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European human rights pluralism

Notion and justification

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The present volume sets itself the daunting, and somewhat presumptuous task of 'rethinking legal thinking'. This undertaking strikes us as particularly difficult when transposed to the blooming field of international and European legal theory: after all, we are still having a hard time thinking about international and European law, so how can we be expected to be rethinking our legal thinking yet? At the same time, however, we also know that, when thinking about new forms of law developing outside the boundaries of the state, it is essential not to apply too hastily traditional conceptions and approaches in legal theory. Not only might those conceptions not fit the practice of European and international law but, given the integrated nature of the European legal order and of parts of the international legal order, they might no longer fit that of domestic law either. Building this new boat on an open sea, to borrow an expression from Neurath and Habermas, may be a necessary project as a result, however difficult it may be.[1]

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[1] See e.g. M. Giudice and K. Culver, 'Not a system but an order: explaining the legality of the European Union' in J. Dickson and P. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012), pp 54–76; W. Waluchow, 'Legality's frontier: a review of Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence*', 1 *Transnational Legal Theory* 4 (2010), 575–85; S. Besson and J. Tasioulas, 'Introduction' in Besson and Tasioulas (eds), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp 1–27; K. Culver and M. Giudice, *Legality's Borders* (Oxford: Oxford University Press, 2010); W. Twining, *General*

In this chapter, I would like to take the title of the volume to imply primarily a change of perspective in legal theory; a change of perspective that is important if one wants to embrace the most difficult issues in international and European legal theory, issues that seem to be resisting existing paradigms in traditional legal theory. My topic pertains to the now famous (or infamous) idea of legal pluralism in European and international legal theory, i.e. the idea that not all legal norms applicable in a given legal order ought to be regarded as validated by reference to the same criteria and hence as situated within a hierarchy, and that, accordingly, some normative conflicts may get no legal answer as a result.[2]

Importantly, however, I will try to look at the question of legal pluralism from a different perspective: that of human rights law in the context of human rights legal theory. This new focus is particularly topical as it is in the human rights context that most authors endorsing one form or the other of legal pluralism see evidence to support their view. They either understand human rights pluralism as a case of legal pluralism,[3] and

Jurisprudence: Understanding Law from a Global Perspective (Cambridge: Cambridge University Press, 2009); S. Besson, 'How international is the European legal order?', *No Foundations* 5 (2008), available at www.helsinki.fi/nofo/; S. Besson, 'The concept of constitutionalism in Europe: interpretation *in lieu of* translation', *No Foundations* 4 (2007), available at www.helsinki.fi/nofo/; N. Walker, 'Legal theory and the European Union', 25 *Oxford Journal of Legal Studies* 4 (2005), 581–601 at 592.

[2] See e.g. G. Davies, 'Constitutional disagreement in Europe and the search for pluralism' in M. Avbelj and J, Komarek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012), pp 269–83; M. Maduro, 'Three claims of constitutional pluralism' in *ibid.*, pp 67–84; S. Besson, 'The truth about legal pluralism: a review of Nico Krisch, *Beyond Constitutionalism*', 8 *European Constitutional Law Review* 2 (2012), 354–61; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2011); S. Besson, 'European legal pluralism after *Kadi*', 5 *European Constitutional Law Review* 2 (2009), 237–64; N. Krisch, *The Case for Pluralism in Postnational Law* (London: LSE Legal Studies Working Papers, 2009); J. Baquero Cruz, 'The legacy of the Maastricht-*Urteil* and the pluralist movement', 14 *European Law Journal* 4 (2008), 389–422 at 397–403; Besson, 'How international', note 1 above; M. Maduro, 'Interpreting European law: judicial adjudication in a context of constitutional pluralism', *European Journal of Legal Studies* 1 (2007); N. Barber, 'Legal pluralism and the European Union', 12 *European Law Journal* 3 (2006), 306–29; M. Kumm, 'The jurisprudence of constitutional conflict: constitutional supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* 3 (2005), 262–307; M. Maduro, 'Contrapunctual law: Europe's constitutional pluralism in action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Oxford, Hart Publishing, 2003), pp 501–37; N. Walker, 'The idea of constitutional pluralism', 65 *Modern Law Review* 3 (2002), 317–59; N. MacCormick, 'The Maastricht-*Urteil*: sovereignty now', 1 *European Law Journal* 3 (1995), 259–66 at 259.

[3] See e.g. N. Krisch, 'The open architecture of European human rights law', 71 *Modern Law Review* 2 (2008), 183–216; Maduro, 'Three claims', note 2 above.

sometimes even as the only case they can think of,[4] or envisage human rights as a solution to the more widespread phenomenon of legal pluralism, for instance in judicial settlements of normative conflicts.[5] Against this new trend in European and international legal scholarship,[6] however, I will argue that human rights plurality certainly exists through the coexistence of multilevel human rights norms and judicial interpretations of those norms stemming from different international or European and domestic legal orders and institutions, but that we should be more cautious before referring too quickly to that plurality as human rights pluralism of the kind the use of the term 'legal pluralism' is meant to indicate. Contrary to what many authors claim when conflating the two terms,[7] the plurality of human rights does not necessarily imply their pluralism,[8] and the necessary normative arguments for the latter have not actually been provided in the literature, which tends to be empirical and largely descriptive.[9] Furthermore, human rights norms are legitimating norms, and as a result their pluralism is bound to be very different from that of other legal norms. If there is a form of human rights pluralism at work in Europe, I will argue that it is one of a very different kind: one that is about mutual legitimation, and that is situated at the core of the complex process of democratic legitimation of European legal orders.

[4] If one looks at the examples in Maduro, 'Three claims', note 2 above, or M. Kumm, 'The cosmopolitan turn in constitutionalism: on the relationship between constitutionalism in and beyond the state' in J. L. Dunoff and J. P. Trachtman (eds), *Ruling the World? International Law, Global Governance, Constitutionalism* (Cambridge: Cambridge University Press, 2009), pp 258–326, human rights feature almost exclusively in their examples of legal pluralism. For Krisch, 'Open architecture', note 3 above at 186 and 215, and *Beyond Constitutionalism*, note 2 above, by contrast, human rights pluralism is one kind of legal pluralism among many others. The same may be said paradoxically about the non-pluralist account of G. Letsas, 'Harmonic law – the case against pluralism and dialogue' in Dickson and Eleftheriadis, note 1 above, pp 77–108, who focuses on human rights in his argument against legal pluralism (although he does argue later on that human rights are different from other issues arising within ordinary EU law).

[5] See e.g. L. Azoulai, 'Conclusions' in E. Dubout and S. Touzé (eds), *Les droits fondamentaux: charnières entres ordres et systèmes juridiques* (Paris: Pedone, 2010), pp 327–33.

[6] See e.g. Krisch, 'Open architecture', note 3 above; the essays in Dubout and Touzé, note 5 above.

[7] See e.g. Maduro, 'Three claims', note 2 above; Krisch, 'Open architecture', note 3 above; Krisch, *Beyond Constitutionalism*, note 2 above.

[8] See e.g. Letsas, note 4 above.

[9] Krisch, 'Open architecture', note 3 above at 198 fn. 92, 209ff., for instance, only provides empirical evidence of heterarchy and discusses strategic explanations for domestic and European courts' attitudes.

Context matters if we are to understand this topic, and a few words are therefore in order about the circumstances in which the issues of European legal pluralism and human rights have come together. Lately, circumstances of legal pluralism in the European Union (EU) have led to an increased focus on values,[10] on one hand, and on courts,[11] on the other. Values have been identified, by legal scholars and practitioners equally, as constitutive of the common standards that democratic political and institutional structures and legal rules no longer provide in a context of competing legal orders, regimes and sources – or at least, provide only at the price of very high complexity. Unsurprisingly in those conditions, courts have become the privileged forum for decision making and have used values as guidance in complex normative conflicts. This conjunction of values and judicial power actually explains why human rights have become so central to the articulation of European legal orders and regimes in recent years. Increasingly, indeed, human rights are used as common standards for adjudicating normative conflicts in Europe, and hence as a solution to the normative consequences of legal pluralism.[12] The idea is indeed that all legitimate orders protect human rights and that their respective human rights norms provide common ground for judicial settlements in cases of normative conflict.

Increasing references to human rights as the solution or part of the solution to legal pluralism in Europe do not come without difficulties, however. First, the multilevel and multisourced guarantees of human rights have been said to give rise to a legal pluralism of their own. This is the idea of human rights pluralism defended by many authors in the absence of a clear hierarchy between those guarantees.[13] Second, even if one disagrees with the possibility or idea of human rights pluralism, the plurality of courts and bodies interpreting human rights law in Europe has triggered jurisdictional conflicts over the correct interpretations of those rights. This kind of interpretative or judicial pluralism, and conflict over human rights interpretations, are an even more serious concern. Finally, a more careful and informed approach to the nature and legitimacy of the

[10] See A. Rosas, 'The European Court of Justice in context: forms and patterns of judicial dialogue', 1 *European Journal of Legal Studies* 2 (2007).

[11] See *ibid.*, Maduro, 'Interpreting European law', note 2 above.

[12] See e.g. M. Maduro, 'La fonction juridictionnelle dans le contexte du pluralisme constitutionnel: l'approche du droit communautaire' in Dubout and Touzé, note 5 above; V. Champeil-Desplats, 'Les droits fondamentaux et l'identité des ordres juridiques: l'approche publiciste', in *ibid.*, pp 149–64; and Azoulai, note 5 above.

[13] See e.g. Krisch, 'Open architecture', note 3 above; Maduro, 'Three claims', note 2 above.

various human rights guarantees applying in Europe shows how the reference to human rights pluralism merely obfuscates the real stakes of legal pluralism. It reveals a misunderstanding of both what European human rights are and what they are used for in European adjudication. Clarifying why this is the case in this chapter is not only part of our collective endeavour to devise a new European legal theory, but should also contribute to the nascent international law theory and international human rights theory in particular, as we may be able to learn from experiences gained within the European Union.[14]

My argument about European human rights pluralism will be four-pronged. The first step will clarify what European legal pluralism really amounts to as it means different things to different people – and sometimes even to the same people. In section 2 of this chapter, I will turn to European human rights pluralism, and to its different understandings and roles in practice. The final section of the chapter will re-examine the question of European legal pluralism from a more political and, in particular, a more democratic approach.

1. European legal pluralism

Over the last twenty years or so, the concept of legal pluralism has developed and consolidated in Europe. It emerged from the current circumstances of increasing density in European law,[15] and stems from the limitations of the monist/dualist divide when faced with the immediate validity of and/or lack of hierarchy among norms stemming from different legal orders, regimes and sources within the European Union.[16]

[14] See S. Besson, 'Human rights and democracy in a global context: decoupling and recoupling', 4 *Ethics and Global Politics* 1 (2011), 19–50.

[15] I am consciously avoiding the term 'constitutional pluralism', as I am assuming that the autonomy of a legal order implies a rule of recognition and hence some kind of constitution in a material sense. As a result, legal pluralism in the sense it is understood in this chapter can only be constitutional pluralism (and see Letsas, note 4 above, indirectly). See also Opinion of Advocate General Maduro, Joined cases C–402/05 P and C–415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities* [2008] ECR I–6351, para. 21, by reference to Case 294/83, *Les Verts* v. *Parliament* [1986] ECR 1339, para. 23.

[16] On those limitations, see the introduction in A. Nollkaemper and J. Nijman (eds), *New Perspectives on the Divide between International Law and National Law* (Oxford: Oxford University Press, 2007). See e.g. the references in footnote 2. See also, more generally, Besson, 'European legal pluralism', note 2 above.

Needless to say, legal pluralism remains an ambiguous or 'fuzzy' concept.[17] Two dimensions of meaning at least need to be distinguished. In a first meaning, pluralism can be used to refer either to the normative consequences of the existence of a plurality or multiplicity of legal norms, sources or regimes applicable within the same legal order (internal legal pluralism). This is what is usually meant by reference to pluralism within international law.[18] In a second meaning, and this is its most common meaning and the one that is used in this chapter, it refers to a multiplicity of legal orders the norms contained in which can apply within a given legal order, usually the domestic one, albeit stemming from different legal orders (external legal pluralism). Of course, both types of legal pluralism can overlap and usually external legal pluralism is also characterised by some form of internal legal pluralism.[19]

In practice, and this is what distinguishes a situation of legal pluralism from the legal situation that used to prevail, those plural legal norms coincide in the same social sphere and overlap on the same issues, people and territory, thus sharing the same material, personal and territorial scope.[20] As a result, legal pluralism is usually experienced within a domestic legal order where norms stemming from the European and international legal orders meet and interact upon direct application to their subjects. In this respect, it is important to distinguish between legal pluralism in an

[17] 'Fuzzy': Letsas, note 4 above. I am not looking here at moral pluralism or social and cultural pluralism, but only at legal pluralism. Of course, legal pluralism can be a consequence of moral, social or cultural pluralism, but is not necessarily so. Moreover, I am not looking at non-official forms of law and social norms and hence am not considering those forms of pluralism of social norms: see e.g. S. Moore Falk, *Law as Process: An Anthropological Approach* (London: Routledge, 1978); B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995). See also K. Günther, 'Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem' in L. Wingert and K. Günther (eds), *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit* (Frankfurt: Suhrkamp, 2001), pp 539–67; J. Griffiths, 'What is legal pluralism?', 24 *Journal of Legal Pluralism* (1986), 2–55; W. Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000).

[18] See e.g. International Law Commission, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law', Final Report, 13 April 2006, UN Doc. A/CN.4/L.682. See also S. Besson, 'Whose constitution(s)? international law, constitutionalism and democracy' in Dunoff and Trachtman, note 4 above, pp 381–407; S. Besson, 'Theorizing the sources of international law' in Besson and Tasioulas, note 1 above, pp 163–85.

[19] This is also why external legal pluralism is the more complete of the two and entails both the validity-related and authority-related dimensions discussed below.

[20] See e.g. Griffiths, note 17 above at 8; Twining, *Globalisation and Legal Theory*, note 17 above, p. 8.

integrated legal order such as that made up of the EU and domestic legal orders, on one hand, and legal pluralism in other legal orders, on the other. An example of the latter is the legal pluralism that prevails in any domestic order to which different international law regimes apply at the same time, such as the European Convention on Human Rights (ECHR) and UN law in the domestic legal order. Importantly, however, a more advanced form of legal pluralism is very characteristic of the former integrated legal orders. An integrated legal order is indeed an autonomous legal order made up of many autonomous legal orders that do not lose their autonomy as a result.[21] The identification of the particular legal order within which legal pluralism is experienced is important not only in determining the norm-applying actors in charge of validating legal norms stemming from different legal orders and hence of settling their potentially conflicting claims to (exclusionary) legitimate authority. It also matters if one is to avoid the slippery transitions, that are common in the legal pluralism literature, from a discussion of plural legal 'norms' to considerations of a 'pluralist legal order'.[22]

Two further meanings of the concept of external legal pluralism may be identified: first of all, pluralism *qua* validity and pluralism *qua* rank, and, second, within either of them, pluralism of norms/sources/regimes and pluralism of orders (or more exactly of norms stemming from different orders) applying to the same subjects.

When pluralism is used to refer to a plurality of legal orders overlapping within the same social sphere, this is usually meant to distinguish pluralism from monism.[23] As such, it constitutes an elaborate and interlocking version of dualism. Legal validity does not, however, depend on transposition or reception in different legal orders contrary to what is the case in a dualist legal order. What matters is that the validity of those different

[21] On the notion of integrated legal order, see Besson, 'How international', note 1 above and 'European legal pluralism', note 2 above. On the place of international law within the EU's integrated legal order, see *ibid.*, and both the judgment and the Opinion of Advocate General Kokott in Case C–366/10 *Air Transport Association of America*, nyr.

[22] See e.g. Krisch, 'Open architecture', note 3 above at 185–6 on human rights pluralism *qua* pluralistic legal 'order'; he moves swiftly from 'human rights law' (domestic and international) to the opposition between 'different', 'integrated' and 'pluralistic' 'legal orders'. I do not plan, however, to explain how to distinguish between legal pluralism within a particular legal order, usually the domestic one, and a pluralistic legal order, but merely to draw attention to the importance of the distinction.

[23] Note that monism is a theory of legal validity within a given legal order, and not of legal autonomy. As a result legal monism is entirely compatible with the coexistence of separate, autonomous, legal orders, provided they do not overlap entirely.

norms can be established together and at the same time in their respective legal orders, and this is best captured by the concept of plurivalidity.[24] Pluralism in this first meaning of the concept pertains therefore to the *validity* of legal norms. It assumes that legal norms' validity can have many autonomous sources within the same territory or political community and within the same legal order. More specifically, this may be explained, in legal positivist terms, by reference to the plurality of rules of recognition coexisting within the same legal order and identifying the criteria for validity of the legal norms to be applied in each case by the norm-applying institutions.[25]

The term 'legal pluralism' can also be used, however, having the meaning equivalence of legal norms or of legal sources, either within a legal order or between different legal orders. In that sense, pluralism is opposed to hierarchy. It provides a different answer to the question of first *primacy* and then *rank* among legal norms from the same legal order or from different legal orders that overlap in a given legal order. Of course, the plurality of valid and equally strong legal norms need not necessarily lead to normative conflict, but it might do so and this is how it usually attracts attention. In a case of normative conflict, pluralism is usually contrasted with the existence of a formal hierarchy of sources or of norms, and equated with heterarchy as a result; the legal order at stake entails no rules of conflict and the settlement of potential normative conflicts has to be left to judicial politics. More specifically, the equivalence in rank of legal norms within a pluralist legal order may be explained, in legal positivist terms, by reference to the coexistence of various rules of recognition with distinct validity criteria, on one hand, and to the absence of ranking rules in all legal orders, on the other.[26]

Those distinctions are important. First, not all those forms of legal pluralism present the same difficulty for legal theory. It is one thing for the law-applying institutions in a legal order to recognise the legal norms of another legal order as valid and hence as authoritative norms in their legal order, and another to discuss which ones should take priority in cases of conflict. Nor, secondly, need the remedies be the same in all cases. Thus, the principle of normative coherence can be regarded as a remedy for the absence of hierarchy or rules of conflict between norms in the same

[24] See Besson, 'How international', note 1 above, p. 14; Günther, note 17 above.

[25] See J. Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1980), p. 35ff.; Barber, note 2 above.

[26] See Raz, *ibid.*, p. 35ff.; Barber, *ibid.*, at 322.

legal order. It is not so relevant, however, when the question pertains to the validity of one legal order's norms in another legal order. Of course, in general, often pluralism *qua* validity only really matters when questions of conflict between norms and hence issues of rank arise; normative conflicts are really of interest only if the legal norms at stake are concurrently valid legal norms. And this is what makes the distinction so difficult to draw in practice.

From a meta-theoretical perspective, legal pluralism is often used as a descriptive concept and hence presumably in order to qualify an empirical fact.[27] It is important, however, to distinguish the mere plurality of legal norms from legal pluralism.[28] Legal pluralism implies some kind of normative statement about how the legal validity and legal authority of that plurality of norms ought to be organised. Those cannot merely be described. True, practices around them or even the legal actors' cost–benefit calculus and attitudes may be,[29] but not the legal norms' validity and authority themselves. Regrettably, no normative argument for legal pluralism is to be found in that scholarship, except for a few contributions that are usually sceptical about its existence.[30]

Of course, this normative onus on theories of legal pluralism raises the broader issue of whether legal theory can ever be purely descriptive. My answer is that it cannot. Legal positivism, which is the kind of legal theory endorsed here, is itself normative *qua* legal theory. And legal pluralism, as part of legal positivism,[31] needs to be argued for normatively. It is important, therefore, to provide a normative defence of legal pluralism within the realm of legal positivism. The argument is that legal pluralism may be justified by reference to democratic legitimacy and, more specifically, to the multilevel democratic legitimation of different legal sources,

[27] See e.g. Krisch, 'Open architecture', note 3 above, and *Beyond Constitutionalism*, note 2 above.

[28] The same distinction may be drawn between 'ethical plurality' and 'ethical pluralism'.

[29] This is what Krisch, 'Open architecture', note 3 above at 209ff. does, for instance, by reference to political science literature in the field of international adjudication.

[30] See e.g. Besson, 'European legal pluralism', note 2 above; A. Somek, 'The concept of "law" in global administrative law: a reply to Benedict Kingsbury', 20 *European Journal of International Law* 4 (2009), 985–95; Letsas, note 4 above. See, however, most recently Maduro, 'Three claims', note 2 above; Davies, note 2 above.

[31] I agree with Letsas, note 4 above, and A. Zysset, 'Epistemological analysis of the "disorder" of European legal pluralism' in S. Besson and N. Levrat (eds), *Dés-ordres Juridiques Européens – European Legal Dis-Orders* (Zurich: Schulthess, 2012), on the legal positivist underpinnings of the notion of legal pluralism. However, I disagree with them about the fatality of the empirical nature of the legal positivist argument for legal pluralism.

regimes and orders by reference to the same democratic people.[32] This normative, democracy-based argument for legal pluralism also explains the judicial recourse to further principles in the resolution of normative conflicts, such as subsidiarity, for instance. As I will argue in the human rights context, judicial dialogue on its own cannot explain what judges are doing when settling those cases. Nor may it account on its own for the kind of normative cooperation and mutual reasoning they embrace.

Last but not least, it is important to distinguish the legal pluralism discussed in this section from *judicial* pluralism, i.e. the plurality of and lack of hierarchy between courts belonging to different legal orders albeit interpreting and applying the same legal norms in each of those legal orders. The two forms of pluralism are distinct, albeit often joint in practice. It is important to keep them apart, however. There may be many courts with jurisdiction over the application and interpretation of the same legal norms in the same political community, as exemplified by the adjudication over the ECHR in the EU by the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and domestic courts. Conversely, the same court may be called on to apply a plurality of legal norms stemming from different legal orders as exemplified by domestic courts applying EU law. Of course, in most cases, judicial pluralism enhances legal pluralism by multiplying the interpretations of the same norms that stem from different legal orders within the same legal order. Moreover, judicial pluralism is largely a consequence of legal pluralism, given that normative conflicts need to be settled somehow and usually through judicial intervention. And in cases where those settlements are in the hands of many courts, legal pluralism is more or less regulated by judicial pluralism. In this chapter, however, I shall focus on legal pluralism as distinct from judicial pluralism so as to untie, as much as possible, the role of human rights in the articulation of legal orders from what courts hold of that role and from the function they play in that context.[33]

[32] See Besson, 'European legal pluralism', note 2 above, drawing a distinction in this respect between EU law and international law.

[33] Most discussions of human rights pluralism in Europe usually treat both issues together. See e.g. L. Scheeck, 'The relationship between the European Courts and integration through human rights', 65 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (2005), 837–85; S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the growing European human rights *acquis*', *Common Market Law Review* 43 (2006), 629–66; Rosas, note 10 above; G. Harpaz, 'The ECJ and its relations with the ECtHR', *Common Market Law Review* 46 (2009), 105–42; J. Callewaert, 'The European Convention on Human

Interestingly, one of the most severe challenges to legal pluralism stems precisely from its proponents' emphasis on judges and judicial politics in cases of normative conflicts. Letsas argues, for instance, that this emphasis implies that the non-legal and political role of judges becomes so important that it is untenable for legal positivists, who can only accommodate judicial discretion within certain limited boundaries.[34] This argument fails to convince, however. It is not only indeterminate in terms of threshold but, given that legal pluralism does not necessarily lead to normative conflicts, it lacks teeth. Legal pluralism is no less tenable for courts because it is no longer only internal but also external, to refer to the distinction I made before. Of course, Letsas is right to argue against judicial dialogue as the solution to legal pluralism, however. As I will argue, handling legal pluralism requires much more than dialogue. As a result, not all legal pluralist theories need to endorse judicial dialogue, and the objections to judicial dialogue need not be regarded as objections to legal pluralism.

2. European human rights pluralism

When transposed into the European human rights context, the issue of legal pluralism raises two distinct sets of questions: the issue of human rights pluralism itself and that of the role of human rights in the context of legal pluralism. Both need to be addressed in turn, as they raise separate difficulties and have too often been conflated, with the result that both are either endorsed or rejected at the same time, and usually for the wrong reasons.

2.1. Human rights pluralism in Europe

Interestingly, European human rights law is often invoked as a primary example of legal pluralism in Europe.[35] The human rights applicable to any given situation within a European state stem from many different legal

Rights and European Union law: a long way to harmony', *European Human Rights Law Review* 6 (2009), 768–83; Krisch, *Beyond Constitutionalism*, note 2 above. See on the legitimacy of supranational human rights review in Europe, e.g. S. Besson, 'European human rights, supranational judicial review and democracy – thinking outside the judicial box' in P. Popelier, C. van Nuffel and P. van den Heyning (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Cambridge: Intersentia, 2011), pp 97–145.

[34] Letsas, note 4 above.

[35] See e.g. Krisch, 'Open architecture', note 3 above; Maduro, 'Three claims', note 2 above.

orders, or at least from different sources and regimes within the same legal order: e.g. domestic human rights, EU fundamental rights and ECHR rights. Because those various sources of human rights interact in ways that allegedly can no longer be explained solely by reference to monism or dualism,[36] and, more precisely, because ECHR rights in particular are mostly immediately valid as domestic human rights within the domestic legal order, pluralism is usually regarded as the best explanation of their relationship, on one hand.[37] On the other, the relationship between domestic human rights, ECHR rights and EU fundamental rights, when interpreted by their respective adjudication bodies, is said to be unclear and conflicting claims to authority are said to be made in many cases. As a result, that relationship is usually approached as a pluralist one in the absence of a clear hierarchy between those rights.[38]

In line with the argument I made earlier about European legal pluralism, the key question, however, is whether, besides the empirical evidence given for those two dimensions of European human rights plurality, one may bring forward normative arguments for the existence of European human rights pluralism proper. As I argued earlier, indeed, legal validity and legal authority cannot merely be described as empirical facts, and the normative underpinnings of those descriptive statements need to be argued for. The plurality of human rights norms internationally and domestically, and of interpretations of human rights by international and domestic judicial bodies, need not yet imply a form of human rights pluralism.

I will make two sets of points here: one pertaining to the pluralism of human rights themselves and the other to the pluralism of human rights' interpretations. Within each, I will focus both on the plural validity and the plural authority of human rights norms. Of course, as I have explained and will explain again in relation to human rights, the distinction between human rights norms and their judicial interpretations and applications is artificial. All the same, it is important to draw that distinction between human rights norms and their judicial interpretations in order to stress the difference between plural validity and plural rank, and, more significantly, in order to dispel the idea, which I will address later in the chapter, that their abstract normative equivalence might be invoked to settle other normative conflicts without requiring a judicial interpretation of the

[36] See e.g. H. Keller and A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008).

[37] See e.g. Krisch, 'Open architecture', note 3 above at 184–5. [38] *Ibid.*

human rights themselves and without having to consider the potential conflicts between distinct international or European and domestic judicial interpretations.

2.2. Pluralism of human rights law in Europe

By reference to what I said about legal pluralism in the previous section, the argument that would need to be made in favour of human rights pluralism would be, first, that European human rights norms are immediately valid on the domestic level regardless of whether the domestic legal order is monist or dualist and, second, that there are no hierarchies when European norms conflict with domestic human rights norms.

While both points appear to be arguable at first sight, they underestimate a crucial feature of international or European and domestic human rights norms: their mutuality, both in terms of validity and in terms of legitimate authority. Thus, while human rights law may indeed be regarded as pluralist, this, on its own, does not capture the core of the relationship at work between international or European human rights law and domestic human rights law. Since I have already developed an argument for the mutual validation and legitimation of domestic and international or regional human rights law elsewhere,[39] I will focus here on how that mutual validation and legitimation may be understood as a special instantiation of legal pluralism. Note that, as I explained earlier in relation to legal pluralism in general, the distinction between validity and legitimacy is merely conceptual given how closely related they are in practice, and the mutual validity of international or European human rights and domestic human rights has to be explained by reference to their mutual legitimation.

First of all, then, let us look at the plurivalidity of human rights law. A pluralist argument would read along the lines that international or European and domestic human rights legal norms draw their joint validity from separate rules of recognition within the domestic legal order. Actually, however, it would be more accurate to argue that their plurivalidity amounts to intervalidity or mutual validity to the extent that their validity is mutually determined.

[39] See S. Besson, 'Human rights and constitutional law' in R. Cruft, S. M. Liao and N. Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2014), forthcoming.

To start with, it is important to stress the existence of a so-called 'dual positivisation' of human rights in international or European law and domestic law.[40] Authors still disagree about the grounds for that dual positivisation and juxtaposition of human rights regimes in the domestic legal order. Those are neither chronological, substantive nor remedial. International and domestic 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 which or after which most existing domestic constitutions were either completely revised or drafted anew on the basis of the international bill of rights.[41] Nowadays, in actual fact, constitutional rights either antedate 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 consequence thereof [42] – thus confirming the synchronic nature of their functions and the requirement that they coexist; one no longer goes without the other.[43] Interestingly, however, the content and the structure of the human rights protected are, by and large, the same.[44] Neither, finally, does the key to the relationship between domestic and international human rights lie in their enforcement, as both human rights regimes are owned by domestic institutions, implemented by domestic institutions and monitored in the same way.[45]

What is clear, however, is that the two regimes are not merely juxtaposed – with international human rights law *qua* gap-filling rights[46] – and hence should not be regarded as redundant regimes at best. The difference between the two legal regimes of human rights and the underlying ground for their dual positivisation and validation in the domestic legal order, as a result, pertains to their distinct albeit complementary functions.[47] International human rights law secures the external and minimal protection of the right to have domestic human rights in the political community of

[40] See G. Neuman, 'Human rights and constitutional rights', 55 *Stanford Law Review* 5 (2003), 1863–1900 at 1864.

[41] S. Gardbaum, 'Human rights as international constitutional rights', 19 *European Journal of International Law* 4 (2008), 749–68 at 750.

[42] See e.g. Art. 1 ECHR; Arts. 2 and 4 Convention on the Rights of the Child.

[43] See also Gardbaum, note 41 above at 764ff. [44] *Ibid.*, at 750–51.

[45] See also R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap, 2011), pp 333–4. See also K. Hessler, 'Resolving interpretive conflicts in international human rights law', 13 *Journal of Political Philosophy* 1 (2005), 29–52 at 37.

[46] See Gardbaum, note 41 above at 764. [47] See also Dworkin, note 45 above, pp 334–5.

which one is a member. That externalised human rights regime works on three levels domestically and has three functions accordingly:

1. 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;[48]
2. a *personal* one: it requires the inclusion of all those subjected to domestic jurisdiction,[49] territorially and extraterritorially and whether they are nationals or not, in the scope of those rights;[50] and
3. a *procedural* one: it requires the introduction of both internal and external institutional mechanisms to monitor and enforce those rights.[51]

Both levels of protection are usually regarded as complementary and as serving different functions, therefore, rather than as providing competing guarantees. This complementary relationship between international and domestic guarantees explains why the reception of international human rights into domestic law is favoured or even required by international human rights instruments. Domestic human rights law does more than merely implement international human rights, therefore: it contextualises and specifies them. This explains why international human rights are usually drafted in minimal and abstract terms, thus calling for domestic reception and specification.[52] They rely on national guarantees to formulate a minimal threshold that they reflect and entrench internationally. That entrenchment is dynamic and the minimal content of international human rights may evolve with time.[53] More importantly, they are usually abstract and meant to be fleshed out at the domestic level, not only in terms of the specific duties attached to a given right but also in terms of the right itself.

[48] See A. Buchanan, 'Reciprocal legitimation: reframing the problem of international legitimacy', 10 *Politics, Philosophy and Economics* 1 (2011), 5–19 at 11; Gardbaum, note 41 above at 764.

[49] See S. Besson, 'The extraterritoriality of the European Convention on Human Rights: why human rights require jurisdiction and what jurisdiction amounts to', 25 *Leiden Journal of International Law* 4 (2012), 857–84.

[50] See Buchanan, note 48 above at 12–13; Gardbaum, note 41 above at 765–7.

[51] I do not agree with the other functions of international human rights law suggested by Gardbaum, note 41 above at 766–8 and Buchanan, note 48 above at 11–14.

[52] See Besson, 'Decoupling and recoupling', note 14 above; Dworkin, note 45 above, pp 337–8.

[53] See S. Besson, 'The *erga omnes* effect of ECtHR's judgments – what's in a name?', in Besson (ed.), *The European Court of Human Rights after Protocol 14 – First Assessment and Perspectives* (Zurich: Schulthess, 2011), pp 125–75, on the interpretative authority of the ECtHR's judgments.

As a matter of fact, 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.[54] International human rights law places duties on domestic authorities to include them within domestic human rights law and to implement them in a democratic fashion, and the latter feed into international human rights guarantees in return. This constant interaction between international and domestic human rights is reminiscent of Arendt's universal right to have particular rights and the to-ing and fro-ing between the universal and the particular. 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 reference to the sources of international human rights law. International human rights law is indeed deemed to belong to general international law and finds its sources both in general principles of international law, and arguably also in customary international law. Both sets of sources derive international norms from domestic ones and this jurisgenerative process is actually epitomised by the sources of international human rights law.[55] 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 after 1945 to come into line with the former.[56] The mutual relationship between international and domestic human rights can also be confirmed by recent human rights practice, whether it is of a customary, conventional or even judicial nature. Domestic human rights contribute to the development of the corresponding international human rights' judicial or quasi-judicial interpretations. This is clearly the case in the case law of the European Court of Human Rights where common

[54] See Besson, 'Decoupling and recoupling', note 14 above; J. Habermas, 'The concept of human dignity and the realistic utopia of human rights', 41 *Metaphilosophy* 4 (2010), 465–80 at 478; S. Benhabib, 'Claiming rights across borders: international human rights and democratic sovereignty', 103 *American Political Science Review* 4 (2009), 691–704; S. Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Cambridge: Polity Press, 2011), pp 16 and 126; J. Habermas, *Zur Verfassung Europas: Ein Essay* (Berlin: Suhrkamp, 2011), pp 31–2, 36–8.

[55] 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* (Zurich: Schulthess, 2011), pp 21–68.

[56] See J. Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2009), p. 149.

ground is a constant concern and is sought after when interpreting the ECHR.[57]

That mutual relationship between international and domestic human rights law may also be observed from the way in which international human rights norms are validated in the domestic legal order.[58] Unlike other international law norms, international human rights law claims, and is usually granted, immediate validity and direct effect in domestic legal orders.[59] This occurs in many cases through the joint and largely indistinct application of international and constitutional human rights by domestic authorities, and in particular domestic courts. There is, in other words, no difference between international human rights and domestic constitutional rights in terms of validity within the domestic legal order. Nor are they differentiated in most cases, as they are usually subsumed within a composite set of human rights norms. Once validated through this kind of indiscriminate application, what matters is the human right, and no longer its legal source.

Second, we must examine the heterarchy of human rights law. The second feature of legal pluralism may also be verified in the human rights context, which does not assign to international or European human rights law priority over domestic human rights law and vice versa. As a matter of fact, not only does neither take priority over the other, as in other cases of legal pluralism, but they should be seen, moreover, as standing in a relationship of mutual legitimation that is usually lacking in those other cases.

Importantly, indeed, the legal enforcement 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 also spreads from the bottom upwards and comes closer to a virtuous circle of legitimation. The recognition and existence of those rights *qua* international human rights that constrain domestic politics ought indeed to be based on democratic practices recognised on a domestic level. Their content reflects the outcome of democratic interpretations of human rights. And only those polities that both respect international human rights and are democratic are deemed

[57] See Besson, '*Erga omnes* effect', note 53 above.

[58] See Neuman, note 40 above at 1890–95.

[59] This is particularly striking in legal orders within which international law is not necessarily granted immediate validity and direct effect. See e.g. S. Besson, 'The reception of the ECHR in the United Kingdom and Ireland' in Keller and Stone Sweet, note 36 above, pp 31–106; and H. Keller and A. Stone Sweet, 'Introduction: the reception of the ECHR in national legal orders' in *ibid.*, pp 3–30.

legitimate in specifying the content of those rights further, and hence in contributing to the further recognition and existence of those rights *qua* international human rights that will constrain them in return.[60] This dynamic phenomenon is what Buchanan refers to as the mutual legitimation of domestic and international law.[61]

Of course, the mutual legitimation of international or European human rights law and domestic human rights law does not mean that normative conflicts cannot arise. This is the so-called 'divergence question', and it is usually described as a conflict of incompatible claims to legitimate authority stemming from domestic and international human rights law.[62]

Interestingly, the question is often misunderstood. One of the main difficulties with this understanding of the question and of the discourse pertaining to human rights pluralism in Europe is actually the tendency to conflate the plurality of judicial interpretations of the same human rights norms among European and domestic institutions, a serious issue in itself, with the plurality of human rights norms just discussed. Not only does the latter not imply the former, but their respective pluralisms need to be carefully distinguished from one another, as I explained earlier in relationship to the general distinction between legal and judicial pluralism.

Human rights themselves cannot enter into conflict as they share the same abstract content (i.e. protection of the same interests against the same standard threats) independently of their international or domestic sources. Instead, it is the interpretations of human rights and the specifications of the corresponding duties in concrete local circumstances by international and domestic institutions that may conflict with each other. And this is the case *a fortiori*, whether the human rights interpreted and specified by those institutions are the same international human rights, on one hand, or distinct international and domestic human rights, on the other. In other words, where two human rights norms stem from different legal sources, therefore, what may differ between them are not the abstract rights but the concrete duties and this can only be the case once the norms have been applied to the same set of circumstances by different authorities. Furthermore, as discussed above, in the reception

[60] See Hessler, note 45 above at 48ff.

[61] See A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004), pp 187–9; Buchanan, 'Reciprocal legitimation', note 48 above.

[62] Neuman, note 40 above at 1873–4 and 1874ff. for the various divergences.

process international human rights are usually subsumed within domestic human rights norms, and in particular within constitutional rights, and this turns them into valid domestic law; it not only grants them the legitimacy of domestic law, but also takes care, usually, of any potential conflict of authority as a result.

All this explains why the idea of human rights pluralism *qua* human rights heterarchy is misleading:[63] there may be a plurality of human rights institutions interpreting the same international human rights norms differently, but this does not entail a conflict between the international or domestic legal norms protecting those rights.[64] Of course, human rights may come into conflict when their corresponding duties conflict,[65] but again this is an independent question that has nothing to do with either the international or domestic sources of the rights themselves, on one hand, or the international or domestic nature of the interpreting institutions, on the other.[66] Finally, international human rights may conflict with norms of domestic constitutional law other than human rights, when the abstract content of the latter is clear, but this is another matter.

Once reformulated, the question is then how one should handle conflicts of interpretation or specification between international and domestic human rights institutions.[67] This means identifying which institution is legitimate or justified in its claim to final authority over the issue.[68] International human rights institutions may be tribunals, like the European or Inter-American Court of Human Rights, or independent treaty bodies, like the UN human rights treaty bodies. Domestic human rights institutions cover any domestic institutions implementing human rights, but mostly judicial bodies whether they specialise in human rights or have general jurisdiction. And this issue actually constitutes the object of the next section.

[63] See e.g. Krisch, *Beyond Constitutionalism*, note 2 above.
[64] See Besson, 'Human rights and constitutional law', note 39 above.
[65] See e.g. J. Waldron, 'Rights in conflict' in *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993), pp 203–24; S. Besson, 'Conflicts of constitutional rights: nature, typology and resolution' in Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Oxford: Hart Publishing, 2005), pp 419–56; L. Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (New York: Oxford University Press, 2007).
[66] Contra: see e.g. A. Torres Perez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford: Oxford University Press, 2009).
[67] See e.g. Hessler, note 45 above at 32–3.
[68] See S. Besson, 'The legitimate authority of international human rights' in A. Føllesdal et al. (eds), *The Legitimacy of International Human Rights Regimes* (Cambridge: Cambridge University Press, 2013).

2.3. Pluralism of human rights interpretations in Europe

The next question then is whether the plurality of human rights interpretations that stem from different competent judicial bodies in Europe may be equated with a form of legal pluralism. This is not so much a question of validity, but rather one of rank or hierarchy in response to potential conflicts between those plural interpretations. Allegedly, indeed, the relationship between European interpretations of human rights by their respective adjudication bodies is unclear, and conflicting claims to authority are made in many cases. In the absence of a clear hierarchy between them, that relationship is usually approached as a pluralist one.[69]

Here again, my argument will be that, while it is true that there is no hierarchy of human rights interpretations in Europe, their relationship is more complex than mere heterarchy: it is one of mutuality. Their different roles or functions preclude the possibility of a real conflict as a result.

To start with, there are various arguments one might articulate for the priority of domestic human rights institutions in the interpretation and specification of human rights.[70] I will restrict myself to two here: one is democratic and the other practical. First of all, domestic human rights institutions are the institutions of the democratic polity to which belong the members whose rights are affected and to which those members' duties need to be allocated. The egalitarian dimension of human rights ties them closely to political and more specifically to democratic procedures in the specification and allocation of duties. Only domestic institutions present those democratic and egalitarian qualities in relation to the human rights that bind them and which they ought to protect. Second, domestic institutions have the institutional capacity to allocate the burden of duties fairly in view of the resources available and in knowledge of the concrete threats to the protected interests. The concrete dimension of human rights duties makes their identification and distribution a necessarily local matter and the same applies to the resolution of conflicts of human rights duties or to the justification of required restrictions to human rights duties. Domestic institutions are clearly better situated to ensure

[69] See e.g. Krisch, 'Open architecture', note 3 above at 184–5.
[70] See Hessler, note 45 above at 42ff. On the legitimacy of international judicial review of human rights, see also Besson, 'Supranational judicial review', note 33 above; A. Føllesdal, 'International judicial human rights review – effective, legitimate or both?' in J. Sihvola, P. Korkman and V. Mäkinen (eds), *Universalism in International Law and Political Philosophy* (Helsinki: Helsinki Collegium for Advanced Studies, 2008); A. von Staden, 'The democratic legitimacy of judicial review beyond the state: normative subsidiarity and judicial standards of review', 10 *International Journal of Constitutional Law* 4 (2012), 1023–49.

that allocation and hence the interpretation of human rights duties in context.

Importantly, however, despite being situated outside the democratic polity to which belong those members whose human rights and duties are concerned, the parallel existence of international human rights institutions with a claim to final and legitimate authority does not mean that this should be understood as a juxtaposed and competing monitoring regime, situated in a heterarchical relationship to domestic ones. As a result, assigning priority to either domestic or international human rights interpretations should not be understood as implying a hierarchy or a higher legitimate authority in any way. The claims to legitimate authority of international and domestic human rights institutions are not in competition and potential conflict with one another.[71] Their mutuality dates back to the post-1945 human rights regime and needs to be fully grasped at last. This implies understanding that their 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.[72] Thus, it is the international human rights institutions' potential contribution to democratic processes or compensation for any domestic lack thereof that helps justify their legitimate authority in the cases in which they impose particular human rights interpretations on domestic authorities.[73] Just as international human rights contribute to protecting the rights to democratic membership and to have human rights in a democratic polity, international human rights institutions protect democratic institutions and guarantee their ability to respect human rights.

Thus, just as 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, interpretative endeavour and not as mutually exclusive interpretative authorities. This is confirmed by the fact that institutional and procedural standards for the implementation and monitoring of human rights are developed internally in cooperation among democratic states, transnationalised and then internationalised from the bottom up and then imposed from the top down again as external constraints on domestic institutions and procedures. International institutions and procedures

[71] See e.g. Neuman, note 40 above at 1873–4.
[72] See Buchanan, 'Reciprocal legitimation', note 48 above.
[73] *Ibid.* See also Hessler, note 45 above at 45ff.

are incomplete without domestic ones, but the latter are organised so as to work in tension with the former. One may think, for instance, of the development of conventional review in European democracies that did not know of constitutional review before ratifying the ECHR. Conversely, one should mention the 2009 introduction within the ECHR regime of an infringement procedure, based on domestic authorities' experiences with the implementation of their own human rights decisions.

This normative account of the mutual interpretative authority of domestic and international human rights institutions fits current human rights practice and the ways in which potential interpretative conflicts are handled,[74] and in particular the principle of *subsidiarity* that characterises that practice.[75] International human rights institutions only intervene once domestic remedies have been exhausted and domestic authorities have had a chance to specify, allocate and interpret human rights duties in context. One may refer to this as procedural or jurisdictional subsidiarity. Further, they are usually very reluctant to question domestic institutions' interpretations and specifications of human rights in the specific political context. This may be described as material or substantive subsidiarity. International human rights institutions respect domestic institutions' 'margin of appreciation' in most cases.[76] Finally, they usually impose obligations to reach a result through judgment or decision, but leave the choice of means to domestic authorities. This is referred to as remedial subsidiarity.

The only limit on that international institutional subsidiarity, however, is the existence of a *consensus* among most democratic states going in a

[74] See Neuman, note 40 above at 1880ff.
[75] See Besson, '*Erga omnes* effect', note 53 above. See also D. Shelton, 'Subsidiarity and human rights law', 27 *Human Rights Law Journal* 1 (2006), 4–11; L. Helfer, 'Redesigning the European Court of Human Rights: embeddedness as a deep structural principle of the European human rights regime', 19 *European Journal of International Law* (2008), 125–59.
[76] See C. van de Heyning, 'No place like home: discretionary space for the domestic protection of fundamental rights' in Popelier, van Nuffel and van de Heyning, note 33 above, pp 65–96, especially 87–91; J. Kratochvil, 'The inflation of the margin of appreciation by the European Court of Human Rights', 29 *Netherlands Quarterly of Human Rights* 3 (2011), 324–57; Krisch, *Beyond Constitutionalism*, note 2 above, pp 140–43; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002); E. Brems, 'The margin of appreciation doctrine in the case-law of the European Court of Human Rights', 56 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1996), 240–314; R. MacDonald, 'The margin of appreciation' in R. MacDonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff, 1993), pp 83–124.

direction different from the one chosen by a given state.[77] Here, the mutual validation and legitimation among democratic states alluded to in the previous section also applies to the level of human rights interpretation and specification. The joint interpretative endeavour of all democratic domestic authorities leads indeed to the gradual constitution of an international interpretation and specification for 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 recognised by international human rights institutions themselves and thus become consolidated and entrenched at the international level. The evolutionary nature of this joint interpretative process is sometimes referred to as 'dynamic interpretation' of international human rights law.[78] And the joint and mutual process of human rights interpretation among domestic and international human rights institutions is sometimes called 'judicial dialogue'.[79] Once identified, that minimal human rights interpretation can then be reimposed on domestic authorities. This is what is often referred to as the interpretative authority or *erga omnes* effect of an international human rights interpretation or decision.[80]

Importantly, however, those minimal international interpretations can only be more protective and never less protective than the conflicting domestic one; they entrench interpretations to prevent levelling-down but never hinder levelling-up.[81] This is the point of so-called *saving clauses* in

[77] See e.g. L. Helfer, 'Consensus, coherence and the European Convention on Human Rights', 26 *Cornell International Law Journal* (1993), 133–65; K. Dzehtsiarou, 'Does consensus matter? Legitimacy of European consensus in the case law of the ECtHR', *Public Law* (2011), 534–53. See also Neuman, note 40 above at 1884.

[78] See e.g. *Tyrer* v. *United Kingdom* (App. No. 5856/72) Series A (1979–80) No. 26. On the subsidiary nature of its interpretations, see e.g. *Burden* v. *United Kingdom* (App. No. 13378/05) [2008] ECHR 357, para. 42; *Hatton* v. *United Kingdom* (App. No. 36022/97) [2003] ECHR 338, para. 97. See also Letsas, note 4 above.

[79] See e.g. Krisch, *Beyond Constitutionalism*, note 2 above, pp 109–52, 126ff.; L. Wildhaber, 'Ein Überdenken des Zustands und der Zukunft des Europäischen Gerichtshofs für Menschenrechte', *Europäische Grundrechtezeitschrift* 36 (2009), 547–53; E. Lambert Abdelgawad, *Les effets des arrêts de la Cour européenne des droits de l'homme* (Brussels: Établissements Émile Bruylant, 1999), pp 331–4.

[80] See e.g. Besson, '*Erga omnes* effect', note 53 above; J. Christoffersen, 'Individual and constitutional justice: can the power balance of adjudication be reversed?' (pp 204–29) and L. Wildhaber, 'Rethinking the European Court of Human Rights' (pp 181–203), both in J. Christoffersen and M. Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011).

[81] See, more generally, A. Buchanan, 'Moral progress and human rights' in C. Holder and D. Reidy (eds), *Human Rights: The Hard Questions* (Cambridge: Cambridge University Press, 2012), pp 399–417.

many international human rights instruments (e.g. Article 53 ECHR).[82] Of course, a domestic institution may still disagree about whether some international interpretation provides better protection of a given human right than a domestic one.[83] Here, the judicial nature of the interpretative authority of international human rights decisions implies that judicial distinctions and overruling past decisions may always be possible provided judicial reasoning across institutional levels leads to that result.[84] Furthermore, domestic courts may invoke a change in the transnational interpretative consensus itself. Thus, the interpretative authority of an international human rights institution ought to evolve in step with states' margin of appreciation as a two-way street and not simply oppose it, as some may fear.[85] Moreover, restrictions to human rights may always be justified on important grounds and provided the conditions of democratic necessity are fulfilled.[86] This applies even in circumstances in which there is a transnational human rights consensus, for instance on controversial moral issues,[87] and even when that consensus has been sanctioned with interpretative authority by an international human rights decision

[82] See Neuman, note 40 above at 1886–7. See also van de Heyning, note 76 above.

[83] See e.g. Besson, 'Decoupling and recoupling', note 14 above; Buchanan, *Justice, Legitimacy, and Self-Determination*, note 61 above, pp 180–86. Contra: E. Brems, 'Human rights: minimum and maximum perspectives', 9 *Human Rights Law Review* 3 (2009), 343–72.

[84] See e.g. Besson, '*Erga omnes* effect', note 53 above. See e.g. in the United Kingdom, the House of Lords' decision in *R.* v. *Lyons* [2002] UKHL 44, [2002] WLR 1562, 1580, 1584, 1595 that was confirmed later by the ECtHR in *Lyons and others* v. *United Kingdom* (App. No. 15227/03) ECHR 2003–IX. See also *Z and others* v. *United Kingdom* (App. No. 29392/95) ECHR 2001–V, confirming a British decision (*Barrett* v. *Enfield LBC* [1999] UKHL 25, [2001] 2 AC 550) that had been intentionally decided against the European Court's decision in *Osman* v. *United Kingdom* (App. No. 23452/94). Most recently, see also ECtHR, *A* v. *United Kingdom* (App. No. 3455/05) [2009] ECHR 301. See also Besson, 'Reception of the ECHR', note 59 above; Besson, 'Supranational judicial review', note 33 above, p. 129; Krisch, *Beyond Constitutionalism*, note 2 above, pp 134ff.; van de Heyning, note 76 above, pp 91–4; Christoffersen, note 80 above, pp 198–200.

[85] See Wildhaber, 'Ein Überdenken', note 79 above, and 'Rethinking the European Court of Human Rights', note 80 above, pp 215–7 on interpretation at the ECtHR not being a 'one-way street'. See also van de Heyning, note 76 above, pp 90–91; Krisch, *Beyond Constitutionalism*, note 2 above, p. 143; Lambert Abdelgawad, note 79 above, pp 331–4.

[86] On this second meaning of the margin of appreciation in the ECtHR's case law (the first being the equivalent to the material or substantive subsidiarity alluded to before), see e.g. G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2008).

[87] See e.g. *Stübing* v. *Germany* (App. No. 43547/08) 12 April 2012, nyr; ECtHR, *A, B and C* v. *Ireland* (App. No. 25579/05) [2010] ECtHR 2032.

or judgment. 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 interpretative declarations or even *reservations* to certain human rights in order to favour their established interpretations when acceding to a human rights instrument.[88] Importantly, however, those may not be devised later, after new interpretations have arisen.

What this means for the idea of alleged pluralism of human rights interpretations in Europe, however, is that legal pluralism alone is not an adequate model to capture the way in which complementary and distinct human rights interpretations relate in case of conflict. The model does perceive the immediate validity and lack of hierarchy among international or European and domestic human rights norms, but misses the mutuality and reciprocal validation and legitimation process at stake. There is much more than judicial politics and dialogue at play, if one is to explain the existing processes of mutual interpretation and reasoning.[89] There are reasons, in other words, behind international or European judges' and domestic judges' cooperation, reasons that go beyond judicial attitudes and strategies and their mutual respect for each other's beliefs.

This does not mean, however, that human rights adjudication is merely about finding the right determination of human rights in each adjudication body and independently of what the other domestic or European/international human rights courts have said, as Letsas argues.[90] There is no right determination of the scope and allocation of human rights duties in circumstances of widespread and persistent moral disagreement and deep indeterminacy about human rights, except for a democratically legitimate one in the community to which belong those members whose rights and duties are at stake. Of course, that democratically legitimate, collective determination may then be questioned in court, and before many different courts including international or European ones. However, as I argued earlier, the democratic dimension of human rights implies that international human rights bodies may only interpret human rights in cooperation with domestic democratic ones. There is therefore a third way that lies between human rights pluralism *stricto sensu* and Letsas's 'harmonic law'.

[88] See Neuman, note 40 above at 1888–90.

[89] This is something that the pluralist account of Krisch, 'Open architecture', note 3 above at 215, cannot explain on its own.

[90] See Letsas, 'Harmonic law', note 4 above.

2.4. Human rights in response to legal pluralism in Europe

Besides European human rights' own legal pluralism, human rights are also related to European legal pluralism in a second and distinct way. This is the role human rights are seen to play in the judicial settlement of normative conflicts that stems from the legal pluralism prevailing in other areas of European law.

Increasingly, human rights are used as common standards for adjudicating normative conflicts in the EU. They allegedly provide a basis for the common 'identity' or 'equivalence' of the overlapping legal orders in Europe and enable those legal orders to 'communicate' on that basis.[91] Evidence of this may also be found in European judicial decisions that refer to the equivalence of human rights guarantees stemming from the different legal orders applying in an actual case.[92] The argument seems to be that, if the legal orders from which the conflicting legal norms stem entail equivalent human rights norms, the prima facie normative conflicts may no longer need to be regarded as conflicts.

Renewed references to human rights as the solution or part of the solution to legal pluralism in Europe do not come without difficulties, however. First,the multilevel and multisourced guarantees of human rights have given rise to what I have referred to before as human rights plurality. And that plurality is in the way of a settlement of normative conflicts themselves generated by a plurality of legal norms. To start with, when different legal orders overlap, usually their respective human rights guarantees also overlap. The EU legal order is a case in point with ECHR rights, EU fundamental rights and domestic fundamental rights overlapping. Even when overlapping legal orders do not contain their own human rights legal regime because some of them are specialised, human rights are usually interpreted differently from one political context and from one judicial body to the next. The ECHR is an example: its

[91] See e.g. the chapters by Maduro, by Champeil-Desplats and by Azoulai, in Dubout and Touzé, note 5 above.

[92] See e.g. Case C–127/07 *Arcelor Atlantique* [2008] ECR I–9895; Case C–213/07 *Michaniki AE* [2008] ECR I–9999. See also, for the latest example of the corresponding practice of domestic courts, e.g. the German Federal Constitutional Court case, *Lissabonvertrag*, 2/08 BVerfGE 5/08, para. 340. See also Kumm, note 4 above; Maduro, 'Three claims', note 2 above. Authors (e.g. Azoulai, note 5 above) usually also include the ECtHR's equivalence presumption in *Bosphorus* (*Bosphorus* v. *Ireland* (App. No. 45036/98) ECHR 2005–VI; confirmed in *Michaud* v. *France* (App. No. 12323/11) ECHR 2012–VI). As I will argue, however, the equivalence test used in *Bosphorus* is of another kind and ought not to be conflated with the *Arcelor* and *Lissabonvertrag* tests.

interpretation varies depending on the context of application and the jurisdiction. Finally, within the same legal order, human rights often have many sources without clear hierarchies between those sources. This is the case in the EU where EU fundamental rights find their sources in general principles of EU law, in EU primary law and in EU secondary law. It is still unclear, however, which of these should take priority in cases of conflict (see e.g. Article 6(3) TEU; Article 53 Charter).

Second, even when it is clear which human rights apply within each legal order and one finds the same human rights within different overlapping legal orders, it would be wrong to assume that they are equivalent norms that can be compared and hence be deemed equivalent. Human rights are not like other abstract legal norms, and their legal guarantees at different legal levels do not have the same function.[93]

On one hand, human rights, when they are legally recognised, are not legal norms like any other. To start with, they are non-functional norms in that they cannot be said to fulfil the same function in every legal order. Their function differs from one domestic legal order to another. They are indeed an essential part of the mutual recognition of political equality among members of the polity, but because polities differ, the exact function of human rights varies accordingly.[94] In this respect, human rights cannot be described as multi-source equivalent norms (MSENs)[95] the way the principles of proportionality or non-discrimination could.

Furthermore, legal human rights cannot even be regarded as legal norms *stricto sensu*, at least in the abstract. A human right exists *qua* moral right when an interest is a sufficient ground or reason to hold someone else (the duty-bearer) under a (categorical and exclusionary) duty to respect that interest *vis-à-vis* the right holder.[96] For a right to be recognised, a sufficient interest must be established and weighed against other interests and other considerations with which it might conflict in a particular social context.[97] Rights, in this conception, are intermediaries

[93] On the specificities of legal human rights, see S. Besson, 'Human rights: ethical, political,... or legal? first steps in a legal theory of human rights' in D. E. Childress III (ed.), *The Role of Ethics in International Law* (Cambridge: Cambridge University Press, 2011), pp 211–45.

[94] *Ibid.*

[95] Y. Shany and T. Broude, 'The international law and policy of multi-sourced equivalent norms' in Shany and Broude (eds), *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2010), pp 1–18.

[96] J. Raz, 'On the nature of rights', 93 *Mind* (1984), 194–214 at 195.

[97] *Ibid.*, at 200, 209.

between interests and duties.[98] It follows, first of all, that a right may be recognised and protected before specifying which duties correspond to it.[99] Once a duty is specified, it will correlate to the (specific) right, but the right might already exist in the abstract without its specific duties being identified. The relationship between rights and particular duties is justificatory therefore, and not logical.[100] As a result, determining who bears the duty in relation to a right and the exact content of that duty are not conditions for the existence of a moral right.[101] A right, secondly, is a sufficient ground for holding other individuals as owing all the duties necessary to protect the interest, regardless of the details of those duties.[102] It follows that a right might provide for the imposition of many duties and not just one. Rights actually have a dynamic nature and, as such, successive specific duties can be grounded on a given right depending on the circumstances.[103] In short, it is only in local circumstances that the allocation and specification of duties may take place.

What this means is that legal human rights only give rise to duties in a specific context. It is only then that one may say there is a human rights norm at work. As a result, they cannot be compared abstractly and cannot be deemed equivalent before they apply to a specific case. For instance, even if a human right is protected both *qua* EU fundamental right and *qua* domestic fundamental right, it will only bear duties in a domestic context once applied to a specific case and there will only be one normative requirement as a result. This actually explains why it is difficult to know in practice when an ECHR right is better protected by EU law than by the ECHR or when an ECHR right 'corresponds' to a domestic or an EU fundamental right along the lines of Article 53 ECHR or Articles 52(3) and 53 Charter.[104]

On the other hand, another difficulty with the idea of human rights equivalence is that human rights' legal guarantees do not have the same function at different legal levels, as I argued earlier. International and

[98] *Ibid.*, at 208.

[99] See N. MacCormick, 'Rights in legislation' in P. M. S. Hacker and J. Raz (eds), *Law, Morality and Society: Essays in Honour of H. L. A. Hart* (Oxford: Oxford University Press, 1977), p. 201.

[100] See *ibid.*, pp 199–202; Raz, note 96 above at 196, 200.

[101] See also 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: Oxford University Press, 2007), pp 75–101.

[102] See J. Waldron, 'Introduction' in Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984), pp 10–11.

[103] See Raz, note 96 above at 197–9.

[104] See van de Heyning, note 76 above.

national human rights guarantees cannot be deemed equivalent, as a result. The same may be said about regional human rights guarantees such as European human rights. It would be wrong therefore to compare EU fundamental rights, ECHR rights and domestic fundamental rights even when they all apply to the same specific case.

This difference in function between international or European and domestic human rights by reference to their institutional and political role reveals how misguided it would be to assimilate European human rights too readily to domestic fundamental rights.[105] ECHR rights guarantee the minimum requirements to be respected by a European democratic society. They are guaranteed internationally, outside any democratic polity and have to be transposed into European democratic legal orders. By contrast, EU fundamental rights are the rights of a democratic polity albeit of a post-national and complex nature. This explains their hybrid nature: they play an external, minimal role of the kind the ECHR plays in domestic legal orders, but they also have a municipal dimension that pertains to the EU democratic polity. Their multiple sources and bottom-up nature reflect that hybrid nature.[106] This difference in nature among European human rights explains in turn why the relationship between the interpretations of ECHR rights and domestic rights cannot be the same as that between interpretations of EU fundamental rights and domestic rights, nor, as a result, between interpretations of ECHR rights and EU fundamental rights, the latter being doubly subsidiary to the former.[107]

In view of those arguments, it would be wrong to assume that European human rights may be equivalent across the domestic, the EU and the Council of Europe legal orders, not only in an abstract way but also in a specific case. And even if they were, it remains unclear why this would be of any relevance to the relationship between norms stemming from different legal orders.

In this latter respect, there are two categories that are usually conflated in discussions of the equivalence of European human rights.[108] In the first instance, the normative conflict may be a conflict between human

[105] In this sense, I differ from Letsas, *A Theory of Interpretation*, note 86 above. See also Besson, '*Erga omnes* effect', note 53 above.
[106] See Besson, 'Decoupling and Recoupling', note 14 above.
[107] See e.g. Besson, 'Supranational judicial review', note 33 above. For confirmation of the interpretation of Art. 53 of the EU Fundamental Rights Charter (that it should not be interpreted along the lines of the saving clause in Art. 53 ECHR), see Case C–399/11 *Melloni*, nyr, para. 60; and Case C–617/10 *Åkerberg Fransson*, nyr, para. 29.
[108] See e.g. Letsas, 'Harmonic law', note 4 above.

rights guarantees themselves. It may be a conflict between two or many human rights stemming from different legal orders or, most commonly, one between incompatible interpretations of the same human rights or restrictions to the same human rights. This is the kind of case in which the relationship between EU fundamental rights and ECHR rights has been raised and for which the equivalence presumption in *Bosphorus* was first elaborated.[109] These are the cases I discussed in the previous section. In the second category, which is the most common, the normative conflict is not about human rights, but the latter are invoked as part of its resolution. This category corresponds to the vast majority of cases in which the relationship between EU law and domestic fundamental rights has been raised, and for which the equivalence test developed by the German Federal Constitutional Court in the wake of *Solange II*,[110] and by the ECJ/CJEU in its *Michaniki* or *Arcelor* decisions were put forward.[111]

Clearly, the idea of human rights equivalence is different in those two categories of cases. In the former, it is a judicial test aimed at allocating jurisdiction over certain parts of EU law. In the latter case, while it is also a judicial test, it is not directly aimed at allocating jurisdiction and does not pertain solely to monitoring human rights, but at testing the legitimate authority of EU norms and their primacy over domestic law, including constitutional rights. *Qua* test of legitimacy, human rights equivalence is not about 'communication' between legal orders,[112] therefore. It is about authorising the immediate validity and the primacy of EU law within the domestic legal order including its primacy over domestic human rights. This explains why it would be wrong to conflate too quickly the *Solange II* equivalence test with the presumption of equivalence used by the ECtHR in *Bosphorus*. The former is about testing the legitimacy of legal norms that claim immediate validity and primacy within domestic law in an integrated legal order, that of the EU, while the latter is about allocating between two courts jurisdictional power over human rights violations that only partially belong within the jurisdiction of one of them, hence the problem.

In sum, a more careful and informed approach to the function of various human rights guarantees in Europe shows how the reference to human rights as a solution to legal pluralism merely obscures what is

[109] *Bosphorus*, note 92 above.
[110] BVerfGE, *Solange II* 73, 339 (1986).
[111] *Arcelor*, note 92 above; *Michaniki*, note 92 above.
[112] On this notion, see Azoulai, note 5 above.

really at stake in circumstances of legal pluralism. This has to do with a misunderstanding of both the function of different European human rights norms and their role in European adjudication.

If human rights play a role in the articulation of legal orders in the EU, it is as part of the basis for a legal order's claim to legitimacy in a given polity. Since the European polity is a complex one that entails many *demoi*, the idea of human rights pluralism reflects its democratic complexity. While human rights are rightly a part of that legitimacy test, they are not the only one. This is why the *Solange II* test should be regarded as a much richer one than authors are usually ready to concede.[113] As confirmed by recent revivals of that test in the caselaw of the Czech Constitutional Court, democracy is as important a component of political legitimacy as human rights since the two go hand in hand.[114]

3. European legal pluralism *redux*

Following the above considerations about the relationship between human rights and democracy, it is interesting to return to the question of European legal pluralism in order to assess it from an angle more sensitive to human rights *cum* democracy.

Legal pluralism in both meanings discussed in the first section, i.e. *qua* plurivalidity and *qua* heterarchy, should not too readily be ascribed across the board, to all relationships between legal orders and to all legal orders. Issues of legal validity and of rank between legal orders are not contingent matters of fact, and ought to reflect key positions on the legitimacy of legal orders and norms. It is only by distinguishing more carefully between the conditions for legitimacy of international, European and national law, and between questions of validity and rank, that we can propose a convincing model of the relationship between legal orders in the EU.

While pluralism may be the right model to capture the integrated nature of the EU legal order,[115] I would like to argue that it is not to the right model for the relationship between international law and European law or

[113] *Solange II*, note 110 above.

[114] Czech Constitutional Court, *Sugar Quota Regulation II*, judgment of 8 March 2006, Pl US 50/04 or *European Arrest Warrant*, judgment of 3 May 2006, Pl US 66/04. See most recently, Czech Constitutional Court, *Landtova*, judgment of 14 February 2012, Pl US 5/12. For a confirmation, see the reasoning of the German Federal Constitutional Court in *Lissabonsvertrag*, note 92 above.

[115] See Besson, 'How international', note 1 above, pp 12–15.

between international law and domestic law. Legal validity is shorthand for a claim to legitimacy and ought to entail the possibility for that claim to obtain.[116] The autonomy of a legal order is not a merely legal phenomenon, but the reflection of a political reality: the polity's self-determination. As a result, not all legal orders can be deemed as equivalent and likewise their relationships cannot be organised in a comparable fashion, especially when their subjects are individuals and states, or just individuals.

The very refined *demoi*-cratic regime that was developed within the European legal order during the past thirty years can account for the legitimacy of EU law.[117] It justifies a pluralist relationship between domestic and EU law within the European legal order.[118] Democratic inclusion might be best guaranteed, depending on the cases, at the European level and this may grant certain EU law norms a higher democratic legitimacy.[119] The same may be said about human rights within the EU; EU fundamental rights developed in two stages, first *qua* international and then *qua* transnational human rights, to enable the development of EU democratic credentials and hence to justify EU law's immediate validity within domestic legal orders and its claim to primacy over domestic law. The specificity of their bottom-up sources and the lack of EU human rights competence are characteristic of a form of human rights protection that amounts to more than minimal and external international human rights guarantees while, at the same time, avoids the substitution of an EU set of human rights for the domestic ones. There is a form of EU human rights pluralism, in other words, that backs up the legal pluralism that prevails in the EU legal order *qua* integrated legal order.

[116] See Besson, 'Democratic authority', note 68 above. See also Somek, note 30 above.

[117] See S. Besson, 'Deliberative *demoi*-cracy in the European Union: towards the deterritorialization of democracy' in S. Besson and J. L. Martí (eds), *Deliberative Democracy and its Discontents* (Aldershot: Ashgate, 2006), pp 181–214.

[118] See Besson, 'How international', note 1 above; Besson, 'European legal pluralism', note 2 above.

[119] See for an illustration of the link between fundamental rights and democracy, on one hand, and of the relations between different levels of democratic government, the rich test one may find in the reasoning of the Czech Constitutional Court in the 2006 *Sugar Quota Regulation II* or in the 2006 *European Arrest Warrant* (both note 114 above). It is particularly striking when contrasted with the *Solange I* or *II* tests used by the German Federal Constitutional Court: the latter focus only on fundamental rights and conceive of the national polity as the only source of democratic legitimacy.

Of course, the emergence of a third stage in the EU human rights regime *qua* municipal human rights regime after Lisbon currently questions this status quo.[120] This is why one may argue, as I have in the previous section, that the relationship between domestic fundamental rights and EU fundamental rights is now organised in an increasingly different fashion than that between domestic fundamental rights and ECHR rights, for instance. Unsurprisingly, this development has occurred alongside the development of the principle of political equality in EU law (Article 9 TEU); as always, democracy and human rights develop hand in hand and, with the consolidation of the EU Fundamental Rights Charter, the special kind of *demoi*-cracy we have had in Europe in the past is clearly turning into a more municipal albeit federalist kind of democracy.

This is not (yet) the case at the international level, however. Not only is international human rights protection deficient, but it does not serve the same function as fundamental rights protection within the EU. More importantly, international lawmaking lacks the democratic dimension necessary to back a claim to immediate validity and to constitutional rank within the European legal order.[121] Paying due attention to that democratic requirement appears even more essential in an integrated legal order where validity in EU law also implies immediate validity within Member States' national legal orders and democratic polities.

So, while European legal pluralism could be defended as the model of the relationship between domestic and European law that can best be justified on grounds of democratic legitimacy, that very legitimacy also explains why it cannot constitute the most legitimate model for the relationship between European (and domestic) law and international law. One cannot rule out, of course, the possibility that the international legal order, or the UN regime at least, might at some time develop into an internal legal order with transnational dimensions on the model of the European legal order. This would, however, require accepting even deeper changes within national democracies than what has taken place in the EU since 1957.[122] This is why the ECJ was right not to follow

[120] See Besson, 'Decoupling and recoupling', note 14 above. See also the CJEU's decision in *Melloni* (note 107 above).

[121] See my critique of the Advocate General's opinion in *Kadi* (note 15 above) in this respect: Besson, 'How international', note 1 above, pp 12–17.

[122] On those challenges, see S. Besson, '*Ubi ius, ibi civitas:* a republican account of the international community' in S. Besson and J. L. Martí (eds), *Legal Republicanism: National and International Perspectives* (Oxford: Oxford University Press, 2009), pp 205–37; S. Besson, 'Institutionalizing global *demoi*-cracy' in L. H. Meyer (ed.), *Justice, Legitimacy and Public International Law* (Cambridge: Cambridge University Press, 2009), pp 58–91.

Advocate General Maduro in the *Kadi* case;[123] there is more at stake in the relationship between international law and EU law in terms of political legitimacy than in the relationship between EU law and domestic law. And neither can the *Solange II* test be applied to that relationship simply by analogy with what prevails in the relationship between EU law and domestic law.[124]

Interestingly, international law includes the ECHR regime. The ECHR remains indeed a regional albeit international law regime and distinct from the integrated legal order of the EU and its Member States. As a result, and as I argued earlier, the relationship between EU law and ECHR rights cannot be described only along the strict lines of the legal pluralist model. Nor can that between ECHR rights and EU Member States' legal orders. Of course, European human rights, like international human rights, are legitimised through reception and contextualisation as domestic or municipal human rights within the domestic or municipal legal order. And this turns their validity and rank into a constitutional matter, as discussed previously. All this, and what was presented in previous sections about the respective nature and role of different human rights guarantees depending on the level of guarantee, explains why the relationship between human rights norms is a special case, compared to that between other legal norms stemming from different legal orders and hence from legal pluralism as it has been understood so far.

One should emphasise that the relationship between the ECHR and EU fundamental rights will now go through a process of reconfiguration in the context of the EU's accession to the ECHR. While one might be tempted to see accession as marking the continuation of the *Bosphorus* test, the argument made in this chapter has hopefully demonstrated that it will toll that test's knell.[125] The negotiations aiming at the EU's accession to the ECHR have awakened the sore question of the Union's human rights

[123] AG Maduro, *Kadi*, note 15 above; Case T–315/01, *Kadi* v. *Council and Commission* [2005] ECR–II 3649. See also Case T–85/09 *Kadi* v. *Commission* [2010] ECR II–5177. The dualism between international law and EU law has been confirmed by Case C–366/10 *Air Transport Association of America*, nyr.

[124] See my critique of the Advocate General's opinion in *Kadi* (note 15 above, para. 22ff.): Besson, 'How international', note 1 above, pp 12–17.

[125] See also O. de Schutter, 'L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: Feuille de route de la négociation', 21 *Revue trimestrielle des droits de l'Homme* 83 (2010), 535–72 at 544, 565. See also the ECtHR's decision in *Michaud*

competence precisely because it implies a shift from the current, hybrid, human rights regime that applies in the EU towards a more municipal model of human rights.[126] And this also means entering a new stage in the political and democratic development of the EU. In this context, the relationship between the EU legal order and its Member States' legal orders will change, but so will that between the CJEU and the ECtHR pertaining to human rights as a result. The CJEU's human rights review of domestic law will have to become bolder and more coherent, while the ECtHR's human rights review of EU law will have to come closer to the subsidiary review it ought to be applying in its relationship to domestic courts and hence less subsidiary than it has been since the *Bosphorus* presumption was adopted.

4. Conclusion

Domestic legal orders match domestic political communities. This realisation affects their autonomy and hence their relationship to other legal orders, whether domestic and hence democratic or regional and international.

Trying to understand and handle European legal pluralism by abstracting from normative political theory and without taking into account the political differences between those orders is doomed to fail. Recent attempts to do this by reference to values instead of democracy, and through human rights equivalence and judicial comity only, are evidence of that failure. While human rights adjudication is a privileged point of contact between norms stemming from different European legal orders, it is not the only one. And it can only perform its role if one takes into account the institutional and political context of the norms and institutions European judges are monitoring.

With respect to human rights more specifically, I hope to have shown how complex those legal norms are and how little we are in fact saying when we refer to 'human rights pluralism'. European human rights guarantees are both plural and complementary at the same time: their plurality gives rise to a richer form of pluralism than that between other

(note 92 above). More generally on the accession negotiations, see http://hub.coe.int/en/what-we-do/human-rights/eu-accession-to-the-convention/.

[126] See Besson, 'Decoupling and recoupling', note 14 above; S. Besson, 'The human rights competence in the EU – the state of the question after Lisbon' in G. Kofler, M. P. Maduro and P. Pistone (eds), *Human Rights and Taxation in Europe and the World*, The 5th GREIT Conference (Amsterdam: IBFD, 2011), pp 37–63.

legal norms, i.e. a kind of pluralism that is characterised by mutuality, both in validity and legitimation, and not by equivalence and competition. The reasons have to do with the political function and the democratically legitimating role of human rights. It is those reasons we need to focus on now, since they are channeling the future of democracy and human rights protection in the EU, but we also might one day need to focus on them in our international relations.