

## The Juridical *Coup d'État* and the Problem of Authority

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This essay is a true working paper, a work-in-progress that raises a set of questions that I am not yet sure how to answer. The questions are not unknown; indeed, they lurk in the shadows of scholarly discourse on the three systems I will examine. They are, however, often ignored in research and commentary on the constitutional law, and they have never been the focus of comparative inquiry. I nonetheless will argue that the answers one gives to them will bear directly on how we should understand the nature, evolution, and political (i.e., normative) legitimacy of legal systems.

The paper focuses on authority problems created by the *juridical coup d'état*. In part A, I define that concept, and discuss some of the theoretical problems that would necessarily be posed if an instance of a *juridical coup d'état* could, in fact, be identified. In part B, I describe three such instances, summarize the main systemic consequences for each case, and provide illustrations of the authority problems produced. In part C, I address various theoretical issues in light of the empirics.

### A. The Juridical Coup d'État

By the phrase *juridical coup d'état*, I mean a *fundamental transformation in the normative foundations of a legal system through the constitutional lawmaking of a court*.

A “normative foundation” is a precept of a system’s higher law. Although there are differences between Kelsen’s conception of the *Grundnorm* and Hart’s notion of a *Rule of Recognition*, a *juridical coup d'état* is a judicial decision that changes both.

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I conceptualize “fundamental transformation” restrictively. 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. The transformation will make it impossible for an observer to deduce the new system from institutional design at the *ex ante* constitutional moment. It will also imply a breach of pre-*coup* separation of powers orthodoxy. Put differently, traditional separation of powers schemes will fail to model, post-*coup*, the constitutional roles and limitations conferred on the organs of the state.

Last, by “constitutional lawmaking,” I mean the modification of the constitution through adjudication (interpretation and application). A *juridical coup d'état* constitutes a particular type of lawmaking, one that alters the Basic Norm and a Rule of Recognition.

My notion of the *juridical coup d'état* raises a range of important issues. First, the question of how to understand an endogenous change in a legal system's *Grundnorm*, let alone one accomplished through adjudication, is not a simple one. In the first version of his *Pure Theory of Law*, Kelsen himself equated the idea of “successful revolution” with a change in the Basic Norm, and used the example of a *coup d'état*, in which the King is replaced by representative government, as an illustration. After the *coup*, Kelsen writes, “One [now] presupposes a new Basic Norm, no longer the Basic Norm delegating law making authority to the monarch, but [one] delegating authority to the revolutionary government.”<sup>1</sup>

Let's stipulate that a revolutionary *coup d'état* proceeds through acts that are not authorized under the Basic Norm, whereas a *juridical coup d'état* proceeds through the exercise of powers that have been delegated by the Basic Norm to the judicial authority. One might now wonder whether, indeed, the judicial authority had behaved “unconstitutionally.” By definition, a *juridical coup d'état* produces legal effects and, for Kelsen, a norm that produces legal effects must be considered a valid norm. Yet the substance of the judicial decision might not have been authorized, or might even have been forbidden, by the substance of the prior Basic Norm. Accordingly, one deep structural question concerns whether the constitutional delegation to the judge includes substantive constraints on the judge's decision-making (lawmaking). It may be that the constitution enables judicially lawmaking (procedurally), but does not necessarily constrain it

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<sup>1</sup> HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW 54 (Bonnie Litschewski Paulson and Stanley L. Paulson trans., 1992).

substantively. In part B, I show that the *juridical coup d'état* can be institutionalized as a successful revision of the Basic Norm, with transformative effects on law and politics.

Second, much positivist legal theory builds its account of legitimate judicial authority, and of the legitimate exercise of judicial discretion, through describing the ways in which the legal system constrains (or ought to constrain) judging. Judges are expected to package their decisions in ways that make their rulings appear to be relatively redundant, self-evident, deductive extensions of existing legal materials. H.L.A. Hart argued that the extent of defensible judicial discretion in place at any point was inversely proportional to the extent of the applicable law's indeterminacy, so long as judges resolve disputes in an "adequate," or "reasonably defensible," rather than in an "arbitrary" or "irrational," manner.<sup>2</sup> In Hart's account, judicial lawmaking is defensible, rather than arbitrary, to the extent that it proceeds in light of pre-existing law and past rulings, and to the extent that it "renders" existing that law "more determinate." For Neil MacCormick, a close student of Hart's, the primary objective of legal theory is the development of standards for evaluating a court's jurisprudence as "good or bad," "acceptable or not acceptable," "rational or arbitrary."<sup>3</sup> Bad decisions are those that cannot, ultimately, be packaged as a deduction from prior, first-order norms and principles. It should be obvious that a *juridical coup d'état* fatally undermines this project. In its own terms, we have little choice but to classify juridical *coups* as the result of bad, arbitrary, and irrational decisions.

In the real world, of course, doctrinal authorities have choices. They can celebrate or decry the decision; they can ignore it, or treat it as an anomaly or an exception that proves the rule. The likelihood that any *juridical coup d'état* will provoke doctrinal wars, big and small, is nonetheless high. If the court maintains its position, mainstream doctrine, at least, is likely to follow, at least eventually. Scholars can reconstruct the legitimacy of the post-*coup* legal order, and of judicial authority within it, but only in terms of the new Basic Norm and the new Rule of Recognition. The old Norm and the old Rule, once overthrown, cannot provide the normative basis for the way the new legal system evolves after the *coup*.

Third, though I have tried to develop clear and restrictive criteria, uncertainty about what should count as a *juridical coup d'état*, and what does not count, is inevitable. If all *coups* will likely be produced by acts of "creative" legal interpretation, not all creative judicial lawmaking will constitute *coups*. Further, a

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<sup>2</sup> H.L.A. HART, THE CONCEPT OF LAW 124-41 (1994).

<sup>3</sup> NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978).

court may overrule itself, deciding that it had gotten the law wrong in the past. Such decisions will, indeed, engender a change in the law's effects on its subjects, but that does not mean that they have altered the Basic Norm or a Rule of Recognition. Rather, one has to distinguish between an interpretation of the content of the Basic Norm, and a revision of the Basic Norm. The point accepted, there will be hard cases of classification. What does one do with *Griswold v. Connecticut*,<sup>4</sup> for example? In *Griswold*, the U.S. Supreme Court found that the Federal Constitution contained a right to privacy, at least over reproductive decisions, despite the fact that the Constitution contains no provision on privacy, *per se*. Nevertheless, Douglas, writing for the majority, took pains to package the ruling as a deduction from the structure, content, and the "penumbras" of various provisions of the Bill of Rights. The decision is one of the most controversial in American constitutional history precisely because Douglas seeks so tortuously to avoid the charge that he has fundamentally revised the U.S. Constitution.

### B. Three Cases

Using the criteria established in Part A, I can identify three important instances of the *juridical coup d'état* in Europe. Perhaps there are more.<sup>5</sup> In 1958, the German Federal Constitutional Court held, in *Lüth*,<sup>6</sup> that since "constitutional values" [now usually called "principles"] permeate "all spheres of law," it would henceforth be the duty of the entire judiciary to ensure the compatibility of "every provision of the private law" with rights. The German Basic Law says no such thing. In 1964, in *Costa*,<sup>7</sup> the European Court of Justice [ECJ] announced the doctrine of the supremacy of EC law which, in combination with the Court's doctrine of direct effect, in *Van Gend en Loos*,<sup>8</sup> gradually served to "constitutionalize" the Treaty of Rome (Weiler 1991; Stone Sweet 2004).<sup>9</sup> The Member States neither provided for the supremacy of the Treaty, nor for the direct effect of the Treaty or of EC Directives.

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<sup>4</sup> *Griswold v. Connecticut*. 381 U.S. 479 (1965).

<sup>5</sup> There are important cases outside of Europe that would count, including the U.S. Supreme Court's decisions to enforce the Federal Bill of Rights against the States, in cases that would otherwise be governed entirely by state law.

<sup>6</sup> BVerfGE 7, 198 (1958), English translation in: DONALD KOMMERS/RUSSELL MILLER, *THE JURISPRUDENCE OF THE GERMAN CONSTITUTIONAL COURT*, 3<sup>RD</sup> ed. *forthcoming*.

<sup>7</sup> *Costa*, ECJ 6/64, *ECR* (1964), 585.

<sup>8</sup> *Van Gend en Loos*, ECJ 26/62, *ECR* (1963), 1.

<sup>9</sup> Joseph Weiler, *The Transformation of Europe*, 100 *YALE LAW JOURNAL* 2403 (1991); ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2002).

In 1971, the French Constitutional Council began incorporating a charter of rights into the Constitution of the Fifth Republic,<sup>10</sup> knowing full well that the founders had explicitly rejected including such a charter. The move destroyed the remnants of what was left of a once sacred Republican orthodoxy: legislative sovereignty.

Each of these cases constitutes, respectively, the single most important constitutional change in the history of that system. In each, the *juridical coup d'état* provoked systemic change, post-revolution, as its implications materialized and were processed. These changes have been registered on separation of powers doctrines, core components of which have been swept away. And, in each, a specialized constitutional court radically expanded the scope of its own authority, and that of the constitutional law, while generating a set of fundamental authority conflicts. Defined generically, an authority conflict is a governance situation in which the organ empowered to make (or give content to) the law has no direct, jurisdictional means of obtaining obedience from a second organ, whose exercise of authority is necessary to render the law made by the first organ effective. I now turn to how three such situations emerged as a result of what I will call the *juridical coup d'état*.

### *I. The German Federal Republic*

The German Basic Law (1948) gives pride of place to rights provisions and confers on a Federal Constitutional Court (FCC) broad powers – abstract and concrete review authority, as well as jurisdiction over individual constitutional complaints – to protect those rights. The Constitution, however, tells us next to nothing about the status of rights in the private law, or on the scope of the role private law judges ought to play in protecting rights. In 1950, there were good reasons to believe that the Basic Law would not fundamentally alter the relationship between public and private law, and that the latter would retain its autonomy from the former, except at the margins (through concrete review processes). The founders had rejected proposals to confer judicial review powers on ordinary judges and on the various supreme courts; and they did not stipulate that rights would have effect between private individuals in their legal relations. Academic lawyers dominated the drafting process and, in German doctrine, distinctions between public and private law were considered quasi-absolute. Moreover, the private law, and in particular the Civil Code (1896) possessed great prestige, much more than the public law.

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<sup>10</sup> Council Decision 71-44, *Recueil des Décisions du Conseil Constitutionnel* 29 (1971).

Prior to the *Lüth* case, some judges began to use constitutional rights in their interpretation of certain statutes, without prompting from the FCC, especially in the labor courts. In *Lüth*, the FCC partly legitimised this behavior. But it went further, requiring that all private law judges employ proportionality analysis to balance (a) rights and (b) other cognizable legal interests (constitutional values inhering in the codes) when the two come into tension in any specific case. According to the Court, the “value system” expressed by the constitution, and in particular the system of rights, “affects all spheres of law.” As a result, “every provision of the private law must be compatible with this system ... and every such provision must be interpreted in its spirit.” When private law judges fail to do so, the FCC asserted, or when they fail to strike a proper balance, they violate “objective constitutional law,” and thus the rights of individuals. Read as a jurisdictional revolution, the ruling created a new cause of action, against the civil law judge, which the FCC would hear through the constitutional complaint procedure.

As subsequently developed, the *Lüth* line of jurisprudence means that “all private law is directly subject to constitutional rights,” which means that rights are indirectly effective between individuals.<sup>11</sup> In practice, the difference between direct and indirect effect is negligible.<sup>12</sup> Indeed, Kumm argues that if, tomorrow, Germans were to adopt a constitutional amendment designed to make rights *directly* effective between individuals, the amendment “would change practically nothing.”<sup>13</sup>

By definition, a *juridical coup d'état* is deeply structural, and so are its most important implications. I would emphasise the following in the German case. First, in private law litigation, individuals not only may plead rights; they sometimes possess a right to a procedure – proportionality analysis – to determine the scope of their rights in the private law context. Second, the individual complaint has been transformed: after *Lüth*, it becomes a mechanism for monitoring and enforcing the FCC’s new constitutional order. My third point is a necessary consequence of the first two. Once rights come into play, the civil judge must reason and decide much as a constitutional judge would. The FCC, for its part, can

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<sup>11</sup> Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 388 (2003).

<sup>12</sup> ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 352-65 (2002).

<sup>13</sup> Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 352 7 GERMAN L.J. 4 (2006), available at: <http://www.germanlawjournal.com/article.php?id=724>, last accessed 26 September 2007

only properly perform its task – to review how a civil court has balanced rights and other legal values – by intruding on the role of the presiding judge.<sup>14</sup>

Constitutionalist lawyers and judges celebrate the *Lüth* jurisprudence for, in effect, securing and completing the *Rechtsstaat*; but it remains deeply controversial in parts of the private law world.<sup>15</sup> The bottom-line issue is about authority: once the *Rechtsstaat* has been constitutionalised, how can it be defended, given the fragmented structure of judicial authority? The FCC enlists all judges in the project then commands: “thou shalt balance.” Because, in balancing situations, it is not the doctrine (“thou shalt balance; everything in proportion”) but the fact-context that varies, the boundaries between the work of ordinary and constitutional judges will be obliterated, routinely, if the latter is to review the substantive decision-making of the former. Placed in the shadow of the constitutional complaint, civil law judges today record their efforts to arrive at decisions that will satisfy the proportionality requirement. When the FCC overrules them, it is on substantive grounds. It says: “procedurally you have acted as a good constitutional judge (you have balanced), but you have misinterpreted rights (you have got things out of proportion).” To repeat, the FCC cannot assess how the private law judge has weighed contending interests, without sifting through the facts and reweighing these same interests.

Skeptics start from the presumption that the civil law judge is in a far better position to balance, if balancing there must be. Even the most fervent supporters of *Lüth* acknowledge that balancing is a relatively open-ended exercise in judicial policymaking.<sup>16</sup> If balancing leads the judge to a choice from among at least two (legally-defensible) policies, why should the FCC possess the power to impose its preferred policy on the courts closest to the dispute – and to the law being interpreted? As we shall see, a version of this issue has also emerged in EC law, once the ECJ required national judges to engage in proportionality analysis, as it

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<sup>14</sup> The comments on a recent FCC ruling in this genre are revealing: Peer Zumbansen, *Federal Constitutional Court Affirms Horizontal Effect of Constitutional Rights in Private Law Relations and Voids a Marital Agreement on Constitutional Grounds*, 2 GERMAN L.J. No. 6 (2001), available at: <http://www.germanlawjournal.com/article.php?id=61>. See also the commentary on the FCC's ruling on the “Benetton Shock Ads”: Peer Zumbansen, *Federal Constitutional Court Bans Shock Ads: Free Expression, Fair Competition, and the Opaque Boundaries between Political Message and Social Standards*, 2 GERMAN L.J. No. 1 (2001), available at: <http://www.germanlawjournal.com/article.php?id=14>, last accessed 26 September 2007.

<sup>15</sup> Indeed, the intensity of the scholarly debate about shows no sign of relenting; see Uwe Diederichsen, *Das Bundesverfassungsgericht als oberstes Zivilgericht – ein Lehrstück der juristischen Methodenlehre*, in ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 171 (1998); CLAUS-WILHELM, GRUNDERECHTE UND PRIVATRECHT – EINE ZWISCHENBILANZ (1999).

<sup>16</sup> ALEXY (note 12), postscript.

did, for example, in the adjudication of free movement of goods and indirect sex discrimination claims. Though the controversy still rages in Germany, it would seem that the core of the authority problem can be resolved through the constitutional complaint procedure,<sup>17</sup> as it cannot be in EC law.

## II. The French Fifth Republic

The founders created the Constitutional Council to help them secure the Government's control over Parliament, which they meant to be virtually absolute. In the *Travaux préparatoires*,<sup>18</sup> efforts to confer upon the Council "judicial" attributes were blocked. The founders explicitly rejected proposals to model the organ on the Austro-German prototype, and they pointedly refused to grant it jurisdiction over rights.<sup>19</sup> Although the Preamble to the 1958 Constitution declares the "solemn attachment" of the French people to the Preamble of the 1946 Constitution, the drafters of both the 1946 and 1958 constitutions insisted that the preamble was unenforceable as law.<sup>20</sup> In 1971, the Council began to incorporate a set of rights texts, found in the 1946 Preamble, into the 1958 Constitution. By 1979, it had used each of these texts to strike down Government-sponsored statutes adopted by Parliament, and in the 1980s it emerged as a powerful force in French legislative politics.

One expects a *juridical coup d'état* to generate developments that are unforeseeable, and the French case is no exception. In the post-*coup* (Sixth) Republic, for the first time in French history, constitutional rights are enforceable, but not only by the Council.

During the Fourth Republic, the supreme administrative court, the Council of State developed, under the banner of "general principles of law," various restrictions on administrative action. Most of these principles, including "individual liberty," "equality before the law," "freedom of conscience," and "non-retroactivity," functioned, *de facto*, as rights. In the 1980s, the Council of State began to convert them into rights, *de jure*, thus securing their permanence and higher law status. It

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<sup>17</sup> The gaps in constitutional control that remain can be important in certain cases; see Hans-Joachim Faller, *Bundesverfassungsgericht und Bundesgerichtshof*, in 115 ARCHIV DES ÖFFENTLICHEN RECHTS 189-92 (1990).

<sup>18</sup> *Travaux préparatoires de la Constitution du 4 Octobre 1958*. Paris: Documentation française, 1960.

<sup>19</sup> STONE SWEET (note 9), chapter 2.

<sup>20</sup> For the Fourth Republic, see *Débats du 7 Mars, 1946*, Assemblée nationale constituante: 607 – 639. For the Fifth Republic, see *Travaux préparatoires de la Constitution du 4 Octobre 1958*.

shielded itself by following the Constitutional Council's lead, converting those principles that the latter had already promoted to a constitutional rung. In 1996, the Council of State took the momentous step of constitutionalising a principle on its own, without prior authorization by the constitutional judge. For its part, the supreme civil court, Cassation, began to engage in a new form of statutory review in the late-1980s: "the constitutional correction of legal norms" (Cartier 1995). Ordinary judges are now obliged to interpret provisions of the codes as if they were in harmony with constitutional rights (and, more importantly, with the ECHR). In the presence of a law deemed unconstitutional, all the judiciary can do is correct the law through interpretation, since there is no way for a law, once promulgated, to be annulled.

It is indisputable that the *juridical coup d'état* enhanced the Council of State's authority over the administration, and (if less so) Cassation's authority over statute. In some meaningful sense, both are now constitutional judges, and both are rights-protecting courts. One could discuss at great length the implications for French separation of powers doctrines that flow from the fact that rights now play a role in the legal order, but yet are outside of the Constitutional Council's reach. I will focus instead only on the scope of the latter's authority over the interpretation of rights. Compared to the German Court's position, the Council's authority over the courts is feeble at best. The Council exercises only pre-enforcement abstract review of statutes; there is no formal link between the Council and the judiciary.

In the 1980s, following the examples of the German and Italian constitutional courts, the Council began to issue "binding interpretations" - *réserves d'interprétation*. Such rulings declare that statutory provisions under review may *only* be considered constitutional under one specific interpretation (the narrowest of "saving constructions" in American parlance). The percentage of decisions containing such pronouncements has increased over time, in some years to as high as 60%. They are meant to bind all public authorities, including judges; to allow otherwise would be to permit a law to be enforced in an unconstitutional way.

The authority problem is obvious: the Council relies on the judiciary to enforce its legal positions, but cannot compel the courts to do so. The position of Cassation has always been that "there is no legal obligation to follow binding interpretations."<sup>21</sup> Many civil judges are openly hostile to the idea of being placed under the tutelage of the Council. Their major union, the Professional Association of Judges, even went so far as to release a *Communiqué* that called on judges and prosecutors to ignore binding interpretations, which they characterized as "trivial

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<sup>21</sup> Table Ronde 279-80 (1995).

gloss.”<sup>22</sup> The Council of State also insists that it is not legally bound by the Council’s reasoning, although it has sometimes copied binding interpretations into its decisions.

Since there is zero chance that the Constitutional Council will be given jurisdiction over individual constitutional complaints, the authority problem is irresolvable.

### III. *The European Union*

The Treaty of Rome established an enforcement system that I would characterize as “international law plus,” the “plus” being the compulsory nature of the Court’s jurisdiction, and the authority of the Commission within the various proceedings. With respect to national law, the Member States neither provided for the primacy or direct applicability of the Treaty in their courts. As a now familiar meta-narrative would have it, the Treaty of Rome was “constitutionalised,” and the Community thereby “transformed” by a series of seminal decisions of the European Court.<sup>23</sup>

The ECJ’s jurisprudence of the direct effect and supremacy of European law replaced the Member State’s blueprint of the legal system with its own. As the ECJ’s doctrines of direct effect and supremacy gradually took hold, Article 234 EC,<sup>24</sup> emerged as a kind of central nervous system for the enforcement of EC law and the coordination of the EC and the national legal orders. For more than forty years, this system – wholly a product of a *juridical coup d’état* – has managed the myriad complexities of legal integration. It has also heavily conditioned legislative outcomes in a wide range of policy domains, and it has helped to determine the course of European integration more generally.<sup>25</sup> The *coup* also produced powerful legal effects in national legal orders, the most important of which derive from the fact that supremacy requires national judges to review the legal validity of national law, including parliamentary statutes, under EC law. Over time, the courts in the Member States embraced this role, despite the fact that many national constitutions and separation of powers traditions prohibit the judicial review of statutes.

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<sup>22</sup> *Le Monde*, 9 August 1993.

<sup>23</sup> Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT’L L. 1 (1981); WEILER (note 9).

<sup>24</sup> Art. 234 connects the ECJ and the national courts through a preliminary reference procedure, that is similar to the mechanism at the heart of German concrete review.

<sup>25</sup> STONE SWEET (note 9); Neil Fligstein and Alec Stone Sweet, *Constructing Markets and Policies: An Institutionalist Account of European Integration*, 107 AM. J. SOC. 1206 (2002).

The underlying social logic of the Article 234 EC system – the key to its success – is that it provides a relatively stable *process* for handling the peculiar problems associated with governing a multi-tiered polity like the EU. This process, however, has not been content-free, because the Court's notion of supremacy is not neutral with respect to the functions assigned to national judges. The Court expects national judges to operate as agents of the Community order: when they adjudicate disputes in domains governed by EC law, they are obliged to take decisions with reference, and deference, to that law. As European integration has deepened, the list of duties the ECJ has assigned to national judges, as *de facto* Community judges, has lengthened. Some judges may inhabit this role naturally and easily, but most will never fully embrace supremacy, at least not as the ECJ conceives it. The Court knows this perfectly well. The Court also knows that it has no means of forcing national judges to accept its jurisdiction or to help it achieve its vision of legal integration. In consequence, the various scholarly accounts tell us, legal integration has proceeded through persuasion, mutual empowerment, and inter-court dialogue.

The formal story of how supremacy developed has always been accompanied by another set of accounts, stories that are more political science than doctrinal deduction. These accounts seek to explain the evolution of supremacy as strategic choices of the Court, reacting to strategic choices made by national judges. For the most part, they are told by and for academic lawyers, not political scientists, and they dominate the scholarly discourse on supremacy. Although there are differences in approach and focus, there is broad consensus on the basics: that the supremacy saga is a profoundly political process, mediated by constitutional law and intra-judicial interaction through Article 234; that this process is relatively open-ended; that it cannot be explained simply in legal terms or any single logic of action; and that it is about the nature and division of judicial authority in Europe.<sup>26</sup>

For all, or because, of its success in organising legal integration, the Article 234 system has generated – chronically – massive authority problems which, by their nature, are irresolvable under its procedures. The Court could not have expected as much. In the beginning, the Court aimed direct effect and supremacy at the Member States. The national courts were not primary targets; instead the Court sought to build them into a new enforcement mechanism. Further, in early important cases (e.g., *Van Gend en Loos*), referring judges showed themselves to be willing partners in the endeavor, all but begging for authorisation to enforce the

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<sup>26</sup> THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT (Anne-Marie Slaughter, Alec Stone Sweet & Joseph Weiler, eds., 1998); KAREN ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW (2001); PAUL CRAIG AND GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 439-52 (2003).

Treaty against conflicting national rules. Today it is obvious that supremacy and direct effect, ultimately, are about the effectiveness of EC law, but “effectiveness” has had no ultimate endpoint. Instead, the Court has steadily intruded on domains previously thought to be immune to its reach; consider doctrines associated with rights, state liability, and effectiveness of remedy.

As it stands, all basic authority conflicts between the ECJ and national judges are irresolvable under the present Art. 234 system. Several have been the subject of extensive doctrinal commentary and controversy, including the classic supremacy problems: how to protect rights, settle *Kompetenz-Kompetenz* issues, and determine when the *acte claire* doctrine ought to apply. But we also find them in the day-to-day application of the ECJ doctrines by national courts. The Court requires, for example, that national judges apply proportionality tests, featuring a least-restrictive means stage, in free movement of goods (Article 28 EC) and indirect sex discrimination (Article 141 EC), and many other domains of EC law. But most national judges, most of the time, choose not to engage in proportionality analysis, at least not in any rigorous way.<sup>27</sup>

The ECJ can command that national judges interpret and apply EC law as it does, but it cannot force them into following its lead. In Europe, a great deal of judicial governance proceeds on this absence of coercive authority, because it proceeds in the absence of normative authority.

### C. Concluding Comments

This paper has raised more questions than I can answer. I will conclude with brief comments on issues that deserve more explicit treatment than I have given them.

First, my interest in the juridical *coup d'état* is empirical, not normative. Nothing in the analysis requires me to take a normative position on these developments. Most German and French constitutional lawyers, and most EU law scholars, defend what has happened in the fields of their respective expertise. Many scholars who specialize in legal domains that have been disturbed by these changes have been far more critical. Indeed, each of these *coups* set off doctrinal wars that have not been extinguished to this day. One of my claims is that any attempt to justify these rulings as deductions from the *Grundnorm* or from black-letter constitutional law, will fail, precisely because such rulings altered, fundamentally, the *Grundnorm*

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<sup>27</sup> MALCOLM JARVIS, *THE APPLICATION OF EC LAW BY NATIONAL COURTS*, (1998); STONE SWEET (note 9), chapter 3-4.

itself. As a result, a huge amount of doctrinal activity is devoted to defending the *coup d'état*, on functional<sup>28</sup> and other normative grounds, while attacking them on other grounds (e.g., separation of powers). These normative debates are important to me to the extent that they have been important to how the law has subsequently developed, post-*coup*.

Second, in these cases, the juridical *coup d'état* led to a steady growth of judicial power, *vis à vis* that of legislators and executives. Although this paper does not emphasise the fact, the courts are more central to the process through which the constitution and the polity evolves than they would have been had the *coup* not occurred. Although each *coup* also produced an authority problem between judges, dealing with it has not diminished the judiciary's centrality. There is no paradox. In each case, the *coup* expanded the reach of rights across the legal system, while leaving intact the system's organizational architecture: a judiciary of independent, functionally-differentiated courts. Garlicki has recently argued that the authority problem inheres in the European model of constitutional review.<sup>29</sup> If so, the *coup d'état* exacerbated the problem, making its emergence inevitable. Doctrinal wars pitting sides attached to courts.

Third, for students of the evolution of whole legal systems, it is worth noting that the juridical *coup d'état* comprises, by definition, what economic historians and "historical institutionalists" would call a "critical juncture" – a rupture in norms and practices that starts a social system down a new but unpredictable path.<sup>30</sup> From the point of view of the founders of the constitution, the new path was unintended, and the systemic consequences of the *coup* could not have been foreseen. From the point of view of the judges who propagated the *coup*, the authority problem that emerged was unintended. Yet, in each of our cases, the authority problem itself generated dynamics that have helped propel the system forward.

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<sup>28</sup> By a "functional defense," I mean a normative evaluation of a judicial ruling in view of the purported benefits it will provide to society; the good provided may be moral, economic, political, legal, and so on. In each of my three cases, it is the functional defense of the juridical *coup* that counts in the mainstream scholarly discourse on the matter, not the doctrinal deduction.

<sup>29</sup> Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 INT'L J. CON. L. 44 (2007).

<sup>30</sup> STONE SWEET (note 9).

