Reaction – Themis and Dike in the International Arena: Comments on von Bogdandy's and Venzke's "Democratic Legitimation of International Judicial Lawmaking"

By Giacinto della Cananea[*]

A. The Contested Legitimacy of International Courts

The Max Planck Institute's research on international judicial institutions as lawmakers, which was published in May as a special issue of the German Law Journal,[1] is an important contribution to the analysis of one of the most complex and controversial legal issues in our epoch. In the last two decades, international adjudication has become a recurrent source of legal concern, and sometimes even a source of public concern.[2]

What is so singular about international adjudication in the current period? An easy answer to this question is that there is a widely-shared perception that, since the last decade of the twentieth century, we have witnessed unprecedented growth in international litigation. This change has not only inundated existing international judicial institutions with claims, often giving rise to complex disputes, but it also has promoted the creation of new dispute settlement bodies. Still, it might be argued that the growth of litigation and the emergence of new institutions is not necessarily a cause for alarm. First, such growth may merely signal a period of transition from one set of rules to another. It takes time, in other words, to interpret the new rules and adjust the behavior of a more differentiated variety of players. Second, the proliferation of international tribunals simply may be a

[*] University of Rome "Tor Vergata." This is a revised version of the comments that I made in the seminar organized by the Max Planck Institute for Comparative Law and International Law in order to discuss the research concerning international judicial institutions as lawmakers. My thanks to Armin von Bogdandy for his kind invitation and to Eyal Benvenisti and Ingo Vetzke for their remarks. The usual disclaimer applies. Email: giacinto.dellacananea@fastwebnet.it.

[1] *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GERMAN L.J. 5 (2011) (Armin von Bogdandy & Ingo Vetzke eds.).

[2] *See* Marrti Koskenniemi, *The Ideology of International Adjudication and the 1907 Hague Conference*, *in* TOPICALITY OF THE 1907 HAGUE CONFERENCE 152 (Yves Daudet ed., 2008). *See also* MATTHEW PARISH, MIRAGES OF INTERNATIONAL JUSTICE: THE ELUSIVE PURSUIT OF A TRANSNATIONAL LEGAL ORDER (2011) (arguing that there is not a "system" of courts and that, at worst, they obscure the exercise of political power).

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consequence of the fact that international regulation has become pervasive.[3] There are functional reasons for this, an important one being the fact that many interests now require global standards, for example with respect to food safety and electronic communications.[4] This may explain why there is demand for more specialized bodies to adjudicate the disputes that arise from such regulation. It might also explain why there are some connections between those bodies.[5] Third, the scenario is rounded out by the simple fact that, for several reasons, domestic litigation increasingly has become the vehicle for expressing individual or social dissatisfaction of all sorts. More and more, all those who have an interest to protect or a protest to lodge seek to do so via courts and tribunals. If this is a general feature or our epoch, the growth of litigation outside the state cannot be terribly surprising.

Yet, if these suggestions concerning the significance of the new trends approximate the reality, then a twofold problem persists. The first is that we need to know much more about international judicial institutions if they are increasingly going to contribute to the machinery of the law. There is not only a gap with respect to accessibility, despite the electronic marvels of modern websites and databases. There also is a gap of jurisprudential knowledge. In this respect, the articles published in the special issue of the German Law Journal are very helpful. They improve our empirical foundation with regard to adjudicators' processes and decisions. For example, the use of precedent is considered. This permits an inquiry into the extent to which the outcomes of adjudication are foreseeable and, thus, contribute to legal certainty.[6]

The second problem is that the functional explanations for the international adjudicatory phenomenon that I offered above surely are not adequately complex to satisfy those who believe that litigation within international judicial institutions is a cause for concern because it involves the resolution of specific disputes, thereby giving rise to judicial lawmaking. This is precisely the perspective chosen by von Bogdandy and Venzke in their

[3] *See* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 21 (2005) (observing that the states are increasingly bound by external norms, often of administrative character).

[4] *But see* Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 457 (2000) (holding that "instead of resolving disputes through institutionalized bargaining, states choose to delegate the task to third-party tribunals").

[5] *See* YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS 1297, 1302(2007) (considering judicial methods for solving conflicts of jurisdiction, such as comity); *see generally* SABINO CASSESE, I TRIBUNALI DI BABELE (2009) (arguing that international judicial institutions are strengthening the connections between global regulatory regimes).

[6] Ingo Vetzke, *Making General Exceptions: Developing Article XX GATT into Standards for Domestic Regulatory Policy*, 12 GERMAN L.J. 1111 (2011).

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introduction,[7] and especially in their concluding article.[8] They do not focus so much on the increasing number of judicial decisions and arbitral awards. From their point of view, something fundamental has gone wrong or, at least, has changed in a way that is not compatible with the indirect legitimacy of international judicial institutions. For them, there is more at stake than the simple fact that too many judicial decisions are being taken in a judicial realm beyond the state, a development itself implicates a growing number of interests.[9] Thus, the most interesting and perplexing question raised by the research regards the legitimacy of a huge range of courts or court-like bodies interpreting a diverse range of international instruments and general principles of law.[10]

B. Three Questions About the Legitimacy of International Courts' Lawmaking

It must be said at the outset that von Bogdandy's and Venzke's critique of international judicial lawmaking does not rest on a simplistic idea of the law as a sort of a mechanical system, operating similar to a calculator that is supposed to produce results that conform to the rules previously established by the legislator. There may be people, in some political bodies,[11] and even in academic circles, that think about the law in these terms. But von Bogdandy and Venzke cannot be counted among them. To the contrary, they are aware of the complexities inevitably inherent in handling the scales of justice.[12]

This is precisely the reason why von Bogdandy and Venzke convincingly focus on whether international courts use reasonably accurate processes or whether they present sufficiently sound reasoning in their decision-making, especially when such decisions have a legislative nature or when collective interests are at stake. Examples of the latter would be decisions involving the protection of the environment. Their analysis is also well-argued

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[7] Armin von Bogdandy & Ingo Vetzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 GERMAN L.J. 979 (2011) [hereinafter Bobdandy & Vetzke, *Beyond Dispute*].

[8] Armin von Bogdandy & Ingo Vetzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GERMAN L.J. 1341 (2011) [hereinafter Bobdandy & Vetzke, *On the Democratic*].

[9] *See id*. at 1343 (affirming that functional theories "can no longer convincingly settle legitimatory concerns").

[10] Bogdandy & Vetzke, *Beyond Dispute*, *supra* note 7, at 979 n.1 (specifying that that a broad understanding of the term "court" is used, covering both arbitral tribunals and institutions fulfilling a court-like function such as WTO bodies).

[11] Reactions to judicial overreach took place, for example, after the WTO Appellate Body's decision in *Shrimps*. *See* REPORT OF THE APPELLATE BODY, WT/DS58/AB/R (12 Oct. 1998). Interestingly, Armin von Bogdandy criticized that decision, holding that the AB had created law, thus threatening the delicate balance between political sources and other ones. Armin von Bogdandy, *Law and Politics in the WTO: Strategies to Cope with a Deficient Relationship*, *in* MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 609, 613 (2001); *see also* Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 489, 514 (2003) (criticizing the "illegitimate judicial activism").

[12] Bogdandy & Vetzke, *Beyond Dispute*, *supra* note 7, at 983.

and enriched by the frequent references to the literature of political science and philosophy. They reconsider prevailing narratives of legitimacy[13] and challenge the traditional understanding of international adjudication as a method for applying abstract norms to concrete cases.

I share many of the concerns expressed by von Bogdandy and Venzke. However, I disagree with their conception of justice, which naturally informs their analysis. To advance my critique, I propose three questions. First, although in liberal democracies most of the job of the courts consists in enforcing the rules established by constitutions and statutes, is there really something anomalous in judicial lawmaking? Is it really incompatible with the basic ideas of justice that we inherited from the Enlightenment by way of its roots in Greek and Roman doctrine? If not, then the second question arises: is this role for the courts objectionable in light of the idea that elected legislators provide better answers to the problems of justice in the global arena? Third, before concluding that a sort of legislative framework for international adjudication is, in fact, the best option, should alternative strategies be taken into account, in particular the possibility of mutual learning between international judicial institutions?

C. An Idealized Approach to the Judicial Function

As I remarked earlier, according to von Bogdandy and Venzke, what is at issue is not simply whether the decisions taken by international judicial institutions are based on fair procedures and are well reasoned. Rather, judicial lawmaking as such is at issue, including the question to what extent do these institutions exercise unbounded discretion outside the control of the traditional chains of legitimacy common in our liberal democracies.[14] Of course, this criticism is not new. Many people think that judicial lawmaking is deeply wrong. There is a long line of arguments to the effect that courts lack the institutional competence to make law. The United States Supreme Court's resistance to the New Deal legislation is a good example.[15] Similar concerns have been raised about the Court of Justice of the European Community's (ECJ) active constitution-building.[16] All of this is

[13] Bogdandy & Vetzke, *On the Democratic*, *supra* note 8, at 1341.

[14] *See id.* at 1343 (arguing that "not all lawmaking as such is ultra vires," but "not all lawmaking falls within a court's competence").

[15] Among the vast literature regarding this topic, RÉNÉ LÉCOURT, LE GOUVERNEMENT DES JUGES AUX ETATS-UNIS (1935) reveals the traditional French opposition to judicial lawmaking, after the excesses of the *ancien régime*.

[16] For critical remarks, see Hjalte Rasmussen, *Between Self-Restraint and Judicial Activism: A Judicial Policy for the European Court*, 13 Eur. L. Rev. 28 (1988). For a defense of the ECJ, see Mauro Cappelletti, *Is the European Court of Justice "Running Wild"?*, 12 Eur. L. Rev. 3 (1987). For a retrospective, see generally ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE (2004). More recently, judicial lawmaking by supranational courts has been considered illegal by the German Constitutional Court, in some circumstances. *See* Bogdandy & Vetzke, *On the Democratic*, *supra* note 8, at 1345.

sound enough from the point of view of democratic theory, or at least some strains of democratic theory.[17]

But von Bogdandy and Venzke's arguments are both functional and normative. The proper function of the courts, they argue, consists in examining the requests of the parties in the light of existing law, in balancing the interests at stake in that specific dispute, and, finally, in taking a decision that, in principle, should not produce effects beyond that dispute. Normatively, they argue that judicial decision-making contributes to the good functioning of liberal and democratic polities only if the judicial function is conceived in these narrow terms. Outside these limits courts are (functionally) less appropriate for balancing a variety of different interests. They also lack the necessary constitutional legitimacy on normative grounds, for it is the idea that the judge is not a legislator that underlies national constitutions, which are instrumental to maintaining the conception of individual liberty and democracy that our polities affirm.[18] This applies, *a fortiori*, to international adjudicatory bodies because all their powers are, in the end, only means for protecting and enhancing the interests of the participating States.[19]

At an intuitive level, von Bogdandy and Venzke's approach is undoubtedly appealing. We all feel that judges are appointed and called to take authoritative decisions in order to solve the problems that social actors (individuals and groups, private and public institutions) raise. This contrasts with the wide political discretion enjoyed by legislators. The latter may take decisions affecting any interest they consider to be within the public sphere, provided that some constitutional limits—such as the right to privacy—are respected. The former may only take into account the interests brought in by the parties and may not exceed their demands. Hence the old maxim *ne eat judex ultra petita partium*.

The notion that courts are best suited to serve as the ultimate guarantors of a balance of interests defined by political actors is appealing. However, it leaves me at least vaguely dissatisfied. More significantly, its underlying assumptions about the necessary limits to the judicial function are questionable.[20] To some, including elected and unelected policymakers, the old adage may be appealing: "What (elected) politicians decided, [the

[17] *See* Ronald Dworkin, *The Judge's New Role: Should Personal Convictions Count?*, 1 J. INT'L CRIM. JUST. 4, 10 (2003) (arguing that we must not simply ask whether some judicial power is undemocratic according to one traditional understanding of that democracy is but, rather, whether it is undemocratic according to the best understanding of that ideal, which does not equate democracy with majority rule in itself).

[18] *See* Bogdandy & Vetzke, *On the Democratic*, *supra* note 8, at 1343.

[19] Although the authors focus on liberal democracies, their broader argument is that in any case the legitimacy of international decisions flows from the consent of the states' parties to the dispute. *See id.* at 1341.

[20] For an accurate discussion, see Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 672 (2004) (showing convincingly that bounded discretion is simply a myth).

courts] will enforce." But it hardly catches the high complexity of the judicial function. Ancient Greeks, as observed earlier, were fully aware of such complexity. They distinguished the two faces of justice, Themis and Dike (in Greek, *Θέμις* and *Δίκη*). Well after the end of the Middle Ages, it remained undisputed that the achievement of justice (*jurisdictio*) did not coincide with the enforcement of the rules established by the rulers (*gubernaculum*).[21]

It is true that von Bogdandy and Venzke are well aware of the inescapable limits of all strongly abstract understandings of the judicial function. They clearly do not assert the old idea that the judge should be merely the "bouche de la loi." They are aware, too, of the intrinsic difficulty that emerges when trying to set a clear distinction between interpreting the law and integrating or creating it. Nevertheless, they argue that international courts should refrain from taking decisions of a general and abstract nature, that is, to issue rules.[22] There also is a problem with the way in which von Bogdandy and Venzke display their argumentation.[23] They simply do not contest the conduct of international courts from the point of view of their respective institutional frameworks, choosing instead to rely on an abstracted "core" ideal of the judicial function. Any idealized approach has limitations when it is applied to the real world. In this case the weakness lies in the difficulty in excluding or limiting rigorously judicial lawmaking.

D. Judicial Lawmaking in the Real World

My contention is that judicial lawmaking simply is inevitable, at least in some circumstances. This claim is not limited to constitutional courts but also applies to "ordinary" courts.

As far as constitutional courts are concerned, there are several examples. Consider the United States Supreme Court after 2001, when it was confronted with the question of an appropriate process for US citizens who were detained because they were suspected of having taken part in the activities of terrorist groups.[24] The Court was obliged to choose among competing conceptions of the due process clause that is found in the Fifth Amendment to the 1787 Constitution. The Court could not use the widely repudiated

[21] For a masterly analysis, see generally JOHN M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THOUGHT (1992) and ALESSANDRO GIULIANI, GIUSTIZIA ED ORDINE ECONOMICO (1997) (arguing that the medioeval conception of justice influenced Adam Smith's philosophical writings).

[22] For the distinction between rules and decisions, see generally FREDERICK SCHAUER, PLAYING WITH RULES (1999).

[23] Following an authoritative theory, I intend argumentation as aiming "at securing the adherence of those to whom is addressed, it is, in its entirety, relative to the audience to be influenced." *See* CHAIM PERELMAN & LUCIE OLBRECHTS-TYTECA, TRAITÉ DE L'ARGUMENTATION: NOUVELLE RETHORIQUE 19 (1958).

[24] For further analysis of the earlier case law, see generally BRUCE ACKERMAN, BEFORE THE NEXT ATTACK (2005).

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approach it adopted in the early 1940s, pursuant to which U.S. citizens of Japanese descent were held in internment camps. Regardless of the implicit value of a traditional approach, based on an original understanding of the Constitution (à la Scalia), that approach might easily illuminate classical cases in which a citizen takes up the cause of a foreign state in a time of war but that differs from the more modern scenario involving the provision of financial or logistical support to the activities of groups of terrorists, although such activities put citizens' lives and goods at risk. Nor could the Court refer to its established case law concerning, say, the termination of welfare benefits. Neither lines of precedent, in other words, provided the Court with an adequate standard of judgment. This shows that tradition has serious limitations, at least because, if there are competing traditions, a choice must be made between them. As Justice Brennan affirmed, constitutional adjudication must ensure that the "living document" can be used to cope with contemporary needs and problems.[25]

Let us consider, anyway, a possible objection concerning the relevance of this example, and of the many others that could easily be added. It could be observed that, although in constitutional adjudication judicial lawmaking is sometimes inevitable, this not does implicate the decisions taken by ordinary courts, which are far more numerous. The ordinary courts have enough work to do, employing a literal interpretation, concentrating on the ordinary meaning of the words of the positivistic norm, and, if necessary, resorting to a systematic interpretation that involves a search for support in other legal materials. Nevertheless, even if we were to assume that judicial lawmaking is limited to constitutional adjudication, this would imply that the ideal of bounded judicial discretion does not apply to that jurisdiction. Since judicial review for constitutionality presumes that the judge is not bounded, and a substantial category of judicial decisions may not be aptly characterized in this way, the doctrine of bounded judicial discretion should be refined. To say the least, its scope of application must be narrowed. I wonder whether the methodological and normative underpinnings of such a characterization of the judicial function are still adequate. What other notions of the judicial function are available and what are their strengths and weaknesses? The following is my argument about a comparison of such approaches and, ultimately, about the normative superiority of one.

A serious challenge to the doctrine of bounded judicial discretion comes from the works of Israeli Supreme Court Chief Justice Aharon Barak.[26] He has argued that ordinary courts, similar to constitutional courts, occasionally find themselves confronted with—and must resolve—"hard cases" for which there are several possible lawful outcomes. In such cases, he proposes, literal and even systematic interpretation will have little to offer the courts or the scholars examining their work. An accurate application of existing legal rules will not suffice. The judge literally must create a new rule for solving the new problems.

[25] *See* William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 1, 2 (1985–86).

[26] AHARON BARAK, JUDICIAL DISCRETION 40 (1989) (calling this the "objectivity test").

Consider, for example, expropriation of private property by public authorities. In all European legal orders, nineteenth century constitutions regarded private property as an absolute right that could be limited or sacrificed only in exceptional circumstances. But the constitutions of the twentieth century have limited that protection. Everywhere, legislators and administrators have developed several activities that encroach on private property. Italy is no exception to this general trend. Although the Italian Constitution of 1947 allows expropriation only if legislative prescriptions have been respected and compensation has been paid, several local authorities reached this goal by invoking their emergency powers. The ordinary courts, and ultimately the court of last instance (the Corte di Cassazione), were confronted with a new problem. Eventually, the Corte di Cassazione decided that in these circumstances the loss suffered by the property owner also had to be compensated.[27] In my view, this conclusion was wrong. First, this practice was not simply outside, but against the Constitution. Second, in this way expropriation took place regardless of the limits stemming from the European Convention of Human Rights. This view has been confirmed by several judgments of the European Court of Human Rights.[28] In 2007 the Italian Constitutional Court (ICC) also found that the ECHR had been violated by this line of jurisprudence.[29] That said, what matters for our purposes is the fact that, for the higher jurisdiction, an approach focused on an accurate application of existing legal rules was not sufficient. Instead of the overprotective standard that echoed nineteenth century ideas about private property, the Corte di Cassazione opted for a less protective standard. The question, however, is not whether it made a good or a bad choice (as I argued earlier). Rather, my point is that this "highest" of ordinary courts made a choice. Its jurisprudence has neither been static nor can it adequately be described as a simple application of existing legal provisions.

This reveals the problem that lies at the heart of the bounded judicial discretion doctrine, exposing both its attraction and its impossibility. It also means to raise a wholly different set of complex questions. What are the standards and limits of judicial discretion? What is their normative justification? Is it that the judiciary is "the least dangerous branch" or simply that another branch of government is constrained from acting by the Constitution

[27] For further remarks, see Domenico Sorace, *Compensation for Expropriation*, *in* ITALIAN STUDIES IN LAW: A REVIEW OF LEGAL PROBLEMS 83 (Alessandro Pizzorusso ed., 1992).

[28] *See* Scordino v. Italy (No. 3), 2007-__ Eur. Ct. H. R. __. (holding that indirect expropriation had infringed the "law", as individuated by Article 1 of the First additional protocol; another ground of unlawfulness was the retroactive application of new standards).

[29] *See* judgments n. 347 and 348 of 2007 of the ICC, commented by Silvia Mirate, *A New Status for the ECHR in Italy*, 15 EUR. PUB. L. 89 (2009) (emphasizing the quasi-constitutional status of the ECHR). For a broader analysis of the reception of ECHR in the Italian legal order, see Mercedes Candela Soriano, *The Reception Process in Spain and Italy*, *in* A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 393, 407 (Helen Keller & Alec Stone Sweet eds., 2008) (observing that the Italian Constitutional Court uses the Convention as a guide for an evolutionary interpretation of rights).

or other fundamental rules?[30] The purpose of this comment is to suggest that a different conception of judicial discretion is not only possible, but also necessary. Whether, and the extent to which, such a different conception should take into account the specific features of international adjudication, is yet another question. It is adequate for my purposes to observe that the greater frequency of gaps in the field of international law suggests that judicial discretion may be hardly more bounded than in national settings, as several international lawyers have observed in the past.[31]

E. From Problems to Solutions: Too Much Emphasis on Elected Legislators

The functional and normative arguments that are made by von Bogdandy and Venzke must not be considered only from the point of view of the problems that affect the exercise of justice beyond states. Their arguments also should be considered from the point of view of solutions that focus on the role of political institutions.

Their starting point is empirical and convincing. If we consider empirically several areas of international adjudication, they argue, it soon becomes evident that there are several weaknesses. Procedural safeguards for the parties and the interests they protect often are weak and the thresholds for admitting third party intervention are too high.[32] Too frequently the reasoning of judicial and arbitral bodies is poor. The frequency of discrepancies in judicial decisions and arbitral awards is another problem, and not an irrelevant one, since the absence of a jurisprudence constant may undermine legal certainty (even if this no longer is conceptualized as it was during the nineteenth century).[33] Nor is the selection of judges, to ensure their independence and impartiality, simply an issue of theoretical concern. Where I part from von Bogdandy and Venzke is when they pass from problems to solutions. They argue that "the distance to parliamentary politics is one of the main problems of international judicial lawmaking,"[34] and insist that the solutions to the problems must be adopted by institutions having electoral legitimacy. The underlying assumption is that international adjudication is simply an instrument to ensure that the will of the members of any international club is respected.[35] This solution raises two new questions. First, can great expectations of legal

[30] *See* generally JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (conceiving the judiciary as a counterailing power, which is essential in order to preserve the rights of individuals and minorities).

[31] Bogdandy & Vetzke, *On the Democratic*, *supra* note 8, at 1348 (considering Kelsen's theories).

[32] *See id.* at 1361.

[33] *See generally* FLAVIO LOPEZ DE ONATE, LA CERTEZZA DEL DIRITTO (1941).

[34] Bogdandy & Vetzke, *On the Democratic*, *supra* note 8, at 1350.

[35] For this metaphor, see Robert O. Keohane & Joseph S. Nye Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, *in* EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264, 227 (Roger B. Porter et al. eds., 2003).

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change really be placed on elected legislators? Second, if so, how can this apply to the global arena?

Historical analysis is quite helpful in this context. When considering the history of domestic parliamentary regimes, it is easy to see that the powers of elected assemblies should not be overestimated. As Albert Venn Dicey, the major Victorian constitutional lawyer, observed at the beginning of the twentieth century, parliaments often do little more than codify standards that already have emerged within society.[36] A century later, there is a widespread awareness that a growing proportion of the rules that govern industrial societies are adopted not only by specialized governmental authorities, but also by private bodies. These examples are not meant to suggest that the idea of a bounded judicial discretion is weak only in a few critical points. Rather, they are meant to suggest that great expectations should not be placed on elected assemblies because often the facts determine legal rules, rather than the other way around. Even within Western liberal democracies administrators and judges exercise discretionary powers and the exercise of that authority cannot be explained and legitimated as, in any realistic sense, the direct expression of the will of the peoples' representatives.

Whether the exercise of judicial power by international courts needs to be kept within strict limits, in order to make it democratically acceptable, is another question that must be considered. It can be argued that judicial decisions may even endanger the possibilities of democratic self-determination, although it is fair to observe that von Bogdandy and Venzke do not share the now-conventional view that international organizations undermine democracy.[37] This conventional wisdom is challenged by those political scientists who argue that multilateral institutions can enhance the quality of national democratic processes, in particular by protecting individual rights.[38]

Anyway, what is more important for my purposes is that von Bogdandy's and Venzke's approach attempts to integrate judicial discretion into conventional democratic theory, holding that adjudicators may exercise their discretion only within the limits set by political actors.[39] In the same way that elected representatives control the activities of administrators in the domestic context, the representatives of the states control the

[36] *See generally* ALBERT VENN DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND (1905).

[37] *See generally* ROBERT DAHL, ON DEMOCRACY 115 (1998). As Albert Venn Dicey, the major Victorian constitutional lawyer, observed at the beginning of the twentieth century, parliaments often do little more than codify standards that already have emerged within society. *See* ALBERT VENN DICEY, LECTURES ON THE RELATIONS BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 3 (1914, 2nd ed.) (observing that "there exist many communities ... that are influenced by habits.").

[38] For this thesis, see Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009).

[39] Bogdandy & Vetzke, *On the Democratic*, *supra* note 8, at 1341.

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conduct of the international institutions they create, including the courts. Although there is certainly some validity for the search of a political connection with the social basis of multilateral institutions, mainly via the participating states, I am afraid that this explanation fails to account for much of the reality of multilateral institutions. It is rare that a parliamentary body is established beyond states; the European Union, with its Parliament, is an exception. In other regimes, even when the representatives of the member States meet regularly, their powers often are quite limited. This is true of the World Trade Organization's General Council. In the context of the International Centre for Settlement of Investment Disputes (ICSID), there is no body of this kind. Adjudication, therefore, is characterized by institutional dynamics, which differ largely from those of the domestic sphere. Of course, it is possible to affirm, normatively, that the problems concerning the protection of collective interests must be solved by elected institutions. On this view, judicial legitimacy lies in tracing authority to the mandate of democratically elected institutions. But parliaments do not exist at the global level. It is even difficult to conceive of them, as their advocates concede. Consider only the enormous problems arising when considering that several, if not most, national polities still are not based on electoral processes.[40]

F. An Alternative to a "Grand Design": Mutual Learning Between International Judicial Institutions

At least some of the problems highlighted by von Bogdandy and Venzke can be solved in the way they suggest. But these problems are real and require adequate solutions. Their response points out the need of a "grand design" and, consequently, requires the intervention of politically legitimated institutions. But, for all its appeal, I am very skeptical about the idea of a reform that reduces, or eliminates, the discrepancies between the different international courts. My skepticism is strengthened by the inevitable weaknesses of any "grand design," which is at the same time, paradoxically, overinclusive and ineffective. It is overinclusive because it tends inevitably to impose the same general rules to a variety of situations and leads, therefore, to unwanted effects. It is ineffective because those rules, precisely because they are not apt for all the courts, will be applied in a different way and thus generate further discontent.

An alternative response concedes that those problems must be solved. However, it calls for something other than a "grand design," which explicitly draws on Edmund Burke's caveat that the maintenance of institutions requires a careful balance between conservation and change.[41] It insists, therefore, that a different methodology ought to be explored, that of mutual learning. In this perspective, we may wonder whether

[40] *See* Andrew L. Falk & Richard Strauss, *On the Creation of a Global Peoples Assembly*, 36 STAN. J. INT'L L. 191 (2000).

[41] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 13 (1790).

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multilateral institutions, and in particular their judicial or arbitral bodies, may learn from each other, for example with regard to the limits within which the presentation of amici curiae briefs may be allowed, in order to enhance their procedural legitimacy, or improve their reasoning so as to improve the transparency and accountability of judicial decisions and awards. At least two preliminary questions arise: Whether and to what extent the experiences made in one field of international adjudication are likely to be fruitful in another and how the debates concerning such experiences can be linked? Furthermore, the role of scholars, and of critical legal analysis, ought to be considered. Regardless of the grounds of dissent presented earlier, the fact that the MPI's research program brings these problems within the current debate is a considerable achievement.

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