

Kantian Courts:

On the Legitimacy of International Human Rights Courts

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Introduction¹

In recent decades human rights have increasingly been established in international conventions.² Most observers welcome this development. It may provide a better protection for the basic civil, political, and social rights that are crucial to individual liberty and the functioning of democracy. Yet, the increase in human

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² These include global UN conventions such as the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights (both in 1966). Examples of regional conventions are the European Convention of Human rights adopted by the members of the Council of Europe (in 1953) and the American Convention on Human Rights adopted by the Organization of American States (in 1969).

rights law has led to an increase in international courts that interpret and judge on the conventions.³ These courts introduce a new source of power, which in some people's opinion pose a threat to national democratic assemblies.⁴ When decisions are moved from political arenas to courts they may seem to be transferred from the realm of open and democratic opinion formation to that of secluded expertise. Thus, while rights protection is inherent to democracy, the currently favoured method for protecting rights seems to subvert it.

In order to evaluate such conclusions it is necessary to determine the nature and legitimacy of international human rights courts (IHRs). Kantian theory has recently been enlisted in this endeavour, and two different approaches have crystallized, each appealing to a key Kantian notion. On the one hand is the political view held by Armin von Bogdandy and Ingo Venzke that the Kantian legacy is a democratic approach to judging. Public authority must be justified to those subject to it. Courts ought therefore ideally be elected through democratic procedures and they must remain accountable in public discourse. On the other hand is Martti Koskeniemi's view that Kant's key legacy is a moral approach to judging. Judges ought to be bound neither by the letter of the law, nor by any objectives it is to

³ Yuval Shany, "No Longer a Weak department of Power? Reflections on the Emergence of a New International Judiciary," 20 *European Journal of International Law*, Vol. 20, Issue 1 (2009): 73-91.

⁴ Richard Bellamy, "The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the Hirst Case." In *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives*, edited by Andreas Follesdal, Johan Karlsson Schaffer and Geir Ulfstein. Cambridge: Cambridge University Press, forthcoming.

achieve, but rather to a moral mindset, which applies the kind of reasoning Kant developed in the theory of the categorical imperative to legal decisionmaking. Courts are legitimate as a feature of an international order where judges bring a moral criterion to the law.

Both views build on fundamental Kantian ideas, yet in this essay I will argue that they are not the best ways in which to look at courts from a Kantian perspective. Kant himself did not think of courts as contexts for moral reasoning or democratic representation, and, as I will show, he avoided such views for good reasons. Moral reasoning and democratic accountability are appropriate standards for legislation by representative assemblies, not for application of the law by judges. The Kantian court should not uphold what ought to be the law, or what a community might accept as law, but perform a circumscribed function within a larger constitutional context. This function is to apply the law to particular cases, and it is the source of the court's legitimacy. Unlike the two other Kantian views, the focus is not on the legal process, but on the institutional context, dominated by a legislating organ, which has the twin tasks of developing the law and of checking that the judiciary does not overstep its boundaries. By contrast to the political and moral view I will call this the rule of law view.

Although this view has fallen out of favour in jurisprudence due to the difficulties of separating application of law from legislation,⁵ there are good reasons for maintaining it as a standard of legitimacy. The view is not just more in line with Kant's actual view of courts, but more appropriate from a democratic perspective because the functional division of powers secures the generality of the law, and therefore enables persons to be free rather than subject to an arbitrary will. The policy implication for increasing the legitimacy of international courts is not to make judges more moral or courts more democratic, but to build international legislative organs to match the growth of the international judiciary.

The first section presents the four worries that are commonly raised about IHRCs, the second section analyzes two prominent Kantian views on the legitimacy of courts, the third presents an alternative Kantian view on court legitimacy, which emphasizes their role within a system functionally divided powers, and the fourth section draws conclusions for the legitimacy of IHRCs.

1. Concerns About International Human Rights Courts

IHRCs are usually established to ensure that signatory states to human rights conventions observe their obligations to protect rights. To do so, their task is to

⁵ See Michael Dorf, "Legal Indeterminacy and Institutional Design", 78 *New York University Law Review* 875 (2003): 878–879.

interpret and apply the law.⁶ Four features render IHRCs controversial. First, they sometimes have the power to review municipal legislation and to require states to take measures if they are found to violate the law.⁷ Judicial review is the principle that a court is entitled to review a law, court ruling, or administrative rule in order to judge whether it is consistent with a higher law (such as a Bill of Rights or a Human Rights Convention). IHRCs are set to judge on human rights law, which, unlike municipal law applies regionally or globally. The wider reach of the law creates a legal hierarchy, where a higher level above municipal law is added, and human rights law becomes a valid limit on the highest jurisdictions within each country. The obligations of the conventions are incorporated in national law through legislation or court practice. In a system of *strong* judicial review the international court can declare the law or rule to be invalid, or it can require legislators to change the law. In *weak* judicial review the court may only scrutinize legislation and request national institutions to review it, but it is not directly binding on them.⁸ Strong review is particularly controversial because it raises the question about whether a court should be entitled to overrule a democratic legislative assembly.

⁶ See for example the European Convention on Human Rights, articles 19 and 32. <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

⁷ Not all human rights conventions have courts and the authority to demand compliance. For example, the UN conventions are monitored by UN treaty bodies, which require states to give accounts and which can receive complaints and judge in individual cases. These instances are beyond the scope of this essay, however.

⁸ Jeremy Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal* 115, (2006): 1346-1406, here at p. 1372-3.

Second, IHRCs are controversial because they are not situated within a full set of constitutionally established powers. Unlike domestic constitutional courts, they are not part of an institutional context, which also consist of legislative and executive organs that create and enforce the law. International human rights law does not result from a standing international legislature, but comes into being through conventions signed by states. This means that it is very difficult to develop human rights law, since it requires states to gather and form a consensus. As a result it is often left to courts to interpret the law 'dynamically' so that it can be made relevant for contemporary issues. It also means that there is no check on the court if it oversteps its authority. By contrast, in the domestic case legislatures can amend the law in cases where it is vague, contradictory, or characterized by gaps. Legislative organs can change the law in cases where they disagree with the way courts interpret or develop the law. Domestic courts also operate within a national public sphere, in which decisions are made the subject of general scrutiny. Nothing comparable exists for international courts. The European Court of Human Rights (ECtHR), for example, is not accountable to proper legislative and governing organs at its level, and while there exists a European public sphere, which in principle can scrutinize its decisions, it is not very unified. Thus, IHRCs often have significant discretion to develop the law and can do so unchecked by other institutions.

Third, IHRCs raise concerns because their judges are not popularly elected or elected by parliaments, but usually appointed by governments, sometimes in a procedure that involves international institutions. For example, in the ECtHR judges

are elected by majority vote in the Parliamentary Assembly of the Council of Europe, a body consisting of representatives from national parliaments. The judges are nominated by member states. That they are not popularly elected means that their democratic legitimacy is only of an indirect kind.

Fourth, IHRCs are controversial because human rights conventions are vague. Framed in highly abstract language and concerning complex philosophical principles, they leave courts to decide on the meaning of vague and controversial concepts such as 'dignity' in particular contexts. Vagueness is not just a function of the inherent complexity of the matter at hand. It is also a result of the difficult effort at creating consensus among states around a convention. Broad and sweeping statements have often been chosen in order to create a consensus among parties to conventions.⁹ But while framers manage to create a consensus, this strategy of avoidance shifts the difficulty of making sense of the precise implications of human rights from lawmakers to the courts. For laws to be of any use in particular cases, the judges will have to engage in complex interpretation, sometimes rendering it

⁹ The drafters of the ECHR describes that the priority and strategy in creating the treaty was 'to have a short, non-controversial text which the governments could accept at once, while the tide for human rights was strong'. See Harris and O'Boyle cited by François Tulkens in 'Seminar: What are the limits to the evolutive interpretation of the convention?' in *Dialogue Between Judges*, European Court of Human Rights, Council of Europe, Strasbourg: 2011, p. 6. Likewise the Universal Declaration of Human Rights: 'To paraphrase the philosopher Jacques Maritain, it was possible to agree on a list of human rights only on the condition that almost nothing was said about how they were grounded'. See Allen Buchanan, "The Legitimacy of International Law" in *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, Oxford: Oxford University Press, 2010, p. 96. While the UN Declaration was not adopted as a treaty it is widely cited in legal contexts that include courts.

difficult to separate mere interpretation from lawmaking. Critics of judicial review sometimes charge that decisions by higher courts are more like lawmaking than anything else. Jeremy Waldron has argued that judges in constitutional courts are not simply applying the law, but making it up. While there may be an element of law development in all court practice, human rights conventions seem to open for it to an unusual extent because of their vague language about complex moral questions.¹⁰

In sum: international courts limit state sovereignty, are not part of a normal division of powers, are not popularly elected, and are based on vague conventions. These peculiarities render them controversial. To some critics, they exercise a form of arbitrary lawgiving power. The power is allegedly arbitrary because the courts are not directly elected, accountable, or checked institutionally, and they engage in lawgiving because their decisions are not just interpretations of conventions but the covert creation of new laws.¹¹ From a democratic point of view – regardless of whether it is a form of democracy that emphasizes participation, deliberation, or constitutionalism – legislative institutions must be popularly elected. That is their source of legitimacy. Since courts only have a very indirect democratic legitimacy, it

¹⁰ Waldron writes that the ‘platitudes’ of Bills of rights are too vague and abstract to guide proper interpretation. They do not settle any disagreements about rights in society; at best they are ‘popularly selected sites for dispute about these issues’. See ‘The Core of the Case’, p. 1393.

¹¹ Dominic Raab, *Strasbourg in the Dock: Prisoner Voting, Human Rights & the Case for Democracy* (London: Civitas, 2011), p. 9.

seems inappropriate that they take the power to create law and to overrule actual democratic assemblies.¹²

The legitimacy of international human rights courts therefore needs to be explained. Legitimacy, in this context, means that which gives an institution the right to rule and which provides a reason for those subject to it to accept its decisions even when they disagree.¹³ A defence of IHRCs must show why the four controversial features do not pose a serious legitimacy deficit.

Two approaches to the legitimacy of IHRCs have become prominent. On the one hand are critics who take democracy as the condition of legitimacy and who claim that international human rights review ought to be avoided, or avoided in its strong form. Richard Bellamy has argued that if there is to be judicial review of international human rights conventions, it must be of the weak kind, which is not binding on states. His view is based on a 'political constitutionalist' position, according to which the democratic process possesses constitutional qualities that

¹² The Hirst ruling of the ECtHR illustrates the controversy. This decision resulted in the United Kingdom being found in breach of the convention because it denies the franchise to prison inmates. The decision was challenged in terms of its quality, when critics claimed that there is no warrant in the ECHR for this right since it is not mentioned in it and is unlikely to have been on the mind of the framers. This quickly led to a challenge of the very institution's legitimacy. Non-elected institutions should not be entitled to review the legislation of a parliament, because this amounts to a form of usurpation of legislative authority. For this debate, see Bellamy, "The Democratic Legitimacy of International Human Rights Conventions".

¹³ Legitimacy is often used also in a sociological sense to describe the reasons why persons in fact support a practice, but that belongs to a separate discussion.

should not be subordinated to a court – neither domestic, nor international.¹⁴ The paramount value is democratic equality. Decision by the majority principle is the only fair procedure, respecting the equal right of citizens to be the sources of what counts as rights.¹⁵ Bellamy does not deny the value of human rights, but argues that rights are legitimately promoted only through a democratic process.¹⁶

Critics have charged that political constitutionalism provides only weak protection for the rights of minorities.¹⁷ They may consistently be outvoted in a domestic democratic process, and disfavoured by domestic courts, which may be biased towards the majority view. The concern for the protection of minorities animates the other approach. It takes human rights to be the foundation of legitimacy, and favours some practices of international human rights review for their effects in protecting rights. An example is Andreas Follesdal's liberal contractualist argument in favour of international judicial review. By contrast with Bellamy's political constitutionalism, liberal contractualism puts less emphasis on the significance of the democratic process. The legitimacy of institutions primarily depends on the extent to which they impact the interest of citizens. The democratic procedure is

¹⁴ Bellamy, Bellamy, "The Democratic Legitimacy of International Human Rights Conventions".

¹⁵ Waldron, 'The Core of the Case against Judicial Review', and Bellamy, "The Democratic Legitimacy of International Human Rights Conventions".

¹⁶ Bellamy, "The Democratic Legitimacy of International Human Rights Conventions".

¹⁷ Andreas Follesdal, "The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights", *Journal of Social Philosophy* 40 (4) (2009): 595-607.

mainly an instrument for selecting leaders and for ensuring that they remain accountable to the citizens.¹⁸ International courts derive their legitimacy from providing assurance that citizens and authorities will comply with the established basic rights. This is particularly the case with isolated minorities who in a domestic context risk being subjected to the tyranny of a majority.¹⁹ An international court that restricts a domestic legislature, which is about to harm the human rights of individuals and minorities, does not prevent a legitimate exercise of self-determination. Because of the danger of the tyranny of the majority human rights are better protected through an international court than by domestic institutions.

This view of court legitimacy is outcome-based: IHRCs are on balance better than domestic procedures at protecting human rights. For this reason the vagueness problem of human rights courts poses a serious obstacle. An outcome-based reason presupposes a comparative assessment of consequences, which requires the social scientist to take a stand on an inherently contested matter: the true meaning of a legal text. Since human rights conventions express vague philosophical matters, it is difficult to arrive at noncontroversial views on interpretation that can function as benchmarks for determining outcomes.

¹⁸ Andreas Follesdal, "The Legitimacy of International Human Rights Review," p. 599.

¹⁹ Follesdal writes: 'The best such case for international bodies that review proposed legislation for human rights violations is that such actors may provide citizens and foreigners much needed assurance. With such review, those who fear that they will regularly be outvoted can be somewhat more certain that the majority will not subject them to undue domination, risks of unfortunate deliberations, or incompetence.' See Follesdal, "The Legitimacy of International Human Rights Review", p. 600.

Whether a court secures the best outcome in, for example, protecting the political rights of prison inmates depends at least partly on the observer's philosophical views about the nature of political rights. Added comes the problem that the court does not stand in an institutional context where a legislature can fulfil the twin tasks of specifying the law and checking the court. This is why critics are worried that court practice may amount to a form of arbitrary lawgiving.

The two sides to the current controversy therefore lead to a dilemma. If human rights are left to domestic legislative organs, they may offer little protection to those who need it the most. On the other hand, if human rights are left for international courts to decide, it may lead to the imposition of a form of arbitrary power. Some seek to alleviate the problem of the imposition of courts on the democratic process by arguing for the doctrine of the margin of appreciation, which as currently practiced by the ECtHR allows domestic legislatures leeway in deciding whether a state is in compliance with its human rights obligations.²⁰ This is motivated by the principle of subsidiarity; that decisions ought to be taken at the lowest possible level of a multi-level order. For example, human rights issues that only impact domestic policies can be decided in the national context, while human rights issues that impact the relations among states should be settled through the international court. But while that may alleviate some of the worry about the imposition of courts on domestic democratic processes, it leads again to the

²⁰ Andreas von Staden, "The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review," in *International Journal of Constitutional Law* 10 (2012): 1023–1049.

problem of allowing national legislatures, which might consistently favour majorities, to be the highest authorities over human rights.

2. Kantian Approaches

One might wonder what, if anything, Kant's philosophy has to contribute to understanding the legitimacy of IHRCs. Kant himself had no views on the matter since nothing comparable existed in the eighteenth century. But his rights-based theory of law and justice has in recent years been utilized for thinking about international courts. As already mentioned, two subtle and rich approaches have recently been suggested, a political approach by Armin von Bogdandy and Ingo Venzke, and a moral approach by Martti Koskeniemi.

Both approaches take as point of departure the fourth controversial aspect of human rights law, its ambiguity. Judgment is to subsume particular cases under a law. But this can never be a matter of deductive reasoning since the judge always imposes a particular view on the law. This is not just the case with human rights law, but discloses a necessary indeterminacy inherent in the interpretation of any law. Support for the view is found in an observation Kant made in *Critique of Pure Reason* that logic can contain no rules for judgment. The reason is that to judge is to distinguish whether something falls under a rule. If there were an additional rule for judgment, this rule would again need a judgment for application, leading to an infinite regress. For this reason, judgement cannot be reduced to mere deduction.

Instead, it requires a certain knack, which Kant calls ‘mother-wit’ (*Mutterwitz*), “the lack of which cannot be made good by any school”:

A physician therefore, a judge, or a statesman, can have many fine pathological, juridical, or political rules in his head, of which he can even be a thorough teacher, and yet can easily stumble in their application, either because he is lacking in natural power of judgment (though not in understanding), and to be sure understands the universal *in abstracto* but cannot distinguish whether a case *in concreto* belongs under it, or also because he has not received adequate training for this judgment through examples and actual business.²¹

Bogdandy, Venzke, and Koskenniemi draw the radical conclusion that this indeterminacy of judgments render impossible the separation between application and legislation. The court will create the law in lieu of merely applying it since the very nature of the law is indeterminate. Moreover, since judgments may serve as precedents for future judgments, dynamic interpretations develop the law in significant respects.

While vagueness is only one controversial aspect of international courts, the worry gets its urgency from the combination with the three other concerns. Lawmaking by courts is particularly problematic because IHRCs have extensive power, are not checked by a regular legislative assembly, and not democratically elected. The legitimacy problem of IHRCs results from the agency they take in developing the law. Had their decisions been mere logical deductions the practices would have been easier to justify.

²¹ Kant, CPR 3: A 133-4.

Bogdandy and Venzke take a political approach to what might make IHRCs legitimate. The approach is political in the sense that IHRCs are treated as political institutions, and their legitimacy rests on a political process. Development of the law by judges can hardly be avoided as long as past decisions function as precedent. Since courts will not just apply law but make law, they must be treated as a form of public authority. The Kantian legacy, as they see it, is that public authority needs to be justified to those who are subject to it. This accountability takes the form of a democratic process. It follows that IHRCs require a democratic form of legitimacy. It is not enough that states consent initially to setting up courts, the courts must continuously be responsive to a democratic process. This can be achieved if judges are elected by domestic legislative assemblies or by international institutions such as the United Nations. Democratic legitimacy is also improved through court transparency and an increased openness to the public sphere.²² Courts should justify their decisions not just to parties involved, but to society in general. That way the larger legal discourse can become “a mechanism of control and critique” by the public over the courts.²³ As a result, it will be possible for courts to be seen as *representing* the people, to ‘speak in its name’.²⁴

²² Bogdandy, Armin von and Ingo Venzke. “In Whose Name?: An Investigation of International Courts’ Public Authority and Its Democratic Justification,” *European Journal of International Law* 23 (2012): 7–41, p. 26ff.

²³ Bogdandy and Venzke, “In Whose Name?” p. 15.

²⁴ Bogdandy and Venzke, “In Whose Name?” p. 40-1.

By contrast, Koskenniemi's approach to the legitimacy of international courts is fundamentally moral. The key to their legitimacy is not their democratic pedigree, although they are established by legislative institutions. What matters is that judges engage in moral reasoning. Since the law is indeterminate, and judges cannot simply postulate functional objectives the law should seek to achieve, they should instead explicate it according to a moral principle. To know the law is to be able to use a particular form of moral reasoning, which is identified as the Kantian theory that a maxim must be capable of being made universal without leading to a contradiction.²⁵ The "moral duty" of law appliers is "to judge for themselves what the principles of universality and freedom might require in a real world of conflict and contestation. [...] Law is simply the name for the external institutions that administer what is a moral-political project."²⁶ Unlike the political approach of Bogdandy and Venzke, judges are not *representatives*; they are moral reasoners. Lawyers are to "think for themselves" and to:

[J]udge the world in a manner that aims for universality, impartiality, and all the virtues of the "inner morality of law": honesty, fairness, concern for others, the prohibition of deceit, injury, and coercion.

²⁵ Martti Koskenniemi, "Constitutionalism as Mindset. Reflections on Kantian Themes about International Law and Globalization", 8 *Theoretical Inquiries in Law* (2007), 9-36, here at p. 22. See also Koskenniemi, "Miserable Comforters: International Relations as New Natural Law," *European Journal of International Relations* 15, no. 3 (2009): 395-422.

²⁶ Koskenniemi, "Constitutionalism as Mindset," p. 31. Koskenniemi also seeks to connect this to Kant's notion of aesthetic judgment, but that does not seem obviously consistent with the view of Kantian constitutionalism as a moral project. See *op. cit.*, p. 32.

Though this is the vocabulary of moral regeneration, it is also the vocabulary of constitutionalism.”²⁷

This is necessary for a responsible attitude to the use of power that judgment entails. On Koskenniemi’s view, then, Kantian courts are sites for moral regeneration spearheaded by judges who take on the role of philosophers, limited not by the positive laws and intentions of legislators, but by the formal principles of Kantian “other-worldly” moral reasoning.

Although the approaches of Bogdandy and Koskenniemi start from the same problem – the indeterminacy of law – they reach for different remedies. The authority of courts must be justified either democratically, or by being in the hands of judges capable of moral reasoning. In effect each approach finds substitutes for the law: either the ideal court approaches a political institution, or it becomes a forum for moral reasoning. Although each of the approaches prop up their views with the help of Kantian reasons, they are in fact rather far from what Kant himself thought about courts and their justification. We shall now take a look at this view, before we go on to show that it provides different and in some respects more attractive conclusions for IHRCs than those by the contemporary Kantians.

3. Kant on Courts

²⁷ Koskenniemi, *“Constitutionalism as Mindset,”* p. 33.

Kant wrote that ‘whether such a thing [a court] exists or does not exist is the most important question that can be asked about any arrangements having to do with rights’.²⁸ Despite this centrality of courts in Kant’s philosophy, he never gave an extended systematic treatment of them, and this perhaps explains why little has been written on it. Exploring his view on courts and legal interpretation is nonetheless worth our while, because if we put together the various statements he made we will find that he has an original and attractive view. To begin with, we must briefly consider his view on freedom, which is the basic value a legal system establishes and protects.

The freedom that matters in Kant’s legal and political writings is what he calls external use of choice.²⁹ Persons have an ‘innate right’ to freedom, ‘insofar as it can coexist with the freedom of every other in accordance with a universal law’.³⁰ That this right is innate means that it does not result from any act by an individual or by a public authority, and as such it is a human right, an entitlement by nature.³¹ Equal legal status is inherent in this freedom: everyone must be their own masters, and no one can be entitled to bind others to more than they in turn can be bound by them. As such, freedom is to be legally independent from domination. Freedom is

²⁸ Kant, MM 6: 306.

²⁹ As such, it contrasts to the inner use of choice, which is freedom as autonomy. Autonomy is to act out of rational motives, rather than desires and inclinations. External freedom does not have to do with the motives of action, exercising this kind of freedom is to act without undue interference.

³⁰ Kant, MM 6: 237-238; TP 8: 290, 292.

³¹ See Ariel Zylberman, ‘Kant’s Juridical Idea of Human Rights’, this volume.

therefore not merely to do as one pleases without external physical interference.

This was the view Hobbes had defended, and which Kant rejects as merely 'wild and lawless' freedom.

Lawful freedom is a matter of having rights, which imposes duties on others to not interfere with one's use of freedom. The universal principle of right is "Any action is *right* 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."³² Rights are formal and not material by which Kant means that they only have to do with the form of interaction, not the ends pursued. Deciding what persons can have a right to is not a matter of evaluating the attractiveness of ends, but only about whether persons can perform actions without unduly interfering with each other. This aspect separates Kant's philosophy from the teleological theory of the Wolffian school, a dominant tradition in Germany at the time, which considered the state entitled to foster ends of moral perfection and social welfare. In Kant's proto-liberal view, the state should not be concerned with the ultimate ends persons have, but only with the formal compatibility of their choices.

Since rights impose obligations on others, one individual cannot unilaterally stake a claim to a right. That would be for him or her to arbitrarily impose their will on others. Right and wrong must instead be established from an omnilateral point of

³² Kant, MM 6: 230.

view, which takes everyone's freedom into account.³³ Only if persons can see their rational will as contained within the law can they be bound by it and yet remain free. A private individual cannot claim to represent an omnilateral perspective, however, since another might equally claim to do so, and in the absence of a court it would be impossible to tell whose view is to prevail. For that reason it is necessary to set up a public authority. This consists of a legislature that establishes rights through law, an executive, which enforces them coercively, and a judiciary, which applies them to particular cases.³⁴

Kant's theory of rights can be called a public recognition view.³⁵ This entails that rights only become fully defined and valid when instituted through public legal authority. When Kant indicted the authors of the natural law tradition (Grotius, Pufendorf, and Vattel) as 'sorry comforters' whose principles 'has not the slightest *lawful force*' it was because they simply offered the philosophical views by private individuals on a matter. They should not be appealed to by rulers and judges as if they in fact had legal authority and as if their books contained valid laws.³⁶ Without a proper legal structure, moral principles can simply serve to give a rhetorical legitimacy to unilateral action aiming at private interests – as was the case when rulers legitimized aggression by reference to the natural law tradition.

³³ Kant, MM 6: 256 and 6: 263.

³⁴ See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, Cambridge, MA: Harvard University Press 2009.

³⁵ Reidar Maliks, 'Kant, the State, and Revolution', in *Kantian Review*, Vol. 18: 1 (2013): 29-47.

³⁶ Kant, PP 8: 355.

The state's legitimacy rests on providing the institutions and procedures that secures rights and duties through law. Subjects are under an obligation to take the existing law as valid because it results from the appropriate procedure, even if they may disagree with it. They are not under an obligation to agree with the law – all that is required is behaviour in conformity with it – and they must be free to seek to change the law through existing procedures to make it conform with their view on justice.³⁷

To understand the role of courts in this theory, we must see them in relation to the other public institutions. There are three powers of the state, and they are functionally separated. The legislature is sovereign, represents the people, and is elected. As the originator of the law, it does not itself stand under positive law. It creates law according to a notion of a general will, since individual liberty within the state only can be preserved if everyone could be conceived as consenting to the law (*volenti non fit iniuria*). The legislature must be elected democratically, otherwise it would be incompatible with citizens being their own masters. The executive authority (the government) exercises coercion in conformity with the law. Finally, judicial authority has the task of applying the law to particular cases ('to render to each what is his'³⁸). Its final verdict cannot be appealed.

³⁷ See Thomas W. Pogge, "Kant's Theory of Justice," *Kant-Studien*, 79 (1988): 407-33, here at p. 423-425.

³⁸ Kant, MM 6: 317.

Kant uses a logical metaphor for the complimentary relation between the three powers:

These [authorities] are like the three propositions in a practical syllogism: the major premise, which contains the *law* of that will; the minor premise, which contains the *command* to behave in accordance with the law, that is, the principle of subsumption under the law; and the conclusion, which contains the *verdict* (sentence), what is laid down as right in the case at hand.³⁹

The point of this statement is not a naïve view that courts reach their verdicts by simple deductive reasoning. As we have seen, Kant rejects that rules can be applied by simple logic. The metaphor illustrates instead the relation of authority and function among the three authorities. The legislature sets the premises by establishing the law, and the court applies the law to a particular case. The powers are functionally differentiated but not equal, since the legislature is sovereign and appoints the two other powers.⁴⁰

Lawgivers and judges use different types of judgment.⁴¹ The legislature uses practical reason in the sense that it establishes a rule of right and wrong with the purpose of shaping the future action of citizens. The rule is to be applied to cases, but at the moment of its creation the cases do not yet exist. Because their job is to establish the rule, legislators are not limited already by a ruler or an existing law.

³⁹ Kant, MM 6: 313. See also Kant, PP 8: 352.

⁴⁰ Kant, MM 6: 317.

⁴¹ See Onora O'Neill, "Instituting Principles: Between Duty and Action" in Timmons, ed. *Kant's Metaphysics of Morals: Interpretive Essays* (Oxford: Oxford University Press, 2002), pp. 331-337.

They are limited only by the principle that law must be established according to the formal and omnilateral perspective of the universal principle of right. They can reach this by engaging in a thought experiment: if it could be possible for everyone in a society as a rational being to consent to the law, then the law is justified. It is not conceivable that persons could agree to limit their own freedom unequally.

Legislators thus represent the people and in a metaphorical way it can be said that the people act through its legislators.

Judges, on the other hand, engage in theoretical judgment. Their skill consists in viewing a particular situation, deciding how to describe it, and finding the rule under which it falls.⁴² Their judgment is essentially retrospective: it does not create rules for future cases, but subsumes existing cases under a given rule, “what is laid down as right”.⁴³ For the judge, both the rule and the particular case exists; his or her task is merely to apply the former to the latter. For this reason, the judge is not expected to engage with the reasons for the law:

The jurist, as an authority on the text, does not look to his reason for the laws that secure the *Mine* and *Thine*, but to the code of laws that has been publicly promulgated and sanctioned by the highest authority (if, as he should, he acts as a civil servant). To require him to prove the truth of these laws and their conformity with right, or to defend them against reason’s objections, would be unfair. For these decrees first determine

⁴² Op. Cit., p. 336.

⁴³ Kant, MM 6: 297.

what is right, and the jurist must straightaway dismiss as nonsense further questions of whether the decrees themselves are right.⁴⁴

The reference to jurists as civil servants invokes an argument Kant had developed earlier, in his essay on Enlightenment about the relation between freedom of conscience and public authority.⁴⁵ As members of the reasoning public, everyone must be free to voice their opinion, but as civil servants, persons are bound to profess the existing doctrines of the state.

The distinction between legislation and application is strict. The task of judges is only to see to it that what is “laid down as right” is used as the criterion for judging particular cases, not to see to it that perfect justice is secured. This means that there can be a gap between positive law and what is “right in itself” according to what reason would settle.⁴⁶ These are cases where equity (*Billigkeit, Aequitas*) is at stake, and it would be fair to act in one way, but where it cannot be secured by right:

Suppose that a domestic servant is paid his wages at the end of a year in money that has depreciated in the interval, so that he cannot buy with it what he could have bought with it when he concluded the contract. The servant cannot appeal to his right to be compensated when he gets the same amount of money but it is of unequal value. He can appeal only on grounds of equity (a mute divinity who cannot be heard); for nothing was specified about this in the contract, and a judge cannot pronounce in accordance with indefinite conditions.

⁴⁴ Kant, CF 7: 24-5; MM 6: 317.

⁴⁵ Kant, WE 8: 37-8.

⁴⁶ Kant, MM 6: 296.

Judges are not at liberty to set law aside for the sake of what they think would be a more just outcome. Equity can therefore only be settled by a court of conscience (*Gewissensgericht*), not before civil right (*das bürgerliche Recht*).⁴⁷

What justifies this strict division between legislation and application? The first reason has to do with authority. The court is not authorized to develop the law, because, as unelected, it is not a representative organ. For it to overrule existing law is to usurp the legislature's function, in essence thwarting what counts as the will of the people and subverting the principle of popular sovereignty. For two reasons it would not be a solution to make the judiciary elected and representative. The first has to do with Kant's view of sovereignty. If it were possible for an elected court to develop the law, it would compete with the legislature and there would be no institutional way to settle disagreements between the two institutions. This would render it impossible to identify exactly what is "laid down as law". This contradicts the nature of a civil condition, which must establish one view of right and wrong. But why could the two functions not just be united in one institution?

This brings us to the second reason courts should not make the law. The institutional separation between those laying down the law and those applying it is the safeguard of the generality of the law, and hence of freedom. Legislation must be according to practical reason and must issue in general principles. This formality ensures its validity, because it ensures that it applies regardless of the aims people

⁴⁷ Kant, MM 6: 235.

pursue. If law instead targets particular cases, it will be an arbitrary decision in the sense that it will not rest on a principle but it will be a mere instrument tailored for reaching a desired outcome. This is arbitrary in the sense that the law will vary according to the private ends the ruler pursues. Whenever the ruler changes ends, the laws will change as well. By contrast, if a legislator lacks the power to apply the law, he or she will not be in a position to tailor the law to particular outcomes. It is harder to invent laws that are imposed only on political opponents, for example. Putting the application of the law in someone else's hands prevents legislators from using it to pursue their private ends; therefore, the institutional differentiation between legislation and application is key to securing freedom from arbitrary rule.⁴⁸

To sum up: Kant's public recognition view of rights means that rights can be defined, enforced, and adjudicated only within a constitutional structure. The generality of the law is a precondition for persons being free and under law at the same time, and this condition can be preserved only under a functional division of authorities.

Courts cannot make the law because this usurps the legislature, which represents the people and subverts the formality of law, which ensures that it is not oriented towards arbitrary ends. Hence to ensure that persons can be free and under law at the same time, courts must be limited to applying the law.

⁴⁸ The inspiration for this view seems to be Rousseau's double generality condition: law must be general in its object and in its source. Law is general in its object when it applies to all similar cases and is not targeted to unique cases, and it is general in its source when it results from legislators representing the entire people. See Rousseau, *On the Social Contract*, p. 161. For a discussion, see Melissa Schwartzberg, "Rousseau on Fundamental Law," *Political Studies*, vol. 51 (2), (2003): 387-403.

4. A Kantian Theory of the Legitimacy of IHRCs

We are now in a position to use the reconstructed Kantian view of courts to explore the legitimacy of international human rights courts. To begin with, we must evaluate the existing Kantian theories.

The political view of Bogdandy and Venzke holds courts to be legitimate only if they are democratically accountable. There should be an expanded role for the public in democratic elections of judges, and they should be accountable in the public sphere. By contrast, the Kantian view developed here makes the democratic credential less crucial. To be sure, the public sphere and elections through parliaments have *some* significance: vigilant citizens make judges less likely to act on biases, and parliamentary appointment may help the selection of skilled candidates. Yet, there is an important difference to the case of legislation. Judges are not to create law and therefore they do not represent the people. Because the courts merely apply existing law, they do not create new relations of rights and duties, and therefore do not require democratic election. The reason legislatures must be elected is that they impose rights and duties on citizens, and this is compatible with everyone being their own masters only if the process is democratic. Bogdandy and Venzke assume that courts are political, and therefore using practical reason to decide how laws ought to be. In contrast, the Kantian view defended here is that courts should be limited to performing a legal function, and only judge retrospectively about how facts fit existing legal categories.

Like Bogdandy and Venzke, Koskenniemi's moral view advocates judges engaging in a form of practical reasoning about what laws ought to be. Their duty is to "judge for themselves what the principles of universality and freedom might require in a real world of conflict and contestation."⁴⁹ These are moral principles, however, not 'what is laid down as right'. On Koskenniemi's view, courts are sites for moral regeneration spearheaded by judges who, transcending positive law, take on the role of philosophers. The difficulty with this view is that it allows judges to overrule the representative legislative organ and thereby impose on the institution that has democratic legitimacy. While Koskenniemi's view may be intended as an idealistic attempt at infusing morality into the law, the result may be to elevate the private views of morality by judges above the law created by representatives of the people. Abandoning the aspiration for a separation between legislation and application, it risks that judges develop the law according to their private view of attractive outcomes.

By contrast with these two approaches, the Kantian view established in this essay entails that judges ought to engage only in theoretical judgment. That is, their work consists in taking existing laws and applying them to existing facts. Their task is to provide an authoritative interpretation of the law, enabling persons to know and obey the law. Judges are to be considered experts on the law. Whereas democratic representatives are responsive to and mediate the will of the people, judges' mandate is to express the perspective of the law. They are set to guard the law

⁴⁹ Koskenniemi *"Constitutionalism as Mindset,"* p. 31.

created by democratic representatives, hence they perform an essential service in a democracy, without themselves being a democratic institution. They should for that reason interpret the law as it is, not reconstruct it as it ought to be. The main feature of interpretation, separating it from lawmaking, is that it is limited by an object – positive law. Interpretation of the law can be supplemented by exploring the intention of the author, which reveals itself through the text, and by a contextual study of what the terms meant at the time of writing. Interpretation should strive to conserve this original intention.⁵⁰

This view may seem impossible for human rights conventions, which are replete with moral principles, such as ‘rights’, ‘liberty’ and ‘degrading treatment’. How could a judge possibly make sense of such law without engaging in moral reasoning? The answer hinges on a distinction between practical and theoretical reason. While judges must make sense of moral concepts established in law, they must do so not from the perspective of practical judgment, as someone who seeks to create moral principles. Rather, they must use their theoretical judgment to explore facts about what lawgivers may have intended by these concepts. They do not engage in reasoning about what is right or wrong, but in reasoning about what a legislative assembly held to be right or wrong.

⁵⁰ For a similar view, see Joseph Raz, ‘Intention in Interpretation’, in *The Autonomy of Law: Essays on Legal Positivism*, edited by Robert P. George, Oxford: Clarendon Press, 1996.

This view might nonetheless seem to beg the question, because it seems to neglect the indeterminacy of law. This was, after all, the starting point of the two alternative interpretations, and, as we have seen, Kant was aware that legal reasoning is not just deductive. Yet, there is a difference between admitting that all interpretation is constructive and adopting the view that application is not essentially different from legislation. Indeed, the *point* of interpretation is that it is not a merely mechanical reproduction but involves a judgement. As Kant pointed out, not everyone has that skill, but like any other skill it can be developed. A commitment to the separation between legislation and application should not be understood as a naïve description of facts, but rather as a duty resting on justices. This duty rests on them because as public servants they are not entitled to their own opinion on what constitutes a morally good law, but must profess the public doctrine.

Instead of making the court more democratic or judges more virtuous, the rule of law based view advocates the creation of stronger lawmaking institutions. The purpose of legislatures is twofold: to enable representative bodies to develop the law and to check courts from overstepping their boundaries. Both aspects raise thorny questions for international human rights law, since there are no ordinary legislatures and because conventions normally are adopted by state consent.⁵¹ With regard to the lawgiving function, the result is that the law becomes entrenched. This might not seem to be a cause for concern; indeed there may be good reasons why

⁵¹ The only international institution, which has anything resembling lawgiving authority is the UN Security Council.

human rights law should be difficult to change by majorities. It protects basic rights of particular significance and should not be easily changed by legislatures. Yet, it is also true that human rights law must be developed. This is partly because it must remain relevant to contemporary conditions, and because it may have been ambiguous or unclear to begin with (a case in point is the question of prisoners' voting rights highlighted by the Hirst case). Some gaps and ambiguities involve a mere extension of existing principles, and can be developed by a court, while more serious cases require new legislation.

A lack of international lawgiving assemblies lead to the same problems with regard to the function of legislatures in providing a check on courts. Although individual judges may to some extent be accountable to the member states appointing them, no international court is confronted by an international legislative body. As Bogdandy and Venzke rightly point out, there are nonetheless good reasons for courts to be held accountable. Not, however, because they should represent the people, but to prevent them from going beyond their limits, crossing the threshold from application to legislation.

Empowering international lawgiving institutions need not involve an agenda of abandoning the state. Jürgen Habermas has convincingly shown that it is possible to combine national and cosmopolitan institutions such that international lawgiving assemblies are committed both to individuals as citizens of states and as world

citizens.⁵² It should be possible to create multilevel legal institutions that draw legitimacy both from national parliaments and from international and cosmopolitan institutions. It should also be possible for public spheres to increasingly develop at a higher level. Although no regional associations of states have a public sphere of equal strength to that of nations, there is some evidence that public spheres follow decision making authority.⁵³ Thus, the reason public spheres are stronger nationally is not necessarily attributable to cultural peculiarities facilitating communication, but may also mirror the fact that most decisions affecting citizens, and which citizens in turn can influence, are taken within the boundaries of the state. It is reasonable to expect that the public sphere will develop around international assemblies if they become more significant.

It may be objected that the Kantian view sketched here in restraining judicial activism renders courts less useful. As Bogdandy and Venzke have argued, if courts are prevented from creating law "The larger legal discourse could no longer function as a mechanism of control and critique"⁵⁴ This is to beg the question, however. There is no reason that the legal discourse taking place around courts should be the privileged site for public critique of the law. Public discourse is equally well served if

⁵² See Jürgen Habermas, "The Constitutionalization of International Law and the Legitimation. Problems of a Constitution for World Society," in *Constellations*, Volume 15, (2008) 4: 444–455.

⁵³ Andreas Follesdal and Simon Hix, "Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik," *Journal of Common Market Studies* 44(3), (2006): 533-562.

⁵⁴ Bogdandy and Venzke, "In Whose Name?" p. 15.

it centres around legislative assemblies, which, after all, are the legitimate originators of law, and which represent the people. It may also be objected that courts may do a better job at human rights protection if the judges are entitled to freedom in interpretation in order to fit as comprehensive a human rights protection as possible within an interpretation of the law. The ECtHR, for example, was able to expand the understanding of human rights and to insist on political rights as incompatible with the UK practice of blanket rejection of the right to vote among certain categories of prison inmates. Yet, this is again to beg the question. Courts may be able to expand human rights protection, but they are not justified in creating new law because they lack the democratic legitimacy for it and because it subverts the functional differentiation of powers.

It may also be objected that the primary duty of judges is to morality and not to law, and that they therefore should interpret the law from a full moral perspective.

Gustav Radbruch famously claimed that a positivist theory of the law, which holds that laws are valid by their source in a legislature, “has rendered jurists and the people alike defenceless against arbitrary, cruel, or criminal laws, however extreme they might be”.⁵⁵ Written in Germany in September 1945, no one could be in doubt about what he had in mind. His conclusion was that the judge must evaluate whether the law is just, and if it is not, then it cannot be considered a law. On a Kantian view, however, the primary duty of judges is to the law and not to morality.

⁵⁵ Gustav Radbruch, “Five Minutes of Legal Philosophy,” in *Oxford Journal of Legal Studies*, Vol. 26, No. 1 (2006): 13-15, here at p. 13.

As civil servants they are not entitled to set their private views over the law. But that does not render them defenceless against atrocious law. As human beings their primary obligation is to morality, and as such they can make the choice to speak out against the law in public or to renounce their position as judges.

What, then, is the Kantian answer to the four concerns about international human rights courts mentioned at the outset of this essay? The first worry about the large scope of the courts is not inherently a problem as long as the court is justified. Nor is it a problem that courts lack democratic legitimacy: they are not supposed to legislate and therefore do not stand in need of democratic legitimacy. The difficulty, however, is the second worry, the absence of a normal institutional context where a legislature performs the twin functions of developing the law and checking the courts. For this reason, the fourth worry, the ambiguity of human rights law, is particularly difficult because it leaves courts with the task of dynamically developing the law. The solution, on the rule of law based Kantian view is to develop international lawmaking institutions to match the courts, thereby decreasing the likelihood of a situation where courts faced with entrenched law cross the line from application to legislation.

It might seem like the Kantian view sketched here in reality just advocates the creation of a supranational state, and that this merely brings the problem of limiting state action one level up from the nation state. If the purpose of the international courts and legislative organs is to impose human rights as limits on states, what is to make sure that the supranational body itself stays faithful to human rights? The

result seems to be an infinite regress, where each new level of supervision simultaneously introduces a new possibility of transgression. The objection is true as far as it goes: no institutions can be secure against abuse. But a supranational and multilevel arrangement for securing human rights is nonetheless preferable to a merely national arrangement. This is so for two reasons. First, the multiple institutional levels create additional checks and balances. The international institutions can intervene to prevent domestic human rights abuses, but states can conversely check international political and legal institutions from abuse. Second, a legal system external to nation states has greater distance to parochial culture and introduces a court that is accountable not just in a local context but to a number of communities. This is reflected even at the level of court membership, since international courts usually are composed of judges from several nations. This is significant, because the most obvious reason to be sceptical to domestic courts judging over a human rights treaty is that they may harbour the same prejudices that domestic legislatures do (this was the case with US supreme court cases like *Korematsu* and *Dred Scott*). Judges on an international court may be biased too, but they are unlikely all to be biased in the same way.

It may also be objected that this view is utopian in assuming states to be willing to join around supranational legislative organs. This is a more comprehensive transfer of power than the existing mode of human rights construction through regular international conventions, which require unanimous consent by states. The objection points to the circumstances of justice and as such it is relevant for the implementation of the ideal under non-ideal circumstances. No doubt the difficulty

is very real. But the objection does nothing to undermine the ideal of a functionally divided multilevel system of powers as the appropriate institutional arrangement for securing human rights protection. That an ideal is difficult to realize does not discredit the ideal as long as it is not entirely unrealistic. It should also be born in mind that a proper supranational institutional context around human rights offers states an increased opportunity to take part in shaping the human rights they are constrained by, rather than remaining just passive recipients of court judgments.

5. Conclusion

International human rights courts raise questions of legitimacy because of four concerns. They have significant power; do not operate within a normal institutional context; are not democratically elected; and are set to judge over vague law. Some of the deepest Kantian commitments are to democratic accountability and morally practical reasoning, and one might easily assume that courts and judges should be held to such standards. This is what animates the theories by Bogdandy and Venzke and Koskenniemi. Yet, as we have seen, Kant himself rejected such a view of court, and, I hope to have shown, he did so for good reasons. Direct democratic accountability and moral reasoning are important in legislation, not in application. Judges are obliged to use judgement in its theoretical sense, fitting existing cases within an established law. Their virtue is to have legal expertise and understanding of the world. That courts are forums for expertise should not be worrisome in a democratic perspective as long as legislating organs are representative and accountable. In upholding democratically enacted law, courts perform a crucial task

in a democracy, but without themselves becoming representative institutions.

The Kantian view does not naively suppose that courts never cross the line from application to legislation. But staying within existing law is a moral requirement of judges. Some development of the law can hardly be avoided as long there are gaps and surface contradictions, and as long as past decisions function as precedent. This is particularly the case with very entrenched law about abstract rights, which needs to be extended to bear on contemporary issues, as often is the case with human rights law. But the Kantian remedy is not to make courts into democratic institutions or to advocate judges' use of practical reason (in the Kantian meaning of that term), but to ensure that the lawgiving institutions are capable of developing the law and checking courts when needed. As long as it cannot be proven impossible, this remains a moral ideal, even though in today's world it is an optimistic agenda.

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