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The Judicial Trilemma

Jeffrey L. Dunoff and Mark A. Pollack

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International tribunals confront a “Judicial Trilemma.” More specifically the states that design, and the judges that serve on, international courts face an interlocking series of tradeoffs among three core values: (1) judicial independence, the freedom of judges to decide cases on the facts and the law; (2) judicial accountability, structural checks on judicial authority found most prominently in international courts in reappointment and reelection processes; and (3) judicial transparency, mechanisms that permit the identification of individual judicial positions (such as through individual opinions and dissents). The Trilemma is that it is possible to maximize, at most, two of these three values. Drawing on interviews with current and former judges at leading international courts, this article unpacks the logic underlying the Judicial Trilemma, and traces the varied ways in which this logic manifests itself in the design and operation of the International Court of Justice, European Court of Human Rights, Court of Justice of the European Union, and the World Trade Organization’s Appellate Body. The Judicial Trilemma does not identify an “ideal” court design. Rather it provides a framework that enables international actors to understand the inevitable tradeoffs that international courts confront, and thereby helps to ensure that these tradeoffs are made deliberately and with a richer appreciation of their implications.

Human Rights Experimentalism

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Human rights in general and the international human rights system in particular have come under increasing attack in recent years. Quite apart from the domestic and global political events since 2016, including an apparent retreat from international institutions, the human rights system has in recent times come in for severe criticism from academic scholars. Amongst the various criticisms levelled have been: (1) the ineffectiveness and lack of impact of international human rights regimes, (2) the ambiguity and lack of specificity of human rights standards, (3) the weakness of international human rights enforcement mechanisms, and (4) the claim to universalism of human rights standards coupled with the hegemonic imposition of these standards on diverse parts of the world. This article responds to several of those criticisms by introducing the idea of experimentalist governance, interpreting key

aspects of the functioning of certain international human rights treaties from the perspective of experimentalist governance theory, and surveying a body of recent scholarship on the effectiveness of such treaties. Contrary to the depiction of international human rights regimes as both ineffective and top-down, the article argues that they function at their best as dynamic, participatory, and iterative systems. Experimentalist governance offers a theory of the causal effectiveness of human rights treaties, brings to light a set of features and interactions that are routinely overlooked in many accounts, and suggests possible avenues for reform of other human rights treaty regimes with a view to making them more effective in practice.

Constructing an International Community

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What unites states and other global actors around a shared governance project? How does the group— what I will call an “international community”— coalesce and stay engaged in the enterprise? A frequent assumption is that an international community is cemented by its members’ commonalities and depleted by their intractable disagreements. This article critiques that assumption and presents, as an alternative, a theory that accounts for the combined integration and discord that actually characterize most global governance associations. I argue that conflict, especially conflict that manifests in law, is not necessarily corrosive to an international community. To the contrary, it often is a unifying force that helps constitute and fortify the community and support the governance project. As such, international legal conflict can have systemic value for the global order, even when it lacks substantive resolution. The implications for the design and practice of international law are far-reaching.

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