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## **Towards an Integrated Approach to Democracy in International Law**

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### **Abstract**

The article starts from the premise that international law scholarship's approach to the study of democracy is caught in a vicious circle because of the separation between the study of democracy within states on one side and democratic credentials of international institutions and international law more broadly on the other side. In order to overcome this vicious circle, the article proposes that international law scholarship needs to develop an integrated approach to democracy. Such an integrated approach to democracy shall start from a purposeful reflection on meanings and practices of democracy going beyond the traditional western European heritage. Using the example of practices of democracy emerging from Islamic tradition and reflection on meanings of democracy in an African tradition the article demonstrates how an integrated approach to democracy can work and establishes its importance for resolving international law's continuing problems with democracy.

**Key-words:** *International law, democracy, Islamic separation of powers, ubuntu*

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## Introduction

International law's preoccupation with democracy has two distinct sides. One targets democratic structures and institutions within states; the other deals with democratic credentials of the international law itself. I argue that neither one nor the other will produce any tangible results as long as they operate in disjunction. In order to establish a coherent framework for democracy in international law a reflection on the meanings and practices of democracy is needed. The current discourse on democracy in international law whether in relation to states or in relation to international law itself (mostly international organisations) focuses on the established western institutional structures of democracy, the most important being parliaments and elections. These structures being developed within and for state-based framework of western societies have limited utility beyond that framework. However, there is no sustained and profound discussion on the meanings of democracy and their relevance to international law and on different, non-western or less widely accepted western practices of democracy. This contribution proposes a way to overcome this difficulty by utilising non-western practices of democracy as a starting point for initiating a sustained and fruitful discussion on both the meanings and the practices of democracy that will allow overcoming western bias and imagine practices of democracy adapted to the supranational context. Within the limited framework of an article this goal obviously could only be realised to a limited extent: namely, as an illustration of the initial results obtained based on two selected cases-studies. It is hoped that by demonstrating the usefulness of the study of non-western practices and meanings of democracy for a more coherent approach to democracy in international law, this article will initiate a broad array of case-studies that in turn can feed into a later more far-reaching and systematic discussion of the issue.

After sketching the state of the art in relation to democracy in international law, the contribution's main part will focus on presenting one alternative non-western practice as a practice of democracy. Here the main focus will be on demonstrating how presenting this practice as an alternative practice of democracy raises new questions that enrich existing discussions and potentially open up avenues for envisaging an integrated approach to democracy in international law and new democratic practices at the international law level. In order to reinforce the argument about the utility of discussion of non-western practices as alternative practices of democracy for a more coherent approach to democracy in international law an additional example focusing on the alternative meanings of democracy will be discussed briefly.

The final part of this contribution demonstrates that this method of discussing the meanings of democracy and practices of democracy in relation to international law starting from non-western democratic practices assists in overcoming western bias, enhances support for ensuing international norms, provides a more coherent framework for thinking and practicing democracy beyond nation states.

## **1. State of the Art**

Traditionally, the discussions of democracy in international law take one of the two forms: either they address the democracy within states or they discuss democratic credentials of international institutions. So far, there is no coherent vision of democracy connecting international law's preoccupations with democracy within states and those related to democracy of international institutions. This is a major gap that undermines efforts in both areas because divergences in the approach to democracy in each of these areas will be used as an argument against the international law's commitment to democracy. For example, international institutions are often said to lack democratic legitimacy for two reasons: because not all states members of intergovernmental organisations are democratic and because not all processes and procedures within these organisations allow for the voice of all affected to be heard. Any palliative measures to address democracy deficit in international institutions that focus on such principles as transparency and accountability without addressing the broader issue of participation in decision-making process of all potentially affected individuals and entities remain subject to criticism and accusation of simple window-dressing. This in turn undermines efforts by these same institutions at promoting democracy within states and thus the institutions remain vulnerable to democracy-deficit criticism because their member states resist democratisation efforts. The vicious circle of democracy in international law can also take other more pervasive forms (Weiler 2004). This contribution purports to initiate a discussion on an integrated approach to democracy in international law that has a potential of breaking this vicious circle. It is hoped that the integrated approach to democracy proposed here based on two case-studies can be utilised to tackle various forms of democracy paradox in international law. The proposed approach consists in initiating a sustained discussion on both practices and meanings of democracy. As far as meanings of democracy are concerned, the discussion is quite rich among political scientists and philosophers. However, so far, it has only marginally affected debates on democracy in international law whether in relation to structures within states or in relation to international structures themselves.

International lawyers discuss practices of democracy slightly more. For example, Anne Peters significantly advanced discussion of direct democracy in international law through consideration of referenda and other forms of consultation of affected populations as possible international democratic practices (Peters 2009). However, these discussions remain limited to a small range of experiences of western liberal states.

The integrated approach to democracy is proposed not with a view of formulating a theory of democracy for international law but with a view of broadening the range of meanings of democracy and thus also the range of what counts as practices of democracy. In particular, it is crucially important to detach the vocabulary of democracy from western liberal democratic tradition focusing on the demos, the nation and the state. This should broaden the range of what is acceptable as practices of democracy. This in turn should allow for emergence of mechanisms that are more adapted to the diversity of institutions, processes and decision-making sites of the international system. In particular, moving beyond the traditional mechanisms that are tied to the state system through their conceptualisation and historical legacy. For this reason, this contribution suggests that an integrated approach to democracy needs to start from a discussion of alternative meanings and practices of democracy as they emerge from the experience of non-western societies. Since the idea of the state and its connection to democracy is a phenomenon born from the historical experience of western societies, the search for alternatives overcoming the link to the state should take place in contexts where the idea of the state did not exist yet or was not as influential as in the west. This article will demonstrate using two examples – one coming from early Islamic tradition and another coming from an African tradition – how discussion of non-western practices and debates as pertaining to democracy enriches both meanings and practices of democracy and also provides new models for addressing democracy deficit in international law. These two examples should provide initial guidance on the procedure involved in considering meanings and practices of democracy in international law as well as first insights as to the potential of this procedure for transforming the approach to democracy in international law.

## **2. Islamic ‘Separation of Powers’ as an Alternative Practice of Democracy**

The practice in question emerges from the historical experience of early Islamic societies. Obviously calling it ‘democratic’ displaces the practice of democracy from its traditional historical context and raises issues about the

meaning and place of democracy. This calls for a more thorough reflection on our current practices too. This practice called 'separation of powers' by one of the most prominent contemporary scholars of Islamic law Wael Hallaq (see in particular Hallaq 2012) can be conceived as a practice of democracy in a particular sense: it allows ordinary citizens to participate in the selection of those specialists who will become empowered to influence content of norms applicable to them. Rephrasing in more familiar terms we could say that it allows ordinary citizens to participate in the selection of legislators and judges. However, the mechanism used is far removed from western system of elections and the institution of parliaments. Reflecting on the mechanisms involved in this Islamic practice also allows imagining some interesting avenues for conceiving new practices of democracy in contemporary international law. In particular, it will be demonstrated that it calls among others to rethink the prevailing attitude towards the requirement of high moral character currently contained in many instruments dealing with selection of high-ranking international officials. Taking this requirement of high moral character seriously can also be considered part and parcel of international law's democratic credentials.

## **2.1 Islamic 'Separation of Powers'**

What is called here 'separation of powers' is very different from the traditional western concept of separation of powers. However, the use of the term is justified to the extent that both mechanisms ensure operation of the normative in separation from political influences as well as from personal preferences of decision-makers. The practice and the associated mechanism discussed in this section have as their main purpose to ensure that those who have influence over the construction of rules that will apply to the life of Muslim community and its individual members do not misuse the power they possess for personal purposes. It also ensures that political leaders are unable to influence the production of the normative. In order to understand this practice, it is necessary first to grasp the functional differentiation of roles related to governance, power, and law as they emerge from the early Islamic governance paradigm. These different roles and the associated functional differentiation were to various degrees part of the life of historical Muslim communities. However, they never existed in their pure form. This is similar to the western ideal of democracy: while we can identify instances where this concept is quite well implemented it is more difficult to affirm that it was ever fully realised.

The governance structure within the early Islamic society was based on a functional differentiation that has no parallels in the western legal tradition<sup>1</sup>. The best way of presenting this functional differentiation is by comprehending the different roles played by different individuals who participated in the normative regulation of conduct. In this regard, the central role of a jurist-interpreter (*mujtahid*)<sup>2</sup> and its relationship to other roles is of crucial importance. The jurist-interpreter is a specialist who due to his<sup>3</sup> knowledge and skills is recognised by the surrounding community as possessing the authority to derive rules suitable for application in concrete cases from indicators contained in primary textual sources. These primary textual sources of Islam (Quran and *sunna*) contain a number of pronouncements about the appropriate conduct in different types of situations. These pronouncements are supposed to guide the behaviour of believers at all times and in all places. However, the variety of conditions under which these situations arise and the situations themselves are in practice broader than what the primary sources contain. Thus, the need for all believers to be able to find guidance for their behaviour even in situations and under conditions that are not directly, clearly and unambiguously addressed in the primary textual sources. Juristic interpretative methodology served this specific need of believers. The methodology developed over time and became very complex matter requiring a number of skills and vast amount of knowledge. Jurists-interpreters were those specialists who possessed these skills and knowledge and to whom other believers turn when they need guidance and advice with regard to their behaviour. Their position within the normative field of Islamic societies was particularly important owing to their capacity and authority to develop and articulate new normative standards or more precisely new rules for application in concrete situations. Within this context ‘new’ always

<sup>1</sup> The description of the governance structure of early Islamic societies below is adapted from my latest book (Yahyaoui Krivenko 2017, 128-135) where it is used for distinct purposes unrelated to the issue of democracy.

<sup>2</sup> There are two Arabic terms that designate the jurist-interpreter: *mujtahid* and *mufti*. The difference between them relates to different broader social roles within Islamic societies. Their technical role in relation to production of normative standards is the same. For the purposes of this article it is not necessary to go further into this distinction. Therefore, in the subsequent discussion the term ‘jurist-interpreter’ is utilised as a generic term to denote the paradigm of highly qualified specialists who were able to derive new rules from indicators and advise other non-qualified believers on appropriate normative standards in particular situations. For some discussions regarding this distinction see Abdalla 2011; Hallaq 1996; Hallaq 2005, 146-147.

<sup>3</sup> The pronoun ‘he’ is used in discussing this early Islamic practice because historically at that time various roles described in this section were effectively reserved for men. However, the exclusion of women from these roles historically does not mean that the same is or has to be maintained today.

maintains the link to the primary sources and principles contained therein. Hallaq describes this authority of jurists-interpreters as epistemic (Hallaq 2005, 66; similarly Abu el Fadl 2001, 53) since the basis of authority was knowledge and qualifications obtained by a particular person within certain fields, such as Arabic language, history, knowledge of *Quran* and *sunna*, to name just a few. There is no agreement among scholars on the required qualifications. While a number of core qualifications can be discerned, their precise contours always remained subject to debate (Abu el Fadl 2001). The best way of understanding the role played by the jurist-interpreter is through a comparison to other functions fulfilled within the normative field of Islamic societies by other types of specialists.

The first significant distinction is drawn between the jurist-interpreter and the judge (*qāḍī*). Judges' function evolved significantly over time. During its crystallisation as a distinct and specialised function it became focused on 'conflict resolution and legal administration.' (Hallaq 2005, 57) At the early stages of development of the Islamic normative system judges were not required to possess legal knowledge (Hallaq 2005, 34-35, 38). Judges' efforts in resolving disputes between parties were focused more on a fullest possible understanding of social relationships between litigating parties and possible future implications of different outcomes rather than on a strict application of a black-letter law (Rosen 1989, 16-19). Thus, the main function of judges was gathering of evidence and hearing of witnesses, which included a major element of investigating integrity and rectitude of all participants (Hallaq 2009, 170).

When a more difficult question of law surfaced within a particular process, the judge would resort to legal opinions (*fatwās*) issued by jurists-interpreters. The existing research attests to the significant role played by jurists-interpreters in assisting judges with correct interpretation and application of points of law ranging from regular presence of jurists-interpreters in the courts of law to routine reference of difficult cases to jurists-interpreters (Hallaq 2009, 177-178; Masud et al 1996, 10-11; Powers 1993, 93, 94, 96). Obviously, at times it happened that a person assuming function of a judge possessed required qualifications of a jurist-interpreter. However, significantly, there is a strong tradition of jurists-interpreters refusing and avoiding appointments as judges (Hallaq 2005, 180-181). This was due to the fact that judges were appointed and paid by the political leader (*calif*) while jurists-interpreters in order to maintain their position of epistemic authority dissociated themselves from political influences, including through the maintenance of their financial independence (Bigh-Abramski 1992, 41; Hallaq 2009, 159-196; Abu el Fadl 2001, 15). This independence was a guarantee and a sign that their pronouncements on legal issues are based exclusively on



their epistemic authority, on their knowledge. This also ensured that jurists-interpreters are free from worldly political influences. Although, in practice the dynamics of the relationship between jurists-interpreters, judges and the ruler were far more complex, authors generally agree on the tendency of jurists-interpreters maintaining their independence from the political power and rulers being dependent upon uncorrupted jurists-interpreters to legitimate their position of power (Bigh-Abramski 1992; Hallaq 2003). One last remark on the conduct of hearings before a judge: Very often parties to a dispute present to a judge opinions of jurists-interpreters of their choice whom they consult in advance of appearing before the judge (Masud et al 1996, 9, 11). If there is a need to make a choice between opinions of different jurists-interpreters, it is based on the epistemic reputation of a particular jurist-interpreter that is obviously linked to his skills and knowledge, including the persuasiveness of his argument (Ibid).

Another role that needs to be distinguished from that of the jurist-interpreter is the role of the author-jurist. This role consisted mainly in the writing of legal manuals and other long treatises on law. Thus, author-jurist compiled and systematised legal knowledge produced by jurists-interpreters. Again, nothing prevented some jurists-interpreters from writing these compilations. However, fundamentally two activities were performed by two different sets of specialists. While an author-jurist needed training in law similar to that of the jurist-interpreter, the degree of perfection and depth of this knowledge was less demanding than that of the jurist-interpreter (Hallaq 2009, 176-183).

One fundamental question that arises with regard to the role of jurists-interpreters is the following: How a non-specialist could possibly know and check that the jurist-interpreter followed the prescribed methodology faithfully? How could a non-specialist ascertain that the specialist's advice was not simply an arbitrary ruling based on his own personal preferences? The seriousness of these questions and the need to find appropriate answers to them becomes more obvious if we remember that using the same methodology jurists-interpreters can arrive at different, even opposing results, but also that there are some differences in how the methodology is applied across different groups of specialists (schools of law). According to the fundamental principle of Islamic normative universe every specialist is deemed correct in his answers (every *mujtahid* is correct) (Abou el Fadl 2001, 32-33). Thus, in order to preserve links to the divine as expressed in the primary sources and ensure that advice is guided only by the search for the most faithful solution and not by personal preferences of the specialists, mechanisms of control were required.

The first element of this mechanism was the recognition of the inherent pluralism of Islamic normativity or Islamic law. The diversity of opinions

and divergences between scholars were recognised as a blessing and as a richness within Islamic tradition. In order to foster and maintain this diversity, the principle 'every *mujtahid* is correct' emerged very early in the development of Islamic normativity. The principle highlighted the recognition of the fundamental fallibility of human intellect while at the same time recognising the value of intellectual efforts of jurists-interpreters. The pluralism combined with the principle 'every *mujtahid* is correct' also ensured that no group of persons could legitimately claim that only one interpretation or vision of law is valid and thus usurp the power within a particular Islamic society.

The next important element was related to the possibility for believers to select among specialists to whom they turn for advice combined with the absence of an official system for determination of those qualified as jurists-interpreters. Since knowing God's expectations regarding each individual's behaviour (law) and acting accordingly is conceived in Islam as a fundamental religious duty of every believer, every Muslim is expected to understand and actively engage with the normative. Becoming a jurist-interpreter was potentially open to any believer and achievable without financial sacrifice (Hallaq 2009, 125-158). For those believers who were not qualified as jurists-interpreters this meant a duty to diligently select a jurist-interpreter whom they wish to follow (Weiss 1968, 128-129; Abu el Fadl 2001, 51). Diligence in this regard signified gaining as much as possible understanding of each particular jurist-interpreter's approach to legal reasoning as well as acquire knowledge of his piety, moral standing, and similar personal qualities. This was quite easily achievable task because jurists-interpreters did not form an elite class but permeated all classes and social strata of society (Lapidus 1967, 108). On the other hand, the standing of jurists-interpreters, including the precise enumeration of qualifications they needed to acquire has never been officialised or sanctioned by the ruling authorities (Hallaq 2009, 125-158; Weiss 1968, 128-129). Therefore, the decision about who is qualified as a jurist-interpreter and who is the best jurist-interpreter was left to ordinary believers who would through their choices, through their solicitation of opinions of jurists-interpreters determine the standing of a particular specialist as a recognised and renowned jurist-interpreter.

The third element within the system was related to financial aspects of jurists-interpreters' activities. These financial aspects are of a twofold nature: they encompass the accessibility of services and financial independence of jurists-interpreters. Accessibility of advice and services provided by jurists-interpreters was one of the fundamental pillars of the Islamic governance system. In order for the ordinary believer to be able to access freely the specialised knowledge of jurists-interpreters and choose without constraints

those whom he/she deems most qualified and pious, free nature of services was essential. This element also allowed keeping the mechanism related to the free choice of specialists by individual believers running efficiently. The second financial aspect relates to jurists-interpreters' financial independence. The provision of free services to believers meant that jurists-interpreters had to find other sources of income. Simultaneously, as mentioned above, jurists-interpreters needed to maintain their independence from the ruling elite. Therefore, they could not rely on a systematic payment from the ruler. This led to the creation of other mechanisms ensuring sources of income for jurists-interpreters. Many of them had other professions or qualifications that constituted their main source of income. Occasionally, they would accept positions and services remunerated by the ruler. However, this would be done in such a way as not to overshadow their independence. The relationship between rulers and jurists-interpreters was quite complex (see eg Zaman 1997). However, authors generally conclude that 'caliph does not define the law' (Zaman 1997, 36).

As a result, a particular dynamic emerges whereby specialists who can influence the content of the normative, exercise their norm-setting competence within a framework that creates external conditions and internal incentives most favourable to an independent and purely epistemologically oriented activity. This in turn results in the effective pre-emption of the arbitrary use of power by jurists-interpreters themselves but also by rulers or political power-holders. Of course, rulers or political power-holders could always attempt to manipulate opinions of jurists-interpreters by brute force. There are many examples of physical repression of jurists-interpreters through the centuries of Islamic history. The political power-holders could also simply disregard the opinion of jurists-interpreters and act as they wish. However, in both cases the ruler or political power-holder loses his legitimacy as a political leader of Muslim community. Therefore, in the history of Islamic societies the rulers had never acted as if they were indifferent to the opinions of jurists-interpreters. They adopted various strategies aimed at justifying their actions from within the juristic discourse by attempting to exercise some degree of control over the discourse of jurists-interpreters. For instance, they would privilege a particular school or stream labelling others as apostates or blasphemers or attempt to develop strategies at influencing at least some portions of jurists-interpreters through financial means. For example, the period of Islamic history known as *mihna* symbolises this effort by the ruling elite to impose only one stream of thought (see eg Tuner 2013). However, paradigmatically, this structure represents a particular assemblage that ensured norm-production guided by shared normative values of a community. Within this norm-production

different mechanisms were built in that operated as guardians of continuing pluralism and re-negotiation of values thus allowing for a full participation of all believers in the elaboration of normative standards of the community in line with democratic ideals ensuring that all members of the community fully belonged to and participated in the norm-producing assemblage.

We can summarise the essential elements of this structure as follows: (1) celebrated and actively promoted pluralism with a clear absence of hierarchy; (2) free access to jurists-interpreters (norm producers) that itself included such sub-elements as (a) promotion of diligence (understood as selection based on relevant criteria such as knowledge and piety) on the part of the general public in selecting their preferred norm-producer, (b) possibility for general public to get knowledge about the qualifications and attitude of norm-producers personally even if indirectly, (c) absence of sanctioning authority of power-holders with regard to the recognition of qualifications of norm-producers. Finally, the third element (3) consisted in the financial independence of jurists-interpreters that signified independence from both the power-holder (jurists-interpreters could not be paid regularly by power-holders for their services or could never be considered as somehow employed by the ruling elite) and general public (in the sense that the provision of services by jurists-interpreters was for free; while this helped maintain the genuine character of the second element, it also ensured that a wealthy member of the general public could not manipulate the opinion provided by the jurist-interpreter through a higher payment)<sup>4</sup>.

Having clarified this particular practice of early Islamic societies, it is possible now to consider its implications for discussions on democracy in international law.

## **2.2 Impact of Islamic ‘Separation of Powers’ on Approach to Democracy in International Law**

Labelling the above-presented early Islamic practice of ‘separation of powers’ as a practice of democracy calls for a justification. This need for justification immediately demands for a reflection on the meanings of democracy. Although the importance of reflecting on the meanings of democracy will be discussed in more detail in relation to the example of an African practice in the next section, the interconnected nature of the

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<sup>4</sup> It should be noted that this structure compared by Hallaq to the separation of powers was intimately linked to what he labels as the moral technologies of the self. These technologies acted as an addition safeguard against possible misuses of certain elements mentioned above. However, this aspect cannot be dealt with here due to limitations of space. For more information see Hallaq 2012, chapter 5.

reflection on the meanings and practices of democracy is apparent already here and is therefore briefly discussed in relation to the practice of Islamic separation of powers.

When initiating the reflection on the practice of Islamic separation of powers as a practice of democracy, it is necessary to acknowledge that the traditional western focus on elections is just one of the possible mechanisms in achieving democracy. Even within western democratic states practices of democracy are not limited to electoral and representative models but include various forms of direct participation, referenda being the most obvious example. When trying to think about the practices of democracy beyond elections and parliaments, it is important to remember political scientists' characterisation of democracy as paradoxical, confusing and unsettled (see eg Dahl 2000, Held 2007). Trying to determine if a particular practice can potentially be counted as democratic requires considering the underlying principles associated with democracy, such as liberty of choice for each and every individual and possibility of self-expression. For example, Josiah Ober develops a powerful argument for democracy as a capacity to do things, not a majority rule (Robert 2008). Other authors stress variety of understandings of democracy (Held 2007) or highlight contrasting discussions of values underlying different ideals of democracy (Pettit 2012). This broadening of reflection on practices of democracy to the underlying democratic principles also leads to the questioning of the sufficiency of democratic credentials of mechanisms traditionally available at the level of international law. Simultaneously, the question about suitability of this historically and culturally circumscribed practice of Islamic separation of powers as a model or place of inspiration for envisaging new democratic practices of global governance emerges. In order to approach this question in a most productive and unbiased manner I suggest focusing on the *mechanism* embedded in this practice simultaneously evaluating its democratic credentials. Only then can the question about the transferability of this mechanism between different historical and cultural contexts be considered.

The mechanism of Islamic separation of powers includes a series of extra-normative dynamics that ensure that pronouncements of jurists-interpreters on normative questions are as much as possible based on purely cognitive or epistemological foundations without any influence by such considerations as financial, political, personal/private relationships and similar unrelated factors. Thus, the system aims at ensuring that the jurist-interpreter as the person authorised to influence and change the content of the normative has all required knowledge in order to engage in the rule-producing process, but in addition it also introduced a series of conditions allowing the jurist-interpreter to live and engage in the rule-producing process without

being manipulated through his human needs and necessities. However, considering that some people do not content themselves with just basic necessities and might desire more wealth or power and thus be tempted to corrupt the epistemological purity of the normative production process in order to satisfy these desires, an additional element was integrated into this control mechanism. This element can be called 'moral' in reference to the personal integrity and conduct of jurists-interpreters in everyday life. This element functioned through embeddedness of jurists-interpreters in their surrounding community. Living side-by-side with people who come for advice and guidance, whose life generates needs for rules that jurist-interpreters formulate also meant that daily behaviour and attitude of jurists-interpreters could be scrutinised by the surrounding community. If ordinary people suspected that a particular jurist-interpreter was not sincerely devoted to the search for truth, that he did not follow his own pronouncements, they would easily turn away from him to another jurist-interpreter with more integrity and higher moral standards. This simultaneous acceptance of diversity within a given range of methodological approaches and possibility for the followers to select and follow the approach of their choice functioned as a controlling mechanism but also as a democratic mechanism allowing all members of the community to influence norm production through their selection of most qualified (both morally and epistemologically) specialists. Therefore, the mechanism can legitimately be called democratic because it allows people to exercise power over and control norm production based on personal choices.

Envisaging the transferability of this mechanism to international law requires reflection on a series of questions. The first question is: are there at the international law level individuals whose role is comparable to the role of jurists-interpreters, namely, are there any individuals who can significantly influence the norm-production process in international law? If yes, who are they? This requires consideration of the influence exercised on the norm production in international law by various individuals beyond the traditional theory of sources. The roles coming closest in international law to the role of the jurist-interpreter are various decision-making positions in judicial and quasi-judicial bodies. From a strictly positivist point of view these decision-makers do not contribute to the formation of norms of international law except to the limited extent allowed by art. 38(1)d) of the Statute of the International Court of Justice. However, in practice, the growing impact of judicial and quasi-judicial bodies on the elaboration of international norms cannot be underestimated. This is evidenced by the increasing attention paid to the work of and influence exercised by various international courts and tribunals. In addition, the role of judges in law-

making has been subject of scholarly debate and scrutiny since at least the early days of the Permanent Court of International Justice (see eg Ginsburg 2006; Hernandez 2016). More recently, proliferation of courts and tribunals as well as the increasing role they play in some areas led scholars to affirm that the practice of constitutional legitimation was transferred, at least in part, from legislatures to judiciaries (Thornhill 2016, 100). In this regard, the parallels between the role of jurists-interpreters and that of decision-makers in judicial and quasi-judicial bodies are even more compelling and the need for democratic credentials of these decision-making bodies even more urgent.

Since individuals fulfilling similar functions in both contexts were identified, a more important question about the transferability of the mechanism that ensures direct control by those potentially affected by the decisions of these judicial and quasi-judicial bodies over the epistemological and moral qualities of members of these bodies can be raised. First, it should be noted that as a matter of principle international law recognises the importance of both knowledge-based and character-based qualifications of decision-makers in various judicial and quasi-judicial bodies and other important positions within international institutions. Rules of selection and appointment of numerous international judicial and quasi-judicial bodies include the requirement of good moral character<sup>5</sup>. At present, the requirement of a good

<sup>5</sup> Some examples include: For Judges of the ICJ see art 2 ICJ Statute: ‘persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris consults of recognised competence in international law.’ For other examples see members of the Human Rights Committee ‘shall be persons of high moral character and recognised competence in the field of human rights’ (International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 28(2)); provisions for other human rights treaty monitoring bodies indicate the following requirements: ‘experts of high moral standing and acknowledged impartiality’ (Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195, art 8(1)); ‘experts of high moral standing and recognised competence in the field of human rights’ (Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, art 17(1)); ‘high moral standing and competence in the field covered by the Convention’ (Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13 art 17); ‘high moral standing and recognised competence in the field covered by this Convention’ (Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, art 43(2)); ‘high moral standing, impartiality and recognised competence in the field covered by the Convention’ (International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families, 18 December 1990, 2220 UNTS 3, art 72 (1)b)); ‘high moral standing and recognised competence and experience in the field covered by the present Convention’ (Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3, art 34(3)); ‘high moral character and recognised competence in the field of human rights’ (International Convention for the Protection of All Persons from Enforced Disappearances, 20 December 2006, 2716 UNTS 3, art 26(1)); with regard to the mandate-holders within special procures of the Human Rights Council, ‘The following general

moral character is not verified seriously during the selection procedure. As one commentator put it, the requirement of high moral character is at present 'more or less the equivalent of unimpeachable conduct as a public figure; in other words, the candidate need not be an angel, though he must not be only little better than a rascal.' (Elias 1979, 73) This is a very superficial assessment from the perspective of the Islamic governance system where the scrutiny of the moral character is very thorough and continuous aimed at ensuring that the decision-maker himself adheres on an everyday basis to values and norms he postulates for others. Also, this assessment in the Islamic mechanism is not left to institutions detached from the lives and experiences of those whom decisions will affect but is performed by the very persons who will be affected by decisions. Given the localised character of the Islamic mechanism of separation of powers the transferability of this mechanism to the global level might be questioned. However, we should note that, first, the reputation of some highly qualified and respected jurists-interpreters was so well-known that the opinions of these jurist-interpreters were solicited not only by those belonging to the local community within which the jurist-interpreter lived, but also from faraway lands. Today, with the development of internet and rapid exchange of information, it is possible to envisage mechanisms that would allow every person to have access to relevant information about a particular decision-maker or a candidate for a decision-making position. It is also possible to envisage a mechanism that would allow individuals to have a say in the selection of international decision-makers. For example, by creating lists of candidates from which parties can choose their preferred judges or decision-makers. Paying attention to the various safeguards inbuilt into the Islamic mechanism of separation of powers when envisaging a similar mechanism at the international level can also help preventing potential malfunctions and misuses.

This analysis of the mechanism of Islamic separation of powers and its transferability to international law demonstrated two essential points: First,

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criteria will be of paramount importance while nominating, selecting and appointing mandate-holders: (a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity' art 39 of the A/HRC/RES/5/1 18.6.2007; Beyond the broad area of human rights the requirement also applies. For a few examples see art 2(1) of the Statute of the International Tribunal for the Law of the Sea requiring judges to be 'persons enjoying the highest reputation for fairness and integrity and of recognised competence in the field of the law of the sea.' (Annex to the Convention on the Law of the Sea, 10 December 1982, 1833 UNTS, 3) and art 36(3) a) of the Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3 stipulating that judges be 'chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices'.



the reflection on non-western practices of democracy puts existing practices of international law into a new light and nurtures a more critical reflection that has a greater potential to transform existing practices at two levels simultaneously: at the level of international institutions and at the level of individual participation in decision-making processes affecting international law. Second, this analysis also demonstrated how important reflection on meanings of democracy is in considering alternative and new practices of democracy. The next section of this article focuses on the significance of reflection on the meanings of democracy in slightly more detail.

### **3. Ubuntu and Alternative Meanings of Democracy in International Law**

To reinforce the argument about the potential of the reliance on non-western ideas and practices another supporting example, namely Ubuntu, is briefly discussed here. Although it is debatable whether this traditional African concept can be called 'democracy', reflecting on the debates assists in a deeper analysis of democratic credential of various international law mechanisms and practices. It also provides necessary direction to the discussion of the meanings of democracy and reflection on the practices of democracy.

Ubuntu is a more elusive concept than the practice of 'separation of powers' in the paradigm of Islamic governance described above. Some view it as a philosophy, others as an ethical or moral concept (Gade 2012). In either case the initial discussion is situated at a very general level highlighting the link between Ubuntu and the idea of humanity, between the collective and the individual. Usually the following saying is presented as the quintessence of Ubuntu: 'a human being is a human being because of other human beings' (Letseka 2012, 48; Mokgoro 1998, 15-16). However, many scholars highlight the impossibility of faithfully rendering the concept of Ubuntu into European languages. Also, the implications of Ubuntu for contemporary policy-making, political and legal practice are highly debatable. In relation to democracy, the views range from insights into the philosophy of Ubuntu being an enabler of a just and peaceful society, even overcoming the shortcomings of western liberal democracies (Zandberg 2010, 8, 107), to an outright negation that Ubuntu 'could provide a distinctive underpinning for democracy' (Enslin and Horsthemke 2004, 552). However, I submit that this very controversy raises a series of fundamental questions that if discussed seriously provide a fruitful framework for envisaging an integrated approach to democracy in international law, similarly to the previously discussed practice, connecting

democracy within states with democratic credentials of international institutions. Below I highlight just a few of these questions and indicate how a discussion around these questions can assist in advancing towards an integrated approach to democracy in international law.

One of the debates emerging from the proposals at utilising Ubuntu in shaping South African democracy is whether democracy is essentially an embedded, local or a universal concept. For instance, Enslin and Horsthemke affirm: 'The legitimate assumption that democracy is a contested concept may lead some to believe that there is a plethora of democracies ... that vary dramatically from one social, political, economic or cultural context to another. We consider such a position ... to be not only unhelpful but ultimately untenable.' (Enslin and Horsthemke 2004, 553) Thus, they suggest that democracy is a universal concept that has the same conceptual, empirical/epistemic and normative legacy everywhere (Ibid). This view is disputed by Letseka who highlights different meanings of democracy and argues with the help of some prominent liberal theorists including Dworkin that human beings are essentially embedded and thus need to perceive everyday political practices as familiar and welcoming. Therefore, according to him there is nothing wrong with the embeddedness of democracy (Letseka 2012, 50-51). This discussion brings to the fore some issues of fundamental importance for democracy in international law. If democracy itself is an essentially contested concept, what is it that international law promotes and even imposes through its support for free elections? Was there any opportunity for states – not to talk about other subjects of international law including individuals – to participate in a sustained and detailed discussion on the meaning(s) of democracy? Even if democracy is a universal concept as Enslin and Horsthemke argue, since there is still no agreement among political scientists and philosophers on its conceptual and normative underpinnings, how can international law legitimately assume that its activities aimed at democracy promotion are really promoting democracy? In order to approach these questions constructively, I suggest that international law needs to distinguish in its activities on democracy between meanings of democracy and practices of democracy. While meanings of democracy can have some universalising conceptual content, practices of democracy need to be embedded in local contexts. Moreover, both meanings and practices of democracy have to be subject to constant re-negotiation and debate. In this regard, we have to acknowledge that practices of democracy will necessarily differ depending on contexts. In this context, many activities by international institutions aimed at implementing the western electoral practices around the world might be viewed as highly problematic.

Another issue typically raised in relation to Ubuntu relates to its communitarian outlook. Some authors argue that the communitarian aspects of Ubuntu are so strong that they undermine individual autonomy and freedoms that are essential components of western liberal democracies at least to the extent that according to the philosophy of Ubuntu ‘the group constitutes the focus of the activities of the individual members of the society at large...’ (Kamwangamalu 2008, 115; see also Keevy 2009, 70) However, many authors express more nuanced opinions on Ubuntu highlighting the interdependency of the individual and the community:

[W]hat is at stake here is the process of becoming a person or, more strongly put, how one is given a chance to become a person at all. (...) The community, then, is always being formed through an ethic of being with others, and this ethic is in turn evaluated by how it empowers people. (Cornell and van Marle 2005, 206)

According to some authors, this leads to a political ideal that not simply dictates values to members of a given community but involves a constant development of shared understandings and meanings bearing on the political life of one’s community (Letseka 2012, 56; Nikondo 2007, 95-96). This development of concepts and institutions of a given political community through deliberation is clearly supportive of democratic ideals because it allows individuals to influence change, to have a direct influence on the future of societies and institutions within which they will live. The discussion around the individualistic v communitarian characteristics of Ubuntu enriches the understanding of the meanings of democracy and provides a basis for a discussion of some fundamental for international democracy questions, such as the possibility and dynamics of global democracy in a world characterised by diversity. Most importantly, for the purposes of present article it also indicates ways of transcending the division between democracy within states and democratic credentials of international institutions thus leading to a more integrated approach to democracy breaking the vicious circle described at the beginning of this article.

## Conclusions

This article’s aim was to argue for a possibility of an integrated approach to democracy in international law overcoming a currently existing separation between democracy within states and democratic credentials of international institutions. The article suggested that one of the ways to achieve this is through discussion and consideration of practices and meanings of democracy, in particular in less familiar non-western contexts. In this process, it was

emphasised, it was important to keep meanings and practices of democracy as separate but interdependent and interrelated elements. In order to defend this argument, the article discussed two examples: a practice of democracy from a non-western context, namely Islamic separation of powers, and meanings of democracy as they emerge from the African concept of Ubuntu.

The above examples demonstrate that this method of discussing the meanings of democracy and practices of democracy in relation to international law starting from non-western democratic practices assists in overcoming shortcomings of the current approach. In particular, it widens the understanding of democracy and the variety of practices counting as democratic. This in turn creates more fruitful basis for imagining responses to democracy deficit in international law. The example of the separation of powers in Islamic governance also demonstrates interdependency of meanings and practices of democracy. It emphasises that envisaging more radically new practices of democracy is impossible without a simultaneous discussion of meanings of democracy. Finally, this example demonstrated how by focusing on mechanisms involved and their functional equivalents in other contexts a transfer of alternative practices of democracy to the global level becomes possible. Similar dynamic is visible in the discussion of meanings of democracy in relation to Ubuntu that raises a fundamental for international law issues on the relationship between the individual and the community in the context of diversity. Transferring these discussions from the African context of Ubuntu into the context of international law with all the insights already gained opens up new directions for theory and practice of democracy at the global level overcoming the separation between democracy within states and democratic credentials of international institutions.

Continuing discovery and engagement with non-western practices and traditions of democracy has the potential to provide a more coherent integrated framework for democracy in international law. The diversity of contexts within which these non-western practices and traditions operate or operated offers the possibility of devising a variety of practices and meanings adapted to a panoply of institutional, procedural and other contexts within which the issue of democracy arises for international law. Since many non-western notions developed without the reliance on the idea of state they also can offer insights more adapted to international law and realities of globalisation than the traditional state-centred western structures.

## References

- Abdalla, M. (2011) 'Do Australian Muslims Need a Mufti? Analysing the Institution of ifta in the Australian Context', in Hosen N. and Mohr

- R., (eds.), *Law and Religion in Public Life: A Contemporary Debate*, London: Routledge, 214-228.
- Abou el Fadl, K. (2001) *Speaking in God's Name: Islamic Law, Authority and Women*, Oxford: Oneworld.
- Bligh-Abramski, I. (1992) 'The Judiciary (Qādīs) as a Governmental-Administrative Tool in Early Islam', *Journal of the Economic and Social History of the Orient*, 35 (1), 40-71.
- Cornell D. and van Marle, K. (2005) 'Exploring Ubuntu: Tentative Reflections', *African Human Rights Law Journal*, 5 (2), 195-220.
- Dahl, R.A. (2000) 'A Democratic Paradox', *Political Science Quarterly*, 115 (1), 35-40.
- Elias, T.O. (1979) *New Horizons in International Law*, The Hague: Sijthoff & Noordhoff.
- Enslin, P. and Horsthemke, K. (2004) 'Can Ubuntu Provide a Model for Citizenship Education in African Democracies?' *Comparative Education* 40 (4), 545-558
- Gade, C.B.N. (2012) 'What is Ubuntu? Different Interpretations among South Africans of African Descent' *South African Journal of Philosophy* 31 (2), 484-503.
- Ginsburg, T. (2006) 'International Judicial Lawmaking', in Voigt, S., Albert, M. and Schnmodtchen, D. (eds.), *International Conflict Resolution*, Tübingen: Mohr Siebeck, 155-183.
- Hallaq, W. (1996) 'Ifta' and Ijtihad in Sunni Legal Theory: A Developmental Account', in Masud, M.K., Messick, B. and Powers, D.S. (eds.) *Islamic Legal Interpretation. Muftis and Their Fatwas*, Cambridge MA: Harvard University Press, 33-43.
- Hallaq, W. (2003) 'Juristic Authority v State Power: The Legal Crises of Modern Islam', *Journal of Law and Religion*, 19 (2), 243-258.
- Hallaq, W. (2005) *The Origins and Evolution of Islamic Law*, Cambridge: Cambridge University Press.
- Hallaq, W. (2009) *Shari'a: Theory, Practice, Transformations*, Cambridge: Cambridge University Press.
- Hallaq, W. (2012) *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*, New York: Columbia University Press.
- Held, D. (2006) *Models of Democracy* 3<sup>rd</sup> ed. Cambridge: Polity Press.

- Hernández, G.I. (2016) 'International Judicial Lawmaking', in Brölmann, C. and Radi, Y. (eds.), *Research Handbook on the Theory and Practice of International Lawmaking*, Cheltenham, Northampton: Elgar, 200-221.
- Kamwangamalu, N. (2008) 'Ubuntu in South Africa: A Sociological Perspective to a Pan-African Concept.', in Asante, M.K., Miike, Y., and Yin, J. (eds.), *The Global Intercultural Communication Reader*, London: Routledge, 113-122.
- Keevy, I. (2009) 'The Constitutional Court and Ubuntu's Inseparable Trinity', *Journal for Juridical Science*, 34 (1), 61-88.
- Lapidus, I.M. (1967) *Muslim Cities in the Later Middle Ages*, Cambridge: Cambridge University Press.
- Letseka, M. (2012) 'In Defense of Ubuntu', *Studies in Philosophy and Education*, 31 (1), 47-60.
- Masud, M.K., Messick, B., and Powers, D.S. (1996) 'Muftis, Fatwas, and Islamic Legal Interpretation.', in Masud, M.K., Messick, B., and Powers, D.S. (eds.), *Islamic Legal Interpretation. Muftis and Their Fatwas*, Cambridge MA: Harvard University Press, 3-32.
- Mokgoro, Y. (1998) 'Ubuntu, and the Law in South Africa', *Buffalo Human Rights Law Review*, 4 (1), 15-23.
- Nkondo, G.M. (2007) 'Ubuntu as Public Policy in South Africa: A Conceptual Framework', *International Journal of African Renaissance Studies*, 2 (1), 88-100.
- Ober, J. (2008) 'The Original Meaning of "Democracy": Capacity to Do Things, not Majority Rule', *Constellations*, 15 (1), 3-9.
- Peters, A. (2009) 'Dual Democracy' in Klabbers, J., Peters, A., and Ulfstein, G. *The Constitutionalization of International Law*, Oxford: Oxford University Press, 263-341.
- Pettit, P. (2012) *On the People's Terms: A Republican Theory and Model of Democracy*, Cambridge: Cambridge University Press.
- Powers, D.S. (1993) 'Legal Consultation (futyā) in Medieval Spain and North Africa', in Chibli, M. (ed.), *Islam and Public Law: Classical and Contemporary Studies*, London: Graham and Trotman, 85-106.
- Rosen, L. (1989) *The Anthropology of Justice: Law as Culture in Islamic Society*, Cambridge: Cambridge University Press.
- Thornhill, C. (2016) *A Sociology of Transnational Constitutions*, Cambridge: Cambridge University Press.
- Turner, J.P. (2013) *Inquisition in Early Islam: The Competition for Political and Religious Authority in the Abbasid Empire*, London: I.B. Tauris.

- Weiler, J.H.H. (2004) 'The Geology of International Law – Governance, Democracy and Legitimacy', *ZaöRV* 64 (3), 547-562.
- Weiss, B.G. (1968) *The Spirit of Islamic Law*, Athens and London: The University of Georgia Press.
- Yahyaoui Krivenko, E. (2017) *Rethinking Human Rights and Global Constitutionalism: From Inclusion to Belonging*, Cambridge: Cambridge University Press.
- Zaman, M.K. (1997) 'The Caliphs, the "Ulamā", and the Law: Defining the Role and Functions of the Caliph in Early 'Abbāsīd Period', *Islamic Law and Society* 4 (1), 1-36.
- Zandberg, J. (2010) *The Philosophy of Ubuntu and the Origins of Democracy*, Lulu Publisher.