
National Courts, Domestic Democracy, and the Evolution of International Law

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Abstract

National courts are gradually abandoning their traditional policy of deference to their executive branches in the field of foreign policy and beginning more aggressively to engage in the interpretation and application of international law. This change has been precipitated by the recognition of courts in democratic states that continued passivity in the face of a rapidly expanding international regulatory apparatus raises constitutionally-related concerns about excessive executive power and risks further erosion in the effective scope of judicial review. To avoid this, national courts have begun to exploit the expanding scope and fragmented character of international regulation to create opportunities to act collectively by engaging in a loose form of inter-judicial co-ordination. Such collective action increases their ability to resist external pressures on their respective governments, and reduces the likelihood that any particular court or country that it represents will be singled out and punished as an outlier by either domestic or foreign actors. Should this strategy continue to be refined and developed, it holds out the promise of enabling national courts not only to safeguard their role domestically but to function as full partners with international courts in creating a more coherent international regulatory apparatus.

1 Introduction: Then and Now

In 1993, Volume 4 of this journal published 'Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts',¹ an article which explored the deep divide that continued to exist between the role that international

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¹ Benvenisti, 'Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts', 4 *EJIL* (1993) 159.

legal theorists envisaged that national courts should be playing in the evolution of the international law and that held by the national courts themselves. It argued that, despite the fact that national court judges shared a legal heritage similar to that of their colleagues at the international level and in many states possessed a substantial degree of structural independence, they continued to defer to their executive branches with respect to the conduct of foreign affairs and to ignore the prescription of theorists that they concentrate on the broader goals of ensuring compliance with international norms and promoting a global rule of law.

The depth of this deference was illustrated by describing three interpretive biases that were regularly reflected in court opinions at the time and which functioned to allow executives as much latitude as possible in the area of foreign policy. These included: (1) a tendency to interpret narrowly those articles of their national constitutions that imported international law into the local legal systems, thereby reducing their own opportunities to interfere with governmental policies in light of international law; (2) a tendency to interpret international rules in light of their governments' interests, sometimes to the point of actually seeking guidance from the executive for interpreting treaties; and (3) the use of a variety of 'avoidance doctrines', either doctrines which were specifically devised for such matters, like the act of state doctrine, or general doctrines like standing and justiciability, in ways that provided the executive with an effective shield against judicial review under international law.

In retrospect, it is now increasingly clear that the continued persistence with which national courts employed such heuristics during a period of increasingly rapid globalization was a mistake which had serious unintended consequences. It limited the influence of national courts on the design and subsequent operation of the rapidly expanding international regulatory apparatus when more active engagement on their part might have led to a more coherent and less fragmented international legal system. Even worse, by dissociating themselves from policies that would have growing implications for their states' domestic policy, they inadvertently collaborated in shrinking the domestic policy space and restricting the effective scope of their judicial review.

Now, some 15 years later, another article, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts',² revisited the same subject, this time arguing that there is evidence that at least some prominent national courts in democratic states have become aware of these consequences and have altered their approach to international law. It describes several recent decisions which testify to the fact that these courts have finally begun to engage quite seriously in the interpretation and application of international law and to heed the constitutional jurisprudence of other national courts. The article goes on to suggest that such inter-judicial interaction has at least the potential of both providing an effective check on executive power at the national and international levels alike and promoting the ideals of the rule of law in the global sphere.

² Benvenisti 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', 102 *AJIL* (2008) 241.

This article briefly reflects on the reasons why courts have adopted this strategy of inter-judicial co-operation and the likelihood that this potential can be achieved.

There is little indication that the change is related to any alteration in the process by which judges are selected or to the growing salience of international law school curricula over the last 15 years. The self-defined mission of national court judges as guardians of the domestic legal order has largely remained the same. They continue to regard themselves first and foremost as national agents, and their chief motivation is not to promote global justice but to protect primarily, if not exclusively, the domestic rule of law. Moreover, their sensitivity to the national interest continues to reflect itself in any number of traditional and predictable ways, such as their continuing refusal to constrain their executives when such constraints might harm their economies, for example by imposing international trade law obligations on their executives,³ or piercing the immunity granted by international law to acting officials of foreign states.⁴

What has changed is the context in which national court judges find themselves operating. Fifteen years of accelerating globalization have altered the assessment of national courts about what the primary threats to the domestic order are and what strategies they will need to adopt in order to cope with them. National courts are increasingly discovering that the most effective way for them to maintain the space for domestic deliberation and to strengthen the ability of their governments to withstand the pressure brought to bear by foreign and local interest groups and powerful foreign governments is to ensure to the extent possible that their judgments complement rather than conflict with those of other national courts. Increasingly this requires them to monitor the opinions of other courts at both the national and international level and to engage in what amounts to tacit co-ordination. We argue that these co-ordination activities, in turn, can function as a kind of global good which facilitates further interjudicial co-operation, potentially accelerating the evolution of a more coherent international legal system.

2 Globalization and the Increasing Costs of Judicial Deference

Since the early 1990s, intergovernmental co-ordination has become a prerequisite for the regulation of a host of activities in areas such as the environment, national security, and financial markets which had previously been the exclusive province of

³ Cases C-120/06 P and C-121/06 P, *FIAMM v. Council of the EU*, Judgment of 9 Sept. 2008, available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefs=&mdatefs=&ydatefs=&nomusuel=fiamm&domaine=&mots=&resmax=100>.

⁴ *Jones (Respondent) v. Ministry of Interior (Kingdom of Saudi Arabia) (Appellants)* [2006] UKHL 26, [2007] 1 All ER 113 (HL).

individual state governments. This co-ordination effort has been driven and controlled by the executive branches of the states involved, and in most cases dominated by those of the powerful developed countries. From the standpoint of domestic democracy as it has been traditionally conceived, the spectrum of issues that has been transferred from the domestic areas to the transnational sphere has grown dangerously wide. The process by which such issues have been transferred is also a matter of concern. The fragmented means by which such intergovernmental co-ordination was accomplished – ranging from formal treaties through more fragmented regional and bilateral agreement to informal *ad hoc* understandings – provided lesser (and increasingly fading) opportunities for public participation in decision-making and limited mechanisms to ensure accountability of the co-ordinating agencies to civil society.⁵ Of course, public participation in ‘foreign affairs’ has often been limited even in advanced democracies, but, increasingly, inter-governmental policy-making is reaching far more deeply into many areas of domestic affairs. In the process it is regularly circumventing domestic democratic and supervisory processes that had developed over the years through the efforts of civil society, legislatures, and courts.

Benvenisti’s 2008 article suggests that the courts’ traditional deference rested on a number of assumptions which have become increasingly untenable in the intervening years. One such assumption was that both the boundary between domestic and foreign affairs and their associated legal orders remained relatively well-defined and distinct. This assumption has lost its force over the years, in conjunction with the increasing permeability of the domestic legal system to external regulatory efforts. The formal delegation of authority to international institutions and informal inter-governmental co-ordination render significant parts of the domestic decision-making processes of most countries ineffectual. In many areas of regulation – encompassing not only economic activities but also matters of national security and, in recent years, the fight against global terrorism – no longer are purely international affairs at issue, but matters which affect every citizen.

A second assumption was that the government was capable of adequately representing and protecting the interests of its domestic constituency in its foreign diplomacy. This too is increasingly being undermined by globalization by virtue of the increasing vulnerability of the domestic legal system to external interest groups the power of which has been vastly enhanced by the reduced costs of investment across boundaries and outsourcing. The influence of these groups on governments undermines the second assumption underpinning the deferential policy: that governments are the best representatives of national interests abroad. While this premise has always been (or should have been) somewhat suspect, in recent years more evidence has accumulated regarding small interest groups’ exploitation of international politics to advance their narrow interests. Using their economic leverage, they pressurize their own governments or foreign governments to accept international agreements which are

⁵ On the impact of the fragmentation of international law on these matters see Benvenisti and Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’, 60 *Stanford L Rev* (2007) 595.

beneficial to them but detrimental to most other citizens of their countries. Moreover, the new modalities of global standard-setting by private actors have handed these groups direct authority to shape outcomes.

Finally, the third assumption, that international interaction should be as free of legal restraints as possible and that the diplomatic approach between 'two sovereign nations' was preferable to 'unilateral action by the courts of one nation',⁶ now seems both irrelevant and naïve. Since then, however, the presumption that equal sovereignty allows governments to bargain freely (or effectively) has become increasingly questionable. Not only has a dependence on foreign investment undercut the bargaining leverage of developing states considerably, but more and more global standards are being created by coalitions of strong powers – most notably the Group of Eight – acting through formal and informal institutions setting standards that all others are forced to follow. Law increasingly has replaced diplomacy as the medium in which states interact and act collectively.

Under these conditions the continued deference on the part of national courts to their governments in the realm of foreign affairs is a risky policy from the perspective of democracy. Granted, the increasing opportunities of international adjudicatory bodies to review domestic policies, such as for example the European Court of Justice, the European Court of Human Rights, the Appellate Body of the WTO, or the Inspection Panel of the World Bank and their demands for transparency and participation in domestic decision-making processes, promoted accountability in the domestic sphere.⁷ But these opportunities remained only a small part of the various formal and increasingly informal institutions that characterized global regulation, and their performance often left much to be desired. Ultimately the creatures of powerful governments, and primarily mindful to enhance the goals of the inter-governmental bargain (for example free trade in the WTO context, or the protection of foreign investments), these institutions often failed to match the national courts' concerns and levels of scrutiny.⁸

From the perspective of the national courts, it is not only their relationship with their executive branches that is at issue. Another emerging challenge has been the establishment of several international adjudicatory bodies which possess attributes that give them leverage *vis-à-vis* national courts. They often have *de facto* review power over national court decisions, and otherwise they are in a position to act as agenda setters by having an early opportunity to interpret international norms, and thus establish a legal focal point which can function to narrow the range of options that remain open to national legislatures and courts. The general jurisdiction of the

⁶ *United States v. Alvarez-Machain*, 504 US 655 (1992), fn. 16.

⁷ R.O. Keohane, S. Macedo, and A. Moravcsik, *Democracy-Enhancing Multilateralism*, IILJ Working Paper 2007/4, Global Administrative Law Series, available at: www.iilj.org.

⁸ The World Bank's Inspection Panel offers a striking example of an external review mechanism that addresses concerns of domestic constituencies adversely affected by domestic policies. See the Panel's successive reports on *India: Mumbai Urban Transport Project (2004–2007)*, available at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20223785~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>.

ICJ and the narrow scope and technical expertise of other international or regional tribunals generally provide them with a first mover advantage. This enables them to shape the interpretation of international law before national courts form their own interpretation, potentially reducing the domestic courts' discretion and what they are able to accomplish through co-ordination. For example, a ruling by the ICJ that incumbent state officials enjoy immunity from trial in national courts even in cases involving accusation of torture can pre-empt these courts reaching the opposite conclusion, or create disunity among national courts on this matter.⁹

Increasingly, these courts and court-like bodies are also functioning as what amounts to courts of appeal when a foreign government loses a case involving international law before another state's national court.¹⁰ Thus, to give just a few examples, the ICJ has been effectively reviewing US courts' failure to give effect to the Vienna Convention rights of foreign nationals charged with crimes to contact the consular officials of their home countries;¹¹ Congo 'appealed' the Belgian court's decision to indict its foreign minister before the ICJ,¹² and Germany is now 'appealing' the Italian court decisions of 2004 that rejected its immunity to actions for damages for World War II crimes.¹³

Faced with the prospect that their judicial space would continue to shrink as the result of an ever greater proportion of domestic regulatory policy being determined by international institutions and increased competition from international tribunals, it would have been surprising if the national courts had not felt a sense of jeopardy regarding their ability to fulfil their traditional constitutional role. However, they also possessed a variety of resources that they could potentially use to address these potential threats. Better insulated than their political branches from both domestic and foreign special-interest pressure, the courts could pressurize their governments to seek legislative approval of their actions, or block certain policies as incompatible with constitutional and international legal texts. By creating clearer boundaries which placed limits on executive unilateralism in the area of foreign policy, they could better safeguard domestic democratic processes and reinforce their own autonomy. Moreover, they had reason to believe that these stricter demands on their executive would not necessarily jeopardize the latter's bargaining position *vis-à-vis* its negotiating partners but might actually provide credibility to the government's reluctance to succumb to external pressures demanding compliance with certain policies. Pressure exerted on a

⁹ See the ICJ judgment in *Arrest Warrant of 11 April 2000 (Congo v. Belgium)*, [2002] ICJ Rep 3.

¹⁰ Ahdieh, 'Between Dialogue and Decree: International Review of National Courts', 79 *NYU L Rev* (2004) 2029 (describing examples of review of national courts by international tribunals focusing in particular on NAFTA proceedings under Ch. 11 involving such situations).

¹¹ On the *Breard/LaGrand/Avena* cases see Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' in C. Romano (ed.), *The United States and International Courts and Tribunals* (2008).

¹² *Arrest Warrant* case, *supra* note 9.

¹³ See International Court of Justice, Case concerning Jurisdictional Immunities (Germany v. Italy), Application of the Federal Republic of Germany (23 December 2008) available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=60&case=143&code=gi&p3=0>. The main Italian judgment is *Ferrini v. Germany*, 128 *ILR* (2004) 658. On this case see Bianchi, 'Ferrini v. Federal Republic of Germany. Italian Court of Cassation, March 11, 2004', 99 *AJIL* (2005) 242; De Sena and De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case', 16 *EJIL* (2005) 89.

certain government by its disapproving court can, in fact, result in greater bargaining leeway for that government, as it uses that pressure as an explanation of its inability to bow to the pressure of the foreign negotiators.¹⁴

3 The Evolution of Interjudicial Co-operation

The traditional deference of national courts to their executive branches in matters connected with foreign policy did not vanish over night. Even today it continues to persist in some areas of global regulation such as trade, as was recently reflected in the judgment of the ECJ which refused to give direct effect to the EU's obligations under the WTO absent the promise of reciprocity by other courts.¹⁵ But as courts have developed increasingly more effective ways of coping with the effects of globalization described above, they have also slowly set about the task of trying to rein in the growth of executive branch discretion. To accomplish this the courts still had to solve their perennial problem of how to go about doing this without damaging their executive branches' effectiveness in the area of foreign policy and risking serious political problems for themselves domestically.

Collective action involving a significant number of like-minded courts facing similar problems offered a potential solution. Acting collectively would enable them more effectively to resist external pressures on their respective governments, and it would reduce the likelihood that any particular court would be singled out and punished domestically as an outlier. Moreover, globalization made inter-judicial co-operation far easier to achieve than it had previously been because it presented courts in a large number of democratic states with the same constitutionally-related concerns about excessive executive power. For the first time, inter-judicial co-operation provided courts with a viable strategy for both protecting their authority and safeguarding the domestic democratic processes.

The optimal way for courts to initiate and maintain the necessary co-operation is through mutual exchange of information. Their judicial reasoning and outcomes convey information about their commitment to co-operating. More specifically, their reliance on the same or similar legal sources facilitates this communication and, to a considerable extent, signals their commitment. Both positive and negative messages can be communicated in this framework. Co-operative courts will be cited with approval and approbation by their counterparts, whereas courts which step out of line by either refusing to give force to a new standard or setting a different standard will

¹⁴ On the 'two-level game' logic see Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 42 *Int'l Org* (1988) 427.

¹⁵ *FIAMM v. Council*, *supra* note 3, at para. 119: 'to accept that the Community courts have the direct responsibility for ensuring that Community law complies with the WTO rules would effectively deprive the Community's legislative or executive organs of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners. It is not in dispute that some of the contracting parties, including the Community's most important trading partners, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law.'

be criticized, sometimes quite severely, in judgments.¹⁶ In other words, one court's decisions function as signals to other courts about the former's commitment to co-operation. These signals can embolden the other courts or weaken their resolve in the face of the same dilemmas. At times, specific judgments will have novel and eminently compelling statements that resonate amongst courts in other jurisdictions.¹⁷ A court in one jurisdiction can serve as the beacon for other courts, as has the Indian Supreme Court for the Indian subcontinent and elsewhere in the developing world in the area of environmental protection.

Courts which wish to signal readiness to co-operate will tend to use the language other courts understand: comparative law (primarily comparative constitutional law) and international law. The use of comparative analysis is a signal that courts are willing to learn from one another, or are seeking support from other jurisdictions for their judgments, or both. More significantly, they learn from each other's legal systems how to balance amongst the competing common interests and how to manage the conflicting common risks to their societies. They can compare statutory arrangements, such as, for example, conditions for detaining suspected terrorists, seeking the arrangement that minimally impinges on constitutional rights. Even more accessible than specific statutes are the constitutional texts, which often have similar provisions regarding such issues as the right to life, due process, equality, and fundamental political rights. And, indeed, courts seeking co-operation do engage in comparative constitutional analysis in their judgments. Such analysis has taken centre-stage in the emerging jurisprudence on counter-terrorism and in court decisions in developing countries concerning the right to a healthy environment.

Even more significantly, international law, the source of collective standards, has become a most valuable co-ordination tool for national courts. In this regard, the exponential growth of areas subject to inter-governmental regulation facilitated inter-judicial dialogue which developed into cross-signalling which, in turn, could nurture co-operation. The courts discovered that they are almost as well-positioned to exploit the fragmentation of international law and international organizations to their benefit as is the executive branch. Their main tool in this context was their exclusive control to interpret their respective national constitutions and their ability to control the channels through which international law, including decisions of international organizations being part of that law, were legally binding domestically. This gave national courts almost the same ability as the powerful states to pick and choose selectively from conflicting international legal standards to determine which will be

¹⁶ For example the Italian Court of Cassation criticized in 2004 (*Ferrini v. Germany*) a decision of the Greek Court of Cassation of 2000 (*Prefecture of Voiotia v. Federal Republic of Germany*, reported in 95 *AJIL* (2001) 198, by Gavouneli and Bantekas), while the House of Lords criticized, in turn, the *Ferrini* judgment (in *Jones*, *supra* note 4, at paras. 22, 63). See De Sena and De Vittor, *supra* note 13, at 101–102.

¹⁷ One such example is the landmark *Minors Oposa* judgment delivered by the Philippines Supreme Court, which recognized the stake of future generations in a healthy environment: *Minors Oposa v. Sec'y of Dep't Env't & Natural Res.*, 33 *ILM* (1994) 174. This celebrated case was cited by the Bangladeshi and Indian courts and in numerous scholarly articles from across the globe.

applied within their domestic jurisdictions. The judges can exercise this discretion in any number of ways: by interpreting treaties, by ordering treaty obligations in a hierarchical order, by ‘finding’ customary international law, and by determining which of these norms is directly applicable within the domestic legal system and how they interact with domestic norms. Thus, a national court may choose to link human rights obligations to the legal regime of refugees, suspected terrorists, or environmental law obligations, thereby managing to add layers of protection not provided by the immediately relevant treaty regime. Similarly these courts may prefer *jus cogens* norms over foreign officials’ claims for traditional immunities from prosecution in cases involving war crimes, or apply domestic principles of accountability of administrative decisions to decisions taken by international bodies, thereby making substantial changes in international legal regimes which were unanticipated and unwelcomed by the executive branches of either the states or the organizations.

The growth of common spheres for judicial action and the capacity of courts to exploit the discretion that fragmentation provided them with facilitated court co-operation by enlarging the scope and frequency of inter-judicial dialogue. For example, in the sphere of monitoring counter-terrorism measures, the emerging judicial dialogue currently includes courts from several other jurisdictions, including France, Germany, Hong Kong, India, Israel, and New Zealand.¹⁸ These courts explore the international obligations of their respective states, making references to texts of treaties on human rights and the laws of armed conflict, and to customary international law.¹⁹ They learn from each other’s constitutional law’s doctrines.²⁰ They cite each other extensively in this process of interpretation. For example, in a House of Lords decision concerning the admissibility of evidence obtained through torture by foreign officials, the Law Lords engaged in a comparative analysis of the jurisprudence of foreign courts, including Canadian, Dutch, French, German, and American courts.²¹ Moreover, they compared statutory arrangements in different countries as a way to determine the measures that minimally impair constitutional rights.²² The same applies to the judicial practice of courts in the sphere of determining refugee status.²³ Not only does attending to each other’s decisions allow them to exchange information about their legal reasoning, it

¹⁸ For a review of these decisions see Benvenisti, ‘Inter-Judicial Cooperation to Secure Independent Review of Counter-Terrorism Measures’, in A. Bianchi and A. Keller (eds), *Counterterrorism: Democracy’s Challenge* (2008), at 251.

¹⁹ For example, the prohibition on torture has been the focus of decisions of several national courts, including the Israeli Supreme Court (1999), Canadian Supreme Court (2002), the House of Lords (2005), and the New Zealand Supreme Court (2006). See Benvenisti, *supra* note 2.

²⁰ For example, the Indian court, when addressing the constitutionality of the Indian 2002 Prevention of Terrorism Act, refers to the institution of the ‘independent counsel’, appointed in New Zealand and elsewhere (*People’s Union for Civil Liberties v. Union of India* [2004] 1 LRI 1).

²¹ *A (FC) and Others (FC) v. Secretary of State* [2005] UKHL 71 [2006], 1 All ER 575 (HL).

²² In the 2007 *Charkaoui* decision (*Charkaoui v. Canada (Citizenship & Immigration)* [2007] SCC 9), the Canadian Supreme Court presented the procedure adopted in the UK as a model for the Canadian Parliament to consider when it re-enacts the statute.

²³ Benvenisti, *supra* note 2.

also enables them to signal each other about their doctrinal preferences, thereby creating mutual expectations that can serve as the basis for co-operation.

National courts also found several means to increase their interaction and enhance their collective action. Dozens of real and virtual venues have sprouted where judges correspond. Through these venues they can not only notice ‘defections’ but can also criticize and even ‘softly’ penalize them.²⁴

Their willingness to co-operate has provided national courts with an effective new tool that they can employ to maintain the integrity of their national legal systems and the space for their domestic democratic processes. Indirectly, and perhaps inadvertently, it has also made them key players in the creation of a global legal order. The serious application of international law on the part of national courts has also signalled to international courts that they regard themselves as equal partners in the transnational law-making process and will no longer passively accept the decisions of international tribunals. Since the effectiveness of international tribunals depends on compliance with their decisions, they must anticipate the reaction of the national courts to those decisions and come to terms with their jurisprudence. In this sense, assertive national courts invoking international law can effectively limit the autonomy of the international tribunals and initiate an informal bargaining process in which they, their legislatures, and their respective civil societies are relatively equal partners.

4 The Promise of Interjudicial Co-operation

The newly acquired tools for interjudicial co-ordination and co-operation hold out the possibility that national courts may be able to play an important collaborative role in helping international courts create a coherent web of linked obligations out of the cacophony of atomistic and often conflicting treaties which currently composes international law—an elusive goal that would benefit both and help address what is arguably the growing ‘judicial deficit’ in the global governance system which has emerged from the lack of effective judicial review of international organization policies.²⁵

As previously noted, the reason for optimism lies in the fact that national courts in democratic countries are generally more insulated from executive control than international courts. Unlike international tribunals, which are preoccupied by the constant threat of further fragmentation and loss of business to competing tribunals, national courts know that their executive is firmly tied to the national constitution from which it cannot exit and which the courts have the responsibility and sole authority to protect, for the benefit of the domestic population. Judges in national courts are relatively more independent than judges in international tribunals, and enjoy broader public

²⁴ For a list of these venues see the report of Hiil (the Hague Institute for the Internationalization of Law), Inventory and Bibliography, Appendix A (2008), available at www.hiil.org/uploads/File/ac2008/ac2008_inventory.pdf.

²⁵ On this point see Benvenisti and Downs, ‘Court Cooperation, Executive Accountability and Global Governance’, *NYU J Int’l L & Policy* (forthcoming 2009).

support for their decisions. Their independent source of authority – the domestic constitutions – serves as the basis of an autonomous legal system, one that no international norm has the authority to affect.

Fortunately, more effective review of international organizations by national courts does not necessarily require co-operation on the part of all or even most courts. A relatively small subset of powerful actors will often be enough, especially when there is no organized opposition on part of other courts. As Mancur Olson has famously shown, there are times when power discrepancies among actors promote rather than pre-empt provision of the public good. To the extent that these national courts are those of democratic states and reliably represent their respective domestic constituencies, they are likely to be no less representative of the global constituency than the international decision-makers and judges designed by state executives. The potential benefits of national court assertiveness even indirectly extend to helping to address the democratic deficit via increasing citizen participation in decision-making and transparency. To the extent that courts are successful in promoting accountability of international organizations, they enhance the opportunities their citizens have to participate in the decision-making processes in those institutions. In addition, as they become more assertive, courts themselves increasingly become venues for public participation through NGOs and other representatives of civil society acting as either claimants or *amici*. Several courts have facilitated this development by lowering their standing requirements and allowing *amicus* briefs.

There is also considerable reason to believe that national court rulings and sometimes the ruling of a single court can generate broad positive consequences. The 1994 judgment of the German constitutional court insisting on public participation in EU decision-making as a precondition for Germany's ratification of the new treaty benefited civil society throughout the EU.²⁶ Among courts in the developing world, it was the Indian Supreme Court which took the initiative to impose environmental standards on India's subnational governments, a decision which later inspired other courts in the region to follow suit.²⁷

Of course there are serious risks associated with increased national court assertiveness with respect to policies of international organizations that it would be foolish to disregard. Probably the most obvious such risk is that a growing willingness on the part of national courts to review the policies of international institutions will lead to a protracted period of conflict between national courts and international tribunals over which court will dominate. Should this occur it will weaken them both and lead to even greater executive dominance at both the state and global levels than that which currently exists. Collaboration between national courts and international organizations (in particular international tribunals) is essential if global governance is to flourish. Co-operation only among national courts can at best limit the damage

²⁶ *Brunner v. The European Union Treaty*, German Federal Constitutional Court Judgment of 12 Oct. 1993, trans. in [1994] CMLR 57.

²⁷ Benvenisti, *supra* note 2.

that excessive executive dominance produces and act as a catalyst to provoke closer co-operation between national and international courts. By itself it cannot possibly succeed in creating a more coherent international regulatory system or, for that matter, even in modestly defragmenting the present system.

There is reason to be hopeful that conflict between national and international courts can be minimized or prevented. While competition between the two sets of actors is probably inescapable, they are also increasingly dependent on each other and mutually vulnerable. International courts are likely to tolerate increased domestic court review if it results in slowing or reversing the process of executive-driven fragmentation that they increasingly view as the greatest barrier to them increasing their discretion and reducing the incoherence of international law. For their part, national courts are likely to welcome the efforts of international tribunals to defragment the international legal system and broaden their authority if they reduce the extent to which executive branches can employ international venues to escape domestic accountability and traditional constitutional constraints.

These complementary interests can also help national courts and international tribunals fend off the reaction that governments are likely to mount to the challenge that the co-operation of the two courts presents to their dominance. There are already clear signs of an emerging collective inter-governmental response to pre-empt or restrain their domestic courts. In the area of counter-terrorism, governments have worked through the Counter-Terrorism Committee, under the aegis of Chapter VII of the United Nations Charter, to limit judicial review by their national courts.²⁸ In the sphere of migration there is clear evidence of European governments pre-empting their courts by resorting to the apparatus of the EU to regulate migration policies.²⁹

National courts have their own characteristic weaknesses as well as strengths. Ultimately they remain agents of their states, and more often than not reflect similar policy preferences, and they may reflect other limitations as well. They may suffer from

²⁸ Thus far national courts found different explanations for failing to review the legality of Security Council Chapter VII Resolutions (the Dutch District Court (*Milosevic v. The Netherlands*, trans. in 48 *Netherlands Int'l L Rev* (2001) 357), the Swiss Federal Supreme Court (*Rukundo*, app nos. 1A.129/2001, 1A.130/2001/viz (2001), available at: www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm) and the US Fifth Circuit Court of Appeals (*Ntakirutimana v. Reno*, 184 F 3d 419 (1999)). See also the Swiss Supreme Court in *Nada v. SECO* (decision of 14 Nov. 2007, not yet reported officially, available at http://jcb.blogs.com/jcb_blog/files/tf_youssef_nada.pdf).

²⁹ See Council Directive 2004/83/EC of 29 Apr. 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ (2004) L304/12; Council Directive 2001/55 of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ (2001) L212/12, available at: www.ecre.org/eu_developments/temporary%20protection/tpdir.pdf (last visited 18 May 2007); Reynolds, 'European Council Directive 2001/55/EC: Toward a Common European Asylum System', 8 *Columbia J European L* (2002) 359. For an earlier similar inter-governmental move see Hathaway, 'Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration', 26 *Cornell Int'l LJ* (1993) 719.

class, gender, and ethnicity biases and they may not have the expertise necessary to assess and manage risks. As a result their intervention can burden as well as enhance global governance. These concerns, well-known in the debate about the legitimacy of domestic judicial review, are equally valid in the context of transnational review. Courts are aware of these concerns and often defer to domestic pressures by exhibiting self-restraint. In the context of migration policies, for example, the French and German courts had to bow to strong domestic pressures to deny protection to migrants, and thereby 'defected' from the judicial coalition over refugee status.³⁰

Another important source of conflict which is likely to limit the extent to which they will be able to co-operate is the policy differences that exist between states that are often reflected in their courts. The modest progress which we have described in this brief article has been chiefly driven by a relatively small number of courts from prominent democratic states that share a host of things in common: relatively similar constitutions, governments that hold comparable policy preferences on a wide variety of issues; closely-related legal traditions; similar legal training; a high degree of political independence from their respective governments; and a high level of familiarity with the operation and even the personnel of international organizations and tribunals.

These shared attributes have been critical to their success. Their common cultural and legal background greatly reduced the transaction costs of co-operation. The power of the states that they represented made it possible for a small number of them to have a far larger effect than an equivalent number of weaker states. Moreover, this effect was further enhanced by the fact that these courts were the first to act in a coordinated way – if only informally.

It is unrealistic to assume that other national courts will continue to stand aside indefinitely and allow this small and homogenous group of national courts to represent them in their dealings with international tribunals and bureaucracies. The moment is coming when courts from states with very different political systems, legal traditions, and policy preferences will demand seats at the table.³¹ When this happens it is likely that co-operation among national courts will become far more difficult – if also potentially more equitable – than it has up to this point. Courts, like the states they represent, may discover that the common ground among them is limited and begin to split into rival blocks that compete for dominance of the international regulatory system or choose to circumvent it by focusing on the development of regional systems. In either case, the prospect that each block will be willing unilaterally to engage in the review of international organization policies, and is likely to do so in a different way, raises the spectre of either greater instability and fragmentation in the international regulatory system or a long period of gridlock during which progress on critical regulatory problems comes to a virtual halt, or both.

³⁰ See Benvenisti, *supra* note 2.

³¹ See The National Intelligence Council, *Global Trends 2025: A Transformed World* (2008), available at: www.dni.gov/nic/NIC_2025_project.html. This report envisages the growing role of new players—Brazil, Russia, India, and China—and estimates that they will bring to the table new stakes and rules of the game.

Such outcomes cannot comfortably be ruled out. Differences in the legal traditions of democratic and non-democratic states, especially with respect to the independence of courts, are substantial and are likely to remain so. The schism between the North and South shows no signs of being resolved and the current world economic crisis is likely further to heighten tensions. There are early signs of co-operation among Southern courts resisting economic pressures of Northern corporations which seek to enforce trade norms or intellectual property rights in drugs that threaten domestic health or environmental policies.³² Similarly, it is easy to imagine national courts of Northern countries agreeing on a common policy with regard to asylum seekers which would differ from that adopted by national courts of developing states.

There still appears to be some time before the national courts of states such as China, Brazil and Russia are likely actively to engage themselves in inter-judicial co-operation. This creates a small window of opportunity during which the national courts from prominent democratic states which have been at the core of the movement of inter-judicial co-operation can actively collaborate with international tribunals to reduce the judicial deficit and 'lock in' a less fragmented and more constitutionalized global legal system which can potentially sustain global governance in the difficult period that may be approaching. Ultimately, however, such a system will succeed only if its design is responsive to the equity concerns of the Southern and newly developed state courts that are not yet fully represented among them.

³² In 2007 the High Court in Madras rejected Novartis's claim that the Indian patent law violated India's TRIPs obligations (*Novartis v. India*, Judgment of 6 Aug. 2007, available at: <http://judis.nic.in/chennai/qrydisp.asp?tfnm=11121>). In 2001 several international pharmaceutical corporations dropped their suit which made a similar claim against a South African Act after the South African court allowed NGOs to present affidavits (Case No. 4138/98, High Court of South Africa). On this litigation see Barnard, 'In the High Court of South Africa, Case No. 4138/98: The Global Politics of Access to Low-Cost AIDS Drugs in Poor Countries', 12 *Kennedy Institute of Ethics J* (2002) 159. Courts in Bangladesh, India, and Pakistan prevented the importation of contaminated food and blocked advertisement campaigns of foreign tobacco companies (see *Farooque v. Bangladesh*, 48 DLR 438 (Bangladesh Supreme Court), *Vincent v. Union of India*, AIR 1987 (India Supreme Court) 990, *Islam v. Bangladesh*, 52 DLR (2000) 413; ILDC 477 (BD 2000) (Bangladesh Supreme Court) (referring to the similar decisions of the Indian court in *Bamakrishna v. State of Kerala and ors*, 1992 (2) KLT 725 (Kerala High Court), and Pakistan (*Pakistan Chest Foundation and ors v. Pakistan and ors*, 1997 CLC 1379)).