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BOOK REVIEW

Shai Dothan, *International Judicial Review: When Should International Courts Intervene?*, Cambridge University Press, 2020, 170pp, £85.00, ISBN 9781108488761
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International Judicial Review by Shai Dothan asks what may seem like a simple question, yet the large volume of scholarly discussion on the legitimacy of international courts[1] demonstrates that there are no simple answers. The book enters this debate by attempting to respond to critics of international courts by identifying when international court interventions are legitimate and can positively influence national policies. The motivation of the book is to search for how international courts can do *good*, not simply how they can do *well*.

The book does not define what Dothan refers to as 'international judicial review'. This broad reference may evoke the entirely different concepts of global administrative review[2] or domestic judicial review,[3] depending on the reader's background. Only as the book progresses and concludes does 'international judicial review' refine itself to an internationalization of the domestic concept. The attempt in the final chapter to highlight the parallels between the theories in the book and those used to justify domestic judicial review[4] is the first time the reader is presented with a clear understanding of what Dothan perceives under this concept.

The European Court of Human Rights (ECHR) provides the primary source for both the theoretical and empirical investigations that Dothan undertakes to understand the potential impact of international courts on national policies. The book is presented as a study of international courts. Yet, the ECHR is the focus, with only limited reference to other courts in some chapters. The choice of court reflects the challenge for authors that the study of international courts often presents: the difficulty with generalizing behaviour across the many varied tribunals. The conscious choice of the ECHR enables the book to focus on the critical reasoning, rather than on the voluminous doctrinal work that could be required for a larger number of international courts. However, the selection of the ECHR presents questions throughout the work of expanding the conclusions on the ECHR to other international courts, particularly those dealing with inter-state disputes.

The book is made up of five substantive chapters each dealing with a specific criticism of international judicial review and drawing from Dothan's earlier work on these questions. Chapters 2 and 3 are primarily concerned with the legitimacy of international courts and their decisions while

[1]See, for example, N. Grossman et al. (eds.), *Legitimacy and International Courts* (2018); T. Squarito et al. (eds.), *The Performance of International Courts and Tribunals* (2018).

[2]See, for example, B. Kingsbury et al., 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15.

[3]See, for example, J. Waldron, 'The Core of the Case against Judicial Review', (2006) 115 *Yale Law Journal* 1346.

[4]In setting out the theories on justification of domestic judicial review, Dothan refers to scholarly works on domestic judicial review in the US.

the remaining chapters consider the consequences of decisions of international courts and their influence on national decision-making. At a little under 150 pages, the book boldly attempts to offer some normative policy recommendations in each of the chapters. However, in order to achieve this ambitious goal in a short work, the book at times relies on generalizations and assumptions about behaviour of states and international adjudicators.

Chapter 2 begins the analysis of international judicial review from the perspective of normative legitimacy by setting out the reason why international courts are entitled to intervene. The chapter explores cases applying the principle of effectiveness and the margin of appreciation in the ECHR. The book argues that the principle of effectiveness provides flexibility to interpret the rights of individuals expansively and the limitations on these rights restrictively. This flexibility may be in conflict with the principle of state consent, which is usually manifested in applying restrictive interpretations of treaties. However, Dothan argues that restrictive interpretation should not be used if it does not adequately represent the interests of all European states or of the people's residing in these states. The argument on restrictive interpretation is not entirely convincing as it oversimplifies the complex treaty negotiations and expression of state consent, as well as the development of rules of interpretation over time. This complexity leads Dothan to concede that an expansive interpretation may give states incentives to limit their treaty obligations to avoid international judicial intrusion. Dothan responds quite simply that courts must play it 'smart'.[5] Readers are left to wonder for themselves how a 'smart' court should behave. The chapter concludes with a call to international judges to first ask themselves if they *should* be the ones to decide. Dothan's call suggests weighing political considerations against the exercise of their authority, even where the judge has jurisdiction, which may concern legalistic readers. Yet, it also shows the harsh reality facing many international courts in their attempts at intervention.

Chapter 3 is concerned with the argument of systemic epistemic superiority: that international courts are uniquely positioned to learn from the collective wisdom of national decisions. This section attempts to address a major challenge to intervention, namely that there is no reason to believe that international court decisions will be better than their national counterparts. The chapter considers the advantages of international courts applying comparative law by analysing the ECHR's doctrine of emerging consensus. Dothan's analysis is centred on the Jury Theorem, drawing from the work of Posner and Sunstein.[6] The author essentially deals with two issues: why are international courts better at applying comparative law than national courts, and what are the problems with comparative law techniques. Dothan argues that international courts have an institutional advantage over national courts in applying comparative legal reasoning as international courts allow states to make the initial independent decision and the court can then aggregate all the policies at a later date. However, the chapter concedes a number of fundamental problems with the application of the Jury Theorem, including that some states are different, that the court could manipulate or delay its decisions, that states could act strategically to avoid findings of violations and that state may not decide policies simultaneously. Dothan argues that the margin of appreciation could be applied differently to solve some of these problems, including the differences between states and manipulation of decisions. However, the problems surrounding state behaviour are left unresolved and continue to weigh against Dothan's conclusion on the applicability of the Jury Theorem. The chapter goes on to deal with a criticism of comparative law, namely that judges may misapply such law. Dothan offers pragmatic solutions to make the best out of the emerging consensus doctrine based on whether the international judge follows the legalist, attitudinal or strategic models of judicial behaviour.[7] The limited analysis of

[5]S. Dothan, *International Judicial Review: When Should International Courts Intervene?* (2020), 36.

[6]E. Posner and C. Sunstein, 'The Law of Other States', (2006) 59 *Stanford Law Review* 131.

[7]Dothan defines these types of behaviour as '(1) legalist models – judges try to implement the law itself in their judgments. (2) attitudinal models – judges decide sincerely based on their policy preferences. (3) strategic model judges try to promote their preferences strategically, taking into account the possible reactions of other actors': *supra* note 5, at 63.

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these models of behaviours does not draw out any single solution that could work for all types of model nor does it consider if a solution for one type would have a positive or negative consequence for an alternative judicial behaviour.

Chapter 4 turns to the process of decision-making at the national level, arguing that international courts can improve 'public deliberation'. The chapter explores three ways in which this can be done: 'stirring' the general public, creating dialogue with governments and creating an international network of lawyers. For Dothan, the myth that international courts are powerful actors in world politics provides the public with a 'rallying cry' and creates incentive for public involvement in politics. International courts can also change the discourse from interests and political power to a discussion of principles and values, demonstrated through the reference to ECHR principles in courts outside its jurisdiction. International courts may also provide a stage for 'non-governmental organizations' (NGOs) to disseminate information to the public, an issue which is further explored in Chapter 5. Turning to the potential for dialogue with governments, the book notes that international courts are constrained institutions but may be able to avoid dangerous backlash if they are aware of these political constraints and shape their judgments accordingly. Dothan draws from responses from the three branches of government to specific judgments of various international courts, including the Court of Justice of the European Union, the International Criminal Court (ICC), and the International Court of Justice. These examples seek to demonstrate that the dialogue between the international court and the branches of government is conducive to a vibrant public deliberation. The examples provided suggest any dialogue is good but do not consider whether that dialogue may produce worse outcomes, for the international court or others. Finally, Dothan turns to the international network of lawyers (of which many readers of the book will be a part of) noting the ability of international courts to provide collaboration within the network, motivate governments to hire more lawyers as well as contribute to legal academia. The chapter primarily relies on anecdotal evidence, with reference to a very limited number of specific examples, albeit from the greatest variety of international courts than other chapters. The anecdotal nature of the chapter may still be sufficient to achieve the less ambitious goal of this chapter, to show that, by engaging these groups in society, international courts can be the starting point for a healthy public debate on national policies.

Chapter 5 deals with whether NGOs should participate in international court proceedings, attempting to address the criticism that courts could be captured by interest groups. The chapter uses empirical analysis to ascertain whether NGOs' practice of shaming states for violations exposed by international courts is capable of getting international public opinion closer or further away from the truth. NGOs are said to be able to send power signals of trust in international courts because they are independent from any formal commitment to the success of these courts. However, Dothan notes the risk of over-reliance on NGOs is to ensure courts maintain their independent ability to monitor compliance. Turning to the empirical investigation of the chapter, Dothan studies the ECHR using social network analysis to assess whether information through NGOs become better or worse. Referring to empirical hypotheses about the way information passes through social networks, the study concludes that NGOs tend to form a 'bandwidth' world, which results in more accurate information over time than an 'echo' hypothesis.[8] This leads to the implication that co-operation between international courts and NGOs can be beneficial but the international court must be mindful of potential accusations of being captured by interest groups. The chapter provides an interesting analysis of the potentially positive role of NGOs in international court proceeding. Yet, the chapter does not explore how international courts can avoid

[8]The 'bandwidth hypothesis' refers to a 'network [resembling] a pipe through which information is transmitted, the denser the network, the wider the pipe and the more accurate information becomes' whereas the 'echo hypothesis' argues that 'information flow within a dense network is not enhanced but rather corrupted': S. Dothan, 'A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States', (2017) 27 *Duke Journal of Comparative and International Law* 141, 182–3.

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accusations of capture by NGOs. The rather vague requirement of different rules for different courts is the only suggestion of the possible regulation to avoid this accusation.

The final substantive chapter, Chapter 6, looks at the outcomes of international court decisions, determining what level of subsidiarity will result in greatest compliance with international law. Chapter 6 steps away from a primary focus on the ECHR and instead turns to the ICC. The chapter analyses the admissibility rules of complementarity and primacy to determine which level of subsidiarity will result in the maximum compliance by soldiers with international criminal laws. The chapter's analysis is inspired by game theory and adopts backward induction to find the optimal admissibility rule. The chapter makes this backward induction for two different scenarios: whether or not the ICC can expose sham trials at the domestic level. The analysis includes two factors that will affect the optimal admissibility rule: whether the state concerned is a corrupt state or a rule of law state, and the probability of prosecution by the ICC. The result of the backward inductive reasoning indicates that these factors will impact the admissibility rule that is most conducive to ensuring compliance in different ways. For example, low probability of prosecution requires a complementarity approach but primacy is preferred where there is a high probability of prosecution. The chapter takes this analysis one step further by identifying how the chosen rule of admissibility will affect states' willingness to join the court's jurisdiction, but without providing any historical examples. The backward inductive reasoning nicely identifies the different outcomes on deterrence based on the various factors. However, the chapter largely relies on generalisations and assumptions about state and soldier behaviour. The chapter does acknowledge the caveats in this reasoning but goes no further to address them. Based on the analysis of high vs low probability of prosecution, the chapter suggests potential normative solutions to ensure maximum deterrence of soldiers (adopting the assumption that sham trials cannot be exposed by the ICC). The normative solutions that are presented, including amending the Rome Statute, changing the admissibility rule by the ICC, and distinguishing between states' types, are each likely to cause potential backlash against the ICC. The solutions that revolve around the ICC instituting changes independently are more likely to come into fruition. Yet, significant legitimacy concerns for the ICC would inevitably follow. These potential legitimacy concerns are not resolved in the chapter and there is no attempt to settle on the 'right' normative solution. Although the ICC's current threat of prosecution is limited, the chapter concludes that the ICC is likely to have had a much stronger effect on reducing international crimes than merely direct deterrence of soldiers, the analysis of which would require an empirical investigation beyond the scope of this book.

Overall, the book provides a thought-provoking study of the ECHR and, to a more limited extent the ICC, engaging the reader through a variety of methodologies and reasoning, ranging from doctrinal analysis, social network analysis and game theory. The ambitious question posed by the book, when should international courts intervene, is unsurprisingly not fully answered within the scope of this short book. However, the book presents the reader with many of the potential issues and how different research methods can be employed to assess international court intervention.

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