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Bulwarks of Democracy: Domestic Courts and Informal International Instruments

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Abstract

Informal international instruments increasingly influence domestic court rulings by serving as authoritative materials to interpret uncertain legal norms. This poses a significant democratic problem because the instruments originate from undemocratic international institutions and bypass parliamentary oversight. This Article challenges the established doctrinal description of the interpretative relevance of legally non-binding instruments by reimagining it through Niklas Luhmann's systems theoretic description of law as communication. The approach reveals a decision-making mechanism that enables democratically suspect political influence to be exercised through the legal system. To address this systemic vulnerability, the Article argues that domestic courts can act as bulwarks of democracy when interpreting legal norms with applicable informal instruments. Drawing upon novel insights from Jürgen Habermas's discursive theory of law and democracy and Martti Koskenniemi's culture of formalism, the Article argues that a democratic legal culture—emerging from a democratic mindset held by judges who visualize themselves in the place of others—can help mitigate the democratic deficit of informal international instruments by bringing them into contact with discursive democratic requirements. Noting that courts are themselves capable of democratically questionable action, the Article finds that the democratic legal culture can also make legal systems more resilient to democratic backsliding.

Keywords: Informal international instruments; legal interpretation; legal system; democratic legitimacy; legal culture

A. Introduction

International governance is increasingly characterized by the use of legally non-binding instruments which operate alongside and address the same substantive questions as traditional international law.¹ The political and legal effects of these *prima facie* political commitments have become so significant that constitutional and democratic discourses cannot ignore them without losing touch with the functions of modern international politics and law.²

A consequence of the growing use of informal international instruments is that domestic courts are increasingly faced with the possibility of interpreting domestic legal rules in line with legally

¹See Matthias Goldmann, *We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law*, 25 LEIDEN J. INT'L L. 335, 335–37 (2012). See generally Mark A. Pollack & Gregory C. Shaffer, *The Interaction of Formal and Informal International Lawmaking*, in *INFORMAL INTERNATIONAL LAWMAKING* 241 (Joost Pauwelyn, Ramses A. Wessel & Jan Wouters eds., 2012); Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733 (2014).

²See Duncan B. Hollis & Joshua J. Newcomer, *“Political” Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 539–48 (2009) (discussing in the context of the United States).

non-binding but authoritative international instruments. On the one hand, this emerges from the common proviso that domestic law should be interpreted in line with the international obligations of the state. These obligations are more or less ambiguous, and to come up with reasoned interpretations, courts may draw from varying sources they view as authoritative, including informal international instruments. On the other hand, some legal norms such as legal principles are shared globally. This links domestic legal discourses with global exchange of ideas, and courts may thus be influenced by informal international instruments when interpreting norms with global implications or international institutional connections. Because of such interpretive effects, informal international instruments can affect peoples' lives more directly than ever before. Open norms of domestic tort law, for example, may be interpreted in the context of changing global circumstances and policy objectives as reflected by informal international instruments, giving the instruments the power to determine the contents of domestic law.³

These effects are of particular concern to states and people whom are politically disadvantaged in international institutions.⁴ A significant democratic problem emerges from the fact that the instruments are produced by circumventing democratic requirements. The instruments are produced through undemocratic processes that are dominated by state executives and international experts to the disadvantage of civil society actors and democratic representatives. Because the instruments are not legally binding treaties, they are not generally subjected to parliamentary scrutiny which has traditionally worked as a constitutional check for international law. As a consequence, power is shifted towards the executive and international institutions away from the legislature.⁵

In view of the increasing influence of informal international instruments and the democratic deficit, this Article has two objectives. First, in Section B, the Article challenges the established doctrinal description of the interpretative relevance of legally non-binding instruments by reimagining it through Niklas Luhmann's systems theory which analyzes law as legal communication. The aim is to produce a nuanced sociological description of how the legal relevance of legally non-binding materials emerges instead of treating the relevance as a given. The Article finds that systems theory reveals a systemic vulnerability that enables democratically suspect political influence to be exercised through the legal system. Section C explores how to address this problem. Section C maintains focus on legal decision-making but expands the analysis from impersonal social systems to human minds and interactions between human individuals. This move enables a discussion of democratic legitimacy that systems theory cannot engage in.⁶ To offer a novel solution, Section C draws upon Jürgen Habermas's discursive theory of law and democracy and Martti Koskeniemi's concept of the culture of formalism to argue that courts can act as *bulwarks of democracy* by having judges exercise a democratic mindset when faced with the task of constructing legal norms with applicable informal instruments. It is argued that the legal culture emerging from a democratic mindset held by judges can help mitigate the democratic deficit of informal international instruments by bringing them into contact with discursive democratic requirements.⁷ It is also found that courts should not be naively idealized as bulwarks of democracy as they are also capable of democratically suspect action. In this regard, the democratic legal culture can make legal systems more resilient to autocratization and democratic

³See *infra* note 42 and discussion thereto.

⁴See generally B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004).

⁵Charles Lipson, *Why are Some International Agreements Informal?*, 45 INT'L ORG. 495, 517 (1991). See also Hollis & Newcomer, *supra* note 2, at 546; Oikeuskansleri [Chancellor of Justice], Valtioneuvoston menettely GCM-kompaktin kansallisessa käsittelyssä [Government Procedure in the National Consideration of the GCM Compact] Decision OKV/1940/1/2018 & OKV/1947/1/2018 (Dec. 10, 2018) (holding that informal international instruments do not require parliamentary approval).

⁶Goldmann, *supra* note 1, at 360.

⁷See *id.* at 364–65, 367–68 (noting the benefits of discourse approaches in this regard).

backsliding. Section D concludes with remarks on how to balance the need for effective governance of global issues and pursuance of public good on the one hand, and the need to support democratic institutions and address legitimacy concerns on the other.

Some conceptual remarks are in place to clarify the ensuing discussion. Throughout its course, the Article uses the concept of *legal system*. The concept is used specifically to refer to the domestic legal systems. This choice is based on the notion that legal systems are still distinctly operating under specific states despite the effects of globalization.⁸ The domestic legal system is analyzed as a system of specialized communication but is approached in two distinct ways. In Section B, the legal system is considered to consist of legal communication in line with Luhmann's systems theory. This means that individuals such as judges are not analyzed as part of the legal system in this part of the Article.⁹ Legal communication cannot exist without individuals, however. Thus, in Section C, the perspective is changed to that of individual judges, including how their actions and attitudes contribute to the structures and operations of the legal system. With the introduction of individuals, the concept of a *legal community* is also introduced to delineate who the relevant legal communicators are. The legal community can be understood either narrowly or broadly. In the narrow sense, the legal community refers to practitioners such as judges, lawyers, scholars, and other professionals. In the broad sense, the legal community refers to all individuals engaged in legal communication. As will be illustrated in Section C, the main argument of the Article—that courts can act as bulwarks of democracy—relies on the judges' ability to engage the will and opinions of the *broad* legal community for legitimation purposes. In the emergence of the democratic legal culture and prevention of democratic backsliding, however, the narrow legal community is essential as it determines what it is to be a legal professional.

B. The Legal Relevance of Informal International Instruments

This section utilizes Niklas Luhmann's systems theory to reimagine the established doctrinal description of the legal relevance of informal international instruments to provide a nuanced description of the social dynamics behind their legal effects.¹⁰ Systems theory deviates in many respects from the intuitive ways lawyers think about law. Thus, to facilitate understanding of the arguments made in this section, I first explain the basic features of systems theory before illustrating how the theory can be used to explain the emergence of the legal relevance of informal international instruments. At the end of the section, some illustrative examples are provided which suggest a mechanism through which external political influence can seep into domestic legal systems. To end the section, I argue that this is problematic from the perspective of democratic legitimacy requirements, which sets the stage for discussion on courts and democracy in Section C.

Before the systems theoretic explanation, however, we need a description of how legal doctrine usually processes legally non-binding materials. From a doctrinal point of view, the task of a legal decision-maker is to find or construe legal norms. Because legal rules are rarely unambiguous, the decision-maker must engage in interpretation for which it needs external evidence of law. The legal relevance of legally non-binding sources is thus understood as *evincing* the existence of law or *guiding* the decision-maker in the interpretation of law.¹¹ Such legal relevance of non-binding materials is treated as a given by doctrine. Courts use non-binding sources to interpret law, and because the task of doctrine is to interpret and systematize law—including decisions and

⁸Hugh Baxter, *Niklas Luhmann's Theory of Autopoietic Legal Systems*, 9 ANN. REV. L. & SOC. SCI. 167, 167–69 (2013).

⁹See *infra* note 15 and discussion thereto.

¹⁰See generally NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* (Klaus A. Ziegert trans., Fatima Kastner, Richard Nobles, David Schiff & Rosamund Ziegert eds., 2004) (providing an English translation of Luhmann's most important work on law).

¹¹See generally Machiko Kanetake, *Soft Law*, in INTERNATIONAL LAW IN DOMESTIC COURTS: A CASEBOOK 311, 311–12 (André Nollkaemper, August Reinisch, Ralph Janik & Florentina Simlinger eds., 2018).

interpretations by courts—it suffices to treat the legal relevance of non-binding instruments as a social fact from which to draw normative evidence.

The doctrinal description fails to examine the functional demands that bring about the legal relevance of non-binding sources. This results from doctrine's focus on norms rather than the social processes behind them. Doctrine also ignores questions of non-legal justification as it usually draws upon legal positivism. A decision applying a non-binding source may be criticized for unconvincing reasoning or for creating conflicts with other norms, but not for conflicting with requirements such as democracy which it considers extra-legal.¹² With a description of the social mechanisms through which the legal relevance of informal instruments emerges, systems theory offers a more nuanced foundation for the legitimacy discussion in Section C than could be provided with a doctrinal description.

We can now move on to discuss how systems theory helps us understand the legal relevance of informal international instruments. Systems theory's explanatory benefits emerge from its analysis of law as pure communication. When observed as communication, law appears as a social system with one function: to distinguish legal from illegal. Law is identified as the communications which apply the binary code legal and illegal.¹³ By its function and code the legal system is differentiated from other major social systems such as economy and politics which have their own functions and codes. The society emerges as a system consisting of functional subsystems with each operating in an environment consisting of other subsystems.¹⁴ In systems theory, society is not understood as organized interaction between individuals but as the totality of all communications.¹⁵ The legal system then consists of the totality of legal communications, not of judges and lawyers or their interactions around legal rules.

Systems theory argues that systems are *operationally closed* and *autopoietic*. The meanings of these concepts can be explained by illustrating how social systems are typically understood. The conventional understanding is that social systems are open with inputs and outputs. Open systems interact with each other through series of actions. For example, the political system produces legal statutes which are enforced by the administration. The judiciary interprets the law as an expression of the will of the legislator and applies it to particular cases. Talcott Parsons is a prominent figure of open systems thinking.¹⁶

Operational closure posits that systems cannot directly interact with each other in this way. Systems operate in their own terms, and these terms emerge from the binary codes of the systems. For example, a statute produced by the political system can only become meaningful in the legal system when communicated in legal terms. The legal system does not process legislation as an expression of the will of the legislator but as a communication about legality. The function of the legal system is not to implement political programs, “no matter how much legal decision may be guided by politically desirable consequences.”¹⁷ According to Luhmann, theories arguing to the contrary “founder on the internal culture, the mode of argument operating within the legal system” that is geared towards distinguishing legal from illegal.¹⁸ The concept of *autopoiesis* posits that the legal system maintains itself recursively through its own operations which go back to and anticipate other legal communications.¹⁹

¹²See *infra* note 71 and discussion thereto (discussing how, as far as doctrine coalesces with legal positivism, democratic requirements may be considered as intra-legal standards by critical positivist approaches).

¹³LUHMANN, *supra* note 10, at 93.

¹⁴See generally NIKLAS LUHMANN, *ECOLOGICAL COMMUNICATION* (John Bednarz, Jr., trans., 1989).

¹⁵LUHMANN, *supra* note 10, at 89.

¹⁶Talcott Parsons, *Law as an Intellectual Stepchild*, 47 SOCIO. INQUIRY 11, 24–25 (1977).

¹⁷LUHMANN, *supra* note 10, at 365.

¹⁸*Id.*

¹⁹*Id.* at 81.

The introduction of the idea of *autopoiesis* into systems theory created a problem for Luhmann, however. If social systems are closed, operate in their own terms, and cannot directly steer each other, how can it be explained that politics and law often seem to work towards shared objectives?

Systems theory argues that although social systems are operationally closed, they are also *cognitively open* to each other. This means that systems are aware and can respond to their environments. The responses can only happen through the operations of the system itself. For example, the legal system may react to changes in the political climate, but it can only do so with reference to questions of legality. Similarly, the political system may observe conflicts between different social systems and try to address them with collectively binding decisions. For an example, investments in fossil fuels may produce negative externalities to health and the political system may try to resolve the conflict between the economic and health systems by issuing a statute on reducing the burning of fossil fuels or subsidizing renewable energy sources.²⁰ To the legal system the statute is a communication about the potential illegality of certain conducts.

Such responses are possible because social systems are *structurally coupled* with each other. Statutes participate both in the political and the legal systems. In the political system, a statute is an expression of policies and power while in the legal system it is a directive *program* of what should be considered legal or illegal.²¹ In their basic form, these programs are understood as conditional in that they operate on an if-then basis.²² This is familiar to the way in which lawyers are trained to think: when conduct X has transpired, statute Y stipulates that it must be determined illegal.²³

A short excursion to a more conventional description is in place to put these theoretical considerations into context. Although Luhmann argues that systems have their own cognitions, the cognitive link between systems can be explained by noting how the legislator must take notice of the premises of judicial decision-making before enacting laws. Similarly, judges must try to recognize the intentions of the legislator and apply the law according to the guidance provided by legislation.²⁴ These ideas and the minds thinking of them are necessary for the existence of social systems, but they do not become part of the communications that are studied by systems theory. Whatever the individual thinks of when they trigger a communication may be completely irrelevant to the meaning that another individual attributes to the communication. I may bring up an agreement to remind someone of a due payment, but they may interpret the communication as a threat of legal action. Thus, the legal system itself is cognitively open because legal communications can also be given other, non-legal meanings. Legislation and contracts, for example, act as contact zones of the legal system to the political and economic systems respectively.²⁵ This is the essence of the argument that although the legal system is closed and *autopoietic* in its operations, it is also structurally coupled with other systems.

The basic concepts of systems theory—*autopoiesis*, operational closure, cognitive openness, and structural coupling—have now been outlined. We can then ask, are informal international instruments legal communications and thus part of the legal system? The answer is that they can be, as any assertion for or against the legality of something is a legal communication. An utterance that one must leave someone's property is a legal communication as it suggests that there is a legal construct known as a property and the right to prohibit intrusion which can be legally enforced.²⁶ Similarly, an informal international instrument is a legal communication if it makes a direct assertion about the legality of something. The instrument can also become legally relevant if it is used in a legal argument to make an assertion about legality with a legal decision in

²⁰See MICHAEL KING & CHRIS THORNHILL, NIKLAS LUHMANN'S THEORY OF POLITICS AND LAW 71 (2003).

²¹*Id.* at 45.

²²Hubert Rottluthner, *A Purified Sociology of Law: Niklas Luhmann on the Autonomy of the Legal System*, 23 L. & SOC'Y REV. 779, 784 (1989).

²³LUHMANN, *supra* note 10, at 111.

²⁴*Id.* at 277–78.

²⁵Baxter, *supra* note 8, at 176; LUHMANN, *supra* note 10, at 293.

²⁶Hugh Baxter, *System and Lifeworld in Habermas's Theory of Law*, 23 CARDOZO L. REV. 473, 603 (2002).

mind. Even explicitly non-binding agreements may be used in legal argumentation in this way and thus be operationalized in the legal system. However, it is also possible to report about legal matters in the media or simulate legal decision-making for educational purposes without them becoming internal operations of the legal system, as the communications do not aim at legal decisions.²⁷

As this implies, not all legal communications are alike. Legal communications are pointed towards the determination of legality in *legal decisions*. Legal decisions include statutes, court decisions, contracts, official registrations, and so on.²⁸ Only decisions can change the situation of law. Every other legal communication is a non-decision. Non-decisions cannot “move” the law, so to speak, but they can argue where the law should be moving, that is, what the legal decisions should be.

To determine questions of legality, something or someone must decide. That decision-maker is primarily the courts. This makes court decisions central to the legal system and to the legal relevance of informal international instruments. Accordingly, the rest of the section will focus on decision-making by courts. However, before we can embark on discussing courts in more detail, we need the final piece to the puzzle that illustrates the legal relevance of informal international instruments: the issue of legal validity.

As in doctrinal description, in systems theory non-binding sources are not considered to fulfil the validity requirement of law. In systems theory legal validity is not used to identify law, however. Instead, it is observed from the outside as a unifying symbol that the legal system uses to link legal communications to one another.²⁹ A successful legal communication bases its claim on the validity of other legal communications. For example, claiming that an informal international instrument creates legal rights and obligations would not be successful in courts. This notion can be confirmed by looking at courts, as they do not base their decisions on instruments that are considered legally non-binding.³⁰

But the legal relevance of informal international instruments does not depend on legal validity. As illustrated, a *prima facie* political communication may also be communicated or understood in legal terms. Changes in the political environment may make the legal system react and move into new areas. An issue that was not a legal matter yesterday may become juridified tomorrow. The *autopoiesis* of the legal system does not regulate what kind of legal structures may developed as result of the legal system’s structural coupling with other systems.³¹ In fact, external irritations and the evolving of society may create conditions where non-binding instruments can determine court decisions and thus gain validity in an indirect way.

The rest of the Section centers on illustrating this idea of legal relevance of informal international instruments as their indirect validation by courts. The discussion is structured around the triad of *obligation*, *freedom*, and *limitations* of judicial decision-making.³² Courts have the obligation to adjudicate cases that are brought to them. They generally cannot resort to non liquet to refuse judgment when they are unable to reasonably find the law.³³ This is known as the prohibition of the denial of justice.³⁴

Courts also have freedom to decide. If the courts did not have the creative freedom to construct norms through interpretation, they would not be able to fulfil their function of deciding cases when the law is not clear. Any gap in the written law would render decision-making impossible. This would overburden the political system with having to produce impossibly detailed and

²⁷Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 141–42 (1989).

²⁸Niklas Luhmann, *Legal Argumentation: An Analysis of Its Form*, 58 MOD. L. REV. 285–87 (1995).

²⁹LUHMANN, *supra* note 10, at 122.

³⁰*Id.* at 128–29.

³¹*Id.* at 81.

³²*Id.* at 279.

³³*Id.* at 281.

³⁴*Id.* at 284.

pervasive statutory law. This is why a conception of developing legal positivism requires not only understanding of the legislator but also the judiciary which fills gaps and clarifies ambiguities in law.³⁵

There are limitations to the creative freedom. Foremost, courts are constrained by the symbol of validity. There must be a valid legal communication on which to ground a decision. Courts cannot begin proceedings by themselves which limits what they can decide.³⁶ Courts are also limited by justice as an internal standard of the system in the sense that they must evaluate the consequences of their decisions.³⁷ At minimum, the internal standard of justice requires that like cases are treated alike.³⁸ But because there are no precedents in hard cases, courts must “create,” “postulate,” or “assume” applicable law which can be argued to necessarily lead to juridification of moral norms.³⁹ Also, some structures have emerged to relieve courts’ pressure of having to make decisions. Procedural rules such as rules of standing and jurisdiction, or the concept of *de minimis non curat lex* allow courts not to judge some matters.⁴⁰ Legal principles have arguably emerged to allow courts to adjudicate cases where the written law does not offer sufficient guidance.⁴¹

It is in the moments of instability when courts must decide, have the freedom to construct norms, must reflect on the consequences of their decisions, but are insufficiently guided by legislation that new legal structures can emerge. In other words, when the political system has not provided sufficient programs for the legal system to decide legal cases, a possibility for other sources of political power to seep into legal decisions emerges.

Some examples to concretize this idea. I first illustrate the cases in common terms and then reflect on them from a systems theoretic perspective. Consider the *Milieudefensie v. Royal Dutch Shell* ruling by the District Court of the Hague which gave significant weight to an informal international instrument in determining the substance of climate change obligations of the Royal Dutch Shell Company. This was achieved under the unwritten standard of due care in Book 6 Article 162 of the Dutch Civil Code which orders for repairing damage resulting from tortious acts.⁴² When the court had determined that the unwritten standard of due care applied to the case, the court had to construct substance for it. The court first determined that Article 2—on right to life—and Article 8—on right to respect for private and family life—of the European Convention on Human Rights offer protection against climate change effects and were within the coverage of the unwritten standard.⁴³ Because the articles themselves are open, and because the European Convention on Human Rights only obliges states, the court needed additional materials to determine what kind of concrete obligations the standard of due care could lay out on non-state actors such as private companies.

For this, the court utilized the UN Guiding Principles on Business and Human Rights which is an explicitly non-binding instrument aiming to enhance the promotion and respect of human rights in business operations.⁴⁴ The court argued that the instrument is “an authoritative and internationally endorsed ‘soft law’ instrument,” “in line with the content of other, widely accepted soft law instruments,” and reflective of “current insights.”⁴⁵ Also, the court noted that “the

³⁵*Id.* at 286.

³⁶*Id.* at 280–81.

³⁷*Id.* at 279, 283, 296–97.

³⁸*Id.* at 60.

³⁹*Id.* at 287.

⁴⁰*Id.* at 286.

⁴¹*Id.* at 287.

⁴²Rechtbank Den Haag [RDH] [District Court of the Hague] 26 mei 2021, *Vereniging Milieudefensie v. Royal Dutch Shell PLC*, ECLI:NL:RBDHA:2021:5337, para. 4.4.11, <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2021:5339> (Neth.) [hereinafter *Milieudefensie*].

⁴³*Id.* at para. 4.4.10.

⁴⁴Hum. Rts. Council, Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Annex, 6, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

⁴⁵*Milieudefensie*, ECLI:NL:RBDHA:2021:5337, at para. 4.4.11.

European Commission has expected European businesses to meet their responsibilities to respect human rights” as formulated in the Guiding Principles.⁴⁶ The instrument was authoritative enough to render the fact that Royal Dutch Shell had explicitly supported it irrelevant.⁴⁷ As a consequence, the court determined that the instrument was “suitable as a guideline in the interpretation of the unwritten standard of care.”⁴⁸

Having found that the informal international instrument established climate change obligations under Dutch law, the court decided that Royal Dutch Shell had to achieve a net 45% reduction in the volume of its CO2 emissions by the end 2030, relative to 2019 levels.⁴⁹ The Hague Court of Appeal quashed this judgment in 2024, arguing that it had “not been established in the present proceedings that downsizing the resale activities of Shell Trading will lead to a reduction in CO2 emissions.”⁵⁰ However, the Hague Court of Appeal agreed that companies have the obligation to combat climate change and argued that this follows precisely from informal international instruments such as the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, even when binding law does not lay out such obligations.⁵¹

Similar authority can be exercised by informal instruments in other legal systems as well. In *Canada Ltée v. Hudson* the Canadian Supreme Court used the non-binding Bergen Ministerial Declaration to determine the contents of the precautionary principle used in the interpretation of a local by-law.⁵² This specific example is interesting in two respects. First, legal principles such as the precautionary principle are shared between different levels of governance from the international to local. Thus, the power to influence the contents of legal principles through informal means suggests a possibility to exercise political influence that permeates systems globally. Second, the norm in this case emerged from a declaration,⁵³ which is even more informal than instruments produced by international organizations such as the UN Guiding Principles on Business and Human Rights, or non-binding agreements between states. As a final example of the utilization of informal instruments in this way, the European Court of Human Rights uses legally non-binding sources regularly to give substance to provisions of the European Convention on Human Rights as noted by the claimants in *Milieudefensie*,⁵⁴ which produces domestic legal effects.

The examples should not be read as exposing direct and intentional “injections” of international political authority into domestic legal systems. It is unlikely that the authors of the UN Guiding Principles on Business and Human Rights intended for the instrument to be used to impose climate change obligations on companies. It is neither likely that the District Court of the Hague wanted specifically to operationalize the UN Guiding Principles on Business and Human Rights in the Dutch legal system. Instead, the Guiding Principles was presented to the court by the

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*Id.* at para. 5.3.

⁵⁰Gerechtshof Den Haag [GDH] [Hague Court of Appeal] 12 november 2024, *Shell PLC v. Vereniging Milieudefensie*, ECLI:NL:GHDHA:2024:2099, paras. 7.110, 9, <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:GHDHA:2024:2100> (Neth.). Rechtbank Den Haag [RDH] [District Court of the Hague] 26 mei 2021, *Vereniging Milieudefensie v. Royal Dutch Shell PLC*, ECLI:NL:RBDHA:2021:5337, para. 4.4.11, <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2021:5339> (Neth.) [hereinafter *Milieudefensie*].

⁵¹*Id.* at paras. 7.26, 7.55, 7.61, 7.99. See ORG. FOR ECON. COOP. & DEV. (OECD), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT (2023), https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/06/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_a0b49990/81f92357-en.pdf.

⁵²*Canada Ltée v. Hudson*, [2001] 2 S.C.R. 241, at para. 31 (Can.).

⁵³United Nations Economic Commission for Europe, *Action for a Common Future*: Rep. of the Economic Commission for Europe on the Bergen Conference, Annex, 18, para. 7, U.N. Doc. A/CONF.151/PC/10 (Aug. 6, 1990).

⁵⁴See *Milieudefensie*, *Dagvaarding* [Summons], Dossiernummer [File Number] 90046903, at para. 715 (Apr. 5, 2019), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190405_8918_summons.pdf (Neth.).

claimants who argued in the summons that the informal international instrument establishes binding obligations when it is used to give substance to legal norms of domestic and international law.⁵⁵

From a systems perspective, it was the communication of the legal summons which initially made the informal instrument part of the legal system by arguing that the instrument had an effect on the legality of conduct by private companies in the Netherlands. The District Court of the Hague validated the claim with its decision and made the law move to a new area. This decision created a valid link for future legal communications. While not obliged to do so, the Hague Court of Appeal validated the decisions further and created another communication to which future legal communications could link to.

This implies the existence of an indirect influence mechanism where international authority is used to put on offer, so to speak, materials to be used in legal decision-making by courts when the suitable case emerges. While this offering of authoritative materials can be purposeful, such intentions are hard to prove. Also, one should be wary of treating international rule-makers as a homogenous group with shared hegemonic intentions. The aims of states and international organizations are diverse, complex, and often in conflict with each other. But international governance can be biased, and it often benefits the powerful. Chimni, for example, has argued that the increasingly powerful networks of international institutions often advance the interests of an “emerging transnational capitalist class.”⁵⁶ The relation between international authority and domestic legal discourses should be viewed accordingly in the context of power.

To set up final remarks about informal international instruments before we move on to discuss questions of democracy and legitimacy in more detail in the following section, consider the following passage by Luhmann: “Invalid norms mean nothing to the system. This is most clearly demonstrated by the fact that nobody would even try to apply invalid norms; nobody would argue that certain legal norms are invalid but they help to win the case nevertheless.”⁵⁷

Luhmann is right to argue that nobody would apply non-valid norms alone to try to win court cases. Yet the statement that non-valid norms are meaningless and that they cannot help win cases seem to contradict what we have just discussed. Luhmann’s point, however, is that no one would argue that legal norms can be non-valid, not that non-valid norms cannot be used in legal argumentation. Political and moral norms need to be juridified and operationalized by attaching them to a valid norm to make a successful legal claim. Accordingly, Luhmann continues:

Such inputs are automatically translated into an argument about the validity of law or about changing the currently valid law. The negative value, that is, invalidity, is only useful as a reflexive value for clarifying the conditions under which validity operates, but it does not produce possibilities of further connections.⁵⁸

Political power may irritate an expansion of the boundaries of law when valid law is open in substance. The unwritten standard applied in *Milieudefensie* is an extreme example of a binding legal norm that is so open that it is little more than its validity. Such rules are mere *containers* for which substance is given as the need comes.⁵⁹ Because the legal system is expected to decide like cases alike, new substances constructed for such containers may become entrenched in the legal system. A decision opens the door to further decisions.⁶⁰ The points where informal sources may seep into legal systems are practically endless because of the general indeterminacy of law. The

⁵⁵*Id.* at paras. 710–15.

⁵⁶Chimni, *supra* note 4, at 1, 4.

⁵⁷LUHMANN, *supra* note 10, at 128.

⁵⁸*Id.*

⁵⁹See Jean d’Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT’L L. 1075, 1081 (2008) (providing the container metaphor).

⁶⁰LUHMANN, *supra* note 10, at 282–83.

deciding factor then is the authority that courts confer to informal instruments. By conferring authority to informal instruments, law may be “yielding to political pressure and seeping into previously unregulated areas in ever more increasing volume.”⁶¹

The implications of this are alarming if we pull away from the perspective of a system theorist. Not because a court in the Netherlands decided that big oil companies should bear responsibility for climate change and its adverse effects on human health, but because it makes one wonder what guarantees there are that the same social structures do not result in less desirable decisions in domestic legal systems? Also, although societies are increasingly global, people still mainly base their normative expectations on the domestic political and legal structures. People expect that what the courts decide is sufficiently linked with the domestic law-making authority that they consider to be democratically legitimate. The influence of informal international instruments circumvents both the legitimate law-making process and parliamentary oversight over international matters. In this light, every tangible domestic effect of an informal international instrument signals a shift of political power from the democratic state to international institutions.

As the root of the problem lies in the undemocratic nature of international institutions, it would make sense to focus on enhancing their democratic qualities.⁶² But the legal effects discussed in this section beg the question of how the legal system may address the problem that it seemingly contributes to creating? Whereas systems theory discussed in this section has analyzed law as a system of communication that is independent of constitutional structures and individual human beings, the next section reintroduces more traditional structures of the constitutional state and the individual who is causally necessary for the emergence of legal communication. With this move, we can ask the question: are courts simply enablers of international authority, or can they protect democracy from unjustified political irritations?

A short summary of this section is in place before we move on to answer the question. Systems theoretic analysis reveals how informal international instruments gain their legal relevance by being communicated in legal terms and by being indirectly validated by courts which use them to give substance to valid legal norms. The functional analysis of law as communication reveals the central role that courts have in figuring out the ultimate question of law, that is, what is legal and what is not. The courts cannot escape this task or otherwise the legal system fails to fulfil its function of stabilizing normative expectations in society and depoliticizing decisions. This applies to all cases, including those where the legislation is not clear on the question of what should be legal. It is in these moments when informal instruments can be effectively communicated as legally relevant and where courts may give them the authority to determine what the substance of valid legal norms should be. This way international political communications can be juridified to influence what future legal communications will be considered valid by the legal system. The informal instruments bring about reactions in the legal system and make it move into new areas. An issue that was politics yesterday may be juridified tomorrow; all that is needed is a legal decision which validates the juridification.

C. Bulwarks of Democracy

This section argues that courts can mitigate the democratic deficit of informal international instruments by acting as bulwarks of democracy. The metaphorical bulwark should be set up in two respects: by ensuring respect for the democratic law-making process and by protecting individual liberties from the influence of political processes that the individuals have not sufficiently influenced or participated in. To detail this argument, the section first discusses how courts are usually understood to protect democracy. Utilizing Jürgen Habermas’s discursive theory of law and democracy, the section then details the requirements for democratically

⁶¹*Id.* at 293.

⁶²For concluding notions in this regard, see *infra* note 116 and discussion thereto.

justifiable adjudication. Finally, drawing upon the democratic requirements and Martti Koskenniemi's concept of *culture of formalism*, the section illustrates a democratic mindset that individual judges should hold to resist exercises of power that do not meet the requirements of democratic justifiability.

The suggestion that courts can defend democracy is usually made within the context of the constitutional state. Courts are presumed to keep other state institutions in check and to protect liberties from being encroached. Courts can keep the executive branch accountable by checking that the executive's actions do not overstep its mandate.⁶³ Courts can also support the democratic process, a need which results from two defects. First, the democratic process can produce decisions which are detrimental to itself. It may abolish itself or transfer its powers to another institution to the same effect. Second, the democratic process can be abused. Because direct consensus—agreement *by all*—is not possible on a complete and continuing basis, democracies have generally adopted two features, majoritarian decision-making and representation of the people. Both are threatened by degeneration: majority democracy can deteriorate into a “tyranny of the majority” undermining democratic participation of minorities whereas representative democracy can degenerate into an “iron law of oligarchy” with little regard to whom the parliamentarians are supposed to represent.⁶⁴

Courts can balance the defects of the democratic process and the executive's susceptibility to overstepping its mandate by upholding the rule of law. Courts are supposed to make sure that nothing and no one is above the law of the community, often embodied by a constitution. While all courts must oversee that the constitution is observed, it is particularly for the highest and constitutional courts to check that legislative acts and executive orders are constitutional.⁶⁵ With its power of review, the judiciary can stabilize democracies by incentivizing more prudent political action.⁶⁶ The rule of law and the effective protection of rights can also offer democracies with points of unity if the democratic process itself causes more social discord than cohesion.

It is thus common to turn to courts as the last line of defense of law and democracy. Courts should not be idealized in this way, however, as they can act in questionable ways and even contribute to autocratization. Also, idealization sends the other branches of state the message that they can duck their responsibility for upholding democracy by passing it to the judiciary.⁶⁷ The potential for courts to contribute to democratic backsliding is discussed at the end of this section.⁶⁸ But considering the *potential* of the judiciary to protect democracy, it is reasonable to explore what would be required from courts to act as bulwarks against power *external* to the constitutional state, especially as the courts are seemingly responsible for validating the influence of external political power as illustrated in Section B.

In the context of informal international instruments, the courts' role shifts from keeping other state institutions in check to ensuring respect for the democratic process as the legitimate form of law-making. This is because courts are not only protectors of democracy but also constrained by it in the sense that the law applied or constructed by courts should emerge from or reflect the will of the democratic legislator. Courts should not be tasked with the systematic checking of informal

⁶³JEFFREY K. STATON, CHRISTOPHER REENOCK & JORDAN HOLSINGER, CAN COURTS BE BULWARKS OF DEMOCRACY? JUDGES AND THE POLITICS OF PRUDENCE 120–39 (2022). I use this opportunity to thank the cited authors for inspiring the metaphor used in this article with their book.

⁶⁴ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 168–72 (1989); ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 224, 233, 245 (Eden Paul & Cedar Paul trans., Batoche Books 2001) (1911).

⁶⁵See Majja Dahlberg & Anu Kantola, *Tensions in Finland's ex ante Constitutional Review: The Interplay of Politics, Law, and Media*, 22 INT'L J. CONST. L. 376, 380–81, 383–86 (2024) (exploring how in Finland, constitutional oversight is exercised *ex ante* by the Constitutional Law Committee of the Finnish Parliament and not *ex post* by a specialized constitutional court).

⁶⁶STATON, REENOCK & HOLSINGER, *supra* note 63, at 121.

⁶⁷Ryan D. Doerfler & Samuel Moyn, *Don't Count on the Courts to Save Democracy*, WASHINGTON POST (Mar. 20, 2025), <https://www.washingtonpost.com/opinions/2025/03/20/supremecourt-trump-democracy-crisis/>.

⁶⁸See *infra* note 104 and discussion thereto.

international instruments akin to how the parliaments scrutinize international treaties, however. The bulwark must emerge only in particular cases that are brought to the courts to keep the power of the judiciary itself in check, because the power to initiate review of international political commitments would delegate significant foreign policy power to the judiciary. What is called for instead is a commitment rooted in democratic ideals materializing in cases where the courts must construct legal norms and need to decide what materials to use.

Formulating what the commitment entails requires a proposition of what judges should take on a commitment towards. A description of legitimate law-making is needed together with an account of how it relates to the practices of the legal community. The legal community in this respect is understood narrowly with a particular focus on judges for their central role as formal decision-makers.

In democracies law-making is primarily embodied in the formal legislative process. The legislative process is not, however, necessarily congruent with democracy. Legal positivism derives from the social fact that valid law is created by an authority. For pure positivism it is theoretically irrelevant who or what the authority is as long as the legal norms are produced by a competent authority.⁶⁹ In contrast, in democratic approaches valid law must have a link with the people, the popular sovereign, or the free formation of opinions by active citizens participating in public affairs.⁷⁰ The validity of law is compounded with a normative notion of democracy. To a critical positivist the democratic convictions of society should converge with the internal principles of justification for individual legal norms as practiced by a legal community. Based on its legal culture and deeper structures, the legal community determines the validity of norms through justification principles that should derive from the democratic ideals of the community.⁷¹

Therefore, to argue that legitimate law can only be produced democratically is to say that the legal system should align its practices, culture, and rational foundations of identifying and constructing legal norms to respect the democratic process of law-making. But considering the defects of the majoritarian and representative processes, sufficient connection with the public will and opinion formation emerges as necessary for law-making to be properly democratic. In other words, the formal decisions of the legislator must have a connection with the will and opinions of the citizens. The need for an enhanced connection is emphasized by the modern globalized world where political decision-making has moved away from the local and domestic levels to international and global networks. The previous section illustrated one aspect of this general trend of democratic erosion, where decisions that can affect people's lives are produced by far away institutions without proper domestic checks.

To address democratic erosion in general, Habermas has suggested a reconstruction of modern democracy by supplying the formal law-making process with a flow of public opinions and will from informal public debates. Habermas's model is mainly based on three notions: the discourse principle, the democratic principle, and the public sphere. The discourse principle holds that "[j]ust those action norms are valid to which all possibly affected persons could agree as participants in rational discourses."⁷² The democratic principle deriving from the discourse principle posits that "only those statutes may claim legitimacy that can meet with the assent . . . of all citizens in a discursive process of legislation that in turn has been legally constituted."⁷³ The requirements of agreement and affectedness are intended to synthesize models of democracy which either emphasize active citizenship in public political decision-making or the protection of liberal freedoms from unjustly constraining government power.⁷⁴ Habermas's democratic model is based

⁶⁹HANS Kelsen, *Pure Theory of Law* 194 (Max Knight trans., Lawbook Exch. Ltd. 2008) (1934).

⁷⁰HANNAH ARENDT, *Thinking Without a Banister: Essays in Understanding, 1953–75*, at 255–61 (Jerome Kohn ed., Schocken Books 2018).

⁷¹KARLO TUORI, *Critical Legal Positivism* 262–63 (2016).

⁷²JÜRGEN HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 107 (William Rehg trans., 2d prtg. 1996).

⁷³*Id.* at 110.

⁷⁴See generally Jürgen Habermas, *Three Normative Models of Democracy*, 1 *CONSTITUTIONS* 1 (1994).

on the production of norms that the affected persons *could* assent to if they participated in rational discourse on them. The model thus does not require actual participation by all possibly affected people. Instead, it requires that the participation of citizens in political opinion- and will-formation *processes* can effectively influence what is considered to be the public opinion, which then should influence the laws and policies to which the citizens are subject.⁷⁵

This is where the public sphere is essential for Habermas's model. The public sphere is understood as "a realm of our social life in which something approaching public opinion can be formed."⁷⁶ Democracy is not manifested only in the parliament and elections, instead, "[p]arliamentary opinion- and will-formation must remain anchored in the informal streams of communication emerging from public spheres that are open to all political parties, associations, and citizens."⁷⁷ The informally flowing communicative power exercised through the public sphere prepares and feeds opinions into the legally established formal proceedings. The public sphere operates to hold political power accountable and informed by public political discourses of free citizens. Habermas argues that "all political power derives from the communicative power of citizens."⁷⁸ The communicative power "unleashes" the plurality of interests and opinions which are at risk of being suppressed by majority processes in formal democratic institutions.⁷⁹

The public sphere requires "specific means for transmitting information and influencing those who receive it."⁸⁰ Thus the extent to which different media can effectively and justly transmit information between the informal and formal political discourses is crucial. The challenges of the modern age for the viability of the public sphere—including social media and communication by generative artificial intelligence—are evident, but the scope and focus of this Article do not permit an excursion into them. The key points for the present discussion are that the credibility of democracy requires public discourses and support for them from formal state institutions. The public sphere is where citizens largely contribute to public opinion formation and where their agency is expanded beyond voting.

I argue that adjudication must also draw from the informal flows of public opinion and will formation for its democratic justification. This results from the fact that practically all legal norms are indeterminate and require interpretation. Particularly in the interpretation of open norms, courts must use external materials, and the argument here is that these interpretations must also draw upon the discursive requirements of democracy.

What exactly are the implications of the discursive model for legal decision-making in courts? Habermas is adamant that courts are engaged in discourses of *application* instead of discourses of justification. Discourses of justification are reserved for the legislator and concern arguing on what norms should be valid and binding for a community. The courts should only deliberate on the application of already validated norms, that is, what norm is appropriate to apply to a given case.⁸¹ Because only the democratic legislator that is sufficiently linked with the public sphere can produce legitimate law, it is the only state institution which should deliberate on what norms can be rationally justified as constraining in the society.⁸²

⁷⁵See CRISTINA LAFONT, DEMOCRACY WITHOUT SHORTCUTS: A PARTICIPATORY CONCEPTION OF DELIBERATIVE DEMOCRACY 24 (2020). See also Jürgen Habermas, *Commentary on, Cristina Lafont, Democracy Without Shortcuts*, 16 J. DELIBERATIVE DEMOCRACY 10 (2020) (reviewing CRISTINA LAFONT, DEMOCRACY WITHOUT SHORTCUTS: A PARTICIPATORY CONCEPTION OF DELIBERATIVE DEMOCRACY (2020)).

⁷⁶Jürgen Habermas, *The Public Sphere: An Encyclopedia Article*, in CRITICAL THEORY AND SOCIETY: A READER 136, 136 (Stephen Eric Bronner & Douglas MacKay Kellner eds., 1989).

⁷⁷HABERMAS, *supra* note 72, at 171.

⁷⁸*Id.* at 170.

⁷⁹*Id.* at 151, 186. See generally Jürgen Habermas, *Hannah Arendt's Communications Concept of Power*, 44 SOC. RSCH. 3 (1977) (illustrating that the concept of communicative power builds in large part on the work of Hannah Arendt on the subject).

⁸⁰Habermas, *supra* note 76, at 136.

⁸¹HABERMAS, *supra* note 72, at 115, 217.

⁸²*Id.* at 115, 135, 452.

However, as this Article has illustrated, courts are necessarily engaged in law-creation because of their obligation to adjudicate and the indeterminacy of legislation. Habermas also acknowledges this and notes that in gray areas “juristic discourses of application must be visibly supplemented by elements taken from discourses of justification.”⁸³ Habermas suggests another, a *legal* public sphere to work out the contradiction resulting from the courts’ law-creation:

The additional burden of legitimation could be partly satisfied by additional obligations for courts to justify opinions before an enlarged critical forum specific to the judiciary. This requires the institutionalization of a legal public sphere that goes beyond the existing culture of experts and is sufficiently sensitive to make important court decisions the focus of public controversies.⁸⁴

As the public sphere does with political discourse, the legal public sphere extends juristic discourse to also comprise the public who can engage in deliberating, criticizing, and even influencing legal decisions. Much as in systems theory, the legal system is extended to not only cover communication by the legal community in the narrow sense. Instead, all communication concerning what should be legal or illegal becomes part of the totality of legal communications which are relevant for legal decision-making. The difference is that the discursive model takes a normative position on the matter. Discourse emerging from the public not only may but *should* contribute to determining legal decisions.

It is difficult to see, however, how court *proceedings* could be framed in discursive terms. The proceedings where two parties argue against each other are not deliberative processes where the parties together with the judge engage in rational discourse with the aim of finding the truth. Thus, judges can merely *simulate* discourse in their decision-making.⁸⁵ In this simulation the judge should reflect on the implications of their decisions not only on the parties, but also on the public. For example, where courts must interpret ambiguous legal norms and where useful material could be drawn from informal international sources, courts should reflect on the consequences of doing so on individual liberties and for the integrity of the democratic process. While judges try to interpret what the will of the legislator is, they should also simulate discourses with the view of reaching decisions that the community could agree on if it were to engage in rational discourse on them. This is particularly the case when the legislator’s will cannot be uncovered from the wording of a statute or legislative drafting materials.

The simulated discourse takes place in the minds of the judges and so they must rely on their cognitive capacities and prior learning as members of the legal community. Accordingly, democracy-supporting decision-making requires foremost a democratic mindset from individual judges and a legal culture that institutionalizes the democratically grounded legal practices.

The crucial question then is what form should the legal culture take to produce democratically justifiable decisions? The culture of formalism by Koskenniemi is a promising approach to take as a model in this regard. Mainly discussing legal culture in the context of international law, Koskenniemi defines the culture of formalism “as a culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it.”⁸⁶ Such culture can make “a claim for universality that may be able to resist the pull towards imperialism.”⁸⁷ Koskenniemi contrasts the culture of formalism with a “culture of dynamism” which sees law as a tool or hindrance to

⁸³*Id.* at 439.

⁸⁴*Id.* at 440.

⁸⁵TUORI, *supra* note 71, at 110–11.

⁸⁶MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 500 (2004).

⁸⁷*Id.*

politics; the form of law or formal procedures do not matter in the culture of dynamism if they do not work towards predetermined political goals.⁸⁸

The culture of formalism insists that material preferences must be justified “by reference to standards that are independent from their particular positions or interests.”⁸⁹ It pursues to induce every particularity of human experience and to remain open to all voices in legal argumentation.⁹⁰

The equal consideration of all claims in legal decision-making pinpoints the culture of formalism as a democratic culture. Koskenniemi explicitly contextualizes the value of culture of formalism in “trying to account for the possibility of democratic politics in an era deeply suspicious both of universalist ideologies and the bureaucratic management of social conflicts by bargaining between interest groups.”⁹¹

In contrast to Habermas’s proceduralism, Koskenniemi rejects the notion that the universality of particular claims in the culture of formalism could be pinpointed as a fixed principle or a process.⁹² Instead, Koskenniemi prefers a rather enigmatic concept of a “horizon of possibility.”⁹³ The culture of formalism is perhaps best described as a specific attitude towards law, power, and society that is socially shared and which deliberately avoids being fixed in too precise terms that could be abused for political purposes.

Koskenniemi also uses a related concept of *constitutionalism as mindset*.⁹⁴ Instead of institutional and structural reforms, constitutionally minded individuals should have their focus on a professional repositioning. Koskenniemi’s argument is that a legal decision-maker must navigate the space between legal positivism and predetermined political objectives without conceding to legal decisionism which borders on arbitrariness.⁹⁵ In making decisions, individual judges are called upon to decide “in a manner that aims for universality, impartiality, and all the virtues of the ‘inner morality of law’: honesty, fairness, concern for others, the prohibition of deceit, injury, and coercion.”⁹⁶

This kind of visualizing oneself in everyone else’s place is what the simulated discourse requires from individual judges.⁹⁷ Although the democratic legal culture must mainly draw from the power of reason of individual judges that are cultivated by the legal professional community, a credible culture necessitates engaging the public particularly when courts decide cases on the basis of open norms.⁹⁸ The democratically minded judge cannot trust their ability to gain on the needed moral and social information to bring about the right decision in every case. Judges must be interested in public discourses. Most importantly, particularly in societally important decisions, courts must be transparent about the reasonings of their decisions and present them openly for the public to criticize. Judges must also be open to learn from the criticism and weigh it against possible prejudices instilled in their thinking or in the legal culture they represent. While the politicization of adjudication brings about its own dangers to democracy, European continental legal systems could find something to learn from the United States where constitutionally important court decisions are widely debated in the media and by the public.⁹⁹

⁸⁸*Id.* at 496.

⁸⁹*Id.* at 501.

⁹⁰*Id.* at 504–05, 507.

⁹¹*Id.* at 504.

⁹²*Id.* at 506–08.

⁹³*Id.* at 506.

⁹⁴Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9, 31 (2007).

⁹⁵*Id.* at 12, 29.

⁹⁶*Id.* at 33.

⁹⁷*Id.* at 32.

⁹⁸In a similar vein, see TUORI, *supra* note 71, at 234.

⁹⁹See generally MELVIN I. UROFSKY, *THE PUBLIC DEBATE OVER CONTROVERSIAL SUPREME COURT DECISIONS* (2005).

To bring the argument to a close, I now elaborate on how these considerations relate to informal international instruments. This can be achieved by illustrating what the “counter-attitude” is that the democratic mindset should resist. The democratic mindset is posited squarely against a managerial attitude where different forms and levels of governance are seen as means to an end rather than as a series of checks for ensuring just processes and outcomes.¹⁰⁰ One motivation behind the use of non-binding instruments is specifically to avoid democratic scrutiny.¹⁰¹ In contrast, international organizations cannot produce legally binding instruments and thus the choice of informality is not a managerial choice for them. Instead, mandating international organizations to produce instruments is itself a choice by states to manage international issues by other means than treaties that are scrutinized by parliaments. The task of the democratic judge is to try to balance any international political aspiration with potential domestic effects with the will of the community that which law the judges are supposed to uphold.

This is why metaphors such as *bulwark* and *firewall* are so fitting. Courts are the ones who “receive” the international sources of authority and apply them to cases. What matters is the process between the receiving and application. In a hermeneutic sense, the informal instruments that are used to give substance to binding legal norms should themselves be given substance by reflecting on the public will and opinion formation.

The key is to not accept authority without criticism. Judges should ask critical questions when making decisions, including whose are the “current insights” that informal international instruments should reflect for them to be authoritative?¹⁰² Especially in cases where it is not states whose rights are at stake, why should it be international endorsement and expectations—supposing the standards primarily refer to the perceptions of states and international organizations—which should determine if the instrument is authoritative in a domestic case?¹⁰³ By asking such questions and making the related reasonings explicit, international authority can be brought in contact with democratic expectations and be presented to the public for debate especially in cases of constitutional and political significance.

The argument puts much faith in individual judges and the democratic legal culture in bringing about a democratic sensibility to the use of informal instruments in legal decision-making. But courts may also enable autocratization or concentration of power to the executive.

The issue can be framed with the concept of *autocratic legalism*. Javier Corrales defines the concept as comprising the use, abuse, and non-use of the law in service of the executive branch.¹⁰⁴ This usually concerns autocratic political leaders who consolidate their power by undermining democracy which may take place by deploying or dismantling legal structures.¹⁰⁵ Those with power may capture or intimidate courts into advancing authoritarian goals.¹⁰⁶ Political protest may be exhausted by channeling it to the legal system through legal challenges.¹⁰⁷ In recognition of the prestige that legalism has for its presumed liberal democratic undercurrents, autocrats try to cloak their actions in legal forms for an aura of legitimacy.¹⁰⁸ And with discourses of legitimacy

¹⁰⁰See Koskeniemi, *supra* note 94, at 13–18.

¹⁰¹Hollis & Newcomer, *supra* note 2, at 546.

¹⁰²Milieudefensie, *supra* note 42 and discussion thereto.

¹⁰³*Id.*

¹⁰⁴Javier Corrales, *Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 37, 38 (2015).

¹⁰⁵See generally Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

¹⁰⁶ROSALIND DIXON & DAVID E. LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 81 (2021).

¹⁰⁷Heba M. Khalil, “*This Country has Laws*”: *Legalism as a Tool of Entrenching Autocracy in Egypt*, 68 AM. BEHAV. SCIENTIST 1597, 1603–04 (2024). See NIKLAS LUHMANN, 2 THEORY OF SOCIETY 154–65 (Rhodes Barrett trans., Stanford Univ. Press 2013) (1997) (providing Luhmann’s take on protest movements).

¹⁰⁸Fabio de Sa e Silva, *Autocratic Legalism 2.0: Insights from a Global Collaborative Research Project*, 55 VERFASSUNG UND RECHT IN ÜBERSEE 419, 426 (2022).

authorities can establish a semblance of normative substance to avoid actual critical discussion about the legal and moral substance of decisions.¹⁰⁹

Courts may also advance autocratic aspirations on their own initiative. This kind of abuse takes place largely in courts operated by pro-regime individuals. Importantly, the individuals are usually legal professionals themselves who may attack the democratic conditions of the rule of law.¹¹⁰ The capture of the legal system may also extend to bar associations and educational institutions and comprise “professional liquidation” of the legal profession by weakening its internal coherence.¹¹¹ Courts may contribute to autocratization by upholding democratically problematic legislation and executive action or by actively removing democratic protections. This may take place under the guise of protecting democracy.¹¹² Captured or intimidated courts may respect the letter of the law in mundane cases but twist it when the case has political implications.¹¹³

All this emphasizes that courts should not be hailed as bulwarks of democracy too easily. Courts’ ability to defend or advance democracy is largely dependent on the political context.¹¹⁴ This includes the existence of formal rules regarding the appointment and removal of judges but also informal conventions of judicial autonomy.¹¹⁵ The latter is generally contained by legal culture that individuals assimilate in their legal professionalization. And it is generally the legal culture and its conventions that the legal system can control.

Importantly, this Article analyzes the more subtle ways in which international governance may influence domestic legal decisions. This influence does not comprise more serious threats to the judiciary. Courts are generally not coerced to apply informal instruments in democratic states which are the main focus of this Article. The legal system may be nudged or irritated to judicate in a certain way, however. What this article illustrates is democratic undermining that happens when courts are susceptible to applying law in a way which benefits unjustified external power. This may be intentional, unintentional, or simply triggered by the legal and political circumstances. We can assume that some judges want to advance political goals that they share with those promoted by informal sources which may undermine democratic ideals. All this is not autocratization *per se* but rather indirect transferring of power to global governance networks.

The democracy-undermining activities in courts emphasize either of the two justificatory approaches discussed in this section. As discussed, when individual judges are faced with external influence that could undermine democratic requirements, they should engage in simulated discourses to weigh on different decisions. In some settings judges may deliberate with each other to reach a consensus which can strengthen the deliberative bases of judgments if the judges act in accordance with the democratic legal culture. In so far as courts overstep democratic ideals with their practice, it is for the legal community to bring them in line with the overall system of law. This mainly concerns the legal community in the narrow sense as comprising legal professionals and scholars. As simulated discourses cannot be accessed by others, sufficient reasons for judgments are essential in this regard. Otherwise, a judgment should be deemed inadequate for insufficient reasoning. In significant cases with political implications, the broad legal community as also comprising the public should be engaged through media to trigger justificatory public discourses. This should only pertain to significant cases as public discourses tend to be “flattened” because of the cognitively paralyzing complexity of modern society. Only key developments tend

¹⁰⁹Martti Koskeniemi, *Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism*, 7 ASS’NS 349, 368 (2003).

¹¹⁰See generally Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513 (2024).

¹¹¹See generally Z. Umut Türem, *Professional Liquidation in the Context of Autocratic Legalism: Lawyers, Class, and Status in Turkey, 2002–?*, 50 L. & SOC. INQUIRY 759 (2025).

¹¹²DIXON & LANDAU, *supra* note 106, at 82.

¹¹³See generally Kathryn Hendley & Peter Murrell, *The Formation and Resilience of Law-Abiding Attitudes under Authoritarianism: The Case of Russia*, 57 COMPAR. POL. 169 (2025).

¹¹⁴DIXON & LANDAU, *supra* note 106, at 82.

¹¹⁵Aziz Z. Huq, *Democratic Erosion and the Courts: Comparative Perspectives*, 93 N.Y.U. L. REV. ONLINE 21, 27–30 (2018).

to be thematized in public discourses. Accordingly, there is no point or time to expect comprehensive justificatory discourses on all mundane legal cases.

The approach works best in mature democracies where courts are relatively free from external coercion and capture. The discussion of informal international instruments is also particularly relevant for consolidated liberal democracies because such states are more open to globalized political and legal communication flows than their autocratic counterparts. But visualizing oneself in the place of others is an essential skill to any legal professional. In autocratic countries or countries where legal institutions face autocratization, the issue then moves towards the justification of judicial practice. Regarding the former, it is mainly the public and its democracy movements that can sufficiently challenge an already captured judiciary. Regarding the latter, the discussed democratic legal culture can offer resilience against the autocratization or capture of legal institutions within states, and not just a bulwark against external power.

I now provide a summary of this section before I move on to draw the conclusions of the Article. The idealized position of courts in democracies is that of protectors. Courts are presumed to uphold the rule of law and keep other state institutions in check. In other words, they bulwark democracy from threats within. But democracy also constrains courts. Courts are supposed to apply or construct the law in a way that reflects the will of the democratic legislator. Where the will cannot be deduced from the language of a statute or legislative drafting materials, the democratic will should be supplied with a discursive model of democracy where will and opinion formation emerges not only from the formal legislative process but also from the informal flows of public discourses. I have argued in this section that these democratic requirements impose a need on judges to hold a democratic attitude from which a democratic legal culture can emerge. This culture can resist unjustifiable political influence that emerges not within but without the domestic system. The culture of formalism by Koskenniemi was used as a model in this regard. In essence, what is called for is a bulwark or a firewall where judges, when faced with the possibility of applying informal international instruments, should deliberate on what kind of effects the application may have on individual liberties and the integrity of the democratic process. Whereas informal international instruments can be used to give substance to open or otherwise ambiguous legal norms, the informal instruments themselves, which are equally ambiguous, should be given substance by considerations of public will and opinion formation. It is also important that these considerations are made explicit particularly in cases of constitutional and political significance to enable debate by the broad legal community to make sure that legal practice is aligned with the will and opinions of the community.

D. Conclusion

This Article embarked on two objectives. First, to reimagine the description of the legal relevance of informal international instruments with the help of systems theory, and second, to use the reimagined description as a foundation to analyze how the legal system and courts in particular can address the democratic deficit of informal international instruments. It was shown that the courts' obligation to adjudicate and the freedom to construct norms creates a mechanism of systemic vulnerability through which external political power can seep into domestic legal systems through the act of juridification. It was also shown that while the root of the problem lies in the undemocratically operating international institutions, judges can mitigate the democratic deficit by holding a democratic mindset from which a specifically democratic legal culture can emerge to resist external political influence that does not converge with the public will and opinion formation.

The narrative of this Article should not be understood as implying that all informal international instruments hide malign political intentions and that courts should not apply them. Many informal instruments do good things, and international institutions often aim for the public

good. Global problems call for global solutions and there is little to gain by suggesting that states should turn to parochialism instead of seeking global cooperation. The influence of international materials can also have an invigorating effect on domestic legal systems by introducing fresh materials and insights. And as was illustrated in Section B, courts need all kinds of materials to come up with reasoned interpretations. Otherwise, the courts fail their function which would threaten the stability of the legal system.

Thus, although this Article has deliberately focused on what the legal system and specifically courts can do to address the democratic deficit of informal international instruments, more focus should be placed on international institutions. One solution could be to enhance the deliberative qualities of international decision-making processes to induce democratic sensibility into them.¹¹⁶ A paradigm shift in international law could also be sought as suggested by the International Public Authority project to enable and discipline “the pursuit of public interests by international institutions.”¹¹⁷ The project specifically targets informal governance instruments as exercises of public authority.¹¹⁸ The main benefit of such paradigm shift would be in appeasing two public demands which have also been reflected upon in this Article: the legitimacy concerns and the demand for effective regulation for the public good.¹¹⁹ If the paradigm shift and enhancing decision-making processes were to be achieved, the courts’ task of determining what informal international instruments should be authoritative would become more straightforward, although it would not eliminate the need to reflect on liberties and democratic demands in the domestic context.

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¹¹⁶See generally Tuomas Palosaari, *The Phantom Menace: Effects and Legitimacy of Informal International Instruments*, 38 LEIDEN J. INT’L L. 148 (2025).

¹¹⁷Armin von Bogdandy, Matthias Goldmann & Ingo Venzke, *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUR. J. INT’L L. 115, 115 (2017).

¹¹⁸*Id.* at 133, 137. See generally Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L.J. 1865 (2008).

¹¹⁹See von Bogdandy, Goldmann & Venzke, *supra* note 117, at 116–18.