

Why International Human Rights Judicial Review might be Democratically Legitimate

Andreas Follesdal

| | | |
|----------|--|-----|
| 1 | The Puzzle | 104 |
| 2 | A Liberal Contractualist Account | 105 |
| 2.1 | Liberal Contractualist Account of Legitimacy: Nonrejectability | 105 |
| 2.2 | No Institution has Normative Primacy as the Site for the Common Will or Self-governance | 106 |
| 2.3 | Legitimacy Among ‘Contingent Compliers’ with Existing, Fair Rules Generally Complied with | 107 |
| 2.4 | The Normative Significance of Elected Legislatures and Majority Rule | 108 |
| 2.5 | A General Case for Human Rights Constraints on Legislatures | 109 |
| 3 | Waldron’s Case against Judicial Review | 110 |
| 3.1 | Majority Rule Among Representatives with Unrestricted Domain as ‘Battle of the Sexes’ | 111 |
| 3.2 | Legislatures as the Site of Citizens’ Self-government | 111 |
| 3.3 | Reasons for Majority Rule Among Legislators | 113 |
| 3.4 | Reasons Against Constraints on the Domain of Legislation | 113 |
| 3.5 | Judicial Review Assumes Problematic Conception of Human Nature | 114 |
| 4 | Waldron’s Arguments Considered | 114 |
| 4.1 | The Need to Resolve Deep Conflicts | 115 |
| 4.2 | Why Universal Voting Rights to Legislatures with Unrestricted Domain? | 116 |
| 4.3 | On Majority Rule | 117 |
| 4.4 | On Conception of the Person | 118 |
| 5 | Conclusion | 119 |
| | References | 119 |

1 The Puzzle

International human rights courts face a dire choice.¹ On the one hand, if ineffective or inefficient, international judicial review of human rights is dismissed as insignificant. On the other hand, if effective, critics charge that international judicial human rights review is objectionably undemocratic and hence illegitimate. If the latter critics are correct, we should reject attempts at reform such as Lord Woolf has proposed for the European Court of Human Rights (ECtHR) (Woolf 2005), since they would strengthen international review and enhance the legitimacy deficit. Likewise, such critics would dismiss Anne Marie Slaughter's (Slaughter 2004) optimism outright, about the potential benefits of international networks of courts. Why should we cherish the prospect of democratically unaccountable supranational entities endowed with coercive power against domestic democratically accountable institutions?² Some of these principled worries about the illegitimacy of judicial review in general do not withstand scrutiny, or so I shall argue in the following. Thus courts such as the ECtHR that impose human rights constraints on legislatures need not be problematically undemocratic.

Note two limits to this defence and its extension. It primarily addresses the practice of 'weak review' combined with some respect by the court for State party discretion. An example is the ECtHR which binds the signatory states as a matter of international law, but that grants governments a 'Margin of Appreciation,' and whose judgments need not take direct effect in the domestic legal system. In contrast, 'strong' review by the US Supreme Court allows that the court could not only find a government policy or legislative act incompatible with a constitution or a treaty, but also establish other legislation or policy. Secondly, the defense offered here only addresses some of the concerns about judicial review – a practice that has received scholarly attention elsewhere.³ The concern here is whether decisions of democratically elected and accountable parliamentarians can legitimately be overruled. Another important issue is not addressed here, namely who should have the authority to adjudicate and enforce such constraints – in particular unelected and unaccountable judges on an international court. Thus the present paper does not defend the ECtHR or other

1 I am grateful for opportunities to present and discuss earlier versions of these reflections at the Department of Philosophy, University of Bern, Switzerland; at the Nordic Research Training Course on "Human Rights, Democracy and Constitutionalism" Copenhagen; at the Copenhagen Philosophy Department; at the Nordic Network on Political Theory; at the Colloquium on Universalism in International Law and Political Philosophy, Helsinki; and at the American Political Science Association in September 2006; especially for comments by Hauke Brunkhorst, Lukas Meyer, Dominic Roser, Martha Nussbaum, David Kennedy and Martti Koskenniemi. I am indebted to the Edmond J. Safra Center for Ethics and Currier House, both at Harvard University, for allowing me to pursue some of this research.

2 Anderson 2005, 1282.

3 For a similar distinction *cf.* Freeman 1990, 333. The 'standard' concerns about judicial review – that such review is countermajoritarian (Bickel 1962); and that judges are not accountable to majority – Ely 1980 (Freeman 1990) – must be supplemented by concerns about the international base of the treaties and the judges. *Cf.* Sunstein 1996 176-78, Sunstein 1997.

courts, but only removes some principled objections to their practice of international judicial review of human rights.

Judicial review finds its defenders, typically arguing that it amounts to a self-binding of the legislature to prevent its own rash or callous abuse of legislative powers against vulnerable minorities.⁴ Even if undemocratic, it is legitimate. Some even argue that the practice can be seen as *democratic* and hence legitimate.

Against these defences, Jeremy Waldron has presented several forceful and thought provoking challenges to judicial review. I address these objections in what follows.⁵ Section 2 sketches parts of a liberal contractualist account of legitimacy among 'contingent compliers'. Section 3 lays out Waldron's arguments against judicial review, while Section 4 responds to them. In particular, I consider his concerns that that judicial review conflicts with the grounds for political obligation to majoritarian representative legislature in circumstances of deep conflict.

2 A Liberal Contractualist account

The practice of judicial human rights review seems on the face of it highly undemocratic, and hence illegitimate. The central normative question is whether there is something *objectionably* undemocratic about international judicial review of human rights. There would seem to be three possible answers: we may find that the practice is illegitimate; that the practice is undemocratic yet legitimate; or that it to the contrary is democratic and possibly legitimate. I shall provide a sketch of the latter, based on a liberal account of legitimacy that supports both democratic accountable government and constraints on such democratically elected legislatures.

2.1 Liberal Contractualist Account of Legitimacy: Nonrejectability

Liberal Contractualism holds that institutions should satisfy principles of legitimacy that all subjects would have good reason to unanimously give their consent.⁶ At such a level of generality, this account would seem to count as liberal also in Jeremy Waldron's sense:

The thesis that I want to say is *fundamentally* liberal is this: a social and political order is illegitimate unless it is *rooted in* the consent of all those who have to live under it; the consent or agreement of these people is a condition of its being morally permissible to enforce that order against them.⁷

4 MacCormick 1999, 177, Dworkin 1996, Ely 1980.

5 Cf. Waldron 1993, Waldron 1994, Waldron 1998, Waldron 2000, Waldron 2001, Waldron 2004, Waldron 2005.

6 Cf. Rawls 1971, Scanlon 1998, Barry 1989.

7 Waldron 1987, 140 my emphasis.

How are we to understand this requirement? Liberal Contractualism holds that the inescapable use of public force must be *defensible* to all those required to uphold those practices, as equals. Appeals to ‘hypothetical’ consent serve to bring the vague ideals of equal dignity to bear on these questions of legitimacy and institutional design. The commitment to ‘consent’ is limited to the claim that institutions are legitimate only if they can be justified by arguments in the form of a social contract of some specific kind. No one with an interest in acting on non-rejectable grounds should have reason to reject these arguments or principles. There is no further fundamental appeal to consent, hypothetical or otherwise.⁸ In particular, standards of legitimacy may be specified, assessed and ranked by consideration of their impact on citizens’ interests, e.g. in terms of basic capabilities, social primary goods or the equivalent.

Liberal Contractualism grants that democratic, majority rule among elected and accountable representatives may be one important mechanism to ensure the protection and furtherance of the best interests of citizens. But other arrangements may also be required, such as super-majoritarian features, constraints and checks on parliament and government of various kinds. There is no *prima facie* normative preference for unrestrained parliaments. Liberal Contractualism instead leaves it an open, and largely an empirical, question whether any institutions should rely on decision mechanisms based on actual, deliberated consent among some parties. Even though Liberal Contractualism grant a role both for hypothetical consent and for reasoned deliberation about principles of legitimacy, it does not hold that all institutions should incorporate actual consent and actual deliberation, or as much of it as possible.⁹

2.2 *No Institution has Normative Primacy as the Site for the Common Will or Self-governance*

It is worth noting that while Liberal Contractualism stands in the ‘social contract’ tradition, it does not hold that normative legitimacy is a matter of actual or hypothetical transfer of individuals’ legislative authority in a state of nature to a common pool enjoyed by a unitary body of representatives.¹⁰ Such a whole cloth transfer would render any constraints on such a common authority suspicious and in need of justification. Instead, Liberal Contractualism denies that there is some ‘unrestrained’ will and legislative authority of each to be pooled, and especially not in some way that would convincingly place the burden of argument with any constraints on legislatures. Instead, Liberal Contractualism considers the whole package of decision-making institutions of a society, and requires that it be defended by comparison with the best alternative institutions for binding collective action.¹¹

2.3 *Legitimacy Among ‘Contingent Compliers’ with Existing, Fair Rules Generally Complied with*

8 *Cf.* Hampton 1997.

9 Other liberal thinkers differ. *Cf.* Joshua Cohen: “The ideal deliberative procedure provides a model for institutions, a model that they should mirror, so far as possible.” (Cohen 1997, 79).

10 Again, *cf.* Hampton 1997.

11 *Cf.* Shapiro 2001.

A central topic of normative legitimacy is: When do citizens have a political obligation – that is, a moral duty to abide by the rules and commands of a political order? For illustration, consider how Liberal Contractualism assesses the legitimacy of majority rule with or without international human rights judicial review. These two sets of arrangements must be compared against each other and against the best contenders, on the basis of arguments that assume citizens to have a ‘sense of justice.’

I submit that one important set of answers to such questions of legitimacy arise among “contingent compliers.” Contingent compliers are prepared to comply with common, fair rules as long as they believe that others do so as well, for instance out of a sense of justice. Thus they would prefer to cooperate rather than free ride on existing practices. They may be motivated by what John Rawls (1971) called a *Duty of Justice*

that they will comply with fair practices that exist and apply to them when they believe that the relevant others likewise do their part; and to further just arrangements not yet established, at least when this can be done without too much cost to ourselves.

Among citizens who are contingent compliers, the general answer to the question of when one has political obligations is: When the rules that apply are normatively legitimate, *and* when they are actually generally complied with.¹² For contingently compliant citizens to have a normative duty to obey political rules and authorities two conditions must hold: firstly,

- A) that the commands, rulers and regime are normatively legitimate - by some defensible set of principles of legitimacy; and secondly,
- B) that citizens also have reason to trust in the future compliance of other citizens and authorities with such commands and regimes.

To merit obedience by contingent compliers, institutions must address the assurance problems these actors face within complex structures of interdependence.

The theory of games, from Rousseau onward, helps us understand and address the problems of trust and trustworthiness that face contingent compliers. Institutions can provide valuable assurance by mixes of positive laws, transparency, shared practices, and socialization. I venture that democratic rule, with constraints on legislatures in the form of judicial review may provide one important form of such assurance.

2.4 *The Normative Significance of Elected Legislatures and Majority Rule*

12 Note that other answers may be appropriate among free riders, or under uncertainty about others motivations, or under partial compliance; or when the citizenry abide by unjust rules.

A fullblown theory of democracy is beyond the scope of these notes (cf. Follesdal and Hix 2006). For our purposes, we may think of democracy as a set of institutionally established procedures that regulate

- 1) competition for control over political authority,
- 2) on the basis of deliberation,
- 3) where nearly all adult citizens are permitted to participate in
- 4) an electoral mechanism where their expressed preferences over alternative candidates determine the outcome,
- 5) in such ways that the government is accountable to, and thereby responsive *to the majority* or to as many as possible.

The contractualist argument for such democratic decisionmaking with regards to certain issues and policy ranges is that, compared to the alternatives, democratic rule is over time more reliably responsive to the best interests of the members of the political order.¹³ It is important to consider how this argument proceeds.

The set of social institutions as a whole should protect and further the best interests of the public, and the citizenry should have good reasons to trust the institutions to carry out this task – that is, the institutions should be trustworthy. Which are these interests? I submit that among our urgent best interests are basic needs, non-domination by others, and control over the institutions that shape our lives. Political rights are important for all these interests, since political power profoundly affects the material conditions that determine our basic needs and life chances, as well as other factors that shape our life plans. Thus political power, expressed by public deliberation and voting, has both intrinsic and instrumental value insofar as they secure responsiveness by accountable legislature to the express preferences of citizens. I submit that some democratic arrangements are more trustworthy in this regard than other model of decision making. Historical experience seems to show that durably reliably effective institutions that secure basic needs require familiar mechanisms of democratic accountability. Crucially, compared to other modes of governance, democratic arrangements have better mechanisms to ensure that authorities reliably govern fairly and effectively, and to provide public assurance that such is the case. Democratic competition for legislative and executive power is one such strategy to secure responsiveness. Competition helps align the interests of the subjects to those of their rulers.¹⁴ In particular, party contestation in competitive elections, an active opposition, and scrutiny by media are central to deliberation, opinion formation, informed policy choice, and scrutiny of government. All of these contribute greatly to make the institutions trustworthy.

Note that such a contractualist account grants no foundational or privileged position to sovereign legislatures with unrestricted domain. It is to large extent an empirical question whether decision makers should rely on free deliberation, within greater or lesser scope of decision making, makes for a more reliable and legitimate system of decision-making. Thus we might in principle defend non-

13 Cf. Shapiro 1996, Levi 1998, Beitz 1989, 66.

14 Cf. Shapiro 2001, Schumpeter [1943] 1976, Dahl 1998, esp ch 10; Key Jr. 1961.

democratic arrangements, or constitutional constraints on democratic decisions, if some citizens have more to gain than anyone would have to lose by placing some decisions beyond the reach of accountable politicians. The former may occur when the representatives need to credibly tie their own hands to secure longer term Pareto-improvements that secure public goods, as is arguably the defense for 'undemocratic' central banks. Likewise, we might be prepared to defend human rights checks on a legislature, or a distribution of power between between it and other institutions may be defensible, as laid out in the U.S. federalist tradition or the European consensus-democracy tradition.¹⁵

2.5 A General Case for Human Rights Constraints on Legislatures

Liberal Contractualism recognizes several reasons to entrench human rights constraints on legislatures' authority to make law. A minority may otherwise have reason to doubt that the majority will give their interests their due. Human rights constraints, including democratic rights, offer assurance to minorities that they will avoid some forms of short term or longer term unfairness, because they are protected from domination, risks of unfortunate deliberations, or incompetence.¹⁶ Human rights address at least three major sorts of risks minorities face in democracies under majority rule. One risk is that the minority cannot be certain that they will be obeyed in the future, if they then become part of the majority. They must have reason to trust that the present majority will abide by democratic rule even when to their disadvantage.

In the short term, the majority may exploit its powers, intentionally and knowingly or not, in ways that will harm the minority. One reason for minorities' concern is that they may require unusual arrangements to secure the same needs as the majority, for instance since they are surrounded by a majority. Such arrangements may include special protections, exemptions or support to maintain aspects of their own culture - be it religion, language or other central components of what makes their lives go well in their eyes. The minorities should be given reasons to trust that the majority will provide sufficient protections of such 'special needs'. Another risk is that a minority may have special preferences that will render them a more or less permanent minority across several decisions, each of which may be minor but with deleterious cumulative effect. Minorities may thus fear that they will be harmed even by apparently innocuous majoritarian decisions. The majority can offer no good reasons why they can be trusted to vote according to their sense of justice, even on such 'minor' issues.

I submit that constitutionally entrenched human rights, including a commitment to democratic rights, limit the scope of decisions available to governments. These safeguards reduce the suspicion that those in power will ignore their sense of justice with untoward effects on minorities.

Thus it may be legitimate – though not 'democratic' in the particular sense of majority rule – to restrict the authority of elected legislators, governments and

15 Cf. Majone 1996, Lijphart 1999.

16 Cf. Shapiro 2001, Barry 1991.

administrations to human rights standards - as long as these constraints do not impose burdens of similar weight or ‘urgency’¹⁷ on others.

Thus Liberal Contractualism does not regard human rights constraints on legislatures as fundamentally problematic. Instead, the best reasons to value democracy is that these decision procedures regularly protect and promote individuals’ interests more fairly than alternative arrangements. These reasons also provides us with good reasons to constrain such authority.¹⁸ Liberal contractualism may ever go further and hold that a specified set of human rights constraints is not undemocratic. To the contrary, such constraints should be regarded as part of the specification of the legitimate scope for the right to political participation in the form of majoritarian legislative decisions.¹⁹

There may thus be good liberal reasons from assurance to grant some institutional, nonrepresentative body the authority to review proposed legislation, policies etc. to ensure compliance with human rights.

3 Waldron’s Case against Judicial Review

Human rights constraints and judicial review have a long intellectual and political pedigree. The impressive scholarship notwithstanding, they are not universally accepted. In a range of influential contributions Jeremy Waldron has presented profound and thought provoking objections against domestic judicial review – arguments that would also hold for international review.

Waldron questions both the diagnosis that would necessitate judicial review, and the efficacy of this remedy. We here focus on the former. He seeks to provide a philosophical principled defense of the ‘dignity of legislation’ against its alleged problems, on both philosophical and empirical grounds. He holds that judicial review conflicts in several ways with the grounds for citizens’ political obligation to majoritarian representative legislature in circumstances of deep conflict. Waldron defends this authority of the legislature on the grounds that majority rule among these representatives provides the only solution to what he regards as *deep conflicts* among citizens on substantive issues in such way that it can command sufficient respect and compliance. Even in the absence of general agreement on what should be the content of laws, we must agree to obey the results of a common procedure that expresses equal respect toward all citizens. Only unconstrained majority rule among elected parliamentarians fills this role. Human rights constraints based judicial review challenges this practice.

Several features of Waldron’s argument merit attention.

3.1 *Majority Rule Among Representatives with Unrestricted Domain as ‘Battle of the Sexes’*

17 Scanlon 1975.

18 Cf. De Marneffe 2004, 255, Beatty 1994, 350.

19 Cf. Harel 2006 ref, Fabre 2000, 83.

Waldron is concerned with the reasons we have to value majority rule among accountable representatives who make law over a nearly unrestricted domain. He holds that one central reason is citizens' realized need for some mechanism to select one among a range of outcomes, even when they live in deep conflict. When citizens are committed to abide by a common decision even though it is not the preferred option for each of them, they are in a situation modeled by the 'Battle of the Sexes'. Each party prefers any common outcome within some range rather than the other outcomes where they do not coordinate their actions. Yet they disagree about which of the outcomes within the range is best.²⁰ Waldron holds that majority rule among elected representatives is the best mechanism to select one outcome within this range. There are several elements of this complex position worth scrutiny.

3.2 *Legislatures as the Site of Citizens' Self-government*

Why does Waldron hold that a legislature of representatives is the appropriate body to make decisions by majority rule, and that they should do so over a nearly unrestricted domain of issues? Among the alternatives that are worse would apparently be to decide by lot, or by an aristocracy, -- or by a representative body whose scope of authoritative outcomes is constrained by human rights considerations.

I submit that Waldron regards the legislature as the institutional embodiment of citizens' unrestrained self government, authorized by consent.

Both in theory and in political practice, the legislature is thought of as the main embodiment of popular government: it is where responsible representatives of the people engage in what they would proudly describe as the self-government of the society.²¹

The legislatures are the

particular agencies in which 'the will of the people' is embodied for purposes of ordinary political decisions.²²

The decisions of elected representatives are the institutional expressions of self-government of the people, and any violation, e.g. in the form of judicial review

amounts *pro tanto* to a refusal of self-government. It amounts to an embrace of what Aristotle would call 'aristocracy'—the rule of the few best.²³

He offers three reasons why legislatures have this special standing, and why constitutional constraints such as rights are properly understood as something externally imposed onto these agencies.²⁴

20 Waldron 1999, 104.

21 Waldron 1993, 44.

22 Waldron 1999, 261.

23 Ibid, 264.

Firstly, he suggests a Lockean argument that voting is ‘a way to secure something like *consent*’ from those subject to coercion:

We argue for the right to vote, .. by saying (1) that individuals have a fundamental negative right against the coercion that the exercise of political power involves, (2) that this fundamental right is respected either by limiting the exercise of political power or by securing the consent of those who are subject to it, and (3) that voting is a way of securing something like consent.²⁵

Similarly, he requires that the legislature that deals with issues of principle,

through something like electoral accountability, embodies the spirit of self-government, a body in which we can discern the manifest footprints of our own original consent.²⁶

The notion of consent he had in mind is ‘broadly Lockean’, and may be secured by a contract argument, hypothetical or actual:

Briefly, one would have to show that the system of majoritarian voting – or the constitutional basis on which it was set up – commanded or ought to command the unanimous consent of those legitimately subject of the political power in question.²⁷

Secondly, the right to vote for representatives to the legislature may secure our interest in *control* over factors that affect our lives, based on “our need for control over what happens to us, as part of our general interest in controlling the course of our lives”.²⁸

Thirdly, he argues for individuals’ right to exercise power over legislation on the basis that legislators are empowered to carry out individuals’ *duties* toward others:

“People owe each other certain fundamental duties of respect and mutual aid which are better fulfilled when orchestrated by some central agency like the state than when they are left to the whims of individuals. But since it is *my* duties (among others’) whose performance the state is orchestrating, I have a right to a say in the decision-mechanisms which control their orchestration.”²⁹

3.3 *Reasons for Majority Rule Among Legislators*

24 He mentions further reasons: “the rights to participate have several reasons: political animals, self-protection, quality of public deliberation..dignity,” (1993 36pp).

25 Waldron 2000, 234.

26 Ibid., 309.

27 Ibid., 234, fn 7.

28 Ibid., 1987, 139.

29 Ibid., 234.

Why is majority rule the default decision rule among legislators? Waldron does not simply hold that majority rule is obviously fair.³⁰ Instead, he suggests two reasons.

Majority rule best captures the commitment to equal respect for all citizens, since it expresses ideals of equal participation:

- so far as his participation is concerned - ...he and all others be treated as equals in matters affecting their interest, their rights, and their duties.³¹

Majority voting also avoids taking a stand on contested social goals, and instead allows all, as equal participants, to resolve such controversies without precluding later substantive arrangements.³²

3.4 *Reasons Against Constraints on the Domain of Legislation*

We can now return to interpret Waldron's normative qualms regarding human rights constraints or other substantive constraints on representatives' legislative authority.

On Waldron's view the normatively normal function of the legislature is to make, revise, reform and improve laws unrestrained.³³ This presumption is also evident in his mode of argument, which assumes that it is the constraints on legislatures that carry the burden of the arguments. He rejects many such arguments for constraints, including precommitment and procedural constraints that preclude certain outcomes.³⁴ He concludes that the legislature should not be constrained. Whence this view?

I submit that one possible defense of this claim – and his reliance on legislatures, consent and majority rule – is a particular version of a broadly Lockean social contract argument.³⁵ The legal powers of legislatures are justified on the basis of a hypothetical original consent. In this Original Situation future citizens enjoy full self-government unhampered by institutional restrictions - but subject to moral constraints in the form of fundamental duties of respect and mutual aid. The parties constitute the legislature as the site of self-government of the people once removed, i.e. by their accountable representatives. This contract would transfer the self-government of parties in this original situation whole cloth to the unconstrained domain of legislation by citizens' accountable representatives. This explains why Waldron regards constraints on the legislature as a constraint on the original liberty of subjects.

The three arguments for voting sketched above provide some further support for this view. Constraints on the agenda and options to be decided by voting are problematic because they reduce the normative relevance or weight of voting, be

30 Ibid., 115.

31 Ibid., 239.

32 Ibid., 243, cf 109; 277.

33 Waldron 1993, 27.

34 Waldron 2000, 266, 277.

35 He refers to Lockean political thought in Waldron 1987, Waldron 2000, 234; and of course in Waldron 2002.

it as an expression of consent to submit to the coercion of public power, as a mechanism to secure control, or to satisfy our fundamental duties of mutual aid and respect. A fourth argument could be that any constraints are likely to favor some outcomes over others, and hence some citizens' views over others, on issues likely to be contested. To specify contested goals fairly may require an unrestricted domain.

Judicial review of human rights violates several of the premises of this social contract argument, since this practice challenges the supremacy of legislatures. Judicial review seems to fail to respond respectfully to citizens who have substantive disagreements. And judicial review grants special privilege to the judgments of judges, rather than respecting the majority of elected representatives: "they do not allow a voice to every citizen of the society; instead, they proceed to make final decisions about the rights of millions on the basis of the voices of the few" (299). And surely, judicial review amounts to substantive constraints on parliament.

3.5 *Judicial Review Assumes Problematic Conception of Human Nature*

Waldron also presents another argument that merits further scrutiny. He holds that the practice of judicial review assumes a highly problematic conception of human nature. The risks minorities face arise because legislators are perceived as predatory.

This is at odds with the fundamental premises of democratic rule. The moral justification of democratically elected parliaments is that people are essentially bearers of rights with a sense of justice and commitment to the common good.³⁶ The risk of majority tyranny is limited, since the majority may well adjust their judgment by sense of justice. But the case for judicial review assumes a contrary motivation among the citizenry or their representatives, as unable or unwilling to heed this sense of justice. A defense of constraints on legislatures must also respond to this criticism.

4 Waldron's Arguments Considered

The liberal contractualist account, while close to Waldron's own liberal framework, and within the social contract tradition of political philosophy in the broad sense, does not support these philosophical objections to human rights constraints on majority rule. I consider several of his arguments: based on political obligation as 'Battle of the Spouses', based on the authority of legislatures and majority rule, against constraints on legislation, and his worries about the conception of citizens' motives. Some of these arguments are incompatible with the Lockean grounds Waldron draws on. And these objections do not hold against the theory of Liberal Contractualism that allows human rights constraints - or so I shall argue.

³⁶ Waldron 1999, 222.

4.1 *The Need to Resolve Deep Conflicts*

Waldron holds that citizens locked in a game of ‘Battle of the Sexes’ and who disagree on substantive outcomes, have reason to agree on one particular procedure that selects among the acceptable options, namely majority rule over an unconstrained set of options. This account leaves several issues that merit response.³⁷

Firstly, the game of Battle of the Sexes does seem to capture citizens’ commitment to abide by common decisions even when they believe that other alternatives would be better – be it more to their own advantage, or more fair overall, given their sense of justice and solidarity. However, the Battle of the Sexes model only holds for certain societal conflicts, namely those whose outcomes are to every citizens’ advantage in this broad sense – as compared to no agreement. Clearly, several forms of conflict fall beyond this range. For instance, consider issues or patterns of decisions that violate Waldron’s liberal principle that “the social order must be one that can be justified to the people who have to live under it.” Consider political decisions that establish oppressive patterns which cannot be defended “at the tribunal of each person’s understanding”.³⁸ I submit that a suitably specified set of legal human rights may be understood to specify the range within which the game of Battle of the Sexes applies. In particular, human rights constraints on legislatures help ensure that social orders do not systematically violate some vital interests of individuals. They thus help patrol the limits to political obligation, - indeed, close to Locke’s understanding of limits on legitimate rule.

Secondly, it is unclear whether agreement on unconstrained procedures is easier than agreement on substantive outcomes, or agreement on procedures with substantive constraints. Waldron holds that citizens who agree on their need to agree, yet who disagree on many substantive issues, will find it easiest to reach agreement on procedures that are unconstrained as to their outcome. Yet the avowedly liberal principle of justifiability to all would suggest otherwise. There are at least two reasons for this. A) It is unclear that citizens who disagree on substantive values or outcomes are any more likely to agree on a procedure, especially if they can assess the likelihood of various outcomes – some of which they will believe mistaken. We should certainly expect such consensus to evaporate if the procedure can be expected to regularly leave some parties’ vital needs unattended.³⁹

B) Decisions that seek to respect and promote the vital interests of all, for instance because they respect some human rights, could presumably more easily find general agreement than unbridled majority rule without human rights constraints – even if there is disagreement about exactly how to draw the borders of these constraints. The latter places individuals at avoidable risks, arguably without imposing equally urgent burdens on others.

37 I leave aside here important issues about the disagreements actually addressed by the ECtHR.

38 Waldron 1987, 149.

39 For concerns about similar views held by Baier 1989 and Habermas [1993] 1998, cf. Follesdal 2001.

4.2 *Why Universal Voting Rights to Legislatures with Unrestricted Domain?*

Waldron offers many plausible reasons why all citizens should enjoy equal political power to elect the legislature. But these reasons do not support an unconstrained domain of legislation. Recall that Liberal Contractualism differs from the Lockean social contract that may best support the privileged place Waldron gives legislatures.

The Lockean argument explicates normative legitimacy as a hypothetical transfer of individuals' legislative authority in the state of nature to one specific social institution namely the legislature. Institutional constraints on such common authority are thus suspect. Liberal Contractualism may also appeal to hypothetical consent, but compares alternative packages of decision-making institutions of a society, possibly including international bodies. Liberal Contractualism does not make use of a transfer, hypothetical or historical, of unconstrained legislative authority, and makes no assumption that one institution in isolation is likely to reliably be responsive to the best interests of all affected citizens. Locke's social contract theory fails to explain why individuals would find it rational to alienate all their powers to the society, rather than make a contingent transfer conditional on whether the government secures their preservation and well-being – for instance as expressed by human rights.⁴⁰

Consider the argument from consent. Waldron holds that individuals' claims about coercive political power may be respected either by limits on the exercise of political power or by 'something like consent', the latter somehow secured by the right to vote for legislators. Yet it seems a open question whether our interest in avoiding coercion except by consent is only, and best, secured by voting for a legislature with unrestricted domain. To the contrary, this interest might better be served by constraints on the authority of an elected legislature.

Similarly, our interest in control over those social factors that control the course of our lives is not obviously best secured by leaving a legislature with unrestricted domain. To the contrary, constraints that grant individuals some immunities may provide them with better and more trustworthy control and non-domination.

Finally, the argument from fulfillment of duties supports citizens' claim to participate in the mechanisms that control state power which in turn can satisfy these duties. But it would seem that these duties of respect and mutual aid may be equally or even better secured by human rights constraints on public power, than by an unrestricted domain of legislation which leaves more discretion to the legislators.

The upshot is that the claim to equal control over legislation may be sound, yet this would not be reason to rule out human rights constraints on legislators in principle – indeed, to the contrary.

I submit that substantive constraints on legislatures are also required for Lockean reasons. Consider that he rejects the legitimacy of unlimited transfer of legislative authority:

40 For substantiated criticisms of this sort, cf. Hampton 1997.

no man can, by agreement, pass over to another that which he hath not in himself, a power over his own life. (Ch 4, section 24)

Note that these arguments may challenge the authority of judges to enforce such constraints. I leave that discussion – about the appropriateness of judicial review mechanism - for another occasion. The point here is to consider arguments to the effect that any substantive constraints on legislatures are illegitimate.

4.3 On Majority Rule

Waldron is in favor of majority rule because such arrangements best express the ideal of equality of participation in matters affecting people's interests, rights and duties in the face of profound disagreement about social goods. There are several reasons to be wary of this presumption, as indicated above:⁴¹ Equal participation may be of little value for permanent minorities, who may have good reason to prefer human rights constraints on majorities. Constraints on majority rule may actually seem consistent with Waldron's basic premises, and certainly with Locke's premises – the need to secure control. Some human rights constraints may be justified and publicly defended as necessary so as to secure both something like the 'intrinsic' 'fair value' of political rights⁴² and their Lockean, 'instrumental' value in securing each citizen's interests sufficiently in the long run.⁴³

In response, Waldron might object that majority rule is still the only procedure that remains neutral among the contested policy outcomes. However, this claim is flawed, for two reasons. Firstly, the *added* risks that minorities bear of never winning over a majority show that majority rule – however specified – does not provide a recognizably 'neutral' procedure. Instead, majority rule, as any other procedure, is likely to favor some outcomes rather than others. Secondly, Waldron's own defense of majority rule acknowledges the legitimacy of some substantive constraints, namely those that ensure that the legislature is appropriately modeled as a 'Battle of the Sexes'.

The upshot is that neither instrumental nor intrinsic arguments for majority rule should lead us to reject human rights constraints on the domain of legislation. Such constraints may instead further secure equal protection and furtherance of individuals' interests, and may *express* rather than question the equal respect accorded all citizens.

4.4 On Conception of the Person

Do constraints on what legislatures may decide challenge the normatively preferred conception of the person? In particular, do constitutional rights express a problematic attitude of fundamental mistrust toward fellow citizens?⁴⁴ Liberal Contractualism begs to disagree. It agrees with Waldron's assumption that a credible and defensible conception of the person must expect most of us to have a sense of justice. It shares Waldron's view that the ordinary person's moral

41 Cf. Barry 1991, Beitz 1989 for further arguments.

42 Rawls 1971.

43 Beitz 1989, 89.

44 Waldron 1999, 221, 252, 304.

capacities - sense of justice – is part of the reason why ordinary people can participate responsibly in government. This conviction is also part of the bases for rights:

The identification of someone as a bearer of rights expresses a measure of confidence in that person's moral capacities - in particular his capacity to think responsibly about the relation between his interests and the interests of others. The possession of this capacity - a sense of justice, if you like [with a reference to Rawls' *Political Liberalism* p. 19] - is the primary basis of our conviction that ordinary men and women have what it takes to participate responsibly in the government of their society. And it is the same conviction as that on which the attribution of rights is based.⁴⁵

But this conviction is compatible with the need for institutions with trust-building measures. In particular, it is compatible with rights, and possibly with judicial review and international judicial review in particular. Consider several issues.

Firstly, respect for the citizens and representatives, and a belief they have a usually operative sense of justice, is compatible with a recognition that individuals will not always act according to what justice requires – especially when they act within institutional settings where other pressures are strong, such as within parliamentary competitive politics.⁴⁶

Furthermore, such safeguards help alleviate several assurance problems among citizens and representatives. Bodies that monitor and adjudicate the executive and legislative branches, at arm's length from the national power holders, make for more trustworthy authorities - even in the absence of any sanctioning power. Such credible monitoring helps ensure citizens that the domestic authorities comply with certain human rights constraints– and thus that citizens' duty of justice requires them in turn to comply and do their share.

Sanctions may bolster the trustworthiness even more, insofar as such safeguards prevent human rights violations, and reduce the costs of misplaced trust even more. They thereby remove some reasons citizens might otherwise have to suspect that those in power ignore their sense of justice.

Note that these concerns about trustworthiness do not deny that individuals have a sense of justice which requires them to comply with just arrangements generally complied with. To the contrary, human rights constraints serve to ensure that individuals with such a sense of justice have reason to comply. Human rights constraints help reduce or remove citizens' reasonable doubt that the institutions are unjust, or that others fail to do their share.

5 Conclusion

45 Waldron 1998, 341.

46 *Cf.* Fabre 2000, 91.

These reflections have taken one step in defense of international judicial human rights review. The effort is partial and negative: the upshot is that several of the philosophical objections to constraints on democratically elected legislators do not seem to withstand scrutiny against a liberal contractualist account.

In closing, recall what this presentation has not provided. I have not defended international courts against important forms of criticism, for instance that they are insufficiently accountable, and engage in judicial activism beyond what is defensible; or that the treaties they adjudicate are flawed as a matter of *de lege ferenda*. Among the important remaining research topics are partly the philosophical – whether such independent bodies can be defended in principle – and legal – what sort of role the ECtHR plays, and is likely to play, given the treaties and existing constitutional culture.

I have argued that human rights constraints seem *compatible* with the best reasons we can offer for democratic rule – which on this view should occur within a restricted scope. Indeed, human rights constraints would even seem to be democratic, in that such constraints seem required by the best reasons we can offer for democratic, majority rule among equals.

References

- Anderson, Kenneth. 2005. *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks - Review of Slaughter 2004*. Harvard Law Review: 1255-312.
- Baier, Kurt. 1989. *Justice and the Aims of Political Philosophy*. Ethics 99: 771-90.
- Barry, Brian. 1989. *Theories of Justice*. A Treatise on Social Justice, 1. Berkeley: University of California Press.
- 1991. *Is Democracy Special? Democracy and Power*, 24-60. Oxford: Oxford University Press.
- Beatty, David M. 1994. *The Last Generation: When Rights Lose Their Meaning*. Human Rights and Judicial Review: A Comparative Perspective. David M. Beatty, editor, 321-61. Dordrecht: Martinus Nijhoff.
- Beitz, Charles R. 1989. *Political Equality*. Princeton, N.J.: Princeton University Press.
- Bickel, Alexander. 1962. *The Least Dangerous Branch*. New Haven.
- Cohen, Joshua. 1997. *Deliberation and Democratic Legitimacy*. Deliberative Democracy: Essays on Reason and Politics. James Bohman and William Rehg, editors, 67-91. Cambridge, Mass.: MIT Press.
- Dahl, Robert A. 1998. *On Democracy*. New Haven: Yale University Press.
- De Marneffe, Peter. 2004. *Popular Sovereignty, Original Meaning, and Common Law Constitutionalism*. Law and Philosophy 23, 3 : 223-60.
- Dworkin, Ronald. 1996. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge: Harvard University Press.
- Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Mass.: Harvard University Press.

- Fabre, Cécile. 2000. *A Philosophical Argument for a Bill of Rights*. *British Journal of Political Science* 30: 77-98.
- Follesdal, Andreas. 2001. *Union Citizenship: Unpacking the Beast of Burden*. *Law and Philosophy* 20, 3: 313-43.
- Follesdal, Andreas, and Simon Hix. 2006. *Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*. *Journal of Common Market Studies*. 2006; 44 (3): 533-62. "www.blackwell-synergy.com/doi/pdf/10.1111/j.1468-5965.2006.00650.x"
- Freeman, Samuel. 1990. *Constitutional Democracy and the Legitimacy of Judicial Review*. *Law and Philosophy* 9.
- Habermas, Jürgen. 1998 [1993]. *Struggles for Recognition in the Democratic Constitutional State. The Inclusion of the Other: Studies in Political Theory*. First in *European Journal of Philosophy* 1 (2): 128-155, also in Amy Gutman, ed. *Multiculturalism*, Princeton University Press 1994, 107-148. 203-36. Cambridge, Mass.: MIT Press.
- Hampton, Jean. 1997 *Political Philosophy* Westview Press.
- Key Jr., Valdimer Orlando. 1961. *Public Opinion and American Democracy*. New York: Knopf.
- Levi, Margaret. 1998. *Consent, Dissent and Patriotism*. New York: Cambridge University Press.
- Lijphart, Arend. 1999. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. Buy. New Haven: Yale University Press.
- MacCormick, Neil. 1999. *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*. Oxford: Oxford University Press.
- Majone, Giandomenico. 1996. *A European Regulatory State? European Union: Power and Policy-Making*. Jeremy J. Richardson, editor. London: Routledge.
- Rawls, John. 1971. *A Theory of Justice*. Cambridge, Mass.: Harvard University Press.
- Scanlon, Thomas M. 1975. *Preference and Urgency*. *Journal of Philosophy* 72, 19: 655-69.
- 1998. *What We Owe to Each Other*. Cambridge, Mass.: Harvard University Press.
- Schumpeter, Joseph A. 1976 [1943]. *Capitalism, Socialism and Democracy*. London: Allen and Unwin.
- Shapiro, Ian. 1996. *Democracy's Place*. Ithaca : Cornell University Press.
- 2001. *The State of Democratic Theory*. *Political Science: The State of the Discipline*. Ira Katznelson and Helen Milner, editors APSA.
- Slaughter, Anne Marie. 2004. *A New World Order*. Princeton: Princeton University Press.
- Sunstein, Cass R. 1996. *Legal Reasoning and Political Conflict*. Oxford: Oxford University Press.
- 1997. *The Legitimacy of Constitutional Courts: Notes on Theory and Practice*. *East European Constitutional Review* 6, 1: 61-63.
- Waldron, Jeremy. 1987. *Theoretical Foundations of Liberalism*. *Philosophical Quarterly*

37: 127-50.

- 1993. *A Right-Based Critique of Constitutional Rights*. Oxford Journal of Legal Studies 13: 18-51.
- 1994. *Freeman's Defense of Judicial Review*. Law and Philosophy 13: 27-41.
- 1998a. *Judicial Review and the Conditions of Democracy*. Journal of Political Philosophy 6: 335-55.
- 2000. *Law and Disagreement*. Oxford: Oxford University Press.
- 2001. *Precommitment and Disagreement*. Constitutionalism: Philosophical Foundations. L Alexander, editor, 271-99. Cambridge: Cambridge University Press.
- 2002. *God, Locke and Equality: Christian Foundations in Locke's Political Thought*. Cambridge: Cambridge University Press.
- 2004. *Legislating With Integrity*. Fordham Law Review.
- 2005. *On Judicial Review*. Dissent.