The Denationalization of Constitutional Law

Gráinne de Búrca∗
Oliver Gerstenberg∗∗

INTRODUCTION

International law, in general, and international human rights law, in particular, have experienced a battering in recent years. Spurred in part by national reactions to the “new terrorism,” politicians and legislators—as well as judges, practitioners, and intellectuals worldwide and along the ideological spectrum—have expressed reservations about the role and function of international law in domestic affairs. Reactions have ranged from sharp skepticism about the authority and utility of international law to conditions and caution about how it should be given effect within the domestic system.

Concerns regarding the role of international law are evident throughout Europe. In Germany, the federal constitutional court has in different ways positioned itself as a bulwark between the national legal system and the two European legal orders of which the court is a part—the European Union (“EU”) and the European Court of Human Rights (“ECHR”) system.1 In Denmark, the Council of Europe’s Human Rights Commissioner’s 2004 censure of Danish immigration policy on family reunification sparked critical political and media debate on the relevance and authority of international human rights law.2 And in the United Kingdom, which sought to derogate from the relevant provisions of the European Convention on Human Rights, the Home Secretary responded sharply to the United Nations Special Rapporteur on Tö

∗ Gráinne de Búrca: Professor of Law, European University Institute, and member of the Global Law Faculty, New York University.
∗∗ Oliver Gerstenberg: Reader in Law, School of Law, University of Leeds. This Article was written while the author was a Fellow of the Program in Law and Public Affairs at Princeton University, in 2004-05.

Thanks are due to Ruti Teitel, who made extremely insightful comments at the presentation of an earlier version of this Article in the LAPA-seminar at Princeton University, and to Joshua Cohen, Stanley Katz, Frank Michelman, Andrew Moravcsik, Chuck Sabel, Kim Scheppel, and Anne-Marie Slaughter. The usual disclaimer applies.

1. See, e.g., BverfG, Oct. 14, 2004, docket number BvR 1481/04, at juris online/Rechtsprechung (finding that appellate court did not sufficiently consider the judgment of the European Court of Human Rights concerning the custody rights of biological father); BverfG, July 18, 2005, docket number BvR 2256/04, at juris online/Rechtsprechung (holding that German law implementing resolution concerning European arrest warrant violates German Basic Law).

ture’s criticisms by castigating the United Nations and its alleged focus on the “human rights of terrorists.” On the other side of the Atlantic, the debate about the relevance of “foreign law” to constitutional adjudication has been equally vigorous. A number of liberal academic scholars have joined conservative intellectuals in declaring international law fundamentally anti-democratic.

Using the European experience as a basis for analysis, this Article challenges the prevailing skepticism by arguing for an understanding of international human rights law and international adjudication as a practice of “justification.” Under this view, international law obligates states merely to justify those local practices that deviate from a shared, publicly evolving, cross-community set of standards. This obligation may be triggered in part by individual claims. The theory conceives of the relationship between national constitutional law and international adjudication, moreover, outside the context of a strict monism-dualism dichotomy. According to that dichotomy, international law is either an authoritative external body of law which directly penetrates the national legal order, or a corpus of foreign law which must be filtered first through the prism of national constitutional law. This Article argues instead that international adjudication should be conceived of as having a persuasive function and not an overriding one. International and constitutional norms should be understood as contextually competing rule-of-law values rather than as conflicting legal sources vying against one another.

Part I sets forth the theoretical framework of the argument for a “justification view.” Part II applies this framework to EU law, examining the relationship that has developed between both European Court of Justice (“ECJ”) and European Human Rights Convention (“EHRC”) case law on the one hand and national law on the other.

I. DUALISM AND JUSTIFICATION

An argument for a “justification” theory of international law in the domestic constitutional context requires an initial examination of the prevailing theoretical approaches. Dualism is one of these approaches and is appealing as a contemporary legal doctrine in two distinct ways. First, it erects a bulwark...
against the overextension of judicial comity. From the dualist perspective, the ultimate legitimate source of coercive legal norms within a democratic legal order is the democratic process itself. Accordingly, international norms—including even human rights norms—are enforceable domestically only when and to the extent that the democratic sovereign has explicitly given them effect by “incorporating” them through acts of statutory legislation. Dualists worry that allowing international norms to have an “immediate” effect on domestic constitutional choices—that is, unmediated by legislative acts of statutory incorporation—would open the proverbial floodgates, permitting a free-wheeling and self-programming judiciary, accountable only to its own professional norms of judicial comity, to usurp domestic legal and political prerogatives. Ports of entry, for international and foreign proto-legal materials therefore are, as to both existence and scope, wholly contingent upon domestic statutory legislation under the domestic constitution.

The dualist concern with abdication and delegation of sovereignty to the judiciary may be shallower and more inconclusive than it first appears, perhaps to the extent of bordering on bad faith. After all, primarily the highly successful and influential domestic constitutional courts, such as the German Bundesverfassungsgericht, are today tending toward, if not actively advocating, dualism. The objection, whether based on considerations of sovereignty or merely of institutional competence, simply assumes that norms of public international law and their judicial vindications per se clash with democratic commitments. If law’s validity depends (as the dualists maintain) on originating from democratic processes such as enactment by statute (rather than on democratic values or principles), then international law is necessarily “anti-democratic”: It does not have democratic origins.

Second, and more fundamentally, dualism appeals because of its essentially skeptical view of the status of moral principle and moral reasoning in international affairs outside the “bounded community” of the nation-state. This outward-looking skepticism at once is a corollary of and reinforced by a specifically contractarian view of democratic legitimacy. According to this view, the domain of domestic, inward-looking constitutional law takes on an intrinsic moral and epistemological priority over the essentially “immature” domain of international law.

The increasing ethnic and cultural pluralism within nation-states and, a fortiori, sharp ethnic, cultural, ideological, constitutional, and economic diversity beyond the states (that is, globally), render any assumptions about social convergence in a moral context wildly implausible. Within contemporary interna-

---


7. For examples of the dualism-as-contractualism concept, see Thomas Nagel, The Problem of Global Justice, 35 Phil. & Pub. Aff. 113 (2005), and Rubenfeld, supra note 4.
tional law discourse, this diversity is experienced as an irreversible loss of law’s unity. The result has been the “fragmentation” of international law into pragmatic parallel “regimes” such as trade, environment, human rights, international criminal law, and so on. This fragmentation in turn renders a constitutionalization of international law unlikely, undermining its democratic legitimacy from the contractarian and thus dualist perspectives.8

In response to the existence of pervasive ethnic and cultural pluralism, dualists divide the realm of international public affairs into two separate, mutually juxtaposed and discrete spheres. The first sphere—the “bounded community” of the nation-state—is constituted by an ongoing practice of constitutional interpretation. The “bounded community” is further characterized by a gapless system of constitutional meaning reflecting a political contract among citizens, and by a collectively shared commitment to democratic self-government by citizens as both authors and addressees of binding law. In contrast, the sphere of international relations is one of background-less voluntary agreements between contracting sovereign states, where the primary normative reference is to states, peoples, and societies rather than to individuals. Dualism seeks to re-formalize the role of adjudication along the same lines that divide the domestic and international spheres. Dualism sees the domestic constitutional legal system as a coherent and gapless system of constitutional meanings, expressive of a political contract between citizens and giving rise to special obligations among them, and only among them. Conversely, the role of international adjudication is to monitor the terms of the relational contracts among states, peoples, and societies from which international legal norms arise.

From international law’s inception in the Grotian legal tradition—as described and reformulated by Hersch Lauterpacht—international legal discourse has been fraught with, indeed positively constituted by, a tension between two co-originating, non-mutually substituting ideas: contractual genesis on the one hand and deontological moral validity on the other. While many international norms emerge through complex voluntary treaty obligations among sovereign states and are thus member-driven contractual regimes, human rights norms accrue to individuals as moral and legal persons tout court—as members of a global moral community which is always also a legal community in statu nascendi. According to a contractual-positivist account, international law is, as noted by Lauterpacht, “the product of will, of the will of States as expressed in their consent—a view differing only in degree from the imperative theory of law within the State according to which the essence


of law is that it is the command of the State.”\textsuperscript{10} The rival anti-positivist ac-
account, in contrast, defines international law as being “constituted by its conformity with reason—reason in relation to law conceived as justice and in relation to the State conceived as the recognition of the individual human being its primary and ultimate unit.”\textsuperscript{11}

Given these competing views, the question arises as to how possibly to prescribe human rights norms that (a) are characteristically created through voluntary commitments in the absence of an overwhelming sovereign power with the ultimate right of enforcement; that (b) are legally binding upon both nonstate and state actors when they come into contact even with individuals who are not members of the actors’ own polities; and that (c) express an interculturally acceptable standard of human rights while leaving sufficient margins of appreciation for circumstantial and cultural variations? This genesis/validity paradox is unavoidable in the context of international law and creates, as a corollary, a tension or conflict between two competing accounts of adjudication. The more positivistically inclined account—steeped in private-law metaphors of delegation, principal-agent relations, and trusteeship—is one of deference to the will of states. The other account is a constitutional one, crystallizing around the notion of persuasive authority and the idea of constitutional ordering of social spheres in light of contextually colliding open-ended normative principles.

Whatever the supposed benefits of “participation in a common global enterprise of judging,”\textsuperscript{12} “[j]uxtaposing the constitutional and the international systems with regard to a right they both protect” will, as dualists routinely fear, have the effect of “multipl[y]ing the possibilities for competing influences on the interpretation of the right.”\textsuperscript{13} The realization of this expectation is particularly likely in situations where standards differ and where an international body might interpret even the most basic and seemingly uncontroversial human rights in a way that runs counter to settled features of domestic constitutional law. Dualism’s inner justification, then, lies in barring a domestic constitutional order from placing itself, in its entirety, in the hands of an international court, thus ensuring that the domestic order and its adjudicative acquis are subject only to their own interpretations of basic moral norms that have been established as legal norms.

The familiar distinction between fundamental rights and the Rawlsian notion of the “fair value” of those rights provides insight into dualist fears.\textsuperscript{14}

\begin{itemize}
  \item \textsuperscript{10} \textit{Id.}
  \item \textsuperscript{13} Gerald L. Neuman, \textit{The Uses of International Law in Constitutional Interpretation}, 98 \textit{Am. J. Int’l L.} 82, 85 (2004); see also Gerald L. Neuman, \textit{Human Rights and Constitutional Rights: Harmony and Dissonance}, 55 \textit{Stan. L. Rev.} 1863 (2003) (arguing that “the result may be dissonance in the articulation of fundamental values, or unresolvable conflict between norms that deny each other’s validity”).
  \item \textsuperscript{14} On this distinction, compare Frank I. Michelman, \textit{Liberties, Fair Values, and Constitutional Method}, in \textit{Stone et al., The Bill of Rights in the Modern State} 91 (1992), with Frank I. Michelman,
Constitutions do more than merely provide justiciable legal guarantees for the individual by protecting her freedoms against the intervention of public authority. Constitutions also give rise to a protective function of the state, imposing the institutional and social presuppositions of equal access by all to the effective “use” of the rights and freedoms protected and, in a sense, created by the constitution. Consider, as an example, the difference between having the basic liberty to speak and having the ability and resources to employ that liberty and thus to speak effectively. When conceived of as programs or constitutional directives, fundamental rights reflect a state of affairs that constitution has committed itself to upholding or achieving. The individual rights specify principles and directives according to which social relationships and state-society relationships—that is, entire constitutional domains—are to be ordered through a given political community’s constitutional politics.

A perfectly natural conclusion is that between the normative and the programmatic role of fundamental rights, there exists a relationship of tension and inverse proportionality. That is, the more a fundamental right is programmatic, the less it is judicially enforceable. Accordingly, the less justiciable fundamental rights are or claim to be, the more programmatic they can become as crystallization points of social hope and constitutional-transformative promise, and as appeals to civic participation and to shared constitutional patriotism. But suppose instead that, within a given constitutional order, the proper role of constitutional law and of constitutional adjudication is to enforce comprehensively the protective function of rights. In other words, suppose that the programmatic content of fundamental rights becomes increasingly a matter for courts to enforce. Such an internal development of fundamental rights from “merely programmatic” to “fully normative,” which typically occurs as a matter of transitional justice, occurring instead as a constitutional identity-generating response to past denials of decency and justice, has two consequences.

One consequence is that fundamental rights become available for critical use as mutually acceptable and at least partially justiciable principles of justice. The availability of these rights, in turn, enables even excluded minorities to join a community and the discourse of rights, to cast doubt upon existing con-

---

15. With regard to the German constitutional, legal, and intellectual context, see Brun-Otto Bryde, Programmatik und Normativität der Grundrechte, in HANDBUCH DER GRUNDBRECHTE BAND I ENTWICKLUNG UND GRUNDLAGEN 679 (Detlef Merten & Hans-Jürgen Papier eds.) (Heidelberg 2004).

16. Id. passim.

17. Compare the famous German Lüth case, 7 BverfGE 198 (1958) (holding that private law must be construed to respect fundamental constitutional rights), with the decision by the South-African Constitutional Court in the Grootboom case, South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC) (S. Afr.) (finding that the constitution imposes a duty on the government with respect to right of access to adequate housing). On the idea and practice of transitional justice, see Ruti Teitel, TRANSITIONAL JUSTICE (2000); Ruti Teitel, Comparative Constitutional Law in a Global Age, 117 Harv. L. Rev. 2570 (2004) (reviewing COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS (Norman Dorsen et al. eds., 2003)).
stitutional settlements, and to push for ever more inclusive interpretations of those rights. The programmatic and open-ended content of fundamental rights thus can no longer be positivistically determined by or derived from the traditions of sub-constitutional private or administrative law. 18 Moral principles of equal membership and inclusion do not have to be incorporated from outside law, as positivists would have it. Instead, the principles are necessarily implicated in the process of law “working itself pure.”

A second consequence of widening the province of judicial action, however, is that courts outgrow their function as mere catalysts of democratic reform and become drawn into the very center of political and constitutional-interpretive conflict and controversy. Interpretive disagreement not only proliferates merely within civil society (as law’s counterpart and opposite), but also affects and pervades the inner morality of law 19 itself. Thus, adjudicative legitimacy presupposes and depends on the possibility of a particularly deep personification of the community. It presupposes, in Ronald Dworkin’s words, “that the community as a whole can be committed to principles of fairness or justice, in a way analogous to how persons of integrity can be committed to convictions or ideals.” 20 It is both a regulative and constitutive assumption of successful judicial practice that a given political order’s legal record can be reconstructed into a coherent set of political-legal intentions. Once constitutional adjudication is involved in the political-epistemic struggle, however, the integrative function of the constitution dissolves.

Dualism hesitates to embrace, and ultimately rejects, precisely this latter account of adjudication—of international law penetrating the shield of statehood and becoming “societal” and normative. The dualist view overlaps and blends with normative positivism insofar as dualists advance a cautionary and skeptical view about the propriety of normative considerations, playing a role in practical reasoning about international affairs. At its core, normative positivism rejects an assumption that anti-positivists supposedly embrace: the assumption that there exists a set of distinct, necessary moral norms acting as a kind of political contract, and that when these moral norms are applied in court, a judge can escape the manifold political, cultural, and interpretive conflicts pervading a pluralistic society by reaching into the roots of competing conceptions of justice and political morality. If a constitution functioned as a proposition of fact, rather than as a norm, 21 then one limb of the genesis-validity paradox outlined above would be missing. The idea that the “true” moral status of a norm has any necessary bearing on the possibility of the norm’s being made a legal one would cease to exist.

---

18. “Verwaltungsrecht besteht, Verfassungsrecht vergeht.” Bryde, supra note 15, at 697 (quoting Otto Mayer, I Deutsches Verwaltungsrecht (Vorwort zur dritten Auflage 1924)).
In rejecting the anti-positivist assumption, normative positivists argue that within a deeply pluralistic and morally divided society, whether domestic or international, law can deliver a useful, otherwise unattainable “service” to social actors and can establish a stable framework of rules of interaction. Law can succeed in this respect, the argument goes, provided its rules are transparent, determinate, and self-controlling, in the sense that they preempt moral and political controversies looming at the fringes. 22 What counts as law—including even the supposedly unambiguous public tests necessary to determine what counts as secondary rule of law—can only be self-referentially determined by law itself. Otherwise society’s ongoing cultural wars and ideological divisions would erupt into the province of law itself, the role of legal disputation would be reduced simply to reproducing factional disputation, and law would lose its distinctive purpose of providing a framework for interaction.

Under the normative positivist view, judges in domestic settings should only use their “judicial discretion” to decide cases or surmise legislative intent only when the established rules are insufficient to do so. Similarly, in international adjudicative settings, judges should stick to the terms of contract, using their discretion marginally. Normative positivists thus argue that a zone of judicial discretion is built into “relational contracting” as a necessary element because parties cannot and do not even seek to specify fully their reciprocal rights and duties. 23 The point and purpose of adjudication is to clarify over time the antecedent meaning of the contract and to monitor compliance. This latter supposed function imposes, in turn, an external limit on the degree to which judges are permitted to “incorporate” moral considerations into legal argument and decision-making in any given case before them.

It is undoubtedly true that deep, unbridgeable ideological division does not stop at the boundary of the “sphere” of the state and its domestic law. An important debate exists today about whether persisting disagreements even within domestic constitutional interpretation affect the legitimacy of the domestic democratic system as a whole. But “Hobbes’ thesis,” 24 as it is known in the literature, immunizes the domestic-constitutional sphere from the de- volution of interpretive disagreement into full skepticism. Both “weak” and “strong” versions of Hobbes’ thesis exist. The weak version, as defended by Frank Michelman, 25 posits that the practice of government by law can succeed only when there exists within civil society a persistent and widespread inclination to comply voluntarily with the laws and legal interpretations issuing from that practice. Furthermore, this inclination to comply cannot persist over

time without an existing web of reciprocal expectations that everyone will abide by these laws and interpretations. The persistence of the web of reciprocal expectations, in turn, depends on visible guarantees of institutional backup effectively providing third-party enforcement. Otherwise, the web cannot effectively block participants from sliding back into a state of war or prevent the entire constitutional regime from unraveling. Assuming the citizenry’s expectations include recognition of equal rights first and foremost, no one’s moral interests will be served if morally reprehensible means produce this necessary institutional backup.

The absence of morally reprehensible means, then, must imply a community comprised primarily of members who are attached to a common ideal of justice. Reliance, for the purposes of integration, on other factors such as nationhood, religion, history, or culture, cannot conceivably suffice here. Reference to even a common ideal of justice, however, inevitably raises the specter of “deep, intractable, normative disagreement that recent liberal theory posits as endemic in modern political societies.” Disagreement often occurs over weighty moral and policy issues such as the right to life, the display of religious symbols in the public sphere, the efficacy of constitutional rights in the private sphere, affirmative action, socio-economic rights, taxation, and so on.

This weak version of the Hobbesian thesis yields a reciprocal political attitude within and across civil society that makes constitutional practice under conditions of disagreement possible. The weak version yields, in other words, a constitutional-political attitude of Frustrationstoleranz. Wherever we happen to find ourselves standing within moral debate, frustration of our respective constitutional-interpretive hopes makes us aware of a background that is implicitly shared, and yet our being co-participants in a common constitutional practice. This is a practice which even outsiders and marginalized groups can invoke in order to identify pathologies of exclusion; and losing in one “round” of this practice does not foreclose the chance of having a stake in subsequent rounds.

The strong version of Hobbes’ thesis, by contrast, asserts that only the state can provide the required institutional backup. “Without the enabling condition of [state] sovereignty to confer stability on just institutions,” Thomas Nagel has argued, “individuals however morally motivated can only fall back on a pure aspiration for justice that has no practical expression, apart from the willingness to support just institutions should they become possible.” And from that premise follows the proposition that “[e]galitarian justice is a requirement on the internal political, economic, and social structure of nation-states and cannot be extrapolated to different contexts, which require different stan-

---

26. See generally Nagel, supra note 7.
Finally, the principles of Rawls’ egalitarianism “cannot be reached by extending to the international case the principles of domestic justice.”

An obvious response to this strong version of Hobbes’ thesis is that virtually “all depends.” The role that an international adjudicative body should have in reviewing a domestic system depends on the reasons we believe that the court’s decisions on the whole will be guided by a discourse that is in touch with the relevant rule of law values themselves. That question can be answered only with regard to situation and context. Indeed, an emphasis on persuasive authority points in a direction exactly opposite to and precluded by dualism. This is because the use of persuasive authority brings to light facts regarding the cultural, ethical, and interpretive pluralism that characterizes the constitutional setting beyond the state. The emphasis on de-nationalized persuasive authority therefore may yield an enlarged understanding of justice that comports with enlarging the sphere of mutual justification. In this way, the emphasis may enhance, rather than undermine, the objectivity of adjudication, and ultimately may increase awareness that the character of constitutional law is itself in flux. To be sure, the emphasis on de-nationalized persuasive authority in no way suggests a freestanding monist preference for international law over domestic law.

Rather, using the example of the approach employed by the European Court of Human Rights (“ECtHR”), the relationship between human rights and constitutional rights can be understood as one of mutual backup and multi-layered justification. The ECtHR applies an occasionally substantial “margin of appreciation” in interpreting and enforcing the ECHR’s provisions and states’ reservations of “democratic necessity” that often attach to those provisions. The margin of appreciation doctrine legitimates and, in a sense, invites circumstantial and cultural variations at the domestic level. At the same time, however, the doctrine burdens the states’ localities that produce these variations with a requirement of justification or reason-giving in light of an interculturally accepted but evolving standard of human rights interpretation. The multiple pluralisms evident here—interpretive pluralism, cultural variations, functional differentiation of spheres of life—thereby make us aware of a shared background crystallizing within a common legal-institutional practice. This practice is rights-based—it is triggered at the behest of aggrieved individuals and thereby mirrors facts of radical individualization that accompany the de-nationalized condition. The association of a

30. Id. at 115.
31. Id. at 123. For an important critique of Nagel’s paper which fully engages its philosophical premises, see Joshua Cohen & Charles F. Sabel, Extra Ecclesiam Nulla Justitia?, Phil. & Pub. Aff. (forthcoming 2006).
32. See Slaughter, supra note 12 (examining how domestic legal bodies, responding to forces of globalization, increasingly confer persuasive authority on international legal decisions).
practice of intercultural justification with rights suggests a different analogy than the hierarchic posture of fundamental rights as overriding trumps within the state system, a posture that saturates the prerequisites of a stable political contract between citizens. The analogy is less related to trump cards in a preconceived game than to the concepts of “enabling” and “empowering,” with rights as “preconditions.”

Contrary to the assertions of the contractarian analogy, rights beyond the state are intrinsically political and draw claimants into a shared process of argumentation just as much as they enable claimants to express difference and separateness in the face of “false coherence.” By signaling the need to recognize individuals as participants, these political rights enable doubt to be cast on the conception of existing constitutional settlements as exclusionary. International law, then, neither seeks nor depends on personification, with its corollary of representative democracy. Instead, international law remains deliberately immature and inchoate; expresses a commitment to the idea of law’s working itself pure; exposes the “pride and prejudice” of domestic constitutional practice and of the elite political philosophy reflecting that practice; and provides a forum for a rights-based politics of recognition, thereby permitting the ongoing re-negotiation of the various cultural, social, legal, and economic boundaries of bounded political communities. But taking this possibility seriously necessarily means viewing the intersection of international law and constitutional law less in the conventional terms of established legal sources and more in terms of contextually competing rule of law values.

The preceding analysis may appear a long-winded way of conveying a very simple point—that the genesis-validity paradox of international law simply will not go away, no matter which escape route is chosen. The strong version of Hobbes’ thesis yields, whether we like it or not, normative positivism in international law. And normative positivism, contrary to its supporters’ protestations, is anything but a neutral, non-partisan doctrine. Normative positivism favors and advocates a specific, limited set of rule of law values, the same values associated with the goals of certainty, stability, and efficiency. These are Hayekian values that understand the rule of law as a social facilitator capable of establishing the formal and impersonal guidelines that allow the spontaneous order of the market to advance without impediment. Under this regime, all else is derivative. From a constitutional standpoint, however, those values are far from being the only or even the most important ones. Concerns about fairness, dignity, and social justice for individuals need not be “incorporated” into law because they are already a part of an ongoing process of a law inchoately working itself pure.

The strong version of Hobbes’ thesis presents another, equally serious problem. The ideology of a “multiculturalism of states,” quite apart from the fact that it recapitulates private-law formalism at a higher plane, expresses a prob-
lematic understanding of pluralism itself by conflating the boundaries of political communities with those of ethical ones.\textsuperscript{34} The ideology, moreover, reverses the relationship between the right and the good and between democracy and the demos and builds up an unresolvable tension between romantic ideals of autonomous personality and a closed, historically complete society with a coherent and gapless legal system.

In the context of the problems of collapse into positivism and of collapse into national liberal romanticism, the unsettling and provocative question emerges whether political liberalism, at least in its current official instantiations, has become a self-subverting doctrine. Of course, recourse to the other limb of the paradox—natural-rights thinking in international law—is prohibited, as indeed it should be. Given the existence of multiple pluralisms, retrogression to natural law and to the monism that accompanies it would drive the international legal system toward public law formalism punctuated by the hypocrisy and injustice of deliberate avoidance.

What international adjudication can do then is to engage in a constant grooming of the genesis-validity paradox by embracing both its limbs—the idea of law working itself pure, on the one hand, and the idea of a deliberate inchoateness of international law, on the other. International rules and institutions should—as Anne-Marie Slaughter and William Burke-White have written—“ensure that [domestic political actors] do what they should be doing anyway—e.g., what they have already committed to do in their domestic constitutions and laws.”\textsuperscript{35} From the standpoint of international law, however, terms such as “already committed” and “doing anyway” are themselves constructions or operative fictions—not mere givens to be re-collected and assembled by an impartial observer.

“Being in touch with the relevant rule of law values” could thus mean a shift away from considerations of form, away from the official legal-sources-thinking toward Lauterpacht’s “reason of the thing.”\textsuperscript{36} By devoting attention to the pluralistic social context, adjudication could itself become an invitation to embrace the heuristic possibility of, first, de-nationalizing constitutional and adjudicative norms and gradually transforming them into cosmopolitan norms and, second, re-contextualizing law’s “sense and sensitivity” with regard to the specifics of the particular constitutional domain at issue. These colliding principles would form two corresponding, mutually reinforcing parts of the same process, understood as both a legal and a moral learning process. The following Section, in examining the gradual transformation of EU law and the practice of adjudication it encompasses, argues that this heuristic is not entirely at odds with reality.


\textsuperscript{36} See Lauterpacht, \textit{supra} note 11, at 54 and \textit{passim}. 
II. THE EUROPEAN EXPERIENCE

Of the two main post-war European legal systems—the Council of Europe’s European Convention on Human Rights and the European Communities—only the ECHR was founded expressly as a human rights organization with the primary goal of promoting human rights and democracy in the “wider” Europe. The ECHR sought to achieve its goals through a judicially enforceable international bill of rights. On the whole, the ECHR and its creation, the ECtHR, have gained in strength and reputation over the years and have developed a dynamic transnational legal process aimed at furthering common values. The second of the two systems, now the EU, is clearly the more powerful organization both institutionally and politically, but unlike the ECHR, the EU’s primary focus has generally been on the goals of economic growth and trade liberalization, rather than on the promotion of democracy and human rights. The EU originated as an enterprise to promote the economic growth and wealth of its member-states by creating a common market among them. Although the EU began as a liberal economic experiment, it has since moved beyond economic integration toward a broader, political integration “founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law.”

The EU has begun not only to engage in a broader discourse of transnational constitutionalism, but also to align itself more explicitly with the norms and goals of the ECHR and to identify itself as a rights-based, rather than purely market-based, order. The characterization of the original European Economic Community (“EEC”) as a positivist project of economic integration has been gradually giving way to a complex and comprehensive conception of a transnational legal process, which has recently moved in the direction of a more explicit commitment to a framework of human rights protection. The proclamation in 2000 of a Charter of Fundamental Rights, although a legally complex and uncertain human rights instrument, and the political agreement that emerged during the recent constitutional debate on the desirability of the EU’s accession to the European Convention on Human Rights are indicative of this gradual reorientation. Less symbolically, this trend is also evident in the way in which provisions governing market integration policies have over time been debated and re-interpreted before the European Court.
of Justice in light of other normative commitments expressed in the Treaty establishing the European Community ("EC Treaty") and under the ECHR. This process of adjudicative debate and re-interpretation has gradually destabilized exclusionary national practices in areas such as social welfare and immigration, and it has forced domestic reconsideration of those policies and practices. In this sense, the expansion, development, and deepening of the EU polity have given rise to an increasingly engaged transnational process. Partly through a discourse of equal rights and non-state membership, this process has the potential to challenge the closure of state boundaries and to generate a strengthened level of public justification in a broader cross-national context.

The literature on the process of “constitutionalization” of the EU describes some of the early case law of the ECJ. The term “constitutionalization” in this context refers to the principles of direct effect (whereby EC law can be pleaded directly before national courts by individual litigants on whom it confers rights) and the primacy of EC law over national law. The principle of primacy has often been depicted as a trump card that the European legal order enjoys over national legal systems, implying the subordination of the latter

40. See, e.g., Charter, supra note 38, art. 7, at 8 (indicating a commitment to respecting private and family life); id. art. 21, at 13 (containing the principle of non-discrimination based on sex, race, religion, etc.).
42. See, e.g., Case C-85/96, Sala v. Freistaat Bayern, 1998 E.C.R. I-2708 (holding that Germany cannot require an unemployed Spanish national to produce formal residence permits to receive a child-raising allowance when German nationals need not produce such documentation); Case C-224/98, D’Hoop v. Office national de l’emploi, 2002 E.C.R. I-6191 (finding that a Belgian national could claim a student-tide-over allowance, an unemployment benefit for recently graduated students looking for their first jobs, even though the student completed secondary education in another EU Member State); Case C-184/99, Grzeleczky v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-6229 (finding that a French student was entitled to Belgian unemployment benefits); Case C-138/02, Collins v. Sec’y of State for Work and Pensions, 2004 ECJ WL 58319 (Mar. 23, 2004) (holding that while a national of a Member State national is subject to residency requirements when seeking jobseeker benefits, those requirements must be objective, independent of the person’s nationality, and limited to what will satisfy the authorities that the individual is genuinely seeking work in the host Member State); Case C-456/02, Trojani v. Centre public d’aide sociale de Bruxelles, 2004 ECJ WL 59428 (Sept. 7, 2004) (holding that a French part-time worker was entitled to Belgian residency and economic assistance); Case C-209/03, The Queen (on the application of Dany Bidar) v. London Borough of Ealing, 2005 ECJ WL 588878 (Mar. 15, 2005) (holding that a French student in the United Kingdom was entitled to full residency status for the purpose of student loans).
43. See, e.g., Case C-60/00, Mary Carpenter v. Sec’y of State for the Home Dep’t, 2002 E.C.R. I-6279 (holding that out of a respect for family life, a non-EU citizen married to an EU citizen is entitled to residency in the citizen’s country of origin under Council Directive 73/148/EEC exclusive of any rights derived from the European Constitution); Case C-109/01, Sec’y of State for the Home Dep’t v. Akrich, 2003 E.C.R. I-9607 (indicating that a non-EU citizen who is lawfully a resident in a Member State and married to an EU citizen would be entitled to residency status in any Member State in which the spouse is a resident); Case C-413/99, Baumast v. Sec’y of State for the Home Dep’t, 2002 E.C.R. I-7136 (holding that parents of EU citizens are entitled to remain with their children in any Member State in which the children commence their education even if that parent lacks an independent right of residence).
to the former. This conception has re-ignited debates on dualism, generating counter-arguments about the role of national constitutional courts in protecting the priority of the national constitutional order.\textsuperscript{45} The conception, moreover, seems to contrast with the substance-driven notion of constitutionalism implied in the ECHR system, which focuses not on the priority of legal sources but on the fundamental notion of respect for human dignity and the “public order” necessary to protect that dignity.

\textit{Van Gend en Loos}\textsuperscript{46} and \textit{Costa v. E.N.E.L.},\textsuperscript{47} the cases that introduced principles of direct effect and primacy, should not necessarily be understood as hierarchical assertions of the primacy of legal sources. Instead, these cases can be read as an expression of the commitment made by the member states to give reality to the promise of a “new legal order” that is “more than an agreement which merely creates mutual obligations” among contracting states, that “not only imposes obligations on individuals but is also intended to confer on them rights,”\textsuperscript{48} and that “[i]s an integral part of the legal system of the member states.”\textsuperscript{49} Member states cannot unilaterally derogate from or undermine the commitments they undertook in joining the EU.\textsuperscript{50} EU constitutionalism is rooted in the idea of a transnational system in which states have made good faith commitments from which they cannot withdraw by asserting their sovereignty or by elevating parochial interests over shared common interests. EU constitutionalism requires the states to defend, justify, and reconsider their national preferences and choices in the light of these common commitments.

While the EU and the ECHR were in some ways quite different in origin and aspiration, they are now closely linked systems of transnational cooperation sharing an instantiation of a dynamic form of constitutionalism beyond the state. That is, a group of states has come together against a background of mutual commitments and has agreed to participate in a legal system that has evolved into more than a contract among sovereigns. The system directly implicates the rights of citizens as participants and aims at both reforming and transforming national democracies through a process of transnational engagement, adjudication, and debate. Through these adjudicatory practices, the set of normative and political commitments embodied in the agreements are debated, interpreted, and ultimately reintroduced into national legal orders.

\textsuperscript{45} See, e.g., Mattias Kumm, \textit{Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice}, 36 COMMON Mkt. L. REV. 351 (1999) (addressing whether and to what extent national courts may subject secondary EC law to constitutional review).

\textsuperscript{46} See Case 26/62, N.V. Algemene Transp.- en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie de Belastingen, 1963 E.C.R. 1, 7 (establishing direct effect for EC law, provided the law explicitly grants an individual right and creates for Member States “a specific unambiguous obligation” to their nationals).

\textsuperscript{47} See Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585, 586 (establishing the primacy of the European legal order which “binds both [the Member States’] nationals and themselves”).

\textsuperscript{48} Case 26/62, Nederlandse Administratie de Belastingen, 1963 E.C.R. 1, 12.

\textsuperscript{49} Case 6/64, Costa, 1964 E.C.R. at 597.

\textsuperscript{50} Id. at 593.
triggering a process of reopening, reconsideration, and justification of local practices. Rather than operating as a restraint on national democracy or as an imposition of externally specified standards on locally determined preferences, the European adjudicative process instead forces reconsideration—and sometimes disruption—of particular national or local choices in light of new, potentially richer information, argumentation, and normative understandings generated by prior adjudication. The worth of such adjudication is not found in the authority of European or international jurists, or the priority accorded European or international legal texts, or in the fallacy that normative closure can be achieved by deciding at a “higher” level the contested questions of moral and political values. Rather, EU adjudication’s worth lies in the very process of exposing community practices and norms to self-reflection and justification as part of a shared reflexive practice of developing normative standards based on broadly held values. This process requires openness to the consequence that the agreed upon values may affect and disrupt local rules and programs, and a commitment to accommodate the outcome of these adjudicative processes in good faith, incorporating them into the national process of contestation over how to resolve the problem at hand. Thus, European constitutionalism is not about restraining or undermining national democratic practices, nor about delegating the resolution of incomplete bargains to judicial elites empowered to impose external, centralized standards on local communities. Instead, EU constitutionalism is about enabling local and national democratic practices to be confronted—and, ultimately, strengthened and improved—by debate in cross-national fora, generating renewed explanations of, and justifications for, localized practices.  

The examples below illustrate the way that the practice of constitutionalism has taken shape within Europe. They focus on the contentious field of welfare rights and immigration, both politically difficult and electorally sensitive issues traditionally the concerns of national sovereignty.

The welfare example, at first sight, seems a counter-intuitive one. Judging by some accounts, the EU has little or no social welfare dimension. The EU does not generally engage in redistributive politics, although its internal market rules do destabilize national welfare systems in the interests of trade liberalization. EU social policy is generally described as labor market focused, dealing primarily with employment related issues. Yet closer examination reveals a rudimentary EU welfare system. The gradual unfolding of a series of legal

---

51. Contrast this understanding of European constitutionalism and transnational adjudication with that of the German constitutional court, the Bundesverfassungsgericht, in its famous Maastricht decision. In that decision, the court implied that the EU did not manifest—and was unlikely in the future to develop—the necessary interaction of “social forces, interests and ideas” to satisfy the requirements of democracy. Brunner v. The European Union Treaty, 1 C.M.L.R. 57, 87 (1994).

52. See Andrew Moravcsik, The European Constitutional Compromise and the Neofunctionalist Legacy, 12 J. Eur. Pub. Pol’y 349, 365 (2005) (“Many areas are essentially untouched by direct EU policy-making, including taxation, fiscal policy, social welfare, health care, pensions, education, defense, active cultural policy, and most law and order.”).
challenges based originally on market integration norms, reinterpreted in part through the lens of broad equality norms and thin citizenship commitments in the EU treaties, have resulted in political contestation, adjudicative confrontation, and disruption of the boundaries of national welfare systems. These effects have arguably led to the beginnings of a system of EU welfare and social rights premised on some degree of solidarity across states. Such a system has emerged not as a result of insistence on centrally defined notions of welfare or by external imposition of European-level agreements, but by the requirement that national institutions be at least in principle open to the claims of those who were previously not considered members of the national political community. Furthermore, such national welfare institutions must be reconsidered in light of broader notions of membership generated by the European commitment to transnational engagement.

This contestation of national welfare policies has regularly been triggered by claims based on the provisions on EU citizenship and by adjudication before the ECJ on the implications of these provisions for national welfare institutions. These claims are often brought by members of marginalized groups within local and national systems. Challenges of this kind have been made in the cases of Sala, D’Hoop, Grzelczyk, Baumbast, Trojani, Collins, Bidar, and Ionnidis. Each of these cases invoked the commitment to equal treatment of EU citizens, and each involved a situation where state legislation or practice denied an individual a state benefit on the basis of restrictions contained in national or EC legislation. The ECJ ruled in all of these cases that reliance on these restrictions must be reconsidered and re-interpreted in view of the equal treatment commitment. In a number of the cases—for example,

62. Case C-258/04, Office national de l’emploi v. Ioannis Ioannidis, 2005 ECJ WL 2230265 (Sept. 15, 2005) (holding that a member state cannot deny a tide-over allowance to a national of another member state simply because the individual completed his secondary education in another member state).
63. Invocation of the equal treatment and nondiscrimination principle before the ECJ led also to the disentrenchment of repressive national practices, in particular against transsexuals. See, e.g., C-15/94, P. v. S., 1996 E.C.R. I-2143 (precluding dismissal from employment of a transsexual for any reason related to
Sala, D’Hoop, Grzelczyk, Trojani, and Collins—this outcome meant that welfare benefits previously available only to a Member State’s nationals and residents would have to be made available to other people as well. Other cases, such as Baumbast and R., resulted in an obligation on member states to recognize a right of residence for family members of former residents or non-economically active persons. The logic of particular national immigration policies, or of various kinds of social welfare entitlement, which had been shaped around the notion of the bounded community, had to be reconsidered in each case in view of the minimal solidarity commitments undertaken by the relevant member states, now part of a cross-national community. The ECJ did not impose answers on national courts or national welfare institutions. Rather, the Court required the national authorities to reconsider whether and how they had taken account of the broadened scope of equality and the citizenship norms entailed by membership in the EU.

The developments in this line of cases find support in the EU Charter on Fundamental Rights (although the ECJ has not expressly used the Charter to this effect) and in the commitments assumed by member states in this Charter, with its articles on “Solidarity,” “Equality,” and “Citizens’ Rights.” The existence of this Charter makes it difficult for states to insist on excluding resident non-nationals from membership in, or access to, their national institutions. A further move in this direction can be seen in the gradual development of a complicated body of EC legislation regulating the coordination of social security benefits. This legislation was originally adopted primarily as an “internal market” instrument to facilitate the free movement of labor, but it has in substance—initially through judicial rulings, and then through a triggered political response—become a partial guarantor of welfare rights for EU citizens. Even in some of the softer political attempts to coordinate national social policies in areas such as employment, anti-poverty, pensions, and health, the influence of both the articulation of solidarity rights in the new Charter and the underlying constitutional norm of equality (particularly in

---

64. See, e.g., Case C-456/02, Trojani v. Centre public d’aide sociale de Bruxelles, 2004 ECJ WL 59428 (Sept. 7, 2004) (finding that “in the present case, it must be stated that, while the Member States may make residence of a citizen of the Union who is not economically active conditional on his having sufficient resources, that does not mean that such a person cannot, during his lawful residence in the host Member State, benefit from the fundamental principle of equal treatment as laid down in Article 12 EC”).


the field of gender) is becoming evident. European integration has thus—in part through the growing practice of transnational adjudication—challenged the boundaries of welfare policy, disrupting the rules of inclusion and exclusion set by national citizenship. Integration has challenged the capacity of states to control the resources and actors within their own “social space and jurisdiction,” and has required states to consider other affected actors, interests, and values.67

The second example concerns the field of immigration policy. Here too, arguments based on broadly agreed values in EU and ECHR law, such as the commitments to equality and to respect for family life, have had a disruptive impact on restrictive national and European immigration measures. As a consequence of litigation brought before the ECJ, national authorities have been required to reconsider immigration practices in light of these values and to offer more convincing justifications for their decisions to deport or to refuse entry to non-nationals who do not meet the requirements of domestic immigration law. In the cases of Carpenter68 and Akrich,69 the “public interest” reasons offered by the United Kingdom for restricting the entry and residence rights of non-EU nationals met with the ECJ’s insistence that due consideration be given to the importance of the right to respect for family life contained in the ECHR. Like decisions require not a rewriting of national laws at the EU level or an insistence on the priority of European legal sources. Rather, the cases represent simply a call for reconsideration of domestic law and practice in light of a wider set of normative commitments expressed in the ECHR and in the EU treaties.

III. Conclusion

In a comment on the U.S. Supreme Court decision in Lawrence v. Texas,70 Harold H. Koh notes that “concepts like liberty, equality, and privacy are not exclusively American constitutional ideas but, rather, part and parcel of the global human rights movement.”71 He argues that they are both constitutive and regulatory concepts of a time-honored dialogic process in which “litigants, activists, publicists, and academic commentators seek to inform, influence, and improve . . . judicial decision making.”72 This Article concurs with Koh’s view, but with the following proviso: if the categories of public international law, foreign law, and domestic constitutional law were to collapse entirely to the point of indistinguishability, then the critical-transformative,

---

68. Case C-60/00, Mary Carpenter v. Sec’y of State for the Home Dep’t, 2002 E.C.R. I-6279.
72. Id. at 56.
participatory, and re-contextualizing dimension of international law would be threatened or altogether lost.

The suggestion made by Anne-Marie Slaughter and William Burke-White, in their defense of international law, to "endorse the division between domestic and international affairs, at least conceptually" faces the reverse problem. According to Slaughter and Burke-White, the claim that "the future of international law is domestic" refers not to domestic law, but to domestic politics, in the sense of an elaborate two-level game, with each game staying on its own board, however complex the links between the two. This view seems to introduce a law-politics distinction into the international law-constitutional law interface, with the international sphere of "law" engaging with the domestic sphere of "politics."

According to the view presented in this Article, the relationship between international law and constitutional law should be seen as one of mutual back-up and multilayered justification. The future of international law is not only "domestic" but also societal and normative. This view relies on an ontological premise that flies in the face of the current trend toward Hobbesian retrenchment: Under circumstances of deep and persistent disagreement, constructive dialogue is possible. One might respond to skepticism of this premise with the quip that radical disagreement, not to mention radical translation, begins at home. One might also respond that the de-nationalized constitutionalism presented in this Article does indeed presuppose a mature sense of reasonableness on all sides. The argument here is simply that de-nationalized constitutionalism is a coherent and worthwhile choice, a "realistically utopian" one if only the political will to implement it existed.

73. Slaughter & Burke-White, supra note 35 (manuscript at 31, on file with authors).
74. Id.