

TRACKING JUSTICE DEMOCRATICALLY

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Abstract: Is international judicial human rights review anti-democratic and therefore illegitimate, and objectionably epistocratic to boot? Or is such review compatible with – and even a recommended component of – an epistemic account of democracy? This article defends the latter position, laying out the case for the legitimacy, possibly democratic legitimacy of such judicial review of democratically enacted legislation and policy making. Section 1 offers a brief conceptual sketch of the kind of epistemic democracy and the kind of international human rights courts of concern – in particular the European Court of Human Rights (ECtHR). Section 2 develops some of the relevant aspects of democratic theory: components of an epistemic justification for democratic majority rule, namely to determine whether proposed policy and legislation bundles are just, and providing assurance thereof. Several critical premises and scope conditions are noted in section 3. Section 4 considers the case(s) for international judicial review, arguing that such review helps secure those premises and scope conditions. The section goes on to consider the scope such review should have – and some objections to such an account.

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Is international judicial human rights review ('Review') anti-democratic and therefore illegitimate, and objectionably epistocratic to boot?*,¹ Or is such review compatible with – and even a valued component of – an epistemic account of democracy? This article defends the latter position, laying out the case for the democratic legitimacy of such Review of democratically enacted legislation and policy making (see also Santoro and Liveriero 2017 [this issue]). Of concern here are some of the principled arguments for and against Review, with a focus on a hard case: the European Court of Human Rights' (ECtHR) Review even of quite well functioning democratic

* Andreas Follesdal, Professor of Political Philosophy, Faculty of Law, University of Oslo. Principal Investigator, European Research Council Advanced Grant MultiRights 2011-16, on the Legitimacy of Multi-Level Human rights Judiciary; and Co-Director of PluriCourts, a Centre of Excellence for the Study of the Legitimate Roles of the Judiciary in the Global Order. Ph.D. 1991 in Philosophy, Harvard University. Follesdal publishes in the field of political philosophy, mainly on issues of international political theory, globalisation/Europeanisation, Human Rights, and Socially Responsible Investing.

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member states of the Council of Europe. To make this argument, we must consider in quite some detail the reasons we have for valuing democratic decision making, and under which conditions democracy promotes these values reliably. Section 1 therefore offers a brief sketch of epistemic democracy and one international human rights court - the European Court of Human Rights (ECtHR). Section 2 develops some of the relevant aspects of one particular theory of democracy. The argument requires that we consider in some depth both proceduralist and epistemic justification for democratic majority rule, namely to determine whether proposed policy and legislation bundles are just, and providing assurance thereof. Section 3 sums up several of the important premises and scope conditions. Section 4 argue the case for Review consistent with that account of democracy, and the scope that such review should have in light of the epistemic account of democracy laid out above. Judicial review can on the one hand help foster better epistemic majoritarian democratic decision making, and on the other hand identify and help to remedy errors or unjust outcomes of such democratic decisions. To further elaborate on the position, that section also considers some objections addressed to this sort of epistemic account of democracy drawing on the ECtHR's practice.

1 Background: democracy and the European Court of Human Rights

The account of epistemic democracy laid out here holds that majoritarian democratic decision procedures are necessary but not sufficient to identify legitimate outcomes. For our purposes here Cohen's canonical account of epistemic democracy should be elaborated to include several further features (Cohen 1986, 34, Follesdal and Hix 2006). 'Democracy' refers to

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

Some general features of this theory merit mention before Section 2 explains in some detail why we have reason to value such democratic decision-making. Firstly, note that the focus of assessment is institutional design, and this affects the relevance of particular policy outcomes. No institution is completely reliable in securing desired outcomes: its procedures must be designed to deal with standard cases and be less suited for extraordinary circumstances, and the procedures will not always be fully complied with out of accident, incompetence or ill will. Thus the outcomes of

institutions will sometimes miss such independent standard of correctness as may be (pace 'correctness theories of legitimacy' Estlund 2009). This is important for the argument: when we assess democratic institutions against alternatives by normative standards it is not enough to consider some particular present, actual policy outcomes. Instead we must compare the tendencies of alternative decision making arrangements, as regards how reliably sufficiently responsive they are over time.

Secondly, this approach shares Chamber's 'systems-approach' (Chambers 2017 [this issue]). The subject matter of normative assessment is the set of decision-making institutions as a whole, rather than e.g. an exclusive focus on electoral majoritarian aggregation as a decision procedure. This is important for discussions about the legitimacy of Review as part of democratic decision making: Such institutions may function in "non-democratic" ways yet be valuable components of a political and legal order which *as a whole* merits the label 'democratic.' So somewhat paradoxically, insofar as Review is justifiable, this function by an unaccountable judiciary is a valuable component of a legitimate and *democratic* system of decision making.

Thirdly, the present account maintains that the domain over outcomes which is appropriately decided by majority rule is limited in various ways. In particular, our concern is with constitutional democracies with human rights constraints. Majoritarian deliberation may help monitor such limits, but such monitoring cannot always be assured – opening up for one important contribution of Review.

The European Court of Human Rights (ECtHR) monitors the European Convention on Human Rights (ECHR), and is among the most powerful treaty based courts. It exercises what is sometimes referred to as 'weak' review. That is: the ECtHR can find a law or its application to be incompatible with the ECHR, but this does not directly affect the validity of that law in the domestic legal system. Nor does the ECtHR replace such laws with one of its own making, as would some forms of 'strong' judicial review. When the ECtHR finds that the state is in violation of its international human rights obligations it is for the domestic bodies to decide how to secure consistency with ECHR.

The major normative issue here is whether such international human rights review bodies are compatible with, and even to be recommended as supplements to - democratic decision making processes. Which benefits does Review provide, without imposing worse disadvantages or burdens on anybody – against a baseline of majoritarian democratic arrangements without such review?

2 Proceduralist, epistemic and other reasons for majoritarian democracy

To defend Review it is necessary to consider in some depth the justification for democratic majority rule. The main objective of this section is thus to lay out central features of an epistemic democratic theory (see also Ebeling 2017 [this issue], Landemore 2017 [this issue]). It values democratic decision making both for epistemic and procedural reasons, and has both deliberative and aggregative aspects.

Proceduralist values

We may accord *intrinsic* value to democratic majoritarian rule after deliberation because such procedures express various aspects of fair distribution of influence or power. These aspects include

- the *expression of equal respect* and “a measure of confidence in that person's moral capacities” (Waldron 1998, 341)
- giving each an equal chance to contribute their view (Waldron, *ibid*), and/or
- that majority rule treats all persons' preferences equally (Ackerman 1980, 277-85)

Note that some such arguments for formally equal votes among persons may apply even if there is a large divergence between such equal voting 'weight' and the resultant influence over selection of the outcome (Beitz 1989, Shapiro 2003).

Consequentialist reasons

The present account holds that democracy has both intrinsic and instrumental value. Thus democratic decision making is not the sole good: there are also *outcome* oriented reasons to value majority rule. One reason to value democracy is its instrumental role in preserving certain human rights and other important human interests (Christiano 2011, 175). The current account thus holds that under certain conditions democratic procedures are better than the alternatives at identifying such somewhat procedure independent correct decisions (cf. Landemore 2017 [this issue]; Estlund 2009, 98; Christiano 2011; Anderson 2006; Coleman and Ferejohn 1986).²

Consider also some of consequentialist reasons that are not specifically epistemic, but are rather due to the aggregative role of majoritarian voting. Brian Barry and others argued that majority rule is a fair mode of conflict resolution for the distribution of benefits and burdens of common decisions *within certain constraints* (Barry 1991). There are at least two constraints of relevance here. The gains and losses must be roughly equally valuable: The 'stakes' for each individual must be of 'medium' importance (Shapiro 2003). Secondly, the chances for each person being in the majority are equal. Thus there must be no permanent minorities, - if necessary by adjusting the voting weights. Note that this condition needs not be satisfied for all proceduralist arguments canvassed above.

Both the proceduralist and consequentialist reasons to value majority rule accept voting as legitimately expressing self-oriented preferences. Indeed, on many occasions voting according to one's own interest may be unproblematic (Barry, 1991; Habermas 1993, 63). Yet the voters' preferences should at least sometimes be constrained by or otherwise be guided by a concern for the common good, in

² The present account thus holds an intermediary position between "pure procedural" theories and "pure epistemic" theories. The former may deny that democratic procedures seek to track any "independent truth of the matter" but where the goodness or rightness of an outcome is wholly constituted by the fact of its having emerged in some procedurally correct manner. (List and Goodin 2001, cf. Coleman and Ferejohn 1986, 7). The latter may hold that there is always some fact of the matter, completely independent of the outcome of the actual decision procedure followed, as to what the best or right outcome is.

particular concerns for basic justice and respect for the vital interests of others. Individuals and political parties should constrain their promotion of own interests out of a sense of justice. A challenge arises under complex circumstances: it becomes important but often difficult to ascertain which outcomes - policies or pieces of legislation - are substantively just. Democratic procedures serve important epistemic roles in this regard. A second task is how to decide on which of these just outcomes individuals should accept as authoritative. We turn to these two tasks now.

Epistemic arguments for democratic decision making procedures

I venture that mechanisms of democratic politics can serve at least four valuable epistemic roles in discovering the correct outcomes and in assessing the effectiveness, feasibility and justice of various policies.

A) Creative and critical policy creation. A wide range of friends of deliberation agree that one of the major contributions of deliberation is to help discover and specify policies and pieces of legislation, and to assess their feasibility and expected effects (Przeworski 1998, Elster 1998b, 7). This argument from creative policy creation holds better when the democratic deliberation has indeed fostered such a range of alternatives and prompted public scrutiny of their expected effects on affected parties. If these processes have been stifled the resulting vote is less likely to express citizens' self interest and sense of justice to the greatest extent, and the value of the process suffers as a result.

B) Change ultimate values or interests. Many theorists will hold that democratic deliberation not only help individuals select the most rational means to their given ends, but that discussions also help us discover and even modify our ultimate values. Importantly, through the exchange of opinions and arguments the parties may come to not only understand but also seek to prevent negative impacts of decisions on others. Inclusive deliberation may allow many affected parties to voice their concerns about alternative policies, and this may trigger and enhance other citizens' sense of justice or fairness. This category includes John Stuart Mill's argument about the educative value of democratic mechanisms that train participants toward democratic dispositions and behaviours (Mill 1861 [1972], 325. Goodin 2004).³ There is no claim that these deliberative processes of discovery and change will always lead voters to modify their preferences in a more just or fair direction, rather than foster unfortunate group think, xenophobia and the like. Nor is there an assumption of reaching a consensus if this process only carries on long enough (Przeworski 1998). The deliberative process may well leave the majority insufficiently respectful or aware of the interests of groups who find themselves in the minority.

C) Normative assessment of policies. Discussions may help individuals discover

³ I am grateful to an anonymous reviewer for this reminder.

whether various policies or pieces of legislation – or packages thereof – are sufficiently just. Sometimes such discoveries may lead individuals to modify or prune their self-interested plans, out of consideration for the interests of others.

Note that democratic deliberation does not guarantee such outcomes. To the contrary, insofar as the processes hinder some groups from getting attention to their plight, other citizens may easily overlook the impact of decisions on those groups.

D) To make such findings public knowledge. Publicity about the occurrence of such deliberations as mentioned above and their results has a further value. Such public knowledge helps establish and sustain citizens' sense of a political obligation to comply with legislation and policies. Not only must justice be done, but the institutions as a whole must also give assurance to citizens that there is general belief that this is indeed the case. Democratic procedures can give evidence of such facts. This is especially important among actors who are 'contingent compliers' in the sense familiar from game theoretical discussions of Assurance Games (Taylor 1987, Levi 1998, Kydd 2005). Contingent compliers are prepared to, and prefer to, comply with common, fair rules *as long as they believe that the rules are fair*, - i. a. that C above is satisfied - *and that most others, including the authorities, comply as well*. Acting from such a sense of justice does not entail that individuals are not also motivated by self-oriented interests, but that these self-oriented interests are constrained. One way this constraint is expressed is when a losing minority acquiesces in a majority decision.

Note that these epistemic benefits of democratic rule are not due to the institutions' ability to "mirror" (Cohen 1997, 79) or be otherwise similar to the 'ideal deliberative procedure' eg an "ideal speech situation" of outstanding philosophy seminars. The epistemic benefits are instead largely due to the contestation among parties and the role of the opposition to government. The central challenge is thus not to reduce competition and 'politicking' in favour of consensus, but rather to foster better, genuine competition (Shapiro 2003, 7).

Quasi-pure procedural justice

A further important role of majoritarian democratic rule stems from the fact that standards of justice *underdetermine* policies. Consider cases of 'ideal theory', where *ex hypothesi* the set of background social institutions such as the constitution and other 'rules of the game' are just. In such circumstances the legislature and the executive are often faced with a range of possible, substantively just policies and legislative outcomes to choose among. The domain of such just alternatives is limited by various normative standards: human rights constraints, concerns to avoid domination, and other requirements of distributive justice. So even under such fortuitous conditions, principles of justice as brought to bear by citizens with a well developed sense of justice *underdetermine* many aspects of the political and legal order. That is: several alternative laws, policies or institutions may be in rough accordance with justice.

Such underdetermination occurs for at least two reasons: a) Few if any normative principles of justice are fine grained enough, and our information about the impact of alternatives too limited, to allow individuals to establish a strict ordering of all alternatives according to their effects on the distribution of benefits and burdens. Considerations of justice can at most yield a partial ordering that is often indifferent among several alternative distributions (cf Sen 1982). That is: several different distributions of goods or states may be equally just, and even completely just.

b) Many different institutions or policies may be compatible with the correct normative distributive standards. For instance, even strongly egalitarian principles of distributive justice may not differentiate amongst several forms of public safety nets and constraints on income differentials. Similarly, freedom of religion and commitments to pluralism may allow both a sharp distinction between church and state, and various forms of weak established churches as found in various European states.

I submit that these sources of underdetermination will occur even under ideal deliberative conditions - such that would foster Habermas' ideal speech situation. Thus rationality constraints underdetermine many decisions about the common good. One important role for democratic decision making is to pick out one among such arrangements - which cannot be ranked as more or less just. By selecting one of these, the democratic decision thereby authoritatively makes this option the morally binding one. A game theoretical account may model this function of democratic rule as a mechanism to fairly resolve a Battle of the Sexes situation among substantively just outcomes (Luce and Raiffa 1957, ch 5). This role is elaborated by inter alia Jeremy Waldron (Waldron 1999, 104); and Philip Pettit (Pettit 2000, 199). This is an instance of what Rawls labelled a quasi-pure procedure: If laws and policies are authorized appropriately, *and* lie within the permitted range, they are just and command obedience (Rawls 1971, 210, cf. Beitz 1989, 47). It is only when the democratic procedure yields outcomes *within the domain of substantively just* policy or legislation packages, that the actual performance of the democratic procedure grants legitimacy to the result. The present account thus does not hold that the identification of binding institutions is completely independent of procedures, nor of the substantive outcome.

Both Deliberative and Aggregative

The outline above should make clear that the present democratic theory values both deliberative and 'post-deliberative' aggregative elements. There is no reason to insist that one excludes the other: Deliberation is not an alternative to voting, nor is voting merely a second best response to time constraints. To the contrary, deliberation and voting are two important components of legitimate democratic rule (Bohman 1998; pace Eriksen 2000, 49).

Note also that this insistence on the value of preference formation within deliberative democratic processes does not stem from a highly contested philosophically esoteric version of deliberative democracy (cf Goodin 2004). Rather,

political competition is also an essential vehicle for opinion formation. Competition fosters political debate, which in turn promotes the formation of public opinion on different policy options. Policy debates among political parties, including deliberation about the best means and objectives of policies, are a cherished part of electoral competition. Review may serve important functions in securing such competition.

Competitive elections are crucial to make policies and elected officials responsive to the preferences of citizens (cf. Powell 2000). When well framed, electoral contests provide incentives for elites to develop rival policy ideas and propose rival candidates for political office. This identification of new alternatives is crucial: 'the definition of the alternatives is the supreme instrument of power' (Schattschneider 1960: 68). Competition among parties with different platform that express alternative, somewhat consistent, conceptions of what is in the public interest, and which public policies best achieve those objectives helps voters realize which choices may be made and give them some alternatives (Manin 1987: 338-68).

An essential feature of the practice of democracy is an institutional design that allows for an opposition to the current leadership elites and policy status quo (e.g. Dahl 1971). Institutions must thus provide incentives and arenas for oppositions to organize and articulate their positions. This is important not least for citizens – and politicians – to understand the difference between the present government and the (democratic) political order (Shapiro 1996, Shapiro 2003). This in turn is central to determine and partially order feasible institutional alternatives according to normative principles. And if citizens cannot identify alternative leaders or policy agendas it is difficult for them to determine whether leaders could have done better or to identify who is responsible for policies.

The competition among political parties, further scrutinized by media, encourages them to develop more or less coherent and consistent bundles of policies which voters can in turn distinguish. Without such debates, voters would not be able to form their preferences on complex policy issues. Electoral contestation thus has a powerful formative effect, promoting a gradual evolution of political identities.

These effects of political discourse for 'identity formation' are widely acknowledged, not only among 'communicatively' oriented deliberative democrats – though some of them ignore that much of this is a shared democratic heritage (Weale 1999: 37). Where different theorists disagree is instead in their assessment of the risks, possibilities and best institutions for regulating such preference formation and modification in a normatively preferred direction (cf. Schumpeter 1976; Riker 1982; Follesdal 2000; Shapiro 2003).

With many other scholars, I deny that all such formation and modification is reliably for the better (e.g. Przeworski 1998: 140-60; Elster 1998a: 1-18; cf. Follesdal 2000; Elster 2003: 138-58) – not least due to concerns about power and conflict dimensions (Shapiro 2003). There is no reason to believe that more, and less constrained, deliberation always makes for better democracy. Moreover, there may be good reasons for constitutional constraints on democratic decisions (Dryzek 1990).

We should thus consider checks and balances, drawing on the U.S. federalist tradition or the European consensus-democracy tradition (e.g. Lijphart 1999). In particular, I shall argue that we have good reason to welcome international human rights judicial review over state decisions in order to protect individuals and minorities, rather than exposing them to avoidable risks of unfortunate deliberations and resultant policy mistakes.

Criticism considered

In closing this brief sketch of an epistemic theory of democracy, note some criticisms and responses of particular relevance to our concern about international human rights review.

One challenge to this and other epistemic accounts is that there *is* no procedure-independent standard of truth or correctness (Shapiro 2003, 65-66).⁴ In response, I maintain that there are *some* substantive components of normative standards that may be defensible candidates. They include a range of international human rights that warrant certain international expressions of concern, to protect individuals' vital interests against standard threats within complex, somewhat sovereign states. To be sure, some arguments for such human rights are highly controversial – e.g. based on esoteric religious views, or as 'transcendental' necessary preconditions for speech. But there are other arguments which may be endorsed from broader premises – e.g. based on some conception of vital interests and standard threats (Cohen 2004; Beitz 2009), and the benefits of democratic institutions (Christiano 2011). Secondly, note that the under-determination of policies accept that there are many important issues to which there is no unique correct policy or legislation, e.g. as regard property rights or democratic procedures. Such identification is at most a matter of quasi-pure procedural justice. It then becomes important to ensure that the procedures are fair, and that they pick out policies within the permitted range. I shall suggest that Review helps ensure this.

A second set of objections concern the risk of epistocracy (see also Holst and Molander 2017 [this issue]). Does the democratic theory sketched above support claims that certain experts should dominate the decision-making process? Several epistocratic mechanisms might be feared, ranging from John Stuart Mill's suggestion of "assigning plurality of votes to authenticated superiority of education" (Mill 1861, Mill 1859), to extensive de facto delegation of legislation to expert committees as practiced in the EU (Follesdal 2011). In response, several have raised decisive objections to several of these proposals – including Mill, who observed an important caveat to the suggestion of plurality of votes to the well educated (Mill 1873 (1969), 153). In response, note that the arguments canvassed above do not support such proposals. There are proceduralist reasons for close to universal voting rights, and several of the consequentialist arguments also counsel against epistocracy. A crucial issue concerns how to identify those who are most likely to track correct outcomes,

⁴ For further objections and responses, cf. Landemore 2017

by defensible procedures. There is reasonable disagreement about who is such an expert (Estlund 2009, 36). The argument from creative and critical policy creation is similarly hampered. In particular, there are two weaknesses with such arguments. It seems implausible that a segment of the population will be able to undertake a correct and *full* normative assessment of policies – including their impact on individuals' interests – without ensuring voice to those affected (Mill 1861 [1972]; Young 1997). Secondly, the epistocrats not only need to do this, but the population needs assurance that the epistocracy has indeed made such an assessment in good faith. The risk of suspicion of incompetence and or abuse is high. I thus submit that the present democratic theory is not particularly susceptible to supporting an epistocracy.

In the following section we explore how the current account of democracy and why and when we should value it is compatible with international human rights judicial review by judges. Such Review may contribute to strengthen and correct democratic procedures. A first step is to consider when such democratic procedures may fail, and how Review may prevent or reduce the risk of such failures.

3. Vulnerabilities and scope conditions of proceduralist epistemic democracy

The review above points to several conditions that must be secured to some extent, for democratic decisions to be legitimate. The following summary recalls several of these, before the next section argues that international judicial review can serve both to monitor and promote these processes and conditions, and thus enhance the value of democratic decision making.

As regards the value of deliberation for *creative and critical policy creation*, the processes of discovery and specification of policies and pieces of legislation are crucial. If these processes have been stifled the resulting vote is less likely to reflect citizens' self interest and sense of justice, and the value of the democratic process suffers as a result. Freedom of expression seems crucial to enable such policy creation. Structured analysis of the impact of alternatives is also conducive to this role.

The deliberative process may *change citizens' ultimate values or interests*. To prompt changes toward more other-regarding values, the deliberations should consider the impact on more of the affected individuals of alternative policies, to hopefully trigger and enhance other citizens' sense of justice or fairness. Insofar as this does not occur, there is a risk that the majority decisions fail to heed the important concerns of those in the minority, reducing the value of the democratic process. Indeed, decisions may sometimes be beyond the acceptable domain of just outcomes. Genuine freedom of organization, free media and freedom of expression and opportunities for political opposition parties to voice their views may enable more inclusive deliberation.

Deliberative democratic processes can also help *foster citizens' normative assessment of policies*. A crucial condition is that individuals likely to suffer from some alternatives must be heard. Important enabling conditions for this value of democratic deliberation thus seem to include freedom of association and expression, and political participation for all individuals likely to be affected by policies.

The final epistemic value of deliberative democracy mentioned above is that it provides *publicity about whether policies are normative justifiable*, and to assure citizens that the majority has voted for outcomes that lie within the domain of the substantively just. Recall that it is only then that the majority decision grants legitimacy to the result. Such publicity is necessary to sustain citizens' political obligation. This value only arises when there is credible publicity about these claims, which in turns appear to require freedom of expression and scrutiny of policies, by media, opposition parties and by civil society.

The upshot of this review of the values of deliberative democracy is that several rights and scope conditions must be secured for majoritarian, deliberative democratic decision making to be legitimate in the sense of creating political obligations among citizens. We now turn to consider how international human rights judicial review may foster such rights and scope conditions, necessary for the value of the democratic institutions themselves (Ely 1980).

4 The possible legitimate roles of international human rights review

This section considers how the democratic theory laid out above is compatible with international judicial review of human rights ('Review'), and indeed how such Review may facilitate the conditions which make majoritarian decisions legitimate. The upshot is that we have good reasons to welcome Review: Review supports and reinforces several of the features of epistemic majoritarian democracy which give us reason to value such decision making. And Review arguably helps prevent, identify and alleviate several shortcomings of epistemic majoritarian democracy. Review both foster better epistemic majoritarian democratic decision making, and helps remedy those errors or unjust outcomes which nonetheless occur. Review can thus help protect individuals and minorities against avoidable risks of unfortunate deliberations and resultant policy mistakes. Such risks are especially high if freedom of association and expression is curtailed, or if some groups are denied political participation. To defend and clarify this position, the section concludes by addressing several objections.

Democracy has a long and uneasy relationship with domestic judicial review (Waldron 1998; Bellamy 2007). Such concerns notwithstanding, international review may bolster the legitimacy of domestic majoritarian decision making. Consider first the arguments in favour of this claim before turning to some of the most salient criticisms. For illustration and to fix ideas I refer where relevant to the European

Court of Human Rights (ECtHR) established by the European Convention on Human Rights ('ECHR', Council of Europe 1950).

Review to reduce the risk of failure of democratic procedures. Epistemic benefits of democratic rule discussed above include to foster policy creation, provide information about the impact of alternative policies on various segments of the population, and to socialize citizens toward consideration of each other. Such benefits require that the democratic procedures work well, in particular that they allow freedom of expression and association, broad political participation and so forth. A central value of Review is as an added corrective device to supplement domestic political and judicial safeguards that help maintain these rights necessary for democratic procedures to work in valuable ways. Review may ensure good deliberative procedures so as to include the perspectives of more individuals by ensuring freedom of assembly, of the press etc. (ECHR Art 10, 11). Several defenders of judicial review in general may agree to such rights required for epistemic democratic processes of the kind worth valuing (Ely 1980). Review may thus promote epistemically better democratic deliberation. An international court can foster more thorough, impartial and reliable information gathering by the domestic bodies, due to the reporting and fact finding requirements of signatory states including the contributions of somewhat politically independent domestic courts. This information can feed into domestic democratic processes and enhance the epistemic quality of deliberation.

Review may serve as an independent umpire and safety valve when the democratic processes still fail. Review can monitor whether the majoritarian decisions fall within the domain of outcomes among which majority decision making is authoritative. When democratic deliberation works well, legislators monitor and respect those limits on their own. But there may be situations where the debates fail for a variety of reasons, and impose undue burdens on some individuals. Some such failures are stopped by Review, namely those which violate the parameters defined by international human rights norms such as in the ECHR. When a majority decides on policies which violate the ECHR, the ECtHR thus serves as a safety valve to give notice that these limits have been trespassed. Review may thus be legitimate not only to ensure well functioning democratic processes, but also to protect some further substantive rights. The most obvious candidates are rights against torture and slavery (ECHR Art 3, 4); and rights of minorities which are at risk if the majority does not respect their urgent interests – such as respect for privacy, freedom of religion and freedom of expression, and prohibition against various forms of discrimination (Art 8, 9, 10, 14). These requirements help ensure that the majoritarian decisions do not subject any citizens to domination, but instead trigger political obligations to comply with the decisions.

The margin of appreciation doctrine

One aspect of the ECtHR' practice of granting states a 'margin of appreciation' provides an illuminating illustration of how Review can foster valuable epistemic

democratic processes. The margin of appreciation doctrine is an invention by the ECtHR, whereby it sometimes defers to the state's own judiciary about whether the ECHR has been violated. In particular, the margin may be applied for rights which permit restrictions – typically as "necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals..." (ECHR Art 10.2).

This margin of appreciation practice is highly contested, due to vagueness and risks of inconsistencies (HRLJ 1998, Benvenisti 1999, Arai-Takahashi 2001). Such concerns notwithstanding, for our purposes an interesting feature is that as a condition for granting such a margin, the ECtHR often requires that the accused state has undertaken a 'proportionality test.' Domestic authorities must have checked whether the rights violation could have been avoided by other policies in pursuit of the same – legitimate - social objectives. Such a test includes consideration of alternative policies to ensure that state authorities have not overlooked less invasive mean, and consideration of the impact of these alternatives on the ECHR rights of individuals. Such deliberation about alternatives and their impact promotes several of the valuable epistemic contributions identified above. The proportionality test thus prompts the state authorities to be creative about its policy options, trace their likely impact on affected parties, and assess these according to the human rights standards of the ECHR.

Indeed, insofar as such proportionality testing has *not* occurred we may challenge whether there is much to value and respect about the "democratic" decision making in this particular case. The ECtHR has often made clear in its judgments that it will not grant a margin of appreciation unless there is evidence that the domestic authorities have undertaken such a proportionality test (Lindheim and Others v. Norway 2012 2012, 85). This practice by the Court may urge states into more careful proportionality testing. This is one way Review by the ECtHR in particular supports and strengthens the domestic epistemic democratic processes – including judicial review by an independent domestic judiciary.

A further contribution by Review, including this proportionality test, is to provide assurance to citizens that institutions and the authorities are sufficiently competent and trustworthy, and bolster citizens' confidence that the domestic epistemic democratic mechanisms are indeed fair and likely to track the truth in particular case. Insofar as Review is carried out by independent and competent courts or tribunals, the review mechanism provides assurance to citizens that the democratic procedures create political obligations to comply. This is especially valuable insofar as citizens are 'contingent compliers' in Assurance Games, who comply but only when they have reason to believe that the practices are fair and that others do their part also (Levi 1998). Such Review also allows governments in unstable democracies to 'lock in' democratic rule and deter a non-democratic opposition from seeking power (Moravcsik 2000). These 'costly signal' by governments may also be important to establish and maintain the credibility of other states (Kydd 2005).

Limits to Review?

A final point merit elaboration: What are the substantive limits of Review? The account I have sketched allows Review as a safety valve and umpire to ensure 'procedural' aspects necessary for epistemic democratic procedures to remain 'truth tracking.' In addition, Review also checks several substantive aspects including whether the resulting policies or pieces of legislation comply with substantive human rights norms. This is a broader mandate than some other accounts of human rights. Several of these limit human rights to 'democracy promoting' review (Waldron 1998, 343), or 'speech-act immanent obligations' in some sense or other (Cf Baynes 2009 for review). To illustrate, the mandate is broader than Ian Shapiro's defense of judicial review. His is a self-described

middle-ground approach, in which courts or other second-guessing institutions should play a reactive, escape-valve, role in limiting the perverse consequences of democratic procedures when they produce results that foster domination. (Shapiro 2003, 7)

He furthermore claims that the legitimacy of courts "appropriately varies with the degree to which they act in *democracy-sustaining ways*" (Shapiro 2003, 7). I suggest that Review may also strike down human rights violations that have only a tenuous relationship to the maintenance of fair, truth tracking democratic procedures. Cases in point may include various protections of minorities, including constraints on discrimination, beyond what fair deliberative practices would seem to entail. Such a broader mandate for Review than to improve democratic procedures does not prevent it from being a *part of* democratic decision procedures: Review serves as an umpire to assure citizens that the majority decisions merit deference. Still, I submit that the broader range of rights protected by Review may be supported by theories concerned to prevent domination or other forms of injustice which regard democratic rule as one means for such objectives. I thus submit that Shapiro's defense of judicial review as democracy enhancing might be expanded to also include domination-preventing in other ways. Non-majoritarian arrangements may clearly also serve such purposes – notwithstanding their constraints on the domain of decisions which may secure the intrinsic value of democratic participation.

Objections

We finally consider some objections to the account presented here, with a focus on issues that pertain to features of the epistemic democratic theory laid out in section 2.

Waldron and several others will be wary of the risk of domination by Review. There is an understandable fear that societies will suffer from the rule of lawyers – and from *foreign* lawyers, since that is how international courts are typically staffed. In response, first recall that many cases of Review concern policies by the administration or the executive, rather than legislation. The former cases do not appear to raise concerns about the detrimental effects of Review on democratic rule – to the contrary: here Review arguably helps ensure consistency between the

legislature and the executive.

Second, note that the gains and risks of Review are different from the risks individuals are subject to from a legislature. Two types of risks stemming from two sorts of malfunction may occur. The worry about domination by courts is mainly concerned with the risks of 'false negatives.' 'False positives' will occur when an international court or treaty body *fails* to flag normatively unacceptable policies or legislative acts. In these cases the human rights of some segment of the population are arguably violated, the existence of Review notwithstanding. 'False negative' cases occur when an international court prompts domestic authorities to change normatively unobjectionable policies or legislative acts. But the impact would not appear to be a severe form of domination: The legislature must unnecessarily revise legislation to avoid the problems mistakenly characterized as such by the court. This damage is clearly regrettable, and Waldron and others may insist that such review violates individuals' right to self-determination. Leaving aside those concerns, the mistaken review does seem to entail less worrisome risks than the impact of legislation which itself violates individuals human rights. It is such 'false negatives' that must be heeded in the assessment of success and risks of a practice of judicial review contrasted with a practice of legislation without such review.

Thirdly, note that the mechanism of concern – even with the 'strongest' form of Review, performed by the ECtHR - is one of *soft* review. While the risks of domination are real, the stakes are not as large as with 'strong' review which annuls or even replaces old legislation with new. Consider that the immediate effect of a ruling by the ECtHR is that the offending state to take 'general measures' to prevent new violations. The weak judicial review does not *replace* legislative discussions and decisions. Rather, Review serves notice that legislatures and executives should reconsider, to change some laws that violate international human rights. States have wide discretion in finding the requisite means, which may include new or revised legislation, constitutional changes, policy changes or new administrative routines. The effect will often be public and parliamentary discussions about what means are best suited to the local circumstances and least intrusive of legitimate expectations and culture. The new deliberations will often be guided by a more keen awareness of the internationally protected needs of particular groups – whose concerns have previously been overlooked or overheard. This is not in conflict with the ideals of democratic deliberation that seeks non-domination – to the contrary, such widened awareness is one of the reasons to value such democratic deliberation. Thus the result of a negative decision is that the domestic authorities must revise their policy or legislation, through the ordinary bodies under democratic control. Such Review can therefore not be criticized on the ground that 'what do they know' about what the majority *would have voted for* under more fair conditions; the international court only assesses that this particular domestic policy violates the treaty. Given the several forms of underdetermination, Review cannot replace domestic democratic decision making fully. The judges performing Review cannot reasonably be criticized for being *epistocrats*. They are *not* undertaking a full normative assessment of

domestic policies and legislation, oblivious to the voices of those affected. Rather, the judges of the ECtHR are performing a much more limited task: assessing whether particular policies or legislation is consistent with a particular set of legal norms. One of the critics of the margin of appreciation therefore sets too high standards for the ECtHR when he criticizes it:

The court also relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality. Its decisions reflect a respect of sovereignty, of the notion of subsidiarity, and of national democracy. It stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities. (Benvenisti 1999, 852)

Review is not properly described as a matter of reason and morality over the tyranny of domestic majorities: the judges are not members of such an epistocracy, but limited to legal interpretation, and with a subsidiary role of supporting the domestic democratic processes worth respect - albeit with important discretion in this regard.

We may also consider the pre-emptive role of the ECtHR's decisions: they serve to shape and frame, rather than stifle, the political debates in parliaments and elsewhere. Awareness among all that deeply dissatisfied citizens may appeal decisions to the ECtHR may well promote the commitment to treat all fairly, and foster more careful proportionality tests – which arguably enhances the policy creativity, impact scrutiny and preference formation which gives us epistemic reasons to value deliberative democracy in the first place.

A second criticism is that Review overturns majoritarian democratic decisions, and is therefore anti-democratic – and hence illegitimate. A first response may be to challenge the final step. Arguably, Review may be regarded as an institution that is non-democratic yet a legitimate component of a political and legal order which has sufficient mechanisms of majoritarian decision making rules to warrant calling the order as a whole 'democratic.' I submit a stronger alternative: Review may be regarded as part of the democratic decision-making procedures of a state. Such bodies serve to bolster, ensure and give assurance that the majoritarian democratic decisions are within the domain of sufficiently just outcomes, and that the procedures are followed – so that the majoritarian decisions create political obligations to comply. The bodies that monitor the borders of the domain within which majority rule is authoritative should themselves be regarded as components of the institutions for democratic decision making - especially when they do not replace democratic procedures, but rather return the decision to the democratic process. Still, what are we to make of the remaining concern: Review undoubtedly seeks to undo domestic decisions made by a democratically accountable legislature. How can such practices at all be defended? In response, recall the reasons to value epistemic democracy, and hold them up against the practice of the ECtHR – including in particular its margin of appreciation doctrine.

Recall that the Court hardly grants any margin when certain rights are at risk under certain emergencies, regardless of what states claim, namely rights against

torture or slavery. These would seem to be rights violations where the majoritarian process would not generate any democratic claim to deference to be overridden. The reasons to value democratic decisions are strongest when the results emerge from well functioning democratic mechanisms and the rule of law, where the population has deliberated about alternative policies and legislative proposals in light of their implications for all affected parties, so as to promote broadly shared interests whilst avoiding harm to anyone. When rights concerning political participation, freedom of expression and other rights required for well-functioning democratic decision making are violated, the reasons to defer to the decisions are much weakened. Thus the challenge to democracy also seems weak when the ECtHR overturns domestic decisions which violate such rights. Furthermore, the majoritarian democratic mechanisms are not particularly reliable in securing the vital interests and equal respect for those who are likely to be in the minority when decisions are taken by majorities. In these cases, again, it seems difficult to maintain that the ECtHR is a threat to the sort of democratic process and outcome we have reason to value. Benvenisti puts the point clearly:

One of the main justifications for an international system for the protection of human rights lies in the opportunity it provides for promoting the interests of minorities. This system is an external device to ameliorate some of the deficiencies of the democratic system. Such external mechanisms are not susceptible to the concerns of domestic governments as much as internal decision-makers are. (Benvenisti 1999, 850)

Finally, consider a third criticism relevant for the epistemic account laid out above. *Domestic organs may be in an epistemically better position* than will an international court to determine whether there is a violation of an international human rights treaty. A related concern drawn from the epistemic arguments for democracy is that international judicial review reduces the chance of discovering the correct answers. The judges will be unfamiliar with the local mores, circumstances, traditions and expectations that are crucial for assessment. Review runs against the 'presumption for insiders' wisdom' (Shapiro 2003, 39).

In response, note firstly that the details of how such Review operates mitigate against such worries. In the case of the ECtHR at least two aspects are relevant. The court always includes *ex officio* a judge from the particular state charged with a violation, so as to be informed about relevant background culture, traditions etc. Secondly, the ECtHR often justifies the margin of appreciation doctrine precisely on such grounds, that domestic authorities are in principle better placed than an international court to evaluate local needs and conditions: "By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions." (Fretté v. France 2002, § 41).

Thirdly, while this comparative advantage of local experts may hold in many

circumstances, even democratic deliberative majoritarian decision making is not always well functioning. There is *also* a risk that domestic courts will not only be more familiar with the local circumstances, but that they will be too lenient in favour of the government's claims that particular policies are *necessary* given the local history and conditions. Domestic authorities are also at risk of having adopted the majority's perspectives, values and concerns – rather than those of vulnerable minorities. The need to check such risks of local domination or tyranny should not be overlooked out of fears about domination from the centre – as the Federalist discussion remind us (Brutus 1787, Madison 1787 (1961)). Human rights constraints can serve precisely to guide such 'balancing' between individuals' rights and the interests and mores of a majority. The scrutiny of proclaimed arguments for how such balancing has been performed may reduce the risk of domination and other transgressions outside the domain of just outcomes. Furthermore, domestic authorities may know more about the domestic setting, but not much about which *alternative* policies may serve such legitimate interests and values sufficiently well. The latter requires a comparative perspective which domestic authorities may be too myopic to discern.

Thus this epistemic case for deference by international courts is at its strongest when domestic organs have carried out a proportionality test when human rights are at stake, to give assurance that they have creatively considered less invasive alternatives and have not ignored the impact on some groups. Such deliberation about alternatives and their impact is indeed what well-functioning democratic decision making should secure. Insofar as such proportionality testing has not been carried out at all - in well-functioning democracies and elsewhere – the ECtHR would appear to have no reason from deference for democratic decision making to refrain from reviewing a decision. When a good faith proportionality test has been carried out, however, the ECtHR should more likely defer. And this does indeed match how the ECtHR describes its own practice, as cited above.

5 Conclusion – Contributions to a research agenda

I have sought to argue that international judicial review of human rights constraints is *compatible* with epistemic and proceduralist reasons we can offer for democratic rule – which on this view should occur within a restricted domain. Indeed, human rights constraints would even seem to be democratic, in that such constraints seem required by the best reasons we can offer for why citizens should defer to democratic, majority rule among equals – namely within a certain domain, on the basis of deliberation which promotes several epistemic objectives.

Review can strengthen several of the features of epistemic majoritarian democracy which make such decision making legitimate. Review arguably prevent, identifies and alleviates some of the vulnerabilities of epistemic majoritarian democracy. Review may ensure better deliberative procedures which include the perspectives of more affected parties, e.g. by safeguarding freedom of assembly, of

the press etc. Review also helps remedy those errors or unjust outcomes which nonetheless occur: Review monitors that minorities' human rights are not violated by democratic majoritarian decision-making, as a safety valve if such limits are not identified and respected by the deliberations themselves. Finally, Review provides public assurance to citizens that their government does indeed respect these limitations to legitimate democratic majority rule.

Throughout the discussion the ECtHR has been used as an illustration because the power of this court is the strongest challenge to sovereignty as traditionally conceived. But the concern here has not been to defend a specific set of precise human rights norms, nor the particular courts and treaty bodies currently performing such Review. To conclude, consider several important research topics that should be addressed in pursuit of these lines of reasoning. Several criticisms against the ECtHR and other treaty bodies merit serious consideration (Follesdal 2009). The case for Review is comparative, thus it is important to seek to determine which domestic and international institutional mechanisms *in combination* are best at fostering the requisite public, political debate about the domain of just outcomes, including in particular human rights. Such domestic mechanisms as parliamentary committees and ombudsmen may be strengthened, but are not necessarily alternatives to Review – rather, the latter may serve to bolster domestic mechanisms and give further assurance of their well functioning. Secondly, the procedures of the international courts – including their selection processes – merit closer scrutiny to assess their epistemic contributions. Thirdly, an important design challenge is to how to institutionalize the proper insulation of such courts from parties to the conflict, while ensuring that they remain committed to the human rights to be protected – where the treaties must be interpreted 'dynamically' to ensure continued protection whilst circumstances change (Follesdal 2014). – And not least: How can the system as a whole provide public assurance that these judges, whilst independent, remain accountable so that they contribute to a political and legal order which remains responsive to the best interests of all and hence merits obedience.

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