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Legislative aims and the Kantian supranational court: A comment on Alec Stone Sweet and Clare Ryan, *A Cosmopolitan Legal Order*

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Abstract: In my short comment on the new book by Alec Stone Sweet and Clare Ryan, I claim that the European Court of Human Rights does not take the 'legitimacy of state goals' step in its proportionality analysis seriously enough, relegating all its hard intellectual work to the next step: necessity scrutiny. What is puzzling about Stone Sweet and Ryan's book is that this observation about the ECtHR hardly registered in the book's argument, even though a Kantian perspective seems to be quite hospitable to a consideration of the scarcity of goal scrutiny in ECtHR case law.

Keywords: Convention jurisprudence; European Court of Human Rights; Kant; proportionality analysis; supranational court

At first blush, putting Kantian philosophy and the European Convention of Human Rights (ECHR) system together seems to call for an analysis of how the European Court of Human Rights (ECtHR) scrutinizes *reasons* for state legislation or decisions challenged before the court. Yet, both in the case law of the ECtHR and in this otherwise formidable book by Alec Stone Sweet and Clare Ryan,[1] there is little discussion about this aspect of Convention jurisprudence, and this demands explanation. This short comment picks up this issue raised by, but never fully analysed in, *A Cosmopolitan Legal Order*.

The purposes, or goals or aims (these words will be used interchangeably), for legislation or individual authoritative decisions are crucial from a Kantian perspective, as an extension upon the state of the role of purposes for individual actors exercising their autonomy. If the only unqualifiedly good thing in human action is goodwill, the notion of the right purpose and right motive for action must hold pride of place in a Kantian ethical system. *Reasons* for action must be morally right for an action to be morally worthy,

[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).

and individual self-determination – that is, the exercise of a person's free will – is viewed as the freedom to determine any purpose for oneself.[2] Not surprisingly, commentators such as Thomas Grey write about Kant's 'teleological reason'.[3] In Ernest Weinrib's words, 'purposiveness involves a relationship of a peculiar sort between the purposive being and the object toward which this being acts … A being is purposive insofar as it translates a representation of the object of its desire into reality.'[4]

Extrapolating this centrality from an inquiry about the motives, reasons for actions and purposes of an individual to a collective sphere, it can be suggested that Kantianism requires a focus on the right reasons for legislation, or proper purposes, that the state is entitled to pursue. Consequently, a Kantian perspective on the ECtHR would call for attention to the Court's scrutiny of member states' reasons for legislation expressed in the quality of the aims they pursue, while putatively engaging Convention rights. This is all the more justified since the Court has ample resources to do just that. For one thing, an inquiry into legislative purposes is warranted by the textual formulation of non-absolute rights in the European Convention on Human Rights – namely rights to private life, freedom of religion, freedom of expression, freedom of assembly and association, and freedom of movement (Articles 8, 9, 10, 11, and Art. 2 of Protocol 4, respectively),[5] which come with clauses establishing legitimate grounds for restrictions on those rights. The catalogues of these legitimate purposes vary slightly from the right to a right, and include (in slightly different configurations, depending on the right in question) national security, public safety, prevention of crime, protection of public order, protection of health or morals, protection of the rights and freedoms of others, and maintaining the authority and impartiality of the judiciary. In its case law, the Court has elaborated a doctrine that is well suited to an inquiry into legislative goals. As is well known, when the Court scrutinizes a national law (or a decision) of which an applicant complains, and the breach of any of these non-absolute rights is alleged, it proceeds in a standardized, canonical way, using the following steps: (1) It first determines whether there was an 'interference' by the state with the Convention-protected right in the first place, and only if the answer is positive, it then controls (2) whether the interference was prescribed by law, (3) whether it served a legitimate aim and (4) whether it was 'necessary

[2] EJ Weinrib, 'Law as a Kantian Idea of Reason' (1987) *87 Columbia Law Review* 494.

[3] TC Grey, 'Serpents and Doves: A Note on Kantian Legal Theory' (1987) *87 Columbia Law Review* 588.

[4] See (n 2) 482.

[5] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, available at: <https://www.refworld.org/docid/3ae6b3b04.html>.

in a democratic society'. The key step for an inquiry into legislative purposes is, of course, step (3). It is only if the answer to a question raised in step (3) is affirmative that the Court may proceed with the proportionality analysis encapsulated in step (4).

However, as I show elsewhere,[6] the Court has scarcely used these textual and doctrinal resources in practice and has underplayed step (3) in various ways. First, the Court has almost always been willing to accept the government's recitals of 'legitimate goals' at face value, virtually never probing behind governmental declarations about the goals pursued by the impugned legislation – even if those declarations were, to a reasonable observer, disingenuous. Second, the way the Court has reallocated the burden of its reasoning between steps (3) and (4) suggests that the argument about the real nature of the aim – something presumedly belonging to step (3) – has been executed in step (4) (relating to necessity/proportionality) with its conclusions radiating back upon the ascertainment of the aim. But that renders step (3) redundant because, on its face, the sequencing of steps in the proportionality analysis is all important. A putatively negative answer at step (3) renders step (4) unnecessary – the state action must be disqualified for breaching a Convention right in question.

The following provides two representative examples showing how the Court has downplayed the inquiry into the legitimacy of the state goals. In *HADEP and Demir v Turkey*,[7] the dissolution of a pro-Kurdish party was found to be a violation of Article 11. The government defended the dissolution as necessary to prevent disorder, protect territorial integrity, and thus preserve national security – a legitimate aim under Article 11(2).[8] The Court first expressed its 'hesitations' about whether the dissolution of the party really pursued the legitimate aim of preventing disorder, but said this question was closely related to the *necessity* of a measure, so should be relegated to the next stage of the argument.[9] Additionally, at this latter stage (i.e. proportionality viewed through the prism of necessity), contrary to the government's argument that the party should not be allowed to exist if its aim was to destroy the unity of the state[10] – as was allegedly the case with HADEP – the Court relied on evidence that the party condemned violence[11] and that its advocacy of a right to self-determination was not incompatible

[6] W Sadurski, 'European Court of Human Rights in Pursuit of Public Reason? A Study of Lost Opportunities', in *Public Reason and Courts*, edited by SA Langvatn, M Kumm and W Sadurski (Cambridge University Press, Cambridge, forthcoming).

[7] *HADEP and Demir v Turkey*, Judgment, ECHR Appl. no. 28003/03, 14 December 2010.

[8] See (n 5); see also (n 7) para 43.

[9] See (n 7) para 44.

[10] Ibid, para 50.

[11] Ibid, para 68.

with democratic principles.[12] On these grounds, the Court found that the dissolution had not served 'a pressing social need'[13] and was not necessary in a democratic society.[14] It is clear, however, that it was perfectly open to the Court to turn its 'hesitations' about the true aim of dissolution into something closer to a 'confidence' that concerns for national security were merely a rationalization for eliminating a rival party from the political life of Turkey. The very language of 'hesitations' used suggests that the Court applied a very weak standard of scrutiny to control the aim declared by the state. If its 'hesitations' had transformed into a near-certainty, the necessity scrutiny would be unnecessary – indeed redundant – because the aim of the legislation would have been deemed illegitimate in the first place.

In *Perinçek v Switzerland*,[15] the Court agreed that the reason for punishing a public speaker for denying the fact of the Armenian genocide was aimed at the 'protection of the rights of others', namely the honour of the relatives of genocide victims,[16] but then found a breach of Article 10 on the basis of the absence of a 'pressing social need'.[17] Remarkably, in this case the Court *did* engage in a critical (if laconic) scrutiny of another aim cited by the government: the prevention of disorder.[18] The Court responded that no proof of the risk to public order had been produced.[19] Nevertheless, by stating that the prohibition was not necessary to serve the aim of protecting the honour and feelings of the descendants of the victims,[20] the Court could have taken a parallel strategy regarding this aim, by considering the aim of preventing disorder and stating that this aim lacked credibility in the circumstances of the case. A similar strategy had been taken earlier in the case of *Open Door and Dublin Well Woman v Ireland*,[21] where restraints had been placed upon an organization helping pregnant women to travel abroad with the purpose if obtaining an abortion. While the government's stated objective of 'the prevention of crime'[22] was dismissed by the Court on the basis that the provision of information about abortion did not constitute a crime in Ireland,[23] it nevertheless recognized the goal of the protection of

[12] Ibid, para 79.
[13] Ibid, para 81.
[14] Ibid, para 82.
[15] *Perinçek v Switzerland*, Judgment, ECHR Appl. no. 27510/08, 17 December 2013.
[16] Ibid, para 75.
[17] Ibid, para 126.
[18] Ibid, para 73.
[19] Ibid, para 75.
[20] Ibid, para 129.
[21] *Open Door and Dublin Well Woman v Ireland*, Judgment, ECHR Appl. no, 14234/88 and 14235/88, 29 October 1992.
[22] Ibid, para 61.
[23] Ibid, para 63.

morals as legitimate[24] and subjected it to the necessity scrutiny.[25] These last cases show that the Court *is* occasionally able to dismiss a stated goal on the basis of its implausibility, though in this last case, the force of this move was diluted by *another legitimate goal* being accepted at face value, and without any inquiry into the credibility of *that* goal.

What these cases indicate – and there are many others on the basis of which a similar point can be made[26] – is that the European Court does not take the 'legitimacy of state goals' step in its proportionality analysis seriously enough, relegating all its hard intellectual work to the next step of necessity scrutiny. This is a puzzle (to which I provide a tentative solution at the end of this contribution). Yet this puzzle about the ECtHR hardly registers in Stone Sweet and Ryan's argument, even though a Kantian perspective seems to be quite hospitable to a consideration of the scarcity of goal scrutiny in ECtHR case law.

There is no doubt that Stone Sweet and Ryan do recognize the step of a judge ascertaining the legitimacy of reasons for legislative actions, although they apply this discussion to a 'system of constitutional justice' in general, rather than specifically to the ECtHR.[27] Even then, their discussion – although sophisticated – falls short of fully explaining the 'insouciance' of judges and scholars, as they put it, who 'typically downplay the importance of proper purpose inquiry, deploying it most often to pay their respects to officials' good faith efforts in pursuit of valid public interests, saving any censure for later stages'.[28] This is an excellent account of what is going on when proportionality courts address the legitimacy-of-purpose prong of analysis, but it does not explain *why* it happens. After all, the burden of argument would seem to be that for the purposes of both accountability and candour, the lexical priority of the stages of the proportionality analysis should be respected, and any doubts about 'good faith' in governmental appeal to allegedly legitimate purposes should be decisive in ending the scrutiny with a negative conclusion at this stage, without the need to go any further down the line in the analysis. The burden of such an argument seems to be necessitated by the presumption of invalidity when important constitutional rights are at stake, as is usually the case when we (the scholars) are discussing the actual uses of the proportionality analysis – and this is precisely what is at stake in the instances of 'constitutional justice' discussed by Stone Sweet and Ryan.

[24] Ibid, para 63.
[25] Ibid, paras 64–80.
[26] See (n 5).
[27] See (n 1) 63–67.
[28] Ibid, 64.

The authors do hint at the possibility of precisely *that* state of affairs – that is, at the judicial abandonment of the need to tick subsequent boxes once the answer to the legitimacy-of-purpose question is negative: 'Because the Kantian judge is under a clear duty to filter such [impermissible] ends, one should ask why the legitimate purpose test is not sufficient in itself, that is, why supplement it with three subsequent stages?'[29] This is a good question. The authors' answer is somewhat obscure, but in the end it seems to boil down to judicial deference to the legislature. In the last paragraph of the section of the book, devoted to 'Excluded Reasons and Absolute Rights', Stone Sweet and Ryan suggest that if the courts were to 'develop a more robust application of the legitimate purpose test' (even though they report that, 'In the proportionality world … no court has moved in this direction in any consistent way'), the outcome would have the form of a 'hydraulic effect' under which 'balancing and necessity reasoning would likely flow into the analysis of proper purpose', and such 'an outcome would undermine transparency, as well as the tribunal's capacity to express respect (and condemnation) for officials precisely where it is due'.[30]

One may wonder about the plausibility of this conclusion, and about the force of an argument based on transparency and respect. As far as transparency is concerned, it can be argued that such an open neglect for an explicit scrutiny of the aims of legislation at the first stage of scrutiny actually renders the whole process less transparent than it otherwise could have been. If judges were serious and transparent in their scrutiny of legislative purposes, the legal and general public would receive a clear message that the judiciary refuses to take the legislature's assertion of the purpose pursued by an authoritative act at face value. Rather than faulting legislative officials for their inefficient pursuit of a legitimate goal (as is the case with the balancing and necessity steps of scrutiny), the judge would openly assert that the real purpose pursued by a legislator is illegitimate. Transparency would be improved rather than undermined by a serious approach to the legislative goal scrutiny.

As for the second argument supplied by the authors, about 'respect (and condemnation) for officials precisely where it is due', the immediate response would be that when a judge is prepared to accept without probing the official assurance of legitimate purposes pursued, 'respect' for officials is at its highest. This translates into a strong exercise of judicial deference: the judge does not challenge the officials' good faith in pursuing the asserted *end*, and only in subsequent steps may they question the efficiency of the *means* adopted. But what about situations in which such respect is not

[29] Ibid.
[30] Ibid, 67.

deserved, and the goals asserted are clearly pretextual and disingenuous? In such instances, a judge should be able to express their 'condemnation', as explicitly suggested by the authors. But how can such a condemnation be expressed when a judge treats the step of goal scrutiny in a perfunctory way, and focuses all their fire on the necessity and balancing stages, where the capacity for condemnation is much lower?

At this point, I wish to bracket all that was said in the last four paragraphs, and recall that the discussion to which I have referred is not contained in the book's chapters on the ECtHR but rather in the chapter on constitutional justice *tout court*. Yet the ECtHR replicates exactly the same 'insouciance' about legitimate goal scrutiny in its proportionality case law as do many national constitutional courts. The authors' opinions about whether their general observations about the relative insignificance of goal scrutiny in national constitutional justice apply to the ECtHR as well would be interesting.

My own view is that whatever reasons we have to applaud (as seems to be the case for the authors) or criticize (as is my case) this state of affairs, these should apply, *mutatis mutandis*, to the ECtHR. And the *mutatis mutandis* proviso carries important weight. For the ECtHR in some ways *is*, and some ways *is not*, like a national constitutional court. It is tasked with ascertaining the very nature of the constitutionality ('conventionality', in the ECHR language) of state executive, judicial, and legislative actions just as national courts do; yet, its judgments apply to states, and only via states, to the state bodies. It may be argued that questioning the state at the aim ascertainment stage – in practice, accusing the state of being disingenuous in providing aims that act as mere pretexts, while its true aims are of a much less wholesome character – brings the Court into a head-on collision course with the state, and risks weakening its legitimacy, which is tenuous at the best of times. It *may* be argued that postponing the aim ascertainment to a later stage, and hiding it within a much more technical and complex necessity scrutiny analysis, helps the Court to reduce the reputational losses for a state found to eventually have breached the Convention, and thus to maintain the Court's legitimacy capital. After all, if the legislative restrictions have been found 'unnecessary' to achieve a stated aim, it sounds more like an *error* on the part of the state; if, in contrast, the state is found to publicly provide an aim that is not credible under the circumstances, it sounds much more like a case of a *disingenuous* stance by a state. If you are a state, you prefer to be found mistaken rather than dishonest.

This argument about avoiding direct aim scrutiny in order to reduce the collision between the Court and the state echoes an argument, occasionally found in US constitutional theory, that the judicial scrutiny of aims raises particularly dramatic tensions between the judiciary and the legislature. As

Theodore Eisenberg observes, 'Interbranch tensions increase when judges examine official decisionmakers' motives.'[31] If Eisenberg is right – and his proposition seems eminently plausible – then the 'tensions' are all the more acute when a *supranational* court examines state officials' motives. This would be an explanation, though not necessarily a justification, for the Strasbourg Court's perfunctory treatment of a state's motives and purposes when a citizen asserts a breach of a Convention right. If the authors were to agree with this sketchy interpretation of the Court's approach, then perhaps its Kantian pedigree would have to be found – at least on this point – somewhat wanting.

[31] T Eisenberg, 'Reflections on a Unified Theory of Motive' (1978) *15 San Diego Law Review* 1148.