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Human Rights and Constitutional Law

Patterns of Mutual Validation and Legitimation

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Introduction

When they are approached as legal norms, human rights are primarily guaranteed by domestic law, and usually *qua* constitutional rights and in the form of a constitutional bill of rights. Since 1948, however, human rights have also been protected through international human rights law and the so-called 'international bill of rights'[1]. This dual human rights regime has been famously coined by Gerald Neuman as the 'dual positivization'[2] of human rights in international human rights law (IHRL) and constitutional rights law (CRL).

Interestingly, constitutional lawyers and international human rights lawyers have long been puzzled by the co-existence of those two legal regimes of human rights and wondered about how they ought to relate. Clearly, the reason for this dual human rights regime does not lie in legal *history* or *genealogy* as both types of legal human rights norms as we know them today date back roughly to the same post-1945 era, a time at which or after which the international bill of rights was drafted on the basis of existing domestic bills of rights and at the time at which or after which most existing domestic constitutions were either completely revised or drafted anew on the basis of the international bill of rights. Nowadays, moreover, constitutional rights either pre-exist the adoption of international human rights law or ought to be adopted on the ground of the latter—either in preparation for ratification or as a normative consequence thereof—, thus confirming the synchronic nature of their functions and their co-existence requirement.[3] Nor does the reason for their co-existence lie in the *content* or the *structure* of the human rights protected, as those are held to be, by and large,

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[1] See S. Gardbaum, 'Human Rights as International Constitutional Rights', *European Journal of International Law*, 19(4) (2008): 749–68, 750.

[2] G. Neuman, 'Human Rights and Constitutional Rights', *Stanford Law Review*, 55(5) (2003): 1863–900, 1864. See also J. Waldron, 'Rights and the Citation of Foreign Law', in T. Campbell, K.D. Ewing, and A. Tomkins (eds.), *The Legal Protection of Human Rights. Sceptical Essays* (Oxford University Press 2011), 410–27, 424.

[3] See also Gardbaum, 'Human Rights as International Constitutional Rights', 764ff.

similar in practice.[4] International human rights are not there to fill the gaps of domestic law. Nor, finally, does the key to the relationship between domestic and international human rights lie in their *enforcement* mechanisms, as respect for both human rights regimes are owed by domestic institutions, implemented by domestic institutions and monitored in roughly the same way.[5]

So, what could explain that the two regimes are not merely juxtaposed and concurrent, and hence redundant at best? They have, I will argue, distinct albeit complementary *functions*.[6] The present chapter aims at clarifying those respective and complementary functions of international and domestic human rights. So doing, it hopes to shed light on key issues in human rights theory, such as the nature of human rights (moral and/or legal) and the legitimacy of human rights law (domestic and/or international). The complementarity in function of the two human rights regimes reflects indeed what I will refer to as the 'mutual legitimation' of international and domestic human rights,[7] and their corresponding 'mutual positivization' or mutual legal validation.

Surprisingly given the urgency of some of those questions in international and domestic constitutional law, but also for our contemporary human rights practice, human rights theorists have not yet engaged with them thoroughly and systematically, but for a few exceptions.[8] Some human rights scholars have, of course, addressed the question, but their approach to the co-existence of international human rights law and domestic constitutional rights law remains largely descriptive.[9] Most of the time, indeed, their arguments' normative underpinnings remain either unstated or else unargued for. Furthermore, their accounts are usually ones of a static juxtaposition of human rights regimes and of their conflicting authority claims that ought to be managed and reconciled.[10] This is regrettable as the process of dynamic and 'mutual'—as opposed to merely 'dual'—positivization and legitimation of international and domestic human rights law needs to be understood fully. The relationship between international human rights law and constitutional law is actually only the tip of the iceberg of the mutual relationship between international law and domestic law, and of the new concept of 'dual-sourced' sovereignty enacted in 1945.[11] Moreover,

[4] Gardbaum, 'Human Rights as International Constitutional Rights', 750–1.

[5] See also R. Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), 333–4; K. Hessler, 'Resolving Interpretive Conflicts in International Human Rights Law', *Journal of Political Philosophy*, 13(1) (2005): 29–52, 37.

[6] See also Dworkin, *Justice for Hedgehogs*, 334–5.

[7] See also A. Buchanan, 'Reciprocal Legitimation: Reframing the Problem of International Legitimacy', *Politics, Philosophy & Economics*, 10(1) (2011): 5–19, 15–16.

[8] See, eg, A. Buchanan and R. Powell, 'Constitutional Democracy and the Rule of International Law: Are they Compatible?', *The Journal of Political Philosophy*, 16(3) (2008): 326–49; S. Benhabib, 'The Legitimacy of Human Rights', *Daedalus*, 137(3) (2008): 94–104; S. Benhabib, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty', *American Political Science Review*, 103(4) (2009): 691–704; Gardbaum, 'Human Rights as International Constitutional Rights'; C. Wellman, *The Moral Dimension of Human Rights* (Oxford University Press, 2011).

[9] See, eg, Neuman, 'Human Rights and Constitutional Rights'.

[10] See Neuman, 'Human Rights and Constitutional Rights', 1873–4, 1900.

[11] See, eg, S. Besson, 'Sovereignty', in R. Wolfrum et al. (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012), online edition, http://www.mpepil.com; S. Besson, 'Sovereignty, International Law and Democracy: A Reply to Waldron', *European Journal of International Law*, 22 (2011): 373–87; J.L. Cohen, 'Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization', *Political Theory*, 36(4) (2008): 578–606.

human rights scholars' perspective is usually that of either international or domestic human rights law, but rarely both at the same time and in their mutual relationship, most probably because of the remaining separation between international and constitutional lawyers on the human rights issue. Finally, existing legal accounts are usually made with a specific domestic legal order in mind, for example, from a US constitutional law perspective[12] or a European one, and this limits their generalization potential.

Importantly, this chapter also pertains to understanding the relationship between human rights and constitutional law more generally. As Stephen Gardbaum argues, 'there is undoubtedly something inherently constitutional in the very nature and subject-matter of international human rights law'.[13] And this arguably calls for a broader assessment of both the constitutional dimensions of human rights and of the human rights dimensions of constitutional law. After a discussion of the underlying understanding of human rights, and in particular of their legal nature and relationship to moral rights (section I), the chapter sets out to look at the constitutional dimension of human rights in three constellations: first of all, their guarantees as *domestic constitutional rights* and their relation to international legal human rights (section II); secondly, their relationship to other *domestic constitutional law* norms (section III); and, finally, their role in the *constitutionalization of international law* itself (section IV).

I. Human Rights between Morality and Law

Human rights are best understood as a legally recognized and enforceable subset of universal moral rights.[14] The proposed understanding of the moral (section I.A) *and* legal (section I.B) nature of human rights and how those dimensions relate underpins much of the proposed argument about their relationship to constitutional law and constitutional rights. It differs from other accounts of human rights that work from the premise of the independent moral existence of human rights, on the one hand, and of their legal recognition or so-called 'positivization' as domestic constitutional or legislative rights and/or as international rights, on the other.[15] Neither of them explains the moral justification

[12] See, eg, Neuman, 'Human Rights and Constitutional Rights'; D. Golove, 'Human Rights Treaties and the US Constitution', *DePaul Law Review*, 52 (2002): 579–626; M. Kumm, 'Constitutional Law Encounters International Law: Terms of Engagement', in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), 256–93. On those debates, see V. Jackson, 'Transnational Constitutional Values and Democratic Challenges', *International Journal of Constitutional Law*, 8 (2010): 517–62; Buchanan and Powell, 'Constitutional Democracy and the Rule of International Law'.

[13] Gardbaum, 'Human Rights as International Constitutional Rights', 752.

[14] See S. Besson, 'Human Rights—Ethical, Political... or Legal? First Steps in a Legal Theory of Human Rights', in D. Childress (ed.), *The Role of Ethics in International Law* (Cambridge University Press 2011), 211–45; S. Besson, 'European Human Rights, Democracy and Supranational Judicial Review—Thinking outside the Judicial Box', in P. Popelier., P. van Nuffel, and C. van de Heyning (eds.), *Human Rights Protection in the European Legal Order: Interaction between European Courts and National Courts* (Intersentia 2011), 97–145; J. Raz, 'Human Rights without Foundations', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press 2010), 321–37.

[15] This chapters differs from Buchanan, in this volume (ch. 13), who assesses the relationship between 'moral human rights' and 'international legal human rights'; from Buchanan and Powell, 'Constitutional Democracy and the Rule of International Law', who assess the compatibility between 'international human rights' and 'constitutional law'; from Wellman, *The Moral Dimension of Human Rights*, 138, who assesses the relationship between 'moral human rights' positivized into 'international legal human

for the *legal* positivization of human rights, on the one hand, and for their *dual* positivization in both international human rights law and domestic human rights law, on the other.

A. Human rights as moral rights

Human rights are a subset of universal moral rights (i) that protect fundamental and general human interests (ii) against action or omission of (national, regional or international) public institutions that exercise jurisdiction (iii).[16]

First of all, a human right exists *qua* moral *right* when an interest is a sufficient ground or reason to hold another agent (the duty-bearer) under a duty to respect that interest against certain general albeit reasonable or standard threats vis-a-vis the right-holder.[17] For a right to be recognized, an objective interest must be identified and weighed against other interests and other considerations. Its duties will be determined in each concrete case by reference to the specific circumstances and potential duty-bearers. Rights are, on this account, intermediaries between interests and duties.[18]

Secondly, *human* rights are universal and general moral rights of a special intensity that belong to all human beings by virtue of their humanity. Human rights are *universal* moral rights, on the one hand, because the interests they protect belong to all human beings. *Qua general* moral rights, on the other, they protect fundamental human interests that human beings have by virtue of their humanity and not of a given status or circumstance (unlike special rights). Those interests constitute part of a person's well-being in an objective sense; they are the objective interests that, when guaranteed, make for a decent or minimally good individual life.

Of course, there has to be a threshold of importance at which a given interest is regarded as sufficiently fundamental to give rise to duties and hence to a right. While interests are trans-historical, the sufficiently fundamental nature of the protected interests and hence the existence of the corresponding human rights have to be determined by reference to a context and time rather than established once and for all. What makes it the case that a given individual interest is regarded as sufficiently fundamental or important to generate a duty and that, in other words, the threshold of importance and point of passage from a general and fundamental interest to a human right is reached, may be found in the normative status of each individual *qua* equal member of the moral–political community. This is also what one may refer to as their

rights' and, indirectly via the former, 'constitutional rights'; or from Neuman, 'Human Rights and Constitutional Rights', who assesses the relationship between 'international legal human rights' and 'constitutional rights' and the ways in which both regimes positivize 'moral human rights'.

[16] See for a full-length argument on the moral/legal nature of human rights: Besson, 'Human Rights—Ethical, Political...or Legal?; on the egalitarian dimension of human rights: S. Besson, 'The Egalitarian Dimension of Human Rights', *Archiv für Rechts- und Sozialphilosophie Beiheft*, 136 (2013) 19–52; on human rights' duties and their allocation: S. Besson, 'The Allocation of Anti-poverty Rights Duties—Our Rights, but Whose Duties?', in K. Nadakavukaren Schefer (ed.), *Poverty and the International Legal System* (Cambridge University Press 2013), 408–31.

[17] J. Raz, 'On the Nature of Rights', *Mind*, 93(370) (1984): 194–214, 195.

[18] Raz, 'On the Nature of Rights', 208.

political equality or equal political status.[19] Only those interests that are recognized as socio-comparatively equally important by members of the community can be recognized as sufficiently fundamental to give rise to duties and hence as equal human rights. A person's interests deserve equal protection in virtue of her status as member of the community and of her mutual relations to other members in the community. The recognition of human rights is done mutually and not simply vertically and top-down, and, as a result, human rights are not externally promulgated but mutually granted by members of a given political community.[20] This is particularly important as it allows for the mutual assessment of the general and standard threats on certain interests that deserve protection, on the one hand, and of the feasibility of the burdens and costs of the recognition of the corresponding rights and duties, on the other.

As a matter of fact, human rights are not merely a consequence of individuals' equal moral-political status, but also a way of earning that equal status and consolidating it; they are constitutive of that status. Without human rights, moral-political equality would remain an abstract guarantee; through mutual human rights, individuals become actors of their own equality and members of their political community.[21] Borrowing Arendt's words: 'we are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights'.[22]

This brings me to the third element in the definition of human rights: human rights are entitlements against (national, regional or international) *public institutions* that have jurisdiction. Human rights are rights all individuals have against all other individuals in the political community, ie, against themselves collectively. For practical reasons, but also for reasons of political equality in the allocation of the burden and cost of human rights' duties and of democratic legitimacy of the corresponding procedures, those duties should be mediated institutionally. They generate duties on the part of public authorities not only to protect equal individual interests, but also individuals' political status *qua* equal political actors. Of course, other individuals may violate the interests protected by human rights and ought to be prevented from doing so by public institutions as part of their positive human rights' duties, and in particular through legal means.

B. Human rights as legal rights

Just as moral rights are moral propositions and sources of moral duties, legal rights are legal propositions and sources of legal duties. They are moral interests recognized by

[19] See R. Forst, 'The Justification of Human Rights and the Basic Right to Justification. A Reflexive Approach', *Ethics*, 120(4) (2010): 711–40; R. Forst, 'The Basic Right to Justification: Toward a Constructivist Conception of Human Rights', *Constellations*, 6(1) (1999): 35–60, 48; T. Christiano, *The Constitution of Equality* (Oxford University Press 2008), 138, 156.

[20] See J.L. Cohen, 'Minimalism about Human Rights: The Most We Can Hope For?', *The Journal of Political Philosophy*, 12(2) (2004): 190–213, 197–8; Forst, 'The Justification of Human Rights'; K. Baynes, 'Towards a Political Conception of Human Rights', *Philosophy and Social Criticism*, 35(4) (2009): 371–90, 382.

[21] See Cohen, 'Minimalism about Human Rights'; Cohen, 'Rethinking', 585–6.

[22] H. Arendt, 'The Decline of the Nation-state and the End of the Rights of Man', in *The Origins of Totalitarianism* (Penguin 1951), 147–82.

the law as sufficiently important to generate moral duties.[23] The same may be said of legal human rights: legal human rights are fundamental and general moral interests recognized by the law as sufficiently important to generate moral duties.

Generally speaking, moral rights can exist independently from legal rights, but legal rights recognize, modify or create moral rights by recognizing moral interests as sufficiently important to generate moral duties. Of course, there may be ways of protecting moral interests or even independent moral rights legally without recognizing them as legal 'rights'. Nor should all moral rights be recognized and protected legally. Respect for them should be a matter of individual conscience in priority. Conversely, some legal rights may not actually protect pre-existing moral rights or create moral rights, thus only bearing the name of 'rights' and generating legal duties at the most.[24] The same cannot be said of human rights more specifically, however.

First of all, not all universal moral rights ought to be legally recognized as legal rights, but human rights should. Not all universal moral rights have been or are recognized as legal human rights. Some are even expressly recognized as universal moral rights by the law even though they are not made into legal rights or modulated by the law.[25] A distinct question is whether they ought to be legalized and hence protected by law. Again, respect for universal moral rights ought to be voluntary in priority, and this independently from any institutional involvement. However, for the reasons mentioned before, the universal moral rights that are (equal) human rights create moral duties for institutions, and hence for the law as well, to recognize and protect human rights.[26] In the moral–political account of human rights presented previously, the law provides the best and maybe the only way of mutually recognizing the socio-comparative importance of those interests in a political community of equals.[27] It enables the weighing of those interests against each other and the identification of the general and standard threats to those interests, and hence the drawing of the political equality threshold or comparative line. Further, the law provides the institutional framework in which the necessary pre-human rights recognition assessment of the abstract feasibility of human rights can take place, and in particular the abstract assessment of a feasible identification and egalitarian allocation of human rights duties and duty-bearers.

In short, the law turns universal moral rights into human rights, just as politics turn equal moral status into political equality. As a result, in the moral–political account of human rights propounded here, the legal recognition of a fundamental human interest as a human right, in conditions of political equality, is part of the creation of a moral–political human right. In other words, while being independently justified morally and having a universal and general scope, human rights *qua* subset of universal

[23] J. Raz, 'Legal Rights', *Oxford Journal of Legal Studies*, 4(1) (1984): 1–21, 12; J. Raz, 'Human Rights in the New World Order', *Transnational Legal Theory*, 1(1) (2010): 31–47.

[24] See also Dworkin, *Justice for Hedgehogs*, 331. Contra: Wellman, *The Moral Dimension of Human Rights*.

[25] One may think here of the moral rights mentioned by the 9th Amendment of the US Constitution.

[26] See Raz, 'New World Order'.

[27] See eg Cohen, 'Rethinking', 599–600; Forst, 'Justification of Human Rights'; Forst, 'Basic Right', 48–50.

moral rights are also of an inherently legal nature. To quote Jürgen Habermas, 'they are conceptually oriented towards positive enactment by legislative bodies'.[28]

Secondly, and this follows, legal rights may or may not pre-exist as independent moral rights, but human rights are at once moral and legal and hence do not pre-exist as universal moral rights but become such through legal recognition. Most legal rights are legally recognized moral rights,[29] but others are legally created or legally specified moral rights.[30] Human rights, however, do not pre-exist as independent universal moral rights, but, once recognized, become a subset of those rights. The inherently moral–political nature of human rights and the role the law plays in recognizing given interests as sufficiently important in a group as to generate duties and hence human rights, make it the case that the law recognizes universal moral rights by making them human rights. The law may also specify and modulate moral human interests when recognizing them as legal human rights. One may even imagine certain political interests whose moral–political significance stems from the very moral–political circumstances of life in a polity.

II. Human Rights and Domestic Constitutional Rights

The first constitutional constellation in which the human rights issue arises is their recognition as rights within a domestic constitutional legal order. In this section, I argue, first, that human rights ought to be protected by both domestic and international law at the same time (section II.A) and, second, more specifically as domestic constitutional rights (section II.B). A third section addresses the controversial question of how to solve conflicts between international human rights and domestic constitutional rights (section II.C).

A. Human rights between domestic and international law

The first question pertains to the political community that ought to be recognizing the existence of human rights legally and whose members' political equality is in the making, and hence to the level of legalization of those rights.[31] Here, it is important to understand how international human rights law protects the right to have rights (section II.A.i), before explaining how both the domestic and international levels of legalization but also of legitimation of human rights are mutually reinforcing in practice (section II.A.ii).

[28] J. Habermas, 'Die Legitimation durch Menschenrechte', in *Die postnationale Konstellation. Politische Essays* (Suhrkamp, 1998), 170–92, 183. See also J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1998), 310–12; J. Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', *Metaphilosophy*, 41(4) (2010): 464–80, 470; J. Habermas, *Zur Verfassung Europas. Ein Essay* (Suhrkamp 2011), fn 19.

[29] See eg B. Cali and S. Meckled-Garcia, 'Lost in Translation: The Human Rights Ideal and International Human Rights Law', in S. Meckled-Garcia and B. Cali (eds.), *The Legalization of Human Rights, Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge, 2006), 11–31.

[30] See Raz, 'Legal Rights', 16–17; Raz, 'New World Order'.

[31] See also Besson, 'Human Rights'; S. Besson, 'Human Rights and Democracy in a Global Context—Decoupling and Recoupling', *Ethics and Global Politics*, 4(1) (2011): 19–50.

i. International human rights and the right to have rights

The legalization of human rights could take place either at the domestic or at the international level. Prima facie, of course, international law offers the universal scope that matches that of universal moral rights, and would seem to be the privileged locus of legalization of human rights. Given what was said about the interdependence between human rights, political equality and democracy, however, the political process through which their legalization takes place ought to be egalitarian and public, and include all those whose rights are affected and whose equality is at stake. As a result, using international law as the main instrument to recognize fundamental and general human interests as sufficiently important to generate state duties at the domestic level would not be democratically legitimate.[32]

To solve the riddle of the democratic legitimacy of human rights and succeed in recoupling human rights and democracy across levels of governance, it is important to distinguish between two categories of rights: rights that pertain to the access to membership in a political community (rights to membership) and those that pertain to actual membership in the political community (membership rights). Interestingly, this distinction corresponds to two competing readings of Hannah Arendt's idea of the 'right to have rights' depending on whether one understands them as being moral or legal rights, first, and as being domestic or international rights, second.[33]

Starting with the first category, rights to equal political membership contribute to the constitution of equal political status, as opposed to the second category of rights that protect that very equal political status once it is in existence.[34]

Moral and legal rights to membership cannot be guaranteed exclusively from within a given political community since they work as constraints on democratic sovereignty and self-determination. This is why they are usually protected from the outside and through international human rights law.[35] Of course, to be democratically legitimate, they have to be recognized legally through inclusive and deliberative processes. This may prove difficult in the current circumstances of international law, but processes of that kind are incrementally developed in international law making. Importantly, the legalization of international human rights is a two-way street that is not limited to a top-down reception of international law in domestic law, but is bottom-up. The recognition and existence of those rights *qua* international human rights that constrain domestic politics ought indeed to be based on democratic practises recognized domestically. Their content derives from the outcome of democratic human rights' interpretations. Thus, only those polities that respect international human rights and are democratic are then deemed legitimate in specifying the content of those rights,

[32] See eg T. Christiano, 'Democratic Legitimacy and International Institutions', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press 2010), 119–37. See also Cohen, 'Rethinking', 599–600; S. Besson, 'The Legitimate Authority of International Human Rights', in A. Follesdal, J. Karlsson Schaffer, and G. Ulfstein (eds.), *The Legitimacy of International Human Rights Regimes* (Cambridge University Press 2013), 32–83.

[33] Arendt, 'Decline', 177–8. See S. Besson, 'The Right to have Rights—From Human Rights to Citizens' Rights and Back', in M. Goldoni and C. McCorquodale (eds.), *Arendt and the Law* (Hart Publishing, 2012), 335–56.

[34] See Cohen, 'Rethinking', 587.

[35] See also Dworkin, *Justice for Hedgehogs*, 335–9.

and hence in contributing to the further recognition and existence of those rights *qua* international human rights that will constrain them in return.[36] This dynamic phenomenon is what Allen Buchanan refers to as the mutual legitimation of domestic and international law.[37]

In short, rights to membership correspond to a first and main reading of Arendt's right to have rights: those universal moral rights, and potentially also international legal rights to membership, are rights that guarantee the ulterior benefit of human rights within each political community.[38] Those universal moral rights to have human rights are constitutive of one's equal moral status and amount, in political circumstances where the conditions of political equality are given, to a right to equal political membership and participation.

The second group of rights that guarantee membership in the political community, ie, most human rights, can at least be regarded as legally protected universal moral rights and most of the time as legal rights as well. However, unless they refer to and correspond to existing domestic (moral–political and legal) human rights, they cannot (yet) be regarded as human rights for lack of an international moral–political community.

Qua legal rights, those international human rights norms guarantee rights to individuals under a given state's jurisdiction, on the one hand, and to other states (or arguably international organizations [IOs]) (international human rights are usually guaranteed *erga omnes*), on the other, to have those rights guaranteed as 'human rights' within a given domestic community. They correspond to states' (and/or arguably IOs') duties to secure and ensure respect for those rights as 'human rights' within their own jurisdiction.[39] In that sense, international human rights duties are second-order duties for states (and/or arguably IOs) to generate first-order human rights duties for themselves under domestic law, ie, international duties to have domestic duties. What those international human rights norms do, in other words, is protect legally the universal moral right to have rights discussed as a first kind of human rights, ie, the right to equal membership in a moral–political community with all the other human rights this status implies.

Unlike most readings of Arendt's right to have rights,[40] this reading understands rights in the second category, ie, membership rights, as universal moral rights which may also be protected as international legal rights. Their underlying nature as universal moral rights actually explains their *erga omnes* effects. They are not human rights

[36] See Hessler, 'Resolving Interpretive Conflicts', 48ff.

[37] See A. Buchanan, *Justice, Legitimacy and Self-determination: Moral Foundations for International Law* (Oxford University Press, 2004), 187–9; Buchanan, 'Reciprocal Legitimation'; Buchanan and Powell, 'Constitutional Democracy and the Rule of International Law', 348–9.

[38] See eg Cohen, 'Rethinking'; S. Benhabib, '"The Right to have Rights": Hannah Arendt on the Contradictions of the Nation-state', in S. Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004), 56–61.

[39] See O. O'Neill, 'The Dark Side of Human Rights', *International Affairs*, 81(2) (2005): 427–39, 433.

[40] See eg Benhabib, '"The Right to have Rights"'; S. Gosepath, 'Hannah Arendts Kritik der Menschenrechte und ihr "Recht, Rechte zu haben"', in H. Böll-Stiftung (ed.), *Hannah Arendt: Verborgene Tradition—Unzeitgemäße Aktualität?* (Akademie Verlag 2007), 253–62.

yet, but are rights to have human rights, the latter being at once moral and legal rights and not only positive legal rights.

In sum, there are two groups of rights among the rights usually referred to as 'international human rights': the first group (rights to membership) to be legalized at the international level, while rights belonging to the second group (membership rights) have to be legalized both internationally and domestically in a given political community before they can also be recognized as human rights under international law. In the meantime, international law's human rights norms that protect rights in the latter category guarantee rights to have human rights protected under domestic law.

ii. From international human rights to domestic constitutional human rights and back

Interestingly, those normative considerations about the complementary locus of legalization and legitimation of human rights are reflected in our current human rights legal practice.

International human rights law secures the external protection of the right to have domestic human rights in the political community in which one is a member. That externalized human rights regime works on three dimensions domestically and has three distinct albeit complementary functions accordingly: (i) a *substantive* one: it requires the protection of the minimal and abstract content of those rights against domestic levelling-down, and works therefore as a form of back-up;[41] (ii) a *personal* one: it requires the inclusion of all those subjected to domestic jurisdiction, territorially and extra-territorially and whether they are nationals or not, in the scope of those rights;[42] and (iii) a *procedural* one: it requires the introduction of both internal and external institutional mechanisms of monitoring and enforcement of those rights.

Thus, it is through the relationship of mutual reinforcement between domestic human rights and international human rights and the productive tension between external guarantees and internal ones that human rights law has consolidated at both domestic and international levels.[43] International human rights are specified as domestic human rights, but domestic human rights progressively consolidate into international human rights in return.

This virtuous circle can actually be exemplified by the sources of international human rights law. Historically, much of the content of international human rights treaties was actually drawn from domestic bills of rights, and many of the latter were then revised post-1945 to be in line with the former. International human rights law also finds its sources in general principles of international law, but arguably also in customary international law. Both sets of sources derive international norms from

[41] See Buchanan, 'Reciprocal Legitimation', 11; Gardbaum, 'Human Rights as International Constitutional Rights', 764.

[42] See Buchanan, 'Reciprocal Legitimation', 12–13; Gardbaum, 'Human Rights as International Constitutional Rights', 765–6, 767.

[43] See Besson, 'Decoupling and Recoupling'; Habermas, 'Concept of Human Dignity', 478; Benhabib, 'Claiming Rights'; S. Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Polity Press, 2011), 16 and 126; Habermas, 'Zur Verfassung', 31–2, 36–8.

domestic ones.[44] In return, the mutual validation of international and domestic human rights law may also be observed from the way in which international human rights norms are inserted within the domestic legal order.[45] Unlike other international law norms, international human rights law claims, and is usually granted immediate validity and direct effect in domestic legal orders. This occurs in many cases through the joint and largely indiscriminate application of international and constitutional human rights by domestic authorities, and in particular domestic courts.

B. Human rights as domestic constitutional rights

The next question pertains to the way in which human rights should be legalized within the domestic legal order, and in particular whether they should take the form of constitutional rights.[46]

In international human rights law, states are required to 'secure' or 'recognize' (for example, ECHR, Article 1, in English and in French) the international human rights they have committed to respect. This implies a positive duty to legalize those rights as legal rights under domestic law and to implement them legally so as to grant them full effectivity. There is no obligation, however, to legalize them as constitutional rights. Not all states have written constitutions to date, and some do not even have bills of rights.

In practice, human rights may be recognized legally through various sources and hence at different formal ranks in the legal order: they may be guaranteed either as constitutional rights or as any other legal rights. The question then is whether human rights *should* also be legalized as constitutional rights.

Depending on the political organization corresponding to the domestic legal order, various arguments in favour[47] and against[48] their constitutionalization may be mentioned. First of all, the constitutionalization of human rights contributes to their democratic legitimation to the extent that the constitutional law-making process is usually the most inclusive and deliberative of all. Secondly, constitutional law has a fundamental constitutive function and the inclusion of human rights within the fundamental norms of the legal order confirms their fundamental character. Thirdly, the constitutionalization of human rights guarantees their uniform application across the legal order at all legislative levels. Fourthly, constitutional protection of abstract human rights allows for variations in the legislative specifications of the human rights

[44] See S. Besson, 'General Principles in International Law—Whose Principles?', in S. Besson and P. Pichonnaz (eds.), *Les principes en droit européen—Principles in European Law* (Schulthess, 2011), 21–68.

[45] See Neuman, 'Human Rights and Constitutional Rights', 1890–5.

[46] It is very important not to conflate the inherent legality of human rights and their legalization with the question of how to implement human rights most effectively (contra J. Tasioulas, 'The Moral Reality of Human Rights', in T. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (Oxford University Press, 2007), 75–101; J. Nickel, *Making Sense of Human Rights*, 2nd edn. (Blackwell, 2007), 28–33). See also Besson, 'Human Rights'; Raz, 'New World Order'.

[47] See eg R. Alexy, 'Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat', in S. Gosepath and G. Lohmann (eds.), *Philosophie der Menschenrechte* (Suhrkamp, 1998), 244–64, 258–4; Wellman, *The Moral Dimension of Human Rights*, 128ff.

[48] See eg J. Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999); J. Waldron, *Disagreement and the Law* (Oxford University Press, 1999), 211–31.

duties, but without questioning their abstract guarantees. This constitutes a minimal albeit incompletely theorized agreement on certain interests being deemed sufficiently important to give rise to rights and then to duties, and protects them against being balanced and outweighed by other interests and moral considerations in case of conflict. Finally, human rights' constitutionalization secures the priority of their corresponding duties over other legal norms and obligations stemming from the legal order.

Of course, the constitutional entrenchment of human rights comes in degrees. Further, judicial scrutiny may also vary. As a result, the mere constitutionalization of human rights need not be equated with rigid constitutional entrenchment nor with strong judicial review. There are arguments in favour of the latter, but also against them in democratic theory.[49] In short, it is important to understand that the risks of constitutional rigidity and of democratic precommitment may be put to rest by a soft form of constitutional entrenchment where revision by popular vote is possible and no constitutional judicial review exists.[50]

C. Conflicts between international human rights and domestic constitutional rights

Even though international and domestic human rights are complementary and their legal regimes mutually validating and legitimating, conflicts may arise. This is the so-called 'divergence question', and it is usually described as a conflict between incompatible claims to authority stemming from domestic and international human rights law.[51]

Interestingly, the question is posed in a misleading fashion and needs to be re-formulated. The same domestic and international human rights norms cannot enter into conflict as they share the same abstract content (ie, the protection of the same interests against the same standard threats) and this independently from their international or domestic sources—even though their duties may, of course, enter into conflict, but again this is independent from their respective sources. Rather, it is their interpretations and the specifications of the corresponding duties in concrete local circumstances by international and domestic institutions that may diverge and hence conflict with each other.

Once re-formulated, the question then is how one should handle conflicts of interpretation and specification of human rights' duties between international and domestic human rights institutions.[52] This means identifying which institution is legitimate or justified in its claim to final authority over the issue.[53]

There are various arguments for the priority of domestic human rights institutions in the interpretation and specification of human rights.[54] First of all, domestic human

[49] See eg Waldron, 'Dignity'; Waldron, 'Disagreement', 211–31; J. Waldron, 'Judges as Moral Reasoners', *International Journal of Constitutional Law*, 7(1) (2009): 2–24. See also S. Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart Publishing, 2005), 287–336.

[50] See eg Besson, *The Morality of Conflict*.

[51] Neuman, 'Human Rights and Constitutional Rights', 1873–4 and 1874ff.

[52] See eg Hessler, 'Resolving Interpretive Conflicts', 32–3.

[53] See Besson, 'Democratic Authority'.

[54] See Hessler, 'Resolving Interpretive Conflicts', 42ff. See also Besson, 'European Human Rights'.

rights institutions are the institutions of the democratic polity whose members' rights are affected and whose members' duties need to be allocated. The egalitarian dimension of human rights ties them closely to political and, more specifically, democratic procedures in the specification and allocation of human rights duties. Secondly, domestic institutions have the institutional capacity to allocate the burden of duties fairly in view of the resources available in the political community and the knowledge of the concrete threats on the protected interests. The concrete dimension of human rights duties makes their identification and distribution a necessarily situated matter and the same applies to the resolution of conflicts of human rights duties or to the justification of the restrictions to human rights duties.

Importantly, however, the parallel existence of international human rights institutions with a claim to final and legitimate authority, despite being situated outside the democratic polity whose members' human rights and duties are concerned, does not mean that it should be perceived as a juxtaposed and competing monitoring system and hence as a threat. International and domestic human rights institutions' claims to legitimate authority are not in competition and mutually exclusive the way they would if they belonged to different political communities and corresponding legal orders.[55] Their respective claims to legitimate authority are not distinctly justified on different bases and in an exclusive fashion, but on the contrary share a mutually reinforcing democratic justification.[56] Thus, it is the international human rights' institutions' potential contribution to democratic processes or compensation for the lack thereof domestically that helps justify its legitimate authority in the cases in which they impose certain human rights interpretations on domestic authorities.[57] Just as international human rights contribute to protecting the right to democratic membership and the right to have human rights in a democratic polity, international human rights institutions protect democratic institutions and guarantee their ability to respect human rights.

Because international and domestic human rights law complement each other and are in productive tension, their interpreting institutions should be understood as situated in a joint albeit complementary interpretive endeavour and not as mutually exclusive interpretive authorities. As a matter of fact, historically international institutional and procedural standards for the implementation and monitoring of human rights have been developed internally in cooperation among democratic states, transnationalized and internationalized bottom-up and then imposed top-down again as external constraints on domestic institutions and procedures.

This normative account of the mutual interpretive authority of domestic and international human rights institutions actually fits current human rights practice, especially that of the European Convention on Human Rights, and the ways in which potential interpretive conflicts are handled.[58] It finds a clear confirmation in the principle of *subsidiarity* that characterizes that practice.[59] International human rights institutions only

[55] See eg Neuman, 'Human Rights and Constitutional Rights', 1873–4.

[56] See Buchanan, 'Reciprocal Legitimation'; Buchanan and Powell, 'Constitutional Democracy and the Rule of International Law', 348–9.

[57] See also Hessler, 'Resolving Interpretive Conflicts', 45ff; Buchanan, 'Reciprocal Legitimation'.

[58] See Neuman, 'Human Rights and Constitutional Rights', 1880ff.

[59] See L.R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', *European Journal of International Law*, 19

have jurisdiction once domestic remedies have been exhausted and domestic authorities have had a chance to specify, allocate, and interpret human rights duties in context. This may be referred to as procedural or jurisdictional subsidiarity. Further, they are usually very reluctant to question domestic institutions' interpretations and specifications of human rights in the respective political context. They respect domestic institutions' 'margin of appreciation' in most cases.[60] This may be referred to as material or substantive subsidiarity. Finally, international human rights institutions usually impose obligations of results through judgement or decision, but leave the choice of means to domestic authorities. One may refer to it as remedial subsidiarity.

The only limit on international human rights institutions' subsidiarity, however, is the existence of a *consensus* among most democratic states going another direction than the one chosen by a given state.[61] The joint interpretive endeavour of all democratic domestic authorities leads indeed to the gradual constitution of a transnational interpretation and specification of a given human right, albeit a minimal and abstract one. Once there is such a consensual minimal interpretation among most domestic authorities, it may be recognized by international human rights institutions themselves and thus be consolidated at the international level. The evolutive nature of this joint interpretive process is sometimes referred to as 'dynamic interpretation' of international human rights law. And the joint and mutual process of human rights interpretation between domestic and international human rights institutions is often referred to as 'judicial dialogue'.[62] Once identified, that minimal human rights interpretation can then be re-imposed on domestic authorities. This is what is often referred to as the interpretive authority or *erga omnes* effect of an international human rights interpretation or decision.[63]

Importantly, however, those minimal international interpretations can only be more protective and never less protective than the conflicting domestic ones; they entrench interpretations to prevent a levelling-down but never a levelling-up. This is the point of so-called *saving clauses* in many international human rights instruments.[64] Of course, a domestic institution may still object to the argument that some international interpretation provides a better protection of a given human right than a domestic one.[65] Here, the judicial nature of the interpretive authority of international

(2008): 125–59; S. Besson, 'The *Erga Omnes* Effect of ECtHR's Judgements—What's in a Name?', in *The European Court of Human Rights after Protocol 14—First Assessment and Perspectives*, Collection Forum de droit européen (Schulthess, 2011), 125–75.

[60] See C. van de Heyning, 'No Place like Home: Discretionary Space for the Domestic Protection of Fundamental Rights', in P. Popelier, C. van de Heyning, and P. Van Nuffel (eds.), *Human Rights Protection in the European Legal Order: Interaction between European Courts and National Courts* (Intersentia, 2011), 65–96, 87–91.

[61] See also Neuman, 'Human Rights and Constitutional Rights', 1884.

[62] See eg N. Krisch, 'The Open Architecture of European Human Rights Law', in N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010), 109–52, 126ff.

[63] See eg Besson, 'The *Erga Omnes* Effect of ECtHR's Judgements'; J. Christoffersen, 'Individual and Constitutional Justice: Can the Power of Adjudication Balance be Reversed?', in J. Christoffersen and M. Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011), 181–203; L. Wildhaber, 'Rethinking the European Court of Human Rights', in Christoffersen and Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics*, 204–29.

[64] See Neuman, 'Human Rights and Constitutional Rights', 1886–7.

[65] See Besson, 'Human Rights'; Buchanan, 'Justice, Legitimacy', 180–6.

human rights' decisions implies that judicial distinction and overruling may always be possible provided judicial reasoning across institutional levels leads to that result.[66] Thus, nothing prevents a new transnational consensus from lowering the level of protection reached before, even though the latter was internationalized through international judicial interpretation as a result. Of course, some of those international judicial interpretations may be vested with stronger authority than others to mark the difficulty of reversing them in the future. Furthermore, domestic courts may invoke a change in the transnational interpretive consensus itself. Thus, international human rights institutions' interpretive authority ought to evolve hand in hand with states' margin of appreciation as a two-way street and not against it, as some may fear.[67] Moreover, restrictions to human rights may always be justified on important grounds and provided the conditions of democratic necessity are fulfilled. Finally, if saving clauses and judicial dialogue seem too risky a perspective in view of certain potential structural violations of human rights, states have the possibility of devising interpretive declarations or even *reservations* to certain human rights and their established interpretations when acceding to a human rights instrument.[68] Importantly, however, those may not be devised later on once new interpretations of those human rights have arisen.

III. Human Rights and Domestic Constitutional Law

The second set of issues pertains to the relationship between human rights and constitutional law more generally. The question is particularly sensitive in constitutional democracies where there are no or few constitutional limits on the revision of constitutional law, and not even human rights-related ones, but where international human rights law, or rather their international interpretations, are said to take priority over constitutional law. To see more clearly through those difficult issues, it is important to explore, first, how international human rights may conflict with domestic constitutional law (section III.A). A second step in the argument broaches the question of the relationship between human rights and constitutional democracy (section III.B).

A. Human rights in domestic constitutional law

The question of the potential conflict between international human rights and domestic constitutional law is better understood as one between domestic human rights and domestic constitutional law. Given the mutual relationship and complementarity between international and domestic human rights, what matters here is that there are other constitutional norms that protect important interests that may conflict with human rights whether the latter finds their source in domestic or international law.

[66] See eg Besson, 'European Human Rights'. See also Van de Heyning, 'No Place like Home', 91–4; Christoffersen, 'Individual and Constitutional Justice', 198–200.

[67] See Wildhaber, 'Rethinking', 215–17.

[68] See Neuman, 'Human Rights and Constitutional Rights', 1888–90.

Re-formulated in this way, the question actually pertains to the justification of human rights' restrictions, and in particular to the kind of moral considerations that may justify restrictions to human rights duties and under which procedural conditions. Scope precludes fully addressing the question here, but it is interesting to focus on the role of other constitutional norms in this context. One may indeed argue that the fact that certain moral considerations are constitutionally entrenched may provide enhanced justification for a human right's restriction. It certainly makes the argument of democratic necessity that is the main justification for human rights restrictions under the ECHR, for instance, more plausible. The egalitarian dimension or threshold underlying all human rights that protect interests that are deemed sufficiently socio-comparatively important calls for egalitarian justifications to human rights restrictions. The requirement is that all human rights duties are restricted in an egalitarian way by reference to public interests.[69] This implies, for instance, paying attention to the distributive consequences of any human right restriction: the losers should not always be on the same side. In institutional terms, this egalitarian requirement of human rights restrictions means that democratic procedures are the adequate procedures in which to justify human rights restrictions. Given the democratic qualities of constitutional procedures, constitutional interests or principles conflicting with concrete human rights duties may thus be presumed to be more justified than others in restricting the latter.

Of course, in case interpretations about the justification of constitution law-based restrictions to human rights differ between democratic and international human rights institutions, the model proposed in the previous section could apply. The fact that those international human rights' interpretations conflict with domestic constitutional norms may not in any case vindicate the priority of domestic constitutional law merely because it is constitutional law. Constitutional law, even democratic, may be restricted just as human rights may, whether the latter's sources are international or domestic.

B. Human rights and constitutional democracy

More generally, the relationship between human rights and constitutional law raises the question of the relationship between human rights and constitutional democracy, ie, the way the constitution determines the structure and organization of democracy and hence the way a democratic polity self-determines or self-constitutes itself. What is at stake here, in other words, is the relationship between constitutional self-determination and international human rights law: some fear indeed that the latter may gradually erode constitutional self-determination.

Of course, the question of the relationship between human rights and democracy is an old chestnut. Human rights both constrain and enable democracy, and vice versa. With the internationalization of human rights, however, the debate has sharpened.[70]

[69] See Besson, 'The Egalitarian Dimension of Human Rights'.

[70] See Buchanan and Powell, 'Constitutional Democracy and the Rule of International Law', 326–7, 336ff.

Examples of potential erosion through the pressure of international human rights guarantees are, for instance, the development of judicial review domestically, the de-parliamentarization of domestic political regimes or the centralization of previously federal regimes.

The opposition between domestic democratic self-determination and international human rights protection is exaggerated, however.[71] Since 1945, international law has protected the self-determination of people as much as the individual rights of their members: the former through sovereignty and the latter through human rights. Importantly, therefore, state sovereignty under international law protects a collective entity of individuals—a people—and not individual human beings per se. Of course, their fates are connected, the way democracy and human rights are correlated domestically. But sovereignty, and sovereign equality in particular, protects democratic autonomy in a state's external affairs and remains justified for this separately from international human rights law. If the answer to the classical challenge domestically is that human rights and democracy are mutually required by reference to their egalitarian dimension, then that argument also holds once both elements have been externalized in their guarantees. Importantly, this means that the debate has moved one step outside the domestic legal order and is not that imbalanced after all in favour of human rights, but has only gained in complexity due to its relevant external dimensions. We should no longer be asked to discuss the constitutional democracy issue independently from the external guarantees of democracy one finds in international law the way some constitutional lawyers would like it.

International law standards of democracy contribute to the consolidation of domestic democracy, but they also constrain it. International human rights are an example in point, of course, but one should also mention international law norms on the protection of minorities or on election standards.[72] The question then is how to democratically legitimize them as external standards of democracy.

Interestingly, the issues that arise with the legitimation and validation of international democratic standards without an international democratic polity come very close to the ones discussed before, ie the legitimation and validation of international human rights without an international democratic polity. Unless one opts for global democracy and the corresponding idea of international constitutional law, which is neither normatively desirable nor realistic, the solution should come very close to the one proposed in the human rights context: mutual validation and legitimation through the mutually reinforcing mechanisms of internalization and externalization of standards between domestic and international law-making processes and institutional interpretations. This is also what one may refer to as the development of transnational and mutual democratic standards.

The key then would be to develop a constitutional theory for these transnational legal processes that are captured neither by constitutional legal theory nor by international legal theory as they currently stand. That transnational constitutional theory would have to account for the criteria and procedures for the development of shared

[71] See Besson, 'Democratic Authority'.

[72] See Buchanan and Powell, 'Constitutional Democracy and the Rule of International Law', 330ff.

democratic standards across democratic polities without those standards and procedures being themselves democratic in the absence of a transnational democratic polity. No comparisons could be made in this context with secession theory,[73] however; secession theory pertains indeed to the democratic criteria and procedures applicable to the renunciation to self-determination in one democratic entity to join another democratic entity. Self-determination within the boundaries of some kind of democratic polity, whether national or regional, has to remain the ultimate limit on transnational processes, as a result. This is, of course, an indeterminate constraint, but an absolute one from the perspective of democratic theory.

IV. Human Rights and International and Transnational Constitutional Law

A third concern raised by human rights in a constitutional context is whether human rights can be said to be part of a constitutionalization process in international law. A first question pertains to their relation to international constitutional law (section IV.A). This question also relates closely to a second one, however: that of human rights *qua* transnational constitutional law (section IV.B).

A. Human rights and international constitutional law

The relationship between human rights and international constitutional law may be framed as both one of constitutionalization of international law through human rights and as one of constitutionalization of human rights within the international legal order.[74]

With respect to the first question, it should be clear that although human rights belong, in domestic circumstances, to materially constitutional law norms, they do not suffice in themselves to vest a formally constitutional character on a legal order. The other elements of constitutional law are still missing on the international level. For instance, there is at present no democratic subject constituting itself on the international plane. Constituting such a global democratic subject would not be normatively desirable in any case.[75] The second question pertains to the constitutionalization of human rights within international law. Besides lacking a formal subject, the arguments to the existence of such a constitutionalization process fail to convince. International human rights are legalized in many different sources of international law. Besides, those are of equal rank and none of them are being entrenched against legal change.

It is important to remember that international human rights' function as an external guarantee and pressure on domestic law would be lost if they were too readily identified with the domestic human rights law of the international legal order, ie, as global domestic human rights law.[76] There is even a danger they might turn into a maximal

[73] Contra Buchanan and Powell, 'Constitutional Democracy and the Rule of International Law', 345.

[74] See Gardbaum, 'Human Rights as International Constitutional Rights', 752.

[75] See S. Besson, 'Whose Constitution(s)? International Law, Constitutionalism and Democracy', in J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009), 381–407.

[76] See Besson, 'Human Rights'.

threshold of human rights protection domestically, if they are treated as international constitutional rights and interpretations thereof.[77] The international constitutionalization discourse blinds to one of the key features of the international law order post-1945: the mutual relationship between democratic constitutional legal systems and the international legal order.

B. Human rights and transnational constitutional law

The consolidated corpus of international and domestic human rights may also be referred to as transnational human rights law[78] or even transnational constitutional law.[79] This idea of a transnational set of constitutional rights corresponds to the way in which international human rights apply in priority in the domestic legal order and bind domestic institutions *qua* constitutional rights, albeit in all domestic legal orders at the same time. As I argued before, the process of mutual validation and legitimation of domestic and international human rights requires a certain amount of democratic states through which the process of internalization and externalization can take place. It is the scope of that process that is clearly transnational.

Evidence of that transnational process in practice abounds, as I argued before. Its contours, however, remain curiously undertheorized. One key question that arises is whether this transnational process of mutual validation gives comparative constitutional law, and more particularly combined foreign law, a particular claim to legitimate authority besides its informative and persuasive authority.

Scope precludes rehearsing all the arguments here. It suffices to mention that, among the most serious critiques usually uttered against the legitimate authority of comparative human rights law, one finds the democratic one. It is generally argued indeed that using human rights' interpretations stemming from other domestic institutions than one's own country's would be a clear violation of the democratic principle.[80] It follows from this chapter's argument about the bottom-up legalization and legitimation of international human rights standards and their constraining domestic institutions in return, however, that comparative constitutional law may not only provide the best way to grasp the interpretive content of the transnational human rights practice at stake,[81] but also that transnational human rights may be vested with some indirect democratic legitimation through the respective democratic processes by which they have gradually been recognized.

The proposal made here should not be conflated, however, with a one-to-one use of comparative constitutional law between domestic human rights institutions (for

[77] See eg S. Besson, 'The Reception of the ECHR in the United Kingdom and Ireland', in H. Keller and A. Stone Sweet (eds.), *A Europe of Rights. The Reception of the European Convention on Human Rights* (Oxford University Press, 2008).

[78] See also Hessler, 'Resolving Interpretive Conflicts', 37; C. McCrudden, 'A Common Law of Human Rights: Transnational Judicial Conversations on Human Rights', *Oxford Journal of Legal Studies*, 20(4) (2000): 499–532, 530; Waldron, 'Citation of Foreign Law', 423.

[79] For that expression: McCrudden, 'A Common Law of Human Rights'.

[80] See McCrudden, 'A Common Law of Human Rights', 501ff, 529ff; Waldron, 'Citation of Foreign Law', 412ff.

[81] See also Buchanan, 'Justice, Legitimacy', 189.

example, based on Article 39, paragraph 1 of the South African Constitution). The present argument refers, on the contrary, to an international interpretation of a given international human right based on comparative or transnational constitutional law.

Of course, there are distinct arguments for the use of comparative constitutional law and the reference to 'foreign consensus' within domestic constitutional adjudication itself, including, most importantly, its contribution to conceptual clarification.[82] Importantly, however, if the mutual democratic legitimation of human rights law proposed in this chapter holds, there should, first, be an external and international institution interpreting human rights on the basis of the existing transnational consensus and imposing it on domestic institutions in return, and, second, internal and domestic institutions should be focusing on their local political circumstances. Of course, local circumstances may be comparable and domestic human rights interpretations could be consciously 'boiler-plated',[83] to borrow Jeremy Waldron's terms, in real time as it were and before being constrained by international interpretations based on their transnational consensus. However, they need not. Nor should they be for the purpose of the proposed model. One important reason to refer to foreign interpretations of human rights, however, may be for a domestic institution to make an argument of change with respect to the transnational interpretive consensus of a given human right and to hope to trigger a judicial dialogue with international institutions and maybe bring about a new international interpretation of that right, as I argued before. In any case, one should note a third distinction of relevance here: whereas the one-to-one use of comparative constitutional law by domestic human rights institutions is usually said to have persuasive authority at the most,[84] the kind of transnational human rights law concerned in the consolidation of a human rights consensus is regarded here as having binding authority on the international human rights institutions at stake.

In practice, it is comparative constitutional law that is used to assess whether a general principle of international law may readily be identified among domestic constitutional traditions,[85] or whether there is a European consensus on a given human rights interpretation. Of course, the practice is largely irregular.[86] International human rights institutions lack resources and the time necessary to devote themselves rigorously to comparative human rights law studies. Criteria fail, moreover, as to what comparative evidence may amount to.[87]

The time has come therefore to propose the development of the transnational constitutional theory mentioned at the end of the previous section. One should start by articulating potential constraints on the consolidation process for transnational human rights and democratic standards. First of all, it is important for the domestic standards selected to have been submitted to public constitutional deliberation and vote domestically, and not just to judicial deliberation. Secondly, the international

[82] See eg Waldron, 'Citation of Foreign Law', 411, 418, 420ff; J. Waldron, 'Foreign Law and the Modern Ius Gentium', *Harvard Law Review*, 119 (2005): 129–47; McCrudden, 'A Common Law of Human Rights'.
[83] Waldron, 'Citation of Foreign Law', 423.
[84] See McCrudden, 'A Common Law of Human Rights', 513.
[85] See Besson, 'General Principles'.
[86] See McCrudden, 'A Common Law of Human Rights', 510ff.
[87] See McCrudden, 'A Common Law of Human Rights', 522, 532.

processes through which those standards are being recognized abstractly should be as inclusive as possible and their outcome approved through public constitutional deliberation and vote domestically. Thirdly, the international institutions interpreting them should be composed of members democratically elected domestically. Finally, the ultimate constraint on the authority of international interpretations of human rights and other democratic standards should be democratic self-determination. Of course, these are just some of the criteria one could think of.[88]

Conclusions

The main claim in this chapter was that, in the context of human rights, the relationship between international and domestic law differs from other areas. International human rights and domestic constitutional rights are situated in a relationship of mutual validation and legitimation. Their sources are interrelated, in other words, and so are their grounds of legitimacy. Gradually, this process has also led to the development of transnational human rights law and, arguably, of transnational constitutional law more broadly. It is this integrated and dynamic body of human rights norms and institutions, and their mechanisms of mutual interpretation and consolidation, whether at the regional level or on a more universal scale, and their democratic legitimacy, that are now calling for urgent attention.

[88] See eg Jackson, 'Transnational Constitutional Values and Democratic Challenges'.