Conclusion

Although patients are sovereign over their own health and doctors are complementary to medical care in theory, their relationship is not simply dualistic or monistic but rather more complicated in practice. On the one hand, doctors often proactively employ their expertise, which is accumulated at the universal level, to manage the health conditions of patients. On the other hand, when patients feel that the experts misdiagnose or prescribe a suboptimal drug, or when they are confident they are the 'true experts' for their own bodies, they may engage in dialogue with the medical experts to treat their own diseases independently.[820] This figuration of *co-constitutive relationality* may be applied similarly to the practices of conventionality control. This monograph has surveyed the parallel dynamism between 'constitutionalised international adjudication' (Part I) and 'internationalised constitutional adjudication' (Part 2) by focusing on the practice of conventionality control of domestic law in the European and Inter-American systems of human rights. Chapter 1 of each Part revealed that the interpretation and application of conventionality control parameters combine unifying and diversifying approaches depending on the protection level of universal, regional and constitutional norms in light of the *pro homine* principle embedded in 'more favourable' clause. In addition, Chapter 2 of both Parts demonstrated that the allocation of conventionality control powers can also be centralised and decentralised depending upon the nature of the labour among regional, constitutional and ordinary courts. The results of the analysis is summarised in **Chart 2**.

As noted in the last part of the Introduction, this project purports to create one normative model of conventionality control based on those adjudicatory practices at the international and domestic levels. Given the dynamism of top-down constitutionalisation and bottom-up internationalisation of adjudication in Europe and Latin America, the so-called *static validity* theory (dualism or monism) or the *practical coordination* theory cannot be a panacea to address this phenomenon. Therefore, the monograph, finally, elaborates a *dynamic process* theory that may explain, in

820 This possibility is pointed out in a discussion with Professor Andreas Føllesdal, who questioned that 'So the worries may be that the "experts" misdiagnose, or prescribe a suboptimal drug..?'.

both the empirical and normative senses, the doctrine of conventionality control.

	Chapter 1 Conventionality Control Parameters	Chapter 2 Conventionality Control Powers
Part I Constitutionalisation of International Adjudication	**Interpretation of conventionality control parameters**	**International distribution of conventionality control powers**
Section 2-A Unification-Centralisation	*Unifying* regional and universal standards	*Centralising* powers to regional courts
Section 2-B Diversification-Decentralisation	*Diversifying* regional and universal standards	*Decentralising* powers to domestic courts
Part II Internationalisation of Constitutional Adjudication	**Application of conventionality control parameters**	**Domestic distribution of conventionality control powers**
Section 2-A Unification-Centralisation	*Unifying* regional and constitutional standards	*Centralising* powers to constitutional courts
Section 2-B Diversification-Decentralisation	*Diversifying* regional and constitutional standards	*Decentralising* powers to ordinary courts

Chart 2. Summary of Chapters

1. Reconstructing Pyramid

A. Pyramid Model: Closedness, Formalism and State-Centrism

The pyramidal concept of the relationship between international and domestic law has been developed through monism theories.[821] Based on Adolf Merkl's idea of a *rechtlicher Stufenbau* (hierarchically structured legal pyramid), Hans Kelsen advocated in his *Reine Rechtslehre* that '[t]he legal order is not of legal norms of equal rank but a pyramid structure of different layers of legal norms'.[822] According to this Kelsenian theory, as depicted in **Figure 1** below, there are two theoretically equal possibilities: monism with the supremacy of international law and monism with the

821 Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (Oxford University Press 2018).

822 Hans Kelsen, *Reine Rechtslehre*, 2nd ed (Deuticke 1960) 228ff.

supremacy of the constitution.[823] However, as the present monograph has proved in the context of conventionality control, the contemporary state of affairs poses huge challenges to the supremacy of international law and constitutional law, respectively. In the present context of international adjudication, the literature also proved that 'international constitutional judicial review is not concentrated in a single "world court", as Kelsen might have wished, but rather shared by a many international courts and tribunals within the fragmented and pluralized international system'.[824] It is a remarkable trend that contemporary public law scholars have inherited and refined the *moderate monism* theory to seek constitutionalist approaches to international law.[825] For the present purpose, it is furthermore notable that constitutionalism beyond the state 'regards the unity, universality, and supremacy of the global constitutional legal order vis-à-vis domestic legal orders'.[826]

Nonetheless, the monist figure of a pyramid has been challenged by legal pluralists who, by amplifying dualist perspectives, presuppose the interplay of various layers of law and politics according to rules ultimately set by each layer for itself.[827] Should the legal pyramid be deconstructed due to the internationalisation of constitutional law? Armin von Bogdandy, one of the most prominent critics, answers this question by arguing that the pyramid model should be reconstructed in light of legal pluralism to promote 'the insight that there is an interaction among the different legal orders'.[828] Von Bogdandy admits that, given the state of development of international law, there should be the possibility of placing legal limits on the effect of international law within the domestic legal order if it severely conflicts with constitutional principles.[829] However, his answer is 'not to be understood as monism with the constitution at the apex' but as

823 Ibid 321ff.

824 Tomer Broude, 'The Constitutional Function of Contemporary International Tribunals, or Kelsen's Visions Vindicated' (2012) 4 *Göttingen Journal of International Law* 519–549, 521–522.

825 Thomas Kleinlein, 'Alfred Verdross as a Founding Father of International Constitutionalism?' (2012) 4 *Goettingen Journal of International Law* 385–416.

826 Jean L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press 2012) 47–48.

827 Krisch (n 406) 69.

828 Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397–413, 399–401.

829 Ibid.

a theory of pluralism of legal orders in which the normative independence of international law is not put into question.[830]

From the perspective of legal pluralism, the pyramidal concept can be revised in three aspects. First, the hierarchical pyramid is overly holistic, *close-minded* to the extent that it projects 'a holistic ambition, an ambition to construct a comprehensive, justified political order'.[831] The present volume's whole analyses rather envision an open-minded scheme of conventionality control in line with legal pluralism as Nico Krisch explains its attribute: 'Pluralism's institutional openness thus corresponds with the openness and fluidity of postnational society in a way constitutionalism, tailored to less heterogeneous societies, does not'.[832]

Second, the monist pyramid model adheres to *formalism*, one of the tenets of legal positivism, represented by a formal hierarchy that determines the validity of norms in conflict.[833] As this monograph has demonstrated, however, the decisive element for governing these relations is shifted from a formal hierarchy to *substantive* protection. In this regard, Anne Peters proposed a *nonformalist, substance-oriented* approach, integrating the constitutionalist and pluralist standpoints. Having empirically analysed the interaction between international law and national constitutions, she suggested that '[t]he ranking of the norms at stake should be assessed in a more subtle manner, according to their *substantial* weight and significance'.[834]

Third, the pyramid should be customised for contemporary global law as is illustrated by Rafael Domingo. He expresses the criticism that 'Kelsen's error was to place the state – for him, a personification of the legal order – and not the human person as such at the center of his whole normative system'.[835] The new pyramid model that Domingo instead proposes, 'unlike Kelsen's, would not comprise superimposed normative layers, each dependent on another up through the fundamental norm (*Grundnorm*), but rather a wide base in which each point – that is, each

830 Ibid.
831 Nico Krisch, 'Global Administrative Law and the Constitutional Ambition' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 245–266, 254.
832 Krisch (n 406) 26.
833 D'Aspremont (n 160) 25–26.
834 Peters (n 411) 195–198 (emphasis added).
835 Rafael Dominigo, *The New Global Law* (Cambridge University Press 2010) 147–149.

person – would be projected in the apex'.[836] This humanised pyramid, beyond the context of human rights protection, 'integrates the local and the global across all existing and developing branches of law'.[837]

B. Reconciling Constitutionalism and Legal Pluralism Beyond the State

It has increasingly been accepted that constitutionalist and legal pluralist perspectives should be reconciled, in the name of *constitutional pluralism*. Niel MacCormick, the father of this prevalent strand of thought, made a jurisprudential attempt to overcome 'a narrow one-state or Community-only perspective, a monocular view' within the framework of European integration.[838] By revising H L A Hart's concept of *internal point of view*, MacCormick seeks the cognitive possibility of acknowledging differences of perspective, instead of a volitional commitment to a monocular vision dictated by sovereignty theory.[839] From such pluralised viewpoints, there is 'no compulsion to regard sovereignty, or even hierarchical relationships of superordination and subordination, as necessary to our understanding of legal order in the complex interaction of overlapping legalities'.[840] Having noted the risk of normative conflicts in *radical pluralism*, MacCormick subsequently attenuated his position by espousing *pluralism under international law*.[841]

The idea of constitutional pluralism has widely spread in both theory and practice, and consequently, has multiply diversified within and beyond the context of European integration: socio-teleological constitutionalism (Joseph Weiler), epistemic meta-constitutionalism (Niel Walker), cosmopolitan constitutionalism (Matthias Kumm), contrapunctual law (Miguel Poiares Maduro) and so on.[842] As another framework, Mireille Delmas-Marty coined the concept of *pluralisme ordonné* 'to move beyond

836 Ibid.
837 Ibid.
838 Niel MacCormick, 'Beyond the Sovereign State' (1993) *56 Modern Law Review* 1–18, 5.
839 Ibid 6.
840 Ibid 10 (emphasis added).
841 Niel MacCormick, *Questioning Sovereignty* (Oxford University Press 1999) 113–121.
842 Matej Avbelj and Jan Komárek, 'Introduction' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 1–15, 4–7.

the universal/relative dichotomy and explore the possibility of a law that would order complexity without eliminating it'. In another approach, Ingolf Pernice suggested *multilevel constitutionalism*, or its German term *Verfassungsverbund*, which can articulate 'a theoretical approach to conceptualize the constitutional European system as an interactive process of establishing, dividing, organizing, and limiting powers, involving national constitutions and the supranational constitutional framework, considered two independent components of a legal system governed by constitutional pluralism instead of *hierarchies*'.[843] Instead of the characterisation *multilevel* that might reproduce a hierarchical idea, Bustos Gilbert envisions *constitución red* to illustrate the multiple links corresponding to each constitutional place independent from and interactive with each other.[844] In a similar vein, the *réseau* model is advocated by Ost and Kerchove to explain the emergence of the complex relationship between legal orders against the background of the *bougés* of the pyramidal model.[845] In line with these doctrines, Anne Peters sophisticates her position of global constitutionalist into c*onstitutionalising fragmentation*, according to which 'constitutional principles and procedures are needed to constructively deal with pluralism (and with fragmentation)'.[846]

For the present purpose of reconfiguring the monist model of conventionality control, the camp of legal pluralism provides us with the *relation-*

843 Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 *Columbia Journal of European Law* 349–407 (emphasis added). See also, Ingolf Pernice, 'Theorie und Praxis des Europäischen Verfassungsverbundes' in Calliess (ed), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund* (Mohr Siebeck 2007) 61–92, 78–84.

844 Bustos Gisbert, 'Elementos constitucionales en la red global' (2012) 60 *Estudios de Deusto* 21–43, 26.

845 Ost and van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Publications des Facultés universitaires Saint-Louis 2002) Chap I. See also, Boris Barraud, *Repensar la pyramide des normes à l'ère des réseaux : Pour une conception pragmatique du droit* (L'Harmattan 2012) 65–74.

846 Anne Peters, 'Fragmentation and Constitutionalization' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 1011–1032, 1023–1026. See also, Turkuler Isiksel 'Global Legal Pluralism as Fact and Norm' (2013) 2 *Global Constitutionalism* 160–195, 190 (arguing that 'a relatively consolidated form of global constitutionalism, rather than unregulated global legal pluralism, is the best way to ensure a healthy pluralism of human values').

al concept of law.[847] On the parameters of conventionality control, as each Chapter 1 of Parts I and II demonstrates, their interpretation and application can be directed in two contrasting ways, either unification or diversification, among universal standards, regional conventions and national constitutions. This dynamic interaction of different sources of different orders can no longer be explained by the single rule of recognition within respective legal orders. Inheriting the challenge of MacCormick to generalise Hart's theory, Ralf Michaels endorses the concept of *external rules of recognition* to establish the relation with other legal orders.[848] With such tertiary rules of external recognition complementing secondary rules of internal recognition, legal systems are not conceived as independently autopoietic but rather 'mutually constitute each other through mutual recognition' in an 'allopoietic' manner.[849]

On the powers of conventionality control, as each Chapter 2 of Parts I and II prove, their allocation can also be shifted in opposite directions, either centralisation or decentralisation, among regional, constitutional and ordinary courts. This context-based gradation of power allocation between different judicial organs of different legal orders cannot be elucidated by a self-standing, monolithic understanding of authority. Rather, as Nicole Nicole Roughan theorises *relative authority*, we need to conceive the legitimacy of overlapping or interactive authorities as relative.[850] The relativity condition does not cast aside any values attaching to particular authorities by the presence of other authorities wielding more or better resources, but rather 'places the onus *upon the authorities* to interact appropriately so that subjects can rely upon those authorities to realize their own justifications'.[851]

847 Maksymilian Del Mar, 'Legal Reasoning in Pluralist Jurisprudence: The Practice of The Relational Imagination' in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017) 40–63.

848 Ralf Michaels, 'Law and Recognition: Towards a Relational Concept of Law' in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (Cambridge University Press 2017) 90–115, 99–101.

849 Ibid 91.

850 Nicole Roughan, *Authorities: Conflict, Cooperation, and Transnational Legal Theory* (Oxford University Press 2016) 136.

851 Ibid 142 (emphasis in the original text).

2. Constructing a Trapezium

A. Trapezium Model: Openness, Substantivism and Human-centrism

Inspired by those constitutional pluralist concepts, this monograph presents **Figure 2**, which depicts the *trapezium* model as an alternative to the pyramid model. While the summit of the pyramid fixes either international or constitutional law as the supreme norm, the upper base of the trapezium model consists of both legal sources. The trapezium vision has already been devised by some commentators in relation to Article 75(22) of the Argentine constitution, which places human rights treaties and the national constitution at the same rank.[852] As most famous advocate, Flávia Piovesan, envisions a change from a 'hermetically-closed pyramid focusing on the *State approach*' to 'the permeable trapezium focusing on the *human rights approach*'.[853] Inheriting traits from both constitutionalism and legal pluralism, this paper identifies three features of the novel trapezium in contrast to the traditional pyramid.

The author identifies the following three features of the trapezium model of conventionality control in light of constitutional pluralism. First, equating international standards with constitutional standards *opens up* closed constitutions to international society. The notion of *permeability*, which Piovesan accentuates in her figure, enables a legal order to incorporate the normative principles and content emanating from other legal orders.[854] In this respect, we should carefully reject the overly simplified understanding that constitutionalism is a structurally hierarchical and

852 Víctor Bazán, 'La interacción del derecho internacional de los derechos humanos y el derech interno en Argentina' (2007) 5 *Estudios Constitucionales* 137–183, 142; Calogero Pizzolo, 'Los mechanismos de protección en el sistema interamericano de derechos humanos y el derecho interno de los países miembros: El caso argentino', in R. Méndez Silva (ed.), *Derecho internacional de los derechos humanos. Memoria del VII Congreso Iberoamericano de Derecho Constitucional* (2002) 505–519, 514.

853 Flávia Piovesan, 'Direitos humanos e diálogo entre juridições' (2012) 19 *Revista Brasileira de Direito Constitucional* 67–93, 68–72 (emphasis in original text).

854 For the relationship between these concepts, see Mattias Wendel, *Permeabilität im europäischen Verfassungsrecht: Verfassungsrechtliche Integrationsnormen auf Staats- und Unionsebene im Vergleich* (Mohr Siebeck 2011) 28–30. See also, Mariela Morales Antoniazzi, 'El nuevo paradigma de la apertura de los órdenes constitucionales: una perspectiva sudamericana', in Armin von Bogdandy and José María Serna de la Garza (eds), *Soberanía y Estado abierto en América Latina y Europa* (Biblioteca Jurídica Virtual 2014) 233–282, 243–247.

holistic concept. Just as Giuseppe Martinico rebuffed Krisch's narrow conception, constitutionalists also apprehend openness as the 'established "friendless" within a constitution towards legal sources that are, from a formal point of view, external to those governed by the national system'.[855] The constitutionalist *Offenheit* (openness) is represented by Klaus Vogel's *offene Staatlichkeit* theory[856] and by Peter Häberle's *cooperative Verfassungsstaat* theory.[857] In this way, the constitutional openness based on which plural constitutional orders interact necessarily endorses the *rehabilitación* of the state, converting it into the principal space for human rights protection.[858]

Second, to introduce the anti-formalist approach into the trapezium model, the author envisages that the common values recognised in both international law and national constitutions are placed on its upper level. By crowning these common values independent from the formal hierarchy, 'the domestically rather powerless notion of the *supremacy of international law* would be replaced by a notion of the *supremacy of universal values* that would be able to pierce the divide between the domestic and international sphere'.[859] At the same time, 'a constitution is no longer supreme by the formalities in its approbation – *formal supremacy* –, but rather by the contents which it regulates and proclaims – *supremacy of contents* –'.[860] These parallel positions resonate with Peter's nonformalist, substantive perspective form in which 'certain less significant provisions in state constitutions would have to give way to important international norms. Inversely, [domestic] fundamental rights guarantees should prevail

855 Giuseppe Martinico, 'Constitutionalism, Resistance and Openness: Comparative Law Reflections on Constitutionalism in Global Governance' (2016) 35 *Yearbook of European Law* 318–340, 320.

856 Klaus Vogel, *Die Verfassungsentscheidung des Grundgesetzes für die internationale Zusammenarbeit* (Mohr Siebeck 1964) 42.

857 Peter Häberle, *Der kooperative Verfassungsstaat aus Kultur und als Kultur: Vorstudien zu einer universalen Verfassungslehre* (Duncker & Humblot GmbH 2013) 96–116.

858 Mauricio Iván Del Toro Huerta, 'La aperture constitucional al derecho internacional de los derechos humanos en la era de la Mundialización y sus consecuencias en la práctica judicial' (2005)112 *Boletín Mexicano de Derecho Comparado* 325–363, 331–343.

859 Janne E Nijman and André Nollkaemper, 'Beyond the Divide', in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007) 341–360, 342–348 (emphasis added).

860 Boris Wilson Arias López, 'Entre la Constitución y los tratados de derechos humanos' (2014) 38 *Derecho y Cambio Social* 1–13, 11 (emphasis added).

over less important [international] norms (independent of their locus and type of codification)'.[861]

Third, above all, the substantive values shaped by an open interaction between international and national legal sources are construed for the sake of *persons*, not for states. This notion is expressed in the Roman maxim 'hominum causa omne jus constitutum est' (all law is created for the benefit of human beings).[862] In the human-centric trapezium, the *pro homine* principle constitutes the core element in lieu of the supremacy of international law or constitutional law. To locate human beings at the centre of the legal system, we can consider implications from two relevant illustrations, which attempt to humanise the Kelsenian pyramid just as this paper does. For this attempt, Norberto Garay Boza's illustration, *the structural inversion of the Kelsenian pyramid*, is highly suggestive.[863] In his model, the conformity of domestic norms with international human rights criteria is controlled in light of the principle of *progressiveness*, a concept that is interchangeable with the *pro homine* principle.[864] In contrast with our trapezium schema, the inverse pyramid vision might be problematic from the legal pluralist perspective because it seems to place *a priori* priority of international human rights standards over constitutional ones.[865] Nevertheless, the author supports Boza's argument that if the content of infra-legal regulations are ampler than those of legislation in light of international human rights standards, priority should be given to the former rather than to the latter. This humanity-oriented idea enlightens our trapezium to admit that even hierarchically inferior norms take precedence if they contain the most favourable protection to persons. It follows that the formal supremacy of international law would be powerless to counter more protective legislation and other forms, without prejudice to the formal supremacy of constitution in relation to other national norms.

861 Peters (n 411) 197.

862 *Prosecutor v. Tadić*, ICTY, Case No. IT-94–1, Appeals Chamber, Interlocutory Appeal on Jurisdiction, Judgment of 2 October 1995, para. 97.

863 Norberto E Garay Boza, 'Gobernar desde abajo: Del control de convencionalidad a la instrumentalización de la inversión estructural de la pirámide kelseniana' (2012) 5 *Inter-American and European Human Rights Journal* 124–147, 128–137.

864 Ibid. As to the interchangeability between the principle of progressiveness and the *pro homine* principle, see Brewer-Carías (n 449) 59–61.

865 Ibid.

B. Uni/Diversified Parameters and De/Centralised Powers of Conventionality Control

The newly configured trapezium is more suitable than the traditional pyramid to explicate the practice of conventionality control examined in this monograph. In Chapter 1 of both Parts I and II, which blends unifying and diversifying approaches, the *pro homine* principle embedded in 'more favourable' clauses entails three correlated features. First, a 'more favourable' interpretative clause '*opens the door* for the use of other instruments (international or national) as relevant tools and […] precludes restrictive interpretations' of the rights and freedoms recognised thereby.[866] The *pro homine* principle, as often stipulated in conjunction with 'consistent interpretation' clauses, promotes *open-minded* dialogue between international and national legal actors, and thereby builds important momentum to transform the state into the *estatalidad abierta*.[867] Second, 'more favourable' clauses do 'not decide the precedence on the basis of the hierarchical position of the norm nor of a specific court, but instead on the basis of *substantive* criteria'.[868] The *pro homine* principle likewise demands that decision makers consider various international and national norms and select the most protective *substance* regardless of their hierarchy.[869] Third, 'more favourable' clauses, compared to the traditional value-oriented doctrine of restrictive interpretation in favour of State sovereignty, typify the new trend where 'in case of doubt, the interpretation more favourable to the private party must be preferred'.[870] The *pro homine* principle, as graphically expressed by the Latin maxim itself, also requires the norms in question to be interpreted and applied in the most favourable ways to *persons*.[871]

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866 Lixinski (n 171) 597 (emphasis added).

867 Morales Antoniazzi (n 856) 250.

868 Van de Heyning (n 605) 72 (emphasis added).

869 Humberto Henderson, 'Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*' (2004) 39 *Revista IIDH* 71–99, 92.

870 Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21 *European Journal of International Law* 681–700, 690–691. Although Crema did not consider 'more favorable' clauses in this article such as Article 29(b) ACHR (at 688, footnote 53), he evaluated the *pro homine* principle, embedded in this provision, as a new trend.

871 Mónica Pinto, 'El principio *pro homine*: criterios de la hermenéutica y pautas para la regulación de los derechos humano', in Martín Abregú and Christian

Chapter 2 of both Parts I and II also reveals the context-based variability between the *concentration* and *decentralisation* of conventionality control powers among regional, constitutional and ordinary courts. At the international level, the positive aspect of subsidiarity enables regional courts to *open up* the state black box to identify the pertinent remedial measures and national organs that depend on the *substantive* inability and unwillingness of the latter to protect *human* rights. Inversely, the negative aspect of subsidiarity requires regional courts to be *openly* deferential to States Parties to the extent that national authorities *substantively* behave as the primary guardians of *human* rights. At the domestic level, the task of conventionality control is *open* to all ordinary judges who are required to exercise their *substantive* mandates to disapply and consistently interpret legislation in accordance with *human* rights parameters under the Conventions. The inter-authority relationship for conventionality control, however, is *openly* flexible so that constitutional judges may be trusted when necessary to strike a *substantive* balance between *human* rights and legal certainty and democracy.

The normative trapezium model of conventionality control may be conditioned by taking into account the empirical comparative differences between the ACHR and the ECHR context. As regards the parameters of conventionality control, while the *pro homine* principle reflected in Article 29(b) ACHR has been widely accepted in Latin America, the regional and national courts in Europe have not manifestly adopted the principle. Even when referring to the 'more favourable' provision, Article 53 ECHR, they limit its purpose only to preserving national discretion in human rights protection. In cases of conflicting rights, whereas the San José Court employs the *pro homine* principle, the Strasbourg Court instead prefers the margin of appreciation doctrine. The cautious attitude of European judiciaries can lead to a convincing counterargument that the *pro homine* principle does not work at all in the ECHR implementation. With respect to the powers of conventionality control, the Inter-American Court has been relatively interventionist by means of positive subsidiarity by diminishing national discretion to combat the culture of impunity. Under the influence of the IACtHR's doctrine mandating all judges to exercise conventionality control, ordinary judges in Latin American countries tend to behave as Inter-American guardians in the diffused fashion of judicial review. In contrast, the European Court has maximally shown its deference to national

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Courtis (eds), *La aplicación de los tratados sobre derechos humanos por los tribunales locales* (Centro de Estudios Legales y Sociales 1997) 163–171, 164–165.

authorities in light of negative subsidiarity. Several constitutional courts in Europe have developed to concentrate their own authorities to manage the relations between a conventional and a constitutional bill of rights.

Those disparities, however, should not be taken as a clear-cut contrast between the Latin American and European attitudes but rather corroborate the normative trapezium model by progressively converging with each other from different angles. Inter-American jurisprudence started to recognise a certain degree of national discretion when domestic authorities, particularly constitutional courts, achieved adequate conventionality control for the sake of individuals in a minute balance with legal certainty and democracy. In this sense, the *pro homine* principle embedded in Article 29 ACHR and the margin of appreciation doctrine can move in concert, aiming at the ultimate purpose of the Inter-American human rights system.[872] On the European side, indirectly through the development of Article 53 CFREU as the counterpart of Article 53 ECHR, the idea of *pro homine* can be implied to attenuate the absolute supremacy of either international or constitutional law. By granting a margin of appreciation to States Parties, the European approach rather 'allows the consideration of a role of the state' as an 'expression of the principle of good faith' in interpreting human rights.[873] In essence, the Inter-American and European experiences of conventionality control are two sides of the same coin, and probably, their converging realities will let us get closer to the ideal of *ius constitutionale commune regionale*.

872 José Luis Caballero Ochoa, 'La cláusula de interpretación conforme y el principio *pro persona* (artículo 1º., segundo párrafo, de la Constitucion)' in Miguel Carbonell and Pedro Salazar (eds), *La reforma constitucional de derechos humanos: un nuevo paradigma* (Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México 2012) 103–133, 119–121. See also, Separate Opinion of JudgeMacGregor Poisot, *Gelman*, Order (n 375) para 72.

873 Crema (n 872) 699.

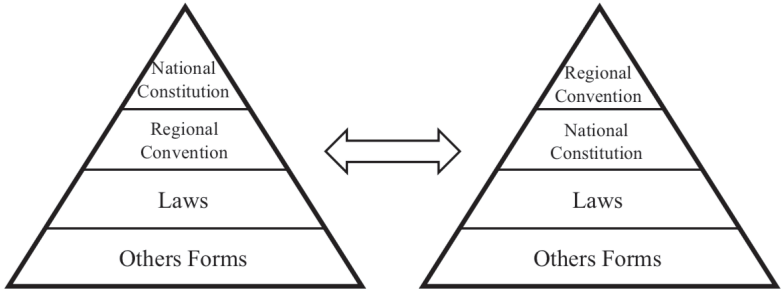

Figure 1. The Monism Pyramids: Supremacy of National Constitution or Regional Convention

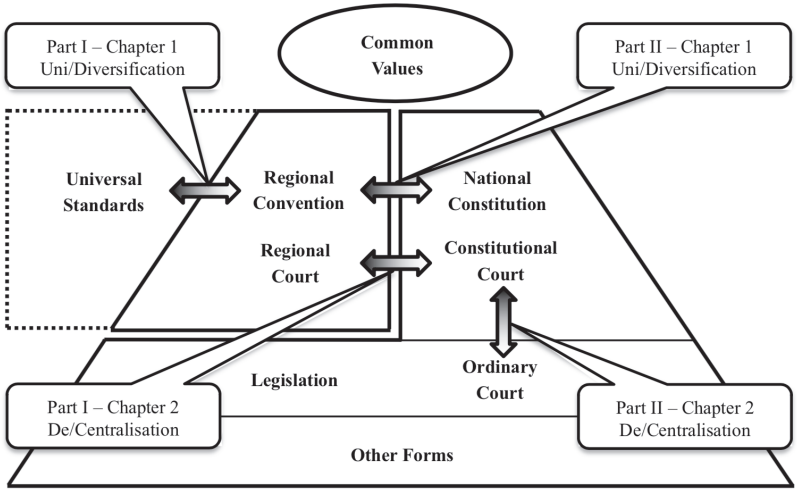

Figure 2. The Constitutional Pluralist Trapezium of Conventionality Control