
Introduction

1.1 Global Governance and the Challenges to Democracy

Theorizing about democracy and its meaning has traditionally been the province of political philosophers and political scientists who envisioned a country whose politics were largely insulated from outside pressures and reflected the inputs and preferences of mainly domestic actors, such as voters, parties, and interest groups. As a result, the sources of potential democratic market failures that concerned them were primarily domestic ones: discrimination against discrete and insular minorities or capture by indigenous interest groups. But since the end of the Cold War, as the process of globalization continued to accelerate, increasing the dependency of most states on foreign actors, there arose additional reasons for concern about the deterioration of the individual's capacity for agency. Popular resentment toward neoliberal globalization served by multilateral institutions finally erupted in 2016, as anti-globalism swept both the left and the right, prompting angry voters in Britain to opt for leaving the European Union and to support anti-globalization candidates in the Democratic and Republican parties in the United States.

In the past few decades it has become increasingly apparent that a substantial number of the international institutions operating as global venues for policy-making are poorly designed to address the democratic deficits that increasingly plague politics at the national level. This is either because the global venues are controlled by the same domestic forces that dominate national politics or because the global bodies are effectively dependent on one or more of the powerful states. As a consequence, many international institutions have functioned to further disempower diffuse domestic electorates by expanding the executive power of powerful states and increasing the leverage of multinational corporations. The net result is that all too often the move to international institutions has to varying degrees led to an erosion of the traditional constitutional checks and balances found in many democracies, as well as of other

domestic oversight and monitoring mechanisms intended to check executive discretion. At the same time, too few new checks and balances have been created to compensate for the loss.

The new global sources of democratic deficits increasingly jeopardize the long-held assumption that domestic democratic processes reliably provide individuals and collectivities with the opportunity and capacity to shape their life opportunities. Addressing these deficits necessitates fresh thinking. Clearly, we must provide opportunities for individuals and communities to exert effective influence on the policy-making that affects them, even if the decision-maker creating that policy is a foreign government. The key question is whether we can continue to rely on global institutions to remedy these deficits, or whether doing so is likely to exacerbate the democratic losses even further.

This book explores the structural reasons for the failure of global institutions to protect the interests of the diffuse, politically weaker constituencies that were led to trust distant bureaucrats who actually served narrow interests. We explain why and how the new global sources of democratic deficits, whether by design or not, increasingly deprive individuals and collectives of the opportunity and capacity to protect their interests and shape their life opportunities. But we also describe the surprising role of courts in mitigating at least somewhat the brute forces of globalization. The various democratic deficits associated with the vigorous scramble for new markets, the creation of global supply chains, and the establishment of transnational economic and regulatory institutions at the end of the Cold War have been met, with varying degrees of success, by the calls of national and international courts for accountability and inclusion. These courts have proved themselves the unlikely heroes in the perennial struggle to define and redefine economic and political institutions and entitlements. While for most democracies these entitlements were traditionally determined by domestic laws and institutions, globalization has reshaped the struggle by opening up various supranational and international arenas where entitlements have been shaped through formal and informal, public or private agreements. These new global venues promised not only new business opportunities for movable capital but also freedom from domestic democratic constraints. Given entrenched synergies between economic and political institutions,¹ the novel opportunities in the new global markets also signal new challenges for those who sought to ensure that economic

¹ Daron Acemoglu & James A. Robinson, *WHY NATIONS FAIL* (2012).

and political power remains widely distributed. Surprisingly, these were courts—institutions relatively insulated from economic and political influence—that have risen to the occasion. Motivated at least partly by their own concern to protect their turf, they proved to be the most decisive set of actors that insisted on maintaining at least some market discipline. They thereby acted against the usurpation of power by the few. In this book, we seek to explain the ways in which in the post–Cold War era the few sought to shape domestic and global institutions to augment and solidify their own power and then to assess the unexpected judicial responses that to some extent proved effective in curbing global capital and ensuring the vitality of inclusive decision-making processes.

With the exponential proliferation of various forms of global regulation—from formal international organizations to informal private standard-setting bodies—and the massive transfer of regulatory functions to them in almost all aspects of life,² a set of fundamental questions came to the fore, such as the concern over fair and inclusive decision-making within international organizations and the anxiety within democracies regarding the loss of their autonomy to supranational regulatory bodies led by powerful nations. While global governance bodies are indispensable for resolving coordination and cooperation problems and for promoting global welfare, they also, at the same time, cast a shadow over the achievements of our constitutional democracies. Although some international regimes were designed with the explicit goal of enhancing domestic democratic processes (for example, the Aarhus Convention on access to domestic environmental decision-making)³ and international tribunals have the capacity to guarantee voice to weak stakeholders at the domestic level (for example, in the areas of human rights or trade),⁴ most international organizations were not intended to address democratic deficits at the national level; to the contrary, they were actually designed to exploit such deficits. As will be shown in Chapter 2, many international organizations have functioned to further disempower diffuse domestic electorates by expanding the executive power of powerful states and increasing the leverage of

² Sabino Cassese, *THE GLOBAL POLITY: GLOBAL DIMENSIONS OF DEMOCRACY AND THE RULE OF LAW* (2012).

³ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Jun. 25, 1998, 38 I.L.M. 517, 2161 U.N.T.S. 447, available at www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

⁴ Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1 (2009).

multinational corporations. The net result was that all too often the move to global regulation has to varying degrees eroded the traditional constitutional checks and balances that defined many democracies, as well as other domestic oversight and monitoring mechanisms intended to check executive discretion.⁵ The transfer of regulatory authority from the domestic to the international realm has enabled a handful of powerful public and private actors to escape the entrenched domestic checks and balances, such as public lawmaking, separation of powers, court independence, and limited government, that have played an important role in safeguarding democratic deliberation and individual rights within states.

What characterizes the new global institutions is their fragmented nature: a large number of functionally specialized international organizations and international tribunals determine policy in almost all aspects of life. But their distinct, clearly defined competences ensure that there will be little or no institutional cooperation among them, despite their potentially related interests. Such fragmentation essentially operates as a “divide and rule” strategy that prevents relatively weaker actors from aggregating their voices to resist the fewer but stronger actors. This, in turn, has hampered the emergence of political competition at the global level by isolating policy-making within narrow, functional venues that are effectively monitored and controlled by the executive branches of a small group of powerful states (or, rather, by elites within those states).⁶ These states have long played a disproportionately large role in selecting key personnel to steer international organizations and tribunals, and their bureaucracies are among the few with the variety and depth of regulatory expertise to effectively monitor the varied activities of international organizations and prevent goal displacement. Although there are numerous international judicial bodies whose overlapping spheres of activity provide them with abundant opportunities to pass judgment on

⁵ Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 *AM. J. INT'L L.* 211 (2014) (discussing strategies to address the evolving gaps in the efficacy of domestic political and legal mechanisms of participation and accountability resulting from shifts of regulatory authority from domestic to global regulatory bodies). See also Chapter 2. There may be additional reasons for the concentration of power in the executive and the decline of domestic checks. See Bruce Ackerman, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) (discussing what he sees are the (domestic) factors that lead to the rise of an unchecked US presidency).

⁶ According to Stewart, fragmentation of regulatory decision-making at the domestic level can have similar consequences, see Richard B. Stewart, *Madison's Nightmare*, 57 *U. CHI. L. REV.* 335 (1990).

each other's policies, there have been far fewer cases of robust review than lawyers might have expected.⁷ As a result, the large and heterogeneous global public residing outside the small group of powerful state elites could never be confident that their interests were being adequately protected from the exercise of arbitrary power. These newly created judicial bodies were accountable, but only to certain specific actors who controlled and funded them, but not necessarily to those they affect.⁸ Developing countries, in particular, often lacked the administrative capacity to meet new regulatory standards,⁹ much less possessed the expertise and political clout necessary to influence the character of those standards or ensure that agencies reliably fulfilled their mandates.¹⁰ Diffuse constituencies in developed countries were disadvantaged by international organizations' opaque decision-making processes, which limited their opportunities to participate in and shape outcomes.

This book seeks to explain these developments. It also explores the prospects for achieving the basic prerequisites of a rule-of-law-based global system of regulatory governance that strives to ensure distribution of political power and responds to the standards that we have come to expect in well-functioning democracies. To explore how best to achieve this goal, we begin by analyzing the political and economic factors that have shaped the evolution of the existing system. Chapter 2 examines the

⁷ Abigail C. Deshman, *Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture*, 22 *EUR. J. INT'L L.* 1089 (2011), see *infra* Chapter 6.

⁸ Stewart, *supra* note 6, at 26–27 (noting that international organizations “are often subject to powerful but in many cases informal mechanisms of supervisory and fiscal accountability to the most powerful states that create, fund, and support these global institutions”); Nico Krisch, *The Pluralism of Global Administrative Law*, 17 *EUR. J. INT'L L.* 247, 250 (2006) (noting that the problem with international organizations is:

“[N]ot an absolute accountability ‘deficit’ . . . [r]ather . . . [they are] accountable to the wrong constituencies. The World Bank, it is often claimed, should respond to the people affected by its decisions, rather than primarily to the (mostly developed) countries that fund it. The FATF should be accountable to those states subject to its measures, not just to its members. Or the Security Council should have to answer to the individuals it targets directly with its sanctions, not only to its member governments or the broader membership of the UN”).

⁹ Benedict Kingsbury & Kevin Davis, *Obligations Overload: Adjusting the Obligations of Fragile or Failed States*, (Nov. 22, 2010) (Preliminary Draft), available at www.iilj.org/courses/documents/HC2010Dec01.DavisKingsbury.pdf.

¹⁰ Krisch, *supra* note 8, at 275–76. In fact, many of these countries face difficulties complying with their obligations under the various treaties, see Kingsbury & Davis, *supra* note 9.

phenomenon of fragmentation and how it has institutionalized the role of powerful states while simultaneously undermining the ability of weaker states to coordinate effectively. Chapter 3 looks behind the veil of “the state” and analyzes the interplay between the key domestic actors—the executive, legislature, courts, interest groups, and civil society—as they vie to realize their goals in a fragmented system of global institutions.

This description of the political economy background of global governance enables us to assess the potential role of courts in promoting a global rule of law. Chapters 4 and 5 address the role of courts as the key defragmenting institutions in the emerging system of global governance. Chapter 4 discusses the promise and limits of international tribunals for reining in global regulatory institutions. Chapter 5 does the same for national courts. Chapter 6 assesses the interplay between national and international courts and explores the potential effect of their cooperation on the realization of a global rule of law. The chapter closes with an assessment of the extent to which court cooperation can increase the effectiveness of the international regulatory system by decreasing the discretionary powers of state executives.

Chapter 7 moves from the descriptive to the normative. It begins by addressing the prevalent concern that judicial involvement in global governance is fundamentally undemocratic. While acknowledging that this is always a danger, we argue that coordination between national and international courts holds out the promise of being able to maintain a proper distribution of political power at both the domestic and the international levels by helping to ensure that the interests of a greater share of relevant stakeholders are taken into account by decision-makers, with the goal of reaching better informed, more balanced outcomes.

The rest of this introduction provides a bird’s-eye view of the course of this book.

1.2 Background: The Fragmentation of International Law

The decades following the end of the Cold War have witnessed the growing proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries. Although practicing jurists have voiced concern about the effect of this increased fragmentation of international law, international legal theorists have tended for the most part to dismiss these concerns. Indeed, many regard the resulting competition for influence among institutions as a generative, market-like

pluralism that has led to greater progress toward integration and democratization than could ever have been achieved through more formal means.

In Chapter 2, we argue that the problem of fragmentation is more serious than is commonly assumed, because it has the potential to sabotage the evolution of a more democratic and egalitarian international regulatory system. It opts for rule by law rather than abiding by the rule of law standards, and it thereby undermines the reputation of international law for integrity. It is also more resistant to reform than is generally assumed. Powerful state executives labor to maintain and even actively promote fragmentation because it enables them both to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate and to break the rules opportunistically without seriously jeopardizing the system they have created.

Fragmentation accomplishes this in three ways. First, by creating institutions along narrow, functionalist lines and restricting the scope of multilateral agreements, it limits the opportunities for weaker actors to build the cross-issue coalitions that could potentially increase their bargaining power and influence. Second, the ambiguous boundaries and overlapping authority created by fragmentation dramatically increase the transaction costs that international legal bodies must incur in trying to reintegrate or rationalize the resulting legal order. Third, by suggesting the absence of design and obscuring the role of intentionality, fragmentation frees powerful states from having to assume responsibility for the shortcomings of a global legal system that they themselves have been instrumental in creating. The result is a global regulatory space that reflects the interests of the powerful, a regulatory space that only they can alter. To make matters worse, an additional type of fragmentation has recently emerged in the wake of the growing practice of private standard-setting by producers, consumers, and other private actors without the input of governments.

1.3 The Domestic Sources of Global Fragmentation

In Chapter 3, we focus on the role of sub-national actors in global governance bodies. We argue that the fragmentation of international law at the global level has been promoted by certain domestic actors who sought global standard-setters and regulators that were relatively insulated from public scrutiny. Political economists long ago demonstrated that state institutions often provide the means by which organized

interest groups can exploit less organized domestic groups in the competitive market for political goods (such as taxes, subsidies, and favorable market regulation). In this market, more organized groups composed of a relatively small number of individuals can outbid larger groups because the former realize higher per capita benefits from cooperation with fellow group members and pay lower costs for monitoring and sanctioning free riders. Hence, other things being equal, smaller groups, such as producers and employers, will often be able to obtain collective goods more efficiently than can larger groups of consumers or employees. Over time this enables them to secure a disproportionate share of the aggregate social welfare while passing on a significant part of their production costs to the larger, more diffuse groups.

For the smaller groups, globalization has meant the ability to exploit new markets for political goods with fewer constraints. For them, therefore, the turn to international markets and international law has always been an effective way of overcoming domestic legal limitations. The most effective domestic constraints they faced were imposed not by politicians, relatively easy prey, but—in states where political power was more evenly distributed—by bureaucrats and judges who were relatively more insulated from the political system. But bureaucrats and judges were more hesitant to interfere in the executive's management of the state's foreign affairs. Domestic courts, traditionally the bastions of individual rights vis-à-vis domestic actors, tended to defer to the politicians and bureaucrats on matters concerning the external affairs of their state. Not only did they refrain from attaching any strings to the extraterritorial activity of the executive or domestic firms; they also found myriad ways to rebuff challenges to such activities, despite seemingly clear language in domestic or international law that prohibits them. Courts in all jurisdictions have developed an array of doctrines—such as the political question doctrine, justiciability, and act of state—to minimize their role as effective keepers of the rule of law in the international arena.

This strong judicial deference opened the door for small groups to shield themselves from the vagaries of the democratic electoral process and rigorous judicial review. For them, the emerging global regulatory space operated like a vast field in which to play hide-and-seek with the ubiquitous review mechanisms. Even better, recourse to permissive international treaties preempted domestic legislation against them. Whereas no constitution was beyond legislative interpretation or immune to popular amendment, which often operates to the detriment of small groups, international law and the courts' deference to the

executive in the international arena offered small groups the ultimate protection for their interests. The fragmented, consent-based nature of international law continued to enable smaller groups to evade national regulations and exploit the global commons. In fact, these smaller groups have had an even greater influence on the development of international law than on domestic law, primarily because information gathering and assessment costs are much higher in the international arena, and relatively smaller and better organized groups are more effective than larger, diffuse constituencies in meeting these costs. The edge enjoyed by small groups can be traced by following the development of international norms.

1.4 The Failed Hope for Cohesion Ensured by International Tribunals

One could have anticipated that the reaction to the evasive efforts of the designers of fragmentation would come from international tribunals and other global review bodies. After all, the story of the taming of domestic administrative agencies is the story of the rise of domestic judicial review of administrative action through law developed primarily by the courts. Unfortunately, the same domestic forces that promoted the rise of global regulatory bodies and the fragmentation of global legal space were the ones to establish and oversee the operation of international tribunals. It should therefore come as no surprise that international tribunals have been less effective than their domestic counterparts in checking their respective regulators. In this chapter, we draw upon the theoretical and empirical literatures on the evolution of court independence in modern democratic states to identify aspects of their political environments that have fostered judicial independence at the domestic level. We then extend that analysis to examine the role that these or similar factors are likely to play in facilitating the independence and legitimacy of international tribunals at the global level.

To date, most of the literature on the independence of international tribunals, like most of the literature dealing with judicial independence at the domestic level, has focused on the rules connected with the ways that judges are nominated, selected, and tenured. While it is true that these formal structural features have an important role to play in determining judicial independence, they are not sufficient in and of themselves to ensure credibility. The effectiveness of international tribunals and their freedom to interpret and develop the law in whatever way they deem

appropriate are also functions or attributes of the broader political context in which they are embedded.

In Chapter 4, we focus on two such broad aspects of the global environment not normally associated with the independence of international tribunals: the extent of political division between states that are parties to an international tribunal (interstate competition) and the extent of political division within states between state executives and national courts (interbranch division). We suggest further that the conditions that facilitate such independence have increased in recent years and are likely to continue to do so. But we also conclude that the best hope for a more independent international judiciary is the potential for symbiotic relations with increasingly assertive national courts.

1.5 The Emergence of Interjudicial Cooperation at the National Level

Chapter 5 describes the potential for the resilience of national courts in the face of pressures from global actors. It argues that these very pressures are the catalyst for the growing assertiveness of national courts in responding to global regulations. The chapter also suggests that this newfound judicial courage is the key to promote coordination with international tribunals and to the empowerment of the latter.

It was not so long ago that the overwhelming majority of courts in democratic countries shared a reluctance to refer to foreign and international law. This reflected a policy of avoiding any application of foreign sources of law that would clash with the position of their domestic governments. However, since the early 2000s, courts in several democracies (aside from the US Supreme Court) have begun to adopt a different approach, often engaging quite seriously in the interpretation and application of international law and heeding the constitutional jurisprudence of other national courts. National courts have gradually abandoned their traditional policy of deference to their executive branches in the field of foreign policy and are beginning to engage more aggressively in the interpretation and application of international law. This change has been precipitated by the recognition by courts in democratic states that continued passivity in the face of a rapidly expanding international regulatory apparatus raises constitutionally related concerns about excessive executive power and risks further erosion in the effective scope of judicial review.

Reacting to the forces of globalization that were placing increasing pressure on governments, legislatures, and courts to conform to global