

The conception of justice pursued by Lord Dyson to navigate the line between continuity and change is one based on rigorous, close and precise analysis of the legal issues before him, unless other broader considerations *need* to be brought into account. This approach leads to, for the most part, decisions which although perhaps adventurous are not adventure for adventure's sake. It is an approach under which judges "decide the cases that are before them for determination". *Justice: Continuity and Change* showcases a demonstrably strong approach to the judicial role across a rich spectrum of law in this jurisdiction and others.

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*Rousseau's Constitutionalism: Austerity and Republican Freedom.* By EOIN DALY.  
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Perhaps more than any other social contract theorist, Rousseau is a frequent target of constitutionalists. His system of popular sovereignty can be understood as exemplifying all that is wrong with unlimited political power. Indeed, constitutionalism, as a theory of limited government, is the perfect antidote for the type of dangers associated with an uncontrolled Rousseauian sovereign. Eoin Daly's *Rousseau's Constitutionalism* presents an interesting and persuasive challenge to that approach. Daly argues that Rousseau should be read as advancing a distinct constitutionalist ideal directed at protecting citizens not only from the domination of arbitrary state power, but from the different (and not necessarily legal or political) conditions that make self-government impossible. Daly advances this argument in five chapters that engage both with most of Rousseau's published writings and with some of the main works on the subject in the secondary literature.

The first chapter of Daly's book seeks to identify Rousseau's place within the republican tradition. Rousseau, Daly maintains, is a republican in the sense that he understands unfreedom as a condition of being dependent on the will of others. However, Rousseau's insight was that this dependency "has a much broader sense than coercion, encompassing affective and even psychic, along with material and economic, dimensions". These forms of unfreedom increase with the development of complex social relations which tend to augment people's need of external recognition. Under this view, the social contract can only offer a partial solution to the problem of unfreedom. It is not enough for a group of human beings to enter civil society and make their own laws: the polity that arises from the social contract must "protect citizens not only against coercive invasions of their person or property, but from dependency in all of its dimensions – affective, social and symbolic".

Rousseau's constitutional project, which Daly begins to reconstruct through the discussion of the Genevan's conception of freedom, seeks to combat those types of dependency by creating and sustaining a form of economic autarky. For example, in his constitutional proposals for Corsica, discussed by Daly in ch. 2, one can find a set of constitutional devices aimed at the promotion of "highly austere, undifferentiated societies, free from the corrupting effects of commerce and luxury". Only in such a social context can the type of freedom Rousseau defends emerge. In terms of the exercise of political power, Daly notes that Rousseau's project for Corsica seems to depart from the type of arrangements he prescribes in the *Social Contract*. In particular, Rousseau argues that "Corsica needs a mixed government where the people

assembles only in sections rather than as a whole, and where the repositories of its authority are frequently rotated". This type of approach, where power is decentralised is, according to Daly, a "necessary corollary of an autarkic and agrarian political economy", but appears to be in tension with the sovereign assembly defended in Rousseau's most famous work. However, as Daly suggests, there is nothing inconsistent with the decentralisation of governmental power and the system envisioned in the *Social Contract*: the people's sovereign power is indivisible, but the day to day power of government could be legitimately exercised in the most diverse ways (e.g. a monarchy, an elected aristocracy, or a democracy: Rousseau, *Social Contract*, trans. Cole (1993), Book III, chs 3–8).

Daly also throws light on Rousseau's constitutional thought by skilfully comparing it to that of other republicans, such as James Madison. For Madison, the best safeguard against domination was not Rousseauian austerity, but a set of institutional devices that prevent factional interests to prevail over the common good. Rousseau, Daly argues, would have been understandably sceptical of the extent to which institutional mechanisms, by themselves, may ensure an equilibrium of competing interests: a "genuine republican politics", for him, cannot be "reconciled with the social and economic life of the moderns". Crucially, Daly shows that Rousseau's concern is not so much the power relations caused by wealth disparities, but the possibility that wealth and economic inequality undermine "the cohesion and solidarity that are needed" for citizens to be able to identify the general will and legislate accordingly. In light of this approach, Daly characterises Rousseau's constitutionalism as "socially-directive": it seeks to "mould and shape citizens' characters" in order to put them in a condition in which the realisation of their freedom is possible.

The flourishing of the conditions that make freedom possible, for Rousseau, is thwarted by the cultural world of liberal societies. Those modes of cultural expression would therefore need to be replaced in order to create republican freedom. Daly examines this aspect of Rousseau's constitutional thought in ch. 3. Rousseau's rituals and ceremonies included, for example, "extensive attention to feast days, commemorations and public games", all embedded with some kind of nationalist component. These rituals, according to Daly, seek to give a concrete meaning to abstract political concepts such as justice and liberty and to trigger emotions that should result in behaviours and dispositions that promote republican freedom. At first sight, some traditions present in contemporary societies, such as the singing of the national anthem or the celebration of national independence, would seem directed to motivate the same kind of civic sentiments that interest Rousseau. The similarity between these practices, however, is only apparent: rather than coexisting with other forms of cultural and aesthetic self-expression, Rousseau's approach seeks to replace them.

"Fundamentally", writes Daly, "Rousseau understood culture and art, in the early-modern context, as sources of social *distinction* . . . and therefore, in turn, as a form of social inequality and domination that is inimical to the republican project" (emphasis original). In order to realise Rousseau's constitutionalism of austerity, the forms of economic autarky previously described are not enough: a new form of civic ritualism that serves as an outlet for inclusive and non-dominating cultural expressions is necessary. Unlike cultural practices such as the opera and the theatre, which require special forms of knowledge that in the last instance create social hierarchies, Rousseau's public rituals aim to be accessible to all. In response to those critics who would see Rousseau as attempting to use these practices as a way as imposing social homogeneity, Daly maintains that he rather seeks to rescue

“festivities and self-expression...from the competitive and esoteric forms that it assumes in the fragmented social order of early liberal societies”.

In ch. 4, Daly moves to a more explicitly political aspect of Rousseau's thought: his conception (and apprehension) of deliberation. In one of the most insightful parts of his book, Daly shows how Rousseau's apparent rejection of deliberation is informed by the same concerns that led him to promote economic autarky and reject the types of cultural expression characteristic of liberal societies: the unfreedom that results from exclusion and inequality. Republicans generally see deliberation as a means for citizens' self-realisation or as a democratic technique for discerning the common good. Rousseau, in contrast, sees it as a source of domination. Like the social and cultural practices of liberal societies, Rousseau sees deliberation as based in a specialised mode of knowledge that rewards arbitrary competences, such as public speaking abilities. Importantly, Daly notes that despite Rousseau's negative view of deliberative practices in liberal societies, the general will must ultimately be expressed after some form of deliberation. But deliberation can escape the risk of becoming a specialised and exclusionary technique only if it takes place in the type of austere society recommended by Rousseau.

Chapter 5 examines the ways in which Rousseau approaches law-making and adjudication, bringing together the themes developed in the previous chapters. The chapter begins by the identification of an apparent puzzle in Rousseau's understanding of the role of judges and judicial interpretation in a society guided by the general will. Rousseau saw law as an expression of the general will that must emanate from a sovereign assembly of the entire people. At the same time, he favoured “terse” and “open-textured” forms of legislation, maintained that well-governed states would need “very few laws” (*Social Contract*, Book IV, ch. 1), and wrote that “it is possible, with a few clear and simple laws...to have justice well administered”. The combination of the nature of Rousseau's laws and the need of implementing the sovereign will would seem to give judges the power to develop or supplement the law and, in some cases, even to subvert it. That is to say, it would transform judges into potential legislators.

Not surprisingly, Daly finds the solution to this problem in Rousseau's austere constitutionalism. Judges, rather than being engaged in a specialised form of reasoning, are envisioned by Rousseau as individuals who are no different from the ordinary citizens who, when living in a society that is free of the vices of social and cultural inequalities, can see what is good for the polity. Judicial power would thus be “disciplined and controlled” by the same virtues of austerity that inform other aspects of Rousseau's constitutional thought and “that permit the general will to be discerned and legislated in the first instance”. Although I am persuaded by Daly's conclusion on this point, I think there is a much simpler way to reach it, one that avoids the puzzle that Rousseau's judges would be inevitably exercising the legislative power every time they issue a judgment that seeks to go beyond established law.

As noted earlier, in the *Social Contract*, Rousseau distinguished between the legislative power (i.e. the sovereign) and the Government (which he also called the executive power). Importantly, the role of government is to implement the laws not only by executing them, namely by applying them to particular situations, but by creating any lower level norms (which Rousseau called “decrees”) that are necessary to realise the relevant legislative will. This is why Rousseau maintained that after the sovereign has adopted a body of laws, there “still remains an infinity of details of administration and economy, which are left to the wisdom” of the officials called to exercise the executive power (*Discourse on Political Economy*, Capaldi and Lloyd (eds.) (2011), p. 80). A judge, for Rousseau, is one of those

officials: he or she has the duty of issuing judicial decrees that execute the decisions of the sovereign people. Put differently, judges, as other magistrates and executive agents, are engaged in the project of realising the general will expressed in legislation. If a law is especially vague, of course, the problem would be to determine which principles or rules should guide a government acting in its judicial capacity and prevent it from replacing or subverting the law.

I think that Rousseau had a twofold answer to that problem (which is also an answer to the apparent puzzle identified by Daly) and it is found in his *Discourse on Political Economy*. First, Rousseau notes that “the spirit of the law ought to decide in every particular case that could not be foreseen”. Second, if the law itself is unclear, particular cases must be decided in the way most conducive to the general will, which is “the source and supplement of all laws” (*Discourse on Political Economy*, p. 80). Those are Rousseau’s maxims of legal interpretation. In following those maxims, courts would not be legislating but simply issuing judicial decrees that develop and supplement the law. How to ensure that judges are able to do *that*, that is, to implement the people’s law in their judgments in a way that realises the common good rather than engage in practices that further different forms of domination? That is one of the key questions that Daly’s account of Rousseau’s austere constitutionalism, described through five concise but rich chapters, answers.

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