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The ECtHR, transregional dialogues and global constitutionalism

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Abstract: In *A Cosmopolitan Legal Order*, Stone Sweet and Ryan suggest that 'from the standpoint of global law, we see that the [European Court of Human Rights] has taken its place in a pluralist, rights-based international order, as one trustee of this global order'. This article is a preliminary attempt to evaluate signs of movement toward global rights review. A multi-level charter of rights exists in the network of international and regional human rights treaties and in national constitutions. An incipient structure of global rights review exists in the form of the regional human rights courts, which see themselves as trustees of the larger global human rights system. Judicial dialogue among the regional courts allows for informal, decentralized coordination among them. The European Court of Human Rights serves as a point of reference for the African and Inter-American systems, though these also cite each other. Transregional judicial dialogue establishes a rudimentary, informal and decentralized mechanism of coordination among bodies that exercise a review function in the multi-level system of international human rights.

Keywords: cosmopolitan legal order; European Court of Human Rights; human rights; judicial dialogue; judicial review

I. Introduction

In *A Cosmopolitan Legal Order*, Stone Sweet and Ryan propose a model of transnational constitutional justice based on the theories of Kant. In doing so, they enter territory into which Kant himself did not venture, namely identifying the institutional and functional features of a system of rights and rights adjudication that would meet Kant's criteria for a 'rightful' condition within and among independent states.[1] Stone Sweet and Ryan argue convincingly that the European Convention on Human Rights (ECHR) and its court, the European Court of Human Rights (ECtHR), display the structural

[1] A Stone Sweet and C Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (Oxford University Press, Oxford, 2018) 27–28.

forms of and operate in practice as such a system – a cosmopolitan legal order (CLO).

Stone Sweet and Ryan offer more measured assessments of the prospects for a rights-based, global constitutional system that would similarly fulfil the criteria for a cosmopolitan legal order. Neither of the other two regional human rights systems, in the Americas and in Africa, has developed into a fully-fledged CLO in the way Europe's has. Major world powers, including China, Russia and the United States, oppose any movement towards global rights standards, much less international rights adjudication. A growing number of democracies (Brazil, India, Hungary, Israel, the Philippines, Poland) have retreated from constitutional rule-of-law principles, and the world's non-democratic countries lack functioning systems of constitutional justice.[2] The construction of a global CLO is at best a long-term prospect and one that can only be assessed in terms of movement along a path or continuum.[3] This article is a preliminary attempt to evaluate signs of movement. It takes as its starting point the following observation: 'Finally, from the standpoint of global law, we see that the Court has taken its place in a pluralist, rights-based international order, as one trustee of this global order. The Court is now positioned to help build and enforce an emerging global constitution, of which the Convention is but one component.'[4]

II. Global constitutionalism

Stone Sweet and Ryan suggest that a global CLO would be a pluralist order consisting of 'domestic and transnational systems of constitutional justice' operating in dialogue with each other.[5] Each level within this multi-level system would include a charter establishing justiciable individual rights (with corresponding obligations on public officials to respect those rights) and a mechanism of rights review – a trustee court – authorized to check the acts of public officials for their compatibility with the rights charter.[6]

The first component – the charter of rights – exists at the global, regional and national levels. Since the UN General Assembly approved the Universal Declaration of Human Rights (UDHR) in 1948, various civil, political, economic and social rights have been incorporated into international treaty

[2] Yap's contribution to the symposium suggests that democracy is a prerequisite for the establishment of a cosmopolitan legal order: see Yap (this issue).

[3] Brown and Andenæs (this issue) as well as Corradetti (this issue) view the CLO as a transitional form of legal cosmopolitanism.

[4] See (n 1) 246.

[5] Ibid 249.

[6] Ibid.

law. The UDHR and the two Covenants – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – embody the core rights of the international human rights legal regime. Subsequent treaties have affirmed or further specified those rights or applied them to particular populations (women, children, persons with disabilities, migrant workers). Several of these treaties have achieved nearly universal ratification: the Convention on the Rights of the Child (193 states parties), the Convention on the Elimination of All Forms of Discrimination Against Women (189), the Convention on the Elimination of All Forms of Racial Discrimination (176), the ICCPR (168), the ICESCR (164), the Convention against Torture (157) and the Convention on the Rights of Persons with Disabilities (156). Taken together, the international human rights treaties form the normative core of a global constitutionalism that establishes rights-based boundaries to state power.[7]

The regional human rights treaties serve a similar function for sub-sets of states. The American Declaration of the Rights and Duties of Man (1948) was the world's first general international human rights document. The American Convention on Human Rights (ACHR) was adopted 21 years later. The European Convention on Human Rights (ECHR, 1950) was the first multilateral human rights legal instrument. The African Charter on Human and Peoples' Rights (ACHPR) followed in 1981. In terms of the rights enumerated and the general principles underlying them, the three regional rights charters and the global treaties cover nearly identical catalogues of rights.

Finally, modern national constitutions include rights charters. Indeed, as Law and Versteeg demonstrate, modern constitutions demonstrate 'a tendency to guarantee an increasing number of rights; the spread of judicial review; and the existence of generic rights that can reliably be found in the vast majority of constitutions'.[8] Stone Sweet and Ryan note that all 106 constitutions established since 1985 have included a charter of rights.[9] The international human rights regime has had a decisive effect on the domestic

[7] S Gardbaum 'Human Rights and International Constitutionalism' in JL Dunoff and JP Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) 233–57; M Kumm 'The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State' in JL Dunoff and JP Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) 258–325; A Stone Sweet and E Palmer 'A Kantian System of Constitutional Justice: Rights, Trusteeship, Balancing' (2017) 6(3) *Global Constitutionalism* 377.

[8] DS Law and M Versteeg 'The Evolution and Ideology of Global Constitutionalism' (2011) *99 California Law Review* 1194.

[9] See (n 1) 54, n 76.

constitutionalization of rights.[10] For example, after adoption of the UDHR, the rate at which UDHR rights appear in national constitutions rises dramatically through the 1990s.[11] In addition, states incorporate regional and international rights provisions in domestic law not just by writing them into constitutions, but also through legislation and judicial decision. For instance, member states of the ECtHR have incorporated ECHR rights in domestic law through all three means (constitution, statute, jurisprudence).[12] Latin American states have constitutionalized international human rights treaties through political means (constitution-writing and legislation) as well as judicial decision.[13] In Africa, the experience is similarly varied, but with the same overall trend.[14]

A multi-level charter of rights, comprising national, regional and global instruments, therefore exists. This means that one of the two essential components of a global CLO – an international charter of rights and a system of judicial rights review[15] – is largely in place. The next section turns to the second component: trustee courts exercising rights review.

III. Regional courts in a global system

By 2010, the number of states with courts authorized to review government policies for their compatibility with a constitution had reached 160.[16] The regional human rights courts review state acts for their congruence with the corresponding regional human rights treaties. Of course, a global court with authority to conduct judicial review with respect to international human

[10] M Versteeg 'Law versus Norms: The Impact of Human Rights Treaties on National Bills of Rights' (2015) *171*(1) *Journal of Institutional and Theoretical Economics* 87.

[11] Z Elkins, T Ginsburg and B Simmons 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) *54*(1) *Harvard International Law Journal* 61; CJ Beck, JW Meyer, R Hosoki and GS Dori 'Constitutions in World Society: A New Measure of Human Rights', unpublished manuscript, 27 January 2017. Available at <https://ssrn.com/abstract=2906946>; D Sloss and W Sandholtz 'Universal Human Rights and Constitutional Change' (2019) *27*(4) *William & Mary Bill of Rights Journal* 1183.

[12] H Keller and A Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press, Oxford, 2008).

[13] ME Góngora Mera, *Inter-American Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (San José, Costa Rica: Inter-American Institute of Human Rights, 2011).

[14] F Viljoen, *International Human Rights Law in Africa* (Oxford University Press, Oxford, 2012) Ch 12.

[15] See (n 1) 249.

[16] M Coppedge et al., 'V-Dem [Country-Year/Country-Date] Dataset v8' in Varieties of Democracy (V-Dem) Project, 2018. Available at: <https://www.v-dem.net/en/data/data-version-8>; M Coppedge et al. *V-Dem Codebook v8, Varieties of Democracy (V-Dem) Project*, 2018. Available at <https://www.v-dem.net/en/data/data-version-8>.

rights treaty law does not exist. However, the regional courts see themselves not just as trustees of their respective regional systems, but also as integral parts of a larger global human rights system.

The ECtHR explicitly places the European Convention and its own jurisprudence in the broader context of international human rights law. As the Court stated in *Hassan v. United Kingdom*, 'As the Court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part.'[17] The ECtHR routinely cites international human rights treaties and the interpretations of the human rights treaty bodies. Similarly, the Inter-American Court repeatedly places the American Convention and the Inter-American Human Rights System within the context of the global human rights regime. In its first advisory opinion, for example, the IACtHR declared:

> The nature of the subject matter itself, however, militates against a strict distinction between universalism and regionalism. Mankind's universality and the universality of the rights and freedoms which are entitled to protection form the core of all international protective systems. In this context, it would be improper to make distinctions based on the regional or non-regional character of the international obligations assumed by States, and thus deny the existence of the common core of basic human rights standards.[18]

Finally, like the ECtHR and the IACtHR, the African Court of Human and Peoples' Rights also sees itself as part of a larger international human rights system. Indeed, the Protocol establishing the Court, under 'Sources of Law', declares, 'The Court shall apply the provisions of the Charter *and any other relevant human rights instruments ratified by the States concerned*.'[19] Like its European and American counterparts, the African Court regularly cites international human rights treaties and treaty bodies.

IV. Supranational judicial review

The regional courts see themselves as trustees of the larger global human rights system, at least for the states and populations within their jurisdiction. A pinnacle international court of human rights that might unify the regional

[17] *Hassan v. United Kingdom*, Judgment (Grand Chamber), European Court of Human Rights, App No 29750/09, 16 September 2014, para. 77.

[18] 'Other Treaties' Subject to the Consultative Jurisdiction of the Court, Series A No 1, Inter-American Court of Human Rights, Advisory Opinion OC-1, 24 September 1982, para 40.

[19] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998, Art 7 (emphasis added).

jurisprudence does not exist. But at times the regional courts engage in informal dialogues that can partially serve that coordinating function. Not only are the three regional human rights courts aware of doctrinal developments in the other two, but they also borrow – or import – legal ideas, principles and norms from each other. 'Inter-judicial dialogue' between the ECtHR and domestic apex courts has been crucial in the development of a CLO in Europe.[20]

Trans-regional judicial dialogue allows for informal, decentralized coordination among the regional courts in interpreting and applying international human rights norms. An obvious limitation of this emerging coordination is that Asia and the Middle East lack regional human rights courts that might participate in the trans-regional dialogue. Still, the jurisprudence of the existing human rights courts is available to activists and NGOs in those regions, offering norms, principles and arguments that could be useful in rights advocacy.[21] And should regional human rights mechanisms emerge in Asia and the Middle East, they would be able to tap into the jurisprudence of the three existing courts and join in the trans-regional dialogue.

Trans-regional judicial dialogue

The ECtHR clearly plays a leading role in cross-regional exchange. As Stone Sweet and Ryan suggest, the European Court is well positioned 'to help build and enforce an emerging global constitution'.[22] The ECtHR already had a large and well-developed case law by the time the other two regional courts started to issue judgments. For instance, when the IACtHR issued its first judgment on the merits in 1988, the ECtHR had already issued 180. When the IACtHR reached 100 merits judgments (2008), the ECtHR had produced more than 10,000. The ACtHPR issued its first judgment on the merits in 2013, and through 2015 it had produced only 12 merits judgments, by which time the ECtHR had accumulated more than 18,000.

The two younger regional courts could be motivated by legitimacy concerns to cite the more established ECtHR.[23] Of course, the decisions of one international court are in no sense binding in another. In international law, judicial decisions are not a source of law but only a 'subsidiary means for the

[20] See (n 1) 230–34.

[21] Yap argues that as proportionality analysis has found its way into courts in South Korea and Taiwan, principles of trusteeship and rights affirmation have as well (Yap, this issue).

[22] See (n 1) 246.

[23] W Sandholtz and A Feldman, 'The Trans-regional Construction of Human Rights' in A Brysk and M Stohl (eds), *Contesting Human Rights: Norms, Institutions and Practice* (Edward Elgar, Cheltenham, 2019) 107–24.

determination of rules of law'.[24] International courts cite each other's judgments for the light they can shed on similar problems and the persuasive support they might add to a court's reasoning. Judges constantly seek to convince important audiences – for example, the litigants in the case plus potential future litigants, other judges and political actors – that their decisions are not arbitrary, biased or simply political. Evidence that other courts have resolved similar legal questions in a similar way, and with similar reasoning, can bolster the credibility, and thus the legitimacy, of a judgment.[25]

The most straightforward way to measure the extent of trans-regional judicial dialogue is through citations from one of the regional courts to another. Counting citations probably under-estimates the extent of jurisprudential cross-fertilization. Judges do not always enter an explicit citation when they incorporate into their judgments ideas, principles, standards and reasoning that they encounter in decisions from other jurisdictions. The data explored here capture only instances of formal citation.[26] Measured in this way, the ECtHR clearly serves as a point of reference for the African and Inter-American courts. Through 2015, the IACtHR cited its European sister court in 75 per cent of its 185 merits judgments. The African Court of Human and Peoples' Rights issued its first judgment on the merits in 2013. Through 2015, out of twelve judgments, the ACtHPR cited the ECtHR in nine (75 per cent). In short, both the Inter-American and the African Courts refer to ECtHR case law in three-quarters of their decisions – a strikingly high rate.[27]

Although it is impossible to assess in depth the substance of IACtHR and ACtHPR citations to the ECtHR in this short essay, some examples could be helpful. One of the most prominent themes in IACtHR case law, developed from the first judgments, is that states are under an obligation to investigate, prosecute and punish serious violations of human rights. The Court has noted that the ECtHR has espoused a similar norm.[28] The IACtHR has also

[24] Statute of the International Court of Justice, Art 38(1)(d).

[25] E Voeten, 'Borrowing and Nonborrowing Among International Courts' (2010) *39*(2) *Journal of Legal Studies* 553.

[26] The data reported here include only final judgments on the merits; they exclude separate opinions, rulings on admissibility and advisory opinions.

[27] The ECtHR cites the other two regional courts but only infrequently. Out of more than 18,000 merits judgments through 2015, the ECtHR cited the IACtHR in 60 and the African Court or the African Commission in sixteen. See W Sandholtz, 'Human Rights Courts and Global Constitutionalism: Coordination through Judicial Dialogue' (forthcoming) Global Constitutionalism.

[28] *Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No 153, 22 September 2006, para 83.

emphasized the right to the truth about the fate of victims of rights violations, and has cited the ECtHR in doing so.[29] In the *Cotton Fields* case, the IACtHR cited judgments of the ECtHR in support of its finding of state responsibility for violations committed by private actors, and for its determination that the failure to prevent violence against women was part of a generalized pattern that amounted to discrimination against women, for which the state accrued responsibility.[30] The IACtHR has also invoked ECtHR rulings to deal with newly arising rights issues – for example, involving sexual orientation[31] and in vitro fertilization.[32]

The ACtHPR, whose case law is still recent and thin, has cited the ECtHR on a variety of issues. It has done so on the right of the accused to know the charges brought against her;[33] the right to a fair judicial proceeding;[34] the relationship between defamation laws, appropriate penalties, and freedom of expression;[35] the conditions under which the state can infringe on qualified rights;[36] the right to legal assistance;[37] and the right of the accused to be present in judicial proceedings against her.[38]

Trans-regional judicial dialogue allows the regional human rights courts to coordinate, in an informal and decentralized way, aspects of their human rights jurisprudence. Of course, much of that jurisprudence will be shaped by local needs and contexts. But cross-regional sharing of jurisprudence means that regional human rights sometimes develop together, under the umbrella of global human rights law that all three courts have recognized as their broader normative and legal framework.

[29] *'Street Children' (Villagrán Morales et al) v Guatemala*, Merits, Inter-American Court of Human Rights, Series C No 63, 19 November 1999, para 176, n 31.

[30] *González et al. (Cotton Field) v Mexico*, Preliminary Objection, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 205, 16 November 2009.

[31] *Atala Riffo and Daughters v Chile*, Merits, Reparations and Costs. Inter-American Court of Human Rights, Series C No 254, 21 November 2012.

[32] *Artavia Murillo et al v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No 257, 28 November 2012; No 24: 115–17.

[33] *Mohamed Abubakari v United Republic of Tanzania*, Judgment on Merits, African Court on Human and Peoples' Rights, App No 007/2013, 3 June 2016, para 158.

[34] *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Côte d'Ivoire*, Judgment on Merits, African Court on Human and Peoples' Rights, App No 001/2014, 18 November 2016, para 95, 134.

[35] *Lohe Issa Konate v Burkina Faso*, Judgment on Merits, African Court on Human and Peoples' Rights, App No 004/2013, 5 December 2014, paras 158–60.

[36] *Rev. Christopher R. Mtikila v United Republic of Tanzania, Judgment on Merits*, African Court on Human and Peoples' Rights, App No 011/2011, 14 June 2013, paras 103–106.

[37] *Wilfred Onyango Nganyi & Nine Others v United Republic of Tanzania*, Judgment on Merits, African Court on Human and Peoples' Rights, App No 006/2013, 18 March 2016, para 176–179.

[38] *Alex Thomas v United Republic of Tanzania, Judgment on Merits*, African Court on Human and Peoples' Rights, App No 005/2013, 20 November 2015, paras 95–98.

V. Concluding thoughts

Rights review appears to be an unlikely prospect at the global level. However, as I have suggested, judicial dialogue among the regional human rights courts establishes a rudimentary, informal and decentralized mechanism of coordination among judicial bodies that do exercise rights review. It is a mechanism that can be expanded and added to, if other regions build similar institutions in the future. In any case, one of the signal contributions of the European Court of Human Rights, in addition to building a cosmopolitan legal order in Europe, has been to provide a model and focal point for the emergence of transregional constructions of rights review.

This article has identified signs of movement towards a global cosmopolitan legal order. Such an order would consist of two principal components:[39] a multi-level charter of rights and a mechanism of rights review. The first element – a charter of rights – exists in the form of parallel rights provisions contained in international and regional treaties and in national constitutions. A framework for the second element, I have argued, is emerging in the ad hoc, decentralized form of coordination embodied in judicial dialogue among the regional human rights courts. This conclusion accords with other contributions to this symposium that explore the idea of 'transitional legal cosmopolitanism'.[40] A CLO that is under long-term construction fits with Kant's vision of a gradual and iterative process of cosmopolitan constitutionalism.

[39] See (n 1) 249.
[40] See the contributions to this symposium by Andenæs and Corradetti.