

The Legitimacy of International Human Rights Courts

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Presentation, 17.01.2012

Work in progress, please do not cite. Comments are very welcome.

Abstract

This essay explores the legitimacy of judicial review as used by international human rights courts, and seeks to explain why advanced democracies may have reason to submit to it. Three justifications for international judicial review are canvassed. The voluntarist view is sceptical, the consequentialist view is conditionally supportive, while only the deontological view supports it unreservedly.

1. Introduction

The European Court of Human Rights (ECtHR) is supposed to solve disagreements on human rights issues among the members of the Council of Europe. As the body with the mandate to be final interpreter of the European Convention on Human Rights it is to be the voice of European states, representing a consensus. Although the court cannot invalidate domestic legislation, it has the authority to request states to make domestic laws compatible with the convention. Citizens and their representatives

may disagree about specific judgments, but at least they agree on the court's authority to render a verdict, its legitimacy.

Yet, in 2011 the court itself was held responsible for creating a constitutional crisis. While the court's brief is to interpret the Human Rights Convention, it was accused of going further, acting as a legislator and thereby usurping the power of a democratically elected parliament. The Hirst ruling resulted in the United Kingdom being found in breach of the convention because it denies the franchise to prison inmates. Yet critics claimed that there is no warrant in the Convention for this rights, since it is not mentioned in it and is unlikely to have been on the mind of the framers. Dominic Raab, a conservative MP, summarized much of the resentment:

The judges have assumed a legislative function, fully aware that there are limited means for elected governments subject to their rulings to exercise any meaningful democratic oversight over them. This judicial coup represents a naked usurpation, by a judicial body, of the legislative power that properly belongs to democratically elected law makers.¹

Several joined him in drawing the conclusion that the court should not have the power of judicial review over national parliaments. Rather than reforming the court, its powers should be limited. Although this line of reasoning in principle is a question of asserting national sovereignty, it is sometimes referred to as 'democratic override' since the signatories to the ECHR are democracies.

¹ Dominic Raab, *Strasbourg in the Dock: Prisoner Voting, Human Rights & the Case for Democracy* (London: Civitas 2011), p. 9.

Sigrid Rausing, a philanthropist, responded to Raab in the *Guardian*.² Her first argument is that even people that we do not like (in this case an inmate guilty of manslaughter) have human rights that must be respected. This argument does not go to the core, however, since Raab had challenged the very authority of the procedure. Her second argument speaks to that. If the UK were to limit its exposure to the court's judicial review it would set a bad example for other states. 'If we too claim democratic override, on what grounds can we argue it is a bad idea for Russia?' Thus, the UK has reason to submit to the court's review for the sake of human rights protection in less stable democracies.³

Rausing's view only makes sense, however, if the court's judicial review in itself is legitimate. This essay will seek to answer that question, and in doing so, it will take its cue from a new literature that has started employing constitutional theory developed in a national context to explore international human rights legislation.⁴ I will present three theories of the legitimacy of judicial review. The first is voluntarist, basing legitimacy on popular sovereignty. The second is consequentialist, basing legitimacy on desirable outcomes. The third view is deontological, basing legitimacy on the rule

² Sigrid Rausing, 'Yes to reforming the European court of human rights. No to overriding it', *Guardian*, 6 December 2011.

³ Mads Andenæs and Anders Ryssdal have argued that Norway has reason to abide by the ECtHR for similar reasons. See 'Vingestekking av menneskeretter', *Aftenposten*, 4 January 2011.

⁴ See Andreas Føllesdal, 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights', *Journal of Social Philosophy* 40 (4) (2009): 595-607, Andreas von Staden 'Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review', *Jean Monnet Working Paper* (NYU), 2011.

of law.⁵ This exploration allows us explore Rausing's idea that advanced democracies should avoid setting a bad example for unconsolidated democracies. Although it is a widely shared intuition, it is rarely stated exactly what it might amount to.

2. Judicial review

Judicial review (JR) is the principle that a court is entitled to review a statute in order to judge whether it is consistent with a higher law (such as a Bill of Rights or a Human Rights Convention). In a system of *strong* JR the court can decline to enforce the statute or require legislators to change the law. In *weak* JR the court may only scrutinize legislation but not overrule it. I will not have much to say about weak JR, since it does not challenge state sovereignty. The European Court of Human Rights seems to be a hybrid form. Unlike some forms of strong JR it is not authorized to repeal national legislation, yet it has the authority to order violating states to abide by the court's decision (subject to the state's discretion).

Judicial review is a legal, not a moral venture. The task of a court is not to strike down morally odious legislation, but to strike down legislation in conflict with a higher positive law. Judges may take the view that the law itself should be given a moral interpretation, but even Ronald Dworkin, a proponent of this view, would not deny that the task is to establish the meaning of the law. Because its task is to secure positive law, JR is a *normatively dependent* concept. Although it is often thought of as

⁵ For another application of this theoretical framework, see Pavlos Eleftheriadis, 'The Moral Distinctiveness of the European Union' forthcoming in *International Journal of Constitutional Law*.

an institution safeguarding liberal rights, paradigmatically in the work of the US Supreme Court, it is not limited to liberal regimes (the Iranian Guardian Council too has JR). It is morally justifiable only in those cases where the law itself is justified. Where the constitution is morally odious, JR will itself reinforce an odious constitution and indeed it may prevent statutes from being enacted that, substantially, would improve the moral quality of the law. The following discussion will be limited to JR in contexts of democracies.

International JR is controversial for two reasons in particular. The first is that it is a challenge to domestic democratic legislatures. If a country is found to violate a human rights convention, its legislature will have to amend the laws. As the UK case shows, this may be considered an affront both to national sovereignty and to democracy. While national legislatures have democratic legitimacy, judges on international courts are usually not democratically elected. Governments appoint judges, sometimes combined with a selection process in an international forum. Moreover, there is no international parliament that might function as a counter-part to the international judiciary. This means that if the judiciary acts arbitrarily it will be hard for any single state to do anything about it.

Second, international JR is controversial because it is subject to the *pragmatist objection*. As Frank Michelman expresses it: 'any foundational set of procedures or principles sufficiently abstract to secure consensus will be too abstract to guide

action.’⁶ The problem of legal interpretation is particularly acute in international human rights law because it is usually framed in highly abstract language and concerns complex philosophical principles. The drafters of the ECHR describes that the priority and strategy was ‘to have a short, non-controversial text which the governments could accept at once, while the tide for human rights was strong’.⁷ This opens for wide discretion for the court (indeed the quote by the framers was used by a judge to justify the court’s dynamic interpretation of the law). Again the UK debate shows that what the court is at pains to describe as contextual application of law will by the disgruntled be described as law making (and therefore usurpation of power).

3. Voluntarism and consequentialism

The legitimacy of judicial review is its philosophical justification, that which explains that the practice is worth supporting. Legitimacy is often used also in a sociological sense to describe the reasons why persons in fact support a practice,⁸ but that will not be a topic in the following. The debate about JR is not necessarily about whether rights, human or otherwise, are important. Although some critics of JR question the value of rights, they will not be discussed in the following. The following is about how rights should be upheld: by a court or by a parliament.

⁶ This is a paraphrase by Michael Dorf in ‘Legal Indeterminacy and Institutional Design’, *New York University Law Review* 78 (2003): 875–981. Note: cited after draft version. The Michelman quote is removed from the final edition of Dorf’s paper.

⁷ Harris and O’Boyle cited by François Tulkens in ‘Seminar: What are the limits to the evolutive interpretation of the convention?’ in *Dialogue Between Judges*, European Court of Human Rights, Council of Europe, Strasbourg: 2011, p. 6.

⁸ See Daniel Bodansky, ‘Legitimacy in International Law and International Relations’, ms. presented at MultiRights in 2011.

The view someone takes on that likely results from two factors: a view of legitimacy and a view of legal interpretation. A large variety of views on the nature of interpretation have been developed, many of them in the context of domestic JR, in particular that of the US Supreme Court. The genre has its boosters and knockers. Some are sceptical to the possibility of eliciting a true meaning out of legal texts; others are more optimistic.⁹ A view on the legitimacy of JR can therefore be combined with a whole range of more technical hermeneutic theories about truth in interpretation. Indeed, a view on the legitimacy of courts is likely to depend quite a bit on a view of interpretation.

I will first address the *voluntarist* view, maintained among others by Jeremy Waldron. It is sceptical both to the legitimacy of JR and to legal interpretation. Waldron's view is voluntarist because it takes the stated will of the population as the condition of legitimacy of a procedure. In this, Waldron is influenced by John Locke's view theory of legitimacy by consent. The problem with courts is that they are usually not elected, thereby they fall foul on the principle of political equality. Only democratic assemblies operating by the majority principle treats everyone as an equal, because each is given the right to vote so that the result ultimately reflects the opinion with the most supporters in society:

⁹ For an overview, see Dorf 'Legal Indeterminacy and Institutional Design' pp. 889-935.

Better than any other rule, MD [Majority Decision] is neutral as between the contested outcomes, treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions.¹⁰

As a result, even those who disagree with outcomes have reason to abide by them. To be sure, elected representatives appoint the judges on courts. But while courts therefore have some democratic legitimacy it is of a much weaker kind than that of a parliament.

Waldron combines this scepticism to the legitimacy of judges with scepticism to legal interpretation, reminiscent of Michelman's pragmatic objection. The 'platitudes' of Bills of rights (and by extension human rights conventions) are too vague and abstract to guide proper interpretation. They do not settle any disagreements about rights in society; at best they are 'popularly selected sites for dispute about these issues'.¹¹ The idea of constitutional rights as a people's precommitment (hence embodying a popular will in the law¹²) is a non-starter because it presupposes that it is possible to say with any degree of certainty what the people may have meant at the

¹⁰ Jeremy Waldron, 'The Core of the Case Against Judicial Review', *Yale Law Journal* 115, (2006): 1346-1406, here at 1388. See also Waldron's 'Disagreement and precommitment', chapter 12 in *Law and Disagreement* (Oxford: Oxford University Press, 1999), pp. 255-281, and 'Judicial Power and Popular Sovereignty,' in *Marbury versus Madison: Documents and Commentary* edited by Mark Graber and Michael Perhac (CQ Press, 2002), 181-202.

¹¹ Waldron, 'The Core of the Case', p. 1393.

¹² See Stephen Holmes, 'Precommitment and the Paradox of Democracy' in *Constitutionalism and Democracy*, edited by Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), pp. 195-241.

time, and therefore what it may have committed itself to.¹³ But because of legal indeterminacy this is impossible. The work of a constitutional court is best understood as law creation rather than application.

But law creation without proper democratic credential is not legitimate. Hence, rights ought to be upheld by democratic parliaments rather than unelected courts.

Parliaments, although sometimes prejudiced, and although constitutionally inclined to favour the view of the majority, are also more capable of properly deliberating about issues because they take into account the full range of reasons. In this they differ from courts, which limit themselves to showing how a statute is consistent or not with the constitution or with previous legislation and cases. They care about the 'interpretation of doctrine' whereas legislatures discuss 'the real issues at stake in good faith disagreement about right' and go straight to that which is of 'moral importance'.¹⁴

Although does not treat international human rights, it seems likely that his conclusion would be negative, since international JR has even less direct democratic legitimacy than the domestic variety. The voluntarist view runs into difficulties, however. While it is difficult not to agree that democratic elections is a powerful source of legitimacy, it is not clear how democratic decisions can grant any special authority to human rights law. Although parliaments are excellent deliberative fora, they may in the end

¹³ See Waldron, 'Disagreement and precommitment'.

¹⁴ Jeremy Waldron, 'The Core of the Case' p. 1383.

engage in legislation that is normatively suspect. Parliamentary majorities do not necessarily represent the truth about a matter, and questions of human rights are ill suited to being treated as ideological concerns.

Although one might wish courts to have a more direct democratic legitimacy, they do not need it to the same extent as parliaments. The reason is that courts have a more limited authority: their brief is not to make but to apply the law. Parliamentary representatives must be democratically elected partly because in making law they ought to be the advocates of the interests and sentiments of their constituencies.¹⁵ Elections are a good way of making them responsive. Judges, however, should exclusively represent the point of view of the law, and it would be positively damaging if they were beholden to particular constituencies. This is why their democratic legitimacy is indirect: they answer to the parliament as a national institution. For the same reason, they are not (*pace* Waldron) expected to engage in the full moral reasoning, in which a parliament engages. Indeed, any court doing so invites the suspicion that it seeks to cross the line into the territory of law making.

A final difficulty with Waldron's view is that its reach is restricted to societies, such as the US and the UK, with well-functioning democratic institutions and a culture of respecting rights. Such mature democracies are capable of self-correction, and this renders the tyranny of the majority less of a worry. But this limitation is slightly disappointing from the perspective of international human rights, because these

¹⁵ See Nadia Urbinati, Representation as Advocacy: A Study of Democratic Deliberation, in *Political Theory* 28 (6) (2000): 758-786.

regimes include new and unconsolidated democracies, where minorities may have little reason to trust majorities. Andreas Føllesdal has made these regimes the topic of his conditional defence of JR.¹⁶

Føllesdal's theory exemplifies the second, *consequentialist* view. While JR itself should not be oriented to outcomes (but to upholding liberal rights), the legitimacy of the institution rests on it furthering trust in society. It provides assurance that other persons and authorities will comply with the established basic rights. This is particularly important for minorities because those who are outvoted can be somewhat more secure that the majority will not subject them to domination:

The best such case for international bodies that review proposed legislation for human rights violations is that such actors may provide citizens and foreigners much needed assurance. 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.¹⁷

Judicial review may lead to other good outcomes as well: it can spark parliamentary debate about how to avoid violating human rights, there will be more awareness of

¹⁶ See Føllesdal, 'The Legitimacy of International Human Rights Review'. This defence is of weak JR, and as such the target is slightly different from that of Waldron, who aims at strong JR. But Føllesdal's example is the European Court of Human Rights, which is a hybrid. In common with weak judicial review it does not invalidate legislation, but like strong judicial review it requires states to change their legislation. It therefore raises similar questions about overriding domestic democratic processes.

¹⁷ Føllesdal, 'The Legitimacy of International Human Rights Review', p. 600.

legally protected rights of minorities, and this awareness may well lead them to be treated with greater fairness.¹⁸

Although Føllesdal does not discuss legal interpretation extensively, his view is more positive than Waldron's and the assumption is that courts more often than not are effective in protecting human rights legislation. Nonetheless, this view is tempered by the awareness that judges may serve particular interests, in particular in international human rights bodies like the ECtHR where nations will propose judges loyal to national interests.

The consequentialist argument is no doubt powerful for many unconsolidated democracies, where rights must be protected in contexts of distrust. In the most extreme case, secession and national disintegration can be avoided if minority rights are properly secured (hence, paradoxically, ceding sovereignty to an international body can bolster it). Yet this view too raises difficult questions. First, it might lead the court's authority to be unstable. If the legitimacy of JR depends on success in building trust, it might appear that the court's authority would fluctuate with circumstances. Would it lack authority if it fails to properly establish itself in difficult circumstances? That might render its authority insecure in countries where it is the most needed. Second, the consequentialist view only gives a conditional justification of international JR since it does not apply to the countries where trust already exists. Consider Waldron's baseline, that advanced democracies have a culture of respect for

¹⁸ Føllesdal, 'The Legitimacy of International Human Rights Review', p. 603.

rights and therefore can self-correct through domestic parliaments. If we accept this, then international JR would seem to contribute very little to HR protection in these countries. This leads to the question why they should engage in cooperation like the European Court of Human Rights, where the assurance benefit will be unevenly distributed. Even if we admit that advanced democracies do have *some* benefit from international JR it is likely much smaller than that of new democracies. Since the benefit will be unevenly distributed, the legitimacy of the institution will vary: it would be low in the UK and Norway and high in Russia and Turkey.¹⁹

Perhaps that extra modicum of trust-building is sufficient reason for advanced democracies to submit to the practice. The alternative would seem to be that advanced democracies, as Rausing suggested, submit to judicial review because it will strengthen trust in *other* societies. One might see reasons for this. It might be a duty of solidarity or simply a matter of self-interest, since advanced democracies presumably benefit from stable neighbours. But even if these were good reasons to submit to a court they seem somewhat incomplete. It is not clear why one country should have a duty of solidarity to contribute to developing trust in another country. Even if there were such a duty, trust can be built in multiple ways, and advanced

¹⁹ It is natural to argue that countries like the UK and Norway benefit from submitting to the JR of the ECtHR, since they have many times been found in violation of human rights (indeed, if we correct for population size, Norway is quantitatively not that much behind Russia). Yet, the point is not that these decisions do not ensure rights protection. They do. The point is that advanced democracies may be capable of solving these questions by domestic political procedures. If we trust Waldron, there is a virtue in these procedures too: they allow a population to deliberate on all the features of a moral issue, rather than just to deliberate about the significance of a verdict from Strasbourg.

democracies would not necessarily have to do it by the instrument of an international court. In conclusion, it seems a fragile rationale compared to the ordinary reason to submit to a court: that justice must be protected.

4. Deontology

In this section I will briefly develop a deontological theory of judicial review. This moniker is meant to denote that the court's legitimacy arises from playing an essential role in the rule of law. Democratic procedures and desirable outcomes are of importance in legislation, but not to the same degree for the legitimacy of courts. The authority of courts arises from them safeguarding human rights. Ultimately, the legitimacy of courts derives from a moral imperative to institute legal relations among nations and individuals. Individuals who unavoidably interact will come into conflict and to avoid conflict resolution by unilateral violence they must secure their mutual freedom in a legal system.²⁰ A full defence of this deontological view of justice cannot be given here; the following will explore some implications for the legitimacy of courts.

The key idea of the rule of law is that government should be bound by fixed, stable, publicly known and general rules, allowing persons to know the law, predict how government will act on it, and therefore be able to plan their lives accordingly.²¹ The

²⁰ See Immanuel Kant, *The Metaphysics of Morals*, edited by Mary Gregor (Cambridge: Cambridge University Press, 1996), especially pp. 44-45 (AA 256-257), and 84-90 (AA 306-313).

²¹ Joseph Raz, 'The Rule of Law and Its Virtue' chapter 11 in *The Authority of Law* (Oxford: Oxford University Press, 1979), p. 210ff.

role played by the court is to explain what the law is and to apply it in particular contexts. Without this explication it is impossible for subjects to know and obey the law. Judges are experts on the law. They can be compared to democratic representatives, only that they have a different mandate: where representatives are responsive to and mediate the will of their constituencies and the people as a whole, judges express the perspective of the law. If they have authority, it is because they are a necessary part of any system of justice, not because of the process in which they were elected or because they secure desirable outcomes such as trust or moral values. The court nonetheless plays two democratic functions: it secures the laws that were initially enacted by a democratic parliament, and it ensures basic civil rights that are necessary for the outcomes of democratic procedures to be considered legitimate.

No doubt, this principle of legitimacy has sometimes been bolstered by an implausible view of interpretation. Immanuel Kant, for example, considered the relation between the three powers as a practical syllogism, where the legislative provides the major premise, the executive the minor, and the court draws the conclusion by deduction.²² It is natural to ask what the response might be to Michelman's pragmatic objection. As mentioned, legal indeterminacy is a particularly thorny issue in human rights legislation, which contain moral principles pitched at a very high level of abstraction. Moreover, when abstract laws are applied to particular contexts interpretation must

²² Kant, *The Metaphysics of Morals*, p. 91 (AA: 313).

be flexible and it will be hard to distinguish application from law making. Even some supporters of parliamentary democracy admit that courts make law.²³

Yet, dynamic interpretation is different from deriving rights from a convention, which were not initially included,²⁴ and although the border can be difficult to ascertain it must be upheld in principle since the court's claim to authority is that it engages in interpretation. This is not the place once and for all to settle the question of legal interpretation and indeterminacy.²⁵ It is nonetheless clear that the deontological view excludes or cautions against some approaches to interpretation. Interpretation should not be oriented to an existing democratic opinion, nor should it seek attractive consequences. Originalism should also be avoided as it depends on the voluntarist view that the will of framers is of particular significance to interpreting the law. A moral interpretation of the law should also be restrained, since this can involve reading much more into the law than one could reasonably expect ordinary citizens to be capable of (and as a result, the law would lose the important function of stabilizing behavioural expectations). In sum: it cautions modesty.

On the deontological view, then, the legitimacy of judicial review by courts comes from their role (within a system of divided powers) of applying the law. Yet, I have

²³ See Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', *European Journal of International Law* 23 (1) (2012): 11-12 (ms. pagination).

²⁴ See Tulkens in 'Limits to evolutive interpretation?', p. 8.

²⁵ For a review of the debates see Dorf 'Legal Indeterminacy and Institutional Design' pp. 889-935.

not presented any arguments for why courts necessarily must have *strong* JR. Why should it not simply be up to national parliaments to settle issues of HR law? It is easy to see the use of international JR for new and unconsolidated democracies (think Hungary) but it is not clear why mature democracies should submit to it. Are there other reasons than solidarity and self-interest?

The deontological answer might come in two parts. First, remember the assumption that it is a duty for all states to secure the protection of human rights internationally. Again, this is grounded in a moral duty for individuals who unavoidably interact to secure their mutual freedom in a legal system. One way for the UK, and other European states, to satisfy this duty is by being a member of the European Council and by adhering to the European Convention on Human Rights (in the case of the UK through the Human Rights Act). The duty to secure human rights does not stop at the borders of the CE, but it may be necessary to enlist regional associations in the effort.

The second idea is that once countries have agreed to submit to a binding convention, they should no longer consider the convention from a domestic perspective but from the perspective of the community subject to the treaty. In the case of the CE, the community includes both advanced and unconsolidated democracies. The relevant question, then, is not whether strong JR by the ECtHR is necessary for Britain. The question is whether it is necessary for the CE. To this the answer would be yes, since it cannot be said that basic human rights are sufficiently protected by domestic parliaments everywhere in the area that makes up the CE. When the CE is considered as one juridical system it would not do to exempt some countries from judicial

review, because that would be to not apply the law equally. Thus, the UK should not submit to the court in order to set a good example, as Rausing suggested, but because the authority of the law is not compatible with exemptions.

One might object that the deontological view on international JR depends on an implausible view of interpretation. Yet, interpretation is not just about hermeneutics but also about institutional features, and some of them may render an international court better off than its domestic counterparts. First, if there is doubt about the interpretation of a human rights statute within a particular context, an international court can learn from established practice among its member states. Its discretion is guided by experiment and precedent. Second, the court is usually composed of members from several nations. This is significant, because the most obvious reason to be sceptical to juridical review in a domestic context is that courts may harbour exactly the same prejudices that legislatures do (think of US supreme court cases like *Korematsu* or *Dred Scott*). Members of an international court, however, are external to domestic prejudices in the countries where they intervene, and although the judges may be biased they are unlikely all to be biased in the same way.

Scholars have suggested additional institutional features as targets for improvement. They include developing the principle of the margin of appreciation,²⁶ so that questions of authority in multilevel government can be settled with greater facility (and so that decisions can be taken as close as possible to those subject to them).

²⁶ See Føllesdal, 'The Legitimacy of International Human Rights Review', and von Staden, 'Democratic Legitimacy of Judicial Review Beyond the State'.

Others propose to increase the democratic legitimacy of courts by expanding the role of the public in election of judges and in judicial proceedings, perhaps by letting domestic parliaments elect judges or by expanding the role of supranational parliaments.²⁷ That might enable democratic legislators to HR law from time to time, setting stricter parameters for the court. Although the legitimacy of JR may not need to rest on direct democratic election it is no doubt a contributing feature.

5. Conclusion

This essay has attempted to explain the legitimacy of JR by international human rights courts, and to provide reasons why advanced democracies ought to submit to it. Courts are legitimate not because they have been democratically elected or because they lead to desirable outcomes, but because their review is an essential part in securing justice through the rule of law. Advanced democracies have reason to submit to international human rights courts because of the moral duty to secure human rights requires states to join shared legal regimes. Because JR is necessary for the regime as such, there can be no exception for advanced democracies.

The paper has a restricted topic. It has not attempted to explain the deeper reasons why individuals and states in the first place are under an obligation to support human rights universally. Nor has it explored alternative multilateral institutional arrangements that could lead to proper rights protection in the absence of courts with JR. These are interesting topics for further explorations.

²⁷ See von Bogdandy and Venzke, 'In Whose Name?' pp. 36, 38, 44 (pagination from ms edition).

An advantage of the deontological view is that it sets a clear standard for when courts engage in usurpation. They usurp power if instead of applying the law they start making it. Whatever else one might think of Raab's contribution to the British debate, at least he has one principle in order: the court should not legislate. But the conclusion need not be to reaffirm the sovereignty of national parliaments as a check on 'activist' courts. A more ambitious approach, in line with British traditions of parliamentarism and multilateralism, would be to join those who seek to build parliamentary institutions at the transnational level.