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

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I

The underlying phenomenon that Benvenisti and Downs want to explain has to do with transnational judicial cooperation of a certain type, namely decisions and doctrines constraining domestic executives. This phenomenon is well documented in other work by these scholars.¹ Courts, they argue, were traditionally fairly deferential with regard to foreign affairs decision-making, but have recently shifted their attitudes in response to globalization. Courts have become more vigorous in constraining executive decision-making in a number of high-profile areas.

Benvenisti and Downs implicitly adopt their basic set of assumptions about

courts from the strategic model of judicial behaviour. Courts in this view exercise governmental power but do so interdependently, that is under constraint by other actors. Courts are not free to decide cases in any way they wish, for they may be overruled or punished by other players in the political system. In a pure domestic system, these players include legislatures, the executive branch, and the public. On the international level, they include states, large investors, NGOs, and international organizations. The approach assumes that courts seek to protect or maximize their decision-making space, as well as advance policy preferences.

In purely domestic policy space, it sometimes makes sense for courts to defer to the executive branch and sometimes does not. Factors that might dictate one or the other approach include the political preferences of other actors and the level of generalized support for the courts. Another factor that has attracted a good deal of attention in the normative literature is the institutional competence

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

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¹ Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts', 102 *AJIL* (2008) 241.

of courts – are courts capable of getting the right answer if they second-guess the executive? Such considerations are particularly amplified in the context of foreign affairs. Foreign affairs are matters of great national import, in which the costs of getting it wrong are perceived to be high, and there is a long line of argument to the effect that courts lack the institutional competence to get it right. For high stakes decisions in which other actors have better information, deference makes good sense. Surely these institutional arguments also reflect political pragmatism, namely that the executive might punish the court for constraining it, or else simply ignore the court. Courts have few means of forcing the executive to comply in a realm where even legislatures have little say.

Benvenisti and Downs have done a great service by highlighting how globalization changes this calculus for courts. In a globalized era, international regulatory networks and other institutions increasingly impinge on domestic decision-making of all types, including decisions made by judges. Hence the strategic court interested in preserving its zone of autonomy will consider not just the preferences of other domestic actors but also those of international ones. To the extent that international actors – or national executives embedded in international networks – are reducing the overall policy space for the domestic sphere, the courts may have an incentive to act *vis-à-vis* these new sources of constraint in order to maintain strategic space for decision-making. In doing so, courts may also be giving voice to publics who seek more local control over internationalized areas of governance. Because executives are often allied with international

actors, enhancing judicial policy space and domestic control involves constraining the executive or reducing deference thereto.

All this is sound enough on theoretical grounds. Where I part ways with their analysis, however, is with regard to two additional claims. First, Benvenisti and Downs argue that constraint by judges involves transnational collective action by courts. Second, they apply two-level game theory to argue that courts are serving their respective national interests by constraining their own governments. I find each claim to be plausible but not proven, and argue that the facts are consistent with other accounts that are equally or more plausible.

II

Benvenisti and Downs claim that courts have overcome their collective action problems in responding to executive dominance in foreign affairs. This way of framing the problem suggests that a single court that challenges an executive will fail, whereas when multiple courts coordinate their responses, there is more likelihood of executive deference to courts in general. As they summarize the argument, '[a]cting collectively would enable [courts] more effectively to resist external pressures on their respective governments, and it would reduce the likelihood that any particular court would be singled out and punished domestically as an outlier'. In this account, courts act on behalf of their national governments, while also constraining them. Judicial opinions play a crucial role in overcoming the collective action problem: they are not mere opinions stating the rationale of the decision,

but signals about a court's propensity to cooperate with other courts.

As an initial matter, it is not obvious why national executives are more likely to defer to courts just because national executives in other countries do so. Perhaps national executives are socialized (or 'acculturated' in the parlance of international law theorists) so that norms adopted by other courts carry extra weight in their calculus of reacting to court decisions. Perhaps the foreign citation transmits information, namely that the policy proposed by the court is a reasonable one. It is also possible that national executives are in fact no more likely to defer just because foreign citations indicate that other executives have done so. We lack any empirical basis to know. But in any case, the mere presence of foreign citation by itself does not indicate collective action on the part of courts.

A persuasive account of resolution of a collective action problem involves not just a clear identification of the problem and a story as to why cooperation makes sense, but elaboration of the way in which deviations from the collectively optimal policy are identified and punished. The authors' specific claim is that collective action has worked to coordinate judicial responses to executives. This implies that when, say, Courts A and B challenge executives and Court C defers to an executive on the same issue, Court C will be punished somehow. Perhaps Courts A and B will react negatively with regard to Court C by withholding cooperation in some collateral area such as the enforcement of judgments. Perhaps the 'cooperating' courts will criticize an opinion of Court C, *not* simply to distinguish the holding, but to *punish* Court

C for non-cooperation. Mere criticism by another court might be considered a punishment, but it might not – that will depend on the initial audience for the judicial opinion. Indeed, some courts and judges might obtain positive benefits from external criticism (Justice Scalia comes to mind). The assumption that criticism by a foreign court imposes costs suggests that judges care more about the views of foreign judges than other relevant audiences, such as domestic publics or executives, when audience preferences diverge. In short, the mechanism of punishment of deviant courts is not clear in Benvenisti and Downs' account of judicial collective action.

This is an important point. If Court C is not punished for its 'non-cooperative' opinion, then its lack of cooperation was not costly. Nor should we draw any inference of cooperation from opinions that reach the same conclusion or cite the same cases. Such opinions need not be 'signals'.² Signals usually involve incurring a cost; without a cost, the opinion may be mere 'cheap talk' which does not transmit any information about the intentions of the court down the road. The fact that an opinion involves foreign citations is consistent with many other less elaborate theories, including learning, acculturation, and simply the presence of more foreign opinions published in languages available to the judges. It may also be consistent with the idea that domestic audiences draw a positive inference from foreign citation, namely that the decision at issue is a sound one. But none of these theories have anything to do with collective action.

² Benvenisti and Downs, *supra* note 1, at 65-66.

We also have no account of *how* the courts actually engage in collective action. What is the mechanism through which judges communicate and coordinate? Besides opinions, the typical account in the literature on transnational judicial dialogue emphasizes that judges now meet more often across borders to socialize and talk about what they do. But for the most part, unlike executives, judges cannot actually meet with and *negotiate* with their counterparts. Simply attending judicial dialogues and discussions does *not* mean that the participants are actually cooperating or talking about cooperating. They may simply be sharing information or enjoying fine Austrian wines.

It is thus likely that any trans-judicial cooperation is tacit rather than explicit. It is not that it is impossible to overcome collective action problems with only tacit communication, but direct communication surely makes it easier. The theoretical reliance on tacit communication and the lack of a clear means of punishing violations makes the collective action story seem implausible.

The one example where conscious collective action seems to have occurred is the establishment of the International Association of Refugee Law Judges, discussed in Benvenisti's earlier article in the *American Journal of International Law*.³ In this area, Benvenisti has identified a genuine collective action problem among states. States as a collectivity have an interest in protecting refugees, but each individual state has an interest in offloading as much of the cost of absorbing refugees as possible onto other states. A state that observes the spirit of the Refugee

Convention would draw refugees to its shores. This provides governments with an incentive to pressure courts to define the term refugee narrowly, and we can imagine how judges able to coordinate a common response might immunize themselves from taking the blame for a liberal definition. In 2003, Benvenisti tells us, refugee law judges formed an organization with the express intention of creating a coherent and consistent jurisprudence. But in a way, the example proves too much. National governments have an interest in this coordination and so the courts are hardly constraining the executive branch. In any case, it is not clear that one can generalize from this area to others, such as counter-terrorism, where no analogous institution has been created. Benvenisti and Downs have a good account of transnational collective action by judges in one area of law.

III

A second theoretical objection concerns the use of two-level game theory. Two-level game theory highlights that governments can sometimes benefit in one sphere of negotiation from constraints in another. A government that has little international leverage can overcome domestic opposition to 'necessary' policies, just as an executive that faces a hostile legislature may have more leverage in international negotiations. No doubt Benvenisti and Downs are correct that domestic judicial constraint of the executive *might* in fact give the government more degrees of freedom in international negotiations. What is unclear is why judges would care about this outcome in deciding cases.

³ Benvenisti, *supra* note 2.

As described above, most strategic accounts of judicial power stipulate that judges wish to maximize the institutional interest of the courts on which they serve. We do have other theories of judicial motivation in which judges seek to maximize leisure, impact on the law, and various other goals. At one point Benvenisti and Downs suggest that courts might be acting on behalf of other actors such as the polity itself, or the very government they are constraining, so as to expand the space for domestic deliberation.

To a certain extent the argument about two-level games is in tension with the argument that judges are empowered through collective action *vis-à-vis* the executive branch. The collective action argument is that courts need the support of courts in other jurisdictions to withstand pressures from their own executives. The two-level game argument is that courts are constraining their own executives on behalf of some wider interest of the polity and state. These seem inconsistent. If judges are indeed acting on behalf of the national interest as it is widely perceived by the polity, they are unlikely to need the support of such a weak political ally as foreign judges. Furthermore, given international competition, it is unclear why foreign judges would support a strategy that enhances another state's negotiating power. If a judge is acting on behalf of its own national interest, it will not undertake costly punishment of foreign judges, especially if that punishment ultimately strengthens the foreign state.

The argument might work if judges have a special ability to identify the national interest and to calibrate the amount of constraint needed to empower their own executives on the international

plane. This, however, cuts against longstanding doubts among legal scholars and judges themselves about judicial capacity in the realm of foreign affairs.⁴ And it violates basic logic about the ways democracies work: if judges know the proper level of constraint required by the national interest, shouldn't the executive and legislature have the same information?

In short, the application of two-level game theory to elucidate a *motivation* for judicial action seems inapposite. Until we have evidence of judges learning about this bit of social science, having motivation to apply it, and doing so, it is mere speculation to assert that the theory is relevant. Two-level game theory might help us understand some collateral *benefits* from transnational judicial cooperation and constraint of the executive, but it seems an unnecessary extension, and fits somewhat poorly with the collective action idea.⁵

⁴ Benvenisti and Downs have a relatively strong view of judicial capacity. They believe that limited judicial influence on the development of the international regulatory apparatus might have led to more fragmentation, *supra* note 1, at 60.

⁵ The authors seem to think that two-level game theory is sensitive to absolute levels of power. For example, Benvenisti suggests that American courts are more deferential to the executive because American hegemony means that the two-level dynamic is less relevant. Benvenisti, *supra* note 2, at 248. But even the US must negotiate with other powers, for example in setting regulatory standards with the EU. Simply because the US is powerful in absolute terms does not mean it would not benefit from the two-level game dynamic. In a negotiation with the EU, the US would be able to extract *even more* benefit were its courts to provide some constraint. Thus the two-level game theory does not help distinguish among judiciaries.

IV

What alternative accounts provide plausible explanations for the observed phenomenon of increased scrutiny of the executive branch and increased judicial dialogue? One plausible account of increased judicial dialogue centres on learning. Courts may read others' opinions not to resolve collective action problems but simply to learn about alternative ways of analysing common legal issues.⁶ Globalization certainly increases the probability that courts in different contexts will indeed face common issues, and a natural response is to see how other courts have handled similar questions.

Why then might we observe greater *constraint* of domestic executives in recent years? There may be no global explanation. In some cases, such as the refugee law example, collective action may be at work. In the more high profile counter-terrorism cases, increased judicial scrutiny of executive branch measures is quite consistent with an oft-observed

tendency for courts to increase their scrutiny of emergency action as the time of crisis grows more remote. Major terrorist bombings in London and Spain, and September 11 in the United States, are now less salient. The passage of time means that courts will begin to discount the probabilities of new attacks, and to call tough and overbroad security measures into question.

These alternative accounts do not require elaborate assumptions about judicial motivation or communication. Judges need not be engaged in collective action in order to adopt common approaches to similar problems or to cite each others' opinions. They need not be able to identify the national interest more accurately than their own executive branches. Professors Benvenisti and Downs have identified an important phenomenon, and provided a theoretical account that *might* explain it. Without further evidence, we must conclude that it might not, and that simpler theories do a better job.

⁶ Posner and Sunstein, 'The Law of Other States', 59 *Stanford L. Rev.* (2006) 131.