The Legitimacy Deficits of Human Rights Supervisory Organs – the Human Rights Judiciary:

Elements and Implications of a Normative Theory¹

---- Draft, do not cite. All comments welcome --

"If men know not their duty, what is there that can force them to obey the law? An army, you will say. But what shall force the army?" (Hobbes 1681 [1668], 29)

Introduction

Are international and regional human rights courts and other treaty bodies normatively legitimate? If so, why, and when? The present paper addresses some of the disagreement concerning the legitimacy of this (human rights) judiciary. The aim is to sketch a general theoretical framework suitable to address several of the dilemmas and also illustrate some contributions of and challenges for attempts to bring international political philosophy to bear on institutions and their design.

The International Human Rights Judiciary

This judiciary includes regional bodies such as the European Court of Human Rights (ECtHR) which interprets and adjudicates the European Convention on Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR) established under the Organization of American States (OAS). It also includes international bodies such as the core treaty bodies set up to monitor states’ compliance with such human rights treaties as they have subjected themselves to, such as the United Nations Human Rights Committee (HRC) for the International Covenant on Civil and Political Rights; the Committee on the Elimination of Discrimination against Women (CEDAW), and the Committee on the Elimination of Racial Discrimination (CERD).

The taxonomy of ‘legitimacy’

The increased attention to issues of legitimacy has made it abundantly clear that ‘legitimacy’ is used in a variety of ways regarding the international judiciary.

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The normative legitimacy central to this paper concerns when and why the decisions and recommendations of the international judiciary – be they legally binding or not – should count as (defeasible) reasons for other actors when they decide what to do – be it domestic courts, legislatures, administrations, or civil society bodies, or other states (cf Helfer xx this issue); be it when they interpret treaties, shape new pieces of legislation, or urging reforms, respectively (cf Teitel and Howse xx this issue). How are we to understand the nature of the various forms of normative ‘pull’ or reason-giving force that the concept ‘legitimacy’ exerts with regard to the international judiciary (Franck 1990, 24)?

Such normative legitimacy is related to, but should be distinguished from concerns about a lack of social legitimacy: whether the judiciary command general compliance, for instance insofar as states fail to comply with the judgments of a regional court. Does this affect the normative legitimacy of such treaty bodies, of the noncompliant state, or of both? Some also challenge the legal legitimacy or legality of how dynamically the judiciary interprets treaties, e.g. with reference to to the Vienna Convention on the Law of treaties (United Nations 1969). Finally, several discussions about legitimacy concern the effectiveness of treaties and their bodies in the sense of whether they actually achieve or even promote their stated objectives. A central conceptual question is whether these various forms of ‘legitimacy’ are related, and how. In particular, some note that a weak judiciary without enforcement under its command requires higher perceived normative legitimacy. That is: insofar as the treaties require ‘deep cooperation’ - i.e. that “states depart from what they would have done in its absence” (Downs, Rocke and Barsoom 1996, 384), the treaty bodies must affect actors’ reasons for actions without threats of sanctions. Some international courts and treaty bodies may threaten persistent violators with exclusion from important ‘club goods’ – such as potential exclusion from the EU [or from the WTO?]. But many treaty bodies exercise ‘weak’ power at most, i.e. without formal sanctions. A state who decides to heed the authority of such bodies even against its other countervailing interests must thus be convinced to comply, possibly by the perceived normative legitimacy of the authority. Thus some hold that the legitimacy of international human rights courts and treaty bodies is central if states are to recognize their authority and take their statements as independent reasons for compliance – be they observations, judgments, views, recommendations or general comments (Wheatley 2013; Bodansky 2011). Thus there is a (perceived) causal relation: the decisions a judiciary that actors believe is normatively legitimate is more likely to have various forms of impact.

The present concern is limited to the human rights judiciary with some attention to two central challenges. Firstly, what is the problem for which the international human rights judiciary is a solution? Answers to this question is required in order to determine their normative legitimacy, to start to measure the effectiveness of these bodies, and to determine what design features should be adjusted. A second concern is how to start to address charges that the human rights judiciary is undemocratic and even anti-democratic when it overrules domestic,
accountable legislatures – and that this undemocratic nature renders this judiciary normatively illegitimate. The paper lays out some aspects of a theory of legitimacy for the international human rights judiciary that seem relevant to address these puzzles. Section 2 provides a sketch of an institutional normative theory of the legitimacy of the international human rights judiciary, and section 3 identifies three reasons to value such institutions. Throughout I point to the significance of publicity and general compliance for the normative authority of the international judiciary. In conclusion, section 4 notes some further challenges to the current human rights judiciary.

But first some notes on the recent concerns about the legitimacy of the international judiciary. This attention may seem odd. Many would presumably answer the question of why the judiciary should be heeded by appeals to the function of the relevant treaty. Standard functions are familiar from game theory: States join treaties to help address various collective action problems. They may want a sufficiently independent third party to adjudicate conflicts peacefully; or to assure other actors of their long term commitments to limit or pool their sovereignty on some issues in order to avoid prisoners’ dilemma or free rider problems and instead achieve solutions each prefer. These treaties have often become more contested in recent years. One reason may be that their decisions impose burdens and a sense of injustice on some parties, raising questions of why comply:

If the intrusions into the constituent units of a multilevel system are too strong and compliance works too well, then compliance crises may result, which involve an open, normatively-driven rejection of the regulation. This is especially true if social integration lags behind and a common public discourse is absent.” (Zurn 2005, 1)

The human rights judiciary is gathering particular criticism. One reason may be that the general rationale for treaties are not as obvious for human rights treaties. Human rights norms largely regulate domestic treatment of own citizens, thus the kind of collective action problem (the ‘situation-structural side’ (Rittberger and Zurn 1991) is different from other sectors where mutual self binding is deemed necessary to advance shared objectives.

A second concern is one of the central roles of the human rights judiciary, which is to limit majoritarian democracy. Thus several authors have criticized practices of domestic judicial review for being undemocratic and hence illegitimate (Waldron 2006, Bellamy 2007). A theory of human rights should help us understand, assess and alleviate such and other tensions between national democracy and a robust international judiciary (Buchanan 2008).

Such concerns about a counted-majoritarian judiciary are heightened due to courts’ ‘evolutive’ or ‘dynamic’ interpretation of treaties – and human rights treaties in particular. How can treaty bodies ensure that the rights remain “practical and effective” (2002) when circumstances change, whilst responding to the concern that
they thus “make law” without being democratically accountable.

2 Aspects of a Normative Theory

The normative issues raised by the human rights judiciary require systematic attention to the legitimacy of these bodies.

What is at stake?

To frame the issue, consider in contrast the standard case that normative theories of legitimacy have addressed, concerning the state. The central actors are citizens and governments. The challenge is to find reasoned answers when citizens ask whether a particular government is normatively legitimate: “why and under what conditions should I as a citizen obey my government?” The general question is when and why the decisions of the state should count as a (defeasible) reason for citizens, to act differently than they otherwise would – where the reason is not simply the threat of sanctions or other forms of direct self interest. Regarding the human rights judiciary, we ask similarly: When and why should the decisions/views/recommendations of the international judiciary count as (defeasible) reasons for other actors so that they act differently that they otherwise would? Note that the action guiding role is different in at least three ways: the judiciary utters not only decisions, but views or recommendations; some are legally binding others are not.

Secondly, the actors are not simply subjects. There are many members of the “compliance community” (Alter 2009, Simmons 2009, Helfer and Voeten 2011). They may include - more directly - national courts and parliaments, political parties, the executive and administration; and civil society actors, business actors or the like seeking to influence such state bodies, or whose bargaining position shifts in the shadow of the international judiciary Howse and Teitel 2010. Other actors who may be affected are other international courts and treaty bodies, and other states who may consider retaliation or further collaboration. Thirdly, each of these actors may consider the human rights judiciary’s utterances as reasons affecting quite different kinds of actions. The central issue is not whether to simply ‘comply’ with the international judiciary. If the human rights judiciary is legitimate, the obligations the bodies create are not necessarily that the other bodies comply with the rules unconditionally, but that they take the judgments, view or recommendation as a weighty reason to comply with it (Buchanan 256). State organs or other international bodies may hold that another interpretation of the treaty under discussion is better, but be affected by their ‘duty to cooperate’ with the treaty body. A domestic judiciary may decide judge in conformity with the international tribunal, or to ‘pay it due regard.’ A parliament or administration may decide to reform or make laws or policies or policy platforms that conform. Tomuschat notes that even though the ‘views’ of the Human Rights Committee in cases of individual complaints are non-binding, states have an obligation to examine them carefully, and if they disagree they must present counter-arguments (Tomuschat 2008, at 220; cited in Ulfstein 2012).
Civil society actors may use judgments or a ‘view’ as a political tool in support of changes. This complexity adds to the challenges when exploring how the international judiciary can increase its normative legitimacy.

**Political/Institutional Theory of Human Rights**

The present approach employs what is often called a ‘political’ or ‘institutional’ theory of human rights. Thus Beitz holds that human rights norms constrain “the domestic constitutions of states and the fundamental rules of international organizations and regimes.” (Beitz 2001.)

On these accounts, a central function of human rights is to delimit the domain of state sovereignty: “their actual or anticipated violation is a (defeasible) reason for taking action against the violators in the international arena.” (Raz 2010. That is: as long as it respects human rights, a state can claim that its sovereignty provides a reason for other states to not interfere. Rawls’ account (Rawls 1993) focused exclusively on international military intervention, while other theories also include a broader range of actions or concern. Several of these political theories share features of importance here.

**Institutional not ‘interactional’**

Firstly, they are institutional, in that they claim that human rights are norms that primarily regulate coercive social institutions rather than individuals’ actions (Pogge 2002, 44). A critical issue is whether such institutionalized practices must be legally binding, possibly sanctioned, or merely socially embedded. The human rights judiciary is presumably such institutions, but with a special twist: their main function is to regulate other institutions accord to human rights standards, albeit with varying extent of coercive power. They serve to limit states’ claims to external sovereignty in the sense of immunity from concern and various forms of intervention by outsiders. The courts and treaty bodies of this judiciary issues judgments, views, or opinions whose legal status and coercive sanctions vary: some are binding, some are non-binding.

**Subject matter: the Global Basic Structure, including states**

Secondly, several but of these political theories regard the human rights judiciary as an integral part of a broader subject matter which we may think of as the global basic structure: the rules and institutionalised practices as a whole which structure individuals’ actions (Follesdal 2011). In our global basic structure states play prominent roles, with their own domestic basic structures. In addition, there are regional and international basic structures  which includes – in particular - regional and international treaties and treaty bodies. They are best assessed as serving important yet limited functions within the larger set of institutions, e.g. as corrective checks on democratic legislatures, or compensatory mechanisms for an overall unjust set of international rules.
We now consider some salient features of such a political theory of the human rights judiciary.

**Legitimacy, Authority and content-independent reasons**

As indicated above, ‘Legitimacy’ is an action guiding concept, possibly aspiring to regulate quite different sorts of action by several different actors. A prevalent explication of the term is that it concerns an institution’s moral right to attempt to regulate other actors’ actions – be they citizens questioning their own government, or other states asking whether to respect the sovereignty of a human rights violating government. Thus Buchanan holds that legitimacy is a matter of whether an institution is justified in wielding power (Buchanan 2011). Buchanan and Keohane note that

"Legitimacy requires not only that institutional agents are justified in carrying out their roles, but also that those to whom institutional rules are addressed have content-independent reasons to comply with them, and that those within the domain of the institution’s operations have content-independent reasons to support the institution or at least to not interfere with its functioning. (Buchanan and Keohane 2006, 11)

Their - typical - account of ‘content-independent’ reason is that

One has a content-independent reason to comply with a rule if and only if one has a reason to comply regardless of any positive assessment of the content of that rule. For example, I have a content-independent reason to comply with the rules of a club to which I belong if I have agreed to follow them and this reason is independent of whether I judge any particular rule to be a good or useful one. (411); cf Bodansky 2011..)

Such accounts of content independence are often drawn from Hart (Hart 1982) and Joseph Raz. These accounts may still limits on the contents of the commands, so that if an otherwise legitimate authority issues a clearly unjust decision, this does not obligate the subjects even though issued by an otherwise legitimate authority, would not obligate the subjects (Raz 1994).

In our case, then, the central questions are whether, when and why the international human rights judiciary is legitimate. It will be helpful to distinguish such questions of legitimacy from a related issue sometimes referred to as a question of Authority: whether other agents have a moral obligation to take the institution’s decisions – within certain bounds - as a (defeasible) reason for action.

Normative concepts of legitimacy are now often expressed in terms of justifiability among political equals, for instance by appeals to hypothetical acceptance or consent. The legitimacy of a political order such as the state, or of the global basic structure, or the human rights judiciary, is seen as an issue of whether the relevant affected parties would have or could have accepted it, under appropriate choice conditions. They “ask whether the coercive exercise of political power could be
reasonably accepted by citizens considered free and equal and who possess both a capacity for and a desire to enter into fair terms of cooperation.” (Choudhry 2001, 383). Normative standards of legitimacy for the ‘global basic structure’ as a whole are for instance that it should be arranged so as to respect, protect and further the best interests of individuals globally (cf Pogge 2002, Caney 2005, Teitel 2011).

A central premise is the motivation of the parties whose acceptance matters. I assume that the individuals act on a duty of justice. That is, they are committed “to support and comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves.” “... predicated on the belief that others will do their part” (Rawls 1971: 115, 336)

This account of political obligation has several features familiar from ‘assurance games’ in game theory (Ostrom 1991; Gibbard 1992). On this account, the subjects are ‘contingent compliers.’ They will comply and thereby abstain from some benefits to themselves, but only under certain conditions. For them to have a normative duty to obey commands – that is, for the institution to have normative authority - requires firstly, that the authority is normatively legitimate, and secondly, that citizens also have reason to trust in the future compliance of other citizens and authorities with such commands. Thus, if the institution is to have authority it is not enough that it is normatively legitimate: the subjects – or those otherwise supposed to heed it – must be assured of this, and be assured of general compliance.

**Normative legitimacy, social legitimacy and effective problem-solving**

This account may help us lay out some of the complex relations between social and normative concepts of legitimacy. Lack of general compliance may reduce or remove individuals’ moral obligation to comply; and inversely: general compliance – with normatively legitimate institutions – may bolster individuals’ moral obligation to do so. That a state regards a treaty as legitimate is often thought to increase the state’s compliance – though the empirical evidence thereof seems lacking (Hurd 2013, Bodansky 2011). The account sketched above may explain why belief in normative legitimacy need not trigger change in behaviour. Belief that an institution is normative legitimacy alone is not enough to affect behaviour among contingent compliers: they must also have assurance that others share such a judgment and that they generally comply. Indeed, without such assurance an otherwise normatively legitimate institution may lack authority in that it fails to trigger other actors’ moral obligation to obey or defer.

This account also fits with legitimacy understood as effective problem solving. In general, treaties may be justified when they help resolve various collective action problems that actually benefit individuals. This is what Raz describes as a ‘service conception’ (Raz 2006). What it takes for some agents to have a duty to subject their will to another is centrally that the agent conforms better to reasons for action that
apply to the agent anyway. Often, goods that we have moral reasons to secure for ourselves and others can only or best be obtained by yielding to a coordinating authority, e.g. in the form of a treaty body. The agents are then not generally at liberty to second guess the authority: its directives generally pre-empt the subjects’ reasons (1016-20). When such goods are indeed so identified, decided on and promoted by a treaty body, it enjoys legitimacy and authority. Consider, for instance, such justifications for the European Union. Objectives hitherto out of reach have ranged from peace – in the late 1940-1950s, to economic growth and a sustainable environment. The EU suffers from the lack of such legitimacy when it fails to contribute to addressing the problems the signatories intended with the various EU treaties. Other treaties and their bodies typically address various collective action games ranging from prisoners’ dilemmas where each party wants to free ride on the compliant others, over precommitment arrangements (Majone 1998), to ‘battle of the sexes’ games where all parties seek some collective decision, but disagree about which should be decisive and agree to leave that decision to a sufficiently independent court. In each case, establishing an authoritative treaty body can help the states achieve what they have reason to value.

Four remarks are relevant. Firstly, this account brings out that even though such treaties limit sovereignty, they may at the same time expand the range of valuable options available for sovereign states. Treaties and their bodies may increase states’ capacity to achieve public purposes (Keohane, Macedo and Moravcsik 2009) – we may think of this as the ‘worth’ of sovereignty. Thus several note that in our multi-level world ‘sovereignty’ changes from being a constitutive feature of states to a set of bargaining chips by which states pool decision authority in various sectors (Keohane 1995, 175).

Secondly, several problems and their appropriate solution predictably changes dynamically over time, so that treaty signatories may have reason to value that the treaty body likewise adjusts its interpretation dynamically over time.

Thirdly, note that the ability to solve such a problem is not sufficient for a treaty to have legitimate authority. It remains to be argued why individuals or other actors are bound by one particular such proposed treaty – why that authority can constitute a sufficient reason for action. Official ratification and acceptance of a treaty, by a sufficient number of signatory states are important factors in establishing such authority.

Fourthly, the legitimacy of such problem-solving institutions crucially depends on whether such treaties do contribute to their normatively permissible objectives, e.g. actually benefitting not only the interests of states, but ultimately the interests of individuals (For some of the literature: Krasner 1993; Hathaway 2002, Goodman 2003, Simmons 2009).

4 A justification for the Human Rights Judiciary

Such defences of treaty bodies as collective action solutions among contingent compliers seem less appropriate for the human rights judiciary. Many treaties and their bodies clearly require general compliance in order to achieve their objective and
hence be normatively valued. But one of the intriguing issues for attempts to apply this schema to human rights treaties is *what the nature of the problem is, which merits such mutual self binding and subjection to common authorities*. Indeed, if the human rights judiciary should be regarded as the solution, what exactly is the collective action problem? Why accept such treaty bodies as normatively authoritative? An in particular: why should generally human rights compliant democratic states bind themselves thus?

I submit that there are at least three reasons for international judicial review of human rights, even for well-functioning democracies which largely comply with these legal human rights obligations anyway. This is not to say that these arguments support the present institutions and practices of the human rights judiciary in general, and the ECtHR in particular, but they indicate the kinds of arguments that may guide reforms.

The following brief sketch takes as a normative starting point that the ‘global basic structure’ as a whole should be arranged so as to be trusted to respect, protect and further the best interests of individuals globally -- and promote public trustworthiness that this is in fact the case. Note that for our purposes we can bracket much disagreement about the substantive requirements of justice for the global basic structure, beyond maintaining that citizens have some obligation to promote human rights compliance even in other states than their own.

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

**A Case for Democracy**

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

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

Essential to the case for democracy over alternative decision procedures is competitive elections. They are important to make policies and elected officials responsive to the preferences of citizens (Powell 2000). In particular, an ‘opposition’ must be able to contest the current leadership elites and policy status quo (e.g. Dahl 1971). Active opposition parties and media scrutiny are crucial for fact finding, agenda setting and assessments of the effectiveness of policies.
On this line of argument, the normative case for democratic rule is comparative: Forms of democratic rule by means of competitive elections to choose policies and leaders are better than alternative constitutional arrangements for decision making. The claim is that such democratic accountability mechanisms ensure that the decisions can be trusted to be more reliably responsive to the best interests of the citizenry than other collective decision making arrangements.

But mistakes occur even under the best procedures, and review of such decisions serve as a valuable safety mechanism. I submit that human rights courts and treaty bodies address several such risks, inter alia the prerequisites for well functioning democratic procedures such as freedom of speech, free and fair elections, etc. Other risks are those that minorities tend to face under majority rule. The majority may exploit its powers, intentionally and knowingly or not, in ways that harm the minority unduly. One added reason for some minorities to be concerned is that they may require unusual arrangements to secure the same needs as the surrounding majority. Such arrangements may include special protections, exemptions or support to maintain aspects of their own culture – ‘special needs’ with regard to freedom of religion, education and language, diet or other central components of what makes their lives go well in their eyes. A minority may also have special preferences which will lose out in all majoritarian decisions, each of which may be minor but with deleterious cumulative effect. Minorities may thus fear that they will be harmed even by apparently innocuous majoritarian decisions.

Standard mechanisms in a democracy that ensure responsiveness to the electorate will not work for such groups. For instance, a small minority may never get attention from political parties that seek votes. The majority can offer some, but not many good reasons why they can be trusted to vote according to their sense of justice, even on such ‘minor’ issues.

In general, a well functioning domestic judiciary should protect minorities against such standard threats.

(1) The human rights judiciary can correct the (few) human rights violations that can be expected even when democracies work well.

The first reason for the human rights judiciary is that well functioning international human rights judiciary provides further protection of vulnerable domestic groups. This is partly because the domestic judiciary may not be sufficiently independent from the government. Furthermore, the judges are steeped in the domestic culture, often drawn from cultural majorities. There is thus a risk that they fail to notice or give sufficient weight to the untoward effects of decisions on various minority groups: there is a real risk that they do not fully grasp the impact of such decisions. Furthermore, they are not obviously well trained to discern whether there are alternative policies and legislation that can secure the same laudable objectives without violating some human rights. A judiciary composed largely of foreign members will be less likely to suffer from such biases, and may help press for
reasoned argument for those trade-offs that may nonetheless be required. The international judiciary may thus serve to monitor the limits on decisions states can make within their borders – they serve to delimit citizens’ political obligations toward their own government. This safeguard reduces the reasonable fear that those in power will ignore their sense of justice with untoward effects on those who do not gain the majority vote.

Social science research suggests that human rights treaties – and hence their bodies - provide such protections under certain conditions. Thus Beth Simmons notes that the effect of human rights treaty ratification is greatest in countries that are neither stable democracies (where most rights are already protected and the motive to mobilize is relatively low) nor stable autocracies (where the likelihood of successful mobilization is low if the rights the treaty addresses are seen in any way as challenging status quo governing arrangements). Key here is the legitimating function of an explicit commitment to a global standard. That commitment is used strategically by demandeurs to improve the rights in which they have an interest.” (Simmons 2009)

Note that these findings mainly concern the impact of ratification rather than that of adjudication. Furthermore, the treaties – and their bodies – play a limited role in well-functioning democracies. But I still submit that one reason to value the human rights judiciary is insofar as it does reduce the risk of human rights violations also in generally well-functioning democracies, - without imposing comparable costs on the population.

(2) The Duty to Promote just institutions – in other states

A second reason to value the human rights judiciary is based on citizens’ duty of justice to promote just institutions when they do not yet exist. In particular, ratification is sometimes one way to promote ratification by other states whose citizens stand to benefit from such review. This is because ratification by some states adds pressure on other states to also ratify – states whose ratification does make a difference to citizens. Beth Simmons notes that

The single strongest motive for ratification in the absence of a strong value commitment is the preference that nearly all governments have to avoid the social and political pressures of remaining aloof from a multilateral agreement to which most of their peers have already committed themselves. (Simmons 2009, 13).

One consequence of this impact of the human rights judiciary is that the assessment of the human rights judiciary cannot be restrained to intra-state effects, but must also consider the impact in less democratic states that form part of the present global structure. This seems an appropriate response to some generally well-functioning democracies who claim that the human rights judiciary at best provides
few benefits for the domestic population.

(3) **Assurance that the domestic institutions are sufficiently legitimate so that their commands should count as reasons for action**

A third reason for a human rights judiciary is that such bodies that are independent of the domestic government may provide citizens much needed assurance about others’ compliance – including that of their government. Such a mechanism helps convince ‘contingent compliers’ that the government will reliably continue to pursue acceptable outcomes. This is an implication of the role of human rights Raz noted: The human rights judiciary serves to delineate the limits of national governments’ authority over citizens. The human rights judiciary thus bestows legitimacy on states by providing assurance when appropriate that these actors are pursuing normatively just policies. These governments thus have the right to rule and are authorities that creates obligations for yet others. Recall that compared to other modes of governance, democratic arrangements not only have better mechanisms to ensure that authorities reliably govern fairly and effectively, but they also help provide public assurance that so is the case (Przeworski, Shapiro and Hacker-Cordon 1999, Shapiro 2001, Pettit 2000). Party contestation and media scrutiny help align the interests of the subjects to those of their rulers, and contribute to make the institutions trustworthy (Fabre 2000, 83). I submit that judicial review to protect human rights provides another trust-building measure. With such review, those who fear that they will regularly be outvoted can be somewhat more certain that the majority will not subject them to undue domination, risks of unfortunate deliberations, or incompetence. This safeguard reduces reasons to fear that those in power will ignore their sense of justice, with untoward effects on minorities.

As an example, consider that in 2011, of the 955 applications against the UK that the ECtHR decided, the government was found to violate the ECHR in only eight cases (Bratza 2012). Since the very large majority of cases show the government to be in compliance with its obligations under ECHR even when alleged victims think otherwise, the ECtHR thus serves to assure the citizens that this particular government generally merits compliance.

But note that this reason of assurance is conditional. If the government fails to comply with the human rights judiciary, this assurance-building role fails – instead signalling to citizens that their government perhaps does not merit obedience.

One implication of this argument is that we must assess the human rights judiciary, and reform proposals thereof not only by whether they enhance compliance with human rights within states, but whether they also provide public assurance thereof.

At least two aspects of these arguments are relevant for this discussion of legitimacy. Firstly, the main mechanisms for why treaties have effects on the ground are not due to international enforcement, but domestic, often democratic
mechanisms. Such treaties – and arguably their bodies – contribute to shift the
domestic political agenda; they empower grass root movements, and they allow
victims of some human rights violations to go to court to defend their interests. Thus
the legal force and amount of sanctions available to the treaty bodies may not be so
significant for their effects on the ground. Secondly, note that the first and third
reasons for valuing the human rights judiciary seem to hold regardless of whether
other actors accept the authority of the human rights judiciary, thus worries about
partial compliance need not count against such bodies.

4 Some Further Implications

In conclusion I elaborate some aspects of this normative theory of the legitimacy of
the human rights judiciary. Recall that this assessment should apply an institutional
perspective, including considerations about the broader impact of the human rights
judiciary beyond any single state, to the global basic structure as a whole.

One important methodological issues concerns which such alternative global
basic structures are relevant. One important strand of normative theory is labeled
‘ideal theory’. It’s concern are the appropriate standards of legitimacy for a global
basic structure whose institutions are generally ordered according to such standards,
and where most actors follow those rules. ‘Non-ideal’ theory, on the other hand,
concerns the appropriate standards for the various circumstances of partial
compliance, or of compliance with less than legitimate institutions. A particular
challenge for a legitimate human rights judiciary today is that the topic clearly
belongs to non-ideal theory. The norms and treaty bodies must be appropriate for
well functioning, human rights respecting rule of law states, and at the same time
also apply to states that are unwilling and/or unable with regard to human rights.

Three remarks merit mention. Firstly, note that a central normative issue is
whether the benefits of the human rights judiciary – duly modified to provide the
benefits indicated above - do indeed provide benefits to some, without imposing
burdens of similar weight or urgency on others. However, the stakes are contested.
Consider that even when the human rights judiciary works as it should in stopping a
legislative act, some will regret what they see as a loss to the democratic quality of the
decision, since a majority decision is overturned. Some regard these losses as high –
and question the likely gains (cf. Bellamy 2007). On the other hand, I submit that
some such limitations on the scope of legislatures’ authority, and bodies entrusted to
uphold such limitations, are not necessarily nondemocratic. Firstly, of course, the
convention has been ratified in a democratic manner, so that the international human
rights judiciary enjoys delegated power in a democratic way. Furthermore, minority
protections of some kind, with authority placed outside the legislature itself, may be
a component of any set of workable majoritarian democratic institutions worth
respecting. All institutions must have a specified scope of authority, and a legislature
which is corrected when it oversteps its authority is not obviously overruled in a
nondemocratic way. Which bodies may be best placed and authorized in what ways to
provide such benefits remains an open question.

Secondly, I submit that the normative theory sketched above avoids what we may think of as a ‘Fallacy of Decomposition.’ According to this theory the global basic structure as a whole may have to be accountable, transparent, under some form of democratic control etc. But we need not require that every part needs to be transparent or stand in competitive democratic elections. This account would thus not agree that the central question is:

“How can the rule of international courts be justified in accordance with basic principles of democratic legitimacy?” (Bogdandy and Venzke 2012). It may well be correct that the Global Basic Structure as a whole must have mechanisms of accountability - democratic and otherwise; elements of consent to determine which of several possible norms should bind the parties e.g. in the form of a treaty; and be sufficiently effective so as to promote or even secure certain objectives. However, it does not follow that each institution must incorporate all such legitimating mechanisms. Indeed, “no plausible theory could have held that all normative political standards are produced by actual democratic decisions. “ (Estlund 1996). For instance, an institutional theory may value democratic forms of governance for both intrinsic and instrumental reasons, yet deny that all institutions should be based on unconstrained majority rule after suitable deliberation – cf. the fallacy Pettit notes concerning some theories of democracy:

that of associating democracy exclusively with the rule of the collective people: the rule of the people en masse;..If the role of democracy is to empower all and only the common, recognizable interests of people, then a very bad way of pursuing that role will be to give over control of government to anything like unconstrained, majority rule.” (Pettit 2000, 39)

The upshot here is that an “undemocratic” international (human rights) judiciary may still be a legitimate part of a legitimate Global Basic Structure. International courts may be a valuable part of a multi-level legal order, which as a whole is sufficiently controlled by democratic mechanisms to be legitimate - ie. justifiable toward all affected parties as equals. In short, there seems to be good reasons to maintain and develop the distinction between democratic theory, theory of legitimacy and theory of justice.

Thirdly, I submit that this theory of legitimacy avoids a “Fallacy of Monotonicity” Every increase in accountability or match between objectives and outputs does not increase legitimacy. In contrast, some scholars seem to hold a ‘cumulative’ view of how to increase the legitimacy of particular institutions, or of the global basic structure as a whole.’ Thus Buchanan and Keohane argue convincingly for three conditions that tend to enhance the legitimacy of global governance institutions such as the WTO, the IMF and the International Criminal Court – and presumably the human rights judiciary. Such institutions must enjoy a minimum of moral acceptability in terms of human rights. They must provide some benefit otherwise out of reach - compared to alternative institutions; and they must
enjoy ‘institutional integrity’ in the form of a match between its actual performance and its procedures and major goals (Buchanan and Keohane 2006, 422). But they then go on to claim that

Our three substantive conditions are best thought of as what Rawls calls “counting principles”: the more of them an institution satisfies, and the higher the degree to which it satisfies them, the stronger its claim to legitimacy.” (424).

Against these views, I submit that it seems mistaken to hold that any increase in a valuable component or aspect of democratic rule, or a mechanism of legitimation such as ‘institutional integrity’, also increases the ‘quality’ of democracy, or increases the legitimacy of the institution not to mention the set of institutions as a whole. The relationship between inclusion in decision making processes and increased ‘quality’ of democratic deliberation, election and accountability is much more complex. Consider, for instance, the risks of corporatist arrangements that include some segments but leave some affected parties disenfranchised and arguably worse off due to the inclusion of others. Similarly with regard to the relation between a better match of stated objectives and actual effects to a more legitimate institution e.g. without attention to which objectives the treaty or institution has; or in ignorance of how the treaty distributes benefits and burdens. When those objectives are indeed compatible with human rights the case for increased legitimacy may be stronger, but otherwise not.

In contrast, the focus of institutional theories of legitimacy is on complex combination of such legitimation mechanisms, as applied to a broader subject - the global basic structure as a whole. This broader subject matter, I venture, reduces the likelihood of the fallacy of monotonicity.

To conclude, I insist that this sketch of a justification of the human rights judiciary should not be taken to imply that the ECtHR or other parts of the human rights judiciary is currently legitimate. These bodies may well have to be modified to enhance their justifiable functions (Follesdal 2009). But the form of comparison is holistic and institutionalist. The salient question is not how things would have turned out in the absence of institutions. Instead, we should compare the current human rights judiciary with the best alternative institutions that compose a global basic structure. I venture that in order to move toward more legitimate global basic structure we should not reject the present international human rights judiciary, but rather identify areas of urgent reforms.

References

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