

.....

National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs[†]

Jacob Katz Cogan*

The proliferation of international law and institutions over the past two decades has produced both excitement and anxiety. Cooperation and coordination – formal and informal – have allowed states and other international actors to get at global and regional problems and facilitate international exchange much more than in the past. The heightened activities of international organizations and national governments have pertained both to traditional areas, as well as those, such as environmental law, which had hitherto been almost exclusively within the domain of domestic politics and law. Such developments have worried those who believe that decisions taken at the international level are insufficiently reflective of and constrained by democratic politics and basic principles of due process,

and unfairly give preferences to powerful states over less powerful ones.¹

As a consequence, there has been a renewed effort – particularly within the past five years – to think about ways to limit powerful states, make international organizations more accountable, and increase popular influence in the international system. Where an earlier generation aspired to establish judicial review at the international level, this one has largely given up that effort (at least as an end in itself) in favour of a combination of inter-related theories of control and participation at multiple levels of governance. One approach has been to stress the rule of law, legalization, compliance, and formality.²

[†] Benvenisti and Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *EJIL* (2009) 59, <http://ejil.oxfordjournals.org/cgi/reprint/20/1/59>.

* Associate Professor of Law, University of Cincinnati College of Law. Email: coganjk@ucmail.uc.edu.

¹ An excellent early example is Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *AJIL* (1999) 596.

² E.g., Benvenisti and Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stanford L Rev* (2007) 595. For this trend see Cogan, 'Noncompliance and the International Rule of Law', 31 *Yale J Intl L* (2006) 189; Cogan, 'Representation and Power in International Organization: The Operational Constitution and Its Critics', 103 *AJIL* (2009) 209.

A second method – which often goes under the rubric of ‘global administrative law’ – provides solutions through the articulation and application of accountability and responsibility mechanisms and rules, such as more transparency in the work of international organizations, increased public deliberation in their organs, and greater participation of non-governmental organizations and other non-state actors in their activities.³ And yet a third technique promotes greater popular participation in foreign affairs through the activities of national institutions, including legislatures and courts.⁴ Eyal Benvenisti and George W. Downs have been the strongest proponents of this last tactic, and it is the subject of their article entitled ‘National Courts, Domestic Democracy, and the Evolution of International Law’.⁵

In that piece, and in a series of related articles,⁶ Benvenisti and Downs argue that national courts have rightly begun to

defer less to their executive branches and increasingly to check executive authority in international affairs. By requiring governments to receive legislative sanction for their international actions or by countermanding those acts as breaches of national or international law, courts can ‘safeguard domestic democratic processes’.⁷ National courts, in this way, are democracy-reinforcing institutions, ensuring the accountability of executive branch officials who are no longer properly limited by domestic popular political pressures but, rather, have been captured by discrete interest groups. To be sure, by taking this approach, national court judges are acting self-interestedly to protect their traditional jurisdictions (which are at risk of being effectively outsourced to international institutions and international courts) and to retain and promote their status, of which they are quite fond, but such selfish motivations are of no particular significance. The means by which they accomplish this task – by creating transnational judicial networks, by favourably citing decisions of foreign tribunals, by regulating the relationship between national and international law – are also of no great concern, except to the extent that they facilitate favourable outcomes. And the fact that all this is being done by officials who themselves are not

³ E.g., Kingsbury, Krisch, and Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law & Contemp Probs* (2005) 15; Johnstone, ‘Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit’, 102 *AJIL* (2008) 275.

⁴ On the role of national legislatures see Wolfrum, ‘Kontrolle auswärtiger Gewalt’, 56 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1997) 38, cited in Wolfrum, ‘Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations’, in R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (2008), at 1, 5 n. 13; McGinnis, ‘Medellín and the Future of International Delegation’, 118 *Yale LJ* (2009) 1712. For a proposal to reform the US system see Hathaway, ‘Presidential Power over International Law: Restoring the Balance’, 119 *Yale LJ* (2009) 140.

⁵ Benvenisti and Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’, 20 *EJIL* (2009) 59.

⁶ Benvenisti and Downs, ‘Court Cooperation, Executive Accountability and Global Governance’,

NYU J Intl L & Politics (forthcoming 2009); Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’, 102 *AJIL* (2008) 241; Benvenisti and Downs, ‘Toward Global Checks and Balances’, 20 *Const Pol Econ* (2009) 366; Benvenisti, ‘United We Stand: National Courts Reviewing Counterterrorism Measures’, in A. Bianchi and A. Keller (eds), *Counterterrorism: Democracy’s Challenge* (2008), at 251.

⁷ Benvenisti and Downs, *supra* note 5, at 64.

formally democratically accountable is of no importance either. What matters are the ends – the control of unbounded executive power and the facilitation of that power's public accountability.

But there's more. Not only will national courts constrain executives through adjudicative processes, thereby increasing the opportunity for popular influence on foreign affairs, the coordination of activities and cooperation among national courts and between national courts and international courts will tend towards the harmonization of an increasingly fragmented international legal regime. Domestic courts will, by contributing to the establishment of a coherent international law, also control international organizations which, like national executive branches, lack sufficient monitoring. As with increased supervision of executive branches, greater judicial review will lead to the increased legitimacy of international institutions and their decisions.

National courts can therefore be an important solution to four interrelated problems of our era: the unchecked executive in foreign affairs; the unaccountable international institution; the democratic deficit in international relations; and the fragmentation of international law. Ironically, the parochial interests of national courts will serve to stabilize and democratize the international order.

1 The Effectiveness of National Courts

The crux of Benvenisti and Downs's argument rests on two claims: that executive branches, particularly those of powerful countries, are insufficiently controlled at both the international and domestic levels,

especially by democratic politics, and that national courts can solve this problem.⁸

There is no doubt that controls are crucial to any system which recognizes limitations on authority. Controls are 'techniques or mechanisms in engineered artifacts, whether physical or social, whose function is to ensure that an artifact works the way it was designed to work'.⁹ Without them, actors entrusted by a system with discrete authority, aware that nothing stands in their way, may act *ultra vires*, regardless of the nature of the authority so entrusted. Controls ensure that delegated processes are conducted within proper bounds. The work that controls do, therefore, contributes to the legitimacy of the system itself; their importance cannot be minimized.

To be effective, controls must recognize the distribution of actual power, in its many forms, within a system, so that that power can be successfully harnessed to limit the controlled entities, optimally with minimal overall costs. Such controls can be horizontal or vertical, formal or informal. Formal horizontal

⁸ The discussion here is limited to the subject of Benvenisti and Downs's article: the role of national courts in checking executive authority in international affairs. It does not go to the role of national courts in other matters pertaining to foreign affairs or international law or the use of comparative constitutional law in judicial decision-making generally.

⁹ W.M. Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (1992), at 1. The discussion of controls which follows is based, in part, on Reisman's analysis. Because of space constraints, it is necessarily schematic. For a helpful application in the context of international courts see Helfer and Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', 93 *California L Rev* (2005) 899.

controls seek to engage coordinate bodies in a process of reciprocal policing. Within international organizations, for instance, the acts of one body may be subject to the control of another. At the domestic level, branches of government typically exert some control over each other by constitutional design, in what is often called checks and balances. Formal vertical controls employ hierarchies instead. Within judiciaries, higher courts review the decisions of lower courts. And in domestic systems, many executive and legislative branch officials are electorally accountable. Electoral control has the additional benefit of providing a popular foundation for governments.¹⁰

Informal control mechanisms are not to be discounted, however. Thus, at both the international and domestic levels, public opinion, as articulated (however imperfectly) through non-governmental organizations, the media, and other processes, serves as a non-electoral popular method of control.¹¹ And at the international level states serve as checks on the acts of other states outside formal organizational relationships. During the Cold War, the conflict between the Soviet Union and the United States limited the activities of international organizations significantly, as the two powers checked each other's influence. Only in areas where both powers were in agreement (or in international organizations in which only one power reigned, such as the International Monetary Fund and

the World Bank) did significant work get done. Indeed, it was the end of the Cold War – and the reciprocal controls that the two superpowers exerted on each other – which freed states and international organizations to engage in the international activity which concerns Benvenisti and Downs. In essence, we have gone too far in the opposite direction – from too much control of executive branches in international affairs to not enough.

Benvenisti and Downs claim that national courts are the best device for the control of executives and the facilitation of popular participation, but national courts are unlikely to be as effective as the authors hope and desire.¹² To a certain extent, they recognize that their claim is more normative and predictive than definitively descriptive.¹³ They acknowledge, for instance, that 'inter-judicial interaction has at least the *potential* of both providing an effective check on executive power at the national and international levels

¹⁰ Some of these processes can extend beyond control, to what, in the judicial context, is called an appeal. See Reisman, *supra* note 9, at 8–9.

¹¹ For a critique see Anderson and Rieff, 'Global Civil Society: A Sceptical View', in H. Anheier, M. Glasius, and M. Kaldor (eds), *Global Civil Society 2004/5* (2004), at 26.

¹² Nowhere do they argue that national courts are the *only* solution. They do suggest, however, that national courts will be the *most effective* solution. See Benvenisti and Downs, 'Toward Global Checks', *supra* note 6, at 366.

¹³ The evidence of greater judicial activity in the aggregate (including reduced deference) would appear to be correct (some empirical work would be helpful), but what does it mean? The specific connections between the activity and the authors' explanations for it are intuitive perhaps, but not definitive. Similarly, how do we know the purpose of inter-judicial dialogue? The authors – in the article and in related pieces – provide a rationale which may be the right answer, but not necessarily. The cited cases are subject to differing interpretations. It is no criticism to say that much of the authors' work on the topic is brilliantly suggestive.

alike and promoting the ideals of the rule of law in the global sphere'.¹⁴ And they recognize that national courts are 'beginning more aggressively to engage in the interpretation and application of international law'.¹⁵ Yet there are considerable doubts that national courts are strong enough to take on these difficult tasks. And there are serious reasons to be suspicious that national courts are to be counted on to do so. For courts to act as effective checks in foreign affairs, they need to believe that they are acting within their competence, that they are acting in ways which will be countenanced by other key actors, and that they will consistently act in the ways which the authors envisage.

Courts are often reluctant to engage in foreign affairs matters for a variety of reasons. One justification for such restraint focuses on the relative competence of courts. The authors point to some potential explanations for judicial abstention in foreign affairs in the past and explain why those reasons no longer make sense, but they do this as a matter of abstract logic and not from the perspective of a judge deciding cases. It may be true, for example, that 'governments are [not] the best representatives of national interests abroad', as Benvenisti and Downs argue.¹⁶ Yet, even if predisposed to assert themselves, judges are required to act in accordance with their constitutional

structure; exceedingly rarely do courts pierce the constitutional veil. Not surprisingly, national constitutions incorporate the principle that the government is the legitimate (indeed, typically, the only) representative of national interests in international affairs. Seen from this perspective, courts appropriately defer to executives, at least to the extent that they believe the matter goes beyond their particular expertise or overlaps with the competence of another branch of government.¹⁷

Even if a court is satisfied that it may properly act in a particular foreign affairs matter, it still may abstain because it is cognizant that other branches of government or the general populace may not agree with that determination. The concern here is not just retaliation but legitimacy. Some courts are quite aware of, and care quite a lot about, their public accountability.¹⁸ The authors mostly dismiss these dynamics, writing that '[j]udges in national courts are relatively more independent than judges in international tribunals, and enjoy broader public support for their

¹⁴ Benvenisti and Downs, *supra* note 5, at 60 (emphasis added).

¹⁵ *Ibid.*, at 59. See also *ibid.* (positing that inter-judicial dialogue 'holds out the promise of enabling national courts . . . to safeguard their role domestically . . . [and] function as full partners with national courts') (emphasis added).

¹⁶ *Ibid.*, at 62.

¹⁷ The authors give short shrift to concerns about the proper role of a judiciary in a democracy, asserting that so long as the courts are 'resurrect[ing] domestic democracy and compel[ling] domestic deliberation' their actions are legitimate: Benvenisti, 'Reclaiming Democracy', *supra* note 6, at 272–273. A fuller account, though, would be helpful in light of criticisms of these and others defences of judicial review. See, e.g., Waldron, 'The Core Case Against Judicial Review', 115 *Yale LJ* (2006) 1346.

¹⁸ See B. Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009); cf. M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (2004), at 338–347.

decisions'.¹⁹ They also see international judicial dialogue as a way to provide support for judicial action in foreign affairs cases. But the fact that national courts are *relatively* more independent than international courts (at least in some countries) and enjoy *broader* public support (again, in some countries) does not mean that they will act to contain executives or will be successful at doing so. The relevant comparison is not between the relative characteristics of national courts and international courts but between the power and authority of national courts, their respective political branches, and public opinion. We observed these dynamics during the early years of the recent 'war on terror', when national courts abstained from interfering in executive acts in the face of the combined views of national legislatures, executives, and the public. Not until popular opinion shifted did courts believe they had the ability (maybe even the right) to confront the actions of the political branches. One wonders, in this regard, whether the citation of foreign judicial decisions will impress and impede those who seek to condemn and counter national court action. Comparative law may give judges confidence that they are deciding cases correctly, but its utility as a deterrent to inter-branch jealousy and retaliation or as a balm to the scorn of popular opinion would appear to be at the margins. Thus, even if courts are motivated to act in foreign affairs cases

and believe they have the competence to do so, it is unclear that they will, at least until they have gained the political cover to do so. In this regard, judicial respect for democracy may undercut judicial control of the executive.²⁰

It is also unclear that courts, when they do feel at liberty to act, will do so in the ways that the authors desire – toward the control of executive branches and the promotion of democratic deliberation. There are a number of reasons for this. First, courts are typically confronted in cases not with just one value but with many competing values. This may lead to decisions, under both national and international law, in which judges abstain from reviewing executive branch actions or affirmatively endorse such actions, even when important competing policies are in play.²¹ Secondly, there is, at most, agreement at only a high level of generality on the key policies which Benvenisti and Downs promote. That is no surprise, as what checks are appropriate or what democracy requires is a notoriously difficult matter to define with precision, particularly across cultures and political systems. Nations also have differing interests, and courts, as the authors acknowledge, 'represent their respective domestic constituencies'.²² The activity of national courts may therefore lead to conflicting rulings and interpretations. Knowing this, the authors hope that 'national courts from prominent democratic states . . . can actively collaborate with international

¹⁹ Benvenisti and Downs, *supra* note 5, at 68–69. They also argue that national courts are 'better insulated than their political branches from both domestic and foreign special-interest pressure': *ibid.*, at 64 (emphasis added). That, of course, does not mean that national courts are immune from such pressure.

²⁰ Unless, of course, the people believe that the fundamental role of courts is to check the executive branch regardless of transitory popular opinion.

²¹ E.g., *R (on the application of Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58 (House of Lords).

²² Benvenisti and Downs, *supra* note 5, at 69.

tribunals to reduce the judicial deficit and “lock in” a less fragmented and more constitutionalized global legal system’.²³ Without evident irony, they declare that ‘there are times when power discrepancies among actors promote rather than pre-empt provision of the public good’.²⁴ Leaving aside the considerable possibility that there will be disagreement among²⁵ (and even within²⁶) the courts of prominent democratic states, we are left with the unsatisfactory conclusion that, while we should be wary of the actions of executive branches of powerful states, we should encourage the activities of courts from powerful states, except when those courts are from powerful states, such as China or Russia, the values of which may not correspond to our own.

2 The Constitutive Process at Work

My aim, though, is not to dismiss national courts entirely. My point here is simply that the reliance placed by Benvenisti and Downs on domestic judiciaries is too

great, even for the best of them. This is not simple speculation. Courts, including those in democratic states, can and have disappointed. Once liberals in the United States looked to the Supreme Court to right wrongs; now, based upon decades of experience, they look elsewhere and advocate constitutional interpretation outside the judiciary.²⁷ While they have not given up on the judicial path, US progressives have come to appreciate the importance of politics and the uses of power for the protection of rights.

Indeed, those concerned with the transfer of decision-making to the international level are, quite strategically, not putting all their eggs in the judicial basket. At the national level, legislatures, local authorities, and civil society are becoming more effective at monitoring and influencing executive actions abroad. While there may initially have been a lag when issues which once were discussed and decided in national capitals were transferred to international fora, that gap (to the extent that it existed) has narrowed considerably as domestic actors have come to appreciate the new dynamics and have recalibrated their efforts accordingly. At the international level, in international organizations (which are far from the mere agents of the powerful, as the authors appear to assume) and in informal international groups (like the G-20), the less powerful are deft at leveraging their individual and collective strengths.²⁸ The creation of an

²³ *Ibid.*, at 72.

²⁴ *Ibid.*, at 69.

²⁵ See, e.g., the cases concerning refugees, discussed in Benvenisti, ‘Reclaiming Democracy’, *supra* note 6, at 262–267. Benvenisti and Downs appear to criticize the ‘defection’ of the French and German courts from an emerging international judicial coalition regarding migration issues, but those courts, as the authors recognize, were responding to ‘strong domestic pressures’: Benvenisti and Downs, *supra* note 5, at 71. Such criticism is difficult to reconcile with the authors’ apparent endorsement, a couple of pages earlier, of national courts which ‘reliably represent their respective domestic constituencies’: *ibid.*, at 69.

²⁶ Thus, in the US Supreme Court’s decision in *Medellin v. Texas*, 128 S Ct 1346 (2008), the majority and minority opinions disagreed on whether the President’s memorandum was authorized by Congress.

²⁷ See, e.g., Fleming, ‘The Constitution Outside the Courts’, 86 *Cornell L Rev* (2000) 215 (book review).

²⁸ Cf. Reisman, ‘The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application’, in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (2005), at 15.

International Criminal Court which was not subservient to the Security Council, the ultimate rejection by the Council of immunity for US peacekeepers from possible international prosecution, and the recent discarding of the longstanding tradition of US and European control over the top appointments at the International Monetary Fund and the World Bank are only some obvious recent examples. Non-governmental organizations, too, adeptly assert their influence, forming coalitions among themselves and with other international actors, such as states and international organizations.²⁹ And in the future the differing interests of powerful states, new and old, will increasingly lead to rivalries which, while they may not match those of the Cold War, will have similar effects. Through these complex formal and informal techniques (and others), the manoeuvrability of powerful states is restricted and a wider variety of voices are heard, although, of course, not perfectly so.³⁰ National courts are a part of this new dynamic, and have clearly made some important contributions, but they are by no means the most important part.

We are seeing, in other words, a complex and contentious constitutive process of adaptation of supervisory techniques, not their reduction or elimination. In this regard, the fact that some of the old techniques may not be transferred (or wholly transferred) from the domestic sphere to the international should not concern us, as long as an appropriate level of control remains. That some of the means used are informal should not disturb us either. Nor

should the existence of a ‘judicial deficit’ (a concept based upon a domestic standard) worry us *per se*. What matters is that the *congeries* of techniques supports the desired policies.³¹ What those policies are and their specific application will depend on particular institutions and processes and require, often, difficult choices among values.³² The result, though, will be a new operational system of accountability.

³¹ Maybe, in the view of the Benvenisti and Downs, these control mechanisms, as they have evolved and continue to develop, are insufficient in the sense that they do not adequately restrict powerful states and international organizations or fail to provide a satisfactory democratic basis for the new international regime. See Benvenisti, ‘Reclaiming Democracy’, *supra* note 6, at 245; Benvenisti and Downs, ‘Toward Global Checks’, *supra* note 6, at 370–379. But if that is their position, they do not elucidate a theory which would explain precisely the insufficiencies of the controls described above, clarify why multilateralism may not, at times, enhance domestic democracy, as some have recently argued, or, perhaps most importantly, detail what the minimum standard for popular participation in government (national and international) need be. On how multilateralism might enhance democracy see Keohane, Macedo, and Moravcsik, ‘Democracy-Enhancing Multilateralism’, 63 *Intl Org* (2009) 1; Chander, ‘Globalization and Distrust’, 114 *Yale LJ* (2005) 1193. On the debate regarding the proper level of delegation to international institutions see, e.g., Symposium, ‘The Law and Politics of International Delegation’, 71 *Law & Contemp Probs* (2008).

³² See Bodansky, ‘The Concept of Legitimacy in International Law’, in Wolfrum and Röben, *supra* note 4, at 309; Buchanan and Powell, ‘Constitutional Democracy and the Rule of International Law: Are They Compatible?’, 16 *J Political Philosophy* (2008) 326; Grant and Keohane, ‘Accountability and Abuses of Power in World Politics’, 99 *Am Political Science Rev* (2005) 29.

²⁹ See, e.g., Benvenisti and Downs, ‘Empire’s New Clothes’, *supra* note 2, at 619–625.

³⁰ Benvenisti and Downs are certainly quite aware of these mechanisms and others: *ibid*.