Embracing the Tension between National and International Human Rights Law: The Case for Parity

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"Sovereignty [is] 'freedom that is organised by international law and committed to it.'"[1]

"[T]he legal consciousness of the civilized world demands the recognition for the individual of rights that are immune from any interference on the part of the State,"[2]

Abstract

Individual rights are secured by at least two legal sources: constitutional law and international law. The co-existence of constitutional and international law norms is inevitably a source of conflict: When there is a conflict between a constitutional provision and an international law provision, which (if any) provision should have the upper hand?

Theorists thus far have argued for (and assumed the necessity of) a clear hierarchy between constitutional and international law. This Article argues that the conviction that one system of norms is superior to the other is false. Instead we embrace competition between constitutional and international norms, what we call the "discordant parity hypothesis." It is the persistent tension and conflict

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[1] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08 (¶ 223) (Ger.) (the Lisbon Treaty judgment) (quoting Ferdinand von Martitz, a German legal scholar writing in 1888, *see infra*, note 9).

[2] *Institut de droit international, Déclaration des droits internationaux de l'homme* [Declaration on the International Rights of Man] (Rapporteur: M. André Mandelstam) (Session de New York – 1929), *available at* http://www.idi-iil.org/idiF/resolutionsF/1929_nyork_03_fr.pdf.

between the two systems of norms that is necessary for recognizing and ensuring individual freedom.

To establish the discordant parity hypothesis, we explore the best possible arguments for both the internationalists' and for constitutionalists' positions. We suggest that the argument supporting the overriding power of international law norms is the recognition of the state's duty to protect rights, rather than merely a discretionary gesture on its part. The overriding power of constitutional norms stems from its promise to individuals of being the masters of their destiny. We believe that both claims are equally convincing. Instead of trying to establish hierarchy between the claims, we embrace their equal standing and the ensuing conflict between them. We believe that constant tensions and conflicts between international norms and state norms are ideally suited to ensure individual liberty.

I. INTRODUCTION

Individual rights are secured by at least two different legal sources: constitutional law and international law. The co-existence of constitutional and international law norms is inevitably a source of conflict: When there is a conflict between the scope of a right under a constitutional provision and an international law provision, which (if any) provision should have the upper hand? Who is (or should be) the final arbiter as to what rights we have?

This Article argues that the conviction that one system of norms is superior to the other is false. As a matter of fact we argue in favor of "discordant parity hypothesis" that embraces competition between constitutional and international norms. It is the persistent tension and conflict between the two systems of norms, each of which claims superiority, that is necessary for recognizing and ensuring individual freedom.

Debates about the relations between constitutional and international law hark back to the emergence of the concept of the sovereign state. The rejection of a global order based on religion or nature and the rise of popular sovereignty necessarily gave rise to two conflicting theses. One gave primacy to the national constitution, which draws its authority from the people who is the only legitimate source of power, being the *pouvoir constituant.*[3] This implied two consequences for the relationship between constitutional law and international law: International law is

[3] EMMANUEL JOSEPH SIEYES, QU'EST-CE LE TIERS ETAT? (Paris, 1789) ("The nation exists prior to everything; it is the origin of everything. Its will is always legal. It is the law itself. Prior to the nation and above the nation there is only natural law…. Not only is a nation not subject to a constitution, it cannot be and should not be." See EMMANUEL J. SIEYÈS, POLITICAL WRITINGS 93, 136-37 (Michael Sonenscher ed. & trans., 2003)).

derived from the constitution, founded on state consent,[4] and it stops at the states' borders, incapable of intervening in states' internal affairs.[5] These consequences were famously asserted by Chief Justice Marshall, in Schooner Exchange vs. McFaddon (1812):

"The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty."[6]

But there is also an alternative reading of the relationship between the constitutional and the international that put international law as the fountainhead of the law. August Wilhelm Heffter wrote about a European society of states that was bound by a shared legal order,[7] Georg Jellinek argued that as a member in the "community of states," all states were necessarily bound by "objective international law,"[8] and Ferdinand von Martitz proposed that sovereignty was "freedom that is organized by international law and committed to it."[9] Hans Kelsen was the first to offer a systemic elaboration of the relationship reaching through his pure theory of law the conclusion that constitutional law is necessarily derived from the international legal order.[10] Hersch Lauterpacht grounded the primacy of international law on its reflection of "the universal law of humanity in which the individual human being, as the ultimate unit of all law, rises sovereign over the limited province of the State."[11]

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[4] S.S. Wimbledon (U.K., Fr., It., & Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1 at 25 (Aug. 17). ("The Court declines to see in the conclusion of any Treaty by which a state undertakes to perform or to refrain from performing a particular act an abandonment of its sovereignty … [T]he right of entering into international engagements is an attribute of state sovereignty"); S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10 at I8 (Sep. 7) (International law "emanate[s] from the [states'] own free will").

[5] Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, *in*THE TWILIGHT OF CONSTITUTIONALISM? 3, 13 (Petra Dobner and Martin Loughlin eds.,2010) ("The two bodies of law - constitutional law as internal law and international law as external law - could thus exist independently of one another.").

[6] 11 U.S. 7 Cranch 116 136 (1812).

[7] As translated by HENRY WHEATON, ELEMENTS OF INTERNATIONAL Law Pt. I § 11 (Richard Henry Dana Ed., 8thed, 1866) ("A Nation associating itself with the general society of nations, thereby recognizes a law common to all nations by which its international relations are to be regulated.").

[8] Georg Jellinek, Die Lehre von den Staatenverbindungen 92-96 (1882), as lucidly explained in Jochen von Bernstorf, *Georg Jellinek and the Origins of Liberal Constitutionalism in International Law,* 4 GOETTINGEN JOURNAL OF INTERNATIONAL LAW 659, 672-3 (2012).

[9] 1 FERDINAND VON MARTITZ, INTERNATIONALE RECHTSHILFE IN STRAFSACHEN 416 (1888).

[10] HANS KELSEN, REINE RECHTSLEHRE (1st ed. 1934), *translated in* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (Bonnie Litschewski Paulson & Stanley L. Paulson, 1992). In his second edition he revised his argument, suggesting that hierarchy between the two systems must exist, but his pure theory cannot resolve which system is superior to the other: HANS KELSEN, PURE THEORY OF LAW (Max Knight, trans., 1960).

[11] Hersch Lauterpacht, 'The Grotian Tradition in International Law', 23 British Yearbook of International Law 1, 47 (1946). *See* Roman Kwiecień, *Sir Hersch Lauterpacht's Idea of State Sovereignty – Is It Still Alive?* 13 INTERNATIONAL COMMUNITY LAW REVIEW 23 (2011).

This way or the other, the preoccupation of theorists has been to argue for (and often to assume the necessity of) a clear hierarchy between constitutional and international law. This resulted in endless debates whether "dualism" (the idea that state law was the source of international law) could or should concede to a "monist" vision of the legal system (i.e., that international law was the source of state law).[12] The question was not *whether* one set of norms overrides the other but merely *which* set of norms overrides the other: either constitutional law norms override international law norms or vice versa.

In this Article we challenge the quest for a hierarchy between constitutional law and international law. We believe that the quest for a hierarchy is inherently misguided. Instead, we argue for "the discordant parity" hypothesis, namely the equal status of international law and constitutional law.

To establish the discordant parity hypothesis, the Article provides new arguments both for the internationalists' sentiments under which international norms ought to override constitutional norms (the "internationalist" view)[13] and for constitutionalists' sentiments under which constitutional norms ought to override international norms (the "constitutionalist" view). We argue that both arguments are sound and that the equal status of international and constitutional law rests upon the normative force of these arguments. Ultimately we suggest that the parity hypothesis is ideally suited to ensure individual liberty. The parity between international and constitutional norms does not rest on harmonious interdependence. Parity implies friction; but friction is a positive, indeed, a necessary element for ensuring individual liberty. Hence the '*discordant* parity': international norms and constitutional norms compete with each other and seek to dominate the normative sphere. It is this friction that ensures individual liberty.

Our justification for the discordant parity model does not rest on empirical conjectures concerning the effectiveness of such a system. Instead our argument rests on principled concerns – concerns that are independent of any empirical conjectures. The justifications for both internationalism and constitutionalism defended in this Article give rise to what we label *robust internationalism* and *robust constitutionalism*. We label it 'robust' because under the proposed view, the value of international law norms and the value of constitutional norms do not hinge (merely) on their contingent contribution to the substantive merit of the resulting political or legal decisions. In contrast to the prevalent view,

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[12] Hans Kelsen, Introduction, *supra* note 10, at 107–55; GEORGES SCELLE, PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTEMATIQUE (Dalloz 2008)(1932); Armin von Bogdandy, *Common principles for a plurality of orders: A study on public authority in the European legal area*, 12 INT'L J. CONST. L. 980 (2014).

[13] For a clear statement of this view, *see* Case C-106/77, Amministrazione delle Finanzedello Stato. v. Simmenthal, 1978 E.C.R. 629; *see also* GEORGES SCELLE, PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTEMATIQUE (Dalloz 2008) (1932) (on *dédoublement fonctionelle* [dual functionality]); Hersch Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 10 BRIT. Y. B. INT'L L. 65, 93 (1929); Institut de droit international, The Activities of National Judges and the International Relations of their State (Rapporteur: Benedetto Conforti), (Session of Milan - 1993) *available at* www.idi-iil.org/idiE/resolutionsE/1993_mil_01_en.PDF; *See also* Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L. J. 329, 349 (2002).

international law norms as well as constitutional norms are not mere contingent instruments to guarantee good, just or coherent decisions; they are valuable for other reasons and, consequently, their desirability does not depend only or primarily on the degree to which they contribute to the substantive merit of the resulting legislation or decisions. More specifically international norms and constitutional norms are valuable because they transform and restructure the relations between the state, its citizens and the global community in various ways. The conflict between the two positions is inevitable as it is a byproduct of justified claims of both systems.

To justify the superior normative status of international norms (*robust internationalism*) we argue that the overriding power of international norms is necessary to publicly acknowledge that the protection of rights by the state is obligatory. The protection of rights is a *duty* of the state – including its *pouvoir constituant* – rather than contingent on its good will or discretion. The overriding power of international law norms constitutes public recognition that the protection of rights is the state's (and the people's) *duty* rather than merely a discretionary gesture on its part.

To justify the superior normative status of constitutional norms (*robust constitutionalism)* we argue that the overriding power of state constitutions is necessary to guarantee that citizens are not alienated from their rights. The value of rights hinges on the active participation of the citizen in the definition and the exercise of her rights. The effective exercise of rights hinges on the control that individuals have over the content of the rights without which rights lose their value.[14] To the extent that individuals do not perceive the rights as their own creation, their ability to pursue these rights and exercise them is undermined. We support therefore the discordant parity paradigm under which the two systems of norms claims to be superior to the other.

To help conceptualize the discordant parity paradigm let us provide an analogy. The legal system typically enforces obligations on parents to take care of their children and promote their well-being according to authoritative determinations and it treats these determinations as overriding the determinations of the parents. The legal obligation is important not only or primarily for its contribution to the welfare of children. Instead it is important also because it underscores the fact that promoting the well-being of children is not discretionary on the will of parents; it is a duty publicly recognized by the law.[15] Yet, at the same time, it is also understood that parents must promote their children's well-being because they care about it rather than because they merely comply with a legal obligation. Hence the law must also respect the rights of parents to actively participate in making authoritative determinations concerning the well-being of the child. Inevitably, there may be tensions between the state's determinations and the parents' determinations of what well-being consists of and the best means to bring

[14] ALON HAREL, WHY LAW MATTERS 39 (2014).

[15] Michael S. Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 638 (1976).

it about. Authoritative judgments of the state claim priority over the judgments of the parent and, at the same time, some parents defy the state's judgments on the grounds that their judgment is superior to that of the state and therefore it ought to prevail. Such defiance is sometimes tolerated by the state given the understanding that parents have the right to actively participate in making determinations concerning the well-being of their children.[16] There is therefore a persistent tension between the conviction that well-being of children must be defined by the state in ways that are independent of the parent's discretion and the conviction that effective parenthood presupposes power to make such determinations and, at times, even subordinate the state's determinations to those of the parent.[17] This tension is not only tolerated, but should be protected, to emphasize the validity of both perspectives and the accountability of each perspective to the other. The relations between international law norms and constitutional norms are similar; international and constitutional norms co-exist and their co-existence is characterized – and must be characterized – by persistent conflicts and tensions.

Part II briefly examines the traditional justifications for entrenching international and constitutional norms and for acknowledging their overriding normative force. We explore both the instrumental justifications and the consent-based arguments. While we do not reject these arguments we identify some of their shortcomings. Part III defends robust internationalism and Part IV defends robust constitutionalism. Part V defends the discordant parity model and draws the implications of this view. Part VI concludes.

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[16] Education can provide a good example. Parents may wish to educate the child in a way that the state regards as detrimental to the well-being of the child. On the one hand parents must have some input on the child's education, on the other hand the state ought to impose some limits. We don't know ex ante what the boundaries of state intervention are. At times we respect the parent's judgments even when we judge their judgments to be wrong. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972). The Court in Yoder said:

> "Indeed it seems clear that if the State is empowered, as parens patriae, to "save" a child from himself or his Amish parents….Even more markedly than in Prince, therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *See id.* at 233.

[17] A clear articulation of this ambivalence concerning the law can be found in Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 Yale L. J. 293, 301 (1988). Bartlett argues:

> "The role of law in forming the social context within which parents might internalize high ideals for responsibility and voluntarily proceed to act upon them is a tricky one. Somehow the law must contribute to the creation of high expectations for parents, while leaving sufficient leeway so that parents are free to become responsible in the true sense. A hands-off approach by the law to questions of parenthood would abdicate any societal responsibility for norms of parenthood; yet a tight, comprehensive set of controls would remove from parents the discretion to act, upon which the capacity of moral decision making actually depends."

II. THE INSTRUMENTALIST AND THE CONSENT-BASED JUSTIFICATIONS OF INTERNATIONALISM AND STATE CONSTITUTIONALISM

This section investigates the traditional justifications used by internationalists and by state constitutionalists. It establishes that both internationalists and state constitutionalists use similar arguments to justify the superiority of their favorite set of norms. Both internationalists and constitutionalists use two primary arguments: 1) an instrumental argument under which one system of norms overrides the other because it is more likely to protect rights: it is more effective, stable or impartial. 2) A consent-based argument under which the normative status of the norms rests on (individual or state) consent. We also point out some of the weaknesses of these traditional explanations. These weaknesses prompt us to explore alternative justifications which we label "robust" justifications.

A. The Instrumentalist Justifications

(1) Instrumentalist Support for the Primacy of International Norms over Constitutional Norms

Many theorists advocating and opposing internationalism believe that international rights are grounded in instrumentalist considerations. Under this view, rights internationalism is designed to induce the states to protect human rights, impose sanctions on states which violate rights and rectify such failures. The underlying assumption of instrumentalism is that individuals have rights and that we ought to design institutions in a way that best identifies what the scope of these rights is and protects them effectively. International norms are justified only to the extent that they facilitate, promote or reinforce the effective protection of rights. Further the normative force of international and constitutional norms and in particular which set of norms overrides in cases of conflict ought to be determined on the basis of instrumental considerations.

This view is shared by both advocates and opponents of internationalism of rights. Louis Henkin believes that international human rights were promulgated

> "[t]o induce states to arrange their constitutional-legal systems to achieve that result, and to rectify any failures to do so…. International human rights, then, were born because national protections for accepted human rights were deemed deficient and can be seen as merely additional international protections for rights under national law."[18]

[18] Louis Henkin, *International Human Rights as "Rights"*, 1 CARDOZO L. REV. 425, 427–28 (1979); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1383 (2005) ("The human rights regime was principally constructed to identify and classify which rights are globally legitimate, to provide a forum for the exchange of information regarding violations, and to convince governments and

Henkin went further and argued that in a world in which states respected human rights adequately there would be no need for international law and institutions to help to protect human rights.[19]

Several authors illustrate how international norms can at times serve the effective protection of rights. By binding their state to international norms progressive forces succeeded in constraining their domestic opponents and prevent subsequent backlash against human rights.[20] Beth Simmons demonstrates through a combination of statistical analyses and case studies that the ratification of treaties leads to better rights practices on average.[21] Harold Koh adds his voice to those who believe that international norms are effective. He identifies the development of a "transnational legal process" in which "public and private actors-nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals-interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."[22] Ryan Goodman and Derek Jinks believe that international norms influence domestic systems through a process of acculturation by which they refer to the adoption of sets of beliefs and patterns of behavior that are conducive to the protection of rights.[23] Very frequently instrumentalists point out that internationalism may correct the democratic failures that adversely affect discrete and insular minorities or improve gender

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violators that laws protecting human rights are appropriate constraints on the nation-state that should be respected.").

[19] Henkin, *supra* note 18, at 428.

[20] Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 228 (2000). Moravcsik argues:

> "From this perspective**,** human rights norms are expressions of the self-interest of democratic governments in ''locking in'' democratic rule through the enforcement of human rights. By placing interpretation in the hands of independent authorities managed in part by foreign governments—in other words, by alienating sovereignty to an international body—governments seek to establish *reliable judicial constraints on future nondemocratic governments or on democratically elected governments that may seek (as in interwar Italy and Germany) to subvert democracy from within.*" (Emphasis ours)

Thus, for instance, the Labor government in Britain promoted the European Convention on Human Rights to safeguard domestic human rights also when the Conservative government returns to power; *See* ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2010), Vick, *supra* note 13, at 349-50.

[21] *See* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

[22] Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996).

[23] Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621, 626 (2004). They argue:

> "By acculturation, we mean the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture. This mechanism induces behavioral changes through pressures to assimilate- some imposed by other actors and some imposed by the self. Acculturation encompasses a number of micro processes including mimicry, identification, and status maximization. The touchstone of this mechanism is that identification with a reference group generates varying degrees of cognitive and social pressures- real or imagined-to conform."

equality.[24] International courts and tribunals could provide an opportunity for minorities to voice their claims and benefit from protection.[25]

(2) Instrumentalist Support for the Primacy of Constitutional Rights over International Norms

Instrumentalist views are shared also by opponents of internationalism who rest the case against rights internationalism on its ineffectiveness. The only difference is that the opponents believe that as a matter of fact globalism of rights is not conducive (or at least not always or typically conducive) to the protection of individual rights. The instrumentalist opponents of internationalism share the view that individuals have rights and that the criteria to determine which institutions ought to protect these rights rest on the ability of these institutions to rightly identify what these rights are and to protect them. Yet instrumentalist opponents of internationalism emphasize the greater instrumentalist merit of constitutional protection of individual rights. Once they establish that state constitutional norms are more effective, they conclude that constitutional norms ought to override international law provisions as they are more likely to be effective. This claim is justified in different ways.

First some opponents of internationalism are concerned that international standards are too lenient and, hence, may lower the level of protection that the community would have chosen in the absence of international standards. For instance freedom of speech is protected under the US Constitution significantly more than under international human rights law. International standards may erode the protection granted by constitutional standards.[26] Second many theorists argue that international standards are skewed and fail to reflect local sensitivities. This resistance to global norms emerged under the banner of "cultural relativism" during the 1980s. It is reflected, for example, in Jack Donnelley's work.[27] Donnelley points out that:

> "Where there is a thriving indigenous cultural tradition and community, arguments of cultural relativism based on the principle of the self-determination of peoples offer a strong defense against outside interference- including disruptions that might be caused by the introduction of "universal" human rights."[28]

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[24] Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT'L L. & POL. 843, 848, 850 (1999); (concerning discrete and insular minorities); Neil A. Englehart & Melissa K. Miller, *The CEDAW Effect: International Law's Impact on Women's Rights*, 13 J. HUM. RIGHTS, 22 (2014) (concerning gender equality).

[25] *See* Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1, 26 (2009). The instrumentalist justification of globalism is shared not only by lawyers but also by political theorists and philosophers; *See* Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF.2 (2013).

[26] For a discussion of this claim and an attempt to rebut it, *see* Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 147, 164 (Michael Ignatieff ed., 2005).

[27] Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 415 (1984).

[28] *Id*. at 410.

A more blatant expression of these concerns was made by a former Ethics and Integrity State Minister of Uganda who argued that: foreign countries should stop seeing Uganda as "dumping ground for their practices and values which they are touting to be 'human rights' but in reality are a threat to our nation's viability and integrity."[29]

A closely related concern is that internationalism impinges upon the sovereignty of the polity and is detrimental to values such as self-determination and sovereignty of the people. Many critics also point out the history of abuse of humanitarianism by colonial powers who justified their appetite for controlling other peoples' resources as humanitarian assistance.[30] David Kennedy is among the leading sceptics concerning the effectiveness of human rights globalism and argues for a pragmatist view. Pragmatism for him means weighing the long terms effects of international human rights. An even more sceptical if not hostile to global norms on the grounds that they are ineffective is Eric Posner. Posner believes that: international law is, and must be, weak, and, specifically, cannot fully exploit opportunities for creating global collective goods.[31]

Some scholars believe that contemporary invocation of global humanism may suffer from similar motives and perhaps lead to the same results.[32] In the legal discourse the concern to protect state constitutionalism from global influence is reflected most clearly in the US jurisprudence, as reflected in the debate about citing foreign and international law when interpreting the constitution.[33]

(3) Evaluating Instrumentalism

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[29] Cited in Johanna Kalb, The Judicial Role in New Democracies: A Strategic Account of Comparative Citation, 38 Yale J. Int'l L 423, 465 (2013).

[30] *See e.g.*, MARTTI KOSKENNIEMI, THE GENTLE CIVILISER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2004); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2007).

[31] Eric Posner, *International Law: A Welfare Approach* 73 U. CHICAGO L. REV. 487, 543 (2006). *See* in general, ERIC POSNER, THE PERILS OF GLOBAL LEGALISM (2009), Eric Posner, THE TWILIGHT OF HUMAN RIGHTS LAW (2014).

[32] Jules Lobel, *The Benefits of Legal Restraint*, 94 AM. SOC'Y INT'L L. PROC. 304, 305 (2000); Michael J. Brazyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN.J. INT'L L. 547, 584–86, 592 (1987).

[33] *See, e.g.*, T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006); Jeremy Waldron, *Foreign Law and the Modern IUS Gentium*, 119 HARV. L. REV. 129 (2005); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

The instrumentalist debate between internationalism and constitutionalism seems to suggest that international norms may be detrimental to the effective protection of rights by the constitution and vice versa. We have grave doubts whether internationalism or state constitutionalism can indeed be justified on instrumentalist grounds for two reasons. First, the task of establishing that either approach is conducive (or detrimental) in the long run to the effective protection of rights cannot be settled by using regular tools of social science. The question of whether international treaties are conducive to the protection of rights depends upon numerous contingent factors. The soundness of such claims differs from one generation to another and one place to another while the claims of political theorists often transcend both place and time. To the extent that the political theorist wants to provide an argument that extends beyond a specific place and a specific time, she needs to provide more solid empirical foundations for its conclusions.[34]

Second, even if such empirical evidence can be found the attempt to use it in order to justify either internationalism or constitutionalism suffers (as one of us has argued elsewhere) from "insincerity" or "inauthenticity;" it fails to identify (or capture) the real sentiments underlying the urge to sustain or design global institutions or procedures or state constitutions.[35] There is a sense that instrumental considerations are not the ones that appeal to citizens or politicians and that, as a matter of fact, such considerations are mere rationalizations of other sentiments. Even if states do not improve their behavior as a result of international human rights treaties, the treaties serve an important function in that they convey publicly the condemnation of violations as wrongs and they also serve as proclamations that the state is not the ultimate authority which determines what is right and what is wrong.[36]

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[34] We do not deny of course that there are numerous studies that try to measure the effectiveness of global norms. *See, e.g.*, Simmons, *supra* note 21; Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 1935 (2001); Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 299 (2013); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 182 (2003); There are of course contexts in such an examination is valuable. Yet there is also a growing skepticism about the soundness of these studies. *See* Robert Justin Goldstein, *The Limitations of Using Quantitative Data in Studying Human Rights Abuses*, 8 HUM. RTS. Q. 607, 610, 622, 626 (1986); Michael Stohl et al., *State Violation of Human Rights: Issues and Problems of Measurement*,8 HUM. RTS. Q. 592, 593–94, 599–600 (1986).Yet at the same time there is a large body of literature which aims to measure the effectiveness of international law provisions. *See, e.g.*, George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 397–406 (1996); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008).

[35] One of us has argued that much of political theory is designed to rationalise institutions and procedures in terms that are alien to those who establish these institutions and sustain them. *See* HAREL, *supra* note 14, at 1–9.

[36] There are numerous sources that emphasize the declaratory importance of law in general and of international law in particular. Thus, Dunoff argued that: "*Laws are important not only for what they do-their consequences-but also for what they say or signify*. Consider the ICC treaty. *Is the real debate here over consequences?* Will the ICC deter leaders otherwise inclined to commit human rights atrocities? Or can we better understand this treaty on expressive grounds, as *a collective statement that there is certain behavior the international community will not and cannot tolerate."* (emphasis ours). *See* Jeffrey L. Dunoff, *Some Costs and Benefits of Economic Analysis*

B. Consent-Based Justifications

(1) Consent-Based Support for the Primacy of International Norms over Constitutional Norms

The traditional view in international law is that the overriding force of international norms hinges on state consent. This view rests upon a persistent tension between the conviction that states are the supreme law-creating and law-enforcing on the one hand and the fact that states are often subject to constraints of international law. If states are sovereign, in the sense that they have the unlimited power to "make or unmake any law whatever"[37] or "decide on the exception"[38] to the law, they are always free to revoke the constraints of international law.

Some international lawyers went further and argued that state consent could at times be irrevocable, especially in the case of human rights. Under this theory, there are at least some areas where states agreed to irrevocably bind themselves to the overriding power of global norms.[39] As Lewis Henkin critically pointed out, in the area of human rights law, "[s]overeignty is subject to some 'creeping' international human rights, to the extent sovereign nations consent."[40] The Human Rights Committee has opined that once a state committed to comply with a certain human rights treaty in a certain territory, the rights inhere in those individuals whose rights had been recognized, and therefore even other state actors who operate in that territory must comply with the treaty even if they have not become parties to it.[41]

(2) Support for Consent-Based Justifications for the Primacy of Constitutional Rights over International Rights

The consensual grounding of constitutional rights is a well-known justification for the primacy of constitutional rights which draws on the idea of popular

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of International Law, 94 AM. SOC'Y INT'L L. PROC. 185, 186 (2000). Hathaway et al. argued: "inquiry into *the benefit of concluding an international agreement ought to be broadly conceived*, including securing foreign cooperation, solving a collective action problem, or *strengthening shared normative commitments ... Human rights treaties, even if they have no enforcement mechanism, articulate international standards that carry significant moral authority*" (emphasis ours) (*see* Hathaway et al., *The Treaty Power, supra* note 34 at p. 299 note 343.

[37] A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 38 (London, MacMillan & Co. 1885).

[38] CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab ed. & trans., Univ. Chi. Press 2005) (1922).

[39] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 68 (Sept. 7).

[40] Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 5 (1999).

[41] U.N. Human Rights Comm., CCPR General Comment No. 26: Continuity of Obligations, U.N. Doc. A/53/40 (Dec. 8, 1997).

sovereignty.[42] The Virginia Declaration of rights rests on the conviction that all public powers derive their authority from the people.[43] The people's consent is always revocable and "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government."[44] As Locke argued, "there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for all power given with trust for the attaining an end, being limited by that end."[45] Thus as a document ratified by "we the people," the text of the constitution enjoys primacy over any global norm, as much as it rejects any commitment to those outside the community.[46] The international norms are not only of lesser legal significance; they are of no legal significance at all unless and to the extent (and for the duration) that the international norm is incorporated by the people's representatives.[47]

(3) Evaluating Consent-Based Arguments

The objections to the consent-based basis for constitutionalism are also well-known. It is evident that there is no *actual* consent to the Constitution.[48] Mila Versteeg has argued that "a significant discrepancy exists between what people want from their constitution and what the document actually provides. The global practice of constitution-making… is characterized by unpopular constitutionalism."[49] Hence advocates of consent-based justifications need to resort to hypothetical rather than actual consent. But it is highly dubious that hypothetical consent can ground any obligations.[50]

Moreover, the consent-based argument rests on the unarticulated premise that a certain group of people has the authority to give its consent. But that premise is challenged by the controversy about the right to self-determination and to secession which reflects a serious theoretical and pragmatic debate among constitutional law and international law theorists over who is entitled to form the

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[42] *See also* THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) ("The federal and State governments are in fact but different agents and trustees of the people").

[43] VIRGINIA DECLARATION OF RIGHTS § 2 (U.S. 1776) ("That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them.").

[44] THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776). See also Edwin Borchard, *The Relation between International Law and Municipal Law*, 27 VA. L. REV. 137, 138 (1940).

[45] JOHN LOCKE, TWO TREATISES OF GOVERNMENT ¶ 149, at 366 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[46] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66 (1990). Noting that the Fourth Amendment protects the right of "the people." the Court held that this "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."

[47] Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L. L. 1 (2000) (analyzing that vision of international law).

[48] Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

[49] Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1138 (2014).

[50] *See* Ronald Dworkin, *The Original Position*, *in* READING RAWLS 16, 17–21 (Norman Daniels ed., 1975); Fallon, *supra* note 48, at 1807–08.

pouvoir constituant and consent to bind itself.[51] Arguably there is a pre-political set of norms which explains why the governed have the right to govern and delineates the scope of their authority. In the words of the American Declaration of Independence, governments are instituted to secure "certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" of all.[52]

That international law, especially regarding human rights, is based on consent is equally difficult to maintain. The international instruments clearly indicate their declaratory rather than constitutive role, "[r]ecognizing that these rights derive from the inherent dignity of the human person."[53] The consent argument therefore reflects a more foundational intransgressible set of norms. The international norms reflect the effort to define humanity's contemporary understanding of what those norms are. As Ronald Dworkin wrote in his posthumously published article, "International law could not serve the purposes it must serve in the contemporary world … unless it escaped the straitjackets of state-by-state consent."[54]

Needless to say this Part fails even to scratch the surface of the questions concerning the normative status of global and state norms. It is only meant to establish that there is vast literature that attempts to explore these questions and that the standard justifications are not compelling. The main purpose of this Article is to develop new justifications for globalism and state constitutionalism. Part III develops an argument favoring globalism and part IV develops an argument favoring state constitutionalism.

III. *WHY INTERNATIONAL NORMS MUST ENJOY PRIMACY? IN DEFENSE OF ROBUST INTERNATIONALISM*

The Talmud tells a story of a Gentile who missed a great business opportunity because he did not want to disturb his father by taking a key that was under his father's pillow. The red cow that was his reward for honoring his parents was of immense value at the time. Rabbi Ulla inferred from this story the lesson that if a Gentile, who is not commanded by God to honor his parents, was rewarded so profoundly, a Jew, who is subject to the commandment to honor his parents, would be rewarded even more for so doing. Rabbi Ulla based this conclusion on a

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[51] *See* Hans Agné, *Democratic Founding: We the People and the Others*, 10 INT'L J. CONST. L. 836 (2012).

[52] THE DECLARATION OF INDEPENDENCE (U.S. 1776); *See* David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39 (2002); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, And the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010); Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, SUFFOLK U. L. REV. (forthcoming 2014).

[53] Preamble, International Covenant on Civil and Political Rights (1966).

[54] Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2, 6 (2013).

statement by Rabbi Hanina that "he who is commanded and fulfills [the command] is greater than he who fulfills it though not commanded."[55]

This Part applies this lesson to the state, and argues that a society in which the state honors rights but is not "commanded to do so," i.e., is not internationally bound to do so, is inferior to a society in which the constituent assembly "is commanded to do so," i.e., bound by extra-constitutional duties protecting individual rights (and complies with them). The latter society is superior for the reason that in such a society individuals do not live "at the mercy" of the collective; their rights do not depend on the state's judgments (concerning the public good) or on its inclinations.

A. Why States Should be Bound by Internationally Recognized Human Rights

This Part develops the observation illustrated by the red cow story; it argues that the value of internationally-based human rights is not grounded merely in their effectiveness; instead, they serve an important function in publicly conveying the fact that human rights are not discretionary; that they are a matter of global concern to be observed by the state as a matter of duty rather than choice, preference or judgment. This is the real case for robust internationalism. It is robust in the sense that this justification does not hinge on empirical considerations such as the effectiveness of international human rights or the question of whether the states agreed to be bound by these rights. Thus, in contrast to Henkin's view, even if states respected human rights adequately, international norms would be valuable as they provide recognition that human rights are mandatory rather than discretionary on the good will of the state.[56]

One of the first architects of the international protection of human rights, André Mandelstam, who drafted the 1929 Resolution of the Institute of International Law on international human rights, was the first to articulate this idea. He stated:

> "I am convinced that, without resorting to the political arena, the Institute's duty is to raise its voice loudly and to proclaim without delay the great

[55] *See* BABYLONIAN TALMUD, tract Kiddushin at 31a. The *Tosafoth*, one of the important Talmudic commentaries, explains the rationale underlying this surprising claim. It argues that one who is commanded is anxious to obey the commandment. Someone who is not commanded obeys because of his own will to do so, and consequently, should not be rewarded in the same way. The *Ritba* (another influential Talmudic commentary) argues that: "it is the devil who argues when he is commanded, and the devil does not argue when he is not commanded." A natural understanding of the reference to the "devil" is the evil residing in every individual, which tempts people to resist what they have been commanded to do. A person's reward is greater when a greater effort is necessary to overcome one's natural inclinations.

[56] For Henkin' s view, *see* Henkin, *supra* note 18, at 427–28.

> new principle […]: human rights exist, and it is the duty of each state to respect them."[57]

It is therefore the *loud voice* and the *proclamation without delay* that seem important to Mandelstam. The global voice is a voice that announces that "it is the duty of each state" to respect human rights. This conviction is reflected in the 1929 Resolution that emphasizes several times the "duty" of every state to recognize and protect every individual the equal right to life and liberty, as well as other rights.[58]

The significance of proclamation of this type was also emphasized by Eleanor Roosevelt, the mastermind of the 1948 Universal Declaration of Human Rights who stressed the importance of the declarative act of an otherwise non-legally binding document:

> It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations. ....[59]

These sources suggest that internationalism is designed to underscore the fact that the protection of human rights is a matter of duty rather than discretion or good will. The international order consisting of binding global directives facilitates a clear differentiation between duty-based decisions and discretionary decisions which depend on the good will of the state. Internationalism highlights the fact that the former category of duty-based decisions must be publicly acknowledged and differentiated from the second. The statements of Mandelstam and Roosevelt are evidence that our view (if successful) provides not only a sound normative justification for acknowledging the superior normative status of international norms but also that it captures sentiments prevalent among international lawyers and human rights activists. Unlike the traditional justifications that suffer as we argued above from insincerity, our proposed justifications reflect the inner convictions of those who establish and promote internationalism.

The claim we defend has two distinctive components. The first concerns cases in which the state complies with the internationally-recognized rights. It is obviously good when our rights are being protected by the state, but it is even better if it is

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[57] André Mandelstam, Inst. of Int'l Law (Oct. 8, 1921), *quoted in* BRUNO CABANES, THE GREAT WAR AND THE ORIGINS OF HUMANITARIANISM, 1918–1924, at 313 (2014); *See also* Helmut Philipp Aust, *From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights*, 25 EUR. J. INT'L L.1105 (2014).

[58] *See, e.g*, *supra* note 2, Art. 1.: "Il est du devoir de tout Etat de reconnaître à tout individu le droit égal à la vie, à la liberté, … " ("**It is the duty** of every State to recognize to everyone the equal right to life, liberty…" (our emphasis).

[59] Eleanor Roosevelt, U.S. Delegate, U.N. Gen. Assembly, On the Adoption of the Universal Declaration of Human Rights (Dec. 9, 1948). Interestingly the approach taken by the drafters of the 1948 Declaration is radically different. Instead of emphasizing states' duties, as the 1929 resolution did, the Universal Declaration refers to "the rights" of "everyone," The rationale provided to these rights is consent. ("whereas Member States have pledged themselves to achieve, … the promotion of universal respect for and observance of human rights and fundamental freedoms.").

acknowledged that the protection is not a byproduct of discretion or judgment on the part of the state. The international norms highlight the fact that the protection of rights is not discretionary; it is mandatory and a state which protects it merely complies with what it ought to do.

The second component concerns cases of violation of rights. It is of course bad if our rights are being violated by the state, but it is even worse if the state violates them without the violation being labelled as a violation and condemned as wrongful. The international community serves as a body that recognizes the wrongfulness of the violation and, consequently, raises its voice and pronounces condemnation. Such a voice may of course serve to deter (or prevent) future violations or help to bring about a remedy. But this is not the only purpose of global proclamations. In addition global proclamations constitute public acknowledgment and recognition that the state committed a wrong,

To sum up we defend here two observations: 1) It is good when rights are respected but it is even better when rights are respected not merely out of the good will or the judgment of the state but out of public understanding that it is its duty to respect these rights; 2) It is bad when rights are violated but even worse when the violation is not publicly recognized as such. The rest of this section aims to establish these two claims and to argue that the superior normative status of global norms can be justified in these terms.

Individuals have political rights, and the normative force of these rights is (at least sometimes) independent of the legal entrenchment of the rights in the national or international arena. States ought to protect freedoms and guarantee equality independently of whether these are locally or globally entrenched. The case for robust internationalism rests on the view that the state need not only conform with its duties but it also ought to acknowledge their status as duties, namely as norms that bind the state independently of its will. The body that can plausibly identify the duties of the state and voice its repugnance when these are violated is the international community. Its judgments are ones that turn what otherwise would be publicly understood to be merely decisions based on the state's good will or inclination into internationally-recognized binding provisions. We label this view robust internationalism because it does not rest on factual contingencies and does not depend on any empirical generalizations (e.g., the global community is better at protecting rights than the polity).

To examine the case for robust internationalism, compare the following two worlds. In world A some states protect rights effectively while others do not but no international duties to protect are recognized. World B is similar; some jurisdictions protect rights effectively while others do not, but there is an internationally-recognized duty to protect human rights. Given that there are no other differences between the two worlds, which world (if any) is superior? Is it valuable to internationally entrench pre-existing moral/political rights even when such an entrenchment is not conducive to the protection of these rights? Do international human rights matter *as such*, and, if so, why?

One consideration why world B is better than A is that rights internationalism facilitates an important differentiation between two types of decisions of the state: decisions that rest on the discretion of the state and decisions that exist independently of states' will. When a right is internationally entrenched, the decision to comply with it is not 'up to the state' and is not subject to its discretion.

Some skeptical voices may question the normative relevance of this observation. In particular one may ask why one should care about such differentiation between issues that are subject to the discretion of the state and those that are not. Arguably what we care about is the effective protection of rights and not whether such a protection is recognized as a duty or who recognizes it as a duty. Hence, international human rights are mere instruments and the view that attributes to them value independently of their effects on the compliance of the states is nothing but internationalist fetishism.

The answer to this challenge rests on the concern for freedom, in particular the concern for republican freedom. Republican freedom requires not only that other people do not restrict our freedoms but also that no other people *have the power* to restrict our freedoms.[60] Consequently, citizens are freer in a society in which human rights are recognized as duties binding the state rather than as resulting from the mere judgments, preferences or inclinations of legislatures or polities. In states in which human rights are recognized as duties imposed on the state, citizens do not live at the mercy of their legislature or, at the mercy of the drafters or interpreters of the national constitution. Their rights are not contingent on the good will or the inclination of the state; they are protected by the state because of the institutionally-entrenched international recognition that it is obliged to protect them and not merely because the state prefers to protect them or because it judges that protecting them promotes the public good.

To establish this claim consider first the following analogy: A needs $100 to cover some urgent costs. Fortunately B owes A $100 and A turns to B to get his money back. B denies that he *owes* A the money, but, as a gesture of friendship, is willing to grant A $100 "as a present," as B professes to understand that A faces economic hardship.

A is justifiably resentful and possibly even furious. A cares not merely that the $100 be given to him to cover his urgent costs, but also that it be given to him as a repayment of a debt rather than as a present. A wants B to *repay his debt*, rather than merely to receive money. But why should A care? Why should it matter to him whether B gives him a present or repays his debt? B's reluctance to concede his debt harms A, as it implies that A is "at the mercy of" B's good will, i.e., that it is up to B to decide whether or not to give A the money.

Even if B insists on giving the money as a present, A may find some consolation in the willingness of the community to support his demand, impose sanctions on B and punish B for his reluctance to acknowledge his debt. Thus, A may not merely justifiably insist that B concede the debt but also insists that if B fails to repay his debt to A (and insists on giving A "a present"), then the community at large,

[60] PHILLIP PETTIT, REBULICANISM: A THEORY OF FREEDOM AND GOVERNMENT 5 (1999).

reproaches B. As long as such a public condemnation is as a general rule intense and effective, then it would be appropriate to say that A is not "at the mercy of B." In other words, there is a sense in which A is not "at the mercy of B," to the extent that B is subjected to social and even legal sanctions in the event that B fails to repay his debt. In such a case, it is not "up to B" to make the decision as the decision is mandatory; it is imposed on him by the community. So in order not to be at the mercy of B, it is sufficient that B acknowledges the debt, and that, in case he does not, the community reproaches B in a way that is generally effective.

Closer to our concerns here is the example of slavery. Slavery could presumably be eradicated without entrenching an international prohibition on slavery. Instead of entrenching such an international prohibition, citizens could entrench such prohibitions in their own constitutions. Yet, the international prohibition serves to highlight the fact that the abolition of slavery is not discretionary on the will of the state; it does not depend on its good will. The entrenchment of international law prohibition on slavery may have had some instrumental value in eliminating slavery. But the instrumental contribution to the elimination of slavery is not the only concern underlying the international entrenchment of the prohibition against slavery.

There are two important claims that can be illustrated by considering the example of debt. First, in order not to be "at the mercy of" B it is not sufficient that there are *moral* norms requiring B to honor rights. There also must be effective *social* norms, conventions and understandings requiring B to do so. It is the public understanding that counts not merely the binding force of moral norms. In the absence of such a public understanding, it can be plausibly said that the debt is "up to B" in the sense that the repayment of the debt hinges on B's judgments or inclinations to repay.

Second, in order "not to be at the mercy of B" it is not required that B would indeed be forced to acknowledge his debt. Precisely as I am not "at the mercy" of criminals if I live in a state that effectively enforces the law (even in case a crime is committed against me), so A is not at the mercy of B simply because B refuses to acknowledge his debt so long as there is a general system of sanctions or at least stigma attached to people who refuse to acknowledge their debts. A failure of the system to enforce the debt of B in a particular case does not imply that it is "up to B" to pay or not to pay his debt or that A is "at his mercy." Further, for certain purposes even if I am very vulnerable to outside interference, there is a fundamental difference between different types of vulnerability. As Louis Phillipe Hodgson noted: "If I live in a particularly nasty part of town, then it may turn out that, when all relevant factors are taken into account, I am just as vulnerable to outside interference as are the slaves in the royal palace, yet it does not follow that our conditions are equivalent from the point of view of freedom."[61]

International norms that require the state to honor its rights-based duties are equivalent to the social norms that require B to pay his debt or to the legal norms

[61] Louis-Philippe Hodgson, *Kant on the Right to Freedom: A Defense*, 120 ETHICS 791, 816 (2010).

that bar slavery. Such norms serve the purpose of labelling violations of human rights as wrongs and publicly emphasizing that their status as wrongs does not hinge upon the good will of the state. It helps in differentiating those norms that are discretionary upon the good will of the state and those that bind the state.

In the absence of international norms, individuals live at the mercy of the provisions of their own national constitutions. If the state violates individual rights, no authoritative body superior to the state can proclaim that wrongs were committed. While other states can condemn the violations they cannot claim that their judgments are superior to those of the state. If rights are honored, it is unclear whether honoring them is merely discretionary or obligatory on the part of the state. Honoring them could be understood to be a discretionary matter or even a matter of taste. If rights are not honored, it is unclear whether the decision not to honor them is a violation of a duty or merely a legitimate exercise of state power.

The establishment of an additional layer of norms (an international one) contributes to the protection of freedom in the same way that adding an independent layer of constitutional norms contributes to freedom. Individuals who live in a global human rights order are free not (only) because (and to the extent that) their rights are better protected but because the protection of their rights does not depend upon the good will of the state. Precisely as the turn to constitutionalism protects us from the prospects of living at the mercy of legislatures,[62] so the turn to internationalism protects us from the prospects of living at the mercy of the drafters of national constitutions. Before we turn to examine the role of constitutional norms let us first examine what may seem a devastating challenge to this analysis.

B. At the Mercy of Persons after All? Response to Criticism

Against this argument one could raise the following objection: neither international norms nor constitutional norms can protect our freedom as all of these norms are a human creation and, consequently, we all are subject to the mercy of others. Somebody after all has to draft international norms and somebody has to interpret them. It follows that even if binding international norms are entrenched citizens still live at the mercy of the drafters of the global norms or their interpreters. In the absence of a constitution citizens in a democracy live at the mercy of their legislatures. The entrenchment of constitutional rights that overrides legislative decisions protects them from this predicament but, instead it subjects citizens to the mercy of the drafters (or interpreters) of the constitution or to the mercy of its interpreters. Similarly, international human rights norms may protect individuals from the whims of the interpreters or the drafters of the constitution but it subjects individuals to the preferences, judgments and whims of those who draft or interpret the international norms. There is therefore no way we can overcome the subjugation to some set of

[62] *See* HAREL, *supra* note 14 147–90.

norms that ultimately is drafted and interpreted by human beings and depend therefore on their discretion or on their preferences.

It is easy to see that this argument implies that freedom in the sense that we use here can never be realized. Whatever constraints designed to protect individual rights are imposed, it is always the case that there is some entity which imposed it (or which can amend or interpret it).

This challenge is important and misguided at the same time.[63] It is important because (as we show below) it can serve in explaining the limitations of national constitutions or even of international norms. It is true therefore that in some sense we are always at the mercy of some entity or other. At the same time it is misguided because it proves too much. It is one thing to be a slave whose benevolent master does not use his power to issue commands and quite another thing to live in a jurisdiction which prohibits slavery, or in a jurisdiction which entrenches a constitutional prohibition against slavery. Admittedly in both cases we are subject to the power of some entity (the master in the first case and the legislature in the second case). But it is essential to know who that entity is, what it represents and what it means to be subjected to its powers. The slave owner may be benevolent and never use his powers but to be at his mercy is demeaning nevertheless. In contrast to be subject to the power of the interpreter of the international or the constitutional norm is fundamentally different and it does not bear on our status in the same way.

This observation raises the question of identifying the difference between these two conditions. When can we justifiably raise the grievance that we are un-free not because we are deprived of our rights but because our rights hinge on the good will or intentions of others and when being dependent on the will of others is detrimental to our freedom.

Judgments of this type are often contextual; they require an understanding of traditions practices and institutions. To be at the mercy of an interpreter of the international or the constitutional norm is often perceived to be better than to be at the mercy of a legislature. This is not (only) because courts are more likely to protect such rights. More importantly, the interpreter has a text to interpret, and any interpretation requires her to give account for her choice, whereas the voter has only to cast her preference, unabashedly promoting her interest. The same relation which exists between legislatures and state constitutions is replicated in the relations between the international community and the constitutions.

We can sum up the discussion by using perhaps an observation which has been made in a different context by Thomas Nagel: "To be tortured would be terrible; but to be tortured and also to be someone it was not wrong to torture would be even worse."[64] Robust internationalism rests on the conviction that there is one thing that is even worse than violation of rights – violation which is not accompanied by an authoritative proclamation that such a violation is wrong. It is not enough that states protect human rights; in addition their violation ought to be

[63] *See* HAREL, *supra* note 14, at 185.
[64] Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFF. 83, 93 (1995).

recognized publicly as a wrong. Human rights internationalism is not merely an instrument to protect rights; the desirability of human rights internationalism does not hinge only on the question of whether it is effective in protecting rights or in minimizing the frequency and severity of human rights violations. The overriding power of international norms provides a clear indication for the binding nature of rights. The protection of rights is not a prerogative of the state which it may comply with or not. It is a duty of the state and the international norms provide an institutional recognition of this fact.

Naturally this argument is not conclusive. Perhaps there are strong instrumental reasons which override the concerns raised above. Perhaps, for instance, state constitutions are more effective in protecting rights and the overriding powers of international norms undermines their effectiveness. Indeed, in the next section we show that there are principled reasons to grant overriding normative powers to constitutional norms.

IV. *WHY CONSTITUTIONAL NORMS MUST ENJOY PRIMACY? IN DEFENSE OF ROBUST CONSTITUTIONALISM*

The last Part provided arguments favoring the supremacy of international law. Yet, as we show in this Part there are also compelling arguments favoring the supremacy of constitutional law (or more broadly of state law).

There are two traditional ways to justify the overriding powers of constitutional norms over international norms. Under the first, constitutions are necessary as the protection of rights ought to be informed by local concerns and circumstances. State constitutions may therefore entrench rights in ways that are more conducive to the effective protection of rights given the local concerns and traditions.[65] Under the second, state constitutions are the embodiment of the will of the people and the will of the people or their consent are necessary for legitimacy. Democratic concerns therefore require us to subject ourselves to the authority of state constitutions.[66] Hence democratic concerns dictate that state constitutional provisions have overriding powers over global norms.

This Part argues that a justification for the robust constitutionalism is grounded in different concerns. The constitutional protection of rights is not simply a matter of local concerns, popular consent or general agreement. Instead the value of rights hinges on who makes authoritative determinations about them. The very same right-protecting norm may have a different value depending on its origins. More specifically, making authoritative judgments by the state induces its citizens to define the boundaries of human rights and their weight. This task in turn is conducive to the exercise of these rights by citizens. Granting international norms

[65] *See, e.g.*, James W. Nickel, *Cultural Diversity and Human Rights*, *in* INTERNATIONAL HUMAN RIGHTS: CONTEMPORARY ISSUES 43 (Jack L. Nelson & Vera M. Green eds., 1980); Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUM. RTS. Q. 838, 844 (2000).

[66] For a discussion, *see supra* text to notes 42-47.

overriding normative status distances citizens from these rights and, consequently, undermines the willingness and readiness to exercise them.

A. The Value of *Exercising* Rights

Why do rights need to be our creation? What makes it important that we determine what our rights are? The answer lies in an important feature of rights, namely in the fact that (many) rights become valuable when individuals *exercise* their rights. The value of autonomy-enhancing rights remains unfulfilled if individuals do not exercise their autonomy-enhancing rights. This is part of a theme characterizing values more generally. Values, as Joseph Raz maintains, "depend on valuers for their realisation, for the value of objects with value is fulfilled only through being appreciated."[67] Given that rights are grounded in values, the engagement of rights holders is necessary for the realization of the value of rights. The more the rights are "our creation" the more likely they are to be exercised and appreciated.[68]

To illustrate let us use the example mentioned in the introduction: determinations concerning the welfare of a child. Identifying what is conducive to the welfare of a child can be done by various agents. But it is particularly desirable that it be done by the parent who is in charge of promoting the welfare of the child. Even flawed judgments made by the parent have value as they contribute to the forging of a strong relationship between the parent and the child. Granting powers to the parent to make such determinations (even when her judgments are somewhat inferior to those of the state) may therefore be desirable. Similarly we believe granting states overriding powers to make determinations concerning the scope of rights and their weight is valuable not because states are better in making these determinations but because the very collective participation in making these determinations by citizens is valuable.

Further as Benvenisti and Lustig pointed out in a different context, the participation of citizens in making basic judgments concerning rights "facilitates informed decisions, whose importance to the individual goes way beyond instrumental considerations. Through participation one develops a sense of empathy to one's fellow-citizens and becomes consciously a member of one's community.[69] As John Stuart Mill argued : "[I]t is from political discussion and collective political action that one whose daily occupations concentrate his interests in a small circle round himself, learns to feel for and with his fellow-

[67] Joseph Raz, *The Practice of Value*, *in* THE TANNER LECTURES ON HUMAN VALUES 124 (2001).
[68] Robert Post and Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 373, 374 (2007) ("The premise of democratic constitutionalism is that the authority of the Constitution depends on its democratic legitimacy, upon the Constitution's ability to inspire Americans to recognize it as *their* Constitution.") (emphasis in original).
[69] Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as 'The Good Despot': The Democratic Costs of Privatization in Global Settings*, 15 THEORETICAL INQUIRIES IN L. 125, 136 (2014).

citizens, and becomes consciously a member of a great community.[70] One of the negative byproducts of internationalism is the fear of alienation of the polity from the culture of rights; in other words, relegating citizens to be norm-takers. Rights must be embodied in the practices of executive bodies, in the modes of operation of state institutions and also be entrenched in foundational documents of the state. This makes rights "ours" in a way that contrasts with the way rights operate in a world in which states "comply" or "defer" to the dictates of international norms.

B. How can Robust Constitutionalism Accommodate Robust Internationalism?

Even international law norms often acknowledge the importance of local (in particular state) powers to make determinations concerning rights. [71] For example, one of the principles entrenched in the Treaty of the European Union is the principle of subsidiarity, which requires that "the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[72] It is thus evident that the drafters of the treaty thought it essential that decisions effecting individuals' rights be taken by political institutions as close as possible to the citizens. As Neil MacCormick argued, subsidiarity allows individuals "to be masters of their own destiny at the level of individual and local-communal life, without losing the power to operate in a large scale economy that can create the conditions for the kind of decent prosperity that may well be the necessary guarantee of durable peace."[73]

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[70] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, 83 (HENRY REGNERY CO. 1962) (1861).

[71] For examples *see infra* notes 94-99 and accompanying text.

[72] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 5, Dec. 13, 2007, 2007 O.J, (C 306) 1; *See* George Bermann, *Europe 1992: Roundup on the Law and Politics of the European Community*, 85 AM. SOC'Y INT'L L. PROC. 152, 155 (1991) ("subsidiarity is the idea that power should vest in . . . institutions only to the extent that the objectives meant to be served cannot be effectively accomplished at a lower level of government.")

[73] Neil MacCormic, *Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth'*, 16 LAW & PHIL. 331, 338–39 (1997); *See also* Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 GOVERNANCE 73 (2003); Paul Craig, *Subsidiarity: A Political and Legal Analysis*, 50 J. COMMON MKT. STUD. 72 (2012); *See* Andreas Follesdal, *The Principle of Subsidiarity as a Constitutional Principle in International Law*, (Jean Monnet Working Paper No. 12/2011); PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS 161 (2012); Federico Fabbrini, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison*, *in* A FUTURE FOR THE MARGIN OF APPRECIATION? (Mads Andenas, Eirik Bjorge, & Giuseppe Bianco eds.) (Forthcoming 2015). Obviously, the inclusion of this principle was motivated also by the pragmatic need to "ensure the acceptance of the EU among the citizens" (*see* Reimer von Borries & Malte Hauschild, *Implementing the Subsidiarity Principle*, 5 COLUM. J. EUR. L. 369 (1999)).

To support this intuition assume a world which is governed exclusively by international law norms. In this world states are bound by international norms protecting human rights. Further in our imaginary world states comply with international norms but they do it merely on the basis of their international duties. They perceive the international norms protecting rights as side constraints imposed on them by the international community.

Kelsen had a useful analogy. We can analogize states in a global polity to companies in a state.[74] Companies are expected to abide by the law including the law protecting the rights of workers and consumers. But they are not expected to be active participants in determining what these rights are. They have to accept the authoritative judgments made by the state (and, perhaps, by the international community). One could think of states as companies namely as passive recipients of the judgments of the international community rather than as active participants in determining what rights we have. A state which defers to the international norms and makes no judgments of its own as to the justifiability of these norms is unlikely to create an environment in which citizens exercise their rights. Precisely as a parent who aims at promoting the well-being of a child without participating actively in determining what the well-being of the child consists of would inevitably fail in doing so, so the state which merely defers to or complies with the international norms would fail in promoting rights. The granting of overriding normative status to international norms weakens the involvement of the state in delineating the scope of rights. This, in turn would alienate citizens and weaken their willingness and ability to exercise rights.

Arguably however constitutions are as detached and alienated as international law is. After all constitutions are designed to limit and constrain the popular will. Hence it is paradoxical to say that by giving priority to constitutional norms, one gives a voice to the people.

We do not deny that *relative to legislation* constitutional provisions may be alienating. If the contrast is between constitutions and legislation it is evident that legislation is less detached than constitutions and that individuals have greater control over it. Yet we believe that typically when the contrast is between constitutional law and international law, constitutional law is less detached and less alienating from international law as state constitutions are still a product of the polities. We turn in the next section to examine the normative implications of this view and defend the discordant parity hypothesis.

V. *THE CASE FOR DISCORDANT PARITY*

Part III and Part IV give rise to a dilemma. On the one hand Part III argues for robust internationalism, namely it argues that international human rights should override constitutional norms as their superior normative power provides an institutional embodiment of the idea that rights are not merely discretionary; they

[74] Hans Kelsen, *Foundations of Democracy*, 66 ETHICS 1, 34 (1955).

are duties imposed on the state. On the other hand Part IV argues for robust constitutionalism, namely it argues that constitutional entrenchment of rights and the active participation of the state in determining their boundaries and their weight is essential for the effective protection of rights by the polity as it facilitates engagement with rights and reinforces the willingness and readiness of citizens to exercise their rights. Consequently, the role of law in this context is a tricky one; it must, on the one hand, embody the understanding that the protection of rights is a matter of duty and, on the other hand, it must prompt citizens to exercise their rights. Somehow the law must square the circle; it must contribute to the creation of high expectations for states, while leaving sufficient leeway so that states are free to become responsible in the true sense. A hands-off approach by the international community to questions of rights would erode the recognition that protecting rights is a duty of the state. Yet a tight, comprehensive set of global controls would remove from the states the discretion to make decisions and, consequently would weaken the capacity of citizens to exercise these rights.

One solution is of course to decide which concern is weightier. If the case for internationalism is weightier it follows that international norms ought to override state norms. If, on the other hand the case for constitutionalism is stronger, international norms ought to be overridden by state norms. In this Part we develop a different proposal and defend what we label the model of discordant parity, namely a system under which international and constitutional norms have equal status. The parity we advocate is not based on harmony and cooperation between international or constitutional norms but on constant tensions frictions and conflicts. Before defending it let us first establish that legal practice often presupposes hierarchy. Section B establishes that both state and international courts presuppose hierarchy and reject parity. As we argued in the introduction the disagreement is not *whether* hierarchy is desirable but *which* hierarchy ought to guide courts. Section C defends discordant parity and examines its practical implications.

A. Conflicting Assumptions of Hierarchy as Practiced by Courts

The view that there must be strict hierarchy between international and state norms can be found in legal decisions made by both state and international courts. Unsurprisingly state courts believe that state constitutions are superior to international norms while international tribunals defend the opposite view. Let us illustrate.

State courts in Europe refused to give up on the national protection of their citizens' human rights as dictated by their own constitutions. For this reason, the unanimous conclusion of state courts is that in cases of direct conflict between international and state norms, the state norms prevail.[75]

[75] *See* Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 3 VIENNA ONLINE J. ON INT'L CONST. L. 170, 187 (2009); Eyal Benvenisti, *Reclaiming Democracy:*

A clear instance is the so-called Brunner case where the German Constitutional Court asserted that its role is to guarantee "this essential content [of the basic rights] as against the sovereign powers of the [European] Community as well," although it tried to mitigate the conflict by emphasizing that the German Court "exercises its jurisdiction on the applicability of secondary community legislation in Germany in a relationship of co-operation with the European Court."[76] Later on in the Lisbon case the German Court reiterated its commitment to the view that when powers are transferred to international organizations such powers:

> [A]re granted under the condition that the sovereign statehood of a constitutional state is maintained on the basis of an integration programme according to the principle of conferral and respecting the Member States' constitutional identity, and that at the same time the Member States do not lose their ability to politically and socially shape the living conditions on their own responsibility.[77]

Accordingly the conclusion of the German Court in the Lisbon cases was that the legal order of the EU is a "derived fundamental order," whose "autonomy can only be understood as an autonomy to rule which is not independent but . . . is granted by other legal entities." By contrast, the sovereignty of the state "requires independence from an external will," And, therefore sovereignty should be described as "freedom that is organised by international law and committed to it."[78] The Czech Constitutional Court followed a similar route and argued that "for a nation-state just as for an individual within a society, practical freedom means being an actor, not an object."[79] These statements concerning the powers of state court are not grounded in technical considerations such as jurisdiction. Rather, the courts openly assert their responsibility as state organs who are guardians of their state constitution, the protectors of constitutional rights as against the potential intrusion on the part of the international order.[80]

A blatant statement to this effect was given by the Italian Constitutional Court. In justifying the primacy of state norms over international norms the Italian Court

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The Strategic Uses of Foreign and International Law by National Courts, 102 Am. J. Int'l L. 241 (2008).

[76] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 1 C.M.L.R. 57 (1994) (Ger.).

[77] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08 (¶ 226).

[78] *Id.* at ¶ 223.

[79] Ústavnísoud Českérepubliky 26.11.2008 (ÚS) [Constitutional Court], 19/08, ¶ 107 (Quoting DAVID P. CALLEO, RETHINKING EUROPE'S FUTURE 141 (2001)); *See in general* Wojciech Sadurski, *"Solange, chapter 3": Constitutional Courts in Central Europe—Democracy—European Union*, 14 EUR. L. J. 1 (2008).

[80] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] May 29, 1974, 2 C.M.L.R. 540 (1974) (The *Solange I* decision). *Solange* ('as long as') stands for the assertion by European constitutional courts resisting a surrender their authority to the European Court of Justice, and insisting on their role as guardians of their national constitutions. *See also* Joined Cases C-402/05 P and C-415/05 P, *Kadi& Al Barakaat Int'l Found. v. Council & Comm'n*, 2008 E.C.R. I-06351, *available at*http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0402&lang1=en&type=TXT&ancre=.

argued that the transfer of powers to the international community is unauthorized when they result in:

> "[S]uppression or restriction of the fundamental rights granted to them [Italian citizens] by the Constitution, for these are guarantees that pertain to disposed of, and most importantly cannot be left at the mercy of international institutions extraneous to the legal system of our country."[81]

The Italian Court reiterated this position in another recent judgment, declaring as unconstitutional a law that would have barred the right of Italian citizens to sue Germany in Italian courts for crimes it committed during World War II.[82] The Court acknowledged that under international law, the individual "right to judicial protection of fundamental rights" is subject to the claim of foreign states to immunity. Nevertheless, the tension between these two conflicting interests must be resolved differently under the Italian constitution:

> in an institutional context characterized by the centrality of human rights,…the denial of judicial protection of fundamental rights of the victims of the crimes at issue (now dating back in time), determines the completely disproportionate sacrifice of two supreme principles of the Constitution. They are indeed sacrificed in order to pursue the goal of not interfering with the exercise of the governmental powers of the State even when, as in the present case, state actions can be considered war crimes and crimes against humanity, in breach of inviolable human rights, and as such are excluded from the lawful exercise of governmental powers […] Consequently, insofar as the [international] law of immunity from jurisdiction of States conflicts with the aforementioned fundamental principles [of the Constitution], it has not entered the Italian legal order and, therefore, does not have any effect therein.[83]

It is hardly surprising that international tribunals reject the primacy of state courts and believe in the primacy of international norms. The International Court of Justice had little trouble rejecting the position of the Italian courts "in denying Germany the immunity to which the Court has held it was entitled under customary international law [as] a breach of the obligations owed by the Italian State to Germany."[84] Similarly, the European Court of Justice believes in "the idea of absolute supremacy according to which Community law trumps even the core of member states' constitution."[85] Numerous cases insist on the superiority of

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[81] Guglielmo Verdirame, *A Normative Theory of Sovereignty Transfers*, 49 STAN. J. INT'L L. 371, 377–78 (2013) (Quoting Corte Cost. [Constitutional Court], 16 Dec., 1965, n. 98).

[82] Corte. Cost., 22 October 2014, n. 238 (It.), *unofficial translation available at* http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf (regarding the constitutionality of Article 1 of Law No. 848).

[83] *Id.*, at p. 15.

[84] The International Court of Justice in Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) (Merits) [2012] ICJ Rep 99, para. 107.

[85] Fernando Castillo de la Torre, *Tribunal Constitucional (Spanish Constitutional Court), Opinion 1/2004 of 13 December 2004, on the Treaty Establishing a Constitution for Europe*, 42 COMMON

European community law over the provisions of state constitutional law.[86] The position of the regional human rights courts (European and Inter-American) is equally unambiguous.[87] The International Criminal Tribunal for the Former Yugoslavia (ICTY) asserted its exclusive role in prosecuting war crimes while preempting state courts due to the fact that major violations of human rights that amount to crimes against humanity are "universal in nature … and transcending the interest of any one State. [I]n such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world."[88]

Most scholars regard this head-on clash with concern. Many are critical and seek to offer theses why national courts are right and international courts are wrong, or vice versa.[89] We are less concerned. We actually regard this tension as useful for emphasizing the primacy of human rights and for bolstering freedom. The next section rejects the two conflicting assumptions of hierarchy and defends the parity paradigm.

B. The Case for Discordant Parity

This section argues that both international and state courts have it right *and* wrong. In analyzing this tension, it may be useful to point out that in practical terms, it was this inherent tension between the two normative sources of law which proved an effective ratcheting-up mechanism for promoting individual liberties. The state courts in Europe that insisted on the primacy of their state constitutions prompted a debate in the international sphere that led to a considerable improvement in the level of protection of individual rights; at the same time, criticisms voiced by international courts and other organs have led to reforms in state protection of individuals.[90]

MKT. L. REV. 1169 (2005) (Quoting Declaración T.C. [Constitutional Court], Dec. 13, 2004 (Spain)).

[86] *See, e.g.*, Case 11/70, *Internationale Handelsgesellschaft mbh v. Einfuhr*, 1970 E.C.R. 1125; Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585. For a general account of the European courts and their attitudes towards fundamental rights, see Lorenzo Zucca, Monism and Fundamental Rights in *Philosophical Foundations of European Union Law* chap. 13 (eds. Julie Dickson & Pavlos Elefheriadis, 2012).

[87] *See, e.g.*, Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L. J. 1203 (2011). For examples see "Mapiripán Massacre" v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 243 (Sep. 15, 2005); Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 79 (Feb. 24, 2012).

[88] Prosecutor v Tadic (Jurisdiction), Appeals Chamber, 2 October 1995, (1997) at para. 42 (available at http://www.icty.org/x/cases/tadic/tdec/en/100895.htm)

[89] For the thesis that international courts are right see recently ANDRE NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW (2011). For the opposite view see ERIC POSNER AND JACK GOLDSMITH, THE LIMITS OF INTERNATIONAL LAW (2005).

[90] Eyal Benvenisti & George Downs, *Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance*, 46 NYU J. INT'L L & POL. 741 (2014). See also Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 74-75 (2003).

The discordant parity paradigm rejects both internationalism (advocated by international tribunals) and constitutionalism (advocated by state courts). Under the discordant parity paradigm, a system that seeks to respect and ensure human rights must not be based on a rigid hierarchy but instead on two distinct foundations, one derived from a global concern for individual rights aimed at conveying publicly the mandatory non-discretionary force of human rights and the other derived from the concern of the political community of which one is a member to participate in determining the scope of rights and their weight.

Some theorists have defended a parity paradigm which is based on harmonious interdependence between international and constitutional law.[91] Although we share the insight about the complementary rather than hierarchical relationship between the global and the national systems, we do not see the relationship between international and constitutional law as based on harmonious interdependence. Instead we are disposed to recommend discordant parity under which international and state norms and courts constantly compete with each other and assert their superiority over each other. Discordant parity gives expression both to the demand to publicly convey the fact that human rights are mandatory rather than discretionary, namely that the state has a duty to protect them and to the wish to facilitate the effective exercise of rights. The co-existence of the two layers is justified not (only or primarily) by its instrumental contribution to the protection of rights but also by the fact that the protection of rights is neither at the mercy of national constitutional courts nor detached or alienated from the local communities. Like Escher's drawing, the two systems can be side by side, each controlling the other.

The discordant parity paradigm developed here highlights the fact that delineating the scope of human rights is a deliberative enterprise based on competing ideals. Because of the parity, each norm-interpreter, be it either an international law or a domestic law interpreter, must give due account to the interpretation adopted by its national and international peers. The conflict between international and state norms respects human agency and therefore need not be resolved but in fact celebrated and even intensified. But at the same time, because interpreters must accept the relevancy and pertinence of the equivalent norms of the parallel and complementary body of law, they must consult the parallel sources with the view to accommodate them unless serious considerations suggest otherwise.

Discordant parity should provide a guide for constitutional framers and for international lawyers. It suggests for example that it is wrong to strive for global

[91] For example Mattias Kumm argued: "The relationship between domestic and international law is neither one of derivation nor of autonomy, but of mutual dependence. National and international law are mutually co-constitutive. The constitutional legitimacy of national law depends, in part, on being adequately integrated into an appropriately structured international legal system. And the legitimacy of the international legal system depends, in part, on states having an adequate constitutional structure. The standards of constitutional legitimacy are to be derived from an integrative conception of public law that spans the national-international divide." See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law,* 20 IND. J. GLOBAL LEGAL STUD. 605, 612 (2013).

constitutionalism or a global rule of law based on hierarchy, or endorse a constitutional provision (as the Netherlands has done) under which every requirement of international law becomes automatically part of the law of the state. It is also wrong to assume that state institutions can operate at the same time also as agents of the international system – what George Scelle termed in the 1930s "*dedoublement fonctionnel*" (dual functionality).[92] Instead, to guarantee discordant parity, the state ought to seek to accommodate – but not to defer to -- the international order. Every state must assert its convictions and express its judgments even when they conflict with international law. Similarly, international tribunals ought also to maintain a degree of independence from the national courts.

This analysis sheds new light on various doctrines of international law, reflected in the jurisprudence of international courts that seek to regulate the interface between the domestic and the international by encouraging accommodation but not deference. In addition to the doctrine of subsidiarity discussed above,[93] another well-settled doctrine of European law is the doctrine of "margin of appreciation" developed by the European Court for Human Rights to mediate between the demands of the European Convention on Human Rights and the domestic norms of the member states. According to the Court, "the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."[94]

The Court acknowledged that in the sphere of education it "must … take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development." But at the same time it rejected simple deference, when it "emphasise[d] that the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols."[95] Similarly, with respect to France's ban on the burqa and niqab, the ECtHR stated that "It is also important to emphasize the fundamentally subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."[96]

In the same vein, the principle of complementarity stipulates that states should be granted preference in addressing even the most horrendous human rights violations that amount to crimes against humanity, and that foreign courts and the International Criminal Court would intervene only when the state demonstrated its unwillingness or inability genuinely to prosecute the

[92] *See* SCELLE supra note 12.
[93] *Supra* note 71-74 and accompanying text.
[94] Lautsi v. Italy, App. No. 30814/06, 2011 Eur. Ct. H.R..
[95] *Id.* at para. 68.
[96] *S.A.S. v. France* App. No. 43835/11, 2014 Eur. Ct. H.R..

perpetrators.[97] Finally, the Appellate Body, which is the judicial organ of the WTO stated that its analysis of the legality of import restriction measures that invoke the necessity to protect "public morals" must be exercised carefully, taking into account the fact that "the content of public morals can be characterized by a degree of variation, and that, for this reason, Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values."[98]

Our analysis implies that the efforts to critique such doctrines as inherently unclear and imprecise fail, and, in fact, the efforts to clarify, specify and disambiguate those doctrines are inherently misguided. Clarity is the enemy of discordant parity. The pursuit of "hierarchy," "harmony" and "order" between the international and the constitutional is fundamentally at odds with the idea that individual freedom is founded on friction and discordance.

As Christopher McCrudden argued in a different context the inherent conflicts characterizing human rights law are positive and even necessary for sustaining of human rights discourse.[99] What we add to this insightful description is that McCrudden under-estimated the scope of the conflicts. They consist not only in a conflict over what human rights are but also who the author of those rights is and consequently which institutions – international or constitutional – have authority to define their scope and determine their weight. The conflict between international and state norms need not be resolved; in fact it needs to be maintained and even intensified. This conflict is a permanent and desirable feature of the legal world. Ironically it is the resolution of the conflict which may undermine the legitimacy of the constitutional and international order.[100]

V. *CONCLUSION*

[97] *See* The Rome Statute of the International Criminal Court, Article 17; F. Gioia, *State Sovereignty, Jurisdiction, and "Modern" International Law: The Principle of Complementarity in the International Criminal Court*, 19 LEIDEN JOURNAL OF INTERNATIONAL LAW 1095 (2006), Carsten Stahn, *Complementarity, Amnesties and Alternate Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. Int'l Crim. Justice 695 (2005).

[98] Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) (*adopted* June 18, 2014).

[99] McCrudden argues: "Under my preferred approach, the lack of resolution of the contradiction in judicial adjudication of human rights disputes is not to be regarded as a failure, but rather as essential to the system. The practice of human rights adjudication, human rights law, and human rights courts becomes the site of a provisional (and politically) temporary accommodation that helps us to live together, despite the basic conflicts that are brought to court, we agree to abide by the decisions of a decision-maker, whom we agree, for the moment at least, is broadly legitimate and competent." *See* (paper on file with authors).

[100] There are reasons which we do not discuss here to believe that discordant parity has also positive instrumental consequences. It has been observed that the very tension that exists between state law and international law empowers state and international courts, respectively, to resist each other's rulings. The potential conflict between state courts and international courts requires them to accommodate each other's normative constraints, but it can also yield stable inter-judicial cooperation in protecting individual rights against intrusion by national and international regulatory bodies. *See* EYAL BENVENISTI, THE LAW ON GLOBAL GOVERNANCE (2004).

Discordant parity is founded on the conviction that the role of law in forming the social context within which states honor rights is a tricky one. Somehow the law must contribute to the creation of challenging demands from the state, while leaving also sufficient leeway so that states are free to become responsible for determining the content of rights. A hands-off approach by the law to questions of rights would abdicate any global responsibility for norms of justice; yet a tight, comprehensive supervision would remove from states the discretion to act and consequently undermine the willingness and the readiness to exercise rights.

Internationalism is the institutional embodiment of the vision that states are bound by rights. The protection of rights is obligatory rather than discretionary and their mandatory force needs to be publicly acknowledged. The state need not only protect rights; it also needs to do it in a way that underscores the fact that it is obliged to do so. Internationalism provides the institutional tool to enable the state to do so. On the other hand constitutionalism is also essential as the value of rights hinges on the exercise of rights and to facilitate and reinforce the exercise of rights, it is necessary that the polity participates actively in dictating what these rights are. If citizens are alienated from the process of determining what the rights are and what their weight is, they are less likely to actively exercise the rights. The solution – discordant parity -- challenges the tradition that is based on a strict hierarchy between international law and state law. Such parity implies constant tensions and conflicts between the international norms and state norms. This conflict is a permanent and desirable feature of the legal world. Ironically it is the urge to resolve this conflict – the urge to realize orderly harmony may undermine the legitimacy of the constitutional and international order.