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Survey article: the legitimacy of Supreme Courts in the context of globalisation

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1. Introduction

What are the consequences of globalisation for the legitimacy of Supreme Courts? The question seems to defy a concise and categorical answer. Like most issues relating to the general theme of globalisation, there are as many answers as there are observers. The objective of this article is not to advance any novel statement on the general issue of legitimacy and Supreme Courts. Rather, it aims more modestly to present the reader with an overview of the salient approaches to the present theme, both within jurisprudence and within related disciplines. It will ultimately conclude that there are a variety of different discourses on judicial legitimacy, and that the conceptual challenge is to convincingly reconcile these various themes in a satisfying manner. A central difficulty of this endeavour lies in bridging the gap which exists between notions which originate within the setting of the nation state and notions which have been explicitly developed to accommodate the particular features of a globalised world. Before surveying the relevant literature and discussing the various positions, however, the general problems pertaining to judicial legitimacy in an age of globalisation will be sketched in the remainder of this section.

1.1. Supreme Courts and globalisation

The context within which the social, economic and political spheres of human activity take place is becoming increasingly internationalised. As trivial as this assertion may seem, it raises serious obstacles for those coming to terms with this phenomenon, whether practically and conceptually. At one end of the spectrum, much intellectual energy is being expended in the search for conceptual and theoretical clarity in what remains an opaque field of inquiry. Despite these efforts, the difficulties posed to practitioners have become no less challenging. Because of globalisation, professionals within a variety of disciplines are seeing changes in the nature of their tasks.

National Supreme Courts are amongst the actors that feel the exigencies of globalisation most keenly and urgently, for several reasons. First, these institutions are faced with the intellectual task of taking legal notions that have traditionally found their sole application within the domestic sphere and successfully transposing them to an internationalised environment. These notions (*e.g.* legal unity, judicial legitimacy and, more generally, the political ideals of democracy and accountability) are in need of a critical re-examination in light of globalisation if they

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are to retain their foothold in the modern world. Second, and more importantly, Supreme Courts are charged with responsibility for dispensing justice at the national level within a world in which problems frequently transcend borders. Ultimately, the task incumbent upon Supreme Courts is simply 'to deliver the goods', despite the changing contexts precipitated by globalisation. The expectations that these domestic institutions must meet therefore include certain standards of what might be called 'output legitimacy'. In other words, national Supreme Courts are required continually to ensure an adequate measure of domestic justice, despite the increasing interconnectedness of legal orders.

This area of inquiry is one which, in recent years, has attained some degree of prominence in various scholarly circles, although not always with the same degree of urgency. A particularly salient focus for contemporary scholars is the emergence of large quantities of cross-cutting formal and informal legal relations between domestic jurisdictions that are largely unprecedented in terms of frequency and visibility and, most importantly, defy classification according to the traditional taxonomies of domestic and international law falling somewhere in between.[1] Significantly, the fluidity of boundaries between domestic and international legal orders is primarily the product of domestic judicial agency. Judges and other legal actors cite each other's decisions, engage in transnational dialogue, attend conferences, exchange best practices and generally become increasingly aware of and attentive to both transnational and international legal developments. And again, it must be reiterated that these phenomena occupy a middle ground between the domestic and the international legal order, being neither wholly domestic nor wholly international. In general, in the remainder of this article, these processes will be referred to as *judicial internationalisation*.

The central intuition that underpins the literature to be considered in what follows is that the processes of judicial internationalisation have an impact on the legitimacy of judicial institutions. Some scholars argue that judicial internationalisation poses a grave affront to this legitimacy, according to the models that have traditionally been employed to operationalise the concept of judicial legitimacy. Scholars at the opposite end of the spectrum claim that judicial internationalisation falls perfectly within the existing boundaries of our paradigmatic notions of legitimacy, and that the phenomenon may actually serve to enhance legitimacy.

Between these extremes, other authors are sympathetic to judicial internationalisation, even though they argue that novel paradigms of legitimacy are required in order to provide a firm foundation for judicial internationalisation. In essence, judicial internationalisation *is* normatively suspect according to many existing models of legitimacy, but these models themselves may be anachronistic and in need of revision in light of globalisation and other contemporary developments.

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1 For examples and overviews, see: A.-M. Slaughter, *A New World Order,* 2004; Y. Shany*, Regulating Jurisdictional Relations between National and International Courts*, 2007; R.B. Ahdieh, 'Between Dialogue and Decree: International Review of National Courts', 2004 *New York University Law Review*, no. 6, pp. 2029-2163; C. Baudenbacher, 'Foreword: The Globalization of the Judiciary', 2003a *Texas International Law Journal* 38, pp. 397-404; M.S. Flaherty, 'Separation of Powers in a Global Context', in: J. Morison *et al.* (eds.), *Judges, Transition, and Human Rights*, pp. 9-32; C.A. Whytock, 'Foreign Law, Domestic Courts, and World Politics', 2006, conference paper of the *International Studies Association, San Diego, California, March 22-25*, http://www.law.utah.edu/_personfiles/ 6580/whytock-fldcwp-031406.pdf; P. Wismer, 'Bring Down the Walls!—On the Ever-increasing Dynamic Between the National and International Domains', 2006 *Chinese Journal of International Law*, no. 3, pp. 511–553; A.-M. Slaughter, 'A Typology of Transjudicial Communication', 1994 *University of Richmond Law Review* 29, pp. 99-137. A.-M. Slaughter, 'A Global Community of Courts', 2003 *Harvard International Law Journal*, no. 1, pp. 191–219; D. Williams, 'Courts and Globalization', 2004 *Indiana Journal of Global Legal Studies*, no. 1, pp. 57-69; M. Tushnet, 'Referring to Foreign Law in Constitutional Interpretation: an Episode in the Culture Wars', 2006 *University of Baltimore Law Review* 35, pp. 299-312; G, Slyz, 'International Law in National Courts', 1996 *New York University Journal of International Law and Politics* 28, pp. 65–113; H.L. Buxbaum, 'From Empire to Globalization… and Back? A Post-Colonial View of Transjudicialism', 2004 *Indiana Journal of Global Legal Studies*, no. 1, pp. 183-189.

1.2. An outline of the debate

To appreciate the relative force of these claims (or the lack thereof), it is necessary to circumscribe the precise nature of the problem. Rather than framing the narrative of these issues in abstract concepts, a brief review of several of the concrete positions taken within the debate could be instructive.

The question of judicial legitimacy is often tied to a particular conception of the judicial role. What judges *must* do largely determines what they are *permitted* to do. In a somewhat conscious violation of the Humean principle, which specifies that *ought* cannot be derived from *is,* jurisprudence generally proceeds from some conception of what is required of judges in order to circumscribe the means and instruments of which they may consequently avail themselves. In general, legal positivism holds that judges must apply the law as posited by an authoritative legislator. The legitimacy of the judiciary consequently depends upon its fidelity to the enacted laws, which is often translated into theories of interpretation that emphasize a restrictive set of interpretive sources (a prominent example in this context would be the US constitutional doctrine of originalism).

The focus on the duties incumbent upon Supreme Court judges in general is a salient point. In general, the question then becomes as follows: 'What in the nature of the judicial function compels judges to consult non-domestic legal sources or to confer with their foreign peers? If such a normative requirement for an extra-domestic orientation can be discerned, what are its permissible limits? Is this orientation essential or accidental to the judicial office?'

Answers of a more pragmatic nature (*i.e.* the task of a judge is to deliver good, qualitatively solid decisions) tend to have no inherent bias against the appropriate instruments of adjudication. There is no *a priori* reason to assume that the practice of borrowing foreign precedents or consulting foreign colleagues would detract from the quality of judicial decisions.

Many authors are slightly more cautious than this ideal type suggests. The transnational legal universe is *sometimes* relevant for domestic adjudication. The question concerns the precise modalities of this 'sometimes': are foreign legal sources only relevant for very practical, means/ends types of disputes, or are they equally relevant to the adjudication of basic rights disputes, as in wrongful life or anti-terrorism cases? If we borrow precedents, from which jurisdiction do we borrow them? How can we properly understand foreign legal decisions outside of their particular domestic contexts?

1.3. The importance of legal context

In the context of Supreme Courts, these issues are often treated with particular urgency because of the power of judicial review. When Supreme Courts have the authority to void democratically enacted legislation, and when legislators subsequently lack the *de facto* or *de iure* power to overturn such decisions (*e.g.* because of supermajority requirements), the burdens of judicial justification are significant, and the use of non-domestic legal sources is particularly conspicuous, especially when their relevance is not immediately apparent. The introduction of judicial review into the equation raises the familiar 'counter-majoritarian' difficulty as articulated by Alexander Bickel. A paradigmatic example of a debate centring this issue is currently being conducted within US constitutional circles. Without a doubt, the issue of the US Supreme Court's use of foreign materials is responsible for the majority of scholarship focusing on these issues, as will become apparent in the remainder of this article.

A further point that can be made in this vein is that the urgency of these issues is highly context dependent. For example, in addition to its concern with the counter-majoritarian character of judicial review, US legal culture has also been described as quite particularistic. In settings in

which the term 'democracy' has very strong republican overtones, foreign legal materials may appear to be particularly suspicious as sources of judicial inspiration. On the other hand, many continental European judges may perceive this entire debate as a storm in a teacup. In settings that involve a strong tradition of foreign inspiration in instances of domestic adjudication and in which the legal culture is thus accustomed to this practice, concerns of legitimacy are not likely to rise to the level of prominence that is exhibited in the US debate. Jurisdictions within the common-law tradition are also likely to be comfortable with the consultation of non-domestic legal sources, particularly those from jurisdictions having a Commonwealth heritage.

It would therefore be a mistake to assume the existence of one central, overarching problem of legitimacy associated with judicial internationalisation and that this over-arching problem is uniformly applicable to all legal cultures. This article proceeds from this basic premise. In this context, it is also important to note that the literature discussing the normative dimension of judicial legitimacy is also not strongly unified. Many arguments are applicable only to the legal cultures or areas of law to which they are directed. Others are of a general nature but are not geared toward any comprehensive, generally applicable normative doctrine of judicial internationalisation. In essence, the art is in a state of infancy, in which a rough patchwork of interrelated yet distinct arguments is made, but in which the unifying factors are still difficult to discern.

2. Roadmap of the debate

A survey of the various positions within this debate reveals that there are essentially two ways in which the correlation between judicial internationalisation is being reconciled with judicial legitimacy. In very basic terms, the opposition is between those who defend and advocate a conception of judicial legitimacy, as it is traditionally understood (*i.e.* as a function of the separation of powers), and those who see scope for additional grounds for legitimacy.

According to the first school of thought, the judicial branch is largely an organ of national sovereignty, and it is accountable to the national constituency from whence its constitutional authority flows. As a democratically unelected organ, its charge is to ascertain the meaning of the law, and not to promulgate its own or replace democratically sanctioned laws with judicial caprice. In this view, the rule of the people is prized over and above the rule of judges, and judicial internationalisation results in juristocracy of the worst kind: judges who not only exceed their position within the separation of powers, but who do so by privileging the views of foreign, non-elected bodies in the adjudication of domestic matters.[2] According to this argument, the fact that judicial internationalisation is indeed taking place does not mean that it is legitimate. Assuming its legitimacy would amount to the basic argumentative fallacy of confusing an *is* with an *ought*. The mere fact that judicial internationalisation *is* does not mean that it *ought to be*.

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2 The main proponents of this view include K.I. Kersch, 'The "Globalized Judiciary" and the Rule of Law', 2004 *The Good Society*, no. 3, pp. 17-23; K.I. Kersch, 'The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law', 2005 *Washington University Global Studies Law Review* 4, pp. 345-387; K.I. Kersch, 'The Supreme Court and International Relations Theory', 2006 *Albany Law Review* 69, pp. 101-129; J.A. Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States*, 2005; Justice Scalia in his debate with Justice Stephen Breyer at the U.S. association of constitutional law on the subject 'constitutional relevance of foreign court decisions' (hereafter: Scalia/Breyer debate); E.A. Young, 'The Trouble with Global Constitutionalism', 2003 *Texas International Law Journal* 38, pp. 527–545; A.L. Paulus, 'Comment/Commentary to Andreas Fischer-Lescano & Gunther Teubner/The Legitimacy of International Law and the Role of the State', 2004 *Michigan Journal of International Law* 25, pp. 1047–1058; D.J. Kochan, 'Sovereignty and the American Courts at the Cocktail Party of International Law: the Dangers of Domestic Judicial Invocations of Foreign and International Law', 2006 *Fordham International Law Journal* 29, pp. 507-551; A.T. Aleinikoff, 'Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution', 2004 *Texas Law Review*, no. 7, pp. 1988-2016; C. Baudenbacher, 'Judicial Globalization: New Development or Old Wine in New Bottles?', 2003b *Texas International Law Journal* 38, pp. 505-526.

The second approach approvingly recognises the changing activities of an internationalised judiciary as consistent with a transformed understanding of the judicial role. Particularly in its more dogmatic incarnations, the separation of powers is becoming something of an anachronism. Globalisation has caused many legal problems to transcend borders because of increasingly integrated economies, more mobile individuals and ever more voluminous and instantaneous information streams. Supreme Courts are subject to a number of different forces. Far from being the sole agents of the domestic legislative will, judges are facing pressure to ensure such values as the rule of law, the protection of human rights, the uniform interpretation of international law and acquiescence with the moral sentiments of the international community at large. Moreover, global interdependence creates strong pragmatic incentives to ensure uniformity across domestic legal orders in the interests of expediency and efficacy. In light of these and other factors, it is not plausible that judicial legitimacy can and ought to be based on an insulated, domestic understanding of the separation of powers. If this is the case, however, what should replace the separation of powers as the cardinal measure of judicial legitimacy?

Although the process of judicial internationalisation has been widely defended by its proponents, their arguments have often remained somewhat diffuse, in the sense that few, if any, call for abandoning the separation of powers completely in favour of a novel paradigm of judicial legitimacy. This paucity is remarkable, however, when compared to the overwhelming abundance of literature dealing with global governance as such (*e.g.* the democratic deficit of the EU and international institutions, the role of global society, accountability at a global level, cosmopolitan rights). Although all advocates argue that judicial internationalisation is conducive to judicial legitimacy, broad and sweeping statements that call for the revision of the separation of powers paradigm are conspicuous primarily in their absence.

Arguments in favour of judicial internationalisation tend to emphasise specific points, contexts or areas of law in which non-domestic legal sources may contribute to the efficient and just functioning of domestic legal orders. A typical claim is that, within the area of commercial law, transnational standardisation is essential to maintaining a competitive position within a globalised economy. Moreover, for cases in which empirical data are particularly relevant (*e.g.* the socio-economic effects of certain types of regulatory legislation), foreign jurisdictions may provide useful and illustrative case studies that can be used to anticipate the effects at home. Because the case in favour of judicial legitimacy is diffuse by nature, the debate presented therefore follows a thematic approach.

Section 3 begins by considering the basic objections to the use of non-domestic law from the perspective of traditional separation-of-powers theory. Section 4 provides an overview of various novel approaches that have been offered for conceptualising sources of judicial legitimacy. Finally, Section 5 considers other contemporary objections to the use of non-domestic law.

3. The traditional approach: judicial internationalisation as a problem of interpretive theory

3.1. The judge as **'la bouche de la loi'** *or the judge as Hercules?*

By far the most ubiquitous approach to the normative implications of judicial internationalisation is contained in the key of interpretive legal theory.[3] With specific reference to judicial legitimacy, the basic dilemma concerns the degree of interpretive theory that can legitimately be accorded

3 See Kersch (2006), *supra* note 2, p. 103.

to the judiciary. This involves the question of whether judicial legitimacy is best served by Montesquieu's '*la bouche de la loi*' (the mouth of the law), Ronald Dworkin's 'Hercules' or something in between.

The basic polarisation juxtaposes democratic decision making against the importance of individual rights. Whilst self-government generally requires that the laws governing society be the product of democratically sanctioned, inclusive decision-making procedures, we also recognise a commitment to a more substantial understanding of the rule of law. Such an understanding includes a strong concern for the notion of individual rights and their insulation from the contingency and unpredictability that often characterise the political process through the enshrinement of basic rights in a constitution, enforced by judicial review. The basic difficulty with bringing the separation of powers into practice therefore involves balancing the demand of majoritarian decision-making with the necessity of protecting individual rights.[4]

As always, the devil is in the details; the boundary between politics and judicial review is notoriously difficult to demarcate. Several strategies have been proposed in recent decades.[5] Notably, constitutionalists in the tradition of Ronald Dworkin accord a strong degree of autonomy to the judiciary in determining the content of individual rights, arguing that a pure procedural understanding of the rule of law is not only impracticable, but also implausible due to the interconnection between law and morality. This view has recently been defended during a roundtable discussion between a number of pre-eminent judges and scholars (Stephen Breyer, Dieter Grimm, Robert Badinter and Professor Ronald Dworkin). These experts were nearly unanimous in accepting that judges are essential for checking the excesses of democratic government, and that they are instrumental in securing its enabling conditions: individual liberties, civil and political rights and the rule of law.[6]

Krotoszynski concludes:

> 'In sum, the panelists effectively turn the question of judicial legitimacy on its head. Rather than a judiciary needing and desperately seeking some sort of democratic mandate to legitimate its work, the panelists propose a new paradigm in which it is the judges who legitimate the functioning of the more democratically accountable branches of government. Under this understanding, it would be harder to justify democracy without judges or constitutional courts; the real cause for concern should not be the legitimacy of judicial review but rather the fundamental fairness and justice of unchecked majoritarianism.'[7]

Such views have obviously been subject to trenchant criticism in other quarters, most vocally by the originalist school of interpretive theory in the United States.[8] Robert Bork is representative of a tradition that derides judicial empowerment through judicial review for leading toward judicial activism and 'juristocracy': rule by judges in place of rule by the people. Bork claims:

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4 On this more general topic, see D. Meyerson, 'The Rule of Law and the Separation of Powers', 2004 *Macquarie Law Journal* 4, pp. 1-6; R. Mullender, 'Parliamentary Sovereignty, the Constitution, and the Judiciary', 1998 *Northern Ireland Legal Quarterly*, no. 2, pp. 138–166; R. Hirschl, 'The Political Origins of the New Constitutionalism', 2004 *Indiana Journal of Global Legal Studies*, no. 1, pp. 71-108; S. Freeman, 'Constitutional democracy and the legitimacy of judicial review', 1999 *Law and Philosophy*, no. 4, pp. 327-370.

5 For a comprehensive overview, see E. van Dommelen, *Constitutionele Rechtspraak vanuit rechtsfilosofisch perspectief*, 2003.

6 Review article by R.J. Krotoszynski (Jr.), '"I'd Like to Teach the World to Sing (in Perfect Harmony)": International Judicial Dialogue and the Muses – Reflections on the Perils and the Promise of International Judicial Dialogue', 2004 *Michigan Law Review* 104, pp. 1321-1359.

7 See Krotoszynski, *supra* note 6, p. 1347.

8 See R.H. Bork, *Coercing Virtue: The Worldwide Rule of Judges*, 2003; Kochan, *supra* note 2; Scalia/Breyer debate, *supra* note 2.

> '[t]he malady [of judicial imperialism] appears wherever judges have been given or have been able to appropriate the power to override decisions of others branches of government, the power of judicial review. (…) Increasingly, the power of the people of Western nations to govern themselves is diluted, and their ability to choose the moral environment in which they live is steadily diminished'.[9]

When judicial review is not met with outright opposition, it is constrained by highly determinate principles regulating its mode of exercise. In this way, textualist and originalist theories of interpretation reconcile the counter-majoritarian character of judicial review with majoritarian decision-making by interpreting constitutional provisions restrictively in accordance with the original intent of its framers and the plain meaning of the text. This limited mandate serves to curb the worst excesses of juristocracy and subjective judicial policy-making by narrowing the range of available interpretations of rights.

Whatever the merits of these two positions, the basic framework of the separation of powers stands. In principle, democratically elected legislatures decide on substantive issues. The judiciary has the power to override these decisions if they are deemed to conflict with the constitution and the fundamental civil and political rights protected therein. The extent and autonomy accorded to this process is heavily disputed, but the basic narrative of popular sovereignty with domestically-oriented institutional relations remains.

3.2. Judicial internationalisation and legal theory

In light of the issues presented above, two basic arguments are made against judicial internationalisation. The first is an extension of the originalist position, which fears that the use of foreign law could open a source of arguments so vast that it could be used and abused to justify almost any degree of personal whim or caprice by a judge.[10] This is succinctly articulated in the public debate between Justices Scalia and Breyer concerning the relevance of foreign law to constitutional interpretation.[11]

The sheer abundance of non-domestic legal sources has prompted metaphors to the effect that selecting foreign law is like picking out your friends in a crowd at a cocktail party or 'cherry picking'.[12] What other criteria do we have for selecting one over the other besides subjective agreeableness? According to legalism/originalism, looking beyond domestic borders can have one of two results. One possibility is that the decision of a foreign court exactly mirrors the intent of the domestic constitution's framers, although such an outcome would amount to nothing more than jurisprudential serendipity, finding a needle in a very large haystack. Foreign case law is an odd place to begin a determined quest for the original meaning of a text. Another possibility is that a judge will find the most socially efficacious, economically efficient and morally satisfying argumentative construction, although it cannot be reconciled with the constitutional text and associated historical records. In such cases, judges have been seduced by the allure of a good argument to the detriment of their duty toward faithful interpretation. Bork is even more scornful of the practice:

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9 See Bork, *supra* note 8, p. 1.

10 See Kersch (2006), *supra* note 2, p. 103; A.L. Parrish, 'Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law', 2007 *University of Illinois Law Review*, no. 2, pp. 637–680.

11 See Scalia/Beyer debate, *supra* note 2.

12 See Kochan, *supra* note 2, p. 509.

> 'The internationalisation of law is happening with phenomenal speed and comprehensiveness. With that development comes law's seemingly inevitable accompaniment: judicial activism. (…) internationalisation will magnify many times over the defects (…) the loss of democratic government, the incursion of politics into law, and the coerced movement of cultures to the left.'[13]

It is thus argued that foreign law becomes the thin end of a wedge, the fatal blow to what little judicial restraint is left in a world ruled by judges.

A second, closely related objection is concerned with the *a priori* applicability of foreign law to the adjudication of domestic legislation. In addition to creating additional avenues for judicial activism, judicial internationalisation is doubly deplorable, as it does so by referring to values that are foreign to the domestic constituency. Particularly in the United States, the borrowing of foreign precedents has been widely rejected on the grounds of legal particularism.[14] The idea is that the use of non-domestic legal sources is especially abhorrent because, unlike alternative extra-legal sources, every pretension of domestic loyalty is disregarded in favour of overt, anti-democratic, anti-majoritarian decision-making. According to Justice Scalia, 'we don't have the same moral and legal framework as the rest of the world, and never have'.[15]

One issue that emerges from this debate is that the disapproval of the practice of judicial internationalism is due less to the fact that it is foreign than it is to the mere fact that it is an additional nail in the coffin of judicial restraint. Noga Morag Levine notes that 'Supreme Court opinions are replete with references to extra-legal sources such as philosophical treatises and social science research. Why single out foreign case law as deserving of special condemnation?'[16] Indeed, as presented above, the debate has prompted a number of metaphors questioning whether the whole debate can be reduced to 'old wine in new bottles'[17] or 'a storm in a teacup'.[18]

Framing the debate solely in terms of the opposition between legalism and interpretivism apparently does not fundamentally alter the terms of the debate by the introduction of judicial internationalisation. In essence, the introduction of judicial internationalisation does not preclude discussion of the ever relevant but, for the purposes of this article, the distinct issue of majoritarian rule as opposed to anti-majoritarian judicial review. Foreign law is an interpretive source like any other, and its admissibility in domestic adjudication depends on the individual's general position concerning the appropriate extent of judicial interpretation. Consensus appears to be growing that the debate cannot be resolved within the narrow confines of legal theory.[19]

In order to keep the problems in accurate perspective, it is necessary to consider the possibility that judicial internationalisation may affect the very basis upon which the separation of powers is founded: the supremacy of the legislative branch or constitutional texts and the primacy of popular sovereignty. This strategy is discernible within the burgeoning literature that is sympathetic to judicial internationalisation, which constitutes the subject-matter of the following section.

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13 See Bork, *supra* note 8, pp. 15-16.
14 See Parrish, *supra* note 10, pp. 649-652.
15 See Scalia/Beyer debate, *supra* note 2.
16 See Whytock, *supra* note 1, p. 1.
17 See Baudenbacher, *supra* note 2.
18 See Parrish, *supra* note 10.
19 See *e.g.* Flaherty, *supra* note 1; Kersch (2006), *supra* note 2; Slaughter (2004), *supra* note 1; E. Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', 2008, Working paper, to be published in: *American Journal of International Law* 102.

4. Novel approaches to judicial legitimacy and judicial internationalisation

4.1. Lacunae: asymmetry between global governance studies

A wealth of conjecture currently exists with regard to the course that democratic governance is likely to take in a globalised world. According to the most salient articulations of democratic theory, a baseline requirement is that 'legislative and chief executive offices are filled through regular, competitive, multiparty elections with universal suffrage'.[20] Such minimalist formulations of democracy express the notion that rule by the people requires efficacious structures of representation and accountability. Democratically-elected representatives are agents on behalf of the people, and procedures are in place to hold them accountable, the most vital of which are elections. This is obviously the same notion that underlies the separation of powers. From a more conservative perspective, the judiciary fails to meet either of these baseline democratic requirements, and it should therefore exercise a significant degree of restraint in order to avoid encroaching upon the other branches. Even those conceding that the judiciary has an autonomous role in curbing the tyranny of the majority rarely question the principle of domestic separation of powers.

Globalisation is intrinsically problematic when considered from this domestically informed paradigm of democracy. One phenomenon that is at least partially related to internationalisation is that '[i]n modern democracies, unelected bodies now take many of the detailed policy decisions that affect people's lives, untangle key conflicts of interest for society, resolve disputes over the allocation of resources and even make ethical judgments in some of the most sensitive areas'.[21] Although not solely attributable to internationalisation (the rise of administrative power has long since been recognised as a significant domestic phenomenon), it has acted as a catalyst for the devolution of political power to unelected, technocratic institutions. Many of today's problems transcend borders, and it is becoming increasingly necessary to address them at a regional and global level. Moreover, such problems often involve areas of a technical nature, including economics, health, security and technology. These factors have precipitated the massive rise in the number of international institutions and the incremental growth in both their formal and informal power.

In the absence of a true cosmopolitan world government (*i.e.* global institutions which perfectly mirror the structure of their domestic counterparts), the question of the 'democratic deficit' within world politics 'is emerging as one of the central questions – perhaps the central question – in contemporary world politics. Whatever their underlying motivations, critics these days ranging from the extreme right to the extreme left, and at almost every point in between, couch criticisms of globalisation in democratic rhetoric'.[22]

A discernable development within the burgeoning field of globalisation and global governance argues that the domestic model of democracy is unfit to serve as a blueprint for global governance. Robert Keohane contends, '[u]nfortunately, such a vision [global democracy analogous to domestic democracy] would be utopian in the sense of illusory – impossible of realization under realistically foreseeable conditions'.[23] Instead, there has been a proliferation of

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20 See L. Diamond, *Developing Democracy*, 1999, p. 10.

21 See F. Vibert, *The Rise of the Unelected / Democracy and the New Separation of Powers*, 2007.

22 See A. Moravcsik, 'Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis', 2004 *Government and Opposition*, no. 2, p. 336.

23 See R.O. Keohane, 'Accountability in World Politics', 2006 *Scandinavian Political Studies*, no. 2, p. 77: 'A system of democratic accountability in world politics would be one in which power-wielders would have to report to people whose actions they profoundly affected, and be subject to sanctions from them (Held 2004, chapter 6). For someone who believes in liberal democracy like me, it would be pleasant to imagine that such a system could be constructed for world politics; unfortunately, such a vision would be utopian in the sense of illusory

alternative models of global governance that attempt to reconcile the basic principles and demands of domestic democracy with the practical necessities of a globalised world. In fact, this body of literature is rapidly becoming one of the most voluminous in the field of political science.[24] Novel alternative approaches to democracy and global governance tend to emphasise the role of pluralistic accountability mechanisms between various domestic and international actors,[25] institutional reform at the international level to incorporate more traditional democratic elements,[26] indirect accountability through domestic institutions[27] and legitimisation through technical expertise.[28]

The quantity of these general studies, however, stands in contrast to the paucity of studies dealing directly with the question of *judicial* legitimacy in a globalised world. The following sections therefore focus on various attempts to ground judicial legitimacy in a globalised context. One crucial feature of these approaches is that they form part of an attempt to move beyond the domestically informed paradigm of the separation of powers, which has traditionally been dominant within the discipline.

4.2. Judicial legitimacy in a globalised world: patchwork legitimacy?

As noted in the introduction, many of the aforementioned objections have been raised in the context of the US Supreme Court, a context that differs in many respects from other jurisdictions around the world. The *objections* are therefore not always equally applicable or equally strong when applied to other legal contexts.

Many would argue that there is no negative legitimacy problem associated with judicial legitimacy. The validity of this argument depends on numerous legal and extralegal variables. The presence of judicial-review powers is important, as are many issues of historical and cultural context, dominant political ideology and similar matters. The goal of this section is not to delve directly into these modalities, but to consider them in a more indirect way. Moving away from the issue of negative legitimacy, this section considers the question of *positive* legitimacy. This survey shows that the positive legitimacy is very much a patchwork legitimacy; to date, it would be difficult to find a single coherent statement of the relation between legitimacy and judicial internationalisation. Instead, there are numerous discrete but interrelated arguments, emphasising particular elements that are subsequently relevant under particular circumstances. These circumstances may include such variables as political or legal culture, as well as social and historical background.

This paragraph will thus outline four dominant approaches to the question of judicial legitimacy in a globalised world.[29] One common feature of these approaches is that they (i) reject the notion that judicial legitimacy is almost exclusively a function of observing the appropriate separation of powers as mandated by the separation-of-powers doctrine and (ii) either wholly or partially invoke circumstances that are either consequences or corollaries of processes of globalisation.

– impossible of realization under realistically foreseeable conditions'.

24 For an overview of the various approaches, see Moravcsik, *supra* note 22; R.A. Cichowski, 'Courts, Rights, and Democratic Participation', 2006 *Comparative Political Studies*, no. 1, pp. 50-75; M. Shapiro, '"Deliberative," "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.', 2005 *Law and Contemporary Problems* 68, pp. 341–356.

25 See *e.g.* Keohane, *supra* note 23.

26 *E.g.* the work of David Held and Daniele Archibugi. For a review see W.E. Scheuerman, 'Cosmopolitan Democracy and the Rule of Law', 2002 *Ratio Juris*, no. 4, pp. 439–457.

27 Often involving some version of Principal-Agent theories, see Moravcsik, *supra* note 22, pp. 354-355.

28 Most prominently, Vibert, *supra* note 21.

29 See also Kersch (2005), *supra* note 2.

Although not all of the authors explicitly claim to displace the separation of powers as a model for judicial legitimacy, their arguments can be read as indicating possible directions in which a novel paradigm of judicial legitimacy may evolve. Defending and advocating judicial internationalisation requires arguing why a judiciary that operates partly in the international and transnational sphere is desirable. Moreover, arguing that judicial internationalisation is desirable also requires arguing that it is legitimate.

4.2.1. The judiciary as the executive agent of global human rights regimes

As discussed in the previous section, in which the strict version of separation of powers arouses suspicion toward the practice of judicial review, the practice has often been defended on the grounds that the judiciary is best equipped to curb the excesses of majoritarian rule and to ensure the observance and political salience of individual rights. In contrast to the notion that judicial legitimacy is primarily a function of its constitutional relationship to the legislative and executive branches of government (*i.e.* a function of the separation of powers), these accounts offer a more substantive alternative to judicial legitimacy. This alternative renders judicial legitimacy contingent on its effectiveness in securing a level of protection for basic rights with regard to the legislature and the democratic process in general. In summary, '[f]undamental rights must have a higher status than legislation. They must be protected from ordinary amendment and repeal. And it is the judiciary who must enforce the higher order status of fundamental rights – un-reviewed by the legislature'.[30]

The advent of regional and global human rights regimes is undoubtedly an important source of judicial empowerment, and it conceptually reinforces the notion that judges have an autonomous role as protectors of individual rights. Human rights treaties are thus seen as further entrenching, consolidating and amplifying the status of domestic judicial review. Judges do this by broadening their mandate as upholders of constitutional rights and as upholders of human rights treaties. As such, the rise of supranational constitutional and human rights norms has ensured that '[c]ourts are increasingly given the powers to constrain, shape, and dismantle government action and acts'.[31] This is particularly visible under the legal regimes of both the European Court of Human Rights (ECHR)[32] and the European Court of Justice (ECJ),[33] where it is argued in certain quarters that the judiciary has been an agent of European integration as well as of the European rights culture.

Slaughter has drawn attention to the fact that one central consequence of this international dimension, which moves beyond the domestic paradigm, is that the emergence of global human rights law has a strong socialisation effect on individual judges. According to Slaughter, 'Courts may well feel a particular common bond with one another in adjudicating human rights cases, however, because such cases engage a core judicial function in many countries around the world'.[34] The core judicial function – the protection of individual rights – is buttressed by the development of cross-cutting links amongst various domestic courts, as well as between domestic courts and supranational courts.

Nonetheless, the symbiosis between human rights treaties and constitutional norms is not uncontested. For example, Yuval Shany argues that domestic courts are often reluctant to import

30 See J. McLean, 'From Empire to Globalization: The New Zealand Experience', 2004 *Indiana Journal of Global Legal Studies*, no. 1, p. 186.
31 See Cichowski, *supra* note 24, p. 51.
32 See Cichowski, *supra* note 24; Slaughter (2004), *supra* note 1, pp. 79-82.
33 See A. Stone Sweet, *The Judicial Construction of Europe*, 2004.
34 See Slaughter (2004), *supra* note 1, p., 79.

treaty norms into constitutional adjudication.[35] Elsewhere, Janet McLean highlights the difficulty of incorporating human rights treaties as supreme (*i.e.* as overruling domestic legislation and constitutions) in the US, as well as in the common-law legal systems. In the US, the supremacy of the constitution is considered imperative to the efficacious protection of rights; under common law, problems arise in relation to the doctrine of parliamentary sovereignty.[36]

Slaughter suggests that judges are conscious of the need to engage their professional counterparts in foreign countries and actively ensure a degree of uniform interpretation and application of human rights across borders, as long as doing so does not grossly violate domestic moral sentiments. From the perspective of judicial legitimacy, this suggests that courts currently have responsibilities to both a domestic constitutional order and *de facto* to an emerging global constitutional order (although Slaughter does not specifically argue to this effect). This argument appears to be affirmed by the increasing degree to which sovereignty is being made contingent upon the observance of basic standards of human rights, the rule of law and democracy (*e.g.* the ICISS' *Responsibility to Protect* report).[37] Despite empirical evidence to the contrary, Shany also extols the virtues of the nexus between domestic constitutions and international human rights law, identifying such benefits as the 'limitation of unchecked judicial discretion, protection of the power of the executive to conduct foreign policy, necessity of harmonising domestic law with self-executing international norms, promotion of the desirable social values reflected in IHR norms, confirmation of an emerging cosmopolitan identity, minimisation of international criticism, etc.'[38] All of these factors can ultimately be considered to enhance legitimacy.

Nonetheless, most of the arguments can be read as echoes of the same sentiments. Judicial legitimacy can be enhanced by judicial internationalisation. Globalisation raises new questions of legitimacy, and many authors have thus proposed new answers. These developments suggest, but do not unambiguously assert, that the domestic judiciary is evolving into a 'funnel' between domestic constitutional orders and global human rights regimes. This mediating role is necessary to strengthen core constitutional values in a world in which domestic insularity is becoming less and less tenable. Internationalisation thus seems a necessary judicial strategy to ensure the effectiveness of constitutional values, which are being placed under pressure domestically by globalisation.

The situation described above raises several questions: do the aforementioned considerations constitute sufficient grounds for abandoning the separation of powers, or at least for moving beyond its strict, domestically oriented form? To what extent does the judiciary have an identifiable loyalty to an emerging global constitution, in addition to or even in the place of domestic constitutions? Are domestic constitutions losing their foothold in a globalised world? At a more fundamental level, can we attribute an autonomous role to the judiciary in counteracting the exigencies of globalisation, or should this be left to parliaments or other organs? These questions and others must certainly be answered if the separation of powers is to be replaced by alternative models of judicial legitimacy.

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35 See Y. Shany, 'How Supreme Is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts', 2006 *Brooklyn Journal of International Law* 31, pp. 341- 404.

36 See McLean, *supra* note 30, pp. 167-171.

37 Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001. Available at http://www.iciss.ca/report2-en.asp

38 See Shany, *supra* note 35, p. 399.

4.2.2. The judiciary as the guardian of democracy with regard to the forces of globalisation

Interestingly and perhaps counter-intuitively at first glance, some authors have argued that the global entrenchment of fundamental rights allows an internationalised judiciary to counteract the destabilising consequences of globalisation. In particular, it is argued that *domestic* democracy is best protected by a *globalised* judiciary.

The nexus of this claim is informed by the understanding that the devolution of political power to various non-elected bodies constitutes an important consequence of globalisation. In addition to a strong preference for the executive branches of government as the central organ charged with conducting foreign policy, a veritable mass of non-government organisations, inter-governmental organisations, technocratic bodies, supranational courts and other bodies have been established to address the border-transcending nature of contemporary politics.

From this perspective (as mentioned in the introduction to this section), the threat to democracy comes not from an overzealous judiciary, but from an all-powerful executive, which is insulated from the traditional checks of democratic oversight that are typically provided by parliaments and other domestic agencies. If it acts in a coordinated unitary fashion, the judiciary may counteract this deficit by ensuring that the executive is scrutinised by domestic courts as well as courts everywhere, at least tacitly united in their understanding that it is necessary to place a check on unrestrained executive supremacy.

Martin Flaherty thus proceeds from the domestic understanding of the separation of powers, arguing that, if we concede that globalisation tends to favour the executive branches of government at the expense of the legislature and the judiciary, thereby disrupting the institutional balance, judicial internationalisation is a salutary force, as it restores this balance by relatively strengthening the judiciary. This subsequently does indeed lead to a 'global separation of powers'.[39]

In a similar vein, Eyal Benvenisti argues that judicial internationalisation creates more assertive domestic courts, as their position is strengthened by a new form of global judicial solidarity. This new-found leverage empowers the judiciary to act against the encroachment of global, unelected bodies on domestic politics by pressuring national governments to ensure representativeness to their domestic constituents.[40] Specifically, it shows how executives and legislatures face a certain 'pressure to conform', a pressure that would be less potent within a truly independent judiciary. These findings are echoed in a case study of the South African Constitutional Court, which notably has a constitutional mandate to reference non-domestic law and, despite its counter-majoritarian decisions, enjoys a significant degree of popular legitimacy.[41]

These and other similar arguments echo the observation that was made at the beginning of this section that democracy has always been a fluid concept; this is particularly true when considered in a global context. The dynamics of democratic governance, especially in its institutional manifestations, are transforming under the influence of globalisation. This suggests that classical anti-majoritarian and separation-of-powers type theories are themselves in need of revision, as the general parameters have changed.

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39 See M.S. Flaherty, 'Judicial Globalization in the Service of Self-Government', 2006 *Ethics & International Affairs*, no. 4, pp. 477-503.

40 See Benvenisti, *supra* note 19.

41 See J.L. Gibson *et al.*, 'Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court', 2003 *The Journal of Politics*, no. 1, pp. 1–30.

4.2.3. The judiciary as a foreign policy agent

An alternative line of reasoning suggests that judicial internationalisation is legitimated partly by an appeal to its conduciveness to the promotion of the rule of law, democracy, human rights and constitutionalism at home and abroad.[42] Indeed, this notion informs much of the literature arguing in the direction of judicial internationalisation.

Concluding an analysis of judicial globalisation, Slaughter notes,

> '[i]n sum, judges around the world are coming together in various ways that are achieving many of the goals of a formal global legal system: the cross-fertilization of legal cultures in general and solutions to specific legal problems in particular; the strengthening of a set of universal norms regarding judicial independence and the rule of law (however broadly defined)'.[43]

In this context, it is often noted that judicial internationalisation is conducive to the consolidation of independent judiciaries in recently established and consolidating democracies. Through judicial internationalisation, newly established judiciaries benefit from the expertise, support, status and persuasive authority derived from global judicial networks. This socialisation '[i]s important for convincing judges to try to uphold global norms of judicial independence and integrity in countries and at times when those are under assault'.[44] Justice Breyer also considers this consequence of judicial internationalisation to be generally desirable:

> 'in some of these countries there are institutions, courts that are trying to make their way in societies that didn't used to be democratic, and they are trying to protect human rights, they are trying to protect democracy. They're having a document called a constitution, and they want to be independent judges. And for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then go to some of their legislators and others and say, "See, the Supreme Court of the United States cites us." That might give them a leg up, even if we just say it's an interesting example.'[45]

Indeed, Ken Kersch argues that several US Supreme Court judges, in referencing foreign law, both consciously and subconsciously subscribe to the core tenets of liberal internationalism, holding that:

> '[w]hen judges from well-established, advanced western democracies enter into conversations with their counterparts in emerging liberal democracies, they help enhance the status and prestige of judges from these countries. This is not, from the perspective of either side, an affront to the sovereignty of the developing nation, or to the independence of its judiciary. It is a win-win situation which actually strengthens the authority of the judiciary in the developing state. In doing so, it works to strengthen the authority of the liberal constitutional state itself. Viewed in this way, judicial globalisation is a way of strengthen-

42 See Kersch (2005 and 2006), *supra* note 2; A. Mills, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law', 2005 *Leiden Journal of International Law* 18, pp. 1-30.
43 See Slaughter (2004), *supra* note 1, p. 102.
44 *Ibid.*, p. 99.
45 See Scalia/Breyer debate, *supra* note 2.

> ing national sovereignty, not limiting it: it is part of a state-building initiative in a broader, liberal international order'.[46]

The notion that judicial internationalisation promotes such values as democracy and the rule of law is prominent in an article by Flaherty, who asserts that:

> 'Looking forward, judicial globalisation becomes not just permissible but imperative once the hoary doctrine of Separation of Powers is itself considered in a global context. Global Separation of Powers theory views globalisation as enhancing the powers of the executive in any particular country. It follows that any form of globalisation that works to enhance the authority of a corresponding judiciary (or legislature) works to maintain and restore the goal of balance among the principal branches of government that is the definitive feature of Separation of Powers doctrine'.[47]

Somewhat paradoxically, Flaherty argues that by abandoning a strictly domestic understanding of the separation of powers and thus accepting judicial internationalisation as a permissible and even desirable practice actually strengthens the separation of powers at the national level by creating a global judicial power. Karel Wellens underscores the same accountability-reinforcing function externally, through such activities as acting as a watchdog with regard to international organisations. In this respect, international courts are the primary actors, although domestic courts are gaining ground as International Organisation immunity is becoming the subject of increasing debate.[48]

In this view, a judiciary that actively works to promote and streamline liberal democracy abroad by engaging in transnational relations is not weakening its legitimacy, but strengthening it. Both this section and the previous section suggest that the notion that a judiciary is blind beyond its borders, dealing solely with domestic matters, has become chimerical. In a globalised world, the judiciary must recognise that its moral responsibility includes attentiveness to extra-domestic factors, including global constitutionalism and the export of the rule of law.

4.2.4. Judges as problem solvers: technocratic competence as a basis for judicial legitimacy

Slaughter refers to global governance as a paradox: '[w]e need more government on a global and regional scale, but we don't want the centralization of decision-making power and coercive authority so far from the people actually to be governed'.[49] The result has been the rise of NGOs, international institutions, international civil society, and so forth rather than a world government. What many of these organisations have in common is their technical or professional character.

For a significant portion of NGOs and autonomous bodies that are charged with specific public regulatory functions, political value judgments are not the only questions to be addressed in this regard; questions of a technical nature are of equal (or perhaps greater) significance. This is particularly true for bodies involved in regulating the economy, health, harmonisation and safety.[50] This problem obviously predates the post-Cold War interest in globalisation. The rise of bureaucratic agencies within domestic borders has long been a part of political life and has

46 See Kersch (2006), *supra* note 2, p. 115.
47 See Flaherty (2006), *supra* note 39, p. 479.
48 See K. Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: the Role of the Judiciary in Closing the Gap', 2004 *Michigan Journal of International Law* 25, pp. 1159–1181.
49 See Slaughter (2004), *supra* note 1, p. 8.
50 See Vibert, *supra* note 21, pp. 30-32.

facilitated the growing demand for government regulation in ever more spheres of public life. The novelty lies in the fact that globalisation has led to new types of problems (*i.e.* global threats) that require regional and global cooperation, in addition to a homogenisation of domestic problems due to the growing interdependence in economic and (because of mass media and communication) even cultural terms.

Slaughter argues that one significant way in which government officials have responded to these problems is to form cross-national information networks to facilitate the exchange of technical expertise between groups of professions. Significantly, this means that the black-box view of the state as a unitary actor is being replaced by a 'disaggregated view of sovereignty' in which sub-state actors autonomously establish inter-state relations. The nexus of this argument is formed by the empirical fact that government officials from all branches are increasingly seeking out quasi-formal and quasi-institutionalised information exchanges with their professional counterparts in foreign territories. When solving essentially domestic problems, such officials draw upon the expertise and similar experiences of others to reduce transaction costs and increase domestic efficiency. A globalised world is accompanied by global problems, which elude effective domestic regulation. Global epistemic networks are an instrument that allows for efficacious cooperation on problems of a border-transcending scale whilst avoiding the perceived perils of world government.

The prime consequence of the establishment of global professional networks, indeed one of the features that set contemporary developments apart from traditional forms of transnational communication, is its socialising effect. Slaughter explains, '[i]t is closer in some ways to a global "community of courts", in the sense that judges around the world interact with one another aware of their membership and participation in a common enterprise – regardless of their actual status as state, national, regional or international judges'.[51] Slaughter often alludes to the development that globalisation has been a homogenising force with regard to the legal problems faced by domestic courts, assigning increasing privilege to technical, problem-solving approaches over overtly political solutions. In other words, the idea that domestic legal problems are necessarily idiosyncratic is in decline, as 'the focus shifts from the dispute-resolvers to the disputes themselves, to the common values that all judges share in guaranteeing litigant rights while also safeguarding an efficient and effective system'.[52]

This is due in no small part to the nature of contemporary policy-making, according to Frank Vibert:

> 'In modern democracies unelected bodies now make many of the detailed policy decisions that affect people's lives, untangle key conflicts of interest for society, resolve disputes over the allocation of resources and even make ethical judgments in some of the most sensitive areas. By contrast, our elected politicians often seem ill-equipped to deal with the complexities of public policy, lightweight in the knowledge they bring to bear, masters not of substance but of spin and presentation and skilled above all in avoiding being blamed for public mishaps.'[53]

Admittedly, this legitimation hinges on whether the cases presented to judges are indeed 'problems' in a technical, value-neutral sense or whether they imply an undue degree of judicial

51 See Slaughter (2004), *supra* note 1, pp. 100-101.
52 See Slaughter (2004), *supra* note 1, p. 102.
53 See Vibert, *supra* note 21, p. 1.

influence over essentially political decisions. At first glance, it is plausible that certain legal questions (*i.e.* those involving the relation between means and ends and the probable effects of certain decisions) can benefit strongly from foreign experiences. In cases of fundamental human rights, however, the nature of the problems involved may also be converging, even if the solutions are not. Justice Breyer, a prominent advocate of a pragmatic, problem-solving approach to constitutional interpretation, argues that, across the globe, there are

> 'human beings, called judges, who have problems that often, more and more, are similar to our own. They're dealing with these certain texts, texts that more and more protect basic human rights. Their societies more and more have become democratic, and they're faced not with things that should be obvious – should we stop torture or whatever – they're faced with some of the really difficult ones where there's a lot to be said on both sides. Hard to decide. I said, "If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something".'[54]

In summary, the pivotal point in the argument for judicial internationalisation is that extra-domestic legal sources can be a powerful heuristic aid in domestic adjudication. The legitimating element of judicial internationalisation lies in quality-enhancing aspects of domestic decision-making. Looking abroad will either yield well informed, reasoned and considered decisions or give cause for 'reasoned divergence':[55] the rejection of non-domestic legal sources after having engaged and refuted the substance of the arguments. Viewed in this way, judicial internationalisation is arguably a force that enhances legitimacy.

4.3. Conclusions

The preceding inventory of arguments offered in favour of judicial internationalisation implies that these arguments are in some way conducive to judicial legitimacy. In many cases, the arguments are more implicit than explicit; the defence of a practice, however, implies commitment to its legitimacy. Few authors have attempted to offer a comprehensive theory of judicial legitimacy in a globalised world, opting instead to underscore developments that may be leading in such a direction. Although not entirely discrete, these arguments fall broadly into three camps: the emergence of global human rights regimes as a basis for enlarged judicial autonomy and hence legitimacy; the autonomous role of judges in advancing certain legal and political values in the foreign policy arena; and the shift toward technical decisions, coupled with the homogenisation of legal problems as a legitimising force of judicial internationalisation. The common unifying element seems to be that the judiciary cannot be conceived solely as a domestic actor. In this way, contemporary judges can legitimately claim the right to operate beyond their own borders.

The arguments above raise further questions: Can the factors mentioned above, alone or in tandem, offer a paradigm of judicial legitimacy to supplement or replace that of the original separation of powers? How do the various factors relate to each other? In short, how can judicial internationalisation be coherently accommodated in the existing paradigm of the separation of powers, and, if not, what paradigm of legitimacy presents itself as a viable alternative?

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54 See Scalia/Breyer debate, *supra* note 2.
55 See Slaughter (2004), *supra* note 1, p. 103.

5. Contemporary objections to judicial internationalisation

The scholarship extolling the virtues of judicial internationalisation – the subject of the previous section – has received much criticism in recent years. The premises on which the proponents of judicial internationalisation build their arguments (a converging global consensus on values, the foreign policy role of judges and the professional competency of the judiciary in technical matters) have been critically questioned by a number of authors.[56]

The core of these criticisms tend to refer back to the basic elements of the separation of powers: all that is said in favour of judicial internationalisation obscures the fact that the unelected judiciary is increasingly and dangerously encroaching upon fundamentally political matters that, in the final analysis, must fall to democratically elected legislatures. Judicial internationalisation potentially endangers the values of national sovereignty and democratic self-government. In their view, the separation of powers is as solid a prescription as it ever was, and judicial internationalisation is nothing more than an attempt to dismantle it. Kersch summarises the point as follows:

> 'Constitutions – longstanding, stable and successful democratic constitutions, like that of the United States – are defined by their relatively clear (or, at least, advisedly balanced) and transparent lines of responsibility and authority. The deliberate blurring of offices and authorities championed by proponents of judicial globalization are, as such, moves in an anti-legal and anti-constitutional direction.'[57]

The following sections consider their arguments as a response to the positions outlined in the previous section.

5.1. A denial of global technocracy and moral consensus

Advocates of judicial internationalisation tend to treat the emergence of global human rights jurisprudence and the increasing need for technical competence within the judiciary as overlapping but essentially distinct phenomena. The detractors of judicial internationalisation, however, tend to treat these issues as two sides of the same coin. On the one hand, they claim that human rights rhetoric is a veil behind which political choices are defused and surrendered to unelected bodies. This alleged convergence, in turn, lends support to the proposition that judges are indeed technocrats or problem-solvers. Absent deep moral disagreement, adjudication can indeed be more plausibly viewed as a technical-legal rather than a moral-political endeavour.

The views presented in this discussion are united in their conviction that the stakes of judicial internationalisation are too high. Judicial internationalisation inevitably leads to the loss of legislative autonomy and with it the foundations of democratic self-government (*i.e.* rule by democratically elected representatives). Bork argues:

> '[o]ne telling indication of the judicial activism and uniformity of outlook among judges is the way that legal interpretations of constitutions with very different texts and histories are now giving way to common attitudes expressed in judicial rulings. (…) The trend to

56 In general, see the authors mentioned in note 2, *supra*.
57 See Kersch (2004), *supra* note 2, pp. 21-22.

> transform political and moral questions into legal issues, and thereby transfer power from elected legislatures and executives to unaccountable courts, continues.'[58]

This uniformity of outlook is not limited to domestic judges; it is gaining international adherence as well. According to Kersch, '[i]t is hard not to conclude that many of the discussions of these issues, in their fussing over narrow, technical points, are either deliberately or in their effects, throwing a smokescreen over the profound issues of constitutional self-government that, at bottom, are at stake'.[59]

In a more extended passage, Jeremy Rabkin identifies the alleged 'inescapable moral truth' of internationally shared values accompanying the emergence of technocratic bodies, to the detriment of legislative autonomy:

> '[g]lobal governance rests on the quite different premise that legislative consent to law is not so important to the authority of law. After all, in the perspective of advocates for global governance, there are no great choices left to make. Judges must embrace international standards, most notably in the realm of human rights, because what most nations have affirmed (or at least what many advocacy groups have asserted) is something approaching an inescapable moral truth. So, too, global governance encourages the delegation of rule-making powers to international organizations, in which the agreement of national representatives – representatives of the national executive – can bind whole nations to new international regulatory standards. Systematically left out is the power of a legislature to determine a state's own law.'[60]

Kersch's reference to internationalised judges as 'cosmopolitan administrators'[61] tellingly reveals the deep connection between globalisation, the rights culture, judicial activism and judges as 'problem-solvers'. The problem of human rights is apparently an administrative problem, not a political one. All of these issues, however, amount to nothing more than an intricate sleight of hand by judicial imperialists. Andreas Paulus also laments the 'reliance on and trust in apolitical, functionalist solutions to value-conflicts between different legal orders'.[62]

Although it is not the root cause of judicial activism, judicial internationalisation can be skilfully manipulated by the judiciary to create the illusion of consensus. They can be used to cultivate the idea that the basic moral contours of society have been fixed, thus giving rise to the notion that adjudication is primarily a technocratic endeavour, that it is truly a problem-solving activity. Overlooking the political and controversial nature of many purportedly 'technical' problems threatens democratic accountability. Unlike Keohane, Moravcsik and other authors, the authors mentioned in this section deny the imperative to adapt extant paradigms of democratic accountability. Instead, we must judge the effects of internationalisation by our traditional normative standards. According to this argument, doing so will reveal that democratic accountability is waning due to the process of globalisation. Accountability ultimately requires identifiable, elected representatives. Rabkin reminds us, however,that

58 See Bork, *supra* note 8, p. 11.
59 See Kersch (2004), *supra* note 2, p. 21.
60 See Rabkin, *supra* note 2, p. 41 (emphasis added).
61 See Kersch (2004), *supra* note 2, p. 19.
62 See Paulus, *supra* note 2, p. 1048.

> '[t]he whole logic of global governance subverts the claim of a legislature to make its own decisions for its own constituents. Global governance requires us to acknowledge that 'we' – the constituents of a particular legislative authority – do not have different interests from the others, so we don't really need distinct institutions to define these interests. Of course, there can still be legislative action in local matters, if such decisions do not threaten the larger scheme'.[63]

In summary, the argument thus holds that judicial internationalisation *can* be a legitimating force *if* a global consensus is so strongly shared that there is no logical necessity for domestic institutions and domestic legislatures. This premise is mistaken, according to those opposing judicial internationalisation; there is no such global consensus, and such is not expected in the near future. Once this point is conceded, the notion of judges as problem-solvers falls apart. Problems imply technical expertise, means-ends relationships, and value-neutral calculations. According to the views presented here, however, this is far from the case. Political choices should be made by political actors; more specifically, they should be made by elected legislatures, and not by officials who have not been elected.

5.2. The role of the judiciary in international relations

What remains of the proposition that the judicial role includes the export and consolidation of democracy and the rule of law? Judicial internationalisation is conducive to this end, as it fosters uniformity across liberal democracies and serves to consolidate the judicial understanding of what it means to apply these principles in conformance with regional or global standards. As Kersch explains, 'American judges citing foreign precedent and practices (both when they follow those and when they reject them) will see themselves as doing their part. They will understand themselves as engaging in a process aimed at the desirable objective of bringing liberal rule of law values (that is, American values) to formerly non-liberal non-democratic states'.[64]

In the same spirit, which favours legislative authority and democratic accountability over strong judicial autonomy, some have argued that advancing the rule of law and democracy confuses procedural with substantive values. Alexander Mills and Tim Stephens explain:

> 'The principles Slaughter specifies reveal that a characteristically liberal focus on procedure lies at the heart of her approach. A shared acceptance of procedural rules, however, is no substitute for a set of shared values. (…) However, an implicit, unwritten, unacknowledged "consensus" on procedural norms makes a flimsy foundation for a transnational community. (…) Slaughter's transnational community of courts is in fact not a site of global consensus, but of conflicting norms, including in particular a conflict between transnational norms and domestic liberal democratic values'.[65]

Nonetheless, the confusion of means (judicial internationalisation) with ends (the global promotion of democracy and the rule of law) is not the only factor that forms an affront to the critics of judicial internationalisation. There are many principled reasons for not condoning the practice, and all of them involve a strict traditional understanding of sovereignty. One of the more vociferous advocates of the 'sovereigntist' movement, Rabkin, goes to some lengths to argue that

63 See Rabkin, *supra* note 2, p. 43.
64 See Kersch (2006), *supra* note 2, p. 123.
65 See Mills, *supra* note 42, pp. 20-23.

the heart of liberal democracy is the recognition of value pluralism. Particularly in foreign affairs, sovereignty is premised on the notion that the appropriate means to deal with this diversity is to allow each government the authority to conduct its affairs in accordance with the sentiments of its own constituency. On the topic, Rabkin says:

> 'A legislature is an institutional monument to differences among voters as well as to their willingness to be bound, in the end, by a common rule. Global governance not only thwarts or distorts the policy impulses of legislatures, but denigrates the principles that stand behind legislative authority – that a diverse electorate will accept the results of an ultimately legislative decision so that "we" can be governed in common.'[66]

If the judiciary adopts a substantive understanding of the rule of law and democracy whilst dabbling in foreign affairs, it violates legislative supremacy. The very notion of the judiciary as a foreign policy agent, however, is debarred on the classical understanding of sovereignty, which states that each government (specifically, foreign legislatures) reigns supreme in its own territory. By using judicial internationalisation as a tool to foster convergence in substantive values, judges who subscribe to this view actually accomplish the opposite of what they set out to do; they create a loss of democratic accountability and the rule of law through bypassing democratically elected legislatures in favour of global governance networks and similar entities. Rabkin argues, '[t]here is no obvious reason why outsiders would care whether any particular people does organize itself under liberal institutions, if that people does not threaten others'.[67] In other words, the non-intervention principle, as once championed by the UN, argues forcefully against interfering in another nation's sovereignty (with one important and difficult qualification: 'if that people does not threaten others'). In any case, should such interference be required, the judiciary has no place in making such decisions.

In summary, the authors of this section argue that an appeal to the salutary power of judicial internationalisation in establishing democracy and the rule of law is misguided. According to their argument, it is misguided because the rule of law and democracy are procedural values. By engaging in 'uniform interpretation', the judiciary necessarily oversteps its appropriate competency.

5.3. The problems of methodological indeterminacy

Not all objections to the judicial internationalisation turn on principles of sovereignty and democracy. A number of authors do not deride the use of foreign precedents in principle, arguing instead that there are methodological problems that may also 'spill over' into the realm of legitimacy. In particular, Vlad Perju and Robert Alford argue that the use of foreign materials is still significantly underdetermined from a methodological perspective.[68]

This is true, first, from a normative perspective. As noted above, if we can accept the legitimacy of judicial internationalisation under certain circumstances, we still need *workable* directives to guide judges in particular cases. How can judges determine whether particular instances of adjudication may benefit from comparison to non-domestic legal sources? This question is relevant in the context of methodological difficulties that may result from the

66 See Rabkin, *supra* note 2, p. 42.
67 See Rabkin, *supra* note 2, p. 255.
68 See V.F. Perju, 'The Puzzling Parameters of the Foreign Law Debate', 2007 *Utah Law Review*, pp. 167-214; R.P. Alford, 'In Search of a Theory for Constitutional Comparativism', 2005 *UCLA Law Review* 52, pp. 639-714.

unreflective and uncritical use of foreign legal sources. This section addresses some of the more obvious methodological problems at stake.

The problem of selection bias is an example of these methodological problems. Because it is virtually impossible to consider every piece of jurisprudence ever produced in the world, it is often easiest to look towards those that are most readily available. This could lead to a bias in favour of more prominent jurisdictions, such as the US Supreme Court, which has been a 'net exporter' of decisions for many years. The problem of such piecemeal comparison may lie in the fact it stifles the diversification of views, given that certain sources of decisions are over-privileged, to the detriment of a more inclusive mode of judicial deliberation.

Related to this point is the problem of language. This bias is undoubtedly enhanced by referring only to those decisions that are published in a familiar language. Courts lacking the means to have their decisions translated on their own initiative may find their voices dwindling in the 'global community of courts'.

An additional problem concerns what it actually means to 'use' foreign precedents. As Perju argues, merely citing non-domestic legal sources is often simply an exercise of 'nose counting'.[69] A court may question what persuasive force derives from the mere fact that other courts have made decisions that are similar or dissimilar to its own decisions. Normative arguments are necessary for the further definition of the appeal that is actually being made when non-domestic legal sources are cited as persuasive authorities. Why are they persuasive? The discussion above demonstrates several possible grounds upon which non-domestic legal sources may constitute persuasive authority. The problem is more mundane, however, and it lies in the fact that judges who fail to make explicit why they cite particular foreign precedents do nothing more than create the illusion of persuasiveness sustained by the veil of authority.

5.4. Alternatives to judicial internationalisation

The tenor of these arguments suggests that those opposing judicial internationalisation have placed the burden of proof on its advocates. In the final analysis, our entire mode of thinking about democracy, accountability, the rule of law and, most importantly, judicial legitimacy has proven itself over the last two centuries. Why should these models be suddenly left behind because of globalisation?

Thus far, the various answers to this question have failed to convince these authors. The central thrust of this school of thought is thus that attempts to conceptualise accountability in non-electoral terms are misguided. Accountability and legitimacy derive from the popular consent of the people, as expressed in their constitutions and legislation. 'States continue to be the main units of legitimacy and of, ideally democratic, debate and decision-making. For this role of the State, no substitute appears on the horizon'.[70]

Constitutions, parliaments and elections are the currency in which legitimacy is valued. This currency involves sovereignty, not in the qualified, post-modern sense, but as it was articulated by its intellectual progenitors: Hobbes, Rousseau and Locke.

> 'Sovereignty is the first bulwark of constitutional government – as it implies the right to say no to outsiders. Without that, it may be hard to say no at all, because it becomes so hard to determine who has the right to utter the no and in whose name. (…) If the power of national governments rests on their respect for certain constitutional standards and limits,

69 See Perju, *supra* note 68.
70 See Paulus, *supra* note 2, p. 1048.

> undermining those governments almost necessarily puts at risk the authority of those standards and limits'.[71]

Judicial internationalisation is thus deemed detrimental to judicial legitimacy.

> 'A nation should have the freedom to control the development of its own laws. The elected branches, which develop U.S. law, lose that control if judges are able to import extraterritorial and extra-constitutional sources for the determination of legally applicable standards. (…) If Congress has not chosen to reduce a norm to legislation it is presumptuous for the courts to pretend they know better'.[72]

This is a strong reaffirmation of the separation of powers. It is also an attack on the assertion that global governance is, on the whole, a good thing. According to these authors, judicial internationalisation is far from harmless, as it obscures the real issue: democratic legitimacy and accountability. Rather than reinterpreting our normative framework in light of (judicial) internationalisation, we should resolutely do the opposite. We should cling to the separation of powers as the tried and tested foundation of legitimate government and judicial internationalisation, and it must be treated with considerable caution in most understandings of the practice.

6. Conclusion

The discussion above has endeavoured to portray the normative problems of judicial legitimacy in the narrative of a larger debate concerning the changing nature of politics itself within a globalising world. Some voices advocate (whether implicitly or explicitly) a transformation in our standards of legitimacy. A globalised world cannot make do with normative paradigms that are rooted in the 'fiction' of a Westphalian system. Globalisation requires global governance, and global governance requires global categories of legitimacy. As Keohane asserts, '(…) the domestic analogy is unhelpful since the conditions for electoral democracy, much less participatory democracy, do not exist on a global level. Rather than abandoning democratic principles, we should rethink our ambitions'.[73]

Rethinking our ambitions could very well mean that we must embrace judicial internationalisation as a favourable and legitimacy-enhancing phenomenon. Judicial legitimacy is no longer defined in terms of the rigid, anachronistic separation of powers, with its slavish deference to the legislative will. This is a new world order, one in which sovereignty is limited and in which human rights and the rule of law are universal, or at least global. More importantly, it is a world in which judges across the globe have a responsibility to protect these basic values. Judicial globalisation is a highly valuable corollary to this task, and it will help give the judiciary a global voice, thus fostering the development of the international rule of law.

Moreover, it is possible that the traditional understanding of the judiciary as an organ of national sovereignty has been transformed. Perhaps the domestic constituency now exists alongside other important constituencies (*e.g.* the transnational legal order, global human rights regimes) to which judges have an autonomous responsibility.

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71 See Rabkin, *supra* note 2, pp. 69-70.
72 See Kochan, *supra* note 2, pp. 541-542.
73 See Keohane, *supra* note 23, p. 77.

For others, leaving behind the domestic analogy constitutes a craven and perilous attempt to obscure the true lines of democratic accountability, which are always based on constitutions and elected bodies. Globalisation does not mandate a paradigm shift; instead, it compels us to defend ever more strongly the separation of powers and national sovereignty against intrusion by technocratic, unelected bodies. As Donald Kochan professes, '[t]he foundation of democratic governance lies in the people's ability, responsibility, and power to create law or control the mechanisms by which it is created. Democratic control is lost when sources outside the domestic political processes serve as the bases of decision'.

Finally, Kersch rejects all talk of global governance, information networks and the like as a façade for what is actually the usurpation of political power by a bureaucratised judiciary. The separation of powers and domestic lawmaking are as strong as ever, and they are in dire need of protection from movements such as judicial globalisation:

> 'Constitutions create a government; they do not launch quasi-autonomous "networks" of "governance." Rule by networks of governance that have succeeded in cultivating a quasi-autonomy through a constructed legitimacy is not constitutional government as Americans have traditionally understood it. This process should not be allowed to proceed without considerably more scrutiny than it has received.'[74]

If anything, the preceding survey is testament to the significant amount of contestation – both normatively, theoretically and empirically – engendered by globalisation. It is also indicative of the difficulty in clearly separating concerns of a normative and theoretical nature. However, that is not to say that the scholarship on this point is underdeveloped or lacking in sophistication. The problem is rather, and this is not an uncommon malady, how to unify the variety of different perspectives and disciplines in a meaningful and coherent manner.

In essence, one might say whether globalisation has any normative import at all. If globalisation is, empirically speaking, changing the factual nature of the nation state this does not imply that the nation state as a normative principle (including *inter alia* traditional notions of popular sovereignty, separation of powers and domestic accountability) is without purchase. But then again, the opposite point is also being argued with increasing frequency, particularly from the perspectives of political science and normative (cosmopolitan) political theory.

In sum, the debate concerning judicial legitimacy and globalisation is sufficiently distinct to merit the increasing attention it has been receiving in recent years. It seems likely, however, that the fate of this debate is none the less bound up with the more general throes of globalisation studies. The jury is still out.

74 See Kersch (2004), *supra* note 2, p. 22.