
The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights

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Abstract

International Human Rights Courts (IHRCTs), such as the European Court of Human Rights (ECtHR), have come under increasing criticism as being incompatible with domestic judicial and legislative mechanisms for upholding rights. These domestic instruments are said to possess greater democratic legitimacy than international instruments do or could do. Within the UK this critique has led some prominent judges and politicians to propose withdrawing from the European Convention on Human Rights (ECHR). Legal cosmopolitans respond by denying the validity of this democratic critique. By contrast this article argues that such criticisms are defensible from a political constitutionalist perspective but that International Human Rights Conventions (IHRCTs) can nevertheless be understood in ways that meet them. To do so, IHRCT must be conceived as legislated for and controlled by an international association of democratic states, which authorizes IHRCTs and holds them accountable, limiting them to 'weak review'. The resulting model of IHRCT is that of a 'two level' political constitution. The ECHR is shown to largely accord with this model, which is argued to be both more plausible and desirable than a legal cosmopolitan model that sidelines democracy and advocates 'strong' review.

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1 Introduction: The Democratic Legitimacy of International Human Rights Conventions

A prime purpose of International Human Rights Conventions (IHRCs) is to encourage the signatory states to comply with a certain set of human rights standards. The International Human Rights Courts (IHRCTs) often charged with upholding these conventions, such as the European Court of Human Rights (ECtHR), increasingly claim the authority to oblige states to alter legislation in areas that have hitherto been regarded as exclusively domestic, such as the punishment of prisoners, membership of the armed forces, the nature of marriage, or the treatment of children by parents and schools, often overturning the judgments of domestic legislatures and constitutional courts in the process. Such decisions have been welcomed as enhancing both rights and, in a broader sense, democracy, in that they seek to advance equal concern and respect for the individuals and groups involved. Yet, they have also attracted growing criticism from a substantial number of legal and political actors, such as judges, politicians, and academics, from within established democracies. These critics argue that IHRCTs, such as the ECtHR, are not only less democratically legitimate than domestic legislative and judicial mechanisms for the promotion and protection of rights but also risk undermining these domestic instruments.¹

The objections to IHRCTs voiced by these critics are normative rather than strictly legal. After all, all well functioning democracies have signed up to at least some IHRC, thereby incurring the resulting legal obligations. The issue is whether they *should* have done so, or – in the case of those who claim that the circumstances that made it reasonable to do so in the past no longer obtain – should continue to remain parties to them. Four related democratic concerns underlie their criticisms.² The first criticism arises from the concern that these arrangements undermine domestic democracy because they involve citizens being subject to an authority that is not exclusively accountable to them. Call this the ‘exclusive democratic control’ objection. The second holds that these international arrangements suffer from a democratic deficit and are largely controlled by unaccountable elites. As a result, there is an absence of on-going democratic control. This forms the ‘global democratic deficit’ objection. The third argues that the transfer of powers from the state to such bodies tends to lack appropriate democratic authorization in the first place, and that executives have abused their powers in using a treaty to alter the competences of domestic constitutional structures and the related democratic and legal processes. This comprises the ‘constitutional transfer’ objection. Finally, the fourth contends that IHRCs can add to the discretionary power of the judiciary. Two worries are involved here. On the one hand, it is felt that the terms

¹ E.g., Lord Hoffmann, at one time the second most senior judge in the UK, ‘The Universality of Human Rights’, Judicial Studies Board Annual Lecture (19 Mar. 2009) and, most recently Lord Sumption, a Judge on the UK Supreme Court, ‘The Limits of Law’, the 27th Sultan Azlan Shah Lecture, Kuala Lumpur (20 Nov. 2013). For a similar view from the USA see J.A. Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States* (2005).

² Buchanan and Powell, ‘Survey Article: Constitutional Democracy and the Rule of International Law: Are they Compatible?’, 16(3) *J Political Philosophy* (2008) 326.

of IHRCs are so vague and abstract that both domestic judges and IHRCs can more or less choose when and in what ways to apply them to particular cases in potentially arbitrary ways. On the other hand, domestic judges may become inappropriately bound by IHRCt rulings made with regard to another jurisdiction that involves quite different circumstances. These concerns constitute the 'judicial discretion' objection.

These objections are not new. Andrew Moravcsik has shown how they figured prominently among the established European democracies at the time of the drafting of the European Convention on Human Rights (ECHR), making their initial support ambivalent at best.³ Yet, far from disappearing or diminishing in significance as the influence of such bodies has grown, they continue to attract considerable and ever more vocal support. With different emphases, the four objections have been aired both in countries with a tradition of 'legal' constitutionalism,⁴ such as the United States and Germany,⁵ and in those that have a 'political' constitutionalist tradition, such as the UK, many Commonwealth states, and the Nordic countries.⁶ Both versions of these criticisms serve to unsettle any easy assumption on the part of legal cosmopolitans that an adherence to constitutional democracy and human rights ought to translate automatically into enthusiasm for international human rights law.⁷

Legal constitutionalists regard the political system as being established through and constrained by a judicially protected legal constitution that operates as a 'higher' law, above the ordinary legislation issuing from the democratic process. In such systems, ordinary legislation can be disapplied by 'strong',⁸ rights-based, judicial review on the part of a constitutional court. By contrast, political constitutionalists contend that the very democratic mechanisms through which the people authorize their political and legal representatives and hold them to account comprise the constitution of a polity. They prioritize a parliamentary model of rights review and a 'weak' form of rights-based judicial review, in which a declaration of incompatibility by the appropriate court is either advisory or can be overridden or put to one side by the legislature.

Legal constitutionalists may seem more surprising critics of IHRCs than political constitutionalists. They might be expected to be natural supporters of a cosmopolitan legal constitutionalist framework potentially encompassing all democratic regimes.⁹ Yet, those legal constitutionalists who raise the four objections do so for reasons they share with political constitutionalists, albeit in a more moderate form: namely, that

³ Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', 54 *Int'l Org* (2000) 217.

⁴ On the legal/political constitutionalism distinction see R. Bellamy, *Political Constitutionalism* (2007), at 2–7.

⁵ E.g., Bradley and Goldsmith, 'UN Human Rights Standards and US Law: The Current Illegitimacy of International Human Rights', 66 *Fordham L Rev* (1997) 319.

⁶ E.g., see the analysis of recent criticisms of such bodies in Nordic countries in Follesdal and Wind, 'Nordic Reluctance towards Judicial Review under Siege', 27.2, Special Issue, *Nordic J Hum Rts* (2009) 131.

⁷ E.g., Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *EJIL* (2004) 907.

⁸ For the strong/weak judicial review distinction see Waldron, 'The Core Case against Judicial Review', 115 *Yale Lj* (2006) 1346, at 1354–1355.

⁹ For an example of this assumption on the part of a prominent legal constitutionalist see Dworkin, 'A New Philosophy for International Law', 41 *Phil & Pub Aff* (2013) 2.

domestic constitutions and the courts that uphold them enjoy a higher degree of democratic authorization and accountability than international arrangements currently do and possibly ever could do. According to this line of argument, national legal constitutions articulate the sovereign will of the people as a whole, which national courts are duty bound to uphold, tending to follow sustained national popular opinion as a result.¹⁰ Political constitutionalists simply hold a more radical version of this thesis, for they regard the normal processes of democratic authorization and accountability as the means whereby a people both constitutes itself and imposes a constitutional check on the way it is ruled and rules itself.¹¹ Underlying both positions is the belief that no objective epistemology can ground the ontological determinations by courts regarding even basic human rights.¹² The legitimacy of such judgments, therefore, must rest on their concurrence with the democratically established views of those to whom they are to apply, be it through their consistency with a popularly endorsed constitution, duly enacted legislation, or some mixture of the two.

This article deals predominantly with the political constitutionalist version of the four objections, referring to parallel legal constitutionalist arguments only occasionally. Political constitutionalism articulates the democratic concerns underlying the objections to IHRCs and IHRCTs in their starkest form. If these instruments can be reconciled with political constitutionalism, they can also be rendered consistent with the legal constitutionalist versions of these same criticisms. Those making the four objections from a broadly political constitutionalist perspective, such as the current UK Home Secretary, Theresa May, tend to assume they render international instruments such as the ECHR incompatible with domestic constitutional and democratic arrangements, and advocate withdrawal from them as a result.¹³ Their critics have tended to accept this assumption and consequently question the coherence and validity of the objections on legal cosmopolitan grounds.¹⁴ What follows challenges both these positions. I shall argue that political constitutionalism provides a coherent account of the four objections yet need not lead to negative conclusions regarding IHRCs. Rather, an account of their rationale and operation can be given that not only satisfies the four objections but also largely accords with the nature of the ECHR.

Beyond the parochial significance of such a demonstration within the British debate, this exercise yields a different understanding of the character of IHRCs from that associated with legal cosmopolitans. They assume IHRCs must involve a form of legal constitutionalism in which strong rights-based judicial review by an IHRCT provides a justified and necessary constraint on both popular and state sovereignty.¹⁵

¹⁰ E.g., the account of the US constitution in B. Ackerman, *We the People: Foundations* (1991).

¹¹ See J. Waldron, *Law and Disagreement* (1999), and Bellamy, *supra* note 4.

¹² E.g., Waldron, *supra* note 11, at ch. 8.

¹³ For an overview of the objections see M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (2011) and the analysis of the debate in the House of Commons following the ECHR judgment in App. No. 74025/01, *Hirst v. United Kingdom* (No. 2), Grand Chamber Judgment 06/10/2005 on Prisoners' Voting Rights in Nicol, 'Legitimacy of the Commons Debate on Prisoner Voting', *Public L* (2011) 681.

¹⁴ E.g., O'Connell, *Human Rights and the UK Constitution* (2012).

¹⁵ E.g., Pogge, *World Poverty and Human Rights* (2008), at 53 and 177; A. Buchanan, *Justice, Legitimacy and Self-Determination* (2003).

As we shall see, though, not only are some versions of legal constitutionalism incompatible with such a legal cosmopolitanism, but also IHRCs can be conceived in quite different terms as products of popular and state sovereignty that are necessarily and justifiably under the joint and equal control of sovereign democratic peoples as part of an international political constitution. Indeed, I shall argue that in the absence of a global *demos* and democratic system, which even if possible prove normatively problematic, such an international political constitution may be the only way to render both legal and political constitutionalism at the domestic level consistent with IHRCs and IHRCTs.

The argument proceeds in five steps. Step one briefly outlines the political constitutionalist position, and shows how it provides a constitutional rationale for the 'exclusive democratic control' and 'judicial discretion' objections and yet is compatible at the domestic level with a legislative bill of rights and weak judicial review by an independent judiciary operating within politically dependent courts. To meet these two objections, therefore, an IHRC and associated IHRCT must possess similar qualities to their respective domestic counterparts and be likewise under the democratic control of those subject to them, either directly or via their elected representatives. To achieve this result, it appears necessary to respond to the 'global democratic deficit' and 'constitutional transfer' objections as well. Step two explores whether a popularly endorsed global democratic system could meet all four objections, and argues that while theoretically it could do so it has practical and normative shortcomings. Step three offers an alternative route. It starts by suggesting why political constitutionalists might regard IHRCs and IHRCTs as necessary to preserve rather than undermine exclusive democratic control in an interconnected world. I then show how all four objections could be met via an IHRC and IHRCT that are embedded within an international association of democratic states and under their equal on-going democratic control. Step four shows how such a system largely accords with the ECHR. Step five concludes by suggesting a political constitutionalist approach to IHRCs involving weak review by IHRCTs has few disadvantages and many advantages with regard to rights protection compared with a cosmopolitan legal constitutionalist position incorporating strong review.

2 Political Constitutionalism: Democracy, Human Rights and Weak Judicial Review

Political constitutionalism began as a descriptive account of the Westminster model of democracy and its relationship to public law,¹⁶ but has recently been generalized by normative legal and political theorists to offer a democratic theory of constitutionalism.¹⁷ I will not defend political constitutionalism here.¹⁸ Rather, the aim is to show

¹⁶ Griffith, 'The Political Constitution', 42 *MLR* (1979) 1.

¹⁷ E.g., Waldron, *supra* note 11; Bellamy, *supra* note 4.

¹⁸ I do so in *ibid.* For a recent survey see M. Goldoni and C. McCorkindale (eds), Special Issue on 'Political Constitutions', 14 *German LJ* (2013), issue no. 12.

how – *pace* the criticism of legal cosmopolitans – a coherent rationale for the ‘exclusive democratic control’ and ‘judicial discretion’ objections can be provided from this perspective. Nevertheless, that does not mean political constitutionalism is opposed to rights-based judicial review in any form. It proves compatible with a legislative bill of rights that is upheld by a democratically dependent court. The challenge, explored in subsequent sections, is to see if IHRCs and IHRCts respectively can possess analogous qualities.

A *Political Constitutionalism*

Political constitutionalists contend that a democratic political system, involving regular elections for the legislature and executive between competing parties on the basis of one person, one vote and majority rule, offers the most legitimate and effective mechanism for constraining governments so they rule in the interests of the governed, including by ensuring they protect and promote rights. Two arguments underlie this claim.¹⁹ First, that rights are matters of reasonable disagreement and, secondly, that the most appropriate way to show citizens equal respect and concern in resolving these disagreements is via a democratic system that treats their different views and interests impartially and equitably by giving them an equal influence in any collective decision, including those concerning rights. I shall outline both these arguments and then explore their implications for the standard legal mechanisms for rights protection via a judicially protected bill of rights. As we shall see, the political constitutionalist insists that these mechanisms must lie within rather than outside the normal democratic system. The challenge with regard to IHRCs and IHRCts is whether that is possible at the international level.

According to the first argument, rights are matters of what John Rawls termed ‘reasonable disagreement’ because, contrary to his own belief, they are subject to the various limitations of practical reasoning he associated with ‘the fact of pluralism’.²⁰ Such factors as people’s different life experiences, the vagueness of general concepts of rights, the diverse conceptions of them to which different theories give rise, the variety of normative considerations by which we might weigh rights against competing rights claims or other moral considerations, or the difficulties that often attend the application of our theories and conceptions of rights to concrete cases can all lead to reasoned and conscientious judgments about rights to diverge. Acknowledging such divergence need not imply either scepticism about rights or relativism. Merely, that even such broadly supported basic rights as those that appear in IHRCs can be subject to reasonable disagreement with regard to the nature of their justification, the policies that might best uphold them, and their relationship to other rights and values – both in general and in the circumstances of a particular case. After all, these same factors regularly lead the members of both domestic and international courts to diverge in their opinions over the status of a given right and the reasons and ways it may or may not be judged to have been infringed.

¹⁹ See Waldron, *supra* note 8.

²⁰ J. Rawls, *Political Liberalism* (1993), at 55–56.

The second argument enters here. When courts divide in their opinions they reach agreement on the basis of majority rule. Political constitutionalists argue that to the extent that these judicial disagreements reflect differences of opinion among the population as a whole, their resolution should ultimately rest with legislatures that are elected and decide themselves on the basis of majority rule. The complexity and openness of modern societies render even the most conscientious and professional politician, official, or judge cognitively partial and fallible in their judgments, inevitably favouring positions that reflect their own experience and preferences. Given this context of biased and possibly mistaken disagreement, democracy offers an impartial mechanism for citizens to protect and promote their interests in an equitable manner.²¹ The democratic process promotes equal respect of our different views of rights by giving each person a vote on the issue and employing a fair procedure, majority rule, which is neutral between them, to decide which view should prevail. This process also promotes equality of concern. Voting takes place in the context of an election between competing parties, allowing policies to be contested and rulers to be held to account for their failures – including a failure to uphold rights. Within pluralist societies, majorities have to be constructed by building a coalition of minorities. If social divisions are cross-cutting, then most minorities will have sufficient electoral clout to ensure that their views are not ignored altogether. Not being ignored, though, is different from getting your own way. Parties win elections by proposing a programme of government with wide appeal to different minorities. Such programmes bring together people's views on a variety of rights, weighing them according to the relative importance they have for each citizen so as to settle on a collective view of the balance of rights within the community as a whole. When electoral competition occurs within one dimension, such as left-right, as is the case within most mature democracies, parties tend to converge on the median voter, which represents the Condorcet winner or those policies that achieve the highest ranking among the population as a whole. Electoral accountability leads the legislature to by and large respond to these views when debating particular policies. As with a legal process, the democratic process gives rights due consideration, but that does not mean all come away satisfied. Many will not, but they may not deserve to do so if they have been unable to convince sufficient fellow citizens that their views and preferences should prevail over those of others.

Legal constitutionalists are apt to observe that democracy is 'not just majority rule', while some rights are even 'anti-democratic'.²² Both remarks arise from the fact that a democratic majority might vote to suppress a minority's rights. However, political constitutionalists retort that to the extent that rights are not privileges of particular groups but the universal entitlements of all individuals, then majority rule actively promotes rights by challenging the domination of the many by the few and improving the likelihood of passing policies that reflect public rather than particular interests.²³ Historically, the rule of undemocratic minorities has been far more of a danger

²¹ T. Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (2008).

²² Buchanan and Powell, *supra* note 2, at 330.

²³ Christiano, 'An Instrumental Argument for a Human Right to Democracy', 39 *Phil and Pub Aff* (2011) 142.

to human rights than that of democratic majorities. Meanwhile, the dangers of a potential ‘tyranny of the majority’ are assuaged by the aforementioned ways in which the electoral process provides regular opportunities for contestation and the need to recruit or accommodate minorities to win or exercise power.

According to the political constitutionalist, the standard features of the normal democratic process possess important constitutional properties.²⁴ On the one hand, party competition institutionalizes a balance of power between government and opposition, rulers and ruled. On the other hand, it provides an incentive to public reasoning, whereby those who rule or aspire to do so must address the commonly avowable interests of the public. Support for a particular group will need to be justified in public terms: that tax breaks for high earners, say, help the economy as a whole and so benefit the general population, or that special rights for individuals in a given condition or profession can be justified on the basis of principles that apply equally to all or serve some public good. As a result, the dangers of arbitrary rule are diminished.

Of course, precisely these claims are made by legal constitutionalists for the role of courts and rights-based judicial review. Yet, from the political constitutionalist’s perspective these legal mechanisms can be sources of arbitrary power unless they are themselves accountable to the public through some form of democratic process. Otherwise, the risk arises that the judicial determination of rights will simply reflect the views of those groups that have captured the judicial system and have the resources to exploit it. To guard against this possibility, political constitutionalists advocate placing the legal process of rights based judicial review within the democratic process of legislative rights review rather than the other way round, as legal constitutionalists generally propose. Nevertheless, as we saw, some legal constitutionalists accept a weaker version of this reasoning. They see the legal process as ultimately grounded in, and constrained by, exceptional moments of constitutional democratic politics, even if they regard courts as legitimately overseeing the normal democratic politics of legislation. By contrast, political constitutionalists regard even the democratically authorized power of a constitutional court to strike down legislation as offending the ‘right of rights’ of citizens to play an equal part in the determination of their rights.²⁵

It might be objected that democracy itself presupposes rights, and that this ‘right of rights’ needs a due democratic process to be judicially protected, even if substantive decisions regarding the content of other rights remain a matter for that process itself. Political constitutionalists retort that the procedural-substantive distinction proves impossible to maintain. Not only are process rights as controversial as substantive rights, but also they are often implicated in most substantive decisions. For example, Habermas claims that ‘a constitutional court guided by a proceduralist understanding of the constitution does not have to draw on its legitimation credit’; it can simply adjudicate on whether democratic decisions respect the ‘logic of argumentation’.²⁶ Yet, he contends a ‘consistent proceduralist understanding of the constitution relies on the

²⁴ Bellamy, *supra* note 4, at ch. 6.

²⁵ Waldron, *supra* note 11.

²⁶ J. Habermas, *Between Facts and Norms* (1996), at 279.

intrinsically rational character of a democratic process that grounds the presumption of rational outcomes'.²⁷ This argument makes the test of the rationality and appropriateness of a given democratic procedure whether it produces rational substantive outcomes, thereby undermining the procedural-substantive distinction. As with other rights, political constitutionalists contend that rights related to the democratic process need to be claimed and reformed within existing, normal democratic politics. After all, it was through such mechanisms that workers and women gained the right to vote in the United Kingdom, that forms of proportional representation were introduced in New Zealand and in the UK for regional and European elections, and so on. Those legal constitutionalists who regard a constitutional referendum as necessary to legitimize a constitution likewise recognize the possibility and justification for democracy to pull itself up by its own boot straps, albeit through exceptional constitutional rather than normal politics.

B Independent Judges within a Democratically Dependent Judiciary: A Legislative Bill of Rights and Weak Review

Political constitutionalists support exclusive democratic control and are wary of judicial discretion, but they do not oppose courts *per se*. They acknowledge that courts play an essential role in ensuring the law is applied impartially and equitably to individual cases. However, they argue that to ensure that this is the case the judicial system cannot be entirely independent from the democratic system. The judicial process and the judiciary themselves need to possess certain democratic qualities, and judicial discretion be constrained by deference to democratic legislation.

The judicial system needs to possess democratic qualities to ensure that access to justice is open equally to all, rather than the preserve of the wealthy or the well placed, and the judiciary do not form a self-selecting caste or an entrenched part of the ruling class, and hence are predisposed to siding with the privileged and powerful against the unprivileged and powerless. To be followable and identified with, the law must in certain crucial respects also be the 'people's' law rather than merely 'lawyer's' law. As a result, the judiciary need to be in touch with the changing social circumstances or mores of those whom their judgments affect if they are not to make arcane, arbitrary, or unreasonable demands of citizens.

Political constitutionalists argue that the legal and judicial system only comes to possess these qualities through being open to social and political pressures towards equality of access and membership. Only then are all likely to be treated as equal under the law. Law must operate within a democratic context, therefore, rather than being isolated entirely from democratic pressures, as legal constitutionalists sometimes propose. Though electing judges would impugn their independence and impartiality, as well as undermine the division of labour between the legislative and judicial branches, political constitutionalists believe the system for selecting judges should be open and politically criticizable should it fail to recruit in ways that are broadly representative of the political community, while judicial decisions must likewise not be isolated from

²⁷ *Ibid.*, at 285.

public discussion and critique. Such pressures tend to exist even in legal constitutionalist regimes. For example, in the United States they have led Supreme Court decisions broadly to follow sustained, national, majority opinion.²⁸

So far as judicial discretion is concerned, political constitutionalists contend that recognizing democratic processes as the source of law plays an important role in upholding the rule of law.²⁹ They regard a democratic process as necessary to ensure laws are framed in ways that treat all equitably by judging like cases alike and unlike cases in ways that are relevantly different. As we saw, they maintain that this process encourages elected lawmakers to take into account the various views and interests of citizens in ways that accord them equal respect and concern. Therefore, it is important that court judgments defer to the legislature rather than engaging in constructive interpretations of the legislative implications of constitutional principles. Too much judicial discretion in the application of the law risks appearing arbitrary as to both the source of law, which may then seem to reflect individual whim rather than a recognized public process, and its content, which may fail to give equal consideration to all relevant factors through being limited to those persons and arguments that have legal standing in the case at hand. Again, certain legal constitutionalists accept a soft form of this argument in regarding the constitution as a ‘higher’ law that the people have given themselves via a democratic process that is binding on judges as well as governments and citizens.

None of the above should be taken as suggesting that political constitutionalists do not think that rights are particularly important and merit special consideration or that courts should play no role in their protection. Rather, they believe that the specialness of rights can be indicated by the special way they are treated by politicians rather than through their not being handled by politicians at all, and that courts should be a part of, and ultimately defer to, this special political process. These two conditions can be met by having a legislative process of rights review that is supplemented by ‘weak’ review through the courts.

For example, the UK Human Rights Act (HRA) combines both these elements. Rather than an entrenched Charter above the normal political process, the HRA is an ordinary statute that incorporates the ECHR into domestic law but which can be repealed or amended like any other piece of legislation. The Act established particularly rigorous procedures for ensuring all other legislation takes rights into consideration.³⁰ Under section 19 of the HRA, Ministers must accompany all legislative proposals with a declaration of compatibility with the Act, or if necessary explain why they believe it is justified in not being compatible. These declarations are informed by a scrutiny of the legislation by a special committee of both Houses of Parliament, the Joint Committee on Human Rights (JCHR). The JCHR reports inform subsequent debate on the legislation in Parliament and Explanatory Notes on rights compliance are now published with every government bill. Other jurisdictions

²⁸ Dahl, ‘Decision-making in a Democracy: The Supreme Court as National Policymaker’, 6 *J Public L* (1957) 279.

²⁹ Waldron, ‘Can There Be a Democratic Jurisprudence?’, 58 *Emory LJ* (2008–2009) 675.

³⁰ Bellamy, *supra* note 4.

which prioritize parliamentary over judicial scrutiny of rights, such as the Nordic and many former Commonwealth countries, typically adopt similarly rigorous political procedures.³¹ At the same time, section 3 of the HRA allows weak review by the courts,³² whereby they can declare a measure or law incompatible with a bill of rights, at least so far as it applies to a given case, with the final decision on whether to repeal or amend the legislation remaining the prerogative of the democratically elected legislature.

The rationale for weak review follows from the two elements underlying the political constitutionalist case itself: the possibility for reasonable disagreement about rights and the fallibility of any decision about them, and the need for the equal consideration of the views and interests of citizens. Weak review provides for contestatory 'editorial' democracy rather than 'authorial' democracy.³³ It invites legislatures to think again. That can be justified if a legal challenge reveals inconsistencies between legislative acts, unearths unfortunate consequences not anticipated when framing the legislation, or when certain minorities prove so 'discreet and isolated' that their concerns fail to gain a hearing through democratic politics.

The capacity of courts to uncover such problems derives from their focus on individual cases. As a result, they can draw attention to those circumstances when legislation and policies might produce adverse effects for certain categories of persons that legislatures, which cannot explore or anticipate every possibility and are chiefly concerned with general rather than particular considerations, may have overlooked or underestimated. However, political constitutionalists contend that this same feature of courts makes them poorly suited for considering rights in the round and the ways the gains for rights protection overall might need to be balanced against such individual cases. Government action may sometimes curb given rights of certain groups to promote the more equal or fuller enjoyment of the full range of rights by other groups. For example, governments may wish to regulate tobacco advertising, thereby limiting freedom of speech, for reasons of public health, or to constrain freedom of contract and exchange to protect minimum employment standards or to secure certain public goods. The legal and individual focus may unduly narrow the range of moral and other considerations that need to be taken into account, and over-emphasize the danger of government power to rights.³⁴ Courts may be jurisdictionally constrained from considering, and in any case have less access to, the multifarious concerns of millions of individuals that legislatures need to respond to. Consequently, it remains important for the democratic legitimacy of such judicial opinions that the final word lies with the

³¹ See T. Campbell *et al.*, *The Legal Protection of Rights: Sceptical Essays* (2011), Pt 2 for a discussion of different parliamentary systems for rights protection and Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review', 35 *British J Political Science* (2005) 235 on the Commonwealth model.

³² Tushnet, 'Alternative forms of Judicial Review', 101 *Michigan L Rev* (2003) 2781, at 2782–2786.

³³ These terms are taken from Pettit, 'Democracy: Electoral and Contestatory', in I. Shapiro and S. Macedo (eds), *Designing Democratic Institutions* (2000), at 105.

³⁴ M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2007).

legislature. The purpose of such review is to enhance the democratic consideration of rights, not to substitute for it.

While the HRA's provisions for legislative scrutiny of rights and weak review provide a model of how the judicial and democratic protection of rights might be combined in ways consistent with political constitutionalism, two features of the Act have come in for increasing criticism. These are the obligation of the British courts to take into account the jurisprudence of the ECtR (section 2(1)) and the fast tracking to the ECtHR of those cases that give rise to a declaration of incompatibility in the domestic courts and find no legislative redress (section 10). I now turn to the issue of whether political constitutionalists must regard IHRCs and IHRCts as falling foul of the four objections.

3 A Global Political Constitution?

The foregoing analysis showed how political constitutionalists believe that the determination of any collective policy on rights must be under the equal control of those to whom they are to apply, at least indirectly via their elected representatives. Courts may play a part in ensuring that all interests have been equally considered, but the final say must rest with the democratic legislature and ultimately the people themselves. To be compatible with political constitutionalism, therefore, IHRCs and IHRCts must be: (1) products of and controlled by an international system of normal democracy grounded in and attuned to the domestic systems of the contracting states; (2) offer international versions of a legislative bill of rights; and (3) only involve the exercise of 'weak' review.

Consequently, the fourth, 'judicial discretion', objection to IHRCts can only be met by overcoming the first, 'exclusive democratic control', objection. Meeting these two objections at the international level would seem to require also meeting the second, global democratic deficit, objection, and the third, constitutional transfer, objection, by creating a global or, in the European and similar cases, regional *demos* and a corresponding global or regional political and constitutional order, with which all *demos* merge via a series of referenda.³⁵ Even supposing such a global democratic system was both feasible and desirable, its establishment would still pose a significant contingent barrier to the democratic legitimacy of IHRCts for the foreseeable future. Yet the feasibility and desirability of such global or regional democratic systems can also be doubted, since they are unlikely to possess the constitutional qualities political and legal constitutionalists associate with democracy.

The political constitutionalist case rests on the democratic process being able to promote the collective interests of those involved in a public and equal way. Unless there is a shared public sphere and reasonably clear lines of authorization and accountability, on the one hand, and a roughly equal stake in the decisions being made and sufficient shared values and cross-cutting cleavages to overcome the problem of persistent

³⁵ Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society', 15 *Constellations* (2008) 444.

minorities, on the other, neither of these qualities is likely to obtain.³⁶ A global *demos* will in all probability be too culturally and socially differentiated for either of these ontological prerequisites for fair democratic decision-making to exist.³⁷ Moreover, the homogenization needed to overcome these difficulties would itself involve a loss of value in denying those existing peoples, which do possess shared political cultures and histories, the capacity to live according to their various different and not always compatible norms.

Many legal constitutionalists have similar reservations about such schemes. Some legal cosmopolitans have supposed it would be sufficient from a legal constitutionalist perspective to meet the third, constitutional transfer, objection and have a constitutional referendum transferring the requisite authority to an IHRCt.³⁸ Yet, as the German Federal Constitutional Court's *Maastricht* and *Lisbon* decisions indicate,³⁹ that would not satisfy all such legal constitutionalist concerns. In these judgments, the Court argued that its legitimacy lay in representing a German *demos* that is capable of expressing itself through an associated national democratic system. As such, the Court could only hand over that responsibility to the Court of Justice of the European Union (CJEU) in circumstances where the CJEU was similarly responsible to a European *demos*. Only then would it be appropriate to ask the German people if they were prepared to join such an arrangement. Until that time it might be possible for a state to confer certain competences on an international body, but the responsibility for ensuring it operated legitimately remained with the relevant domestic institutions, not least the German Court itself.⁴⁰ Thus, it would appear that for legal as well as political constitutionalists the legitimacy of IHRCts will rest for the foreseeable future on their being placed under the *demos*-cratic control of the various *demos* that acknowledge their authority,⁴¹ at least indirectly via their democratically authorized and accountable political and legal representatives. It remains to be seen how far, if at all, this can be achieved.

4 International Courts and a *Demos*-cratic Association of Democratic States

The last two sections indicated that for political and many legal constitutionalists a democratically legitimate system of international human rights protection will need to be subject to on-going democratic political control through the ordinary legislative process. Such control must apply to the content of the IHRC, the running of the legal

³⁶ Christiano, 'Democratic Legitimacy and International Institutions', in S. Besson, and J. Tasioulis (eds), *The Philosophy of International Law* (2010), at 119.

³⁷ Miller, 'Democracy's Domain', 37 *Phil and Pub Aff* (2009) 201.

³⁸ Buchanan and Powell, *supra* note 2.

³⁹ *Brunner v. European Union Treaty*, 12 Oct. 1993, BVerfGE 89, 155, [1994]; *German Lisbon Decision*, 30 June 2009, BVerfG, 2 be 2/08.

⁴⁰ *Ibid.*, at para. 301. I appreciate these judgments are controversial, and the Court's bark proved louder than its bite, given that it affirmed the German constitution's openness to international law. Here it suffices to note that legal constitutionalists could raise this objection. See P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nations State* (2010), at 24.

⁴¹ For the notion of *demos*cracy see Nicolaïdis, 'European *Demos*cracy and its Crisis', 51 *JCMS* (2013) 351.

system charged with its interpretation, and to the competences and – in the ultimate instance – to the decisions of the IHRcT. The challenge, addressed in this section, is to see whether that is possible without assuming a regional or global *demos* and democratic system that might exercise that control.

The first, exclusive democratic control, objection provides a key barrier in this regard. It suggests that the only democratically legitimate international order would be a world of separate and independent democratic states. However, this picture of autarkic democratic states is unrealistic given the current reality of interdependence, a condition on which a great deal of our economic well-being depends. In these circumstances, decisions in one state can have important consequences for those in another state, undermining exclusive democratic control. Creating international regimes, such as IHRCs, is one way to respond to this situation. In certain respects, they involve a weakening of exclusive democratic control. But in other respects, as I shall show, these regimes can be conceived in ways that seek to bolster it and to render it as compatible with an interconnected world as possible.

Three issues might motivate democratic states to establish IHRCs and IHRcTs. All three stem from a commitment to upholding the ‘right of rights’ of peoples (and hence of their citizens) to live under democratic regimes. First, states may support such mechanisms as ways of promoting democratization. The move to judicialization generally occurs when hegemonic elites fear their political opponents may overturn their policies.⁴² The governments of new democracies can rationally see such international commitments as helping to lock in the domestic *status quo* against their non-democratic opponents. Mature democracies may doubt the utility or legitimacy of such arrangements for themselves but regard them as helpful for less established democracies. Support for this function can be regarded as a corollary of the political constitutionalist belief that rights are best protected through democracy and because of the threat that non-democratic or unstable democratic regimes may pose to democracies.⁴³

Secondly, even if all states are democratic, democratic states have an incentive to ensure that their ability to operate in a democratic manner is not undermined by the decisions of other states, democratic or otherwise. Therefore, they have reason to create institutions to guarantee that democracies treat each other with equal concern and respect.⁴⁴ Examples include trade negotiations, particularly concerning the exploitation of another country’s natural resources, and the promotion of global public goods such as combating climate change and protecting the environment more generally. These arguments also extend to establishing mechanisms to ensure that trans- and multi-national corporations and organizations respect democratic standards and decision-making.

Both the first and second issues can also be related to protecting the stateless and those seeking entry to democratic states. On the one hand, such persons lack access to the democratic process and, since democratic states are committed to spreading

⁴² R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

⁴³ Moravcsik, *supra* note 3, at 243–246.

⁴⁴ Pettit, ‘Legitimate International Institutions: A Neo-Republican Perspective’, in Besson and Tasioulis, *supra* note 36, at 139, 152–153.

democracy, the reasoning underlying the first issue also extends to them. On the other hand, democratic states might fear that unless the burden of admitting them is shared equitably, the democratic quality of certain states could suffer, thereby invoking the second issue. As a result, states have an interest in securing common, democracy-friendly, policies in this area.

Finally, even mature democracies can acknowledge that no democratic process is perfect. So long as the imperfections of any judicial process can also be corrected by a democratic mechanism, then providing a contestatory channel at the international level may allow lessons to be learned from other democracies and certain unfounded parochial biases and prejudices to be challenged.

These three issues can be linked to three criteria for the governance of the international mechanisms that might be established to address them so as to ensure that these in their turn remain consistent with political constitutionalist assumptions.⁴⁵

First, these courts and the international arrangements of which they form a part must promote and be compatible with the possibility for all individuals to live in legitimate states that possess democratic systems where collective decisions are made in ways that show them equal respect and concern through being under their shared and equal control. Secondly, these international mechanisms should be under the equal control of such states. If the legitimacy of democratic states stems from them offering reasonably effective mechanisms for the identification and equal advancement of the interests of their citizens, then the legitimacy of international systems stems from them doing likewise through being in their turn under the shared and equal control of the signatory states. Thirdly, membership of such international systems should be voluntary. Not all states will have an equal stake in collective arrangements on a given issue, and many will not have equal bargaining power. Voluntary arrangements allow states to tailor their international commitments to the interests of their populations and ideally to negotiate the terms of their adherence accordingly.

The basic institutional model of the international order stemming from these issues and criteria is that of a voluntary and fair association among democratic states. Such an association offers a 'two level' political constitution,⁴⁶ whereby a political constitution at the international level renders an IHRC and IHRCt subject to the democratic authorization and accountability of the representatives of the contracting democratic states, who are in their turn democratically authorized and accountable to those they represent through a political constitution at the domestic level. A number of recommendations follow from this account as to the competences and scope of judicial review by IHRCts, on the one hand, and the democratic organization of IHRCs, on the other. I shall take each in order below.

With regard to the competences and scope of IHRCts four remarks are in order. First, as Thomas Christiano has noted,⁴⁷ this model grounds certain international *jus cogens* norms concerning the performance of agreements duly made and against slavery, genocide and aggressive war, since these norms are prerequisites of, or internal to,

⁴⁵ *Ibid.*, at 153–158; Christiano, *supra* note 36, at 122–124, 126–129.

⁴⁶ Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 42 *Int'l Org* (1988) 427.

⁴⁷ Christiano, *supra* note 36, at 123.

such an arrangement and the importance it places on the value of consent. Therefore, there can be no problem with IHRCTs seeking to uphold such norms unconditionally.

Secondly, a prime focus of such Conventions should be the interactions between states and those who either lack democratic representation or operate outside adequate democratic control, such as refugees and multinational corporations respectively.

Thirdly, if IHRCTs are to respect the integrity of the democratic process, particularly in their judgments on domestic legislation and policies, they must be restricted to weak review. Moreover, contestation ought to be limited to cases where domestic political and judicial avenues have been exhausted and only involve those rights that might be considered basic to each citizen within a given polity being able publicly to advance their interests on equal terms to others, though controversy exists as to whether these involve only core civil and political rights or also certain minimum social and economic rights too.⁴⁸ Allowance also has to be made for the variety of ways different legal systems may choose to specify a given right and the numerous circumstances that may lead legislatures to limit the scope of one right in order to secure other rights.

Fourthly, given that courts may be as mistaken as legislators, the possibility for a democratic override of an IHRCT judgment must also exist, with such decisions resting with a consensus among the representatives of the democratic governments, who should be ultimately charged with monitoring state compliance with the Court's rulings. A number of benefits stem from this arrangement. For a start, from the perspective of the democratic state challenging the judgment, this would be a decision of peers.⁴⁹ The governments of other democratic states would appreciate the need to attune rights to domestic situations and the adverse reaction an IHRCT decision perceived as insensitive to such considerations and in error might arouse. Yet, that need not mean they would tolerate almost any objection to a ruling that proved inconvenient for the government concerned – quite the contrary. For they would also be fully alive to the dangers of allowing states to renege on their solidaristic obligations and of undermining the Court's authority through frivolous or self-serving challenges – particularly with regard to democratizing states.

The issue of democratic organization enters here, with three points being pertinent. First, this model is compatible with granting IHRCTs a degree of independence from the states that bring them into being so long as the participating states have the right of exit and can determine the competences of these Courts. In other words, the functionaries of the IHRC, such as the judges, may act independently but the system itself must be democratically dependent on the contracting states.

Secondly, the democratic legitimacy of such dependence rests on the agents of the states involved adequately reflecting the views and concerns of the populations they represent. Consequently, signatories to IHRCTs should be limited to states that are at least credibly democratizing. The evidence suggests that non-democratic states do not respect the decisions of such bodies in any case – their formal adherence merely serves to give a spurious legitimacy to such regimes.⁵⁰ Meanwhile, given the discretion

⁴⁸ Christiano, *supra* note 21, at 273–274.

⁴⁹ Scharpf, 'Legitimacy in the Multilevel European Polity', 1 *European Political Science Rev* (2009) 173, at 199–200.

⁵⁰ B. Simmons, *Mobilizing for Human Rights* (2009).

executives of even democratic states have been accustomed to enjoy in foreign affairs, it is important to ensure the state officials involved remain accountable for their decisions to the legislature and ultimately the electorate.

Finally, if the system as a whole is to offer equal consideration to the interests of the democratic peoples that it serves, then the signatory states ought to exercise equal control over the IHRC. For example, all states should have an equal vote in decisions regarding changes to the Convention, the selection of judges and instructions as to their working methods, the implementation of the Court's judgments, the budget, and so on.

How do these arrangements fare against the four objections? With regard to the first, exclusive democratic control, objection, that is met at a base line level by insisting that entry into these arrangements is voluntary and includes a right of exit. Moreover, their purpose and operation are structured around respect for democratic self-government. As we saw, this goal lies behind both the three issues motivating the establishment of this system and the three criteria guiding its competences and organization. In particular, its governance structure does not involve a simple transfer of authority from a domestic to an international actor. Rather, it places domestic actors, who remain democratically accountable to citizens or their representatives, in control on an equal and democratic basis. This structure overcomes the second, global democratic deficit, objection without assuming either a global *demos* or democracy. Instead, the arrangement is one of a democratic international association of democracies and their *demoi*. This sort of 'two level' arrangement has been characterized as *demoicratic*. The fact that the system is an outgrowth of domestic democratic systems reduces the force of the third objection regarding the need for a constitutional transition. There is not so much a transfer of competences as the creation of a jointly controlled mechanism to tackle those common problems that domestic institutions lack the competence to deal with alone. Finally, the fourth objection, of undue judicial discretion, is met through rendering the IHRCT systemically dependent on the collective democratic decisions of the contracting states with regard to their competences and, in the last instance, judgments. Judges may be independent but only with respect to weak review.

Clearly, many problems stand in the way of realizing this system, and in practice institutional arrangements may not necessarily always meet the criteria or answer all relevant issues. In particular, there is the problem of asymmetric bargaining between richer and more powerful states and poorer and weaker states, though coalitions among the latter can to some degree counteract the influence of the former.⁵¹ As with all domestic democratic systems, the international *demoicratic* system is work in progress, with various groups employing the existing processes to further, and occasionally to hinder, its development. This section has aimed simply at formulating its normative and institutional underpinnings.

5 The Political Constitution of the ECHR

A measure of the plausibility of this approach can be gauged by the significant degree to which the ECHR can be assimilated to it. All signatories must meet certain minimal

⁵¹ Christiano, *supra* note 36, at 125–126; Pettit, *supra* note 44, at 158–160.

democratic standards. The Court and Convention are overseen by the Council of Europe, the governance structure of which consists of the Committee of Ministers, comprising the Foreign Ministers or their permanent representatives of all 47 member states, along with the Parliamentary Assembly of the Council of Europe (PACE). The Committee decides the Council's budget, negotiates the treaties and conventions governing its competences, and monitors the implementation of Court decisions. PACE, which includes between two and 18 members, depending on population size, from the national parliaments of each of the signatory states, selects the judges – one from each member state – and the Secretary General of the Council from lists supplied by the Committee of Ministers. As a result, there is a degree of legislative oversight of executive action in this area, with PACE also receiving regular reports from and making recommendations to the Committee of Ministers. The danger of overlooking domestic or transnational minorities is also lessened through the involvement of a Congress of Local and Regional Authorities of the Council of Europe, composed of elected members from these bodies within the member states charged with exploring the enhancement of local democracy and, in an advisory role, the International Non-governmental Organizations (INGOs) Conference of the Council of Europe.

Meanwhile, the Court applies a margin of appreciation in making its judgments, especially where no common standard exists across the Council of Europe and it may be necessary to balance rights and other interests,⁵² thereby taking account of the diverse ways a right may be specified within different legal systems. Moreover, the Court has generally applied a wider margin when the case involves a choice that has been publically debated by a democratic legislature and where opinions reasonably differ, and narrowed it where a legislature has enacted or re-enacted a measure without due consideration.⁵³ Its judgments also only apply to the given jurisdiction and do not necessarily serve as precedents for rulings in similar cases in another state, thereby minimizing the 'one size fits all' problem. The recent Brighton declaration has proposed formally incorporating both the margin of appreciation and the principle of subsidiarity into the Preamble to the Convention,⁵⁴ thereby underlining that the primary duty for the implementation of Convention rights rests with domestic legal and especially political organs. Indeed, it proposes that all parliaments should adopt the enhanced pre-legislative scrutiny procedures currently found in the UK and Nordic countries. In fact, the record suggests that the ECtHR already operates at the margins so far as mature democracies are concerned. For example, since 1966 97 per cent of the cases brought against the UK have been deemed inadmissible, while only 271 out of the 443 cases that were heard were held to involve an infraction – 61 per cent or an average of 6.15 cases per year, less than 2 per cent of all cases brought. Five countries

⁵² See *Rasmussen v. Denmark* (1984) 7 EHRR 371, at paras 40–41 for the lack of a common approach, and *Dickenson v. United Kingdom* (2008) 46 EHRR 41, GC, at paras 77–79 for the issue of balance.

⁵³ *Hatton v. United Kingdom* (2003) 37 EHRR 28, GC, at para. 97; *Draon v. France* (2006) 42 EHRR 40, GC, at paras 106–108, and – for the converse argument – *Hirst v. United Kingdom (No. 2)* (2006) 42 EHRR 41; *Sukhovetsky v. Ukraine* (2007) 44 EHRR 57, at paras 65–67, and the analysis in A. Legg, *The Margin of Appreciation in International Human Rights Law* (2012), especially ch. 4.

⁵⁴ High Level Conference on the future of the ECtHR, Brighton Declaration, 19/20 Apr. 2012, available at: <http://hub.coe.int/en/20120419-brighton-declaration/>.

– Russia, Ukraine, Romania, Turkey, and Italy – currently account for over half the cases brought before the Court, with Russia alone responsible for 27 per cent of them.

These features of the Council of Europe correspond quite closely to the criteria and corresponding recommendations given in the last section for ensuring that an international association of democracies itself meets democratic criteria. Not only is it under the equal control of the representatives of democratic states, but these representatives are not simply from the executive branch. The involvement of parliamentary representatives and, to a lesser extent, representatives from local government and NGOs as well, increases the likelihood that state policies are more democratically representative of domestic interests than is often the case in foreign affairs, including minority interests. As a result, it meets the concerns behind the ‘global democratic deficit’ objection in ways that address at least some of the worries behind the ‘exclusive democratic control’ objection. The ECHR can be regarded in some ways as having the qualities of an international legislative charter of rights, with reports from PACE often leading to changes to the convention or procedures by the Council of Ministers. Last but not least, the ECtHR is politically dependent, in being chosen and overseen by a representative body of the contracting states, and is constrained to respect to a high degree their domestic rights enforcing mechanisms. As a result of these two aspects, the force of the judicial discretion objection is also weakened to a considerable extent.

That said, the ECHR system falls down in two key respects. First, notwithstanding the margin of appreciation, strictly speaking the ECtHR does not adopt weak review. Under Article 46 of the Convention its judgments have binding force on the High Contracting Parties, and once a final ruling has been given by a Grand Chamber there are no further grounds of appeal. Still, it does not disapply national laws – they remain in force until the relevant domestic legislature changes them and can only offer a remedy in international not domestic law. To that extent, the ECtHR could be described as applying a ‘soft’ version of strong review. Yet, the system could be adapted to deliver weak review relatively easily. As I noted, the Committee of Ministers is responsible for the implementation of these judgments and can sanction a member for failing to comply and even expel it. However, it would be perfectly possible to allow the Committee to become the final court of appeal as proposed above.

Secondly, hitherto the focus of the ECtHR has been on the issue of domestic compliance with the ECHR. Although the Council of Europe has explored common issues affecting the relations between states, these have been at the margins. That will change with the proposed accession of the EU to the ECHR, which will introduce monitoring of inter-state economic agreements for compliance with human rights. Already, an important difference between the ECtHR and the Court of Justice of the European Union (CJEU) with regard to labour rights suggests ways in which this move might lead to greater equal respect and concern between the states involved for their internal democratic processes.⁵⁵ Yet, how far that happens is likely to depend on the degree to which both the Council of Europe and the EU are regarded as being bound by a political rather than a legal constitution.

⁵⁵ Fudge, ‘Constitutionalizing Labour Rights in Europe’, in Campbell *et al.*, *supra* note 31, at 244.

6 The Disadvantages of Legal Cosmopolitanism and the Advantages of the Political Constitutional Approach

So far I have simply argued that it is possible to provide a political constitutionalist account of IHRCs that meets the four objections. I have said relatively little about the broader advantages that might derive from a political constitutionalist rather than a cosmopolitan legal constitutionalist perspective that rejected the four objections in the first place. Such a cosmopolitan position can take a number of forms. Here I shall consider a relatively modest version, which avoids controversial ontological and epistemological claims as far as possible. This version might grant that some reasonable disagreement about rights exists, but note that in practice most democracies agree on the broad outlines of at least some basic rights, such as those in the ECHR, and that for pragmatic as much as principled reasons rights-based judicial review of domestic legislation by independent international courts offers a way of correcting for local prejudices, self-interest, or myopia.⁵⁶ These pragmatic arguments can be roughly grouped together under the legal norm of '*nemo iudex in sua causa*'.⁵⁷ In this section I shall argue that many of these concerns prove misplaced and that weak review within a political constitutionalist structure offers a more effective and coherent approach to rights promotion than strong review by an IHRC cut off from democratic control.

For a start, it can be questioned how far it is applicable to regard a democratic state as being a 'judge in its own cause'. This position treats a state as a unitary actor, deciding an issue of rights in its own self-interest. However, given that the decisions in question tend not to be about inter-state relations, it seems inappropriate to regard these judgments as challenging the self-interest of states. The exceptions might be policies concerning access to citizenship or entry to and continued residence in a state for asylum seekers or immigrants. These cases are additionally strong given that neither group can influence the relevant domestic legal and political system via the democratic process, while most of the first and many of the second will either be citizens of regimes that are not democratic, or only minimally so, or stateless persons. However, we saw in section 3 that democratic states have incentives to create collective arrangements to deal with such issues that can balance the rights of their citizens against those of aspirant and non-citizens, and ultimately aim to promote democracy among all states. As a result, such arrangements only require weak review. Given that it is mutually advantageous for all the contracting states to a convention to comply with them, this would not be an issue where governments would be likely to regard an ICtHR as exceeding its competence.

It is also worth noting that what is perhaps the strongest case for strong review is also the least developed in practice. In the standard cases, which concern purely domestic measures that only affect citizens, the notion of the state being 'judge in its own cause' proves harder to sustain.⁵⁸ The democratic decision-making process that

⁵⁶ Buchanan, *supra* note 15, at 297–298.

⁵⁷ Buchanan and Powell, *supra* note 2, at 330–336.

⁵⁸ Hessler, 'Resolving Interpretive Conflicts in International Human Rights Law', 13.1 *J Political Philosophy* (2005) 29, at 41–42.

leads to the disputed law involves a large number of different and often opposed actors. Elected executives will have had to gain the assent of representatives in Parliament and indirectly a majority of citizens, while domestic courts will have also held the measure to be acceptable. Moreover, as we have seen, these domestic processes may well have been scrupulous in their attention to rights considerations. There will have been no single actor 'judging in its own cause' in this situation. Within most democratic systems, an electoral majority is built on a coalition of diverse groups of voters, with the executive and legislative majority often made up of a shifting coalition of different parties. In many systems, measures have to be approved by two chambers and are subject to review by domestic courts.

It will be objected that nonetheless certain 'discrete and insular' or widely dispersed minorities, with little or no bargaining power, might still be consistently ignored by these democratic and legal mechanisms. Those social groups who are likely to form part of the electoral majority and the domestic legal and political elite may suppress these minorities' individual rights – be it through self-interest, prejudice, myopia, ignorance, carelessness, or plain error. Indeed, one or more of these factors could lead a majority to pay insufficient attention to their own rights in the face of an over zealous, inept, misguided, or corrupt executive, as some commentators have alleged has been the case with excessively restrictive anti-terrorist legislation. In such instances, an IHRcT offers even a well-run domestic legal and political system the benefit of an 'outsider's' perspective. For example, other legal systems may provide instances of policies that challenge the local prejudices and assumptions of the state in question. Through being more disengaged from the circumstances that give rise to a given policy, such bodies can also help guard against precipitate over-reactions to a shocking incident, such as a terrorist bomb or the abduction of a child, and point to the longer term adverse consequences of over-hasty legislation.

Though such reasoning may prove valid in certain circumstances, it is again doubtful that it offers a general case for anything beyond 'weak review'. Indeed, the drawbacks political constitutionalists note with relying on courts for the defence of rights may be amplified in the case of judicial review by IHRcTs, in part for the very reasons that their proponents advance in their defence. For a start, the 'outsider's' view may overlook how the specification of a particular right within a given legal system forms part of a more general approach to rights, that balances different rights considerations and which, taken overall, is reasonable and reflects local circumstances and concerns.⁵⁹ Ruling on a single case does not allow for all these various factors to be taken into account, and IHRcTs are likely to be even less aware of the impact on other rights and moral concerns of citizens than a domestic court. An IHRcT may also be moved to assume 'one size fits all' and seek to apply a minimal standard that overlooks substantive differences between different cases and systems.

Distance also exacerbates the potential for the under-protection of rights that can arise when IHRcTs are perceived as the key agents of rights protection. Whereas political constitutionalism stresses *ex ante* rights scrutiny, courts operate *ex post*.

⁵⁹ *Ibid.*, at 43–44.

If a higher court comes to be regarded as the prime instrument of rights protection, there is a danger that the subordinate bodies – particularly executives and legislatures – will be less scrupulous themselves and take rights into consideration only to the extent that they believe they may be legally challenged to do so. An IHRCt may exacerbate this tendency by adding to the already high costs in time and money of mounting a legal challenge. Meanwhile, though IHRCts can help dilute the influence of local factions, weakening the effects of their rent seeking and prejudices, they may also give undue weight in their turn to those groups able to organize transnationally. As we noted, states can unjustifiably exclude underprivileged groups, such as refugees or poor migrants. However, certain exclusionary state policies – such as those regulating wages or health and safety – may serve to provide social protection for the more vulnerable within their borders. Yet, those seeking to dismantle exclusions of the latter kind, such as corporations, are likely to have more resources and be better able to mount legal challenges at the international level than those seeking to remove exclusions of the former kind, such as the global poor.⁶⁰

There has been a move recently to enshrine some of these social protections in IHRCs. However, many of these issues are matters of reasonable disagreement within most democracies and closely related to the left-right divide that forms the dominant political cleavage within them. As we noted, courts also have limitations when deciding general issues of public policy and often feel they lack the expertise as well as the legitimacy to do so. All rights are costly and how far any state may be able to meet its rights commitments will be a matter of degree, involving various trade-offs that courts invariably feel reluctant to make. Again, distance can add to the court's timidity in areas that may entail more rather than less state action. Unsurprisingly, the empirical record suggests the constitutionalization of social rights has little impact *per se*. The key factors are the degree of development of the country concerned and the ability of the underprivileged to organize themselves through unions and parties capable of promoting their interests.⁶¹

It might be thought that when courts fail to correct an injustice their influence is neutral – they have simply failed to right a wrong. That is not the case. Under strong review they add legitimacy to that wrong and render its righting harder. Courts may also make mistakes, and in doing so commit a double wrong. Not only have the rights of those individuals directly affected by the particular decision been infringed, but so has the right of all citizens to have an equal say in defining their rights. Weak review may commit the first wrong but in escaping the second also makes the rectification of the first easier to effect.

Given that the legitimacy of democratic processes to decide rights issues depends on their providing an adequate means for giving equal consideration to the views and interests of those concerned, it has been argued that even if courts ought not to offer substantive rulings on the nature of rights they do have a role in deeming whether

⁶⁰ Nicol, 'Business Rights as Human Rights', in Campbell *et al.*, *supra* note 31, at 229.

⁶¹ Hirschl and Rosevear, 'Constitutional Law Meets Comparative Politics: Socio-economic Rights and Political Realities', in Campbell *et al.*, *supra* note 30, 207

democratic procedures meet the appropriate standards for their decisions to have authority.⁶² Moreover, the argument for not being judge in one's own cause appears particularly strong in this case. Those in power will always have an incentive to alter the rules of the game in their favour. The difficulty is that process issues can be as subject to reasonable disagreement as substantive questions. Citizens may agree that procedures should show those involved equal respect and concern, yet disagree as to how best to interpret these requirements. These procedural disagreements will most likely reflect their substantive disagreements. Even when agreement exists on a given understanding of political equality, the institutions most likely to bring it about are difficult to specify and likely to depend on the social circumstances in which they are located. Therefore, it can be hard for courts to offer an impartial or satisfactory decision in such cases, with IHRCs once again hampered by distance and a lack of local knowledge.

Although a human right to democracy is controversial,⁶³ it might be thought central for political constitutionalists – even the 'right of rights'⁶⁴ – and so render strong judicial review legitimate.⁶⁵ In this area, courts could be said not just to restore the rights of those individuals who have been unjustly excluded from the process but also the rights of all those involved in it, because by ensuring their inclusion a court reinstates the authority of the process as a whole.⁶⁶ Yet, the principled and pragmatic objections to strong review remain, given that courts may fail to uphold the democratic rights of citizens or even hamper attempts by the legislature to do so. For example, compare *Buckley v. Valeo*, where the US Supreme Court prevented the legislature limiting campaign finance, to the British Parliament's considered preparedness to override potential judicial objections to its regulation of political advertising in the Communications Act 2003. Both cases concerned freedom of speech and the appropriate way to secure its promotion.⁶⁷ The difference between the Supreme Court's perspective and that of the UK (and US) legislature was not between a rights-based view and a non-rights-based view, but over which measures best secured this right within a democratic society. Again, the argument points at best to weak review because, while it is important to draw attention to potential individual rights infringements, a court may not offer the most suitable forum for ensuring rights protection remains consistent with equal concern and respect for all citizens. In this case, it could be argued it was precisely because the politicians had an interest in the decision that they appreciated the need for regulation to ensure a roughly level playing field for fair and equal elections.

⁶² J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980)

⁶³ Cohen, 'Is There a Human Right to Democracy?', in C. Sypnowich (ed.), *The Egalitarian Conscience: Essays in Honour of G. A. Cohen* (2006), at 226.

⁶⁴ Waldron, *supra* note 11, at 232.

⁶⁵ Dahl, *Democracy and its Critics* (1989), at 191 and 359 n. 9.

⁶⁶ Christiano *supra* note 20, at 275–277.

⁶⁷ The UK Parliament (Communications Act 2003 (UK), 2003, c. 21, ss. 319–321) sought to ensure political equality at election time by regulating political broadcasts – a move that had cross-party support but which it anticipated, in part because of decisions such as *Buckley v. Valeo* 424 US (1976), 1, might be ruled as contrary to Art. 10 ECHR, leading to a declaration of incompatibility as allowed under Art. 19 HRA. Influenced by Parliament's reasoning, the British courts subsequently upheld the measure in *R. (Animal Defenders International) v. Secretary for Culture, Media and Sport* [2008] UKHL 15, especially Lord Bingham at paras. 7–21.

Finally, the argument against being judge in one's own cause is in some respects deployed selectively and ultimately lacks coherence. For it is inescapable that some person or institution will be. After all, superior courts generally claim the competence to decide their own competences. Political constitutionalists argue that to the extent that this is true of domestic democratic legislatures it can at least be justified by the countervailing principle that 'what touches all should be decided by all'. This doctrine embodies the important epistemic principle that decisions are best made by those with sufficient stake in the matter to decide responsibly. IHRCs by their very nature as outsiders lack that incentive.

7 Conclusion

The upholding of IHRCs by IHRCs has been criticized for lacking democratic legitimacy. Such criticisms have emanated from certain legal constitutionalist regimes, such as the United States and Germany, but have been particularly strong in political constitutionalist regimes, such as the UK. Indeed, a campaign, enjoying cross-party support but championed above all by senior Conservatives within the current government, now proposes that Britain withdraw from all such arrangements.⁶⁸ This article has taken these criticisms seriously but has argued that they can be met by regarding IHRCs as forming part of a 'two level' political constitution resulting from an association of democratic states. In fact, the ECHR, which has borne the brunt of recent attacks on IHRCs within the UK, largely conforms to this model. This arrangement also renders IHRCs consistent with legal constitutionalism at the domestic level by allowing national constitutional courts to legitimize and control their competences in the name of their respective *demoi*. Finally, limiting IHRCs to weak review, as this system requires, proves not only a more democratically legitimate but also a more effective means of protecting rights than the strong review advocated by a legal cosmopolitan approach.

⁶⁸ See 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws', 3 October 2014. Available at www.politicshome.com/uk/article/105764/the_conservatives_proposals_for_changing_britains_human_rights_laws.html (last visited 3 December 2014).