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## From constitutional to human rights: on the moral structure of international human rights

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## **From Constitutional to Human Rights**

### **On the moral structure of international human rights**

#### **ABSTRACT:**

The paper presents a theory of the moral structure of international human rights. It proceeds by drawing on recent scholarship on the philosophy of national constitutional rights, which has shown that there is now an emerging global consensus on certain structural features of constitutional rights; in previous work I have summarised this under the label ‘the global model of constitutional rights’. Starting from the theory of rights underlying the global model, the paper asks what modifications, if any, are required to turn that theory into a suitable theory of international human rights. In particular, it examines the widely held view that international human rights are more minimalist than national constitutional rights. Discussing recent work by Ronald Dworkin (on political/constitutional versus human rights) and Joseph Raz (on legitimate authority versus national sovereignty), the paper concludes that it is not possible to make rights more minimalist than they already are under the global model. It follows that the moral structures of national constitutional rights and international human rights are identical. The final section of the paper examines some implications of this result, addressing the issues of the workability of the proposed conception of international human rights in practice, its point and purpose, and discussing the obligations of states to participate in international mechanisms for the protection of human rights.

#### **I. Introduction**

The current philosophical discussion about international human rights is at least partly sparked by a mismatch between their great practical and theoretical importance on the one hand and what is perceived to be an under-developed grasp of their moral structure on the other. Broadly speaking, two strategies, to which this paper will add a third, are frequently employed in order to throw light on international human rights:<sup>1</sup> some approach them by starting from a moral theory of human rights as opposed to specifically *international* human rights, and then ask to what extent a proper understanding of the former can help illuminate

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<sup>1</sup> See Allen Buchanan, ‘The Egalitarianism of Human Rights’, 120 (2010) *Ethics* 679, 680–82.

the latter.<sup>2</sup> Others focus on the international sphere of which international human rights are a part, trying to derive a theory of international human rights from the role they play or ought to play in the sphere of the relations between states.<sup>3</sup> Nothing is wrong as a matter of principle with those approaches: a full-fledged theory of international human rights must surely make sense of both ‘international’ and ‘human rights’; thus, what we are ultimately looking for is an integrated theory. It therefore seems plausible to assume that one can approach the project of developing a comprehensive theory of international human rights from different angles, just as one might reach the top of a mountain from different sides. In this paper, I will develop and propose a theory of international human rights, but I will choose another, previously largely unexplored route, namely one via the philosophy of national constitutional rights.

There are important structural similarities between national constitutional rights and international human rights.<sup>4</sup> In both contexts, compliance with fundamental (read: constitutional; human) rights is, loosely speaking, one of the important yardsticks of legitimacy, be it in the sense of constitutional legitimacy or in the sense of falling within the sphere of a state’s sovereignty. Furthermore, the lists of rights protected by national constitutions and international treaties look, on the whole, strikingly similar. This similarity does not end on the surface but goes all the way down. European lawyers who are acquainted with both national constitutional law of a jurisdiction that employs strong judicial review – such as Germany in its Basic Law – and the law of the European Convention on Human Rights (ECHR) know that the doctrinal tools, style of reasoning, and the outcomes produced by national constitutional courts on the one hand and the European Court of Human Rights (ECtHR) on the other are very similar indeed. As is well known, when the United Kingdom decided in the late 1990s to set up a system of constitutional judicial review, it did *not* design a new, national bill of ‘British’ rights (although that is a project that continues to be on the table in the respective political discussions) but instead simply incorporated the ECHR into

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<sup>2</sup> James Griffin, *On Human Rights* (Oxford University Press, 2008). See also John Tasioulas, ‘Taking Rights out of Human Rights’, 120 (2010) *Ethics* 647.

<sup>3</sup> Joseph Raz, ‘Human Rights without Foundations’, in: Besson and Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), 321; Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2011).

<sup>4</sup> On this issue, see also Stephen Gardbaum, ‘Human Rights as International Constitutional Rights’, 19 (2008) *European Journal of International Law* 749.

UK law;<sup>5</sup> thus effectively adopting the text of the European Convention together with the existing and future jurisprudence of the ECtHR<sup>6</sup> as part of its national constitutional law.

Structural similarities such as the ones mentioned above as well as historical and semantic links between the concepts of constitutional and international human rights make it promising to approach the project of developing a comprehensive theory of international human rights via an understanding of national constitutional rights. This route becomes even more appealing in light of the fact that in recent years there has been a wave of scholarship theorising constitutional rights;<sup>7</sup> thus, drawing on this work may prevent philosophers of international human rights from having to re-invent the wheel.

I will proceed by setting out some structural features of national constitutional rights in the next section. That section will argue that it is misguided to believe, as many do, that national constitutional rights law rests to a considerable extent on contingencies specific to the national community which has adopted them. The opposite is true: conversations about constitutional rights are, on the whole, no less global in appeal than conversations about international human rights. Furthermore, the section will give an overview of those structural features of constitutional rights which in previous work I have labelled ‘the global model of constitutional rights’, and it will present the basic elements of a theory of that global model, focusing on the questions of the scope of rights (‘which interests ought to be acknowledged as grounding rights?’) and their permissible limitations (‘under what conditions is a limitation of a right legitimate?’). This will prepare the ground for the subsequent section, which takes the step from national constitutional rights to international human rights. It examines the case for a view held by many international human rights theorists, namely that international human rights are more minimalist than national constitutional rights (call this *international human rights minimalism*). Thus, the paper will ask whether there is moral space to make national constitutional rights more minimalist. My conclusion will be that there is not: any

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<sup>5</sup> UK Human Rights Act 1998.

<sup>6</sup> Section 2 (1) of the UK Human Rights Act 1998: ‘A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights ... whenever made or given [...]’.

<sup>7</sup> See in particular Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002); Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’, (2010) 4 *Law & Ethics of Human Rights* 141; Mattias Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement’, in Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing, 2007), 131; Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012).

such attempt will either introduce arbitrariness (because, as will be shown, reducing the scope of interests protected as rights will necessarily involve the drawing of morally arbitrary thresholds) or will ignore the fact that constitutional rights are already as minimalist as coherently possible (because, as will become clear, they set up a reasonableness standard of justification, and treating policies which limit rights and which are not even reasonable as legitimate is morally unappealing). Thus, the paper will show that there exists neither the necessity nor the moral possibility to make constitutional rights more minimalist. It follows that *the moral structures of national constitutional rights and international human rights are identical*. The final section will spell out some implications of this conclusion, addressing the issues of the workability of my conception of international human rights in practice, its point and purpose, and discussing the obligations of states to participate in international mechanisms for the protection of human rights.

## **II. The moral structure of national constitutional rights**

### *1. A global conversation about rights*

In terms of their potential geographical appeal, contemporary discussions about constitutional rights are global. Thus, it is emphatically *not* the case that the moral demands of constitutional rights are inextricably linked to and intertwined with a particular constitution with a particular interpretative history, adopted by a particular political community at a particular point in time. Rather, constitutional rights discourse is governed more by ‘free-standing’ moral argument about what rights and legitimacy require than by considerations relating to the history of a document or people. *Constitutional rights discourse has gone global.*<sup>8</sup>

A look at the structure of constitutional rights law helps explain why this is the case. Courts around the world employ a two-stage analysis when determining whether an act by a public authority violates constitutional rights. At the first stage, they ask whether the act interferes with (limits, restricts) a right. If so, the question at the second stage is whether the

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<sup>8</sup> And hence, it is possible to provide comprehensive theories of this global discourse; for a moral theory see my *The Global Model of Constitutional Rights* (n. 7). For a formal theory, originally intended as explaining German constitutional rights law but in terms of its relevance and as evidenced by its success clearly of global relevance, see Alexy’s *A Theory of Constitutional Rights* (n. 7).

interference is justifiable. The test that is almost<sup>9</sup> globally employed at this second stage is the proportionality test, according to which an interference with a right is justifiable if it serves a legitimate goal and is proportionate to that goal. In judicial practice, the first stage has become less and less important, largely as a consequence of rights inflation, that is, the phenomenon that more and more interests are protected as rights. Thus, the focus of the analysis has shifted to the second stage, and the proportionality principle which dominates that stage has become the by far most important doctrinal principle of constitutional rights law around the world. Interestingly, national constitutions do not give courts any guidance as to how to conduct the proportionality test. Constitutions normally do not even mention the term ‘proportionality’. Instead, they use phrases similar to that employed by the Canadian Charter of Rights and Freedoms, which stipulates that rights are guaranteed ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’<sup>10</sup> The point of those rather vague phrases is to release judges from interpretative constraints;<sup>11</sup> thus, when courts apply proportionality analysis, they are not usually bound by textual subtleties, nor are they bound by the history of the particular constitution they are interpreting. Rather, they engage in free-standing moral reasoning about what rights require, largely unguided by the constitution which they interpret.

## 2. *The global model of constitutional rights*<sup>12</sup>

While it is to be expected that different courts will sometimes come to different conclusions when dealing with a particular rights issue – say, the question of whether or under what conditions hate speech may be prohibited, or whether assisted suicide must be permitted – at a more abstract level, a remarkable consensus about certain structural features of constitutional rights has emerged in recent decades. I have labelled this set of doctrines and

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<sup>9</sup> An important exception is the US jurisprudence. On the issue of whether the US Supreme Court applies proportionality under a different name, see Paul Yowell, ‘Proportionality in United States Constitutional Law’ in Lazarus, McCrudden and Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014). See also Kai Möller (above n. 7), 17–20.

<sup>10</sup> *Canadian Charter of Rights and Freedoms 1982*, section 1.

<sup>11</sup> Kai Möller, ‘Proportionality: Challenging the critics’, 10 (2012) *International Journal of Constitutional Law* 709, 717.

<sup>12</sup> This and the following section draw on ideas developed in greater depth in my book *The Global Model of Constitutional Rights* (above n. 7).

phenomena ‘the global model of constitutional rights’; in this section I will briefly introduce its main features, which will pave the way for presenting, in the following section, a theory of constitutional rights which fits and justifies these features.

The global model of constitutional rights is best introduced and explained by contrasting it with what I call the ‘dominant narrative’ of the philosophy of fundamental rights. The dominant narrative holds (1) that rights cover only a *limited domain* by protecting only certain *especially important* interests of individuals; (2) that rights impose exclusively or primarily *negative* obligations on the state; (3) that rights operate only *between a citizen and his government*, not between private citizens; and (4) that rights enjoy a *special normative force*, which means that they can be outweighed, if at all, only under *exceptional circumstances*. Of these features of the dominant narrative, the general acceptance of the second – rights as imposing negative obligations on the state – has already eroded considerably, mainly because of the growing recognition of social and economic rights.<sup>13</sup> The third – limitation to the relationship between citizen and government –, while generally held to be true, does not normally attract much attention by rights theorists. The first and the fourth features – special importance and special normative force –, which are the most significant ones for my purposes in this paper, are still almost uncontroversial: philosophers of rights insist that not just *any* interest can be protected as a right, and that a crucial characteristic of rights is that they normally take priority over competing considerations. To name just the most famous examples of this theoretical approach: for Ronald Dworkin, rights operate as ‘trumps’ over competing policy concerns;<sup>14</sup> for Robert Nozick, they are ‘side constraints upon action’,<sup>15</sup> and for John Rawls, they take lexical priority.<sup>16</sup>

By way of contrast, under the global model of constitutional rights *all four* elements of this narrative have been given up – and often a long time ago. The doctrines and developments in constitutional rights law which have led to their erosion are rights inflation, positive obligations and socio-economic rights, horizontal effect, and balancing and proportionality.

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<sup>13</sup> For a theoretical account of this development, see Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), ch. 1.

<sup>14</sup> Ronald Dworkin has defended this position throughout his career; see for example his ‘Rights as Trumps’ in Waldron (ed.), *Theories of Rights* (Oxford University Press, 1984). For a more recent restatement see his *Justice for Hedgehogs* (Harvard University Press, 2011), 329.

<sup>15</sup> Robert Nozick, *Anarchy, State, and Utopia* (Basil Blackwell, 1974), 28–33.

<sup>16</sup> John Rawls, *A Theory of Justice*, Revised edition (Oxford University Press, 1999), 53–4.

### *a. Rights inflation*

Constitutional rights are no longer seen as only protecting certain particularly important interests. Especially in Europe a development has been observed that is sometimes pejoratively called ‘rights inflation’<sup>17</sup>, a name which I will use in a neutral way as describing the phenomenon that increasingly, relatively trivial interests are protected as (*prima facie*) rights. The most extreme approach is that of the German Federal Constitutional Court (FCC), which has explicitly given up any threshold to distinguish a mere interest from a constitutional right. As early as 1957 it held that Article 2(1) of the Basic Law, which protects everyone’s right to freely develop his personality, is to be interpreted as a right to freedom of action.<sup>18</sup> It affirmed this ruling in various later decisions; most famously it declared that Article 2(1) of the Basic Law included the rights to feed pigeons in a park<sup>19</sup> and to go riding in the woods.<sup>20</sup>

While other jurisdictions have not, to my knowledge, adopted such a far-reaching approach to the scope of rights, the phenomenon of rights inflation and the difficulty of finding a principled way of distinguishing rights from mere interests have been widely observed. It is important to note that the broad understanding of rights does of course not imply that the state is prohibited from interfering with the right in question. Rather, as has been hinted at above, there is an important conceptual distinction between *an interference with* and *a violation of* a right: an interference will only amount to a violation if it cannot be justified at the justification stage. Thus, the broad understanding of rights at the *prima facie* stage must be seen in conjunction with the proportionality test which permits the limitation of *prima facie* rights when they are outweighed by a competing right or public interest.

### *b. Positive obligations and socio-economic rights*

Rights are no longer regarded as exclusively imposing negative obligations on the state. But while most theorists of rights only reconsidered their views on this issue following the growing acceptance of socio-economic rights (particularly their inclusion in the South

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<sup>17</sup> George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), 126.

<sup>18</sup> BVerfGE 6, 32 (*Elfen*).

<sup>19</sup> BVerfGE 54, 143 (*Pigeon-Feeding*).

<sup>20</sup> BVerfGE 80, 137 (*Riding in the Woods*).



African Constitution), constitutional rights law had given up the idea that rights impose only negative obligations from the 1970s onwards, when the doctrines of positive duties or protective obligations became established.<sup>21</sup> The idea is that the state is under a duty to take adequate steps to prevent harm to the interests protected by (otherwise negative) rights. Thus, the state must, as a matter of constitutional rights law, put in place a system which effectively protects the people from dangers emanating from other private persons, such as criminal activities which threaten, for example, life, physical integrity, or property; and it must also protect them from dangers which do not have a (direct) human cause, such as natural disasters.

Furthermore and maybe more importantly, there is the aforementioned trend towards the acknowledgement of socio-economic rights, which obviously impose positive duties on the state and thus conflict with the dominant narrative according to which rights are concerned only or mainly with negative obligations. The most widely discussed example of this development is the South African Constitution, which contains rights to housing, health care, food, water, social security and education.<sup>22</sup>

### *c. Horizontal effect*

Constitutional rights are no longer seen as affecting only the relationship between the citizen and the state; rather, they apply in some way between private persons as well. For example, the constitutional right to privacy may protect a person not only against infringements of his privacy by the state, but also against such infringements by his neighbour, landlord, or employer. The doctrinal tool which achieves this is called *horizontal effect* of rights, where ‘horizontal’ as opposed to ‘vertical’ indicates that rights operate between private persons. The first court to acknowledge horizontal effect was the German FCC in its famous *Lüth* decision of 1953.<sup>23</sup> From Germany the concept has travelled to other parts of the world,<sup>24</sup> including Canada<sup>25</sup> and South Africa.<sup>26</sup>

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<sup>21</sup> To my knowledge, the first constitutional court to acknowledge positive obligations was the German FCC in its first abortion judgment; see BVerfGE 39, 1 (1975). One indicator of the global success of the doctrine is that the relatively young South African Constitution includes an explicit commitment to them in section 7(2): ‘The state must respect, protect, promote and fulfil the rights in the Bill of Rights.’ Here, ‘protect’ refers to positive obligations.

<sup>22</sup> Sections 26, 27 and 29 of the South African Constitution.

<sup>23</sup> BVerfGE 7, 198 (*Lüth*).

#### *d. Balancing and proportionality*

Contrary to the dominant narrative, it is not the case that constitutional rights generally enjoy a special or heightened normative force in legal practice. While it is true that some rights are absolute – for example the right to freedom from torture –, most rights – including the rights to life, physical integrity, privacy, property, freedom of religion, expression, assembly and association – can be limited in line with the proportionality test. Proportionality, whose origins are in Germany, has become *the* central doctrine of contemporary constitutional rights law; it has been accepted in South Africa, Israel, Canada, virtually every constitutional court in Central and Eastern Europe, and it is increasingly employed in Central and South American jurisdictions.<sup>27</sup> The test has four prongs. First, a policy interfering with the right must be in pursuit of a legitimate goal; second, it must be a suitable means of furthering the achievement of the goal (suitability or rational connection); third, it must be necessary in that there must not be a less restrictive and equally effective alternative (necessity); and finally and most importantly, it must not impose a disproportionate burden on the right-holder (balancing or proportionality in the strict sense). Some courts have adopted conceptions of the proportionality principle that look slightly different on the surface; however, what all tests have in common is a *balancing exercise* where the right is balanced against the competing right or public interest, which implies that far from enjoying any special or elevated status over public interests, rights operate on the same plane as policy considerations.<sup>28</sup>

### *3. Theorising the global model: between minimalism and maximalism*

#### *a) The scope of rights: endorsing ‘rights maximalism’*

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<sup>24</sup> For a comprehensive overview see Dawn Oliver and Jörg Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish, 2007).

<sup>25</sup> *Retail, Wholesale & Dep’t Store Union v. Dolphin Delivery Ltd.*, (1986) 2 SCR 573, 605 (Canadian Supreme Court). The subsequent judgment in *Hill v. Church of Scientology of Toronto*, (1995) 2 SCR 1170 confirmed this approach and fleshed it out further.

<sup>26</sup> Section 8(2) of the South African Constitution states in slightly awkward language: ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

<sup>27</sup> Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008–9) 47 *Columbia Journal of Transnational Law* 72, 112.

<sup>28</sup> This is captured in Robert Alexy’s theory of rights as principles and optimization requirements; see Alexy (above n. 7).

The global model does not reflect the once uncontroversial idea that the point of constitutional rights is to limit government and keep it out of our lives: that idea cannot make sense of the doctrines of horizontal effect and positive obligations and the increasing acknowledgment of socio-economic rights. The point of constitutional rights under the global model is not to *disable* government; rather it is to *enable* every person to take control of his or her life. Constitutional rights protect the ability of persons to live their lives according to their self-conceptions; thus, they are based on the value of *personal autonomy*. For example, constitutional rights protect a person's right to engage in free speech, believe in and follow the precepts of her religion (important aspects of personal autonomy), control her private life (including her sexual and reproductive autonomy), to bodily integrity (partly a precondition for, partly an element of personal autonomy), and so on. This focus on autonomy makes sense of the existence of horizontal effect and positive obligations: from an autonomy-based perspective, what matters is not *who* violates the right but rather the adequate protection of the interest at stake. It can furthermore explain the existence of socio-economic rights such as the rights to food, healthcare, or education, which protect the preconditions of autonomy.

The crucial question for present purposes is the scope of protection offered by constitutional rights: should they cover a narrow or a broad range of autonomy interests? The first feature of the global model (rights inflation) suggests that an approach which regards rights as protecting *all* of a person's autonomy interests – including those of trivial importance, such as feeding birds or riding in the woods (to use those famous German cases again) – sits best with the practice of constitutional rights law. Thus, the picture that emerges is that under the global model, all autonomy interests are protected as rights; however, this protection is not absolute or near-absolute; rather it can be limited as long as the limitation is proportionate. This conception of rights will strike many as counter-intuitive. Is it possible to show it as morally coherent? It is indeed possible, but to do so, we must dispense with a dearly held view of most if not all philosophers, who insist that fundamental rights protect only a narrow range of interests while having a special normative force which means that they can rarely, if ever, be outweighed by competing considerations. That model is flatly incompatible with the practice of constitutional rights law around the world, in particular with the global endorsement of the proportionality approach. Instead, I defend the following account of the point and purpose of constitutional rights. The basic entitlement that a person has under the global model is to being treated with a certain *attitude*: an attitude that *takes her seriously as a person with a life to live*, and that will therefore deny her the ability to live her life in a

certain way only when there are *sufficiently strong reasons* for this. Applied to the case of hobbies such as feeding the birds, this means that we should not ask whether the freedom to feed birds is an aspect of a narrowly defined set of especially important interests. Rather, we should ask whether the state treats a person subject to its authority in a way which is justifiable to her when it prohibits, for example, her participation in the activity of feeding birds; and this will be the case only when there are sufficiently strong reasons supporting the prohibition. Thus, the point of constitutional rights is *not* to single out certain especially important interests for heightened protection. Rather, it is to show a particular form of respect for persons by insisting that each and every state measure which affects a person's ability to live her life according to her self-conception must take her autonomy interests adequately into account in order to be justifiable *to her*. Constitutional rights law institutionalises a 'right to justification'<sup>29</sup>, that is, a right to be provided with an adequate justification for every state action (and omission) that affects the agent's autonomy.

*b) The structure of justification: 'rights minimalism'*

To say that a person has a constitutional right to X (where X could stand for freedom of religion, freedom of expression, property, etc.) means *not* that the state cannot, or at least not normally, limit X. Rather, it means that when the state limits X, it must be able to point to sufficiently strong reasons: if the reasons supporting the limitation are sufficiently strong, then the limitation will be proportionate and therefore justified; if they are not strong enough, the limitation will be disproportionate and the right will have been violated. This raises the question of the standard of 'sufficiently strong reasons' (and therefore also proportionality) in the domain of constitutional rights. Two candidate approaches suggest themselves. According to the *correctness standard*, when a state limits a right, it is justified in doing so only if its policy is the best possible – the correct – response to the social problem at hand. By way of contrast, under a *reasonableness standard*, the state acts legitimately when it chooses a reasonable, as opposed to the one correct, policy.

As an illustration, let us look at the problem of assisted suicide. Some people who are suffering from an incurable disease and who desire to kill themselves when their situation

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<sup>29</sup> On the idea of a moral human right to a justification see Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach', (2010) 120 *Ethics* 711. See further Matthias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', (2010) 4 *Law & Ethics of Human Rights* 141.

becomes unbearable know that once they will reach that stage, they will no longer be physically capable of implementing that plan on their own, although they could still do it with help from a partner, friend, or physician. However, it is precisely this assistance which in many, though by no means all, countries is illegal and punishable. The reason given for such policies is usually that allowing assisted suicide would lead to the risk of abuse, where weak and vulnerable patients could be bullied into killing themselves or might even be killed by relatives or carers. Under the correctness approach, a state which limits the right to assisted suicide – which is part of the right to private life or privacy – is justified in doing so only where this limitation is, as a matter of substance, the best possible policy. By way of contrast, under the reasonableness approach, the limitation is justified if it is at least reasonable (though possibly not correct). Thus, let us stipulate that a ban of assisted suicide is an example of a policy which legislators can in good faith believe to be the best policy (that is, it is reasonable), but which as a matter of moral fact is not the best policy. Under the correctness approach, we should consider this policy as one which violates rights, whereas under a reasonableness approach, we should accept it as justified.

Both as a matter of the current practice of judicial review around the world and as a matter of philosophical attractiveness, the reasonableness approach is preferable. The justification for this is controversial, however. Mattias Kumm points to the existence of reasonable disagreement: where such reasonable disagreement about the best policy exists, a decision to adopt one of the reasonable policies must be legitimate.<sup>30</sup> I have argued that the notion of reasonable disagreement, while relevant, cannot do all of the moral work and proposed that it is the principle of democracy which requires that a policy which is reasonable, as opposed to correct, is considered as constitutionally legitimate.<sup>31</sup> If we required the democratic process to come up with the best possible policy whenever it legislates in the domain of rights, this would, in light of the broad scope of rights under the global model, mean that often or indeed possibly always the outcome of democratic deliberations would be predetermined by the moral requirements of rights. There would be no room for democratic deliberation and good faith disagreement; and this must be flatly incompatible with our understanding of democracy as a form of government where the people and their representatives debate and, usually, face a genuine choice with regard to the proper way to deal with a particular social problem. Thus,

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<sup>30</sup> Mattias Kumm (above n. 29), 168–70.

<sup>31</sup> Kai Möller (above n. 7), 118.

the value of democracy requires that we accept a reasonableness standard as opposed to a correctness standard for assessing the justifiability of the limitation of a right.

This reasonableness standard is reflected in the jurisprudence of national constitutional courts. I do not have the space here show this point in depth; so a few observations must suffice. The Canadian Supreme Court has stated that ‘the legislature must be given reasonable room to manoeuvre’<sup>32</sup>, a phrase whose point is to indicate that the legislature need not find the one right answer to the rights question at stake. The German FCC often uses a negative formulation, stating that the proportionality test is satisfied if the interference is ‘not disproportionate’ or ‘not out of proportion’.<sup>33</sup> So rather than requiring positively that the policy be proportionate, the Court demands negatively that it not be disproportionate; the effect of this is to give the necessary leeway to the elected branches. Occasionally the Court uses formulations that indicate even more clearly that its approach is really a reasonableness approach, for example when it states that there must be ‘a relationship [between the seriousness of the interference and the weight of the reasons supporting the interference] that can still be considered as reasonable’<sup>34</sup>.

*c) The emerging picture: between minimalist and maximalist approaches*

The picture which emerges is that national constitutional rights are at the same time minimalist and maximalist: they are maximalist with regard to the range of interests that they protect as rights, and minimalist with regard to the standard of justification which they demand in relation to the protection of those interests. While as a consequence of rights inflation *all* autonomy interests, including those of trivial importance, are protected as rights, a measure limiting a right is constitutionally legitimate if supported by a reasonable, as opposed to the best possible, justification. The underlying ideas are that every state measure which affects a person in a morally relevant way – in other words, every state measure which affects a person’s ability to live his life according to his self-conception – triggers the duty of justification; and that the standard of justification must be a reasonableness standard in order to preserve a meaningful sphere of democratic debate about and choice between different reasonable policies.

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<sup>32</sup> *R. v. Edwards Books and Art*, (1986) S.C.R. 713, 795.

<sup>33</sup> See for example BVerfGE 65, 1, 54.

<sup>34</sup> BVerfGE 76, 1, 51.

### III. From national constitutional rights to international human rights

With the above account of the moral structure of national constitutional rights in mind, we can now approach international human rights. As explained in the introduction, the working hypothesis of this paper is that the moral structures of national constitutional rights and international human rights will at least be related. Thus, the question to be addressed now is what modifications, if any, we have to apply to the theory of national constitutional rights presented above in order to make it a suitable theory of international human rights. My conclusion will be that we need no modifications whatsoever.

There are two objections which a theorist of international human rights could have to this view. The first is that national constitutional rights, unlike international human rights, reflect and are based on national idiosyncrasies and contingencies and are therefore not a suitable candidate for a theory of international human rights, which by its very nature must transcend such contingencies. However, as I have explained above, constitutional rights discourse is just as global as international human rights discourse; constitutions around the world contain broadly the same set of rights, and constitutional courts employ the same doctrinal tools to interpret them, most importantly the proportionality test whose point is to enable a free-standing discussion of the moral justifiability of a policy. The idea that constitutional rights are or ought to be reflective of national idiosyncrasies to a large extent is simply wrong and ought to be abandoned.

The second and more promising objection is that constitutional rights are morally more demanding than international human rights. The idea is that constitutional rights incorporate and reflect a comprehensive set of legitimacy conditions for a policy or executive decision, whereas international human rights set only minimum standards.<sup>35</sup> Correlative to this perceived distance between national constitutional rights and international human rights is a perceived distance between constitutional legitimacy and national sovereignty: not everything that is constitutionally illegitimate (read: that violates constitutional rights) also transcends

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<sup>35</sup> In addition to Joseph Raz and Ronald Dworkin, whose work I discuss in more detail below, the view that international human rights are minimalist in structure has been defended by Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2009); Joshua Cohen, 'Minimalism About Human Rights: The Most We Can Hope For?', 2004 (12) *Journal of Political Philosophy* 190; Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2003); James Nickel, *Making Sense of Human Rights* (Wiley-Blackwell, 2<sup>nd</sup> ed, 2006); John Rawls, *The Law of Peoples* (Harvard University Press, 1999).

the sphere of a state's sovereignty (and conflicts with international human rights): most would hold that there is room for policies to fall within the sphere of sovereignty while at the same time violating constitutional rights.

Here are two important views from the literature which reflect this basic approach. The first talks about the relationship between constitutional and human rights, and the second focuses on the relationship between legitimate authority and national sovereignty. In *Justice for Hedgehogs*, Ronald Dworkin proposes a theory of both constitutional (in his terminology: political) rights and human rights. He writes:

'It seems widely agreed that not all political rights are human rights. People who all accept that government must show equal concern for all its members disagree about what economic system that requires ... But almost none of them would suggest that the many nations that disagree with his opinion are guilty of human rights violations ... Why not? Human rights are widely thought to be special and, according to most commentators and to political practice, more important and fundamental.'<sup>36</sup>

The second quote, by Joseph Raz, deals with the corresponding point of the relationship between legitimate authority and national sovereignty. My interest here is not in legitimate authority but in constitutional legitimacy, and I have no space to explore the relationship between the two. However, Raz's basic intuition also works, I believe, if we replace his reference to legitimate authority with constitutional legitimacy.

'We must not confuse the limits of sovereignty with the limits of legitimate authority. The sovereignty of states sets limits to the right of others to interfere with their affairs. The notion of sovereignty is the counterpart of that of rightful international intervention. The criteria determining the limits of legitimate authority depend on the morality of the authority's actions. However, not every action exceeding a state's legitimate authority can be a reason for interference by other states, whatever the circumstances, just as not every moral wrongdoing by an individual can justify intervention by others to stop or punish it.'<sup>37</sup>

Thus, according to the widely held view reflected in the above statements, there is a distance between constitutional legitimacy and constitutional rights on the one hand, and international human rights and state sovereignty on the other. This is the view that I will challenge in this section. My strategy will be negative: I will show that, starting from the theory of constitutional rights which I outlined in the previous section, there is neither a morally coherent way to create this distance, nor is there a need for it. It follows that if we want to

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<sup>36</sup> Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), 332.

<sup>37</sup> Joseph Raz (above n. 3), 330.



protect human rights at the international level, we should accept precisely the same account of rights that is appropriate at the national level, and that the moral boundaries of constitutional legitimacy are the same as those of national sovereignty.

Structurally, there are two ways to tinker with the theory of constitutional rights presented in the previous section in order to make it more minimalist. First, one could reduce the range of interests protected as rights. Second, one could focus on the standard of justification (the reasonableness standard) and make this standard looser. I will consider both options in turn, concluding that none of them can be implemented without making the resulting account of international human rights morally unappealing.

### *1. Limiting the range of interests protected as rights*

I argued above that under the global model of constitutional rights, all of a person's (autonomy) interests are protected as rights. Thus, to employ two famous German cases one last time, a person can successfully claim a right to feed birds in a park or to go riding in the woods. The underlying idea of this broad scope of rights is that every state action (and omission) which affects a person in a morally relevant way requires justification. To 'translate' this 'right to justification'<sup>38</sup> into a theory of rights, it is necessary to protect all autonomy interests of a person at the prima facie stage, and to assess the justifiability of their limitation at the justification stage, using the proportionality test.

Now, an international human rights theorist might respond by arguing that while it may be appropriate to protect such a broad scope of rights in the context of national constitutional law, it would be inappropriate to do so at the international level. Thus, the range of interests protected as rights ought to be drawn more narrowly, introducing a *threshold* which distinguishes rights from mere interests.

For this idea to succeed, however, it must be possible to identify a threshold which points to a principled distinction between those interests which do and those which do not attract the protection of rights. A first approach could be to draw the line in a *pragmatic* way: we could argue that only interests of, say, 'fundamental' importance attract the protection of international human rights. But the problem with pragmatic approaches is precisely their pragmatic character, that is, the absence of principle. A second, more promising strategy

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<sup>38</sup> See above n. 29.

could be to consider the existence of a *qualitative* difference between rights and mere interests. The most promising attempt in this direction has been made by James Griffin in his book *On Human Rights*. He argues that the threshold can be derived from the idea of personhood:

‘Human life is different from the life of other animals. We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be ... And we try to realise these pictures. This is what we mean by a distinctively *human* existence ... And we value our status as human beings especially highly, often more highly than even our happiness. This status centres on our being agents – deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves.

Human rights can then be seen as protections of our human standing or, as I shall put it, our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) choose one’s own path through life – that is, not be dominated or controlled by someone or something else (call it “autonomy”). ... [And] (third) others must not forcibly stop one from pursuing what one sees as a worthwhile life (call this “liberty”).<sup>39</sup>

Griffin tells us more about how demanding the right to liberty is:

‘[L]iberty applies to the final stage of agency, namely to the pursuit of one’s conception of a worthwhile life. By no means everything we aim at matters to that. Therefore, society will accept a person’s claim to the protection of liberty only if the claim meets the material constraint that what is at stake is indeed conceivable as mattering to whether or not we function as normative agents.’<sup>40</sup>

Griffin’s idea is that ‘personhood’ functions both as the basis of human rights and as a limitation on their scope: only those interests that are important for personhood are protected as human rights. However, this account does not work. Its failure is that the personhood approach does not offer a coherent way to delineate interests relevant for personhood from other interests. For Griffin, personhood requires autonomy and liberty (in my terminology, personal autonomy): basically, control over one’s life. But it requires only that kind of control over one’s life that is required by the value of personhood. This leaves open the question of what the test is for determining whether some instance of liberty (autonomy) is required for personhood. My suspicion is that it is simply ‘importance’. For example, Griffin explains that

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<sup>39</sup> James Griffin (above n. 2), 32–33. Griffin’s second point, omitted in the quote, is about ‘minimum provision’ of resources and capabilities that it takes to be an agent.

<sup>40</sup> *Ibid*, 167.

‘the domain of liberty is limited to what is *major enough* to count as part of the pursuit of a worthwhile life’<sup>41</sup>. At another point, he defends a human right to gay marriage on the ground ‘of its *centrality* to characteristic human conceptions of a worthwhile life’.<sup>42</sup> Thus, it seems that the threshold of personhood simply refers back to a sliding scale of importance: an interest that is ‘major enough’ or ‘central’ will acquire the status of a human right. But such a sliding scale cannot, as explained above, do the moral work. The threshold would have to be between ‘not quite major enough’ and ‘barely major enough’ or ‘not quite central’ and ‘barely central’. Then, under Griffin’s model, all that separates a mere interest from a human right is a small difference in terms of importance or centrality. This small difference, however, cannot justify the great normative significance that for proponents of threshold models comes with one of them being a simple interest and the other a human right. I believe that this is a general problem of threshold theories that is not limited to Griffin’s account.<sup>43</sup> If that is true, then the only possible conclusions are that the threshold requirement should be dropped and that it should be acknowledged that the scope of international human rights, just as the scope of national constitutional rights, extends to *everything that is in the interest of a person’s autonomy*. However, this being so, we must abandon the idea that by reducing the scope of interests protected as rights we can make sense of the wide-spread intuition that there is a distance between the moral demands of national constitutional rights and international human rights.

## 2. Lowering the standard of justification

The second structural possibility to create a distance between national constitutional rights and international human rights is to relax the standard of justification. As explained above, under national constitutional rights, a policy limiting a right will be considered justified if it is reasonable (as opposed to correct). This means that to be constitutionally legitimate, the legislature does not have to find the best possible, or ‘one right’, answer to the social problem at hand; rather it acts legitimately if its answer is reasonable.

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<sup>41</sup> *Ibid*, 234 (emphasis added).

<sup>42</sup> *Ibid*, 163 (emphasis added).

<sup>43</sup> For a similar view, cf. Joseph Raz (above n. 3), 326; Ronald Dworkin (above n. 36), 334–5, especially n. 5.

The importance of this point cannot be overstated. Much of the discussion about the justifiability of judicial review at the national level rests on the mistaken assumption that when courts adjudicate constitutional rights, they thereby remove the choice between different policies from the democratically elected legislature.<sup>44</sup> This view is however misleading: courts do not remove choice as such from the legislature; they remove only the possibility to choose an unreasonable – disproportionate – policy. The choice between all possible reasonable – proportionate – policies remains with the legislature. When a court declares that a policy respects constitutional rights, it says nothing more or less than that the policy under consideration is reasonable; it does not pass judgment on whether it is correct (this is simply not the court’s task). Conversely, where a court declares a policy a violation of constitutional rights, it decides that this particular policy is outside the scope of reasonable policies; but it leaves to the legislature the task of choosing a reasonable policy.

With this clarification in mind, let us turn to Dworkin’s proposal about how to delineate constitutional (political) from international human rights:

‘We must ... insist that though people do have a political right to equal concern and respect on the right conception, they have a more fundamental, because more abstract, right. They have a right to be treated with the attitude that these debates presuppose and reflect – a right to be treated *as* a human being whose dignity fundamentally matters.

That more abstract right – the right to an attitude – is the basic human right. Government may respect that basic human right even when it fails to achieve a correct understanding of more concrete political rights ... We ask: Can the laws and policies of a particular political community sensibly be interpreted as an attempt, even if finally a failed attempt, to respect the dignity of those in its power? Or must at least some of its laws and policies be understood as a rejection of those responsibilities, toward either its subjects at large or some group within them? The latter laws or policies violate a human right.

... The test ... cannot be satisfied simply by a nation’s pronouncement of good faith. It is satisfied only when a government’s overall behaviour is defensible under an intelligible, even if unconvincing, conception of what our two principles of human dignity require.’<sup>45</sup>

As the above quote shows, Dworkin must believe that in the domain of constitutional (political) rights, legitimacy requires that government get it right, i.e. that it find the one right answer to the rights issue at hand. This can be contrasted with the domain of human rights

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<sup>44</sup> Jeremy Waldron, ‘The Core of the Case Against Judicial Review’, (2006) 115 *Yale Law Journal*, 1346, 1386–1395.

<sup>45</sup> Ronald Dworkin (above n. 36), 335–6 (emphasis in the original).

which, according to Dworkin, require only that government act in good faith. As Dworkin explains, the good faith requirement is not a subjective but an objective test: it requires that the respective policy be defensible under an intelligible conception of what dignity requires. In light of this, I believe it is fair to Dworkin's intentions to equate 'in good faith' with 'reasonable': the function of the good faith requirement is to acknowledge a sphere of acceptable disagreement while nevertheless requiring that the policy at stake be objectively justifiable. This must in substance amount to a reasonableness standard: an unreasonable policy is not defensible as enacted in good faith or as intelligible, whereas a reasonable policy is defensible in this way.

Can we use Dworkin's idea to create a distance between national constitutional rights and international human rights under the global model? I believe that we cannot. Dworkin can create this distance in his theory only because the standard of justification in his account of constitutional (political) rights is 'correctness'. I cannot assess here whether this position is viable within Dworkin's theory of rights (I have my doubts). But on the assumption that it is, it is indeed a structural possibility for Dworkin to then relax the correctness standard which he uses for constitutional rights and adopt a reasonableness (good faith) standard for international human rights. By way of contrast, in the theory of constitutional rights which underlies the global model, the standard of review is already 'only' a reasonableness standard anyway; therefore any further relaxation of this standard would imply that international human rights have no objection to policies which affect people's rights and which are not even reasonable. 'Reasonable' means something like 'supported by adequate reasons'. It is implausible to hold that a policy which limits a person's human rights and which is not supported by adequate reasons nevertheless complies with human rights. In other words, we cannot go below the threshold of reasonableness, and given that this threshold is already employed by national constitutional rights, we cannot create a distance between national constitutional rights and international human rights by relaxing the standard of justification.

The above argument concerns itself with the relationship between national constitutional rights and international human rights. We can examine the same issue by looking at the relationship between constitutional legitimacy and national sovereignty. Remember Raz's claim, quoted above, that the two refer to different standards, with national sovereignty being wider than what he calls legitimate authority, and what I call constitutional legitimacy. Why is this so, for Raz?

‘As I see it, the core point, which is too complex to be dwelt upon here, is that much of the content of the moral principles which govern social relations and the structure of social organisation is determined by the contingent practices of different societies. Hence the principles which should govern international relations cannot just be a generalisation of the principles of justice which govern any individual society. How does this bear on the issue of state sovereignty? Directly it establishes a degree of variability between standards of justice and thereby variability in the precise content and scope of rights which apply in different political societies. This speaks for caution in giving outsiders a right to intervene in the affairs of other states. It also suggests the desirability of allowing political societies freedom from too close external scrutiny, to be free to develop their own rights-affecting practices.’<sup>46</sup>

By Raz’s own admission, this is only the sketch of an argument. In what follows, I will unpack and interpret the statement, and I will again replace Raz’s term of ‘legitimate authority’ with ‘constitutional legitimacy’; so what follows is the critique of a position which Raz presumably holds only partially. There is a close connection between constitutional legitimacy and ‘the principles of justice that govern any individual society’. But those principles of justice will vary from society to society. This is not so because of moral relativism (which Raz rightly rejects), or because whatever principles a society happens to accept make those principles just. Rather, it is because of what Raz calls a ‘benign social relativism’, according to which the principles of justice will be sensitive to social facts. Certain practices will have developed within a society, and the principles of justice which are applicable to that society will or at least may be sensitive to those practices. Hence it is not possible to simply take one society’s principles of justice and apply them to another society with different practices and structures; and given the close connection between justice and constitutional legitimacy, it is not possible to equate national sovereignty with any given society’s standards for constitutional legitimacy. In light of this, caution is required when assessing questions of justice from the outside, and no ‘too close external scrutiny’ should be applied.

To illustrate this idea, let us take the example of the right to education, which Raz also considers in his paper, albeit in a different context. Let us say that in country A, people have a moral right against the state to be provided with education, but that in country B, people have no such moral right because, say, the social structures of that country are such that people can have a rewarding life without formal instruction, or because in that country education is provided by the family or clan and the state need not get involved. In short, in

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<sup>46</sup> Joseph Raz (above n. 3), 331.

country A justice requires that the state provide education and in country B it does not. Thus, an international judge who is a citizen of country A and who is called upon to assess the human rights situation in country B could mistakenly believe that education is a human right (based on her experience at home); in order to avoid such mistakes she should adopt an attitude of caution, and additionally she should keep in mind the fact that societies need freedom to develop their own rights-affecting practices.

The first problem with this approach is the assumed link between constitutional legitimacy and justice. Constitutional legitimacy is not about securing justice. Rather, as explained above,<sup>47</sup> it is about whether a policy is supported by adequate reasons: we may say, it is about whether a policy relies on a reasonable, as opposed to the one correct, conception of justice. In other words, a policy may be unjust but nevertheless constitutionally legitimate. This must be true because if constitutional legitimacy required justice, then there would be no room for democratic disagreement about questions of justice – rather, only one, namely the one just, policy would be constitutionally legitimate; such an approach would be incompatible with the value of democracy which requires the people and their representatives to engage in discussions and controversies about and ultimately hold a vote on what justice requires. This means that constitutional legitimacy leaves states a considerable room for manoeuvre: all it insists on is that a policy be a reasonable attempt at justice. From the point of constitutional legitimacy, states have an enormous leeway in working out which conception of justice works best for them, and they may take their structure of social relation, history, and social practices into account when doing so. There is no moral need, nor is there the moral possibility, to make this leeway even wider in the context of national sovereignty because doing so would imply awarding the dignifying label of ‘falling into the sphere of national sovereignty’ to a policy which is not only unjust but which cannot even be defended as a reasonable attempt at justice. The pluralism and diversity which rightly ought to be cherished in the international arena must, to be morally defensible, be a diversity and pluralism of *reasonable* conceptions of justice, not one of unreasonable and therefore unjustifiable ones.

In light of this clarification, let us assess Raz’s two arguments about why for him, sovereignty is wider than constitutional legitimacy. One of his points is that societies need freedom to develop their own rights-affecting practices, and that therefore international supervision ought not to be too intrusive. This argument is unconvincing: the freedom to

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<sup>47</sup> Section II.3.b.

develop one's rights-affecting practices is surely valuable when used to develop rights-respecting practices. But what if a society uses it to develop rights-violating practices? Societies do indeed need freedom to develop their own practices, but the only freedom they need is to choose between different reasonable conceptions of justice, not the freedom to choose unreasonable ones; and, as pointed out above, policies based on reasonable conceptions of justice do not violate rights and remain within the sphere of national sovereignty.

Raz's second point is that there are certain difficulties with outsiders assessing the requirements of justice in a given society. As a preliminary point, these difficulties are reduced but do not entirely go away when we replace 'justice' with 'constitutional legitimacy': they are reduced because it will often be easier, especially for an outsider, to assess whether a policy is reasonable than to assess whether it is correct; however, the problems still persist to an extent because the reasonableness of a policy will still be sensitive to local contingencies to some extent.

I believe that Raz has a valid point here, albeit one which leads him to draw an unattractive conclusion. Let us take the example of an international judge. It is true that an international judge cannot simply rely on the conception of constitutional legitimacy adopted in his home country and apply it to the society from which the case on his desk originates. Rather, he must ask the question of whether the policy at stake is legitimate under the standards of legitimacy of the society whose policy it is; and establishing this may on occasion be difficult or even impossible for him. However, the proper response to this problem is not to loosen the moral requirements of sovereignty but rather to acknowledge that sometimes an outsider's empirical and/or normative knowledge is limited, and therefore to show a degree of deference towards the original decision-maker.

Dealing with this kind of uncertainty is the daily business of international courts such as the ECtHR, which has developed strategies and doctrines to do so satisfactorily. Its judgments usually contain long sections setting out the domestic context of the rights issue at stake; this enables the Court to assess whether the policy is justifiable within that context. Furthermore and more importantly, the Court's doctrine of the *margin of appreciation* acknowledges and provides a way of dealing with the specific institutional limitations under which it, as an international court, operates. The classic statement of the margin of appreciation was set out in the famous *Handyside* case:



‘By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on [the question of whether a restriction of the right is necessary]. [...] [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context.

Consequently, Article 10 (2) leaves to the Contracting States a margin of appreciation. [...] Nevertheless, Article 10 (2) does not give the Contracting States an unlimited power of appreciation. The Court, which [...] is responsible for ensuring the observance of those States’ engagements, is empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.’<sup>48</sup>

The margin of appreciation doctrine enables the Court to defer to the national authorities of the respective member state in a situation where it has doubts about the justifiability of a policy but is simultaneously unable to convince itself of its unjustifiability (because of epistemic uncertainty). In such cases, the Court will often hold that the measure at stake lies within the margin of appreciation of the respective member state. It should be noted that the margin of appreciation doctrine is not only one of the cornerstones of European human rights law, but also one of the most difficult and controversial parts of it; and the Court is often rightly accused of taking recourse to it too lightly. So my goal here is not to wholeheartedly defend the Court’s approach; rather it is to make the more limited point that there are indeed cases where the doctrine is rightly invoked because of epistemic uncertainty.

To give an example of a scenario where it is difficult and maybe impossible for the Court to establish the right outcome, let us consider the *Refah Party* case.<sup>49</sup> Turkey banned the Refah Party which it considered extremist and a threat to Turkish democracy, in particular because of its right-wing Islamic agenda, which included, among other things, a proposal to introduce aspects of Sharia law. In a nutshell, one of the important issues at stake was whether Turkey was justified in taking a tough stance towards religious, in particular Islamic, parties, in order to protect its commitment to what has been labelled ‘militant secularism’<sup>50</sup>, which in turn was regarded by Turkey as a cornerstone of protecting its democracy from being undermined and eventually, to put it bluntly, slipping into an Islamic dictatorship. I regard this case as a paradigm example of the scenario Raz must have in mind, where it is extremely difficult if

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<sup>48</sup> *Handyside v. United Kingdom*, (1979-80) 1 EHRR 737, 753–4.

<sup>49</sup> *Refah Partisi (Welfare Party) and Others v. Turkey*, (2002) 35 EHRR 3.

<sup>50</sup> Patrick Macklem, ‘Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe’ (August 17, 2010). Available at SSRN: <http://ssrn.com/abstract=1660649> or <http://dx.doi.org/10.2139/ssrn.1660649>.

not impossible for an outsider such as an international judge to decide whether Turkey's action of dissolving the Refah party was justified, and the reason for this difficulty lies in the fact that normative considerations about the legitimacy of banning a political party are inextricably bound up with questions relating to Turkey's history, culture, and politics, which make it difficult if not impossible for an outsider to resolve the issue satisfactorily. So, to repeat, Raz has a point. But if I am given the task to resolve a mathematical puzzle which is too difficult for me, the response to my personal intellectual limitations cannot be to relax the standards of mathematical truth. Similarly, where an international court is unable to determine whether a country's policy reflects a reasonable conception of justice, we should not respond by relaxing the moral requirements of sovereignty. Rather, we should acknowledge that the problem of epistemic uncertainty may on occasion lead international courts to defer to the respective national authorities – problematic and unsatisfactory as this may be –, and at the same time insist that sovereignty can be invoked only in support of justifiable (reasonable) policies.

### *3. Conclusion*

Both strategies of creating a distance between national constitutional rights and constitutional legitimacy on the one hand and international human rights and national sovereignty on the other failed. To the extent that constitutional rights are 'maximalist' in character by protecting all (autonomy) interests as rights, this cannot be abandoned without introducing arbitrariness, and to the extent that constitutional rights are 'minimalist' by insisting not on a correctness but only on a reasonableness standard of justification, a further lowering of the standard is neither necessary nor coherently possible. It follows that national constitutional rights and constitutional legitimacy on the one hand and international human rights and national sovereignty on the other have the same moral structure. The next section will flesh out some of the implications of this view.

## **IV. Implications**

### *1. An alternative explanation of international human rights minimalism, and its limits*

Many believe that minimalism is built into the moral structure of international human rights. However, the only way in which international human rights may be defensibly minimalist is *pragmatic* and therefore *external* to the moral structure of international human rights. There are good reasons why much of international human rights *practice* focuses on preventing particularly egregious violations of human rights. But those reasons have nothing to do with the moral structure of international human rights; they simply reflect judgments about priorities.

While it is plausible to defend some form of minimalism on pragmatic grounds, we would however paint a one-sided picture of international human rights if we argued that all of it *is* or *ought to be* minimalist for pragmatic reasons. Pragmatic minimalism can be justified only to the extent that it is politically impossible or excessively costly to protect international human rights comprehensively. In other words, we should work towards a state of affairs where international human rights are comprehensively protected, and where it is not necessary to limit their practical reach to the prevention of only the worst human rights violations. In this sense the theory of international human rights proposed here is partly *aspirational*.

I say ‘partly’ because there exists already one instance of a legal institutionalisation of human rights at the international level which broadly reflects the model I advocate: the ECHR. The jurisprudence of the ECtHR is structurally very similar to the global model of constitutional rights. *First*, we can identify rights inflation in the Court’s jurisprudence: it regularly reads the protection of relatively trivial interests into the Convention, most often into Article 8 (the right to respect for private and family life). To give just one example, in a case involving residents near Heathrow airport complaining about the noise caused by night flights, the Court held that Article 8 also covers the right not to be affected by aircraft noise<sup>51</sup> – dismissively dubbed ‘the human right to sleep well’<sup>52</sup> by George Letsas. *Second*, the Court protects negative as well as positive obligations – in fact, it has more or less dropped the distinction between the two.<sup>53</sup> (It admittedly does not, at least not comprehensively, protect

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<sup>51</sup> *Hatton v. United Kingdom*, (2003) 37 EHRR 28.

<sup>52</sup> George Letsas (above n. 17), 126.

<sup>53</sup> See for example *Hatton* (above n. 51), para. 98: ‘Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants’ rights under para.1 of Art. 8 or in terms of an interference by a public authority to be justified in accordance with para. 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.’

socio-economic rights, which were deliberately left out of the Convention.) *Third*, the Court applies the proportionality test and, by and large, has no scruples about declaring a measure of a member state disproportionate and therefore in violation of human rights. To give, again, just one example: the Court recently ruled against the United Kingdom for failing to protect the right of an employee of British Airways to openly wear a small cross during work, arguing that BA's interest in maintaining a certain corporate image was outweighed by the applicant's right to manifest her religion.<sup>54</sup>

While a comprehensive analysis of the Court's jurisprudence is beyond the scope of this paper, it is fair to say that its approach to human rights is structurally extremely close to that of national constitutional courts. This being so, it cannot be argued that because of its great scope of protection, the theory of rights which I propose in this paper is unworkable or unhelpful in the context of international human rights. It has already proven workable in practice, namely in the member states of the Council of Europe, and not only does it work *somehow*; rather, the jurisprudence of the ECtHR is widely and rightly regarded as the poster child of international human rights law.

## 2. *The point of international human rights law*

If, as I argue, the moral structures of national constitutional rights and international human rights are identical and we should work towards a state of affairs where the international order protects fundamental rights as well as some national constitutional courts already do, then this leads to the question of the point of this additional layer of rights protection. At first glance, an institutionalised mechanism for the protection of international human rights which relies on the same standards as those applied by national constitutional courts may seem odd and an unnecessary complication and duplication of responsibilities.

There is, however, nothing suspicious about the fact that under the model advocated here, national constitutional courts and international human rights courts apply the same standards of review. The international mechanisms for the protection of human rights will only kick in when something has gone wrong at the national level. Thus, if one were to adopt a minimalist approach to international human rights, then the international actors would only become active after the national level has failed to deliver even this minimum standard. In the model

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<sup>54</sup> *Eweida v. United Kingdom* (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10), Judgment of 15 January 2013.

advocated here, the international actors would interfere when the respective national constitutional court made a mistake and accepted a policy as complying with the requirements of constitutional legitimacy when in reality it violated them and therefore fell outside the sphere of the state's sovereignty. Thus, there is no deep problem here. The point of international human rights law is *to police the boundaries of a state's sovereignty*.

### *3. The obligation of states to participate in international mechanisms for the protection of human rights*

A further question is whether there is a moral obligation on states to promote the international protection of human rights by participating in legal mechanisms for their protection which bind themselves and all other participating states. I believe that there are, and I will provide two reasons for states to sign up to international human rights treaties and organisations. The first centres on each state's duty to ensure and improve its own legitimacy in relation to its citizens.<sup>55</sup> One important aspect of its legitimacy is its respect for its citizens' fundamental rights. There are good outcome-related reasons to hold that an adequate institutionalisation of fundamental rights will provide not only a national level of constitutional protection but include an additional international layer as well.<sup>56</sup> First, the international layer may stabilise a country's long-term commitment to the values of democracy, the rule of law, and fundamental rights, and may make it harder for forces seeking to undermine or destroy its democratic practices to succeed. In a national context, the integrity of a constitutional court is most under threat when the governing parties seek to undermine its work, for example through the appointment of judges who support the government's ideology, the tinkering with procedural rules, or constitutional amendments. While it is true that international courts, too, operate in an environment which involves political pressure (this is visible in the case of the ECtHR which occasionally backtracks from its own jurisprudence when faced with resistance from national governments), it will be impossible for any one national government gone astray and acting in isolation to do serious damage to an international court. Second and independently, there is reason to assume that international courts will sometimes reach better

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<sup>55</sup> On a state's obligation to improve its own legitimacy see Ronald Dworkin, 'A New Philosophy for International Law', (2013) *Philosophy & Public Affairs* 1, 17.

<sup>56</sup> I leave open the further question of whether there are *outcome-independent* reasons (that is, reasons which do not rest on the assumed ability of international courts to improve the overall level of rights protection) which necessitate the existence of a right to a hearing before an *international* court. For the national context, such a claim has been made by Alon Harel, *Why Law Matters* (OUP 2014), ch. 6 and Matthias Kumm (above n. 29), 170–1.

outcomes compared to national constitutional courts. National and international courts have their respective weaknesses and strengths. Among the strengths of a well-designed national constitutional court is that its judges will have more adequate ways of acquiring the relevant empirical knowledge on which the correct outcome of legal cases, including constitutional and human rights cases, often depends, and that they will have a deeper understanding of the principles of justice applicable to their respective society. An international court will find it more difficult to access the relevant empirical data; and, as discussed above, will also on occasion find it more difficult to assess the justifiability of a state's practices from the outside. In the case of the ECtHR, this often leads the Court to adopt a relatively high degree of deference towards the respective national authorities, which potentially leads to an under-protection of human rights. There are, however, also important ways in which an international court may be better placed to engage in judicial review: the human mind often leads us to trust what we are familiar with, and therefore in the case of a national constitutional court, the judges' intimate knowledge of their own legal order may on occasion preclude a fresh and unbiased assessment of the law at stake. In such situations, an international court, as a body mostly made up of judges from other jurisdictions, may be in a better position, relatively speaking, to identify certain pathologies of the politics and policies of a national community.

The second reason for joining an international system for the protection of human rights can be derived from a state's obligations to people living *in other states* and can be explained in the following way. Human rights flow from a fundamental status of human beings which they possess simply by virtue of their humanity; we may call this status 'human dignity'. Violations of human dignity are a moral concern for everyone; this proposition is the basis of the view, assumed by this paper, that the sovereignty defence does not hold in the case of a violation of human rights: a violating state cannot claim that its violation of human rights is not the business of other states. Thus, every state is under a moral obligation *to take adequate steps* in the international arena to ensure that the human dignity of people living in other states is respected. One important way of discharging this moral obligation is to participate in international systems of human rights protection that are likely to lead to an improvement in human rights compliance *in those states*. Thus, even a country whose democratic and rights-respecting culture is of such a high quality that in terms of improving its level of rights protection at home it has nothing to gain from joining an international system of rights protection will be under a moral obligation to participate if by doing so it contributes to a

more effective protection of human rights abroad. For example, the current debate in the United Kingdom about whether the country should leave the Council of Europe centres almost exclusively on the question of what the UK may get out of staying or leaving, and usually neglects the fact that whatever the answer to that question may be, the more important consideration relates to the UK's obligation to contribute to making the ECHR a success across Europe and improving human rights compliance in other member states with a less impressive democratic and rights-respecting culture than that of the UK.

Which steps are adequate and therefore morally required will of course be a difficult question, and resolving it will crucially involve strategic considerations as to the likely success of the scheme under consideration in improving human rights compliance in the long run. Assume that the measure under consideration is a regional human rights treaty which includes the right of individuals to petition an international court with the final authority on questions of interpretation – in other words, a scheme similar to the ECHR. Where the international situation is such that it can be expected that the newly created court will, on the whole, function well and improve compliance of the participating states with the demands of human dignity, a state will be under an obligation to participate in this scheme even if its rights situation at home does not need improvement and can be considered entirely stable even in the long run. It owes this duty not to its own citizens but to the people of other states whose dignity is not currently adequately respected, or who live in states whose democratic and rights-respecting culture is not sufficiently mature and needs the stabilising effect of this treaty in order to keep the country on a dignity-respecting course. By way of contrast, where the international situation is such that it could be expected that the treaty under consideration would not contribute to more respect for dignity in the respective region – for example because one would have to expect that many of the participating countries would send incompetent or corrupt judges to sit on the new court, or because there is no sufficient prospect of the new court's judgments being obeyed – no such obligation would arise. (However, in such a situation, other obligations would of course exist, the crucial question being which steps are likely to improve compliance with human rights over time.) Thus, importantly, my argument is not that whatever the state of the world or the respective region, international human rights courts ought to be set up everywhere. Such courts are only one of a range of potential measures to stabilise a region's respect for human rights in the long run, and they should only be used where there is a reasonable chance of them succeeding with

their work. That said, where the conditions are sufficiently favourable, there is an obligation to introduce them, for the reasons given above.

The above argument claims that states have an *obligation* to take adequate steps to promote the protection of human rights inside as well as outside their own borders. The point can be pushed further: I will claim that the creation of an international court of human rights will, under certain conditions, itself be a matter of human rights. The argument to this effect proceeds in two steps and is structurally similar to, though substantively different from, establishing the existence of a moral right under Raz's interest theory of rights. Raz has famously argued that a right exists where a person's interest grounds duties in others.<sup>57</sup> In a structurally parallel way, I claim that a person has a right if someone else is under an obligation which is grounded in that person's status; and this right will be a human right if the status under consideration is the status of human dignity. Thus, a person has a human right to the creation of an international human rights court if states are under an obligation to create such an institutional protection of human rights and if this obligation flows from that person's human dignity. The obligation to create an international human rights court, where it exists, is, as argued above, grounded in the status of human dignity of especially those people whose human rights are at risk of not being adequately respected in their home states in the present or the future. This establishes the possibility of the existence of a human right to the creation of an international court of human rights.

## **V. Conclusion**

This paper has demonstrated that international human rights have the same moral structure as national constitutional rights and, in particular, that the wide-spread view that international human rights are more minimalist than national constitutional rights cannot be maintained. As has been shown, international human rights minimalism is neither coherently possible, nor is it desirable in the interests of a reasonable pluralism and diversity at the international level. It follows that minimalism can, if at all, only be justified pragmatically, as a necessary setting of priorities in order to tackle at least the most urgent human rights problems. But we should try to limit the need for this pragmatism. The aspiration expressed by the theory of

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<sup>57</sup> Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986), 166: 'Definition: "X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.'



international human rights proposed by this paper is that of a world where the same level of rights protection that today already exists at the national level in many countries is also endorsed and effectively institutionalised at the international level.

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