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From speaking truth to power to speaking power's truth

Transnational judicial activism in an increasingly illiberal world

Daniel Quiroga-Villamarin 2019-09-03T08:25:01

From San José to Karlsruhe, Strasbourg to New Delhi, in both the Global North and South, judges have been at the forefront of the establishment of a new *jus gentium* common to all humankind. Implicit in this narrative, however, lies the idea that transnational judicial activism has inherent *progressive* outcomes: the rule of law, human rights, or liberalism *tout court* are the necessary products of these new forms of judicial communications. This implicit premise – which, unsurprisingly, responds to the *naiveté* of the post-cold war era – cannot hold in an increasingly illiberal world.

Often, the usual illiberal response has been to confront courts – both national and international – for their entanglement with the creation of the (neo)liberal "new world order." In my intervention at this symposium, I will argue that scholars of courts and tribunals should heed to another illiberal reaction: using the discursive tools invented by liberal internationalism to advance illiberal objectives. In a similar way as Trump has used the legal toolkit of imperial "endless war" created by his liberal predecessors, illiberal judges are now communicating with each other, and embracing international law to further their agendas. The right has rediscovered its own history: long before liberals and disgruntled socialists turned to judges to protect human rights, courts had been a bulwark of the *statu quo*. The (in)famous *Lochner* case before the US Supreme Court bears witness to the fact that Courts not only have the potential to speak truth to power, but also, to speak power's truth.

In this short blog piece, I will only provide a recap of my larger argument that I will present at the upcoming conference on *Cynical International Law*. The paper (and its full list of references) will be available upon request by any interested reader.

Constitutionalism and Judicialization in the Contemporary Cosmopolitan Imagination

One common narrative in the history of the discipline is that the dark past of selfishness, conflict, and bilateralism eventually was superseded by a bright present in which cooperation, multilateralism, and peace shine, leading eventually to a future of perpetual peace and good global governance. This narrative – which, following David Kennedy, I will name the "Cosmopolitan Dream" – has often had a distinctively "German" flair, insofar as it understands the field of international law through the "vocabularies of public law," be that administrative or constitutional law. For this narrative, bridging this gap between the utopia of "community interest" and the crude

apology of egoistic state-interest has been one of the founding traumas for our discipline.

As the Berlin wall crumbled, cosmopolitan dreamers found themselves unshackled from the iron cage of the cold war. Suddenly, it seemed that the time for the liberal international legal order – dreamt since 1945, 1873, or even 1648 – had finally come. International law, at last, was going to *progressively* develop to new heights. Thus, the nineties saw the emergence of a myriad of legal frameworks and the proliferation of international courts and tribunals that attempted to set the parameters for the global rule of law. For all of our past historical benchmarks and geological foundations, contemporary international law truly began in the 1990s. The events, characters, and trends before that are just *history*: confined to the past; sad remnants of the struggles lost and won; a tragic inheritance of the limited success and resounding failures of our forefathers.

Following Duncan Kennedy's seminal piece on the *Three Globalizations of Law,* I argue that we should understand the cosmopolitan dream as a form of (international) legal consciousness. This cosmopolitan consciousness – which was forged in the crucible of this "age of global optimism" – came to determine the scope and parameters of contemporary legal thought in international law. In fact, the cosmopolitan dream should be understood in the backdrop of Kennedy's third globalization, which began in 1945, accelerated in the 70s, but only came into full speed in the 90s. And, as Tomlins has aptly shown, this third globalization should be studied as the adaptation of legal *parole* to the rise of neoliberal economics as a hegemonic horizon in – and beyond – legal consciousness.

As this blog entry does not offer us a space to fully review the connecting veins between neoliberalism and (international) law in contemporary legal consciousness, I will merely review two twin stars which have guided contemporary cosmopolitan imagination: constitutionalism and judicialization. Most of the existing literature on judicial dialogue and strategic human rights litigation cannot be understood without reference to the magnetic field created by these two poles. They have shaped our expectations, hopes, and aspirations when it comes to transnational judicial activism.

Constitutionalism and judicialization were products of the *zeitgeist* of liberal hegemony, in a period marked by high hopes on the promises of law and rights in contemporary global governance. Sadly, the days in which we could assume that judges and courts would always be staunch allies for liberal causes are long gone (if they were ever here). As the tide turns, however, and the (neo)liberal consensus crumbles, there seems little space left to the legal transnational advocacy networks (TANs) that promoted litigation. Provocatively, I would like to suggest that TANs might be at their best a powerless companion to neoliberal politics, and at their worst perhaps part of the problem. These networks are merely part of a wider approach of center-left responses to globalization: what I would like to call the Academic-NGO-Courts Complex. According to this strategy, law is the best – if not the only – instrument for social change, and must be mobilized from the Courts, the Classrooms, and Civil Society. But, as the rising populist Right create their own NGOs, purges law schools, and packs the courts, one can only wonder if TANs can still count that the "right people" with the "right biases" will still be in place when

their day in court finally comes. As Goya reminds us, the sleep of reason produces monsters. And now, as Gramsci once said, “the old world is dying, and the new world struggles to be born: now is the time of monsters.”

Francisco Goya. El sueño de la razón produce monstrous [the sleep of reason produces monsters] (1791-1799). Aguatinta sobre papel – Museo del Prado (Madrid, Spain).

The Sleep of Reason produces Monsters: Backlash(es) against International Law

As it is well known, liberal juristocracy is a highly contentious issue, and is not without its discontents. Critics argue that a board of unelected judges cannot take highly political decisions and should defer to the democratic legitimacy of the executive power or of parliament. This line of critique only carries more weight when applied to international judges, who are often seen even more far away from the "people" they are regulating. The government of judges – even in the name of the rule of law – has often been accused of suffering from a democratic deficit. Benvenisti attempted to argue that judges are actually "reclaiming democracy" in a highly globalized world, instead of taking it away from the people or the other branches of government. Despite his pleas, voters all around the world have been unconvinced, revolting against national and international courts. The recent – and unsuccessful – attempt in Switzerland to block "foreign" judges is but the latest case of a long trail of illiberal denunciation of transnational judicial dialogue.

This illiberal response is all too well known for international lawyers: it is now an established genre of contemporary scholarship: backlash(es). When the illiberal revolt started years ago in the backyard of Empire, Eastern Europe and Latin America, it didn't seem to trouble international lawyers at the core. Cosmopolitan dreamers, avid readers of Rawl's *Law of Peoples*, simply dismissed this as the immature tendencies of the indecent, non-liberal peoples and their outlaw states. However, when in 2016, the populist revolt came home to the Northern Atlantic (with Brexit in the UK and Trump's election in the US), international lawyers quickly came to terms with the far right's challenge against the cosmopolitan imagination. From the age of global optimism, we found ourselves in the age of global anger.

Under siege, most international lawyers decided to strike back. Framing the issue as a matter of *us (*the cosmopolitan dreamers) vs. *them* (the backward nationalist populists), lawyers have turned to litigation to defend the rule of law, seeing the populist revolt as merely a setback. Perhaps their manifesto is Koh's *Trump and International Law*, which highlights the many ways in which the "resistance" is winning over Trump. Another clear example can be found in Ginsburg's recent Lauterpacht Memorial lectures, where he posited the dichotomy between *we*, the *democratic internationalists* vs. *them*, the *authoritarian Westphalians*.

Sadly, international lawyers have focused so much on this typical illiberal strategy and on the dichotomy us-good vs. them-bad, that we have paid scant attention to another possible avenue for backlash: using the discursive tools invented by liberal internationalism to advance illiberal objectives. More often than not, illiberal governments have understood that instead of attacking courts, they might as well *pack* them. The career of judge (and now Minister) Sergio Moro in Brazil, for instance, is a clear example of how illiberals can use the judiciary as a weapon in their favor. In other words, contrary to cosmopolitan assumptions, the tools, discourses, and doctrines by liberal constitutionalism can further agendas which, in principle, seem to contradict the lofty dreams of the 90s. Perhaps the dreamers

will soon find themselves in a nightmare of abusive constitutionalism and illiberal judicialization in global governance.

Abusive constitutionalism in International Law: Trump's "Commission on Unalienable Rights"

Let me refer to only one example of this growing trend. Recently, the Trump Administration created a new Commission on Unalienable Rights, which has the purpose of advising the Secretary of State on "international human rights matters." According to its Charter (which has been credited to Robert George, a conservative law professor who recently co-edited the *Cambridge Companion to Natural Law*), this commission has the task to "provide fresh thinking about human rights and [propose] reforms for human rights discourse where it was departed from our nation's founding principles of natural law and natural rights." Surprisingly, I must here agree with (Eric) Posner's affirmation that this Commission plays a crucial role in the Trump administration's attempt to reinterpret international human rights law under the lens of conservative religious natural-law thinking. In particular, liberal commentators are worried that this Commission would use rights (or, to paraphrase its Charter, rights *discourse*) against sexual and reproductive rights, or transgender rights, or sexual equality. As Mégret aptly noted, "[p]erhaps nothing is more misleading than the Dworkinian image of rights as *trumps*." Rather, unalienable rights could be mobilized to expand the power of the state and crush the already limited space of women and sexual minorities in – and beyond – the US.

In a recent debate on the future of strategic human rights litigation, Wolfgang Kaleck suggested that human rights activist needed to politicize their struggle. Moyn, along these lines, has already issued a similar call to action, inviting human rights to "descend into the world as language of contest and struggle." Sadly, cosmopolitan dreamers insist "keeping calm and carry on" lawyering as usual, with their "radically moderate approach." While Rome burns, the cosmopolitans have not started to question the role of perils of judges as instruments of illiberal global governance. The right, however, has rediscovered its own history, and is willing to embrace (and politicize) human rights, constitutionalism, and judicialization in their own image. And now, to remember Bob Dylan, the times they are a changin', we don't need a weatherman to know which way the wind is blowing.

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