I N D E X

academic debates 'circumstances of legitimacy', 20 compliance, 20 data types, 16 democracy, 19 democratic theory, 18 ideal theory, 20 international human rights regime, 15 - 21international legitimacy, 18 international relations, 16 moral philosophers, 16 non-ideal theory, 20 philosophical theory, 16 political philosophy, 16, 17 political science, 16 political theory, 17 politicalization, 18 research, 16, 18, 33 academic debates, 19 actors conduct, 124 Africa, 8 agents moral conflict, 122 Asia, 9 Association of Southeast Asian Nations (ASEAN), 9 Declaration, 10 dictators, club of, 10 authority acceptance, why?, 238 adjudicatory, 161 growth, 12 justification, 40 model of, 41 normative justifications, 215

questioning, 13 test of transfer of, 151 Bolivarian bloc, 7 Brazil, 7 class of subjects, 47 climate change, 2, 208, 262 coercion, 195 collective self-determination respect for, 139 compliance, 24 conflicts concepts, as, 13 consent theory, 69 constitutional courts role of, 107, 108 conventions, 243-250 democracy, and, 247 judiciary, 247 legal constitutionalism, 248 legitimacy, reasons for, 248 public opinion, 247 ratification, 247 support for, 247 coordination democratic, 46, 47 partial-conflict, 46 problems, 46, 64 cosmopolitan world order, 215 cosmopolitanism, 214 Council of Europe, 265-266 deciding what to do, 223 deference, principle of, 143, 146, 156 ambiguity, 151 bad interpretations, 156-159

300

INDEX

301

bad state records, and, 147 basic rights, 159 case for, 147-151 design of international interpretive authorities, 160-161 distinct moral contribution, 147 domestic interpretations, 152-156 duty, 148 entitlement to, 160 hierarchy, 147 independence, 149 indirect instrumentalism, and, 162 international authorities best placed, 143 interpretations, 143 isolation, 153 prima facie, 150 problem of bad interpretations, 156 - 161rebuttal, 146 relationship, 149 value of legitimacy, 144 democracy, 219, 243-250 citizens' trust, 280 collective arrangements, 256 common features, 280 constitutional consensus, 106 constraining authority, 155 courts, 259 credentials, 136 criteria for relying on judiciary, 262-264 decision-making process, 256 deliberative conception, 105 democratic spirit, 273 disagreements, 259 effectiveness, 257 elections, 281 epistemic authority, 103 human right to, 259 human rights, and, 19, 37 institutional justice, 280 legal constitutionalism, 248, 253 majoritarianism, 112 majorities, 257 majority rule, 46 meaning, 65 minimum standards for ECHR, 265

minorities, 257 minority voices, 155 motivations to use judiciary, 261-262 non-democratic, 284 problems with using judiciary, 264 promotion of human rights, 151 protection of rights, 248 public reason, 106 quality of decisions, 284 representation difficulties, 261 respect for human rights, 273 self-government conception, 105 self-interest, acting, 256 state scepticism, 273 United Kingdom, 246 democratic membership, 50 dialogue engaging in, 14 disenfranchisement of prisoners United Kingdom, 243-245 domestic procedures, 22 domestic authorities, 23 epistemic humility, 23, 111 equal status of humans, 128 equality, 128-132 disproportionality, 131 felon disenfranchisement, 138 felony disenfranchisement, 130 historical concern, 129 internal political legitimacy, 132 justice, and, 134 role of, 130 value of status, 135 equality of citizens, 119 European Court of Human Rights (ECtHR), 5, 107, 110, 275-276, 279 academic debates, 16 accountability, 288 allaying fears, 289-291 approach, 100 association of democratic states, and, 261-267 authority, 7 back to Hirst, 267–268 cases, 5 citizens, and, 289

302

INDEX

European Court of Human Rights (ECtHR) (cont.) conferences, 6 controversial decisions, 26 criticisms, 257, 272, 277 critique, 86 decisions, 246 democratic legitimacy, 246 dynamic interpretation, 285 effectiveness, 285 enhancing, 273 failure, 266 failure to comply, 276 focus, 266 Hirst case, 243-245 illegitimacy, 276 inadmissibility of applications, 285 interpretation, 287 interpretation of treaty, 100 judicial activism, 286 judicial review, 26 legality, 276 legitimacy deficits, 276-279 margin of appreciation, 245, 266 non-accountable judges, 287 normatively justifiable, 276 one country, one judge principle, 160 partial defence of, 285-291 performance, 276 problems, 287 proposals, 278-279, 291-293 remaining challenges, 293-296 repetitive cases, 285 statistics, 266 support for, 5 unfamilarity, 288 United Kingdom, and, 86 weak review, 266 European Union political entity, as, 274 first-order duty, 40 fragmentation, 11, 12, 277 consent, and, 69 free trade, 215 functionalism, 214 functionally-comprehensive

functionally-specific institutions, 208, 209 global governance authority, 221, 238 beneficiaries and benefactors, 217 complex standard of legitimacy, 219 cosmopolitan functionalism, 213, 215 - 226cultural pluralism, and, 214 hybrid model, 219 institutions, 18, 213-226, 232 legitimacy, 212 monopoly of violence, 214 object of study, 214 perceiving legitimacy, 217 public goods, 216 purpose of common good, 215 simplifying problem of legitimacy, 218 state consent, and, 214, 235 global reach, 11 governments legitimacy, challenging, 13 human rights, 121-135 alternative proposals, 138 development, 87 different levels, 149 domestic and international, 53 dominant discourse, as, 84 entitlements, 51 global discourse, 91 growth, 165 improving, 137 increasing global protection, 153 institutional conception, 118, 124, 125, 127 interactionist conception, 124, 127 interest-based theory, 50 interests, sufficient, 48 joint benefits, no, 227 legal, 51-55 legalization, 53 marker, 123 measurements, 135 minimal consensus, 54 moral, 48-51

associations, 208

INDEX

303

nature of, 48-55 obscuring, 127 overlapping consensus, 113 philosophical theory, and, 129 political equality, 49, 75 political equality, 49 qua-legal rights, 54 reciprocal enforcement, no, 227 recognition, 49, 51, 52 single violation, 125 social-comparative way, 129 standards for membership, 230 state sovereignty, 55 taking seriously, 138 universal, 49, 52 urgency, 123 what are?, 123-126 independence condition, 71 indirect democratic consent, 38 institutionalized politicization, 12 institutions, 25, 213, 230, 232, 235, 236 accountability, 185, 209 African, 8 Asia, 9 assumptions, and, 15 authority, 233, 238 authority relationship, 218 checks and balances, 215 civil condition, 133 collective action, 25 collective goods, 231 commitment to, 228 complex standards, 224 concern for legitimacy, 190 conflict, 19 deviation, 209 different types, 205 discretion, restricting, 231 disruption, 13 epistemic functions, 236 epistemic problems, 223 equal moral freedom, 134 exceptional virtues, 126 failures, 237 function, 126 functional explanations, 216

funding, 218 global governance, and, 232, see also global governance global justice, 215 how relevant?, 126-128 illegitimacy, 118 instrumental justifications, 215 interference, 219 interpretation, 34 inverting legitimacy puzzle, 231 joint benefits, 215, 231 justifying power, 231 legitimacy, 15, 25 legitimacy of, 35 legitimacy puzzle of, 231-232 legitimacy/obligation, and, 202-210 legitimate, are they?, 200 level of legitimacy, 134 measurement, 199 morally, 126 morally acceptable, 225 narrow compass, 205 nature, 226 need for justification, 209 order, 130 political effect, 230 political impact, 226 political legitimacy, 25, 205 political theory, and, 190 politicization, 18 power, 203 powers, 204 problems, 212 problems and solutions of legitimacy, 217-226 public goods, 217 questions, 203 relationships, 203 responsibilities, 197 role of, 127 scope, 35 scope of jurisdiction, 208 state of nature, 134 status, 202 structure, 124, 130 sui generis, 239 UN treaty bodies, 119 uniqueness, 212, 239

304

INDEX

Inter-American Court of Human Rights, 7 rights, 8 International Covenant on Civil and Political Rights, 90 Human Rights Committee, 92, 117 recommendations, 118 International Covenant on Economic, Social and Cultural Rights, 90 international human rights agreements and, 38 content, 44 duties and, 75 historical explanation, 39 history, 32 interest, as object of, 32 justification, as, 38 legitimate authority of, 55-71 moral justification, 39 moral-legal nature, 41 neglect of, 37 priority, and, 38 scope, 44 specific nature, 39 international human rights bodies (IHRBs) accepting regulation, 99 adoption of treaty, 109 approach, 100 authority of, 98-104 authority, state acceptance of, 109, 113 capacity to legislate, 84 check and balance, 94 citizens' involvement, 153 Concluding Observations, Views, Recommendations, and General Comments, 85, 107, 109, 111 constitutional self-awareness, 101 constitutionalization, 98, 101, 110 deliberative reasoning, and, 108 democracy, and, 102, 111 factors of analysis, 85 framework, 101 function, 97, 108, 135 function, developing, 93 interpretation, 100, 111 judicial function, 108

jurisprudence, 91, 101 legitimate authority, 110 mechanisms for compliance, 91 normal justification criterion, 102 normative authority, 94 normative legitimacy of, 135-139 norms, 107, 110 political conception of human rights, and, 104-109 political power, exercise of, 99 precedents, and, 111 proper function, 85 regulate, ability to, 97 regulatory function, 110 right to rule, the, 94-109 rights, engagement with, 86 role of, 84, 99 sovereign consent, 99 supranational, 90 supranational political institutions, as, 136 treaties, 98 international human rights institutions, see institutions international human rights law, 86-94 authority for interpretation, 142 doubly piecemeal, 21 international human rights regimes acceptance and resistance, 1-15 actors, 4 concept of legitimacy, and, 21 critique, 2 doctrines, 2 exist today, 1 extent, 1 legitimacy of, 4 normative challenges, 2 norms, 12 participation, 136 political agenda, 11 political decisions, 4 resentment, 2 rethinking, 230 scepticism, 2 structure, 4 traditions, 2 treaties, number of, 3 universally contestable, 3-12

INDEX

305

international law deliberation, 184 instrumental use of, 184 public nature of, 183 role of, 184 strategic use, 183 tool, as, 185 interpretation, 34 actions, 144 adjudicative authority, 143 alternatives, considering, 160 assurances, 155 authorities, 148 authority, 143 burden of proof, 157 cases as heuristic aids, 161 challenging, 157 competence, 156 comprehensive doctrines, and, 157 conflict, 154 convergence of standards, 149 decision to follow, 142 deference, principle of, see deference, principle of definition of bad, 157 disagreements, 154 domestic high standards, 147 duty to detect bad, 157 duty to take into account, 158 establishing reasons, 159 example, 145-146 extent, 142 international and domestic authorities, 143 involvement, 154 jurisdiction, 144 learning from other states, 147 legitimacy standard, 146 liberal democratic states, 153 merits-only standard, 146 no justificatory framework, 157 original intent, 158 overriding, 161 practice, in, 156 procedure, 157 qua citizens, 153 range of, 155

reason-giving, 158 responsibilities, 158 sharing common goals, 146 standards, 161 undermining, 154 widest representation possible, 160 willingness to improve, 148 wrong, getting it, 146 intervention, permissible, 122 isolationism, 153 judge in one's own cause, 256-261 judicial review concern, 272 defence of, need for international, 279 - 284need for, 279 reasons for, 281-283 support for, 291 judiciary capacity, 255 concerns, 287 justice, 23 justifications complexity, 40 legal guarantees relationship between domestic and international, 41 legal norms, 35 determining, 41 interpretation, and, 34 neglect, 36 piecemeal, 76 state, effect on, 43 legal rights recognition of, 39 legality, 151-152 legitimacy, 121-135 alternative accounts, 135 ascribing, 204 assumptions, 166 authority, question of, 33 circumstances, 150 citizens' conformity, 223 claims to, 209 coexisiting traditions, 175

306

INDEX

legitimacy (cont.) co-existence of reasons, 144 collective self-determination, and, 132 - 135compliance, and, 166 concept, 191-202 conceptions, 166 conditions for external actors, 22 conferring on claimant, 207 connection to compliance, 173-175 content, 174 content-independent reasons, 144 context of problematisation, 195-201 decent states, 134 denial reasons, and, 76 descriptive, 217 disputes, 144 duty to obey, 220 empirical research, for, 222 exclusionary power, 199 expressions of, 14 general scope, 68 governments, and, 13 guidance for action, 222 hybrid standards of, 25 inadequacy, 225 increased discussions, 36 inequality, 66 insufficient compliance, 14 interference, justifications for, 137 intervention, 135 justice, 135 justification, morality or justice, not, 191-192 lack of concern, 37 legality, and, 151-152 legality, as, 88 'legitimacy talk', 203 liberal principle of, 132, 133, 139 literature, 173-175 measurement versus selection, 195 - 199measurements, 135 minimal threshold, 134 non-ideal theory, 21 normative, see normative legitimacy objective, 217 objective tradition, 175

obligation, coercion, and, 195 political, see political legitimacy political obligation, 193-195 political procedures, 133 political system, 136 political theory, 191 problems indicated by criticism, 12 - 15real world context, 150 reasons, 145 reasons for action, 207, 208 relationships, 144 relevance, 144 revisiting the concept, 207-210 right to rule, the, 192-193, 220 scalar predicate, 138 scrutiny, 138 selection function, 198 single human rights violation, 125 sociological, 36 standards, 132, 213 subjective, 217 subjective tradition, 174 substantive concerns, 222 three-tier structure, 207, 208 threshold conditions, 197 toleration, and, 132, 134 torture, see torture triadic, as, 199-201 value of, 144-147 voluntary agreement, 144 legitimacy, concept of academic debates, 15-21 legitimate authority, 41-48 authority by whom, 58-59 authority over whom, 60-61 concept of, 42-44 conception of in international law, 44 - 48congruence, lack of, 58 consent, 68-71 consequences of role of states, 59 content-independent reasons, 45, 63 coordinating authority, 62-65 coordination-based justifications, 63 democratic authority, 65-68 dependence condition, 62 diversity, 42

INDEX

307

domestic subjects, 56 extents, 56 free, rational agents, 60 global democracy, 65 guarantees, 67 horizontal relationships, 63 ideal-type theory, 95 individual autonomy, and, 62 international and national law, differences, 42 international human rights, of, 55-71 international relationships, 57 international subjects, 56 justifications, 43 legal security, lack of, 59 legal validity, 68 new forms of law, 42 non-democratic state, 62 normal justification thesis, 95, 103 only justification, 71 other justifications, 64 piecemeal authority, 62-68 pluralism, 64 qua officials, 58 Razian authority, 44-45, 94 Raz's interventionist account of human rights, 96-98 revised Razian authority, 45-48 role of states, 59 service conception, 45 source of obligations, 69 sovereignty, and, 71-74 state and individual, 60 state binding, 60, 61 state conformity, 62 state veil, 57 subjects, 55-61 treaties, 61 minimally decent human life, 122, 123 moral duties, 33 moral values lack of consensus, 128

multi-level governance structures, 151 Nazi regime, 88

normative legitimacy concept of, 119–121

conditions, 119 considerations, role of, 120 content-independent reasons, 120 disagreement, 120 institutions and, 120 international human rights bodies (IHRBs), 135-139 justice and, 120 political power, 121 state governments, existence of, 121 normative theory justice, 201 legitimacy, 201 legitimate power, 206 need for, 201 refining concepts, 209 use, 206 overlapping jurisdictions, 11, 12 philosophical theory, 122 pluralist legal order conceptual unity, 43 political conception meaning, 104 political constitutionalism, 251-255 'nemo iudex in sua causa', problems with, 256 capacity of courts, 255 compatibility of instruments, 249 courts, reliance on, 257 democracy, 249, 254 democratic legitimacy, 251 easiest way to realise, 261 existing democracy, 251 instrumental merit, 251 judicial review, 252 legislative scrutiny, 253 legitimacy, 251 referenda, 252 rule of law, and, 249 specialness of rights, 252 starting point, as, 250 status quo, 252 strong review, 254 weak review, 254 political equality, 37 human rights, 75

308

INDEX

political equality (cont.) meaning, 50 protected, 37 political legitimacy, 25 moral significance of, 121 political obligation, 193-195 political power manifestations of, 165 positivist analysis, 88 power distinguishing, 201 protection, see democracy balancing rights, 260 courts, 257 distance, 258 effectiveness, 257 enshrining, 258 failure by courts, 259 realist sceptics, 227 regional human rights mechanisms, 1 balancing disagreements, 12 regulatory regimes cooperation, 215 rights-based judicial review argument for, 256 rule of law controversies, 168 fixed, 181 ideology, 181 known, 181 rule of recognition, 152 second-order duty, 40 security, 124 scepticism, 2, 12 slave trade, 88, 128 societal problems, 214 sovereignty, 71-74, 121-135 authority, absence of, 73 collective entities, as, 72 commitments, limit, 74 compatibility with international law, 72 delegated, 198 escaping authority, not, 74 human rights' position, 73

minimizing restrictions, 286 political equality, and, 74 restricting, 228 stringent view, 122 threat to, 237 United Kingdom, 246 unqualified recourse, 199 state consent, 69, 70 authority, 58 cosmopolitan functionalism, and, 213 crucial, 234 democracy, and, 236 dismissing, 233 free, 70 illegitimacy, 234 informed, 70 institutions, 235 legitimacy, and, 69, 213, 219, 233, 236 moral agency, 234 necessary, 235, 238 power, and, 221 pragmatism, 234 rejection, 232 role of, 3, 38, 55 treaties as result of, 171 usefulness of, 232-238 subsidiarity, principle of, 26, 220, 266, 267, 275, 278, 279 torture absence of controversy, 172 anti-torture regime, 171 arguments for, 177-179 bridge between international and US law, 171 Bush administration, 176-180 case law, 169 complexity, 166 compliance model, 172 compliance paradigm, 182 criticisms of arguments, 179 definition, 178 deviation from international law, 179 evidence for anti-torture laws, 173

INDEX

309

explaining need, 177 implications of US case, 180-185 instruments, other, 170 international humanitarian law, in, 168-173 international law's purpose, and, 182 interrogation measures, 173 jurisdiction, 178 key documents, 168-169 laws, 175 legal defences, 180 legal space, constructing, 180 non-compliance with rules, 176 philosophy of international law, and, 171 purpose of instruments, 171 regulative documents, 178 rule and practice, tension, 176 rule of law, and, 181 rule-breaking and legitimacy, 176 rules on, 182 special procedures, 173 universal endorsement, 173 unknown, 182 unlimited freedom of treatment, 180 USA, in, 175–180 use, 175 war on terror, and, 178

trade, 2, 262 treaties agendas, effecting, 229 discretion, constraining, 229 dynamic interpretation, 286 formal commitment, 143 importance, 226 Lisbon Treaty, path to, 274 principles of interpretation, 99 spark mobilization, 229 support litigation, 229 unique class of agreement, 229 treaty interpretation, 117 United Nations Covenant on Civil and Political Rights (ICCPR) Human Rights Committee, 141 monitoring compliance, 141 Universal Declaration on Human Rights human rights, 90 language, 89 post, 90 preamble, 88 States' conceptualization, 103 universal validity, 11 weak enforcement, 12

wrongful imprisonment, 125