

**Institutionalising Socratic Contestation: The Rationalist Human Rights
Paradigm, Legitimate Authority and the Point of Judicial Review**

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The debate about judicial review is not over. In the latest round of contributions on what is one of the classical issues of Post World War II constitutionalism, Jeremy Waldron¹ and Richard Bellamy² restate, sharpen and refine old arguments against the authority of courts to set aside or declare null and void legislation on the grounds that it violates constitutional or human rights.

The core criticism of judicial review is focused on two main grounds. First, at least in reasonably mature liberal democracies there is no reason to suppose that rights are better protected by this practice than they would be by democratic legislatures. In particular the legalist nature of judicial rights discourse, its focus on text, history, precedent etc., tend to unhelpfully distract from the moral issues central to the validation of rights claims, whereas these legalistic distractions do not burden political debate. Second, quite apart from the outcome it generates, judicial review is democratically illegitimate. The protection of rights might be a precondition for the legitimacy of law, but what these rights amount to in concrete circumstances is likely to be subject to reasonable disagreement between citizens. Under those circumstances the idea of political equality requires that rights issues too should be decided using a process that provides for electoral accountability. To some extent the arguments Waldron and Bellamy make, like the debate over judicial review more generally, is unlikely to resonate strongly in Europe. In most European jurisdictions the question whether or not there should be judicial review is institutionally settled by positive law in form of clear constitutional and international legal commitments.³ But these challenges provide a welcome occasion to reflect more deeply about the nature of human and constitutional rights practice as

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¹ J. WALDRON, "The Case Against Judicial Review", *Yale Law Journal*, 2006, pp. 1348-1406.

² R. BELLAMY, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy*, CUP, 2007; besides addressing the issue of judicial review, this book addresses a significantly wider range of constitutional questions.

³ Of course this is a generalisation. In Britain as well as Scandinavian countries the role of courts in authoritatively deciding constitutional rights issues is limited and debates about the desirability of judicial review are very much alive.

it has evolved in Europe and to ask what, if any, its specific virtues are and how these virtues relate to the legitimacy of law in a liberal democracy. As will become clear, European constitutional and human rights practice provides good reasons to think again about the nature of those rights, the relationship between rights and democracy and the institutions that seek to reflect and realise these commitments.

I will argue that Waldron and Bellamy address the right kind of concerns, but they get things exactly wrong. First, outcomes *are* likely to be improved with judicial review. The essay defends conventional wisdom against the challenge of legalist distortion, but does so in a way that is focused specifically on contemporary European human and constitutional rights practice. In this practice the legalist distortions that Waldron in particular describes are mostly absent. Instead in Europe what I refer to as a Rationalist Human Rights Paradigm (hereinafter, RHRP) is dominant. Within such a paradigm the four prong proportionality test in particular allows courts to engage all relevant moral and pragmatic arguments explicitly, without the kind of legalistic guidance and constraint that otherwise characterises legal reasoning. Furthermore, when judges do so, they are not generally engaged in an exercise of sophisticated theorising, but in a relatively pedestrian structured process of scrutinising reasons. This process is capable of identifying a wide range of political pathologies that are common enough even in mature democracies. In describing the Rationalist Human Rights Paradigm, the article highlights some central structural features of European human rights practice, that distinguish it in interesting ways from the US context, to which Waldron and much of the most sophisticated thinking about judicial review, generally refers.

Second, even though the Rationalist Human Rights Paradigm does not provide much in terms of legal constraint and authoritative guidance for courts adjudicating rights claims, this does not exacerbate or confirm the legitimacy problem that sceptics claim is at the heart of the case against judicial review. The opposite is true. Under reasonably favourable circumstances of a mature liberal democracy judicial review is a necessary complement to democratically accountable decision-making. Both judicial review of legislation and electoral accountability of the legislator give institutional expression to co-original and equally basic commitments of liberal-democratic constitutionalism. Both are central pillars of constitutional legitimacy. Judicial review deserves to be defended not only on the pragmatic grounds that it leads to better outcomes, but also as a matter of principle.

At the heart of a defence of judicial review has to be an account of the point of such a practice. That account has to both fit the practice it purports to defend and articulate what is attractive about it.⁴ An account can fail either because it does not meaningfully connect to an actual practice or because it does not show what is attractive about it. The rich literature on judicial review generated by US scholars⁵ that generally addresses US Constitutional practice does not capture some central features of European Constitutional practice. It does not fit that practice and therefore does little to illuminate it.⁶ More specifically none of that literature captures the distinct structural features central to the Rationalist Human Rights Paradigm. On the other hand those comparative or European constitutional scholars more attuned to the core features of the Rationalist Human Rights Paradigm⁷ that dominates European practice have not provided well-developed persuasive accounts about why such a practice should be regarded as attractive. This essay is an attempt to provide the barebones structure of such an account. It can only present the argument in a cursory and underdeveloped way and does not claim to do justice to the rich set of questions that will be encountered or the considerable literatures that address them.

The point of judicial review, I will argue, is to legally institutionalise a practice of Socratic contestation. Socratic contestation refers to the practice of critically engaging authorities, in order to assess whether the claims they make are based on good reasons. This practice, described most vividly in the early Platonic dialogues,⁸ led to understandable frustration of many of the established authorities whose claims Socrates scrutinised and found lacking. It led the historical Socrates to be convicted and sentenced to death for questioning the gods of the community and corrupting youth in democratic Athens. Human and

⁴ This way of framing the issue has much in common with the methodology described by **R. DWORKIN**, *Law's Empire*, 1986; such an approach does not only provides a positive account that shows the practice in its best light, it also articulates a normative standard by which specific aspects of that practice can be criticised as falling short of what it is supposed to be.

⁵ Canonical contributions include **A. BICKEL**, *The Least Dangerous Branch*, 1969; **J.H. ELY**, *Democracy and Distrust*, 1981; **R. BORK and R. DWORKIN**, *Freedom's Laws*, HUP, 1996; **C. EISGRUBER**, *Constitutional Self-Government*, HUP, 2001; **L. SAGER**, *Justice in Plainclothes*, Yale University Press, 2004; **L. KRAMER**, *The People Themselves*, OUP, 2004; **M. TUSHNET**, *Taking the Constitution Away from the Courts*, Princeton University Press, 1999.

⁶ This is a point rightly made by **D. BEATTY**, *Ultimate Rule of Law*, OUP, 2004.

⁷ **R. ALEXY**, *A Theory of Constitutional Rights*, OUP, 2002; **D. BEATTY**, *Ultimate Rule of Law*, OUP, 2004.

⁸ Here I follow Gregory Vlastos, who distinguished between the Socrates of the elenctic dialogues of Plato's earlier period and the Socrates depicted in later dialogues. The elenctic dialogues are, in alphabetical order: *The Apology*, *Charmides*, *Crito*, *Eutyphro*, *Gorgias*, *Hippias Minor*, *Ion*, *Laches*, *Protagoras* and the first book of *The Republic*; See **G. VLASTOS**, *Socrates: Ironist and Moral Philosopher*, CUP, 1991, p. 46.

constitutional rights adjudication, as it has developed in much of Europe, I will argue, is a form of legally institutionalised Socratic contestation. When individuals bring claims grounded in human or constitutional rights, they enlist courts to critically engage public authorities in order to assess whether their acts and the burdens they impose on the rights-claimants are susceptible to plausible justification. The Socrates that Plato describes in his early dialogues is right to have claimed a place of honour in the Democratic Athenian Polis, rather than having to suffer for it on trumped up charges that his activities violated community values and corrupted youth. Conversely, citizens in Europe are right to have legally institutionalised a practice of Socratic contestation as a litmus test that any act by public authorities must meet, when legally challenged. Legally institutionalised Socratic contestation is desirable, both because it tends to improve outcomes and because it expresses a central liberal commitment about the conditions that must be met, in order for law to be legitimate.

The first part of the essay will highlight the core structural features of the Rationalist Human Rights Paradigm that informs much of European human and constitutional rights practice. The second part will argue that the point to institutionalise a rights-practice that has this structure is to legally establish a practice of Socratic contestation. Socratic contestation is a practice that gives institutional expression to the idea that all legitimate authority depends on being grounded in public reasons, that is, justifiable to others on grounds they might reasonably accept.⁹ In practice Socratic contestation is well suited to address a wide range of ordinary pathologies of the political process. The third part first puts both the RHRP and judicial review in a historical context, before arguing that judicial review of rights is not in tension with democratic legitimacy but a necessary complement to it. I will argue that the idea of competitive electoral politics grounded in an equal right to vote and the rights-based practice of Socratic contestation are complementary basic institutional commitments of liberal democratic constitutionalism, whose legitimacy does not turn exclusively on outcome related arguments. Liberal democracy without judicial review would be incomplete and deficient. A final part will contain some tentative hypothesis about why there has been so much debate about the counter-majoritarian difficulty and judicial review and so little about the

⁹ Note how this formulation is different from the one that Scanlon uses to capture the core of the liberal contractualist conception of justice, requiring “justifiability to others on grounds they could not reasonably reject”; see **T.M. SCANLON**, *What We Owe to Each Other*, HUP, 1998. The difference between these formulations is the difference between a formulation that seeks to establish criteria for justice and one that establishes criteria for legitimacy. Even though this is in issue of some importance, it can’t be addressed here. As I will argue in greater depth below, judicial review is concerned with legitimacy, not justice.

majoritarian difficulty. It is only in the Europe of the last fifty years that the liberal democratic constitutional tradition has gradually begun to emancipate itself from the authoritarian, collectivist –and often nationalist– biases that have, in the form of constitutional theories of democracy as collective self-government, continued to inform a great deal of constitutional thinking in the age of the nation state. The shadow of Hobbes continues to hover over much of contemporary constitutional theory.

I. The ‘rational human rights paradigm’

Human and constitutional rights practice in Europe is, to a significant extent, not legalist but rationalist. It is generally focused not on the interpretation of legal authority, but on the justification of acts of public authorities in terms of public reason. Arguments relating to legal texts, history, precedence, *etc.* have a relatively modest role to play in European constitutional rights practice. Instead the operative heart of a human or constitutional rights challenge is the proportionality test (1). That test, however, provides little more than a checklist of individually necessary and collectively sufficient criteria that need to be met for behaviour by public authorities to be justified in terms of public reason. It provides a structure for the assessment of public reasons (2). Furthermore the range of interests that enjoy *prima facie* protection as a right are generally not narrow and limited, but expansive. Both the German Constitutional Court and the ECJ, for example, recognise a general right to liberty and a general right to equality. That means that just about any act infringing on interests of individuals trigger are opened up for a constitutional or human rights challenge and requires to be justified in terms of public reason (3).

(1) It is true that not all constitutional or human rights listed in legal documents require proportionality analysis or any other discussion of limitations. The catalogues of rights contained in domestic constitutions and international human rights documents include norms that have a simple categorical, rule like structure. They may stipulate such things as: “the death penalty is abolished”; or “every citizen has the right to be heard by a judge within 24 hours after his arrest”. Most specific rules of this kind are best understood as authoritative determinations made by the constitutional legislator about how all the relevant first order considerations of morality and policy play out in the circumstances defined by the rule. Notwithstanding interpretative issues that may arise at the margins, clearly the judicial

enforcement of such rules is not subject to proportionality analysis or any other meaningful engagement with moral considerations.

But at the heart of modern human and constitutional rights practice are rights provisions of a different kind. Modern constitutions establish abstract requirements such as a right to freedom of speech, freedom of association, freedom of religion etc. These rights, it seems, can't plausibly have the same structure as the specific rights listed above. Clearly there must be limitations to such rights. There is no right to shout fire in a crowded cinema or to organise a spontaneous mass demonstration in the middle of Champs Elysées during rush hour. How should these limits be determined?

In part constitutional texts provide further insights into how those limits ought to be conceived. As a matter of textual architecture it is helpful to distinguish between three different approaches to the limits of rights.

The first textual approach is not to say anything at all about limits. In the United States the 1st Amendment, for example, simply states that "Congress shall make no laws [...] abridging the freedom of speech [or] the free exercise of religion".¹⁰ Not surprising it remains a unique feature of US constitutional rights culture to insist on defining rights narrowly, so that there are as few as possible exceptions to them.¹¹

The second approach is characteristic of Human Rights Treaties and Constitutions enacted in the period following WWII. Characteristic of rights codifications during this era is a bifurcated approach. The first part of a provision defines the scope of the right. The second describes the limits of the rights by defining the conditions under which an infringement of the right is justified. Article 10 of the European Convention of Human Rights, for example, states:

¹⁰ Perhaps also for reasons relating to the structure of constitutional text in the US there is a view that courts charged with their enforcement of such provisions should read them as short-hand references to a set of more specific rules that were intended either by the constitutional legislator or that reflect a deep historical consensus of the political community. Whenever courts can't find such a concrete and specific rule, the legislator should be free to enact any legislation it deems appropriate.

¹¹ **F. SCHAUER**, "Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture", in **G. NOLTE**, *European and US Constitutionalism*, Cambridge University Press, 2005; see also: **C. FRIED**, *Right and Wrongs*, OUP, 1978.

“Everyone has the right to freedom of expression [...]; the exercise of these freedoms [...] may be subject to such formalities, conditions, restrictions or penalties as prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety”.

Similarly, Article 2 § 1 of the German Basic Law states that “every person has the right to the free development of their personality, to the extent they do not infringe on the rights of others or offend against the constitutional order or the rights of public morals”.

The first part defines the scope of the interests to be protected – here: all those interests that relate respectively to “freedom of expression” or “the free development of the personality”. The second part establishes the conditions under which infringements of these interests can be justified: “restrictions [...] necessary in a democratic society in the interests of” and “when the limitations serve to protect the rights of others, the constitutional order or public morals”. The first step of constitutional analysis typically consists in determining whether an act infringes the scope of a right. If it does a *prima facie* violation of a right has occurred. The second step consists in determining whether that infringement can be justified under the limitations clause. Only if it can not is there a *definitive* violation of the right.

Even though the term proportionality is not generally used in constitutional limitation clauses immediately after WWII, over time courts have practically uniformly interpreted this kind of limitation clauses as requiring proportionality analysis. Besides the requirement of legality –any limitations suffered by the individual must be prescribed by law– the proportionality requirement lies at the heart of determining whether an infringement of the scope of a right is justified.

Finally more recent rights codifications often recognise and embrace this development and have often substituted the rights-specific limitation clauses by a general default limitations clause.¹²

12 The Canadian Charter prescribes in Section 1 that rights may be subject to “such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society”. Section 36 of the South African Constitution states that rights may be limited by “a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of

Article II § 112 of the recently negotiated European Charter of Fundamental Rights, for example, states that “subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”.

(2) The connection between rights and proportionality analysis has been thoroughly analysed by Robert Alexy.¹³ According to Alexy the abstract rights characteristically listed in constitutional catalogues are principles. Principles, as Alexy understands them, require the realisation of something to the greatest extent possible, given countervailing concerns. Principles are structurally equivalent to values. Statements of value can be reformulated as statements of principle and vice-versa. We can say that privacy is a value or that privacy is a principle. Saying that something is a value does not yet say anything about the relative priority of that value over another, either abstractly or in a specific context. Statements of principle, express an ‘ideal ought’. Like statements of value they are not yet, as Alexy puts it, “related to possibilities of the factual and normative world”. The proportionality test is the means by which values are related to possibilities of the normative and factual world. Whenever there is a conflict between a principle and countervailing concerns, the proportionality test provides the criteria to determine which concerns take precedence under the circumstances. The proportionality test provides an analytical structure for assessing whether limits imposed on the realisation of a principle in a particular context are justified.

The proportionality test is not merely a convenient pragmatic tool that helps provide a doctrinal structure for the purpose of legal analysis. If rights as principles are like statements of value, the proportionality structure provides an analytical framework to assess the necessary and sufficient conditions under which a right takes precedence over competing considerations as a matter of first order political morality. Reasoning about rights means

the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; (e) less restrictive means to achieve the purpose”.

¹³ **R. ALEXY**, *A Theory of Constitutional Rights*, OUP, 2002. The following pages draw heavily on **M. KUMM**, “Constitutional rights as principles: On the structure and domain of constitutional justice”, *ICON*, 2004, No 2, pp. 574-596.

reasoning about how a particular value relates to the exigencies of the circumstances. It requires general practical reasoning.¹⁴

An example drawn from the European Court of Human Rights [hereinafter ECHR] illustrates how proportionality analysis operates in the adjudication of rights claims.

In *Lustig-Prean and Beckett v. United Kingdom*¹⁵ the applicants complained that the investigations into their sexual orientation and their discharge from the Royal Navy on the sole ground that they are gay violated Article 8 of the European Convention of Human Rights [hereinafter ECHR]. Article 8, in so far as is relevant, reads as follows:

“Everyone has the right to respect for his private [...] life. There shall be no interference by a public authority with the exercise of this rights except such as is in accordance with the law and is necessary in a democratic society [...] in the interest of national security, [...] for the prevention of disorder”.

Since the government had accepted that there had been interferences with the applicants’ right to respect for their private life -a violation of a *prima facie* right had occurred- the only question was whether the interferences were justified or whether the interference amounted to not merely a *prima facie*, but a *definitive* violation of the right. The actions of the government were in compliance with domestic statutes and applicable European Community Law and thus fulfilled the requirement of having been ‘in accordance with the law’. The question was whether the law authorising the government’s actions qualified as ‘necessary in a democratic society’. The Court has essentially interpreted that requirement as stipulating a proportionality test. The following is a reconstructed and summarised account of the court’s reasoning.

The first question the Court addressed concerns the existence of a *legitimate aim*. This prong is relatively easy to satisfy in cases where the constitutional provision does not specifically restrict the kind of aims that count as legitimate for justifying an interference with a specific right. In this case the constitutional provision limits the kind of aims that count as

¹⁴ If legal reasoning is a special case of general practical reasoning [cf R. ALEXY, *A Theory of Legal Argumentation*, Clarendon, 1989], reasoning about rights as principles is a special case of legal reasoning that approximates general practical reasoning without the special features that characterise legal reasoning.

¹⁵ E.C.H.R., *Lustig-Prean and Beckett v. United Kingdom*, 27 Sept. 1999.

legitimate for the purpose of justifying an infringement of privacy. Here the UK offered the maintenance of morale, fighting power and operational effectiveness of the armed forces -a purpose clearly related to national security- as its justification to prohibit gays from serving in its armed forces.

The next question is, whether disallowing gays from serving in the armed forces is a *suitable means to further the legitimate policy goal*. This is an empirical question. A means is suitable, if it actually furthers the declared policy goal of the government. In this case a government commissioned study had shown that there would be integration problems posed to the military system if declared gays were to serve in the army. Even though the Court remained sceptical with regard to the severity of these problems, it accepted that there would be *some* integration problems if gays were allowed to serve in the armed forces. Given this state of affairs there was no question that, as an empirical matter, these problems are significantly mitigated if not completely eliminated by excluding gays from the ranks of the armed forces.

A more difficult question was whether the prohibition of homosexuals serving in the armed forces is necessary. A measure is necessary only if there is no less restrictive but equally effective measure available to achieve the intended policy goal. This test incorporates but goes beyond the requirement known to US constitutional lawyers that a measure has to be narrowly tailored towards achieving the respective policy goals. The ‘necessary’ requirement incorporates the ‘narrowly tailored’ requirement, because any measure that falls short of the ‘narrowly tailored’ test also falls short of the necessity requirement. It goes beyond the ‘narrowly tailored’ requirement, because it allows the consideration of alternative means, rather than just insisting on tightening up and limiting the chosen means to address the problem. In this case the issue was whether a code of conduct backed by disciplinary measures, certainly a less intrusive measure, could be regarded as equally effective. Ultimately the Court held that even though a code of conduct backed by disciplinary measures would go quite some way to address problems of integration, the government had plausible reasons to believe that it does not go so far as to qualify as an equally effective alternative to the blanket prohibition.

Finally the court had to assess whether the measure was proportional in the narrow sense, applying the so-called ‘balancing test’. The balancing test involves applying what Alexy calls the ‘Law of Balancing’: “the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other”.¹⁶

The decisive question in the case of the gay soldiers discharged from the British armed forces is whether on balance the increase in the morale, fighting force and operational effectiveness achieved by prohibiting gays from serving in the armed forces justifies the degree of interference in the applicant’s privacy or whether it is disproportionate. On the one hand the court invoked the seriousness of the infringement of the soldiers’ privacy, given that sexual orientation concerns the most intimate aspect of the individual’s private life. On the other hand the degree of disruption to the armed forces without such policies was predicted to be relatively minor. The Court pointed to the experiences in other European armies that had recently opened the armed forces to gays, the successful cooperation of the UK army with allied NATO units which included gays, the availability of codes of conduct and disciplinary measures to prevent inappropriate conduct, as well as the experience with the successful admission of women and racial minorities into the armed forces causing only modest disruptions. On balance the UK measures were held to be sufficiently disproportionate to fall outside the government’s margin of appreciation and held the United Kingdom to have violated Article 8 ECHR.

The example illustrates two characteristic features of rights reasoning. First, a rights-holder does not have very much in virtue of his having a right. More specifically, the fact that a rights holder has a *prima facie* right does not imply that he holds a position that gives him any kind of priority over countervailing considerations of policy. An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified. But the fact that rights are not trumps in this sense does not mean that they provide no effective protection. The example demonstrates that in practice, even without such priority, rights can be formidable weapons. The second characteristic feature of rights reasoning is the flip side of the first. Since comparatively little is decided by acknowledging that a measure infringes a right, the focus of rights adjudication is generally on

¹⁶ R. ALEXY, *supra* note 8, at p. 102. Alexy illustrates the Law of Balancing using indifference curves, a device used by economists as a means of representing a relation of substitution between interests. Such a device is useful to illustrate the analogy between the Law of Balancing and the law of diminishing marginal utility.

the reasons that justify the infringement. Furthermore, the four-prong structure of proportionality analysis provides little more than a structure which functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshalled to justify an infringement of a right are good reasons under the circumstances. Assessing the justification for rights infringements is, at least in the many cases where the constitution provides no specific further guidance, largely an exercise of structured practical reasoning without many of the constraining features that otherwise characterises legal reasoning. Rights reasoning under this model, then, shares important structural features with rational policy assessment.¹⁷ *The proportionality test merely provides a structure for the justification of an act in terms of public reason.*

(3) Conceiving rights in this way also helps explain another widespread feature of contemporary human and constitutional rights practice that can only be briefly be pointed to here. If all you have in virtue of having a right is a position whose strength in any particular context is determined by proportionality analysis, there are no obvious reasons for defining narrowly the scope of interests protected as a right. Shouldn't all acts by public authorities effecting individuals meet the proportionality requirement? Does the proportionality test not provide a general purpose test for ensuring that public institutions take seriously individuals and their interests and act only for good reasons? Not surprisingly, one of the corollary features of a proportionality oriented human and constitutional rights practice is its remarkable scope. Interests protected as rights are not restricted to the classical catalogue of rights such as freedom of speech, association, religion and privacy narrowly conceived. Instead with the spread of proportionality analysis there is a tendency to include all kinds of liberty interests within the domain of interests that enjoy *prima facie* protection as a right. The European Court of Justice, for example, recognises a right to freely pursue a profession as part of the common constitutional heritage of member states of the European Union, thus enabling it to subject a considerable amount of social and economic regulation to proportionality review. The European Court of Human Rights has adopted an expansive understanding of

¹⁷ That does not mean that the two are identical. There are at least four differences between substantive rights analysis and general policy assessments. First, courts are not faced with generating and evaluating competing policy proposals, but merely to assess whether the choices made by other institutional actors is justified. Second, they only assess the merit of these policy decisions in so far they affect the scope of a right. Third, specific constitutional rules concerning limits to constitutional rights or judicial precedence establishing rules that fix conditional relations of preference frequently exist. Fourth, proportionality analysis leaves space for deference to be accorded to other institutional actors. The ECHR refers to this as the 'margin of appreciation'.

privacy guaranteed under Article 8 ECHR and the German Constitutional Court regards any liberty interest whatsoever as enjoying *prima facie* protection as a right. In Germany the right to the ‘free development of the personality’ is interpreted as a general right to liberty understood as the right to do or not to do whatever you please. It has been held by the Constitutional Court to include such mundane things as a right to ride horses through public woods, feeding pigeons on public squares or the right to trade a particular breed of dogs. In this way the language of human and constitutional rights is used to subject practically all acts of public authorities that effect the interests of individuals to proportionality review and thus to the test of public reason.¹⁸

II. The point of rights: Legally institutionalising Socratic contestation

But what is the point of authorising courts to adjudicate just about any policy issue, once it is framed as an issue of rights within the RHRP?

(1) There is a puzzle relating to the wisdom of judicial review that shares many structural features of the puzzle of Socratic wisdom, as it becomes manifest in Plato’s early dialogues. The kind of claims that have to be made on behalf of constitutional courts to justify their role in public life, are, *prima facie*, as improbable as the claims of wisdom made by and on behalf of Socrates, to justify his way of life to run around and force members of the Athenian political establishment into debates about basic questions of justice and what it means to live your life well.

That puzzle is not plausibly resolved, but only deepened, by pointing to authority: True, in the case of Socrates it is the Oracle of Delphi that determines that Socrates is the wisest man.¹⁹ Similarly, constitutional law and European Human Rights Law have authoritatively established courts with the task to serve as final arbiters of human and constitutional rights issues *as a matter of positive law*, presumably believing that this task is best left to them rather than anyone else. But of course the puzzle remains. How can these authorities be right? Does it make any sense? There is a puzzle here. Socrates, a craftsman by

¹⁸ For the argument that the ECJ’s human rights jurisprudence also fits the RHRP, see: M. KUMM, “Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm”, in M. MADURO and L. AZOULAI, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, Hart [forthcoming].

¹⁹ PLATO, *Apology*, 21a.

trade, denies that he has any special knowledge about justice or anything else. He is not and makes no claim to be the kind of philosopher king that Plato would later describe as the ideal statesman in the Republic.²⁰ In fact he insists that the only thing he does know is that he knows nothing. Similarly a constitutional or human rights court, staffed by trained lawyers, is not generally credited with having special knowledge about what justice requires and constitutional judges widely cringe at the idea that they should conceive of themselves as philosopher kings,²¹ no doubt sensing their own ineptness. The only thing judges might plausibly claim to know is the law. Ironically, this is much the same as saying they know nothing, because within the rationalist human rights paradigm, the law -understood as the sum of authoritatively enacted norms guiding and constraining the task of adjudication- typically provides very little guidance for the resolution of concrete rights claims. Just as there is no reason to believe that a man of humble background and position such as Socrates is the wisest man alive, there seems to be no reason to believe that courts staffed by lawyers are the appropriate final arbiters of contentious questions of right, second-guessing the results of the judgment made by the democratically accountable politically branches using the check-list that the proportionality test provides.

But perhaps the specific wisdom of Socrates and constitutional judges lies not in what they *know* about theories of justice or policy, but *in the questions they know to ask others* who have, at least prima facie, a better claim of wisdom on their side. When Socrates is told that he is the wisest man, he goes and seeks out those who seem to have a better claim on wisdom and scrutinises their claims. It is only in the encounter with those who are held out as wise or think of themselves as wise that Socrates begins to understand why the Oracle was right to call him the wisest man alive. Socratic questioning reveals a great deal of thoughtlessness, platitudes, conventions or brute power-mongering that dresses up as wisdom, but falls together like a house of cards when pressed for justifications. His comparative wisdom lies in not thinking that he knows something, when in fact he does not, whereas others think they know something, which, on examination it turns out they don't.

²⁰ As Vlastos points out, only the Socrates of the middle and later dialogues has sophisticated theories about metaphysics, epistemology, science, *etc.*

²¹ Arguably nothing made Ronald Dworkin's account of judging more suspect to judges than his claim that adjudication required demi-god like 'Herculean' intellectual labor; see *ICON*, 2003, No 4 [special issue on Dworkin].

At this point it is useful to take a closer look at what the Socrates of Plato's early dialogues is actually doing. How exactly does he engage others? First, Socrates is something of an annoying figure, insisting on involving respected establishment figures, statesmen first of all,²² wherever he encounters them in conversations about what they claim is good or just, even when they don't really want to or have had enough. In some dialogues the other party runs away in the end, in others the other party resigns cynically and says yes to everything Socrates says just so that the conversation comes to an end more quickly. He forces a certain type of inquiry onto others. Second, the characteristic Socratic method in Plato's earlier dialogues is the *elenchus*.²³ On a general level elenchus "means examining a person with regard to a statement he has made, by putting to him questions calling for further statements, in the hope that they will determine the meaning and the truth value of his first statement".²⁴ The Socratic elenchus is adversative and bears some resemblance to cross-examination. His role in the debate is not to defend a thesis of his own but only to examine the interlocutor's. Socrates is active primarily as a questioner, examining the preconditions and consequences of the premises the other side accepts, in order to determine whether they are contradictory or plausible. Socrates does not know anything, but he wants to know what grounds others have to believe that the claims they make are true. He tests the coherence of other persons' views. Third, Socrates does what he does in public spaces, but he does it removed from the practice of ordinary democratic politics. The type of public reasoning he engages in, he claims,²⁵ is impossible to sustain when the interests and passions of ordinary democratic politics intervene.

This type of Socratic engagement shares important features that are characteristic of court's engagement with public authorities. First, courts compel public authorities into a process of reasoned engagement. Public authorities have to defend themselves, once a plaintiff goes to court claiming that his rights have been violated. In that sense, like the Socratic interlocutors, they are put on the spot and drawn into a process they might otherwise have resisted. Second, court's engagement with public authorities shares some salient features

²² PLATO, *Apology*, 21c.

²³ For an insightful analysis, see: G. VLASTOS, "The Socratic Elenchus", *Oxford Studies in Ancient Philosophy*, 1983, pp. 27-58.

²⁴ R. ROBINSON, *Plato's Earlier Dialectics*, 2nd ed., Oxford, Clarendon, 1953, Chapter 2.

²⁵ PLATO, *Apology*, 31c-32a.

with the Socratic elenchus.²⁶ At the heart of the judicial process is the examinations of reasons, both in the written part of the proceedings in which the parties of the conflict can submit all the relevant reason, to a limited extent also in the oral proceedings where they exist and, of course, in the final judgment. Furthermore in this process of reason-examination the parties are the ones that advance arguments. The court's role consists in asking questions - particularly the questions that make up the four prongs of the proportionality test- and assessing the coherence of the answers that the parties provide it with. A court's activity is not focused on the active construction of elaborate theories,²⁷ but on a considerably more pedestrian form assessing the reasons presented by others, in order to determine their plausibility. Third, this engagement takes place as a public procedure leading to a public judgment, while institutional rules relating to judicial independence ensure that it is immunised from the pressures of the ordinary political process.²⁸

(2) But even if there are some important structural similarities between the practice of Socratic contestation described by Plato in his early dialogues and the judicial practice of engaging public authorities when rights claims are made, what are the virtues of such a practice? Socrates claimed that the way he lived his life -his perpetual critical questioning - should have earned him a place of honour in Athens. He claims to be to the Athenian people as a gadfly to a noble but sluggish horse.²⁹ By convincing Athenians that they are ignorant of the things they think they know -by puzzling them and sometimes numbing his interlocutors like an electric ray-³⁰ Socrates creates a situation in which perhaps the truth will be more seriously sought after, because the false beliefs no longer foster false complacency. Because of the insights his critical questioning brings to the fore, he is described as a midwife bringing to light insights which otherwise would have remained undeveloped and obscure. But what

²⁶ The claim is not that Socratic elenctic reasoning is generally like proportionality analysis, or that cross-examination plays an important role in constitutional litigation. Instead the claim is that courts and the early Platonic Socrates engage in a practice, in which they challenge others to provide reasons for their claims and then assess these reasons for their internal consistency and coherence. In this way the two practices share salient features. Note how in the *Georgias* Plato has Socrates describe the difference between his procedure and that of the law courts [see **PLATO**, *Georgias*, 471E-472C, 474A, 475E].

²⁷ This does not mean that there is never an occasion where theoretical sophistication is required.

²⁸ Interestingly highest courts are often geographically located not in a political power centres, but in the provinces. The ECJ is in the sleepy Duchy of Luxembourg, not in the European political power-centre that is Brussels. The European Court of Human Rights is in Strasbourg, not a European capital. The German Federal Constitutional Court is in Karlsruhe, not in Berlin. On the other hand I am not aware of a single country in Europe that does not have its highest political branches located together in its capital. The widely challenged double seat arrangement of the European Parliament in Strasbourg and Brussels is the only exception to this rule.

²⁹ **PLATO**, *Apology*, 30 E.

³⁰ **PLATO**, *Menon*, 84.

exactly is so important about sustaining a practice of reasoning and truth seeking? What is so terrible about a complacent people governing itself democratically? The answer lies in part in the nexus in Platonic philosophy between seeking knowledge and virtue on the one hand, and the centrality of the virtue not to do injustice on the other. Socrates insists that, whatever you do, you should never act unjustly. It is worse to suffer injustice than to do injustice. The life of the tyrant is more miserable than the life of those the tyrant persecutes.³¹ So if it is central that you do not commit injustice, how do you avoid doing injustice? By knowing what justice requires. It turns out, however, that it is not easy to know what justice requires. There is much disagreement about it. The virtue of Socratic contestation is that it helps to keep alive the question what justice requires, so that we may avoid committing injustice unknowingly.³²

It is possible to think of the virtues of courts adjudicating human and constitutional rights in a related way.

First, the very fact that courts are granted jurisdiction to assess whether acts by public authorities are supported by plausible reasons serves as an institutionalised reminder that any coercive act in a liberal democracy has to be conceivable as *a collective judgment of reason* about what justice and good policy requires. It reminds everyone that the legitimate authority of a legal act depends on the possibility of providing a justification for it based on grounds that might be reasonably accepted even by the party who has to bear the greatest part of the burden. Every judicial proceeding, every judgment handed down and opinion written applying something like the RHRP is a ritualistic affirmation of this idea.

Second, it is not at all implausible that in practice the judicial process functions reasonably well to produce improved outcomes. The most persuasive way to substantiate that claim would be to analyse more closely a large set of randomly selected cases across a sufficiently wide set of jurisdictions and addressing a sufficiently wide range of issues. Such an analysis might provide a typology of pathologies of the political process that courts successfully help uncover and address. It might also uncover the limits and deficiencies of courts as they fail to live up to the task assigned to them. But none of this can be done here.

³¹ PLATO, *Republic*, Book I.

³² In modern political thought it was Hannah Arendt, who, through the figures of Socrates on the one hand and Eichmann on the other, reflected on the link between justice and the practice of thinking on the one hand and evil and thoughtlessness on the other; see H. ARENDT, *The Life of the Mind*, Harvest, 1981, pp. 3-16.

Here it must suffice to provide some general observations that might go some way to establish *prima facie* plausibility for the claim that the availability of judicial review improves outcomes.

To begin with it might be useful to take up another challenge by Waldron and Bellamy. Their scepticism about judicial review producing better outcomes is not just informed by claims about the distracting legalist nature of judicial review. They also claim more generally, that the political process provides an arena where sophisticated arguments can be made and deliberatively assessed. As an example Waldron points to the abortion debate, comparing the dissatisfying reasoning of the US Supreme Court with the rich and sophisticated parliamentary debate in the UK.³³ Waldron has chosen his examples well. First he focuses on a case, in which the judicial reasoning by the US Supreme Court³⁴ is particularly poor and did not persuade anyone not already persuaded on other grounds. Second, he describes a political process in the UK that worked as well as one might hope for, with reasons on all sides being carefully assessed. Waldron is right about two things. In many cases the political process works well. And in some instances judicial reasoning is poor. But to establish his case it would have been helpful to choose the debates that typically informed state laws prohibiting abortion in the United States as a point of comparison, rather than debates in the UK. It may have turned out that the laws on the books in many US states existed primarily because of traditional patriarchal views about gender roles that placed central importance on male control over female sexuality. Given that the Supreme Court had encountered these prejudices and stereotypes in its previous engagement with issues such as the availability of contraceptives,³⁵ the case against Supreme Court intervention might not be strong, even if a better reasoned judgment could have been hoped for. The UK example does little more than provide an argument for the claim that when a serious, extended and mutually respectful parliamentary debate has taken place before deciding an issue that is a good reason for the court to be deferential to the outcome reached. But such a conclusion at least comes close to a tautology. If there has been an extended debate of a deliberate, mutually respectful nature in a mature liberal democracy, any results reached is highly likely to be based on plausible reasons and thus deserve and are likely to be given deference by rights-adjudicating courts.

³³ J. WALDRON, "The Case Against Judicial Review", *supra* note 1.

³⁴ Supreme Court of the United States, *Roe v. Wade*, 1973, 410 US 113.

³⁵ Supreme Court of the United States, *Griswold v. Connecticut*, 1965, 381 US 479.

A much more telling example is the ECHR case relating to gays in the military, which also originates in Britain. In order to understand the power of Socratic contestation, it is necessary to move away from the discussions of ‘operative effectiveness and morale’ that characterise much of the opinion. The significance of Socratic contestation lies not only in what it makes explicit, but also what it forces underground. Why was it that those suspected of being gay were intrusively investigated and, when suspicions were confirmed, dishonourably discharged? Let’s entertain a wild guess. Here are some answers that one might expect some military leaders, parts of the ministerial bureaucracy and some members of parliament to have invoked in moments of candour, protected from public scrutiny: “We have never accepted homosexuals here; we all agree that this is not a place for homosexuals; we just don’t want them here; faggots are disgusting”.³⁶ These are arguments, if you want to call them that, based on tradition, convention, preference, all feeding prejudice. Furthermore some Christians might have claimed, in line with many –though by no means all– official church doctrines, based on scripture: “homosexual practices are an abomination against god”. This is an argument based on what political philosophers such as Rawls would call ‘conceptions of the good’. An important point about the practice of justifying infringements of human rights is that these types of reasons don’t count. They are not legitimate reasons to restrict rights and do not fulfil the requirements of the first prong of the proportionality test. Traditions, conventions, preferences, without an attachment to something more, are not legitimate reasons to justify an infringement of someone’s right, and nor are theologically based accounts – whether or not they are plausible interpretations of scripture– of what it means to live a life without sin. Like some of the characters that Socrates quarrels with in the early Platonic dialogues, those who embrace *this kind of reasons* have good reasons to evade Socratic questioning. Once forced into the game of having to justify a practice in terms of public reason, participants are forced to refocus their arguments, and what comes to the foreground are sanitised argument relating to ‘operative effectiveness and morale’. But once the focus is on only legitimate reasons of that kind, they often turn out to be insufficient to justify the measures they are supposed to justify, because, just by themselves, they turn out not to be necessary or disproportionate. Very often this is the point of proportionality analysis: not to

³⁶ Of course I don’t know how widespread these sentiments were in the British officer corps, the ministerial bureaucracy or the parliament at the time. I am merely assuming that the British context was, at the time, not radically different from views I encountered discussing this and connected issues while doing military service in the relative progressive German Bundeswehr in the 1980s.

substitute the same cost-benefit analysis that the legislature engaged in with a judgment by the court. But to sort out the reasons that are relevant to the issue at hand, while setting aside those that are not, and then testing whether those legitimate reasons plausibly justify the actions of public authorities. One important function of proportionality analysis is to function as a filter device that helps to determine whether illegitimate reasons might have skewed the democratic process against the case of the rights-claimant.

There is another form of thoughtlessness however, that judicial review is reasonably good at countering, that I will refer to as *ideological reasoning* that I can only briefly describe here. Ideological reasoning did not play a role in the case of *Lustig Preen v. Beckett*. But it plays a huge role in the context of measures taken in the ‘war on terrorism’. A necessary ingredient of ideological thinking is the idea of a powerful and vicious enemy that needs to be fought effectively. Clearly not all claims that there is a powerful and vicious enemy that needs to be fought effectively are ideological. Such claims might well reflect reality, as it did when Roosevelt rallied his country against Nazi Germany. But the characteristic feature of ideological thinking is that the nature of the threat is characterised without much attention to relevant detail and is immunised from serious scrutiny either by put-downs, threats or claims of secrecy, whereas the evil nature of those who are against us and the pure nature of our cause is perpetually emphasised. Furthermore asking questions relating to the means ends relationship of the purportedly necessary counter-measures is regarded as symptom of weakness, perhaps even of sympathy with the enemy. Ideological thinking is symptomatic for totalitarian dictatorships.³⁷ But, as recent years have illustrated, it can also at least temporarily take hold in mature constitutional democracies, subverting them and raising the spectre of liberal constitutional democracy degenerating into electoral dictatorship. In such a dark world, wars of aggression are justified as preventive wars, a head of state can claim with impunity that he is authorised to detain for an unlimited amount of time on his say-so, and measures that qualify as paradigm cases of torture are not discussed in the context of impeachment proceedings or international criminal law, but publicly defended as ‘enhanced interrogation techniques’. There is an increasingly rich case law, both in the US and in Europe that bears testimony to ideological thinking in the context of the ‘war on terrorism’. It also illustrates how judicial review can help undermine it at least to some extent and bring back some realism into the discussion of legitimate security concerns. Furthermore it is not implausible that a

³⁷ H. ARENDT, *The Origins of Totalitarianism*, Harvest, 1985, pp. 461-474.

political culture that supports a practice of legally institutionalised Socratic contestation is immunised to a greater extent from ideological thinking than a political culture that is likely to damn any kind of impartial third party reasoned scrutiny as undemocratic and elitist. The point here is not that judicial review in those and comparable cases can solve the serious problems that societies have, that have succumbed to ideological thinking and the propaganda that characterises it. Whatever the merits of judicial review, it is no panacea. But judicial review might have a role to play in putting the thumb on the scales to counteract at least some of the worst policies and provide institutional support for the political forces that try to overcome it.

I have identified three types of pathologies of the political process, that even mature democracies are not generally immune from and that a rights based legal practice of Socratic contestation plausibly provides a helpful antidote for. First, there is the vice of thoughtlessness based on tradition, convention or preference, that give rise to all kinds of inertia to either address established injustices or create new injustices by refusing to make available new technologies to groups which need them most. Second, there are illegitimate reasons relating to the good, which do not respect the limits of public reason and the grounds that coercive power of public authorities may be used for. Third, there is the problem of ideology. Ideological claims are claims loosely related to concerns that are legitimate. But they fail to justify the concrete measures they are invoked for, because they lack a firm and sufficiently concrete base in reality and are not meaningfully attuned to means-ends relationships.

To summarise, the legal institutionalisation of Socratic contestation helps keep alive the idea that acts by public authorities must be understandable as reasonable collective judgments about what justice and good policy require to be legitimate. This is likely to have a disciplining effect on public authorities and help foster an attitude of civilian confidence among citizens. And second, the actual practice of rights based Socratic contestation is likely to improve outcomes, because such contestation effectively addresses a number of political pathologies that even legislation in mature democracies are not immune from. Clearly both the very limited examples and the limited range of arguments that have been addressed so far do not make a comprehensive case for judicial review as Socratic contestation. But for now it must suffice to have addressed at least some powerful arguments why a certain type of

judicial review, based on the RHRP, might be attractive. What remains to be explored is whether this type of judicial review raises serious issues with regard to democratic legitimacy.

III. Socratic Contestation, the ‘rational human rights paradigm’ and the legitimacy of law

There are at least two important differences between what the early Platonic Socrates was described as doing and real world judges adjudicating human and constitutional rights claims. First, the Socratic commitment to reason has something heroic about it, whereas the institutionalisation of Socratic contestation does not generally require judges to be the hero that Socrates was. Instead the impartial posture and commitment to reason-giving that characterised Socratic inquiry is secured in adjudication by means of institutional rules which guarantee relative independence from immediate political pressures. Judges find themselves in an epistemic environment, which favours, supports and immunises from serious political backlashes the kind of contestation-oriented practice, that Socrates risked dying for.³⁸ Second, whereas Socrates might have humiliated his interlocutors and undermined their authority, his actions did not have any immediate legal effect. The actions of courts, however, do have legal effects, often invalidating political decisions held in violation of human or constitutional rights. This raises the basic issue whether, notwithstanding a plausible claim that outcomes may be improved, legally institutionalising a practice of Socratic contestation unduly compromises constitutional democracy.

A. On the relationship between rights and democracy

There is nothing new in understanding rights in the expansive way of the RHRP. The Declaration of Independence states that the whole point of government is to secure the rights that individuals have. And the framers of the US constitution knew that the more specific rights they enumerated in the Bill of Rights did not exhaust the rights that the constitution was established to protect.³⁹ In the French revolutionary tradition rights were understood in much the way the RHRP describes. The French Declaration of the Rights of Man establishes that everyone has an equal right to equality and liberty. In the enlightenment tradition that has

³⁸ L. SAGER, *Justice in Plainclothes*, Yale University Press, 2004, pp. 199-201.

³⁹ See the 9th Amendment of the US Constitution; C. BLACK, *A New Birth of Freedom*, 1997.

gave rise to modern constitutionalism as defining *a limited domain not subject democratic intervention*. Indeed, the core task of democratic intervention in a true republic was to delimitate the respective spheres of liberty between individuals in a way that takes them seriously as equals and does so in a way that best furthers the general interest and allows for the meaningful exercise of those liberties. In this way democracy was conceived not only as rights-based, but as having as its appropriate subject matter the delimitation and specification of rights. Legislation, such as the enactment of the *Code Civil*, was rights specification and implementation.

Furthermore, the abstract rights, as they were articulated in the Declaration, were *only* specified, interpreted and implemented through the *legislative process*. Courts originally had no role to play whatsoever in the exercise to determine the specific content of what it means to be free and equal in specific circumstances. Courts, discredited as part of the *ancien régime* - the *noblesse de robe*- were to function as the mouthpiece of the law as enacted by the legislature and had no additional constitutional role. Rights and democracy were not conceived as in tension to one-another, but as mutually referring to one-another. Rights needed specification and implementation by democratic legislatures and the authorisation of the democratic legislatures consisted exclusively in spelling out the implications of a commitment to everyone's right to be regarded as free and equal. Rights and democracy were co-equal and mutually dependant. Democratic actions not conceivable as rights specification and implementation -for example laws establishing one religion as the true religion- were illegitimate, as was rights specification and implementation that was not democratic. The basic rights of individuals were the exclusive subject matter of legislative intervention and, in abstract form, guided and constrained legislative intervention.⁴⁰

The RHRP, it turns out, is little more than the constitutionalisation of this idea. There is nothing radical or new about the RHRP on the level of a conception of rights. What is new about post WWII constitutionalism is the *general supervisory role of the judiciary* in the process of rights-specification and implementation. In the second half of the 20th century the vast majority of countries that have gone through the experience of either national-socialist,

⁴⁰ Even today France is something of an outlier in the institutions it chooses to protect rights. In France the *Conseil constitutionnel*, an institution that increasingly engages in rights analysis of the kind described above, is not referred to as a court. Though it is a veto player in that it can preclude legislation from entering into force by holding it to be in violation of rights, it remains a 'council' to the legislature and individuals may not bring cases.

fascist-authoritarian, communist or simply racist rule and made the transition to a reasonably inclusive liberal constitutional democracy have made a remarkable and original institutional choice. To establish a Kelsenian type constitutional court and constitutionalise rights that generally authorise those whose non-trivial interests are effected by the actions of public authorities to challenge them in court.⁴¹ The court would then assess whether, under the circumstances, the acts of public authorities, even of elected legislatures, can reasonably be justified. Of course the primary task of delimitating the respective spheres of liberty of free and equals continuous to be left to the legislatures. Legislatures remain the authors of the laws in liberal constitutional democracies. But courts have assumed an important editorial function⁴² as junior-partners and veto players in the enterprise of specifying and implementing a constitutions commitment to rights. Courts, as guardians and subsidiary enforcers of human and constitutional rights serve as an institution that provides a forum in which legislatures can be held accountable at the behest of effected individuals claiming that their legitimate interests have not been taken seriously.

B. Rights and democracy: The institutional question

But given that there is often reasonable disagreement about what rights individuals have with regard to concrete issues, should decisions relating to that disagreement not be made by a political process, in which electorally accountable political decision-makers make the relevant determinations? Was the original French institutional commitment to legislation by an elected assembly not right? Given reasonable disagreement, does the idea of political equality not demand, that everyone's conception of how to delimitate these rights, should be given equal respect? Is the idea of political equality not undermined, when electorally unaccountable courts are empowered to override legislative decisions to make these determinations? That, as I understand it, is the core challenge posed by arguments such as those put forward forcefully by Waldron and Bellamy. In the following I will provide an argument that judicial review based on the RHRP should be regarded as basic an institutional

⁴¹ Individuals can either vindicate their rights by filing a complaint with the constitutional court after exhausting other remedies, or they have to convince an ordinary court that their constitutional claim is meritorious, requiring that court to refer the issue to the constitutional court.

⁴² **P. PETTIT**, *Republicanism: A Theory of Freedom and Government*, OUP, 1997. Larry Sager refers to the court as a redundant 'quality control' mechanism; see **L. SAGER**, *Justice in Plainclothes*, YUP, 2004. Tom Franck refers to the function of courts as 'providing a second opinion'; see **T. FRANCK**, *Proportionality as Global Second Opinion*, unpublished [on file with the author].

commitment of liberal-democratic constitutionalism as electoral accountability based on an equal right to vote. There is nothing puzzling about the legitimacy of judicial review. Arguably the more interesting issue is why the practice of judicial review receives the critical attention that it does.

(1) From a historical perspective there is a peculiar asymmetry between the critical attitude displayed towards judicial review and the relatively untroubled embrace of representative, electorally-mediated decision-making. Historically, the transition from direct democracy -Athens, Geneva and the New England Town Hall- to the elections of representatives was a serious issue. Democracy referred only to a process by which the people legislated directly. In 18th century France the idea of representative democracy was by many thought to be a contradiction in terms and in the US the framers thought of themselves as establishing a republic, not a democracy, exactly because the constitution had no place for a national town hall or national referenda. Over the course of the 19th century democracy was reconceived to include legislation by elected representatives. Participation-wise, that transition involves a significant empowerment of officials to the detriment of the 'people'. Similarly, after WWII, the establishment of courts as additional veto-players can be construed as the empowerment of another group of officials, one further step removed from the 'people', whose task includes the supervision of activities by the other group of empowered officials. As a matter of principle I understand the scepticism articulated by those who refused to accept 'representative democracy' as democracy properly so-called. But once the step to the empowerment of officials to legislate in the name of the people has been accepted as a matter of principle, it is difficult to see why the restriction of the powers of those officials by other officials that are generally appointed by the officials that have been given the authority to legislate, can possibly be wrong as a matter of principle. If representative democracy is legitimate, why can't representative democracy involving a rights-based judicial veto-power be legitimate? All three decision-making procedures are majoritarian. In referenda it is the majority of those who vote that count, in legislative decision-making it is the majority of representatives that count, and in judicial decision-making it is the majority of judges. Furthermore all of these institutions are republican in that they claim to make decisions in the name of the people and derive their legitimacy ultimately from the approval of the electorate. The core difference is the directness of the link between authoritative decision-making and the electorate. If the principle of democracy required the most direct and unmediated form of

participation possible, under present day circumstances much of representative decision-making would be illegitimate. There would seem to be as much cause to talk about the undemocratic empowerment of elected representatives, who get to decide on laws without the people having a direct say in the legislative decision, as it is to talk about the undemocratic empowerment of judges, who make their decisions without direct participation of the people. The reason why representative democracy is *not* regarded as illegitimate, is presumably because any plausible commitment to democracy allows trade-offs along the dimension of participatory directness, when less direct procedures exhibit comparative advantages along other dimensions, such as deliberative quality or outcomes. It is not clear what the issue of deep principle could be, that would condemn judicial review, but not electoral representation.

At the very least it is utterly implausible to claim that through ordinary legislative procedures ‘the people themselves’ decide political questions, whereas decisions of duly appointed judges are cast as platonic guardians imposing their will on the people. Anyone who uses that language does not deserve to be taken seriously, because instead of presenting an argument they engage in a rhetorical sleight of hand. Why not say, that elected representatives have usurped the power of the people by making decisions for them? Why is the legislature the medium of ‘We the people’? And if it can be, why not say that the people themselves, through the judicial process, sometimes act to constrain a runaway legislature? What excludes the possibility of including the judiciary as a medium by which ‘We the people’ articulates itself? The rhetoric of ‘the people themselves’ sabotages clear thinking. There are no plausible reasons to identify ‘the people’ with the voice of one institution, even when that institution is a Parliament. A parliament is a parliament, not the people. You and I and the others subject to the public authorities that have jurisdiction over us, are the people. You and I, as citizens, can participate in the political process. But as individuals among millions of similarly situated individuals, practically none of us can make much difference by participating in the political process. Whether you vote or not is unlikely to ever change the government that you are under. The probability that your or my individual vote, looked at in isolation, will change anything is no higher than the probability of winning the national lottery. When we discuss political issues we may understand more deeply what we believe and who we are as citizens. Some of us may found movements and become charismatic leaders for a cause or run for office. But nothing the great majority of us will ever do is likely to bring about any meaningful change in national public policy. The most likely way that a

citizen is ever going to change the outcomes of a national political process, is by going to court and claiming that his rights have been violated by public authorities. If courts are persuaded by your arguments rather than the counterarguments made by public authorities, you will have effectively said 'no, not like this!' in a way that actually changes outcomes. In the real world of modern territorial democracy, the right to persuade a court to veto a policy is at least as empowering as the right to vote to change policy.

(2) But the puzzle deepens. The legitimacy of the political process depends on the consent of the governed. On this thinkers in the contractualist tradition as well as French and American Revolutionaries agree. Note that *consent* is the starting point for thinking about legitimacy, *not majorities*. Of course, given reasonable disagreement, actual consent is impossible to achieve in the real world. If legitimate law is to be possible at all -and given the problems that law is required to solve it had better be possible- less demanding criteria of constitutional legitimacy adapted to the conditions of real political life need to be developed to serve as real world surrogates and approximations to the consent requirement. In modern constitutional practice there are two such surrogates that need to cumulatively be fulfilled in order for law to be constitutionally legitimate. First, a political process that reflects a commitment to political equality and is based on majoritarian decision-making needs to be at the heart of political the decision-making process. This is the procedural prong of the constitutional legitimacy requirement. But this is only the first leg on which constitutional legitimacy stands. The second is outcome-oriented. The outcome must plausibly qualify as a *collective judgment of reason* about what the commitment to rights of citizens translates into under the concrete circumstances addressed by the legislation. Even if it is not necessary for everyone to *actually* agree with the results, the result must be justifiable in terms that those who disagree with it *might reasonably accept*. Even those left worst off and most heavily burdened by legislation must be conceivable as free and equal partners in a joint enterprise of law-giving. Those burdened by legislation must be able to see themselves not only as losers of a political battle dominated by the victorious side (ah, the spoils of victory!), they must be able to interpret the legislative act as a reasonable attempt to specify what citizens -all citizens, including those on the losing side- owe to each other as free and equals. When courts apply the proportionality test, they are in fact assessing whether or not legislation can be justified in terms of public reasons, reasons of the kind that every citizen might reasonably accept, even if actually they don't. When such a justification succeeds a court is in fact saying

something like the following to the rights-claiming litigant: “what public authorities have done, using the legally prescribed democratic procedures, is to provide a good faith collective judgment of reason about what justice and good policy requires under the circumstances; given the fact of reasonable disagreement on the issue and the corollary margin of appreciation/deference that courts appropriately accord electorally accountable political institutions under the circumstances, it remains a possibility that public authorities were wrong and you are right and that public authorities should have acted otherwise; but our institutional role as a court is not to guarantee that public authorities have found *the one right answer* to the questions they have addressed; our task is to *police the boundaries of the reasonable* and to strike down as violations of right those acts of public authorities that, when scrutinised, can not persuasively be justified in terms of public reason”. Conversely, a court that strikes down a piece of legislation on the grounds that it violates a right is in fact telling public authorities and the constituencies who supported the measure: “our job is not to govern and generally tell public authorities what justice and good policy requires; but it is our job to detect and strike down as instances of legislated injustice measures that, whether supported by majorities or not, impose burdens on some people, when no sufficiently plausible defence in terms of public reasons can be mounted for doing so”. Note how this understanding of the role of courts acknowledges that there is reasonable disagreement and that reasonable disagreement is best resolved using the political process. But it also insists that not all winners of political battles and not all disagreements, even in mature democracies, are reasonable. Often they are not. Political battles might be won by playing to thoughtless perpetuation of traditions or endorsement of prejudicial other-regarding preferences, or ideology, or straightforward interest-group politics falling below the radar screen of high-profile politics. Socratic contestation is the mechanism by which courts ascertain whether the settlement of the disagreement between the public authorities and the rights claimant is in fact reasonable. Courts are not in the business of settling reasonable disagreements. They are in the business of policing the line between disagreements that are reasonable and those that are not and ensure that the victorious party that gets to consecrate its views into legislation is not unreasonable.⁴³

⁴³ Of course the very fact of rights litigation suggests that there is also reasonable disagreement about the limits of reasonable disagreement. Here the original argument about reasonable disagreement about rights as the proper domain of the democratic process resurfaces on the meta-level. But whereas it is a plausible claim to suggest that disputes about justice are at the heart of what the democratic process is about, it is not as obvious that the democratic process is also good at policing the domain of the reasonable. At any rate, there is no reason not to entrust the task of delimitating the domain of the reasonable to courts, both as a matter of principle -giving expression to the link between legitimacy and reasonableness- and because it improves outcomes [see *infra*].

Acts by public authorities that are unreasonable can make no plausible claim to legitimate authority in a liberal constitutional democracy. The question is not what justifies the ‘counter-majoritarian’⁴⁴ imposition of outcomes by non-elected judges. The question is what justifies the authority of a legislative decision, when it can be established with sufficient certainty that it imposes burdens on individuals for which there is no plausible justification. The judicial practice of Socratic contestation, structured conceptually by the RHRP and the proportionality test, and institutionally protected by rules relating to independence, impartiality and reason-giving, is uniquely suitable to give expression to and enforce this aspect of constitutional legitimacy. Constitutional legitimacy does not stand only on one leg.

(3) The right to contest acts of public authorities that impose burdens on the individual is as basic an institutional commitment underlying liberal-democratic constitutionalism as an equal right to vote. Just as the ideals underlying liberal democratic constitutionalism are not fully realised without the institutionalisation of genuinely competitive elections in which all citizens have an equal right to vote, they are not fully realised without a rights and public reason based, institutionalised practice of Socratic contestation. There is a symmetry here that deserves to be described in some greater length, because it helps sharpen the implications of the argument made above.

Both the constitutional justification of an equal right to vote and the legal institutionalisation of Socratic contestation do not depend exclusively on the outcomes generated. Both constitutional commitments are justified because they provide *archetypal expressions*⁴⁵ of basic constitutional commitments. Citizens get an *equal* right to vote largely because it expresses a commitment to equality. The weight of a vote is not the result of carefully calibrating different assignment of weights to outcomes. We do not ask whether it would improve outcomes if votes of citizens with university degrees, or those with children or those paying higher taxes would count for more, even though it is not implausible, that it would.⁴⁶ There are many aspects of election laws that can be tinkered with on outcome-related

⁴⁴ For an account of the ‘counter-majoritarian difficulty’ as an academic obsession in US constitutional scholarship, see generally: **B. FRIEDMAN**, “The Counter-majoritarian Problem and the Pathology of Constitutional Scholarship”, *N.W. U. L. Rev.*, 2001, pp. 933-ff.

⁴⁵ For the idea of legal archetype as a legal rule emblematic for a wider commitment, see: **J. WALDRON**, “Torture and Positive Law: Jurisprudence for the White House”, *Columbia Law Review*, 2005, pp. 1681-ff.

⁴⁶ Even when the right to vote is withdrawn, as it is in many states for convicted prisoners, the reasons for doing so are not outcome-oriented, but seek to punish the prisoner by expressly denying him the status of an equal member of the political community.

grounds. But any such laws much reflect a commitment to the idea that each citizens vote counts for the same to be acceptable. The same is true for the idea of Socratic contestation. It expresses the commitment that legitimate authority over any individual is limited by what can be justified in terms of public reason. If a legislative act burdens an individual in a way that is not susceptible to a justification he might reasonably accept, then it does not deserve to be enforced as law. We should not need to discuss whether or not to provide for the judicial protection of rights, even if it were not relatively obvious that outcomes are improved. What deserves a great deal of thought is how to design the procedures and institutions that institutionalise Socratic contestation. Should each individual be able to have any court address constitutional rights issues? Should there be special constitutional courts with the exclusive jurisdiction over constitutional issues? How should the judges be appointed? How long should their tenure be? What should the rules governing dissenting opinions, submission of *amicus* briefs, *etc.* be? How are the decisions by the judiciary linked to the political process? What comeback possibilities are there for the judicial branches? What are the advantages, what the drawbacks of having an additional layer of judicial review in the form of trans-national human rights protection? These are the kind of questions that need to be addressed by taking into account outcome-related considerations. But the commitment to legally institutionalise Socratic contestation reflects as basic a commitment as an equal right to vote and is, to a certain extent, immune from outcome-related critiques, much like the equal right to vote.

No doubt the successful institutionalisation of both electoral democracy and judicial review depend on a demanding mix of cultural, political and economic presuppositions. In Europe propitious conditions for the institutionalisation of Socratic contestation did generally not exist in the ideologically divided world of the late 19th century and first half of the 20th century. Only after the end of WWII and the end of the Cold War had conditions changed in Europe to allow for the complete constitutionalisation of liberal democracy. One of the preconditions for the successful constitutionalisation of judicial review as Socratic contestation might well be a strong and dominant commitment to a rights-based democracy by political elites and a political culture that has a strong focus on deliberation and reason-giving. Just as there may be good prudential reasons not to force an immediate transition from a non-electoral benign despotism to an electoral form of government, because of the disastrous outcomes it might produce in a particular political environments, there might be context specific outcome-related reasons not to move from a purely electoral form of government to

one that also institutionalises a practice of rights based Socratic contestation. But in either case those committed to liberal democratic constitutionalism have reasons to mourn a real loss.

IV. Conclusion

Thinking about litigation of human and constitutional rights in terms of institutionalising a form of Socratic contestation is more than an at best playful and at worst misleading analogy. It helps clarify thinking about two major questions presented by contemporary human and constitutional rights practice in Europe, that lie at the heart of the debate about judicial review. Does judicial review improve outcomes? And is it democratically legitimate? I have argued that judicial review as Socratic contestation is attractive both because it leads to better outcomes and because it reflects a deep commitment of liberal democracy.

Moreover, Socratic contestation provides an antidote to the collectivist -and often nationalist-⁴⁷ biases that underlies much of 20th century constitutional theorising about democracy.⁴⁸ It is no coincidence that in Europe the proliferation of legally institutionalised Socratic contestation was a corollary to European integration and the relative abatement of nationalist passions that had tormented Europe throughout much of the 19th and early 20th century. Europe no longer sees its legal foundation in a collectivist macro-subject, which started its life as mythical monster called Leviathan.⁴⁹ That monster is still not extinct and continuous to haunt the world with its insatiable hunger for adulation, subjection and sacrifice. It no longer wears the 17th and 18th century garb of a sovereign king, nor the 19th century garb of the sovereign state or the 20th century garb of the sovereign nation. Where it exists in

⁴⁷ Is it a coincidence that the only member states of the European Union that do not have a strong form of judicial review have a monarch as a head of state (*e.g.*, Britain, Holland, Denmark, Finland, Sweden) as a representative of national unity? Is it a coincidence that, with the exception of Spain, there is no country that has a strong form of judicial review that is a monarchy? Is it a coincidence that the government that strengthened the constitutional role of the European Convention of Human Rights in the UK was also the government that dared to radically reform the hallowed but deeply undemocratic national institution that is the House of Lords and encourage devolution? At the very least these patterns invite further analysis.

⁴⁸ This authoritarian and collectivist bias is something that 20th century constitutional theory shares with much of 18th century constitutional thinking. It is a remarkable feature of continental thinkers such as Rousseau, Kant or Fichte, how quickly they move from the conceptual starting point of citizens recognising each other as free and equal to apologists of a strong centralised state. The shadow of Hobbes has cast a long shadow and continues to linger over much of constitutional theory.

⁴⁹ Article 6 EUT mentions human rights, democracy and the rule of law as foundations of law. Ultimately these in turn are derived from a commitment of human dignity [see *infra*].

the western world that monster today is dressed up as 'We the People' and claims to speak as the embodiment of democracy. Whichever clothes it covers itself with, it ultimately speaks the language of will, not the language of rights-based reasons. It will always have a precarious and unstable relationship with the practice of Socratic contestation. Socrates is never safe under public authorities that conceive of themselves as sovereign. In Europe that monster has been tamed, for the time being, and duly pushed off its throne and replaced by the idea of human dignity as the foundation of law. Human dignity is no less mysterious as the foundation of law than sovereignty, probably more so. But whatever is required to understand that mystery, it does not require idolatrous submission to a Leviathan that conceives of itself as an earthly god, an earthly god that not only claims to provide the ultimate horizon of meaning and defines for its citizens the limits of who they are. It also claims to have the coercive power to draft into service its citizens to kill the enemies that it defines and, if necessary, require citizens to sacrifice their lives. The great virtue and challenge of human dignity as the foundation of law is that *as a philosophical idea* is that it leaves open to each individual to explore what it means and wherein it lies. Its limits are the limits of a person's courage to seriously explore the horizons of her existence. Its mystery is the possible subject of an existential quest, which can take an infinite variety of forms or be ignored by those who choose to do so. Such a quest might have a strong political component, but it might also be spiritually focused and it might be none of the above.⁵⁰ But addressed to public authorities *as a legal postulate* human dignity is prosaic and reasonably straightforward. Central among the prescriptions derived from it⁵¹ is the requirement that public authorities help build and sustain a world in which human rights are respected, protected and fulfilled. The practice of legally institutionalised Socratic contestation, along with electoral accountability and trans-national legal integration, is a central element of such a world.

⁵⁰ Carl Schmitt's insinuation that existential seriousness is exclusively connected to the drama of the 'political' as he understands it is so evidently impoverished that it is difficult not to accept it as an invitation to psychologues; see *Der Begriff des Politischen*, 3d ed., Duncker & Humblodt, 1963.

⁵¹ There are two other, more specific rules derived from human dignity: first, the general prohibition of instrumentalisation of persons without their consent; second, an anti-humiliation rule. For the way that human dignity has been understood in human rights discourse, see: **D. KRETZMER and E. KLEIN**, *The Concept of Human Dignity in Human Rights Discourse*, Kluwer, 2002.