidelity or otherwise to a recondite and disputable text. But precisely because what is "fundamental" is a question of degree and extent means that there are problems of uncertainty here too. Stone Sweet, again reasonably enough, wants to concentrate on the systemic dimension of transformation, in particular departure from traditional separation of power models and the alteration of the existing institutional balance - including, in all three cases, the self-authorized expansion in the scope of authority by a specialized constitutional court. But none of this helpful fleshing out of what is important can transform a matter of degree into a categorical distinction.

Does any of this really matter? Might the author not reply that he has already conceded in the original article that "uncertainty about what should count as *juridical coup d'état* is inevitable"? And can he not plead that the existence of marginal cases undermines neither the efficacy nor the value of the distinction

² Julio Baquero Cruz, *The Changing Constitutional Role of the European Court of Justice*, 34 INTERNATIONAL JOURNAL OF LEGAL INFORMATION 223-245 (2006).

between a *coup* and any of the many lesser species of judicial creativity we habitually confront?

I would certainly accept that we have to find a way of distinguishing those forms of judicial initiative which have important consequences for system destabilization and transformation from those which do not, and that if we are in the business of understanding and accounting for large-scale socio-political change we sacrifice an important explanatory insight if we dump every act of 'creative' law-making in the same analytical basket. All the same, it seems to me that the difference Stone Sweet is getting at is better captured in more-or-less than yes-or-no terms. Partly, this is simply an epistemological point. There are just too many hard cases for us to be confident that penumbra will not crowd out the core - including a whole open-ended class of 'substantive-doctrinal-but-with-structural-implications' cases introduced by the author himself through the example of *Griswold v. Connecticut*, where the development of a new substantive textual right of privacy had clear knock-on effects both for the power of the US Supreme Court and the federal-state balance of powers.

Yet partly too - and this is my second line of argument - even if we managed to isolate the juridical *coup* in our conceptual laboratory it is not clear what the explanatory purchase of that move would be. It seems to me that the main promise of Stone Sweet's line of argument, and one that has clear continuities with the broadly neo-functionalist approach with which much of his other work is associated, is to extend our understanding of how judicial initiative in circumstances of incomplete authority, as he defines it, can develop its own momentum and can set in motion a self-justifying and self-reinforcing dynamic both within and between particular courts. Whether we are talking about France's incomplete Bill of Rights, or Germany's incomplete constitutional jurisdiction, or the EU's incomplete constitutional structure, what we can see is a progressive dance of adaptation to the problem of incompleteness, with each judicial step both offering a way forward and also exposing new gaps, for which the need for closure justifies yet further steps.

What this does is to place the analytical emphasis very much on the post-initiative stage, on secondary and tertiary consequences rather than on first causes. And so there is a danger that if we nonetheless insist too much on privileging first causes in the overall conceptual scheme, we may end up with a distorting confusion of cause and effect. For if we look again at each of the cases under analysis, what is striking is the extent to which judicial initiative looks more transformative - more *coup*-like - if we treat it as a process rather than an event. In the European and French cases in particular, it is difficult to pinpoint just one pivotal moment. Rather, what we observe is a cluster of key cases, which taken as a whole trigger the transformation

of the system. But if that is the case, are we not overstretching the meaning of *coup* – supposedly a sudden, event-specific transformation? What is more, *within* such a cluster of cases – take for example the relationship between *Van Gend en Loos* (direct effect) and *Costa* (supremacy) in the European context – is the logic of progression not always and already one of response to incomplete authority? And if that is the case, even if we were to stretch our semantic understanding of a *coup* to cover a key cluster spread over time, would there not be a misleading redundancy in dressing up as an independent ‘cause’ something which operates in accordance with precisely the same logic as the ‘effect’ it seeks to explain?

In conclusion, I would repeat that I am far from out of sympathy with Alec Stone Sweet’s project, or with the inventiveness with which he has pursued it. Indeed, it is precisely because I find the second part of his analysis – his discussion of the authority problem – powerful and intriguing in its own right that I doubt whether the idea of the juridical *coup d’état* is worth the considerable trouble it would take to attempt its adequate operationalization.