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# THE MULTINATIONAL CORPORATION AS “THE GOOD DESPOT”: THE DEMOCRATIC COSTS OF PRIVATIZATION IN GLOBAL SETTINGS

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**The Multinational Corporation as “the Good Despot”:  
The Democratic Costs of Privatization in Global Settings**

*Doreen Lustig and Eyal Benvenisti\**

*In 1861 John Stuart Mill published Considerations on Representative Government to discuss the justifications of democracy. The third chapter of this book explores why a government run by a good despot is unacceptable. In this Article we revisit Mill's critique of the good despot to problematize the contemporary exercise of authority and influence by multinational companies especially in foreign countries. Inspired by Mill, we redefine the problem of privatization. The challenges of privatization are mostly defined by essentialist concerns (whether certain governmental functions must remain the province of public authorities) or a consequentialist critique on the problematic outcomes of privatization (how it influences human rights or causes environmental damage). In this Article we shift the attention to the democracy losses associated with the privatized decision-making process. We identify the growing influence of private, particularly foreign actors, as a democratic problem of exclusion of persons from decision-making processes on issues with constitutive influence on their lives, and explore the different aspects of what we regard as an acute problem of democratic deficit. The redefining of the problem as one of process and democratic deficit allows us to conclude with a critical assessment of the potentials and limitations of contemporary attempts to solve it.*

## INTRODUCTION

In this Article we wish to highlight the democratic costs associated with privatization, in particular privatization involving foreign businesses. We argue that the combination of two contemporary trends — privatization and globalization — imposes enormous challenges to the democratic ideal. To do so we return to nineteenth century ideas about democracy which were then understood to materialize within a sovereign state, premised on the existence of a fit between the state and the affected stakeholders. This feature which marries territorial democracy and sovereignty collapsed in the global age. The misfit between those who decide and those who are affected by the decision is further exacerbated by the growing influence of private actors such as multinational companies and their complex apparatuses of fragmented structures of authority over broader dimensions of life, especially in the case of communities that depend on foreign investments.

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To understand these challenges we explore John Stuart Mill's theory on democracy. In 1861 Mill published his theory on democracy in *Considerations on Representative Government*.<sup>1</sup> He used the parable of the Good Despot to explain the main justification for democratic rule. The best of all despots could never take the interests of all those who are affected into account. For Mill, the rule of the good despot could only be justified in colonial settings because of the backwardness of colonial societies. Although this line of reasoning (of the civilized v. uncivilized) is now widely recognized as illegitimate today, a new version of the good despot still passes as a legitimate form of governance especially in post-colonial settings, in the form of the private corporation which makes no claims of intervening in public policy-making but instead following the seemingly neutral laws of the market. In this Article we argue that by applying The Milliean Good Despot metaphor it is possible to assess the contemporary challenges to democratic rule that companies, especially foreign companies, pose. In what follows we show how Mill's argument in favor of representative government can be applied to challenge the legitimacy of some aspects of private exercise of authority and influence, especially in economically-dependent communities. Ultimately, we turn Mill against himself.

Inspired by Mill, we move away from the preoccupation of contemporary literature on private exercise of authority with the identity question of the actor (the question whether certain governmental functions must remain the province of public authorities instead of being privatized because they are inherently public<sup>2</sup>) or the negative outcomes of privatization (how it influences human rights or causes environmental damages<sup>3</sup>) and shift our gaze to the decision-

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<sup>1</sup> John Stuart Mill, *Considerations on Representative Government* (Henry Regnery Co. 1962) (1861).

<sup>2</sup> For this line of argument see, for example, Avihay Dorfman & Alon Harel, *The Case Against Privatization*, PHIL. & PUB. AFF. (forthcoming 2013); Mathew Blum, *The Federal Framework for Competing Commercial Work Between the Public and Private Sectors*, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 63, 66 (Jody Freeman & Martha Minow eds., 2009); Alfred C. Aman Jr., *Privatization and Democracy: Resources in Administrative Law*, in GOVERNMENT BY CONTRACT, *supra*, at 261, 285; Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT, *supra*, at 110, 126-27.

<sup>3</sup> See, e.g., Hila Shamir, *The Public: Regulation and Privatization Beyond the State/Market Duality*, 15 THEORETICAL INQUIRIES L. xxx (2014); Tony Prosser, Public Service Law: Privatization's Unexpected Offspring, 63 LAW & CONTEMP. PROBS. 63, 67-70 (2000) (discussing the negative consequences for disempowered communities); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1026 (2005) (addressing violations of human rights and the jeopardy to the interests of society: "[T]hese interests include controlling costs, minimizing financial waste, maximizing effectiveness, happening of atrocities in the context of privatizing a function in the military, public confidence in the government"); Jeffrey Branstetter, Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement, 34 PUB. CONT. L.J. 443, 444, 447 (2005) (addressing corruption and conflict of interests); Alfred C. Aman, *Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEGAL STUD. 511, 518 (2005) ("Markets and market approaches can cut costs in ways that politically accountable officials usually wish to avoid. Privatization of some governmental services may make it easier to cut budgets or eliminate unions."); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1308 (2003) ("[T]he new array of contracts has produced a more fragmented network of local agencies and private providers, which makes

making process of the corporation, particularly the foreign corporation, and the issue of participation in its decisions. Rather than looking at actors and results, we identify the exclusion of persons from the decision-making processes on issues with constitutive influence on their lives as a key challenge that the growing influence of private actors poses for democracy.

In Part I we discuss the Millian challenge to despotic rule and elaborate on his (and others) utilitarian and non-utilitarian arguments in favor of democracy. Despite Mill's support for a close link between the governing body and the community it governs, he did not consider his critique of despotic rule applicable to the case of colonial rule in India. In Part II we revisit his support for the neutral bureaucracy of the East India Company. Using Mill's own terms, we inquire whether a modern version of an East India Company — a Good Distant Company (GDC) — offers a satisfying answer to Mill's concerns. In Part III we use a few illustrations from contemporary cases to turn the Milliean theory in favor of democratic rule against his argument in favor of the GDC. We analyze four aspects of the democratic deficit that we identify to characterize the involvement of the GDC: the problem of asymmetric information; the shrinking of the structured deliberative space; the distance between the actor and the affected constituency which creates conflicts of interest; and, finally, the reliance on the good, distant judge to resolve disputes, which might further impoverish indigenous mechanisms of decision-making and further disintegrate the community. We close our discussion in Part IV by addressing the rise of global administrative norms as potential procedural safeguards reduce the democratic losses even without a functioning democracy. The last Part concludes.

## I. THE GOOD DESPOT AND THE SIGNIFICANCE OF VOICE

### A. *The Utilitarian Challenge*

A few years after leaving his senior position in the East India Company (EIC), John Stuart Mill published *Considerations on Representative Government* (1861). Possibly reflecting on his experience at the EIC,<sup>4</sup> the third chapter of this book discusses whether a *good despot* could become the best form of government:

The supposition is that absolute power, in the hands of an eminent individual, would insure a virtuous and intelligent performance of all the duties of governments. Good laws would be established and enforced, bad laws would be reformed; the best men would be placed in all situations of trust; justice would

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it more difficult to obtain information, lodge complaints, and monitor quality"); PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT*, 103-09, 158-73 (2007) (absence of supervision).

<sup>4</sup> Mill wasn't a mere spectator in the debate over the governance of India. He joined the EIC at the age of seventeen and followed his father footsteps in dedicating most of his life to its service. Mill was a fierce advocate for the Company's rule in India and objected its replacement by the direct governmental rule of Britain. Losing the battle over the renewal of the company's charter in 1858, Mill opted for early retirement and ran for political office instead. For further discussion see NICHOLAS CAPALDI, *JOHN STUART MILL: A BIOGRAPHY* 241-45 (2004); JENNIFER PITTS, *A TURN TO EMPIRE* 122-51 (2005).

be as well administered, the public burdens would be as light and as judiciously imposed . . . .<sup>5</sup>

Mill further described how the monarch would be an "all seeing one" and at all times "informed correctly, in considerable detail, of the conduct and working of every branch of the administration." He will give "an effective share of attention and superintendence to all parts of this vast field . . . ."<sup>6</sup> Mill portrayed the despotic rule in ideal terms of "superhuman mental activity."<sup>7</sup> In such a government of good despotism there is no positive oppression by officers of the state; the ideal despot is capable of considering all relevant interests. Given such capacities, why would we prefer democracies to the ideal despotic rule?

Mill's initial critique of the Good Despot challenged the feasibility of inclusiveness in despotic rule; he considered it unlikely that the despot could take all affected interests into account. Individuals, according to Mill, are the safest guardians of their own interests: "[I]n the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns."<sup>8</sup> Despotic rule is therefore likely to overlook and misconceive certain interests.<sup>9</sup> This line of argument, however, merely undermines the *feasibility* of an enlightened, well-meaning despot who can adequately protect and faithfully conceive the concerns and interests of others.

Mill also offered a more principled set of arguments. From a utilitarian perspective, he suggested, "the general prosperity attains a greater height, and is more widely diffused, in proportion to the amount and variety of the personal energies enlisted in promoting it."<sup>10</sup> Or, in

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<sup>5</sup> MILL, *supra* note 1, at 26-27.

<sup>6</sup> *Id.* at 27.

<sup>7</sup> *Id.* at 50.

<sup>8</sup> *Id.* at 32. Mill famously made this argument in his campaign for women's suffrage. In his first major speech as a member of parliament, in April 13, 1866, he used it to support a bill for extending the franchise to the working class:

Is there, I wonder, a single member of this House who thoroughly knows the working men's views of trade unions, or of strikes, and could bring these subjects before the House in a manner satisfactory to working men? . . . Are there many of us who so perfectly understand the subject of apprenticeships, let us say, or the hours of labour, as to have nothing to learn on the subject from intelligent operatives? . . . What is asked is a sufficient representation to ensure that their opinions are fairly placed before the House, and are met by real arguments, addressed to their own reason, by people who can enter into their way of looking at the subjects in which they are concerned. (Cheers.)

182 PARL. DEB., H.C. (3th ser.) (1866) 1260 (U.K.), *quoted in* J. Joseph Miller, *J.S. Mill on Plural Voting, Competence and Participation*, 24 HIST. POL. THOUGHT 647, 655 (2003).

<sup>9</sup> MILL, *supra* note 1, at 31 ("[T]he rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, or habitually disposed to stand up for them").

<sup>10</sup> *Id.* at 3. Dennis Thompson considers this argument with the former one as comprising *the protective argument* according to which "in a popular government citizens are more likely to acquire the habit of

negative terms, exclusion limits the "invigorating effect of freedom upon the character."<sup>11</sup> He further noted that "it is a great discouragement to an individual, and a still greater one to a class, to be left out of the constitution; to be reduced to plead from outside the door to the arbiters of their destiny, not taken into consultation within."<sup>12</sup> Participation, if defined as owning the decision, thus promotes the well-being of society.<sup>13</sup>

A second, more central, reason for Mill in democratic inclusion lies in its educational function. For Mill, "the most important point of excellence which any form of government can possess is to promote the virtue and intelligence of the people themselves."<sup>14</sup> Mill dedicated considerable attention in his writings to education in its traditional sense. He advocated an education that involves participation of students and teachers alike actively inquiring and discussing the material.<sup>15</sup> But for Mill education should not be confined to textbooks and classrooms. Active participation should promote the ideal human character and is best for individuals and society<sup>16</sup>

One may summarize Mill's argument on the educational value of the right to participation as follows: in order for participation to be effective one needs to be able to convince one's fellow citizen of his views. Since some level of education is required for participation to be effective, inclusion provides incentives to acquire education. In addition, the very act of participation holds an important educational value as it leads us to think critically on matters of general concern. Participation is therefore conducive for self-improvement, and self-improvement is beneficial for the individual and for society at large.<sup>17</sup>

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doing things for themselves and that as a result the general level of prosperity — mainly economic — will be raised." DENNIS F. THOMPSON, JOHN STUART MILL AND REPRESENTATIVE GOVERNMENT 13-26 (1976).

<sup>11</sup> MILL, *supra* note 1, at 71.

<sup>12</sup> *Id.* at 37.

<sup>13</sup> It should be noted that Mill's argument in favor of participation was often conveyed without reference to its utilitarian objectives. Indeed, it seems reasonable that utilitarian assumptions were underlying his theory of government. But utilitarian considerations are not necessary inherent to his argument in favor of participation and could be accepted by non-utilitarians as well. For further illustration of this point see ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 93-94 (1989).

<sup>14</sup> MILL, *supra* note 1, at 19.

<sup>15</sup> MILL, *supra* note 8, at 659; *see also id.* at 656-61 (elaborating on the link between Mill's political and moral philosophy and his views on education. Mill argued that knowledge can come only through experience and associations in the mind. Certain habits are thus constitutive of one's character.).

<sup>16</sup> MILL, *supra* note 1, at 38. He adds (*id.*): "It is not sufficiently considered how little there is in most men's ordinary life to give any largeness either to their conceptions or to their sentiments . . . . If circumstances allow the amount of public duty assigned to him to be considerable, it makes him an educated man." Democratic governments are more likely to foster the active character as demonstrated by the "striving go-ahead character of [citizens of] England and the United States." *Id.* at 87.

<sup>17</sup> The educational function of participation, however, held less favorable prospects for the uneducated masses. Mill was concerned that if participation is granted to all members of society and non-educated people may outnumber the rest, they may opt to follow their own self-interests rather than the general welfare. Mill offered to solve this problem by a voting scheme that secures the presence and preference of the more competent voters. MILL, *supra* note 1, at 90. In the long run, however "we might expect that all . . . would be in possession of votes, so that suffrage would be . . . universal." *id.* at 86. Such distinction in favor of education, however, "must stop short of enabling them [the educated] to practice class legislation

*B. The Democratic Critique: Personal, Collective and Institutional Justifications for Voice*

*1. The intrinsic value of participation to the individual*

So far our consideration of Mill's critique of the Good Despot focused on its instrumental aspects. Indeed, some authors consider participation, as well as other political rights, to be instrumental by definition.<sup>18</sup> But Mill alludes to or at least paves the way to move beyond instrumental concerns, toward an intrinsic value of participation as well:

[I]t is a personal injustice to withhold from any one . . . the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people. If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should be legally entitled to be told what for; to have his consent asked, and his opinion counted at its worth, though not at more than its worth. There ought to be no pariahs in a full-grown and civilized nation; no persons disqualified except through their own default. Everyone is degraded, whether aware of it or not, when other people, without consulting him, take upon themselves unlimited power to regulate his destiny . . .

<sup>19</sup>

Similarly, in *On Liberty* he wrote:

He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties. . . . It is possible that he might be guided in some good path, and kept out of harm's way, without any of these things. But what will be his comparative worth as a human being?<sup>20</sup>

As noted by Isaiah Berlin, “[w]ithout the right of protest, and the capacity for it, there is for Mill no justice, there are no ends worth pursuing.”<sup>21</sup> Mill's *empirical assumption* about the capacity for equal concern is related to a *principled presumption* of such capacity (“no persons disqualified, except through their own default”).<sup>22</sup> Jeremy Waldron suggests that one cannot take my rights seriously without asking me what I have to say about the matter. “It is impossible

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on their own account.” Furthermore, such a scheme should be open to the poorest individual in the community if he can prove that, “in spite of all difficulties and obstacles, he is, in point of intelligence, entitled to them.” *Id.* at 89. For further discussion on this scheme of “plural voting” see Miller, *supra* note 8, at 663-67. These elements in Mill's theory led Jürgen Habermas to criticize the Millian scheme of representative government as a reaction to the rising power of the masses over the former elites. JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 137 (Thomas Burger trans., 1989). Isaiah Berlin, on the other hand, considered such interpretation implausible given Mill's own warnings against Comtian despotism. ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 206 (1969) (“Mill was apprehensive of the rule of the uneducated democratic majority. In his writings he tried to insert to the democratic system some guarantees against its vices.”).

<sup>18</sup> See Dahl, *supra* note 13, and also *infra* refs in notes 33-36

<sup>19</sup> MILL, *supra* note 1, at 169-70.

<sup>20</sup> JOHN STUART MILL, *ON LIBERTY* 58-59 (Albury Castell ed., Crofts Classics 1947) (1857); In the following paragraphs in this chapter Mill turns to consider utilitarian justifications implying the intrinsic considerations are insufficient.

<sup>21</sup> BERLIN, *supra* note 17, at 197.

<sup>22</sup> MILL, *supra* note 1, at 169.

. . . to think of a person as a right-bearer and not to think of him as someone who has the sort of capacity that is required to figure out what rights he has."<sup>23</sup>

Participation as an exercise of self-government could also be articulated in terms of personal autonomy. In the *Morality of Freedom*, Joseph Raz defines autonomy as a specific notion of self-authorship:

An autonomous person is part author of his own life. His life is, in part, of his own making. The autonomous person's life is marked not only by what it is but also by what it might have been and by the way it became what it is. A person is autonomous only if he had a variety of acceptable options to choose from, and his life became as it is through his choice of some of these options. A person who has never had any significant choice, or was not aware of it, or never exercised choice in significant matters but simply drifted through life is not an autonomous person.<sup>24</sup>

According to Raz, autonomy is comprised of three components: appropriate mental abilities, an adequate range of options, and independence. By making binding collective decisions, the Good Despot's views on the laws, rules, and the variety of acceptable options are counted as superior to ours. Such paternalistic authority challenges our capacity and replaces personal autonomy with a state of childhood and dependence.<sup>25</sup> "Autonomous life is lived in circumstances where acceptable alternatives are present."<sup>26</sup> Despotism doesn't allow us to take a constitutive role in the laws, rules and policies that affect key aspects in the course of our lives and could significantly narrow the variety of acceptable options we are left to choose from. In addition, the ideal of personal autonomy is the vision of people controlling their destiny through decisions they make throughout their lives.<sup>27</sup> Despotism is defined by our lack of such measure of control. Stated more crudely, autonomy is opposed to life of coerced choices.<sup>28</sup>

One could define the intrinsic value of participation in equality terms as well. Indeed, Mill's good despot is theoretically compatible with a particular understanding of equality —

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<sup>23</sup> Jeremy Waldron, *Participation: The Right of Rights*, 98 PROCEEDINGS ARISTOTELIAN SOC'Y 307, 332 (1998). Waldron defines participation as the *right of rights* because it is especially relevant when right-bearers disagree about the *rights* they have. Waldron further explores how participation is both a subject-matter of authority (the right to participate) and a possible answer to the question of authority (how should political decisions be made).

<sup>24</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM* 204 (1986).

<sup>25</sup> DAHL, *supra* note 13, at 104-05. Immanuel Kant articulated a similar view: "A government might be established on the principle of benevolence towards the people, like that of a father towards his children. Under such a paternal government (*imperium paternale*), the subjects, as immature children who cannot distinguish what is truly useful or harmful to themselves, would be obliged to behave purely passively and to rely upon the judgment of the head of state as to how they ought to be happy, and upon his kindness in willing their happiness at all. Such a government is the greatest conceivable despotism, i.e. a constitution which suspends the entire freedom of its subjects, who thenceforth have no rights whatsoever." KANT, *POLITICAL WRITINGS* 74 (Hans Reiss, ed., 2003) [1970].

<sup>26</sup> RAZ, *supra* note 24, at 205.

<sup>27</sup> *Id.* at 369.

<sup>28</sup> *Id.* at 371.

that the good or interests of each person must be given equal consideration.<sup>29</sup> However, it is incompatible with an understanding of equality that emphasizes the *equal freedom* of the individual. In his *Second Treatise of Government* John Locke articulates this notion of equality as follows: "That all Men by Nature are equal . . . being that *equal Right* that every Man hath, to *his Natural Freedom*, without being subjected to the Will or Authority of any other Man."<sup>30</sup> Lockeian equality means that no one is entitled to subject another to his or her will or authority without consent.<sup>31</sup> Hence, John Locke's understanding of the principle of equality cannot be fulfilled in a world governed by the Good Despot.<sup>32</sup>

## 2. *The value of participation to the individual as member of a community*

Mill's Good Despot undermines something even more politically profound than the equal opportunity of every individual to take part in decisions that shape her or his life. The Despot precludes these individuals from hearing one another and reacting to each other's views. The concentration of the decision making process in the hands of the Good Despot prevents the creation of a public space in which individuals communicate and deliberate through their participation. The right to deliberate has both an instrumental aspect and an intrinsic one.

The case for the instrumental value of communication or of *participatory democracy* has been thoroughly discussed in recent years. It has at least three aspects. The first relates to the importance of communications for oneself. It focuses on the role of democracy in empowering and encouraging people to engage frequently and meaningfully in issues that shape their social life.<sup>33</sup> The second aspect relates to the benefits of deliberation for informed public decision-making, and the empowerment of diffuse individuals who need to act in concert *vis-à-vis* others.<sup>34</sup> *Deliberative democracy* is concerned with the normative requirements of inclusion of affected interests, equal opportunities to participate, methods of decision making, information gaps and similar concerns.<sup>35</sup> The third aspect relates to the distributional effects of deliberation.

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<sup>29</sup> "[I]f the good of each person is entitled to equal consideration, and if a superior group of guardians could best ensure equal consideration, then it follows that guardianship would definitely be desirable, and democracy just as definitely would be undesirable." DAHL, *supra* note 13, at 8.

<sup>30</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 31 § 54 (C.B. Macpherson ed., Hackett 1980) (1690) (emphasis added).

<sup>31</sup> *Id.* at 52 § 95.

<sup>32</sup> DAHL, *supra* note 13, at 84-89.

<sup>33</sup> Hannah Arendt has written much on the communicative value of speech within a community, and also relied on Immanuel Kant and James Madison. HANNAH ARENDT, *THE HUMAN CONDITION*, 192-212 (1958).

<sup>34</sup> See *id.*

<sup>35</sup> See, e.g., Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *The Good Polity: Normative Analysis of the State* 17 (Alan Hamlin & Philip Pettit eds., 1989); James Bohman, *Public Deliberation: Pluralism, Complexity and Democracy* (1996); *Deliberative Democracy* (James Bohman & William Rehg eds., 1997); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 *Pol. Theory* 338 (1987). The debates over deliberative democracy often concentrate on the challenges of culturally pluralistic

Public deliberation and participation reduce the costs of collective action by diffused actors in society, and enhances their ability to forge coalitions that demand more freedoms and a greater share of public resources. Bruce Bueno de Mesquita and George W. Downs coined the term *Coordination Goods* to address the “public goods that critically affect the ability of political opponents to coordinate,”<sup>36</sup> such as free speech and the freedom of establishment.

Hannah Arendt discusses the intrinsic value of public deliberation in her emphasis on communication as an inherent facet of human life. The close and intimate links within the community are constituted by the deliberative process.<sup>37</sup> Here we can return to Mill. The intrinsic value of voice and participation is related to our previous discussion on Mill and the educational functions of participation. Education through participation facilitates informed decisions, whose importance to the individual goes way beyond instrumental considerations.<sup>38</sup> Through participation one develops a sense of empathy to one’s fellow-citizens and becomes consciously a member of one’s community: “[I]t is from political discussion and collective political action that one whose daily occupations concentrate his interests in a small circle round himself, learns to feel for and with his fellow-citizens, and becomes consciously a member of a great community.”<sup>39</sup>

In other words, it is through the (utilitarian) need to forge coalitions and convince others to join our cause that an (intrinsic) sense of community emerges. People’s identification with a specific community is at the heart of peoples’ self-conception as members of particular communities. Being a member in a particular community and the relationships it entails form an important element in one’s autonomy, especially for those whose identity and value-commitments are deeply related to their cultural commitments.<sup>40</sup> Put differently, participation plays a pivotal role in preserving and promoting the constitutive elements for personal autonomy and the self-determination of groups and communities.<sup>41</sup>

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democracies. *See, e.g.,* Democracy and Difference: Contesting the Boundaries of the Political (Selya Benhabib ed., 1996).

<sup>36</sup> Bruce Bueno de Mesquita & George W. Downs, *Development and Democracy*, 84 FOREIGN AFF. 77, 82-83 (2005).

<sup>37</sup> ARENDT, *supra* note 33, at 207-08.

<sup>38</sup> It is by political discussion that the manual laborer, whose employment is a routine, and whose way of life brings him in contact with no variety of impressions, circumstances, or ideas, is taught that remote causes, and events which take place far off, have a most sensible effect even on his personal interests. MILL, *supra* note 1, at 168.

<sup>39</sup> MILL, *supra* note 1, at 83.

<sup>40</sup> The alternative conception of *relational autonomy* has been developed to address this challenge. Relational Autonomy emphasizes the constitutive role of social conditions to the development of the self. *See* Jennifer Nedelsky, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW* (2011).

<sup>41</sup> To Waldron, this point is almost self-evident: That there is a collective element in the way in which the rights of the citizen are understood is evident from the term commonly use to describe them: the right to participate. To participate is to ‘take part or share in an action . . . .’ Something which necessarily

### 3. *The need for Institutional Safeguards*

Mill was aware of the fact that getting rid of the Good Despot and instituting a democratic process was not enough. He was conscious of the inherent challenge to the marketplace of ideas caused by asymmetric information. As a result of insufficient or distorted information voters have difficulties forming their views and making the optimal choices for them. To ensure effective voice, systemic failures inherent in collective decision-making must be corrected by institutions that ensure the free flow of information to and from the voter. Mill argued that the only remedy for the problem of exclusion is representative government but was nonetheless aware of the risks it posed to the free flow of information to relevant stakeholders. He identified "[o]ne of the greatest dangers . . . of democracy" as "the sinister interest of the holders of power: . . . the danger of class legislation, of government intended for (whether really effecting it or not) the immediate benefit of the dominant class, to the lasting detriment of the whole." He believed that an important barrier against such problems of capture was the dissemination of information. Mill distinguished between the government as an actor that intervenes in the markets as opposed to the government as a depository and disseminator of knowledge to the public.<sup>42</sup> While this principle is presented at the very end of *On Liberty* and is not much developed further, Mill draws our attention to the problems of market failures, primarily that of asymmetric information, that characterize both the economic and the political markets.

James Madison similarly explained the need to limit by institutional means the state exercise of authority and prevent one part of society from using the state to oppress the interests of others.<sup>43</sup> Madison's main response to the inherent failures of the rule by representatives was to distribute authority among "so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable."<sup>44</sup> The experience with democratic rule which has accumulated over the years emphasizes the importance of institutional safeguards to check the influence of special interests and in general to overcome

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supposes that one is not the only person with a part or share in the activity in question. Waldron, *supra* note 23, at 311.

<sup>42</sup> MILL, *supra* note 20, at 116.

<sup>43</sup> James Madison, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, 51 FEDERALIST PAPERS, Feb. 6, 1788, available at [http://thomas.loc.gov/home/histdox/fed\\_51.html](http://thomas.loc.gov/home/histdox/fed_51.html):

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

problems of asymmetric information. It is widely understood that such mechanisms are necessary to ensure a vibrant democracy.

*C. Conclusion: The Democratic Limitations on Democratic Delegation to the Good Despot*

For all these reasons, even if the decision to grant exclusive authority to a Good Despot was decided in an inclusive and informed political process, say by referendum or by a constitutional amendment, in general or for a specific matter, it would remain in tension and potentially violate Mill's concerns (the instrumental and intrinsic concerns articulated above). Similar to Mill's argument in *On Liberty* that no one has the liberty to give away one's own liberty, we can read Mill to suggest that no one has the capacity to silence oneself and deprive oneself from the right and the opportunity to participate by delegating authority to good despots.<sup>45</sup>

Mill's insights about the negative ramifications of being ruled by a Good Despot help to identify the losses associated with privatization. The delegation of public functions to private actors, even assuming such actors are well intentioned and capable of identifying and promoting the public good, raises virtually all the worries that Mill has toward the good despot. We explore these worries in the following Part.

II. A GOOD *PRIVATE* DESPOT?

A. *The Good Company*

The logic of private exercise of authority invokes efficiency considerations that are similar to those that recommend granting authority to the Good Despot. The political scene is messy, cumbersome and slow, and the decision-makers in charge of managing collective resources and providing services to their constituencies are unprofessional and corruptible. By contrast, the market-oriented Good Company will manage community resources efficiently and promote collective welfare through its cost-effective policies and the efficient market. Moreover, the growing influence of private actors can be cast as promoting personal autonomy, as the freedom promised by the idea of market offers myriad opportunities for individual self-fulfillment absent societal constraints. Also from a collective point of view, the market has been described as the "consumers' ballot, held daily in the marketplace."<sup>46</sup> Mill himself warned against "turning into governmental channels too great a proportion of the general activity"<sup>47</sup> and admonished against,

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<sup>44</sup> *Id.*

<sup>45</sup> This argument is even stronger from a perspective of inter-generational justice, as famously noted in the Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *reprinted in* THE PORTABLE THOMAS JEFFERSON 449 (Merrill D. Peterson ed., 1975) ("[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.").

<sup>46</sup> Ludwig von Mises, *Socialism — An Economic and Sociological Analysis* 22 (2d ed. 1951).

<sup>47</sup> MILL, *supra* note 20, at 116.

for example, governmental intervention in school curricula.<sup>48</sup> While it is not easy to offer abstract guidelines for determining what Mill regarded as “one of the most difficult and complicated questions in the art of government,”<sup>49</sup> namely when the market promotes individual self-determination and when it undermines it, still, it is worthwhile to pose this very question and explore: under which circumstances does private influence threaten the democratic ideals Mill identified?

In response to this question, and in light of Mill's concerns about the democratic losses associated with the metaphor of the good despot, we explore in this Section two aspects of the democratic deficit caused by the *Good Company*. *The first* concerns the asymmetric information and the relative lack of transparency involved in the operation of private actors. *The second* involves the shrinking of the structured deliberative space for domestic constituencies as a consequence of the grant of exclusivity to the foreign company.

*The Asymmetric information problem* derives from the relatively weak accountability mechanisms that private actors are traditionally subjected to (as opposed to public ones). While the very decision to delegate authority to a private body may be subject to judicial review and public scrutiny, once granted, the delegated actor enjoys greater freedom from public scrutiny. It is often exempted from the notice-and-comment obligations and other procedural safeguards that enable public scrutiny of decision-makers. In fact, this is one of the perceived benefits of privatization. As noted by Jody Freeman, “one of the purposes of privatization is to replace a rule-oriented, bureaucratic system of accountability with the more streamlined accountability afforded by the market.”<sup>50</sup>

But this “streamlined” accountability is limited by the inherent for-profit logic of the company, being accountable to its shareholders,<sup>51</sup> and subject to the logic of market competition that prompts the company's interest in secrecy and closure.<sup>52</sup> In such competitive environment,

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<sup>48</sup> *Id.* at 106.

<sup>49</sup> *Id.* at 116.

<sup>50</sup> FREEMAN, *supra* note 3, at 1310-11.

<sup>51</sup> There is relative consensus on the ultimate ends of a corporation: the pursuit of the aggregate social welfare. The prevalent answer on how best to achieve this end is shareholder primacy. FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 37-39 (1991). Shareholder primacy is a key feature of Anglo-American corporate law. Corporate law in other jurisdictions includes a broader set of stakeholders, especially in Germany, Austria, the Nordic countries, and the Netherlands. Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 69 AM. J. COMP. L. 1, 28-30 (2011). Some authors have pointed to the triumph of the shareholder primacy framework over progressive approaches to corporate law in recent years (most notably, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001)). For competing accounts, see, e.g., Franklin A. Gevurtz, *The Globalization of Corporate Law: The End of History of a Never-Ending Story?* 86 WASH. L. REV. 475 (2011).

<sup>52</sup> Alfred C. Aman, Jr., *Globalization, Democracy, and the need for a New Administrative Law* 10 IND. J. GLOBAL LEGAL STUD. 125, 151 (2003) (“Private Providers of public services clearly have the profit motive in mind—that is, their obligations to their shareholders. . . . The profit motive can be a good

private actors will enjoy exemption from disclosure and transparency requirements unless such are explicitly imposed on them by public demand, often with the aid of the law.<sup>53</sup> However, since the imposition of such requirements is often the *result* of public pressure, there has to be an initial public awareness for the need to ensure accountability by the companies, and in order for such public demand to arise, a certain degree of information and public visibility is required. Thus, to the extent the private actor controls the information relevant to its actions, the public may not even be aware of the need to seek and obtain greater ability to monitor and control the decision-making processes of the private actor. The public may not be aware that the information it manages to obtain is either accurate or sufficient. Without sufficient information public participation in democratic decision-making cannot be meaningful.

A less informed public cannot seek others who have similar concerns to forge coalitions and create a counter-balance and public pressure; the opportunities to organize may diminish behind the ignorance and silence which privatization imposes. This leads us to *the second democratic concern raised by privatization: the shrinking of the structured deliberative space*. Privatization may undermine the democratic safeguards of checks and balances against imbalanced exercise of power. With privatization, "the public is no longer involved directly in the decision making."<sup>54</sup> The public is demoted to an on-looker, able at the most to monitor and to comment on the company's practice, but never part of those who decide. Madison's vision of "*separate descriptions of citizens*" vying for influence and of different units checking each other and thereby achieving accommodation of their respective demands<sup>55</sup> seems less likely to materialize.

Space is limited to develop a theory on the exact limits of privatization that can be derived from the perspective of democracy and the right to individual and collective self-determination. Market-based responses to democratic concerns can be constructed, providing opportunities for the exercise of personal self-determination, even expanding the reach of public law to realms traditionally thought private.<sup>56</sup> But what we do argue is that the democratic perspective imposes an initial burden on any privatization. Every delegation of authority away

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incentive, but, in public settings, it is not the sole goal, and it can conflict with other values."). *see also* Minow, *supra* note 3, at 995 (describing the problem in the context of military contractors).

<sup>53</sup> A Canadian Supreme Court decision from 2004 concerning a dispute over indigenous rights for lands in British Columbia exemplifies this point. "The duty to consult and accommodate [Aboriginal peoples] as discussed above flows from the Crown's assumption for sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate . . . ." *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, ¶ 52 (Can.).

<sup>54</sup> Aman, *supra* note 3, at 517.

<sup>55</sup> *See supra* text to note 44.

<sup>56</sup> Freeman, *supra* note 3, at 1285-352 (arguing that privatization may enhance public law norms by extending them to realms where they typically do not play a significant role).

from the public sphere must provide for effective avenues for public voice and deliberation to somehow compensate for the democratic losses. It must therefore remain subject to public control and scrutiny, and, of course, be revocable by public decision.

Contemporary features of private influence often involve a private actor who is foreign to the community in which it operates. Whether and how should the foreignness of the private company influence democratic considerations?

## *B. The Good Distant Company*

### *1. Democracy and Community*

Mill's ideas about democracy and community were premised on the possibility of a perfect fit between the scope of sovereign authority and the affected stakeholders.<sup>57</sup> But he was aware of the ability and the interest of one society not to allow this possibility to materialize for another. Mill therefore emphasized the importance of a close link between the sovereign and the community it governs. In the final chapters of *Considerations on Representative Government* Mill critically addressed the rule over foreigners and stressed the principle of self-rule by the national community. Mill defined nationality as follows:

A portion of mankind may be said to constitute a nationality if they are united among themselves by common sympathies which do not exist between them and any others — which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively.<sup>58</sup>

He explained that decision-making must be exclusive for the members of that nationality:

Where the sentiment of nationality exists in any force, there is a *prima facie* case for uniting all the members of the nationality under the same government, and a government to themselves apart. This is merely saying that the question of government ought to be decided by the governed. . . . Free institutions are next to impossible in a country made up of different nationalities. . . .<sup>59</sup>

He also noted the “question . . . whether the different parts of the nation require to be governed in a way so essentially different that it is not probable the same Legislature, and the same ministry or administrative body, will give satisfaction to them all.”<sup>60</sup> It follows, that “[a] free country which attempts to govern a distant dependency, inhabited by a dissimilar people, by means of a branch of its own executive, will almost inevitably fail.”<sup>61</sup>

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<sup>57</sup> For further discussion see Eyal Benvenisti, *Sovereigns as Trustees of Humanity*, 107 AM. J. INT'L L. 295 (2013).

<sup>58</sup> MILL, *supra* note 1, at 303.

<sup>59</sup> *Id.* at 309.

<sup>60</sup> *Id.* at 332.

<sup>61</sup> *Id.* 357:

In what follows we refer to the misfit between the governing body and those it governs as the *Distance Element*. Mill used the critique on the Distance Element to criticize the replacement of the EIC with the direct governmental rule of Britain. He considered such formal imposition of the British rule in India ill-suited to govern the foreign colony. This logic, however, did not lead Mill to eschew colonialism. Instead, in the closing chapter of the book Mill returned to a model of government akin to the Good Despot as a preferable model for British colonial rule in India.<sup>62</sup> Mill's ideal of the Good, Distant, Despot portrays a neutral bureaucracy governed by experts who are able to take into account and consider the interests of the local community.<sup>63</sup>

Mill's discussion on the EIC is highly relevant to contemporary challenges posed by the Good, Distant Despot: how can democratic conditions obtain in societies heavily influenced by outside actors? Sovereigns today regulate resources that belong to others and regularly shape the life opportunities of foreigners, "without the latter being able to participate meaningfully in shaping these measures either directly or by relying on their own governments to effectively protect them. The opposite also occurs, as citizens find their own government subjected to capture by affluent foreigners who intervene in domestic decision-making." In addition, "[s]tates rely more and have greater influence on the availability and quality of shared resources such as air, water and fisheries. They use resources that are not fully theirs."<sup>64</sup> The challenges raised are even more acute in the case of foreign companies that operate in foreign countries. In fact, the misfit between territorial control and governments as well as the fragmented structures of authority of companies render the case of the distant despot the rule rather than the exception. Can a modern version of an EIC — as the Good, Distant, Company, with a neutral bureaucracy

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The only mode which has any chance of tolerable success is to govern through a delegated body of a comparatively permanent character, allowing only a right of inspection and a negative voice to the changeable administration of the state. Such a body did exist in the case of India; and I fear that both India and England will pay a severe penalty for the shortsighted policy by which this intermediate instrument of government was done away with.

<sup>62</sup> Mill, *supra* note 20 at 10: "[d]espotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end." 1858 marked the final days of the East India Company. The British Parliament planned to reorganize the government of India under a secretary of state. While the reorganization bills were pending in the parliament, Mill wrote four pamphlets criticizing these bills. As noted by Abram L. Harris: "It is common knowledge that in Mill's opinion the conditions for the survival of representative government were absent in the India of his day. In the absence of these conditions the form of government that Mill thought best suited India was a benevolent despotism." However, although Mill believed that the good government of India requires control by Europeans, he favored the appointment of "qualified natives" to the administrative services and to the higher positions in government. Abram L. Harris, *John Stuart Mill: Servant of the East India Company*, 30 CAN. J.F ECON. & POL. SCI, 185, 191-93 (1964).

<sup>63</sup> MILL, *supra* note 1 at 357-58.

<sup>64</sup> Benvenisti, *supra* note 57, at 331.

governed by experts — offer a satisfying answer to Mill’s concerns? Can it respond adequately to all the democratic challenges that our Article, following Mill, has identified?

## 2. *The Distance Element in the Era of Globalization*

Globalization intensified and deepened the involvement of foreign companies in the lives of communities. Privatization came to mean the delegation of public functions to foreign actors. In addition to the two aspects of democratic deficit discussed above, the problem of asymmetric information and the shrinking public space, the Good Distant Company (GDC) adds at least two additional ones. The *third* aspect concerns the *Distance Element* - the misfit between the governing body and those it governs which is characterized by the limited interest of foreign corporate actors in the interests of the local population in the area where they operate. This, in turn, leads to their limited interest in the sustainable use of the host country’s resources.

A *fourth* aspect – the *Good, Distant, Private Adjudicator* - concerns the move from public institutions that monitor and discipline corporate actors or state authorities that interact with those actors — such as national courts of the host country — to private or foreign fora such as arbitral tribunals and foreign courts. Whereas domestic institutions are designed by the community for the community, and reflect communal perspectives and goals, the foreign judicial actors typically insulate the foreign actor from adverse domestic judicial and other oversight proceedings. Our concern here is that the foreign, private judicial proceedings will not be able to internalize and give proper space to the preferences and values of the domestic community.

The *third* aspect - the distance element – addresses the contemporary challenges that global businesses pose to principles of democracy. We can mention but a few features of transnational corporations to update the Millian critique of the distance element. During the final decades of the twentieth century the global reach of corporate actors increased significantly. Transnational firms conduct many of their business activities beyond the reach of the nation state. These developments rendered the national boundaries that separate the domestic from the foreign fuzzier. Indeed Europeans invested abroad for centuries. Yet, developments of the late twentieth century intensified the presence of corporate actors in diffuse structures of authority across the globe and introduced new modalities for their operations. Different pieces of the production chain occur in more than one locality. The free movement of capital and operations enables large business enterprises to “forum shop” and choose settings which best satisfy their regulatory preferences, and thereby impose their own rules on foreign communities.<sup>65</sup> Here the Millian worry, about the need to extend membership in democracy to

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<sup>65</sup> For an overview of these developments see Gerald F. Davis, Marina V. N. Whitman & Mayer Nathan Zald, *The Responsibility Paradox: Multinational Firms and Global Corporate Social*

those who internalize the consequences of public decisions and only to them, becomes pertinent. The foreignness of the Good Distant Company makes it even less reliable agent who could internalize the interests of all the affected stakeholders whose ability to resist the foreign economic pressures is severely limited. Not bearing all the costs of their actions leads corporations to decisions that might benefit them but that are harmful to the relevant societies.

Finally, we come to the *fourth* aspect. As discussed above, a key dimension of the democratic idea relates to the need of a close link between democracy and community.<sup>66</sup> Affected populations are able to voice their preferences and concerns as *a community* either through direct engagement with their government (to the extent such engagement is possible or potentially effective) or through *voluntary* procedural routes of participation adopted by companies. The domestic deliberative process involves also the domestic courts. Litigation before the court and the court's judgment and reasoning contribute to the collective formation of public policies.<sup>67</sup> The involvement of foreign companies is characterized by bypassing the domestic court and domestic interest representation and instead entails the empowerment of foreign, private adjudicators whose focus is the protection of the rights of the foreign investor, and whose procedures are not necessarily open to the public. Thus, the *fourth* aspect, the privatization of the judicial process, further shrinks the deliberative space and impoverishes the quality of the deliberative process because it reduces the opportunities for public resistance through judicial means and it decreases the quantity and quality of the information that is relevant for the internal debate.

Furthermore, private adjudication which pits the host state against foreign private or public actors (for example in investment or trade disputes) regards the host state as a cohesive and unitary actor. This treatment of the state as a unitary entity and the intervention in the policies it adopted necessarily interferes with the complex intra-relations that exist between the

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Responsibility (Ross School of Business Working Paper Series, No. 1031, April 2006); Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L. J. 411 (2005). In addition, during the course of the twentieth century the volume of family-owned corporations declined in favor of multinational corporations that rely on regulated financial markets. These changes are linked to changing trends in investment patterns toward dispersed ownership of corporate equity and portfolio investments in addition to radical increase in the amount of assets invested through institutional investors. These developments exacerbated the distance element as they moved shareholders further away from the corporations they own and the ramifications of their conduct. For an elaborate discussion on these developments and their political costs see Ilan Benshalom *Who Should Decide Whether the Apple is Rotten? Corporate Political Agency, Social Responsibility and (Tax) Disclosure* (forthcoming, on file with author).

<sup>66</sup> *Supra* Sub-Section I.B.2.

<sup>67</sup> See Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997) (claiming that adjudication is constrained by a process of participatory decisionmaking which involves the litigants and interest representation).

communities which constitute the host state, and with the operation of the internal checking and balancing mechanisms that those communities have developed, and reduces the role of disagreement and conflicting agendas in the constant shaping of the collective identity. This foreign judicial intervention, if not carefully checked, can therefore destabilize the domestic democratic processes in the four dimensions we described. The involvement of the Good, Distant Private Adjudicator interact with the investor or the host state and thus limit the capacity of individual stakeholders from influencing policies crucial to their life, and reduce their urge to get their act together and forge or maintain coalitions and a sense of community.

*C. Illustrating the Democratic Losses Associated with the Good Distant Company*

The involvement of the GDC in foreign communities is legally framed and discussed in foreign investment proceedings such as investment-state arbitration cases or the involvement of financial institutions. In this Part we examine the four aspects of the democratic deficit in such instances. We should note that this is not a comprehensive analysis of contemporary trends in such proceedings but rather an attempt to use the phenomenon to illuminate the Milliean critique in action, namely the problems of asymmetric information, the shrinking public space for deliberation, the distance element and the reliance on foreign private adjudicator to settle disputes.

All these problems characterize the regulation of foreign direct investments, governed by high-level agreements such as Bilateral Investment Treaties (BITs). The asymmetric information results from ratification processes of BITs reveal similar information asymmetries. The negotiation processes over BITs are often quite removed from the public eye. Although BITs may have a certain “spill over” effect that could help populations overcome some of the information asymmetries, for example, by requiring host states to develop better administrative practices to comply with international investment standards,<sup>68</sup> such consultation processes may suffer from familiar problems of capture by interest groups. In addition, these consultations tend to be a single event (rather than ongoing) in which information is inherently limited and incomplete.<sup>69</sup> Thus, the involvement and exercise of authority and power by private actors holds

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<sup>68</sup> Roberto Echandi, *What Do Developing Countries Expect from the International Investment Regime?*, in THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS 3, 13-14 (José E. Alvarez, Karl P. Sauvant, Kamil Gérard Ahmed & Gabriela P. Vizcaíno eds., 2011). For example, Article 19 of the 2004 Canadian Model BIT requires that all “interested persons” and the other party will be consulted ex ante on investment-related legislation. Foreign Investment Protection and Promotion Agreement Model (2004) (Can.), available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

<sup>69</sup> Sonja Vermeulen & Lorenzo Cotula, *Over the Heads of Local People: Consultation, Consent and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa*, 37 J. PEASANT STUD. 899, 899-916 (2010). For a related critique on the procedural reforms suggested in the RAI and Eleven Principles in the context of the global land rush, see Smita Narula, *The Global Land Rush: Markets, Rights and the Politics of Food*, 49 STAN. J. INT’L L. 101 (2013).

the risk of privileging certain actors at the expense of others and adversely affecting the flow of information.<sup>70</sup> The structure of the BITs that insulates them from domestic deliberation processes during the life of the investment and the foreign, private dispute settlement process that they are subject to, encapsulate all the democratic deficits identified by the Millean critique.

Such democratic difficulties become most pressing where the subject of foreign investment is central for the life of the local community, such as BITs related to the management of public lands near local municipalities, or water and sewage facilities servicing local communities. In such cases the democratic losses are palpable and a source of resentment that may turn violent. A central example is the successful public campaign against a concession for the supply of water services granted by the government of Bolivia to a foreign consortium.<sup>71</sup> In this case the government had to backtrack and change the terms of the contract in light of effective popular campaign against the concession.

Often, the distant, private, adjudicator would ignore such democracy-based opposition simply because the relevant BIT does not leave much space for it. In *Metalclad Corp. v. United Mexican States*, the opposition of the local population to the operation of a hazardous waste landfill led the Mexican government agency not to renew Metalclad operation permit.<sup>72</sup> The Tribunal rejected the relevance of the public protest to the question of state responsibility. Conversely, it defined the importance of procedural justice for the protection of the investor in its interactions with the host state.<sup>73</sup> Similarly, the *Tecmed Tribunal*, which addressed similar circumstances, read the BIT's provision as requiring the state parties to act consistently,

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<sup>70</sup> As documented by a World Bank report:

In some of the country studies, inability to see the texts of laws and regulations — even by lawyers and officials expected to adjudicate disputes at the local level — had a negative impact on communities' ability to understand the agreements they were about to enter... Given cultural and capacity gaps between investors and local communities there is a large scope for misunderstanding. [However], in some cases, such negotiations have provided considerable benefits to communities . . . .

See KLAUS DEININGER & DEREK BYERLEE, THE WORLD BANK, RISING GLOBAL INTEREST IN FARM LAND 107 (2011).

<sup>71</sup> *Agua del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, (Oct. 2, 2005); See Erik J. Woodhouse, *The "Guera del Agua" and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure*, 39 STAN. J. INT'L L. 295, 324-37 (2003); Ibrónke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 PENN ST. INT'L L. REV. 251, 259-60 (2007-2008); William Finnegan, Letter from Bolivia: Leasing the Rain, NEW YORKER, Apr. 8, 2002, at 45.

<sup>72</sup> The Tribunal concluded that in the "totality of the circumstances" Mexico had failed to ensure a "transparent and predictable framework" for Metalclad's business planning and investment. This lack of transparency and procedural fairness denied Metalclad "fair and equitable treatment in accordance with international law," *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB/(AF)/97/1, Award, ¶ 99 (Aug. 30, 2000), 16 ICSID Rev. 168 (2001).

<sup>73</sup> *Id.* at ¶¶ 74, 101.

transparently, and without ambiguity *toward the foreign investors and their investments*.<sup>74</sup> Clearly, these tribunals do not see themselves responsible for ensuring that the domestic procedures are equally open and transparent to the indigenous communities. Explicitly, the *Tecmed* tribunal took account of public protests but rejected them as not sufficiently reflecting a "genuine social crisis" or "public emergency" justifying non-renewal of the permit.<sup>75</sup> In both *Tecmed* and *Metalclad* cases, the community's attempt to voice its protest was rejected, creating a negative incentive to voice similar concerns in the future and thus shrinking significantly the public deliberative space and the capacity of the locals to participate in shaping their future lives in favor of the arbitrators' interpretation of what should be regarded as relevant concerns.<sup>76</sup> In the *Tecmed* case, Mexico contended that its decision was a legitimate regulatory action taken by a government agency "in a highly regulated and extremely sensitive framework of environmental protection and public health."<sup>77</sup> The Tribunal concluded that even though the public agency's resolution not to renew the permit was legitimate under domestic law it indirectly expropriated *Tecmed*'s property in violation of the BIT. In *Metalclad*, the Tribunal rejected the constitutional authority of the city to refuse the construction permit and the relevance of the environmental concerns to its decision.<sup>78</sup>

In the same vein, a looming crisis could involve a relatively new phenomenon, namely the involvement of GDCs in the land-rush that occurred after the 2007-2008 world-wide food crisis.<sup>79</sup> The crisis led both investors and governments to enter a scramble of great magnitude for suitable farmland and fresh water resources in foreign countries.<sup>80</sup> Private investors embarked on leasing vast areas of land for cultivation, securing such deals with contracts with

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<sup>74</sup> *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154-155 (May 29, 2003), 19 ICSID Rev. 158 (2004).

<sup>75</sup> *Id.*, at ¶¶ 124-133.

<sup>76</sup> *Aman*, *supra* note 3, at 517:

When regulation is given over to the market or international decision-makers, the public is no longer involved directly in decision making, nor is information usually available in a form that would make public participation meaningful. Market outcomes coupled with decisions not to act, or an inability to act, are often the result.

*See also Aman*, *supra* note 52, at 154: "[T]he democracy deficit reflects the lost opportunity for the public to participate in the deliberation by which the value regimes that determine outcomes are themselves defined, distinguished, and decided from among plural possibilities."

<sup>77</sup> *Tecmed*, at ¶92.

<sup>78</sup> *Metalclad* ¶ 86. For a critical review of the decision, see DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE* 82-86 (2008). For further critical discussion on international arbitration in this vein see GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* 152-84 (2007).

<sup>79</sup> *See* WORLD BANK, *WORLD DEVELOPMENT REPORT 2008 — AGRICULTURE FOR DEVELOPMENT* (2007), available at <http://siteresources.worldbank.org/INTWDRS/Resources/477365-1327599046334/8394679-1327614067045/WDROver2008-ENG.pdf>.

<sup>80</sup> For a general overview see Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT'L L.J. 503 (2011).

host governments. The World Bank, invoking the rhetoric of “the development agenda”<sup>81</sup> celebrated the role of this “new agriculture” in creating efficient and fair labor markets: “The state — through enhanced capacity and new forms of governance — corrects market failures, regulates competition, and engages strategically in public-private partnerships to promote competitiveness in the agribusiness sector and support the greater inclusion of smallholders and rural workers.”<sup>82</sup> As it turned out, the land deals between private investors and local governments often involved customarily owned lands or were done in countries where land registration hardly existed. As a result, many such large-scale land deals were negotiated without consulting local communities that relied on the land.<sup>83</sup> As a consequence, the local populations directly affected by such deals were not aware of the forthcoming expropriation of their land. The information they received was often inaccurate and incomplete,<sup>84</sup> because of the rapid pace of the phenomenon and because such deals may not be officially recorded at all.<sup>85</sup> The World Bank found that poor management of land information has resulted in lack of knowledge on behalf of land agencies and governments as to what was going on within their borders.<sup>86</sup> In countries that do require consultation with affected communities (such as Tanzania and Mozambique), those affected received limited information on the proposed investments prior to formal consultation meetings and limited time, if at all, to engage in consultation and negotiation exercises.<sup>87</sup> The other democracy-based problems — shrinking public space, involvement of foreign interests, and dispute resolution by foreign, private adjudicators interpreting BITs or international trade law — are present here as well.

To add to the sense of democratic deprivation by the distant despot, developing countries can compare their lot with that of affluent communities, whose democratic processes are respected by investment tribunals. For example, the arbitral award in *Glamis Gold Ltd. v.*

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<sup>81</sup> On the “development” rhetoric as a rationalization for continued Western domination of the developing world in the post-colonial era see SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW* (2011).

<sup>82</sup> WORLD BANK, *supra* note 79, at 8.

<sup>83</sup> Vermeulen & Cotula, *supra* note 69, at 909.

<sup>84</sup> Ctr. for Human Rts. & Global Just., *Foreign Land Deals and Human Rights: Case Studies on Agricultural and Biofuel Investment* (2010), *available at* [http://www.law.nyu.edu/ecm\\_dlv1/groups/public/@nyu\\_law\\_website\\_\\_alumni/documents/documents/ecm\\_pro\\_067266.pdf](http://www.law.nyu.edu/ecm_dlv1/groups/public/@nyu_law_website__alumni/documents/documents/ecm_pro_067266.pdf).

<sup>85</sup> Such deals are characterized by heterogeneous registry requirements and procedures among and within states. Difficulties in collecting information may result in large data gaps. For example, the agrofuel project of the German company Flora EcoPower in Ethiopia was reported by Reuters to involve 13,000 hectares while only 3,800 hectares are registered with the Ethiopian Investment Agency. A 400,000 hectares deal in Sudan, reported in the media in 2009 is absent from Sudan’s public available government statistics. LORENZO COTULA, SONJA VERMEULEN, REBECA LEONARD & JAMES KEELEY, *INT’L FUND FOR AGRICULTURAL DEV. (IFAD), LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA* 41 (2009), *available at* <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/IFAD%20IIIEE%20Land%20Grab%20in%20Africa.pdf>.

<sup>86</sup> DEININGER & BYERLEE, *supra* note 70, at 71.

<sup>87</sup> Vermeulen & Cotula, *supra* note 69, at 900-01.

*United States of America* developed a different, more deferential, approach to domestic regulatory measures which were prompted by domestic concerns.<sup>88</sup> A German dispute over the nuclear phase-out conveyed a similar sensitivity toward greater deference to local interests and voice.<sup>89</sup> The unstated underlying assumption of the arbitrators, that “Northern” democratic processes merit more deference than those in developing countries offer another indication to the problematique of subjecting democratic deliberations to the assessment of a distant, private adjudicator.<sup>90</sup>

### III. THE PROMISE OF PROCEDURAL SAFEGUARDS AND ITS LIMITATIONS

An important reaction to the privatization process, especially in the global context, has been the rise of networks of private actors and NGOs who monitor multinational corporations and react to policies they find as repugnant. One intriguing reaction to the silencing ramifications of the growing influence of distant despots on the public space is consumer networks and social network protests.<sup>91</sup> Such networks contributed, *inter alia*, to the rising influence of the global civil society and its role in the promotion of soft law mechanisms for the

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<sup>88</sup> Glamis Gold undertook from 1994 to 2002 to mine gold at the Imperial Project, on federal land in southeastern California, utilizing mining rights it owns. Changes in government and the undertaking of environmental and cultural impact assessment processes, including the potential effects on Native American religious and cultural sites, raised public concerns and controversy. California took a few legislative measures to mitigate the negative implications of the project. The *Glamis Gold* Tribunal ruled that the diminished levels of profit caused by these measures "did not cause sufficient economic impact...to effect an expropriation of the Claimant's investment." *Glamis Gold v. U.S.*, Award, ¶¶ 166-184, 536 NAFTA Arb. Trib. (June 8, 2009).

<sup>89</sup> In the summer of 2011 the German parliament decided to abandon the use of nuclear energy by the year 2022. It was the result of a lengthy public debate about the use of nuclear energy. The new law foresaw the immediate closure (during 2011) of a few power plants and the remaining plants will be gradually shut down by 2022. The Swedish energy group Vattenfall took steps to establish arbitration proceedings and the case is currently pending at ICSID. *See Vattenfall AB v. Fed. Republic of Ger.*, ICSID Case No. ARB/12/12 (Mar. 11, 2011).

<sup>90</sup> Viewed from a broader perspective, the tribunals' decision on how to interpret different open-ended provisions may influence non-participants beyond the scope of the dispute. The interpretation of treaty provisions by an arbitral tribunal potentially shapes the future behavior of states, investors and other arbitral tribunals. *See* Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in *50 Years of the New York Convention, ICAA Congress Series no 14*, 42, 43 (Albert Jan van den Berg ed., 2009).

<sup>91</sup> For an optimistic analysis of such an evolving public sphere, especially thanks to the internet, see Armando Salvatore, *New Media, the "Arab Spring," and the Metamorphosis of the Public Sphere: Beyond Western Assumptions on Collective Agency and Democratic Politics*, 20 *CONSTELLATIONS* 1 (2013). Despite the participatory potential of the internet, the findings of political scientists aren't highly optimistic. Some argue that without equal-access, "the medium will continue to advantage those types of people already engaged in politics." Brian S. Krueger, *Assessing the Potential of Internet Political Participation in the United States: A Resource Approach*, 30 *AM. POL. RES.* 476, 494 (2002). Others add the highly fragmented structure of the internet and the increasing commercialization as additional limiting factors. Nevertheless, some scholars argue that appropriate design may overcome the limitations of the internet as a public sphere and lead to enhanced political participation. *See, e.g.,* Rabia Karakaya Polat, *The Internet and Political Participation: Exploring the Explanatory Links*, 20 *EUR. J. COMM.* 435, 454 (2000).

promotion of human rights, sustainable development and further scrutiny over the practices of business actors.<sup>92</sup> An important line of scholarship has emerged that celebrates this response.<sup>93</sup>

In the international legal jurisprudence, the call for a Global Administrative Law framework explores the applicability of diverse accountability mechanisms to transnational decision-making bodies, including private companies and other private regulators and emphasizes the procedural requirements whose observance by private companies should ensure the interests of the affected stakeholders.<sup>94</sup> Indeed, Good Private Despots increasingly attempt to remedy the democratic deficits caused by their involvement by introducing mechanisms that provide voice for affected stakeholders and allow a measure of responsiveness to their concerns. The introduction of participatory rights, transparency and other accountability mechanisms is gaining greater purchase and support by investors and investment mechanisms in recent years because of the increasing awareness to the democratic and other losses associated with private power, and in light of open acts of public protest. For example, a call for such mechanisms became prevalent in the immediate aftermath of the post 2008 land rush. Human rights activists, international organizations and financial institutions were quick to observe and react to the problems caused by the growing flood of land deals.<sup>95</sup> Their suggested approaches focused on participation, accountability and voice.<sup>96</sup> Similarly, some arbitration proceedings became more responsive and open to public participation.<sup>97</sup>

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<sup>92</sup> See, e.g., Rebeca DeWinter, *The Anti-Sweatshop Movement: Constructing Corporate Moral Agency in the Global Apparel Industry*, 15 ETHICS & INT'L AFF. 99 (2001). On the emergence of corporate social responsibility (CSR) codes of conducts see, for example, David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations in International Law*, 44 VA. J. INT'L L. 931 (2004); Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635 (2004); Antonio Vives, *Corporate Social Responsibility: The Role and Markets and the Case of Developing Countries*, 83 CHI.-KENT L. REV. 199 (2008); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389 (2004-2005).

<sup>93</sup> See, e.g., Freeman, *supra* note 3; Rosen-Zvi, [###]; Shamir *supra* note 3; Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

<sup>94</sup> For an overview statement on the Global Administrative Law Project see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005).

<sup>95</sup> DEININGER & BYERLEE, *supra* note 70 . For an overview of the United Nations and human rights organizations' reaction, see Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT'L L. J. 503 (2011).

<sup>96</sup> FAO et al., *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (2010), available at [http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles\\_Extended.pdf](http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf) (regarding the "RAI Principles"). These principles were promulgated in January 2010 by the World Bank, a key facilitator of such deals, together with the U.N Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD), and the U.N. Conference on Trade and Development (UNCTAD). Principle 3 requires that "[p]rocesses for assessing land and other resources and then making associated investments are transparent, monitored, and ensure accountability by all stakeholders, within a proper business, legal and regulatory environment." Similarly, according to Principle 4 "[a]ll those materially affected are consulted, and agreements from consultations are recorded and enforced." The PRAI principles were endorsed by

At first glance, these approaches seem compatible with Mill's arguments for participatory democracy. But their voluntary feature and reliance on corporate governance pose serious challenges to their efficacy.<sup>98</sup> In addition, corporations are not subject to the discipline of constitutional legal constraints that public agencies are governed by. Companies are usually not obliged to give account to the people affected by their policies.<sup>99</sup> Their main liability is limited to compensation for any harm defined as tort under the law.<sup>100</sup> Thus, companies have limited to no incentive to internalize the interests of those who are not their shareholders but are affected by their policies.<sup>101</sup>

The question, however, is whether these accountability and responsiveness mechanisms really empower the affected stakeholder community to wield its democratic authority. Ultimately, not every form of stakeholders' participation is convincing in Milliean terms. As we mentioned earlier, Mill noted that "it is a great discouragement to an individual, and a still greater one to a class, to be left out of the constitution; to be reduced to plead from outside the door to the arbiters of their destiny, not taken into consultation within."<sup>102</sup> The GAL solution, from this angle, is not a satisfactory solution: while the individual is not left out of the constitution, she is relegated to pleading her case to the arbiters of her destiny, without being able to be among those who decide.

One form of participation is that of *the stakeholder-spectator*, the one who can merely review the information related to her interests through measures of transparency and freedom of information. The *stakeholder-commentator* can comment on proceedings related to her rights and interests, voice her concerns, and perhaps make the decision-maker aware of concerns they

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the G20 Leaders at the Cannes Summit in November 2011 and at the Los Cabos Summit in June 2012, see *The Principles for Responsible Agricultural Investment (PRAI)*, UNCTAD, <http://unctad.org/en/Pages/DIAE/G-20/PRAI.aspx> (last visited July 7, 2013). These principles have much in common with principles put forward in OLIVIER DE SCHUTTER, U.N., *LARGE-SCALE LAND ACQUISITIONS AND LEASES: A SET OF CORE PRINCIPLES AND MEASURES TO ADDRESS THE HUMAN RIGHTS CHALLENGE*, briefing note (2009). A similar rationale informs the provisions of the U.N. Declaration On The Rights Of Indigenous Peoples (UNDRIP), G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) "Indigenous peoples should be guaranteed the collective right to give or withhold their free, prior and informed consent to relevant activities that impact their lands, territories and resources").

<sup>97</sup> For an example of civil society involvement in investment arbitration proceedings, see *Methanex Corp. v. U.S.*, Final Award, NAFTA Arb. Tribunal (Aug. 3, 2005).

<sup>98</sup> For a critical discussion on corporate social responsibility see DAVID VOGEL, *THE MARKET FOR VIRTUE* (2005). For an elaborate critique in the context of the land rush see Narula, *supra* note 69.

<sup>99</sup> See *supra*, text accompanying note 51.

<sup>100</sup> Whether or not the Harm Principle is sufficient for a theory of global corporate responsibility is subject to a heated debate among scholars and practitioners in the field of corporate human rights responsibility. For an overview of this debate, see Stepan Wood, *The Case for Leverage-Based Corporate Human-Rights Responsibility*, 22 BUS. ETHICS Q. 63 (2012).

<sup>101</sup> Some authors demonstrated how CSR measures could be compatible with the maximization of profits and shareholders' interests but evidence for this argument remains limited. See Yishai Blank & Issi Rosen-Zvi, *The Persistence of the Public/Private Divide in Environmental Regulation*, 15 THEORETICAL INQUIRIES L. XXX, XXX (2014).

<sup>102</sup> *Id.* at 37.

haven't thought about. But it seems that only the *stakeholder-voter* — the one who casts her vote — can fulfill the Milliean concerns:

If he is compelled to pay, if he may be compelled to fight, if he is required implicitly to obey, he should be legally entitled to be told what for; to have his consent asked, and his opinion counted at its worth, though not at more than its worth. . . . Every one is degraded, whether aware of it or not, when other people, without consulting him, take upon themselves unlimited power to regulate his destiny . . . .<sup>103</sup>

Providing greater voice and participation cannot replace the lost *vote* of the community in affairs essential to its well-being. Participation with no vote positions the public in an inherently inferior position, as one that is being governed by a good despot. It is beyond the scope of this Article to elaborate on this concern. Suffice it to mention in this context that the celebration of the most sophisticated accountability mechanisms should not conceal the fact that they remain secondary to the primary urge of individuals to be the ones that take their futures in their own hands.

#### CONCLUSION

In this article we used the Milliean critique of the Good Despot to develop a critique on privatization that focuses on the democratic deficits it creates. We discussed how privatization may lead to the loss of the instrumental and intrinsic values of participation, the constraints it imposes on communities and its destabilizing effects on the institutional safeguards of democracy. Such critique shifts the attention away from the essentialist and consequentialist assessment of privatization to address the influence of privatization on decision making processes.

The democratic lense that we adopted here demonstrate how the four aspects of the democratic deficit — asymmetric information, the shrinking public sphere, the distance element and the undermining of the community by adjudication processes — while less acute in the context of a functioning government of a well-established democracy that has a solid economy and robust internal deliberation processes. become more challenging as we move to more economically dependent, fragile or even undemocratic regimes. Although the presence and involvement of the good distant companies in weaker countries could mobilize various civil society actors to demand greater accountability, there are inherent limits to what a distant, private company can offer. While the Good Distant Company may in theory be better than a dictator, there is no guarantee that it is can in fact be better, or much better. The deep structural problems of despotism remain and they are problems which the GDC cannot correct. This renders the GDC more of an accomplice than a gentle civilizer of a despotic regime.

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<sup>103</sup> MILL, *supra* note1, at 169-70.

These insights should not necessarily be taken as total rejection of privatization. There can be market-based responses to some or even most of the democracy losses we identified. Our emphasis is on the need to regulate the privatization process so that its outcomes ensure the existence of robust democratic processes that protect individual and collective self-determination. Privatization should be reined in either by putting limits to it or by complementing it by remedial procedures that enable the bi-and multi-directional flow of information, and the effective participation of all those affected by it.

When privatization “goes global” and multinational corporations influence directly and indirectly the lives of foreign communities, a further question arises: Who is capable of regulating the companies? To the extent that domestic actors in the host states are too weak to insist on effective regulation, the obvious response is to impose similar obligations on the companies’ home states. Those are able to discipline companies registered in their jurisdiction also for their activities outside their borders. The home states, aware of the desperate need for such regulation, may even be willing to do so by controlling the multinational companies registered in their respective jurisdictions.<sup>104</sup> As Mill tells us, this comes with a high price: by protecting a foreign community against predatory policies of our companies we reduce harm to that community. But at the same time we also numb the foreign community’s urge to take matters into their hands, and thus may even weaken the very sense of a community. The distant company’s home state thus risks becoming yet another good distant despot that Mill admonished against. Is there a third way out of this conundrum?

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<sup>104</sup> See e.g. the OECD Guidelines for multinational enterprises at <http://www.oecd.org/daf/inv/mne/>