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THE FUTURE OF DEMOCRATIC SOVEREIGNTY
AND TRANSNATIONAL LAW

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
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Abstract

This essay examines the rise of legal cosmopolitanism in the period since the UDHR of 1948 as it gives rise to two very distinct sets of literature and preoccupations. I contrast the mainly negative conclusions drawn by conventional political theory about the possibility of reconciling democratic sovereignty with a transnational legal order to the utopianism of contemporary legal scholarship that projects varieties of global constitutionalism with or without the state.

I argue that transnational human rights norms strengthen rather than weaken democratic sovereignty. Distinguishing between a ‘concept’ and a ‘conception’ of human rights, I claim that self-government in a free public sphere and free civil society is essential to the concretization of the necessarily abstract norms of human rights. *My 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 human rights as being legitimate.* I name processes through which rights-norms are contextualized in polities ‘democratic iterations.’

The institutionalization of human rights norms through democratic iterations that permit their revision, rearticulation and contestation, both within judicial institutions and in the larger spheres of civil society, exhibits certain ‘epistemic virtues’ and shows, in Allen Buchanan’s words, ‘public practical reason’ at work.

In conclusion, in addition to Buchanan’s thesis, I consider Anne-Marie Slaughter’s concept of ‘transjudicial communication,’ and Judith Resnik’s model of ‘law by affiliation’. These three models, like ‘democratic iterations,’ develop modalities of thinking beyond the binarism of the cosmopolitan versus the civic republican; democratic versus the international and transnational; democratic sovereignty versus human rights law.

Keywords

Legal cosmopolitanism; transnational legal order; human rights law; democratic iterations; democratic sovereignty.

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I. The Resurgence of Cosmopolitanism

The last two decades have seen a revival of interest in cosmopolitanism across a wide variety of fields, ranging from law to cultural studies, from philosophy to international politics, and even to city planning and urban studies.¹ How do we account for this? Undoubtedly, the most important reasons for this shift in our sensibilities and cognitions are the epoch-making transformations referred to as ‘globalization’ and the end of the ‘Westphalian-Keynesian-Fordist’ paradigm by many;² as the spread of neo-liberal capitalism by some; and as the rise of multiculturalism and the displacement of the West by the ‘rest’ by others. Cosmopolitanism has become a place-holder for thinking beyond the confusing present towards a possible and viable future.

Legal developments are at the forefront of these transformations. 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 characterized by a transition from *international* to *cosmopolitan* norms of justice. While norms of international law emerge either through what is recognized as customary international law or through treaty obligations to which states and their representatives are signatories, cosmopolitan norms accrue to individuals considered as moral and legal persons in a world-wide civil society. By ‘cosmopolitanism’ I have in mind both a moral and a legal proposition: morally, the cosmopolitan tradition is committed to viewing each individual as equally entitled to moral respect and concern; legally, cosmopolitanism considers each individual as a legal person entitled to the protection of their 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 various 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

¹ Seyla Benhabib, *Dignity in Adversity. Human Rights in Troubled Times* (Cambridge, UK and Cambridge, MA; Polity Press, 2011), pp. 1-20; Cf. Pheng Cheah and Bruce Robbins, eds. *Cosmopolitics: Thinking and Feeling Beyond the Nation* (Minneapolis: University of Minnesota Press, 1998); Pheng Cheah, *Inhuman Conditions. On Cosmopolitanism and Human Rights* (Cambridge, MA: Harvard University Press, 2006); for philosophy cf. the debate started by the volume *For Love of Country? Debating the Limits of Patriotism*, ed. by Joshua Cohen and Martha Nussbaum (Boston: Beacon Press, 1996) and Nussbaum’s well-known essay in this volume, “Patriotism and Cosmopolitanism”, pp. 3-17; but see Nussbaum’s later retractions, in: 137 *Daedalus* 3 (Summer 2008). Cf. Anthony Appiah, *Cosmopolitanism. Ethics in a World of Strangers* (New York: W.W. Norton and Company, 2006); Thomas Pogge, “Cosmopolitanism and Sovereignty,” 103 *Ethics* 1 (October 1992): 48-75; Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge, UK: Polity, 2002); Stan van Hooff, *Cosmopolitanism. A Philosophy for Global Ethics* (Montreal and Kingston: McGill- Queen’s University Press, 2009). For the pioneering work in political theory and international relations cf. Daniel Archibugi, David Held and Martin Kohler, *Re-Imagining Political Community. Studies in Cosmopolitan Democracy* (Stanford: Stanford University Press, 1998); David Held, *Democracy and the Global Order* (Stanford: Stanford University Press, 1994); Daniel Archibugi, *The Global Commonwealth of Citizens. Toward Cosmopolitan Democracy* (Princeton: Princeton University Press, 2008); for urban studies, Leonie Sandercock, *Cosmopolis II. Mongrel, Cities in the 21st Century* (London: Continuum, 2003).

² For a recent lucid statement of the end of the ‘Westphalian-Keynesian-Fordist’ paradigm, see Nancy Fraser, *Scales of Justice. Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009), pp. 1 -30.

treaties themselves. This is the uniqueness of the many human rights covenants concluded since WWII: through them sovereign states undertake the ‘self-limitation’ of their own prerogatives.

The best known of the 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:³ 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 on December 9 1948 (Chapter II); the 1951 Convention on Refugees (which entered into force in 1954);⁴ the International Covenant on Civil and Political Rights (ICCPR; signed in 1966 and entered into force in 1976, with 167 countries out of 195 being party to it as of 2012)⁵; the International Covenant on Economic, Social and Cultural Rights (ICESCR; entered into force the same year and with 160 member parties as of 2012);⁶ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW; signed in 1979 and entered into force in 1981, with 99 signatories and 187 state parties as of 2012);⁷ the International Convention on the Elimination of All Forms of Racial Discrimination (entry into force on March 12, 1969, with 86 signatories and 175 parties as of 2012);⁸ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entry into force June 26, 1987, with 78 signatories and 150 parties as of 2012).⁹ These are some of the best known among many other treaties and conventions.

2. The Skeptical Objection

The skeptic will ask: but what does all this really mean? What possible significance can these multilateral human rights covenants and developments in ‘humanity’s law’¹⁰ have, if states continuously and brazenly violate them and manipulate them to serve their own ends? Are they not mere words at worst or aspirational ideals at best that have little traction in influencing and limiting state conduct? Do these developments add up to a novel, enforceable and justiciable legal world order? Doesn’t the process of formulating RUDs – reservations, understandings and declarations –

³ Universal Declaration on Human Rights, G.A. res. 217A (III) (Dec. 10, 1948) [hereinafter, “UDHR”].

⁴ Convention relating to the Status of Refugees, G.A. res. 429 (V) (entered into force April 22, 1954). [hereinafter, “1951 Convention.”]

⁵ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976.), referred to as “ICCPR”].

⁶ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter, “ICESCR”].

⁷ The Convention to Eliminate All Forms of Discrimination Against Women, United Nations, General Assembly Resolution 34/180, Dec. 18, 1979 (entered into force, Sept. 3, 1981) [hereinafter, “CEDAW”].]

⁸ International Convention on the Elimination of all Forms of Racial Discrimination, General Assembly Resolution 2106 (XX), Dec. 21, 1965.

⁹ Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Resolution 39/46, Dec. 10, 1984.

¹⁰ Ruti Teitel, *Humanity’s Law* (Oxford: Oxford University Press, 2011).

take the bite out of the human rights treaties and make them merely convenient smoke-screens for states to hide behind?

While skeptical doubts about state behavior and an international state-system that remains beset by violence, civil wars and proxy wars cannot be set aside, I remain convinced that something has changed profoundly in the grammar and syntax of the language of international law, sovereignty and human rights.¹¹ Just as repeated use may imperceptibly change grammar and syntax in a language – consider for example, the frequent use of contractions such as “he’s” for “he is” in English – legal practice, institutionalization and adjudication may change legal doctrine. In an earlier work, I described such processes of transformation in the international domain through the use of another metaphor: we are like travelers navigating a new terrain with the help of old maps; while the terrain has radically changed our maps have not. Thus, we stumble upon streams we did not know existed, and we have to climb hills we had never dreamt of.¹²

Mirroring these imperceptible but cumulative transformations of the last three decades, the status of international law and of transnational legal agreements and treaties with respect to the sovereignty claims of liberal democracies has become a highly contentious theoretical and political issue. Deep divergences have emerged among democracies normally considered allies. While Europe, under the impact of the cumulative jurisprudence of the European Court of Justice, the European Court of Human Rights, and strong constitutional courts such as the *Bundesverfassungsgericht*, has moved towards a cosmopolitan order of strong rights-protection and increasing harmonization of domestic laws with the UDHR and other international treaties,¹³ a strong isolationist current has become powerfully visible in the U.S. Supreme Court.

At least two different controversies have dominated recent discussions. First, what is the status of foreign law, including the law of other nations and international treaties in constitutional and statutory adjudication? As we know, great variations across countries exist in this regard: while international law becomes part of the valid constitutional order in many countries of the world such as The Netherlands and South Africa (referred to as *constitutional monism*), other constitutions are *dualist* with respect to treaty-based international law, and require various forms of treaty-ratification before these can become part of the law of the land.

¹¹ See Teitel (*Humanity’s Law*, pp. 7) for an exploration of these themes in the domains of the law of war, international human rights law, and international criminal justice.

¹² S. Benhabib, *The Rights of Others. Aliens, Residents and Citizens*. The John Seeley Lectures (Cambridge, UK: Cambridge University Press, 2004), p. 6.

¹³ Alec Stone Sweet, “A Cosmopolitan legal order: Constitutional Pluralism and rights adjudication in Europe,” 1 *Global Constitutionalism* 1 (2012), pp. 53-90.

A second controversy concerns whether recent developments in legal doctrine and practice can be seen as leading toward ‘global constitutionalism,’ with or without the state.¹⁴ *Global constitutionalists* point to increasing cooperation among constitutional court justices across the globe; their learning from one another and increasingly, their citing one another in considering similar cases, not as precedent but as significant evidence. Even some scholars, such as Jeremy Waldron, who find the concept of ‘global constitutionalism’ exaggerated, nonetheless argue that there is increasing convergence around a ‘law for all nations.’¹⁵

Others who defend *constitutionalization without the state*, such as Gunther Teubner, single out the spread of norms of *lex mercatoria*, and many other “lex’s,” such as *lex sportiva*, to argue that processes of norm-hierarchy, coordination and cooperation beyond the purview of states have evolved into a self-regulating system.¹⁶ Why shouldn’t a system that exhibits so many features of constitutionalism also be honored with that title?

Surveying the legal writing of the last two decades on constitutionalization with or without the state, global constitutionalism, legal pluralism, constitutional pluralism, juridification or constitutionalization in the world-society etc., I have the impression that law and legal scholarship today, much as they helped to consolidate the gains of the interstate Westphalian peace of 1648 by providing the philosophical and jurisprudential bases of liberal bourgeois revolutions in the 18th century, are anticipating a world that is yet to be born, “*une vérité à faire*.”¹⁷ Legal scholarship has become a constitutive element in a new world that is yet to come, but which we, as contemporaries, can only grasp with the help of various metaphors.

¹⁴ Among the literature discussing ‘world constitutionalization,’ See Bardo Fassbender, “The United Nations Charter as Constitution of the International Community,” *Columbia Journal of Transnational Law* 3 (1998); B. Fassbender, “‘We the Peoples of the United Nations’: Constituent Power and Constitutional Form,” in: *The Paradox of Constitutionalism*, M. Loughlin and N. Walker, eds. (2007) ; Arnim von Bogdandy, “Constitutionalism in International Law: Comment on a Proposal from Germany,” 47 *Harvard International Law Journal* (2006), pp. 223-242; Brun-Otto Bryde, “Konstitutionalisierung des Voelkerrechts und Internationalisierung des Verfassungsbegriffs,” in: *Der Staat* 1 (2003), pp. 61-75; Hauke Brunkhorst, “Globalizing Democracy without a State: Weak Public, Strong Public, Global Constitutionalism,” 31 *Millennium: Journal of International Studies* 3 (2002), pp. 675-690. For historical antecedents cf. Hans Kelsen, *Das Problem der Souveranität und die Theorie des Voelkerrechts. Beitrag zu Einer reinen Rechtslehre* (Vienna: Scientia Allen, [1928], 1960); Alfred Verdross, *Die Verfassung der Voelkerrechtsgemeinschaft* (Vienna, 1926). There are parallel discussions concerning constitutionalization in the EU; in the WTO and the IMF etc. See Alec Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes” 16 *Indiana Journal of Global Legal Studies* 2 (2009), pp. 621 ff.

¹⁵ Jeremy Waldron, *Partly Laws Common to all Mankind: Foreign Law in American Courts*, Storrs Lectures, Yale University (New Haven: Yale University Press, 2012); Cf. also Jeremy Waldron, “The Supreme Court, 2004 Term-Comment: Foreign Law and the Modern *Jus Gentium*,” 119 *Harvard Law Review* 129 (2005).

¹⁶ For the first position see Gunther Teubner, “Global Bukovina,” in *Global Law Without a State*, G. Teubner, ed. (Aldershot and Brookfield, Vermont: Dartmouth Publishing Com., 1997), pp. 3-28; Gunther Teubner, “Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory,” in: *Transnational Governance and Constitutionalism*, ed. Christian Joerges, I. J. Sand and G. Teubner (Oxford: Hart Publishers, 2004), pp. 3-29.

¹⁷ See Jean L. Cohen, “Constitutionalism Beyond the State: Myth or Necessity? (A Pluralist Approach),” 2 *Humanity* 1 (Spring 2011), pp. 127-158; here, p. 128.

By contrast, political science has lost its privileged object domain, namely the state and inter-state relations. This observation pertains both to Realists who take the unitary state as the principal actor for all reflection and investigation, and to Liberal Internationalists who have a more pluralist vision of the state and who analyze state behavior differently. Whether we think that states behave as self-interested principals only, or as agents and principals that are susceptible to normative and value considerations and are not guided by strategic self-interest alone, the unit we are looking at remains the same: the state and its institutions. Whereas the new legal scholarship has ‘disaggregated’ this unit, political science – with few exceptions – has not yet taken note of these transformations.

My own questions are related to, but distinct, from all these issues. I am interested in legal cosmopolitanism, as it bears on the moral individual as a legal person in the international community, and I wish to examine the alleged conflict between one class of international legal norms in particular, namely those pertaining to human rights, broadly understood, and democratic sovereignty. I will argue that transnational human rights norms strengthen rather than weaken democratic sovereignty. Distinguishing between a ‘concept’ and a ‘conception’ of human rights, I claim that self-government in a free public sphere and free civil society is essential to the concretization of the necessarily abstract norms of human rights. *My 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 human rights as being legitimate.* I name such processes ‘democratic iterations.’

The institutionalization of human rights norms through democratic iterations that permit their revision, rearticulation and contestation, both within judicial institutions and in the larger spheres of civil society, exhibits certain ‘epistemic virtues,’ and shows, in Allen Buchanan’s words, ‘public practical reason’ at work.

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3. Robert Dahl on Democracy and Skepticism Toward International Institutions

Let us begin by considering the prevalent view in political science that democracy and transnational institutions and transnational law¹⁸ are incompatible. In his highly influential article, “Can

¹⁸ I am using the term ‘transnational law’ in the sense described by Harold Koh, “Transnational Legal Process,” in: 75 *Nebraska Law Review*, pp. 181-208, and Harold Koh, “Transnational Public Law Litigation,” in: 100 *Yale Law Journal*, pp. 2347-2402.

international organizations be democratic? A skeptic's view,"¹⁹ Robert Dahl's crisp answer is: "an international organization is not and probably cannot be democratic."²⁰ Dahl argues that the most important aspects of democracy are that it is a "system of popular control over governmental policies and decisions," and that is "a system of fundamental rights."²¹ Viewed thus, democracy consists "of rule by the people, or rather the demos, with a government of the state that is responsive and accountable to the demos, a sovereign authority that decides important political matters either directly in popular assemblies or indirectly through representatives..."²²

Having established these non-controversial features of democracies, Dahl then states his main argument: "In democratic countries where democratic institutions and practices have long been well established and where, as best we can tell, a fairly strong democratic political culture exists, it is notoriously difficult for citizens to exercise effective control over many key decisions on foreign affairs. What grounds have we for thinking, then, that citizens in different countries engaged in international systems can ever attain the degree of influence and control over decisions they now exercise within their own countries?"²³ Dahl's skeptical answer emphasizes (i) epistemic limits, (ii) cultural diversity, and (iii) procedural factors as deterrents to citizens being able to exercise such control.

Ad. i. Since international matters are infinitely complex, they are beyond the judgment of the average citizen and are often handled by experts. But, we may ask, is it more difficult to understand why the spread of AIDS in Africa needs to be stopped than to decipher the US Federal tax code? Isn't the epistemic argument of complexity a matter of degree rather than of kind?

Ad. ii. For Dahl, when a democratic unit is enlarged to include new territory and people, "the demos is likely to become more heterogeneous."²⁴ Diversity increases the possible cleavages over socio-economic and political interests, as well as over cultural, national and religious identity, and this, in turn, makes it more difficult for citizens to understand the situation, needs, conditions, and aims of "distant others."²⁵ However, in complex modern societies whose population is becoming rapidly reconfigured under conditions of global economic migrations, cultural and scientific exchanges and world-wide travel, isn't the demos quite "non-homogeneous" already? Doesn't Dahl's conception of the citizens' perceptions of their own interests and identities seriously underestimate the deep

¹⁹ In: Ian Shapiro and Casiano Hacker-Cordon, eds., *Democracy's Edges* (Cambridge, UK: Cambridge University Press, 1999), pp. 19-36.

²⁰ *Ibid.*, p. 19.

²¹ *Ibid.*, p. 20.

²² *Ibid.*

²³ *Ibid.*, p. 23.

²⁴ *Ibid.*, p. 26.

²⁵ *Ibid.*

diasporic attachments and multiple identities that citizens may feel with subnational as well as transnational groups? Again, is this a matter of degree or of kind?

Ad. iii. The proper criterion for government decisions is the public good. But Dahl sees both substantive and procedural hurdles to realize this in international organizations. Substantive hurdles concern the divergence of interests and identities. Procedurally, the public good is as contested in international matters as in domestic ones, yet the weight of elite consensus on international matters means that the views and interests of the majority of citizens would not be represented. But don't similar trends exist in domestic politics as well, and furthermore, why couldn't procedural reform and institutional tinkering lead to better representation of interests and a more affective articulation of the good of all those affected in international institutions as well?

In sum: Dahl's answer that not only international organizations, but international institutions and processes as well, cannot be democratic, is based upon the model of a conventionally state-centered and homogeneous demos with very clear lines demarcating the inside from the outside, domestic from foreign politics.²⁶ Dahl concedes that sometimes citizens can become sufficiently galvanized such that foreign affairs are seen along more of a continuum with domestic ones and this can cause their passions to enflame. He also observes that "international organizations can help to expand human rights and the rule of law."²⁷ But in the final analysis, such institutions will remain "bureaucratic bargaining systems," even if we need to develop democratic criteria to judge them.

Dahl's nation-state centric understanding of international organizations, institutions and processes is not adequate to account for the radical interdependence of states throughout the ecological, immunological, financial, banking, and many other global systems and networks in our days. Whereas historically, states could more or less hope to influence their external environment through their own actions and policy measures, today the scope and effectiveness of state action and capacity have been greatly reduced. States are one among many actors in transnational networks that they cannot control. The sovereign-debt crisis of the last years is the most vivid illustration of states' dependence upon international organizations, networks, and processes, showing the degree to which Dahl's boundary categories have become irrelevant.

²⁶ All democracies presuppose a principle of membership according to which some are entitled to political voice while others are excluded. The decision as to who is entitled to have political voice and who is not can only be reached, however, if some who are already members decide who is to be excluded and who is not. This means that there can be no non-circular manner of determining democratic membership. Robert Dahl had already observed that the problem of how to legitimately make up the people had been neglected by all major democratic theorists. See Robert Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989), pp. 119-131; Robert Dahl, *After the Revolution* (New Haven: Yale University Press, 1970), pp. 59-63. For an attempt to ameliorate Dahl's paradox, see S. Benhabib, "Democratic Exclusions and Democratic Iterations: Dilemmas of Just Membership and Prospects of Cosmopolitan Federalism," in: *Dignity in Adversity*, pp. 138-166.

²⁷ R. Dahl (1999), p. 32.

There are three positions within contemporary social science that provide us with a different assessment of the relationship of democracies to international institutions. I will name these “the transformation of sovereignty thesis” (TOS); the thesis that “democracies need international institutions” (DNII); and the thesis that “international institutions strengthen human rights (IIHR).”

Saskia Sassen, one of the most prominent defenders of the TOS thesis,²⁸ notes that the national and the transnational are not binaries; they interpenetrate; the national tries to structure the transnational and the transnational is both enframed by and simultaneously pushes up against the limits of the national. Relations with other *demoi* are no longer intermittent and episodic but continuous and structural. “State sovereignty,” writes Sassen, “is usually understood as the State’s monopoly of authority over a particular territory, demarcated by reasonably established geographic borders. Today, it is becoming evident that even as national territories remain bound by traditional geographic borderlines, globalization is causing novel types of ‘borderings’ to multiply...”²⁹ Among those most significant novel ‘borderings’ are the ‘denationalization’ of what was once national. “[The] State,” adds Sassen, “plays an active role in this denationalizing, but this only becomes evident when we disaggregate ‘the’ State and examine the work of particular parts of the State: particular agencies, particular court decisions, particular executive conditions. It also means that this denationalizing can coexist with traditional borders and with the ongoing role of the State in new global regimes.”³⁰

Whereas Sassen questions the sociological adequacy of the model of state sovereignty that underlines Dahl’s concept of democracy, in “Democracy Enhancing Multilateralism,” Robert O. Koehane, Stephen Macedo and Andrew Moravcsik, argue “that participants in multilateral institutions – defined broadly to include international organizations, regimes and networks governed by formal international agreements, can enhance the quality of domestic democracy.”³¹ Defenders of the DNII thesis see this “democracy-enhancement” as occurring in three domains: they argue that membership in international organizations restricts the power of special interest groups within states in matters concerning the environment and global trade, for example. Such membership can enhance the protection of minority rights either through treaty membership or by belonging to regional human rights regimes such as the European Convention on Human Rights and Fundamental Freedoms, the African Charter of Human Rights and Duties, etc. Finally, they see such membership as enhancing the

²⁸ In addition to Sassen’s work cited in footnote 29 below, see Wendy Brown, *Walled States, Waning Sovereignty* (New York: Zone Books, 2010), and my essay “Twilight of Sovereignty or the Emergence of Cosmopolitan Norms,” in: *Dignity in Adversity*, pp.94-117; J.G. Ruggie, “Territoriality and Beyond: Problematizing Modernity in International Relations,” 47 *International Organization* 1 (1993), pp. 139-74. From a more jurisprudential point of view see Abram Chayes and Antonia Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995).

²⁹ Saskia Sassen, “Bordering Capabilities versus Borders: Implications for National Borders,” 30 *Michigan Journal of International Law* (2008-2009), pp. 567-597; here p. 567. See also S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (New Jersey and Oxford: Princeton University Press, 2006).

³⁰ S. Sassen (2008-9), 569.

quality of democratic deliberation by “fostering collective deliberation in non-majoritarian institutions,” such as “courts, bureaucratic agencies, national executives and the military.”³² One of the most prominent examples of such a deliberation-enhancing, non-majoritarian institution is the Intergovernmental Panel on Climate Change, formed under UN auspices in 1988. Throughout, the authors’ strategy is to take issue with conceptions of direct deliberative democracy by arguing that just as constitutional democracy means that the people accept certain limits on their unbridled sovereignty so as to govern themselves democratically over the long-term (and not just on the basis of periodic majoritarian elections), so too, multilateral institutions and regimes can be seen as creating institutional and normative limitations on democratic majorities such as to enable better cooperation on a global scale.

Beth Simmons’s recent work supports the third thesis (IIHR), namely, that international institutions strengthen observance of, and respect for, human rights in non-democracies as well as democracies. Simmons has provided empirical case studies to analyze the impact of states’ ratifications of various human rights treaties on domestic adherence to human rights norms. She observes that “the more interesting cases ... are those in which governments ratify an international human rights agreement, yet make no move to implement or comply with it. Why should a ratified treaty make a difference in such cases?”³³ One reason may be that since treaties constitute law in some jurisdictions, they could strengthen civil rights litigation. Yet it is more challenging when ratified treaties enable citizens’ mobilization. Simmons focuses on “non-democratic” states to argue that “ratification injects a new model of rights into domestic discourse, potentially altering expectations of domestic groups and encouraging them to imagine themselves as entitled to forms of official respect.”³⁴ Furthermore, “Treaties create additional political resources for pro-rights coalitions under these circumstances. They resonate well with an embryonic rule of law culture and gather support from groups that not only believe in the specific rights at stake, but also believe they must take a stand on rule-governed political behavior in general.”³⁵ Simmons presents an analysis of the impact of the ICCPR on civil liberties and religious freedoms across several countries. “These results suggest,” she writes, “a modest but important conclusion: international treaty commitments quite likely have made a positive contribution to civil rights practices in many countries around the world.”³⁶

(Contd.) _____

³¹ In: *International Organization* 63 (Winter 2009), pp. 1-31; here p.1.

³² *Ibid.*, 18-9.

³³ See Beth Simmons, “Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights,” *Indiana Journal of Global Legal Studies*, vol. 16, No. 2 (Summer 2009), pp. 437-481, here p. 443.

³⁴ *Ibid.*, p. 445.

³⁵ *Ibid.*, p. 447.

³⁶ *Ibid.*, p. 480. For further research on the significance of treaty ratification for human rights’ observance and activism, see Margaret E. Kick and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca: Cornell University Press, 1998); Thomas Risse, Steven Rapp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change*

In view of these perspectives, new questions suggest themselves: rather than being confined to the nation-centric demos, democracy itself may no longer be possible *except* as a project of *state interdependence and global cooperation*. Second, international organizations themselves need to be increasingly subject to multilateral criteria of democratic accountability and transparency, as Dahl himself also observes. In fact, some of the literature on constitutionalization and human rights now focuses on WTO, IMF and various public administrative law regimes.³⁷

I want to integrate here legal scholars' contributions to this debate with certain normative considerations on human rights and democratic theory. I want to follow the DNII and IIHR theses presented above, by elucidating a more philosophical approach to the interdependence of democracy and human rights. Human rights constitute the core of legal cosmopolitanism; without clarifying the relationship of human rights treaties and international practices to the institutions and practices of states, much talk about legal cosmopolitanism hangs in thin air.

Christopher McCrudden observes that in considering the meaning and significance of national judges' citation of judgments from other jurisdictions in cases with a significant human (or constitutional) rights aspect, three questions suggest themselves: "empirical questions (how far does it happen, and where?), jurisprudential questions (can we identify criteria that help explain why it does or does not happen), and normative questions (is it legitimate?)."³⁸ McCrudden believes that the first two are "the most pressing, and probably the most difficult to resolve."³⁹ In this essay, I hope to contribute to a clarification of the third – the normative – problem by focusing on human rights and the democratic right to self-governance.

4. Human Rights and Constitutional Rights

There is wide-ranging disagreement among contemporary philosophers about the philosophical justification as well as the content of human rights. Some argue that human rights constitute the "core of a universal thin morality," (Michael Walzer), while others claim that they form "reasonable conditions of a world-political consensus," (Martha Nussbaum). Still others narrow the concept of human rights "to a minimum standard of well-ordered political institutions for all peoples"(John

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(Cambridge, UK: Cambridge University Press, 1999); Beth Simmons *Mobilizing for Human Rights. International Law in Domestic Politics*, (Cambridge, UK: Cambridge University Press, 2009).

³⁷ See Nico Krisch, "Global Administrative Law and the Constitutional Ambition," in: *The Twilight of Constitutionalism*, ed. Petra Dobner and Martin Loughlin (Oxford: Oxford University Press, 2010), pp. 245-267; Ann Peters, "Membership in the Global Constitutional Community," sections on International Organizations and Business Actors, in: Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford and New York: Oxford University Press, 2009), pp. 153-263

³⁸ Christopher McCrudden, "A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights," 20 *Oxford Journal of Legal Studies* 4 (2000), pp. 499-532; here p. 499.

³⁹ *Ibid.*, p. 532.

Rawls).⁴⁰ Allen Buchanan has observed, therefore, that there is a “justification deficit” in human rights discourse, characterized by the “disturbing fact that, while the global culture and institutionalization of human rights” has gained considerable traction, “the nature of the justification for claims about the existence of human rights remains obscure.”⁴¹

Admittedly, the philosophical discussion of human rights and the conversation among lawyers, jurists, and legal scholars do not run in tandem, but the philosophical debate does raise a legitimate question about the relationship of human rights norms and constitutional rights. In this essay, I do not provide my preferred strategy of philosophical justification for human rights, which proceeds from the value and norm of communicative freedom. I have done so elsewhere.⁴² Briefly, in my view, 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. I agree with James Griffin that human rights do not exhaust the *entirety* of our conceptions of justice, let alone of morality.⁴³ 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 and some vision of human agency. Human rights are most central to a public vocabulary of political justice; they designate a special and narrow class of moral rights.

Human rights covenants and declarations articulate general principles which need contextualization and specification in the form of legal norms. How is this legal content to be shaped? Basic human rights are rights that require justiciable form, i.e. rights that require embodiment and instantiation in a specific legal framework. Human rights straddle that line between morality and legality; they enable us to judge the legitimacy of law.⁴⁴

It is important to consider Jurgen Habermas’s caveat about not making an all-too hasty a transition from human rights considered as moral principles to constitutional rights: “Hence we must not understand basic rights or *Grundrechte*, which take the shape of constitutional norms, as mere imitations of moral rights, and we must not take political autonomy to be a mere copy of moral

⁴⁰ Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, (Notre Dame, IN: University of Notre Dame Press, 1994); Martha C. Nussbaum, “Capabilities and Human Rights,” in: *Fordham Law Review* (1997-98), vol. 66, No. 273, pp. 273-300; John Rawls, “The Law of Peoples,” [1993], in: J. Rawls, *Collected Papers*, ed. by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), pp. 529-564; here p. 552. There are interesting differences in formulation between this early article and Rawls’s later book *The Law of Peoples*. See J. Rawls, *The Law of Peoples with “The Idea of Public Reason Revisited*,” (Cambridge, Mass.: Harvard University Press, 1999).

⁴¹ Allen Buchanan, “The Egalitarianism of Human Rights,” 120 *Ethics* (July 2010): 669-710; here, p. 679.

⁴² See S. Benhabib, “Another Universalism. On the Unity and Diversity of Human Rights,” in: *Dignity in Adversity*, pp. 57-77.

⁴³ James Griffin, “Human Rights: Questions of Aim and Approach,” in: 120 *Ethics* (July 2010), pp. 741-760; here p. 745.

⁴⁴ See the classical essay by Ronald Dworkin, “Taking Rights Seriously” (1970), in: *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), pp. 184ff.

autonomy. Rather, norms of action *branch out* into moral and legal rules.”⁴⁵ Since even basic constitutional norms such as respect for the dignity of the person and equality 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. Moral principles, such as respect for human dignity and equality, do not *dictate* a specific constitutional content, but all constitutional basic norms entail certain moral principles of respect for persons, their equality and dignity.

In negotiating the relationship between general human rights norms, as formulated in various human rights declarations, and their concretization in the multiple legal documents of various countries, we may invoke the distinction between a *concept* and a *conception*.⁴⁶ We need to differentiate between *moral concepts* such as fairness, equality and liberty – let us say – and *conceptions* of fairness, equality and liberty which would be attained as a result of introducing additional moral and political principles to supplement the original conception.⁴⁷ Should justice be defined as “fairness” (Rawls) or as “from each according to his abilities to each according to his needs” (Marx)? To be able to argue for one or the other, we would need to introduce some further claims about scarcity, human needs and wants, the structure of the basic subject of justice and the like to supplement our original concept of justice.

Applied to the question of how we move from general normative principles of human rights, as enshrined in the various covenants, to specific formulations of them as enacted in various legal documents, this would suggest the following: these documents formulate core *concepts* of human rights which would form part of any *conception* of valid constitutional rights. 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 democratic law-giver. And here a range of legitimate variations can always be the case. 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 would

⁴⁵ Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, UK: Polity Press, 1996), p. 107.

⁴⁶ In *A Theory of Justice*, Rawls invokes H.L. A. Hart’s discussion in *The Concept of Law* to introduce this distinction. See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), here p. 5 and H.L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1975 [1961]), pp. 155-159. Many thanks to the late Ed Baker for clarifying some of the intertextual issues involved here.

⁴⁷ R. Dworkin, “Constitutional Cases,” in: *Taking Rights Seriously*, pp. 131-149; here pp. 134 ff.

be completely unacceptable.⁴⁸ 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 Title IX which applies only to major public institutions which receive federal funding.⁴⁹ Political parties are excluded from this.

James Nickel is one of the few authors who have noted the multiplicity of levels at which rights vocabulary can function and who have tried to explain the translation of the language of moral principle to that of justiciable rights claims. Nickel writes: “The rights vocabulary can be used at any of these levels. For example, one might talk at the grand level of the right to equal respect, at the middle levels of the constitutional right to due process, and at the application levels of a statutory right to have thirty days to prepare for a hearing. But the vocabulary of human rights is used most typically at the middle level – it is used by nations or international organizations to outline in broad but still fairly definite terms what grander principles of morality and justice require in one country or era.”⁵⁰

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.” But the legitimacy of this range of variation and interpretation is crucially dependent upon the principle of self-government. *My 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 human rights as being 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 actualized. *So, the right to self-government is the condition for the possibility of the realization of a democratic schedule of rights.*⁵¹ Just as without the actualization of human rights themselves, self-

⁴⁸ Seyla Benhabib, *The Claims of Culture. Equality and Diversity in the Global Era* (Princeton, N.J : Princeton University Press, 2002), pp. 154-168.

⁴⁹ Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1972).

⁵⁰ James W. Nickel, *Making Sense of Human Rights. Philosophical Reflections on the Universal Declaration of Human Rights* (Berkeley: University of California Press, 1987), p. 44.

⁵¹ This strong thesis will provoke the objection that surely it is possible that a non-democratic regime, say a monarchy or some other form of benevolent authoritarianism, may be a form of “constitutional theocracy,” [see Ran Hirschl, *Constitutional Theocracy* (Cambridge, MA: Harvard University Press, 2010)], may respect human rights without accepting a human right to self-government. John Rawls’ distinction between liberal democracies and decent-hierarchical regimes in *The Law of Peoples* was based on this insight. I am willing to bite the bullet here and argue that such a limitation of human rights to minimal protections 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 one by some higher authority. The people can claim rights to be its own only when it can recognize itself, through the proper institutional channels, to be their author as well. Certainly, stability, some respect for the rule of law and property relations, civic peace among competing ethnic and religious groups are politically valuable and the fact that many “decent-hierarchical” regimes may achieve them is not to be dismissed. But they cannot satisfy a prime condition of political modernity which is that legitimacy originates with respect for the capacity of persons to be the sources of reasonable consent. See S. Benhabib, “Is There a Human

government cannot be meaningfully exercised, so too, without the right to self-government, human rights cannot be contextualized as justiciable entitlements. They are coequal. That is, the *liberal* defense of human rights as placing limits on the publicly justifiable exercise of power needs to be complemented by the *civic-republican* vision of rights as constituents of a people's exercise of public autonomy. Without the basic rights of the person, republican sovereignty would be blind; and without the exercise of collective autonomy, rights of the person would be empty.⁵² The concretization of human rights as justiciable entitlements take place in different venues through a multiplicity of institutional channels. I have introduced the term 'democratic iterations' to characterize such processes.

5. Democratic Iterations

By *democratic iterations* I mean complex processes of public argument, deliberation and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society. The iteration and interpretation of norms and of every aspect of the universe of value, however, is never merely an act of repetition.⁵³ Every act of iteration involves making sense of an 'authoritative original' in a new and different context through interpretation. The antecedent thereby is repositioned 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 reinterpret and reappropriate human rights principles to give them shape as constitutional rights, thus suffusing constitutional rights with *new* content. Nor is it to be precluded that such constitutional iterations may themselves provide feed-back loops in rendering more precise the intent and language of international human rights declarations and treaties. Such processes of democratic iteration at their best produce a messy awareness of the difficulties as well as attractions of world-citizenship. It is only by suffusing the universalist promise of human rights with concrete moral

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Right to Democracy? Beyond Interventionism and Indifference," in: *Philosophical Dimensions of Human Rights. Some Contemporary Views*, ed. by Claudio Corradetti (New York: Springer, 2011), pp. 190-213.

⁵² I owe this formulation to Habermas's thesis of the cooriginality of public and private autonomy. See J. Habermas, *Between Facts and Norms*, pp. 84-104. The final sentence refers, of course, to Kant's famous formula that "Thoughts without concepts are empty, intuitions without concepts are blind." Immanuel Kant, *Critique of Pure Reason*, unabridged edn., trans. by Norman Kemp Smith (New York: St Martin's Press, 1965), p. 93. Although I am indebted to Habermas's general discussions of the relationship between public and private autonomy and his analysis of the discursive legitimation of law, I do not follow his "discourse-theoretic deduction of basic rights." See my review of Habermas's *Between Facts and Norms* in: *9 American Political Science Review* 3 (1997), pp. 725-26.

⁵³ Cf. Jacques Derrida, "Signature Event Context." In: *Limited, Inc.* (Evanston, Ill.: Northwestern University Press, 1988).

and political struggles in concrete contexts that visions of cosmopolitan citizenship and global subjectivities can develop.⁵⁴

Democratic iterations occur throughout civil society and the public sphere in diverse sites. In constitutional democracies, the courts are the primary authoritative sites of norm iteration through judicial interpretation. But the interaction between domestic and binding transnational norms can take place outside courts, through the contributions of organizations such as NGOs, INGOs, Amnesty International and Human Rights Watch. These organizations produce expert reports as well as mobilizing public opinion around both rights-interpretations and rights-violations, thus entering the iterative conversation. A third site of iteration emerges through the interaction of judicial and transnational sources of rights-interpretation with the beliefs and opinions of ordinary citizens concerning their rights and those of others. In formulating the concept of democratic iterations in earlier works, it is this latter process that I had most in mind, and in section 6 below I would like to expand my concept to encompass these other sites of iteration as well.

Before doing so though, let me consider the objection: if democratic iterations are necessary in order for us to judge the legitimacy of a range of variation in the interpretation of a right claim, how can we assess whether democratic iterations have taken place rather than demagogic processes of manipulation or authoritarian indoctrination? Do not democratic iterations themselves presuppose some standards of rights to be properly evaluated? Furthermore, aren't democratic iterations conceding too much to, or may be even idealizing, democratic processes that are inevitably messy, often ill-informed, and more significantly, which may result in the trampling of the rights of unwanted others and minorities?

My model seems to conflate liberal protections of rights with a majoritarian democratic conversation. As we know, this relationship is one of the most significant and fraught throughout the history of modern political thought. I am very much aware of this and yet insist on the necessary interaction between the liberal-discourse of rights-protection and the democratic processes of opinion-and-will-formation. Democratic iterations are not merely populist politics but 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 discourses of justification that are established independently of them. Very briefly, such discourses stipulate several formal-procedural criteria: all those whose interests are affected by the adoption of a specific norm have the right to participate in discourses through which such norms are to be adopted. First then is a condition of *equal*

⁵⁴ I have discussed in more detail the role of global social movements in claiming rights across borders and generating cosmopolitan citizenship in: S Benhabib, "Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty," *Dignity in Adversity. Human Rights in Troubled Times*, p. 117-138; originally published in: *103 American Political Science Review* 4 (November 2009), pp. 691-704.

participation of all affected. Second is the right of all discourse participants to an *equal say* in such conversations. Third is the right of all participants to challenge *the rules of agenda setting*, and fourth is the right of participants to engage in *meta-discourses* about the procedures for framing discourses. As is well-known, this discourse model of justification, much like John Rawls's model of the two principles of justice, is a counter-factual 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 and contextualized, expanded and debated, in actual institutions of civil and political society. Such criteria minimally distinguish a *de facto consensus* from a *rationaly motivated one*. Such criteria are not guidelines for building institutions, any more than Rawls's second principle of justice – the difference principle – tells us how to organize the economy! 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 a “veto power,” if you wish.

Some will note that there may be some kind of circularity here: I am talking about the *right of participants* to equal say, agenda-setting, etc., and you will say, but “weren't these norms 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 are then reflexive processes through which much of what we always already take for granted is challenged, questioned, and their validity is “bracketed,” until these presuppositions are reestablished at the end of the conversation – a conversation which itself is always open to a future challenge.

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 rules that frame the discourses themselves,⁵⁵ which then need to be repositied and rearticulated through the conversation. This *recursive model of justification*, based on the force of iterations, is related to many discussions in contemporary epistemology as well.

In the next section, I will consider three normative models for conceptualizing the epistemic and political dialogue around rights concepts, as they take place both within and across democracies.

⁵⁵ Neil Walker, “Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship,” 39 *Rechtsphilosophie & Rechtstheorie* 3 (2010), pp. 206-233; N. Walker, “Constitutionalism and the Incompleteness of Democracy. A Reply to Four Critics,” *Ibid.*, pp. 276-288; N. Walker, “Constitutionalism and the Incompleteness of Democracy: State and Global,” Paper presented at the NYU Faculty Colloquium and on file with the author. Walker is discussing democracy in these articles and not rules of discourse per se, but rules of discourse are the most abstract norms that undergird democratic practices, and the principle of “incompleteness” holds for both. While not accepting the prospect “of postnational constitutionalism without democracy,” Walker shows the inadequacy of the sovereign nation-centric model discussed above by elucidating how constitutionalism and democracy define and ‘complete’ each other. (“Constitutionalism and the Incompleteness Democracy: An Iterative Relationship,” pp. 228 ff.)

These three models develop modalities of thinking beyond the binarism of the cosmopolitan versus the civic republican; democratic versus the international and transnational; democratic sovereignty versus human rights law.

6. Human Rights and the Legitimacy of the International Order

The arguments presented above are greatly supported by an article of Allen Buchanan's.⁵⁶ Although Buchanan does not use the concept of 'democratic iterations' or the 'discourse theory of legitimacy,' many of his formulations are consistent with both and expand them in helpful ways. Buchanan begins with the observation that "The more seriously the international legal system takes the protection of human rights and the more teeth the commitment has, the more problematic the lack of a credible public justification for human rights norms becomes."⁵⁷ He then spells out what such a 'public justification' process would entail: specifying and justifying human-rights norms should be understood as "a matter of ongoing mutual adjustment between our *provisional core conception of human rights*, our standards for the epistemic performance of the institutions that articulate human rights-norms, and our judgments about the existence and content of particular human rights."⁵⁸ Buchanan's real innovative move is to claim that a specific justification of human rights can only be evaluated, if, in addition the philosophical articulation of a *concept* of human rights, formulated in the light of major human rights documents and treaties, we focus on "the epistemic virtues of institutions through which the norms are specified, contested and revised over time."⁵⁹

Buchanan's concept of 'epistemic virtue' is enormously helpful to unpack my concept of 'democratic iterations.' Given that human-rights norms are necessarily abstract, they need contextualization and specification. But to avoid the parochialism and a free-for-all pluralism that may result from such contextualization, we need institutional processes of a certain *epistemic quality*. First and foremost, we should note that the *legal* translations of human-rights norms are not mere mechanical applications of moral norms but that they constitute "modes of public practical reasoning that contribute to our understanding of moral rights [I would add as well as legal ones SB] and to their justification."⁶⁰ Epistemic virtue in these matters then entails concretizing and specifying the content of such rights through "modes of public practical reasoning" which are themselves publicly accessible and justifiable.

What might such public practical reasoning involve? Beyond the transmission and utilization of correct factual information that may bear on such reasoning, "institutions that contribute to the

⁵⁶ Allen Buchanan, "Human Rights and the Legitimacy of the International Order," *Legal Theory*, 14 (2008), pp. 39-70.

⁵⁷ *Ibid.*, p. 41.

⁵⁸ *Ibid.*, p. 66, emphasis in the original text.

⁵⁹ *Ibid.*, p. 39.

⁶⁰ *Ibid.*, p. 48.

articulation of human-rights norms ought to provide venues for deliberation in which the authority of good reasons is recognized, in which credible efforts are made to reduce the risk that strategic bargaining or raw power will displace rational deliberation, in which principled contestation of alternative views is encouraged, in which no points of view are excluded on the basis of prejudicial attitudes toward those who voice them ...”⁶¹

Such epistemic virtues are the virtues of a democratic public sphere and of deliberative sites in the judiciary, civil society, and political representative institutions that interact with the democratic public sphere. Since the contextualization of human rights norms entails such processes of public practical reason, and since states cannot simply hide behind the shield of sovereignty, what we are looking at is a *transnational conversation of practical reason(s)* that toggle(s) back and forth between moral and the legal concepts of human rights and their supporting arguments. I don’t think that this transnational conversation amounts to global constitutionalism, but global constitutionalism can only emerge, if at all, in and through such iterations, conversations, and contestations.

Anne-Marie Slaughter has called such dialogues among courts “transjudicial communication.”⁶² The courts around the world recognize that a global set of human rights issues are to be adjudicated upon in “colloquy with one another.” “Such recognition,” she writes, “flows from the ideology of universal human rights ... The premise of universalism, however, does not anoint any one tribunal with universal authority to interpret and apply these rights. Collective judicial deliberation, through awareness, acknowledgment, and use of decisions rendered by fellow human rights tribunals, frames a universal process of judicial deliberation and decision.”⁶³

Anne-Marie Slaughter has been an enthusiastic and most able advocate of “the new world order” of global constitutionalism and judicial internationalism. Even if we may not share in her political optimism about these processes, she is undoubtedly correct in calling our attention to the emergent world of ‘transjudicial communication.’ What I am trying to suggest is that such processes of ‘transjudicial communication’ can be seen as forms of practical reasoning as well, insofar as they involve practices of reason-giving, deliberation and reasoned argumentation.

⁶¹ Ibid., p. 62. Note that Allen Buchanan’s criteria of the epistemic virtue of institutions are, like those of the discourse-theoretic approach I defend, also formal-procedural ones. One needs to emphasize though that such criteria provide *necessary* but not *sufficient* conditions of the exercise of practical reason. Criteria as well as procedures require interpretation; and here critical judgment has a role to play. Practical reason involves both ‘determinative’ and ‘reflective’ judgment in the Kantian sense. For my early analysis of these issues, see “Judgment and the Moral Foundations of Politics in Hannah Arendt’s Thought,” in: S. Benhabib, *The Reluctant Modernism of Hannah Arendt* (CA: Sage Publications, 1996; expanded edition : New Jersey: Rowman and Littlefield, 2003), pp. 173-193. For some recent work on the problem of judgment, see Alessandro Ferrara, *The Force of the Example* (New York: Cambridge University Press, 2008) and Albenaz Azmanova, *The Scandal of Reason. A Critical Theory of Political Judgment* (New York: Columbia University Press, 2012).

⁶² Anne-Marie Slaughter, “A Typology of Transjudicial Communication,” 29 *University of Richmond Law Review* (1994-5), p. 123.

⁶³ Ibid., p. 121-2.

What about the skeptic's point then that this typology of transjudicial communication flies in the face of states' practice of placing RUD's – reservations, understandings and declarations – on human rights treaties such as to blunt their import and shield their own practices of non-compliance? As Judith Resnik has observed, treaty ratification processes now no longer center upon “a singular formal moment of ratification through a monovocal nation-state.”⁶⁴ Increasingly, cities, states, counties, municipalities are themselves incorporating major human rights treaties into their own charters. The city of San Francisco has adopted CEDAW, just as San Paolo (Brazil) has; Portland, Oregon has incorporated the UDHR into its charter.⁶⁵ Such processes of *legal seepage* at sites below the centralized judicial authority of the state testify to the ‘disaggregation’ processes of the national that Saskia Sassen is also concerned with. However, one cannot naively assume that all ‘local iterations’ enhance democratic processes and values; they do not. Nevertheless, such affiliations multiply the sites at which transjudicial conversations can occur, and show how even in the face of national recalcitrance and resistance to some human rights organs such as CEDAW, for example, a human rights discourse across national and local boundaries can take place.

Judith Resnik's contribution is to suggest that RUD's 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 (vide India's Muslim Family Law). Yet whereas the local and regional incorporation of rights treaties suggest their expansion across borders, these other processes may point to the limiting and blunting of their normative reach. Resnik observes that “...wholesale criticism of the practice undervalues CEDAW's contribution to a political economy in which a formal commitment to women's equality is seen to confer capital. 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 ... [M]oreover, RUDs are not necessarily static; they can provide a means of beginning conversations about treaty obligations.”⁶⁶ 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 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 is not oblivious either to the limiting effect of RUDs nor to the potentially opportunistic uses made of the doctrine of “margin of appreciation” by European Courts. Yet she sees “these models of mediated participation,” as offering a “cosmo-political” vision to “capture the idea of

⁶⁴ Judith Resnik, “Comparative (in)equalities: CEDAW, the jurisdiction of gender, and the heterogeneity of transnational law production,” *I.CON* (2011), pp. 1-20. Forthcoming.

⁶⁵ *Ibid.*, p. 7.

⁶⁶ *Ibid.*, p. 16.

polities joining in commitments that both acknowledge[d] their independent identities while imposing reciprocal obligations.”⁶⁷

7. Conclusion

As this final discussion indicates, whether we emphasize the ‘epistemic virtues’ of practical reason at work in the deliberative institutions of a democratic society (Buchanan), the transjudicial conversations of judges (Anne-Marie Slaughter), or law’s affiliations through de-centering the nation-state paradigm and the ‘heterogeneity of transnational law production’ (Resnik), transnational treaties, practices and institutions are seen to enhance rather than diminish democratic deliberation and rights discourse.

While not sharing the skepticism of realist state-theorists, I am also unable to share in the enthusiasm of contemporary global constitutionalists. It is within *bounded* polities (which may or may not be nation-states – they can be multiethnic or multicultural democracies, binational federations, or constitutional post-national polities such as the EU) – that democratic iterations can occur. These boundaries are porous, permeable and active sites of transnational as well as national democratic conversations and iterations. It is this radical fact of interdependence and transnational affiliation that contemporary legal cosmopolitanism seeks to elucidate. Such radical interdependence and transnational affiliations raise the ‘threshold of justification’⁶⁸ for the interpretation, concretization, as well as limitation, of rights in the process of their constitutionalization by national legislatures and judiciaries, thus contributing to enhance the quality of democratic discourse and democratic practice.

⁶⁷ Ibid., p. 19.

⁶⁸ For the idea of a ‘threshold of justification,’ see S. Benhabib, “Twilight of Sovereignty or the Emergence of Cosmopolitan Norms. Rethinking Citizenship in Volatile Times,” in: *Dignity in Adversity*, pp. 99 ff.

