

# KANT, RIGHTS AND BALANCING

**BY Professor Alec Stone Sweet**

***Saw Swee Hock Centennial Professor, National University of Singapore***

5 APRIL 2016, TUESDAY

4.00PM – 6.00PM

LEE SHERIDAN CONFERENCE ROOM, LEVEL 1, EU TONG SEN BUILDING

FACULTY OF LAW, NUS (BUKIT TIMAH CAMPUS)

## **ABSTRACT**

Proportionality analysis [PA] is, today, the dominant doctrinal procedure for determining when it is legitimate to adjust the scope and content of a right in light of (1) a conflicting right, or (2) a constitutionally-recognized public purpose. The paper's ambition is to demonstrate that PA is both consistent with, and is justified by, a Kantian account of freedom and public Right. The argument is sequenced as follows. First, it is submitted that rights, as concretized norms of a system of equal freedom, generate the authorization to exercise coercive force, in order to ensure that agents exercise their freedom consistently with the freedom of others. Second, in the modern state, a system of Right is instantiated through constitutional rights, which are positive requirements of any valid act of public authority. In effect, the People, in legislating a rights-based constitution, place the values that undergird public Right in trust, thereby generating a fiduciary obligation to fulfill these requirements, borne by all state officials. Third, although the point is only implicit in Kant, a mode of judicial review is required to evaluate the reasons given by officials to justify acts that burden the exercise of a right. This meta-rule – a claimant's right to justification, and the duty of officials to give reasons – governs the fiduciary relationship. Fourth, it is submitted that PA, which lays down a distinctive multi-stage, trans-substantive analytical framework for adjudicating rights claims, is compatible with Kant's practical philosophy. This Kantian reconstruction of the proportionality principle sheds light on two controversies that beset debates on PA. The paper (a) rejects notions that balancing reduces to purely interest-based consequentialist logics, and (b) provides a defense of judicial supremacy – arrangements in which constitutional judges are tasked with supervising the balancing determinations of all other lawmaking officials, and invalidating public acts that violate the proportionality principle.

The paper comprises a draft of a chapter in a new book project on cosmopolitan constitutionalism for OUP; and it extends the brief analysis of Kant's views on rights in Stone Sweet, "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe" (1 Journal of Global Constitutionalism, 2012: 53-90).

## **ABOUT THE SPEAKER**



**Alec Stone Sweet** works in the fields of comparative and international politics, and comparative and international law. Prior to moving to NUS, he held chaired professorships at the Yale Law School and Nuffield College, Oxford. Stone Sweet has also held visiting professorships at the Columbia Law School, as well as in universities in Aix-en-Provence, Bologna, Florence, Madrid, Milan, Paris, Stockholm, Sydney, and Vienna. Books include: *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008); *The Judicial Construction of Europe* (2004); *On Law, Politics, and Judicialization* (2003); *The Politics of Delegation* (2002); *The Institutionalization of Europe* (2001); *Governing with Judges* (2000); *European Integration and Supranational Governance* (1998); and *The Birth of Judicial Politics in France* (1992).

## **Participation is By Invitation Only**

Registration commences at 3.45pm. For more information, please contact Ms Yvonne Lim at [lawylhh@nus.edu.sg](mailto:lawylhh@nus.edu.sg)