



**ENSURING ACCESS TO INFORMATION: INTERNATIONAL LAW'S
CONTRIBUTION TO GLOBAL JUSTICE**

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Ensuring Access to Information: International Law's Contribution to Global Justice

Eyal Benvenisti*

This essay examines the role of international law in promoting indirectly global (and domestic) distributive justice. This focus on institutions and processes at the global level is grounded on the assumption that questions of the just allocation and reallocation of resources are ultimately resolved through processes of public deliberation or open contestation (including through the involvement of courts). I argue that the key to approaching a more just allocation of resources is by addressing the democratic deficits that underlie the skewed distribution (or the lack of redistribution) of assets and opportunities. My claim is that international law can play a role in the political empowerment of weak constituencies (within and between states). In doing so, international law can indirectly shape the distribution and redistribution of resources, in a manner that is more dignified and preferable to handing them charitable contributions. Just like the empowerment of labor by the freedom of association, legal intervention that empowers disadvantaged communities will not only increase their bargaining power, but also enable them to function as agents rather than as charity recipients.

1. Introduction

One could understand the theme of this book – “the rise or decline of international law” – as being grounded on the assumption that “the rise” of international law is intimately linked to global justice, whereas its decline augurs global injustice.¹ That more international law, or stronger adherence to its principles, means a more just world. This essay partly challenges this assumption, arguing that there is nothing inherently just in more international norms and more international organizations. There is nothing inherently just in a law that is grounded in state consent but in fact represents the interests or values of the few, and the proliferation of state-made norms and institutions may be counterproductive from the perspective of global justice. The association of “the decline” of international law with global injustice is clearer, although sometimes the rise of national constitutional law, even as a challenge to international law and a check on international organizations, can offer a much needed

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¹ See Heike Krieger & Georg Nolte, *The International Rule of Law – Rise or Decline? – Points of Departure* (KFG, Working Paper No. 1, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2866940.

correction to international institutions and tribunals influenced by the powerful few.² The question as to how international law can contribute to global justice therefore requires an assessment of what principles of international law are conducive to global justice, of which we would need more. This essay seeks to address this question. It also examines contemporary challenges to such principles, challenges that reflect a “decline” in the commitment to them.

How can international law contribute to global justice? In one sense, international law is *about* global justice – seeking ways and means to reduce inter- and intra-state conflicts and promote human welfare, given existing political, social and economic constraints. International law has been used to address several specific areas of global human concern such as the prohibition on the use of force unless in self-defense,³ the prevention and repression of crimes against humanity,⁴ the promotion of human rights and the granting of asylum to refugees and possibly to some types of migrants,⁵ the recognition of a duty to assist countries facing natural disasters,⁶ the regulation of labor markets,⁷ and the obligations to manage transboundary and global resources equitably and sustainably and to provide development aid.⁸ Several systemic approaches have focused on a global rule of law as promoting global justice, and on ensuring the accountability of global decision-makers under the approach of Global Administrative Law.⁹ More critical voices have probed international law's use as a tool of global injustice, having served to further the Empire's domination of the New World – criticisms that are designed to discover the law's blind spots and urge reform.¹⁰ Some voices seeking reform have focused on tweaking the concept of “sovereignty” to insist on solidarity among sovereigns,¹¹ while others have insisted on

² EYAL BENVENISTI & GEORGE W. DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY: THE ROLE OF NATIONAL COURTS 56-65, 149-65 (2017).

³ U.N. Charter art. 2, para. 4.

⁴ Rome Statute of the International Criminal Court art. 7, July 17, 1998.

⁵ Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S. 137.

⁶ On this duty see Kigab Park, *The Law on Natural Disaster*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW (Eyal Benvenisti & Georg Nolte eds., forthcoming 2018).

⁷ For a description of how the World Trade Organization shapes national regulation see Gregory Shaffer, *How the World Trade Organization Shapes Global Governance*, 9 REG. & GOVERNANCE 1 (2015).

⁸ For the development of international law on transboundary ecosystems see EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES 156-200 (2012).

⁹ For a review of community interests in international law, see COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW (Eyal Benvenisti & Georg Nolte eds., forthcoming 2018); Bruno Simma, *From Bilateralism to Community Interests in International Law*, in 250 COLLECTED COURSES OF THE HAUGE ACADEMY OF INTERNATIONAL LAW 217 (1994).

¹⁰ See, e.g., SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND POLITICS OF UNIVERSALITY (2011); ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2007); Jochen von Bernstorff, *International Law and Global Justice: On Recent Inquiries into the Dark Side of Economic Globalization*, 26 EUR. J. INT'L L. 279 (2015); DOREEN LUSTIG, THE HISTORY OF INTERNATIONAL LAW AND PRIVATE BUSINESS CORPORATIONS, 1886-1980 (forthcoming 2018).

¹¹ See Nicolas Politis, *Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux*, in 6 COLLECTED COURSES OF THE HAUGE ACADEMY OF INTERNATIONAL LAW 1, 5-6 (1925) (Fr.); GEORGES SCELLE, 2 PRÉCIS DE DROIT DES GENS 1 (1934)

certain moral duties for states to mitigate the failures of the state sovereignty system,¹² and to take into account the interests of foreigners.¹³

But how could international law contribute to “global justice” in the sense that has captured the attention of moral philosophers in recent decades? The “global justice” literature in moral philosophy focuses on justice among individuals rather than among states, and it often regards international law as part of the problem – not only in the colonial context but as an inherently unjust order – rather than the key to the solution. Perhaps for the same reasons, the question of global distributive justice has been by and large ignored by international lawyers as being outside their purview.¹⁴ Questions about the nature and scope of obligations that individuals, states and international organizations in the affluent “North” have toward the less privileged individuals in the “South,” and in general whether nations should regard the human flourishing of strangers as a matter of concern, are regarded by most lawyers as best left to political deliberation.¹⁵

In this essay I wish to highlight the role of institutions and decision-making procedures in promoting – indirectly – global (and domestic) distributive justice. This focus on institutions and processes at the global level is grounded on the assumption that questions of the just allocation and reallocation of resources are ultimately resolved through processes of public deliberation or open contestation (including through the involvement of courts). The question is therefore whether law can be instrumental in ensuring the conditions for open deliberation and contestation. Focusing on the limited opportunities of politically weaker constituencies to engage effectively in such interactions, the task of the law, I will suggest, is to provide them with meaningful voice to more effectively stake their claims for global justice in the various decision-making fora. In other words, I wish to argue that the key to approaching a more just allocation of resources is not by devising direct distributive justice tools like Thomas Pogge’s global resources dividend¹⁶ or by providing justifications to those affected (as suggested by Rainer Forst),¹⁷ but by enhancing

(Fr.); see generally SOLIDARITY: A STRUCTURAL PRINCIPLE OF INTERNATIONAL LAW (Rüdiger Wolfrum & Chia Kojima eds., 2009).

¹² See, e.g., Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2, 20–22 (2013).

¹³ See, e.g., Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295 (2013).

¹⁴ For exceptions, see STEPHEN RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS* (2015); ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2004).

¹⁵ See Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005) (claims that there is no burden of justification between states). But see David Miller, *National Responsibility and Global Justice*, 11 CRITICAL REV. INT’L SOC. & POL. PHIL. 383 (2008) (proposes a theory of global justice whose main elements are the protection of basic human rights worldwide).

¹⁶ THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2002). It was adopted by the CESCRC Committee which expects member states to contribute 0.7% of their GNP for development cooperation.

¹⁷ RAINER FORST, *THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE* (2012).

what Isaiah Berlin called the “liberty for”¹⁸ of those affected by addressing the democratic deficits that underlie the skewed distribution (or the lack of redistribution) of assets and opportunities. My claim is that international law can play a role in the political empowerment of weak constituencies (within and between states). In doing so, international law can indirectly shape the distribution and redistribution of resources, in a manner that is more dignified and preferable to handing them charitable contributions. Just like the empowerment of labor by the freedom of association, legal intervention that empowers disadvantaged communities will not only increase their bargaining power, but also enable them to function as agents rather than as charity recipients.¹⁹

This essay claims that international law can and should prove useful in creating the conditions that enable the transformation of the debate about global distributive justice from the philosophical to the political by the political empowerment of the weak and the disregarded.²⁰ Although international law cannot replace the necessary political debate about what global justice means and how it should be implemented, its goal can and should be to contribute to creating inclusive frameworks and venues within which the political debate could take place in a meaningful way. The political debate will be meaningful only if communities have the information that is necessary to inform them in deliberations about the redistribution of resources and the opportunity to take part in the decision-making processes that redistribute and monitor redistribution. For the same reason, one does not need to elaborate too much about labor rights as long as the right to form a labor union is enshrined. Can international law be useful for this purpose?

After outlining the claim that the key to global distributive justice is through empowerment of the agency of the politically weak, the essay will describe the underlying connection between international law and the conditions that preclude political debate about global justice. I will briefly argue that it is the current global political-legal structure that inhibits the political process whereby global justice considerations could be argued, weighed, adopted and implemented. I will then suggest that international law could be part of the solution for those seeking to promote any version of global justice, emphasizing the link between access to data, information and knowledge as key to participation and voice, and necessary for effective political voice.

2. Provide hooks and not fish: the misguided focus on “justice” as distribution of resources

¹⁸ ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 16, 16-34 (1969).

¹⁹ See Miriam Ronzoni, *Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design*, 15 *CRITICAL REV. INT'L SOC. & POL. PHIL.* 573, 580 (2012) (claims that “[v]irtually all liberal societies are characterized by a package of institutions and policies aimed at promoting different variations on, and degrees of, a mixed model of freedom”).

²⁰ On “the problem of the disregard” see Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 *AM. J. INT'L L.* 211 (2014).

Pogge's "Global Resources Dividend"²¹ and other schemes for the redistribution of global assets, as well as well-wishing programs such as the Bill and Melinda Gates Foundation²² or the Bill Clinton Foundation,²³ have a very strong intuitive appeal. But this appeal is misguided even if it is effective. Its main fault is that it ignores agency. It leaves decision-making power in the hands of Northern governments, the Clintons and the Gates's. It leaves the aid recipients in their state of eternal dependency, in the hope that the aid they receive fits their needs and will continue. In other words, the global redistribution of material goods is insufficient because it perpetuates the dependency relationships and denies the agency of the recipients. It ignores the right to individual and collective self-determination of the beneficiaries.

Worse, the assets-redistribution approach is also unnecessary for achieving a more just allocation of resources and opportunities. Arguably, the redistribution of meaningful voice in decision-making venues where decisions are taken about regulation, resource management and allocation, etc. will necessarily result in a leveling of the political playing field and thereby in the leveling of opportunities for individuals and communities to develop their skills and obtain their proper share of global resources. Therefore, the key to approaching a more just allocation of resources is not by devising direct distributive justice tools, but rather by analyzing the inherent global democratic deficits that underlie the skewed distribution of assets and opportunities and devising means to correct them.

Take, as one seemingly minor illustration of the problem, the European Community's food safety regime.²⁴ The European Commission's stringent food-safety law requirements constitute a major barrier to exports entering the European market from developing countries. These countries depend on these exports, as the European Community is their primary export market. The European safety requirements, writes Morten Broberg, have been ranked as one of the foremost factors affecting exports of agricultural and food products from developing countries.²⁵ Broberg shows the one-sided regulatory process that imposes "prohibitively strict criteria," shifting all the burdens on the growers in developing countries, burdens that in his view are "disproportionate" and "excessive." As a monopsonic market, the EC can dictate the rules. Shifting to more transparent regulatory processes that provide opportunities for growers to have voice is likely to reduce production costs and increase welfare in developing countries as a matter of right, not charity. From this perspective, the EU's trumpeting its commitment to assisting these very countries rings hollow.²⁶

²¹ POGGE, *supra* note 16.

²² BILL & MELINDA GATES FOUNDATION, <https://www.gatesfoundation.org/> (last visited Dec. 8, 2017).

²³ CLINTON FOUNDATION, <https://www.clintonfoundation.org/> (last visited Dec. 8, 2017).

²⁴ FOOD SAFETY: OVERVIEW, https://ec.europa.eu/food/overview_en (last visited Dec. 8, 2017).

²⁵ Morten Broberg, *European Food Safety Regulation and the Developing Countries: Regulatory Problems and Possibilities* 3 (DIIS Working Paper 09, 2009), <http://static-curis.ku.dk/portal/files/15584884/PDF>.

²⁶ Most probably, the food safety regime violates these commitments. *See Id.* at 36-38. *See also* Consolidated Version of the Treaty on the Functioning of the European Union art. 208, May 9, 2008, 2008 O.J. (C115) 47:

Among the global justice philosophers, Rainer Forst has come closest to this realization. In his insightful book²⁷ he elaborates on the basic right to justification that “expresses the demand that there be no political or social relations of governance that cannot be adequately justified to those affected by them.”²⁸ He emphasizes not only the need to provide reasons for those affected by a decision, but also the need to hear them out, thereby having them participate in common decision-making.²⁹ His emphasis is on persuasion by deliberation, grounded in his faith in “the forceless force of the better argument or rather the force pushing toward the better argument.”³⁰

But the assumption that the decision-maker will be convinced by the better argument applies only to decision-makers that are impartial, such as the ideal judge or the expert. Once this assumption is questioned, however, more robust protection of interests is needed. This is why Forst then invokes the concept of consent. But how can consent be facilitated in global decision-making arenas? Suggesting a concept of “minimal transnational justice” as a middle course between global and international justice, he calls for “minimally fair transnational terms of discourse and of cooperation” where national communities are participants “of (roughly) equal standing in the global economic and political system,” with “a (qualified) ‘veto right’ of the worst off” in matters of “basic justice that touch the participatory minimum.”³¹ This, of course, calls for definitions of the various components (“the worst off,” “basic justice,” “the participatory minimum”), as well as paying attention to the complex background conditions that could ensure the “(roughly) equal standing” of all those affected by those decisions.

1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States complement and reinforce each other. Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries. 2. The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

²⁷ FORST, *supra* note 17.

²⁸ *Id.* at 2.

²⁹ Rainer Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, 120 ETHICS 711, 717-20, 727-28 (2010).

³⁰ FORST, *supra* note 17, at 7.

³¹ *Id.* at 263-65. On “minimal transnational justice”:

members of societies of multiple domination have a legitimate claim to the resources necessary to establish a (minimally) justified democratic order within their political community and that this community be a participant of (roughly) equal standing in the global economic and political system. And the citizens of the societies benefiting from the present global system do have a collective “duty of assistance” to use Rawls’s terms, to provide these resources (ranging from food, housing and medical care to a basic education, information, the possibility of effective participation, and so on) necessary to attain self-government. [...] minimally fair transnational terms of discourse and of cooperation.” At 265: “a (qualified) ‘veto right’ of the worst off. Such that no decision can be made that can be reciprocally and generally be rejected by those in the weakest position.

But more importantly, it leaves the worst off, and any other affected individual, in the reactive position of someone who may have the opportunity to consent, but never the opportunity to initiate, to set the agenda, to upset the existing order because it is unjust. A reactive, even if not entirely passive, right to justification is therefore not enough to ensure voice and usher in globally just policies. Instead, the key to global justice is inclusive participation in decisions – including all the parties in decisions that affect them. Can international law be instrumental in this endeavor? Before outlining a hesitant positive response, I wish to explore the main structural conditions that impede inclusive political participation in domestic and global decision-making fora, arguably impeding the just allocation of resources. Understanding these conditions could hold the key to institutional remedies and indirectly contribute to global (including domestic) justice.

3. The negative contribution of international law to global justice

This Part explores the systemic democratic failures in contemporary national and international decision-making venues, and suggests ways to empower politically weak stakeholders. I will suggest that international law is part of the problem, as it ineluctably forms part of the global arrangement of powers and competences among states, which is currently undermining the political agency of many individuals. Understanding this role of international law may offer guidance on its potential role in promoting global (and domestic) justice through its various interlocutors, primarily courts and other reviewing bodies.

To do so, this Part identifies four aspects that have bearing on the possibility of deliberating on global justice issues (let alone promoting them). These four aspects contribute to the diminishing voice of diffuse voters in public decision-making. Exposing the complicity of international law to the rise of these four aspects is key to assessing the ways by which international norms that could offer responses. While international law is part of the failing structure of global governance today, it can be instrumental in providing the necessary response.

There are four principal factors that contribute to the diminishing voice of individuals in public decision-making processes. All of them result from structural failures of the current global system of allocating competences to states, a system that faces challenges in our era of global connectedness, interdependency, and the rise of new information and communication technologies. Two of them relate – counterintuitively perhaps – not so much to the global sphere but more to the domestic sphere. These are two aspects of the contemporary global legal order that shapes the opportunities of citizens first and foremost within their respective states. The first aspect is the law's shaping of the citizens' possibilities to exit their respective countries and enter others. The second aspect is the law's crude way of separating out spheres of decision-making along the political boundaries of states. Together, these rules shape people's ability to take part in public decisions affecting them, and hinder their ability to demand wealth distribution and redistribution to promote collective welfare. It is not

difficult to prove that these rules benefit some and burden others, and the discrimination that ensues frustrates political pressure to promote justice at the global level. The third principal way in which international law creates and maintains global inequalities is its fragmented nature, which divides potential voices for justice and thereby silences them. The last determinant factor is the growing power of private actors – Facebook, Google, etc. – whose control of information and communication technologies and vast amounts of data poses a challenge to state authority and hence diminishes the space for democracy and individual and group agency.

(a) International law controls stakeholders' options for "exit" and "voice"

The debate about global justice that sets it apart from domestic justice, similarly to the debate about the domestic legal order that is seemingly distinct from international law, is profoundly misleading, because the dividing line between the internal and the external obscures the full picture. One cannot speak about the domestic sphere without taking into account the context in which it is embedded. The deep insight that Albert Hirschman contributed to our understanding of the dynamics of any human relationship – be it a company, a marriage, or a state – is that it is myopic to ignore the alternative options that members have: that in addition to "voice" within the relationship, people also must have the option of "exit."³² A marriage without the opportunity to divorce will not be the same as one where each of the partners can terminate it at will. Having no way out of the relationship seriously undermines the voice of those who are forced to remain inside it. For the same reason, the unequal allocation of the right to exit also shapes the parties' relative voice. Moreover, someone who has more exit options than others will be less likely to invest in promoting the welfare of the group of which s/he is a member.³³ Since democracy thrives on the collective action of its many members, and in fact is constantly defined by that activity,³⁴ too much exit could possibly harm the community due to underinvestment in promoting its interests by those who have alternatives (we sometime note this aspect when talking about "brain drain").³⁵ For democracy to

³² ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). On exit and voice in the context of the European Union, see Joseph. H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991).

³³ Elinor Ostrom noted that individuals who collectively manage what she terms common pool resources (such as a spring or an aquifer) strengthen their commitment to cooperate with the rest by severely constraining their room for independent action: ELINOR OSTROM, *GOVERNING THE COMMONS* 43-45 (1990).

³⁴ As John Stuart Mill has observed, democracy is the way the community forms itself. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 168 (Henry Regnery Co. 1962) (1861): "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."

³⁵ On the brain drain phenomenon and its implications, see Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 *N.Y.U. L. REV.* 148 (2006); Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 *YALE L.J.* 2098 (2011).

flourish within states, we can conclude, there has to be an optimal level of exit options – not too few, not too many – and they should be allocated on an equal basis among voters. For the same reason, there has to be an optimal level of entry options – not overly restricted, not completely closed, and also nondiscriminatory. Without opportunities for entry (another state), the right to exit is meaningless, and vice versa.³⁶

By necessity, international law regulates the interface of exit/entry. It either allows the "freedom" of exit and entry, or otherwise regulates it. International law regulates the movement of individuals. It is international law that recognizes states' wide discretion to allow entry, subject to the recognition (but not enforcement) of the right of exit and the right of entry as individual human rights. To the extent that individuals can rely on their combined exit/entry rights, their voice is secured, as compared to a situation where the ruling regime knows that their options of leaving the country are limited. The availability of these rights shapes the voice that right-holders have (or do not have) in their respective countries.³⁷

Whereas international law limits the exit options of most voters, it enhances the actual and virtual exit opportunities of investors.³⁸ It is international law that is responsible for the invention of a corporation that on the one hand is independent of its foreign parent company, but simultaneously is still recognized as being owned by the foreign company and hence immune from taking by the state of incorporation. This invention – harking back to the so-called Cobden treaty of 1860 between France and the United Kingdom³⁹ – is perhaps no less momentous for global business than the very invention of the company,⁴⁰ for it is the key to the ability of multinational corporations to evade political boundaries with their regulatory regimes. Moreover, if the company is operated from a third country, the tax laws of both the host state and the parent company's home state will not apply, and the entire operation could thus benefit from "tax havens" without contributing to the budgets of either the host or home state, thereby not only preempting the political demand for redistribution but also depleting the supply of necessary resources for implementing domestic and global justice policies.⁴¹ As Ronen Palan explains, "[o]nce these legal persons could

³⁶ Jeremy Waldron, *Exclusion: Property Analogies in the Immigration Debate*, 18 THEORETICAL INQUIRIES L. 469, 471 (2017) (a general presumption against states' restricting emigration implies limits on the sovereign's right to restrict immigration).

³⁷ Albert O. Hirschman, *Exit, Voice, and the State*, 31 WORLD POL. 90, 95-96: "Unfortunately, because of differences in income and wealth, the ability to vote with one's feet is unequally distributed in modern societies".

³⁸ See Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999); BENVENISTI & DOWNS, *supra* note 2, at 52-87.

³⁹ PETER. T. MARSH, *BARGAINING ON EUROPE: BRITAIN AND THE FIRST COMMON MARKET, 1860-1892*, at 8-27 (1999).

⁴⁰ See Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 INT'L ORG. 151, 168-69 (2002).

⁴¹ Tsilly Dagan, *The Global Market for Tax and Legal Rules* 3 (Apr. 17, 2017) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506051 ("[T]he ability of individuals and businesses to choose the laws applicable to them or to avoid application of a particular legal regime altogether radically diminishes the effectiveness of redistribution through the tax system.").

reside in different locations, there was always the risk that they would go shopping for the best bundles of regulation they could find,⁴² picking and choosing from what the different jurisdictions offer them.⁴³ By increasing the real or virtual exit options of owners (and of their capital or the income thereof), these “freedoms” of movement and incorporation also increase the owners’ voice in all relevant jurisdictions and lower their incentives to contribute to the welfare of the community, while at the same time diminishing the voice of those whose exit options are more limited, as well as their means of promoting community goals.

The result of the skewed exit options – and the virtual immunity of mobile capital from national regulation – is that global justice initiatives (and many domestic justice initiatives) now depend on the discretion of the mobile elements in the global community. And to the extent that these promote global justice initiatives, they do so as a measure of charity rather than a right. The routinization of private charity intensifies dependency, political disempowerment and the lack of ownership over one’s life opportunities.⁴⁴

(b) International law and the fortuitous allocation of spheres of policymaking

Current global interdependencies are responsible for the lack of fit between the group that has the right to vote and the group that is affected by the decisions made by, or on behalf of, the first group. The basic assumption of state democracy—that these two types of stakeholders overlap—was perhaps correct in the world of separate mansions, when territorial boundaries defined not only the persons entitled to vote but also the community affected by those choices. Because of that fit, exclusive state sovereignty was both efficient and democratically just. Today, however, the policies of one government affect foreign stakeholders on a regular basis, without the latter having the right to vote for that government or otherwise being able to influence its decisions. The domestic political process becomes irrelevant as a way to secure community goals.

Moreover, the political boundaries raise the costs for the majorities within a discrete group of states to unite against a common external rival – a powerful foreign state or an even mightier and more ruthless MNC – that practices “divide and rule” strategies against them, when seeking, for example, concessions for its investment. From this perspective, the spectacular success of the decolonization movement made the

⁴² Palan, *supra* note 40, at 172.

⁴³ Dagan calls this phenomenon of picking and choosing “fragmentation”. Dagan, *supra* note 41, at 17-22.

⁴⁴ See Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as “the Good Despot”: The Democratic Costs of Privatization in Global Settings*, 15 THEORETICAL INQUIRIES L. 125 (2014) (using the Millian critique of the Good Despot to develop a critique of privatization that focuses on the democratic deficits it creates.).

numerous new states vulnerable to a new type of exploitation by a handful of powerful states or other global actors. Weaker states that find it difficult to bundle up their disparate preferences submit to the dictates of the few powerful actors and the global institutions that they have created. As a result, the space for discretion that many sovereigns (and hence voters) are left with is severely restricted. The promise of “sovereignty as freedom” has not materialized for many countries, which experience their traditional or hard-won formal freedom as having erected new types of walls that separate them from each other and from the actual public or private venue of deliberation and decision-making.

(c) International law as a fragmented legal space

State authorities have in recent years delegated or surrendered regulatory functions to a fragmented tapestry of various forms of public and private, formal and informal, international and private bodies.⁴⁵ The pressure to privatize has further shrunk the space for political deliberation,⁴⁶ and all too often the move to such global regulatory bodies has to varying degrees eroded the functionality of public participation in politics, traditional constitutional checks and balances found in many democracies, and other domestic oversight and monitoring mechanisms of executive discretion.⁴⁷ The multiplicity of single-issue institutions limits the ability of many state executives of medium-sized or small states, and certainly of developing states, to create coalitions that could withstand the domination of the powerful states who are the masters of the treaties. Moreover, with global regulation becoming ubiquitous, heavily influenced by capture by special domestic interest groups that thrive on asymmetric information, the question of voice of individuals in global bodies arises. Also the voice of diffuse voters in domestic bodies diminishes when states’ ability to resist a foreign actor is effectively lost because a discrete group of states finds it impossible to unite against a common external rival – a powerful foreign state or an even mightier and more ruthless MNC – that practices “divide and rule” strategies against them, when imposing its demands on them.

⁴⁵ BENVENISTI & DOWNS, *supra* note 2, at 14-19, 30-44.

⁴⁶ Lustig & Benvenisti, *supra* note 44, at 139-41.

⁴⁷ Stewart, *supra* note 20, at 231-68 (discussing strategies to address the evolving gaps in the efficacy of domestic political and legal mechanisms of participation and accountability resulting from shifts of regulatory authority from domestic to global regulatory bodies). *See also* Benvenisti, *supra* note 38 (arguing that by employing international organizations as venues for policymaking, state executives and interest groups manage to reduce the impact of domestic checks and balances). There may be additional reasons for the concentration of power in the executive and the decline of domestic checks. *See* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) (discussing what he sees as the domestic factors leading to the rise of an unchecked U.S. presidency).

(d) The rise of private power (and data as the new global resource)

In addition to the traditional influence of capital on decision-makers, we are witnessing a revolution in governance as a consequence of the availability of new information and communication technologies. The emergence of giant firms such as Facebook, Google, Twitter and Amazon that provide the technologies upon which humanity has come to depend, and their accumulation of vast amounts of data, poses a challenge to state authority and hence diminishes the space for democracy and individual and group agency. There is growing evidence that they are able to manipulate public opinion and that they regularly do so.⁴⁸ Their current status as private actors and their claim to ownership of their algorithms and their vast amounts of data has been met with weak legal responses and no concerted attempt to curtail their freedom.⁴⁹

(e) Summary: International law and global injustice

The four contributing factors to the diminishing human agency in the public space converge to preempt deliberation on global (and domestic) justice issues that could turn the philosophical debate into a political one. International law is very much a part of the system that is responsible for these four factors. Hence the call for perfecting that system is very much a call upon international law to offer solutions. The question that remains is how international law can develop in ways that respond to these inherent failings of the state system.

⁴⁸ Jonathan L. Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 335-37 (2014) (demonstrates how Facebook and Google may shape public opinion to serve their own interests); Seth Fiegerman, *Facebook Is Well Aware that It Can Influence Elections*, CNN TECH, Nov. 17, 2016, <http://money.cnn.com/2016/11/17/technology/facebook-election-influence/>; Trevor Timm, *You May Hate Donald Trump. But Do You Want Facebook to Rig the Election Against Him?*, THE GUARDIAN, Apr. 19, 2016, <https://www.theguardian.com/commentisfree/2016/apr/19/donald-trump-facebook-election-manipulate-behavior>.

⁴⁹ For more on this, see Eyal Benvenisti, *Foreword: Democracy and the Law of Global Governance: Past, Present and Future*, EUR. J. INT'L L. (forthcoming 2018).

4. The potential positive contribution of international law to global justice

The various misalignments between decision-makers and those affected by their decisions and the rise of private power generate problems of asymmetric information flows between decision-makers and voters. Voters receive less or distorted information about the choices they have and about the motivations of the decision-makers, and they also find it difficult to convey their views and preferences to decision-makers and participate in decision-making. Their ability to form opinions on the basis of reliable information and act upon it in the polls or through participation in decision-making processes is inhibited. Although the information revolution has brought a wealth of data within reach of our fingertips, the ability of individuals to make sense of this data remains limited.⁵⁰ Anthony Downs's profound observation about asymmetric information as the key challenge of democracy remains true even in our hyper-connected world. His 1957 prediction that "a world where perfect knowledge prevails" will never materialize remains accurate.⁵¹ Therefore, as Downs observed, governments do not assign to "the preferences of each citizen exactly the same weight as those of every other citizen."⁵² quite an understatement that continues to resonate. Recent experience suggests that the communication revolution as such is no panacea.⁵³ The new communication tools have created new gaps, particularly among groups of voters, empowering those who can easily rally behind specific causes or form almost virtual political parties.⁵⁴ It remains beyond voters' capacity to assess and act upon the wealth of data – often deliberately skewed – that is accessible to them, and people tend to rely on proxies in forming their opinions. Individuals unconsciously process the wealth of information in ways that fit their predispositions, a process known in psychology as motivated reasoning.⁵⁵

a) The Discipline of Accountability

Domestic public law has sought to respond to the problems of asymmetric information by compelling governments to release information and thereby become

⁵⁰ Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. Econ. 99, 101 (1955): "Because of the psychological limits of the organism... actual human rationality-striving can at best be an extremely crude and simplified approximation to the kind of global rationality that is implied, for example, by game-theoretical models".

⁵¹ Anthony Downs, *An Economic Theory of Democracy*, 65 J. POL. ECON. 135, 139 (1957).

⁵² *Id.*

⁵³ Jonas Lerman, *Big Data and Its Exclusions*, 66 STAN. L. REV. ONLINE 55 (2013) (claims that the Big Data revolution may lead policy-makers to ignore the preferences of certain stakeholders).

⁵⁴ See, e.g., CASS SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017); Andrew Chadwick, *Web 2.0: New Challenges for the Study of E-Democracy in an Era of Informational Exuberance*, in CONNECTING DEMOCRACY: ONLINE CONSULTATION AND THE FLOW OF POLITICAL COMMUNICATION 45, 49-51 (Stephen Coleman & Peter M. Shane eds., 2012); Benvenisti, *supra* note 49.

⁵⁵ See generally Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407 (2013); Ulrike Hahn & Adam J. L. Harris, *What Does It Mean to Be Biased: Motivated Reasoning and Rationality*, 61 PSYCHOL. LEARNING & MOTIVATION 41 (2014).

transparent and accountable, the assumption being that the release of new information will level the political playing field between stakeholders. Transparency then reduces the power of the ‘agents’ (the policymakers) by making more information available to the ‘principals’ (the public, voters), and citizen participation mechanisms allow the public to take action and ensure that their agents deliver outcomes closer to their preferences.⁵⁶ Global Administrative Law can be seen as an approach to adapting domestic public law tools to global governance bodies.⁵⁷ The imposition of accountability obligations on global bodies has not been easy, given the limited incentives of actors at the global level (primarily state executives and special interests) to share decisional authority. The executive or legislative branches of influential state parties to international organizations, for instance, are well positioned to assess their behavior, impose sanctions (e.g., withhold budgetary allocations), and employ a variety of political and legal mechanisms to exert pressure on them to adopt policies and programs that are aligned with the priorities and interests of these member states. High-profile international NGOs may affect IOs’ behavior by taking advantage of their access to global media outlets or knowledge of international organizations’ internal decision-making processes. Special interests, such as the tobacco industry, have learnt to exploit transparency and citizen participation mechanisms to burden or slow adverse regulation.⁵⁸ Imposing the discipline of accountability on global bodies has gained some success, but it certainly has not reduced all the information asymmetries and ensured meaningful voice for all and always.

Take, for example, the EU’s Impact Assessment Guidelines that require the EU to take into account the effects of EU policies on developing countries,⁵⁹ and its evolving practice of commissioning Sustainability Impact Assessments (SIAs) to examine the possible impacts of trade and investment agreements on developing countries.⁶⁰ The European Commission has stipulated that in conducting such SIAs during trade negotiations they “will pay particular attention to wide consultation and

⁵⁶ PETER CANE, ADMINISTRATIVE LAW 113 (2011): “[C]onsultation at an early stage may at least increase levels of compliance later on and reduce the chance that those dissatisfied with any made will seek actively to challenge them”.

⁵⁷ Benvenisti, *supra* note 49, at 24-51.

⁵⁸ Georgina Dimopoulos, Andrew D. Mitchell & Tania Voon, *The Tobacco Industry’s Strategic Use of Freedom of Information Laws: A Comparative Analysis*, 2016 OXFORD U. COMP. L.F. 2; Karen EC Levy & David Merritt John, *When Open Data Is a Trojan Horse: The Weaponization of Transparency in Science and Governance*, 3 BIG DATA & SOC’Y 1 (2016); Andrew D. Mitchell & Tania Voon, *Someone to Watch Over Me: Use of FOI Requests by the Tobacco Industry*, 22 AUSTRALIAN J. ADMIN. L. 18 (2014).

⁵⁹ THE EVALUATION PARTNERSHIP, EVALUATION OF THE COMMISSION’S IMPACT ASSESSMENT SYSTEM – FINAL REPORT 17 (2007), http://ec.europa.eu/governance/impact/key_docs/docs/tep_eias_final_report.pdf.

⁶⁰ EUROPEAN COMMISSION, TRADE, GROWTH AND WORLD AFFAIRS: TRADE POLICY AS A CORE COMPONENT OF THE EU’S 2020 STRATEGY 14 (2010), http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf. See also Lorand Bartels, *Policy Coherence for Development Under Article 208 of the Treaty on the Functioning of the European Union – Towards a Complaints Mechanism* (Univ. of Cambridge Faculty of Law Research Paper No. 18, 2016), <http://ssrn.com/abstract=2754079>.

involvement of civil society,”⁶¹ But Lorand Bartels cites problems with the process “going to the heart of the impact assessment process as it is currently constituted,”⁶² and recommends “the involvement of developing countries and civil society, as well as any developing country groups specially affected by the policy at issue.”⁶³

This may be too timid a beginning to provide a space for collective deliberations concerning the appropriate global justice aspects of a new global legal order. It is certainly a modest proposal that mitigates some of the failings of the current system but without undermining it, as a possibly noncontroversial lowest global common denominator as regards global justice: the idea that there should be justice in the manner whereby public decisions affect the rights and interests of others.

b) Judicial (and other) review

The availability of national and international courts and other reviewing bodies offers alternative venues for collective decision-making. These bodies also generate information, often appreciated by the public as more reliable than that produced by the executive.⁶⁴ The resulting global checks and balances can potentially reduce some of the difficulties of asymmetric information and voice and thereby promote redistributive policies (both domestically and globally).

If we identify the lack of political pressure to maintain the achievements of the welfare state and promote global justice with internal and external democratic failures, perhaps the key to resisting pressures and building countervailing processes lies with “de-fragmenting” and “counter-capital” institutions.⁶⁵ The natural and traditional candidates for such bodies are domestic courts and (at least some) international courts. To the extent that these courts are independent from captured state executives, they could curb the excessive power of capital and enhance the procedures that offer space for majoritarian voices (indeed, calling courts “counter-majoritarian” is deeply misleading in a system controlled by narrow interest groups); a rebalancing of political power is possible. Because judicial bodies need to be coherent to claim legitimacy and are capable of recreating a systemic vision of the domestic and international legal orders (and strengthening the links between the domestic and the international), these bodies have the potential of limiting the possibilities of exiting the law, and of bundling up issues for institutions to decide. Since they require information from various sources to form an independent policy, they tend to lower the requirements with regard to access for petitioners and third

⁶¹ See Bartels, *supra* note 60, at 8 (quoting EUROPEAN COMMISSION, *supra* note 60, at 14).

⁶² Bartels, *supra* note 60, at 10.

⁶³ *Id.* at 15.

⁶⁴ See Matthew C. Stephenson, “*When the Devil Turns...*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 62 (2003) (presenting the informational benefits courts provide to legislatures).

⁶⁵ See BENVENISTI & DOWNS, *supra* note 2, at 149-65.

parties. Those who are not represented during the negotiations and drafting of the law often have their day in court.

In this context, it is noteworthy that in recent years, and perhaps in response to the globalization of markets and policymaking, national courts have begun to coordinate their jurisprudence along several aspects of public life, from security through gatekeeping and environmental and health-related policies, to controlling international organizations.⁶⁶ Being relatively immune to capture by global capital and having the capacity to coordinate their jurisprudence with otherwise competing jurisdictions, courts can “reclaim democracy” at the domestic level and press for the creation of representative venues within global bodies.⁶⁷ The new judicial assertiveness has provided legislators more opportunities to weigh in on global issues and thereby respond to the grassroots demand for voice.

Regional courts have also contributed to this effort, especially by acting on behalf of several states to fend off “divide and rule” strategies that affected the states’ ability to withstand external pressure. The ECtHR, like other international tribunals, can help resolve the collective action problems of states that are unable to overcome the “sovereignty trap,” and rebuff a powerful state or a multinational company that seeks to force the weaker state to comply with its demands.⁶⁸ The CJEU has been quite successful in this context, imposing European legal standards on sporting associations that sought insulation from public-law obligations.⁶⁹ Most conspicuously, it led the way in resisting the UN Security Council’s counterterrorism measures.⁷⁰ The ECtHR insisted that international organizations cannot hide behind their immunities under international law to evade the employers’ duties under national labor laws.⁷¹ Such acts indirectly provide positive spillover effects, as these standards benefit other societies. But courts can also be effective in a more direct manner. For example, most recently, the CJEU insisted that the Council must not ignore the rights of foreign communities when signing treaties with foreign governments.⁷²

Moreover, courts can also resolve collective action problems by moving the law forward so that it reflects collective interests.⁷³ Several decisions of international

⁶⁶ See, e.g., Zachary D. Clopton, *The Global Class Action and its Alternatives*, 19 THEORETICAL INQUIRIES L. (forthcoming 2018) (discussing how judges and courts also can provide individualized opportunities for multijurisdictional resolution).

⁶⁷ BENVENISTI & DOWNS, *supra* note 2, at 24-30, 44-49; Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241 (2008).

⁶⁸ BENVENISTI & DOWNS, *supra* note 2, at 149-65.

⁶⁹ Case C-519/04, *David Meca-Medina & Igor Majcen v. Comm’n of the European Communities*, 2006 E.C.R. I-6991; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*, 1995 E.C.R. I-4921. In these cases, the CJEU was able to resolve the collective action problem created when private sports associations imposed their standards on individual states.

⁷⁰ S.C. Res. 1267 (Oct. 15, 1999).

⁷¹ See *Waite and Kennedy v. Germany*, App. No. 26083/94, Eur. Ct. H.R. (1999).

⁷² Case T-512/12 *Front Polisario v. Council of the European Union*, 2015 E.C.R. 953, para. 228: Council must “[E]nsure that the production of products export is not conducted at the expense of the population of the territory in question or imply violations of fundamental rights.”

⁷³ Benvenisti, *supra* note 13, at 314-18.

tribunals have created linkages between trade and the environment, investments and human rights, showing how treaties can be thickened and the space for politics widened within institutions where initially silenced parties can have voice. These courts can promote policies that take into account the interests and wishes also of those not represented at the negotiation table or the treaty-signing ceremony. Indeed, international tribunals have promoted in their judgments human rights and the sustainable allocation of maritime resources, and redefined global resources as shared, thereby prodding state parties to take each other's interests into account.⁷⁴

As domestic public opinion and legislators become increasingly aware of the growing importance of global capital and the attendant growing pressures on domestic political space, they tend to provide much needed support for increasingly assertive domestic courts. This has been the case not only in developed democracies in Europe, but also in several developing countries. The famous judgment of the Indian Supreme Court in *Novartis v. The State of India* (2013),⁷⁵ which interpreted India's trade-related obligations narrowly, was both a culmination of case law that ventured to intervene in matters affecting the state's international commitments,⁷⁶ as well as a model for other national courts to emulate.

That national courts are a force to be reckoned with can be inferred from the reaction to the budding efforts by powerful states that are seeking to insulate investments from the jurisdiction of national courts. The current effort – in the so called Mega Regional agreements such as the TPP – is to extend investors-state dispute settlement (ISDS) processes beyond investment to also cover trade-related disputes. It may well be that this recent assertiveness of national courts is the “problem” that the ISDS hopes to resolve. What seems to policymakers and their constituencies to be assertiveness that promotes democratic deliberations is viewed by foreign stakeholders as barriers to trade. No doubt, the *Novartis v. India* judgment must have added to the determination of Northern pharmaceutical companies to offer the ISDS as a system that would nullify the *Novartis* precedent and curb its potential ramifications around the developing world.⁷⁷

Indeed, much as international law is responsible for global injustice, so are national and international courts that in the past took part in creating the current system, not

⁷⁴ See, e.g., *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25); see also *BENVENISITI*, *supra* note 8 at 209.

⁷⁵ *Novartis AG v. Union of India*, (2013) 13(1) SCR 148 (India); see also *Bayer Corporation & Anr v. Union of India & Ors*, LPA 443 (Del.) (2009).

⁷⁶ In 2003 the Supreme Court of Sri Lanka found that a bill that would have precluded compulsory licensing and parallel importing (regarded as important tools to ensure affordable access to pharmaceutical drugs) required a special majority in parliament because it infringed the principle of equality enshrined in the constitution. S.C. Special Determination No.14/2003. Courts in Bangladesh, India, and Pakistan prevented the importation of contaminated food and blocked advertising campaigns of foreign tobacco companies: *M. Farooque v. Bangladesh*, 48 DLR 438 (1996) (Ban.); *Vincent v. Union of India*, 1987 AIR 990 (India); *Islam v. Bangladesh*, 52 DLR 413 (2000) (Ban.) (referring to the similar decisions of the Indian court in *Ramakrishna v. State of Kerala*, 1968 AIR 1367 (Ker.), and *Chest Foundation v. Pakistan*, 1997 CLC 1379 (Pak.)).

⁷⁷ Amy Kapczynski, *Engineered in India — Patent Law 2.0*, 369 NEW. ENG. J. MED. 497 (2013).

only by developing and applying international law but also by developing choice of law norms, including the rules relating to tax liability, that have facilitated the evasive possibilities available to MNCs and the immunity of capital from national regulation.⁷⁸ As part of the problem, they can also become part of the solution.

c) Access to “private” big data

These “accountability technologies,” however, assume that public bodies have information which they can and must share. This assumption has been challenged by the rise of new information and communication technologies that allow a handful of companies to amass more data than most state governments will ever have or have the ability to make sense of. These companies govern, in the sense that their algorithms affect our choices, and through their ability to observe and assess our behavior, they can manipulate our preferences by prioritizing the information that we will be exposed to and by the sophisticated use of behavioral psychology. Both algorithms and data, they claim, are their private property,⁷⁹ immune to public interference.

The role of law, including international law, in this context is clear. The right of access of individual stakeholders to an aggregate and anonymized version of data held by public and private global bodies must in principle be free, and free from manipulation and pollution: access to big data holds the potential to reduce the acute informational problems. Processing the huge amounts of data could provide information about both private and public actions, their motivations and consequences. This knowledge can then empower the various actors to take political action.⁸⁰ The data could enlighten us about ourselves, and instruct us on matters like how to improve our health, avoid car accidents, or design more accessible and efficient markets. The data could also suggest areas for attention and perhaps regulation where it is lacking. Big data generated by the public cannot be treated as entirely owned by those who store it. Rather, they are obliged to share the data, even if at cost.

Often, when refusing to share their data, corporations rely on the users’ consent to their retention and disclosure policy. Indeed, users who register for the services of big data corporations are usually required to consent to the corporation’s policy of collection, use, disclosure, retention, and protection of personal information. But how much weight should be accorded to such consent? Because many of these corporations hold considerable market power, potential users do not have any real alternatives to obtain such services elsewhere, and therefore their consent cannot be viewed as freely given, nor can it justify withholding the data. This consent merely reflects the skewed market relations between the individual user and the mighty

⁷⁸ Palan, *supra* note 40, at 159-63 (British courts are responsible for the rule, which spread around the Commonwealth, that foreign control exempts companies from local tax liability).

⁷⁹ See, e.g., Jason Schultz, *The Internet of Things We Don’t Own?*, 59 COMM. ACM 36 (2016).

⁸⁰ For a fuller argument, see Benvenisti, *supra* note 49.

service provider. More importantly, corporations with a large market share become themselves the market: much more than a player, the corporation is rather the market maker, architect and regulator. Google, for instance, is not merely a player in the search engine market, but rather the manufacturer of people's daily access to knowledge. With this huge influence comes also the responsibility to investigate the implications for the users of the services they provide, and to enlighten the public about them.

Obviously, sharing the information as well as investigating it in-house would entail costs to big corporations. They would have to screen researchers' applications, provide them with resources and training, and risk negative media coverage. Although these costs are not negligible, these are the responsibilities that come with the benefits of being a market maker, and they should be weighed against the potential public good unleashed with the release of the information.

Reducing asymmetric information is a public good. It calls for global efforts to allow access to privately obtained data. It also calls for the prevention of the "pollution" of information flows by deceit and overload, not unlike the collective efforts needed to protect the environment. The close relationship between asymmetric information and global (and domestic) injustice may be another factor to spur legal responses.

The benefits of access to national data have been recognized by several governments, and the rationale applies with equal force in the global context. In an Executive Order issued by President Obama in 2013, he acknowledged that "making information resources easy to find, accessible, and usable can fuel entrepreneurship, innovation, and scientific discovery that improves Americans' lives and contributes significantly to job creation." He therefore ordered that "the default state of new and modernized Government information resources shall be open and machine readable."⁸¹ The OECD in 2015 and the EU in 2017 have also recognized the collective benefits arising from shared access to data. The EU has embarked on an effort to create a "Digital Single Market" that is designed "to fully unleash the data economy benefits."⁸²

This utilitarian perspective is reminiscent of Grotius's justification for opening the high seas to all: "If any person should prevent any other person from taking fire from his fire or light from his torch, I should accuse him of violating the law of human society, because that is the essence of its very nature [...] why then, when it can be done without any prejudice to his own interests, will not one person share with another things which are useful to the recipient, and no loss to the giver?"⁸³ Principles

⁸¹ Exec. Order No. 13642, 78 Fed. Reg. 93, 28111 (May 9, 2013), <https://www.gpo.gov/fdsys/pkg/FR-2013-05-14/pdf/2013-11533.pdf>.

⁸² *Building a European Data Economy*, EUROPEAN COMMISSION (Sept. 9, 2017), <https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy>.

⁸³ HUGO GROTIUS, *THE FREEDOM OF THE SEAS* 38 (Ralph van Deman Magoffin trans., James Brown Scott ed., Oxford Univ. Press 1916) (1633).

such as good neighborliness⁸⁴ or trusteeship for humanity⁸⁵ strengthen this argument. Even the business model of social media providers such as Facebook and Google, which is based on selling users' data to advertisers, does not limit its being shared for other purposes, such as public uses including the monitoring of government action or academic research.⁸⁶

d) Development aid on the data, information, knowledge axis

To facilitate the voice of the disregarded, it may also be necessary to commit resources to enhancing the capacity of certain disadvantaged groups in society to explore the vast data and make sense of it. This requires the allocation of educational services and other tools. One such example is the Codex Alimentarius trust fund, designed to help developing countries in transition to increase their participation in the work of CODEX (which establishes food safety and quality standards and fair practices in the food trade).⁸⁷ Another example is the African Legal Support Facility, hosted by the African Development Bank, which has been supporting African governments in the negotiation of complex commercial transactions since 2010. The ALSF is an organization dedicated solely to providing legal advice and technical assistance to African countries.⁸⁸ Michal Gal has shown that regional competition-law

⁸⁴ Laurence Boisson de Chazournes & Danio Campanelli, *Neighbour States*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW 1072 (2006).

⁸⁵ Benvenisti, *supra* note 13.

⁸⁶ See Yafit Lev-Aretz, *Data Philanthropy 3* (Dec 3, 2017) (unpublished manuscript) (on file with author) (Providing example of a collaboration of a mobile network organizer and a non-profit organization during the Nepal earthquake crisis in 2015 and states that "Data generated via platforms like telecom operators, satellite companies, and social media networks makes possible a range of insights into economic developments, medical advances, environmental issues, and various other properties of public life that could accelerate the pace and scope of social discovery and development."). For an overview of the various private sector players that have initiated "data for good" projects see *id.* at 8-10. Lev-Aretz also suggests a modification of FIPs that will allow the use of private data for the greater good.

⁸⁷ *More Than Codex: FAO, WHO and Wider Partnerships*, FAO, <https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy>:

Launched in 2003 by the Directors-General of FAO and WHO, the Trust Fund is seeking US\$40 million over a 12-year period to help developing countries and countries in transition to increase their participation in the vital work of the Commission. Increased participation will be achieved by: helping regulators and food experts from all areas of the world to participate in international standards-setting work in the framework of Codex; and enhancing their capacity to help establish effective food safety and quality standards and fair practices in the food trade, both in the framework of the Codex Alimentarius and in their own countries. In 2004, its first year of operation, the Trust Fund helped experts from more than 90 developing countries to attend and participate in the Codex standards-setting process. The Trust Fund is based at the headquarters of WHO.

See also David E. Winickof & Douglas M. Bushey, *Science and Power in Global Food Regulation: The Rise of the Codex Alimentarius*, 35 SCI. TECH. & HUM. VALUES 356 (2010).

⁸⁸ *African Legal Support Facility*, AFRICAN DEVELOPMENT BANK GROUP, <http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/>.

agreements could offer an effective tool for developing countries seeking to improve antitrust enforcement.⁸⁹ Here, again, the redistribution of hooks is much more respectful of developing communities than the distribution of fish. Technology transfer such as that envisioned under Article 66(2) of TRIPs is a potentially more empowering and democratizing approach.⁹⁰

5. Conclusion

While international law cannot replace the necessary political debate about what global justice means and how it should be implemented, its goal can and should be to contribute to creating inclusive frameworks and venues within which the political debate about the just allocation and reallocation of resources could take place in a meaningful way. The political debate will be meaningful only if communities have access to data, information and knowledge, and the wherewithal to engage in deliberations on decisions affecting them. Unfortunately, the new information and communication technologies that make it possible to bridge such informational gaps are the same technologies that are being used by various state and non-state actors to limit state authority and diminish the space for democratic deliberation and accountability. As we know from history, however, this recent decline might well prove momentary and eventually prompt the rise of international law designed to secure the necessary space for inclusive deliberations.

⁸⁹ Michal S. Gal, *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 U. TORONTO L.J. 239, 241-48 (2010).

⁹⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 66.2, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, LEGAL INSTRUMENTS - RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994): "Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base."

See also SUIRIE MOON, MEANINGFUL TECHNOLOGY TRANSFER TO THE LDCs: A PROPOSAL FOR A MONITORING MECHANISM FOR TRIPS ARTICLE 66.2 12 (2011), <http://www.ictsd.org/downloads/2011/05/technology-transfer-to-the-ldcs.pdf>: "This updated analysis of developed country reports has found little evidence that TRIPS Article 66.2 has resulted in significant additional incentives beyond business-as usual for transferring technology to LDC Members. It also concludes that the existing reporting system does not function as an effective monitoring mechanism."