

International ‘Dialogue’ among Courts in Light of Democracy^{*}

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<Abstract>

In our globalized world, courts have come to adopt roles that differ significantly from those typically held in the past. Some have pointed out that courts also create a kind of ‘network’ on the international level. The word ‘network’ here refers to the interaction among courts inter alia mutual in reference to their precedents. Some call this international ‘dialogue’. However, it remains unclear what the role of this network of courts or international dialogue among courts is in our globalized legal system. Furthermore, we cannot overlook the fact that in the United States strong criticism has been levied against reference to foreign or international law and precedents in light of democracy. This teaches us we must take democratic legitimacy into account. For that reason, in this essay we examine the functions and limits of international dialogue among courts mainly in light of democracy. In addition, we discuss the

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dialogue between not only domestic courts but also international courts. Prof. von Bogdandy insists international courts exercise a kind of public authority and this requires a certain democratic legitimization. We submit the importance of transparency, public participants and systematic interpretation of international law. Here we also try to justify the reference to foreign or international judgments by domestic courts. To that end, we introduce several ways/methods of justification, but find in Condorcet's Jury Theorem the greatest potential. This theorem offers the possibility of both justifying and limiting the transnational references to judgments by not only domestic courts but also international ones.

Key Words: globalization, dialogue among courts, democracy, international court, legitimacy

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I . Introduction

Over the past few decades, the interchange of human activities has become more and more globalized. In order to regulate activity on a global scale, not only states but also international organizations, informal intergovernmental networks, domestic administrative agencies, and even

private actors such as NGOs have come to play a significant role in setting, applying and executing legal norms. This indicates the extent to which globalization has also become a legal phenomenon or issue. Since approximately 2000, some scholars, including the prominent scholar, Prof. Anne-Marie Slaughter, have argued that the new legal order in the era of globalization is not a centralized but a disaggregated one, and is focused on both international formal or informal networks.¹⁾ The word 'network' is not strictly defined here and includes great range of interactions among states, institutions and individuals, from the mere exchange of information to the setting rules and even executing them. Slaughter asserts that both international and domestic courts also form a kind of network.²⁾ Some scholars, including Slaughter, have referred to this as a kind of international dialogue or deliberation among courts.³⁾ However, in Slaughter's entire image of the 'new world order,' the role of the courts and the inter-courts-network remains poorly defined. In order to bring further clarity to this point, I would like to examine the international dialogue among the courts, particularly in light of the issues of democratic legitimation.

For this purpose, I will at first briefly discuss what the phenomenon of the international dialogue among the courts actually is. Second, I will offer a more carefully examination of international courts, addressing their functions and limits. Third, I will examine the functions and limits of domestic courts within the network of courts. Finally, I will conclude this essay with a short comment on the relationships between

¹⁾ Anne-Marie Slaughter, *A New World Order* 261ff. (2004).

²⁾ *Ibid.*, at 65ff.

³⁾ See, e.g., Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Renquist Court*, 34 *Tulsa L.J.* 15, 17 (1998). Slaughter also cites this L'Heureux-Dubé's paper (Slaughter, *supra* note 1, at 74).

international and domestic courts, and the normative image of international dialogue among courts.

II. What is International Dialogue among Courts?

When the word ‘network’ is used in the context of globalization, people usually image assemblies of administrative agencies or domestic regulators, such as the Basel Committee on Banking Supervision.⁴⁾ Is there any similar entity for courts? Probably the answer is no. Of course, previously some international conferences of judges have been held, and judges have had interactions among themselves.⁵⁾ However, they do not work systematically and they have few or unclear effects on individual cases.⁶⁾ This means that any rules directly applied in concrete cases are not made through such conferences and judges decide the case before them without input from any outside judges but based solely on their own assessments, unlike what occurs in the rule making done by networks of administrative agencies.

Thus international dialogue or deliberation indicates, at best, mutual references to judgments. For a long time, courts have consulted not only their own precedents but also foreign judgments of similar cases to

4) See, e.g., P-H. Verdier, *Transnational Regulatory Networks and Their Limits*, 34 Yale J. Int'l L. 113, 132-143 (2009) and also *the Website of Bank of International Settlements*, <http://www.bis.org/bcbs/>.

5) Indeed, in South Africa and Brazil, worldwide conferences of constitutional justices have already been held. See, the website of World Conference of Constitutional Justice, http://www.venice.coe.int/wccj/wccj_e.asp and also Slaughter, *supra* note 1, at 96-99.

6) See, e.g., Tom Ginsburg, *National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs*, 20 Euro J. Int'l L. 1021, 1024 (2009).

their own. Even though the cross referencing of judgments is not completely a new phenomenon, globalization makes it more familiar. This grows out of the situation in which many countries face the same or at least similar legal issues. In addition, international courts or tribunals are also actors on this stage. Indeed approximately 100 years ago international courts were already starting to appear. But it has been over the past 20 years that more and more international courts or tribunals have been established and they have dealt with cases, which relate directly to individuals or domestic issues.⁷⁾ Thus, nowadays what is at issue is a dialogue that occurs not only among domestic courts (reference to foreign judgments) but also among international and domestic courts. If we are to come to a greater understanding of this international dialogue that has developed among courts, it will be necessary to examine the functions and limits of international courts or tribunals, along with those of domestic courts.

In addition, especially in the United States⁸⁾, courts' references to foreign or international law have been criticized in light of democracy.⁹⁾

⁷⁾ The International Criminal Court is one of the most famous examples.

⁸⁾ Judicial dialogue (der Dialog der Gerichte / dialogue des juges) is also discussed in the European countries. See, Maya Hertig Randall, *Der grundrechtliche Dialog der Gerichte in Europa* (Fundamental-rights-dialogue of Courts in Europe), 41 *Europäische Grundrechte Zeitschrift* (EuGRZ) 5 (2014) [which mainly discusses the debate in German-speaking countries; however, footnote 10 in that work also cites the related French literature].

⁹⁾ The United States has a long history of referring to foreign and international law cases (at this point see, e.g., V.C. Jackson, *Progressive Constitutionalism and Transnational Legal Discourse*, in *The Constitution in 2020* 285, 286-288 (J.M. Balkin & R.B. Siegel eds., 2009)), in particular after *Lawrence v. Texas*, 539 U.S. 559 (2003), in whose opinion of the Court Justice Kennedy invokes the so-called 'the Wolfenden Report of England and the precedent of the European Court of Human Rights in the process of showing unconstitutionality of the same-sex sodomy prohibition', or *Roper v. Simmons*, 543 U.S. 551 (2005),

And also international court's decisions on matters that were originally a domestic issue or that had some impact on a domestic situation are problematic when we view them from a democratic standpoint. Hence we shall also examine the functions and limits of each type of court in light of democracy.

III. International Courts: Functions and Limits

Early in the 20th century, international adjudication was introduced as a means of peaceful settlement for international conflicts. The legitimacy of international adjudication was originally based on the consent of states.¹⁰⁾ This is in principle still valid today.¹¹⁾ It means that individual consent to jurisdiction of courts for each case or *ex ante* categorical acceptance of jurisdiction is necessary when international courts settle disputes. As another important point is the fact that international courts mainly deal with conflicts between nation states, not between individuals or state and individual. However, in recent years, the basic image of

whose opinion of the Court (written also by Justice Kennedy) mentions abolishment and prohibition of juvenile death penalty in foreign and international law in order to show that the death penalty for offenders under 18 is 'unusual punishment' of the 8th Amendment. However, there is tension in the U.S. associated with various controversies over referencing foreign or international law. There is also an issue over two other 8th Amendment Cases, *Graham v. Florida*, 560 U.S. 48 (2010) and *Atkins v. Virginia*, 536 U.S. 304 (2002), which include references to foreign law.

¹⁰⁾ See, Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Court's Public Authority and Its Democratic Justification*, 23 Euro J. Int'l L. 7, 24 (2012).

¹¹⁾ See, e.g., Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 Geo. Wash. Int'l L. Rev. 107 (2009). It attaches more weight on consent by states.

international courts has been changing. For example, not states but individuals are accused in the International Criminal Court. And human rights courts such as the European Court of Human Rights adjudicate disputes between states and individuals.¹²⁾ As these examples indicate, international adjudication has some direct or at least indirect effect on the domestic sphere.

Prof. Armin von Bogdandy, together with Dr. Ingo Venzke, have argued that today international courts exercise a kind of 'public authority'¹³⁾ because of these functions related to international adjudication (though not limited to adjudication in the strictest sense).¹⁴⁾ Exercising 'public authority' in and of itself calls for legitimation, and especially nowadays a democratic means of legitimation.¹⁵⁾

¹²⁾ For further examples, *see, e.g.*, Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 *Leiden J. Int'l L.* 49, 57-59 (2013).

¹³⁾ The definition of 'public authority' by von Bogdandy is 'the legal capacity to determine others and to reduce their freedom.' *See*, Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance*, 9 *Ger. L.J.* 1375, 1381-1382 (2008). To the further argument over international public authority, *see, ibid.*, at 1383ff.

¹⁴⁾ Von Bogdandy & Venzke, *supra* note 12, at 52-59, points out that the major functions of international courts are settling disputes (adjudication in the strictest sense), stabilizing normative expectations, making laws and controlling and legitimating (another) public authority.

¹⁵⁾ Of course, consent by states, the traditional source of legitimacy, is still an important moment for legitimation, but it is, von Bogdandy thinks, not enough. Furthermore, reason, which is often invoked as a moment of legitimacy in the domestic context (he makes a reference to Jürgen Habermas here), does not function here either because of the lack of a democratic parliament on the supranational level. *See*, von Bogdandy & Venzke, *supra* note 10, at 13ff. For an interesting perspective on a unique form of legitimation of judicial power other than democratic legitimacy, *see*, Christoph Möllers, *The Three Branches* (2013).

Initially von Bogdandy refers to the election of judges¹⁶⁾ and places an emphasis on the importance of the independence or impartiality of international judges¹⁷⁾ to secure a good judicial qualification, even though ‘they do not exhaust the potential of democratic legitimation that judicial elections contain’.¹⁸⁾ In addition, he argues that the ‘fragmentation of international law’ has the strong possibility of weakening democratic legitimacy.¹⁹⁾ Here the ‘fragmentation of international law’ means the coexistence of many separated legal systems mainly established by the specialized international courts. Von Bogdandy insists that the ‘fragmentation of international law’ leads to a weakened democratic generality.²⁰⁾ This is because we can regard the law as democratically legitimate only when it is made through a procedure that is thematically unsettled and widely opened to all kinds of competing perspectives, according to his argument.²¹⁾

For this reason von Bogdandy is concerned about the lack of democratic legitimacy and lists a number of strategies that could solve the problem. According to him, such procedural elements as transparency²²⁾ and public participation could make the exercising of

¹⁶⁾ Von Bogdandy & Venzke, *ibid.*, at 32ff..

¹⁷⁾ Interestingly enough, as we will see below, Benvenisti and Downs points out the relatively weak independence of international judges from related international organization serves as a limiting factor for international courts. See, Eyal Benvenisti & George W. Downs, *Toward Global Checks and Balance*, 20 Const. Polit. Econ. 366, 373-374 (2009).

¹⁸⁾ Von Bogdandy & Venzke, *supra* note 10, at 34.

¹⁹⁾ *Ibid.*, at 23.

²⁰⁾ *Ibid.*

²¹⁾ *Ibid.*

²²⁾ Although Prof. Grossman places little importance on the democratic legitimacy of international courts, he also mentions that transparency enhances democratic legitimacy. See, Grossman, *supra* note 11, at 156.

public authority by international courts democratically legitimate.²³⁾ In other words, he argues that the public disclosure of procedure, the wide approval of the third party intervention and the use of *amicus curiae* system, could help to realize transparency and public participation. In this connection, von Bogdandy also refers to the impossibility of supranational parliamentarianism and does so by invoking Habermas.²⁴⁾ Therefore, I suppose that he mentions these procedural elements of international courts also as a second best strategy to legitimize law making on the transnational level.

In the end, however, he recognizes the limitations of democratic legitimacy with regards to international courts.²⁵⁾ Taking these limitations into consideration, domestic courts should play an important role in disencumbering the legitimacy problem of international courts.²⁶⁾ This is because, as he says, domestic courts or other national constitutional organs examine whether a decision on the international level fits domestic constitutional values such as democracy before executing the judgments issuing from international courts.²⁷⁾

Finally, with regards to the fragmentation of international law and its related issues, von Bogdandy suggests that a systematic interpretation is effective for avoiding or at least easing the weakening of the democratic generality. A systematic interpretation means that someone

²³⁾ Von Bogdandy & Venzke, *supra* note 10, at 25ff..

²⁴⁾ See, *ibid.*, at 35.

²⁵⁾ *Ibid.*, at 39.

²⁶⁾ *Ibid.*, at 39. However, Andreas von Staden, *The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 Int'l J. Const. L. 1023, 1032 (2012) criticizes von Bogdandy for ignoring the extent to which there is an "allocation of decision-making authority between international courts and national governments(.)" For more on this point, see, below Section V.1.

²⁷⁾ Von Bogdandy & Venzke, *ibid.*, at 39-40.

needs to take the relevant rules of international law into account when he or she interprets a certain legal norm.²⁸⁾ In this way, we may justify and even normatively require mutual reference to the precedents of international courts.

IV. Domestic Courts: Functions and Limits of the Reference to Foreign or International Law

As mentioned above in the Introduction, more and more domestic courts cite precedents of foreign or international courts.²⁹⁾ Some

²⁸⁾ *Ibid.*, at 36-38.

²⁹⁾ For example, *The Use of Foreign Precedents by Constitutional Judges* (T. Groppi & M-C. Poyhoreau eds., 2014) shows the *status quo*.

In Japan, the comparative perspective of law is very popular and important because the modern Japanese legal system was imported from western countries. However, relatively few Japanese scholars are interested in the issue of making reference to foreign or international precedence. The scholars in Japan who do mention this problem do so mainly when introducing the controversy in the United States. Additionally although the Supreme Court of Japan (SCJ) and lower courts seldom invoke foreign or international cases explicitly, recently SCJ made reference to foreign law and international human rights treaties in two cases (Saiko Saibansho [Sup. Ct.] Jun. 4, 2008, Hei 18 (Gyo Tsu) no. 135, 62 Saiko Saibansho minji hanreishu [Minshu] 1367 (Japan) [held that a part of the nationality law is unconstitutional]; Saiko Saibansho [Sup. Ct.] Sep. 4, 2013, Hei 24 (Ku) no. 984&985, 67 Saiko Saibansho minji hanreishu [Minshu] 1320 (Japan) [held that the inheritance clause in civil law is unconstitutional]) and those references had a significant impact. For more detailed information about Japan in English, see, e.g., Akiko Ejima, *A Gap between the Apparent and Hidden Attitudes of the Supreme Court of Japan towards Foreign Precedents, in The Use of Foreign Precedents by Constitutional Judges* 273 (T. Groppi & M-C. Poyhoreau eds., 2014); Akiko Ejima, *Emerging Transjudicial Dialogue on Human Rights in Japan*, 14 *Meiji L. Sch. R.* 139 (2014).

David S. Law and Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86

proponents of such references argue that such a reference can contribute to the emergence of an international rule of law³⁰⁾ or cosmopolitan (value of) public law.³¹⁾ Others suggest that those are very helpful to make a good decision because experiments in the outside of a state give lots of useful information that domestic courts has never taken.³²⁾ However, particularly in the United States³³⁾, there are not only proponents³⁴⁾ but also many opponents. They oppose references to

Wash. L. Rev. 523, 539-540 n.61 (2011) indicates that situation in South Korea is very similar to that of Japan. That is to say Korean Constitutional Court shows reluctance to make direct reference to foreign precedents, although comparative law is also very popular there. According to Law and Chang, there are only a few cases, in which particular foreign law systems are referred. *See*, Hunbeob jaepanso [Const. Ct.], 97 Hun-Ka12, Aug. 31, 2000, (2000 DKCC, 52, 60) (S. Kor.) [The case concerning the Nationality Act. This decision mentions Article 15 of the United Nation's Universal Declaration of Human Rights (December 10, 1948) in order to clarify the concept and nature of nationality, and also compare nationality acquiring systems in foreign countries and that of Korea.]; Hunbeob jaepanso [Const. Ct.], 2002 Hun-Ka14, June 26, 2003, (2003 DKCC, 45, 67) (S. Kor.) [The case concerning constitutionality of the Juvenile Sex Protection Act. It refer to the similar legislations in the United States and Taiwan in examining the appropriateness of the means used by the Korean Act.]; Hunbeob jaepanso [Const. Ct.], 2002 Hun-Ka1, Aug.26, 2004, (2004 DKCC, 11, 43) (S. Kor.) [The case concerning conscientious objection of military service. Its dissenting opinion cites alternative system for military service in some foreign countries.].

³⁰⁾ Eyal Benvenisti and George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 Euro. J. Int'l L. 59, 60 (2009).

³¹⁾ L'Heureux-Dubé, *supra* note 3, at 40. About cosmopolitan law, *see*, Mark D. Walters, *The Common Law Constitution and Legal Cosmopolitanism, in The Unity of Public Law* 431ff. (David Dyzenhaus ed., 2004).

³²⁾ *See, e.g.*, Gerald L. Neuman, *The Use of International Law in Constitutional Interpretation*, 98 Am. J. Int'l L. 82, 87 (2004).

³³⁾ As already mentioned in footnote 9, after *Lawrence v. Texas*, 539 U.S. 559 (2003) and *Roper v. Simmons*, 543 U.S. 551 (2005), there has been a tense controversy over making reference to foreign or international law.

³⁴⁾ For example, Profs. Bruce Ackerman, Vicki C. Jackson, Harold H. Koh, and

foreign or international law because they believe such references can potentially damage domestic constitutional values.³⁵⁾ For example, Justice Scalia submits that the original meaning of the Constitution is changed by judges' preference through citing only favorable opinions to them.³⁶⁾ Some of the opponents regard this issue as a new kind of so-called counter majoritarian problem of judicial review.³⁷⁾ I do not completely agree with the arguments being put forth by these opponents but I think this recognition is basically correct. Similar to the original counter majoritarian issue, I also suppose that a complete abandonment of referencing foreign or international law is not the right answer. Therefore, the question that we should answer here is how to regulate the referencing of international law through analyzing its functions and limits. In what follows, we will examine a few suggested functions and

Slaughter are usually named as proponents in legal academic circles. Justice Kennedy (*see, supra* note 9), O'Connor (*see, e.g.,* Roper, 543 U.S. at 604-605), Breyer (*see, e.g.,* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 403 (2000) (Breyer, J., concurring)), Stevens (*see, e.g.,* Thompson v. Oklahoma, 487 U.S. 815, 830-831 (1988) (plurality opinion)) and Ginsburg (*see, e.g.,* Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., joined by Breyer, J., concurring)) out of the U.S. Supreme Court Justices are also famous proponents.

³⁵⁾ *See, e.g.,* Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 Am. J. Int'l L. 57, 58-61 (2004); Julian Ku & John Yoo, *Taming Globalization* 227ff. (2012). Out of the U.S. Supreme Court Justices Chief Justice Rehnquist (*see, Atkins v. Virginia*, 536 U.S. 304, 324-325 (Rehnquist, C.J., dissenting)), Justice Scalia (*see, below*) and Thomas (*see, Foster v. Florida*, 537 U.S. 990, 990 n.* (Thomas, J., concurring in denial of certiorari)) have expressed hesitancy to referencing foreign or international law.

³⁶⁾ Roper v. Simmons, 543 U.S. 607, 628 (2005) (Scalia, J., dissenting). It reads: What these foreign sources "affirm," rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.

³⁷⁾ *See, Anupam Chander, Globalization and Distrust*, 114 Yale L.J. 1193, 1194-1204 (2005).

limits of reference to foreign or international law, mainly in light of democracy.

1. Domestic Courts as Guardians of Democracy?

Prof. Eyal Benvenisti and Prof. George W. Downs have argued that at a national level domestic courts can play a role as the guardians of democracy and other constitutional systems.³⁸⁾ In their minds, domestic courts should give deference to executives in the diplomatic area and more positively examine governments' actions in the arena of foreign affairs. This is because, as they have explained, an increasing number of unilateral executive or administrative actions in such arenas damage the constitutional power balance between constitutional organs and lead to a shortage of domestic deliberation. Detailed examinations by the courts make governments more accountable and open trials enhance the transparency of government decision-making.³⁹⁾ With the *amicus curiae* system, Benvenisti and Downs say, a kind of public participation can be realized.⁴⁰⁾ In addition, through the cooperation of domestic courts all over the world — in other words, through the mutual exchange of information or dialogue — domestic courts find good strategies to deal with excessive executive power.⁴¹⁾ Furthermore, we may say that reference to some kinds of international law, *i.e.* international human rights treaties, protects the individual right to participate in political deliberation and democracy in the end.⁴²⁾

³⁸⁾ From many, for example, Benvenisti & George W. Downs, *supra* note 30.

³⁹⁾ *Ibid.*, at 64.

⁴⁰⁾ *Ibid.*, at 69.

⁴¹⁾ *Ibid.*, at 65.

⁴²⁾ See, Shotaro Hamamoto, *An Undemocratic Guardian of Democracy - International Human Rights Complaint Procedures*, 38 Victoria U. Wellington L.

However, despite the merits of their argument, it seems to me that Benvenisti and Downs fail to indicate exactly what kind of courts should aggressively apply foreign or international law. Furthermore, their approach contains a contradiction that is difficult to overlook; while they approve of courts applying or referring to foreign or international law, they also criticize executives for introducing international legal norms unilaterally.⁴³⁾ In order to solve these problems, it is essential that we understand their argument, which I explain below. Namely, on one hand, the courts are to positively apply the international human rights law that guarantees individual citizens the right to access to political deliberation or the democratic process. On the other hand, they can only refer to foreign cases when they need to know how courts in other countries defend the same or similar fundamental value or structure in their own constitutions. Through this kind of restructuring of Benvenisti and Downs' argument, we can begin to view it as a version of the process theory, which Prof. John H. Ely and his follower have proposed.

Lastly I wonder why domestic courts, not international courts, are the guardians of democracy. Of course, a domestic court of a certain state is most familiar to domestic democracy or the constitutional principles of the state in question state. However, as to international law such as human rights law, I would say that, international courts do better as the guardian. Actually Benvenisti and Downs have already answered this question. They argue that international courts are less independent from political organization than domestic courts. Therefore domestic courts are more suitable for fighting against political unilateralism.⁴⁴⁾ Here we can

Rev. 199, 208-209 (2007).

⁴³⁾ Over more criticism, *see*, Ginsburg, *supra* note 6.

⁴⁴⁾ Benvenisti & Downs, *supra* note 17, at 373-380.

find some similarities to von Bodgandy's emphasis on the importance of the independence of international judges. Thus we may regard the danger of fragmentation as additional reason for giving domestic courts superiority over international courts.

2. Attempts at Normative Authorization

Others have attempted to normatively authorize reference to foreign or international law cases. In particular, these scholars have pressed for such efforts in human rights cases where international cases or norms reflect natural law or reason that is viewed as superior to democracy or majoritarianism.⁴⁵⁾ Prof. Jeremy Waldron suggests we can induce *ius gentium* from the common thesis offered in courts' decision all over the world.⁴⁶⁾ I think that the justification, which Waldron suggests, is one of the attempts to promote normative authorization.⁴⁷⁾ Indeed we cannot deny that, at the very least after the World War II, people have come to believe that some kinds of human rights have superior and universal value. However it seems to me that these arguments only reconfirm the

⁴⁵⁾ To these arguments, *see, e.g.*, Chander, *supra* note 37, at 1228ff..

⁴⁶⁾ Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 Harv. L. Rev. 129 (2005).

⁴⁷⁾ On this point, while Tatsuhiko Yamamoto, *Kempo Sosho ni okeru Gaikokuho Sansho no Saho (The Right Way to Refer to Foreign Law in Judicial Review)*, in *Gendai Amerika no Shiho to Kempo (Judicial Power and Constitution in Contemporary America)* 316, 326 (J. Kotani et al eds., 2013) regards Waldron's *ius gentium* theory as a pragmatic one, Hajime Yamamoto, *Gurobaruka Sekai to Jinken Hogenron no Tenkai (Globalized World and the Theory over Sources of Human Rights Law)*, in *Gendai Amerika no Shiho to Kempo (Judicial Power and Constitution in Contemporary America)* 344, 348 & 353-355 (J. Kotani et al eds., 2013) criticizes this view. [The original Japanese titles of papers or books are translated into English in this essay not by the original authors but the author of this paper.]

starting point of the problem here, which is how we can make an arrangement for these two competing but important values—democracy and the rule of law (or a kind of reason). These attempts do not succeed in demonstrating the criteria for when and how the rules of law or human rights are superior to democracy.

Nevertheless, we can also find some hints for establishing a rule. For example, Waldron's *ius gentium* thesis needs the accumulation of similar decisions.⁴⁸⁾ He does not completely consider *ius gentium* of natural law. He indicates that *ius gentium* was originally a mere expedient that reflects the pragmatic prudence found in many cases.⁴⁹⁾ But he does not indicate the detailed standard needed to refer to foreign or international precedents.⁵⁰⁾

In the next section, we will examine this more detailed standard from various pragmatic perspectives.

3. Pragmatic Justification

⁴⁸⁾ Waldron, *supra* note 46, at 133.

⁴⁹⁾ *Ibid.* Prof. Tatsuhiko Yamamoto places emphasis on this point. See, T. Yamamoto, *supra* note 47, at 326. On the other hand, Prof. Hajime Yamamoto thinks this is the only explanation of the origin of *ius gentium* and Waldron himself sees *ius gentium* as reflecting the universality of human rights. See, H. Yamamoto, *supra* note 47, at 348. In addition, Prof. Mark D. Walter's definition that cosmopolitan law is a kind of common law, which originated from the Roman *ius gentium*, should also be introduced here. See, e.g., Walters, *supra* note 31, at 441.

⁵⁰⁾ With regards to this point, Jackson criticizes Waldron. See, Jackson, *supra* note 9, at 294 n.23 [He argues a genuine and deliberated consensus is needed to apply Waldron's thesis but such consensus is a relatively rare case.]. Prof. Allan also criticizes Waldron's analogy in which he views reference to foreign law with natural science. See, James Allan, *Jeremy Waldron and the Philosopher's Stone*, 45 San Diego L. Rev. 133, 140-141 (2008).

At the end of the last section, I suggested the importance of providing a pragmatic justification for the reference to foreign or international law precedents. But why should we cite foreign or international law precedents, when many similar decisions are found in foreign or international courts? Prof. Eric A. Posner and Prof. Cass R. Sunstein give us the answer to this question.⁵¹⁾ The Condorcet Jury Theorem, they submit, explains why it is significant to refer to cases that are outside of our own state and show us the limits of citation too.⁵²⁾ As is well known, the Jury Theorem submits that in a case in which every individual member of a certain group has the greatest possibility of making a correct decision, then the more people take part in the vote, the greater the possibility that the vote result will be correct, when these members vote independently.⁵³⁾ Posner and Sunstein apply this theorem to the cases for the following foreign or international decisions.

Concretely they list up three conditions for following foreign practices. They are: 1) 'those practices reflect the judgment of the affected population or decision makers'⁵⁴⁾; 2) 'the other state is sufficiently similar'⁵⁵⁾; and 3) 'the judgment embodied in the practice of the other state is independent'.⁵⁶⁾

⁵¹⁾ Posner and Sunstein emphasize that they, in their paper below (*infra* note 52), mean 'to understand not only why a court might be interested in the decisions of other courts, but also on what assumptions that interest might be unjustified.' See, Eric A. Posner & Cass R. Sunstein, *On learning from Others*, 59 Stan. L. Rev. 1309, 1310 (2007).

⁵²⁾ Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 Stan. L. Rev. 131, 136-137 (2006).

⁵³⁾ See, e.g., Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 Am. J. Pol. Sci. 617, 617-618 (1992).

⁵⁴⁾ Posner & Sunstein, *supra* note 52, at 144.

⁵⁵⁾ *Ibid.*

Let me add some additional explanations. First, the theorem assumes that each voter has a greater possibility of making the right decision. It means, in order to be counted as a voter, one must have enough and relevant information. This is why Posner and Sunstein enumerate condition 1. Second, the Jury Theorem originally deals with a case that focused on a certain question. Therefore other state's decisions must be made under a sufficiently similar situation (condition 2). Third, condition 3 is clearly included in the definition of the theorem, which requires an independent vote. This framework of Posner and Sunstein successfully elucidates, I think, at most points the reasons and the criteria that can be followed by other states or international community, although it is difficult to decide whether the conditions are fulfilled or not.⁵⁷⁾ Posner and Sunstein actually cast doubt on the judicial competence needed to judge the fulfillment of these conditions in concrete cases.⁵⁸⁾ This demonstrates that when we evaluate the courts' reference to foreign or international cases, we have to take the capacity

⁵⁶⁾ *Ibid.*, at 144-145.

⁵⁷⁾ In my original report in National Taiwan University, on which this paper is based, Prof. Ginsburg pointed out the difficulty associated with inquiring into the similarity and independency at the same time. I suppose the word 'similarity' means that the situation in question is not far from that of the referred case, while 'independency' eliminates mimicry or obedience to the other judgments. Thus these requests, I think, could be fulfilled simultaneously, even though the associated difficulty is not completely erased.

Furthermore Prof. Rosenkranz, in Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 *Stan. L. Rev.* 1281 (2007), makes a little more fundamental criticism of the Posner and Sunstein's arguments. In summary, he submits that Condorcet Jury Theorem is based on the assumption that the right answer does exist, while the Founding Fathers deny such an idea. This criticism seems to be no more than an originalist view. Posner and Sunstein also replied to Rosenkranz in Posner & Sunstein, *supra* note 51, at 1310ff.

⁵⁸⁾ Posner & Sunstein, *supra* note 52, at 168-172.

of courts into consideration.

Another point that I shall mention is they distinctly separate foreign law and international law⁵⁹⁾, even though others often mix them.⁶⁰⁾ They devote most of their thesis to questions about following foreign practices and only a few comments on international law. These two professors advocate that 'a domestic court should not place any weight on international treaties, except as the equivalent of "vote" by each of the parties'.⁶¹⁾ However, I think this does not deny the utility of three conditions as criteria. In other words, this criteria is, I think, to be said the universal one. Thus it justifies reference to not only human rights law but also all kinds of law.

Lastly here, I would like to call attention to von Bogdandy's argument that international courts should take the systematic way of interpretation to avoid the fragmentation of international law and damage on democratic generality.⁶²⁾ Although he does not talk a lot about precise ways or criteria of systematic interpretation, I think the Jury Theorem also works here as such criteria.⁶³⁾

⁵⁹⁾ *Ibid.*, at 164-168.

⁶⁰⁾ Arguments that invoke Cosmopolitan law or *ius gentium* have the possibility of relativizing the distinction between foreign and international law.

⁶¹⁾ Posner & Sunstein, *supra* note 52, at 166. Indeed this point is very important, but we should not overlook the fact that international law, especially the international human rights treaties in question, here also have the status of valid domestic law in many countries, while foreign law has no validity as law outside its own country.

⁶²⁾ Von Bogdandy & Venzke, *supra* note 10, at 36-38.

⁶³⁾ However, in the international context, we might have to be careful of cultural pluralism.

V. Conclusion

In Section III and IV, we offered a brief analyze of the functions and limits of international and domestic courts. Here I will conclude this essay with consideration to the relationship between international courts and domestic courts (1.). Then I will reconfirm what the international dialogue among courts is and should be (2.).

1. Relationship between International Courts and Domestic Courts

We have already reviewed some ideas regarding the relationship between international courts and domestic courts. For example, von Bogdandy suggests execution of the decision of an international court would need supplementary arrangements by domestic courts.⁶⁴⁾ In relation to this, some argue that international (or higher level) courts should defer to domestic (or lower level) courts in a case when a domestic matter is at issue (the principle of subsidiarity).⁶⁵⁾ This is because, von Staden submits, international courts are far removed from individuals, therefore national decision-makers are better at deciding what is suitable for domestic situations.⁶⁶⁾

Though not discussed previously in this article, Benvenisti and Downs submit that domestic courts should cooperate with each other in order to apply pressure on international courts to reconsider their own decisions.⁶⁷⁾ Moreover, on one hand, while Posner and Sunstein do not completely deny the possibility that domestic courts could cite

⁶⁴⁾ Von Bogdandy & Venzke, *supra* note 10, at 39. *See, also*, Benvenisti & Downs, *supra* note 17, at 380.

⁶⁵⁾ *See, e.g.*, von Staden, *supra* note 26, at 1026.

⁶⁶⁾ *See, ibid.*, at 1034-1038.

⁶⁷⁾ *See*, Benvenisti & Downs, *supra* note 6, at 68.

international precedents, on the other hand, von Bogdandy's systematic interpretation principle does not exclude international court's reference to relevant domestic cases.

These arguments demonstrate the importance and utility of mutual checking between international and domestic courts.

2. Reconfirm: What is international dialogue among courts?

Here, I would like to summarize the argument above. First, international dialogue among courts means the interaction of courts or horizontal and vertical reference among courts. Second, democratic legitimacy based on the general public must be taken into account when we evaluate the dialogue. Third, with an understanding and respecting mutual independency and originality, courts should check each other through cross-referencing. In particular, subsidiarity is needed in vertical interactions. Finally courts shall decide whether a certain precedent is followed under the three conditions lead from the Condorcet Jury Theorem.

Lastly I would like to mention one more point. Interestingly Slaughter asserts that in an era of disaggregated sovereignty like what we are experiencing today, five norms must be observed if we are to build a just world order: deliberative equality, legitimate difference, positive comity, check and balance, and finally subsidiarity.⁶⁸⁾ When comparing these with the discussion above, you would find some accordance between them. This seems to demonstrate that Slaughter's normative evaluation of 'network' also basically applies to the international interaction of courts or international 'dialogue' among courts.

⁶⁸⁾ Slaughter, *supra* note 1, at 244ff..

References

<Books>

- Groppi, T. & Poyhoreau, M-C. (Eds.) (2014). *The Use of Foreign Precedents by Constitutional Judges*. Portland, OR: Hart Publishing.
- Ku, J. & Yoo, J. (2012). *Taming Globalization*. New York, NY: Oxford University Press.
- Möllers, C. (2013). *The Three Branches*. Oxford, UK: Oxford University Press.
- Slaughter, A-M. (2004). *A New World Order*. Princeton, NJ: Princeton University Press.

<Articles>

- Alford, R. P. (2004). Misusing International Sources to Interpret the Constitution. *American Journal of International Law*. 98, 57-69.
- Allan, J. (2008). Jeremy Waldron and the Philosopher's Stone. *San Diego Law Review* 45, 133-162
- Benvenisti, E. & Downs, G. W. (2009). National Courts, Domestic Democracy, and the Evolution of International Law. *European Journal of International Law*. 20, 59-72.
- Benvenisti, E. & Downs, G. W. (2009). Toward Global Checks and Balance. *Constitutional Political Economy*. 20, 366- 387.
- Chander, A. (2005). Globalization and Distrust. *Yale Law Journal*. 114, 1193-1236.
- Ejima, A. (2014). A Gap between the Apparent and Hidden Attitudes of the Supreme Court of Japan towards Foreign Precedents. In Groppi, T. & Poyhoreau, M-C. (Eds.), *The Use of Foreign Precedents by Constitutional Judges* (pp. 273-299). Portland,

OR: Hart Publishing.

- Ejima, A. (2014). Emerging Transjudicial Dialogue on Human Rights in Japan. *Meiji Law School Review*. 14, 139-167.
- Ginsburg, T. (2009). National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs. *European Journal of International Law*. 20, 1021-1026.
- Grossman, N. (2009). Legitimacy and International Adjudicative Bodies. *George Washington International Law Review*. 41, 107-180.
- Hamamoto, S. (2007). An Undemocratic Guardian of Democracy - International Human Rights Complaint Procedures. *Victoria University of Wellington Law Review*. 38, 199-216.
- Jackson, V.C. (2009). Progressive Constitutionalism and Transnational Legal Discourse. In M. Balkin & R.B. Siegel (Eds.), *The Constitution in 2020* (pp. 285-295). New York, NY: Oxford University Press.
- Ladha, K. K. (1992). The Condorcet Jury Theorem, Free Speech, and Correlated Votes. *American Journal of Political Science*. 36, 617-634.
- L'Heureux-Dubé, C. (1998). The Importance of Dialogue: Globalization and the International Impact of the Renquist Court. *Tulsa Law Journal*, 34, 15-40.
- Law, David S. & Chang, Wen-Chen (2011). The Limits of Global Judicial Dialogue. *Washington Law Review*, 86, 523-577.
- Neuman, G. L. (2004). The Use of International Law in Constitutional Interpretation. *American Journal of International Law*. 98, 82-90.
- Posner, E. A. & Sunstein, C. R. (2006). The Law of Other States. *Stanford Law Review*. 59, 131-179.
- Posner, E. A. & Sunstein, C. R. (2007). On Learning from Others.

- Stanford Law Review*. 59, 1309-1314.
- Randall, M. H. (2014). Der grundrechtliche Dialog der Gerichte in Europa. *Europäische Grundrechte Zeitschrift*. 41, 5-18.
- Rosenkranz, N. Q. (2007). Condorcet and the Constitution: A Response to The Law of Other States. *Stanford Law Review*. 59, 1281-1308.
- Verdier, P-H. (2009). Transnational Regulatory Networks and Their Limits. *Yale Journal of International Law*. 34, 113-172.
- von Bogdandy, A., Dann, P. & Goldmann, M. (2008). Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance. *German Law Journal*. 9, 1375-1400.
- von Bogdandy, A. & Venzke, I. (2012). In Whose Name? An Investigation of International Court's Public Authority and Its Democratic Justification. *European Journal International Law*. 23, 7-41.
- von Bogdandy, A. & Venzke, I. (2013). On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority. *Leiden Journal International Law*. 26, 49-82
- von Staden, A. (2012). The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review. *International Journal of Constitutional Law* 10, 1023-1049.
- Waldron, J. (2005). Foreign Law and the Modern *Ius Gentium*. *Harvard Law Review*. 119, 129-147.
- Walters, M. D. (2004). The Common Law Constitution and Legal Cosmopolitanism. In David Dyzenhaus, D. (Ed.), *The Unity of Public Law* (pp.431-454). Portland, OR: Hart Publishing.
- Yamamoto, H. (2013). Gurobaruka Sekai to Jinken Hogenron no Tenkai

(Globalized World and the Theory over Sources of Human Rights Law). In Kotani, J. et al (Eds.), *Gendai Amerika no Shiho to Kempo (Judicial Power and Constitution in Contemporary America)* 344-365.

Yamamoto, T. (2013). Kempo Soshō ni okeru Gaikokuho Sanshō no Saho (The Right Way to Refer to Foreign Law in Judicial Review). In Kotani, J. et al (Eds.), *Gendai Amerika no Shiho to Kempo (Judicial Power and Constitution in Contemporary America)* 316-343

[Cases]

Atkins v. Virginia, 536 U.S. 304 (2002)

Foster v. Florida, 537 U.S. 990 (2002)

Graham v. Florida, 560 U.S. 48 (2010)

Grutter v. Bollinger, 539 U.S. 306 (2003)

Hunbeob jaepanso [Const. Ct.], 97 Hun-Ka12, Aug. 31, 2000, (2000 DKCC, 52, 60) (S. Kor.)

Hunbeob jaepanso [Const. Ct.], 2002 Hun-Ka14, June 26, 2003, (2003 DKCC, 45, 67) (S. Kor.)

Hunbeob jaepanso [Const. Ct.], 2002 Hun-Ka1, Aug.26, 2004, (2004 DKCC, 11, 43) (S. Kor.).

Lawrence v. Texas, 539 U.S. 559 (2003)

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000)

Roper v. Simmons, 543 U.S. 551 (2005)

Saiko Saibansho [Sup. Ct.] Jun. 4, 2008, Hei 18 (Gyo Tsu) no. 135, 62 *Saiko Saibansho minji hanreishu [Minshu]*, 1367 (Japan).

Saiko Saibansho [Sup. Ct.] Sep. 4, 2013, Hei 24 (Ku) no. 984&985, 67 *Saiko Saibansho minji hanreishu [Minshu]* , 1320 (Japan).

Thompson v. Oklahoma, 487 U.S. 815 (1988)

<국문초록>

민주주의의 관점에서 법원간의 국제적 ‘대화’

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세계화 시대에, 법원은 과거에 가졌던 역할과는 상당히 다른 역할을 채택하고 있다. 몇몇 사람들은 법원이 또한 국제 수준에서 일종의 ‘네트워크’를 형성한다고 지적했다. 여기에서 ‘네트워크’라는 단어는 법원간의 상호작용, 그 중에서도 선례를 따르는 상호작용을 의미한다. 이들은 이를 국제적 ‘대화’라고 부른다. 그러나, 세계화된 법률시스템 내에서 법원의 이러한 상호작용의 역할이 무엇인지가 불확실한 상태로 남아있다. 게다가, 우리는 미국에서 외국 또는 국제적인 법과 선례의 참조를 민주주의의 관점에서 강하게 비판해왔다는 사실을 간과할 수 없다. 이것은 우리가 반드시 민주적 정당성을 고려해야 함을 알려주는 것이다. 이러한 이유로, 본 논문에서는 주로 민주주의의 관점에서 법원간의 국제적 대화의 기능과 한계를 검토한다. 그리고 국내의 법원뿐만 아니라 국제적인 법원 사이의 대화에 대해 논해본다. Von Bogdandy 교수는 국제법원이 공권력을 발휘하는 데에는, 특별한 민주적 합법화가 요구된다고 주장한다. 이는 투명성, 공중참여, 국제법의 체계적 해석의 중요성을 제기한다. 또한 본 논문에서는 국내법원의 외국 또는 국제 판결의 참조를 정당화시키고자 한다. 이를 위해, 정당화를 위한 몇 가지 방법을 소개하면서, 그 중에서 Condorcet’s Jury Theorem가 가장 적합함을 밝히고 있다. Condorcet’s Jury Theorem은 국내법원과 국제법원의 판결에 초국가적인 참고를 정당화하는 것과 제한하는 것 모두를 가능하게 하기 때문이다.

주제어: 세계화, 법원간의 대담, 민주주의, 국제사법재판소, 정당성

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