Tracking Justice Democratically\footnote{1}

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This paper explores some aspects and institutional implications of epistemic theories of democracy. I am particularly interested in the implications for the legitimacy, possibly democratic legitimacy, if any, of judicial review by international human rights courts and other human rights treaty bodies and tribunals (ICTs) of democratic legislation and policy making – henceforth called ‘Judicial Review’ /’JR.’

After a brief conceptual discussion in Section 1, Section 2 sketches a democratic theory that includes components of an epistemic justification for democratic majority rule: determining whether proposed policy and legislation bundles are just, and providing assurance thereof. [One possible section may elaborate on the case for multi-level or federal legal orders.] Section 3 considers the case(s) for judicial review, the scope such review should have – and some objections to such an account.

1 Epistemic democracy – Quasi-Pure Procedural Justice

The epistemic theory of democracy explored is a mixed form, with both epistemic and procedural elements (- i.e. a case where these are intertwined, cf Landemore this workshop), and with both deliberative and aggregative aspects.

The main features of this form of democracy are (Follesdal and Hix 2006):

1) Institutionally established procedures\footnote{2} 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.

This is not intended as a complete definition, but specifies some aspects relevant for the present discussions.

Note that this account allows that the domain over outcomes decided by majority rule is limited in various ways. In particular, my concern is with constitutional democracies with human rights constraints.

The epistemic account I explore is not a ‘pure’ form of epistemic theory that would claim A) “there is 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 (cf List and Goodin 2001), though it would have to be prepared to show
that B) under certain circumstances democratic procedures are better than alternative procedures at identifying such correct decisions.\(^3\)

Nor does it fit into a narrow definition of procedural democracy, e.g. according to which “democracy is not about tracking any "independent truth of the matter"; instead, 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, my emphasis\(^4\)).

### On Procedure Independence

The epistemic democratic theory I am interested in holds that the democratic - deliberative cum voting - procedure is necessary but not sufficient to identify the normatively legitimate outcome – i.e. the one which citizens have a moral obligation to comply with.

The general idea is that principles of justice and citizens with a well developed sense of justice underdetermine many aspects of the political and legal order, for at least two reasons:\(^5\) a) Many different institutions or policies may be compatible with the correct normative standards. For instance, freedom of religion and commitments to pluralism may allow both a sharp distinction between church and state, and various forms of weak ‘state churches’ as found in Europe. Even strongly egalitarian principles of distributive justice may allow several forms of public safety nets and constraints on income differentials. b) Normative principles of justice are not fine grained enough to establish a strict ordering of all distributions (where all distributions are related as ‘<’), but instead a partial ordering that allows indifference among alternative distributions (‘\(\leq\)’, cf Sen 1982). That is: several different distributions of goods or states may be equally just, and even completely just.

Theories that allow such underdetermination may draw on proceduralist, epistemic and other consequencialist roles for democratic decision making.

### 1 Proceduralist, Epistemic and other Reasons for Majoritarian Democracy

Democracy is one central good, of both intrinsic and instrumental value, but on this account democracy not the sole good. Thus one reason to value democracy may be the alleged instrumental role democracy plays in preserving certain human rights: cf Christiano 2011, who draws on several large-n studies\(^6\) to show that

“minimally egalitarian … democracies are normally necessary and reliable in protecting fundamental human rights of personal integrity [i.e. the protections of the right not to be tortured, the right not to be arbitrarily imprisoned, and the rights not to be murdered or disappeared by the state]” (Christiano 2011,175)

On this account states can be democratic in various senses, yet illegitimate, and particular institutions may be non-democratic yet legitimate components of a political and legal order with sufficient democratic features to warrant calling the order as a whole ‘democratic’\(^7\).

Consider cases of ‘ideal theory’, where by hypotheses the set of social institutions is just. The legislature and the executive are then faced with a domain of possible,
substantively just policy and legislative outcomes, bounded e.g. by human rights constraints and other requirements of distributive justice. Democratic decision making picks out one of these substantively just outcomes, and thereby makes it the morally binding one. A game theoretical account might spell this out in the form of a democratic decision procedure to resolve a Battle of the Sexes among substantively just outcomes. This would also seem to match Rawls’ description of cases of quasi-pure procedure:

on many questions of social and economic policy we must fall back upon a notion of quasi-pure procedural justice: laws and policies are just provided that they lie within the allowed range, and the legislature, in ways authorized by a just constitution, has in fact enacted them. This indeterminacy in the theory of justice is not in itself a defect. It is what we should expect.

(Rawls 1971, 210)

This also seems compatible with Beitz’ defense of majoritarian democracy for cases in which there is an independent standard for assessing a procedure's outcomes, but there are also non-outcome-oriented criteria of fairness pertaining to the procedure itself. (Beitz 1989, 47).

Note that 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 itself grants legitimacy to the result. So this account does not hold that standards of correctness are completely independent of procedures, as some proceduralist accounts (including ‘Fair Proceduralism’?) may hold. The standards are dependent on procedures firstly a) in that normative principles such as human rights, anti-domination, egalitarian, sufficiency-thresholds or other distributive standards etc may draw on hypothetical or ideal contracts/agreements, in the sense noted by inter alia Estlund, and exemplified by Rawls, Scanlon and others (possibly Cohen 1989, 32?). Secondly, b) the standards are somewhat but not fully independent (logically) from the actual procedure that gave rise to the outcome in question." (Estlund 1997, 180).

This is because the result of the actual democratic procedure is normatively binding only when it is within the domain of the substantively just.

What reasons are there to value such majoritarian procedures?

Proceduralist values

We may accord ‘intrinsic’ value to such procedures because they express various aspects of fair distribution of influence/power, such as a) the expression of equal respect and “a measure of confidence in that person’s moral capacities” (Waldron 1998, 341) b) by giving each an equal chance to contribute their view (Waldron, ref ), and/or c) that majority rule treats all persons’ preferences equally (Ackerman 1980 277-85 [check]) etc. Note that some such arguments may apply even if there is a large divergence between such equal votes and the resultant influence over selection of the outcome (Beitz 1989, Shapiro 2003 etc.).
Consequentialist reasons

There are also outcome-oriented reasons to value majority rule that are not specifically epistemic, due to the aggregative role of majoritarian voting. Brian Barry and others have argued that majority rule is a fair way of conflict resolution regarding distributing benefits and burdens of common decisions within certain constraints (Barry 1991: 1) gains and losses are equally valuable, i.e. the stakes are equal in weight – and presumably of ‘medium’ importance 2) the chances of being in the majority are equal - i.e. there are no permanent minorities, or voting weights are adjusted accordingly.

Note that several of these reasons to value majority rule regards voting as legitimately expressing self-oriented preferences. However, sometimes voting should be constrained by or otherwise be guided by a concern for the common good, especially for issues where basic justice and vital interests are at stake. On other occasions, voting according to one’s own interest may be unproblematic (Barry, 1991; Habermas, 1993, 63). Often the individual – or the political parties – should constrain the promotion of own interests out of a sense of justice. In such complex but common instances it becomes important but difficult to ascertain which outcomes (e.g. set of policies or pieces of legislation) are within the domain of substantively just. This is one valuable role served by epistemic contributions of democracy.

Epistemic values

What is the epistemic role of democratic processes in this account? That is, in what ways is this a process of discovering the correct outcomes? I venture that there are at least five valuable epistemic roles served by mechanisms of democratic politics, in discovering and assess the effectiveness, feasibility and justice of various policies:

A) Condorcet-based arguments [I have little to add to the learned other contributions here on this topic]
B) to discover and creatively specify policies and pieces of legislation, and to assess their feasibility and expected effects.
C) to determine whether various policies or pieces of legislation – or packages thereof – are in the domain of substantively just – even though the selection among those is not a matter of epistemic discovery, important for the many situations when one’s self-interested voting strategies must be pruned by concern for others.
D) To determine whether the scope conditions are satisfied for when majoritarian decisions with a rotating majority are fair.
E) To make such findings public knowledge. This is particularly important in order to establish and sustain ‘political obligations’ to comply with legislation and policies among citizens and other actors who are ‘contingent compliers’ in the sense familiar from game theoretical discussions of Assurance Games. 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 and D above are satisfied - and that most others, including the authorities, comply as well. Acting from such a sense of justice does not entail that
they are not also motivated by self-oriented interests, but that these self-oriented interests are constrained. So not only must justice be done, but the institutions as a whole must also give assurance to citizens so that they have reason to believe that they and others believe this to be the case, and comply. Democratic mechanisms – and judicial review – can give evidence of such facts.

In the following I sketch some of the important mechanisms of democratic rule that have these epistemic benefits. Note that the truth-tracking nature of democratic rule is not directly due to its ability to “mirror” (Cohen 1997, 79) or be otherwise similar to the ‘ideal deliberative procedure’ eg an “ideal speech situation” of outstanding philosophy seminars. Rather, this is due largely to the contestation among parties and the role of the opposition. A central challenge is thus to foster “genuine competition by decision-makers for the votes of those who are actually affected by their decisions” (Shapiro 2003, 7)

**Competitive Elections**

*Competitive elections are crucial to make policies and elected officials responsive to the preferences of citizens* (cf. Powell 2000). 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 public interest and public policies helps voters realize which choices may be made and give them some alternatives (Manin 1987: 338-68).

**Opposition**

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 quos (e.g. Dahl 1971). Institutions must thus provide incentives and arenas for oppositions to organize and articulate their positions. This is important to ensure that citizens understand the difference between the present government and the (democratic) political order (Shapiro 1996, Shapiro 2003). This 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.

**Both Deliberative and Aggregative**

Note that this democratic theory includes both deliberative and aggregative elements – it values both deliberation, and post-deliberative democratic elements. The insistence on the value of preference formation within deliberative democratic processes does not stem from a greatly contested philosophically esoteric version of deliberative democracy. *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 including deliberation
concerning the best means and objectives of policies are an inherent by-product of electoral competition. 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 they sometimes seem to 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; Schmitter 2000; 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 1998: 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). And we may have good reason to welcome human rights constraints and Judicial Review on legislatures to protect individuals and minorities, rather than exposing them to avoidable risks of unfortunate deliberations and resultant policy mistakes.

**Criticism considered**

One criticism against this and other epistemic accounts is that there is no procedure-independent standard of truth or correctness. In response [to be expanded] I note that some substantive components would seem arguably candidates, such as various human rights protecting vital interests against standard threats within complex modern states and within a system of somewhat sovereign states. Some such rights might be justified by ‘transcendental’ arguments, such as being necessary preconditions for speech, or for the minimal working of democratic institutions (cf Habermas, Cohen ref) – but I would also argue that there are further, substantive interests justified on at least equally solid grounds (cf Beitz 2009. [leaving aside important questions of conflicts among such rights, their threshold levels etc])

A version of this criticism merits further attention. Shapiro argues that

The mere statement of substantively democratic views suffices to make plain their problematic nature. How can Ely know what democratic pro-//cedures ought to have achieved had they not been corrupted by the Carolene problem? Whence the theory of just legislation against which Beitz will evaluate the results of voting procedures? How do Riker and Weingast know which system of property rights is just?... Writers like Ely and Beitz have nothing to say to those who are not attracted by the respective conceptions of 'equal concern and respect' and 'qualitative fairness,'.... " If, as I maintain, there is no criterion for justice that is entirely independent of what democracy generates, this should not be surprising. (Shapiro 2003, 65-66)

In response, note that the theory I lay out does not include epistemic claims of the
kind that requires or allows identification of the correct policies or pieces of legislation. Such identification is a matter of quasi-pure procedural justice.

This feature of the theory also helps rebut some criticisms against Judicial Review, which I turn to below.

[* A case for federalism/Multi-Level legal orders? – to be dropped or drastically expanded..]

Explore implications of this epistemic account for the existence and distributive justice of (quasi) federal political orders - exclude those from decision-making authority who are not affected by the decisions... - segment the democracy (Douglas Rae 1999: 165-92). – and reduce the deliberative/epistemic burdens of citizens ([Follesdal, 2006 #40840]).

– What are the limits on majoritarianism: epistemic overload gives one reason for federal/subsidiarity, mutual responsibilities offloaded by hr constraints...

This democratic theory allows different votes within federations, eg more weight to less populous member units, to alleviate power differentials that in turn affect the epistemic contributions of deliberation and voting. Defenses of disproportionate voting may rest on concerns that majority rule is inappropriate for populations divided along cultural, ethnic or other deep cleavages. In these societies individuals of large and small groups face different risks of being in the minority (Barry 1991, Follesdal 1998a, Lijphart 1999, McKay 2001, 146-47). Skewed voting weight may be important to secure equal non-interference, non-domination, enhanced capability sets, or a combination of these (Dobson 2004).

Overrepresentation of small states in coming-together federations may also be justified based on citizens’ interest in fulfilling their established, legitimate expectations, which requires representation in common decision making bodies.12

Such skewed voting weights may be less compatible with more ‘pure’ procedural theories [cf inter alia Cohen 2003.... To be expanded]

3 The possible legitimate roles of judicial review by ICTs

International judicial review of human rights may contribute in several ways to bolster legitimacy, including non-domination, as well as the quality of democratic decision making.13 Of concern here are some of the principled arguments for – and against - the practice of international judicial review of human rights, using the European Court of Human Rights (ECtHR) as a suitable case. The literature concerning judicial review reveals a long list of misgivings of such constraints on domestic democratic decision-making (Waldron 1998 etc; Bellamy 2007...). Some of the objections also hold against international judicial review, and some also against the ECtHR. This court 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.¹⁴ Nor does the ECtHR replace such laws with one of its own making, as some forms of ‘strong’ judicial review would.

The major normative issue here is what benefits such review bodies provide to democratic states on the basis of the democratic theory sketched above, when they return those decisions that are found to be incompatible with international human rights to democratic fora for re-decision. Do these practices provide benefits without imposing burdens of similar weight or urgency on anybody – compared to majoritarian democratic arrangements without such review?

1) A safety valve when democratic procedures fail, procedurally or epistemically

A central value of such JR is to serve as a corrective devise when democratic arrangements fail, be it due to their deliberative or aggregative aspects. JR may thus help ensure freedom of speech, fair voting procedures, real agenda competition among political parties (by restraining the influence of money…) etc. This is in line with the claims of defenders of JR such as John Hart Ely (Ely 1980) and others who (at least on some interpretations) defend judicial review to protect rights that in some broad sense are procedurally constitutive of democratic rule of the kind worth valuing.

One implication of this way to justify JR is that such constraints and bodies that maintain them may more easily be regarded as democratic though in some sense ‘anti-majoritarian’.

On the view I explore here, JR may in principle also serve as an independent umpire to ensure that the democratic decisions fall within the domain of just outcomes, at least as defined by international human rights norms or the ECHR. These roles render international courts and treaty bodies into safeguards to further prevent domination and bolster the kind of democratic procedures worth valuing.

2) Provide independent and hence somewhat more trustworthy information

These courts may also promote democratic deliberation by prompting more reliable information, through the reporting and fact finding requirements of signatory states and the findings of politically independent courts and treaty bodies. This information can in turn both feed into domestic democratic processes, enhancing the quality of deliberation, and bolster citizens’ confidence that the domestic democratic mechanisms are indeed fair procedures and truth-tracking in particular cases.

3) Provide assurance to citizens that institutions and the authorities are sufficiently competent and trustworthy

Insofar as the JR is done by independent and competent courts, the review mechanisms provides assurance to citizens that their government is indeed pursuing just policies. Such ‘costly signal’ by governments are important for other states within and outside federal arrangementst (Kydd 2005). For our purposes the central
value is to bolster the credibility of their commitments toward their own citizens understood as ‘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).

**How expansive mandate? Added protection against domination**

What are the substantive limits of judicial review? On the view I have sketched, JR may be justified as a safety valve not only to ensure ‘procedural’ aspects to ensure that democratic procedures remain ‘truth tracking’ but also some ‘substantive’ aspects of democratic rule – including the resulting policies or pieces of legislation.

Note that this is a somewhat broader role than some other accounts of human rights, including some that restrict human rights to ‘speech-act immanent obligations’ in some sense or other (Cf Baynes 2009 for review). It is also broader than Ian Shapiro’s defense, which I generally agree with. He defends judicial review by a

- a 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 (social?) legitimacy of courts “appropriately varies with the degree to which they act in democracy-sustaining ways” (Shapiro 2003, 7)

In addition, I suggest that JR may strike down other violations of principles of justice, such as human rights that have only a tenuous relationship to the maintenance of fair, truth tracking democratic procedures. Cases in point may include various constraints on inequalities, beyond what fair deliberative practices would seem to entail. – An example may be (?) striking down ‘separate but equal’ educational facilities such as Brown vs. Board of Education.

Such a broader mandate for JR than to improve democratic procedures may be legitimate, but are less obviously part of democratic procedures. I submit that several other authors who stress the instrumental value of democratic procedures may grant this broader role. Consider theories that hold as ultimate concerns to prevent domination or other forms of injustice, and that regard democratic rule as one means for such objectives. For such theories, it seems at least possible to consider whether non-democratic arrangements may also serve such purposes – their cost to the intrinsic values of democracy notwithstanding. Thus, for instance, Shapiro’s defense of judicial review as democracy enhancing, might be expanded to also be domination-preventing in other ways.

**Objections:**

**This cure against domination is worse than the disease**

Waldron and several others will be wary of the risk of domination by JR: the understandable fear that societies will suffer from the rule of lawyers. In response, note that the mechanism is one of soft review. Thus it does not suffer from the criticism of ‘what do they know’ about what the majority would have voted for
under more fair conditions – since the result of such review is at most that the
decisions are returned to the democratic bodies.

Secondly, while the risks of domination are real, the stakes are not as large as
with ‘strong’ review. Consider that the immediate effect of a ruling by the ECtHR is
that the offending state to take ‘general measures’ to prevent new violations. 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. A change from previous debates, however, will often be a
more keen awareness of the legally protected needs of particular groups – whose
concerns have previously been overlooked or overheard. This is hardly in conflict
with the ideals of democratic deliberation that seeks non-domination. Finally, we
may also insist on 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.

Thus the gains and risks of judicial review by the ECtHR are different from the
risks individuals are subject to from a legislature. Such weak judicial review does not
replace legislative discussions and decisions. Rather, such review serves notice that
legislatures and executives should reconsider, so that some objectionable laws are
eventually changed. Two types of risks stemming from two sorts of malfunction may
occur. ‘False positives’ occur when a court or treaty body fails to flag normatively
unacceptable policies or legislative acts. In these cases the vital interests of some
segment of the population are arguably violated, the existence of judicial review
notwithstanding. The worry about domination by courts would therefore mainly
seem to be concerned with the risks of ‘false negatives.’ These cases occur when a
court stops normatively unobjectionable policies or legislative acts. It is such false
negatives that are the main form of problematic domination. But the impact is not a
severe form of domination: The legislature must – in these cases unnecessarily -
revise its legislation to avoid the problems mistakenly characterized as such by the
court. This damage is clearly regrettable, but note that the impact of such mistakes is
different from the impact of legislation. 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.

**International Courts and treaty bodies are more distant, thus less able to
ascertain the relevant details**

A second objection stemming from the epistemic arguments for democracy is that
international judicial review reduces the chance of discovering the correct answers,
since the judges will be unfamiliar with the local mores, circumstances, traditions
and expectations that are crucial for assessment. JR runs against the ‘presumption for
insiders’ wisdom’ (Shapiro 2003, 3916).

In response, note firstly that the details of how such JR operates may mitigate
against such worries – which should at most be prima facie concerns anyway. In the
case of the ECtHR, for instance, two aspects are relevant. A) The court always
include- ex officio a judge from the particular state charged with a violation – so as to be informed about relevant background culture, traditions etc. B) the court often grants states a ‘margin of appreciation’, leaving it to the national judiciary to determine whether the treaty obligations have been met. This is in recognition that “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.”(Frette v France 2002, § 41).17

Secondly, the epistemic arguments for leaving the umpire task with domestic courts are not decisive. 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. 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 1961). Human rights constraints 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.

JR overturns democratic procedures thus anti-democratic – and hence illegitimate

There are at least two kinds of responses to the objection that JR overturns and replaces majoritarian decision procedures in undemocratic and hence illegitimate ways.

Firstly, this sort of JR may be regarded as one of the institutions that is non-democratic yet a legitimate component of a political and legal order with sufficient democratic features to warrant calling the order as a whole ‘democratic’.

Alternatively, JR may also be regarded as part of the democratic procedures of a state. This may be more generally accepted if the review is limited to the democracy-enhancing rights. But I would also hold that such bodies serve to ensure and give assurance that the democratic decisions are within the domain of just outcomes, and that the procedures are followed – so that the decisions create political obligations to comply. The bodies that monitor these domain borders may be regarded as components of democratic decision making - especially when they do not replace democratic procedures, but rather return the decision to the democratic process.

Conclusion – Contributions to a research agenda

I have sought to argue that international judicial review of human rights constraints seem 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 democratic, majority rule among equals.
Note that I have not defended a particular set of human rights norms, nor the particular courts and treaty bodies currently performing such review. To conclude [this draft], consider several important research topics that should be addressed in pursuit of these lines of reasoning:

Among the criticisms concerning the ECtHR – and other treaty bodies - that I do think merit further attention are the following, to foster the potential contributions to more legitimate democratic rule:18

1) which institutional mechanisms that are better at fostering the requisite public, political debate about the domain of just outcomes, including in particular human rights. Leaving aside worries about any division of power, we may ask whether there are domestic mechanisms such as parliamentary committees, ombudsmen etc., which may combine to provide equivalent protection, without the added risks, whatever they might be, of international bodies.

2) Does the deliberative and truth-tracking quality of debate by such courts and treaty bodies stand up to scrutiny, especially compared to domestic legislatures and courts, satisfy minimum standards?

3) Are there better ways to institutionalize the proper insulation from parties to the conflict, while maintaining sufficient commitment to the rights of the European Convention on Human Rights and other such conventions - And are there better ways of providing public assurance of this? In particular, how should the ‘Margin of Appreciation’ be explicated and applied, to reduce citizens’ subjection to judges’ discretion and domination.

How can the institutions framing party competition and aggregation best promote ‘truth tracking’ – including such issues as

4) regulation of party funding and their access to media

5) quotas and other measures to ensure cross-cutting representation within parties in deeply divided societies (Shapiro 2003, and contributions in Follesdal 2011, etc etc).

6) The allocation of voting weights within quasi-federal political orders.

[...]
References

One kind of implicat

A better explanation is that under normal circumstances it is the social decision procedure most likely to produce


For a better explanation, perhaps under normal circumstances it is the social decision procedure most likely to produce

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1 This primary issue is institutional design, not policy outcomes. Thus we cannot appeal only to present policy outcomes to assess democratic arrangements and their alternatives, but must also consider their tendency to reliably be sufficiently responsive over time, compared to alternative arrangements.

2 Under a given set of conditions majority rule maximizes the group's chances to pick the right answer (Landemore’s paper for this workshop); “(1) an independent standard of correct decisions—that is, an account of justice or of the common good that is independent of current consensus and the outcomes of votes; (2) a cognitive account of voting - that is, the view that voting expresses beliefs about what the correct policies are according to the independent standard, not personal preferences for policies; and (3) an account of decision making as a process of the adjustment of beliefs, adjustments that are undertaken in part in light of the evidence about the correct answer that is provided by the beliefs of others.” (Cohen 1986, 34), “Democratic legitimacy requires that the procedure can be held, in terms acceptable to all qualified points of view, to be epistemically the best (or close to it) among those that are better than random.” (Estlund 2007, 98 [ – check Christiano 2009] , and cf Anderson 2006, Coleman and Ferejohn 1986, List and Goodin 2001...

4 but cf Coleman and Ferejohn 1986, 7: “Proceduralism holds that what justifies a decision-making procedure is a necessary property of the procedure — one entailed by the definition of the procedure alone”.

5 This holds true for contractualist approaches concerned with non-rejectability, less so for maximizing consequentialist approaches – to be expanded if necessary.


7 Normative defenses of majoritarian decision making with (close to) universal franchise over other procedures may depend somewhat on one’s normative outlook, in that the focus may be on the reasons for such democratic procedures, or on the strongest objections to them compared to the alternatives – as an example of the latter, consider Beitz’ strategy, that

A better explanation is that under normal circumstances it is the social decision procedure most likely to produce outcomes to which no one will have good reason to object. (Beitz 1989, 66)

One kind of implication may be that the latter focuses more on avoiding harms than securing benefits – possibly supporting more attention to non-domination and related conceptions of the common good (Shapiro 2003, and Beitz 1989, 218: “political fairness is not a matter of maximizing some value for society at large or of arranging institutions so that the decisions reached are in any sense best overall. Instead, it requires avoiding certain forms of harm, so far as this is possible by means of institutional reform and can be accomplished without producing consequences that would be even more objectionable. In this sense, the practical force of political fairness is primarily negative -- though, obviously, avoiding harm can dictate affirmative as well as negative requirements of institutions.”


9 The account of a ‘common will’ or ‘general will’ need not be committed to a (comprehensive) ‘common will’ in ways inconsistent with Shapiro’s narrower account - interests shared by those concerned to avoid domination (Shapiro 2003).

10 So 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).

12 Cf Follesdal 1997.
13 I do not wish to defend the ECtHR or any other international court or treaty body; to the contrary, for several criticisms of the current modus operandi cf Follesdal 2009.
14 cf. Bernhardt 1994, 297
15 Thus, Waldron and others may well disagree with these arguments. He seems to that the justifiability of soft JR is limited to democracy promotion, not other forms of legitimacy promotion Waldron 1998, 343.
16 "a presumption for insiders' wisdom: we should assume that those skilled in a particular activity are more likely than anyone else to know how to do it well, and a fortiori, to know how much and what sorts of deliberation are most likely to enhance it. Insiders' wisdom is pertinent, we may say, to the pursuit of superordinate goods: the purposes for which people strive from which they derive meaning and value."
17 Leaving aside here whether the actual practice of granting such a margin also or rather reflects power differentials etc – addressed elsewhere.
18 cF Follesdal 2009.