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Political Liberalism or Political Right? A Commentary on Michelman's Legitimacy, The Social Turn and Constitutional Review*

Zusammenfassung

Im Unterschied zur „rechtlichen Verfassung", in der sich alles um das liberale Projekt der Legimitation im Sinne der Verfassung dreht – Hauptthema in Michelmans Beitrag in dieser Ausgabe – beschreibt diese Antwort die „politische Verfassung", die sich von der Priorität der rechtlichen Normativität entfernt, die in der „rechtlichen Verfassung" stark hervorgehoben wird. Der Verwurf der Behauptung, dass der normative Streit in Bezug auf Rechtsschutz die Organisation politischer Gesellschaften von der faktisch politischen Herrschaft befreien kann, ist das Hauptmerkmal von politischer Unterstützung der konstitutiven Staatsform, die schlussendlich fundamentale Rechtsschutzmaßnahmen historischen staatlichen Institutionen und Ämtern anvertraut ohne den Normen zu universeller Gültigkeit zu verhelfen. Die Charakterisierung der politischen Verfassung in dieser Antwort zu Michelmans Essay spiegelt das Bewusstsein wider, dass die unabdingbare Anwesenheit von verlässlichen Staatsinstitutionen und staatlichen Praktiken direkt von den normativen Argumenten abhängen, die von politischem Liberalismus und legalem Konstitutionalismus für eine rechtliche Überprüfung verlangt werden, jedoch wird gefordert, dass diese normativen Argumente ein Teil der historisch-politischen Praktiken bleiben. Sie gehen nicht über das Politische hinaus und können somit nicht für die Einführung von „normativen Grenzen" des Politischen angewendet werden.

Résumé

Contrairement à la « constitution juridique » sur laquelle repose le projet libéral de légitimation par la constitution – principal sujet discuté par Michelman dans sa contribution à ce volume – cette réponse décrit une « constitution politique » qui s'affranchit de son devoir de donner la priorité à la normativité juridique mise en exergue dans la « Constitution juridique ». Le rejet de la plainte selon laquelle les arguments normatifs concernant la protection des droits peuvent avoir pour effet de priver l'organisation des communautés politiques de l'autorité politique ou « Herrschaft » témoigne de ce constitutionnalisme politique qui finit toujours par confier et attribuer les protections fondamentales en matière de droits aux institutions et pratiques gouvernementales historiques plutôt qu'à des normes abstraites à la validité universelle. La description de la constitution politique, dans cette réponse à l'essai de Michelman, soulève dûment une prise de conscience : l'autorité des institutions et pratiques gouvernementales établies repose invariablement sur des arguments normatifs comparables à ceux régissant le

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libéralisme politique et le constitutionnalisme juridique et sujets des contrôles judiciaires. L'essai insiste cependant sur le fait que ces arguments normatifs font partie intégrante de l'histoire des pratiques politiques. Ils ne dépassent pas la sphère du politique et par conséquent ne peuvent pas non plus être invoqués pour imposer des « limites normatives » à la politique.

What role does the constitution perform in the legitimation of a political regime? This is the most basic question that animates Frank Michelman's argument in his essay in this volume. He addresses the question by way of an assessment of John Rawls' advocacy of "the liberal principle of legitimacy" or, as Michelman – following Grimm and other German scholars – reformulates it, by analyzing the phenomenon of "legitimation by constitution." But Michelman, who is a highly adept interpreter of Rawls' work, does not intend to simply offer a Rawlsian analysis of the question. Rather, he seeks to reinterpret political liberalism with the aim of bringing about a reconciliation between that position and the precepts of contemporary civic republicanism. Consequently, he presents us with a more precise question for consideration. Is the constitution of a regime committed to Rawlsian political liberalism, he asks, obliged not only to recognize but also to institutionalize socio-economic rights?

Michelman offers an answer to this more precisely-formulated question by presenting four sequential questions, each of which needs to be answered affirmatively if the main question is to receive an affirmative answer. These questions are:

1. Does adherence to political liberalism require acknowledgement of the necessity of meeting basic needs that correspond to social and economic rights? This is a question of *justice*.
2. Is the recognition of those needs a minimal condition of a regime's moral legitimacy? This is a question of *legitimacy*.
3. Should these basic needs be incorporated in the constitution? In effect: should these needs be recognized as constitutional rights? This is the question of *constitutionalization*.
4. Should such constitutional rights be judicially enforced? This is the question of *judicialization*.

Michelman suggests that although each of these questions can be answered in the affirmative, "legitimation by constitution" only requires that a regime adopt a version of what is sometimes called "weak constitutionalism." That is, although social and economic rights should be accorded constitutional recognition, the limited institutional competence of courts strictly to enforce these types of rights suggests that such recognition is likely to be accompanied by adoption of deliberative, dialogical, or experimentalist modes of judicial review.

Michelman's argument flows in a logical manner and, on these terms, I would not venture to fault it. This comment is, therefore, intended to probe the basis on which his general argument proceeds. *Michelman* maintains that his is not a normative argument, in the sense that he is not seeking to advocate or approve of this emerging constitutional practice. Rather, it is a positive account, one that helps us to "understand, explain, or appraise" that practice.[1] If that is so, then the question I want to ask is: why start with

1 Frank I. Michelman, *Legitimacy, The Social Turn, and Constitutional Review: What Political Liberalism Suggests,* this volume, 201.

the pre-suppositions of political liberalism?[2] If a positive approach is to be adopted, could a less normatively-freighted basis not be found?

In this short comment, I want to follow this up by suggesting a modification in the positive presentation of the argument. This requires some revision of the four questions. In place of the second question, that of legitimacy, I propose to substitute a question of authority. The question then becomes: does the recognition of those needs provide a basis of a regime's *authority*? Presented in this way, the question becomes more conditional and it also absorbs the first question, that of justice, within it. The third question can then be reformulated in non-normative terms. Instead of asking "*should* basic needs be constitutionalized," we might ask: *why* has it recently been felt necessary to accord constitutional recognition to social and economic rights? Finally, instead of asking "*should* these rights be judicially enforced" (the fourth question), it might be asked: *what* is the impact on judicial practice of according constitutional recognition to these basic needs? These adjustments to *Michelman's* questions alter the nature of the inquiry. But they might also help us detect what is at stake with respect to liberal constitutionalism and the judicial enforcement of socio-economic rights.

I.

Why, it might be asked, should the issue of basic needs recognition be considered through the lens of authority rather than as an aspect of justice and legitimacy? The short reason is that the latter approach too readily lends itself to being deployed as a vehicle for importing certain moral values into the political domain. A positive account can be presented in a more dispassionate manner, I would suggest, only if the political domain is conceived as a distinct world within which, rather than being imported from outside, questions of nature and justification are examined from within the terms of its own constitution. Instead of asking whether or not a regime is just, we might begin by considering the ways in which a regime builds its authority.

Authority, explains *Alexandre Kojève*, involves a relationship. Authority is "the *possibility* that an agent has of *acting* on others (or on another) without these others *reacting* against him, despite being capable of doing so."[3] The authority of a political regime can then be assessed by the degree to which its actions are accepted by its subjects. Of particular interest is the way *Kojève* relates authority to a right. I have a right to something, he explains, "when I can do it without encountering an *opposition* (reaction), the latter being in principle possible."[4] *Kojève* goes on to show that although authority and right are closely related they are not corollaries. The reason is that any reaction to the exercise of authority destroys authority, whereas any reaction against a right need not destroy a right. Whereas authority excludes force, a right presupposes its existence. As he notes, "Right has authority only for those who 'recognize' it, but it remains a Right

2 For my views on the limitations of Rawlsian political liberalism as an expression of constitutional thought, see Martin Loughlin, *Constitutional Theory: a 25th Anniversary Essay*, 25 O.J.L.S. 183 (2005).

3 Alexandre Kojève, The Notion of Authority (A Brief Presentation) 8 (Hager Weslati trans., Verso 2014).

4 *Id.* at 9.

even for those who are subject to it without 'recognizing' it."[5] For *Kojève*, a right exists only when there is a third party that recognizes and enforces it: "there is no Right without court of law, no court without police that can carry out the decisions of the court by force."[6] The person subject to the right might react against it, but this will be against the court and not the right-holder.

The value of *Kojève's* method is to enable us to consider *Michelman's* questions from a phenomenological, rather than a normative, stance. The formal liberty and equality of citizens in a political regime is not presupposed in the way postulated in political liberalism. It is the lack of this presupposition that enables us to convert the issues of justice and moral legitimacy (the first two questions) into one of authority. The question then becomes: is the recognition of certain basic needs of citizens a precondition of the conferral of authority? Presented in this manner, it is conceivable that authoritarian – and not just liberal – regimes might answer that question in the affirmative.

II.

By focusing on the issue of authority, *Michelman's* last two questions, on constitutionalization and judicialization, can be understood to concern the degree to which basic needs should be formally recognized through institutionalization and, then, considered (in *Kojève's* terminology) as conferring rights. Again, once a phenomenological method is adopted, it is not necessary to presuppose political liberalism. In an illuminating essay on the rule of law, *Stephen Holmes* has provided a helpful illustration. Rather than commencing with a morally-inflected question, Holmes begins by asking: why do rulers obey law? This can be rephrased to render it closer to present concerns: why do rulers comply with constitutional rules? Holmes then offers a nuanced answer: he suggests that rulers comply with constitutional rules either because "they are in the grip of moral norms" or because "they anticipate the advantages of self-restraint."[7] Although an avowed political liberal, Holmes recognizes that, rather than assuming the authority of moral norms in the political domain, it might be more insightful to reflect on the political advantages of maintaining self-restraint.

Holmes recognizes in particular that, given the complexity of the institutional arrangements of contemporary political regimes, a key factor that enables rulers to maintain their authority is their ability to insulate themselves from assuming responsibility for all governmental decisions. Rulers maintain their authority by virtue of deniability: "Shedding responsibilities, downsizing goals to match capacities, is a prudent step for the most Herculean of bosses, commanders, rulers, panjandrums, chiefs."[8] Control is enhanced, especially in the typical political situation in which problems appear intractable, where office-holders are able to deny responsibility.

Once this principle is generalized, we can see how it gives a different inflection to the precepts of political liberalism. What is often generally referred to as constitutionalism

5 *Id.* at 11.
6 *Id.* at 10.
7 Stephen Holmes, *Lineages of the Rule of Law in* Democracy and the Rule of Law at 19, 24 (José María Maravall & Adam Przeworski eds., 2003).
8 *Id.* at 26.

– the institutional differentiation of governing tasks – is recognized to be a vital technique for maintaining authority. The continuous differentiation of governmental tasks – such as distinguishing between executive and judicial tasks, or between law-finding (for judges) and fact-finding (for juries), or establishing executive agencies that operate at arm's length from ministerial control – is a means of maintaining authority. To defend against external threats, argues Holmes, "prescient rulers will create, train, and finance a military establishment"; for the purpose of defending against internal threats "they will create, train, and finance a judicial establishment."[9] The institutionalization of political power and the establishment of rule-based governmental procedures are, in short, important methods of maintaining and enhancing governmental authority.

This suggests that constraints on the range of a ruling body's powers serve to generate their authority. Rulers thus bind themselves to respect constitutional rules largely from self-interest, and under certain conditions this dynamic can lead ultimately to the evolution of a regime in which constitutional rules become self-enforcing.[10] That is, the processes of constitutionalization might owe as much, if not more, to prudential necessities than to the hegemony of liberal moral values.

Once constitutionalization presents itself as a practical working principle of governing, the key task becomes that of co-ordination. Constitutional arrangements are co-ordination mechanisms that, notwithstanding their basic value differences, enable citizens to work in concert and to mutual advantage.[11] This might explain why in the present phase of governing, in which the activity is acknowledged to be complex and extensive, more regimes than ever are coming to appreciate the significance of constitutions. It is not only liberal democracies but also authoritarian regimes that now seem to be recognizing the importance of constitutions in acting as co-ordination and controlling mechanisms and thereby to performing the role of vehicles for both stabilizing and enhancing the authority of the regime.[12] This line of analysis might suggest that these recent developments owe less to the influence of an evolving moral philosophy of political liberalism than to the dynamics of a type of prudential political reason that I have elsewhere called the workings of "political right."[13]

III.

I am now able to address *Michelman's* last question, on the judicial enforcement of social and economic rights. It is evident that it is unlikely that authoritarian regimes will confer justiciable rights on subjects, especially with respect to social and economic

9 *Id.* at 36.

10 *See, e.g.*, Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 Am. Pol. Sci. Rev. 245 (1997).

11 *See, e.g.*, Russell Hardin, Liberalism, Constitutionalism, and Democracy 87 (1999) ("in coordination theory the issue is not that we did agree but that our incentives and those of virtually everyone are to go along once a particular coordination is established. *Coordination theory is primarily a theory of workability*, not of normativity or obligation.".

12 *See, e.g.*, Constitutions in Authoritarian Regimes (Tom Ginsburg & Alberto Simpser eds., 2014).

13 Martin Loughlin, Foundations of Public Law, esp. ch. 6 (2010).

needs. Apart from other considerations, to do so would be to give too much power to the judiciary, a group that the ruling regime is likely to regard as mere servants of the state. But what about liberal regimes? As *Michelman* notes, constitutional recognition of social and economic needs emerges in conjunction with a decline in their recognition as enforceable rights, that is, a decline in their status as rights in either *Hohfeld's* or *Kojève's* sense. Constitutionalization of socio-economic rights has emerged in conjunction with processes that have led to courts, in the exercise of their constitutional responsibilities, being converted into functionally-integrative generic vehicles of policy co-ordination.

The growing recognition of the constitutional character of socio-economic rights is one element in a general "rights revolution" that is altering the character of public law. Constitutional rights are no longer perceived as attaching to a limited category of human interests that are deserving of special judicial protection; it is now argued that almost all human interests can be expressed in the form of a rights-claim.[14] This is, of course, a liberal achievement. But it is one that has had a significant impact on modes of recognition and protection. Rights come to have the status of little more than mere political claims and they are accorded institutional protection only once the strength of that claim has been evaluated in context. Any strict sense of legality loses purchase as courts go through a process of examining the public policy justification for interfering with the "right."

Some (especially political liberals) regard such rights as focal points of "interpretive disagreement and agreement, of agitation and contestation, and of monitoring and enforcement."[15] This is, of course, of a piece with the emergence of deliberative, dialogical, or experimental modes of judicial review that *Michelman* suggests as an answer to the question of how political liberal constitutional arrangements might recognize and give effect to social and economic rights claims. But if we shift register from normative analysis to functional assessment, it is evident that a "right" is now essentially a mere claim, and one that must be placed into a balance alongside other competing interests at stake. With the growing prevalence of this type of proportionality analysis, the judiciary loses much of its discrete mode of legal analysis. The maxim *fiat justitia ruat caelum* ceases to resonate as courts are converted into functionally-integrative elements of a general administrative machinery. Courts become auditors.

The significance of this development can be assessed once it is set into the frame of the recent audit explosion. Over the last thirty or so years, methods of public policy evaluation have considerably changed. This reform is most clearly signified by the extension of auditing arrangements from regularity audit (i.e., compliance with legal rules) to the establishment of new techniques of managerial audit and performance management. Its significance can most succinctly be explained with reference to an input-throughput-output-impact model of action.

Viewed thus, we can identify a number of key measures of performance. First, there is the *cost* of a service or programme, which is a quantitative measure and might, therefore, be most easily determined (e.g., the budget set for a national health service). Secondly, we should consider *resources*, which are the inputs used in operations, and

14 Kai Möller, The Global Model of Constitutional Rights (2012).

15 Katherine G. Young, Constituting Economic and Social Rights 2 (2012).

require a more qualitative assessment (e.g., the hospitals and medical centres, together with the associated professionals employed in the service). Resources are then transformed by "throughputs" into *outputs*. Such outputs are the direct results of the activity (the goods or services supplied) and may utilise quantitative measures (e.g., the number of patients treated), although generally a measure of quality is required (e.g., morbidity rates). Finally, we might use *impact* as a performance measure. The measurement of impact or outcome is perhaps the most important objective since it seeks to assess the effectiveness of the operation in meeting the needs and requirements of those for whom the operations are designed to benefit (e.g., improved health and well-being of the population), and this is often the most difficult to assess.

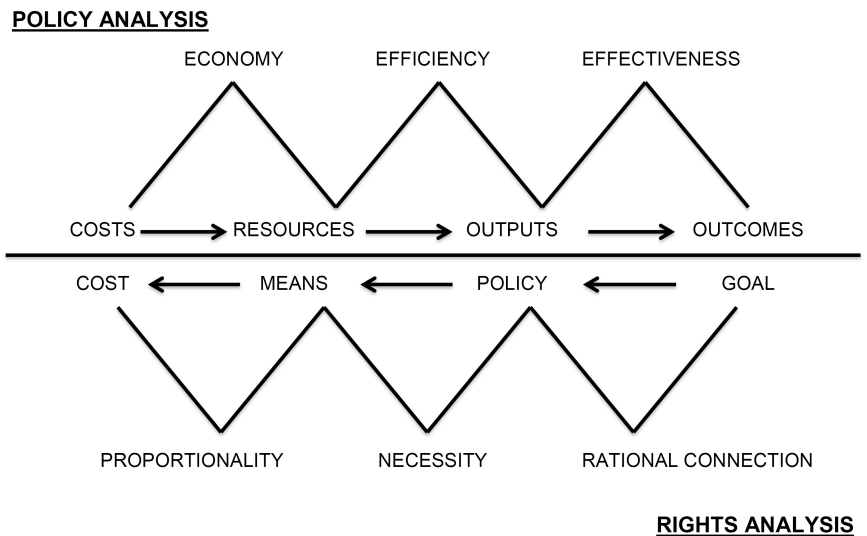
Given such assessment difficulties, certain *performance indicators* are widely used; these are proxy measures that are designed to indicate how well socio-economic services are being provided and with what results. The key performance indicators utilized are those which examine the relationship between costs and resources (*economy*), between resources and outputs (*efficiency*), and between outputs and outcomes (*effectiveness*).

This type of framework, sketched in the upper section of the Figure (attached), is generally referred to as value-for-money (VFM) audit. It has been widely used in recent years to assess public policy performance in the delivery of social and economic services (education, health, and welfare services of various kinds). VFM audit has undoubted benefits, not least in imposing a coherent structure on public policy decision-making processes, thereby strengthening public accountability. But it is only a framework and it contains certain major tensions: between economic rationality and professional standards; between the indicators of economy, efficiency, and effectiveness; between economy, efficiency, or effectiveness, on the one hand, and equity on the other; between production goals (i.e., services provided to consumers, beneficiaries, and clients) and organizational goals (i.e., maintenance and development of that body's resources in order to provide a base for future action). Especially in the context of austerity regimes, some argue that the framework is used primarily to promote economy and efficiency over effectiveness and equity, and production goals at the expense of organizational goals, and that, in general, professional standards have been subsumed into, if not entirely overridden by, VFM criteria.

The point I want to emphasize in sketching this development is that the exercise that the judiciary undertakes when engaging in an assessment of whether a governmental agency has unduly interfered with an individual's right closely mirrors the exercise entailed in undertaking VFM audit. As the lower section of the Figure seeks to show, once a rights claim is asserted, courts undertake an analysis that assesses the governmental policy or programme in stages: first, to examine whether there is a rational connection between the public policy objective and the policy intended to give effect to it; secondly, to examine whether the measure adopted is necessary to give effect to that policy (and, in particular, to assess whether there is a less restrictive measure that could have given effect to the policy without impairing the asserted right); and, finally, to examine, through a balancing exercise, whether there is a proportionate relationship between the effects of the measure and the incursions on the right.

As the Figure shows, there is a clear symmetry between the structure of VFM audit and the adoption of a proportionality analysis when rights-claims are made. The input-throughput-output framework of policy assessment of the economy, efficiency, and ef-

fectiveness of governmental programmes designed to meet social and economic needs runs from left to right. Because proportionality analysis is undertaken only when a claim is made that implementation of a governmental programme impairs the exercise of an individual right, the rights analysis is to be read as running from right to left. But the structural logic, I would suggest, is identical. Judicialization of social and economic rights is accompanied by a shift from strict protection of basic rights to the transformation of courts into mechanisms by which social rights and public policy goals are placed in the balance.



IV.

This comment does not directly challenge the logic of *Michelman's* argument. *Michelman* makes a cogent case, on its own terms, that political liberalism should be read as recognizing a minimum standard of basic needs as conditions of justice and legitimacy and that the emerging practice of inscribing these needs in constitutional texts is one reason for the growth in influence of deliberative or dialogical modes of constitutional review. My objective here has been primarily to offer an alternative explanation of these developments, one that is not so normatively inflected and that may, therefore, have an equal claim to stand as a positive account. In this largely functional analysis, it is not evident that the recent processes of "governmentalization" of both public policy assessment or of rights-claims can most appropriately be explained through the frame of political liberalism. If, as we might conclude, the dynamic that drives constitutional development involves an iteration between normative claims and functional imperatives, then perhaps some synthesis between these two accounts is what ultimately will be needed.