Law's Legitimacy in Distress

The Changing Structure of International Law-Making and Its impact on the Domestic Legal Order

KAKU Shun*

ABSTRACT

In this paper I will examine what impact the expansion of international law-making may have on law's legitimacy in domestic society. The international law-making process seeks for universal regulation of human conduct by establishing a set of legal rules and principles, especially through multilateral treaties or decisions of international organisations, in order to achieve values and interests which are claimed to be shared at the global scale. This mode of global regulation involves precise control on individual conduct in the domestic sphere, in contrast to traditional regulatory norms which regulate state conduct vis-à-vis other states in the international sphere typified by the principle of the non-use of force. States are now required to make legislation within their jurisdiction to comply with their obligations under multilateral frameworks for, for example, the environmental protection or the war against terrorism. Although this may be seen as a favourable trend towards global justice and common values, some cautiousness is in order as this may undermine legitimacy of law at the domestic level. First, if the conclusion to be reached is predetermined by the international law-making process, the domestic legislature is deprived of the chance to go through a genuine deliberative process by which to autonomously determine the conclusion. Second, and related to this, is a shift of governmental power within the constitutional order especially from the legislative to the executive branch. In the absence of an effective and legitimate accountability framework at the global scale, the challenge for contemporary international lawyers is to enhance the effort for globally shared goals while at the same time retaining the value of the pluralist world order, which respects the democratic process and constitutional checks and balances at the domestic level.

I. INTRODUCTION

Recent years have seen at the international level an increasing trend towards global regulation which seeks to control state and non-state actors on a global scale through multilateral treaties or decisions of international organisations. This responds to the urgent need for tackling collective problems in human society and the emerging perception of

* Email: skaku@juris.hokudai.ac.jp. Associate Professor, Hokkaido University, Japan, and Visiting Researcher, the Max Planck Institute for Comparative Public Law and International Law, Germany.

common values and interests at the global level, or global justice in a broad sense. As there is no genuine legislative process at the international level comparable with one in domestic society, this international law-making process serves as a substitute in a decentralised world, although incomplete. International law-making is an attempt to universally regulate human conduct to promote global justice, just as domestic legislation is at the national level. In this paper, I will adopt a broad sense of global justice, which covers various conceptions of distributive and corrective justice, including liberalism, libertarianism and utilitarianism.

This universalising trend in legal regulation involves encroachment by international law on issues which have once exclusively fallen within the domestic jurisdiction of the state. States are obligated, within their jurisdiction: to protect human rights under international human rights law; to criminalise certain activities under international criminal law; to regulate certain activities detrimental to the environment under international environmental law; etc. In the following analysis in this paper, I will call this trend *the expansion of international law-making*. This trend is new, since, traditionally, only external acts of the state are controlled by international law. For example, international law on the use of force merely regulates the conduct of states, and is not related to regulations within their jurisdictions. In short, the expansion of international law-making is a shift to unified regulation over individual conduct at a global scale through domestic legal systems.

Implications of the expansion of international law-making may be understood in different ways. It may be seen as a positive move towards global justice, since inefficiency or unfair distribution of burdens which stems from a lack of universal control on human activities is eliminated. In contrast, foundations of domestic legal orders may be viewed as being at risk, since the expansion of international law-making means effectively partial subordination of domestic law to international law.[1] Instinctive worry about the changing political landscape has sometimes led to reactive movements against globalisation in real politics. And yet, in order to ascertain whether such concern has a good cause, we have to examine where precisely the problem lies. Allen Buchanan and Russell Powell, by focusing on the context of the US, made an insightful analysis on the topic in their pioneering work.[2] In what follows, I will try to make a further contribution to this issue by adopting a more general scope of analysis and exploring the impact from a legal and political philosophical perspective. More specifically, I will argue that the expansion of international law-making raises serious issues in relation to constitutional democracy. It may invalidate the idea of self-government by blurring the boundaries of political units. It may also cause a shift in the constitutional balance between governmental powers against the legislature and thus subvert the rule of law. And insofar as constitutional democracy is an essential legal and political framework for justice in domestic society, it must be respected in conjunction with the promotion of global justice through international law-making. I will conclude with prospect for a better relationship between international and domestic law.

1 A similar view on the current trend is shared by André Nollkaemper, 'Inside or Out: Two Types of International Legal Pluralism', Jan Krabbers and Touko Piiparinen (eds), *Normative Pluralism and International Law* (New York: Cambridge University Press, 2013).

2 Allen Buchanan and Russell Powell, 'Constitutional Democracy and the Rules of International Law: Are they Compatible?' (2008) 16(3) *Journal of Political Philosophy*, 326.

II. THE PRESENT STATE OF INTERNATIONAL LAW-MAKING AND THE ISSUE IT RAISES

A. The Expansion of International law-making

There is no genuine universal legislative process at the international level equivalent to the domestic legislative process. International society has no legislative organ, nor any formal legislative procedure in the strict sense. In the traditional, positivistic idea of international law, sovereign states have been considered legally not bound without consent. The maxim *pacta sunt servanda* prevails. The corollary is that there is no procedure for intentionally creating a legal norm with universal scope, for a treaty is not binding for each member of international society unless it is given prior consent, while customary law requires state practice and *opinio juris necessitatis* for its establishment.

Nevertheless, it has been increasingly difficult to deny values and norms broadly shared in international society. The idea of human rights is one of the most prominent examples.[3] While the specific content of human rights is generally highly controversial, the very idea of human rights and the state's obligation to protect basic human rights within its jurisdiction has received broad recognition in contemporary international society. Any state, whether it has given explicit consent to relevant rules and principles, if it fails to accept the idea or denies the obligation, loses its legitimacy in international society.

This universalising trend is not confined to human rights obligations. International regimes established for the pursuit of global public interests appear to share some characteristics. Reservations are often limited in its scope, or even prohibited. Treaty obligations are at times very specific, supplemented by protocols, decisions of conference or meeting of the parties (COP/MOP), guidelines, etc. The *pacta tertiis nec nocent nec prosunt* principle also no longer strictly applies, since rules and principles adopted by multilateral regimes may instantly be considered customary law. Even if not legally obligated, third party states are often politically pressurised to act in conformity with the established regime, or to become members of multilateral treaty regimes.

Globally unified regulations are necessary, it is alleged for deviation impedes the collective pursuit of common goals. For an effective prevention of international crimes such as the act of torture, it is essential to ensure that there is no asylum for offenders. Sometimes a scheme for fair distribution of burdens is necessary in such undertakings. If a global regulatory regime is for the good of members of the global society, it may not be just to stand in its way and refuse to share the burden, although it is still possible to raise objection on the ground that certain goals are not genuinely global or that burden is not shared equally. This implies that states cannot be presumed to enjoy sovereign freedom.

It may be useful to pay attention to the contrast between the private legal order and the public legal order.[4] The public legal order is characterised by its orientation to the collective pursuit of common goals, and not only performance of obligations, but exercise of rights conferred by it, is assessed in that light. In contrast, the private legal order typically confers a power on a legal subject to create rights and duties through a contract with other subjects, and

3 Onuma Yasuaki, 'In Quest of Intercivilizational Human Rights: "Universal" vs. "Relative", Human Rights Viewed from an Asian Perspective' (2000) 1 *Asia Pacific Journal of Human Rights & Law*, 53.

4 Komori Teruo, 'Diversification of Implementation Processes and Changing Concepts of Effectiveness: From a Factor-Based to a Process-Based Approach' in Komori T and K Wellens (eds), *Public Interest Rules of International Law* (Ashgate 2009) 53-55.

is characterised by its general indifference to the purpose for which the right is used. International legal rules are often understood by analogy with private law.[5] The content of an agreement between states is determined either freely by parties, or by international law. For example, states may freely determine the content of a defence treaty which provides rights and duties between them, insofar as it does not infringe on the principle of the prohibition on the use of force. States may also agree to send diplomatic missions to each other, but the rights and obligations of parties are already set by the Vienna Convention on Diplomatic Relations of 1961. In both cases, states are seen to be free to enter into a treaty relationship for whatever purpose.

The logic of the public legal order lies behind the globally unified regulations through international law-making. It is predominantly a system for the collective pursuit of common goals through burden-sharing, and is marked by conferral of rights accompanied by duties. Rights conferred by the public legal order are more cogent, because their exercise is not for subjective interests of the right-holder, but for widely shared objective goals and interests pursuit of which is duty for participants.

When a public legal order is created through the international law-making process, two different types of regulatory regimes may be adopted.[6] One, more traditional, type of regime regulates the conduct of states in the international sphere, such as the use of force by states. This has a relatively long history which goes back more than a century. The other type of regime, which is increasingly more prominent in the contemporary world, aim to control the conduct of private individuals and, for that purpose, obligates states to adopt certain measures within their jurisdiction. In this paper I will focus on the latter type of regulatory regime, for the close cooperation, as well as friction, between international and domestic legal orders is more evident in this type. This includes, for example, regulation on the disposal and transboundary movement of hazardous wastes under the Basel Convention, universal criminalisation of certain activities under the UN Convention against Transnational Organized Crime, and the protection of intellectual property rights under the TRIPs Agreement.

We have seen that the expansion of international law-making has brought about public legal order regimes in which international law created by the multilateral decision-making process directs the mode and substance of regulation by states within their jurisdiction. Admittedly, there are variations among such regimes. Some have a scope which is less than global, and some give more specific direction to domestic law while others allow states relatively broad discretion. However, in what follows, I will put aside these details and see the trend at an abstract level.

B. Normative Issues Concerning the Expansion of International Law-Making

How can we normatively assess the expansion of international law-making? There may be two answers which conflict with each other. On the one hand, the expansion of international law-making is a desirable move towards global justice as it reinforces the common pursuit of shared ends on a global scale by enabling harmonisation among domestic legal orders. At the global level, not only the protection of human rights or the pursuance of international crimes, but also that of the global environment leads to elimination of injustice, for the global poor are

5 Hersch Lauterpacht, *Private Sources and Analogies of International Law* (first published 1927, Longsmans, Green and Co 2002) 3-42.

6 Daniel Bodansky, *The Art and Craft of International Environmental Law* (Cambridge: Massachusetts: Harvard University Press, 2010) 206.

the most vulnerable to the environmental deterioration. Establishment of an adequate regulatory regime enables fair distribution of burdens. At the domestic level, international law is sometimes used as a means to raise standards of human rights or to break through a political standstill for proper legislation. In these respects, international law-making process is a relief for national law reformation.

On the other hand, the expansion of international law-making may be taken as an undesirable trend with detrimental effects on the domestic legal order, as it eventually invites subordination of domestic law to international law. If international law, in its endeavour to achieve ends shared on a global scale, determines rights and obligations of individuals in the domestic sphere, and prescribes the mode and content of regulation by domestic law, legitimacy of domestic law is eroded. Domestic legislation as necessitated by international law appears to have only a weaker basis in domestic society. And if a significant part of domestic law is under the sway of international law, the legitimacy of the entire domestic legal order may be put into doubt.

We tend to focus on the benign aspect of the expansion of international law-making. However, perhaps we should not easily dismiss its malignant aspects. Its negative impact tends to be more visible in weaker states. The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) shows an example.[7] The TRIPS Agreement was designed to increase incentives on a global scale for investment in the research and development of new ideas and technologies. In so doing, it prescribes the minimum standards for intellectual property rights protection to be provided by WTO members, and thus generally necessitates domestic legislation by their governments. It has been argued, however, that having no adequate resources for research and development and with the cost of innovation prohibitive for them, developing countries may be excluded from the long-term benefits of intellectual property rights protection, while losing the possibility of copying or of importing copies may incur immediate social costs.[8] This affects especially the price of pharmaceuticals vital for curing certain diseases such as HIV/AIDS. Nonetheless, developing countries cannot refuse the TRIPs agreement altogether, for it is an integral part of the WTO Agreement,[9] and withdrawing from the entire free trade regime and therefore abandoning all the benefits is not an option for them. In this way, international law-making may create global rules which have detrimental effects on domestic society.

However, creation of international rules with particular substance which is prejudicial to some states is perhaps not the only problem. A greater problem may be found in that, regardless of whether rules created are especially disadvantageous, they are created at the international level in such a way as to specify the mode and content of legislation to be made within the domestic legal order. Issues with regard to particular content of international rules may have different contexts and should be dealt with accordingly. But, at a more general level, the expansion of international law-making poses a different type of problem of its impact upon the domestic legal process. Even if it only generates rules with substance which causes no difficult issues in domestic society, the international law-making process has perhaps undermined the legitimacy of law at the domestic level by putting the domestic legal order into an auxiliary position. But we should not to be quick in reaching such a conclusion. We may be deceived by unreasonable nationalist affection for sovereignty. Thus, in this paper, I

7 I owe this example to Pawarit Lertdhamtewe.

8 Yamane Hiroko, *Interpreting TRIPS, Globalisation of Intellectual Property Rights and Access to Medicines* (Hart 2011) 1.

9 *Marrakesh Agreement establishing the World Trade Organization* (15 April 1994) LT/UR/A/2 art 2 para 2.

will make an analysis to find out more specifically what impact the expansion of international law-making has brought about and what its future consequences will be.

III. INADEQUATE REASONS FOR REJECTION

To begin with, attention must be paid to the contentions based on the contrast between the international and domestic spheres. A prominent example is found in the argument of Carl Schmitt on 'the political'. For Schmitt, the distinction between friend and foe, i.e., the boundaries of the political community, is crucial in establishing the political. As this distinction is unobtainable beyond the narrow confines of a nation, he opposed any idea which is connected to universal values—citing Proudhon, he says, "Whoever invokes humanity wants to cheat."[10] From this perspective, the universalising force of the expansion of international law-making would be seen as an adversary of the national community and therefore of domestic law as its product.

Although international law-making is premised on universal, or at least broadly shared, values among nations, it carries a hollow dream based on a naïve view which neglects the profoundness of the political, or worse, a disguised manoeuvre of imperialism. Indeed, Schmitt criticised the League of Nations in such a way.[11] Since international law-making presumably has no political community at its basis, its expansion would also be seen as futile. Law created through the process is inevitably either powerless or made an instrument of those who hold power. If international law-making prevails, it blurs the boundaries of each political community as the unit of political decision and therefore undermines the basis of law. Whether this may be so depends upon the significance of the national community as the political unit and the validity of the contrast between the international and domestic spheres.

A. Contextuality of Law

A first argument against the expansion of international law-making is that while law needs some contextual basis for interpretation, international law has no particular context, and therefore empty.[12] Law cannot be understood in a vacuum. A nation is typically considered to have common political culture and shared understandings which provide a contextual background for legal practice. In contrast to domestic society, in which some such context is shared, international society tends to be described as an arena where multiple cultures collide and conflict with each other.[13] Thus, when law appears to solve social problems in the international sphere, it is a mere disguise of the power.

We should not be too quick to leap at a conclusion from this popular image, though. Take, for example, international human rights law. Humanitarian crises, whether the cause is a civil

10 Carl Schmitt, *Der Begriff des Politischen* (Duncker & Humblot first published 1932, 2002), 55 ("Wer Menschheit sagt, will betrügen."). For translation of the phrase, Martti Koskenniemi, *The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2004) 432.

11 Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff*, 3. Aufl. (Duncker & Humblot first published 1938, 2003).

12 Koskenniemi's culture of formalism argument suggests this line. Koskenniemi, above n9, Ch.6.

13 Michael Walzer, *Thick and Thin, Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994).

war, an authoritarian regime or a natural disaster, can no longer be considered a matter exclusively within domestic jurisdiction. International human rights law is founded on a certain moral conviction that is part of global shared understandings. Although response by states is largely driven by self-interest, without taking into account such moral convictions, reaction of the international community as a whole to racial discrimination and genocide would be difficult to explain.

Certainly, states are sharply divided on issues of human rights. The debate on the death penalty is but one example.[14] While almost all European states have abolished the death penalty, in other parts of the world, including Japan and the United States, it still retains widespread support in society. Difference in attitude towards the death penalty has raised diplomatic issues, a couple of which brought before the ICJ, such as the cases of *LaGrand* and *Avena*.[15] That there are such conflicts, however, does not in itself prove that there is no shared understanding on a global scale. The following points deserve attention.

First, there are many issues that have caused bitter legislative and judicial confrontation within each domestic society. Laws on abortion and homosexuality in the United States, Muslim scarves — with various names and styles — in European countries, and the pacifist constitution in Japan are all sources of controversy in each country. Law in domestic society is no less controversial and to that extent we should be careful not to exaggerate the difference between international and domestic law.

Second, the controversiality of international law implies not that international law is in itself meaningless as it merely reflects power politics, but that we share the same legal concepts to be referred to in arguing with each other. Here the distinction between concept and conception is in order.[16] When in a legal dispute one puts forward a certain view, and another takes a different position, they are in disagreement as to which is the better interpretation of law. Each claim must be seen as proposing a conception which revolves around the same concept, if they are not talking across each other. For example, although there are various views on the specific content of human rights, they are premised upon the concept of human rights and the scope of claims is in this regard greatly limited. Insofar as the language of human rights is adopted, reference to bare utilitarianism may not be permitted.

Thus, the argument which draws upon law's contextuality is unfounded. We should not over-emphasise the difference between the domestic and international settings. Domestic law as well as international law is inevitably controversial but this does not render the entire practice of law meaningless. Apart from human rights, we share various values and goals in the international sphere, which provide the basis for international regimes such as environmental protection, free trade and territorial control. Through such common endeavour, people exchange their views with each other, which may lead to the creation of new conceptions adapting to different contexts. International law-making is not a meaningless venture, nor is it mindless imposition of single values on different societies with different social contexts.

---

14 A recent statistics shows that death penalty is being carried out in a considerable number of states, while it has been abolished in many others. See Amnesty International, *Death Sentences and Executions 2014* (2015).

15 *LaGrand (Germany v. the United States)* [2001] ICJ Rep 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep 12.

16 Ronald Dworkin, *Law's Empire* (Belknap 1986) 70-72.

B. The Autonomy of the National Community

A second argument pertains to the importance to be attached to the autonomy of a nation as a political community. As David Miller argues from a liberal nationalist point of view, the importance of the self-determination of a nation lies in that, where a nation is autonomous, it is able to implement a scheme of social justice, it is able to protect and foster common culture, and its members are able collectively to determine its common destiny. Thus, functions which a state must discharge are served better, if its citizens are members of the same nation.[17]

Although Miller's argument lends support for autonomy of the nation, it does not provide an absolute defence for it. First, it is one thing to say that social justice is more easily realised when it is chosen by self-determination of a nation which has unitary community feelings, but it is another to say that social justice is only achieved within the boundaries of a national community. As we will see below, it may be no less meaningful to talk about justice on a global scale, where people in rich countries are claimed to be responsible for inflicting institutional harm on the global poor. Second, while, as it forms a background against which individual choice is made, and it constructs important part of personal identity, total destruction of national public culture may be undesirable, pushing unjust cultural traditions, e.g. serious discrimination against women, for change is not. Preservation of public culture is no excuse for prolonging injustice and in itself provides no basis against more expansive international law-making.

Thirdly, although it is true that where there is no collective autonomy, individual autonomy is also lacking, collective autonomy is of value only insofar as it is part of individual autonomy. In cases where individual autonomy is gravely oppressed, some action from outside may become necessary, even if it conflict with the collective autonomy of the nation. In this context, democracy, with the constitutional protection of basic human rights, may be construed as a minimum precondition for respecting the collective autonomy of a political community. As will be discussed later in this article, the expansion of international law-making may have an impact on democracy at the domestic level, if the nation is no longer considered to be the decisive unit of self-determination.

Miller's argument sheds light on important aspects of national autonomy. Nonetheless, it does not seem to provide a firm basis for rejecting the expansion of international law-making. Miller points out that the importance of national autonomy does not imply that sovereignty must remain rigidly safeguarded. On his account, this is typically shown in the security field, where sovereignty is restricted through treaties.[18] Thus, even adherents of national autonomy may not necessarily oppose to transferring decision making power to the international law-making process. The question to be examined is, rather, *when* transfer of state powers becomes an unacceptable infringement of national autonomy.

To this question, Miller asserts that, because social policy is both the vehicle whereby common ideals can be expressed and the means whereby a society consciously reproduces its own identity, its making must be under the direct control of national governments.[19] However, this account is hardly satisfactory. It is unclear why, for example, national governments should be considered free to take oppressive social policies against women. It becomes even more problematic when he also notes that transfer of state powers must in the last resort be regarded as provisional and the nation may re-appropriate rights of decision where they believe that

17 David Miller, *On Nationality* (Portland: Clarendon, 1997) 99.
18 Ibid, 101.
19 Ibid, 101-102.

vital national interests are at stake. Although a caution is due to avoid any unwanted side effects especially when we approach from outside the cultural context, it is hard to understand why mere belief of the nation that a social policy which unreflectively perpetuates female subjugation involves vital national interests gives it right to retreat from international human rights regimes. Miller argues that in most cases we are not required by justice to intervene to safeguard the human rights of foreigners.[20] Even if direct enforcement by outsiders of human rights must be avoided except in extreme cases, it gives no obvious reasons to give endorsement for oppressive regimes in the name of justice and to refrain from taking any approach to those regimes. Indeed, sometimes international regimes, in endeavouring to secure basic individual human rights, encourage people to enjoy collective autonomy through democratic institutions. Thus, when the autonomy of nations is at issue, we have to narrow the scope of our analysis and focus on constitutional democracy, which, in my view, is the most defensible form of government. But before proceeding to this topic, we have to respond to another, more fundamental challenge.

C. Social Justice

A third argument against the expansion of international law-making turns to the contrast between the international and domestic spheres points to the limits of social justice. Thomas Nagel, for example, argues for what he calls the political conception of justice. According to this view, justice is a specifically political value and the existence of sovereign states serves as a precondition for the value of justice to be applicable, by putting fellow-citizens into an institutional relation, which they do not have with the rest of humanity.[21] In other words, the obligation of justice is an associative obligation, which is owed through shared institutions only to those with whom we have a strong political relation.[22] On the political conception, while negative rights are considered as setting universal and pre-political limits to the legitimate use of power, socioeconomic justice is fully associative and it depends upon positive rights which we do not have against all other persons or groups.[23] The fact that we are both putative joint authors of the coercively imposed system and subject to its norms creates the special demand for our equal treatment by the system.[24]

From this perspective, Nagel argues that requirements of justice for equal treatment, including political equality, equality of opportunity, and distributive justice are limited within national boundaries, since beyond states there is no institutions which is coercively imposed. He takes great care in looking at various formal institutions and informal networks which may be seen as exercising coercive power at the international level, but eventually he arrives at the conclusion that they are representative of states or state institutions, not of their own citizens, and they are for the cooperation in advancing separate aims of each state.[25] On this view, insofar as distributive justice is at issue, states are required to comply only when they agree on account of their separate interests. The international law-making process has no sovereign authority over states, and states represents and bear primary responsibility for those individuals.

---

20 Ibid, 80.

21 Thomas Nagel, 'The Problem of Global Justice' (2005) 33(2) *Philosophy & Public Affairs*, 113, 120.

22 Ibid, 121.

23 Ibid, 127.

24 Ibid, 129.

25 Ibid, 138-140.

However, there are reasons to believe that, even if states are legally free to join and leave treaties, they often find it difficult to do so, because of great disadvantage to remain outside. Moreover, not all multilateral regimes are directed to mutual advantage based on the principle of reciprocity. When shared ends are aimed at, the benefits and burdens of multilateral regimes are often distributed unevenly as in the case of the TRIPs agreement, which we have seen above, and the Kyoto Protocol. It is not very clear whether elimination of discrimination against women or racial discrimination is based on self-interest of states. Thus, it is still disputable whether international institutions are based on voluntary cooperation for mutual advantage of separate interests.

More broadly, as Thomas Pogge points out, there are strong reasons to believe that global social structure is coercively imposed upon the global poor. According to Pogge, the existing global order is causally connected to the persisting global poverty by giving recognition as legitimate government to any group exercising effective control over the state territory, regardless of how this group came to power or exercise it, or of to what extent it is supported by the population it rules. In particular, by conferring on any such groups privileges freely to borrow in the country's name (international borrowing privilege) and freely to dispose of the country's natural resources (international resource privilege), the global order gives false incentives to the government for prolonging oppression and to the opposition forces for overthrowing the regime.[26] In creating and imposing this badly slanted global order, we are harming the global poor in breach of negative duty not to harm others unduly. Making reference to a Lockean account of economic justice, he argues that we are harming others unduly, because we impose upon them a social order under which they do not have access to a certain minimal economic position, or, in other words, certain minimum standards of basic human rights.[27]

Pogge's argument suggests that, contrary to what Nagel maintains, there is indeed a coercively imposed system on a global scale. Thus, from Nagel's point of view, there is little ground for altogether denying positive duty towards people beyond national boundaries, though there may be, and indeed are, still reasons to treat them differently. And even if we have no positive duty to them, we still have remedial duty to reform global institutions, although we have no duty directly to ensure that standards of basic human rights are fulfilled.

Thus, issues of justice is not totally excluded from the scope of international law. International law is already deeply connected to these issues and must be assessed in the light of justice. International law is not neutral in the sense that it does not affect distribution of liberty, wealth, income, opportunity, welfare, etc. In the making of international law, consideration of justice is inevitable. It may legitimately concern issues related to justice beyond borders, and there appears to be no reason to exclude it from issues of equal treatment within borders. Thus, it is not warranted to consider any rules and principles of international law to be objectionable or pointless which have implications to issues of distributive justice in domestic society.

But some may further argue that there are at least practical problems with implementing social justice on a global scale. This type of claim is again found in Miller's discussion, according to which mutual trust among fellow-nationals plays an essential role in the implementation of social justice, especially when redistribution is involved.[28] On his view, a

26 Thomas Pogge, *World Poverty and Human Rights, Cosmopolitan Responsibilities and Reforms* (2nd eds, Polity 2002) 118-122.

27 Ibid 144.

28 Miller, above n 17, 93.

state or a political authority is likely to function more effectively when it embraces a singular national community. State activity involves furthering of goals which require voluntary cooperation of citizens and for the success in this activity the government must be trusted by citizens and citizens must trust each other. As the national community is an importance source of mutual trust, and trust is an important condition under which individuals give support to schemes of social justice, national ties play an essential part in the pursuit of justice.[29]

It would not be hard to imagine that, in a deeply divided society, individuals cannot be expected to fulfil their obligations towards each other. In a society which is torn into mutually hostile groups, loyalty to such groups is likely to prevail over obligations to the entire society. We cannot push a person to undertake obligations when other members of the society cannot be expected to do so. Miller is right in suggesting that mutual trust of citizens is necessary even for social cooperation based on reciprocity and a minimum extent of social justice in a market economy.[30] From this perspective, it may be argued that, if international law-making is not supported by trust of citizens, it is likely to undermine the effort of the national community to achieve social justice by affecting or restricting domestic redistributive policies.[31]

However, it is not self-evident that mutual trust can emerge only among fellow-nationals. States which share the liberal ideals are more likely to put more trust on each other than on other states. It may still be arguable that this trust is qualitatively different from the mutual trust within a national community, but it cannot simply be presumed. It remains to be shown that trust cannot transcend the confines of a nation. Additionally, while social welfare services, such as medical services and pensions tend to be seen as almost exclusively provided within a national community, it is not uncommon that there are a few minorities within each national community who are not fellow-nationals but nevertheless enjoy and support those schemes. Although, admittedly, they are also regarded as part of the nation from Miller's perspective, this may lead to a circular argument that, on the one hand, people are seen as a nation where schemes of social justice is seen, and, on the other hand, schemes of social justice is possible where people have ties as a nation.

It may be true that, in the foreseeable future, the national community retains its major importance as the principal unit within which establishment of frameworks of social justice through cooperation are possible. However, if mutual trust, which is essential to the cooperation towards social justice, can cross the confines of national communities, a striving for social justice is not entirely groundless at the international level. At least, when national social policies collide with existing or proposed rules or principles of international law, there is no reason why priority is automatically attached for the former. Moreover, even if it is admitted that the national community is an exclusive unit of shared enterprise for social justice, there is no obvious reason for a nation or the international community to refrain from helping others to establish a national community, where there is none.

---

29 Ibid 90-91. For a similar argument, see, Michael Walzer, *Spheres of Justice, A Defence of Pluralism and Equality* (Basic Books, 1983).

30 Miller, above n 17, 91.

31 It is not entirely clear whether Miller's argument relates to the limit of moral obligations or necessary mitigation of their undertaking on account of practical difficulties. In other words, while it may be true that one is not forced to comply with one's obligations of justice where there is no mutual trust, this does not necessarily mean that one owes no such obligations towards others, but that one is forgiven for non-compliance simply because compliance cannot be expected in such circumstances. Here I will take this part of Miller's argument as stating a practical problem, not a theoretical one.

That being said, if we cannot take for granted that the nation is the unit of cooperation in achieving social justice, our perception of domestic legal and political institutions will inescapably change. They may cease to be viewed as incorporating solely the common endeavour of the nation, and become part of a broader, global regulative structure. Such a change in our perception about the domestic legal and political order may also greatly affect the ideas of democracy and the rule of law which are at its basis, for both ideas are often associated with the idea that domestic law forms a distinctive, relatively independent order as product of each domestic society. If domestic law in part loses its independence and controlled by international law, these ideas may become unable to give sufficient support to legitimacy of domestic law, and eventually of law as a whole. When the domestic legal order is dominated by the international law-making process, do we still conceive of ourselves as accepting law through the domestic democratic process, and as committing to the idea of the rule of law or integrity? Thus, the inquiry must be focused on the impact of the expansion of international law-making on constitutional democracy.

IV. CONCERNS FOR CONSTITUTIONAL DEMOCRACY

A. Democracy

From the perspective of democracy, it may be argued that if the substance of domestic legislation is pre-determined by international law, domestic democracy cannot provide a basis for the legitimacy of law, for people in domestic society are governed by international law, not by themselves. If what is meant by democracy is the involvement of the legislature representing people, the legislature is indeed usually included in the process of treaty implementation. Before starting an abstract analysis, this point should be clarified.

States are often seen as categorised into two groups with regard to the validity of treaties within their domestic legal orders.[32] One group of states adopt the doctrine of transformation and the other, the doctrine of incorporation. The doctrine of transformation requires some specific act of legislature for rules of international law to be applicable before domestic courts, whereas the doctrine of incorporation requires no such specific procedure. Practice also varies as to what type of international agreement necessitates the involvement of the legislature. However, although there remain some dissimilarities between the two groups of states, the actual practices tend to conflate.[33] Ratification of an agreement is generally not enough for its provisions to regulate legal relations in domestic society effectively. Especially when an agreement includes provisions which have a bearing upon individual rights and obligations, or it is considered to be related to important domestic issues, legislation is often made alongside the agreement during the ratification process. In addition, treaties sometimes specifically obligate states to adopt legislation for implementation.

This shows that the legislature is not excluded from the process in which states undertake and implement international treaty obligations. If the expansion of international law-making is problematic for democracy, the reason lies beyond the formal involvement of the legislature in the treaty implementation process. I will take up three issues to think about the topic,

32 Dinah Shelton, 'Introduction' in id (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: Oxford University Press, 2011) 9-10.

33 Jonas Ebbesson, *Compatibility of International and National Environmental Law* (The Netherlands: Kluwer Law International, 1996), 220.

namely, democratic control of governmental power, democratic deliberation, and democratic self-government.

1. *Democratic Control*

In a democratic society, people control the government through the democratic process. Democratic control is in fact weakened by international law prescribing the mode and substance of legislation, if international law-making is beyond the reach of citizens in domestic society. However, if international law-making can be controlled democratically, this may not be a serious problem. Thus, on this issue, democratic control should be viewed both at the national and the international levels.

It is commonly recognised that there is no democratic representation at the international level. There is no global parliament which represents the global community, nor any representatives elected by people on the globe. Even people in democratic states are only remotely represented by state officials at the global level. In this sense, people do not participate in the global policy-making process in a democratic way. Nonetheless, some argue for the prospect of democratic control. They focus on the possibility of securing appropriate exercise of power through channels for objection and checks and balances between international institutions.

Philip Pettit distinguishes two dimensions of democracy, authorial and editorial.[34] On the one hand, people act actively as the author of political decision through plebiscite or representatives. On the other hand, people exercise virtual control as the editor. People as a collective may exercise editorial control through election, and people may severally control editorially through legitimate channels for contestation. One of the virtues of representative democracy lies in that, while it allows authorial control through representation, it leaves room for editorial control over government by people.[35] Seen in this light, democratic control at the domestic level is not necessarily undermined by the growth of international institutions and transfer of power from national governments.[36] The lack of electoral democracy at the international level is not so problematic as it would be at the domestic level, because mutual benefit flowing from international institutions motivates national governments for pursuit of the common good, and because appointment for limited terms eliminates the danger of an entrenched, self-serving bureaucracy. There is also ample scope for contestatory democracy, for there are channels for appeal available for individuals, non-governmental organisations acting on behalf of people, and even the prospect for a Second Assembly of the United Nations elected by people of the world. In addition, international institutions may enhance the editorial control on government by protecting individuals.

However, this account is not persuasive enough. Indeed, Pettit himself says that his intention is only to show that the prospect for democracy at the international level is "not as dark as it might have seemed" and "however bad things may actually be, at least they are not unimprovable."[37] Mutual benefit does not guarantee cooperation for the common good among states. Entrenched, self-serving bureaucracy is visible with many international organisations. Perhaps Pettit's focus is on editorial control. However, non-governmental organisations often represent disproportionately a narrow view of people in the developed world,[38] and a United

34 Philip Pettit, 'Democracy, National and International' (2006) 89(2) *Monist*, 301, 301-304.
35 Ibid, 305-308.
36 Ibid, 314-321.
37 Ibid, 316.
38 Onuma, above n 3, 74-75.

Nations Second Assembly has yet to become reality. Moreover, the idea of democracy involves the principle that people are not only objects but subjects of governance. Even if citizens in domestic society may be regarded as having editorial control on international law-making, this does not render the aspect of authorial control unnecessary. The weakness in authorial control at the international level may not be vital for democratic governance, if authorial control is firmly held by people at the domestic level. The authorial aspect of the domestic democratic process is indeed crucial and if it is to be encroached upon by the expansion of international law-making, it would cause a serious concern about democracy. Democratic control is thus a genuine source of worry. But when it is warranted to say citizens have lost authorial control in the domestic democratic process? We should make a detailed analysis to find a more precise answer.

2. *Democratic Deliberation*

The emphasis on deliberation has been one of the major trends in recent theories on democracy. Theories of democratic deliberation put forward an alternative view on democracy to both classical liberalism, which takes it as an aggregation process of private interests, and republicanism, which emphasises civic virtue and ethical values of the community. One typical explanation is found in Jürgen Habermas's characterisation of Diskussionstheorie (discourse theory). On the one hand, in contrast with liberalism, which regards politics as a compromise between individuals on administration of economic society, deliberative democracy attaches great importance to formation of political opinion and political will. On the other hand, in contrast with republicanism, which identifies politics as a self-organisation of citizens comprising ethical community through formation of political opinion and will, deliberative democracy puts emphasis on deliberative rationalisation of political decision under constitutional constraint on states.[39]

Expansion of international law-making may become worrisome for adherents of the theory of deliberative democracy, for, if the policy goal and substance of domestic legislation are predetermined, opportunities for deliberation are lost, and rationalisation of political decision through deliberation becomes hard to obtain. Deliberation is an important source of legitimacy for political decision-making, because through it participants will be more aware of the situation of others and their preferences may change. More balanced argument becomes possible and decisions better-informed and more firmly grounded on reasons. To be sure, there are certain limitations in deliberation, such as collective polarisation, and it is hardly a sufficient condition for the legitimacy of political decision-making. Nonetheless, as a process of mutual transformation and consensus formation, deliberation forms an important part of legitimate decision-making. If democratic deliberation becomes unobtainable, the legitimacy of law as an outcome of political decision-making will greatly be undermined.

In one respect, as Buchanan and Powell suggest,[40] the international law-making process may help to improve the deliberation within the domestic legislative process. It can provide broader expertise and a richer body of practices, as well as less influence from interest groups on rule-making. Thus, the national legislative process may benefit from the complementary role of the international law-making process. However, a broader prospect for better legislation does not necessarily mean a broader scope of policy making choice. Broader expertise, a richer

39 Jürgen Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Polity, 1996) 302-314.

40 Buchanan and Powell, above n 2, 332-333.

body of practices, or distance from interest groups may bring better legislation, while at the same time national legislation is limited in scope, being urged to choose among a few alternatives. If what is important in deliberation is that it is free from constraint imposed by the authority of prior norms or requirements, this greatly undermines its values. Moreover, what counts as an improvement in deliberation is itself a controversial matter, and may become doubtful if it means less involvement of the local citizens.

It is not unusual that the direction of deliberation in the domestic legislative process is conditioned by social circumstances at the time. Deliberation in no sense means an open discussion from *tabula rasa*. Still, it is another matter if the domestic legislative process is considered subordinate to the international law-making process. For democratic deliberation to be meaningful, members of society must be committed to the idea that they form a unit of collective decision-making by which social problems are to be solved. Habermas's emphasis on formation of political opinion and political will is premised on such commitment. Joshua Cohen is more explicit about background conditions of deliberative democracy.[41] Among five main features of his formal conception of a deliberative democracy are its being an ongoing and independent association and the members' shared commitment to the outcome of collective decision-making. He also points out that connections between deliberation and outcomes should be manifest, because members of a democratic association regard deliberative procedures as the source of legitimacy. On this account, legitimacy of law will be greatly undermined if boundaries of the unit of collective decision-making blur, and independence of the process of collective decision-making, if not of the political community itself, becomes not obvious in the eyes of its participants.

It is important for a deliberative democracy to be founded on a political community with clear boundaries, for it ensures commitment of its members to collective decision-making through deliberation, and this commitment, in turn, establishes legitimacy of law as its outcome. In other words, deliberation gives a valid basis for legitimacy of law only if it is part of democratic self-government. Thus we must examine whether this idea is affected by the expansion of international law-making and, if so, why.

3. *Democratic Self-Government*

Legitimacy of collective decision is at issue, according to Jeremy Waldron, when people in society are in "the circumstances of politics", that is, there is "the felt need among the members of a certain group of for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be".[42] In these circumstances, members of a society need a collective decision-making procedure that is legitimate, and democracy provides a way to respond to that need. Thus, first, the threat posed by the expansion of international law-making is that it may undermine this premise by dissolving the unit of political decision-making. If domestic political decision-making is significantly controlled by international law, citizens do not regard themselves as constituting a unit of collective decision-making and collective action, and the circumstances of politics will eventually fade away.

Secondly, the need for a decisive political unit of self-government also stems from the idea of fundamental equality of people. In a democratic society, all people are recognised as

41 Joshua Cohen,'Deliberation and Democratic Legitimacy' in D Matravers and J Pike (eds) *Debates in Contemporary Political Philosophy, An Anthology* (Routledge, 2003) 342, 345-346.

42 Jeremy Waldron, *Law and Disagreement* (Clarendon, 1999) 102.

equals and are equally entitled to participate in the political process. The equality between the ruler and the ruled is the source of legitimacy of law. The international law-making process is outside the realm of a domestic political community and international law-makers are not equals of people in the sense that domestic law-makers are. Only if people in the world are to be seen as comprising a global political unit, and people are democratically represented in the international or global law-making process, international law-makers would be equals of people.

Thirdly, if domestic decision-making is subordinated by international law-making, the question of who rules whom becomes vague and where responsibility for a political decision lies becomes difficult to ascertain. Politicians will avoid criticisms by ascribing the responsibility for policy choice to international law-making. People will also think that they are not responsible for decisions because they have little room for making collective decisions by themselves. International law-making may be seen as if it is beyond anyone's reach. The expansion of international law-making may in the end produce a global scheme of collective irresponsibility.

Nevertheless, these worries do not serve as a conclusive basis for rejecting the expansion of international law-making. As Buchanan and Powell indicate,[43] to assume that any international law-making is incompatible with domestic democratic self-governance is to beg the question. Whether these worries become a reality depends upon how the expansion of international law-making will be materialised. I will try to find a way for a better relation between international and domestic law at the end of this paper.

B. The Rule of Law

Democracy needs an institutional constraint to secure its basis, which cannot be fully provided through the democratic process itself. This constitutional restraint is founded upon the idea of the rule of law, which guarantees respect for individuals as autonomous beings. From this perspective, as Pettit suggests, constraint imposed on democracy by international law may in fact promote democracy.[44] To find out whether this is actually the case, the relation between international law-making and the rule of law should be examined.

Integrity of law, forcefully argued by Ronald Dworkin, is one of the conceptions of the rule of law. Dworkin contends that integrity of law excludes checkerboard laws, some of which are based on one principle and others based on another, created as a compromise between different political positions.[45] Proliferation of domestic laws to implement multiple multilateral treaties may similarly be criticized as a patchwork solution. Legislation for implementing international law may introduce legal principles unknown to the domestic legal order which do not necessarily fit existing legal doctrines or practices. If certain pieces of legislation are inserted in domestic law as required by international law, checkerboard laws will emerge, which makes coherent interpretation more difficult.

Let me cite an experience of Japan in ratifying the UN Convention against Transnational Organized Crime.[46] According to the Legislative Guide for the Implementation of the

43 Buchanan and Powell, above n 2, 344.

44 Pettit, above n 34, 320.

45 Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), p.179-186.

46 The Record of the House of Representatives Judicial Committee, the 163rd Session of the Diet, No.8, p.13 (Statement of Mr. Kawabata, 26 October 2005).

Convention, states, under Art. 5, para. 1, of the Convention, are required to adopt laws of conspiracy or that of criminal association.[47] On its reading, adopting the treaty provision on criminal association has a problem of criminalising even a mere act of active participation in non-criminal activities of the organized crime group, and so this path was not taken. But the notion of conspiracy, which covers acts broadly associated with criminal activities, does not fit the existing criminal law, which is basically based on the civil law tradition with a narrowly defined notion of complicity. The proposition for introduction of conspiracy into the domestic legal order led to an issue of vigorous debate, and in the end no legislation was made. If a law had been enacted to insert a provision on conspiracy into the legal order, it might have created patchwork legislation. This shows what difficulty unfamiliar legal conceptions may bring when they are introduced into domestic law.

However, perhaps this should not be overemphasised, since the modern Japanese legal order itself is a complex of different legal traditions. It started as a mixture of various western European legal traditions combined with local convention, and has been influenced by the US law after WWII. At each period of reform, accommodation of changes was not an easy process. But now, the rule of law in Japan is firmly established and the legal order forms an integrated body. If patchwork laws are only a temporary phenomenon, it is far from clear whether introduction of legal notions of various origins hinders integrity of law.

It is another matter whether constitutional organs act in conformity with the rule of law under the pressure of the international law-making process. The balance between the executive and the legislature may shift dramatically towards the former.[48] First, the legislature in general has no power to amend treaty provisions even when it has the constitutional power to give recognition to a treaty.[49] It has the power only to accept or reject what the executive branch has brought before it, but by rejecting it, it may risk the reputation of the state as a contributor to the global common good.

Second, as is mentioned above, in many cases legislation is necessitated for implementing international obligations under multilateral regimes, but its content is practically determined by international law. In some cases, a blank cheque is given, through taking direct or indirect reference, to the multilateral regime for the determination of the specificities of regulation. In such cases, listing of specific items to be regulated under the multilateral regimes is made by the conference or the meeting of parties and provided in annexes, and for legislative convenience domestic regulation will automatically be revised according to amendment made at the international level. When this track is taken, due process, such as public hearings, is often shortcut.

---

47 The Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto.

48 Buchanan and Powell, above n 3, 341-343. Although its gravity is now high, the issue itself is not novel (Komori Teruo, 'Joyaku no Kokunaiteki Kouryoku to Kokunai Rippou [The Validity of Treaties in the Domestic Sphere and Domestic Legislation' in Murase S and Okuwaki N (eds) *Kokka Kankatsuken, Kokusaihou to Kokunaihou* [*The National Jurisdiction, International Law and Domestic Law*] (Keiso Shobo, 1998).

49 An exception to this is the Senate of the United States, which has the power to give advice and consent to the President in making treaties. However, this power is often circumscribed by Fast Track or Trade Promotion Authority of the President. See, Bruce Ackerman and David Golove, 'Is NAFTA Constitutional?' (1995) 108(4) *Harvard Law Review*, 799; Hal Shapiro and Lael Brainard, 'Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More than a Name Change' (2003) 35 *George Washington International Law Review*, 1.

Third, interpretation of existing laws may be altered in accordance with international law. This means that laws may be changed by means other than of explicit legislative amendment and restraint on the executive power is loosened. The balance between constitutional powers may be shifted in favour of the executive as the result of more relaxed view on legislative delegation.

The role of the judiciary can be ambivalent. On the one hand, it may extend its discretion in interpreting and applying law, for, in the disguise of application of international law, it may set itself free from legislative constraints. On the other hand, the court may also act as a guardian of the rule of law. It may provide support for the legislature by limiting executive discretions, and also defend individual rights against abusive rule-making at the international level. This may be strengthened through a mutual citing and learning practice across borders. In order to play such a role, a conscious involvement is due.

V. THE PROSPECT FOR A BETTER RELATIONSHIP BETWEEN INTERNATIONAL LAW-MAKING AND CONSTITUTIONAL DEMOCRACIES

A. Dialectical Relationship

The above analysis has shown that in some respects at least, the expansion of international law-making has negative effects especially on constitutional democracy. The establishment of the world government is arguably a solution to these problems, though it has its own vices. Representative democracy at the global level does not seem to be feasible in the foreseeable future, for there would be either too many representatives at a global parliament, making meaningful deliberation impossible, or too large constituency to be represented by a representative, leaving local voice unheard of.[50] Nor is a world government desirable if it may exercise its power effectively at all, for, as Immanuel Kant knowingly suggests, it turns into a "soulless despotism" with no refuge.[51]

Thus, for the moment, our task will be to reconcile constitutional democracy at the national level with the common pursuit of global justice through international law-making.[52] If, contrary to what is said above, some form of global democratic government is to emerge in the future, at least during the transitional period, such reconciliation would still be needed. My proposition in this regard is to construct a dialectical relationship between the international and domestic legal processes.

---

50 However, one may point out that the population in the world is only about 50 times larger than that of India, which is the largest democracy. Although further inquiry is necessary to avoid hasty conclusion, this difference may not be negligible. Direct democracy which functions in Switzerland may not be feasible well in the US or Indonesia, which has 30 or 40 times larger population. I owe this point to the comment of Jeremy P Carver at the International Law Association British Branch Spring Conference.

51 Immanuel Kant, 'Zum ewigen Frieden, Ein philosophischer Entwurf', in H F Klemme (hg.) *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis Zum ewigen Frieden, Ein philosophischer Entwurf* (first published 1796, FelixMeiner, 1992) 80.

52 A similar view is put forward by Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93(3) *Asian Journal of International Law*, 596.

In pursuing this line of thinking, one example is worth mentioning. In the Kadi case,[53] the effect of the sanctions regime installed by the UN Security Council was virtually the focus of the issue. The UN Security Council Resolution 1267 (1999) established the Security Council Committee, and imposed a ban on flight and freezing of funds relating to the Taliban as designated by the Committee. In the UN Security Council Resolution 1333 (2000) the Council enhanced the measures and decided that States should implement certain provisions of the two resolutions according to a consolidated list by the Committee, enlisting individuals and entities as involved with Taliban and Al-Qaida. This sanctions regime strictly limited rights of those individuals and entities as terrorist suspects. The issue in the case was the measures taken by EU countries in accordance with a EU Council Regulation implementing Security Council Resolutions. The European Court of Justice declared the Council Regulation to be annulled, as lacking due process for the plaintiff. Following this and other cases, the sanctions regime has shown more respect for rights of individuals.[54]

The above example shows that even in the EU, which has a highly organised transnational legal scheme, constituent states can resist decisions made at a higher level. The TRIPS Agreement, which I referred to earlier in this paper, may be cited as yet another example outside Europe. In that case concerns that the agreement might block access by people in the developing countries to medicines especially of HIV/AIDS caused a critical response from the developing world and a number of international non-governmental organisations (NGOs). Such reactions resulted in the Doha Declaration on the TRIPS Agreement and Public Health, adopted at the WTO Ministerial Conference in 2001. The declaration, although still contested, contributed to a more flexible interpretation of exceptions to intellectual property rights protection in favour of public health concerns.[55]

For a dialectical relationship, the challenge is twofold. First, the idea of democratic self-government is essential to meaningful deliberation, and collective autonomy of each political community must be respected. The international law-making process must be kept responsive to legitimate demands from the constitutional democratic process. The above examples show that implementation of international law always necessitates national governments' involvement. Power resources for implementation lie only within the hands of national governments, and this is true for the UN Security Council, being the most powerful international organ.

A second and related point is that, there is an urgent need for re-striking constitutional balance between governmental powers in the light of the idea of the rule of law. Involvement of the judicature and the legislature should be promoted in the implementation process of international law. The court should be fully aware of international law as an instrument for the pursuit of global justice, and view domestic law within a global context. This requires the court

53 Case T-344/99 Arne Mathisen AS v Council [2002] ECR II-2905. Joint cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities [2008] ECR I-06351; Tamio Nakamura, 'Kokuren Anpori Ketsugi wo Jisshi suru EC Kisoku no Kouryoku Shinsa [Judgment on the Effect of the EC Regulation Implementing the United Nations Security Council Resolution]' (2009) 1371 Jurist 48; Machiko Kanetake, 'Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee' (2008) 12 Max Planck Yb UN L 113.

54 Report of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Afghanistan, annexed to UNSC, 'Letter dated 17 January 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Afghanistan addressed to the President of the Security Council' (5 February 2002) UN S/2002/101.

55 See, Yamane, above n 8, 304.

to interpret two legal orders in a harmonised way, and also to safeguard the rule of law by checking the abuse of governmental powers. In the *Kadi* case, it was the European Court of Justice which made objection to the implementation process of the Security Council Resolutions, but the same role is expected to be played by domestic courts.

The legislature should carefully examine the content of legislation for the implementation of international obligations in order not to give a blank cheque to the executive. To this end, a greater role must be played by the legislature before a treaty is ratified. It does not necessarily mean that the legislature should actively participate in the negotiation process a treaty, but some extent of institutionalisation may be required to ensure that, at least where it has impact on individual rights and obligations or otherwise is of major importance, the legislature is well informed of its substance and deliberation is made by the legislature. Even in the UK, where the Royal Prerogative is clearly distinguished from the legislative power, involvement of the legislature has gradually been accepted. In 1924 the Ponsonby Rule, which later crystallised into the constitutional practice on parliamentary scrutiny on treaties, was proposed, and, in the Constitutional Reform and Governance Act 2010, this was codified as a statute.[56] Under this new statute, before ratifying a treaty, the government must wait for 21 sitting days to elapse after a copy of the treaty has been laid before Parliament, without either House voting against ratification. Perhaps this falls short of ensuring that parliamentary scrutiny actually takes place on a treaty, but it is a necessary step forward in that direction. Although in civil law jurisdictions the legislature appears to play a more active role prior to ratification,[57] further inquiry on actual practice is due before drawing any implication.

There is also an implication for international legal studies. Especially when international law necessitates domestic legislation, implementation of international obligations should be regarded as a continuing process. When states have legitimate reasons for non-compliance with international legal rules, it may be desirable to make an amendment to accommodate their objections, rather than to pursue state responsibility. As was argued above, the focus of a public legal order is on the achievement of collective goals through cooperation, which is not necessarily reduced to the interest of each particular state, rather than reciprocal exchange of advantages and disadvantages in a narrower sense. This may lead to an approach somewhat similar to, among others, the managerial model put forward by Abraham Chayes and Antonia Handler Chayes.[58] That being said, it is worth mentioning that the fundamental distinction between what is a legal obligation and what is not must not be blurred, for, without presupposing such distinction, law as a guidance of conduct is forceless in inducing compliance by states.

Some legal scholars argue for constitutionalisation at a global scale. My proposition for dialectical relationship between international and domestic law, although not necessarily at variance with certain types of constitutional argument, may shed a different light to the topic in favour of a more pluralist world. Constitutional democracy is in itself a collective endeavour of a nation for the achievement of justice and it serves as a basis for the legitimacy of global legal order. In this sense, the common pursuit of global justice must strengthen the

---

56 Joanna Harrington, 'Redressing the Democratic Deficit in Treaty Law Making: (Re) Establishing a Role for Parliament' (2005) 50 *McGill Law Journal*, 465, 486; Jill Barrett, 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms', (2011) 60(1) *International and Comparative Law Quarterly*, 225.

57 James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012) 93-103.

58 Abram Chayes and Antonia Handler Chayes, *The New Sovereignty, Compliance with International Regulatory Agreements* (Cambridge, Massachusetts: Harvard University Press, 1998).

constitutional democratic ideal. Then, how can this pluralist world be conceived as a whole? In the last section I will attempt to outline the basic idea.

B. A Broader View of the Global Legal Structure

The overall picture would be somewhat similar to the idea of "postnational pluralism" by Nico Krisch. He contrasts it with constitutionalism, by pointing to the difference in the extent of hierarchy and integrity. While constitutionalism presupposes a clear hierarchy between higher and lower orders, pluralism leaves open the ultimate hierarchy and operates in a relationship between sub-orders. Both reject the complete separation between domestic and international law and see a continuity between two layers, but pluralism recognises more heterarchical relation.[59] According to Krisch, this pluralistic view on the global legal order has several virtues: First, pluralism allows for adaptation to new circumstances, leaving open the relationships between legal sub-orders to political redefinition over time; Second, its openness provide greater contestatory space for weaker actors; Thirdly, with limited authority, any decision can meet with checks and balances through diverse channels, no level of decision which is superior to the others. Moreover, pluralism fits the idea of public autonomy of citizens in the contemporary global political space in which citizens have multiple identities, loyalties and allegiances, while at the same time requiring each relevant polity to justify its particular vision of how to organise the global political space.[60]

It is not my purpose to fully engage in the discussion on the pluralist global legal order against global constitutionalism. Some constitutionalist may accommodate pluralistic ideas.[61] As far as the analysis in this paper is plausible, however, some form of political collective autonomy at the national level is necessary for democracy to be meaningful and for the rule of law to be valid. If the expansion of international law-making aims for a rigid hierarchical order in which international law subordinates domestic law, and restricts the autonomy of political communities, it is likely to have adverse effects on democracy and the rule of law. As Krisch contends, the pluralistic view has several advantages in this respect. Responsiveness of international law to legitimate claims from the domestic level must be retained in order to secure constitutional democratic values.

In the contemporary world, we are faced with an urgent call for solving issues of global justice, from poverty to environmental protection, to international crimes or to terrorism. In tackling these issues, universal control of human conduct is needed and the expansion of international law-making is a necessary part of establishing effective institutional frameworks to that end. However, its importance should be weighed against the values of constitutional democracy. The pursuit of global justice is pointless if the ideals of liberty and equality which is at the core of constitutional democracy is cast aside in its course. If domestic law loses its constitutional democratic basis for legitimacy, legitimacy of international law is also undermined, because the international legal order is primarily a legal order between domestic legal orders. Thus, while the expansion of international law-making has its merits in promoting global justice, for it to be accepted as legitimate, it must be based on the respect for the autonomy of political communities. Their autonomy is crucial, not because the political

59 Nico Krisch, *Beyond Constitutionalism, The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) 235-236.

60 Ibid, 67-105.

61 Matthias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) *European Journal of International Law*, 907.

community is morally important per se, but because it is essential for individual values to flourish.

One may still suspect that this dialectic approach is only a luxury of those with power. It may be true that resistance to the international law-making process is only realistic for those states with power in international sphere; weaker states may be vulnerable and susceptible to the impact of international law-making. Although we cannot ignore the depressing reality of the power relations of the contemporary world, some relief may be found in the following considerations. First, regretting powerlessness of the domestic legal order in the face of the international law-making process is only warranted when the domestic legal order itself is legitimate. Second, and more importantly, the international law-making process pushing states to a certain direction is more benign than an individual state or a group of states giving orders to other states. In the Realpolitik of in the international sphere, small states always have difficulty in keeping their independence. Multilateral regimes are far less harmful for them than being under the direct influence and control of powerful states, for they are founded not solely on power, but at least partly on some common ideals and values, and can be contested on those grounds.