

Special Issue: Third World Approaches to International Law

OBITUARY	<i>In Memoriam: Ram Prakash Anand (1933-2011)</i>
EDITORIALS	Meghana Sharafudeen, 2010-2011: <i>Taking the Road Less Travelled</i> B. S. Chimni, <i>The World of TWAIL: Introduction to the Special Issue</i>
ARTICLES	James Thuo Gathii, <i>TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography</i> Mohsen al Attar & Rebekah Thompson, <i>How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination</i> Luis Eslava & Sundhya Pahuja, <i>Between Resistance and Reform: TWAIL and the Universality of International Law</i> Gus Van Harten, <i>TWAIL and the Dabhol Arbitration</i> Sara L. Seck, <i>Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations</i> M. Sornarajah, <i>Mutations of Neo-Liberalism in International Investment Law</i>
BOOK REVIEW	Gregory Bowman, <i>Of Haves and Have-Nots: A Review of Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission</i> (Hart Publishing 2010)
GRAPHIC ART	<i>Education for Emancipation</i> , written by Mohsen al Attar, illustrated by Mia Koning

TL
&D

Trade, Law *and* Development

Vol. 3, No. 1

2011

PATRON

Justice N. N. Mathur

FACULTY-IN-CHARGE

Yogesh Pai

GUEST EDITOR

B. S. Chimni

EDITORS-IN-CHIEF

Manu Sanan

Meghana Sharafudeen

(ISSUE EDITOR)

EDITORS

(MANAGING)

Prateek Bhattacharya

(CONTENT)

Aditi Patanjali

(CONTENT)

Gopalakrishnan R.

ASSOCIATE EDITORS

Aman Bhattacharya

Ambika Gupta

Jayant Raghu Ram

COPYEDITORS

Meghana S. Chandra

Abhipsit Mishra

Prianka Mohan

Shreya Munoth

Lakshmi Neelakantan

Neha Reddy

Aritra Roy

Geetanjali Sharma

CONSULTING EDITOR

Shashank P. Kumar

BOARD OF ADVISORS

Raj Bhala

Glenn Wiser

Jagdish Bhagwati

Daniel Magraw

B. S. Chimni

M. Sornarajah

Ricardo Ramírez Hernández

Vaughan Lowe

W. Michael Reisman

Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Mohsen al Attar & Rebekah Thompson,
*How the Multi-Level Democratisation of
International Law-Making Can Effect Popular
Aspirations Towards Self-Determination*
3(1) TRADE L. & DEV. 65 (2011)

HOW THE MULTI-LEVEL DEMOCRATISATION OF
INTERNATIONAL LAW-MAKING CAN EFFECT POPULAR
ASPIRATIONS TOWARDS SELF-DETERMINATION

MOHSEN AL ATTAR* AND REBEKAH THOMPSON**

In the face of a globalised economy and an ascendant transnational legal apparatus, states find themselves surrendering responsibilities that were once within the exclusive purview of national governments, to transnational regulatory regimes. As these regimes expand in importance and jurisdiction, questions arise as to the democratic implications of this reconfiguration. In this article, we consider whether there is space for the direct participation of citizens in international law-making. We argue that, when seen through a TWAILian lens, mainstream legal constructs can be used to increase both Third World and popular representation in the international legal regime. The rule of law provides the ideological basis for mass decision-making in international law while the principle of equality opens the door to universal participation in the formulation of laws: no globalisation without representation. The urgency of a democratic international legal regime has been made palpable by soaring global inequality. As we demonstrate, a multi-level global governance structure – a continuum of political engagement from the local to the global – can expand participation beyond the nation-state and improve the likelihood of a more equitable world.

* Senior Lecturer, Faculty of Law, University of Auckland, Auckland, New Zealand. E-mail: m.alattar[at]auckland.ac.nz.

** Final Year, LL.B (Hons.), University of Auckland, Auckland, New Zealand.

The authors are delighted to have been invited to contribute to this special issue of *Trade, Law and Development*.

The authors would like to thank countless TWAIL scholars and Third World revolutionaries for their guidance, inspiration, and tenacity. We also wish to single out Professor R. P. Anand for special mention. His unparalleled contribution to Third World emancipatory struggles has, in the words of Ngugi Wa Thiong'o, encouraged many young people to 'dream a better world'. *A luta continua!* The usual disclaimer applies.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. CONTINUED COLONISATION: INTERNATIONAL LAW AS AN IMPERIAL PROJECT
 - A. *Transnational Law: The Superseding of the State by Meta-regulatory Structures*
 - B. *Third World Disenfranchisement: The Growth of Inequality*
 - 1. Authoritarian International Institutions: Foreign Imposition and Agenda Setting by the 'Usual Suspects'
 - 2. Corporate Influence and Transnational Standardisation: the TCC, TRIPS and GATS
- III. TWAIL: RE-SHAPING SOVEREIGNTY
 - A. *Overcoming Structural and Ideological Hurdles to Inject Democracy into International Law*
 - B. *The Transformation of Sovereignty: Are Some Private Actors More Equal Than Others?*
- IV. SELF-DETERMINATION THROUGH POPULAR PARTICIPATION
 - A. *Rule of Law or Rule by Law? Extending the Equality Principle as a Basis for Popular Participation*
 - B. *Agency as a Path to Equality*
 - C. *Empowerment as a Means of Reclaiming Agency*
- V. POPULAR PARTICIPATION IN INTERNATIONAL LAW-MAKING
 - A. *Increasing Inclusion: Toward Global Citizenship*
 - B. *A Global Parliamentary Assembly*
 - C. *Multi-Level Cosmopolitan Democracy*
 - D. *Participatory Decision-Making: The Example of South America*
- VI. CONCLUSION

The alteration in the sociological structure of the international society must, of course, be accompanied by an alteration in law ... In order that it may be effective, it ought to change with changes in views, powers and interests in the community. The conditions under which the classical, traditional law of nations developed, the views which it contained and the interests which it protected, have all greatly changed.¹

-R.P. Anand

I. INTRODUCTION

As both a political movement and a legal methodology, Third World Approaches to International Law (TWAIL) has been instrumental in advancing critical and occasionally radical appraisals of an evolving international legal regime. To some, the unashamedly partisan nature of this kind of scholarship has been cause for 'discomfort', whereas to others (or, ironically, to *the other*), it represents a precious oppositional interlude to the matter-of-fact, often celebratory, rhetoric

¹ R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55, 63 (1966) (hereinafter Anand).

common to much of mainstream international legal scholarship (MILS).² Efforts of TWAAIL scholars to maintain a watchful eye over international legal expansion possess a greater, if not graver, level of significance when superimposed upon a backdrop of recent independence struggles. To be sure, many of today's nation-states acquired recognition of their sovereign status only a few decades ago. Until then, they were presumptively excluded from formal participation in the formation of international law, thereby making contemporary engagement all the more poignant.

TWAAIL is an alternative narrative of international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus. A fundamentally counter-hegemonic movement, TWAAIL is united in its rejection of what its champions regard as an unjust relationship between the Third World and international law.³ Premised upon principles of tolerance, inclusion, and the 'inherent equivalency of humanity'⁴, the aim is to rethink and reconstruct international law along more equitable lines. In this way, TWAAIL seeks to democratise governance structures, both national and global, and make them more responsive to the aspirations of Third World peoples. It also aims to eliminate conditions of powerlessness and under-development that they continue to suffer under.⁵ In this sense, a reclaiming of the humanity, dignity, and agency of Third World peoples is the ultimate goal of TWAAIL.

Notwithstanding TWAAIL's critical role in ongoing struggles, including critiques of international legal policies that disadvantage Third World nations and advocacy for more equitable relationships between sovereign states of unequal power, certain MILS' scholars continue to dismiss TWAAIL's contribution to international legal scholarship.⁶ It has been labelled as passé, nihilistic, or – in one particularly churlish assessment – 'politically dysfunctional'.⁷ Nevertheless, its relevance persists.

The last quarter of the 20th century has been characterised by the installation of a multitude of international institutions (IIs) and transnational legal regimes, virtually none of which originate in the Third World but all of which possess,

² David P. Fidler, *Revolt Against or From Within the West? TWAAIL, the Developing World, and the Future Direction of International Law*, 2(1) CHINESE J. INT'L L. 29, 31(2003) (hereinafter Fidler).

³ Makau Mutua, *What is TWAAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 36 (2000) (hereinafter Mutua).

⁴ *Id.*

⁵ Mohsen al Attar & Vernon Tava, *TWAAIL Pedagogy – Legal Education for Emancipation*, 15 PALESTINE Y.B. INT'L L. 7, 20 (2009) (hereinafter Al Attar & Tava).

⁶ James Gathii, *Rejoinder: Twailing International Law*, 98 MICH. L. REV. 2066 (2000) (hereinafter Gathii – *Rejoinder*).

⁷ *Id.*

either directly or incidentally, jurisdiction over Third World affairs.⁸ Among Third World peoples, this is cause for unease, as the uploading of their nation's sovereignty translates into a downloading of disenfranchisement.⁹ Today's marginalisation is arguably more insidious: it calls upon the freshly-emancipated to *surrender* their recently-won sovereignty to a network of authorities not far removed from former colonial conquerors.¹⁰ Following hard on the heels of the decolonisation movement, it would be both insensitive and arrogant to underestimate the significant impact such a capitulation has upon the dignity of Third World states.

Ambivalence regarding the international legal regime and also towards First World intentions led to a division in TWAAIL scholarship. TWAAIL I was the original manifestation with its heyday in the age of decolonisation of the 1950s, 60s and 70s. This approach was characterised by a 'non-rejectionist' adoption of the existing standards of international law and a particularly zealous protection of sovereignty.¹¹ However, as a number of brutal and authoritarian regimes arose to fill the power vacuum left by former colonial masters, a new approach, TWAAIL II, adopted a 'philosophy of suspicion'¹² to move conceptions of international law beyond its 'relationships of power and subordination'.¹³ For this reason, TWAAIL II focuses on social movements and democratic participation of citizens.¹⁴ Our contribution is of the latter variety.

In addition to providing a brief sketch of the value of TWAAIL to both Third World peoples and international legal scholarship, the preceding subtly introduces the topic under examination in the present article. As policy-making, law-making and other state functions gradually shift from municipal toward international settings, questions abound as to the reconfiguration of sovereignty and the implications for democratic governance. The substitution of democratic spaces with profoundly autocratic ones is of particular concern. Indeed, while transnational polities have experienced a sharp rise in recent decades, pillars of *good*

⁸ See, e.g., PETER DRAHOS & JOHN BRAITHWAITE, *GLOBAL BUSINESS REGULATION* (2000) (hereinafter DRAHOS & BRAITHWAITE).

⁹ Dana Fisher & Jessica F. Green, *Understanding Disenfranchisement: Civil Society and Developing Countries' Influence and Participation in Global Governance for Sustainable Development*, 4(3) *GLOBAL ENVTL POL.* 65, 69-70 (2004).

¹⁰ B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15(1) *EUR. J. INT'L L.* 1 (2004) (hereinafter Chimni).

¹¹ Al Attar & Tava, *supra* note 5, at 17.

¹² Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2(1) *CHINESE J. INT'L L.* 77, 96 (2003) (hereinafter Anghie & Chimni).

¹³ *Id.* at 84.

¹⁴ Al Attar & Tava, *supra* note 5, at 17.

governance – as exhorted in relation to or, more accurately, *against* Third World states¹⁵ – have failed to develop apace. David Held describes the modern state system as embodying a ‘striking tension between the entrenchment of accountability and democratic legitimacy inside state boundaries and the pursuit of power politics outside such boundaries’.¹⁶ It appears that despite the procurement of many of the social powers of nation-states, there has been a commensurate rejection of the trappings of democratic governance – such as accountability and the rule of law – by IIs. Not that any of this was unexpected.

Building upon the work of William Robinson and Jerry Harris,¹⁷ Bhupinder Chimni argues that a *transnational capitalist class* (TCC) is at the helm of the assemblage of IIs.¹⁸ Averse to public oversight, this class has consistently stifled popular engagement and knowledge of their activities¹⁹. Their aim is the establishment of a global organisational structure supportive of their worldview and, by extension, their material interests: ‘the essence of contemporary developments in the field of IIs is the creation of conditions conducive to the spread and growth of global capitalism’.²⁰ To the extent that existing geo-political asymmetries continue to prescribe influence, the Third World appears as little more than a spectator in the emergent transnational legal apparatus. If anything, the erosion of autonomy instigated by the new order weakens overall Third political power, (*re*)reducing Third World states to productive appendages for the centres of capital and consumption.²¹

Various proposals have been made to promote democratic engagement of citizens in international law-making. This article is of that vein, with particular emphasis on the involvement of Third World peoples. We privilege these populations in part because not only have they suffered the brunt of imperial international legal machinations, they also represent the great mass of world

¹⁵ James Gathii, *The Limits of the New International Rule of Law on Good Governance*, in LEGITIMATE GOVERNANCE IN SUB-SAHARAN AFRICA 215 (E.K. Obiora & O.C. Quashigah eds., 1999) (hereinafter Gathii – *Limits of New Int'l Rule of Law*).

¹⁶ DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER 73 (1995), cited in Susan Marks, *Democracy and International Governance*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 47 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001) (hereinafter Marks).

¹⁷ William I. Robinson & Jerry Harris, *Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class*, 64(1) SCI. & SOC'Y 11 (2000) (hereinafter Robinson & Harris).

¹⁸ Chimni, *supra* note 10, at 6.

¹⁹ *Id.* at 19.

²⁰ *Id.*

²¹ Chimni defines this as ‘recolonisation’. See B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMMUNITY L. REV. 3 (2006) (hereinafter Chimni – *TWAIL*).

population, totalling over five billion²² and clamour for some form of involvement in the international legal apparatus.

In this article, we consider a mechanism that might contribute to arresting – or, more realistically, mildly disrupting – the continuing marginalisation of the Third World in the global arena. Our proposal, not an uncontroversial one, is to inject elements of citizen participation in international law-making. To this end, the article is divided into four parts. In the first part, we provide a critical assessment of the emergent transnational legal apparatus as a form of continued colonisation unchanged from the origins of international law in the age of conquest. Its emphasis is on diminishing Third World autonomy prompted by the plutocratic nature of IIs governing practices. In the second part, we examine the strictures of the Westphalian nation-state model and primacy of sovereignty in international law. In identifying the role of sovereignty in the alienation of swathes of world population inherent in representative democracy, we turn to the question of how to effect self-determination of peoples and regions in the third part by contrasting the rule *of* law with a rule *by* law. If the legitimacy deficit in international law is tied to the disenfranchisement of citizens caused by the supranational operation of capitalist entities, an answer may be found in the inclusion of local and regional groups in a movement of legislative empowerment. The fourth part discusses specific forms this empowerment may take, engendering true self-determination in a participatory model that acts as form of counter-hegemony promoting multi-level democratisation, to achieve a vision of global governance based on principles of self-rule and equality.

The extent to which international law *can* be made by the same people to whom it applies is unclear; the extent to which international law *should* be made by them is another matter altogether. In this limited space, we will attempt to engage both of these issues by tracing a progression from exclusion to inclusion and from autocracy to subsidiarity.

II. CONTINUED COLONISATION: INTERNATIONAL LAW AS AN IMPERIAL PROJECT

Antony Anghie traces the origins of international law to Francisco de Vitoria, who authored the legitimising discourse for colonisation in his lectures on *jus*

²² According to the 2008 World Population Data Sheet, in 2008, the world population stood at 6.7 billion. 1.2 billion people were classed by the United Nations as living in more developed countries, with 5.5 billion people residing in less developed regions. *Available at:* <http://www.prb.org/Publications/Datasheets/2008/2008wpds.aspx> (last visited May 2, 2011).

gentium.²³ International law was initially arranged to facilitate the exploitation of the Third World, primarily by annexation of lands and appropriation of resources, thus re-directing their histories.²⁴ Fast-forward to today, where Third World states find themselves facing a similarly watershed moment. Formidable technological developments in the late 20th century freed capitalism from the mooring of the nation-state, making possible its emergence as a transnational phenomenon.²⁵ In addition to enabling the de-nationalisation of production, these technologies facilitated the global dispersal of economic processes – industrial and financial activities – transforming the planet into a unified economic network. The technological sidestepping of spatial-temporal boundaries has, in turn, generated impetus towards deeper global political integration.²⁶

Some have suggested that these developments are evolutionary in nature, an ineluctable progression of human advancement: from tribe, to city, to nation, to globe.²⁷ The historical record however, supports a claim of structural determinacy.²⁸ Capital mobility occasions productive mobility – investments are strategically made in locales supportive of corporate interests – both of which are contingent upon a favourable legal environment.²⁹ Accordingly, as national communities are fused into a transnational economic network, integrative global legal initiatives loyal to global capitalism were formed. Thus, material, rather than biological or anthropological impetus propelled developments forward.

A. Transnational Law: The Superseding of the State by Meta-regulatory Structures

In respect to what has been said in the preceding paragraphs, a new form of legal institution – transnational law – has been applied to overcome both political and social barriers to commodity and capital mobility. Capitalist momentum is pressing global society towards the establishment of a unitary legal order; one characterised by a corpus of *meta-regulatory regimes* or supranational regulatory

²³ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005) (hereinafter ANGHIE).

²⁴ WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972).

²⁵ WILLIAM I. ROBINSON, *A THEORY OF GLOBAL CAPITALISM: PRODUCTION, CLASS, AND STATE IN A TRANSNATIONAL WORLD* (2004) (hereinafter ROBINSON).

²⁶ DAVID HARVEY, *THE CONDITIONS OF POSTMODERNITY: AN INQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* (1990), cited in O.R Young et. al, *The Globalisation of Socio-ecological Systems: An Agenda for Scientific Research*, 16(3) *GLOBAL ENVTL CHANGE* 304, 308 (2006).

²⁷ For an argument in support of the evolutionary claim, see, e.g., THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE BRANCH* (2000).

²⁸ WILLIAM I. ROBINSON, *TRANSNATIONAL CONFLICTS: CENTRAL AMERICA, SOCIAL CHANGE AND GLOBALISATION* 13 (2003).

²⁹ ROBINSON, *supra* note 25.

structures that often supersede national authority.³⁰ When combined, these regimes shape a transnational legal apparatus governed by autonomous legal norms. Despite being fashioned outside of state mechanisms, nation-states are subject to their implications. Authority over this apparatus, not unlike control over the global economic architecture, is being consolidated in the hands of a transnational propertied bourgeoisie or a transnational capitalist class (TCC): the ‘owners of the major productive resources of the world’.³¹

To achieve its goals, an emergent TCC adopts multifarious strategies that include, *inter alia*, the enactment of supportive regulatory measures.³² Foremost, this class exploits its economic power to influence the position of nation-states on global regulation ‘such that a particular form of economic rationality becomes part of the taken-for-granted ways of policy making’.³³ Meta-regulatory structures are as much about regulating regulation as they are about regulating non-regulation: i.e. defining areas where regulation is permissible. We thus see transnational law placing a series of constraints upon states, ensuring consistency across borders and cultures to facilitate the transnational flow of capital.³⁴ When combined with technological progress, the new legal institution appears to provide the TCC with the means to further entrench their economic, political, and ideological clout. In the process, notions of sovereignty and self-determination are being reconceptualised – *disaggregated*³⁵ – to accommodate transnationally-integrated processes of capital accumulation and global governance.

B. Third World Disenfranchisement: The Growth of Inequality

The scenario is particularly insidious from a Third World perspective. Having struggled to achieve (formal) sovereignty just a few decades ago, Third World

³⁰ Bronwen Morgan, *The Economization of Politics: Meta Regulation as a Form of Non-judicial Legality*, 12(4) SOC. LEGAL STUD. 489, 490 (2003) (hereinafter Morgan).

³¹ Robinson & Harris, *supra* note 17, at 22 & 28-29. The authors further allege that transnationalism is also precipitating the formation of a global proletariat as the national working classes are swept up by globalised circuits of capital.

³² See SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* ch. 4 (2003) (hereinafter SELL). Of course, class formation on a world scale is equally messy; perhaps even more so than at the national level (collective interests do not ensure collective affinity). We therefore witness struggles between a complex corps of factions, united on certain issues and divided on others, but nevertheless coalescing around an objective of transnational economic integration and thus forming a powerful class alliance.

³³ Morgan, *supra* note 30.

³⁴ Antony Anghic, *Time Present and Time Past: Globalisation, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT’L L. & POL. 243 (2000).

³⁵ Chimni, *supra* note 10, at 17.

states today are compelled to cede authority over domestic policymaking. Power is shifting to an ever-expanding network of popularly unrepresentative and politically unaccountable IIs operating at the behest of TCCs which are located principally outside the Third World.³⁶ The erosion of sovereignty is accompanied by a weakening of policy autonomy and national self-determination; an *uploading* of authority promotes a concentration of control that is antithetical to the democratic – and devolutionary – aspirations of freshly decolonised states and peoples.

Even proponents of global integration are hard-pressed to point out the benefits these developments have yielded for Third World peoples. On the contrary, they appear to precipitate the exacerbation of widespread Third World disenfranchisement.³⁷ In terms of economic (in)equality, technological innovation and political influence, gaps between the First World and Third World have accelerated during the last two decades suggesting that global integration is not synonymous with global prosperity.³⁸ While something should be said of emergent middle classes in a handful of target Third World markets – India, China, South Africa and Brazil, to name the cause célèbres of the neoliberal era – on the whole, indices of human wellbeing point to the deterioration rather than amelioration of actual conditions.³⁹ Deeper disenfranchisement during the transnational era is observable on at least two levels: in the narrative of formal equality that dominates IIs and in the ascendant influence of elite non-state actors in transnational law-making processes.

1. Authoritarian International Institutions: Foreign Imposition and Agenda Setting by the 'Usual Suspects'

In line with a one-size-fits-all approach, the new transnational legal apparatus eschews doctrines of yore such as 'voluntarism' and 'common but differentiated responsibility', intended to preserve domestic subjectivity.⁴⁰ They have been replaced with 'single undertakings' and 'democratised blame'; elements of an alleged universal objectivity.⁴¹ In the new legal framework, contexts and conditions

³⁶ *Id.* at 21.

³⁷ Chimni refers to a loss of "policy space" for developing countries in the social, economic and environmental fields. B.S. Chimni, *Prolegomena to a Class Approach to International Law*, 21(1) EUR. J. INT'L L. 57, 74 (2010).

³⁸ DRAHOS & BRAITHWAITE, *supra* note 8.

³⁹ To cite just one example, the 2004 report of the Food and Agriculture Organisation tells us that "hunger has increased to 852 million gravely undernourished children, women and men, compared to 842 last year, despite already warning of a 'setback in the war against hunger' in 2003". Richard Goulet, *'Food Sovereignty': A Step Forward in the Realisation of the Right to Food*, 1 L. SOC. JUST. & GLOBAL DEV. J. 1, 2 (2009) (hereinafter Goulet).

⁴⁰ Chimni, *supra* note 10, at 21.

⁴¹ *Id.*

are casualties of the pathology of procedure and legal uniformity.⁴² A process-oriented index of the type that characterises transnational law originates within a quasi-utopian liberal representation of a global community where sovereign nations freely consent to a set of rational norms and are held accountable by a series of horizontal restraints applied equally to all.⁴³

Though seemingly neutral, this purging of politics and history from international law-making posits a parity of power between First and Third World states that is pure fiction. Contrast the claim by Buchanan and Keohane that '[w]eak states are...less threatened by the dominance of powerful states within the institutions'⁴⁴ with trade expert Raj Bhala's assertion that Third World nations face a '[n]ear impossibility of effective participation' in the WTO where 'the usual suspects' set the agenda for the entire body.⁴⁵ While the illusion of equality is preserved – through voluntary negotiations with IIs – a 'largely pre-determined set of policies' is thrust upon Third World states should they wish to maintain their creditworthiness and ability to participate in the global economy.⁴⁶

Many African leaders for instance, describe domestic fiscal policies as the product of foreign 'imposition', achieved through a relationship of dominance that persists between the continent and neo-colonial IIs.⁴⁷ As an example, Obiora Okafor cites the Nigerian government's National Economic Empowerment and Development Strategy for its reproduction of 'every central tenet of the IMF's and World Bank's requirements for certifying a country...as being engaged in meaningful reform'.⁴⁸ To secure the necessary financial support, evidence of Third

⁴² Deepak Nayar, *International Trade and Factor Mobility: Economic Theory and Political Reality*, in *ECONOMICS AS IDEOLOGY AND EXPERIENCE: ESSAYS IN HONOUR OF ASHOK MITRA* 81 (Deepak Nayar ed., 1998).

⁴³ VAUGHAN LOWE, *INTERNATIONAL LAW* 19 (2007). In reference to state entry into treaties, Lowe discusses the sovereign power of states to act as they please. Should a state consider a particular treaty more advantageous than not, it may elect to become a party. As he later notes, such authority is rooted in the principle of state sovereign equality. While this principle exists in theory, it fails to take into account the reality of resource disparities between states.

⁴⁴ Christian Brutsch & Dirk Lehmkuhl, *Complex Legalisation and the many moves to law*, in *LAW AND LEGALISATION IN TRANSNATIONAL RELATIONS* 36 (Christian Brutsch & Dirk Lehmkuhl eds., 2008) (hereinafter Brutsch & Lehmkuhl).

⁴⁵ Raj Bhala, *Poverty, Islam, and Doha: Unmet Challenges Facing American Trade Law*, 36 *INT'L L.* 159, 171 (2002).

⁴⁶ Obiora Chinedu Okafor, *Poverty, Agency and Resistance in the Future of International Law: An African Perspective*, in *INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE* 95, 102 (Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens eds., 2008) (hereinafter Okafor).

⁴⁷ *Id.* at 101.

⁴⁸ *Id.* at 103.

World compliance with the desired – or imposed – policies is required to be provided.

While the determinacy of the policies has much to do with the privileging of neo-liberalism as the economic ideology (or *science*) of choice, it is also heavily influenced by ‘the way in which patterns of fixed preference are formed and operate inside international institutions’.⁴⁹ A demonstration of the contradictions, complexities, or even disadvantages of the policy is unlikely to be persuasive. When facing *structural bias*, ‘the world of legal practice is quite predictable’⁵⁰, as are the policy objectives of the TCC. Thus, while many mainstream academics may be smitten with the rhetoric and desire espoused by IIs; to TWAIL scholars, the result is the capture of sovereign economic, political, and social spaces of Third World states and peoples by agents operating at the behest of their First World masters and clients.⁵¹

2. Corporate Influence and Transnational Standardisation: the TCC, TRIPS and GATS

Many international legal scholars have identified the strong links between transnational law and corporate actors; arguing that transnational law-making has evolved as a mechanism through which the TCC sows favourable norms across domestic jurisdictions.⁵² A vast network of technocrats makes use of an array of resources in their effort ‘to create a world of ideas that has material force’.⁵³ Two examples of efforts to promote the transnational standardisation of pathways towards capital accumulation are most prominent: the Trade Related Aspects of Intellectual Property agreement (TRIPS)⁵⁴ and the General Agreements on Trade in Services (GATS)⁵⁵.

⁴⁹ Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20(1) EUR. J. INT'L L. 7, 9 (2009) (hereinafter Koskenniemi).

⁵⁰ *Id.*

⁵¹ Chimni, *supra* note 10, at 20. According to Professor Chimni, ‘the IFIs have a weighted voting system that gives Northern states a dominant voice in the decision-making process, with the result that third world countries and peoples are unable to influence in any way the content of conditionalities imposed upon them’.

⁵² Harold Hongju Koh, *Why Transnational Law Matters*, 24(4) PENN ST. INT'L L. REV. 745, 746-47 (2006). Eric C. Ip, *Globalisation and the Future of the law of the Sovereign State*, 8(3) INT'L J. CONST. L. 636, 645 (2010).

⁵³ Chimni, *supra* note 10, at 4.

⁵⁴ Agreement on Trade Related Aspects of Intellectual Property Rights, Jan. 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA, Annex 1C.

⁵⁵ General Agreement on Trade in Services, Jan. 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the

Sell, Drahos, and Braithwaite have meticulously charted the TRIPS narrative in their works. A coalition of private organisations played the key part in facilitating the induction of core minimum intellectual property (IP) standards in the World Trade Organization (WTO) framework.⁵⁶ The TCC assumed multiple roles in advancing this agenda: a legislative role in drafting the treaty, an executive role in monitoring compliance, and a lobbying role in leveraging pressure upon states in the drive to universalise the desired standards.⁵⁷ This approach resulted in the globalisation of precise IP norms via a privately-shaped – yet publicly-driven – transnational legal regime that extended exclusive rights over newly-forged commodities, allowing them to be traded in the global marketplace.

Little of this is in the interest of the Third World. Not only do the bulk of IP rights rest with corporate owners in the United States (US), Europe and Japan, but TRIPS' primary concern is the protection of IP rights and not the dissemination of information.⁵⁸ This modus operandi stands in stark contrast to the municipal legislation of the First World countries that seek to 'balance the economic interests of owners of IP against the public interest in having access to new knowledge'.⁵⁹ Commensurate with an intensification of IP protections is a reduction in technology transfer from the North to the South.⁶⁰ The legislative privileging of First World corporate profit margins over widespread Third World access to technologies and medicines undermines prospects for improved quality of life and economic development in the Third World.

The second example of the TCC's legal resourcefulness is with respect to

Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA, Annex 1B.

⁵⁶ PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? 103 (2002) (hereinafter DRAHOS & BRAITHWAITE – INFORMATION FEUDALISM); SELL, *supra* note 32. Lobby groups championed intellectual property rights as a matter of national interest capable of offsetting the ballooning US trade deficit. While educational programmes were launched to disseminate the new common sense, coercive trade measures were adopted to ensure compliance. In 1974, the US amended its 'Section 301' trade mechanism to allow the exclusion of foreign imports violating the rights of American IP holders. A later amendment went further, creating a legal obligation to deny market access to countries refusing to enact legislation protecting IP rights as counselled by the Office of the United States Trade Representative.

⁵⁷ DRAHOS & BRAITHWAITE – INFORMATION FEUDALISM, *id.* at 99.

⁵⁸ It has been argued by Drahos that "underneath the development ideology of intellectual property there lies an agenda of under-development. It is all about protecting the knowledge and skills of the leaders of the pack". DRAHOS & BRAITHWAITE – INFORMATION FEUDALISM, *id.* at 12.

⁵⁹ Ruth L. Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 742 (1996).

⁶⁰ Ruth L. Gana, *U.S. Science Policy and the International Transfer of Technology*, 3(1) J. TRANSNAT'L L. & POL'Y 205, 205-206 (1994).

international trade in services. The GATS primary function has been the progressive liberalisation of the international service markets.⁶¹ Drake and Nicolaidis describe the leadership behind the services discourse as an epistemic community operating at two tiers.⁶² At one level, government officials, agencies, and firms established alliances and plotted a course for the establishment of a trade-in-services market. At another, academics, jurists, and industry specialists developed a legitimising discourse, de-politicising services through the use of abstract, technical, and legalistic language.⁶³ Tellingly, participation in negotiations to liberalize international trade in services was by invitation only, as the domain was designated as purely technical with limited distributional impacts.⁶⁴ GATS provided the TCC with a forum in which to legitimise and circulate its worldview of commodified and tradeable services; legalising a presumption towards private sector involvement in public service delivery.⁶⁵

Similarly, Kelsey argues that GATS was a project in legal imperialism 'devised and executed by the US with the support of its Organization for Economic Co-operation and Development (OECD) allies'.⁶⁶ Through direct and indirect threat in the areas of trade and aid, these nations funnelled public services into the international trade apparatus.⁶⁷ As a result, 'highly sensitive areas of domestic policy' were placed under the banner of simple commercial activity, detaching them from formulations of national interest that newly independent Third World states were trying to craft. Reminiscent of colonial times, the objective was to preserve First World advantage within the new economy. Thus, through the abstraction typical of contractual relations, international law was used to legitimize the inequalities that produced the persistent political hierarchy between

⁶¹ JANE KELSEY, *SERVING WHOSE INTERESTS? THE POLITICAL ECONOMY OF TRADE IN SERVICES AGREEMENTS* 25 (2008) (hereinafter KELSEY).

⁶² William J. Drake & Kalypso Nicolaidis, *Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round*, 46 INT'L ORG. 37, 39 (1992) (hereinafter Drake & Nicolaidis).

⁶³ *Id.*

⁶⁴ *Id.* at 38. Literature on the negotiations suggests that distributional consequences engendered by the discourse were concealed, including the empowerment of finance-capital to compete more effectively in the trade-in-services market than traditional service providers. Even in more recent times, participation of Third World nations in recent conferences/summits to discuss the future of the global financial architecture post the global financial crisis seems to be restricted to a privileged few. Aldo Calliari, *WAIT! Do We Really Want Those Who Got Us Into the Financial Crisis to Plan Our Way Out?*, available at: <http://www.coc.org/node/6233> (last visited May 16, 2011). We thank the editors of TL&D for bringing this to our attention.

⁶⁵ Andrew Lang, *The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry*, 7(4) J. INT'L ECON. L. 801, 810 (2004).

⁶⁶ KELSEY, *supra* note 61, at 16.

⁶⁷ Drake & Nicolaidis, *supra* note 62.

the First and Third Worlds.

Permanent disparities in power pave way for exploitation: 'Inequalities in a society mean, above all, unequal control over the scarce resources of a community, and it is this difference alone that provides one party with the bargaining or coercive strength to impose an unequal exchange, an exchange that violates a widely shared sense of fair value'.⁶⁸ The TCC and First World states, which occupy the upper reaches of a stratified global society, are in a position to unilaterally impose demands in exchange for the provision of goods and services of which those at the bottom are in need. While compliance is qualitatively different from consent, the articulation of unequal terms of trade in meta-regulatory regimes obliterates the distinction as the TCC makes use of compulsory dispute resolution mechanisms to ensure obeisance.

By combining tiered negotiations (e.g. the 'Green Room'⁶⁹), opaque decision-making and interest group pluralism, IIs have established a progressively plutocratic regime. Moving beyond rhetoric, it is clear that current efforts towards global legal integration are not motivated by aspirations towards popular political emancipation but by the denial to 'a vast majority of humankind of the equality of autonomy to shape its future'.⁷⁰ Needless to say, from a Third World perspective, the situation is intolerable. In the coming section, we argue that if viewed through a democratic prism the situation is unconscionable.

III. TWAIL: RE-SHAPING SOVEREIGNTY

TWAIL urges a re-imagining of the international legal corpus in light of extant 'power relations...[First World] economic domination, and the historical relations between the West and the rest of the world'.⁷¹ Its aim is to highlight, criticise and rectify the almost literal master-slave relationship that characterises First World to Third World political exchanges.⁷² To this end, scholars such as Okafor and Rajagopal have placed much emphasis on popular participatory mechanisms,

⁶⁸ JAMES C. SCOTT, *THE MORAL ECONOMY OF THE PEASANT* 170 (1977) (hereinafter SCOTT).

⁶⁹ Kent Jones, *Green Room Politics and the WTO's Crisis of Representation*, 9(4) *PROGRESS IN DEVELOPMENT STUDIES* 349, 349 (2009). Kent describes the Green Room as an informal institution in the decision-making process of the WTO. It refers to meetings usually called by the Director-General, in which only a small subset of member countries takes part. The Green Room process came under critical scrutiny, particularly during the Doha Round, because of its inherently plutocratic nature.

⁷⁰ Chimni, *supra* note 10, at 31.

⁷¹ Al Attar & Tava, *supra* note 5, at 19.

⁷² Anghie & Chimni, *supra* note 12, at 84.

resulting in important space being dedicated to social movements and ordinary people in their analyses of legal reform.⁷³ Ultimately, 'through [T'WAIL], international law is being held to account in the name of the very people it has historically disenfranchised and...being re-made along more democratic lines'.⁷⁴ This final statement, however, is overly ambitious since the status of democracy in international law, a pillar in foreign-compelled good governance and rule of law projects across the Third World, remains unclear.⁷⁵

A. Overcoming Structural and Ideological Hurdles to Inject Democracy into International Law

Democracy, a political model intended to facilitate collective decision-making and empowerment,⁷⁶ does not sit quite as comfortably within orthodox representations of international law. Part of this tension is structural. At its inception, which Antony Anghie situates in the 16th century, international law was exclusively the purview of burgeoning state power stemming from royal prerogative.⁷⁷ For much of this period, states were characterised by authoritarian forms of government that excluded individuals from both domestic and international affairs.⁷⁸ The international legal apparatus, conceived and developed during this period, is thus structured along state-centric lines. The advent of political freedoms in many First and Third World states seemingly had no effect in redressing the restricted involvement of citizens in international law-making. While local elections provided some modicum of representation among nationals of democratic states, the power of people over IIs remained incidental, because no clear paths were designed for citizens to participate in international law-making activities. Equally telling, no mechanisms were established to ensure the accountability of II officials either.⁷⁹

A more important aspect of this tension, however, is ideological. International law is traditionally regarded as a mechanism through which sovereign states

⁷³ See BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003) for a comprehensive analysis of the impact of social movements; and see Obiora Chinedu Okafor, *Remarkable Returns: The Influence of a Labour led Socio-Economic Rights Movement on Legislative Reasoning, Process and Action in Nigeria (1999-2007)*, 47 J. MOD. AFR. STUD. 241, 242 (2009).

⁷⁴ Al Attar & Tava, *supra* note 5, at 20.

⁷⁵ Gathii – *Limits of New Int'l Rule of Law*, *supra* note 15, at 215.

⁷⁶ Patrizia Nanz & Jens Steffek, *Global Governance, Participation and the Public Sphere*, 39(2) *GOV'T & OPPOSITION* 314, 316 (2004).

⁷⁷ ANGHIE, *supra* note 23, at 13-30.

⁷⁸ ANGHIE, *supra* note 23, at 13-28.

⁷⁹ Chimni, *supra* note 10, at 21.

formalise diplomatic compromise.⁸⁰ Sovereignty is a precious commodity intended to provide legal substance to communal expressions of identity and self-determination and is guarded quite closely by national communities. This is even more so in the Third World where imperial powers have run roughshod over local expressions of autonomy. Accordingly, international legal negotiations – and eventual legal obligations – have traditionally been contingent upon a *voluntary* expression of sovereign will.⁸¹

While extant compromises necessarily imply a *surrender* of sovereignty, this is partial, temporary, and subject to immediate revocation.⁸² From this perspective, sovereignty can be likened to a form of *tribalism* or ethnic differentiation and separatism wherein *our* interests supersede *theirs*. Democracy on a world scale – whether one person-one vote, one state-one vote, a people’s assembly, or variations thereof – curtails national independence in favour of collective *diktat* and interest. This explains the historic apprehension of governments and peoples towards the self-subordination inherent in acquiescence to global imperatives. It also explains the democratic deficit we face today.⁸³ Both structural and ideological hurdles need to be overcome in order to successfully infuse democracy into international law.

B. *The Transformation of Sovereignty: Are Some Private Actors More Equal Than Others?*

In the preceding section, we qualified the sentiment of apprehension with the term *historic* to indicate an ideological shift that appears underway. As examined, a growing number of supranational legal regimes have sprouted; regimes governed by autonomous legal norms devised outside of state mechanisms. While domestic private legal systems have traditionally been used to adapt and reproduce norms favourable to an elite class, their transnational variants appear to possess a more stealthy character.⁸⁴ The *legalisation* of world politics, as termed by Brutsch and Lehmkuhl, is a process intended to ‘effectively restrict the margins of state sovereignty’.⁸⁵ Enshrining a particular logic through meta-regulation limits the parameters of possible state regulatory intervention, requiring societies to accept a

⁸⁰ Diplomacy, as the Wikileaks saga continues to confirm, is covert business.

⁸¹ This is the basis upon which colonialism was legitimated; the alleged lack of sovereignty of non-Christian states. ANGHIE, *supra* note 23, at 26.

⁸² David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 LEGAL THEORY 1, 4 (2002) (hereinafter Held).

⁸³ Obiora Okafor, *Is There a Legitimacy Deficit in International Legal Scholarship and Practice?*, 13 (SPECIAL ISSUE) INT’L INSIGHTS 91 (1997).

⁸⁴ DRAHOS & BRAITHWAITE, *supra* note 8, at 54-56.

⁸⁵ Brutsch & Lehmkuhl, *supra* note 44, at 13.

new paradigm sans public assent.⁸⁶

The ratification of transnational arrangements carries with it the duty to harmonise domestic laws with their new obligations.⁸⁷ While relations between states may have traditionally been dealt with via diplomacy, today's disputes are fashioned into adversarial exercises in litigation, judged according to formally rational meta-norms to which states are increasingly subservient.⁸⁸ To put it differently, within the new legal framework, debates over sovereignty and jurisdictional surrender are quickly becoming moot as we move toward an authoritarian model of global governance.

However, what remains less clear is the role of people in this new model. Few would argue against the need to extend 'democracy beyond the nation-state to bring to account those global and transnational forces which presently escape effective democratic control'.⁸⁹ The EU, the US, and many IIs consistently champion the cause of democracy, accountability, and transparency.⁹⁰ Realpolitik notwithstanding, the democratic ideal has gained much traction, with several noted scholars and United Nations (UN) agencies describing it as both universal value and human right.⁹¹ Yet, states appear to practice a kind of democratic exceptionalism with regard to international affairs; proffering democracy at the national level while opposing it at the global level. Worse still, IIs are facilitating the emergence of increasingly plutocratic authority.

Plutocracy begins with the premise that wealth is a primary marker of political identity, and thus political authority. The uploading of authority to undemocratic and unaccountable IIs has triggered a transformation of the theory and practice of sovereignty. Whether in the Trilateral Commission⁹² or the OECD, corporate and TCC involvement is actively sought.⁹³ In fact, avenues have been fashioned to

⁸⁶ DUNCAN MATTHEWS, GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT 120 (2002).

⁸⁷ Judith Goldstein et al., *Legalisation in World Politics*, 54(3) INT'L ORG. 385, 392 (2000).

⁸⁸ Kenneth W. Abbott et al., *The Concept of Legalisation*, 54(3) INT'L ORG. 401, 401-419 (2000).

⁸⁹ DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO GLOBAL GOVERNANCE (1995), cited in Chimni, *supra* note 10 at 33.

⁹⁰ For its part, the EU articulates its perception of democracy as a 'universal value' in the European Instrument for Democracy and Human Rights, see http://ec.europa.eu/europeaid/how/finance/eidhr_en.htm (last visited May 2, 2011).

⁹¹ Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 77 (1988).

⁹² The Trilateral Commission is a private institution which aims to facilitate the rapprochement between corporate actors and public officials in the US, Europe, and Japan, see <http://www.trilateral.org/> (last visited May 2, 2011).

⁹³ Robinson & Harris, *supra* note 17, at 28.

ensure TCC influence over IIs and transnational regulatory regimes.⁹⁴ This has set in motion the re-imagination of other foundational elements of international law-making. Indeed, with the welcoming of corporate entities into deliberative fora, old arguments against the participation of non-state actors have become moot.

Consequently, challenges to the involvement of ordinary people in international law-making must overcome a different kind of hurdle to those present in the past: for instance, *are some private actors more equal than others?* This shift is to the advantage of those seeking to increase public participation for an equality argument based on equivalency of legal personality— ‘we, citizens of State X, should be permitted to revise this agreement since they, corporations of State X, enjoy this privilege’ – is much cleaner than an inclusionary argument – ‘we, citizens of State X, should be permitted to revise this agreement despite the exclusion of non-state actors since it will ultimately impact our rights and wellbeing’. As we demonstrate in the following sections, this argument is predicated on notions of self-determination and the rule of law.

IV. SELF-DETERMINATION THROUGH POPULAR PARTICIPATION

Self-determination is an ancient concept, found in streams of thought from Greco-Roman, African and Asian civilisations.⁹⁵ Indeed, TWAAIL is first and foremost a tool of decolonisation, with its endpoint being a form of self-determination.⁹⁶ To reiterate, processes of governance are gradually escaping the confines of the nation-state.⁹⁷ IIs and the global economic order they manage are quickly being dominated by non-state actors, including transnational corporations (TNC) and other members of the TCC, most of whom originate in the First World.

An abundance of legislative power in the hands of self-serving actors who are neither democratically elected nor accountable helps to create and perpetuate global inequalities. A stark example is the imbalance between the quality of life enjoyed in the First World and that in the Third World.⁹⁸ While power asymmetries

⁹⁴ *Id.*

⁹⁵ As observed by Judge Ammoun in: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 77-78 (June 21).

⁹⁶ MAIVAN CLECH LAM, *AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF DETERMINATION* 96 (2000).

⁹⁷ DAVID HELD, *MODELS OF DEMOCRACY* 292 (3d ed. 2006).

⁹⁸ At a domestic level, we observe similar levels of inequality across nations. Indeed, the recent and on-going protests across North Africa and the Middle East arguably represent attempts by local communities to challenge both the unaccountability of ruling

in legislative processes are not a new phenomenon – according to Rousseau, ‘laws are invariably useful to those who own property and harmful to those who do not’⁹⁹ – the global nature of the trend makes this a worrying development. The rule of law, at least rhetorically, provides a counter-balance to Rousseau’s political realism.

A. Rule of Law or Rule by Law? Extending the Equality Principle as a Basis for Popular Participation

Having been described as an ‘unqualified universal good’¹⁰⁰, an ‘accepted measure...of governmental legitimacy’¹⁰¹ and an ‘essential pillar upon which any high quality democracy rests’,¹⁰² the rule of law provides the ideological basis for popular participation in international law-making. Notwithstanding the uncertainty surrounding its precise meaning which has resulted in disparate, often conflicting and biased interpretations, the rule of law remains the argument *par excellence* because of a single, widely agreed upon component: the principle of equality before the law or the importance of equals being treated equally.¹⁰³ The proposition, that all individuals should be subject to the law’s equal application, if only formally, has become an incontestable and relatively uncontroversial feature of contemporary global society.

This claim holds true among a diverse array of societies, cultures and political systems, some of which prefer non-democratic forms of governance.¹⁰⁴ Nevertheless, the rule of law and its sub-principle of equality are intertwined with a representation of democracy as the most legitimate form of governance. As stated by John Dewey, ‘belief in equality is part of the democratic credo’.¹⁰⁵ Applying the

regimes and the vulgar inequality that characterises living standards. See Walter Armbrust, *A Revolution Against Neoliberalism?*, available at: <http://english.aljazeera.net/indepth/opinion/2011/02/201122414315249621.html> (last visited May 2, 2011).

⁹⁹ Stephen Holmes, *Lineages of the Rule of Law*, in DEMOCRACY AND THE RULE OF LAW 19, 47 (Jose Maria Maravall & Adam Przeworski eds., 2003) (hereinafter Holmes).

¹⁰⁰ The rule of law was described this way by noted Marxist historian E.P. Thompson. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 137 (2004) (hereinafter TAMANAHA).

¹⁰¹ *Id.* at 3.

¹⁰² Guillermo A. O’Donnell, *Why the Rule of Law Matters*, 15(4) J. DEMOCRACY 32, 32 (2004).

¹⁰³ TAMANAHA, *supra* note 100, at 64.

¹⁰⁴ *Id.* at 2.

¹⁰⁵ Excerpts taken from John Dewey, *Democracy and Educational Administration*, 45 SCH. AND SOC’Y 457-67 (1937), available at: <http://virtual.mjc.edu/anellib/philol23/123-HANDOUTS-LECTURES/On%20Democracy.pdf> (hereinafter Dewey) (last visited May 2, 2011).

rule of law to the emergent system of global governance requires a re-conceptualisation in the form of an extension of the equality principle. Not only should laws *apply* equally to all, but all should be afforded equal opportunity to influence the composition of laws to which they are subject. We find support for this contention from Robert Post who asserts that a useful barometer when assessing the degree of democracy in a given society – democracy exists on a sliding scale – is law-making and the extent to which ‘the laws are made by the same people to whom they apply’.¹⁰⁶

In the domestic context, models of representative democracy ensure that each citizen enjoys the opportunity to participate in the election of an agent and, by extension, the law-making process. Such models are clearly absent from the realm of international governance. While some have argued that authority is bequeathed upon national legislators to regulate the international realm, others have challenged the association between domestic elections and international legislative legitimacy.¹⁰⁷ In fact, so tenuous and fragmented is the link between domestic and international governance that David Held expresses scepticism towards the legitimacy of *democratic mandates* as they pertain to national politicians’ engagement of international law. He bemoans the arrogance of ‘democratic princes’ who either misinterpret or abuse the power bestowed upon them through domestic electoral contests.¹⁰⁸ Held highlights the intersection between national and transnational jurisdictions – which he terms ‘spillover consequences’¹⁰⁹ – and the special status many issues possess, to a global citizenry rather than to a series of national citizenries. This shift in perception is intended to promote humility among political elites, putting into perspective the interconnectedness of issues and ideas. Held, not unlike other visionaries, is motivated by a populist conception of democracy predicated on the aim of fairer and more equal social relations.¹¹⁰

Thus, Held shares with other scholars, the great antipathy towards the rule *by* law that dominates the international legal regime: small groups of privileged elites controlling the law-making and law-enforcing processes.¹¹¹ In contrast, rule *of* law

¹⁰⁶ Robert Post, *Democracy and Equality*, 1 L. CULTURE & HUMAN. 142, 142 (2005) (hereinafter Post).

¹⁰⁷ Held, *supra* note 82, at 21. Held argues that the “democratic princes can energetically pursue public policies – whether in security, trade, technology of welfare – because they feel, and to a degree are, mandated to do so. The broader spillover effects of their policies and agendas are not prominent in their minds or a core part of their political calculations”.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Montserrat Guibernau, *Globalisation, Cosmopolitanism, and Democracy: An Interview with David Held* 8(4) CONSTELLATIONS 427, 434-5 (2001).

¹¹¹ Holmes, *supra* note 99, at 51.

prevails when 'tenants as well as landlords, employees as well as employers' have the opportunity to use the law to protect and advance their interests.¹¹² Taking the aspiration to its logical conclusion, achieving the rule of law is not limited to equal submission to the law itself but also equality in participation in international law-making. Once traditionally excluded groups gain access and influence over the law-making process, rule of law, as opposed to rule by law, emerges as the reigning paradigm. This facilitates the acquisition of popular agency and deepens collective equality.

B. *Agency as a Path to Equality*

Equality and inequality as outcomes are highly dependent on the opportunities available to an individual or group.¹¹³ Effectively exercising one's agency is thus a potential pathway to the enhancement of equality. For the present purposes, 'agency' should be understood *not* as the intent to perform certain acts but the capacity to do so.¹¹⁴ According to Okafor, 'agency' is 'the capability to deal with an issue, question or problem'.¹¹⁵ Between the 19th and 20th centuries, African societies had their agency formally negated by colonial powers.¹¹⁶ The repudiation of African agency took the form of 'an assault on the capacity of African peoples to govern their own lives and chart their own futures'.¹¹⁷ While this denial of agency was more formal, widespread, and suffocating in colonial times, this phenomenon is still rife today, albeit less conspicuous.¹¹⁸

A fundamental difference between 18th century society and today's globalised world is that the former was characterised by *de jure* and *de facto* inequality, whereas the world we live in today consists of *de jure* equality but *de facto* inequality.¹¹⁹ This *de facto/de jure* equality dichotomy can be clearly evidenced in the operations of IIs: the rule of law deems everyone equal in the law's application, yet we sustain inequality by allowing a minority of privileged elites to participate in setting the international

¹¹² *Id.*

¹¹³ Taitu Heron, *Globalization, Neoliberalism and the Exercise of Human Agency*, 20 INT'L J. POL. CULTURE SOC'Y. 85, 92 (2008) (hereinafter Heron).

¹¹⁴ Okafor, *supra* note 46, at 96.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 101.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ As has been documented by Robert J. Steinfeld, the inhabitants of pre-19th century saw little need to conceal society's power imbalance – "the inhabitants of that world frankly acknowledged and openly exercised the power over others which property ownership conferred". In contrast, Steinfeld asserts that today we view the power that property grants over others as "an embarrassment" which we go to great lengths to cover up. Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41(2) STAN. L. REV. 335, 342 (1989).

agenda. Returning to Rousseau: ‘The rich man will always use his influence to make, interpret and apply laws to serve his narrow class interests, disregarding the needs and fears of most of his fellow citizens’.¹²⁰

Globalisation and the spread of neoliberal policies have exacerbated existing social inequalities and created new ones. The imposition of a Western-centric development model – predicated on free markets and trade liberalisation – has resulted in the further disempowerment of Third World societies and consequently, the continued erosion of their agency.¹²¹ The new order in international economic law, with its fusion of public and private spheres, ‘imbued [TNCs] with legal personality and a quasi-sovereign status to enforce contractual and property rights in international legal forums’.¹²² Through economic and legal pressure, the regulatory sovereignty of Third World states has effectively been re-colonised.¹²³ The erosion of agency precipitates the destabilisation of self-sufficiency as Third World states are further subordinated to both the TCC and forced dependence on foreign consumer products.¹²⁴ This is no more evident than in the case of peasants, who have been converted from producers of food to consumers of inputs; a consequence of their integration with the global agriculture market and their relative powerlessness compared to large-scale agribusinesses.¹²⁵

In this regard, transnational law has played a key part in undermining peasant agency. Regulations forbidding the saving of seeds ensure that peasants steadily lose power over the things upon which they depend.¹²⁶ Under threat of direct legal action for breach of IP rights, they can no longer sustain their communities by setting aside seeds to use the following year but must instead purchase new varieties from transnational seed companies.¹²⁷ One scholar has described the dependence created by globalisation as ‘the surrendering of a community’s agential

¹²⁰ Holmes, *supra* note 99, at 47.

¹²¹ Heron, *supra* note 113, at 86.

¹²² KELSEY, *supra* note 61, at 20.

¹²³ Chimni – *TWAIL*, *supra* note 21.

¹²⁴ Heron, *supra* note 113, at 87-88.

¹²⁵ Goulet, *supra* note 39, at 4.

¹²⁶ *See generally*, International Convention for the Protection of New Varieties of Plants (December 2, 1961) (Revised upto March 19, 1991).

¹²⁷ Vandana Shiva, *The Future of Food: Countering Globalisation and Recolonisation of Indian Agriculture*, 36 *FUTURES* 715, 719 (2004) (hereinafter Shiva). Keith Aoki states that “[c]ontemporary juridical, legislative and scientific understandings of genetic engineering make human agency and intervention the benchmark for conferring intellectual property rights in seed germplasm. However, those same juridical understandings minimise the agency and interventions of thousands of farmers and cultivators throughout history”. Keith Aoki, *Weeds, Seeds & Deeds: Recent Skirmishes in the Seed Wars*, 11 *CARDOZO J. INT’L & COMP. L.* 247, 258, (2003).

capacity' to the control of another more powerful group.¹²⁸ In short, the TCC have used their agency to exploit the economic opportunities presented by global capitalism and, in the process, undermined both the rule of law and human equality.¹²⁹

The implementation of neo-liberal policies, where authority over economic regulation shifts from accountable states to unaccountable IIs and market forces, is also weakening popular agency by shifting the locus of power from public to private hands.¹³⁰ Individuals experience declining opportunities to better their own lives due to decreased state investment in communities and reduced access to resources and social services.¹³¹ In a cruel irony, at a time when democracy, alleged citizen agency and empowerment are spreading further across the globe,¹³² 'the most important decisions about human life are progressively removed beyond the reach of electorates'.¹³³ Disempowerment and inequality are of course the natural outcome of this removal: 'Power shifts from labour to capital and from state to market... (and consequently), citizens are locked out of major decisions that affect social well-being'.¹³⁴

C. Empowerment as a Means of Reclaiming Agency

From the previous sections, we have seen how international law has contributed to the negation of Third World peoples' agency both historically and contemporaneously. We have also seen how coercive processes of dependence and exclusion were directed towards the Third World during colonial and post-colonial times, resulting in widespread and systemic social, political, and economic disempowerment. To rectify this 'locking out,' a method of regaining human agency and of empowering individuals must be developed. We believe international law-making can assist in this regard. While 'empowerment' is a nebulous concept, the definition coined by Naila Kabeer will be employed: 'the expansion in people's ability to make strategic life choices in a context where this ability was previously denied to them'.¹³⁵ This definition is preferred because it encapsulates the ideas of

¹²⁸ Heron, *supra* note 113, at 88-89.

¹²⁹ *Id.* at 88.

¹³⁰ *Id.* at 93.

¹³¹ *Id.*

¹³² Christian Welzel & Ronald Inglehart, *The Role of Ordinary People in Democratization*, 19(1) J. DEMOCRACY 126, 128 (2008).

¹³³ Heron, *supra* note 113, at 90.

¹³⁴ *Id.* at 89.

¹³⁵ Naila Kabeer, *Conflicts over Credit: Re-evaluating the empowerment potential of loans to women in rural Bangladesh*, 29(1) WORLD DEV. 63 (2001) (hereinafter Kabeer), cited in Anju Malhotra, Sidney Ruth Schuler & Carol Boender, *Measuring Women's Empowerment as a Variable in International Development* 1, 6 (Background Paper, World Bank Workshop on Poverty and

denial and retrieval, both of which align with the context-based subversion strategies characteristic of Third World emancipatory projects.¹³⁶ It also presents empowerment as a *process* that may precipitate an end-goal of agency.

Empowerment is advanced by providing individuals and communities options ‘from the vantage point of real alternatives’ as well as decision-making powers without the threat of ‘punishingly high costs’.¹³⁷ Returning to the context of peasants, part of their disempowerment is tied to restrictive domestic laws that prevent them from saving seeds for communal exchange. A first of its kind in generations of farming, the prohibition is a direct consequence of TRIPS which, as argued earlier, protects IP rights above all else.¹³⁸ Options are far and few as the choice of flouting the law is accompanied by the ‘punishingly high cost’ of state sanctions. In addition, the penetration of the countryside by agribusinesses and the increasing concentration of land ownership in fewer hands are such that peasants are incapable of operating outside the new economic model, and thus suffer an absence of ‘real alternatives’.¹³⁹

Feelings of empowerment are tied to self-efficacy and the belief that interventions can bring about a desired outcome.¹⁴⁰ In other words, individuals *themselves* must be central actors in transformative processes and improvements in life circumstances.¹⁴¹ Indeed, unless individuals regard themselves as the intervening factor that produced the change, the improvement would not be considered the result of empowerment.¹⁴² However desirable the improved circumstances are, the individuals affected would be mere recipients, rather than empowered persons exercising agency. Contrasting the disempowerment of the peasantry with the power and agency of the TCC, the latter group enjoys a direct line into policy-making at the WTO and, by extension, the domestic laws of all member-states, and thus finds itself – and *feels* itself – to be in a favourable position.

Gender: New Perspectives), *available at*:
<http://siteresources.worldbank.org/INTGENDER/Resources/MalhotraSchulerBoender.pdf> (hereinafter Malhotra et al.). (last visited May 2, 2011).

¹³⁶ Mohsen al Attar & Rosalie Miller, *Towards an Emancipatory International Law: The Bolivarian Reconstruction*, 31(3) THIRD WORLD Q. 347, 349 (2010) (hereinafter Al Attar & Miller).

¹³⁷ KABEER, *supra* note 135, at 6.

¹³⁸ DRAHOS & BRAITHWAITE - INFORMATION FEUDALISM, *supra* note 56, at Introduction.

¹³⁹ For a detailed discussion of the concentration of land ownership and centralised control over agriculture in countries such as India, see Shiva, *supra* note 127, at 716.

¹⁴⁰ Malhotra et al., *supra* note 135, at 6.

¹⁴¹ *Id.* at 7.

¹⁴² *Id.*

Being empowered requires a systemic approach – that is, national and international institutions must provide individuals with opportunity to participate in decision-making processes. Opportunity may manifest in a variety of ways, including not only access to resources and education, but also influence over law-making itself. Believing that one's choices will contribute to an outcome stems not only from the systematic implementation of enabling factors, but also requires an 'inner transformation' – the feeling that one is not only able to make decisions, but is also entitled to do so.¹⁴³ Only when individuals feel that they are entitled to participate and that their participation counts will they acquire a sense of empowerment. If IIs are to continue to espouse the rule of law and its principles of equality as a hallmark of civilised society, the hypocrisy created by the *de jure* equality/ *de facto* inequality dichotomy must be rectified by giving non-state actors an equal opportunity to participate in the international governance process.

V. POPULAR PARTICIPATION IN INTERNATIONAL LAW-MAKING

Despite allusions towards a single universal moral creed – problematic in its own regard¹⁴⁴ – principles of equality rarely surface in political or economic policy, particularly if read alongside their impact upon the Third World.¹⁴⁵ It therefore comes as no surprise that a central tenet in the rising disillusionment with globalisation is the lack of citizen participation in the decision-making of IIs.¹⁴⁶ According to Andrew Strauss, 'in the modern democratic view it is commonly held that within states, political power at all levels of governance must directly involve the citizenry. It is time these basic democratic principles were applied to the international order'.¹⁴⁷ Mutua makes the very same point arguing 'for the full democratization of the structures of both national and international governance so that all voices can be heard'.¹⁴⁸ The answer to the question of meaning and purpose of citizen involvement question may be discerned from the following sections.

A. Increasing Inclusion: Toward Global Citizenship

Alongside the aims of empowerment, democracy is meant to facilitate

¹⁴³ *Id.* at 6.

¹⁴⁴ Gathii – *Rejoinder*, *supra* note 6, at 2071.

¹⁴⁵ David Held, *Cosmopolitanism: Globalisation Tamed?*, 29(4) REV. INT'L STUD. 465, 474 (2003) (hereinafter Held – *Cosmopolitanism*).

¹⁴⁶ Richard Falk & Andrew Strauss, *Toward Global Parliament*, 80(1) FOREIGN AFF. 212, 212 (2001) (hereinafter Falk & Strauss).

¹⁴⁷ Andrew L. Strauss, *Overcoming the Dysfunction of the Bifurcated Global System: The Promise of a Peoples Assembly*, in REFRAMING THE INTERNATIONAL: LAW, CULTURE, POLITICS 83, 96 (Richard Falk, Lester Edwin J. Ruiz & R.J.B. Walker eds., 2002).

¹⁴⁸ Mutua, *supra* note 3, at 37.

aspirations towards autonomy and self-determination. Returning to Post, self-determination equates with self-government, itself characterised by a popular 'warranted conviction' that people are involved in the process of governing themselves.¹⁴⁹ Liberalism's conception is that formal equality is the king, ensuring that all are provided opportunity to participate in the political process. Self-determination directly aligns with TWAIL and its ambition to assist the states and peoples of the Third World escape structural and substantive marginalization.¹⁵⁰

Reducing Third World marginalisation equates with enhancing fairness and substantive equality at an international level. To this end, mechanisms are needed to ensure that those affected by social institutions have a share in producing and managing them. In Rousseau's view, inequality can never be entirely eradicated.¹⁵¹ However, if it is reduced, 'the predatory violence, humiliation, dependency and unpredictability inflicted on the weak can be kept under control'.¹⁵² The lessening of inequality is achieved not by asking the powerful to relinquish their power, a Sisyphean task in itself, but by adding new organised interests to the mix.¹⁵³ A system that values participation has a better chance of achieving equality, for it privileges a plurality of voices and thus a plurality of interests: 'when power and wealth become widely dispersed, law becomes not a stick used by the few against the many but a two-edged sword'.¹⁵⁴

John Dewey regards exclusion from participation as a subtle form of suppression, for it denies individuals the opportunity to decide what is advantageous for them.¹⁵⁵ If this assertion is true and if exclusion equals oppression, then it stands to reason that inclusion and participation equate (some form of) emancipation. While the general will of the collective may not always align with the will of an individual, citizens must experience the *process* by which decisions are authorised and observe first-hand the responsiveness of structures to their represented values and ideas.¹⁵⁶ A responsive and cosmopolitan process therefore is essential to forming a meaningful democracy: if citizens feel alienated from the process by which general will is created, voting is reduced to a mere 'mechanism for decision-making, a mechanism that can easily turn oppressive and undemocratic'.¹⁵⁷

¹⁴⁹ Post, *supra* note 106, at 144.

¹⁵⁰ Fidler, *supra* note 2.

¹⁵¹ Holmes, *supra* note 99, at 49.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 50.

¹⁵⁵ Dewey, *supra* note 105.

¹⁵⁶ Post, *supra* note 106, at 145.

¹⁵⁷ *Id.*

The idea of cosmopolitanism or global citizenship has a lineage extending back to the Roman Empire. But in this age of rapid transportation, instantaneous communications and ever enhanced capacities for 'doing evil at some point on our globe', there seems a greater possibility than ever of overcoming Kant's scepticism as to whether 'the oceans make a community of nations impossible'.¹⁵⁸ Boaventura de Sousa Santos posits that in parallel to neoliberal globalisation, a 'Counter-Hegemonic Globalisation' has arisen which uses the same legal and political innovations as its neoliberal *bête noir*, but is strictly oppositional to it.¹⁵⁹

Santos defines counter-hegemonic globalisation as: 'the vast set of networks, initiatives, organizations and movements that fight against the economic, social and political outcomes of hegemonic globalisation, challenge the conceptions of world development underlying the latter, and propose alternative conceptions'.¹⁶⁰ From these activities, he theorises an oppositional cosmopolitanism termed 'subaltern cosmopolitan legality'. This is a 'bottom-up', participatory approach. It has a 'transcalar'¹⁶¹ character, applying legal strategies at different scales that advance counter-hegemonic globalisation by targeting the 'global in the local and the local in the global'.¹⁶² The great promise of subaltern cosmopolitan legality is that it offers an 'alternative imaginary' beyond the local and nation-state.¹⁶³

In line with counter-hegemonic globalisation contributions, our proposition is that some form of participation should be infused into conceptions of global citizenship via the structure of international law-making, thus enabling the aim of self-determination. The current participation gap has culminated in the oppression of those who are excluded – Third World peoples –and cannot continue in a world where the general understanding of equality rejects the machinations of unelected interest groups and corporate actors in setting policies on behalf of world population.¹⁶⁴ There is thus an urgent need for the extension of participation beyond the nation-state and select private actors to promote accountability among hitherto unaccountable political and economic forces. Of course, participation can take on different shapes and forms, ranging from passive acts of voting to more active acts of developing and proposing alternate arrangements – discussed in the remainder of Part IV – hence TWAIL's variegated approach towards reform

¹⁵⁸ Andrew Dobson, *Citizenship*, in POLITICAL THEORY AND THE ECOLOGICAL CHALLENGE 216 (Andrew Dobson & Robyn Eckersley eds., 2006).

¹⁵⁹ Boaventura De Sousa-Santos, *Beyond Neoliberal Governance*, in LAW AND GLOBALISATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 29 (Boaventura De Sousa-Santos & Cesar A. Rodriguez-Garavito eds., 2005) (hereinafter De Sousa-Santos).

¹⁶⁰ *Id.* at 29.

¹⁶¹ *Id.* at 54.

¹⁶² *Id.* at 53.

¹⁶³ *Id.* at 229.

¹⁶⁴ Falk & Strauss, *supra* note 146, at 212.

including critique, construction, and renewal.¹⁶⁵

B. *A Global Parliamentary Assembly*

In this vein, Richard Falk and Andrew Strauss have proposed the creation of a global democratic forum, deemed a ‘global parliamentary assembly’ (GPA) tasked with enfranchising global citizens.¹⁶⁶ Such a body would not be constituted by states but would instead be endowed with legitimacy through a direct voting process.¹⁶⁷ Direct authority would facilitate the GPA’s emergence as a space for world interest groups to interact. Indeed, popular legitimacy of this level would incite petitioning from citizen groups looking to advance their respective causes.¹⁶⁸ Despite the unlikelihood of the proposal being endorsed by most nation-states, Falk and Strauss maintain that the goal is realistic. It could be accomplished incrementally, beginning with 20-30 forward-thinking countries and gradually gaining the membership of other states as various civil society groups lobby their own governments to join.¹⁶⁹

While we are in agreement with the authors that such an institution is necessary and desirable, we are concerned that without the development of paths towards active participation, this model will fail to be effective. Our concern stems from the fact that they appear to concentrate on the election of representatives for a new transnational institution. A focus on elections, in our view, is misguided, for the privileging of procedural over substantive participation is unlikely to redress the practice of inequality, particularly as it plays out at the global level.

It is coming to be realised that ‘in many countries, the gap between rich and poor is growing, reaching levels not seen for many decades’.¹⁷⁰ Notwithstanding

¹⁶⁵ Mutua, *supra* note 3, at 31. In most citizenship literature, the distinction is between ‘collective action’ and ‘formal engagement’. While there is value to these qualifications, we favour the passive-active distinction as we seek to place emphasis on the sliding scale nature of participatory political culture.

¹⁶⁶ Richard Falk and Andrew Strauss, *On the creation of a Global Peoples Assembly: Legitimacy and the Power of Sovereignty*, 36 STAN J. INT’L L. 191 (2000).

¹⁶⁷ Falk & Strauss, *supra* note 146, at 216.

¹⁶⁸ Richard Falk & Andrew Strauss, *Not a Parliament of Dreams*, WORLD LINK 12, 12 (2002), available at: [http://www.worldlink.co.uk/stories/storyReader\\$1152](http://www.worldlink.co.uk/stories/storyReader$1152). (last visited May 2, 2011).

¹⁶⁹ *Id.*

¹⁷⁰ Michael Sandel, *Towards a just society*, available at: <http://www.guardian.co.uk/commentisfree/2010/feb/20/just-society-civic-virtues> (last visited May 2, 2011) (hereinafter Sandel). This essay is adapted from MICHAEL SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? (2009). For more on the issue of equality see in particular Chapter 6 of this book, “The case for Equality/John Rawls”.

protracted experiences with electoral-based representation, liberal democracies such as the US, the UK¹⁷¹ and New Zealand¹⁷² have experienced massive hikes in inequality during the past 30 years. This is a major problem for democracy, because as Michael Sandel has identified, 'too great a gap between rich and poor undermines the solidarity that democratic citizenship requires. As inequality deepens, rich and poor live increasingly separate lives'.¹⁷³ Many scholars link the widening inequality gap to neo-liberalism, which appears somewhat impervious to systems of governance,¹⁷⁴ hence the emergence of similar patterns in non-democratic neoliberal states such as Egypt, Morocco, and Iran. As market capitalism settles deeper into the global landscape, domestic political options become redundant: 'irrespective of which party or coalition is voted into power in general elections today, the economic and social policies that it would pursue would remain the same in their essentials'.¹⁷⁵ For its part, the value of voting remains indeterminate, primarily because of 'the sporadic and elitist nature of low-intensity representative democracies' and their failure to either '[nurture] a participatory political culture' or to '[deliver] on the goods'.¹⁷⁶

In this model, participation is reduced to the passive ticking of a box and thus does not provide a solution to the absence of genuine deliberative input from local people. If our aim is to truly democratise global governance, an organisational structure must be implemented to provide for participation in a substantial manner: discussion, debate and decision-making. It is hoped, and indeed expected, that heightened emphasis on deliberation would nurture a lively community and cultivate an active citizenship.

Indeed, an important and helpful demarcation, albeit only slightly less arbitrary, is the distinction between passive and active acts of participation. Building on Dewey's earlier comments, it is essential for citizens to contribute to the decision-making process and to witness the implementation of their contribution. Demonstrations, while occasionally effective (as witnessed in the Tunisian and

¹⁷¹ See Robert Wade, *The Global Slump: Deeper Causes and Harder Lessons*, 52(5) CHALLENGE 5, 12 (2009); and see Robert Hunter Wade, *Is Globalisation reducing Poverty and Inequality?*, 32(4) WORLD DEV. 567, 578 (2004).

¹⁷² RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY EQUALITY IS BETTER FOR EVERYONE* (2009).

¹⁷³ Sandel, *supra* note 170.

¹⁷⁴ Philip McMichael, *Peasants Make Their Own History But Not Just as They Please*, 8(2-3) J. AGRARIAN CHANGE 205, 209-13 (2008).

¹⁷⁵ Chimni, *supra* note 10, at 22.

¹⁷⁶ DANIEL SCHUGURENSKY, *Citizenship Participation and Participatory Democracy: Limits and Possibilities*, 50, 51 (paper submitted to the conference 'Learning Democracy by Doing Alternative Practices in Citizenship Learning and Participatory Democracy', Oct. 18-18, 2008).

Egyptian revolutions of 2011), qualify as a passive form of participation as it is impossible to assess the impact upon decision-making or feelings of empowerment. Consider, for instance, the futility of the global marches against the invasion of Iraq in 2003. While passive acts of civic participation or formal engagement (e.g. elections) may 'widen' democracy, whether they 'deepen' democracy is another matter altogether and one that should not be taken for granted.

Perhaps a better approach than the knee-jerk rush towards electoral politics would be a measured strategy that begins by answering certain fundamental questions: whose participation are we promoting; what is the purpose of their involvement; how are they to be involved; what kind of decisions can they make; and how will these decisions be made. At a later stage, it would also be sensible to consider whether the adopted approach has achieved the sought after objectives. Applying TWAAIL to this strategy yields the following responses respectively:¹⁷⁷ global citizens; to eradicate historically (and racially) based social, political, and economic power asymmetries and promote self-determination; by involving peoples in international law-making; with authority to decide the structural principles upon which international law might rest; and via processes of deliberation and democratic participation. While these answers alone do not provide the blueprint for the democratisation of international law-making, they do convey a number of foundational principles upon which a system of global governance could be structured.

C. *Multi-Level Cosmopolitan Democracy*

David Held has offered a more concrete framework of multi-level cosmopolitan democracy that appears promising for improving the prospect of popular participation in global governance. Held believes that the interconnectedness and interdependence of the global era requires forms of decision-making that begin with equality as the basis of status.¹⁷⁸ His theory is premised upon principles of inclusiveness and subsidiarity.

¹⁷⁷ Karin Mickelson has said that:

[T]here is no coherent or distinctive 'Third World approach' to international law; this appears to be the conventional view among international legal scholars. . . [t]he standard view expressed is that these disparate strands do not weave together in any sort of pattern. While for convenience they might be lumped together under the 'Third World' rubric, they constitute little more than a series of ad hoc responses to discrete issues. Even those who would admit the existence of a pattern tend to deny its distinctiveness.

Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16(2) WIS. INT'L L.J. 353 (1998).

¹⁷⁸ Held – *Cosmopolitanism*, *supra* note 145, at 470-471.

Inclusiveness means that all those significantly affected by public decisions or processes should enjoy equal opportunity in shaping them.¹⁷⁹ In keeping with traditional understandings of subsidiarity – *e.g.* the least central unit of government should exercise political power – Held describes it as collective decisions by those whose life chances are being determined.¹⁸⁰ Both principles demonstrate the almost paradoxical significance of decentralisation and centralisation of political power. Prospects for individual participation in policy shaping improve when decision-making is decentralised. At the same time, for trans-local or transnational issues, political institutions must possess a wider scope than the immediate locality.¹⁸¹

The above discussion points to the need for multi-level democratic governance.¹⁸² If participation is to be used to actualise self-determination, a plural democratic public forum must be established. By this we mean that a continuum of political engagement from the local to the global appears necessary to realise our goal of popular participation in international law-making and thus popular aspirations towards self-determination. This continuum would encompass direct and participatory processes of civic participation at the local level; becoming increasingly inclusive the more transnational an issue becomes.¹⁸³ A forum such as a GPA, where delegates can deliberate global issues, would be effective so long as such an institution is complemented and legitimised by local and regional level institutions capable of eliciting – and absorbing – the will of the people.

How then, is such a model to be achieved? What concrete measures and institutions are needed in order to facilitate the injection of participation into a structure such as a GPA? We provide no definitive answer to this question, but instead canvass other participatory institutional mechanisms and suggest how these

¹⁷⁹ *Id.* at 471.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² We note that Held's formulation has come in for heavy criticism. Roland Axtmann doubts that 'capitalism as an inherently egalitarian system organized around the profit motive' can possibly be an appropriate means for ameliorating and eventually overcoming the divide between rich and poor within (and between) states. Axtmann also asserts that there are certain problems that only states can properly deal with: Integration and equality *within* states; the necessity for an agent to implement sustainability and environmental protection measures; and the need for a Westphalian unit of legitimacy in international relations. These objections overlook two deeper issues. First, Axtmann assumes that 'top-down' technocratic approaches are the only appropriate ways of addressing the difficulties of competition between states. Second, he does not take into account the capacity for regional and local groups to act at a supranational level without the mediation of the state. Roland Axtmann, *What's Wrong With Cosmopolitan Democracy?*, in GLOBAL CITIZENSHIP: A CRITICAL READER 105 (Nigel Dower & John Williams eds., 2002).

¹⁸³ Held – *Cosmopolitanism*, *supra* note 145, at 471.

models may be of assistance. Some of the participatory institutions examined are already in place, while others remain hypothetical. Through these brief case studies, we suggest how mechanisms could be adapted to provide participatory channels to international law-making for large-scale populations.

D. Participatory Decision-Making: The Example of South America

Perhaps the most well documented examples of participatory decision-making institutions are those emerging in South America. In Porto Alegre, Brazil for example, a model of popular participation in municipal level governance is in operation. Deliberative health councils, which function as areas of collaborative decision-making between civil society and local governments, were implemented by the Workers Party as part of a grand vision of participatory political reforms.¹⁸⁴ Councils are deliberative in that, joint decisions are reached through a discursive process of debate aimed at persuasion, compromise, and agreement.¹⁸⁵ In addition to promoting public awareness of on-goings, councils are empowered to formulate local health policy and to distribute resources.¹⁸⁶ According to Schonleitner, participation in local councils is a method of ‘deepening democracy from the bottom up’ by providing individuals with real power over decisions of immediate import.¹⁸⁷

Resembling the design of Porto Alegre’s deliberative councils is the governance structure of the Bolivarian Alliance for the Americas (ALBA).¹⁸⁸ A central feature of ALBA’s composition is the Council of Social Movements, which links corresponding national councils consisting of delegates from local community groups of member-states.¹⁸⁹ This Council operates alongside the top-level Council of Ministers and is tasked with both ‘channelling popular opinion into ALBA

¹⁸⁴ Gunther Schonleitner, *Between Liberal and Participatory Democracy: Tensions and Dilemmas of Leftist Politics in Brazil*, 38 J. LAT. AMER. STUD. 35-36 (2006).

¹⁸⁵ *Id.* at 36.

¹⁸⁶ *Id.* at 36.

¹⁸⁷ *Id.* at 35-36.

¹⁸⁸ Membership stands at eight countries: Venezuela, Cuba, Bolivia, Ecuador, Nicaragua, Dominica, Antigua and Barbuda, and St. Vincent and the Grenadines. Three other states are officially recorded as having observer status: Paraguay, Haiti and Iran. Honduras had joined during the Presidency of Manuel Zelaya but the coup government that deposed him pointedly left the alliance upon taking power. The term ‘Nuestra América’ (‘Our America’) has a special resonance in Latin America and the Caribbean. It is the title of a short essay written by Cuban revolutionary José Martí, published in the Mexican paper *El Partido Liberal* (January 30, 1891). In this, he outlines the foundational ideas of the project that is continued in the current Bolivarian Revolution.

¹⁸⁹ Al Attar & Miller, *supra* note 136, at 357.

initiatives and overseeing public interest in existing projects'.¹⁹⁰ In forming a regional alliance, ALBA countries can collectively resist domination in a way that would not be possible as individual nation-states: '[I]t is possible to view some regional frameworks as *counter-hegemonic* projects, which in this historical period are designed to restrict the influence or dominance of the US or the West'.¹⁹¹

Such a structure competes with the hegemonic model of neoliberal globalisation 'on the global, regional, sub and re-construction of hegemonic social structures across multiple levels and scales transcends international relations by employment of trans-national mechanisms'.¹⁹² This arrangement allows popular participation to be transformed from passive to active by bestowing community groups with direct access to top-tier decision-making. In so doing, it has been argued that a 'new kind of legitimacy in international law' has been created.¹⁹³ The 'plurinationality'-constituted member-countries of Bolivia¹⁹⁴ and Ecuador¹⁹⁵ are examples of 'nations' within traditional nation-states; engendering one possible approach to subsidiarity at a highly-devolved local level. Here, Political power is linked to regional awareness and popular action.¹⁹⁶

In a similar vein to these real-life examples of participatory institutions is the hypothetical model of participatory economics formulated by Michael Albert and Robin Hahnel. The institutional design proposed to achieve the goals of economic democracy and solidarity is premised upon a multi-level structure similar to Held's. The proponents state that:¹⁹⁷

[T]he major institutions used to achieve these goals are 1) democratic councils of workers and consumers; 2) jobs balanced for empowerment and desirability; 3) remuneration according to effort as judged by one's work mates; and 4) a participatory planning procedure in which councils and federations of workers

¹⁹⁰ *Id.*

¹⁹¹ De Sousa-Santos, *supra* note 159, at 24.

¹⁹² Thomas Muhr, *Nicaragua Re-visited: From Neo-liberal "Ungovernability" to the Bolivarian Alternative for the Peoples of Our America (ALBA)*, 6(2) GLOBALISATION, SOCIETIES & EDUC. 147, 159-160 (2008) (hereinafter Muhr). Ironically, it was the neoliberal reforms of the 1990s in South America that – in their attempted de-coupling of the state from society - created the space for a local yet globally-engaged leadership to emerge by way of their devolution initiatives.

¹⁹³ Al Attar & Miller, *supra* note 136, at 357.

¹⁹⁴ Constitution of the Plurinational Nation of Bolivia, 2009

¹⁹⁵ Constitution of the Plurinational Nation of Ecuador, 2008

¹⁹⁶ Muhr, *supra* note 192 at 155.

¹⁹⁷ Michael Albert & Robin Hahnel, *In Defense of Participatory Economics*, 66(1) SCI. & SOC'Y 7, 8 (2002).

and consumers propose and revise their own activities under rules designed to guarantee outcomes that are both efficient and equitable.

Starting at the community level and ranging through to the city, the regional and the national levels, a spectrum of organised bodies or ‘consumer councils’ would congregate in order to ‘permit expression of desires for social consumption on an equal footing with the expression of desires for private consumption’.¹⁹⁸ In other words, it is imagined that community members would present their consumption requests to the council, accompanied by the effort ratings they have been awarded by their fellow workers.¹⁹⁹ The burden that such a proposal would impose is then calculated, taking into account the social costs of producing particular goods and services generated by the participatory planning procedure.²⁰⁰

In essence, this model appears to suggest that in opposition to capitalism’s requirement of surplus production for profit, a participatory economy would facilitate the direct communication between consumers and producers in order to ensure that consumption and production are evenly balanced. This militates against the exclusion of those who are normally disenfranchised from economic participation by re-casting the purpose of economic arrangements from mechanisms to deliver profit to the already wealthy, to an allocative mechanism for social goods run according to priorities set in consultation with the most vulnerable in local and global society.

As a final example of a participatory design template, we look to the organisational structure of La Via Campesina (LVC); a transnational association of peasants, smallholding farmers and agricultural workers. It comprises over 150 local and national organisations in over seventy countries from Africa, Asia, Europe and the Americas. The LVC represents the interests of 200 million farmers in its revolt against neoliberal globalisation.²⁰¹ For present purposes, the most important feature of this association is its ‘associative horizontality and transnational regionalism’.²⁰² LVC is divided into seven geographical regions, with each holding assemblies where members deliberate and strategize face-to-face. Each region then selects delegates to meet every three to four years at an

¹⁹⁸ *Id.* at 9.

¹⁹⁹ *Id.* at 10.

²⁰⁰ *Id.*

²⁰¹ Michael Menser, *Transnational Participatory Democracy in Action: The Case of La Via Campesina*, 39(1) J. SOC. PHIL. 20, 21 (2008), available at: http://www.viacampesina.org/en/index.php?option=com_content&view=category&layout=blog&id=27&Itemid=44 (last visited May 2, 2011).

²⁰² *Id.* at 30.

international conference to decide upon the overall direction of LVC. From here, a fourteen member Internal Co-ordinating Commission (ICC) is established, consisting of two representatives from each of the seven regions. The ICC is the core decision-making body of LVC and also the most important link within the member groups of the association.²⁰³

The key function of the LVC is its organisation of deliberative assemblies at the regional and global levels for the purpose of shaping programmes to interconnect groups, cultivate individual and collective capacities and generally deliver material benefits to its members.²⁰⁴ Localisation and regionalisation no doubt increase the potential for popular participation; however such processes by themselves do not necessarily guarantee gender equality in the participation of LVC members. In order to address sexism and patriarchy, 'the most pervasive sources of social and political exclusion', LVC has both created a separate Women's Assembly to discuss the specific needs of women, and established a policy requiring half of all delegates to be women.²⁰⁵ In enacting such a policy, LVC has clearly acknowledged that failure to ensure women's participation in the deliberative process 'would make any claim to participatory democracy preposterous'.²⁰⁶ This deliberate engagement with inequality fosters inclusion by involving those traditionally alienated from mainstream democratic institutions. This is what sets participatory approaches apart from conventional liberal-democratic institutions which inevitably privilege well-resourced groups in society by preserving social inclusion/exclusion outside the sphere of deliberative concern.

The above examples show the very realistic possibility of lower-level institutions achieving the purpose of facilitating deliberative and participatory processes of agenda setting. We believe there is no compelling reason why such community and regional level initiatives cannot complement a global forum such as a GPA similar to the way the World Social Forum does so for civil society.²⁰⁷ It is imperative that an appropriate balance is struck between the centralisation and decentralisation of international law-making if this process is to achieve a

²⁰³ *Id.* at 30-31.

²⁰⁴ *Id.* at 31.

²⁰⁵ *Id.* at 31.

²⁰⁶ *Id.* at 31.

²⁰⁷ The World Social Forum (WSF) was formed in Porto Alegre, Brazil in 2001. Its slogan is 'Another World is Possible.' In Principle 1 of its founding charter it defines itself as 'an open meeting place for reflective thinking, democratic debate of ideas, formulation of proposals, free exchange of experiences and interlinking for effective action, by groups and movements of civil society that are opposed to neo-liberalism and to domination of the world by capital and any form of imperialism, and are committed to building a planetary society directed towards fruitful relationships among Mankind and between it and the Earth'.

participatory character. The likelihood of Third World peoples meaningfully participating in the formation of policies which affect their lives depends on their ability to access localised forums of deliberation, which in turn feed into and influence the outcomes of deliberations at the more centralised, global level.

VI. CONCLUSION

*“The rising aspirations for a better life on the part of millions of human beings, hitherto devoid of any expectation of receiving serious consideration, cannot be suppressed. As it has been well said ‘law must become more political if politics are to become lawful’.”*²⁰⁸

-R.P. Anand

The world is in flames. Stamping feet and rallying cries of the excluded, oppressed, and disenfranchised can be heard across the globe. In North Africa and the Middle East, peoples are revolting against autocratic regimes and their monopolisation of political power. In Asia, hundreds of thousands of Chinese factory workers are striking in protest of harsh labour conditions while in India nearly two hundred thousand peasants have committed suicide in response to debt-induced despair.²⁰⁹ In Europe, Greeks mobilise against frozen wages and vanishing pensions while British students take to the streets in opposition to the trebling of university fees.

Their rage has been triggered by capitalist – principally neoliberal – forces. In three swift decades, global economic policies propelled economic inequality to unprecedented levels. Indeed, while peasants, workers, and whole populations of dispossessed struggle to make ends meet, the number of billionaires in these same places grows exponentially. As James Scott points out, neither success nor exploitation alone is sufficient to trigger a rebellion.²¹⁰ For those living at the margins, the primary concern is not the general improvement of wellbeing but the minimisation of disaster. Precariousness produces a ‘safety first’ outlook. Yet, when even this minimal aspiration is placed out-of-reach, upheavals occur. In this instance, it was the global recession and the banker bailouts that broke the camel’s back.

²⁰⁸ Anand, *supra* note 1, at 55.

²⁰⁹ See Qian Yanfeng, *Workers Protest over pay, toxic chemicals*, CHINA DAILY (2010) available at: http://www.chinadaily.com.cn/china/2010-01/18/content_9332793.htm (last visited May 2, 2011), and see P. Sainath *Neoliberal Terrorism in India: The Largest Wave of Suicides in History*, available at: <http://www.counterpunch.org/2009/02/12/the-largest-wave-of-suicides-in-history/> (last visited May 2, 2011). According to Sainath, 182,936 farmers committed suicide between the years of 1997-2007.

²¹⁰ SCOTT, *supra* note 68, at 170.

Eliminating programmes of social uplift to compensate for the folly and greed of the moneyed classes – all the while protecting their profligate lifestyles – was too much to bear. Hardship may be unpleasant, but hardship in a time of affluence is barbaric. Polanyi made this observation decades ago: ‘the absence of the threat to *individual* starvation which makes primitive society, in a sense, more human than market economy’.²¹¹ The fact that a large proportion of the Third World starves or suffers malnutrition while obesity rates in the First World expand, is testament to the phenomenon of unequal distribution that plagues neoliberal times.

TWAIL’s purpose is not to bring our attention to the aforementioned grumblings but to reform an international order that facilitates the manifestation of such inequity. To this end, TWAIL does not propose a single model but a series of measures aimed at tempering international law’s imperialist aura and actualising its democratic rhetoric. Despite the richness of diversity among TWAIL scholars, what their suggestions have in common is the supremacy of self-determination, the Holy Grail in emancipatory struggles. When reforming global governance, it is imperative to pursue institutional mechanisms that are in ‘harmony with the growing aspirations of the overwhelming numbers of the peoples of the world’.²¹²

Our proposal in this article operates at two levels. The first is structural and requires a comprehensive revision of the blueprint of the international legal architecture. Meaningful change, that is change that aligns with the aspirations of Third World peoples, cannot happen without the adoption of a more pluralistic, inclusive, and participatory framework.²¹³ This is not a controversial point. As Koskeniemi explains, structural bias ensures that ‘patterns of fixed preference are formed and operate inside international institutions.’²¹⁴ In short, nothing is random. To undo these patterns, the system itself must be rebuilt. Exactly how this can be done is open to debate and will be the product of continuing contestation, but there can be little doubt that the application of similar practices, vocabularies, biases, and interests will inherently produce similar outcomes. To paraphrase Albert Einstein, problems cannot be solved through use of the same thinking present when they were created.

This leads us to the second level of our proposal. For all its complexities, the aim is simply to inject another kind of *thinking* into international legal relations.²¹⁵ Liberation struggles have always been predicated on what Ngugiwa Thiong’o

²¹¹ KARL POLANYI, THE GREAT TRANSFORMATION 163-164 (1957).

²¹² Anand, *supra* note 1, at 55.

²¹³ Marks, *supra* note 16, at 48.

²¹⁴ Koskeniemi, *supra* note 49, at 9.

²¹⁵ RICHARD FALK, ON HUMANE GOVERNANCE: TOWARD A NEW GLOBAL POLITICS (1995).

described as a *decolonisation of the mind*:²¹⁶ ‘transforming a situation of subjection to one of liberation is not possible without first changing the individual’s self-perception’.²¹⁷ As elucidated by Paolo Freire’s concept of ‘conscientisation’²¹⁸ and animating the split between TWAIL I and TWAIL II scholars, simply exchanging one set of rulers with another without widespread education in critical analysis of the relations of power will eventually result in a replication of the same inequalities. What is required is not just a structural change but a transformation of the consciousness of citizens. This transformation necessitates a rethinking of the very purpose of international law.²¹⁹ While institutional circles continue to regard it as a type of playground (battlefield to some) for international diplomacy, this state-centric perception appears rather antiquated. International law-making is more than a tool for the management of international relations; it is a site of contestation between competing ethics.

On one hand is an ethics of expertise, exclusion and plutocracy – international law as fiefdom. On the other is an ethics of subsidiarity, inclusion and democracy – international law as self-determination. The clash is one of competing idioms, of competing aspirations: ‘competing descriptions work to push forward some actors or interests while leaving others in the shadows’.²²⁰ In the shadows of international law, TWAIL is a ray of light, a ray of hope, and a ray of the people.

²¹⁶ NGUGI WA THIONG’O, *DECOLONISING THE MIND* 9 (1986).

²¹⁷ Al Attar & Tava, *supra* note 5, at 14.

²¹⁸ PAOLO FREIRE, *PEDAGOGY OF THE OPPRESSED* (30th Anniversary ed., 2000).

²¹⁹ Marks, *supra* note 16, at 64.

²²⁰ Koskenniemi, *supra* note 49, at 11.