

# The new sovereigntism and transnational law: Legal utopianism, democratic scepticism and statist realism

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**Abstract:** This article examines the contemporary debate about the spread of transnational law and its sovereigntist critiques. Sovereigntists argue that the rapid development of international and transnational treaties and the emergence of regional human rights courts such as the European Court of Human Rights (ECtHR) undermine sovereignty and thus pose a threat to democratic self-determination. I criticise the new sovereigntism and argue that transnational human rights strengthen rather than weaken democratic sovereignty, and name processes through which rights-norms are contextualised in polities ‘democratic iterations’. I develop the ‘authorship model of democratic legitimacy’ in order to show how constitutional rights and international human rights can be understood to be in harmony and dissonance with one another. The challenge is to think beyond the binarisms of the cosmopolitan versus the civic republican; democratic versus the international and transnational; democratic sovereignty versus human rights law. Distinguishing between state sovereignty and popular sovereignty enables us to do so. By constraining certain sovereign powers of the state, international human rights regimes and courts can enhance popular sovereignty in that they strengthen the rights of the marginalised and the excluded. The article also briefly touches upon the significance of the Alien Tort Statute in US courts from the standpoint of the development of international human rights norms and focuses on *Hirst v the United Kingdom*, recently adjudicated by the ECtHR, to substantiate the distinction between state and popular sovereignty.

**Keywords:** *Hirst v UK*; human rights conventions; sovereigntism; the Alien Tort Statute; transnational law

## I. The reach of transnational law<sup>1</sup> and contemporary courts

The matter of the citation of foreign law, of the law of other nations, international and transnational law and treaties, as well as the extraterritorial

<sup>1</sup> ‘Transnational law’ is used throughout in the sense described by Harold Koh as international law that moves through public and private institutions and engages not only states but non-governmental organisations as well as commercial corporations and civil

reach of US law, have all recently become subjects of political *scandalon*. Such questions provide a litmus test in the appointment of US Supreme Court Justices who are asked whether or not they will interpret the US Constitution in the light of ‘foreign doctrine or influence’ (cf Waldron 2005 and 2012). Unexpectedly, the Alien Tort Statute, an obscure statute dating back to the Judiciary Act of 1789<sup>2</sup> ‘has served as the starting point for many of these debates concerning the role of international and transnational law in US Courts’ (Childress III 2012: 712).

On 17 April 2013 the US Supreme Court issued its much-awaited decision regarding *Kiobel v Royal Dutch Petroleum* (569 U.S. \_\_\_, (slip op.), 133 S. Ct. 1659 (2013)), one of the most recent cases litigated under the Alien Tort Statute. The Nigerian plaintiffs had sued three oil companies (Dutch, British and Nigerian) along with the military dictatorship in Nigeria for monetary damages for actions undertaken to silence protesters militating against environmental damage caused by the companies. It is reported that scores were killed, and the plaintiffs themselves claimed to have been captured and beaten. Writing for the majority, Chief Justice Roberts Jr. argued: ‘The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach – such violations affecting aliens can occur whether within or outside the United States’ (569 U.S. \_\_\_ (2013), slip op. at 7). He concluded: ‘even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application’ (ibid: 14). Invoking a Westphalian understanding of territorial sovereignty and sovereign immunity, Justice Roberts and the majority in the Court made it much more difficult for US courts to litigate in the name of transnational human rights.

For some, this sovereigntism of the US Supreme Court is nothing new. They have called it ‘American exceptionalism’, mutating into ‘American exemptionalism’ (Ignatieff 2003: 12ff). Yet the current US Supreme Court’s militant understanding of sovereigntism as ‘commitment to territoriality, national politics ... and resistance to comity or international law’ (Koh 2005: 52) is not an isolated phenomenon and can be observed in other countries as well. It is more appropriate to see this new sovereigntism not as an expression of American exceptionalism but rather as part of

society associations. The term ‘international’ always carries statist connotations, but clearly much transnational law is also ‘international’, that is ‘inter-statal’. See Koh 1996 and Koh 1991.

<sup>2</sup> The Alien Tort Statute states that ‘[the] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’. Judiciary Act of 1789, ch. 20, section 9(b), 1 Stat 73, 77 (1789); currently 28 U.S.C. section 1350 (2006) with some revisions to the original language.

a growing resistance to the force of transnational law in the contemporary world. In the European context, this is manifesting itself as resistance to the decisions of the European Court of Human Rights, most notably in the prisoner disenfranchisement case – the *Hirst* decision (*Hirst v The United Kingdom (No 2)* [GC] (no 74025/01) [2005] ECtHR 681; cf Ziegler 2015). *The Guardian* newspaper reported that Michael Gove, the new British justice secretary, had plans ‘which would see the human rights act replaced by a British bill of rights’, and that the European Court of Human Rights would be “no longer binding over the UK’s supreme court” (quoted by Watt 2015). The government would “order a change to UK law”, although British citizens would still be entitled to appeal to the Strasbourg-based court’ (quoted by Watt 2015).<sup>3</sup>

Along with this growing resistance on the part of legislators and judges to the role of transnational courts, a group of scholars, intellectuals and policymakers ‘who view the emerging international legal order and system of global governance with consternation’, have now coalesced as the ‘new sovereigntists’ (Goodhart and Taninchev 2011: 1047). And here strange bedfellows have emerged. Joining Chief Justice Roberts in his Westphalian understanding of sovereignty as territorially circumscribed supreme jurisdictional authority are a group of eminent political theorists ranging from communitarians to liberals to progressive left thinkers. They wish to defend the value of democratic self-determination and claim that recent developments in international law are ideals of cosmopolitan elites with little traction in the life of peoples (Walzer 1983: 51ff; 2004: 171–91; Moyn 2010: 212); that international law amounts to no more than the consensually undertaken contractual commitments among sovereign states which remain the central units of jurisdiction and enforcement (Nagel 2005a: 138 and Nagel 2005b); or that the principle of self-determination expresses an important value and that some form of ‘constitutional or legal pluralism’ and a ‘dualistic sovereignty regime’ may be the desirable middle ground between global cosmopolitanism and national sovereigntism (Cohen 2012: 317–19; 322).

This controversy concerns, at its deepest level, the meaning of democratic sovereignty in a new age and under conditions of a nascent

<sup>3</sup> The question has been raised whether resistance to international and transnational law is more a feature of common law countries such as the United Kingdom and the United States than continental legal traditions which permit easier integration of domestic and transnational law. My sense is that at stake in this debate are less variations in legal culture and reasoning but more political anxieties about the meaning of popular sovereignty and resistance to loss of national autonomy. If my hypothesis is correct, we should expect similar sovereigntist trends to develop in Hungary which is an EU member as well as in Australia, which is not. I thank the anonymous reviewer of this journal for raising this objection.

legal cosmopolitanism (for similar concerns cf Sandel 1996: 399; Skinner 2010: 42–3). Against such sovereigntist anxieties, this article will maintain that transnational human rights and constitutional rights do not stand in contradiction to one another – even in the case of significant divergences – but rather should be seen as engaged in a *reflexive and iterative hermeneutic*. Popular sovereignty and transnational law are not antagonistic; rather, the latter can enhance the former.<sup>4</sup>

Part II of this article describes the new cosmopolitan legal order. (II) Many democratic sovereigntists fail to consider a question posed long ago by Harold Koh: ‘why do nations obey international law’ more or less most of the time (Koh 1997: 2599–659)? Why do so many states sign up to these transnational treaties even if they intend to disobey them some of the time? It is then argued that transnational human rights norms strengthen rather than weaken democratic sovereignty. (III) Even though there will be inevitable conflicts and tensions between international human rights treaties as well as their application and observance in domestic contexts, we need to develop a conceptual and empirical model for understanding these tensions not as a zero-sum game but rather as a process of dialectical norm enhancement and interpretation. This model will be called ‘the authorship model of democratic legitimacy’. (III) We also need to take into account the interpretation and evocation of these norms through democratic legislatures as well as non-governmental actors and social movements as they lead to further norm articulation and interpretation.

On the basis of the distinction between ‘principles’ and ‘norms’ of human rights, it is then claimed that self-government in a free public sphere and free civil society is essential to the concretisation and iteration of the necessarily abstract norms of human rights. (III) Furthermore, without the right to self-government, the range of variation in the content of basic

<sup>4</sup> In an earlier survey of this controversy, Buchanan and Powell distinguished among several issues (Buchanan and Powell 2008: 326–49): i. the incompatibility *in principle* between RIL (robust international law) and constitutional democracies (ibid: 327). With Richard Bellamy, who also draws on this survey article, let us name this the *exclusive democratic control* objection (Bellamy 2014: 1020) ii. the *global democratic deficit* objection; (Buchanan and Powell 2008: 327; Bellamy 2014: 1020) iii. the ‘*constitutional derangement*’ (Buchanan and Powell 2008: 341ff) or ‘*constitutional transfer*’ (Bellamy 2014: 1020) objection, namely the privileging of executives who use treaty interpretation to enhance their powers over the legislative; iv. the ‘*cherry picking*’ (Buchanan and Powell 2008: 327) or the unprincipled increase of the ‘discretionary power of the judiciary’ (Bellamy 2014: 1020) objection; v. finally, the undermining of democratic self-determination objection via the ‘transfer of power from constitutional democracies to global governance institutions without appropriate democratic authorization’ (Buchanan and Powell 2008: 327). In this article I will be concerned with ‘the loss of exclusive democratic control’ and ‘loss of democratic self-determination’ objections primarily. The matters of judicial ‘cherry picking’ and ‘increase of judicial discretion’ will not be at the centre of my discussion.

human rights across constitutional democracies cannot be justified as legitimate. I have called such processes ‘democratic iterations’. (IV)

Three objections to the model of democratic authorship are then considered: the post-Westphalian dispensation (V); ethno-centric arrogance (VI) and displacement of judicial process (VII).

In conclusion, it is argued that transnational human rights law pries open the black box of state sovereignty thus enhancing the demands of popular sovereignty. Much anxiety on the part of political theorists concerning the loss of democratic control and self-determination comes from a confusion of popular with state sovereignty. (VIII) This argument is developed with reference to the widely discussed ‘prisoner disenfranchisement case’ (*Hirst v the United Kingdom (No 2)*).

## II. The world of legal cosmopolitanism: An institutional perspective

It is now widely accepted that since the Universal Declaration of Human Rights in 1948, we have entered a phase in the evolution of global civil society which is characterised by the rise of *cosmopolitan* norms of justice. While norms of international law emerge through what is recognised as customary international law, through treaty obligations to which states and their representatives are signatories, and through transnational law and quasi-constitutional international regimes (cf Isiksel 2013:163 and Perez 2003: 25), cosmopolitan norms accrue to individuals considered as moral and legal persons in a worldwide civil society. By ‘cosmopolitanism’ is meant both a moral and a legal proposition: morally, cosmopolitans view each individual as equally entitled to moral respect and concern; legally, cosmopolitanism considers each individual as a legal person entitled to the protection of basic human rights in virtue of their moral personality and not on account of their citizenship or other membership status. Even if cosmopolitan norms also originate through treaty-like obligations, such as the UN Charter, the UDHR and other human rights covenants, their peculiarity is that they bind signatory states and their representatives to treat their citizens and residents in accordance with certain norms, even when states later wish, as is often the case, to engage in actions which contradict these terms and violate the obligations generated by these treaties. This is the uniqueness of the many human rights covenants concluded since WWII: sovereign states through them undertake the self-limitation of their own prerogatives, thus initiating a new regime of sovereignty. Sovereignty can no longer be understood as the supreme power of a single political authority over all that is living and dead on its territory. In the new sovereignty regime emerging since 1948, states are sovereign to the degree to which they can fulfil certain human rights obligations toward

their populations. States are also bound by customary international law norms of *jus cogens*, prohibiting genocide, slavery, ethnic cleansing, mass atrocities and other crimes against humanity, even if legitimate concerns about the reach and interpretation of these norms remain (Grimm 2015: 85–92).

The best-known human rights agreements which have been signed by a majority of the world's states since the 1948 Universal Declaration on Human Rights (UDHR) are as follows: the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (adopted by Resolution 260(III)A of the UN General Assembly 9th December 1948; with 146 state parties as of 2015); the 1951 Convention on the Status of Refugees (which entered into force in 1954; with only 19 state signatories and 145 state parties) and its Protocol of 1967 (with 146 state parties); the International Covenant on Civil and Political Rights (ICCPR; signed in 1966 and entered into force in 1976, with 168 state parties as of 2015); the International Covenant on Economic, Social and Cultural Rights (ICESCR; entered into force the same year with 164 state parties as of 2015); the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW; signed in 1979 and entered into force in 1981, with 99 signatories and 189 state parties as of 2015); the International Convention on the Elimination of All Forms of Racial Discrimination (entered into force 4th January 1969, with 87 signatories and 177 parties as of 2015); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26th June 1987, with 81 signatories and 158 state parties as of 2015). (Cf for a comprehensive list United Nations Treaty Collection 2015.)

These treaties are supplemented by a growing number of regional human rights regimes. The most developed among them is the European Convention on Human Rights, administered by the Council of Europe, now comprising 47 states and under the jurisdiction of the European Court of Human Rights. As Dieter Grimm explains, the European Convention of Human Rights departs from traditional conceptions of sovereignty in that it 'grants member states the rights to take another country's human rights violations before the court (article 33) ... Second, it ... also allows individuals to bring proceedings against member states for violations of the rights protected in the convention (article 34)' (Grimm 2015: 88). Together with the European Court of Justice, which exercises jurisdiction over the 28 members of the European Union, these new institutions have created an unprecedented regime of cosmopolitan human rights protection (Stone Sweet 2012: 53–90).

The American Convention on Human Rights was adopted by the members of the Organization of American States at San José, Costa Rica

in 1969 and entered into force in 1978. The OAS General Assembly, in 1979, approved the Statute of the Court (Resolution 448) which defines it as ‘an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights’ (see United Nations Department of Economic and Social Affairs 2003–04).

The African Charter on Human and Peoples’ Rights, adopted in 1981 and entered into force in 1986, provides for the establishment of an African Commission on Human Rights within the Organization of African Unity. The mandate of the Commission is to promote Human and Peoples’ Rights.

The Cairo Declaration on Human Rights, adopted by the Islamic Conference in Cairo in 1990 on the one hand accepts the significance of human rights but on the other hand, by claiming Islamic Sharia law as its sole source, justifies extensive derogations from transnational human rights in matters of religion, gender equality, sexuality and political rights. (Cf VII below.)

Of course, treaty ratification is not treaty compliance.<sup>5</sup> At the institutional level, even nations that accede to these transnational treaties are permitted RUDs – restrictions, understandings and derogations – that enable them to depart from compliance with certain treaty articles either temporarily or permanently. These RUDs provide states with certain ‘safety valves’, but they also permit us to see the dynamic interactive process that occurs between states and treaty-monitoring bodies.

Judith Resnik suggests that RUDs themselves can be viewed in analogy to doctrines such as ‘margin of appreciation’ or types of legal pluralism permitted by a variety of federalist arrangements. With respect to CEDAW (one of the most highly subscribed to treaties by states), Resnik argues that, ‘What is intriguing about CEDAW is the decision by many inegalitarian political orders to state – albeit with RUDs – that their versions of legal structures fit within a women’s rights template. Moreover, RUDs are not necessarily static; they can provide a means of beginning conversations about treaty obligations’ (Resnik 2011: 544). Resnik cites how Bangladesh in 1997 withdrew reservations to CEDAW which were earlier based on the conflict between Sharia law and the Convention; Jordan withdrew a similar objection to a woman’s right to independent residence and domicile

<sup>5</sup> There is significant dispute about the extent to which ratification affects state behaviour. See Hathaway 2002: 1935–2042; but cf Simmons 2009a and Simmons 2009b arguing that treaty ratification *does* make a positive difference. For social science literature on this topic, see Kick and Sikkink 1998; Risse, Rapp, and Sikkink 1999. The crucial question is whether we conceive the state as a unitary actor or as an institution in which multiple actors with different interests and perspectives use transnational law for their own goals. Cf the anthropological perspective of Sally Engle Merry (2006b: 109–11), on the struggle for indigenous peoples’ rights who use international, local and tribal law in fighting for their cultural self-determination as well as control of land and other resources.

other than that of her husband in 2009. Sex-based differences in the military had led countries such as Australia, Austria, Germany, New Zealand, Switzerland and Thailand to place reservations on CEDAW, many of which have since then withdrawn their caveats (Resnik 2011: 546). This back-and-forth between states and treaty monitoring bodies can be viewed along an epistemologically dynamic model of norm interpretation and enhancement.

This brief institutional consideration of major transnational human rights treaties suggests a puzzle, which those who claim that these instruments and institutions are the brainchild of cosmopolitan elites alone, cannot resolve: why do states accept to be signatories to these treaties? Are they forced to do so? If so, by whom? Or is it rather that the world society of states in the aftermath of WWII and the establishment of the United Nations is governed by its own norms and logic, and that most states, most of the time, accept international and transnational legal norms in order to continue to be a member in 'good standing' of this society? Surely, states' self-interests play a paramount role here. Whatever explanations can be given for state behaviour, and without recapitulating the tired debate between political realists vs liberal state theorists (cf Scheuerman 2009 and 2011), it is clear that the charge that transnational human rights law is imposed by cosmopolitan elites on recalcitrant states cannot stand (cf Perez 2003: 29). Maybe what these critics are saying is that the treaty ratification processes, even if voluntarily undertaken by states themselves, set in motion a 'mission creep' that transforms the voluntary compliance of states into something else. That there may be a thin line between 'interpretation' and 'amendment' of treaty articles is a hermeneutic difficulty affecting all legal contracts and agreements and not just human rights treaties.

As many historical analyses of the origins of the UDHR show, most of its articles were based upon a critical borrowing from some of the constitutions of the world's most advanced democracies (Glendon 2002; Morsink 1999). In this context Stephen Gardbaum has observed that, 'Taken as a whole, and with the most notable exceptions of certain parts of the ICESCR, the rights contained in the three general human rights instruments are broadly similar in substance to rights contained in most modern constitutions. Both typically include such civil and political rights as the right to liberty and security of the person; rights against torture, cruel and inhumane punishment, and slavery; the right to vote; rights to freedom of expression and religious practice; and rights to be free from state discrimination on the basis of race, ethnicity, national origin, and gender. Many domestic bills of rights also include some of the core social and economic rights contained in the ICESCR, such as the



rights to education, healthcare, choice of work, and basic standard of living' (Gardbaum 2008: 750–1).<sup>6</sup>

Undoubtedly, this new regime of transnational human rights and sovereignty has led to many quagmires as well. While sceptical doubts about state behaviour in a system that remains beset by violence, civil wars and proxy wars cannot be set aside, something has changed profoundly in the grammar and syntax of the language of international law, sovereignty and human rights, and it is wrong to give up these advances in the organisation of world institutions. (See Teitel: 2011.) Surely, the language of human rights protection may be invoked as a fig leaf to justify actions without international legitimacy, as was the case with the intervention in Iraq or with the subsequent misuse of the power of the UN Security Council to institute a regime of the 'global war against terror'.<sup>7</sup> Without denying the slippery slope between the defence of transnational human rights and international humanitarian law on the one hand and humanitarian interventions on the other, we should first get a clearer picture of institutional and conceptual developments initiated by this human rights regime, so as to distinguish the use and abuse of transnational human rights law from its legitimate claims.

### III. Human rights and constitutional rights

Having outlined historical and institutional developments of the transnational human rights treaties, I now turn to a conceptual account for negotiating the relationship between general human rights norms, and their concretisation in the multiple constitutional and statutory documents of different countries in the light of a dynamic, hermeneutical model of norm interpretation and norm enhancement. Gerald Neumann has aptly named this relationship as one of 'harmony and dissonance' (2003).

Two quite distinct ways of considering human rights and their justification have gained foothold in recent debates: the so-called 'traditional' or 'humanistic' conception of Gewirth (1982; 1996) and Griffin (2009), to be

<sup>6</sup> The Convention on the Rights of Persons with Disabilities was adopted by the UN General Assembly in 2006 and came into force in May 2008 (United States International Council on Disabilities 2015). It has 159 state signatories. In December 2012, the US Senate ratification process which requires a two-thirds majority fell short by 6 votes. It was widely acknowledged that this treaty, which failed to pass the US Senate, was based on the US document of The Persons with Disabilities Act! (United States Department of Justice, Civil Rights Division, Disability Rights Section 2012)

<sup>7</sup> For widespread disillusionment with transnational human rights, see Hopgood 2013; Douzinas 2007; Cheah 2006; and Moyn 2010. For a philosophical defence of human rights and a sorting out of some of the political confusions involved, see Lafont 2011 and 2015.

distinguished from the ‘political’ or ‘functional’ conception defended by Raz (2010) and Beitz (2009). Whereas traditional theories build human rights around a conception of human agency, the approach to human rights inspired by John Rawls’s project of developing ‘public reason’, assumes that the late-modern political world is characterised by inevitable value pluralism and by burdens of judgment and thus need not presuppose any such controversial philosophical accounts (Rawls 1999; cf also Gilibert 2011: 439–67).

Admittedly, the philosophical discussion of human rights and the conversation among jurists and legal scholars on rights issues do not run in tandem, but the philosophical debate raises legitimate questions about the relationship of human rights norms to constitutional rights. This article will not provide a philosophical justification for human rights.<sup>8</sup> Briefly, human rights constitute a narrower group of claims than general moral rights; human rights bear on human dignity and equality; they are protective of the *human status* as such. Human rights have their proper place in discourses of political legitimation. Such discourses presuppose moral principles, in the sense that the justification of human rights always leads back to some moral principle such as human dignity, and some view of the value of human autonomy, personhood or communicative freedom. Human rights are most central to a public vocabulary of political justice and political morality; they designate a special and narrow class of moral rights.

Human rights covenants and declarations articulate general principles which need contextualisation and specification in the form of legal norms. How is this legal content shaped? Basic human rights are rights that require justiciable form, i.e. rights that require embodiment and instantiation in a specific legal framework (Gardbaum 2008: 750–1). For this purpose, let us first invoke the distinction between a *concept* and a *conception*.<sup>9</sup> In *Political Liberalism*, Rawls explains this distinction as follows: ‘Roughly, the *concept* is the meaning of a term, while a particular *conception* includes as well the principles required to apply it. ... [A] *conception* includes ... principles and criteria for deciding which distinctions are arbitrary and when a balance between competing claims is proper’ (Rawls 1993: 14–15, my emphasis). I will not follow Rawls in identifying concept with meaning, but the elucidation of how conceptions differ from concepts is helpful.

The terms ‘principles’ and ‘norms,’ introduced by Robert Alexy, are more illuminating in this context. Alexy writes: ‘the decisive point in distinguishing rules from principles is that principles are norms which require that

<sup>8</sup> For an account that proceeds from the value and norm of communicative freedom to a conception of ‘the right to have rights’, see Benhabib 2011b: 57–77 and Benhabib 2013b: 38ff.

<sup>9</sup> In *A Theory of Justice*, Rawls refers to H. L. A. Hart’s discussion in *The Concept of Law* to introduce this distinction (Rawls 1971: 5); cf Hart: [1961] 1975: 155–9).

something be realized to the greatest extent possible given their legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees. ... [B]y contrast rules are norms that are always either fulfilled or not' (Alexy 2002: 47–8). The binarism of concept/conception can now be read as one of principle/norm. A concept of human rights is a *principle of human rights* that permits 'realization to the greatest extent possible', whereas *conceptions of human rights* require specific legal norms for their concretisation, and are subject to varying rules of application and interpretation (cf Kumm 2004: 574–96).

What then is the relationship between general *principles* of human rights, as enshrined in transnational covenants, and specific *conceptions* of them as enacted in various constitutional documents and national Bills of Rights? We can view the transnational documents as formulating core *concepts* of human rights which ought to form an aspect of any *conception* of valid constitutional rights. In other words, human rights principles permit a variety of instantiations as concrete constitutional norms. How then is the *legitimate range* of rights to be determined across liberal democracies, or how can we transition from general *concepts* of rights to specific *conceptions* of them? Even as fundamental a principle as 'the moral equality of persons' assumes a justiciable meaning as a human right once it is posited and interpreted by a lawgiver and adjudicated by courts. For example, while equality before the law is a fundamental principle for all societies observing the rule of law, in many societies such as Canada, Israel and India, this is considered quite compatible with special immunities and entitlements which accrue to individuals in virtue of their belonging to different cultural, linguistic and religious groups. For societies such as the United States and France, with their more universalistic understandings of citizenship, these multicultural arrangements of citizenship would be completely unacceptable (Benhabib 2002: 154–68). At the same time, in France and Germany, the norm of gender equality has led political parties to adopt various versions of the principle of 'parité' – namely that women ought to hold public offices on a fifty-fifty basis with men, and that for electoral office, their names ought to be placed on party tickets on an equal footing with male candidates. By contrast, within the United States, gender equality is protected by Titles VII and IX which apply only to major public institutions such as educational institutions, hospitals, etc which receive federal funding.<sup>10</sup> Political parties are excluded from this.

<sup>10</sup> Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) which prohibits employment discrimination based on race, colour, religion, sex and national origin (amended by the *Lily Ledbetter Fair Pay Act of 2009*) at <<http://www.eeoc.gov/laws/statutes/titlevii.cfm>>, accessed 27 July 2014; Title IX, Education Amendments of 1972, 20 U.S.C. sections 1681–1688 (1972) at <<http://www.dol.gov/oasam/regs/statutes/titleix.htm>>, accessed 27 July 2014.

Since even basic constitutional norms such as respect for the dignity and equality of the person need to be promulgated in accordance with a specific jurisdiction and in a specific time and place, they differ from moral norms which are valid for human beings at all times and places (Habermas 1996: 107). Moral principles, such as respect for human dignity and equality, do not *dictate* a specific constitutional content, but *constrain* the range of possible variations that would be compatible with the principles of respect for persons, their equality and dignity. This interplay is indeed one of ‘harmony’ and ‘dissonance’ between sovereign legislatures, national constitutional courts, and international and transnational human rights courts.

There is, in other words, a *legitimate range of variation* even in the interpretation and implementation of such a basic right as that of ‘equality before the law’. In a liberal-democratic polity, the legitimacy of this range of variation and interpretation is in the first place dependent upon the principle of self-government. The thesis is that without *the right to self-government*, which is exercised through proper legal and political channels, we cannot justify the range of variation in the content of basic constitutional and statutory rights as being legally legitimate. Unless a people can exercise self-government through some form of democratic channels, the translation of human rights norms into justiciable legal claims in a polity cannot be actualised. So, *the right to self-government is the condition for the possibility of the realisation of a democratic schedule of rights*. Just as without the actualisation of human rights themselves, self-government cannot be meaningfully exercised, so too, without the right to self-government, human rights cannot be contextualised as justiciable entitlements. They are coeval.

Known as the ‘equiprimordiality’, the *Gleichursprünglichkeit* thesis (Habermas 1996: 84–104), this position goes beyond the liberal vs civic republican opposition in conceptualising human rights. *Liberals* justifiably view human rights as placing limits on the publicly legitimate exercise of power. However, since Locke the liberal tradition tends to see rights as having some definable content that precedes the political or legal struggles of the *demos*. Human rights are said to be ‘trumps’ (Dworkin 1977) that stand either outside the political process thus constraining it, or they are said to depend for their interpretation upon institutions such as Constitutional Courts and the practice of judicial review that embody impartiality and neutrality and can thus constrain the will of legislatures (Dworkin 1977: 131–49).

In the *civic-republican* vision rights are constituents of a people’s exercise of public autonomy and are defined with the goal of ensuring the public exercise of liberty and securing non-domination, i.e. preventing the arbitrary rule of one over another (Pettit 1997; Pettit 2006). Constitutional

courts and judicial review are met with suspicion and parliamentary sovereignty is considered the prime expression of people's will (Bellamy 2014: 1021).

Both positions miss the essential dialectic between human and constitutional rights and the exercise of popular sovereignty. Without the basic rights of the person guaranteeing private autonomy and non-domination, republican sovereignty would be blind; and without the exercise of collective autonomy, rights of the person would be empty and reside in an illusory pre-political space.<sup>11</sup> Even the most fundamental human rights such as equality in the eyes of the law, security of life, liberty and the person are caught in the dialectical interplay between the law and the political exercise of self-government.

When we argue in politics we argue about whether or not the right to privacy entails the right to request that personal information stored by online sites be erased; when we argue in the law we argue about whether escape from Female Genital Mutilation/Cutting constitutes sufficient grounds for the recognition of a right to asylum.<sup>12</sup> Argument about rights – whose rights, which rights and rights exercised by whom and how – are constitutive of the language of the political. They are recursively and iteratively embedded in democratic politics; they neither simply *precede* the exercise of self-government nor do they *depend* for their validity on the will of the demos alone. They both transcend the quotidian practice of politics and are recursively iterated in processes of 'democratic iterations'.

Historically, human rights have evolved much prior to democratic struggles as well as subsequently being reshaped by them (cf Marshall 1950; Somers 2008). The civil rights of property, contract, and some privacy rights such as freedom of marriage, as well as the right to freedom of conscience, evolved out of struggles in the sixteenth and seventeenth centuries. With the American and French Revolutions political rights over equal suffrage, freedom of association and the press, freedom of assembly and democratic voice gained prominence. Socio-economic rights, such as the right to unemployment compensation, old age and disability pensions, health care, etc are the last to have been attained through democratic and socialist struggles in the first half of the twentieth century and show the most variation across democracies. The struggles for decolonisation and national independence have accompanied the founding of the United Nations from the start and have corrected some of the ethnocentric and colonial

<sup>11</sup> The final sentence refers, of course, to Kant's famous formula that 'Thoughts without concepts are empty, intuitions without concepts are blind' (Kant [1781] 1965: 93).

<sup>12</sup> United Nations High Commissioner for Refugees (UNHCR) 2009; cf International Refugee Rights Initiative (undated) 'Female Genital Mutilation: Grounds for Seeking Asylum'.

biases of many human rights documents (cf Anghie 2004; Mazower 2008; Getachew 2015).

Why use the somewhat awkward locution of a ‘legitimate range of legal variation’ rather than ‘legality’ *simpliciter*? Because there needs to remain a ‘normative gap’ between principles of human right as enshrined in various documents, treaties and covenants and specific articulations of them – or legally legitimate conceptions of them – as norms posited by national legislators (cf Möller 2014: 373–403). This normative gap enables the struggle between the national, local and the international. It permits contestation about rights among various civil society organisations, social movements, NGOs, and INGOs. As principles, concepts of human rights cannot be *reduced* to their specific conceptions, and are usually invoked with a moral force that transcends the legally legitimate will of the demos. Just as the meaning of a term is not exhausted by its multiple instantiations, likewise the force of a principle is not exhausted by the number of norms said to concretise the principle. They enframe and are enframed by democratic iterations, but the sum total of democratic iterations does not exhaust their meaning or their normative force.

Robert Post captures this interplay between the legal and political: ‘[P]olitics and law are thus two distinct ways of managing the inevitable social facts of agreement and disagreement. As social practices, politics and law are both independent and interdependent. They are independent in the sense that they are incompatible. To submit a political controversy to legal resolution is to remove it from the political domain; to submit a legal controversy to political resolution is to undermine the law. Yet they are interdependent in the sense that law requires politics to produce the shared norms that law enforces, whereas politics requires law to stabilize and entrench the shared values the politics strives to achieve’ (Post 2010: 1343). But if ‘the boundary between law and politics is essentially contested, then judicial judgments engage but do not pre-empt politics’ (Post 2010: 1347).

#### IV. Democratic iterations

In a number of works over the last decade, I have developed the concept of ‘democratic iterations’ as a possible normative model with empirical traction to think through this contentious interaction between law and politics. By *democratic iterations* I mean complex processes of public argument, deliberation and exchange through which universalist rights claims are contested and contextualised, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society. Every iteration transforms meaning, adds to it, enriches it in ever-so-subtle ways. Every act of iteration involves making

sense of an authoritative original in a new and different context through interpretation. The antecedent thereby is repositied and resignified via subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well.

Democratic citizens, residents and potentially all those affected by the normative reach of these norms must reinterpret human rights principles such as to give them shape as constitutional rights, and, if and when necessary, *suffuse* constitutional rights with *new* content. Nor is it to be precluded that such constitutional iterations may themselves provide feedback loops in rendering more precise the intent and language of international human rights declarations and treaties.

Democratic iterations occur throughout national and transnational civil society and global public spheres in very diverse sites (Benhabib 2011d: 117–38). In constitutional democracies, the courts are the *primary* authoritative sites of norm iteration through judicial interpretation although not of their *democratic iteration* which takes place in legislative organs. Yet the evaluation of the harmony and dissonance between domestic human rights norms and transnational ones does not take place in courts and legislatures alone. Increasingly participating in such processes are NGOs and INGOs such as Amnesty International and Human Rights Watch, as well as – in the American context – the Center for Constitutional Rights, for example. They produce expert reports and mobilise public opinion around controversial norm interpretation and norm implementation (see Preston 2015: 14 on Center for Human Rights and Constitutional Law). A third site of iteration emerges through the interaction of domestic-judicial and transnational agents of norm-interpretation with the opinion-formation of ordinary citizens and residents often gathered in social movements as well as other civil society associations.

If democratic iterations are necessary in order for us to judge the legitimacy of a range of variation in the interpretation of a rights claim, how can we assess whether democratic iterations have taken place rather than demagogic processes of manipulation or authoritarian indoctrination? Don't democratic iterations themselves presuppose some standards to be properly evaluated? Furthermore, aren't democratic iterations conceding too much to, or may be even idealising, democratic processes that are inevitably messy and often ill-informed, and, more significantly, why wouldn't such iterations result in the trampling of the rights of unwanted others and minorities? Democratic iterations do not idealise populist politics because they have some formal discourse conditions built into them that would exclude the most egregious rights-violations.

*Democratic legitimacy* reaches back to principles of *normative justification*. Democratic iterations do not alter the conditions of validity of moral and political discourses of justification that are established independently of them. The ‘normative gap’ remains. As is well known, this discourse model of justification is a counterfactual one. It leads us to judge as *legitimate* or *illegitimate*, in a preliminary and formal sense, processes of opinion- and will-formation through which rights claims are contested, expanded and debated, in actual institutions of civil and political society (Habermas [1983] 1990: 43–116; Forst 2012; Benhabib 1992: 23–68). Such criteria minimally distinguish a *de facto consensus* from a *rationally motivated one*. They are *counterfactual* criteria which can lead participants to challenge the legitimacy of a decision reached and a norm that is advocated. They provide moral agents with ‘veto rights’ (Forst 2012: 6, 21, 130).

Some will note that there is some kind of circularity here: one is talking about the *right of participants* to equal say, agenda-setting, etc, and you will say, but ‘weren’t such rights supposed to result from a practical discourse in the first place?’ The answer to this objection is twofold: since Aristotle, we know that in reasoning about matters of ethics and politics, we are ‘always already situated’ in *medias res* – we never begin the conversation without some presupposition, and in this case, without some shared understanding of what equality of participation in the conversation, challenging the agenda, and the like, may mean. Discourses and democratic iterations are reflexive processes through which much of what we always already take for granted in the lifeworld is challenged, questioned, ‘bracketed’, until these presuppositions which have become problematical are re-established at the end of the conversation – a conversation which itself is always open to future contention.

This hermeneutic model of iteration is a *recursive* one, based on the same principles of non-foundationalism recently articulated by Neil Walker. There is an *empirical* and a *normative incompleteness* to the interpretation of the rules that frame the discourses themselves (cf Walker 2010: 206–33), just as there is an incompleteness to the democracy principle. Such norms need to be both presupposed and then critically challenged and rearticulated through the conversation. This *recursive model of justification*, based on repeated iterations, is familiar from many discussions in contemporary non-foundationalist epistemology as well (cf Brandom 1994: 5ff).

In the following, three objections to the authorship model and democratic iterations will be considered: the ‘post-Westphalian’ objection; the charge of ‘ethnocentric arrogance’; and ‘displacement of judicial process’.



## V. The post-Westphalian dispensation

In ‘the authorship model’, the democratic people are said to be the ‘authors’ as well as the ‘addressees’ of human rights and constitutional rights. Surely, in view of the complexity of really existing democracies this model can be understood only metaphorically. How can we do justice to the complexity of vastly decentred and fragmented modern and late-modern societies while retaining this ideal? This objection lands us in the familiar territory of discussions of ‘complexity and democracy’. Representation, delegation, institutions of administrative power that are responsible to a democratic legislature are among the minimal institutional arrangements in the light of which we need to think the practice of democratic authorship today. Bruce Ackerman’s (1991; 1998) and Frank Michelman’s (1986; 1998) reformulations of democratic legitimacy in the form of a bipartite model of constitution-making and ordinary law processes are crucial (cf Ferrara 2014: 178). Democratic authorship would thus refer to moments of *higher law-making*, while *ordinary law-making* would need to be responsive to democratic publics and civil society as well as being able to deliver at the administrative level.

Much more needs to be said about this dual-track model of democratic legitimation than I can undertake in this article but the question that is most vexing in the context of the authorship model of democratic legitimacy is the ‘post-Westphalian’ condition. This refers not only to the internal but also to the external complexity faced by modern polities, or better still, to the *erosion* of the line between the ‘interior’ and the ‘exterior’. Nancy Fraser summarises these transformations succinctly: ‘The “who” of communication, previously theorized as a Westphalian national citizenry, is often now a collection of dispersed interlocutors, who do not form a *demos*. The “what” of communication ... now stretches across vast reaches of the globe, in a transnational community of risk ... The “where” of communication, once theorized as the Westphalian national territory, is now deterritorialized cyberspace. ... Finally, the “to whom” or addressee of communication, ... is now an amorphous mix of public and private transnational powers that is neither easily identifiable nor easily rendered accountable’ (Fraser 2014: 26).

The transformations outlined by Fraser are increasing over time but they coexist with older models of state-centric, Westphalian polities still represented by the 195 states in the United Nations. Some among these have not yet attained and may never attain the classical model of Westphalian territorial sovereignty, legislative authorship, and administrative authority (such as many African states). Still others, such as Iraq and Syria, having once attained a kind of Westphalian sovereignty, have now disintegrated

into a pre- and post-Westphalian amorphous condition of civil war and deterritorialisation. The world society of states does not display a ‘from-to’ model of Westphalian vs post-Westphalian politics but rather a pluralist regime in which many institutional forms of sovereignty coexist within the same time-space coordinates.

Fraser herself had earlier distinguished between ‘weak’ and ‘strong’ publics to differentiate ‘strong’ publics such as national legislatures and courts with the jurisdiction to make binding and enforceable decisions, from ‘weak publics’ that are based on communication and the exchange of opinion and information (Fraser 1991: 117–29). The model of transnational law developed in this article explores movements across these boundaries. Like Fraser, I am trying to show that the boundaries between strong and weak publics are porous and that strong publics such as legislatures and courts are dependent upon the democratic legitimacy bestowed upon them by the mobilised weak publics of national and transnational civil societies (Fraser 2009: 76–99). Democratic iterations that can be national or transnational set in motion processes of either democratic reappropriation or resistance to the decisions of strong publics, as the case may be, thus decentring the authorship model without denying the normative legitimacy of its guiding normative ideals.

This implies that the choices we confront are not simply between accepting the sociological force of the post-Westphalian diagnosis and embracing ‘post-democracy’ (Crouch 2004) and admitting that ideals of democratic authorship and popular sovereignty remain captive to a historically defunct model of territorial-boundedness. Rather, we could insist that these normative principles of legitimacy remain necessary guidelines for our democratic praxis as well as theory even in view of the new global arrangements, and that, in fact, they may be in a healthy tension with them. Such tensions may lead to the reform of global arrangements whose democratic provenance, as many new sovereigntists also emphasise, is indeed questionable. Instead of giving up the ideals of democratic authorship and popular sovereignty, the task ahead is to defend a critical-theoretical approach that re-embeds these ideals in new transnational institutions through processes of ‘reflective’ and ‘critical adjustment’ (cf Isiksel, forthcoming 2016; Fraser 2014: 9–10).

## VI. Ethnocentric arrogance: Non-liberal democracies and human rights

The authorship model of democratic legitimacy will provoke the objection that non-democratic regimes – a monarchy, a benevolent authoritarianism (cf Rawls 1999: 79–80, on *Kazanistan*), or some form of ‘constitutional theocracy’ (Hirschl 2010) – could respect human rights without accepting a human right to self-government. Yet such a limitation of human rights

to minimal protection of the person, the rule of law, and guarantees of civic peace and property are *fundamentally incomplete*. Human rights cannot be separated from the right to self-government, because when they are, they no longer are ‘rights’ but ‘privileges’ granted to the population by some higher authority. The people can claim rights to be its own only when it can recognise itself, through the proper institutional channels, to be their author as well. Certainly, stability, respect for the rule of law and property relations, civic peace among competing ethnic and religious groups as some decent-hierarchical regimes may attain, are politically valuable. But they cannot satisfy a prime condition of political modernity that legitimacy originates with respect for the capacity of persons to be the sources of reasonable consent and the sources of validity claims.

In *The Law of Peoples*, Rawls interpreted human rights as defining *conditions of just membership for peoples in a world society of states*. Since then discussions of human rights have been linked to ‘*pro tanto* justifications’ (Raz 2010: 321–39) of limiting state sovereignty, including, when necessary, through the use of military force. Because of this restrictive understanding of the purpose of international human rights, Raz as well as Beitz (2009) have reduced their expectations of decent-hierarchical peoples’ compliance with human rights norms to what may be reasonable to assure pluralism and peace thus avoiding interventionism.

The cosmopolitan theory of democratic iterations proceeds from individuals and not peoples as subjects of transnational human rights law; furthermore, human rights violations do not provide *pro tanto* justifications for intervention, except in the event of most severe ones also prohibited by the Genocide Convention and international human rights law: genocide; slavery; mass extermination; ethnic cleansing; mass deportations; and crimes against humanity (cf Cohen 2012: 196ff).

Once we consider that individuals in decent-hierarchical societies are our moral and legal contemporaries, the conversation and practice of international human rights must take a different form. We need to ask: ‘What good reasons can we reciprocally give each other that we should accept certain forms of gender equality and not others? Why do some of us recognise the curtailment of the rights of religious minorities and others do not?’ Reasonable pluralism among peoples’ interpretation of human rights must not be viewed as a static equilibrium sealed off at the borders of the state; rather, we must understand ‘reasonable pluralism’ as an evolving and contentious conversation among individuals, groups and peoples of different nationalities, faiths and cultures. If we are *moral contemporaries* in a conversation that spans space-time coordinates, and if in some cases, we share the same life-world with individuals from decent-hierarchical societies who can be our observant Muslim, Jewish,

Sikh neighbours next door, we need good reasons to convince one another as to why we would want to accept radically different normative sources of justification for human rights as well as their content. Insofar as the conversation has always been assumed to occur *elsewhere* and *at other times*, across imaginary borders and boundaries thus ignoring the challenge of moral contemporaneity, Rawlsians have misstated the issue.<sup>13</sup>

The work of Muslim women scholars analysing the effects of transnational human rights regimes on women's rights in Islamic countries has shown that, even if the Cairo Declaration on Human Rights has tried to codify Sharia law as legitimizing RUDs deviating from gender equality, the contention around these issues between state and clerical authorities and women's rights groups continues (Moghadam 2009: 255–76). Responding in the 1980s to efforts to strengthen application of gendered Muslim family law, various women's networks, such as Women Living under Muslim Laws (WLUML), came into being.<sup>14</sup> This organization includes women with different approaches to religion: some are anti-religious, while others, such as Malaysia's Sisters in Islam, are observant Muslims. Women's groups have been particularly active in the reform of the Tunisian constitution, which for the first time in the Muslim world, has codified a clause of gender equality (Grami 2014: 391–401).

It is important to dispel the impression that the interpretation of such equality will result in the acceptance of dominant Western moral values alone. Some women's groups in Morocco have pleaded for 'complementarity' rather than strict equality in gender roles, seeing it as quite compatible with a gender equality clause in their constitution (Guessous 2012: 525–33). This view of complementarity is accompanied by a critique of Western feminism as acceding to the commodification of women's bodies through their lack of opposition to nudity and pornography. This is a contentious conversation, taking place among contemporaries across national boundaries, inspired by and adhering to distinct religious and cultural traditions. Deep value divergences about the meaning of female autonomy and the public manifestation of the female body are at stake here, and precisely for this

<sup>13</sup> Cf the exchange between Meckled-Garcia and Benhabib (Meckled-Garcia 2014: 681–8; Benhabib 2014: 697–715). Ferrara analyses the philosophical as well as sociological issues involved through 'reflexive pluralism', in 'multivariate democratic polities' (Ferrara 2014: 67–109).

<sup>14</sup> This transnational organisation of Muslim women is a perfect example for the kind of conversation extending across 'strong' and 'weak' publics, crossing national boundaries, yet looping back into the national strong publics of these women's countries of origin or residency to effect reforms there. In such processes of iteration, even if groups such as WLUML are not 'authors', in the sense of being originating legislators of such rights, they appropriate and make them their own by participating in interpreting their meaning and reach.

reason, such debates will remain a bone of contention among women's groups. Let us note that similar debates about the meaning of feminism, centring around issues of pornography, surrogate motherhood, etc are taking place within capitalist democracies as well. These controversies are not territorially delimited; they move across national boundaries as well as cultures and faiths. There are observant Jewish women feminists just as there are liberal Jewish feminists. Their disagreements about pornography and surrogate motherhood are not that different from disagreements among Muslim women's groups and non-observant feminists also in Muslim countries.

Insofar as all participants in this conversation treat one another as moral equals whom they must convince with good reasons, they need not reach a univocal and uncontested interpretation of the principle of gender equality. They can agree to disagree through democratic iterations. Many women's groups of the Global South criticise those of the North and the West, for example, for being fixated on civil and political rights, in lieu of emphasising the role of socio-economic rights, the rights of children and ecological rights. Why should we preclude that such conversations could result in creative challenges to the distinction between civil and political rights and socio-economic and cultural ones altogether?<sup>15</sup> The charge of the 'ethnocentrism' of human rights is an old chestnut that has been overcome by contemporary movements such as those of women, ecology and indigenous peoples of many different cultures and faiths, who use transnational human rights theory and practice to develop a new contentious politics.

## VII. Displacement of judicial process and *Hirst v the United Kingdom*

One of the most important objections against the model of democratic authorship and democratic iterations is the neglect of the role of courts and the judiciary in the process of rights interpretation, adjudication and limitation.<sup>16</sup> All major human rights documents make provisions for limiting rights when and if necessary. Thus Article 29 of the UDHR reads: '(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and

<sup>15</sup> Ronald C. Slye points out that 'the emerging jurisprudence of the South African Constitutional Court ... includes within its bill of rights civil and political as well as economic, social, and cultural rights' (Slye 2001: 76). These entail a right of access to adequate housing; to health care services, a basic right to education (ibid). South Africa's jurisprudence thus challenges the legacy of the Cold War distinction between civil and political versus socio-economic rights and may prompt innovative thinking in the jurisprudence of older liberal democracies. See also Cornell 2014.

<sup>16</sup> Thanks to Judith Resnik and Alec Stone Sweet for pressing me on this point.

freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society' (Universal Declaration of Human Rights 1948: section 29).

In recent years there has been a lively discussion about the principles of 'margin of appreciation' and 'proportionality' in the adjudicative practices of the European Court of Human Rights in particular.<sup>17</sup> The model of democratic iterations does not neglect the role of national or international courts in the interpretation, adjudication or limitation of human rights. But if we are interested in the boundaries between the political and the legal, between democratic sovereignty and transnational human rights, we need to articulate a dynamic understanding of the interaction between courts, civil society and social movements.

'Political constitutionalism' as developed by Richard Bellamy and the model of democratic iterations have many elements in common and it will be useful to tease out their differences in order to gain clarity on how we should view the interaction between courts, civil society and social movements (cf Bellamy 2007; Bellamy 2014). Both models advocate a democratic political system based on regular and competitive elections for the legislative and executive branches on the basis of one person one vote exercised in an open and free civil society and public sphere. Both models accept that 'rights are matters of reasonable disagreement' (Bellamy 2014: 1024), and that 'the most appropriate way to show citizens equal respect and concern in resolving these disagreements is via a democratic system that treats their different views and interests impartially and equitably' (ibid). Bellamy contends that, 'Weak review provides for "contestatory editorial" democracy rather than "authorial" democracy. It invites legislatures to think again if a legal challenge reveals inconsistencies between legislative acts, unearths unfortunate consequences not anticipated when framing the legislation or when certain minorities prove so "discreet and isolated" *that their concerns fail to gain a hearing through democratic politics*' (Bellamy 2014: 1029 emphasis added).<sup>18</sup>

This distinction between strong and weak rights review is overdrawn, but the crucial difference among the two models is how to protect the rights of 'discreet and isolated' minorities, and how to reconcile such protection with democratic sovereignty. Bellamy is concerned with the

<sup>17</sup> The so-called 'Brighton-Process' initiated by the UK, led to the formulation of Protocol 15 to the European Convention of Human Rights, expressly inscribing the 'Margin of Appreciation Doctrine' and the principle of 'Subsidiarity' into the Convention's preamble. For an excellent discussion see Rennert 2014.

<sup>18</sup> The terms 'editorial' and 'authorial' are from Pettit 2000.

democratic deficit of international human rights courts and covenants. While admitting that the European Court of Human Rights plays an important role in the protection of the rights of ‘discreet and isolated minorities’, nonetheless he maintains that ‘for the democratic legitimacy of such judicial opinions ... the final word lies with the legislature. The purpose of such review is to enhance the democratic consideration of rights, not to substitute for it’ (Bellamy 2014: 1030). This is a reasonable and desirable goal but it underestimates intense differences of sentiments, values and points of view that exist within a democratic civil society when the rights of discreet minorities are involved. The judiciary can sometimes lead in protecting these rights; at other times it must follow.

The case of prisoner disenfranchisement is the source of much political irritation with the European Court of Human Rights at the present and is commonly interpreted as undue interference with democratic sovereignty. In *Hirst v the United Kingdom (No 2)* decision, the Grand Chamber of the ECtHR (2005) held that there had been a violation of Article 3 of Protocol No 1 of the European Convention of Human Rights (ECtHR Press Unit 2015: 2). Mr Hirst was sentenced to life imprisonment for manslaughter, and during his period of detention in accordance with section 3 of the Representation of the People Act of 1983, which applied to persons convicted and serving a custodial sentence, he was disenfranchised. The ECtHR decided as follows: ‘The rights guaranteed under Article 3 of Protocol No 1 [to the European Convention of Human Rights] are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law’ (*Hirst v the United Kingdom (No 2)* [2005] ECtHR 681, paras 58, 69). The Court concluded: ‘Article 3 of Protocol No. 1, which enshrines the individual’s capacity to influence the law-making power, *does not therefore exclude that restrictions on electoral rights could be imposed* on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations ... The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned’ (ibid: para 71, emphasis added).

It is important to note that the ECtHR accepted the argument made by the UK Government, ‘that each state has a wide discretion as to how it regulates the ban, both as regards the type of offence that should result in the loss of the vote and as to whether disenfranchisement should be ordered by a judge in an individual case or should result from general application of the law’ (ECtHR Press Unit 2015: 4). This statement is from the Court’s decision in the *Scoppola* case [*Scoppola v Italy (no 3)*]

[GC] (no 126/05) 22 May 2012)], during which the UK Government had filed an argument. The ECtHR upheld the ban on public office imposed on Mr Scoppola by the Italian Government.

Already in December 2010, two years before the *Scoppola* decision, the UK Government had announced that ‘it would bring forward legislation to allow those offenders sentenced to a custodial sentence of less than four years the right to vote in UK Parliamentary and European Parliament elections, unless the sentencing judge considered it inappropriate’ (Horne and White 2015: 1). In a backbench debate that was held in the House of Commons 10 February 2011 a ‘motion, which supported the continuation of the current ban, was agreed’ to by 234 to 22 (ibid).

This did not end the matter. In a series of continuing appeals to the ECtHR – *Greens and M.T. v the United Kingdom* (decided 23 November 2010 against the UK); *Dunn and Others v the United Kingdom* (filed by 131 applicants 13 May 2014 and found inadmissible); *Firth and Others v the United Kingdom* (concerning 10 prisoners and decided 12 August 2014 against the UK for continuing violation of Article 3 of Protocol No 1) – those serving sentence in UK prisons, sought to reverse what they saw as a violation of their fundamental rights (ECtHR Press Unit 2015: 2ff). That this issue has now become a political *cause célèbre* is evidenced by the fact that the last case to be filed in front of the ECtHR against the UK, *McHugh and Others v the United Kingdom*, ‘concerned 1,015 prisoners who, as an automatic consequence of their convictions and detention pursuant to sentences of imprisonment, were unable to vote in elections’ (ibid: 3). On 10 February 2015 the Court held again that there had been a violation of Article 3 of Protocol No 1 since the UK had failed to amend the relevant legislation (ibid).

The politicisation of the matter by the UK Government is also evident from the following: ‘On 22 November 2012 the Government published a draft Bill, *the Voting Eligibility (Prisoners) Bill*, for ... scrutiny by a Joint Committee of both Houses’, which then ‘recommended on its report on 18 December 2013 that the Government introduce legislation to allow all prisoners serving sentences of 12 months or less to vote in all UK Parliamentary, local and European elections. ... [B]ut the Government have not responded substantively and did not bring forward a Bill’ (Horne and White 2015: 2). The United Kingdom’s Supreme Court, while rejecting the claim that the ‘blanket ban’ was incompatible with European Union Law,<sup>19</sup>

<sup>19</sup> Among Council of Europe countries, only nine practice a legal or de facto ban on Prisoners’ Voting: Andorra, Armenia, Bulgaria, Estonia, Georgia (currently challenged in front of the ECtHR), Hungary, Lichtenstein (currently under reconsideration), Russia and San Marino. The large number of east and central European countries previously behind the Iron Curtain that practise prisoner disenfranchisement should give constitutional democrats pause (see Table, current as of July 2012, in Horne and White 2015: 52–62).



nonetheless accepted that UK's 'blanket ban' was contrary to the European Convention on Human Rights (Horne and White 2015: 2). In December 2014, the Tory government announced that prisoners would not be enfranchised prior to the election of 2015 (*ibid*). Judging from the pronouncements of the Government following their electoral victory in spring 2015, it is unlikely that they intend to enfranchise prisoners even now. Rather, the current UK government is threatening to replace the Human Rights Act by a British Bill of Rights and make the judgments of the ECtHR non-binding on UK law (Watt and Bowcott 2014; Watt 2015).

This conflict between the ECtHR and the Government of the UK is paradigmatic for what sovereigntists see as undue meddling by transnational courts in democratic sovereignty. But this is not borne out by the facts. First, what the ECtHR is objecting to is not the democratic rights of states to disenfranchise prisoners for *certain periods* or for *certain crimes* during and after incarceration. Repeatedly, what the Court is taking issue with is 'the general, automatic and indiscriminate disenfranchisement of all serving prisoners, irrespective of the nature or the gravity of their offences' (ECtHR Press Unit 2015: 4). Such a stipulation does not derogate from the sovereignty of the UK Government; it challenges an absolutistic concept of parliamentary sovereignty that does not grant prisoners' rights to participate in the body politic the same concern and respect that one expects a liberal democratic government to show all its citizens. The ECtHR is here upholding UK prisoners' constitutional rights on the basis of human rights 'principles', in the sense explained above. Participating in elections are core political rights of all citizens, and as such they are also fundamental human rights principles that must be upheld, while the specific norms through which they are materialised are matters for national legislators to decide (see III above). By appealing to such core principles, the UK prisoners are challenging UK's statutory norms which are failing to accord them the full care and respect they deserve as citizens. Rather than judicial overreach, this is an exemplary case of harmony and dissonance between transnational human rights and constitutional rights (cf Neumann 2003).

This conflict between the ECtHR and the UK Government has a dimension which goes well beyond the law into politics and ethics.<sup>20</sup> That prisoners who violate the symbolic social contract of a polity thereby suffer a form of 'civil death' is an argument frequently encountered in the period of the

<sup>20</sup> Cf Koskeniemi on the polysemy of sovereignty: 'Whether this be in terms of naming a good we desire, attacking the inadequacy of some of its institutional realizations, or in other ways trying to make sense of our experience, "sovereignty" will continue to structure and direct our legal and political imagination, hovering ... obscurely in the frontier between the two.' (Koskeniemi 2010: 222)

Enlightenment, particularly in the work of Jean-Jacques Rousseau (Rousseau [1762] 2002: 177). The rationalism of the Enlightenment made it very difficult to explain why individuals would act against reason by violating the laws of the *'contrat social'*; those who did so, were thought to choose evil over good. Disenfranchising prisoners and condemning them to a form of 'civil death' is a practice that is much more widespread in the US than in the UK (cf Weaver and Lerman 2010; Lerman and Weaver 2014). Coupled with the widely acknowledged racialised quality of the US 'carceral state' and the ubiquitous appeal by many governments, the UK included, to the 'global war on terror', it becomes essential to move beyond the imaginary of the 'carceral state' to examine the logic and practice of prisoner disenfranchisement in light of the concealed meanings of democratic citizenship and civil belonging that lie behind such practices. I will suggest that this case displays a clash between sovereignty understood in statist terms and popular sovereignty.

### VIII. Two concepts of sovereignty

The concept of 'sovereignty' ambiguously refers to two moments in the foundation of the modern state, and the history of Western modern political thought since Thomas Hobbes can be told as a contentious struggle between these poles (Benhabib 2011e: 97–8): first, sovereignty means the capacity of a public body, in this case the modern nation state, to act as the final and indivisible seat of authority within a given territory with the jurisdiction to wield not only 'monopoly over the means of violence' (Max Weber) but also to distribute justice and to manage the economy.

Sovereignty also means, particularly since the American and French Revolutions, popular sovereignty – the idea that the people are subject and objects of the law, or their author as well as their subject. Popular sovereignty requires representative institutions, the separation of powers, and the guarantee not only of equality and liberty but of the equal liberty of each – what Étienne Balibar (2014) has called 'equaliberty'. State sovereignty and popular sovereignty can be in conflict to the extent that the sovereign state claims more prerogatives for itself and attempts to protect itself from the demands of popular sovereignty.

Popular sovereignty is a *regulative ideal* of all democratic politics but, as Dieter Grimm notes, 'the people, as the sum of individuals are also difficult to imagine as a personal holder of sovereignty. ... If we limit the people to the active citizens, they are not the entire people. If we include all citizens, they lack the ability to act.' (Grimm 2015: 70) Nonetheless, this *regulative ideal* imposes obligations of transparency, accountability and justification upon the sovereign state.

In *Hirst v the United Kingdom*, governmental institutions acting in the name of the state disenfranchised a group of the population from being included in the popular sovereign. Although prisoners are subject to the law, they are denied the right to have a voice in the articulation of these laws. While there can be democratic debate as to whether certain kinds of crimes should lead to forfeiture of political participation rights – to elect or run for office – for a certain period of time, blanket disenfranchisement for *all* crimes and at *all times* amounts to the (r)ejection of certain individuals from the body politic altogether. To protect such ‘discreet and isolated’ minorities (Bellamy 2014: 1029) from the tyranny of the majority, the regulative principle of popular sovereignty must be invoked, because ‘the people’ includes not only active citizens or the democratically enfranchised ones, but also those who have neither voice nor representation or do so to a very limited extent (such as foreigners, migrants, asylum seekers), as well as those, who like convicts, have lost such voice and representation. This is a process by which the popular sovereign can reflexively reconstitute itself through the expansion of human and citizens’ rights via new forms of constitution-making and statutory reform.

If we distinguish between state sovereignty and popular sovereignty we see that transnational human rights treaties, courts and conventions indeed limit *some sovereign powers of the state*. In this process, state sovereignty is not eliminated; in true Hegelian fashion, it is *aufgehoben*. A new regime of sovereignty emerges which coexists with great power differentials as well as differing degrees of compliance among states.

At the level of popular sovereignty, this new legal regime initiates, and sometimes demands, a reconsideration of the boundaries of popular sovereignty through the work of transnational human rights courts and the actions of national and transnational civil society NGOs and INGOs. Such iterations, whether democratic or judicial, may lead to the realisation that there are always *others* in our midst who are subject in the name of the people to the laws of the popular sovereign but who themselves do not enjoy the full protection of their rights. This results in a contentious struggle in which the vulnerable, the voiceless and the disenfranchised often lose. These are irritating struggles in the eyes of those new sovereigntists who do not distinguish state sovereignty from popular sovereignty, thus minimising the challenge to the power of the state that may come from outsiders such as ‘discreet and isolated’ (Bellamy 2014: 1029) minorities. The puzzle is why strong democrats who defend sovereignty against transnational human rights treaties and courts fail to see that in doing so, they trample on the rights of vulnerable and excluded others (Benhabib 2014). By identifying popular sovereignty with electoral majorities, they betray the regulative power of popular sovereignty which always also includes the voices of those who have no voice.

## IX. Conclusion

The new sovereigntists claim that recent developments in transnational law are ideals of cosmopolitan elites with little traction in the life of peoples (Walzer; Moyn); that international law is no more than the consensually undertaken contractual commitments of sovereign states which remain the central units of jurisdiction and enforcement (Nagel); and that the principle of self-determination expresses an important value and that some form of ‘constitutional and legal pluralism’ and a ‘dualistic sovereignty regime’ may be the desirable middle ground between global cosmopolitanism and national sovereigntism (Cohen).

This article argued that (a) and (b) are empirically false as well as being theoretically inadequate. International and transnational law are not merely fancy documents drawn by remote elites but actually have consequences for the empowerment of peoples around the world. Nor can they be viewed as contractual treaty obligations undertaken by sovereign states alone. They certainly are at least that, but they are also much more than that in that they bind states to a new sovereignty regime in which certain sovereign powers are voluntarily relegated to supra-sovereign institutions and regimes.

This article has struggled to do justice to the values of self-determination and democratic sovereignty on the one hand and transnational human rights regimes – including treaties and courts – on the other. It shares with Cohen, Bellamy and others a commitment to democratic self-determination and popular sovereignty. Only, by distinguishing between state and popular sovereignty, it shows how certain limitations on states’ sovereign powers need not be viewed as limitations on the principle of popular sovereignty as well – quite to the contrary, as in the case of *Hirst v the UK*, we see that the ECtHR is protecting the rights of those who have been cast out of the body politic without due legal process or a clear statute. The ECtHR is not contesting the prerogative of states to withdraw the franchise for certain crimes and for certain periods of time but is claiming that blanket disenfranchisement is against international human rights because it does not accord with the dignity and protection enjoyed by all under the European Convention. Rather than see this as a limitation of democratic sovereignty, it is more proper to understand it as the enhancement of popular sovereignty through the inclusion of voices that would otherwise be silenced.

Surely, transnational courts or even the ECtHR do not always function in this fashion. In the ‘scarf affair’ cases the ECtHR has applied the doctrine of the ‘margin of appreciation’ so broadly as to defend a disciplinarian understanding of state sovereignty in the face of the violation of the civil

rights of the women involved in expressing their freedom of religion and conscience (cf Benhabib 2013c). But the general critique of such courts, as well as the rhetorical attack upon them, for violating democratic sovereignty and the self-determination of peoples by rendering citizens into dependent ‘wards’ (Mamdani 2008) will not do. These charges fly in the face of the facts involved, and more importantly, they fail to analyse the harmony and dissonance between transnational human rights and constitutional rights.

The central theoretical claim in this article is that while the authorship model of democratic legitimacy is necessary for establishing the legitimate range of variation in the articulation of constitutional rights across democracies, it is not sufficient. First, along the lines suggested by Alexy, we can consider transnational human rights as *concepts* of human rights, that is, as *principles of human rights* that permit ‘realization to the greatest extent possible’, whereas *conceptions of human rights* require specific legal norms for their concretisation, and are subject to varying rules of application and interpretation. This interplay between ‘principle’ and ‘norm’ must be viewed recursively and iteratively, as leading to harmony and dissonance. At the institutional level, we see such recursive interpretation at work in the formulation of RUDs and subsequent revisions by state parties.

The ‘authorship model of democratic legitimacy’, which in one mode or another is shared by all sovereigntist critics, is not impervious to this interplay; in fact, democratic legitimacy under conditions of the new sovereignty regime can only be understood through this interaction between principles and norms of human rights. Paul Linden-Retek analyses this process well: ‘the contextualization and resignification of human rights occurs not only as a spatial movement “from the outside in” (interpenetrations of international or regional treaties in national politics), or “from the inside out” (reassessment of regional human rights conceptions in light of national political experience), or even “from the inside in” (revisions of national laws with reference to competing national norms); but also as a temporal movement from the past in view of the future’ (Linden-Retek 2015: 168). Such a temporal movement from the past toward the future has the potential of widening the circle of popular sovereignty by granting voice to the voiceless and rights to the rightless. This cannot be achieved by mere treaty declarations or court decisions; it always requires democratic politics. The new sovereigntist discourse runs the risk of weakening democratic politics, whether at the national, transnational or international levels, by creating false oppositions and depriving democratic politics of a crucial ally.

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