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Book (OUP) Introduction and Overview: A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights

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A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the ECHR
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Introduction and Overview

A *cosmopolitan legal order* is a multi-level, transnational legal system in which (i) justiciable rights are held by individuals; (ii) all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship; and (iii) both domestic and transnational judges supervise how officials do so. In Europe, such an order emerged as a product of the combined effects of Protocol no. 11 (1998) of the European Convention on Human Rights [ECHR], and the incorporation of the Convention into national law. Protocol no. 11 established the right of individual petition, directly to the European Court of Human Rights, upon the exhaustion of domestic remedies. Incorporation made Convention rights directly enforceable by national judges, as a matter of domestic law. The resulting system is governed by a “decentralized sovereign”: a community of courts whose activities are coordinated through the rulings of the European Court, based in Strasbourg. Although imperfect and still maturing, the regime meets significant criteria of effectiveness. It routinely succeeds in raising standards of rights protection. It has anchored transitions to constitutional democracy in post-authoritarian states. And it has steadily developed the capacity to render justice to all people that come under its jurisdiction, even non-citizens who live – and whose rights are violated – beyond Europe. Today, the Convention comprises an important component of a cosmopolitan constitution, and the Strasbourg Court is the single most active and important rights-protecting body in the world.¹

This book explicates and defends these claims in light of Kantian constitutional theory. Its ambition is to provide a Kantian-congruent account of the ECHR, understood as an instantiation of a legal system capable of optimizing progress toward what Immanuel Kant called a “Rightful” constitutional condition. Moral and political philosophy has experienced a powerful revival of interest in Kantian theory, including a sustained effort to extend and modernize his ideas,² and to build a rights-based cosmopolitanism.³ We share these orientations. For their part, political scientists have subjected Kant’s blueprint for “perpetual peace” among liberal states to rigorous testing, with impressive results.⁴ We build on this agenda, though our aim is to explain the emergence of a cosmopolitan legal order [CLO], not the absence of war.

The project also engages scholarship on matters beyond Kantian theory and European law. In particular, we respond to a tenacious controversy concerning the nature and scope of human rights.⁵ Simplifying, the debate has focused on the tension between (i) the universalistic claims of rights, and (ii) the diversity of culture and moral views in the world. This tension is typically resolved in one of two ways. Either the analyst identifies the content of rights from those elements that are common to moral systems, or conceptions of justice, across state boundaries and cultural divides. Or she takes a universalistic stance, deriving rights from normative arguments that every person would be required to accept regardless of differences in cultural standpoints.⁶ While the approaches are incommensurate, they produce a convergent outcome: the view that rights can (and should) only have minimal content.⁷ Minimalism has its detractors,⁸ who worry that it drains rights of their intrinsic moral and legal force. The minimal view also conflicts with the expansive trajectory of rights discourse, politics, and

¹ Stone Sweet (2012b).

² Brown and Held, eds. (2010); Held (2010); Flikschuh (2000); Pogge (1988); Ripstein (2009); Føllesdal and Maliks, eds., (2015).

³ Anderson-Gold (2001); Benhabib (2004, 2009); Brown (2009); Habermas (1997); Kleingeld (2011).

⁴ O’Neal and Russett (1999). For a critical challenge to the findings, see Brown, Lynn-Jones, and Miller, eds. (1996).

⁵ Beitz (2001); Sajo, ed. (2004).

⁶ Finnis (1980); Nickel (2006).

⁷ Ferrara (2003); Ignatieff (2001); Rawls (1999); Walzer (1994).

⁸ Benhabib (2009); Pogge (2000).

adjudication since the end of World War II.⁹ Cohen, a reluctant proponent of minimalism, puts it this way:

We can be tolerant of fundamentally different outlooks on life, or we can be ambitious in our understanding of what human rights demand, but we cannot – contrary to the aims of ... activists – be both tolerant and ambitious.¹⁰

One strong empirical claim of this book is that the European CLO has transcended rights minimalism, while maintaining a meaningful commitment to principles of democracy, national diversity, and regime subsidiarity.

Third, the book follows in a line of research on how new forms of judicial authority emerge and evolve, with what consequences for politics, society, and the economy.¹¹ Courts famously govern not through the sword or the purse, but through reason-based justification and the propagation of argumentation frameworks – what lawyers call “doctrine.” Judges will be effective only to the extent that they draw citizens and non-judicial officials into dynamic, “jurisgenerative” and “judicialized,” fields of action.¹² The ECHR is both a source and product of such processes, and an expansive politics of rights protection has been the result.¹³ The CLO is also a novel, transnational legal system, constituted on the basis of a structural characteristic: “constitutional pluralism.”¹⁴ Research on law and courts “beyond the state”¹⁵ can no longer avoid the question of how to understand both the “constitutional” and “pluralist” features of global governance arrangements.¹⁶ Today, Europe possesses an overarching “constitutional” structure, comprised of fundamental rights and the shared authority of judges to adjudicate individual claims. Yet the system is pluralist: no single organ possesses the “final word” when it comes to a conflict between incompatible interpretations of the content and scope of rights. Instead, activated by a steady stream of cases, the system evolves in large part through inter-court dialogues, both cooperative and competitive.

Since we engage the scholarship on European rights protection throughout the book, we do not survey that literature here, beyond stressing the following preliminary points. In the vast bulk of research on the ECHR,¹⁷ scholars either prioritize the perspective of the Convention (the Strasbourg Court and its judgments), or that of a single domestic regime (national law, courts, and politics), as it relates to, is influenced by, or resists, the ECHR. Our goal is not to refute or debunk other approaches to rights adjudication. Indeed, we expressly build on existing research on the Court, and on the impact of the Court’s evolving case law on domestic officials. The very idea of a CLO, as defined above, stipulates our primary unit of analysis: a multi-level, transnational, composite system of rights protection. While we recognize that domestic systems comprise meaningfully autonomous legal orders, every state party to the ECHR has incorporated the Convention in ways that mitigate this autonomy, as scholars are beginning to document and assess.¹⁸ In Europe, diverse arenas of rights protection, operating at different levels of governance, have become deeply embedded in one another, through the effects of overlapping sources of rights, procedures, and jurisdiction.

⁹ Epp (1998); Stone Sweet (2017).

¹⁰ Cohen (2004: 192).

¹¹ Stone Sweet (1999; 2000; 2004).

¹² Benhabib (2009); Shapiro and Stone Sweet (2002).

¹³ Keller and Stone Sweet (2008: ch. 11).

¹⁴ Following Walker (2002). See Kumm (2009); Maduro (2009); Stone Sweet (2013).

¹⁵ Krisch (2010); Walker (2008a).

¹⁶ Dunoff and Trachtman, eds. (2009); Klabbers, Peters, and Ulfstein (2009); Stone Sweet (2009a).

¹⁷ Important exceptions include the scholarship cited in chapters 4 and 5.

¹⁸ Keller and Stone Sweet, eds. (2008); Brems and Gerards, eds. (2014); Anagnostou, ed. (2013); Bjorge (2015).

Overview of the Book

This book develops a Kantian-congruent account of constitutional justice, both within and beyond the state, which is then applied, as a theoretical framework, to explain the construction of the European CLO, and to assess how it functions. We have sought to provide a short and relatively non-technical introduction to (i) Kantian constitutional theory and (ii) the law and politics of European rights protection, in light of their deep connections with one another. Every effort has been made to engage readers who are neither versed in Kant or philosophical method, nor specialists in human rights and European law. Nonetheless, we are aware that many of the book's most important topics are, in fact, technically complex and normatively fraught. The project's wide scope, coupled with our commitment to brevity, has obvious costs. We expect that the summary nature of some of the arguments, including the normative stances taken, will give some readers reasons for skepticism. We address these potential shortcomings at relevant points in each chapter.¹⁹

The book proceeds as follows. Part I is devoted to Kantian constitutional theory and its application to modern systems of constitutional justice. In chapter 1, we discuss Kant's blueprint for achieving perpetual peace and a condition of Public Right, and argue that the conditions necessary for a CLO to materialize were gradually fulfilled in Europe after World War II. Chapter 2 presents a model of a *domestic* system of constitutional justice rooted in the precepts of Kantian constitutional theory. It is a blunt fact that Kant had little to say about rights, courts, and judicial review in the modern sense. We fill this gap, providing a response to the crucial institutional question: what structural properties must a legal system exhibit for it to render justice in a Kantian sense? Chapter 3 extends and adapts these ideas to a transnational system of rights protection, considers key structural features of a cosmopolitan legal order, and tracks the consolidation of a foundational component of the European CLO: constitutional pluralism. The book thus extends Kant's constitutional ideas into realms in which he had hardly considered.

It is also important to highlight what Part I does not do, which may strike some as an important limitation of the book. We develop a Kantian-congruent account of the structural foundations of a domestic and transnational system of justice. We do not develop a theory purporting to accurately "predict" how a constitutional court would resolve a hard case coming before it, as a matter of substantive law. The usefulness of Kantian theory to help explain a cosmopolitan system of rights protection does not depend on its ability to determine the niceties of the case law it produces. The philosopher himself strongly rejected the view that correct "decisions in concrete situations" could "be deduced from abstract concepts,"²⁰ and he declined to engage in casuistry in the *Doctrine of Right*, which is at the core of his constitutional theory. Nonetheless, Part II gives pride of place to the Strasbourg Court's jurisprudence, the most important strains of which, we argue, display a clear Kantian gloss. The Court has aggressively sought to remedy situations in which individuals and groups (homosexuals and the Roma community, for example) have been denied full juridical status by national law and practices. It has been uncompromising in its approach to the so-called "absolute rights" (including the prohibition of torture and inhuman treatment), adopting strong cosmopolitan positions that it has worked diligently to impose upon the member states. And it has adjudicated the qualified rights in ways that are broadly congruent with the major features of the approach we develop in chapters 2 and 3, in particular through the enforcement of the proportionality principle.

Part II focuses on the evolution of the post-1998 European regime. In chapter 4, we track the constitutionalization of the ECHR, as registered in the accretion of the European Court's powers, and its

¹⁹ It is also important to state up-front what this book is not about. Most important, we do not directly engage the burgeoning of neo-Kantian scholarship on global justice undertaken under the "cosmopolitan" banner. We briefly address some of these issues in the conclusion, in light of this book's priorities.

²⁰ Von Bogdandy and Venzka (2012), citing to Kant, *Critique of Pure Reason*.

capacity to enhance the effectiveness of the Convention in the face of chronic failures of rights protection at the national level. Chapter 5 focuses on the adjudication of the Convention's "qualified" rights, which cover privacy and family life, speech, assembly, and the press, and conscience and religion. These provisions contain a limitation clause permitting a state to legally restrict rights, but only to the extent that such limitations are "necessary" to achieve important public policy purposes. We examine how the Court has adjudicated limitation clauses, and the extent to which the regime has overcome rights minimalism. Chapter 6 attends to the Court's enforcement of the "absolute" rights: the right to life; and the prohibition of torture and inhuman treatment. The Court has also treated access to justice, and the right to an effective judicial remedy, as quasi-absolute. It is through these provisions that the Court has asserted, sometimes aggressively so, its own cosmopolitan *bona fides*, demonstrating that it can protect rights beyond the confines of citizenship and territory. A nascent pluralist and Kantian-constitutional structure to the international level is now discernible. For each of these chapters, we present aggregate data analysis of Grand Chamber rulings and case studies of interactions between the European Court and national officials. In the conclusion, we briefly consider the emergence of cosmopolitan legal systems beyond Europe.