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Dialogic constitutionalism and judicial review

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Abstract: In *A Cosmopolitan Legal Order: Kant, Constitutional Justice and the European Convention on Human Rights*, Alec Stone Sweet and Clare Ryan reconstruct Kant's legal philosophy as a program of cosmopolitan legal order (CLO). A CLO is defined as a multi-level, judicialized, transnational system of rights protection that confers on all persons, by virtue of their humanity, the entitlement to challenge the rights-regarding decisions of public officials, who are under an obligation to assure the equal juridical status of all. The authors illustrate this claim with respect to the development of the ECtHR and the Court of Justice of the European Union. While generally agreeing with their argument, I claim that they minimize the republican aspects of Kant's political philosophy in favour of strong judicial review. After outlining republican and democratic objections, I claim that their book illustrates a model that I call 'dialogic constitutionalism'. Dialogic constitutionalism does not neglect legislative authority, but places it in a conversation with judicial authority, whether domestic or transnational; such conversations can serve to upgrade standards of rights protection over time and are not frozen precommitments. Constitutions also have a representative function of standing for the intergenerational continuity of the people, whereas legislatures are bound by electoral cycles.

Keywords: cosmopolitan constitutional order; dialogic constitutionalism; European Court of Human Rights; judicial review; Kant

I. Introduction

Towards the end of their impressive book, which reconstructs Kant's legal and political philosophy as a program of a cosmopolitan legal order (CLO),[1] Stone Sweet and Ryan write, 'On the ground, as Ingram emphasizes, cosmopolitanism can never be divorced from hard "cosmopolitics."'[2]

[1] Alec Stone Sweet and Clare Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice and the European Convention on Human Rights* (Oxford University Press, Oxford, 2018), referred to in the text as CLO.

[2] CLO, 256. The reference in quotes is to David Ingram, *Radical Cosmopolitics. The Ethics and Politics of Democratic Universalism* (Columbia University Press, New York, 2013).

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Indeed, radical cosmopolitics has fallen on hard times. Attacked by contemporary populist movements for supposedly defending the philosophy of global elites who are indifferent to local attachments, who presumably view the losers of global competition with contempt, and who champion the rights of migrants and refugees over those of their own citizens, cosmopolitans have come to represent much of the discontent with the current world order. A different set of criticisms has been voiced by left-leaning intellectuals who view transnational legal developments, and in particular international human rights theory and practice, with suspicion. Their claim is that international human rights have served as a fig leaf for the spread of global neoliberalism at best, and the neo-imperialist justification of humanitarian interventions at worst.[3]

Stone Sweet and Ryan cut through this cacophony of voices with a non-polemical and firmly grounded reconstruction of the idea of a cosmopolitan legal order as instantiated principally with the development of the European Convention on Human Rights and the trusteeship of the European Court of Human Rights. A CLO is defined as a multi-level, judicialized, transnational system of rights protection that confers on all persons, by virtue of their humanity, the entitlement to challenge the rights-regarding decisions of public officials, who are under an obligation to assure the equal juridical status of all.[4]

I name their procedure a 'reconstruction' because it is neither based on a historical exegesis of Kant's political thought, nor is it an analysis of Kant's doctrine of right in the context of his epistemology and moral philosophy (see methodological debate in the Introduction to this symposium). Instead, Stone Sweet and Ryan extract from Kant's writings the Universal Principle of Right,[5] which imposes certain demands on the exercise of public authority.[6] They admit that Kant was silent on many issues of constitutional design and that he did not develop a fully fledged theory of rights; however, they

[3] The earliest critiques of cosmopolitan elites came from Samuel Huntington, 'Dead Souls: The Denationalization of the American Elite' (2004) 75 *The National Interest* 5; for left critiques, see Perry Anderson, 'Arms and Rights. Rawls, Habermas and Bobbio in an Age of War' (2005) *31 New Left Review* 5; Jacques Rancière, 'Who is the Subject of the Rights of Man?' 203(2/3) *South Atlantic Quarterly* 297; Slavoj Žižek, *NATO as the Left Hand of God* (Arkzin, Zagreb, 2000) and *Did Somebody Say Totalitarianism? Five Essays in the (Mis) Use of a Notion* (Verso, New York, 2001).

[4] CLO, 256.

[5] See (n 1) 39, n 27. By UPR they refer to Kant's principle of external freedom: '[A]ny action is Right [that is, just] if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law' (quoting I Kant, *The Metaphysics of Morals* (1797), 6, 230–31).

[6] CLO, 43.

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ask, 'What components of a system of constitutional justice would optimize a community's capacity to achieve a Public Right?'[7]

While I believe that such a method of reconstruction is perfectly defensible,[8] I argue that their particular reconstruction slants some of the major issues of Kant's political philosophy in the direction of courts and judicial supremacy. Stone Sweet and Ryan admit that 'this part of our argument – that Kantian imperatives generate a powerful functional demand for the structural supremacy of a 'trustee court' – will be controversial'.[9] But exactly why this is so is not spelled out. Stone Sweet and Ryan neglect the *republican* dimension of Kant's political philosophy, according to which the people's constituent power to be a lawmaker is paramount. They assume without much argument that

> when it comes to rights-based constitutionalism, the People, as primary lawmakers, *have legislated judicial supremacy*. Parliamentarians are secondary lawmakers, agents of the People, and subject to the decisions of the trustee court, which holds them accountable to the terms of the trust. Constitutional judges are caretakers, stewards, of the regime.[10]

This brief statement eludes some crucial questions in democratic and constitutional theory, such as: When and how have the people made such a delegation? What are the limits of such delegation? Can the legitimacy of an international trustee court be based on the same act of delegation as that of a constitutional or high court? More precisely, as some Kantian scholars have asked, what is the democratic legitimacy of international human rights courts based upon?[11] Two different issues need to be addressed here. First, what is the democratic legitimacy of judicial review in general? And second, can international human rights courts be justified democratically? It is my claim that cosmopolitan theorists – among whom I count myself – must grapple with these objections. Stone Sweet and Ryan make a valuable contribution to answering this challenge, but one that is implicit rather than stated explicitly in their book. I will name this thesis 'dialogic constitutionalism'.[12]

[7] CLO, 43.

[8] See Corradetti's defence in this issue.

[9] CLO, 49.

[10] CLO, 51. Emphasis added.

[11] See Svenja Ahlhaus, 'The Democratic Paradox of International Human Rights Courts: A Kantian Solution?'; Markus Patberg 'Extraordinary Politics and the Democratic Legitimacy of International Human Rights Court'; Reidar Maliks, 'Kantian Courts: On the Legitimacy of International Human Rights Courts', all in *Kantian Theory and Human Rights*, edited by Andreas Follesdal and Reidar Maliks (Routledge, New York, 2015).

[12] I consider 'dialogic constitutionalism' to be a kin concept to my own 'democratic iterations'. Whereas dialogic constitutionalism focuses on courts, the legislature and other instances of

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II. The Legitimacy of Judicial Review

Standard objections to judicial review are twofold: the 'countermajoritarian difficulty'[13] and 'elitist paternalism'.[14] Richard Bellamy and Jeremy Waldron have reformulated these standard objections as follows. First, the legitimacy of constitutional as well as international courts that prevent the democratic expression of popular will by elected representatives or through referenda and other measures must be questioned. Second, there is no reason to defer to the judgement of elected or appointed experts such as constitutional court judges rather than to the will of the people's *elected* representatives. In Jeremy Waldron's words, 'the dignity of legislation'[15] must not be subordinated to the judgement of high court justices. Third, *strong practices of judicial review* that would delegate the interpretation of constitutional rights to supreme and/or transnational courts alone must be rejected.

Waldron admits that the need for judicial review arises through the 'circumstances of politics',[16] which he defines as deep and enduring disagreements among citizens and residents of a body politic about their conceptions of moral, religious, aesthetic and scientific goods, as well as the constitutions and institutions that should enable their collective life together. How, then, are such disagreements to be resolved when they arise? Judicial review is an answer to the circumstances of politics.

Waldron develops 'a rights-based critique of constitutional rights.'[17] He writes that, 'Theorists of rights then, are committed to the assumption that those to whom rights are assigned are *normally* those to whom decisions about the extent of rights can be extended.'[18] It is thus odd to consider individuals capable of exercising rights while removing from them the capacity to decide about the extent and limits of those rights. If we think

law- and rule-making agencies, democratic iteration is concerned with the iteration of legal norms in civil society associations and through social movements. For a recent discussion, see Seyla Benhabib 'The New Sovereigntism and Transnational Law: Legal Utopianism, Democratic Skepticism and Statist Realism' (2016) 5 *Global Constitutionalism* 109.

[13] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press, New Haven, CT, 1986) 16–18

[14] 'For myself it would be most irksome to be ruled by a bevy of Platonic guardians even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.' In Learned Hand, *The Bill of Rights* (Harvard University Press, Cambridge, MA, 1958) 73–74.

[15] Jeremy Waldron, *The Dignity of Legislation. The Seeley Lectures* (Cambridge University Press, Cambridge, 1999).

[16] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, Oxford, 2004) 101–03

[17] Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) *13*(1) *Oxford Journal of Legal Studies* 18.

[18] See (n 16) 223, emphasis in original.

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of individuals as rights-bearers, we should also trust them to be the bearers of political responsibilities, capable of 'the burden of self-government'. Only the people's elected representatives can justly exercise such self-government in and through legislation. Waldron calls this 'participatory majoritarianism'[19] and accepts it as inevitable that majority rule will prevail 'for governing social decision-making'.[20] Although he admits that under the circumstances of politics, any decision procedure is likely to have some faults, he maintains that trusting the decision of legislative majorities is no less principled than trusting the decision of a five to four majority in controversial Supreme Court decisions in the American case, for example.

Richard Bellamy names his model – which bears many affinities to Waldron's framework[21] – 'political constitutionalism'. Both accept that 'rights are matters of reasonable disagreement', and that 'the most appropriate way to show citizens equal respect and concern in resolving these disagreements is via a democratic system that treats their different views and interests impartially and equitably'.[22] Bellamy is more compromising toward judicial review processes. Using a phrase from Philip Pettit, he claims that:

> Weak review provides for 'contestatory' editorial democracy rather than 'authorial' democracy. It invites legislatures to think again if a legal challenge reveals inconsistencies between legislative acts, unearths unfortunate consequences not anticipated when framing the legislation or when certain minorities prove so 'discreet and isolated' *that their concerns fail to gain a hearing through democratic politics.*[23]

Bellamy is concerned with the democratic deficit of international human rights courts and covenants. While admitting that the European Court of Human Rights may play an important role in the protection of rights, 'for the democratic legitimacy of such judicial opinions … the final word lies with the legislature. The purpose of such review is to enhance the democratic consideration of rights, not to substitute for it.'[24] Transnational courts such

[19] Ibid, 248.
[20] Ibid, 248.
[21] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007).
[22] Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) *25*(4) *European Journal of International Law* 1024.
[23] Ibid, 1029; 'Contestatory' and 'authorial' are Pettit's terms. Cf Philip Pettit. 'Democracy: Electoral and Contestatory' in *NOMOS XLII: Designing Democratic Institutions*, edited by Ian Shapiro and Stephen Macedo (New York University Press, New York, 2000) 105–44.
[24] See (n 22) 1030.

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as the European Court of Human Rights (ECtHR) are justifiable only to the extent that they exercise 'weak judicial review'. Bellamy's position is different from Waldron's in that he is willing to concede legitimacy to transnational courts insofar as they exercise editorial rather than authorial power over the decisions of national courts. What would be a Kantian and cosmopolitan answer to their objection?

III. DIALOGIC CONSTITUTIONALISM

A possible answer to this challenge, also supported by Stone Sweet and Ryan,[25] stresses the *delegation* view. In exercising their popular sovereignty through constitution-creating power, the people might choose various mechanisms to secure their freedom and equality, and could decide upon a constitution that gave the judiciary the power to review the constitutionality of legislation. Seen in this light, Kantians such as Samuel Freedman argue that judicial review '

> is not a limitation upon equal sovereignty, but upon ordinary legislative power in the interest of protecting equal rights of democratic sovereignty. So conceived, judicial review is a kind of rational and shared precommitment among free and equal sovereign citizens at the level of constitutional choice.[26]

Waldron's objection to this view is powerful. He argues that unless they can be subject to constitutional amendment, precommitments may be a way of binding the people's will irrationally over time, since the circumstances of politics change and peoples must be able to consider original commitments rather than being slaves to them. What is so rational in tenuring Supreme Court justices for life, for example, or in accepting the role of the electoral college in the US Constitution? Neither of these institutions has democratic bona fides.[27]

This is a reasonable objection; however, if we follow the Kantian Universal Principle of Right, there needs to be certain minimum institutional guardrails – let us not call them precommitments – without which *no* democratic decision-making process can be called just or legitimate. Democracy would then dissolve into mob rule. Among such institutional guardrails are surely entitlements to rights. Waldron is right that such entitlements are

[25] CLO, 51.

[26] Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990–91) 9 *Law and Philosophy* 353.

[27] See Robert Dahl, *How Democratic is the American Constitution?* (2nd edn, Yale University Press, New Haven, CT, 2003).

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neither cast in stone nor frozen in time. Their evolution can take place through judicial dialogues among constitutional courts, national legislatures and other trustee courts. This is a point neglected by Waldron's position, which attributes supremacy to the legislature alone. Stone Sweet and Ryan emphasize this dialogic dimension:

> First, the most effective constitutional courts are those that are able to draw other policymakers, and at times the citizenry, into the discourse they constitute and curate as a jurisprudence of rights … Second, the ongoing use of PA creates an interface for deliberative engagement between the constitutional court and all other officials who make and enforce the law. Successful trustee courts use PA not to bludgeon officials into submission, but to construct (often intricate) 'dialogues' with legislatures, executives and the ordinary courts … Third, legislatures and executive are unlikely to render a charter of rights effective on their own, without having their decision-making place in the shadow of a trustee court. This last point firmly applies to the new commonwealth model.[28]

I term this view 'dialogic constitutionalism'. According to Stone Sweet and Ryan, what enabled dialogic constitutionalism was the evolution of 'proportionality analysis' and 'margin of appreciation' doctrines as a 'common, relatively stable framework for rights adjudication' over time among members to the European Convention of Human Rights.[29] This development was both dialogic and contestatory, since the European 'prohibition of judicial review of statute, a corollary of legislative sovereignty'[30] was the *norm* for most countries that signed the ECHR in 1950, except for Ireland. The parallel development of EU law during the same period through the doctrines of direct effect and supremacy of community law among EU member countries likewise proceeded through conflict as well as dialogue, contention as well as cooperation among national courts and the European Court of Justice – renamed the Court of Justice of the European Union. Stone Sweet and Ryan provide a most impressive and succinct account of these changes.

Dialogic cosmopolitanism neither disrespects nor dismisses the voice of the people's representatives; instead, it maintains that people's rights are best protected in a multi-level system of judicial review that engages in a back and forth dialogue with national courts and legislatures. Such constitutional dialogues 'served to upgrade standards of protection and the authority of courts at both the national and EU levels of government'.[31]

[28] CLO, 69.
[29] CLO, 104.
[30] CLO, 86.
[31] CLO, 89.

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By contrast, Waldron and Bellamy do not provide such independent standards of ‘upgrades of rights protection’.

In one additional respect, such dialogic cosmopolitanism is preferable to ‘participatory majoritarianism’ (Waldron) and simple ‘political constitutionalism’ (Bellamy). In Bellamy’s views, the legislatures are given a dominant representative function to the exclusion of the representative dimension of a constitution. Yet, as Alessandro Ferrara notes,

> Constitutional courts represent ‘the People’, *qua intergenerational author of the constitution*, of which the present electorate is just the living segment, the sole instance endowed with direct political agency. While the legislative and executive branches of power, parliaments and presidents or prime ministers represent the electorate on an ongoing basis, a constitutional court’s primary task is to ensure that the voice of past generations and the claims of future generations of citizens not be silenced by the one or two generations of citizens possessed of agency and franchise.[32]

The riposte of the dialogic constitutionalist to the critics of judicial review can then be summarized as follows: (1) dialogic constitutionalism does not neglect legislative authority but places it in the context of a conversation with judicial authority whether domestic or transnational; (2) such conversations serve to upgrade standards of rights protection and should not be viewed as defending frozen precommitments over time; and (3) constitutions also have a representative function of standing for the intergenerational continuity of the people, whereas legislatures are bound by electoral cycles.

To the question of what constitutes the *democratic legitimacy* of judicial review, the dialogic constitutionalist answers that judicial review protects the equal sovereignty of a people’s members by guaranteeing the highest standards of rights protection, often as a result of judicial dialogues. People’s sovereignty cannot be equated with democratic majoritarianism; rather, it is only the protection of the equal public and private autonomy of a people that guarantees its sovereignty.[33] This is a fundamental Kantian insight according to which a people’s legislative authority can be enabled only on the basis of guaranteeing their private autonomy as persons and public autonomy as citizens.

[32] Alessandro Ferrara, ‘Courts also Represent “Legitimation by Constitution”’: Representation and the Courts’. Paper presented at Encontro do Grupo de Estudos Democráticos – Campo Grande, 24 a 26 de Junho de 2019. On file with the author. Alessandro Ferrara, ‘Judicial Review and Its Discontents: A Reply to Frank Michelman’ (2017) 4 *Rivista Internazionale di Filosofia del Diritto* 615, author’s emphasis.

[33] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans. W Regh, MIT Press, Cambridge, MA, 1996) 448.

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Whereas the democratic legitimacy of judicial review in national contexts can be justified in the light of the intrinsic link between the exercise of popular sovereignty and entitlement to equal rights, the democratic legitimacy of international human rights courts rests on *delegative commitments* to which a people's elected representatives have agreed.[34] In this case as well, though, dialogic cosmopolitanism is relevant. As Judith Resnik argues, we can view states' engagement with RUDs (reservations, understandings and derogations) through a dialogic model.[35] A multi-level system of rights protection need not violate the trust that a people place in their elected representatives, but can initiate mutual respect and learning between transnational and national courts. I agree with Pettit and Bellamy that such dialogic back and forths and mutual adjustments can be viewed as an 'editorial' process that does not pre-empt the democratic people's 'authorial' function in developing the laws by which they choose to live.

How universal is such a model of dialogic constitutionalism? What kind of transcultural reach can we presume it to have? In the final sections of their book, Stone Sweet and Ryan discuss developments of international human rights regimes in Latin America, Africa and Asia.[36] They propose the construction of a 'cosmopolitan commons' of 'legal norms, procedure and dispositions',[37] which can render justice 'in the absence of a global state'. It is important to bear in mind, though, that such a cosmopolitan commons must mediate between the republican ideal of self-government and the trusteeship role of national and transnational courts. To achieve this, various institutional designs of judicial review based on the principle of dialogic cosmopolitanism may be envisaged. It is the merit of Stone Sweet and Ryan's book to have provided us with a powerful reconstruction of the cosmopolitan legal order as a stepping stone towards accomplishing this goal.

[34] I am grateful to the anonymous reviewer of this manuscript who pressed for further clarification about how democratic such processes of judicial-making by national or transnational high courts can be. A full reply to this issue would exceed the boundaries of this essay, but a number of high-profile cases of recent decades dealing with abortion, same-sex marriage, the wearing of the hijab by Muslim women and the like have been catalysts of democratic conversations in civil society and social movements concerned with these issues. Of course, in some cases activist groups have intentionally brought such issues before the courts to elicit a judgment. Dialogic constitutionalism has two dimensions: the first concerns the formal and institutionalized conversations among official bodies such as parliaments, courts and administrative organs; the second refers to the feedback loop between judicial decisions, and civil society and social movement activism. In their analysis, Stone Sweet and Ryan emphasize the first dimension, while I am calling attention to the second as well.

[35] J Resnik, 'Comparative (In)Equalities: CEDA, the Jurisdiction of Gender and the Heterogeneity of Transnational Law Production' (2011) *10*(2) *International Journal of Constitutional Law* 531.

[36] CLO, 250–51; also see Po Jen Yap's contribution in this issue on proportionality in Asia.

[37] CLO, 258.

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