

# A Twofold Account of the Democratic Status of Constitutional Rights

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**Abstract** The paper makes a twofold contribution. Firstly, it advances a preliminary account of the conditions that need to obtain for constitutional rights to be democratic. Secondly, in so doing, it defends precommitment-based theories from a criticism raised by Jeremy Waldron—namely, that constitutional rights do not become any more democratic when they are democratically adopted, for the people could adopt undemocratic policies without such policies becoming democratic as a result. The paper shows that the *reductio* applies to political rights, yet not to non-political rights, such as reproductive, environmental, or privacy rights. The democratic status of the former is process-independent. The latter, by contrast, are democratic precisely when they are adopted by democratic means.

**Keywords** Constitutional rights · Democracy · Constitutional precommitments · Political and non-political rights · Jeremy Waldron · Bruce Ackerman · Ronald Dworkin

## Introduction

In this paper I shall be concerned with the democratic status of constitutional rights. By constitutional rights I refer to rights that are (a) included in a rigid constitution and (b) protected through judicial review. When conditions (a) and (b) obtain, constitutional rights are sometimes said to be undemocratic, for they constrain citizens' ability to decide which rights they have and how they ought to be interpreted.

They do so in two senses. First, rigid constitutions are difficult to amend. Accordingly, the will of the founding generation regarding which rights ought to be entrenched in the constitution constrains the will of *future* generations and their parliamentary majorities. Second, courts are granted with the final authority to assess whether ordinary

statutes comply with constitutional rights. As a result, the will of a minority of unelected and unaccountable judges constrains the will of *present* parliamentary majorities. Adapting Bickel's (1962) famous expression, they raise two countermajoritarian difficulties.

Given the recent worldwide expansion of constitutional rigidity and judicial review, these difficulties have become even more pressing. Over the last decades, at least 183 countries have adopted rigid bills of rights. In addition, while in 1978 only 26 percent of constitutions provided for a constitutional court, 101 out of the 106 constitutions ratified between 1985 and 2008 have granted courts with final powers of constitutional review (Hirschl 2004; Horowitz 2006; Stone Sweet 2008). Provided that the democratic status of our political institutions is a central source of their legitimacy—yet surely not the only one—, these countermajoritarian difficulties are the more disturbing.

A number of arguments have been advanced in order to show that these difficulties are only apparent. For instance, it has been argued that constitutional rights are necessary for democratic procedures to bring just outcomes about (Arneson 1993); that constitutional rights are constitutive of democracy under a non-purely majoritarian or *statistical* conception of democracy (Dworkin 1995); that constitutional rights set up the political rights and preconditions of a well-functioning democracy (Ely 1982; Holmes and Sunstein 1995); or yet that constitutional rights and democracy have a common normative source and, accordingly, cannot be at odds with each other (Habermas 1996; Brettschneider 2007). For these and some further reasons, it has been often argued that constitutional rights need not be an external limit on democracy, let alone undemocratic. Rather, as Lord Bingham referred to the UK Human Rights Act, they give 'the courts a ... wholly democratic mandate' (cit. Clayton and Tomlinson 2009, p. 68).

In this paper I will focus on a further argument, according to which constitutional rights need not be undemocratic when they are the upshot of a democratic precommitment made by the people—call it the precommitment-based argument for constitutional rights (henceforth, PBA). Waldron (1993; 1994; 1998; 1999) has advanced a number of criticisms of the PBA. According to the criticism on which I shall focus on this paper, constitutional rights do not become any more democratic just because they are adopted by democratic means. Otherwise, any measure adopted by democratic means ought to be considered democratic. Yet the people could adopt blatantly undemocratic measures without such measures becoming democratic as a result.

However, Waldron's *reductio* is partially wrong. As we shall see below political rights are democratic solely by means of their internal features, as Waldron correctly claims. However, non-political rights are democratic mainly by

means of how they are adopted. Since many of the rights included in a bill of rights are of the second sort, Waldron's argument importantly misfires. In order to show this, I will advance a preliminary account of the conditions that need to obtain for different types of constitutional rights to be democratic.

The paper makes, thus, a twofold contribution. Firstly, it advances an account of the democratic status of constitutional rights. Secondly, it uses this account to defend the PBA against the criticism raised by Waldron (yet only partially, since further arguments against it might be advanced).

### **Precommitment-based theories**

According to the PBA, constitutional rights are democratic when they are the upshot of a democratic precommitment (see Hayek 1960; Elster 1984; Holmes 1988; Freeman 1990; Ackerman 1991; Kis 2009). A precommitment is a device through which an individual or collective agent binds herself at  $t_1$  in order to follow—or to increase the likelihood of following—certain course of action at  $t_2$ . The agent can do so by manipulating the structure of future options open to her in order to increase the costs of choosing alternative courses of action to the preferred one. For example, an individual may commit herself to paying a small fee to her partner every time she smokes a cigarette. The people can do this regarding the rights to which they are committed (a) by including them in a rigid constitution and (b) by granting courts with the ability to turn down statutes that may be in conflict with them.

The analogy between collective commitments to constitutional rights and individual commitments to personal rules is a very powerful one. Self-constraining decisions are typically regarded as more autonomous than unconstrained ones. As Frankfurt (1971) famously argued, freedom of the will precisely consists in being able to have second-order desires that constrain our first-order desires. *Mutatis mutandis*, constitutional rights need not be undemocratic when they are the upshot of a democratic precommitment. Rather the contrary. They can be regarded as more democratic than unconstrained actions by parliamentary majorities. As Hayek (1960, p. 106-107) put it, 'Only a demagogue can represent as 'antidemocratic' the limitations which long-term decisions and the general principles held by the people impose upon the power of temporary majorities.'

Briefly consider two versions of the PBA. The first one is advanced by Ronald Dworkin. In *Freedom's Law* (1996, pp. 365-366) (which was published before the UK Human Rights Act was adopted) he argues that the adoption of a bill of rights would not impoverish the British democracy because the great majority of British people favored it. He reports that, in 1986, 71 percent of the British people believed that their democracy would be

improved by the adoption of a bill of rights. Of course, Dworkin does not take a mere poll as a conclusive proof of the desirability of a bill of rights. (If the democratic pedigree of constitutional rights is called into question because such rights constrain temporary majorities, then the support of a temporary majority revealed in a poll could hardly dispose of the democratic objection.) By contrast, he takes the poll as a proxy for a genuine preference for a bill of rights that ought to go through an intense period of public debate before its adoption. Now, if the support persisted after this period, Dworkin says, then it would have been proven that the British people endorsed the need of a bill of rights. And the democratic objection would turn out to be self-defeated as a result.

Ackerman (1991) has advanced a second and more detailed version of the PBA. He adopts a dualist view of democracy that includes, on the one hand, a constitutional law-making track in which citizens deeply engage in the constitution-making process, discuss to each other at length, and reach a wide consensus on fundamental issues, including rights. Yet a dualist democracy also includes an ordinary law-making track in which elected representatives elaborate and enact ordinary statutes. In this latter moment, citizen engagement gives way to political apathy, mobilized deliberation to parliamentary horse-trading, and consensus to fragile equilibria. For that reason, citizens protect the rights to which they have committed in the former moment by including them in rigid constitution with judicial review of legislation. Certainly, such rights constrain parliamentary decisions made in the latter moment. Yet they can hardly be said to be undemocratic, provided that they are the upshot of a decision-making process with outstandingly better democratic credentials.

Ackerman's is not a foundationalist account of constitutional rights. He does not define rights independently from the democratic process. Rather, he takes the will of the people as the only source of their legitimacy.<sup>1</sup> Accordingly, under his account, constitutional rights turn out to be legitimate only insofar as they are the upshot of a commitment made by the people under the above-mentioned conditions of inclusion, engagement, deliberation, and consensus. When such conditions obtain, constitutional rights need not be undemocratic, for they do not jeopardize the will of the people. Rather the contrary. They protect the will of the people from potential abuses by parliamentary majorities when civic engagement is low, accountability imperfect, and logrolling the rule.

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<sup>1</sup> It should be noted that Ackerman's account is primarily aimed at explaining the American constitutional history. It is not a normative account. Further, he has argued elsewhere that, if that were the case, he would rather favor a German-style entrenchment of basic rights. 'We should follow the lead of the modern German Constitution ... It should not require the horror of a holocaust before Americans recognize that dualist democracy is not the best form of government available for modern society' (Ackerman 1994, p. 533). However, given its pervasive influence in normative constitutional theory, and provided that it represents the PBA better than anyone else's account, here I take Ackerman's account as if it were normative.

## Waldron's *reductio*

Ackerman's account is certainly more complex than the sketch provided above. However, there is no need to go into more detail. For present purposes, let us assume that three core ideas of Ackerman's account are correct. First, constitutional precommitments are analogous to individual ones. Second, constitutional precommitments are democratic if the above-mentioned—or some alternative yet democratically very demanding—procedural conditions obtain. Third, such conditions are plausible. The goal in this paper is *not* to call into question if the analogy between individual and collective precommitments holds, or if the conditions stipulated by Ackerman are sufficient for a precommitment to be democratic, or yet if such conditions are plausible. These are sensible concerns that I have addressed elsewhere (González-Ricoy 2012; forth; see also Herzog 1994; Sánchez Cuenca 1998; Waldron 1998; Elster 2000; Bayón 2004; Kis 2009). However, in this paper I shall take them for granted and focus on a further idea—namely, whether being the upshot of a democratic precommitment is sufficient for constitutional rights to be democratic.

Waldron has argued that it is not.<sup>2</sup> According to him, constitutional rules, including constitutional rights, do not become democratic just because they are adopted by democratic means, even when outstandingly democratic procedural conditions obtain. Otherwise, any measure adopted by democratic means would be democratic, provided that such conditions obtain. However, the people can adopt blatantly undemocratic measures without such measures becoming democratic as a result. For example, they can decide to disenfranchise a group of citizens, or to elect a perpetual president. Accordingly, it follows that the democratic status of political arrangements, including constitutional rights, is independent from the means by which they are adopted, regardless of whether such means are procedurally faultless or not. In short, according to the PBA,

(a1) Measure X is democratic if it is the upshot of a democratic precommitment.

However, according to Waldron, it could be the case that

(a2) The disenfranchisement of a group of citizens happens to be the upshot of a democratic precommitment.

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<sup>2</sup> Bayón (2004, p. 114) makes a similar argument.

From which it would follow that

(a3) The disenfranchisement of a group of citizens is democratic.

However, (a3) is obviously false, from which it follows that (a1) is false as well.

Certainly, if measure X is endorsed by the people, says Waldron, then it should be adopted. (This is consistent with his purely proceduralist view of democracy, according to which citizens ought to have the last word on which rights, including constitutional rights, ought to be enacted.) However, the fact that X has been adopted by the people does not make it any more democratic. As he puts it (1999, p. 255),

if the people want a regime of constitutional rights, that is what they should have ... But we must not confuse the reasons for carrying out a proposal with the character of the proposal itself. If the people voted to experiment with dictatorship, democratic principles might give us a reason to allow them to do so. But it would not follow that dictatorship is democratic.

According to Waldron, the confusion comes from a failure to distinguish democracy from popular sovereignty. The latter is the principle according to which the people should be able to decide which form of government they want. The former, by contrast, is a form of government among the various forms from which the people is supposed to choose. Following the principle of popular sovereignty, the people might decide to endorse a democratic form of government. But this form of government is *not* democratic because it has been adopted by the people. It is democratic because of its character, as Waldron puts it. That is, it is democratic because of its internal features, for example, because suffrage is inclusive of all citizens, because all votes count equally, because majority rule is employed in the absence of consensus, and so on.

### **A twofold account of constitutional rights**

This section advances a preliminary account of the democratic status of constitutional rights. The account makes a

twofold distinction, according to which the democratic status of political and non-political rights depends on two different sort of features. While the former are democratic solely by means of their intrinsic character, the latter are democratic mainly by way of the means by which they are adopted.

In addition, the section uses this account to show why Waldron's *reductio* is partially flawed. As we shall see, Waldron is right in arguing that a form of government, as well as the political rights of its citizens, is more or less democratic based on its internal character, rather than on how it is adopted. However, Waldron falls into a *non sequitur* when he extends this argument to *all* constitutional rights, for non-political constitutional rights are democratic precisely by means of how they have been adopted.

The section proceeds as follows. Firstly, a twofold distinction between democratic and undemocratic means and between political and non-political rights will be made. Next, a number of statements in which 'democratic' and 'undemocratic' are alternatively attributed to actual instances of political rights with opposed external and internal features will be considered. The goal of this procedure is to address the truth-conditions of the resulting combinations, and to see the extent to which the character of political rights, and the means by which they are adopted, are among the conditions that need to obtain for the attribution of 'democratic' to this sort of rights to be true. By doing so, we will be able to address the role that the character of political rights, and the means by which they are adopted, play in defining their democratic status. Thirdly, the same procedure will be applied to non-political rights in order to clarify the role of their intrinsic character, and the means by which they are adopted, in defining their democratic status vis-à-vis political rights. Finally, the implications of the twofold account for the two countermajoritarian difficulties presented above will be drawn.

#### Internal and external features

So as to adequately identify the features that make different types of constitutional rights more or less democratic, two distinctions are in order. The first distinction refers to the intrinsic character of constitutional rights compared to the means by which they are adopted—their *internal features* and their *external features*, respectively, as I shall refer to them. The external features of constitutional rights are more or less democratic depending on the degree of citizen engagement, information sharing, and some further properties of their adoption process. The precise conditions that need to obtain for the external features to be considered democratic are contestable and open to reasonable disagreement. Further, the application of such conditions to actual decision-making procedures is likely to trigger the

Sorites paradox. However, as pointed out above regarding the conditions stipulated by Ackerman, I will not address these issues here. Rather, I will assume that the distinction between democratic external features and undemocratic external features holds, and that it can be applied to specific cases even if often only vaguely.

The second distinction refers to the diverse types of *internal features* of constitutional rights. The internal features of constitutional rights can be certainly characterized in a number of ways. However, in defining their internal features, here I will focus exclusively on how such rights relate to the form of government, democratic or otherwise. At the risk of oversimplification, we can make a three-fold distinction. A first category includes *political rights*, which are constitutive of the form of government for they enable it. In the case of democracy, these include ‘general elections, freedom of the press, freedom of assembly, and freedom of speech,’ as Rosa Luxemburg put it criticizing the suspension of civil liberties by the Russian Bolsheviks (cit. Schorske 1955, p. 324). A second category includes *non-political rights*, in the sense that they are conceptually disconnected from the form of government. Reproductive rights, environmental rights, the right not to be tortured, or linguistic rights are plausible instances of these rights.

A third—yet more controversial—category includes *rights as procedural preconditions*, as Brettschneider (2007, p. 13) has labeled them. These rights are not constitutive of the form of government. Yet they are conceptually related to it, for they often serve as necessary preconditions for its adequate functioning. In the case of democracy, some civil rights such as freedom from arbitrary arrest and some social rights such as public schooling or freedom from starvation are often included in this category (Ely 1980; Habermas 1992; Holmes and Sunstein 1995; Przeworski 2010).

The connection of the third category to the form of government does not only depend on which precise form of government we embrace. It also depends on how we define this or that precise form of government. Hence, if we embrace democracy, given that its concept is essentially contested (Gallie 1956), it depends on how we define democracy. For instance, pure proceduralist conceptions of democracy reduce the catalogue of preconditions to a minimum, and often define most preconditions as non-political rights. By contrast, substantive conceptions of democracy tend to expand the catalogue. They often define most, if not all, non-political rights as procedural preconditions. Given these differences, the precise boundaries of the idea of rights as preconditions turn out to be much contested. By contrast, the distinction between political and non-political rights—at least in theory—is clearly much less so. For that reason, let us put aside this category for now and consider only political and non-political rights (more on rights as preconditions will be said in the next section).



## Political rights

Let us begin with political rights. According to Waldron, a form of government, including its decision-making procedures and the political rights of its citizens, is democratic by means of its internal features. To see why this is correct, let us consider a number of specific political policies and rights and the conditions that need to obtain for them to be democratic. Firstly consider the following statement and its truth-conditions:

(b1)           The Belgian electoral law is democratic.

In this case, it appears that ‘democratic’ mainly refers to the internal (democratic) features of the Belgian electoral law, rather than to the (democratic) means by which the law was adopted. It may refer, among other plausible internal features, to the proportionality of the Belgian electoral law, to the compulsory character of its voting, or to its use of open lists. In short, what makes (b1) true is that the Belgian electoral law has the features required for an electoral law to be democratic, whatever such precise features turn out to be.

Yet Waldron’s argument is more demanding than this. It also implies that the external features of the electoral law play no role whatsoever in defining the democratic character of the law. The implication is twofold. The first implication is that democratic policies and rights can be adopted by blatantly undemocratic means without such policies and rights becoming undemocratic as a result. In other words, the democratic character of the external features of political policies and rights is *unnecessary* for the democratic character of such policies and rights. The second implication is that blatantly undemocratic policies can be adopted by democratic means without such policies becoming democratic as a result. As an instance of the first implication, consider the following statement:

(b2)           The postwar Japanese electoral law is democratic.

The 1947 Constitution, which served as the basis for the postwar Japanese electoral law, was largely imposed by the Allies upon the Japanese people in the aftermath of World War II. Accordingly, it is safe to assume that the external features of the law were to great extent undemocratic. However, in addressing its democratic character, the external features of the law are largely irrelevant. As in the case of the Belgian electoral law, what makes the postwar

Japanese electoral law democratic are not the means by which it was adopted, but its internal features. These may include Article 15 of the Constitution, which states that ‘the people have the inalienable right to choose their public officials and to dismiss them,’ or Article 44, which states that the right to vote cannot be denied on the grounds of ‘race, creed, sex, social status, family origin, education, property, or income.’ In short, the status of the means by which the law was adopted is irrelevant in defining the democratic status of the law.

Consider now the second implication of the irrelevance of the external features with regard to the democratic status of political rights and policies. As Waldron argues, blatantly undemocratic policies can be adopted by democratic means without such policies becoming democratic as a result. In other words, the democratic character of the external features of political policies and rights is *insufficient* for the democratic character of such policies and rights. As an instance of this, consider the following statement:

(b3) The 2002 amendment of the Spanish electoral law is undemocratic.

To be sure, this is a controversial statement. The amendment, which was approved by a large majority of both chambers of the parliament and triggered a strong popular support, made it possible to prohibit political organizations—including political parties—associated with terrorism.<sup>3</sup> It was aimed at outlawing the Basque separatist party Batasuna, which was in fact outlawed by the Spanish Supreme Court in 2003. Since its approval, it has been much discussed whether the amendment is democratic or not. For some, the amendment impoverished the Spanish democracy by de facto disenfranchising the voters of Batasuna—by that time, roughly 200,000 voters. For some others, by contrast, it strengthened the Spanish democracy by protecting its institutions from their internal enemies.

For present purposes, it is irrelevant which side of the debate is actually right. What matters are the conditions that need to obtain for (b3) to be true. In that sense, it is not by chance that the debate on the democratic status of the amendment has largely focused on its internal features, thus showing that the external features of the amendment are mostly irrelevant in assessing its democratic status. If (b3) turns out to be true, then it seems clear that it is so by

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<sup>3</sup> The amended Article 9 of the Law of Political Parties reads as follows: ‘a party will be declared illegal when its grave and continuous’ activity ‘makes democratic principles vulnerable.’ Prohibited activities include

‘promoting, justifying or excusing assaults against the life or the integrity of persons ... inciting, bringing about or legitimizing violence as a means for the achievement of political objectives ... politically complementing and helping the action of terrorist organizations for the achievement of their ends of subverting constitutional order or gravely altering public peace ... giving express or tacit political support, legitimizing terrorist actions or excusing and minimizing their significance.’

means of the content of the amendment (for example, that it outlawed one of the main parties of the Basque Country), regardless of how faultlessly democratic its external features might be. If, by contrast, (b3) turns out to be false, then it seems clear that it is so by means of the internal features of the amendment (for example, that it defended the Spanish democracy from those who aimed to destroy it), regardless of the means by which it was adopted. This is, in fact, the position of those who have adopted the latter position, and claimed that (b3) is false. Overall, they have not argued that the amendment is democratic because it was adopted by a large parliamentary majority, but rather because it strengthened the Spanish democracy. In short, regardless of whether (b3) turns out to be eventually true or false, it seems clear that the truth-conditions of (b3) are independent from the democratic status of the amendment.

We can conclude, thus, that the democratic character of *political* rights depends solely on their internal features or, put more formally, that *political rights are democratic if and only if their internal features are democratic*.

#### Non-political rights

Consider non-political rights now. As we shall see, the conditions that apply to political rights do not apply equally to them. While political rights and policies are democratic exclusively by means of the democratic status of their internal features, the democratic status of non-political rights and policies is mainly dependent on their external features. In order to see why, it is useful to consider two types of cases—namely, a first type in which the external features of non-political rights and policies are democratic and a second type in which their external features are undemocratic. Let us firstly address the first type by considering the following statement:

(b4)           The Italian ban on nuclear energy is democratic.

The statement is plausible and, indeed, can be found in the debates that precede and followed the 1987 and the 2011 referendums in which the ban was adopted and ratified, respectively. However, the statement makes little sense unless ‘democratic’ refers to its external features. The internal features of the ban, and the rights that this policy may grant to Italian people, are neither constitutive of democracy, nor a precondition of its correct functioning. Accordingly, such features have little bearing on the democratic character of the ban. In order to make sense of it, we have to look at its external features. That is, we have to look at the means by which the ban was adopted. Were the

turnout of the 1987 and the 2011 referendums high enough? Were such referendums preceded by a strong citizen engagement? Was reliable information shared widely before citizens came to the poll? Did the voting produce clear majorities in favor of the ban? The statement will turn out to be true if the responses to these and perhaps some further questions regarding the democratic status of the external features of the ban are in the positive.

Consider now a second case in which ‘democratic’ is attributed to non-political rights which external features, in contrast to those of the Italian ban on nuclear energy, are undemocratic, such as the following one:

(b5)           The postwar Japanese ban on forced marriage is democratic.

Like the right to vote to which (b2) refers, the Japanese ban on forced marriage was included in the 1947 Constitution (under Article 24). Yet, unlike (b2), (b5) seems to be false. The reason for this is that the truth-conditions of (b2) and (b5) are very different. On the one hand, (b2) refers to political rights. For that reason, the means by which the postwar Japanese electoral law, including the right to vote, was adopted does not have any bearing on its democratic character, and (b2) is true or false *exclusively* by means of the democratic status of the internal features of the law. Now, since the intrinsic features of the law are very democratic, (b2) turns out to be true.

By contrast, the right not to be forced to marry someone seems to be non-political, for it is not constitutive of the political system.<sup>4</sup> Accordingly, the internal features of the right have little bearing on its democratic status, which largely depends on the means by which the law was adopted. Now, since the 1947 Constitution was imposed on the Japanese people by the Allies, it can hardly be said to be democratic. Accordingly, if something, the ban turns out to be undemocratic, and (b5) turns out to be false as a result.

To sum up, statements (b1), (b2), and (b3) refer to political policies and rights—namely, to the Belgian, Japanese, and Spanish electoral laws, respectively. Accordingly, the democratic status of their internal features exhausts their truth-conditions, and the status of their external features is irrelevant. By contrast, (b4) and (b5) refer to non-political policies and rights—namely, to the Italian ban on nuclear energy and to the Japanese ban on forced marriage. Since neither of them is constitutive of democracy, they turn out to be democratic by way of the democratic status of the means by which they were adopted. Put differently, the Italian ban on nuclear energy is democratic mainly because it

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<sup>4</sup> As a reviewer for this journal has observed, this claim can be disputed on the basis that the ban may serve as a procedural precondition for the correct functioning of democracy. For example, it may serve as a precondition for the autonomous political agency of the Japanese people and, notably, the Japanese women. Under this—admittedly plausible—interpretation, the ban may be said to be democratic because of its relationship with the political rights for which it serves as a precondition. I discuss this possibility, and its implications for the account advanced here, below.

is the upshot of a decision made by the Italian people, and because the credentials of that decision are outstandingly democratic. By contrast, the democratic credentials of the adoption of the Japanese ban on forced marriage are poorly democratic because the occupying forces of the Allies imposed it upon the Japanese people. Accordingly, the ban turns out to be undemocratic.

#### Implications for the countermajoritarian difficulty

Briefly consider now the implications of the account advanced here for the countermajoritarian difficulty. As pointed out before, constitutional rights are often said to be undemocratic, for they pose a twofold countermajoritarian difficulty. Since they are entrenched in a rigid constitution and protected through judicial review, they constrain the will of present and future parliamentary majorities. In our democratic societies, in which the democratic credentials of our political institutions is considered a fundamental source of their legitimacy—if by no means the only one—, this difficulty is worrisome. Our understanding of the democratic status of constitutional rights is, thus, fundamental to our understanding of whether the constraints they pose on parliamentary majorities are democratic or not and, accordingly, of whether the countermajoritarian difficulty raised by them is real or merely apparent.

According to the PBA, however, constitutional rights need not be undemocratic if they are adopted under conditions that are outstandingly more democratic than those of ordinary parliamentary politics. Unlike ordinary politics, constitution-making occurs in highly inclusive moments in which citizens deeply engage in politics, discuss to each other at length, reflect carefully about the consequences of their choices, and reach a wide consensus on fundamental issues, including rights. When these circumstances obtain, judicial review and constitutional rigidity need not be undemocratic because they ensure that present and future parliamentary majorities will not be able to amend such fundamental issues unless conditions that are equally demanding obtain. The PBA provides, thus, a potential solution to the countermajoritarian difficulty—and a very influential one in the recent literature, indeed—that is based on the democratic credentials of the means by which constitutional rights are adopted. In response, however, Waldron has argued that constitutional rights do not become any more democratic just because they are adopted by democratic means because the people could adopt blatantly undemocratic measures without such measures becoming democratic as a result.

Under the twofold account advanced in this paper, Waldron's argument succeeds, yet only partially. As

statements (b1), (b2), and (b3) show, in our ordinary understanding political rights are more or less democratic depending exclusively on their internal features, as Waldron claims. Accordingly, the democratic credentials of the means by which they are adopted are irrelevant in assessing the constraints they pose on parliamentary majorities, and the solution to the countermajoritarian difficulty provided by the PBA turns out to fail.<sup>5</sup>

However, Waldron's *reductio* does not apply equally to non-political rights. As statements (b4) and (b5) above show, non-political rights are democratic mainly by way of the means by which they are adopted, as proponents of the PBA claim. Hence, when the democratically demanding conditions of inclusion, engagement, deliberation, and consensus specified by the PBA obtain, the countermajoritarian difficulty largely dissolves. To be sure, under such conditions constitutionally entrenched non-political rights still constrain decision-making by parliamentary majorities. Further, it might be argued that most often such conditions do not obtain. However, when they do, constraints on parliamentary majorities need not be undemocratic, for they protect the upshot of a constitutional process that is outstandingly more democratic than ordinary parliamentary decision-making.<sup>6</sup>

### **Further clarifications**

So far I have argued that the democratic status of political and non-political rights depends on two different features. Political rights are democratic solely by means of their internal features. Non-political rights, by contrast, are democratic mainly by means of their external features. In so doing, I have partially defended the PBA from Waldron's criticism. I have shown that his criticism is correct with regard to political rights, yet not regarding non-political rights. In order to further clarify this account, consider the following three potential objections.

Firstly, it may be objected that the account advanced here is flawed because the statements in which 'democratic' is attributed to non-political policies and rights, such as (b4) and (b5), are largely meaningless. After all, it may be the case that 'democratic' is not suitable to be attributed to non-political policies and rights. Just as 'fast' is something we attribute to a swimmer yet not to a weightlifter, and 'tasty' is something we attribute to a meal yet not to a song, 'democratic' may be something we attribute to political policies and rights yet not to non-political ones.

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5 This does not exclude that alternative attempts to evade the difficulty, such as those provided by Ely (1982), Holmes (1988), or Eisgruber (2001), may succeed in solving the countermajoritarian difficulty raised by political rights.

6 Of course, additional arguments against the PBA that have not been considered here could end up blocking the argument (González Ricoy 2012; forthcoming; see also Herzog 1994; Sánchez Cuenca 1998; Waldron 1998; Elster 2000; Bayón 2004; Kis 2009). However, as pointed out in above, in this paper I am only considering Waldron's criticism and I leave these issues aside.

There is some truth in this. To some extent, it seems awkward to say that a ban on nuclear energy is democratic, or that a ban on forced marriage is undemocratic. Further, provided that the account advanced here has been tested against the uses of ‘democratic’ in ordinary language, the concern is sensible and important. However, it is the case that ‘democratic’ is often attributed to non-political policies and rights. As a matter of fact, both (b4) and (b5) are plausible and rather usual statements in ordinary language. Further, in our democratic societies the democratic status of policies and rights, including non-political policies and rights, is regarded as a central source of their legitimacy—obviously, along with some further normative criteria. For that reason, it is preferable to assume that these are plausible uses of the term and to try to make sense of them, rather than just pretending that ‘democratic’ has no bearing on non-political rights and policies.

Secondly, against the account advanced here, according to which non-political rights and policies are democratic by means of their external features, it may be further objected that the internal features of non-political rights and policies do have some bearing on their democratic status. For example, we sometimes claim that non-political rights and policies are democratic because they apply to all citizens or because they have inclusive effects. Similarly, we sometimes say that low-cost retailers, such as Zara or H&M, have democratized fashion because they have made it available to ordinary people.

It may be replied that these are derivative and uncommon uses of the term. However, such a reply would be inconsistent with the reply to the first objection. It is thus safer to assume that these are plausible and correct uses of the term. Now, even if we assume that they are, it is still the case that their bearing is *greater* regarding the democratic status of political rights than regarding the democratic status of non-political rights. For instance, the Italian ban on nuclear energy may be said to be democratic because it is inclusive of all Italian people, or because it benefits everyone equally. The goal of this paper is not to prove that these uses are implausible and that non-political rights are democratic *exclusively* by means of their external features. Rather, it aims to show that, while political rights are democratic exclusively by means of their internal features, non-political rights are democratic *mainly* by means of their external features. Hence, the internal features of non-political rights may play a role in defining their democratic status. However, this role is less important than the role of their external features and, more importantly for present purposes, it is certainly less important than the role of internal features in defining the democratic status of *political* rights.

Thirdly, and related to the previous objection, it may be argued that many of the alleged non-political rights are, in fact, procedural preconditions for the adequate functioning of democracy. Hence, their internal features may not

be relevant in defining their democratic status when we regard them as non-political rights, or at least not as relevant as the internal features of political rights. However, when we look at them as procedural preconditions for the proper functioning of the democratic system, the means by which they are adopted turns out to be less relevant in defining their democratic status. Instead, their democratic status turns out to depend to great extent on their relationship with the political rights for which they serve as preconditions. For instance, the Japanese ban on forced marriage may be said to be democratic because it serves as a precondition for the autonomous political agency of the Japanese people and, notably, the Japanese women.<sup>7</sup>

Now, as I said above, the precise boundaries of the rights that serve as procedural preconditions are dependent on how we define democracy. Accordingly, the relevance of external features in defining the democratic status of the rights that fall beyond such boundaries depends on how we define democracy. However, unless we happen to define *all* non-political rights as procedural preconditions, the role of their external features will not be irrelevant. Habermas (1996) has provided such a strong account, according to which all basic rights are necessary preconditions for the proper functioning of the political process, which would otherwise be distorted. (In turn, says Habermas, basic rights are also the upshot of the political process, which is the only source of legitimacy under the conditions of ‘post-metaphysical thinking.’) However, I take it that Habermas’s is too radical an account. Even though this is obviously too quick an assessment of his theory, some of the rights that he defines as basic—notably, some of the rights included in his fifth category, such as the rights to protection against technological risks and basic ecological rights (Habermas 1996, pp. 155-156)—seem to be non-political. To the extent that these rights are independent from the democratic process, claims about their democratic status, which are not unusual, cannot be based on their internal features, and the idea that they may be so because of their external features becomes plausible. At least for such rights, and probably for many more, the account provided here still holds.

## **Conclusion**

The paper has addressed the democratic status of constitutional rights. Its contribution has been twofold. On the one hand, it has advanced an account of the conditions that need to obtain for constitutional rights to be democratic. It has argued that two distinctions are in order so as to adequately address this issue—first, a distinction between the

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<sup>7</sup> I am grateful to a reviewer for this journal for raising this issue.



external features of rights (i.e. how they are adopted) and their internal features (i.e. their content) and, second, a distinction between political rights and non-political rights depending on their internal features. Next, it has shown that political rights are democratic exclusively by means of their internal features, while non-political rights are democratic mainly by means of their external features.

On the other hand, the paper has used this account to partially defend precommitment-based theories from a criticism raised by Jeremy Waldron. Precommitment-based theories provide a very influential solution to the counter-majoritarian difficulty based on the outstandingly democratic credentials of the means by which constitutional rights are adopted. According to Waldron, however, constitutional rights do not become democratic when they are adopted by democratic means, for a majority could adopt undemocratic policies without such policies becoming democratic as a result. The paper has concluded that Waldron is right with regard to political rights, which are democratic if and only if their content is democratic. Yet it has also shown that Waldron falls into a *non sequitur* when he applies his *reductio* to all constitutional rights, for non-political constitutional rights are democratic largely by means of how they are adopted.

Of course, the account advanced here is incomplete and in need of further work, at least, in three senses. First, the paper has not addressed the precise status of constitutional rights when they are regarded as procedural preconditions. Second, it has not attempted to define the precise internal and external features that make political and non-political rights, respectively, democratic. Third, it has not addressed the role—if any—of the internal features of non-political rights in defining their democratic status. Provided that in our democratic societies the democratic credentials of our political institutions, including constitutional rights, are a central source of their legitimacy, and that constitutionalism is an ever-growing global phenomenon, these further questions are timely and important.

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