

Much Ado about Nothing? International Judicial Review of Human Rights in Well Functioning Democracies

To appear in *The Legitimacy of International Human Rights Regimes*. A. Follesdal, J. Schaffer and G. Ulfstein. Cambridge, Cambridge University Press, 272-299

Abstract

The chapter addresses some of the tensions between sovereignty, international human rights review and legitimacy, and bring these findings to bear on the proposals for reform of the European Court of Human Rights (ECtHR) that would reduce its authority over national legislatures and judiciaries. The objectives of such review are not obvious, the causes of noncompliance are contested, as is the legality of dynamic treaty interpretation; all of which hamper efforts to assess proposed improvements. Section 1 presents some relevant aspects of the ECtHR. Section 2 reviews some of the recent criticism against the ECtHR practice of judicial review to protect human rights in 'well-functioning' democracies, in terms of various forms of legitimacy deficits. It also presents some of the recent proposals for reform of the ECtHR. Section 3 lays out some reasons why such judicial review of majoritarian democratic decision-making may be defensible, also for well functioning democracies. Section 4 responds to some of the criticisms, and presents a partial defence. Some standard objections are not well targeted against the practices of the ECtHR, partly due to the division of responsibility between it and national public bodies, and the different roles of legislators and of judiciaries. Section 5 returns to the proposals presented in section 2. Section 6 concludes by considering some of the important remaining normative challenges, this partial defence notwithstanding.

Introduction

Worries about international judicial review of human rights have increased in recent years.¹ The European Convention on Human Rights (ECHR) and the court it establishes, the European Court on Human Rights (ECtHR), have sustained particularly much criticism, not least in the Nordic countries and the UK.² In these countries vocal critics have included government commissions and politicians. Such misgivings culminated in some of the proposals entertained at the Brighton conference on reforms of the ECtHR in April 18-20. Several solutions would essentially return sovereignty to the states, pruning the powers of the ECtHR not only over the UK, but across the board. Some protests against international judicial review arise from general misgivings about juridification and internationalization wrought by other influential European courts and international treaty bodies, such

as the Court of Justice of the European Union. In addition, judicial review by the human rights judiciary also raise particular puzzles of legitimacy, especially when performed on democratically enacted legislation. The changes to the ECHR ventured by the British government illustrate some central challenges facing the human rights judiciary as a whole. These proposals seek to enhance the legitimacy of the ECtHR by reducing its authority over national legislatures and judiciaries. The present chapter addresses some of these tensions between sovereignty, international human rights review and legitimacy, and seeks to bring these findings to bear on proposals for reform of the human rights judiciary. The objectives of such review are not obvious, the causes of noncompliance are contested, as is the legality of dynamic treaty interpretation; all of which hamper efforts to assess proposed improvements.

These concerns merit attention for several reasons. They stem from states whose 'democratic spirit' can hardly be doubted, whose citizens enjoy comparatively high scores on most standards of good governance, democracy and political trust in government, and with low levels of relative poverty.³ On the one hand, their scepticism fits with Moravcsik's claim that resistance to the ECHR was higher in precisely such states, rather than where governments are afraid that the opposition will backslide on human rights commitments if they got to power ((Moravcsik, 1995)). On the other hand we would suspect that such states have little to complain about, since they can be expected to seldom violate the human rights conventions they have signed. Statistics bear this out: in 2011 the Nordic states and the UK were responsible for 1,5% of the violations found by the ECtHR. This is much less than the per capita would suggest, since these states include 10.7 % of the population of the Council of Europe member states.⁴

Their general respect for human rights coupled with the relatively small burden of such international criticisms should give us particular ground for concern when public debates in these states concern the alleged democratic deficit of international law in general, and of human rights law and the ECtHR in particular. If wide spread, such protests may hamper future compliance and treaty ratification, possibly with good reason. So why are significant actors in these 'well behaved' states worried about international human rights review, even though they have comparatively little to worry about?

Indeed, similar unease about unaccountable international judicialisation may partly explain the path to the Lisbon Treaty was paved with negative referendums.⁵ We may expect more tensions when the EU ratifies the European Convention on Human Right, and thus become subject to judicial review by the ECtHR. This raises intriguing questions, inter alia about the sort of political entity the EU is and becomes, and the relationship between the Court of Justice of the European Union and the ECtHR. EU ratification of the ECHR adds urgency to the worries of the latter's legitimacy deficit, not least if the Lisbon treaty alleviates the democratic deficit of the EU. Insofar as the EU's rules become more legitimate in the eyes of citizens and authorities, judicial review over human rights issues in the EU may be more suspect. The upshot is that concerns about the normative legitimacy of judicial

review of human rights by international courts merits scrutiny.

To address these issues, this article proceeds in six parts. Section 1 presents some relevant aspects of the ECtHR. Section 2 reviews some of the recent criticism against the ECtHR practice of judicial review to protect human rights in ‘well-functioning’ democracies, in terms of various forms of legitimacy deficits. It also presents some of the recent proposals for reform of the ECtHR. Section 3 lays out some reasons why such judicial review of majoritarian democratic decision-making may be defensible, also for well functioning democracies. I suggest two ways the unit of analysis needs to be clearer than often stated: we need to assess the practice as a whole, applied to both democracies and other states, and we must consider the need not only that states comply with human rights, but also that citizens are assured that such is the case. Section 4 responds to some of the criticisms, and presents a partial defence. Some standard objections are not well targeted against the practices of the ECtHR, partly due to the division of responsibility between it and national public bodies, and the different roles of legislators and of judiciaries. Section 5 returns to the proposals presented in section 2. Section 6 concludes by considering some of the important remaining normative challenges, this partial defence notwithstanding.

1. The European Court of Human Rights

The European Court of Human Rights is an institution of the Council of Europe, set up in 1959 on the basis of the 1950 European Convention on Human Rights. The Preamble states that the convention is a first step toward collective European enforcement of certain rights of the UN Declaration. This early warning system should help prevent lapses into totalitarianism by means of a court that hold states to account for human rights violations ((Woolf, 2005)). These are mainly civil and political rights, but also rights concerning such issues as education and anti-discrimination. The objective of the Convention slowly changed to fine-tune “well-functioning democracies.” With the new crop of member states of the Council of Europe the ECtHR has again had to focus on less stable democracies.

The ECtHR monitors the ECHR, and is among the most powerful treaty based courts. Still, the ECtHR respects States’ discretion in several ways. A) it accords states a ‘Margin of Appreciation’ with regard to assess whether they are in compliance with the obligations of the ECHR ((Bernhardt, 1994)). B) the ECtHR exercises what is sometimes referred to as ‘weak’ review. When the ECtHR finds a law or its application to be incompatible with the ECHR, this does not directly affect the validity of that law in the domestic legal system (ibid). C) When the ECtHR finds a state to be in violation of the ECHR, the state is still left with much leeway with regard to how to change its laws or procedures to secure compliance – in accordance with the principle of subsidiarity.

With regard to procedure, a Chamber of seven members hears most cases, while a Grand Chamber of seventeen judges hears cases found to be of great importance (ECHR article 30). A judge from the accused Member State is always *ex*

officio member of the Court, to ensure relevant background information about national specifics (ECHR article 26(4)).

The judgments against a Member State may include to give reparations to the particular individuals, as well as more 'general measures' necessary to avoid recurrence of violations. States have some freedom with regard to which such measures to take, though subject to monitoring by the Committee of Ministers composed of the foreign ministers of all Member States.⁶ The state may amend or add to its constitution, laws, regulations, or its administrative or judicial practices. The Committee of Ministers can employ a range of sanctions, ranging from the new infringement procedure under ECHR article 46(4), to different modes of bringing pressure on the noncompliant state, suspension of voting rights in the Committee of Ministers, or even expulsion from the Council of Europe (Article 8 of the Statute of the Council of Europe).

2. Backdrop: the legitimacy deficits of the human rights judiciary, especially of the ECtHR, and some proposals

Legitimacy is a complex concept with several interrelated aspects which may best be illustrated by their absence. A body such as the ECtHR may be deemed illegitimate in the eyes of ordinary citizens because of its' poor *performance*: it is *ineffective* in securing or promoting certain objectives (cf. (Beetham and Lord, 1998), 31). Indeed, the objectives of such review are not obvious – we turn to that in section 3.

Regardless of objectives, the ECtHR currently has a backlog of approximately 140000 applications ((European Court of Human Rights, 2012c)), which is taken as a further sign of ineffective protection of human rights. For citizens complaining to the Court, this backlog may weaken their support for the Court – while the states may to the contrary be more accepting of the Court due to this lack of effectiveness. But states' social acceptance seems weak when we address the next concern.

Secondly, the ECtHR can be regarded as illegitimate because the signatory states *fail to comply* with the rulings of the Court. Indeed, 34000 of the cases are classified as 'repetitive' by the registry of the Court, meaning that the relevant government has failed to install suitable general measures to prevent violations identified in earlier cases.

A third form of illegitimacy concerns the lack of *legality*. For the ECtHR this occurs insofar as state governments or administration hold that judges of the ECtHR interpret a treaty unduly creatively, too far beyond the intentions of the signatories and hence *unlawful*. Some hold that this is the case when the ECtHR openly undertakes 'dynamic' interpretation of the convention. However, complaining citizens and NGOs may either downplay such 'illegality', or hold that such interpretations are necessary for many treaties to further their objectives under new societal circumstances.

Fourthly, the human rights judiciary may be accused of failing to be *normatively justifiable*. Thus all judicial review, also by domestic constitutional courts,

is often presented as undemocratic and generally unaccountable, and therefore normatively illegitimate in this sense ((Waldron, 2006)). International courts or treaty bodies raises additional fears: a) the treaties are even less subject to citizens' control than domestic constitutions, since they are more entrenched against popular and parliamentary preferences and more difficult to change.

b) One consequence of such entrenchment is that the courts and treaty organs often resort to more dynamic modes of interpretation of the treaties. This raises further fears of domination by an unaccountable 'juristocracy'.

c) By design, the treaty organs will be largely staffed by officials who are even less accountable than their domestic counterparts. The members will be less familiar with national culture, constitutional traditions, and the legitimate expectations of the citizenry. Some, for instance domestic governments and administrations, fear that this lack of familiarity raises the likelihood of misjudgments about impacts and alternatives ((Østerud and Selle, 2006)).

d) In addition, as a body the international court will be less accountable to the professional norms of their respective peers than are the judges of domestic courts.

e) Adding to these risks, the increased number of international human rights treaties without a clear hierarchy may in the longer run bring familiar, possibly overstated fears wrought by the 'fragmentation of international law.' Forum shopping, divergent interpretation of the same norms and other factors may further reduce the power of legislatures and increase the ability of judges and courts to decide without much in the way of checks ((Conforti, 2007)).

f) Courts and other treaty bodies must also undertake complex and often controversial balancing among norms – including among human rights ((Tamanaha, 2010)). Such weighing or balancing of norms and rights is something a legislature might be expected to do at least as well and responsibly as a treaty organ whose members may know little if anything about public management, local mores, preferences and opportunities. Thus human rights treaties with adjudicating bodies that perform judicial review raise understandable fears among democratically accountable executives of "Qui custodiet ipsos custodiet"?

Much of the recent criticism leveled against the ECtHR expresses such misgivings about the legitimacy of the court, in these various senses of 'legitimacy.' No wonder that there were several proposals to reduce ECtHR's alleged legitimacy challenges, voiced during the spring of 2012 in preparation for discussions at Brighton April 18-20, under the British chairmanship of the Committee of Ministers of the Council of Europe. Prime Minister David Cameron pointed to the vast backlog of the Court as a main challenge to effective performance, and a further delay of justice to wronged parties ((Cameron, 2012)). Some critics may also take the backlog as a sign that the Court is too ambitious in its rulings, meddling in issues beyond its proper mandate.

Prime Minister Cameron maintained that part of the solution is to reduce the ECtHR's authority relative to domestic bodies of governance. The solution is in short to give more priority to sovereignty over international human rights review. Thus

the British government circulated several reform proposals to ensure that the Court will heed democratic decisions by national parliaments more ((UK Government, 2012)). Three proposed amendments merit particular scrutiny as a matter of normative political theory.

Firstly, some hold that the ECHR should be amended to include a clear reference to the “Principle of Subsidiarity” ((UK Government, 2012), para 19 b) A “principle of subsidiarity” regulates how to allocate or use authority within a political or legal order, typically in those orders that disperse authority between a centre and various member units ((Follesdal, 1998b)). The principle holds that the burden of argument lies with attempts to centralize authority. Thus the conception of subsidiarity as laid out by the Lisbon Treaty holds that in those issue areas where the states and the EU share authority, the member states should decide - *unless* central action will ensure higher comparative efficiency or effectiveness in achieving the specified objectives ((Treaty of Lisbon, 2007)). According to the principle of subsidiarity, the ECtHR should only act to *supplement* the domestic legal system, and the burden of argument rests with proposals that give more authority to the international level.

A second proposal is to amend the ECHR to instruct the Court to respect states’ “Margin of Appreciation.” This would be a codification of the Court’s long standing practice to grant states some leeway in some cases, so that the state has the final authority to determine whether certain policies are in compliance with the ECHR.

A third proposal applies these principles to specify which cases the ECtHR should take on. The Court should not consider an application “if it is the same in substance as a matter that has been examined by a national court taking into account the rights guaranteed by the Convention, ((UK Government, 2012), para 23 b). There are only two exceptions: if “the Court considers that: i) The national court clearly erred in its interpretation or application of the Convention rights; or ii) The application raises a serious question affecting the interpretation or application of the Convention;...”

The ECtHR and its President Sir Nicolas Bratza responded. In addition to the existing changes to reduce the backlog, the ECtHR urged several informal means, such as dialogue between Strasbourg and national courts, in the form of regular working meetings and “judicial dialogue through judgments” and possibly a system of advisory opinion jurisdiction ((European Court of Human Rights, 2012b), para 27-28). Judge Bratza has counseled that neither subsidiarity nor the margin of appreciation should be put in the ECHR. Such changes would not help reduce the case load of the court significantly, thus not enhance the effectiveness of the Court ((Bratza, 2012)). In response, one might argue that such changes could still increase its normative legitimacy by giving greater weight to democratic sovereignty.

The general tendency of these UK proposals is to grant more authority regarding human rights review to domestic rather than to regional bodies, and formalize this as amendments to the treaty. Assuming that they are made in good

faith, what are we to think of such attempts to enhance the legitimacy of the ECtHR? Several aspects require attention. One central issue is the objectives of such human rights review. Clarity about these objectives is required in order to determine how to assess these proposals, and how the principle of subsidiarity and the margin of appreciation should be justified, specified and institutionalized.

3. In defence of International Judicial Review to protect Human Rights

There are at least three reasons in principle for international judicial review, even for well-functioning democracies which largely comply with these legal human rights obligations anyway. They concern international peer pressure, domestic safeguard of minorities, and assurance of compliance. The first two may hold more obviously for citizens, and more indirectly for their governments, while the latter may also be supported by the executive branch that seeks to promote compliance with its decisions. This is not to say that these arguments support the present institutions and practices of the human rights judiciary in general, and the ECtHR in particular, but they indicate the kinds of arguments that may guide reforms.

The following brief sketch takes as a normative starting point that the ‘global basic structure’ – the global set of social institutions which includes domestic, regional and international bodies - should be arranged so as to be trusted to respect, protect and further the best interests of individuals globally ((Follesdal, 2011)). I argue below that the citizenry should have good reasons to trust the institutions and their authorities to carry out these tasks. So institutions should not only be just, but also promote public trustworthiness that this is in fact the case. I submit that democratic rule is supported by such reasons, and go on to indicate reasons to favor democratic institutions that are constrained by a human rights judiciary over majoritarian systems of governance without such constraints.

This normative starting point rests on several normative premises. Firstly, there is an assumption that citizens generally should be inculcated to, and be able to assume that almost all others share, a ‘sense of justice.’ The justification of the global set of institutions should be addressed to such individuals, motivated by what John Rawls called a ‘duty of justice’:

“to support and comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves.” “ ... predicated on the belief that others will do their part” ((Rawls, 1971): 115, 336)

I interpret this to mean that citizens are ‘contingent compliers’ in a game theoretical sense. They can only be expected to comply if they are assured that the institutions are just, *and* that others do their share. So citizens must not only have a normally effective sense of justice, but must also be sure that most others are similarly motivated. Note that for our purposes we can bracket much disagreement about the

substantive requirements of justice for the global basic structure, beyond maintaining that citizens have some obligation to promote human rights compliance even in other states than their own.

The global set of institutions must satisfy two conditions if general compliance among such contingent compliers is to occur and be predictably stable. Firstly, the institutions must be normatively legitimate, by whatever defensible set of principles of legitimacy the normative theory defends. Secondly, citizens must also have reason to trust in the future compliance of other citizens and authorities with such fair institutions. In the absence of such trust even a group of persons known to be contingent compliers will have little reason to comply. Indeed, they may prefer to not comply unless institutions provide such assurance.

I venture that democratic rule combined with constraints on legislatures in the form of judicial review of human rights may provide important forms of such assurance.

I here present fairly standard case for democratic rule, agreed by a broad range of democratic theorists (cf. (Follesdal, 1998a), (Follesdal and Hix, 2006)). It is not intended as a complete definition, but rather as a statement about virtually all modern political systems that we would normally call 'democratic'.

- 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.

Essential to the case for democracy over alternative decision procedures is competitive elections. They are important to make policies and elected officials responsive to the preferences of citizens ((Powell, 2000)). It must be possible for an 'opposition' to form against the current leadership elites and policy status quo (e.g. (Dahl, 1971)). Active opposition parties and media scrutiny are crucial for fact finding, agenda setting and assessments of the effectiveness of policies.

On this line of argument, the normative case for democratic rule is comparative: Forms of democratic rule by means of competitive elections to choose policies and leaders are better than alternative constitutional arrangements for decision making. The claim is that such democratic accountability mechanisms ensure that the decisions can be trusted to be more reliably responsive to the best interests of the citizenry than other collective decision making arrangements.

There are at least three reasons why citizens of such democracies may have good reason to subject their state to the human rights judiciary.

One reason is based on citizens' duty of justice to promote just institutions when they do not yet exist. This duty is expressed in one way by which politicians citizens vote into office, and their policies. In particular, ratification by one state is sometimes one way to promote ratification *by other states* whose citizens stand to

benefit from such review. This is because ratification by some states adds pressure on other states to also ratify – states whose ratification does make a difference to citizens. Beth Simmons notes that

The single strongest motive for ratification in the absence of a strong value commitment is the preference that nearly all governments have to avoid the social and political pressures of remaining aloof from a multilateral agreement to which most of their peers have already committed themselves.

((Simmons, 2009), 13).

One consequence of this impact of the human rights judiciary is that the assessment of reforms cannot be restrained to intra-state effects, but must also heed the impact in less democratic states that form part of the present global structure. A generally well functioning democracy may thus have to agree to submit to judicial review in order to promote human rights elsewhere – as long as the burden is not unduly hard.

Secondly, international judicial review of human rights can be important to correct the (few) human rights violations that can be expected even when democracies work very well. Mistakes occur even under the best procedures, and review of such decisions serve as a valuable safety mechanism. Human rights conventions address several such risks, inter alia the prerequisites for well functioning democratic procedures such as freedom of speech, free and fair elections, etc. Other risks are those that various groups tend to face under majority rule. The majority may exploit its powers, intentionally and knowingly or not, in ways that unduly harm those that happen to find themselves in the minority. Of course, many majority decisions may harm minorities. What counts as ‘undue’ harm? Some such harms occur under circumstances where the case for majority rule is weaker. Brian Barry noted that the case for majority rule is stronger when the stakes for each decision are roughly equal, and where there are rotating minorities ((Barry, 1991)). Undue harm may thus arise for groups who find themselves in permanent minority when it comes to decisions. Some groups may also require unusual arrangements to secure the same needs as the surrounding majority. Such arrangements may include special protections, exemptions or support to maintain aspects of their own culture – ‘special needs’ with regard to freedom of religion, education and language, diet or other central components of what makes their lives go well in their eyes. A minority may also have special preferences which will lose out in all majoritarian 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 some, but not many good reasons why they can be trusted to vote according to their sense of justice, even on such ‘minor’ issues. Standard mechanisms in a democracy that ensure responsiveness to the electorate will not work for such groups. For instance, a

small minority may never get attention from political parties that seek votes.

An international human rights judiciary can serve to monitor the limits on decisions states can make within their borders. This safeguard reduces the reasonable fear that those in power will ignore their sense of justice with untoward effects on those who do not gain the majority vote.

The third reason for judicial review is related to the second. Judicial review by bodies that are independent of the domestic government may provide citizens much needed assurance about others' compliance – including that of their government. Such a mechanism helps convince 'contingent compliers' that the government will reliably continue to pursue acceptable outcomes. Compared to other modes of governance, democratic arrangements not only have better mechanisms to ensure that authorities reliably govern fairly and effectively, but they also help provide public assurance that so is the case ((Przeworski et al., 1999), (Shapiro, 2001), (Pettit, 2000)). Party contestation and media scrutiny help align the interests of the subjects to those of their rulers, and contribute to make the institutions trustworthy (Fabre 2000, 83). Judicial review to protect human rights may provide another trust-building measure. With such review, those who fear that they will regularly be outvoted can be somewhat more certain that the majority will not subject them to undue domination, risks of unfortunate deliberations, or incompetence. This safeguard reduces reasons to fear that those in power will ignore their sense of justice, with untoward effects on minorities. This is a reason for such judicial review that may hold both for citizens and politicians: those citizens who can expect to sometimes find themselves in the minority – and that would be most citizens – will have more reason to expect that the majority will not abuse its powers. And politicians will be able to rely on citizens' duty of justice a bit more, also those who find themselves in more or less permanent minority, because the procedures of judicial review will make it public knowledge that abuse of power is less likely.

As an example, in 2011, of the 955 applications against the UK that the ECtHR decided, the government was found to violate the ECHR in only eight cases ((Bratza, 2012)). Since the very large majority of cases show the government to be in compliance with its obligations under ECHR even when alleged victims think otherwise, the ECtHR thus serves to assure the citizens that this particular government generally merits compliance. One implication of this argument is that we must assess the human rights judiciary, and reform proposals thereof not only by whether they enhance compliance with human rights within states, but whether they also provide public assurance thereof.

To conclude, note that a central normative issue is whether the benefits of the human rights judiciary – duly modified to provide the benefits indicated above - do indeed provide benefits to some, without imposing burdens of similar weight or urgency on others. One remark on such normative assessments is in order: The stakes are contested. Even when judicial review works as it should in stopping a legislative act, some will regret what they see as a loss to the *democratic* quality of the decision, since a majority decision is overturned. Some regard these losses as high –

and question the likely gains (cf. (Bellamy, 2007)). On the other hand, some such limitations on the scope of legislatures' authority, and bodies entrusted to uphold such limitations, are not necessarily *nondemocratic*. Indeed, minority protections of some kind, with authority placed outside the legislature itself, may be a component of any set of workable majoritarian democratic institutions worth respecting. All institutions must have a specified scope of authority, and a legislature which is corrected when it oversteps its authority is not obviously overruled in a *nondemocratic* way. Which bodies may be best placed and authorized in what ways to provide such benefits remains an open question. We now turn to some details about how the ECtHR may be modified to enhance its legitimacy.⁷ Recall that the normative assessment should apply an institutional perspective, including the broader impact of the human rights judiciary beyond any single state. That is, the subject of comparison is not how things would have turned out in the absence of institutions. Instead, we should compare the current ECHR regime with the best alternative institutions for binding collective action.⁸ Recall that the 'institutions' to be assessed must be the practice of the human rights judiciary as a whole, as the courts and treaty bodies apply to both well functioning democracies and other states. We must also recall the need not only that states comply with human rights, but also that citizens are assured that such is the case. In the case at hand, the comparison should be with democratic legislatures of varying human rights records, without such an international judicial review of human rights, and with an improved ECHR.

4. A partial defense of the ECtHR

We now return to several of the criticisms presented in section 2 that the ECtHR suffers from various legitimacy deficits. I shall suggest that some objections are not well targeted against the practices of the ECtHR, partly due to the division of responsibility between it and national authorities, and the different roles of legislators and of judiciaries. Other challenges merit much scrutiny.

With regard to charges of ineffectiveness expressed in the large backlog, consider several factors that alleviate the charge against the ECtHR. Recall that analyses of the case load indicates that more than 90% of all applications are deemed inadmissible ((European Court of Human Rights, 2012b)). That is: individuals have been mistaken in assuming that the Court has the authority to decide on the case. Some ways to reduce this number are already established, such as making it easier for potential applicants to understand whether they should petition the Court at all, and to have a quick review process by a single judge. An important consideration is to ensure that potentially well-founded cases receive careful treatment.

Another major cause of backlog are *repetitive cases*. For 34,000 of the pending cases the Court has already delivered judgments finding similar violations of the ECHR, but where the state knowingly flout its obligations to take steps to prevent future violations. That some states fail to so *comply* with the ECtHR is certainly a lack of legitimacy of the Court, but one of compliance rather than its own effectiveness. Indeed, the Court has established a streamlined procedure for these cases, using

three-judge committees.

Finally, when it comes to effectiveness, we can note that of the 47 countries subject to the ECtHR, 5 were responsible for nearly half of the violations in 2011: of the 1157 judgments determining violations in 2011, Turkey 174, Russia 133, Ukraine 105, Greece 73, Poland 71, ((European Court of Human Rights, 2011)). I thus submit that the main sources of ineffectiveness of the ECtHR in processing cases are partly being addressed, and partly due to states' noncompliance.

We now turn to some of the concerns about the *legality* of the ECtHR. The concern is whether the ECtHR's practice of 'dynamic interpretation' goes too far beyond the intentions of the signatories and hence beyond its' legal authority. The ECtHR openly acknowledges that it develops the standards of the ECHR, eg. in light of new social or legal circumstances. The principle of *dynamic interpretation* tends to promote judicial activism. The ECtHR has declared that "the Convention is a living instrument which must be interpreted in the light of present-day conditions." (*Tyrer v. UK*, no 5856/72 (1977), "in a manner which renders its rights practical and effective, not theoretical and illusory." (*Goodwin v. UK* [GC], no 17488/90(2002) paras 74-5). The Court typically justifies such new interpretations by claims that there is broad consensus across most states in Europe ((European Court of Human Rights, 2010)). Be that as it may, it seems clear that the signatories will sometimes be bound in ways not foreseen when they consented. This will seem at clear odds with the doctrine of 'Restrictive interpretation in favour of state sovereignty' which entailed that treaties should be interpreted so as to minimize restrictions on state sovereignty ((Crema, 2010)):

If the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted.

(*Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion, 1925 PCIJ Series B, No. 12, cited in (Crema, 2010), 685)

In response, several arguments defending this practice in general seem to have merit. Firstly, one may challenge the relevance of the old case, arguing that the ICJ no longer relies on the minimum rule has departed from relying on the minimum rule ((Crema, 2010)). Secondly, such a development is not unique to the ECtHR. To the contrary, 'dynamic' or 'evolutive' interpretation of treaties is wide spread.

Thirdly, given relevant changes to the facts or other circumstances, the treaty will have to be interpreted in new ways insofar as the object and purposes of the treaty diverge from the individual treaty provisions. Something will have to give, and thus necessitate 'dynamic' interpretation. The question is rather which adjustments should be made, by what guiding principles. What is special with human rights treaties is that the doctrine of Restrictive Interpretation seems quite inappropriate. In general this doctrine is no longer adhered to, witnessed by the absence of this doctrine in the Vienna Convention. Interpretations now instead focus

more on the object and purpose of the specific treaty. And in particular, it is not at all obvious that this contested principle is appropriate for human rights treaties. They differ from other conventions in being explicitly aimed to protect individuals from their own state. The convention's rights are thus intended to limit state sovereignty, in ways that do not depend on whether other states violate such rights of their own citizens. The ECtHR applies a *Principle of Effectiveness*: The choice of interpretation should not be one which limits the obligations of the parties to the greatest degree, but must rather be appropriate to the aim and object of the treaty: to secure the aims of the Universal Declaration of Human Rights (*Airey v Ireland*, no 6289/73 (1979), *Artico v Italy*, no 6694/74 (1980)). The fact that an interpretation of such rights will be a stronger constraint on state sovereignty can hardly be decisive against such interpretations.

Fourthly, this practice seems at least in principle to be in accordance with the Vienna Convention on the Law of Treaties article 31 (1), which lists the most frequently utilised interpretative methods: good faith, literal and contextual interpretation and interpretation *in light of a treaty's object and purpose*. Leaving aside the normative significance of states' intentions when signing a treaty, it thus seems clear that since the VCLT allows dynamic interpretation guided by such factors, it is reasonable that states' intentions when signing treaties have included such dynamic interpretation since "it is now firmly rooted in the international law on interpretation." ((Schlütter, 2012)).

A final concern about the legitimacy of the ECtHR is that it grants undue power to non-accountable judges. This creates a risk of states being subject to the rule not of law but of lawyers, at odds with standards of legality or the normative standard to avoid domination generally. Some such risks arise for all courts, but increase for international courts, such as the ECtHR.

There thus seems to be at least two different though related kinds of concerns concerning the judges. Firstly the lack of accountability of various kinds which raises risks of domination by judges, and secondly the epistemic risks concerning decisions made by distant judges unfamiliar with domestic circumstances and expectations.

With regard to the risk of domination, judges who are insulated from political pressure may well enjoy greater freedom to stand up to power, but they are also politically unaccountable and hence more likely to ignore citizens' legitimate claims. These risks would seem to be compounded by several features of the ECHR and its Court:

- Judges on international courts and treaty bodies may be less subject to peer pressure and less steeped in a domestic judicial culture; and their selection is not always based on merit but sometimes seem to stem from an opaque mix of nepotism and diplomatic strategy. Thus there is an added risk that judges' discretion is exploited in the service of some states' international objectives.
- Abuse of judicial power is more likely when legislation is more indeterminate, as are many parts of treaties such as the ECHR, and with an established practice of dynamic interpretation ((Letsas, 2007)).

- Treaties – human rights treaties as much as others - are cumbersome to amend, since unanimity is required. Partly for this reason, the ECtHR has been forced to engage in quite drastic interpretations.

There are thus risks that unelected judges of a review court will abuse their discretionary powers, unchecked by accountable politicians. This fear looms especially large with regard to treaty organs.

In partial response, these fears are somewhat alleviated insofar as the judges are still subject to professional standards and various forms of non-electoral accountability. This even holds for members of international courts and treaty bodies. Such bodies are subject to “supervisory accountability” and “fiscal accountability” by the various signatory states – especially toward the more powerful states ((Grant, 2005), 37). The risks of unchecked judges may seem larger for *international* courts, which might be thought problematic also by those who otherwise endorse a domestic division of power. “They are influenced by a host of structural, political and discursive constraints that states can manipulate ex ante and ex post, as well as by the pressures of professional and personal socialization within a global judicial community.” ((Shany, 2012), referring to (Helfer and Slaughter, 1997)).

The second risk is epistemic: that judiciaries generally – and international courts and tribunals in particular – are unfamiliar with the relevant details of the case. This is one reason why several critics warn that the deliberation by courts generally is of no better quality than the legislative debates. Many fear that the solutions rendered by judges are skewed or ill informed since they are typically drawn from a narrow segment of society. Their decisions are for this and other reasons likely to be worse than those of legislatures and bureaucracies. The latter know more about the situation on the ground ((Sunstein, 1996)). Some make the point by comparing cases, such as the abortion debate in the U.S. Supreme Court and British House of Commons ((Waldron, 2005)). Others argue on principle: Mark Tushnet holds that “Democratic faith in the people's judgment means that the arguments liberals deploy in court should be just as good in the political arena” ((Tushnet, 2005)). Some arguments are empirical generalization, or doubts, e.g. against Dworkin's assertion ((Dworkin, 1986), 375) that courts secure social reform and justice more effectively than do legislatures (Tushnet 176).

In the case of the ECtHR such risks of domination and of unfamiliarity about the facts should be reduced due to one of the principle of interpretation. That court (and perhaps other courts, cf. (Shany, 2005)) grants a *Margin of Appreciation* to the states: they are allowed some discretion in how to best secure the rights of their citizens, apparently on the basis of an assumption of subsidiarity picking up on the concerns about local knowledge. The national authorities are thought better placed than an international court to evaluate local needs and conditions (*Fretté v. France* no 36515/97 (2002)). Note that this rationale is sometimes at odds with the practice of the ECtHR to grant a *wider* margin where it discerns no common European standards or values that apply (cf. *Handyside v UK* [PC], no 5493/72 (1976, Muller

1988 (against obscene paintings), Rees (on transsexuals), cf. Bernhardt 1994). Some observe that this margin seems to be shrinking ((Arai-Takahashi, 2001), 201). Insofar as this is correct, it may be due to the harmonization of European laws, which would lead to clearer and more broadly shared European standards.

Even with the caveat of the Margin of Appreciation doctrine, does the ECtHR subject governments – not to mention citizens - to unjustified discretion by unaccountable judges? Indeed, this doctrine may reduce the epistemic risks, but leaves some risks concerning domination. Thus critics may suspect that the ECtHR carefully picks its fights to maintain its own legitimacy. It may grant powerful states a greater margin of discretion than other states.

While such fears of domination and ignorance should give rise to concern, the weight of worry is limited. Firstly, with regard to the epistemic concerns: one reason why a judiciary may make better decisions – and indeed induce more compliance ((Shany, 2012)) - is that it may therefore be, and be regarded as, more *impartial* among the parties. Such impartiality may be enhanced by the fact that few of the international judges can be suspected of parochial ties to either party to a conflict, and that they instead must rely on facts presented on behalf of the parties. They may indeed be better placed to spot widely shared yet mistaken assumptions that particular national ‘local’ human rights-violating practices are ‘necessary’ to secure certain objectives.

Secondly, we should keep in mind that the gains and risks of judicial review by a court are different from those of a legislature. We are concerned only with weak judicial review, where a court observes that there is a conflict between a piece of legislation and treaty obligations, but does not find the law invalid, and does not replace it. Instead, the court warns of a conflict among norms, and returns the dilemma to the democratically accountable legislature. So it is not appropriate simply to compare the failure rates of courts and legislatures. The possible risks are different than the risks a citizen faces from a legislature.

A court that performs judicial review may suffer two types of malfunction, be they the result of epistemic lapses or abuse of discretion. 1) ‘False negatives,’ where the court stops normatively unobjectionable legislative acts. The legislature is then asked to – unnecessarily - revise its legislation to avoid alleged normative problems mistakenly labeled such by the court. 2) ‘False positives’ occur when a court fails to prevent normatively unacceptable legislative acts. In these cases the vital interests of some segment of the population are violated, the existence of judicial review notwithstanding. One of the crucial normative questions arise in the former cases, when a body such as the ECtHR has made a false negative decision, and thus when a parliament is urged to change its decisions but where this has not been necessary to protect citizens’ vital interests – and where these changes are detrimental to some other individual. I suggest that this burden is limited: often a legislature will be able to find constructive responses that respect citizens vital interests to the requisite degree. After all, the ECtHR leaves it the national authorities to decide how to adjust domestic policies, legislation or constitution to avoid future violations. It is for the

Committee of Ministers – which is indirectly democratically accountable (albeit not to a unified European ‘demos’) to decide whether these changes suffice.

Thirdly, the range of issues where the ECtHR may intervene is limited in several ways. An indication of such limits is that 90% of all applications to the ECtHR are found to be inadmissible. Furthermore, the area of intervention into legislative acts is mainly limited in the case of the ECHR to civil and political rights and equal treatment by public authorities. The more contested topics such as weighing the priority of various social and economic rights and shaping welfare policies fall somewhat beyond the scope of the ECHR – though the court has taken on some such issues ((Palmer, 2009)). And the Margin of Appreciation limits the scope of interventions by the ECtHR, especially on issues where they perceive no broad European overlap of values.

Fourthly, with regard to the discretion of judges, we must first keep in mind the comparative perspective: *if* we want international judicial review based on treaties in order to secure effective human rights on the ground, the alternatives to dynamic interpretation may be even worse: judges applying outdated norms or ‘original intent’ to current circumstances. It is not at all clear that such interpretive practices can provide effective protection. Moreover, the ‘unaccountable’ judges do not enjoy a completely unregulated liberty to interpret the ECtHR any way they want. Peer pressure and professional socialization does, and should, serve to constrain such interpretations – albeit in quite other ways than we should expect among democratically accountable representatives. The appropriate, responsible consideration of reasons may well be different for judges who should largely interpret texts. The trustworthiness of judges in these regards may well be enhanced by insulation from, rather than responsiveness to, citizens’ express preferences (cf. (Moore, 2001, Ferejohn, 2002)). We thus see the ECtHR engaged in several institutionalized dialogues with other parts of the human rights judiciary such as national apex courts, and the Inter-American Court of Human Rights.

The upshot of these observations is that the ‘democratic deficit’ of the practice of the ECtHR is not as severe as some critics might charge, due to features of the soft review, and the interpretive principles the Court applies.

Such disclaimers notwithstanding, is the defense of democratic rule compatible with judicial review by courts such as the ECtHR, of the legislation decided by elected representatives?

Valuable contributions contest whether the best interpretations of ‘democracy’ and ‘legitimacy’ in fact *support* judicial review (Ely (Ely, 1980); (Dworkin, 1986), 356; (Freeman, 1990); (Fabre, 2000); (Tamanaha, 2004)); arguments that have been challenged by skeptics of judicial review. The aim here is not primarily to advance that debate. Rather, the concern is also to check whether their concerns also apply to the ECHR.

5. Reform Proposals Considered

We may now return to the reform proposals offered to enhance the legitimacy of the

ECtHR. The general tendency of the UK proposals was to grant domestic bodies more authority regarding human rights review rather than to leave that power with the ECtHR; and formalize some aspects of current practice as amendments to the treaty.

Firstly, consider the suggestion to include the Principle of Subsidiarity and the Margin of Appreciation in the treaty. In political terms such amendments are unlikely since they require unanimity. Be that as it may, it is not clear how such a reform may improve the legitimacy of the ECtHR. One concern of the UK is clearly to reduce the likelihood of the Court finding the UK in violation of the ECHR, thus respecting domestic democratic sovereignty more. This reduces the risk of 'false positives', i.e. of the Court preventing normatively unobjectionable policies. Moreover, the formalization reduces the risk of domination by the judges of the Court, by limiting and specifying their discretion. On the other hand, the risks of such reforms are high, for at least two reasons. The normative basis of these two principles is obscure with regard to human rights. Considerations of subsidiarity do not support placing protection of human rights with the national bodies alone. To the contrary, international human rights have as their objective to protect individuals against abuse by precisely such bodies. Domestic authorities should thus not have the sole responsibility, since that would make them judges in their own case. Reliance on subsidiarity would rather support a multi-level sharing of responsibility, where the regional or international level has the limited responsibility to review the actions of the national ((Follesdal, 2011)). Similarly, a margin of appreciation based on respect for local circumstance and culture stands in clear tension with the protection of human rights; for instance when it comes to the interests of minorities and women that the 'culture' of a domestic dominant group often ignores or overrules. Furthermore, a formalization of these doctrines will most likely require the Court to apply the same margin of appreciation and similar respect for subsidiarity to all states, regardless of their general willingness to comply with the ECHR. Thus the reform might reduce the risks of domination and illegality, but at the cost of effective human rights protection furthering the three objectives discussed in section . Be that as it may, the central issues seem to remain how to determine and assess the appropriate Margin of Appreciation,

The third proposal concerned which cases the ECtHR should take on. The Court should not consider an application "if it is the same in substance as a matter that has been examined by a national court taking into account the rights guaranteed by the Convention, ((UK Government, 2012), para 23 b). There are only two exceptions: if "the Court considers that: i) The national court clearly erred in its interpretation or application of the Convention rights; or ii) The application raises a serious question affecting the interpretation or application of the Convention;..." The aim of this proposal is again to reduce the workload of the ECtHR, by reducing the authority of the Court vis-à-vis national bodies, in particular to reduce the number of false negatives. Unfortunately, the effectiveness of the Court will also suffer. One reason is that the ECtHR may hesitate to thus criticize a national court for having not

only erred but *clearly* erred. Similar chilling effects may have occurred in Sweden which until 2011 allowed the judiciary to arrest legislation only if parliament has committed a 'manifest error' ((Nergelius, 2009)), and in Finland whose Constitution requires there to be an 'evident conflict' (Section 106) for judicial review ((Ojanen, 2009)). In effect, this proposal would seem to remove the right of individuals to petition the Court. For citizens in well functioning democracies the added protection by the ECtHR may not be large, but the risks of this proposal seem clearly larger for citizens in less human rights compliant states. These effects must also be taken into account – it is not sufficient to dismiss the ECtHR because its benefits are small for citizens of the UK. Moreover, some of the benefits this proposal aims for are already secured. The Court already seems to pay attention to how carefully national courts have sought to interpret the ECHR, so that it is more likely to grant a Margin of Appreciation when there is evidence of such careful balancing (ref).

6 Some remaining challenges

The partial rebuttal of criticisms of the ECtHR and judicial review of human rights more generally should not be overdrawn. I conclude by pointing to some areas where such review should continue to spur caution and critical attention.

Firstly, human rights treaties are not exempt from criticism *de lege ferenda*, as to the substantive content of the norms. For instance, it often remains to be argued whether these specific legal human rights, applied by international treaty organs, are suitable and reliable means to protect the best interests of individuals against 'standard threats' that arise in complex modern states. Note that this may one reason in partial defense of Ron Hirschl's criticism of granting judges powers of judicial review. He argues that such authority does not in the end promote "progressive concepts of distributive justice" ((Hirschl, 2004), 13). While this may be correct and lamentable, we must also insist that the role of international judicial review may well be more limited in aspiration: Its aim is more modest, and less contested than a full fledged standard of socioeconomic egalitarianism.

Secondly, the quality of judicial deliberation merits further scrutiny. The patterns of actual debates and decisions in the ECtHR and other courts compared to those in legislatures are indeed a crucial empirical issue relevant for assessing their normative legitimacy. However, the relevant data must go beyond one particular case, such as the abortion debate in the US and the UK. (pace (Waldron, 2005)). There are several reasons for this. The normative theory I laid out above holds that we must compare institutions and practices, so our concern must be general tendencies rather than single results. And there are institutional factors why courts and parliaments should pursue and weigh different reasons and concerns – such as rights – differently, in light of their different social functions. Judges' discretion should be more limited than that of legislatures, to interpretation of legal texts. So different modes of reasoning are to be expected. Furthermore, we may want to study how different rules affect the deliberations of parliaments, e.g., as Steiner et al.

explore ((Steiner et al., 2005 André, Spörndli, Markus, and Steenbergen, Marco R., 2005 #40920)).

Some scholars, including Tushnet, have suggested on more principled grounds that a democrat should hold that the arguments deployed in court “should be just as good in the political arena” ((Tushnet, 2005)). I beg to disagree, for at least two reasons. 1) There are institutional factors – mandate, rules, culture – that legitimately lead the two kinds of bodies to pursue and weigh different reasons and considerations differently. Surely, some policy choices a legislature must make should reflect the comprehensive set of preferences of representatives – both self interested and other regarding – and not only the elements relevant for a court. Majority rule may then be a plausible decision rule to maximize preferences over time. Judges’ discretion, on the other hand, is largely limited to interpretation of legal texts, while there is clearly leeway in such interpretation. It would seem that peer pressure and professional socialization does, and should, serve to constrain such interpretations in quite other ways than we should expect among democratically accountable representatives. Thus the appropriate, responsible consideration of reasons may well be different, and the trustworthiness of legislators and judges in these regards may well be enhanced by insulation from, versus responsiveness to, citizens’ express preferences, respectively (cf. (Moore, 2001, Ferejohn, 2002)). This is not a rebuttal of Tushnet’s concern, but rather indicates that quite other sorts of arguments seem appropriate, also among democrats, on behalf of the reasoning of judges in general, and of the ECtHR in particular.

2) recall that judicial review is a safety mechanism, not a replacement for democratic deliberation. Waldron also grants the value of weak judicial review as a safety mechanism, since legislators might not be able to see the issues of rights embedded in the proposal and its future applications ((Waldron, 2006), 1370). The risks are different for such safety mechanism, as compared to legislation. So it is not appropriate simply to compare the failure rates of courts and legislatures. We must assess the losses imposed on those whose human rights are overruled against the interests of a majority that cannot be pursued in the ways originally thought.

A third source of worry about international judicial review is that judicial solutions will likely be worse than those of legislatures and bureaucracies, because the latter know more about the situation on the ground. In response, note there are several features of the ECtHR that renders this worry less weighty – but which also create other normative challenges. 1) the doctrine of the Margin of Appreciation explicitly recognizes and seeks to respond to this concern. 2) a judge from the accused country is always *ex officio* member of the ECtHR, precisely to provide some such relevant information. 3) the judges’ background varies to some extent, so that the ECtHR as a whole has members with experience of government administration and human rights activism – as well as academia and service on the bench. Moreover, we may also use the distance of international judges engaged in judicial review in their favour: their unfamiliarity with local conflicts and cultural mores,

and their lack of stakes in the result, reduces the risk that the judges will subject a minority to willful domination. These responses should not lead us to conclude that this concern is completely without merit. In particular, it remains to be determined whether the 'Margin of Appreciation' respects the domestic democratic process appropriately, and the vital interests of individuals. I return to this below.

A fourth normative concern, and related to this, the independence and professional quality of the judges on the courts – including the ECtHR – may be challenged. For instance, regarding the ECtHR, some scholars suggest that while the judges often seem sufficiently insulated from national pressures (, 29), several judges are selected by their government on quite other bases than judicial quality. The concerns about bias and independence are clearly worth further attention.

Fifthly, with regard to the interpretive practices of the ECtHR, it remains to be determined whether the dynamic 'margin of appreciation' overlaps reasonably well with the scope of discretion states arguably need to accommodate local circumstances and expectations. Does this practice of recognizing such a margin, combined with the doctrine of dynamic interpretation, reliably help secure citizens' best interests against flaws in majoritarian legislation? There is no obvious reason to believe this Margin overlaps precisely with the scope of the normatively permissible. There is no obvious reason to believe a broad consensus among European legal systems will always tend to converge on the normatively legitimate. And there is a real risk that ECtHR will seek to avoid taking controversial decisions against a powerful state, and instead grant that the issue falls within the margin of appreciation. Finally, the risk of political appointees raise the specter that judges will be affected by foreign policy concerns, rather than the best interests of individuals.

I have addressed some of the concerns that the ECtHR suffers from a lamentable 'legitimacy deficit.' Some may see such review as central to the Rule of Law, and in turn as crucial to a domestic and international constitutionalism worth respecting. At the same time, the literature reveals a long list of misgivings of such constraints on domestic democratic decision-making. We have reviewed some of the recent criticism against the ECtHR, and some of the recent proposals for reform of the ECtHR. To assess such criticisms and proposals I have explored some of the social functions that such judicial review of human rights may play, and laid out how such treaty organs may be defended in principle, and in practice in the case of the ECtHR. I have also argued that several issues remain unresolved, before we can conclude that the ECtHR and other such bodies are normatively defensible. The answers require both normative and empirical contributions, when we we ask whether these practices, better than the alternatives, provide citizens reasons to trust their authorities: that the norms and institutions in place are just, and that others in their societies act as they ought. Not only must the judges of such treaty bodies ensure that justice is done, but the institutions as a whole must also give assurance to

citizens so that they have reason to believe that justice is indeed done.

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¹ This chapter stems from two research projects: ‘Should States Ratify Human Rights Conventions?’, at the Centre for Advanced Study, Oslo; and MultiRights, a European Research Council Advanced Grant. It is based on some previous papers noted where appropriate, and on a draft presented at the conference “Towards Nordic Juristocracy?” at the Faculty of Law, University of Turku, December 8, 2009, and at the University of Sterling July 6, 2010; as well as on a presentation of related concerns at the University of Minho, Portugal, November 2, 2009. I am grateful for all comments received at those occasions, and for comments by Geir Ulfstein, Johan K. Schaffer and Stian Øby Johansen. The Edmond J. Safra Center for Ethics, the Mossavar-Rahmani Center for Business & Government at the Kennedy School and Currier House, all at Harvard University, provided excellent working conditions for some of this research.

² NOU 2003:19: “Makt- og demokratiutredningen”, SOU 2007:85: “Olika former av normkontroll”, FOLLESDAL, A. & WIND, M. 2009. Introduction: Nordic Reluctance towards Judicial Review under Siege. *Nordic Journal of Human Rights*, 27, 131-141., CAMPBELL, T., EWING, K. D. & TOMKINS, A. 2001. *Skeptical essays on human rights*, Oxford, Oxford University Press..

³ Democracy Index 2008, UNITED NATIONS DEVELOPMENT PROGRAMME 2009. Human Development Report 2009.

⁴ In 2011 the ECtHR made a total of 1157 judgments finding violations in 987 of them. Of these, the ECtHR made 37 judgments about Denmark, Finland, Iceland, Norway, Sweden, and the United Kingdom, and found violations in only 15 of these cases. [Denmark 6/1, Finland 7/5, Iceland 0/0, Norway 1/1, Sweden 4/0; and the UK 19/8] (EUROPEAN COURT OF HUMAN RIGHTS 2012a. The European Court of human Rights in Facts and Figures 2011., pp 12-13). In 2011 these states had [5561+5375+318+4920+9416+62436 =] 88 million persons, of almost 819 million living in the Council of Europe states (EUROPEAN COURT OF HUMAN RIGHTS. 2012c. Table of violations 2011. Available: http://www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU_VIOLATIONS_EN_2011.pdf).

⁵ <http://www.voteno.ie> ; <http://no2lisbon.wordpress.com/>; MARTHALER, S. 2005. The French Referendum on Ratification of the Constitutional Treaty. *European Parties Elections and Referendums Network - Briefing Paper* , 6; SIEDENTOP, L. 2008. Europe is failing to restore idealism. *Financial Times*..

⁶ ECHR, *Scozzari and Giunta* [GC], no 39221/98 and 41963/98 (2000) para 249.

⁷ I have addressed other criticisms of international judicial review and of the ECtHR elsewhere (FOLLESDAL, A. 2009. The legitimacy of international human rights review: The case of the European Court of Human Rights. *Journal of Social Philosophy*, 40, 595-607.): that that judicial review must rest on contested ‘liberal’ assumptions. They may be skeptical of the focus on ‘negative’ social and political rights found in many human rights conventions – including the ECHR. Such a priority is thought to flow from flawed premises, and leads to

skewed policies: it assumes a fundamentally adversarial relationship between the individual and her state, and conveys that the paramount tasks of the state are thus limited (BELLAMY, R. 2001. Constitutive citizenship versus constitutional rights: Republican reflections on the EU Charter and the Human Rights act. *In*: CAMPBELL, T., EWING, K. D. & TOMKINS, A. (eds.) *Skeptical essays on human rights*. Oxford: Oxford University Press.). Another range of criticisms concerns the unfortunate impact of judicial review on domestic, democratic processes and outcomes. To entrench certain rights skews both the processes of decision making and the policy outcomes. Some believe such entrenchment aims to deflect conflicts about rights and certain policies away from the political arena. But such insulation is ill advised if not impossible (BELLAMY, R. 1999. *Liberalism and pluralism*, London, Routledge., 166; BELLAMY, R. 2007. *Political Constitutionalism: A republican defense of the constitutionality of democracy*, Cambridge, Cambridge University Press.). A bias toward civil and political rights is aggravated further by such entrenchment, at a cost to social, economic and cultural rights.

⁸ Cf. Shapiro 2001, FOLLESDAL, A. & POGGE, T. 2005. Introduction. *In*: FOLLESDAL, A. & POGGE, T. (eds.) *Real World Justice: Grounds, Principles, Human Rights Standards and Institutions*. Dordrecht: Springer.