Inter-legality and the challenge of democracy

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1. Introduction

In a lengthy review essay on The Challenge of Inter-legality, the always insightful Neil Walker suggested that the very idea of inter-legality might have to overcome some serious challenges. Some of these are empirical in nature: is it really the case that courts generally are in the business of applying inter-legality, and how can we tell? After all, as he rightfully observes, some judicial decisions open themselves up to various readings. Another point worthy of further exploration is the power question: taken by itself, inter-legality does little to question existing power structures and power asymmetries.

Both points are well taken. Inter-legality was inspired by empirical observation: the observation that sometimes courts take decisions involving law originating elsewhere that cannot immediately be explained in terms of classic doctrines about the relationships between legal orders, such as dualism and monism. But it is fair to say that the empirical materials excavated thus far have remained limited, although this is hardly a life-and-death challenge. Spotting only a few plants of a new variety, after all, need not prevent botanists and biologists from trying to understand them. There is no need to await a critical mass of empirical materials or first develop a waterproof method of interpretation – if so, scholarship would have come to a halt a long time ago.

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1 J Klabbers, G Palombella (eds), The Challenge of Inter-legality (CUP 2019).
Likewise, the power question is vital but not fatal. Whether inter-legality ought to be adopted as a prism for the study of law (or as a part of the study of law, more likely) need not depend on its political philosophy, on whether it leaves power asymmetries unchallenged or not. Mostly this is because it is not a very suitable tool for the study of power differences, and was not designed to do that kind of work – it should thus not be evaluated according to that yardstick. This is not the same as suggesting it intentionally obscures the uses of power, because it does not – at least not in responsible hands. This is mostly a reminder that any set of propositions in politics and law can be used responsibly and not so responsibly, can be used for good purposes and less commendable purposes. Much here is in the hands of the user and the eye of the beholder, and the best one can hope for when trying to find an explanation for phenomena not satisfactorily explained otherwise is that a new perspective helps in elucidating what needs to be elucidated and preferably without obscuring too much otherwise. The study of power is home to many variations; inter-legality has the potential of at least making visible how law sometimes crosses borders between legal systems, and therewith allows for the formulation of alternative hypotheses about the power relations involved.⁴

The most immediate problem Walker poses, however, charitably presented as something of an empirical challenge (what to do when a local court closes its legal order off from interference from other legal orders?), is the question of democracy. The question does not only come up in terms of respecting local democracy – indeed, Walker’s example of the Polish courts obstructing the impact of EU law in Poland may not owe all that much to democracy concerns. But extrapolated, the problem takes on its most principled dimension in this form: why should a state that considers itself a democracy set aside domestic law with impeccable democratic credentials when confronted with law coming from elsewhere, whether the external law is itself democratically credentialled or

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¹ Seminal is S Lukes, Power: A Radical View (MacMillan 1974).
² Put differently, and purely by way of fairly random example, it might help make visible that legal orders can exercise power in ways other than by administrative regulation or the exercise of extraterritorial jurisdiction. See, eg, A Bradford, The Brussels Effect (OUP 2020); N Krisch, ‘Jurisdiction Unbound: (Extra)territorial Jurisdiction as Global Governance’ (2022) 33 Eur J Intl L 481-514.
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not. This is a serious challenge, which requires a serious answer. I will aim to provide the beginnings of such answer in what follows.

My argument, in brief, shall be roughly as follows. Democracy is, in principle, a great good: a way of preparing and arriving at political decisions which is, as yet, unparalleled, and this is so mostly because it taps into fundamental ideas about political representation, such as the classic quod omnes tangit principle: those who are affected should have some say in the decisions affecting them. This, however, presupposes an ideal-type model of democracy, the sort of model developed by political thinkers starting from first principles and further developed without much intervention by exogenous factors. It is not, however, a model that is often encountered in the real world, and even where it is, some of its practitioners and beneficiaries may be tempted to try and do away with it: those who have been democratically elected may be tempted to stay in power. It is also, moreover, a model that is quite demanding, asking those who are the subjects of democratic decision-making to be reasonably serious, reasonably diligent, and reasonably well-informed. Such a serious democracy needs to be cherished, all the more so because it proves rather rare. But in many cases, what is ostensibly and nominally a democratic political (and legal) order falls, on closer scrutiny, short of the ideal-type – in such cases, there is little point, it seems, in fetishizing the ideal-type; and even less so if this be done at the expense of doing justice in individual cases.

2. On legal interwovenness

Over the centuries, lawyers have devised all kinds of mechanisms to discuss the inter-relationships between legal orders. After all, it must have become rapidly clear, and especially since the mid-nineteenth century, that legal orders cannot exist in a vacuum. They are never purely self-sufficient, and should not be expected to be self-sufficient. Trade and commerce are of all times, as is the movement of people (call it migration), and this has its own reasons. Grotius, for one, intimated that if God would not have wanted international trade, He (of course …) would have made sure that the same herbs and spices would grow everywhere. The fact that the earth is home to different varieties of species growing and
living in different places, suggests a different master plan. And the ancient Greeks and Romans were well-acquainted with people moving about, often enslaving foreign migrants and conquered populations, with the Romans developing a distinct set of rules, *jus gentium*, to handle the situation of foreign merchants.

More concretely, in order to address private relations with trans-boundary elements, whether of a commercial or some other nature, private international law developed – sometimes also referred to as conflict of laws. This sounds more ‘international’ than it usually is: typically, the application of private international law is done by domestic courts deciding on the basis of domestic rules whether to apply the law of a different legal order or not. Some of this has been harmonized and unified in important treaties on topics ranging from child abduction to the sale of goods and enforcement of domestic judgments, but the adjective ‘international’ here tends to refer not so much to the origin of the rule to be applied, but rather to the perceived facts of the underlying case. And it should perhaps be noted, if only in passing, that debates about the democratic credentials of rules of private international law are few and far between. Whether it concerns the international sale of goods or a matter of international family relations, rarely are arguments raised about whether the state whose law is eventually to be applied may legitimately be considered a democracy or not.

In contrast to private international law, public international law was long merely thought to apply on the inter-state level, handling relations between states alone, eg, by outlining the situations in which they could resort to warfare, or how their embassies, diplomats and prisoners of war should be treated. Not surprisingly then, systematic thinking on the relations between international law and domestic law only started towards the end of the nineteenth century and was hugely informed by the inter-state nature of the law. The leading figure was the German scholar Heinrich Tripel, who formulated what became known as ‘dualism’. Since international law only addressed the relations between states, and domestic law only addressed relations between individuals and groups of individuals or, at best, between states and their citizens, it stood to reason, he suggested, that these legal orders simply would never touch upon each

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6 H Tripel, *Völkerrecht und Landesrecht* (Hirschfeld 1899).
other. He added a caveat in a set of lectures a quarter of a century later, after the League of Nations had started to sponsor conventions for the protection of national minorities following the redrawing of European borders after World War I, but nonetheless to his mind things were clear: since domestic law and international law occupy largely different spheres and regulate the activities of different actors, it follows that as a matter of sociological observation, these legal orders are to be seen as separate. On the rare occasions that they might touch on one another, or when such contact would be desirable, this would demand transformation of acts valid in one system to acts valid in the other. Concretely: for a treaty to be given effect in a domestic legal order, it needed to be transformed into the sort of legal act valid in that domestic legal order. Domestic legal orders are impermeable, and can only accept rules on their own terms: a kind of autopoiesis avant la lettre.

Things were probably never that crystal-clear, and early in the twentieth century another German-speaking lawyer formulated a powerful response. Hans Kelsen took issue with Triepel’s observation. He had no doubt also realized that international law was increasingly drifting away from the purely inter-state regulation of affairs; after all, the various labour conventions and recommendations emanating from the newly-born International Labour Organization quite obviously were somehow envisaged to improve the lot of workers rather than states, and the work of the International Telegraphic Union was meant to protect the interests of telegraphy operators and cable owners, not all of them obviously states. Accordingly, Kelsen posited that instead, all law is related. Law is, essentially, a single order, capped by international law – after all, so he assumed, states can only exist and do their business by virtue of international law. Kelsen’s monism then suggested that international law (he said little about foreign law) could directly enter the domestic legal order,

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7 H Triepel, ‘Les rapports entre le droit interne et le droit international’ (1923) 1 Recueil des Cours de l’Académie de Droit International 75-121.
8 Kelsen’s position pervades much of his work, but is conveniently re-stated in his Principles of International Law (Rinehart & Co 1952).
without need for transformation: under Kelsen’s ‘monism’, as his theory became known, international law could be ‘directly effective’ or, in an evocative phrase, ‘self-executing’.

State practice produced, over the years, something of a double-edged compromise. Domestic legal authorities could decide whether the state be dualist or monist – in this sense, states kept firm control, only opening up their domestic legal orders if they were so inclined. And if they would be further inclined, they could intend to give direct effect to treaty provisions, as the Permanent Court of International Justice held in 1929, in a case involving the fate of a German-Polish agreement concerning the rights of some civil servants (known as the Beamtenabkommen) in the Polish legal order.\(^\text{11}\) The Beamtenabkommen acquired possibly direct effect, but only to the extent this aligned with the intentions of its drafters – and those intentions could be found through interpretation of the text of the agreement. In plain English: if the text of a treaty provision is such that it can be directly applied by a domestic judge, then this must have been an intended result, and thus in states with a monist system such a provision could be invoked before and applied by domestic courts without having to be transformed. None of this was normatively innocent: it has been observed that monism tends to be a far more effective way of implementing international law than is dualism, and therewith the approach is much favoured by self-styled cosmopolitans.\(^\text{12}\) Dualism, by contrast, helps protect the local legal order against intervention from afar.

Monism and dualism could develop (and needed to be developed) because there was no principled solution to the question of hierarchy. Kelsen may have held that international law would always trump domestic law because, well, states owe their existence to international law, but this could at best only be part of the story, and may have stemmed from his social-democratic cosmopolitan outlook as much as anything else.\(^\text{13}\) After all, the opposite is also quite plausible: international law owes its existence to states, and one might thus just as well argue that domestic law – the law of the state – should be considered superior to international

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\(^\text{11}\) See *Jurisdiction of the Courts of Danzig* (Advisory Opinion) [1928] PCIJ Ser B no 15.


law. The problem is one of the chicken-and-egg variety, and no principled answer has ever been developed.\textsuperscript{14} International law, in the form of the Vienna Convention on the Law of Treaties,\textsuperscript{15} may claim that domestic law is no excuse for breaching a treaty, but this only applies to treaties, and is powerless in the face of a domestic law saying that treaties are never an excuse for breaching domestic provisions. Precisely because this proved to be intractable did notions of monism and dualism come up, as well as more granular conflict management mechanisms: \textit{lex posterior derogat legi priori}, or \textit{lex specialis derogat legi generali}, that sort of thing.\textsuperscript{16}

The establishment of the various European Communities in the 1950s clearly illustrated the scope of the issue, and in order to protect the integration project the Court of Justice of the (then) EEC had little choice but to twist the existing system: while with international law generally it may be the case that its domestic effect depends on domestic law (the gatekeeping function of the constitutional choice between monism and dualism), this cannot be the case with EU law. In order to protect the uniform application of EU law in its member states, it has to be EU law that decides on the effect of EU law in domestic law, rather than domestic law.\textsuperscript{17} And from the EU perspective this made perfect sense: if EU rules were applied differently in Holland and Italy, in Belgium and France, the common market would never come off the ground. And this could only be done by somehow elevating EU law, positioning it as a ‘new legal order of international law’ or, later, simply a ‘new legal order’. This then created the further question how EU law would receive international law,\textsuperscript{18} and here the Court unashamedly adopted something of a dualist position – the supposed Völkerrechtsfreundlichkeit of EU law, its much-

\textsuperscript{14} For in-depth theoretical reflection, see V Heiskanen, \textit{International Legal Topics} (Finnish Lawyers’ Publishing Company 1992).

\textsuperscript{15} Art 27 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980); this is closely related to the basic principle that \textit{pacta sunt servanda}.

\textsuperscript{16} See for general discussion J Klabbers, \textit{Treaty Conflict and the European Union} (CUP 2008).

\textsuperscript{17} See \textit{Van Gend & Loos v Netherlands Internal Revenue Administration}, ECLI:EU:C:1963:1.

\textsuperscript{18} And the even further question of how international law, mediated by EU law, enters the legal order of the EU’s member states. This has rarely been studied, but see N Lavranos, \textit{Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States} (Europa Law Publishing 2004).
heralded open disposition towards international law, only applies to a particular kind of international law – the kind that radiates EU law outward. Other manifestations of international law meet with considerable reluctance on the part of the Court.\footnote{And this is relevant due to the absence of any instruction by the constitutional authorities of the EU, ie the member states. Nothing in the TEU and TFEU sees to the reception of international law into the EU legal order. See further J Klabbers, ‘The Reception of International Law in the EU Legal Order: In Defence of the Realm’ in R Schütze, T Tridimas (eds), Oxford Principles of European Union Law, Volume I: The European Union Legal Order (OUP 2018) 1208-1233.}

Perhaps because of its unique position, wedged in between domestic law and international law, the EU – and in particular its Court of Justice – may well have been the first to be confronted with situations where a straightforward application of monism or dualism was no longer considered very satisfactory. One example is the well-known Kadi case, with the Court confronted with EU-ordained sanctions originating from the UN Security Council (binding on all EU member states though not the EU itself, and claiming supremacy over conflicting obligations arising under other treaties by virtue of Article 103 UN Charter), but also with domestic human rights sensitivities, and a full-blown EU human rights catalogue.\footnote{Joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat v Council and Commission, ECLI:EU:C:2008:461.} Simply upholding the sanctions would have been faithful to the UN and the demands of peace and security, but those sanctions themselves were forcefully challenged as negating Mr Kadi’s human rights. Yet, upholding Mr Kadi’s human rights in the face of the Security Council sanctions saddled the EU member states with a treaty conflict. In the end, the Court decided that this was the lesser of two evils, but it could just have easily favoured the alternative solution. Kadi cannot be seen as either a dualist or monist decision. Instead, it is best seen as doing justice to the individual concerned in a case involving the interplay between different legal orders, or inter-legality. The hallmark of such an approach then is not to suggest that courts can pick and choose and utilize some Prinzip der politischen Entscheidung,\footnote{The term was likely coined by future CJEU judge Manfred Zuleeg, ‘Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten’ (1977) 20 German YB Intl L 246-276.} but rather that in such settings the law suggests that justice be done in the individual case or rather, that injustice should not be judicially approved.
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Kadi is possibly the most well-known example, but in particular the EU’s Court of Justice in its case-law on external relations has priors, with the Court often siding with injured individuals against official authority, blissfully disregarding mechanistic notions of dualism or monism. In IATA and ELFAA, instead of choosing between an international convention on air passenger rights on the one hand and implementing Union legislation on the other, it opted for testing the validity of the latter against the former and therewith uphold a stronger form of consumer protection. By contrast, in Intertanko it held it would not test the validity of implementing legislation against an international convention to protect the environment, therewith effectively upholding the stricter EU regime, to the benefit of environmental protection – inspired by a different kind of justice perhaps. And in Opel Austria, the Court of First Instance, as it then was, almost shamelessly re-interpreted the ‘interim obligation’ in the law of treaties so as to do justice to the plight of an Austrian car parts manufacturer confronted with EU Council-ordained tariffs a few weeks before such tariffs would have been prohibited. There are obviously cases susceptible to other conclusions, but however limited still, it seems undisputable at a bare minimum that the EU Court has long ago realized that monism and dualism are not always suitable devices anymore. Even in respect of the much-maligned Racke case (in which the Court misconstrued the idea that treaties can be suspended or terminated upon a fundamental change of circumstances), it may nonetheless be argued that the Court chose to uphold its idea of justice in that case over the rights of a wine merchant. Justice, it may have thought, in the circumstances of that case demanded a show of solidarity with the victims of the Yugoslav conflict, rather than upholding the commercial interests of a German wine importer.

3. The face of democracy

As the above suggests, there may be settings where courts are called upon to apply law emanating from different legal orders: foreign law, EU

22 C-344/04, IATA and ELFAA v Department of Transport, ECLI:EU:C:2006:10.
23 C-308/06, Intertanko v Secretary of State for Transport, ECLI:EU:C:2008:312.
law, international law perhaps. Even more so, the above suggests that inter-legality may demand such application in order to do justice in the individual case or prevent an injustice from taking place. This then may pit justice against democracy, in the perhaps somewhat unorthodox form of individual justice or the prevention of injustice against democracy. Most theories of justice are suggestive of some collective kind of justice, suggestive of just outcomes for society at large. In such a setting, the justice versus democracy debate will not be too spectacular: as long as democracy is regarded as predominantly a decision-making procedure, it will rarely be in a position to trump justice. Put starkly, if in some strange land a democratic decision will be taken to install the death penalty for petty crimes but solely for migrants or the red-haired, such decision will be clearly unjust, and will not require much further discussion. Variations on this are well-known under the heading of the ‘counter-majoritarian problem’, where minorities (of any kind) need protection against the tyranny of the majority.

But individual justice does not pit entire societies against democracy, but only individuals or identifiable groups. Here it is less obvious that justice trumps democracy and, in fact, seems far more obvious that it should be the other way around: decisions backed by the majority, one might suggest, should in principle trump the good of a single person, lest protecting a single person could be obstructing the wishes of the majority. It is this proposition that will be further interrogated: should democracy trump individual justice, and if so, does this always apply? The answer will roughly be in the affirmative, but on condition that democracy is itself plausible, and not just the ritual invocation of a political fetish.

For starters, some undergrowth must be slashed away. It is obvious that democracy is not plausible just by calling itself democracy – something more is needed than a self-proclaimed label. Thus, one should not worry too much about the laws of North Korea: this may be a self-styled ‘people’s democracy’, but friend and foe alike agree that it owes very little to any regular conception of democracy. And much the same would have applied to Stalin’s version, suitable perhaps for the odd misguided fellow


traveler and the odd French philosopher, but not otherwise offering a very credible version of governance based on popular consent or control.

It may also readily be conceded that democracies can get it wrong, either because of their design, or because voters have little sense of the consequences of their actions. The first applies to a state such as the USA, where President Trump was elected with less of the popular vote than his competitor. In particular in ‘first past the post’ systems, it is by no means impossible that democracy ends up a little skewed, with those winning the most votes not receiving the prize – and to think of democracy as a competition, an Olympic sport with a prize at the end, is already questionable, yet highly popular. One of the more disturbing political type of footage, after all, is the victory party after elections, with political parties organizing loud celebrations.

In addition to ‘first past the post’ systems, all other sorts of manipulative devices are in use, even in nominally well-developed democracies. A popular pastime is gerrymandering, redrawing the boundaries of electoral districts so as to guarantee or enhance the chances of particular results. Also not uncommon are attempts to restrict the right to vote, either by limiting methods (no votes per mail; voting only on prior registration) or by limiting the franchise (by excluding prisoners, or former prisoners, or nationals living abroad). And rules on campaign financing may hugely distort election outcomes, as it suggests that the more money can be thrown at advertising, the greater the chances of success. And this is hugely disturbing, as it entails the assumption that voters may be gullible, easily persuaded by slick advertising.

There is also something unprincipled and unjustified about excluding permanent residents from the right to vote, limited as voting usually is to nationals. And there are likewise unprincipled mechanisms at play in not letting all those affected also in on the vote. If this makes some administrative sense with regular elections (even though US elections clearly affect many more than just US residents), it is unconscionable when it comes to independence referenda: surely, Scottish independence affects not only Scots, but the entire United Kingdom – and thus, equally surely, a democratic decision would have to involve the entire UK population. By the same token, the folly known as Brexit affected not only the UK population, but also the population of the 27 other member states of the EU, a community of fate by any definition. By way of thought experiment, had there been, in 2016, a referendum in the 27 EU member states...
(excluding the UK) on expelling the UK, such referendum would have met with howls of disapproval, with the UK claiming its position was affected without it having a say – and the UK would have a point. And currently, holding a referendum in 26 EU states with a view to possibly expelling Orban’s Hungary would be considered unacceptable by Orban – and for once, one might agree with him. But why should the reverse be allowed?

The broader point to emerge is twofold perhaps. First, it is that there is no single concept of democracy in circulation, which raises at least the possibility that some versions are more deserving of respect than others. Second, and possibly more disturbing, is that the practices of politicians aiming to win elections suggest not an overdose of respect for the process, but rather an ill-disguised lust for power. Democracy’s politicians seem not too keen on preserving democracy, or on actually making sure that the people get heard and have a say – at best, they are keen on making sure that the right people (those with the same sympathies) get heard and have a say.

4. Democracy’s assumptions

There is something further at stake, or two things perhaps. The first of these is what we actually conceive by democracy; the second speaks to the demands on those affected. To start with the former, there is a curious idea in circulation, popular amongst politicians and especially those of populist ilk, that democracy means that governments are elected so as to give effect to the desires of the majority; and if things go wrong, the government can be ousted at the next elections.

This probably was never an accurate rendition, not even in the early days of democracy. And regardless of workability, in the early twenty-

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29 In addition, it is arguable that limiting democracy to political processes is rather impoverished; why exclude the workplace, educational institutions, et cetera? For such an argument, see C Gould, Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society (CUP 1988).
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first century such a conception can only be considered unjust. The idea of democracy as ordering government to do things can only work (if at all) on single-issue matters, which may help explain the misguided appeal for referenda. The problem is that the world is a complex place, where voters and politicians alike have to weigh their preferences and reach compromises, both with other participants and in light of limited resources. In the summer of 2023, various big issues vie for prominence. With Russia’s attack on Ukraine ongoing (and Russia seemingly destabilizing), security is a big concern. Energy prices have gone through the roof, combined with ordinary inflation and, probably, ‘greedflation’. Some consider migration to be a challenge to whatever is left of the welfare state; others view it as the only way to keep whatever is left of the welfare state afloat. Pandemics have emerged, demanding some vigilance; climate change is a huge issue, and in its wake such things as energy transition and the question of whether nuclear energy is acceptable. In a country such as the Netherlands, political debate is further dominated by nitrogen, forcing reluctant agro-businesses to restructure, and another dominant theme is coming to terms with Holland’s colonial past. Other states have other issues, usually several at once, dominating political discourse. In such a context, the voter has no choice but to accept what package of positions political parties and their leaders have on offer, but the drawback is that hard and firm conclusions about electoral mandates can hardly be drawn. I might eventually vote conservative for taxation reasons, while forcefully disagreeing with the ‘conservative’ stance on climate change and migration; or I might vote ‘progressive’ for reasons related to education policy, while disagreeing with the progressive position on national security, taxation, health, and EU membership. Or I might vote for a populist party not because of their program and proposed policies (often remarkably opaque at any rate), but because this party gives a voice to my general dissatisfaction with the political process. In short, the democratic process as it is organized in most places (one voter, one vote – usually every four years or so) can at best show a very loose correspondence between voter preferences on any number of topics and actual

50 Far more plausible is to conceive of democracy as giving the electorate the possibility to hold government to account. For such a conceptualization, see P Pettit, Republicanism: A Theory of Freedom and Government (OUP 1997).
votes received. And this, in turn, renders democratic mandates rather limited by definition.

Tocqueville already realized that democracy is at its most impressive when it is ‘bottom up’: when citizens band together and express what it is they would consider best for them, as a group.\(^3\) Ironically, organized democracy tends to suppress this by rapidly becoming a ‘top-down’ affair. The ‘bottom up’ democracy tends to flare up in the face of autocracy, when democracy still needs to be fought for. The typical pattern throughout the history of democracy is that democracy emerges, parliaments are set up, fighting for their powers, but once established, the electorate rapidly loses interest. Political elites are aware of this, and while reluctant to give up their own preferential positions, often devise such things as ‘citizens’ initiatives’ or ‘advisory referenda’ as plasters, and civil society organizations may often be heavily subsidized precisely because they represent the possibility of democracy, but at the end of the day little of this tends to have much real-world effect.

Democracy is difficult to organize well, as the above suggests. But even if well-organized, it stands or falls with the seriousness with which the electorate approaches it. And here, in many established Western democracies, there is little reason to be overly confident – and indeed, political elites are not all that confident. One of the more salient concerns of the last decade or so has been the exercise of foreign influence, in particular via social media. And fair enough, this is a serious issue, but underlying it is a sense that the voter can easily be manipulated: spread some lies on Facebook and the gullible voter will be swayed. Claiming that foreign intervention of this kind is a problem is in effect admitting defeat. It strongly suggests that the voter is not to be trusted: she is not mature enough, serious enough, well-informed enough, to resist the easy temptation of giving in to the ‘fake news’ addressed at her on-line. The widespread popularity of wild conspiracy theories involving lizards and pedophile rings and political enemies (how convenient!) testifies to much the same issue: if politicians spouting this sort of nonsense can nonetheless be elected, and even be rather popular, then democracy has lost its soul.

\(^3\) A de Tocqueville, *Democracy in America* (first published in 1835); the point was taken up with considerable sympathy in H Arendt, *On Revolution* (Penguin 1963).

\(^3\) AR Myers, *Parliaments and Estates in Europe to 1789* (Thames and Hudson 1975).
The version of democracy we usually eulogize is a version where the voters are well-informed and do not vote ‘with their feet’. They take responsibility, in Arendtian terms, for our common world, and will thus have opinions that reach beyond their immediate selfish interests, and are willing to express these in their voting as well. Arendt has often been chided for being somewhat Weltfremd in trying to separate political responsibility from immediate interests and socio-economic status, but perhaps she saw quicker than many that democracy would require a sense of responsibility for the world at large. Curiously, this often arouses suspicion: the rich industrialist with left-wing sympathies is often considered a hypocrite, while the political left has suggested that the working classes voting for right-wing parties suffer from ‘false consciousness’.

That democracy can be demanding has been suggested by experiments with so-called ‘participatory budgeting’. These experiments have involved giving local citizens decision-making powers over (part of) the municipal budget, meaning that they would have to make up their minds as to what to prioritize: a new road perhaps so as to stimulate commerce, or maybe a new school, or an extension of the local hospital. Limited as this is to spending money, it suggests (as a general pattern) that citizens became more involved in politics than before. Not all political decisions are immediately linked to spending money (although quite a few tend to be), but nonetheless, it would seem that where choices need to be made (unlike with referenda), citizens can muster the required level of seriousness.

5. International standards

For all the criticism which may be hurled at contemporary democratic practices, there is often a counter-argument available: most manifestations of international and transnational law have themselves

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33 This theme recurs throughout Arendt’s writings, so much so that a single source is difficult to pinpoint. A good starting point though might be H Arendt, The Human Condition (U of Chicago Press 1958).

34 See, eg, I de Haan, Zelfbestuur en staatsbeheer: het politieke debat over burgerschap en rechtsstaat in de twintigste eeuw (Amsterdam UP 1993).
questionable democratic credentials. And in addition, quite a few states are not democracies on any serious or even not so serious conception, so as a practical matter, a domestic law-applier (a court, an agency, a civil servant) in a democracy can often enough claim that ‘her’ rule is ‘better’ than most other rules that could possibly be applied. If these emanate from other states, they are often non-democratic, and if they emanate from sources beyond a single state, they are often non-democratic as well.

It has been observed that the internationalization of law-making has entailed a leaking away of (potential) democratic control, with international legislative processes usually entailing a bare minimum of democratic scrutiny (if that), and often involving states that can hardly be considered democracies – or not at all. International law making is, in practice, often left to international bureaucracies and gatherings of diplomats well-trained in escaping scrutiny, and through instruments specifically designed to evade scrutiny: memoranda of understanding, soft law, forms of epistemic authority (guides, manuals, handbooks, rankings, indicators). In short, so the argument could run, even though democracy within states leaves much to be desired, international and transnational law are not models of democracy either.

This is, to be sure, a fair point to make. With the possible and partial exception of EU law, most international standards can at best boast a poor democratic pedigree. But two responses are in order. First, the democratic deficit associated with globalized standard-setting can only exist with the connivance of domestic democratic authority. Typically, democratic states (never mind about autocracies) have the tools to control foreign policy, but do not use them very well, or render them subservient to party-political interests. Alert local politicians, in conjunction with alert local populations, could make sure that government does not enter into ostensible non-legal but binding memoranda of understanding, and can build up firewalls against the effect of such instruments as soft law. States can tighten the leash on international organizations and other entities involved in international standard-setting, and democratic politicians could take the lead.

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here. But they do not, therewith forfeiting at least part of the argument that international or transnational standards would be 'undemocratic'. Likewise, states could limit their contacts with autocracies, although doing so may come at a price. Autocracies often sit on reserves of useful natural resources (oil, natural gas, minerals), and also otherwise provide products and services wanted on democracy’s markets: from maids and nannies to cheap textiles and psychotropic substances. Autocracies may be useful customers for products produced in nominal democracies: think of the arms trade, in which the US, UK and France are just as active participants as any number of non-democracies. To the extent that democracies support non-democracies, they cannot claim automatic moral superiority.36

Second, even if it is accurate enough to claim that transnational standards are as problematic in light of democratic pedigree as are many domestic standards, that is not an argument for automatically preferring the local. If anything, it is an argument for emphasizing the injunction to do justice in the individual case: if a domestic rule scores low on the scale of democracy, and an international rule scores just as low, then all the decision-maker can do is to try and do justice to the individual concerned.

The point to emerge with respect to the tension between democracy and the attempt to do individual justice so typical of inter-legality, is that much of this tension dissipates in light of contemporary democracy practices. At the very least, if the choice is between upholding an individual’s right to be free from degrading treatment, and a state’s claim that a democratically legitimated piece of legislation concerning migration (for example), passed by a narrow majority in a state where voter turn out is low and notoriously fickle, warrants automatic expulsion, it cannot be stated with much conviction that the individual should be expelled because that is what the local law says.

6. By way of conclusion

Political communication can be wonderfully effective – and wonderfully revealing. In March 2023 British prime minister Rishi Sunak gave a

36 There is a faint realization of this in J Rawls, The Law of Peoples (Harvard UP 1999).
talk standing behind a lectern carrying the slogan ‘stop the boats’, and this was not an isolated incident: it transpires that the whole of his policy program can be summed up in this pity phrase: ‘stop the boats’. It says a lot about modern democracy that such an unfriendly slogan of limited scope and unlimited simplicity can become the center piece of a policy program in a world plagued by climate change, wars in Africa, Europe and elsewhere, institutional racism, where global inequality of wealth is skyrocketing, and where a billionaire of dubious judgment has bought exclusive control over one significant part of social media – and the other significant parts are held by billionaires of similar dubious judgment.

But if this was bad enough, a slogan featuring in Finland’s national elections was even more revealing. The Finnish Keskusta party (Centre Party), traditionally disproportionately powerful thanks to its powerbase in the sparsely populated Finnish countryside, campaigned on media such as YouTube with a simple shot of a middle-aged blond woman standing in the Finnish countryside with the slogan ‘Keskusta: se kotimainen’. The slogan is well-nigh impossible to translate in a single word or two, and carries a huge dose of associations. ‘Kotimaa’ means ‘homeland’; ‘kotimainen’ is therefore something like ‘from the homeland’, evoking similar pastoral associations as the German word ‘Heimat’, appealing to a sentimental form of nationalism, tapping into sentiments that things were better in earlier days. The message, in all its brevity, was clear: a vote for Keskusta would be a vote for a return to better times, meaning effectively the times before globalization and immigration. Mind you, Finland does not actively want to get rid of cheap construction labour from Estonia, would like its dairy products to be sold to Russia again, is happy to welcome temporary berry-pickers from Thailand, and enthusiastically joined NATO – but it just would like foreigners, and perhaps especially those whose eyes are a different colour from blue, to go elsewhere. As so often, the slogan glorifying the local and the past is hopelessly myopic but, in ironical manner, the message really hit home. Keskusta did not do too well in the elections; it was outdone by the slightly less xenophobic conservatives (Kokoomus) and the hugely xenophobic Finns party: plenty of support for the sentiment underlying ‘se kotimainen’.

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In another ironic twist, the new government’s minister for economic affairs had to resign when after a few days his well-known Nazi sympathies became a little too
In the abstract, the warning that inter-legality runs the risk of undermining democracy is not without merit. Sadly though, the challenge exists mainly in the abstract: in the concrete world of democracy practices, the ideal kind of democracy is rarely reached, often perverted by party-political manoeuvres, gerrymandering, the impact of financial rules, and an electorate that often does not seem to take the demands of democracy very seriously. In such circumstances, doing justice (or preventing injustice) may often seem the wiser course.