

Response to Gianluigi Palombella, Wojciech Sadurski, and Neil Walker

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I wrote *The Juridical Coup d'état and the Problem of Authority* for two main reasons: to solicit responses to a set of questions that I found intriguing, and to consider whether the topic was worth pursuing more systematically. Although the paper is organized otherwise, I proceeded in a way that is usually not recommended in comparative social science.¹ I began by considering a set of findings – concerning the evolution of three legal systems – that are patterned in broadly congruent ways, and then began asking theoretical questions. In each system, a court had moved to confer upon itself new constitutional-jurisdictional authority, in the course of performing its delegated adjudicatory tasks; and these rulings gradually provoked systemic transformation. My interest was not so much in the cases, which I knew well, but how one might deal with them theoretically.

Professors Walker, Sadurski, and Palombella have been generous with their time and comments on the paper, as they have since I presented it at the European University Institute, in spring 2007. I agree with much of what they have written, and I have sympathy with their criticisms, even when we disagree. In this response, I will try to clarify my views in light of their comments. In the first part, I will try to build an even stronger argument to the effect that the label – *juridical coup d'état* – is theoretically appropriate. In the second part, I will focus on the *process* of transformation (constitution-building).

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¹ I am selecting cases off the dependent variable. In this instance, the method can be defended in that I am not seeking an explanation of the phenomenon in question (the *juridical coup d'état*) but, rather, I use the cases to identify pertinent theoretical questions.

A. What is a Juridical *Coup d'état*?

The commentators question the concept of the juridical *coup d'état* and how it might be identified empirically.

Let me begin with the null proposition, that the *juridical coup d'état* is a theoretical impossibility. The null proposition will be valid if the following statement is true: 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. If the null proposition holds, one cannot ask if the terms of any constitutional ruling is "unfounded" or "not authorized" by the constitution. Indeed, it would make no sense to ask if the court ever decided a case wrongly, as a matter of substantive law. Although Walker and Sadurski may lean toward the null proposition, many legal theorists, and nearly all European doctrinal authorities, spend a great deal of time asking whether important decisions were, in fact, decided correctly. Why is that?

I would be shocked, but not unhappy, if one day I were to discover that a consensus had formed around the null proposition - but I have no stake in the survival of Continental legal science or McCormick's version of the theorist's enterprise (quoted in the original paper). If one rejects the null proposition, however, then it would seem that my phrase, *juridical coup d'état*, rings true. Here's what Hans Kelsen writes in his *Pure Theory of Law*:

The principal that a norm of a legal order is valid until its validity is terminated in a way determined by this legal order or replaced by the validity of another norm of this order, is called the principal of legitimacy. The principal is applicable to a legal order with one important limitation only: It does not apply in case of a revolution. A revolution in the broader sense of the word - that includes a *coup d'état* - is every not-legitimate change of this constitution, or its replacement by another constitution. From the point of view of legal science, it is irrelevant whether this change of the legal situation has been brought about by the application of force against the legitimate government, or by members of the government themselves Decisive is only that the valid constitution has been changed or replaced in a manner not prescribed by the constitution [that was] valid until then.²

² HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW 208-09 (Bonnie Litschewski Paulson and Stanley L. Paulson trans., 1992).

Constitutional courts are an obvious and significant part of government in modern constitutional systems of delegated powers. When they delegate to themselves new jurisdictional authority, in “a manner not prescribed by the constitution,” thereby fundamentally changing the structure of delegated arrangements, then we are presumptively in the world of the *juridical coup d'état*.

Kelsen then goes on to discuss why some constitutional transformations are in fact changes in the Grundnorm (when they are deeply structural). It seems impossible to deny that the Grundnorm changed in France when, in the decade of the 1970s, for the first time since the Great Revolution, fundamental rights became enforceable, by an extra-parliamentary body, against statutes duly adopted by Parliament. In the EC, during the period bounded by *Van Gend en Loos* and *Simmmenthal II*, we discovered that a host of constitutional orthodoxies (and prohibitions on judicial power) in place in the Member States were legally invalid under the Treaty of Rome. In France and the EC, courts announced new norms governing the system of delegated powers, and these norms replaced old ones. I suspect that Kelsen would not be surprised to learn that systemic transformation was the result. Others, including the many political scientists who deny the power and agency of norms and normative discourse, would be.

Professor Sadurski suggests that I have chosen the label – *juridical coup d'état* – for its dramatic impact. Pedantic or not, I meant the phrase more literally than metaphorically. For Sadurski, the phrase contains a “sense of usurpation, illegitimacy, and unfoundedness.” Following Kelsen, these adjectives sound right to me, but they do not necessarily imply a normative evaluation. They will appropriately describe the revolution, but only from the point of view of the prior constitution. The new constitution, based on a newly “presupposed” Grundnorm, will legitimate the transformed system, post-revolution (while the old Grundnorm withers away). Tellingly, leading legal scholars commonly use the term, “revolution,” to describe each of the cases I took up in the paper. They have also obsessed about the legal “foundedness” of these rulings, and they have sought to reconstruct the normative bases of systems by presupposing a reconceptualized Grundnorm.³ Such behavior, I argued, is part of the process through which the *coup* engenders and ratifies transformation.⁴

³ Walker cites Cruz (2006), which is a nice example of a doctrinal response to the *juridical coup d'état*, downstream. In the face of charges of usurpation, some legal scholars work to convince us that the Grundnorm always contained the norm produced by the *coup*, or could be derived from it. French and German scholars try to make the same sort of arguments with respect to their own systems, post-transformation. The new Grundnorm is being presupposed.

⁴ Palombella notes that Dworkin's theory of rights adjudication in the U.S. is based on a particular construction of the XIV amendment of the U.S. Constitution; I would say that Dworkin presupposes a preferred Grundnorm, one that shifts centrality to the courts, and away from constituent power. Alexy's

In the paper, I sought to develop identification criteria. Although the criteria help define the term, they also outline a method for identifying instances. Most important, I wrote: “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.” Something like this criterion may be necessary for the analysis to proceed (one needs a benchmark from which one evaluates constitutional change). It might have been defensible to have chosen a slightly less rigorous standard, such as “the analyst bears the burden of showing that the court’s ruling led to a transformation of the original constitution.” I preferred a higher bar.

My commentators critique my criteria. For my part, I see no special problem of method. The exercise would normally proceed just as any other good-faith empirical research on an important, complex historical topic would proceed. The preponderance of the evidence ought to prevail and, once the analyst has identified a *juridical coup d’état*, those who would deny the claim bear the burden of marshalling evidence to the contrary.

Professors Walker and Sadurski note that the criterion is stated in the form of a counter-factual, and counter-factuals are difficult to demonstrate. But my standard does not require counter-factual speculation, and I do not engage in any. The analyst may well find, as in France, that the reason to infer that the founders would have rejected the court’s constitutional amendment is that they had in fact rejected it, in clear and certain terms! 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. In the EC case, it should matter that the various Member States that submitted briefs (observations) to the ECJ in its seminal cases on direct effect and supremacy took great pains to state that neither the direct effect nor the supremacy of Treaty provisions could be derived from the Treaty of Rome. In any event, the empirical cases I made, as Walker notes, are not founded on elaborate counter-factual logics, but on facts. On my criteria, these two cases constitute *juridical coup d’états* (I would be interested in what German readers would say further on the German case).

theory of constitutional rights (cited in the original paper) is based on the structure of rights in the German Basic Law, also presupposes what I would ask to be explicated; See ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2002). In the domain governed by the *Lüth* decision, what was the content of the German Basic Law, pre-*Lüth*?

Professor Palombella's comment includes an interesting warning, namely, that it will often be difficult for one to find the "truth" about a *coup* given that a court routinely hides what it is doing when it chooses to amend the constitution. A court, he writes, will invoke legal text and precedent to show that it does not "claim for itself any authority it does not already possess under the existing constitution." Fair enough. But in the three cases I identified, the judges did not bother themselves much with legal text or precedent. The GFCC and the ECJ based their decisions on new *theories* of the constitution. Since the German Basic Law comprises "an objective system of values, then" ... etc., etc. Because the Treaty of Rome created a "special and original" legal order, therefore" ... etc., etc. The audience for these decisions, even those judges and scholars who supported what had been decided, worried about the weakness of authority (source and reasoning). For its part, the French Council simply referenced the Preamble, but did not state why a preamble had suddenly become a source of law, contrary to long-established canons of interpretation. These decisions are data, and these data strengthen my case. As I stated in the paper, a *juridical coup d'état* is not easily defended with reference to pre-*coup* legal materials. Here the courts were relatively honest about what they are doing - "if you please, we have this new theory of a good (better) constitution and it goes like this ..."

In my paper, I also defended the following statement: "The likelihood that any *juridical coup d'état* will provoke doctrinal wars, big and small, is ... high." Each of the *coups* I identified became the focus of deep (and continuing) doctrinal controversy. In the paper, I treated conflict among legal scholars and judges as an important indicator of the *juridical coup d'état*. It is telling that, in each of the cases, controversy has focused on whether the initial assertion of new authority by these courts was legitimate under, or authorized by, the constitution. Looking upstream, as the process of transformation unfolded, controversy expanded to include new outcomes (but causally dependent on the *coup*). As mentioned, Professor Sadurski dwells on the fact that the phrase *juridical coup d'état* suggests "usurpation, illegitimacy, and unfoundedness." Yet often enough, these words accurately describe the questions that legal scholars debate when they try to make sense of the *coup* and its consequences.

B. The *Juridical Coup d'État* and Constitution-Building

In the empirical section of the paper, I focused on how each *coup* had "provoked systemic change, post-revolution, as its implications materialized and were processed" by other actors and institutions. Walker and Palombella ask whether it might be better to treat the *coup* as a process, rather than as an event.

Transformation, after all, proves the most important point: that a *juridical coup d'état* had indeed occurred.

Analytically, however, there are good reasons to keep the event and the process separate. I am required to do so, given my claim that the transformation process exhibits strong path dependent qualities. I argued that the process of transformation provoked by the *coup* could *not* be derived from the seminal rulings themselves, while remaining causally-dependent upon them. Hart's formulation of the Rule of Recognition gives us another reason to keep event and process separate.⁵ Hart, unlike Kelsen, is not much interested in assessing the legitimacy of changes in the Rule. Instead, he sees the Rule itself as a kind of social norm that is developed through the evolution of shared understandings among officials and other elites. In the course of writing the paper, I was surprised to find that no serious empirical research on the process of how a Rule of Recognition develops or changes exists. In each of my *coups*, one set of officials (judges) proposed a change in the Rule, which provoked a social process that involved other officials. It is, of course, theoretically possible that the proposed change (the event) would ultimately be rejected by officials (the process).

In the paper, I claimed that certain rulings provoked expansive constitution-building processes.⁶ Walker suggests that we may not need the concept of the *juridical coup d'état* in order to understand these constitution-building episodes, which has characterizes as continuous judicially-led "adaptations" to normative "incompleteness." But where did such gap-filling dynamics come from? The judges that instigated my *coups* conferred upon themselves new expansive capacities to "complete" constitutions, displacing constituent authority as regulators of constitutional development. Hovering above every *coup*, it seems, is the specter of judicial supremacy - over constitutional development - and in Europe supremacy is rarely a focus of theorists.

Finally, Sadurski rightly rejects the easy distinction between substance and structure. In each of my cases, substance and structure are linked in complex, multi-dimensional ways. Nonetheless, if we reject the null proposition, one might ask whether the substance of any ruling that helps to determine the structure of the constitution is based upon a correct analysis of structure. All important rights decisions concern both substance and structure, but one might have a good

⁵ H.L.A. HART, THE CONCEPT OF LAW 97-107 (1994).

⁶ Here is where counter-factual analysis, properly speaking, comes in. Take a moment and imagine the evolution of: (a) the German Legal Order without Luth and its progeny; (b) the French Fifth Republic without rights; and (c) the EC without the direct effect or supremacy of the Rome Treaty.

theoretical reason to focus on the latter more than the former, or vice-versa. *Griswold* is a judicial decision that responds to the question “does this pleaded right, although hitherto unknown to us in our law, in fact exist?” The Court answered in the affirmative, with great impact. But the constitutional structure of rights protection was not changed in the U.S. as a result. Compare *Griswold* to a judicial decision that responds to the question, “does this pleaded right, although hitherto unknown to us in our law, in fact exist?,” and also goes on to assert that the constitution now contains a charter of rights when yesterday it did not (France), or that litigants can newly plead rights derived from European law in national courts that judges must enforce (EC), or that private law judges must henceforth interpret the civil code in light of constitutional rights and under the supervision of constitutional judges (Germany).