

The Global ‘Political Voice Deficit Matrix’: What Role for International Law?

Dissertation submitted for the degree of Doctor of Philosophy

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Abstract

This research investigates the contemporary challenges that new information and communication technologies (ICTs) pose to the democratic principle of ‘political voice’, and the role that international law could and should assume to address these challenges. The first two chapters undertake a rigorous analysis of normative theories of democracy to examine the democratic objectives which political voice serves; and explore its transnational relevance under conditions of globalisation. The research then investigates how the regulatory control of global communicative infrastructures by private ICT companies, creates and amplifies ‘political voice deficits’ within, across, and beyond states; and outlines the resulting democratic risks. On the basis of these analyses, the latter chapters examine the international legal obligations that could and should arise for states, for protecting and promoting political voice within, across, and beyond their borders. The research theorises political voice as an ‘international community interest’, and, drawing parallels from international climate change law, it suggests that states should hold due diligence obligations to prevent, or at least minimise the harm caused by the commercial operations of private ICT companies to political voice. Finally, possible avenues for the enforcement of these obligations are explored.

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Introduction

Persons do not become a society by living in physical proximity any more than a man ceases to be socially influenced by being so many feet or miles removed from others.

— John Dewey

1. What this is about, and why it matters

Wandering about the Tate Modern Museum in London, one comes across a fascinating artwork: a tower of radios of varying sizes and ages, some dating back to the 1920s and some of more recent times. The artwork, resembling in form the Tower of Pisa, is the creation of the Brazilian artist Cildo Meireles, and is appropriately entitled *Babel*. ‘*Babel 2001*’, the museum label reads, ‘addresses ideas of information overload and failed communication’. Recounting in visual and conceptual form the biblical story of the Tower of Babel, the artwork symbolises the ultimate source of mankind’s conflicts—the inability to communicate.

The ideas informing and conveyed by Meireles’s artwork, stand at the crux of the present research. It examines the acute challenges posed by novel digital technologies to individuals’ and communities’ ability to receive relevant information, to engage in public discourse, and to communicate with public decision-makers. It explores in-depth the normative force of the democratic tool and ideal of ‘political voice’, its transnational relevance today under conditions of globalisation, and the far-reaching implications that ‘political voice deficits’ have for individuals’ and communities’ democratic well-being. On the basis of these findings, the research further examines the role that international law, as a legal framework, could and should assume in mitigating the challenges problematised herein, in order to secure the protection and promotion of ‘political voice’ within, across, and beyond borders.

Terminology: ‘political voice’ and ‘political voice deficits’

‘Political voice’ is thus the concept at the heart of this research, and which therefore requires defining, unpacking, and contextualising right at the outset. The notion of ‘political voice’ as brought forth here, originates in normative theories of democracy, and is associated therein with the democratic ideal of ‘political action’. Yet, different theories ascribe different meanings to the concept of ‘political voice’; and also, most often, do not employ the expression ‘political

voice' itself in reference to the ideas that it embodies. Instead, democratic theorists habitually refer to different aspects of what this research broadly designates as 'political voice'; employing corresponding terms such as 'public discourse', 'public deliberation', or 'political participation' to indiscriminately describe the notion, practice, tool, or principle of information exchanges and communications between members of a political community, or between these members and public decision-makers.

In this study, I put forward the concept of 'political voice' as an overarching term in relation to these democratic norms, but I distinguish between, and theorise, two distinct, yet interrelated dimensions of this concept. The *horizontal* dimension of political voice, relates to individuals' ability to meaningfully partake in open, deliberative public communications, in which they are able to both receive pertinent information, and to voice and debate their political interests and demands on equal footing with other members of their political community. The *vertical* dimension of political voice, embodies the notion of effective, bi-directional information flow and communications between individuals or communities, and public decision-makers. The notion of 'political voice deficits', accordingly relates to circumstances in which either or both these dimensions are challenged, undermined, or interfered with.

The context

This research is set against the backdrop of international legal analyses of political voice deficits. In this context, strands of international legal scholarship examine and expose how conditions of globalisation, and international law's expansion, create increasing misalignments between public decision-makers and spheres of affected stakeholders, such that contemporary challenges to political voice are no longer exclusively a product of *domestic* democratic deficiencies, but also the outcome of the ills of global governance. These enquiries thus place the issue of political voice deficits on the international legal agenda, despite this topic's contextual and normative origins in domestic public law scholarship.

The present study takes these enquiries forward to investigate and theorise yet another feature of global governance which creates and sustains political voice deficits within and beyond the state: the governance of global informational and communicative infrastructures by private information and communication technology (ICT) companies. This particular focus on ICT companies, however, does more than provide yet another example of how transnational political voice deficits are fashioned. First, this focus helps highlight concerning trends in global governance, specifically, the 'privatisation' of public functions, and its implications for the continued viability of democracy. Second, this focus on ICT companies also reveals

oversights in existing scholarship, and exposes the implications of these oversights for the range of solutions international law may offer to the problems it conceptualises and aims to address.

Specifically, the focus is on the challenges posed to the *horizontal* dimension of political voice, whereas international lawyers have thus far mainly focused on its *vertical* dimension. In order to problematise *these* political voice deficits, the research engages in an in-depth analysis of theories of democracy and the democratic functions they ascribe to political voice. This analysis is particularly important for the study of political voice deficits, as it reveals the interdependence between their two dimensions: the effective use of vertical voice is to a large extent dependent on the availability and robustness of its horizontal manifestation. Examining these two dimensions in tandem, is therefore particularly valuable for understanding, mapping, and regulating political voice deficits.

The investigation of the acute challenges now posed to horizontal political voice by ICT companies' regulation of global communicative infrastructures, thus facilitates a more well-rounded and comprehensive discussion of transnational political voice deficits and their contemporary manifestation. It enables, in particular, a more complex discussion of the role that international law could and should assume in this arena.

2. The outline

Seven chapters make up this dissertation. Following this introductory chapter, the thesis begins, in **Chapter II**, by presenting the notion of political voice deficits as this notion is understood by, and employed in (albeit in different terms), international legal scholarship. The main objectives of this chapter are twofold. First, it aims to provide an overview of prominent international legal literature concerned with the concept of political voice. The chapter carefully examines international legal analyses of how globalisation and the architecture of the international legal order create and mould political voice deficits, while mapping and categorising these analyses into three types. Part 1 centres on what it conceptualises as the 'intra-state' dimension of these deficits. It describes how the globalisation of markets, and international legal frameworks, contribute to individuals' increasing inability to meaningfully partake in domestic public decision-making processes vis-à-vis their *own* governments. Part 2 centres on what it conceptualises the 'inter-state' dimension. It illustrates the adverse impacts of globalisation on individuals' ability to influence public decision-making by *foreign* governments, which increasingly bears on their life opportunities. Part 3 then examines the 'global' dimension of political voice deficits. It accounts for how international law's

transformation into a form of governance, results in individuals' failure to participate in, and impact, public decision-making at the global level; and this notwithstanding the pervasive influence of global governance on individuals' lives.

The second objective of this chapter is to expose the existing oversights of political voice's horizontal dimension in international legal scholarship. Part 4 of Chapter II concludes that this scholarship tends to centre on the *vertical* dimensions of political voice, thus failing to account for the importance of its horizontal dimension, and, importantly, for the ways in which these two dimensions are interlinked. Part 4 therefore directs attention to the importance of investigating the concept of political voice in its original context—normative theories of democracy—in order to gain a more holistic understanding of its relevance across and beyond borders; and thus, of its relevance and scope as a focal point in international legal enquiries.

Chapter III, proceeds to undertake such examination, and constitutes the normative bedrock of the research. The chapter centres on normative theories of democracy which prioritise, and have an expansive vision of political voice as a democratic tool and principle. Specifically, it draws on the normative theories of John Stuart Mill and Hannah Arendt, on participatory and deliberative theories, and on neo-republican theories, especially the work of Philip Pettit.

The chapter is divided into four parts. Part 1 explains in detail the choice of theories that the chapter proceeds to examine. Part 2 undertakes a thematic analysis of these theories, unpacking the four democratic functions that they all ascribe to political voice and the relationships between them. These include its educative, epistemic, liberating, and equitable functions (sections A–D respectively). In its final section E, Part 2 conceptualises these functions as pertaining to two distinct, yet inter-related dimensions of political voice—its horizontal and vertical dimensions. It explains how the adequate functioning of the vertical dimension is highly dependent on the availability and robustness of its horizontal one. This part thus importantly concludes that political voice is a multi-dimensional concept. On the basis of these analyses, Part 3 of this chapter proceeds to rationalise the significance of ensuring political voice beyond the state under conditions of globalisation, but now from a more well-rounded and holistic normative perspective which takes into account both dimensions of political voice. These analyses are also thematic, considering the educative, epistemic, liberating, and equitable functions of political voice in turn, and how each of these now applies to the transnational arena (sections A–D respectively).

Against the backdrop of the first two substantive chapters, **Chapter IV**, proceeds to examine the novel challenges posed to political voice by the advent of new technologies, and

specifically, the regulatory control of global informational and communicative infrastructures by private ICT companies. This enquiry adjoins the existing analyses of political voice deficits created by globalisation and the ills of global governance that were reviewed in Chapter II. Now equipped with an in-depth understanding of the normative thrust of political voice, this study is able to scrutinise the particular democratic objectives that are thwarted by ICT companies' public regulatory functions, and to comprehensively analyse the broader transnational implications of these challenges.

The first part of this chapter turns to both legal and extra-legal scholarship which examines and explains ICT companies' commercial model, and how they operate and control global information and communication channels. It expounds how and why these companies' operational logic results in the fragmentation of communicative spheres and in the pollution of information channels. This part theorises ICT companies' operations as a mode of global digital urban planning, which may be usefully compared to modalities of medieval planning in the form of chartered towns, where 'exclusion [was] the foundation of social organisation'.¹

The second part of the chapter then moves to discuss the implications of ICT companies' operations on the two dimensions of political voice and its four democratic objectives. It first examines how the fragmentation and pollution of information impact the horizontal dimension of political voice, and its educative and epistemic functions. It then studies the consequent implications for the vertical dimension of political voice and its liberating and equitable functions. Importantly, each of these sections focuses on the effects of fragmentation and pollution within national boundaries, but also *across* and *beyond* them. In order to best describe these multi-faceted, multi-dimensional consequences for political voice, the chapter coins the term the global 'political voice deficit matrix'. In conclusion, the third part of the chapter further unpacks the notion of a global 'political voice deficit matrix' as denoting several features, including: how it accounts for horizontal, as well as vertical, deficits; how private and public spheres are obfuscated within this matrix; and how the problems that it creates transcend the domestic political sphere to also affect individuals' and communities' democratic and material well-being on a transnational or global scale. These understandings of the global 'political voice deficit matrix', the chapter concludes, justify an enquiry into the role that international law could and should assume in addressing it.

¹ N Alsayyad and A Roy, 'Medieval Modernity: On Citizenship and Urbanism in a Global Era' (2006) 10 *Space and Polity* 1, 6.

The final two substantive chapters of the dissertation, **Chapters V and VI**, thus engage with whether and how international law could be employed to prevent the global ‘political voice deficit matrix’, or mitigate its adverse implications for individuals’ and communities’ life opportunities.

Chapter V first conceptualises the problems that this matrix poses in international legal terms, and identifies the relevant international legal doctrines which may be engaged in order to impose adequate international legal obligations on states. This chapter is divided into three parts. The first, offers a theorisation of political voice as a ‘community interest’ in international law. It is grounded in an examination of different approaches to ‘community interests’ in international legal doctrine and theory, and argues that political voice could be conceptualised as such on the basis of two criteria: it being an interest widely shared by members of the international community (whether these are considered to be individuals or democratic states); and it being an interest whose transboundary protection and promotion requires the collective action of states. The second part proceeds to consider the international legal obligations that the need to protect political voice, as an international community interest, might give rise to. This question is not considered in the abstract. Rather, the chapter turns to international climate change law for inspiration given the similarities between the challenges posed by both climate change and the global ‘political voice deficit matrix’. Part 2 centres, therefore, on the core customary norm in international environmental law, the principle of prevention, and examines its operational contours. It then considers the extent to which this principle could apply in the context of preventing harm to transnational political voice.

Chapter VI then completes this enquiry by considering how a customary due diligence obligation to prevent harm to political voice may be enforced in practice. It considers two prominent enforcement strategies which occupy a central place in international legal practice: Part 1 examines international horizontal enforcement through international adjudication and the application of the laws of state responsibility; and Part 2 considers domestic enforcement of international legal obligations through litigation in national courts.

Part 1 centres on the *erga omnes* character of the principle of prevention to question its effects for matters of international legal standing; and, regardless of its effects for standing, to examine whether it may play a role in shaping state behaviour more broadly, thus expanding the possibility to vindicate the obligation to prevent harm to political voice. Part 2 examines the possibility of enforcement through domestic courts, drawing, once more, on the field of climate change for insights. It focuses, in particular, on the Dutch case of *Urgenda*, analysing the ways in which the Dutch courts made use of the international legal principle of prevention

to consider the state's duties. Part 2 thus demonstrates the importance of this principle as an evaluative and interpretative tool in domestic litigation. It then applies the same rationales to consider how political voice may be protected and promoted via domestic litigation, claiming that the principle of prevention may be employed to assess and constrain governmental discretion and action in this sphere. The chapter concludes that domestic courts may be considered significant guardians of political voice, not only in their role as adjudicators of legal claims, but also as agents of change with meaningful impact on domestic courts in foreign jurisdictions, and on mobilisation processes by civil society and potential litigants.

The final **Chapter VII** concludes this research. As fit for conclusions, it recounts the main arguments advanced herein, and discusses avenues for future research.

3. Methodologies; contributions

The methodologies engaged in this dissertation are diverse. It oscillates between the description, analysis, and synthesis of a wide range of theories and doctrines, and its own theorising. Several methodological choices and their contributions to the arguments advanced herein are noteworthy:

- (1) *Turning to theories of democracy.* Whilst the dissertation is largely written from the perspective of an international legal scholar, and indeed aims to contribute to international legal scholarship, it nonetheless heavily relies on theories of democracy for its normative pull. This might seem a peculiar choice for an international lawyer given the basic discord that ostensibly exists between international law as a legal framework, and 'democracy'. The choice to justify the need for international legal action on the basis of democratic norms, thus requires some explanation.

The methodological turn to normative theories of democracy provides a robust understanding of the democratic functions and objectives of political voice; one that enables the conceptualisation of the two dimensions of this concept and their interdependence (rather than their co-existence). For this purpose, the research focuses on theories that generally diverge from those belonging to the liberal tradition, and that hold an expansive vision of political voice. Their analysis reveals the *shared* view that these theories all hold of political voice, despite the many differences that exist between them; and thus provides a solid normative bedrock for arguing the importance of political voice, one that does not weakly hinge on the particularities of one theory or another.

Importantly, the uncovering of the democratic functions that theories of democracy all ascribe to political voice, helps to better normatively rationalise the need to safeguard its availability *transnationally*, despite the undemocratic nature and features of the transnational arena. In other words, it is on the basis of these democratic functions that the research theorises horizontal political voice as an interest shared between all individuals universally, or widely shared between democratic states, and thus as an ‘international community interest’. From a methodological perspective then, the study sketches novel links between normative theories of democracy and international legal theory.

- (2) ***Drawing on the discipline of urban planning.*** A second methodological choice is the use of urban planning literature as an explanatory tool to discuss the regulatory role of ICT companies. In this context, the research employs the notion of ‘ordered logics of space’, to portray how ICT companies’ personalisation of information and communications regulates social and political interactions to the detriment of horizontal political voice. Specifically, these companies’ personalisation strategies result in the fragmentation of communicative spheres and the obstruction of public discursive domains.

Although the analysis of urban planning literature is kept quite brief in this research, its lens importantly facilitates a discussion of the ‘public’ quality of these companies’ private commercial operations. It thus highlights concerning trends in global governance. In this context, the research breaks from traditional approaches in international legal scholarship, which often draw a hard line between the ‘public’ and the ‘private’, ‘law’ and ‘regulation’. Rather, it is inspired by ‘new governance’ theorising in political science, which considers private actors as regulatory actors, often much like states. The ‘new governance’ prism opens new avenues for considering the legal responsibilities of private ICT companies in international law, and thus provides interesting paths for future research in this area.

- (3) ***Drawing inspiration from international climate change law.*** Instead of considering international law’s role in addressing the global ‘political voice deficit matrix’ in the abstract, the research draws inspiration and analogies from the field of climate change. Given the close similarities between the contemporary challenges in the field of climate change, and those posed by ICT companies to political voice, the turn to international climate change law and litigation is particularly instructive. Namely, it enables to pinpoint which international legal frameworks and constructs would most adequately apply to the issue of protecting horizontal political voice transnationally, and why so. It equally facilitates a fruitful discussion of the potential of different enforcement avenues on the basis of existing precedents. This is particularly important in the context of this research

because of its strong normative orientation, and because it offers legal solutions as considerations in the progressive development of the law.

The use of these various theories and their synthesis thus lend this dissertation somewhat of a ‘jigsaw puzzle’ quality. Whilst this may complicate the flow of its narrative, it nonetheless befits the complexity of its topic. Ultimately, it also provides a more vigorous normative foundation for the claims and solutions offered in this research.

II

Introducing ‘political voice deficits’

Political voice deficits were not always a cause for concern for international lawyers. The Westphalian paradigm dominating nineteenth-century international legal thought and its black-boxed conception of sovereignty, provided rather crude disciplinary delimitations between the domestic and the international. Whereas states were understood to engage internally in ‘the business of governance’¹, classical international law—marked by its establishment during this period as the law *between states*²—denoted a pre-occupation with ‘[t]he business of setting a legal matrix for coexistence and community among and of [s]tates ensuring order and justice’.³ In other words, for classic international jurists, domestic law defined and regulated the set of vertical relationships between the state and its citizens, whereas international law regulated the mainly-transactional, horizontal relationships between equal sovereigns.⁴

Particularly, the earmarking of vertical relationships between the sovereign and its citizens within the domestic, implied that it was there that matters concerning political membership, the legitimate exercise of political authority, and the pursuit of individual freedom and distributive justice, were demarcated and addressed.⁵ To the extent that the international law of the time concerned itself with these ideals—and with those of domestic political legitimacy in particular—these remained primarily normative, rather than legal, concerns.⁶

¹ JHH Weiler, ‘The Geology of International Law—Governance, Democracy and Legitimacy’ (2004) 64 *Heidelberg Journal of International Law* 547, 547.

² This was in preference to ‘the law of nations’ or ‘droit des gens’, neither of which ‘limited international law to a law between states’: J Crawford and M Koskeniemi, ‘Introduction’ in J Crawford and M Koskeniemi (eds.), *The Cambridge Companion to International Law* (CUP 2012) 7.

³ Weiler, ‘The Geology of International Law’, 547.

⁴ S Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2003) 30–31; Both Held and Reisman make a similar claim. See D Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press 1995) 101; and WM Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’ (1990) 84 *AJIL* 866. See, in particular, Reisman at 867:

‘The public law of Europe, the system of international law established by the assorted monarchs of the continent to serve their common purposes, reflected and reinforced this conception by insulating from legal scrutiny and competence a broad category of events that were later enshrined as “matters solely within the domestic jurisdiction”’.

For a genealogy of the concept of the sovereign state see Q Skinner, ‘The Sovereign State: A Genealogy’ in H Kalmo and Q Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (CUP 2010) 26.

⁵ Marks, *The Riddle of All Constitutions*, 31; N Fraser, ‘Reframing Justice in a Globalizing World’ (2005) 36 *New Left Review* 68, 68; S Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (CUP 2004) 1.

⁶ Marks, *The Riddle of All Constitutions*, 31: ‘At most, prescriptions concerning the forms of government might belong to the realm of what the law ought to be, and were not to be confused with what the law is’; See also

Importantly, this disciplinary division was qualified also by separate bases of legitimacy for each legal framework.⁷ In domestic settings—increasingly adhering to democracy in the past century⁸—the principles of self-government and the rule of law have come to define the axes on which the legitimate exercise of *domestic* political power turns.⁹ International law, by contrast, was mostly framed by transactional modes of command during the nineteenth and early twentieth centuries. It was predominantly legitimised as such, by reference to the consent of states—a markedly different basis of legitimacy than the democratic ideal that vests in the collective the power to impose its authority on its members.¹⁰

However, as time progresses, observes Susan Marks, ‘[t]he boundaries—between politics and law, national law and international law, law and positive morality etc.—through which scholars have defined the distinctive terrain of international law have not, of course, remained stationary’.¹¹ In particular, the effects of globalisation accompanied by the expansion and fragmentation of international law, have hard-pressed international lawyers to re-chart traditional understandings of their disciplinary boundaries. These conditions necessitated a rethinking of international legal theory, and a re-conceptualisation of notions of power and authority, political legitimacy, political membership, justice, and freedom, so as to tailor them to conditions of growing economic integration, blurring of national boundaries, universalisation of threats, expanding delegation of political authority, and the increasing misalignment between decision-makers and spheres of affected stakeholders.¹² Notably, as the

GH Fox and BR Roth, ‘Introduction: The Spread of Liberal Democracy and Its Implications for International Law’ in GH Fox and BR Roth (eds.), *Democratic Governance and International Law* (CUP 2000) 1, 1. Similarly, in the field of international relations, the dominant paradigm was the realist one, under which states are perceived as sovereign, black-boxed, monolithic entities. See Held, *Democracy and the Global Order*, 24.

⁷ Weiler, ‘The Geology of International Law’, 548.

⁸ Held emphasises that ‘the widespread adherence to democracy as a suitable form for organizing political life is less than a hundred years old’: D Held, *Models of Democracy* (Polity Press 1987) 1; See also R Falk and A Strauss, ‘On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty’ (2000) 36 *Stanford Journal of International Law* 191, 191–92.

⁹ As articulated by Kumm, ‘[...] there is a consensus today that legitimacy of domestic law is predicated on it being justifiable in terms of a commitment to liberal constitutional democracy, properly understood’: M Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 *EJIL* 907, 910; See also A von Bogdandy, ‘Globalization and Europe: How to Square Democracy, Globalization, and International Law’ (2004) 15 *EJIL* 885, 887.

¹⁰ Weiler, ‘The Geology of International Law’, 548; N Krisch, ‘The Pluralism of Global Administrative Law’ (2006) 17 *EJIL* 247, 253.

¹¹ Marks, *The Riddle of All Constitutions*, 31; See also von Bogdandy, ‘Globalization and Europe’, 885–89. For a discussion of the conceptual shift these changes entail see A-M Slaughter, *A New World Order* (Princeton University Press 2005).

¹² Weiler, ‘The Geology of International Law’, 561; E Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 *AJIL* 295; B Kingsbury, ‘International Law as Inter-Public Law’ in HS Richardson and MS Williams (eds.), *Moral Universalism and Pluralism* (NYU Press 2009) 167; JL Cohen, ‘Constitutionalism Beyond the State: Myth or Necessity? (A Pluralist Approach)’ (2011) 2 *Humanity* 127; Fraser, ‘Reframing Justice’; Benhabib, *The Right of Others*; Held, *Democracy and the Global Order*, 12.

international legal system itself came to include—as suggested by Joseph Weiler—‘a thick and critical layer’ of governance’, ‘[i]t requires an altogether new discourse of legitimacy.’¹³

The quest for new discourses of legitimacy, further particularises Mattias Kumm, is the product of international law’s transformation into a form governance along three dimensions.¹⁴ The first, is the expansion of its subject matter, to address questions formerly attended to by national legal frameworks. The relevance and role of borders are increasingly determined by international rules, and so are issues pertaining to organised crime, the environment, human rights, and others.¹⁵ Moreover, the expansion of the international legal order is complemented by its fragmentation, which raises concerns regarding its loss of coherence, thus exacerbating its legitimacy crisis.¹⁶ Second, the prominence of state consent in the process of international law’s procedural formation is weakened. Quasi-legislative power is increasingly delegated to treaty-bodies to develop the content of states’ obligations without states’ specific approval; and changes in approaches to customary international law have resulted in the marginalisation of consistent state practice.¹⁷ The transfer of regulatory power to international institutions, has also been accompanied by a de-formalisation of global governance regimes, to include copious intergovernmental networks, public-private bodies, and private standard-setting bodies, all wielding public power often without specific authority.¹⁸ Finally, the growing specificity of states’ international obligations, which results from the proliferation of international courts and their interpretations of these obligations, have encroached on states’ political and legal liberty to interpret and implement international law domestically, or internationally.¹⁹

One type of discourse employed by international lawyers to problematise or legitimise the new vertical power relations established in international law and through global governance, is

¹³ Weiler, ‘The Geology of International Law’, 553; See also Kumm, ‘The Legitimacy’; and A Buchanan and RO Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20 *Ethics & International Affairs* 405; Benvenisti provides a list of prominent responses to these challenges. See Benvenisti, ‘Sovereigns as Trustees’, 299.

¹⁴ Kumm, ‘The Legitimacy’.

¹⁵ *ibid* 913.

¹⁶ According to Peters, because of how the normative pull of international law is generally ‘more precarious’, ‘consistency is particularly important’. Put differently, ‘the normative pull of international law is fortified by its stringency and consistency’, or in negative terms, undermined by fragmentation: A Peters, ‘Fragmentation and Constitutionalization’ in A Orford and F Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 1011, 1014.

¹⁷ Kumm, ‘The Legitimacy’, 914.

¹⁸ B Kingsbury, N Krisch, and RB Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15, 15–16; Benvenisti provides a detailed typology of the types of global governance institutions. See E Benvenisti, *The Law of Global Governance* (Brill 2014) 25–76; RO Keohane, ‘Global Governance and Democratic Accountability’ in D Held and M Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance* (Polity Press 2003) 130; D Held and M Koenig-Archibugi, ‘Introduction’ (2004) 39 *Government and Opposition* 125.

¹⁹ Kumm, ‘The Legitimacy’, 914–15.

one transposed from the context of *domestic* democratic governance. Specifically, that of public law principles concerning the use of voice as a tool of political participation.²⁰ Forming part of a broader trend to couch the legitimacy concerns associated with the ills of global governance in ‘democratic rhetoric’²¹ (i.e., in terms of the absence of democratic stake in global decision and policy-making²²), strands in international legal scholarship have exposed how challenges to political voice are no longer created and sustained only *within* the domestic context, but are, rather, also created and sustained *outside of it*. In other words, scholarship in this area has ‘globalised’ or ‘internationalised’ certain democratic issues, in earmarking them as a cause for concern for international legal scholars, no less than they already are for constitutional or administrative ones.

This scholarship offers, therefore, rigorous positive analyses of the structural deficiencies of the international order, which both create and sustain certain aspects of what the present dissertation refers to, and conceptualises as, ‘political voice deficits’. As defined in the introductory section of this dissertation, the notion of ‘political voice deficits’ relates to descriptive and normative claims regarding individuals’ and communities’ inability to receive pertinent information, and to meaningfully participate in public deliberative fora and public decision-making processes, which affect their life course. International legal analyses of political voice deficits centre on the ways in which individuals’ and communities’ lives are increasingly dominated, or at least heavily influenced, by forces from outside the sovereign state. These forces include the power of foreign governments, that exercised by international organisations, or increasingly that of private organisations of both a commercial and non-commercial character. Importantly, the emergence of these novel sources of power, has not been coupled by processes which enable individuals’ and communities’ to dyadically partake—through the use of voice—in shaping how these forces will influence their lives. Given that political participation is rarely enabled in global and cross-boundary contexts

²⁰ Benvenisti, ‘Sovereigns as Trustees’; These principles are employed both by scholars of Global Administrative Law, as well as by global constitutionalists, and by neo-republican scholars writing in the context of globalisation. See eg, B Kingsbury, M Donaldson, and R Vallejo, ‘Global Administrative Law and Deliberative Democracy’ in A Orford and F Hoffman (eds.), *The Oxford Handbook of the Theory of International Law* (OUP 2016).

²¹ A Moravcsik, ‘Is There a ‘Democratic Deficit’ in World Politics? A Framework for Analysis’ (2004) 39 *Government and Opposition* 336, 336; According to Held and Koenig-Archibugi, international institutions were traditionally legitimised both by the consent of participating governments, and by their capacity to solve the problems brought about by globalisation that led to their establishment in the first place. The legitimacy crisis of recent decades is predicated on the belief that in the face of public power, legitimacy should be evaluated in terms of democratic values of effective public accountability. See Held and Koenig-Archibugi, ‘Introduction’, 125.

²² Held, *Democracy and the Global Order*, 18.

through the archetypical democratic tool of voting power, the meaningful exercise of ‘voice’ as a political tool becomes considerably more momentous for promoting decision-makers’ accountability. This is particularly so, in the face of expropriations of decision-making power from political communities’ collective control.²³

The chief purpose of the present chapter, is to carefully examine international legal analyses of how forces of globalisation, and the architecture of the international order, have contributed to, and continue to shape and sustain, political voice deficits. The chapter does so by mapping three spatial-political arenas in which these deficits present themselves. First, the chapter begins, in Part 1, by discussing how existing domestic democratic failures are exacerbated by the globalisation of markets, and by the international legal framework, thereby thwarting individuals’ ability to meaningfully partake in decision-making domestically, *vis-à-vis their own governments* (hereafter: the ‘intra-state’ dimension of political voice deficits). The chapter then proceeds, in Part 2, to discuss how individuals’ and communities’ lives are increasingly influenced by decision-making of *foreign governments*; and how individuals are yet unable to dyadically participate in these decision-making processes (hereafter: the ‘inter-state’ dimension of political voice deficits). Finally, in Part 3, the chapter reviews the political voice deficits arising from the transfer of regulatory authority from the national arena to the *global* one, and from the fragmentation of global governance (hereafter: the ‘global’ dimension of political voice deficits).

Another objective of this chapter, is to critically reflect on the competence of contemporary international legal accounts of political voice deficits, to justify the application of the concept of political voice to spatial-political arenas beyond the state. Whilst the notion of political voice is presently employed by international lawyers to rationalise global political authority, or problematise its contribution to matters of global injustice, this notion is often so employed in marginalisation or over-implicitness of its contextual theoretical and normative geneses. In other words, it is generally transposed from the *domestic* context, often short of a broader interrogation into the ways in which this concept is understood and theorised in normative

²³ As put by Howse: ‘Among the most common critiques of globalization is that it increasingly constrains the ability of democratic communities to make unfettered choices about policies that affect the fundamental welfare of their citizens, including those of health and safety, the environment, and consumer protection’: R Howse, ‘Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization’ (2000) 98 Michigan Law Review 2329, 2329. Underpinning this notion is a vision of democracy as ‘the right of people to be consulted and to participate in the process by which political values are reconciled and choices made’: TM Franck, ‘Legitimacy and the Democratic Entitlement’ in GH Fox and BR Roth (eds.), *Democratic Governance and International Law* (CUP 2000) 25, 25.

theories of democracy.²⁴ As these contextual normative origins remain presumed rather than explored by international legal scholars, an incomplete normative picture emerges regarding the object and purpose that the notion of political voice assumes within the democratic edifice. Accordingly, an incomplete normative picture emerges also regarding the objects and purposes that the notion of political voice could and should assume in all three spatial-political arenas in which its maintenance is currently identified as relevant by international legal scholars—i.e., within, across, and beyond national borders. This chapter's Part 4, briefly exposes these oversights, which will then be addressed further, and bridged, in the following Chapter III.

1. Political voice deficits: the intra-state dimension

The intra-state dimension of political voice deficits, is concerned with political economy assumptions regarding the effects of international law's *laissez-faire* framework on domestic politics, and its effects on weaker individuals' ability to further their interests through participation in domestic political decision-making vis-à-vis their *own government*.²⁵ These analyses begin with basic conventions regarding the capacity of small interest groups to secure a '[...] disproportionate share of the aggregate social welfare while externalising part of their production costs onto the larger groups'.²⁶ This phenomenon is explained by reference to small groups' low organisational costs, and their subsequent advantages in obtaining information on policies, and in rendering governmental agencies responsive to their interests by closely monitoring governmental decision-making. Within these political dynamics, the political power of weaker and more-diffuse stakeholders is marginalised comparatively to that of smaller and stronger stakeholder groups.²⁷

These domestic democratic deficits are further exacerbated by the influence of well-organised small interest groups and strong economic actors, on the shaping of the *international* legal framework; and, in turn, by the way in which this framework provides strong actors with

²⁴ See a similar claim in the context of global constitutionalism in M Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' (2013) 20 *Indiana Journal of Global Legal Studies* 605, 611.

²⁵ E Benvenisti, 'Exit and Voice in the Age of Globalization' (1999) 98 *Michigan Law Review* 167; See also Benvenisti, 'Sovereigns as Trustees', 303.

²⁶ Benvenisti, 'Exit and Voice', 171.

²⁷ *ibid* 171–72; Benvenisti, 'Sovereigns as Trustees', 303; Downs explains how uncertainty leads governments to rely on strong interest groups as intermediaries which in turn gain 'influence over policy formation greater than their numerical proportion in the population. Thus, uncertainty forces rational governments to regard some voters as more important than others. By doing so it modifies the equality of influence which universal suffrage was designed to insure': A Downs, *An Economic Theory of Democracy* (Harper & Row 1957) 95.

enhanced ‘exit’ opportunities.²⁸ At the centre of these analyses, is an understanding of the intimate interplay between exit and voice, as alternate, yet interdependent tools for influencing political decision-making. Namely, under conditions of constrained or unequal exit opportunities, one’s relative ability to influence decision-making through political *voice*, is equally curtailed.²⁹

The influence of small groups on the shaping of international norms is explained by reference to the higher organisational costs that are incurred in the international arena, and by the typical shielding of international negotiations from domestic public scrutiny, democratic deliberation, and domestic judicial review. These circumstances enable strong economic actors to further their interests by exerting their power on the state apparatus to impact treaty negotiations. More importantly, these conditions enable them to secure their interests in the long run against the modification of the state’s international obligations by domestic majorities or by judicial scrutiny.³⁰ This state of affairs ‘severely handicaps democratic safeguards for ensuring the executive internationalization of voter preferences’.³¹

Moreover, the impact of strong interest groups on the formation of international norms, eventually establishes an international legal environment which provides these groups with ample exit opportunities, thereby aggravating political voice deficits domestically.³² Specifically, the international legal framework facilitates exit options for relatively mobile, strong economic actors, in primarily two respects. First, by lowering barriers to, and costs of, the cross-boundary movement of business and capital, while at the same time, failing to globally protect human and labour rights.³³ These failings both enable and encourage strong economic actors to forum shop for jurisdictions which would be most favourable, in regulatory

²⁸ Benvenisti, ‘Exit and Voice’; E Benvenisti, ‘Ensuring Access to Information: International Law’s Contribution to Global Justice’ GlobalTrust Working Paper Series 09/2017.

²⁹ Benvenisti explains the interplay between exit and voice on the basis of A Hirschman’s work. See Benvenisti, ‘Ensuring Access’; and AO Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970).

³⁰ Benvenisti, ‘Exit and Voice’, 190.

³¹ *ibid* 200; See also Benvenisti, *The Law of Global Governance*, 18. On the other hand, in the context of the WTO’s SPS provisions, Howse presents an approach according to which the ‘hand-tying of the political process by international rules, or by an apolitical authority such as “science”, actually may enhance domestic welfare and even result in regulatory outcomes that reflect more closely the preferences of most citizens’: Howse, ‘Democracy, Science, and Free Trade’, 2333.

³² Benvenisti gives examples of early cases of the influence of 17th and 18th century merchants on the external relations of their governments (See Benvenisti, ‘Exit and Voice’, 174–77), and examples of their contemporary equivalents (at 184–89).

³³ *ibid* 177–78; One example of the lowering of barriers is the development of international tribunals for investment disputes that facilitate foreign investment by substantially mitigating the threat of expropriation of foreign capital by host states. See T Ginsburg, ‘International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance’ (2005) 25 *International Review of Law and Economics* 107, 113.

terms, to guarantee their maximisation of profits.³⁴ Second, international treaty regimes and bilateral investment treaties enable small domestic groups to globalise business transactions through the mediation of the state. In doing so, small groups are able to reduce the transaction costs typically associated with private contracting, and to escape domestic norms that would regularly apply to such contracts.³⁵

As the interplay between exit and voice suggests, the enhanced exit opportunities of strong economic actors also provide them with greater political voice, and thus enable them to capture domestic deliberative processes so as to bias national policies in their favour, and often at the expense of the interests of diffuse stakeholders.³⁶ These political voice deficits are produced and sustained partly because the private wealth generated by powerful actors helps spawn resources for the state, thus rendering the state ‘dependent upon the success of private market[s]’ for political achievements.³⁷ As ‘supercapitalism has spilled over into politics’, aptly illustrates Robert Reich, the political voices of citizens are subsequently ‘drowned out’, and democracy is ‘engulfed’.³⁸ Reich further observes that ‘[t]he corporate takeover of politics also affects how the public *understands* the issues of the day’.³⁹ That is, in order to influence politics, strong economic actors enlist considerable amounts of resources to provide arguments in support of favourable regulation. This results in the ‘corruption of knowledge’,⁴⁰ and the consequent deepening of information asymmetries between strong and weak stakeholders.

Moreover, the global competition for foreign capital enhances the political voice of strong economic actors also in the *foreign* jurisdictions in which they operate.⁴¹ Whilst this has strong implications for the inter-state dimension of political voice deficits (the discussion of which

³⁴ On private corporations’ ability to play one jurisdiction against another see eg: SR Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 Yale Law Journal 443; B Stephens, ‘The Amorality of Profit: Transnational Corporations and Human Rights’ (2002) 20 Berkeley Journal of International Law 45; and D Kinley and J Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 Virginia Journal of International Law 931.

³⁵ Benvenisti, ‘Exit and Voice’, 178; On the enhanced exit options provided by the international legal framework and its implications for domestic institutional environments see also Ginsburg, ‘International Substitutes’.

³⁶ Benvenisti, ‘Sovereigns as Trustees’, 304.

³⁷ D Schneiderman, ‘Investing in Democracy? Political Process and International Investment Law’ (2010) 60 University of Toronto Law Journal 909, 933; This is because of the state’s dependence on these resources to levy taxes. See J Habermas, *The Postnational Constellation: Political Essays* (M Pensky, trans. and ed, Polity Press 2001) 63; In the context of the United States, Vogel claims that the impact of business on politics is correlative to the public’s perception of the strength of the economy. The stronger the economy is perceived the less influential businesses are, and the weaker it is perceived, the more businesses ‘define the terms of political debate and affect governmental decisions’: D Vogel, *Fluctuating Fortunes: The Political Power of Business in America* (Beard Books 2003) 8–9.

³⁸ RB Reich, *Supercapitalism: The Battle for Democracy in an Age of Big Business* (Icon Books 2008) 163–64.

³⁹ *ibid* 158 (emphasis added).

⁴⁰ *ibid*.

⁴¹ Schneiderman, ‘Investing in Democracy?’, 931–40.

will be undertaken in the following section), these actors' participation in foreign politics also diminishes their likelihood to orient their resources domestically to advance the welfare of their *own* community.⁴² From the perspective of governments too, the turn to external dispute resolution mechanisms in their dealings with foreign investors, disincentivises the improvement of local judicial quality. International alternatives thus 'perpetuate poor domestic institutions'⁴³ to the detriment of local citizenry, for whom forming the political coalitions necessary for institutional reform proves arduous.⁴⁴

2. Political voice deficits: the inter-state dimension

The inter-state dimension of political voice deficits is concerned with the cross-boundary effects of government decision-making on *foreign* stakeholders, and the latter's inability to dyadically participate in foreign decision-making fora through vote, or importantly, through political voice. Two primary aspects of these political voice deficits concern international lawyers in particular. The first, involves the management of cross-boundary resources and the demands it poses for 'interlocking political decisions'⁴⁵ between states. Modalities of bilateral or regional cooperative decision-making schemes on the matter of joint or transboundary resources, deepen democratic and accountability deficits as they expropriate decision-making power from the hands of national institutions, transferring them instead to foreign governments. Insofar as individuals affected by such decisions are foreign to the governments who make them, they lack the right to vote; but also, the right to employ their political voice to influence these resolutions.⁴⁶

Yet more fundamentally, the inter-state dimension of political voice deficits arises from the division of political spaces, and the subsequent allocation of political rights of participation in line with territorial boundaries.⁴⁷ In a world of globalised interconnectedness and interdependence, sovereign domestic policymaking often creates decisional externalities which affect the lives of those situated beyond their borders.⁴⁸ The coupling of decisional externalities on one hand, with the territorial allocation of participatory rights and lack of meaningful exit

⁴² Benvenisti, 'Ensuring Access', 8.

⁴³ Ginsburg, 'International Substitutes', 121.

⁴⁴ *ibid* 123.

⁴⁵ Held, *Democracy and the Global Order*, 267.

⁴⁶ Benvenisti, 'Exit and Voice', 201; See also E Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use* (CUP 2002). These democratic deficits become more acute once individuals' own government is captured by private interests as detailed in the previous section.

⁴⁷ Benvenisti, 'Ensuring Access', 10.

⁴⁸ Kumm, 'The Cosmopolitan Turn', 613; See also Held, *Democracy and the Global Order*, 17.

opportunities on the other,⁴⁹ creates an increasing misalignment between the sphere of affected stakeholders and those with the right to vote or influence *foreign* governments' decisions. As decision-making shifts away from the state, it impedes national constituencies' participation in policymaking concerning their lives, resulting in a systemic failure which obstructs individuals' ability to 'have their lives in their own hands'.⁵⁰

Mattias Kumm typologises decisional externalities as including three different types. First, a structural type, which involve the exclusion of others from crossing and entering national borders (e.g., immigration policies). Second, 'justice sensitive externalities', involving national policies that burden foreign stakeholders with harms or risks. Examples of these are decisions influencing pollution or transnational terrorism, the permission to harvest rainforests, or to build nuclear sites in the vicinity of borders.⁵¹ And third, decisional externalities which do not solicit any particular justice concerns, but nevertheless result in lesser benefits for, or in dubious effects on, foreign stakeholders. Examples include protectionist policies that are focused on the benefit of national stakeholders.⁵² International law offers no *general* response to these three types of decisional externalities, given that, generally speaking, they do not raise any responsibility issues under its legal regime.⁵³ From a neo-republican perspective, however, these have been theorised as forms of domination across borders that amount to a mode of global political injustice.⁵⁴ Domination, in this respect, is properly understood as individuals' inability to 'freely form life plans', or their denial of 'equal, autonomous standing with others in a political community or shared social structures'.⁵⁵ It neatly corresponds, therefore, with the notion of transboundary political voice deficits.

For some scholars, neutral and undifferentiated descriptions of these contemporary decisional externalities and forms of cross-border domination, critically overlook the

⁴⁹ Z Bauman, *Globalization: The Human Consequences* (Polity Press 1998) 86, 89.

⁵⁰ Benvenisti, 'Sovereigns as Trustees', 303; See also Benvenisti, 'Ensuring Access'; A Berman, 'Taking Foreign Interests into Account: Rulemaking in the US and EU' (2017) 15 *International Journal of Constitutional Law* 235; See also N Urbinati and ME Warren, 'The Concept of Representation in Contemporary Democratic Theory' (2008) 11 *Annual Review of Political Science* 387, 389–90; Kingsbury, 'International Law as Inter-Public Law', 195.

⁵¹ Held, *Democracy and the Global Order*, 17; Kumm gives also the example of decisions on levels of carbon-dioxide emissions. See Kumm, 'The Cosmopolitan Turn', 613.

⁵² Kumm, 'The Cosmopolitan Turn', 617–24.

⁵³ Berman, 'Taking Foreign Interests into Account', 236; Some of these externalities are obviously governed by international law norms. See eg Kumm, 'The Cosmopolitan Turn', 619 (in the context of refugees). Benvenisti, moreover, points to varying exiting obligations in international law which recognise the responsibility of sovereigns towards foreign affected stakeholders. See Benvenisti, 'Sovereigns as Trustees'.

⁵⁴ B Buckinx, J Trejo-Mathys, and T Waligore, 'Domination Across Borders: An Introduction' in B Buckinx, J Trejo-Mathys, and T Waligore (eds.), *Domination and Global Political Justice: Conceptual, Historical and Institutional Perspectives* (Routledge 2015) 1; J Bohman, *Democracy Across Borders: From Dêmos to Dêmoi* (MIT Press 2007); See also Fraser 'Reframing Justice'; Benhabib, *The Right of Others*.

⁵⁵ Buckinx and others, 'Domination Across Borders', 1.

asymmetries that are constitutive of the process of globalisation. Their claim, is that decisional externalities ‘cross boundaries in one direction only’, ‘from the powerful to the powerless’.⁵⁶ Thus, whilst, according to Andrew Dobson, ‘[i]t is truer than it ever was that “if America sneezes the rest of the world catches a cold”, [...] Bangladesh can contract viral pneumonia without it making the slightest difference to the United States’.⁵⁷ Accordingly, the inter-state dimension of political voice deficits should be further qualified to capture, in particular, the ways in which globalisation empowers certain actors to become rule-makers who shape outcomes, whereas weaker constituencies become ‘rule-takers’.⁵⁸

Cross-border domination and decisional externalities occur, furthermore, not only by governmental decision-making vis-à-vis foreign affected stakeholders, but also by decision-making of foreign *private* entities such as business corporations, that equally diminish the political voice of local stakeholders.⁵⁹ As briefly mentioned in the previous part, foreign corporations operating in host-states, for example, are likely to influence local political decision-making ‘via back-door channels’.⁶⁰ For instance, contractual concessions that are demanded by foreign investors and complied with by states, reduce the state’s responsiveness to local public policy concerns, thus allowing foreign interests to marginalise local ones.⁶¹ Although these types of decision-making are actually made *domestically*, their substantive outcome in terms of political legitimacy, is the domination of foreign interests over domestic stakeholders. This results in the latter’s incapacity to meaningfully participate in the shaping of policies that affect their life course.

3. Political voice deficits: the global dimension

The most discussed dimension of political voice deficits in international law, is the global one. It concerns the ways in which weaker individuals’ and constituencies’ political voice and participatory parity, are adversely affected by the transfer of political authority from the state to global institutions, and by the proliferation and fragmentation of global governance bodies.⁶²

⁵⁶ A Dobson, *Citizenship and the Environment* (OUP 2003) 13.

⁵⁷ *ibid.* The relevance of this approach could nevertheless be presently questioned in light of the decline in American hegemony on the international stage.

⁵⁸ A Hurrell and N Woods, ‘Introduction’ in A Hurrell and N Woods (eds.), *Inequality, Globalization, and World Politics* (OUP 1999) 1, 1. A classic example of this, is that of environmental politics and the position of the United States (both of the Bush and then Trump administrations) despite the fact that it produces a quarter of the world’s greenhouse gases. See Dobson, *Citizenship and the Environment*, 17–18.

⁵⁹ Buckinx and others, ‘Domination Across Borders’, 3; Schneiderman, ‘Investing in Democracy?’.

⁶⁰ Schneiderman, ‘Investing in Democracy?’, 935.

⁶¹ *ibid* 938.

⁶² These institutions include both treaty-based international organisations, as well as hybrid public-private bodies and private standard setting bodies. See Benvenisti, *The Law of Global Governance*; Kingsbury and others,

Notwithstanding the significant contribution of the reallocation of regulatory authority to global institutions to the overcoming of collective action problems, it nevertheless results in the detachment of individuals and communities from the actual venue of decision-making.⁶³ Namely, international law's transition to a form of governance entails the delegation of vast discretionary power and authority to treaty-based bodies that issue rules and norms to steer the conduct of actors, and to develop the substantive content of states' obligations. This transition presents—in and of itself—questions about legitimate authority.⁶⁴

From a global perspective, not only do global governance regimes challenge democratic procedures at the national level, but their fragmented nature leads to additional challenges concerning the ability of weaker states to form effective coalitions in order to further their interests in the global arena.⁶⁵ According to Benvenisti, as a result, 'the large and heterogenous global public that resides outside the small group of powerful [s]tates can never be confident that their interests, in the absence of due process, are being adequately protected from the exercise of arbitrary power'.⁶⁶

Beginning with the challenges posed by the proliferation of global regulatory authority to domestic democratic processes, the literature centres on the ways in which the transfer of regulatory power to international organisations reduces the effect of domestic checks and balances. This is due to the increase in power this transfer affords the executive branch, and to these organisations' immunity from national judicial scrutiny.⁶⁷ More importantly, however, the literature elaborates on the particular structural characteristics of global governance regimes, and how these necessarily result in the systematic marginalisation of, or 'disregard' to, the interests of less powerful individuals and constituencies.⁶⁸ These analyses begin with a

'The Emergence'; RB Stewart, 'Administrative Law in the Twenty-First Century' (2003) 78 NYU Law Review 437, 455–60; and Held, *Democracy and the Global Order*, 107–13.

⁶³ Kingsbury and others, 'The Emergence'; Benvenisti, *The Law of Global Governance*, 17; Held, *Democracy and the Global Order*, 17. This is also the case with regard to private corporations and their growing regulatory functions. See D Lustig and E Benvenisti, 'The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings' (2014) 15 TIL 125.

⁶⁴ Kumm, 'The Legitimacy', 907; Stewart, 'Administrative Law in the Twenty-First Century'; Cohen, 'Constitutionalism Beyond the State', 127; See eg, in the context of trade, the discussion on SPS provisions in Howse, 'Democracy, Science, and Free Trade'.

⁶⁵ For a similar argument in the context of tax treaties see T Dagan, 'The Tax Treaty Myth' (2000) 32 NYU Journal of International Law & Politics 939. According to Dagan, the main benefit of tax treaties is not the prevention of double taxation, but rather to provide 'residence' countries with greater tax revenues than the host country. These treaties thus typically further the interests of stronger states at the expense of weaker states.

⁶⁶ Benvenisti, *The Law of Global Governance*, 20.

⁶⁷ See E Benvenisti and GW Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2010) 60 Stanford Law Review 595; See also Benvenisti, 'Exit and Voice', and the discussion in Part 1 of this chapter.

⁶⁸ Stewart defines global regulation in terms of the 'wide range of programs and activities that adopt and implement rules and other norms in order to steer and coordinate conduct by numerous actors for achievement

recognition of the administrative character of global regulatory bodies, and their vast ‘discretionary decision-making power’.⁶⁹ The ‘problem of disregard’, is accordingly conceptualised in terms of these bodies’ tendency—in exercising decision-making power—to discount or marginalise the interests of politically weak and diffuse stakeholders, which results in unwarranted harms.⁷⁰

First, the specialised nature of global regulatory bodies unavoidably directs these bodies’ attention to specific sectors of human activity, leading to the development of ‘institutional tunnel vision’.⁷¹ This means that they are focused on promoting the objectives of dominant actors, while lacking incentives to consider the interests and concerns of those who are not squarely contributory to the realisation of their missions.⁷² As the latter are often weaker groups and diffuse stakeholders, their interests are systematically disregarded. Moreover, in specific sectors in which the demand for expediency in decision-making is prominent, additional factors contributing to the disregard of stakeholders’ interests are procedural failings which tend to disadvantage politically weak groups.⁷³

The structural feature of narrowly-construed, functional global governance institutions, is characteristic of the fragmented nature of the global regulatory arena. Fragmentation in this arena—actively and continually sustained by powerful actors—hence directly contributes to the occasioning and perpetuation of global accountability deficits.⁷⁴ Echoing the political-economy assumptions underpinning analyses of the intra-state dimension of political voice deficits, fragmentation in the global arena is argued to undermine the democratic potential of the international regulatory framework in primarily two ways.⁷⁵ First, fragmentation constrains the ability of weak, diverse, and diffuse stakeholders, to bargain on equal footing with powerful states by increasing the transaction costs necessary for the former to engage in the political coordination required for forming effective coalitions. Second, fragmentation enables powerful states to ‘forum shop’ and forsake less favourable venues for more advantageous ones, thereby increasing the competition between regulatory institutions, and limiting the impact of weaker

of common objectives’: RB Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’ (2014) 108 AJIL 211, 216.

⁶⁹ *ibid* 219; Kingsbury and others, ‘The Emergence’, Benvenisti, *The Law of Global Governance*.

⁷⁰ Stewart, ‘Remedying Disregard’, 220.

⁷¹ *ibid* 228.

⁷² *ibid* 229: Hybrid or private regulatory bodies which establish standards also tend to ‘disregard the interests of less influential firms and adopt standards that give competitive advantage to dominant members’.

⁷³ *ibid*.

⁷⁴ Benvenisti and Downs, ‘The Empire’s New Clothes’.

⁷⁵ *ibid*.

states.⁷⁶ To complicate matters, fragmentation is also considered an ‘invisible’ strategic tool insofar as it strengthens the bargaining power of the more powerful and limits that of the weak, all the while obscuring ‘the role of intentionality’.⁷⁷ In other words, the ‘narrow, functionalist design’ of global governance institutions operates as a ‘divide and rule strategy’,⁷⁸ permitting powerful actors and their interests to dominate global regulatory agendas ‘in a less visible and politically costly way’.⁷⁹

4. Political voice deficits: the missing dimension (Conclusion)

International legal scholars troubled by the challenges of globalisation and by those posed by the expansion and shifts in character of the international legal order, have employed the concept of political voice to both problematise, and legitimise, certain conditions associated with these processes. The present chapter has offered a mapping, along three dimensions, of existing analyses of what it conceptualises as contemporary ‘political voice deficits’. It has suggested that these three dimensions adequately capture how current international legal scholarship understands the spatial-political arenas in which political voice deficits are manifest today, the ways in which they are influenced, shaped, and sustained by both public and private entities, and particularly, the ways in which they transcend the domestic context, to become a focal point and concern for international law. At the core of these analyses, is thus the absence of mechanisms and infrastructures to ensure the inclusive and meaningful participation of individuals and constituencies in decision-making fora that affect their lives, through the use of political voice as a tool of political participation *within*, *across*, and *beyond* the state.⁸⁰

To recapitulate, the *intra-state* dimension of political voice deficits, centres on the impact of the international order on democratic politics *within* states, and how it impedes diffused stakeholders’ capacity to use political voice as a meaningful tool to affect decision-making vis-à-vis their *own* governmental institutions. Largely predicated on political-economy explanations, and on the interplay between the notions of ‘exit’ and ‘voice’, this part has

⁷⁶ Benvenisti and Downs employ Weingast’s three-person game to explain the way in which hegemons use international law to prevent weak and diffuse stakeholders from coming together: *ibid* 607–608; See also Benvenisti, ‘Sovereigns as Trustees’, 303–304.

⁷⁷ Benvenisti and Downs, ‘The Empire’s New Clothes’, 597.

⁷⁸ Benvenisti, *The Law of Global Governance*, 19; Benvenisti, ‘Ensuring Access’, 11.

⁷⁹ Benvenisti and Downs emphasise that the contemporary fragmented design of the international legal order is, to a great extent, a product of historical contingency, or otherwise, a natural response to the circumstances in the aftermath of World War II, rather than a calculated strategic effort by powerful states. Nevertheless, they argue, strategic concerns were doubtless at work in this period, and continue to be today. In fact, they earmark four strategies employed by powerful states to continue and sustain the fragmented quality of the international regulatory regime. See Benvenisti and Downs, ‘The Empire’s New Clothes’, 598.

⁸⁰ Benvenisti, ‘Ensuring Access’.

emphasised international law's role in facilitating enhanced exit opportunities for strong actors, thus correspondingly augmenting their political voice both within and outside their state of origin. These processes diminish the political voice of weaker stakeholders in political decision-making, and obstruct their ability to further their interests through the domestic democratic machinery.

The *inter-state* dimension of political voice deficits, centres on the cross-boundary effects of decisional externalities, and the increasing incongruence between decision-makers and voters or affected stakeholders. Under conditions of globalisation and the allocation of participatory rights along territorial borders, governmental decision-making often crucially affects the lives of foreign stakeholders albeit the latter's inability to dyadically participate therein through the use of voice as a political tool. Political decisional externalities largely vary along three lines: those regarding the crossing of physical borders; those entailing harmful consequences for foreign stakeholders; and those that do not trigger any particular justice concerns, yet have meaningful cross-boundary impact. Irrespective, however, of their particular type, decisional externalities all decisively determine certain conditions and prospects concerning the lives of foreign others, and this in the absence of deliberative fora guaranteeing participatory access and input through political voice.

The *global* dimension of political voice deficits, is concerned with the entrenched institutional deficiencies of fragmented global governance regimes. These deficiencies result in the marginalisation of the interests of 'the disregarded', and their limited ability to participate and influence global agendas. Not only are global governance regimes structurally organised to promote the interests of dominant and powerful actors, but they lack, more importantly, the institutional mechanisms to allow for meaningful input by diffuse and weaker stakeholders in order to counter, or at least mitigate, the harmful effects of these regimes.

Though largely represented as analytical in purpose and character, contemporary international legal discourses on political voice deficits also inevitably imply *normative* concerns associated with questions of legitimacy. These normative concerns culminate, at times, in demands related to global justice.⁸¹ From a normative and theoretical standpoint, the issue of meaningful political participation through the use of political voice *across and beyond*

⁸¹ See eg, Benvenisti, 'Sovereigns as Trustees'. Benvenisti makes the case for a model of sovereign trusteeship in order to promote global welfare and justice; Benvenisti speaks as well of international law's contribution to global justice in terms of the just allocation of resources. See Benvenisti, 'Ensuring Access'; Benhabib speaks of political membership as an important aspect of international or cosmopolitan justice. See Benhabib, *The Rights of Others*; Similarly, Fraser argues for a broadening of the requirements of global justice to incorporate a political dimension. According to Fraser 'justice requires social arrangements that permit all to participate as peers in social life': Fraser, 'Reframing Justice', 73.

borders, is often understood as a ‘regulative ideal’ that is underpinned by democratic principles.⁸² The normative discourse on political voice in the global arena, thus often assumes ‘democracy’ as a standard of ‘legitimacy’, in establishing a normative appeal to some form of a ‘democratisation’ of the global.⁸³ Strands within this discourse also link ‘democracy’ with ideas of global justice.⁸⁴ In these contexts, global justice is increasingly partnered with democratic ideals and processes, either in the conceptualisation of democratic ideals as *instrumental* for the attainment of global justice,⁸⁵ or, otherwise, in the reframing of global justice concerns in democratic terms, in theorising democracy itself (or the ideals it represents) as a ‘distinct species’ of justice, now to be recast globally.⁸⁶

Either way, what often remains marginal in contemporary international legal scholarship that employs the idea and semantics of political voice, is a thorough and explicit examination of the contextual origins of the normative thrust of voice as a political tool, found in normative theories of democracy. In other words, the objectives of political voice as a democratic ideal and normative benchmark, are often presupposed rather than examined by these international legal accounts. This is perhaps because of the difficulties associated with explicitly assuming democracy as the appropriate ‘order of legitimacy’ for political relationships beyond the state.

Consequently, these often-unqualified transpositions of the idea of political voice from theories of democracy to international legal discourse, are characterised by their implicit assumptions regarding the centrality of political voice in democratic theory; assumptions regarding its incontestable character as a pillar of normative democratic thought; and most importantly, assumptions regarding the *objectives* it is meant to serve within the democratic edifice. Current international legal analyses indeed provide a valuable explanatory framework which accounts for the need to expand the scope of spatial-political arenas in which political voice is, and should be, currently maintained. But their unqualified transposition of this principled idea, nevertheless results in a partial and restricted explanation of its normative purchase in these arenas. International legal accounts are therefore limited in their ability to

⁸² Stewart qualifies this ‘regulative ideal’ as demanding a ‘[...] respect for the same basic norm on which democratic states are constituted: equal respect and regard for all relevant individuals and groups and their interests and concerns’: Stewart, ‘Remedying Disregard’, 212.

⁸³ A Buchanan, ‘The Legitimacy of International Law’ in S Besson and J Tasioulas (eds.), *The Philosophy of International Law* (OUP 2010) 79, 93.

⁸⁴ The link between ‘legitimacy’ and ‘democracy’ and then ‘democracy’ and ‘global justice’ presumably establishes a further link between ‘legitimacy’ and ‘justice’. This is interesting given that, at least according to some, legitimacy is a ‘less-demanding standard than justice’: *ibid* 81. Concerns about the legitimacy of international law thus transform into concerns about international justice via the concept of democracy.

⁸⁵ See eg, Benvenisti, ‘Ensuring Access’.

⁸⁶ Fraser, ‘Reframing Justice’, 76, is an example of the latter.

justify the need to secure political voice beyond the state. They are even more limited in their ability to explain what aspects of political voice should be guaranteed for across and beyond the state, how these aspects should be guaranteed, and for what purposes.

The following Chapter II is tasked, therefore, with unpacking normative theories of democracy in order to shed new and necessary light on existing international legal accounts of contemporary political voice deficits. In undertaking the task of focusing on the *normativity* of political voice (as its subject of enquiry), and unpacking its treatment within theories of democracy, the next chapter is aimed at developing a more qualified understanding of the reasons for which political voice is emphasised and prioritised by some democratic theories, while marginalised or even disregarded by others. This understanding is instrumental in clarifying and refining our thinking about the problems currently posed by globalisation and dispersed political authority. It is only by establishing the role of political voice in attaining particular democratic ideals, that its weight and applicability in the global context, and in relation to political participation in forums of decision-making *beyond* the state, can be properly rationalised and understood in relation to the changing actualities in the exercise of power and political authority.⁸⁷ This analysis, as will become clear in the following chapters, is also a fundamental step in addressing the most recent challenges to political voice posed by the advent of new technologies, the subject of Chapter IV.

⁸⁷ See a similar point made by S Benhabib, 'The Embattled Public Sphere: Hannah Arendt, Juergen Habermas and Beyond' (1997) 90 *Theoria: A Journal of Social and Political Theory* 1, 2:

'Between this regulative ideal of democracy and the increasingly desubstantialised carriers of the anonymous public conversation of mass societies, a hiatus exists; it is this hiatus which transforms the regulative ideal of democracy into a *constitutive fiction*, and it is this fiction which causes continuous anxiety. [...] What a political philosopher can contribute to these issues is a normative clarification of the concept of the public sphere and its centrality for democratic theory and practice'.

III

The normative origins and thrust of ‘political voice’

In his classic *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*, Albert Hirschman presents the idea of ‘voice’ in economic terms, to mean, most basically, consumers’ ability to ‘kick up a fuss’.¹ Voice, in other words, in the context of the market, is a tool for conveying dissatisfaction, an instrument for changing policies, or a ‘mechanism of recuperation’.² In the political context, however—that from which the notion of ‘voice’ is originally borrowed—this notion also implies, more broadly, a kind of eminence. It represents a paradigm, or an ideal; the democratic ideal of ‘political action’.³

Against the backdrop of the preceding chapter, the present chapter engages with the notion of ‘political voice’ as its subject of enquiry, directing the spotlight to its normative significance and value as a democratic tool and ideal. The chapter turns, therefore, to normative theories of democracy. Normative theories of democracy ascribe different meanings to the concept of political voice as is intended in this research, and often use different terminology in relation to these meanings. This chapter thus aims to unpack the concept of political voice and its different connotations, and examine its normative bases and functions within the democratic edifice. This study into the normative force of political voice, seeks first to scrutinise, in particular, what these different connotations are; what they afford in terms of democratic objectives and aspirations; the ways in which they are associated by democratic theorists with broader, more normatively-loaded, democratic ideals; and the ways in which they are used to legitimise the exercise of public power and political authority within the state.

The chapter begins with a brief methodological explanation of the choice of theories it proceeds to examine (Part 1). In short, out of the breadth of normative theories of democracy, it chooses to centre on those which prioritise political voice as a dominant and particularly valuable democratic tool. These theories include the teachings of John Stuart Mill and Hannah Arendt, participatory and deliberative theories, and neo-republican theories. The chapter then proceeds to a substantive examination of these theories by way of nuanced, but largely thematic division, in order to systematically unpack the democratic objectives assigned to political voice within the democratic edifice (Part 2). Part 2 identifies four democratic objectives which the

¹ AO Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970) 30.

² *ibid* 30.

³ *ibid* 16.

variety of theories examined all ascribe to political voice: educative functions, epistemic functions, liberating functions, and equitable functions.

To elaborate, Part 2 begins with an analysis of the *educative* functions of political voice, i.e., its role in developing individuals' political intelligence and their community consciousness. It then proceeds to discuss the *epistemic* values of political voice, outlining its inherent advantage in improving the quality of political decisions, and its potential to promote the public interests of the community, or in other words, the 'common good'. In its third section, this part will examine the nexus theories of democracy establish between the use of political voice, and the ideal of *freedom*. This section will centre on a particular understanding of freedom as non-domination, as conceptualised primarily by neo-republican theories of democracy. These theories depart from the typical understanding of freedom amongst liberal theorists as a form of 'negative' freedom. Instead, they advance the notion of 'positive' freedom, largely understood as the normative power to be in control of one's destiny.⁴ Fourthly, this part will expose the relationship articulated by democratic theorists, between political voice and certain concepts of justice. This fourth section will consider both the absence of political voice as an inherent form of injustice in and of itself, as well as the significance of political voice for reaching just decisions.

This systematic unpacking of normative theories of democracy, permits identifying and conceptualising, in the final section of Part 2, two *distinct dimensions* in which political voice is manifest and in which it has normative value, within the context of the state. The *horizontal dimension* of political voice, most often referred to by democratic theorists as 'public discourse', embodies the notion of free information flow, and open, equal communications between members of a political community. It is primarily this horizontal dimension which has educative and epistemic functions in helping uncover individuals' political will, developing their community consciousness, and enabling the collective attainment of decisions which promote public interests or the common good. The *vertical dimension* of political voice, embodies the notion of effective information exchange and communication between individuals or communities and public decision-makers; and it is this dimension which is regarded as fundamental for the attainment of freedom as non-domination and the realisation of justice. Beyond the conceptualisation of the two dimensions of political voice and their democratic objectives, the in-depth analysis undertaken in Part 2 also unearths the relationships

⁴ On the difference between 'negative' and 'positive' concepts of liberty see I Berlin, 'Two Concepts of Liberty' in *Four Essays on Liberty* (OUP 1969) 118.

between these two dimensions; and, in particular, the significance of the former, horizontal dimension and its objectives, for guaranteeing and sustaining the latter vertical dimension, and *its* objectives.

The analyses in Part 2, provide therefore, a comprehensive normative account of the roles ascribed to political voice within the democratic edifice that is typically associated with the political arena of the nation-state, as the ‘primary locus of political legitimacy and the pursuit of justice’.⁵ As Chapter II has nevertheless clarified, both globalisation and certain developments in the international legal order, have created novel vertical relationships beyond the state which generate problems of democratic legitimacy. These, in turn, have prompted international lawyers to employ the concept of political voice as a legitimising tool in the transnational and global arenas. Having now clarified the two dimensions in which political voice has normative purchase in the domestic sphere, and the specific democratic functions and objectives that it serves therein, Part 3—now treading on more solid normative terrain—proceeds to examine whether normative theories of democracy could offer a point of departure for rationalising the need to secure the use of voice as a political tool *beyond* the state.

Specifically, Part 3 will examine the normative purchase of claims to guarantee both dimensions of political voice transnationally or globally under conditions of globalisation, cross-boundary power-relations between decision-makers and affected stakeholders, in the absence of a global polity or a global democratic forum, and in light of individuals’ inability to participate therein through vote. In other words, the thematic discussion of the functions political voice serves within the *domestic* democratic arena, facilitates a conceptual decontextualization of this priority, to develop an understanding of the ways in which its normative properties could have equal force in certain political contexts beyond the state. The first two sections of Part 3 respectively, will thus examine the relevance of the *horizontal* dimension of political voice (and its educative and epistemic goals) beyond the national polity, to contemplate its normative pull in the context of cross-boundary communities bound together by their subjection to common threats and political power. The following two sections will similarly discuss how the values and objectives of securing freedom and justice can no longer be guaranteed by the state alone; requiring thereby, the transnational availability of the *vertical* dimension of political voice, to enable participation in decision-making forums across and beyond the state.

⁵ T Nagel, ‘The Problem of Global Justice’ (2005) 33 *Philosophy & Public Affairs* 113.

The study undertaken in this chapter is, therefore, at once backward and forward looking in its orientation and contribution. It is backward looking in its aim to shed necessary light on the applicability of the democratic ideal of political voice to political arenas across and beyond the state. The unpacking of theories of democracy and their treatment of political voice, provides the necessary normative bedrock on the basis of which discussions on the relevance and justification of political voice beyond the state, could be steered. This study thus aims to complement existing international legal accounts of present political voice deficits, that were mapped out in Chapter II, by illuminating the previously veiled normative objectives of political voice, and exposing the fundamental importance of its horizontal dimension alongside its vertical one. In doing so, it clears the path for a nuanced application of the concept of political voice to the inter-state and global contexts. The understanding of political voice promoted herein, is one which is coincidentally narrower in scope and ambition, than certain cosmopolitan ideas entailing a comprehensive democratisation of the global; but also, more normatively-inculcated than the problem-solving paradigm of accountability at the crux of most international legal accounts.⁶

This study is nevertheless forward looking as well. Part 4, in conclusion, will explain the significance of the complex normative lens this chapter affords for assessing contemporary challenges to political voice posed by the advent of new technologies. These novel challenges, discussed in detail in Chapter IV, complicate and reshape the political voice deficits that are already produced by conditions of globalisation and the structural features of the international legal regime. Namely, the proliferation of new digital technologies and their regulation by private corporations, primarily generate a significant new *horizontal* voice deficit, which also considerably affects and aggravates the existing vertical deficits currently identified by international legal scholars. The normative discussion this chapter engages in, permits a proper assessment of these novel challenges, and a thorough account of their present implications for individuals' and societies' democratic well-being.

1. Normative theories of democracy

The notions of active political participation, public deliberation, and the exercise of voice as a political tool, feature prominently in several normative theories of democracy. Whilst this

⁶ N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 EJIL 247, 246; Keohane defines accountability as a relationship 'in which an individual, group or other entity makes demands on an agent to report his or her activities, and has the ability to impose costs on the agent': RO Keohane, 'Global Governance and Democratic Accountability' in D Held and M Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance* (Polity Press 2003) 130, 139.

might appear a trite observation given the etymology of the word ‘democracy’,⁷ a closer look at the variants of democratic theory suggests otherwise. These theories all converge on the basic assumption that ‘rule by the people’ is the best political structure for safeguarding individual freedom or social justice; but diverge on their understandings of what these notions of freedom and justice actually mean. These theories also diverge on the ways in which they organise and valorise other ideals normally promoted and protected in democratic orders. Active political participation and the exercise of voice as a political tool through discursive processes, are therefore understood and prioritised differently in varying political theories in accordance with the principles and conceptions from which these theories proceed.⁸

Although the intricacy of these principles and conceptions, and their inherently contested character, complicate efforts to neatly typologise normative theories of democracy, many such typologies implicitly pigeonhole democratic theories according to how thickly or thinly they conceptualise and prioritise political participation and the discursive elements of the democratic process.⁹ Their parting line often divides between theories which take people’s preferences as a given, and those which hold a transformative view of human beings.¹⁰ In this view, the first group of theories—often understood as emanating from, and belonging to, the liberal tradition¹¹—justifies democracy as the best form of government to protect individuals’ pre-existing diverging interests and moral perspectives.¹² It is a defence of individual freedom,

⁷ The origins of the word ‘democracy’ are in the Greek word *demokratia*—*demos* (people) and *kratos* (rule)—to mean rule by the people. See D Held, *Models of Democracy* (Polity Press 1987) 2. Political participation from this standpoint, could be understood as a constitutive feature of any form of democratic rule.

⁸ DW Keim, ‘Participation in Contemporary Democratic Theories’ in JR Pennock and JW Chapman (eds.), *Participation in Politics: Nomos XVI* (Lieber-Atherton 1975) 1, 1.

⁹ See eg, I Shapiro, *The State of Democratic Theory* (Princeton University Press 2003); CS Nino, *The Constitution of Deliberative Democracy* (Yale University Press 1996); Keim, ‘Participation in Contemporary Democratic Theories’.

¹⁰ See eg, Shapiro’s division into ‘aggregative’ and ‘deliberative’ theories: Shapiro, *The State of Democratic Theory*; see also Nino, *The Constitution of Deliberative Democracy*; Or otherwise, the difference between theories that ‘emphasise the plurality of citizens’ interests and the potential for civil strife; [and] those who see possibilities for civil harmony based on a commonality of interests, values, or traditions’: J Bohman and others (eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) x. There are of course, other typologies. Held for example, distinguishes between four ‘classic models’: the classical model in ancient Athens, protective democracy, developmental democracy, and direct democracy, and four contemporary models: elitist democracy, pluralism, legal democracy, and participatory democracy. See Held, *Models of Democracy*; Christiano offers a distinction between utilitarian theories and non-utilitarian theories. See T Christiano ‘Democracy’ in EN Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (2018 Edition).

¹¹ Of course, the liberal tradition itself is a complex one and includes several variants. For an analysis of the liberal tradition of thought see J Brennan and J Tomasi, ‘Classic Liberalism’ in D Estlund (ed), *The Oxford Handbook of Political Philosophy* (OUP 2012) 115; and F Cunningham, *Theories of Democracy: A Critical Introduction* (Routledge 2002).

¹² I Honohan, ‘Liberal and Republican Conceptions of Citizenship’ in A Shachar and others (eds.), *The Oxford Handbook of Citizenship* (OUP 2017) 87; Shapiro, *The State of Democratic Theory*, 3; Nino includes in this group what he terms utilitarian approaches, economic conceptions of democracy, elitist theories, and pluralist theories. See Nino, *The Constitution of Deliberative Democracy*, 68; A similar conception of the theories this group includes can be found in Bohman and others, *Deliberative Democracy*.

whereby freedom is understood in its negative form as representing a *constraint* on government, rather than a goal it should promote.¹³ Governments, from this standpoint, should be neutral towards the moral views of their citizens and refrain from imposing on them, in law, any particular vision of what is considered a ‘good life’.¹⁴

This understanding of freedom and its relation to self-government, is one which holds a minimalist conception of political participation. If the goal of democracy is to accommodate the sum of predispositions of individuals constituting the polity (understood as the ‘common good’);¹⁵ and freedom is one’s opportunity to pursue these preferences with minimal interference from the state; political participation accordingly, is construed as an essentially private act, exercised narrowly through the individual, secret, vote.¹⁶ This group of theories, as aptly put by Frank Cunningham, ‘[. . .] view a large measure of apathy and political *inactivity* on the part of ordinary citizens *essential* to democracy’.¹⁷

Opposite these conceptions, are theories which place active political participation, public deliberation, and the use of voice as a political tool, at the crux of their normative frameworks, thereby prioritising the *discursive* features of democracy. It is the analysis of these theories which is the subject of this chapter, in laying the theoretical and normative groundwork for the chapters to come. Specifically, this chapter will grapple with John Stuart Mill’s nineteenth-century theory of democracy, with the political philosophy of Hannah Arendt, with participatory and deliberative theories of democracy, and with neo-republican theories primarily reflected in the work of Philip Pettit.

Mill and Arendt are two canonical individual thinkers who have been markedly influential in emphasising the normative force of active political participation and public discourse in their political philosophies, but that do not belong neatly to any school of thought.¹⁸ Mill, who despite being considered by most scholars a central pillar of the liberal tradition, has substantial civic components that underscore both the utilitarian and intrinsic values of political voice,

¹³ MJ Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Harvard University Press 1996) 25–26; Honohan points out that this interpretation of freedom can be a negative one, understanding freedom as non-interference, or a positive one, understanding freedom as autonomy. See Honohan, ‘Liberal and Republican Conceptions of Citizenship’, 87.

¹⁴ Sandel, *Democracy’s Discontent*, 4; Honohan, ‘Liberal and Republican Conceptions of Citizenship’, 85; Elster calls these ‘social choice theories’: J Elster, ‘The Market and the Forum: Three Varieties of Political Theory’ in J Bohman and others (eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997).

¹⁵ Elster, ‘The Market and the Forum’.

¹⁶ *ibid* 3.

¹⁷ Cunningham, *Theories of Democracy*, 123 (emphasis added).

¹⁸ Both Mill and Arendt were inspired by the work of Alexis de Tocqueville, and thus although his work is not examined herein in its own right, much of its thrust is brought forth through the discussion of these two thinkers. On this point see C Pateman, *Participation and Democratic Theory* (CUP 1970) 30.

thus rendering him an important figure in any discussion on these values. Arendt's political philosophy has equally been considered a significant landmark in the development of participatory and deliberative theories of democracy, despite the controversial quality of her thinking.¹⁹ Her unique accounts of both the 'political' and the 'public realm', and the way in which they relate to notions of freedom, power, and authority, all illuminate the significance of political voice and its contribution to other democratic values. Similarly, participatory and deliberative theories—as their name indicates—place a special emphasis on active political participation and public deliberation, often considering the deliberative process itself as the source of authority and legitimacy in democratic regimes. Taking shape in the latter half of the twentieth century, these theoretical corpuses clearly set themselves in opposition to their liberal counterparts, in advocating for a vision of politics as a dialogical process of deliberation and contestation rather than one intended to aggregate individual interests. Finally, neo-republican theories—seeking to transform classic republican ideals into modern political doctrines—offer a revised understanding of political freedom which underscores the relevance of political voice as an essential tool in its achievement.

Taken together, these theories provide a rich and comprehensive normative account of the concept of political voice as it is intended in this research. This account will later be drawn on as a normative resource in support of the arguments furthered herein. Methodologically, given the breadth and depth of theories of democracy, a comprehensive analysis of each theoretical body remains beyond scope, but neither is it substantively required. Alternatively, the analyses that feature in this chapter are structured thematically, so as to uncover and highlight the core vision these theories mutually share of the normative pull of political voice. Particularly, the theories this chapter will now proceed to discuss, all establish an intimate nexus between public deliberation and political participation, and individuals' political intelligence, community building, good political decision-making, and the realization of freedom and justice. As the dissertation advances to examine the novel challenges posed at present to political voice within, across, and beyond borders, its instrumental role in securing these democratic ideals will hopefully clarify its critical value and normative purchase in all three arenas.

¹⁹ M Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (CUP 2009); MA Hill, 'Introduction' in MA Hill (ed), *Hannah Arendt: The Recovery of the Public World* (St. Martin's Press 1979) ix, ix.

2. Unpacking the democratic objectives of political voice

A. *The educative functions of political voice*

The educative functions of political voice—properly understood as the contribution of the democratic deliberative process to individuals’ moral and intellectual capacities and their sensibilities towards the interests of others—have been emphasised, albeit occasionally differently, by major democratic theorists who prioritise the dialogical and participatory features of democracy.

John Stuart Mill, a formative contributor to the educative argument and one of its earlier advocates, is commonly considered amongst the first to lay bare and defend *liberal* democracy.²⁰ In contrast, the civic or participatory components of his theory have either been overlooked or otherwise criticised as standing in tension with their liberal, or even elitist, counterparts.²¹ Mill, however, was ‘intensely public-spirited’.²² Despite the complexity and evolving nature of his democratic theory, which accentuated different normative aspects at different periods of his life,²³ his vindication of democratic rule as the ‘ideally best form of government’²⁴ offers a clear set of arguments emphasising the educative objectives of democracy as a whole, and the centrality of political voice for the attainment of these objectives.

Mill’s educative argument centres on the contribution of active political participation and the use of voice through public deliberation, to individuals’ mental and political faculties, and to their cultivation of community consciousness. Premised on his understanding of the objectives political institutions are meant to serve,²⁵ Mill’s theory of government, as outlined primarily in *Considerations on Representative Government*, begins with what is, in his view,

²⁰ Cunningham, *Theories of Democracy*, 27; Held, *Models of Democracy*, 85; See also: JS Dryzek and P Dunleavy, *Theories of the Democratic State* (Palgrave Macmillan 2009).

²¹ DE Miller, ‘John Stuart Mill’s Civic Liberalism’ (2000) 21 *History of Political Thought* 88.

²² According to Justman, who is one of the few scholars to discuss at length the civic components of Mill’s political theory (on this point see Miller, *ibid* 89), Mill’s attitude towards the republican tradition was contentious, on one hand breaking from Benthamism in the name of civic ideals, but also voicing these ideals cautiously, struggling with his conflicting loyalty to liberal values. See S Justman, *The Hidden Text of Mill’s Liberty* (Rowman & Littlefield Publishers 1991).

²³ RW Krouse, ‘Two Concepts of Democratic Representation: James and John Stuart Mill’ (1982) 44 *The Journal of Politics* 509; DF Thompson, *John Stuart Mill and Representative Government* (Princeton University Press 1976) 6; This analysis will focus on Mill’s *On Liberty* and mainly on his later *Considerations of Representative Government*. Nonetheless, in relying also on the writings of Millian scholars, it incorporates their conclusions drawn from his other work as well, and aims to remain faithful to the broader context in which he wrote. For a comprehensive examination of Mill’s thought see Thompson, *John Stuart Mill and Representative Government*; For discussions on the inconsistencies in Mill’s theory and critiques, see eg: G Himmelfarb, *On Liberty and Liberalism: The Case of John Stuart Mill* (Knopf 1974); and Justman, *The Hidden Text*.

²⁴ JS Mill, *Considerations on Representative Government* (CUP 2011) (1861).

²⁵ *ibid*, Chapter II: A Criterion of a Good Form of Government.

a test for good government. He argues that whilst the purpose of any government is to promote the aggregate interests of its society, the test of a good government could not be applied in relation to how it fosters a set of *fixed* values or interests of any *one* society.²⁶ Rather, the success of a government should otherwise depend—more than anything else—on ‘the qualities of the human beings composing the society over which a government is exercised’.²⁷ For Mill then, good government is one which fulfils its *educative* functions—one which promotes ‘the virtue and intelligence of the people themselves’,²⁸ and stimulates ‘[...] the general mental advancement of the community’.²⁹

From this point of departure, it is primarily on the basis of this educative argument that Mill proceeds to rationalise the notion of a representative government, and to vindicate its superiority over despotism, notwithstanding the latter’s virtue or ability to ensure the inclusion of individual interests.³⁰ In other words, Mill is mostly troubled by the prospect of mental and political passivity, which he finds to be an inherent aspect of despotism.³¹ Although an ideal despot, could—at least in principle—‘ensure a virtuous and intelligent performance of all the duties of government’,³² despotism nevertheless implies that individuals are ‘without any potential voice in their own destiny’, and ‘exercise no will in respect to their collective interests’.³³ Not only is political passivity thus most likely to result in the exclusion or marginalisation of individual interests, but more importantly, it is detrimental for the development of individuals’ mental and active qualities, and therefore disadvantageous to the interests of both individuals and society as a whole.³⁴

²⁶ *ibid* 17: ‘For in the first place, the proper functions of a government are not a fixed thing, but different in different states of society’.

²⁷ *ibid* 28.

²⁸ *ibid* 30.

²⁹ *ibid* 33; See also Pateman, *Participation and Democratic Theory*, 29; Thompson, *John Stuart Mill and Representative Government*, 9; Krouse, ‘Two Concepts of Democratic Representation’, 529; Miller, ‘John Stuart Mill’s Civic Liberalism’, 91.

³⁰ This is not to say that Mill marginalised the significance of inclusion of individual interests. In fact, this was the second prong of his argument in support of democracy, often termed the ‘protective argument’: Thompson *John Stuart Mill and Representative Government*. The same type of argument was picked up by later liberal democrats, occasionally labelled ‘democratic revisionism’, an approach which perceives self-protection as the function of political participation: Keim, ‘Participation in Contemporary Democratic Theories’.

³¹ Mill, *Considerations*, 46: ‘Suppose the difficulty vanished. What should we then have? One man of superhuman mental activity managing the entire affairs of a mentally passive people. Their passivity is implied in the very idea of absolute power’.

³² *ibid* 45. Mill also argued the impracticality of actually finding a despot who would prioritise the inclusion of individual interests. He claimed in this context that an ideal monarch would need to be of such extraordinary ‘faculties and energies [...] for performing this task in any supportable manner, that the good despot whom we are supposing can hardly be imagined as consenting to undertake it’ (at 46).

³³ *ibid*.

³⁴ *ibid* 55–57.

Importantly, to Mill, individual cultivation is not a matter of developing one's own intellect in a self-seeking fashion, but is rather conceptualised as the enhancement of the intellectual and moral qualities required for participation in *public* life.³⁵ He idealises the active individual character as the most beneficial to the advancement of the community, and advocates for the exercise of public functions and political participation, as conducive, above all other activities, to the development of such character. It is worth quoting Mill here at length:

What is still more important [...] is the practical discipline which the character obtains, from the occasional demand made upon citizens to exercise, for a time and their turn, some social function. It is not sufficiently considered how little there is in most men's ordinary life to give any largeness either to their conceptions or to their sentiments. Their work is a routine; [...] neither the thing done, nor the process of doing it, introduces the mind to thoughts or feelings extending beyond individuals; [...] in most cases the individual has no access to any person of cultivation much superior to his own. *Giving him something to do for the public, supplies, in a measure, all these deficiencies.*³⁶

According to Mill, the value of political participation is therefore also rooted in its contribution to one's sense of citizenship, to one's ability to become sympathetic to the general interest, and appreciative of the broad and more profound implications of actions.³⁷ In view of that, active political participation cannot be satisfied simply by voting for elected representatives. Rather, it is intimately tied to engagement in collective political discourse and dialectic deliberation through which one becomes conscious of his community.³⁸ As aptly put by Thompson: '[...] he [Mill] locates his "school of public spirit" not so much in the act of voting as in the activities of political associations where individuals can learn from each other by discussing the means and ends of political actions'.³⁹ These discussions are beneficial according to Mill, for political will formation which may then be exercised to influence decision-making through the act of voting.⁴⁰ Robust public deliberation and the use of voice as a political tool are thus prioritised

³⁵ Thompson, *John Stuart Mill and Representative Government*, 37.

³⁶ Mill, *Considerations*, 66–67 (emphasis added).

³⁷ Thompson, *John Stuart Mill and Representative Government*, 17, 38.

³⁸ Mill, *Considerations*, 165:

'It is by political discussion that the manual labourer, whose employment is a routine [...] is taught that remote causes, and events which take place far off, have a most sensible effect even on his personal interests; and it is from political discussion, and collective political action, that one whose daily occupations concentrate his interests in a small circle round himself, learns to feel for and with his fellow-citizens becomes consciously a member of a great community'.

Pateman terms this the 'integrative function' of participation: Pateman, *Participation and Democratic Theory*, 33; See also B Baum, 'Freedom, Power and Public Opinion: J.S. Mill on the Public Sphere' (2001) 22 *History of Political Thought* 501, 501:

'John Stuart Mill explains in *Considerations on Representative Government* that the exercise of political freedom is not limited to the formal institutions of representative democracy; it also encompasses the broader channels of public discussion and political will formation outside of representative assemblies—that Jürgen Habermas calls the public sphere'.

³⁹ Thompson, *John Stuart Mill and Representative Government*, 41.

⁴⁰ According to Mill, public deliberation is meaningless unless it is coupled by the ability to vote as well. He says: 'But political discussions fly over the heads of those who have no votes, and are not endeavouring to

as essential components of the democratic process, through which individuals are able to reach informed public decisions in acting as a community.⁴¹ Moreover, communication and dialogical debate on issues of public concern, enable one to develop shared understandings with fellow members of the community, thereby contributing to one's self-conception and identity as a *member* of that community.⁴²

Indications of Mill's normative endorsement of intersubjective public discourse appear earlier in his account of the role of freedom of expression in a democratic society in *On Liberty*.⁴³ While generally read as a liberal or even libertarian defence of the private sphere, Mill's vindication of the freedom of expression as a whole in *On Liberty* is also informed by republican principles that are interwoven, albeit innocuously, into the text.⁴⁴ Especially when read in conjunction with his later *Considerations on Representative Government*, Mill's liberal thesis may be understood as geared towards both the individual and *social* values of public discussion, in their instrumental and intrinsic effects.⁴⁵

acquire them': Mill, *Considerations*, 165. See also Baum, 'Freedom, Power and Public Opinion', 504: 'In Mill's view [...] political freedom is not a matter of each citizen's simply pursuing a political will that is already formed *before* she or he participates in collective deliberations. It involves citizens sharing in processes of deliberation and will formation'.

⁴¹ See Mill, *Considerations*, 105:

'I know not how a representative assembly can more usefully employ itself than in talk, [...] A place where every interest and shade of opinion in the country can have its cause even passionately pleaded, in the face of the government and of all other interests and opinions, can compel them to listen, [...] is in itself, if it answered no other purpose, one of the most important political institutions that can exist anywhere'.

See also Baum, 'Freedom, Power and Public Opinion', 510; D Lustig and E Benvenisti, 'The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings' (2014) 15 TIL 125, 134.

⁴² Lustig and Benvenisti, 'The Multinational Corporation', 136.

⁴³ JS Mill, *On Liberty* (With an Introduction by WL Courtney, LLD) (The Walter Scott Publishing Co., The Project Gutenberg EBook 2011); On the relationship between the two texts in their treatment of the value of political discourse see J Mansbridge, 'On the Idea that Participation Makes Better Citizens' in SL Elkin and K Edward Soltan (eds.), *Citizen Competence and Democratic Institutions* (The Pennsylvania State University Press 1999) 291.

⁴⁴ According to Justman, Mill's forcible defence of the private sphere overbears these principles in the text of *On Liberty*. Mill's advocacy for self-realisation 'almost loses its political charge, almost becomes identical with the bourgeois ideal of private happiness': Justman, *The Hidden Text*, 3. Justman therefore criticises *On Liberty* as curbing republicanism, in that Mill's republican values can only be gleaned from the subtext (at 27).

⁴⁵ See Mill, *On Liberty*, 63:

'Were an opinion a personal possession of no value except for the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. *But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it*' (emphasis added).

See also Mansbridge, 'On the Idea that Participation Makes Better Citizens', 309: 'Mill advocated individual development in public spirit and critical intelligence primarily for its effects on the larger polity, and only secondarily for the good it might do the individual'.

These are qualified primarily, in *On Liberty*, in terms of the epistemological and moral significance of the discovery of truth or knowledge (as social products).⁴⁶ Their educative value lies in their contribution to the development of habits of curiosity and enquiry forming individual intelligence and an active character.⁴⁷ Whilst, according to Mill, opinions are personal possessions, withholding them from the wider community means depriving society of the occasion to compare ideas. His normative claim for a freedom of *discussion* (rather than *expression*) is grounded, therefore, in the impact of discussion on both speakers *and* listeners.⁴⁸ It serves as an educative tool in the hands of the latter to facilitate the formation of knowledgeable opinions about decisions that shape their lives.⁴⁹

Though professed only tacitly in its final pages, and oddly denied as being connected to the subject of liberty,⁵⁰ it is already in *On Liberty* that Mill recognises the attainment of knowledge—through free discussion—as advantageous for the development of public sentiments and shared public experiences.⁵¹ In that view, deliberative communication is conducive to the ‘cultivation of public spirit’.⁵² Tellingly, he writes:

It belongs to a different occasion from the present to dwell on these things as part of national education; as being, in truth, the peculiar training of a citizen, the practical part of the political education of a free people, taking them out of the narrow circle of personal and family selfishness, and accustoming them to the comprehension of joint interests, the management of joint concerns—habituating them to act from public or semi-public motives, and guide their conduct by aims which unite instead of isolating them from one another.⁵³

⁴⁶ Gouinlock explains Mill’s understanding of truth as a product of a social process of deliberation as being a remarkable departure from classical empiricist epistemology. According to the latter approach, true belief could be distinguished from a false one by the subjective quality of that belief. See J Gouinlock, *Excellence in Public Discourse: John Stuart Mill, John Dewey, and Social Intelligence* (Teachers College Press 1986) 9–10; Mill writes:

‘Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners’: Mill, *On Liberty*, 131.

⁴⁷ Gouinlock, *Excellence in Public Discourse*, 12; Justman, *The Hidden Text*, 60.

⁴⁸ KC O’Rourke, *John Stuart Mill and Freedom of Expression: The Genesis of a Theory* (Routledge 2001) 79, 81. O’Rourke explains this normative reason, however, in terms of its contribution to the development of one’s individuality rather than in its benefit for society as a whole. See O’Rourke at 82, 162–63,

⁴⁹ Gouinlock, *Excellence in Public Discourse*, 17.

⁵⁰ Mill, in speaking of the importance of individuals’ active faculties, says: ‘These are not questions of liberty, and are connected with that subject only by remote tendencies; but they are questions of development’: Mill, *On Liberty*, 279.

⁵¹ According to Justman, this is an informative example of Mill’s struggle in reconciling his republican views with his advocacy for liberal non-interference. Referring to Mill’s notion of people learning to act in concert, he points out that ‘[t]his latter principle so apparently disagrees with the first [non-interference] that Mill banished it to the margin of the text’: Justman, *The Hidden Text*, 165.

⁵² Mansbridge, ‘On the Idea that Participation Makes Better Citizens’, 307; In the words of Justman, ‘Mill pleads for the private sphere in the language of public spirit’: Justman, *The Hidden Text*, 47. Or elsewhere (at 22): ‘Mill defends private interests, then, at the same time that he protests the morality of self-interest in the name of a high-minded republicanism’; See also Miller, ‘John Stuart Mill’s Civic Liberalism’.

⁵³ Mill, *On Liberty*, 279.

Shifting back to *Considerations on Representative Government*, it is only there that Mill clearly tethers his advocacy of deliberative public discourse with political participation and the educative purpose of developing other-regarding sensibilities—with the former being a constitutive element in the latter.⁵⁴ In his view, the significance of open, public, and authentic communication in a political regime, is normatively grounded not only in its role in empowering individuals to meaningfully engage in decision-making that shapes their own lives, but also in its role in political community building.⁵⁵

The educative significance of public deliberation and political participation for community building and the development of other-, or public-, regarding sentiments, is relatedly emphasised in Hannah Arendt's political thought. Unlike Mill's, Arendt's political philosophy does not purport to constitute a full-fledged theory of government. Concerned more, as it were, with the 'fundamental activities that bear upon politics',⁵⁶ she devotes considerable attention to the plurality of humans and its dynamic character.⁵⁷ The starting point for Arendt's understanding of politics, is the recognition that '[...] men, not Man, live on the earth and inhabit the world'.⁵⁸ This represents the most distinctive feature of her thought, the understanding according to which, man alone—contrary to other species—has the capacity not only to distinguish himself from others, but also to communicate his distinction by speaking and acting within the human community.⁵⁹ Accordingly, politics is conceptualised by Arendt

⁵⁴ Mill, *Considerations*, 109–10:

'As between one form of popular government and another, the advantage in this respect lies with that which most widely diffuses the exercise of public functions; [...] and above all by the utmost possible publicity and liberty of discussion, whereby [...] the whole public, are made, to a certain extent, participants in the government'.

As mentioned earlier (see Miller, 'John Stuart Mill's Civic Liberalism'), many commentators view *On Liberty* as inconsistent with the political philosophy Mill develops in other work. According to Miller, however, these perspectives in Mill's thought can be understood as reconciled rather than as standing in tension with one another.

⁵⁵ Lustig and Benvenisti, 'The Multinational Corporation'.

⁵⁶ Canovan, *Hannah Arendt: A Reinterpretation*, 103–104.

⁵⁷ *ibid* 130, 140. This analysis draws mostly on H Arendt, *The Human Condition* (The University of Chicago Press 1958), considered her major philosophical work. In relying on interpretations of her work as well, however, the analysis herein purports to remain faithful to contextual understandings of her thought. Namely, according to Canovan, a proper understanding of Arendt's thoughts as expressed in *The Human Condition*, situates it in the broader context of Arendt's work, in relating it, in particular, to her train of thought 'set off by her encounter with totalitarianism'. *The Human Condition*, that is, should not be taken as a political treatise, and is concerned less with politics than with the 'predicament from which politics must start': Canovan, *Hannah Arendt: A Reinterpretation*, 99–100; Benhabib makes a similar point. According to Benhabib a proper understanding of Arendt's thought requires contextualising her philosophy, as brought forth in *The Human Condition*, in her broader work, and understanding it as emanating from her dialogue with Martin Heidegger and Karl Marx. See S Benhabib, *The Reluctant Modernism of Hannah Arendt* (Rowman & Littlefield Publishers 2003).

⁵⁸ Arendt, *Human Condition*, 7.

⁵⁹ *ibid* 176:

'But only man can express this distinction and distinguish himself, and only he can communicate himself and not merely something—thirst or hunger, affection or hostility or fear. In man, otherness, which he shares with

not as a ruling system, but as a mode of existence which takes place in the intangible space between plural men, enabled and sustained through speech and action.⁶⁰ In other words, the political realm is characterised by the activity of continual dialogical debate and public reasoning between men within this space, dubbed by Arendt ‘the space of appearance’.⁶¹

The thrust of her political philosophy is, therefore, in her understanding of, and normative emphasis on, the significance of the public realm for the ‘web of human relationships’.⁶² According to Arendt, the public realm concurrently enables the deliberation of common affairs of a community, *and* the manifestation of individuality.⁶³ This is because common affairs could only be discussed whereby interlocutors hold different perspectives—stemming from their *individual* distinctness—and where these perspectives could be shared between them through persuasion and dissuasion, exclusively in the public sphere.⁶⁴ Thus, according to Arendt (and echoing Mill), political participation in public discourse have an educative and epistemic

everything that is, and distinctness, which he shares with everything alive, become uniqueness, and human plurality is the paradoxical plurality of unique beings’.

See also P Fuss, ‘Hannah Arendt’s Conception of Political Community’ in MA Hill (ed), *Hannah Arendt: The Recovery of the Public World* (St. Martin’s Press 1979) 157, 158.

⁶⁰ Arendt, *Human Condition*, 175–81; Keim, ‘Participation in Contemporary Democratic Theories’, 18–20; Benhabib, *The Reluctant Modernism*, xliii; This understanding of the ‘political’ informed Arendt’s critique of the tradition of Western political philosophy that misconstrued, according to her, the nature of politics by approaching political philosophy from the philosopher’s standpoint rather than that of the political actor. From this standpoint, politics is understood as a means to an end, rather than an end by itself, naturally giving rise to its conception as a system which should be guided by a ruler, as opposed to a system born from the plurality of actors acting in concert in the public realm. See Canovan, *Hannah Arendt: A Reinterpretation*, 255–56.

⁶¹ Arendt, *Human Condition*, 199; Fuss, ‘Hannah Arendt’s Conception’, 168; Keim, ‘Participation in Contemporary Democratic Theories’, 20–21.

⁶² Arendt, *Human Condition*, 183.

⁶³ *ibid* 180:

‘The revelatory quality of speech and action comes to the fore where people are *with* others and neither for nor against them—that is, in sheer human togetherness. [...] Because of its inherent tendency to disclose the agent together with the act, action needs for its full appearance the shining brightness we once called glory, and which is possible only in the public realm’;

And on page 179: ‘In acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world’;

Also on page 182: ‘Action and speech go on between men, as they are directed toward them, and they retain their agent-revealing capacity even if their content is exclusively “objective”’; ‘Who’ one is—the unique identities of people revealed only in acting and speaking—is therefore, according to Arendt, distinguished from ‘what’ one is—the sum of people’s physical attributes their characters and traits, and the roles they play in society (at 179).

See also Fuss, ‘Hannah Arendt’s Conception’, 160; and J McGowan, *Hannah Arendt: An Introduction* (University of Minnesota Press 1998) 38.

⁶⁴ Arendt, *Human Condition*, 50–58; Canovan, *Hannah Arendt: A Reinterpretation*, 111; See also G Kateb, ‘Political Action: Its Nature and Advantages’ in D Villa (ed), *The Cambridge Companion to Hannah Arendt* (CUP 2000) 130, 132–33. It is important to note, in this vein, Arendt’s distinction between the ‘public’ and the ‘social’ or ‘society’. ‘Society’ in Arendt’s thought was a particular mode of relations, which stood in contrast to the ‘public realm’ as a distortion of that sphere. In society, that is, the concerns that bind individuals are private, relating to production and consumption. What unites individuals in society are their common material needs which can be catered for collectively, rather than a common world in which their distinctness is recognized. See Canovan, *Hannah Arendt: A Reinterpretation*, 116–20.

function in contributing to individual identity building⁶⁵ and to one's encounter with the perspectives of others, and thus to the development of other-regarding sensibilities in individuals and to their uniting.

Arendt often refers to these educative outcomes that public discourse achieves, as the 'common sense',⁶⁶ a 'reality', which informs our individual perception of the world.⁶⁷ It is public discourse within the public realm—the exercises of persuasion, debate, and judgement—that both provide and are enabled by plural perspectives, to produce a certain type of non-scientific knowledge, but one concerned with '[...] opinion about the sphere of public life and the common world'.⁶⁸ In this view, communication differs from expression in that the latter could be achieved through plain gestures rather than speech. Paralleling Mill's notion of becoming conscious of one's community, communication requires what Arendt refers to (in translating Kant) an 'enlarged mentality',⁶⁹ i.e., the ability to understand one's own opinions vis-à-vis those of others, or in Kant's words to '[reflect] upon it from a *general standpoint*'.⁷⁰

Politics thus bring individuals together and transforms their self-interests into common ones.⁷¹ Arendt's narrative of the normative pull of the discursive and educative functions of the democratic public sphere, frames public debate as part and parcel of the basic human condition. Public discourse is not merely a political *tool* but an inalienable part of the political.⁷² The intrinsic value of speech and public debate hence transcend their communicative purposes, as they are the preconditions for human togetherness and for acting in concert, an element without which the political realm could not exist.⁷³

⁶⁵ Arendt, *Human Condition*, 50–58; J Miller, 'The Pathos of Novelty: Hannah Arendt's Image of Freedom in the Modern World' in MA Hill (ed), *Hannah Arendt: The Recovery of the Public World* (St. Martin's Press 1979) 177, 191; and McGowan, *Hannah Arendt: An Introduction*, 94–95.

⁶⁶ Arendt refers to the common sense the way Kant did, in its Latin form, the *sensus communis*, so as to distinguish it as 'an extra sense—like an extra mental capability [...]—that fits us into a community': H Arendt (R Beiner (ed)), *Lectures on Kant's Political Philosophy* (University of Chicago Press 1982) 70.

⁶⁷ Arendt, *Human Condition*, 208–209:

'The only character of the world by which to gauge its reality is its being common to all of us, and common sense occupies such a high rank in the hierarchy of political qualities because it is the one sense that fits into reality as a whole our five strictly individual senses and the strictly particular data they perceive. It is by virtue of common sense that the other sense perceptions are known to disclose reality and are not merely felt as irritations of our nerves or resistant sensations of our bodies'.

See also H Arendt, *Between Past and Future: Six Exercises in Political Thought* (Faber and Faber 1961) 220–21.

⁶⁸ Arendt, *Between Past and Future*, 223.

⁶⁹ Arendt, *Lectures*, 71; Arendt, *Between Past and Future*, 220.

⁷⁰ Arendt, *Lectures*, 71, quoting Kant.

⁷¹ S Benhabib, 'The Embattled Public Sphere: Hannah Arendt, Juergen Habermas and Beyond' (1997) 90 *Theoria: A Journal of Social and Political Theory* 1, 6; DR Villa, 'Postmodernism and the Public Sphere' (1992) 86 *American Political Science Review* 712, 714.

⁷² Arendt, *Human Condition*, 178–80.

⁷³ *ibid* 178–79.

The idea of democratic political participation and public deliberation as performing educative functions, was picked up and reiterated—and at times reconfigured—by later participatory and deliberative theorists in the latter half of the twentieth century.⁷⁴ Drawing on both Mill and Arendt, as well as on the earlier work of Jean Jacques Rousseau,⁷⁵ participatory democrats prioritise a thick vision of political participation. This vision entails the ongoing, widespread, active, and most of all, direct involvement of individuals in public affairs as part of a political culture or a way of living.⁷⁶ However, unlike former thinkers, participatory theory directs its attention primarily to the decentralisation of the political process, or otherwise to the democratisation of all facets of social life. This is advanced by way of restructuring social spheres to include participatory and deliberative processes so as to enhance citizens' control over political decision-making.⁷⁷

In fact, participatory democrats' main thrust, and what principally distinguishes them from parallel interlocutors, is the idiosyncratic use they make of the educative arguments detailed below as a hook on which to hang the democratisation of authority structures beyond the governmental, and advance their notion of a 'participatory society'.⁷⁸ The educative value of political voice, in this view, could only be meaningful whereby individuals are acclimated to

⁷⁴ Participatory democratic theory that peaked in the 1960s and 1970s 'set itself [...] against all versions of liberal democracy that see active politics as the domain of government and [...] interest group leaders': Cunningham, *Theories of Democracy*, 123; See also P Bachrach, *The Theory of Democratic Elitism: A Critique* (University of London Press 1969).

⁷⁵ See McGowan, *Hannah Arendt: An Introduction*; Pateman, *Participation and Democratic Theory*; Keim, 'Participation in Contemporary Democratic Theories', 1 (in his reference to the work of Robert Pranger, and in his reliance on Arendtian concepts for a reconceptualisation of the 'political').

⁷⁶ For how the idea of political participation is conceptualised in terms of a 'political culture' see GA Almond and S Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton University Press 1963); Mansbridge refers to this vision of politics as 'unitary democracy' in which decisions are made by consensus through the 'unitary process' of the give and take of face-to-face discussions on equal footing amongst individuals in the community. Unitary democracy, according to Mansbridge, is essentially an extension to the level of a polity the social relations of friendship: JJ Mansbridge, *Beyond Adversary Democracy* (Basic Books 1980); Barber uses the term 'strong democracy' to denote the idea of a participatory regime which 'resolves conflict in the absence of an independent ground through a participatory process of ongoing, proximate self-legislation and the creation of a political community capable of transforming independent private individuals into free citizens and partial and private interests into public goods': BR Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984) 151.

⁷⁷ Keim, 'Participation in Contemporary Democratic Theories', 8; Pateman, *Participation and Democratic Theory*; Bachrach, *The Theory of Democratic Elitism*; Kateb refers to this idealism as the extension of the practice of citizenship into as many areas of life possible. This notion is present in Mill's theory as well, but does not stand at its centre. See G Kateb, 'Comments on David Braybrooke's "The Meaning of Participation and of Demands for It"' in JR Pennock and JW Chapman (eds.), *Participation in Politics: Nomos XVI* (Lieber-Atherton 1975) 89, 91.

⁷⁸ Pateman, *Participation and Democratic Theory*, 44.

the process of political participation in other spheres of their lives, which foster in them the very qualities necessary for apposite participation in the national arena.⁷⁹

This educative worth has been articulated and framed by participatory democrats both in terms of the contribution of public discourse and active participation to individuals' intellectual and moral capacities—the making of 'better citizens',⁸⁰ and in terms of their role in community building. For example, Arnold Kaufman, who was the first to coin the term 'participatory democracy',⁸¹ emphasises the primary contribution of political participation to '[...] the development of human powers of thought, feeling and action'.⁸² Carol Pateman, echoing both Mill and Arendt in large measure, has otherwise centred on the educative effects of political participation on individuals' sense of public consciousness and their development of responsibility towards the promotion of *public* interests.⁸³

In this sense, public deliberation has a revelatory quality in displaying the interests of *others*, thereby compelling individuals to '[...] take into account wider matters than [their] own'.⁸⁴ In doing so, it performs a further educative function in fostering receptiveness in individuals to collective decisions, and cultivating in them a sense of belonging to their broader community. The participatory experience, as expressed by Pateman, 'attaches the individual to his society and is instrumental in developing it into a true community'.⁸⁵ Pateman further argues that political participation in multiple venues serves to establish in individuals' a sense of 'political efficacy', i.e., a 'sense of general, personal effectiveness, which involves self-confidence in one's dealing with the world'.⁸⁶ The more one has a sense of political efficacy the more likely she is to participate, thus furthering the integrative functions of participation concerned with community building.⁸⁷

⁷⁹ *ibid* 42–43; These include the ability to identify with other members of the community and develop, accordingly, common interests. See J Mansbridge, 'Does Participation Make Better Citizens?' (1995) 5 *The Good Society* 1, 5; See also Barber, *Strong Democracy*, 152.

⁸⁰ Mansbridge, 'Does Participation Make Better Citizens?'.

⁸¹ *ibid* 5.

⁸² AS Kaufman, 'Human Nature and Participatory Democracy' in CJ Friedrich (ed), *Responsibility: Nomos III* (The Liberal Arts Press 1960) 266, 272. See also at 274: 'Third, participation may be an important if not an indispensable condition of a person's fully developing his inherent powers of intelligent thought and action'.

⁸³ Pateman, *Participation and Democratic Theory*, 24–25.

⁸⁴ *ibid* 25; Barber, *Strong Democracy*, 152: 'the "Other" is a construct that becomes real to an individual only when he encounters it directly in the political arena'.

⁸⁵ Pateman naming this the 'integrative function' of participation: Pateman, *Participation and Democratic Theory*, 27; Or as put by Barber, 'Indeed, from the perspective of strong democracy, the two terms *participation* and *community* are aspects of one single mode of social being: citizenship': Barber, *Strong Democracy*, 155.

⁸⁶ Pateman, *Participation and Democratic Theory*, 46. Pateman largely relies in arguing this on Almond and Verba, *The Civic Culture*.

⁸⁷ See Pateman, *Participation and Democratic Theory*, 27.

There are two further types of educative justificatory arguments that are voiced by participatory democrats (and by several theorists that are typically associated with the deliberative school), and that are well intertwined with the epistemic values of public deliberation. One such argument, is based on the vision of the political process as contributory to the development of political intelligence. It centres more specifically on political participation's provision to stimulating individuals' self-awareness to their *own* political interests, hence positively influencing their social consciousness as human beings.⁸⁸ Voiced by Peter Bachrach and similarly by Bernard Manin, this approach is based on a 'dualist concept' of political interests and political participation. According to this dualist concept, individuals' articulated preferences often differ from their real or actual needs.⁸⁹ Public deliberation is thus properly understood as the process of will formation, or 'the particular moment that precedes decision' rather than a process that signifies decision-making itself.⁹⁰ It is a vital practice for individuals to uncover, detect, and express their *true* political demands;⁹¹ or, put differently, it is 'a procedure for becoming informed'.⁹²

Bachrach's and Manin's arguments therefore straddle the fence between the educative and epistemic justifications in support of public deliberation and political participation. They are educative, in their understanding of the deliberative process as promoting individuals' political intelligence by acquiring new perspectives regarding their own, and others', preferences.⁹³ They are also epistemic, as will be elaborated on shortly, in terms of their information-revealing quality and subsequent impact on the process of will formation, and on the quality of decisions eventually achieved through this process.

Another argument combining both educative and epistemic properties is Benjamin Barber's 'epistemology of politics'. According to Barber, '[w]hen politics in the participatory mode becomes the source of political knowledge—when such knowledge is severed from

⁸⁸ P. Bachrach, 'Interest, Participation, and Democratic Theory' in JR Pennock and JW Chapman (eds.), *Participation in Politics: Nomos XVI* (Lieber-Atherton 1975) 39. Bachrach refers to the broader educative argument regarding the contribution of political participation to the development of the human character. See Bachrach, *The Theory of Democratic Elitism*, 98:

'Classical theory, as I emphasized at the outset of this essay, is based on the supposition that man's dignity, and indeed his growth and development as a functioning and responsive individual in a free society, is dependent upon an opportunity to participate actively in decisions that significantly affect him'.

⁸⁹ Bachrach, 'Interest, Participation, and Democratic Theory', 42.

⁹⁰ B. Manin, 'On Legitimacy and Political Deliberation' (1987) 15 *Political Theory* 338, 345.

⁹¹ Bachrach, 'Interest, Participation, and Democratic Theory', 41.

⁹² Manin, 'On Legitimacy and Political Deliberation', 349.

⁹³ *ibid* 350, and at 354:

'They [political deliberation and argumentation] broaden the viewpoints of citizens beyond the limited outlook of their private affairs. They spread light. Such a concept of deliberation implies that the majority of citizens should be educated [...] their exchange of opinions, refereed by the public, offers an education without a unique and eminent teacher'.

formal philosophy and becomes its own epistemology—then knowledge itself is redefined in terms of the chief virtues of democratic politics’.⁹⁴ Underlying his account is an understanding of politics as lacking an independent ground for judgment or for formulating the common good. The common good is rather framed, defined, and acquires legitimacy, through the deliberative democratic political process itself.⁹⁵ Following this narrative, public deliberation and political participation produce an epistemically independent realm of knowledge, in which concepts such as the good, right, or just, are interpreted within a society to define the common lives of individuals constituting the polity.⁹⁶ If so, not only does public deliberation illuminate individuals’ interests and those of others, but it also serves—in its ‘quest for mutual solutions’—to forge ‘public ends where there were none before’.⁹⁷ Although primarily ‘epistemic’ in concept and nomenclature, these features of the deliberative process are thus no less ‘educative’ in character: they are necessarily a product of individuals’ development of public-regarding sentiments, and ultimately result in defining the guiding norms of a political community.

B. *The epistemic functions of political voice*

The deliberative-epistemic argument, is concerned primarily with the contribution of robust public deliberation to the *quality* of political decision-making and the reaching of true, or correct decisions, from a democratic standpoint.⁹⁸ Whilst strongly advocated by certain deliberative democrats,⁹⁹ aspects of the epistemic argument can nonetheless be traced back also to Mill, where they intertwined, as it were, with his educative argument.¹⁰⁰ To properly follow the normative thrust of the deliberative-epistemic argument advocated by contemporary deliberative democrats, it is perhaps useful, at the outset, to qualify this argument by clarifying its tenets vis-à-vis: non-deliberative epistemic arguments, non-epistemic deliberative arguments, and deliberative-epistemic, albeit marginally political, arguments.

⁹⁴ Barber, *Strong Democracy*, 167

⁹⁵ *ibid* 156.

⁹⁶ *ibid* 157.

⁹⁷ *ibid* 152.

⁹⁸ D Estlund and H Landemore, ‘The Epistemic Value of Democratic Deliberation’ in A Bächtiger and others (eds.), *The Oxford Handbook of Deliberative Democracy* (OUP 2018) 113.

⁹⁹ These include most prominently, Jürgen Habermas (echoing in many respects, Hannah Arendt’s thoughts. For the similarities and differences in their concepts of the ‘public sphere’ see Benhabib, ‘The Embattled Public Sphere’), Joshua Cohen, David Estlund and Hélène Landemore.

¹⁰⁰ For a genealogy of the epistemic argument see H Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton University Press 2012) 53–88.

The deliberative-epistemic argument is two-pronged. First, it is predicated on the idea of public deliberation as an ‘epistemic engine’.¹⁰¹ Contrary to *non-deliberative* epistemic arguments, which rely mostly on mathematical theorems that prove the superiority of majority vote for correct decision-making, the deliberative version centres on the epistemic value of *discourse*.¹⁰² This notion of public deliberation as an ‘epistemic engine’ finds its origins in earlier thinkers, amongst the most prominent, John Stuart Mill, in the second chapter of *On Liberty*.¹⁰³ Mill’s epistemic account, however, centres on the necessity of truth for the ‘mental wellbeing of mankind’, thus embodying a different approach to the epistemic notion of correct outcomes than that espoused by later deliberative democrats.¹⁰⁴ Namely, Mill’s account transcends the strictly political, to focus more broadly on the discovery of suitably accurate opinions and actions of *all sorts*. His account thus results in a sincerely deliberative-epistemic, but less political, account.¹⁰⁵

The second demand of contemporary accounts, accordingly concerns the particularities of the deliberative process and its *democratic* features. It stems from the core characteristic of contemporary deliberative theory which took shape in the 1980s, turning on the idea that ‘legitimate law-making issues from the public deliberation of citizens’.¹⁰⁶ In an effort to move beyond the limits of liberalism, deliberative theorists emphasise the notion of ideal democracy as an inherently discursive regime, in which the common affairs of its equal members are governed by public deliberation, and are only considered legitimate whereby they result from ‘a free and reasoned agreement among equals’.¹⁰⁷ This school of deliberative theory as a whole,

¹⁰¹ Estlund and Landemore, ‘The Epistemic Value of Democratic Deliberation’, 114.

¹⁰² The most famous of which is Condorcet’s Jury Theorem proven in 1785. See DM Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2007) 15.

¹⁰³ Mill, *On Liberty*, 61–152. See at 63:

‘But the peculiar evil of silencing an expression of an opinion is, that it is robbing the human race; [...] If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error’.

See also CL Ten, ‘Mill’s *On Liberty*: Introduction’ in CL Ten (ed), *Mill’s On Liberty: A Critical Guide* (CUP 2008) 1, 3.

¹⁰⁴ Mill, *On Liberty*, 141.

¹⁰⁵ Estlund and Landemore, ‘The Epistemic Value of Democratic Deliberation’, 119.

¹⁰⁶ J Bohman and others, ‘Introduction’ in J Bohman and others (eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) ix; In the words of Habermas in J Habermas (W Rehg (trans.)), *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 104:

‘[...] the legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected’.

Habermas articulates this idea in his principle (D) (at 107): ‘Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses’.

¹⁰⁷ J Cohen, ‘Deliberation and Democratic Legitimacy’ in J Bohman and others (eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) 67.

appeals to several normative claims for justifying the legitimising functions of deliberative discourse that stand at the crux of their claims.¹⁰⁸ These normative claims include, inter alia, *non-epistemic* deliberative claims, which emphasise either the instrumental or intrinsic values of public deliberation, in disregard, however, of its *epistemic* effects.¹⁰⁹

Contemporary deliberative-epistemic normative narratives, are therefore underpinned by both the discursive *and* democratic requirements. As regards the first, it is the inclusive public exchange of reasoned claims and the diversity of opinions voiced therein, that are perceived to have epistemic properties in arriving at political ‘truths’.¹¹⁰ According to deliberative democrats, political truths, or the ‘ideal epistemic situation’, is often qualified in normative terms, as that which will promote the public interest or the common good. Deliberative theorists whom advance this approach are thus satisfied in assuming, for the purpose of their arguments, that some political decisions could be more morally wrong than others.¹¹¹

The epistemic properties of public debate (the first prong of the deliberative-epistemic argument) have been elaborated on extensively by Mill in *On Liberty*. There he grounded the significance of public discourse in four distinct rationales. The first and second, concern the public value of truth in society. According to Mill, the dialogical nature of public debate and the public exchange of opinions, enables individuals to judge the truthfulness of an opinion and thus to distinguish the true from the false.¹¹² It is only when facts and arguments are brought before the human mind; when one can hear all varieties of opinion about a subject; and

¹⁰⁸ Deliberative theories differ, for example, from participatory democracy in considering the deliberative process—in and of itself—as the source of legitimate power, as opposed to a political *tool* that ensures meaningful political participation. See Manin, ‘On Legitimacy and Political Deliberation’, 352: ‘[...] a legitimate decision does not represent the *will* of all, but is one that results from the *deliberation of all*. It is the process by which everyone’s will is formed that confers its legitimacy on the outcome, rather than the sum of already formed wills’; Habermas refines this notion in his understanding of the relationship between ‘communicative’ and ‘administrative’ power. According to Habermas, ‘[t]he public opinion that is worked up via democratic procedures into communicative power cannot “rule” of itself, but can only point the use of administrative power in specific directions’: J Habermas, ‘Three Normative Models of Democracy’ in S Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996) 21, 29; For an elaborate discussion of the relationship between participatory and deliberative democratic theory see S Elstub, ‘Deliberative and Participatory Democracy’ in A Bächtiger and others (eds.), *The Oxford Handbook of Deliberative Democracy* (OUP 2018).

¹⁰⁹ Estlund and Landmore, ‘The Epistemic Value of Democratic Deliberation’.

¹¹⁰ Estlund prefers to avoid the concept of truth. See Estlund, *Democratic Authority*. Cohen, by contrast, endorses a ‘political concept’ of truth: J Cohen, ‘Truth and Public Reason’ in J Cohen, *Philosophy, Politics, Democracy: Selected Essays* (Harvard University Press 2009) 348. According to Cohen (at 360):

‘[T]he idea of locating a common ground of political reflection and argument that does without the *concept* of truth—like doing without the concept of an object, or a cause, or a thought, or a reason, or an inference, or evidence—is hard to grasp. Truth is so closely connected with intuitive notions of thinking, asserting, believing, judging, and reasoning, that it is difficult to understand what leaving it behind amounts to’.

¹¹¹ Estlund, *Democratic Authority*, 5–6; Estlund and Landmore, ‘The Epistemic Value of Democratic Deliberation’ 118; Landmore refers to this assumption as ‘political cognitivism’: Landmore, *Democratic Reason*, 208.

¹¹² See Mill’s quote in Mill, *On Liberty*, 63, in *supra* note 103.

when one's own opinions are collated with those of others, that one can truly rely on his judgment and justly act upon it.¹¹³ Moreover, it is exactly this process of truth-discovering that permits members of a society to unearth those opinions which are important to them *as a society*.¹¹⁴ Mill's third and fourth arguments concern not the discovery of truth but its maintenance in public consciousness as a 'living truth'.¹¹⁵ Here Mill emphasises—much like Bachrach and Manin discussed earlier—the significance of free and open public dialogue for understanding the meaning and grounds of one's *own* opinions. This is not by way of prejudice (which to him does not amount to 'knowing the truth'), but by way of constant cultivation and argument in which one is compelled to defend his opinion and refute those of others.¹¹⁶

These epistemic properties of public discourse that are emphasised by Mill, have been echoed by later deliberative democrats more specifically vis-à-vis the realm of democratic politics, to justify public debate as legitimising *political* decisions. According to this epistemic argument, when certain procedural conditions are met, decisions about policymaking attained by majorities strongly indicate what policies are actually the 'best' ones, wherein 'best' is considered against an independent standard—the *common good*.¹¹⁷ Put differently, the epistemic argument is predicated on the assumption that the deliberative democratic process tends to 'produce outcomes that are correct by independent standards'; and therefore decisions that result from this process are perceived democratically legitimate.¹¹⁸ Unlike correctness theories, however, the legitimacy of decisions according to the deliberative-epistemic argument, does not rely entirely on the correctness of the outcome. That is, decisions can be

¹¹³ Mill, *On Liberty*, 69: 'Complete liberty of contradicting and disproving an opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right'.

¹¹⁴ *ibid* 75–77.

¹¹⁵ *ibid* 102.

¹¹⁶ *ibid* 103:

'Waiving, however, this possibility—assuming that the true opinion abides in the mind, but abides as a prejudice, a belief independent of, and proof against, argument—this is not the way in which truth ought to be held by a rational being. This is not knowing the truth'.

¹¹⁷ Cohen also refers to the common good as the 'general will': J Cohen, 'An Epistemic Conception of Democracy' (1986) 97 *Ethics* 26; Landemore, *Democratic Reason*; According to Habermas, the only norms that would count as valid are those which have been accepted, through the process of public deliberation in which all partake on equal footing, by all those participating. Given that this process is inherently oriented towards reaching mutual understandings, the outcome is necessarily epistemically correct. See Habermas, *Between Facts and Norms*, 127.

¹¹⁸ D Estlund, 'Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority' in J Bohman and others (eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) 174. This is so because it is only the common good that can be legitimately politically imposed (at 184); See also Estlund, *Democratic Authority*, 8. Estlund's account however, is a minimal version of the epistemic argument as he argues that this process is imperfect and is only as least as good as, or occasionally better, than a random decision procedure. Landemore's account, however, is a maximal version claiming that the deliberative process is as least as good as, or occasionally better, than any alternative decision rule. See Landemore's *Democratic Reason*, 8.

democratically legitimate on account of the epistemic value of the process itself, even when the outcome proves to be incorrect.¹¹⁹ In the words of Habermas, ‘the democratic process is established so as to *justify the presumption* of a rational outcome without being able to *guarantee the outcome is right*’.¹²⁰

The bases for the epistemic claim are certain conditions that are believed to exist, which guarantee that the democratic procedure yields epistemically correct outcomes, or in the words of David Estlund, that it yields ‘the public view of justice’.¹²¹ Some of these conditions are ‘situational’,¹²² namely, that members of a polity, although differing in their life experiences, have a shared—and publicly acknowledged—conception of the common good, that is consistent with these members’ self-perception as free and equal.¹²³ Other conditions are importantly related to the deliberative procedure itself. According to epistemic deliberative democrats, the deliberative process has certain characteristics, and certain effects on its interlocutors, which make the procedure likely to result in epistemically correct outcomes.

Namely, the deliberative process is a ‘reasoned’ one, in which participants apply ‘cognitive intelligence’ to the moral question at hand to state reasons for and against proposals.¹²⁴ According to Habermas, political decisions often involve different types of reasons for and against, or in other words, different types of ‘validity claims’, i.e., ‘[...] norms that can be justified by calling on pragmatic, ethical-political, and moral reasons’,¹²⁵ which entail different ‘rules of argumentation’.¹²⁶ Plainly put, given that individual preferences are unlikely to be persuasive to others as reasons for accepting or rejecting public policies, participants within the deliberative discourse are motivated to establish justifications that correspond to the public

¹¹⁹ Estlund, ‘Beyond Fairness and Deliberation’, 185.

¹²⁰ Despite his being a purely procedural account, Habermas explains this relatedly as follows:

‘Democratic majority decisions are only *ceasura* in a process of argumentation that has been (temporarily) interrupted under the pressure to decide; the results of this process can be assumed even by the outvoted minority as a basis for a practice binding on all. For acceptance does not mean that the majority accepts the content of the outcome as rational, and thus would have to change their *beliefs*. For the time being, however, the minority can live with the majority opinion as binding on their conduct insofar as the democratic process gives them the possibility of continuing or recommencing the interrupted discussion and shifting the majority by offering (putatively) better arguments’: J Habermas, ‘Reply to Symposium Participants, Benjamin N. Cardozo School of Law’ (1995) 17 *Cardozo Law Review* 1477, 1494.

¹²¹ Estlund, ‘Beyond Fairness and Deliberation’, 196.

¹²² *ibid* 191.

¹²³ Cohen, ‘An Epistemic Conception of Democracy’, 34; Estlund adds a couple of additional criteria. See Estlund, ‘Beyond Fairness and Deliberation’, 191–92.

¹²⁴ Cohen, ‘Deliberation and Democratic Legitimacy’, 74; Estlund, ‘Beyond Fairness and Deliberation’, 196; See also R Talisse, ‘Deliberation’ in D Estlund (ed), *The Oxford Handbook of Political Philosophy* (OUP 2012) 204, 209.

¹²⁵ Habermas, *Between Facts and Norms*, 108.

¹²⁶ *ibid* 109.

view of justice.¹²⁷ Moreover, public discussion itself, and its process of reasoning and engagement with the views of others, is likely to *shape* individuals' preferences. This is because individuals are required to justify these preferences in accordance with the common good.¹²⁸ Provided that the democratic conditions of equal standing and voice are adhered to, subsequently, 'the interests, aims, and ideals that comprise the common good are those that *survive deliberation*, interests that, on public reflection, we think it legitimate to appeal to in making claims on social resources'.¹²⁹

Importantly, inclusive public deliberation maximises the 'cognitive diversity' of a group, which, in the context of problem solving, is claimed to outdo individual ability.¹³⁰ Cognitive diversity relates to 'the difference in the way people will approach a problem or a question', or more specifically 'a diversity of perspectives [...], diversity of interpretations [...], diversity of heuristics [...], and diversity of predictive models'.¹³¹ It is supposed to be more instrumental to problem solving than individual intelligence because it heightens the group's probability to find the correct answer in long series of choices.¹³² The more inclusive the deliberative process is, the more cognitively diverse it is likely to be, and thus higher the probability is that the decision will be collectively intelligent.¹³³

The deliberative process must then be constrained by *democratic* principles in order to fulfil its epistemic functions and to legitimise political decisions (the second prong of the deliberative epistemic argument). According to deliberative democrats, the 'ideal deliberative procedure'¹³⁴ should be public and inclusive;¹³⁵ *free* in that proposals are not constrained by any prior norms, and that participants perceive themselves as bound only by decisions that result from deliberation;¹³⁶ and governed by principles of equality and symmetry between

¹²⁷ In Habermas's words, *ibid* 119:

'Communicatively acting subjects commit themselves to coordinating their action plans on the basis of a consensus that depends in turn on their reciprocally taking positions on, and intersubjectively recognizing, validity claims. From this it follows that only those reasons count that all the participating parties *together* find acceptable. It is in each case the *same* kinds of reasons that have a rationally motivating force for those involved in communicative action'.

¹²⁸ Benhabib, 'The Embattled Public Sphere', 9–10.

¹²⁹ Cohen, 'Deliberation and Democratic Legitimacy', 77 (emphasis added); In Habermas's words, properly institutionalised decision-making can 'justify the presumption that outcomes conforming to the procedure are rational': Habermas, 'Reply to Symposium Participants', 1494.

¹³⁰ Landemore, *Democratic Reason*, 97.

¹³¹ *ibid* 102.

¹³² *ibid* 5.

¹³³ *ibid* 104.

¹³⁴ This terminology is used specifically by Cohen. See Cohen, 'Deliberation and Democratic Legitimacy'.

¹³⁵ Landemore, *Democratic Reason*; Estlund and Landemore, 'The Epistemic Value of Democratic Deliberation', 122.

¹³⁶ Cohen, 'Deliberation and Democratic Legitimacy', 74.

participants.¹³⁷ Once fulfilled, the democratic criteria render public debate authoritative as a source of legitimate power which ‘carries with it a commitment to advance the common good’.¹³⁸

C. *The liberating functions of political voice*

The links between public deliberation and the value of freedom have been articulated more or less explicitly by almost all democratic theorists discussed herein. Beginning with Hannah Arendt, the concept of freedom features prominently in her political thought. It is closely related therein to her concept of the public realm, thereby establishing an intimate connection between public discourse and political participation in public affairs, and the attainment of freedom.¹³⁹

Contrary to liberal conceptions of freedom, according to which ‘freedom begins where politics ends’,¹⁴⁰ Arendt’s approach to political freedom is a product of her predominant concern with human plurality. It is understood in *public terms*, as individuals’ capacity to initiate spontaneously and to ‘call entirely new possibilities into existence’ through collective action in the public space between plural individuals.¹⁴¹ Freedom is, therefore, the ‘raison d’être of politics’, or in other words, that which the political was meant to *produce*.¹⁴² It is that which can only be experienced in action, and can only exist and appear within the ‘worldly space’ of a ‘politically guaranteed public realm’.¹⁴³ As such, freedom is manifest in individuals’ ability to experience reality, whereby ‘reality’ is understood in terms of individuals’ ability to shift between the multiple viewpoints held by plural men within that public space between them.¹⁴⁴ Political participation, public discourse, and freedom, are thus

¹³⁷ Habermas, *Between Facts and Norms*, 110; Cohen, ‘Deliberation and Democratic Legitimacy’, 74–75; S Benhabib, ‘Toward a Deliberative Model of Democratic Legitimacy’ in S Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press 1996) 70; Estlund and Landemore, ‘The Epistemic Value of Democratic Deliberation’, 122.

¹³⁸ Cohen, ‘Deliberation and Democratic Legitimacy’, 75.

¹³⁹ Canovan, *Hannah Arendt: A Reinterpretation*, 212.

¹⁴⁰ H Arendt, ‘What is Freedom?’ in H Arendt, *Between Past and Future: Eight Exercises in Political Thought* (The Viking Press 1961) 143, 149.

¹⁴¹ Canovan, *Hannah Arendt: A Reinterpretation*, 213–15.

¹⁴² Arendt, ‘What is Freedom?’, 146: ‘freedom, which only seldom—in times of crisis or revolution—becomes the direct aim of political action, is actually the reason that men live together in political organization at all. Without it, political life as such would be meaningless’.

¹⁴³ *ibid* 149.

¹⁴⁴ Put in negative terms, the loss of reality occurs either when men are radically isolated, or when they become massified. Our sense of reality, in other words, can be preserved only ‘when “what is” can be confirmed by many in a diversity of aspects without changing its essential identity’: Fuss, ‘Hannah Arendt’s Conception’, 166–67. This understanding of ‘reality’ enabled Arendt to reconcile the tension between politics and philosophy, as this tension was understood by Plato and Heidegger. To them, philosophy occupied an intrinsically solitary realm that was withdrawn from public life and concerned with finding an absolute truth,

understood in Arendt's account as conterminous notions. Evidently then, the presence and availability of public debate and robust participation therein through voice, is vital for the existence and securing of political freedom.

The associations between public debate, political participation, and freedom, are acknowledged also by participatory and deliberative democrats,¹⁴⁵ yet are articulated most zealously by neo-republican theorists. The term 'neo-republicanism' in political theory and philosophy, refers to contemporary political thought emanating from the republican tradition and its interpretation and transformation of classic ideals into a modern political doctrine.¹⁴⁶ Neo-republicanism, therefore often conceptualised as the 'republican revival', is primarily concerned with developing a normative alternative to liberal democratic theory. At its crux, is a revised understanding of the concept of political freedom (or social free will), and the ways in which politics should be reconsidered in accordance with this concept and its demands.¹⁴⁷

This revival of republican thought has generated a plethora of writing, amongst these the most prominent in the re-grounding of politics in a modified understanding of political freedom is the work of Philip Pettit.¹⁴⁸ Given the centrality of his political philosophy in neo-republican thought, and its detailed and rigorous articulation, it is an account of Pettit's work that will largely be undertaken in this section.¹⁴⁹

Writing in 1997, Pettit introduced his philosophical interpretation of the republican principle of 'liberty as nondomination',¹⁵⁰ to construct a normative theory of democracy which was further developed in subsequent writings. In introducing this concept, Pettit sought to

whereas politics was the realm concerned with plural men and ephemeral issues. If reality was conceptualised as the thing revealed when shifting freely between plural perspectives in the public sphere, then the knowledge that philosophy sought ('truth') could actually be found exactly where political action occurs—where reality (and by extension truth) is revealed. This view corresponded to the view of Socrates and Karl Jaspers who understood philosophy as a communicative activity in harmony with politics. See Canovan, *Hannah Arendt: A Reinterpretation*, 263–64, 268, 273; See also FM Dolan, 'Arendt on Philosophy and Politics' in D Villa (ed), *The Cambridge Companion to Hannah Arendt* (CUP 2000) 261, 261–63, 265–66.

¹⁴⁵ Pateman, *Participation and Democratic Theory*, 25–26; Barber, *Strong Democracy*, 152, 157.

¹⁴⁶ F Lovett, 'Republicanism' in EN Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (2018 Edition); S Besson and JL Martí, 'Law and Republicanism: Mapping the Issues' in S Besson and JL Martí (eds.), *Legal Republicanism: National and International Perspectives* (OUP 2009) 3–4.

¹⁴⁷ A Niederberger and P Schink, 'Introduction' in A Niederberger and P Schink (eds.), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013); Others disagree with this characterisation of the purpose of reassessing the republican contribution to political theory, calling for an evaluation of republican ideas in their own terms. See eg, C Laborde and JW Maynor, 'The Republican Contribution to Contemporary Political Theory' in C Laborde and JW Maynor (eds.), *Republicanism and Political Theory* (Blackwell Publishing 2008) 1, 1–2; For an intellectual historical account of this revival see C Laborde, 'Republicanism' in M Freeden and M Stears (eds.), *The Oxford Handbook of Political Ideologies* (OUP 2013).

¹⁴⁸ For a detailed bibliography of contemporary neo-republican thought see P Pettit, 'The Republican Law of Peoples: A Restatement' in B Buckinx, J Trejo-Mathys, and T Waligore (eds.), *Domination and Global Political Justice* (Routledge 2015) 37, 37.

¹⁴⁹ Other neo-republican accounts will occasionally be used to complement and support Pettit's writing.

¹⁵⁰ P Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1999).

redirect the spotlight to political freedom as a value which all democratic theories naturally assign importance to, and yet not all conceptualise as being the source of all other democratic desiderata.¹⁵¹ Importantly, other democratic values—and political participation in particular—are also conceptualised by Pettit in relation to his concept of freedom: their significance stems exclusively from the ways in which they are instrumental in guaranteeing political freedom, properly understood.¹⁵² Thus, despite bearing resemblance to, and overlapping with, several of the philosophical tenets of other political theories hitherto discussed, Pettit's neo-republicanism is at the same time unique in its normative treatment of the values of public deliberation and political participation.

Pettit's notion of political freedom as *non-domination*, which has long been an ideal in the republican tradition, is perhaps best understood when defined by reference to the liberal tradition's largely negative conception of freedom as the absence of *interference*.¹⁵³ Domination, according to Pettit, involves one's (or that of many for that matter) '[...] power of interference on an arbitrary, uncontrolled, basis' over another or others, in certain choices that the dominated is in a position to make.¹⁵⁴ Broken down, there are several features to a relationship of domination which are central to its understanding. First, interference involves an intentional worsening of one's condition, by either act or omission, which either changes the range of options available to her, changes these options' expected payoffs, or controls which payoffs will actually materialise.¹⁵⁵ The *power* of interference on an arbitrary basis—or domination—thus means an actual capacity to interfere, that is also entirely subject to the interferer's decision or choice, and is not under the control of the affected.¹⁵⁶ Therefore,

¹⁵¹ *ibid* 6–7.

¹⁵² *ibid* 8.

¹⁵³ Interference means the intentional or quasi-intentional restriction of one's choice, when the interferer himself has a choice between interfering and not. See P Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 49.

¹⁵⁴ Pettit, *Republicanism*, 52; Pettit further clarifies that contrary to a Hobbesian approach, hindrance of *any* option—whether one's preferred or unpreferred—is a reduction of one's freedom in a choice. See Pettit, *On the People's Terms*, 26–33; In a different neo-republican account, Lovett defined domination as 'a condition experienced by persons or groups to the extent that they are dependent on a social relationship in which some other person or group wields arbitrary power over them': F Lovett, *A General Theory of Domination and Justice* (OUP 2010) 2.

¹⁵⁵ Pettit, *Republicanism*, 53; Pettit, *On the People's Terms*, 50–56.

¹⁵⁶ Pettit, *Republicanism*, 54–55; It is, in other words, the total or partial subjection of the will of one to the will of the other. Pettit differentiates in this sense between factors that are considered 'invaders'—those which impede one's capacity to use her resources to satisfy her will and that derive from the intrusive will of another, as opposed to those that are considered 'vitiators'—that impede the same capacity, but without deriving from the free will of another. Unvitiating resources ensure a freedom of opportunity whereas the absence of invasion ensures a freedom of exercise or freedom of control. See Pettit, *On the People's Terms*, 39, 45. This is not to say however, that vitiating does not amount to domination. Vitiating factors stemming from the ways in which society is organised often result in structural forms of domination. See Pettit, *On the People's Terms*, 63.

domination can be of greater or lesser intensity depending on how arbitrary it actually is, and in how many areas of one's life it is manifested.¹⁵⁷

Importantly, this highlights the distinction between domination and interference, in two complementary ways. First, that domination can exist even where there is no *actual* interference by the agent.¹⁵⁸ In other words, it is enough to have the arbitrary power or *capacity* to interfere in order to dominate, without actually having to interfere in practice. Second, that one can interfere without dominating. If an agent interferes on the basis of individuals' interests and preferences, in a manner that is controllable by the one interfered with, and under constitutionally determined conditions (and thus not at her subjective will), she might interfere, but not dominate.¹⁵⁹ Thus, non-domination (or freedom) in the exercise of power, requires, first, that individuals acquire the resources necessary for exercising choices independently.¹⁶⁰ Second, is that the agents in power be responsive to individuals' interest and preferences as these are expressed by them, and consider them as preconditions for action. This includes individuals' permanent ability to contest the use of power whereby it is not guided by their interests and preferences.¹⁶¹

According to Pettit, one additional feature of a condition of domination, is that its existence is common knowledge both to those involved and to those around them. With the exception of domination through manipulation, domination is normally recognisable and involves the common awareness of those dominating and of those dominated, so as to deprive the dominated of the '[...] psychological status of an equal'.¹⁶² The value of political freedom, is thus a *social* ideal in that it refers to the absence of domination in the presence of other people.¹⁶³ In this sense, freedom refers not just to the mere absence of interference (by virtue of being in isolation for example), but a form of positive power that individuals hold *within* society, to control their

¹⁵⁷ Pettit later qualifies this further to emphasise that 'arbitrary' refers to uncontrolled interference as opposed to not being subject to established rules. Interference that conforms to rules can also be uncontrolled by the affected and thus considered as arbitrary and therefore as domination. See Pettit, *On the People's Terms*, 58.

¹⁵⁸ Pettit, *Republicanism*, 63; Pettit, *On the People's Terms*, 59–60.

¹⁵⁹ Pettit, *On the People's Terms*, 50, 57; See also P Pettit, 'Three Mistakes about Democracy' (2015) 2 *Cilicia Journal of Philosophy* 1, 3; See also M Viroli (A Shugaar, trans.), *Republicanism* (Hill and Wang 2002) 10, 35–38; It is separation between domination and interference that enables viewing coercive law as consistent with freedom, thereby highlighting the significant role of the state in guaranteeing freedom rather than endangering it. For a focus on the relationship between law and freedom see P Pettit, 'Law and Liberty' in S Besson and JL Martí (eds.), *Legal Republicanism: National and International Perspectives* (OUP 2009) 39.

¹⁶⁰ Pettit, *On the People's Terms*, 70.

¹⁶¹ Pettit, *Republicanism*, 63.

¹⁶² *ibid* 60, 64.

¹⁶³ *ibid* 66.

own destiny.¹⁶⁴ In that view, non-domination contrary to the absence of interference, is both a subjective and intersubjective status, and cannot persist without the institutions to guarantee it.

This brings us to the role of the state in securing freedom as non-domination in neo-republican thought, and, accordingly, to what government institutions and public life should be like if they are to take the ideal of freedom as non-domination seriously. Fundamentally, neo-republicanism does not view properly-constrained state action as an inherent violation of liberty, whilst it *does* view certain social circumstances that do not involve state interference as dominating.¹⁶⁵ Consequently, neo-republicanism offers both a theory of social justice, in setting the requirements for people to enjoy non-domination in relation to one another; and a theory of democratic legitimacy, in setting the requirements for individuals to enjoy non-domination from the state.¹⁶⁶ Conceptually speaking, it disassociates between the question of how just a social order is, and that of whether its political imposition by the state is legitimate. Relevant to our context is the latter question.¹⁶⁷

The problem of political legitimacy obviously stems from the way in which the coercive power of political institutions coincides with the value of freedom. In republican terms, the question then becomes whether the state can ‘[...] impose coercively on its citizens without dominating them’.¹⁶⁸ The starting point for the neo-republican response, is the assumption that the state will inevitably interfere with individuals’ lives. Recall, however, that interference alone, in the absence of domination, does not—in and of itself—derogate from, or constitute an affront to freedom. In that view, the core element for a republican theory of political legitimacy, is the idea of controlled interference which demands that the governed regulate the interference practiced by political institutions.¹⁶⁹

This notion directly guides us to neo-republicanism’s normative treatment of public deliberation and political participation. The type of control necessary for citizens to be non-dominated by the state must meet three conditions. First, citizens must exercise a form of joint

¹⁶⁴ *ibid* 69.

¹⁶⁵ *ibid* 148–49.

¹⁶⁶ Pettit, *On the People’s Terms*, 21–22; For an elaborate neo-republican theory of social justice see Lovett, *A General Theory of Domination and Justice*.

¹⁶⁷ Pettit, *On the People’s Terms*, 130, 136. The latter question however necessarily presupposes the former given that it is only once we recognise that the cause of social justice requires a state, that we can move to question what type of state should this be; Just by of way of mentioning the former question, Pettit conceptualises social justice in terms of ensuring that individuals can equally make certain choices without the domination of others. This is done by guaranteeing certain basic liberties in public laws and norms. See Pettit, *On the People’s Terms*, 75–129.

¹⁶⁸ Pettit, *On the People’s Terms*, 147.

¹⁶⁹ *ibid* 153; This is further qualified by Pettit to exclude control over matters that are of historical and political contingency such as whether to live in or out of a political community, whether to live in this state or another, and whether under coercive fidelity to the law (at 165).

control over government, in which each of them equally shares in exercising influence over the government, and in determining the directions this influence should impose. This form of democratic influence and control involves both an equal opportunity of political participation for each citizen, and that the output of decision-making is one that each citizen is disposed to find acceptable.¹⁷⁰ Second, citizens' control over government must be unconditioned, in the sense that it is grounded in society's potential for widespread and robust resistance rather than in the goodwill of the government to go along.¹⁷¹ Finally, popular control must be effective enough to invalidate the imposition of any alien or private will, despite the level of discretion that might be exercised by those in power.¹⁷² Unwelcomed outcomes, according to this condition, must be perceived by citizens as 'tough luck' rather than as the result of 'harbouring an alien will'.¹⁷³ Public deliberation and active political participation, on the account detailed thus far, can now be understood as a *sine qua non* of a democratic model that is based on a neo-republican normative theory of democratic legitimacy. This is because it is only through the use of voice as a political tool, public discourse, and political participation, that the requirements for democratic controlled interference can be met, and the ideal of freedom as non-domination can be guaranteed.

Specifically, public deliberation and active political participation are understood by Pettit as instrumental for attaining both democratic influence and control within an electoral system of government.¹⁷⁴ As regards democratic *influence*, this is to be achieved primarily through means of individualised *contestation*. Diverging slightly from participatory or deliberative democratic theory, the primary emphasis of neo-republicanism in this context, is placed on participation and deliberation via avenues of contestation and adjustment. It is through these mechanisms that majority voting can be effectively challenged by individuals in the minority whose equal access to democratic influence is thwarted by an unequal chance of being on the winning side.¹⁷⁵ To function effectively, such a system must prioritise discursive and participatory features that cultivate an active and contestatory citizenry characterised by high-level civic engagement. Amongst these: ex-ante and ex-post opportunities for contestation,

¹⁷⁰ *ibid* 168–70.

¹⁷¹ *ibid* 172–74.

¹⁷² *ibid* 175–77.

¹⁷³ *ibid* 178.

¹⁷⁴ For the difference between 'influence' and 'control' see Pettit, 'Three Mistakes', 6.

¹⁷⁵ Pettit, *On the People's Terms*, 213–14; Pettit rejects some of what he refers to as the 'romantic' notions of participatory and deliberative democrats of the people all coming together in 'a grand, will-forming, law-making exercise', preferring the promotion of a contestatory model through which civic vigilance is exercised through more specialised, public-interest bodies such as NGOs: Pettit, *On the People's Terms*, 226–27.

transparency in decision-making, open channels of consultation and appeal, and public meetings and demonstrations.¹⁷⁶

As for attaining democratic *control*—the ability to direct the influence on government toward decisions that are equally acceptable to all—the task is one of identifying the equally accepted purposes the system is meant to promote.¹⁷⁷ Here, the neo-republican emphasis is placed on deliberative models of collective decision-making analogous to those advocated by deliberative democrats, as those that are required to dictate the operation of the democratic system of popular influence.¹⁷⁸ Public decision-making, within this system, must be guided by deliberative process norms according to which interlocutors defend their positions in ‘multi-partisan terms’—i.e., on the basis of convergent or concordant considerations that are relevant to all those affected—so as to ‘[...] lay down a foundation of common ground between them’.¹⁷⁹ Although Pettit identifies this type of democratic control over government as a form of ‘deliberative regulation’ that is ‘[...] deeply continuous with the spirit of deliberative democracy’,¹⁸⁰ it differs normatively as well as practically. Normatively, it signals a commitment to realising freedom as non-domination rather than committing to the value of deliberation as such; and practically, it calls for ‘[...] regulation by deliberatively tested [decision-making] norms’ imposed on government, rather than for deliberative forms of coordinated decision-making at *every* site.¹⁸¹ Ultimately however, claims Pettit, these norms will become institutionalised, so as to distinctly re-configure public policy-making into a public-interest based and oriented process which systematically retains certain policies off the agenda.¹⁸²

D. *The equitable functions of political voice*

Articulations of the relationship between the notion of political voice and the ideal of justice are the most complex. Although acknowledged in some form or the other by most democratic theorists presented herein, it is often so acknowledged only in passing. Interestingly however,

¹⁷⁶ *ibid* 216, 226.

¹⁷⁷ *ibid* 239–40.

¹⁷⁸ *ibid* 260.

¹⁷⁹ *ibid* 261; By convergent considerations, Pettit means those which ‘[...] point participants to universal benefits that all take to be relevant’, whereas concordant considerations are those which ‘[...] point the participants [...] to benefits that accrue only to this or that individual or subgroup’, but that ‘[...] command a following on all sides to the extent that everyone accepts that it is a matter of convergent interest that the group as a whole should confer that benefit on the sort of individual or subgroup favoured’: *ibid* 256.

¹⁸⁰ *ibid* 267.

¹⁸¹ *ibid* 267–68.

¹⁸² Pettit, ‘Three Mistakes’, 8.

the nexus between political voice and justice could also be understood to implicitly and indirectly reside in each of the other accounts of the functions of political voice brought herein, insofar as these values themselves (the educative, epistemic, and liberating) are understood to connect in some form or other, to the notion of justice.

Several democratic theorists have expressed the nexus between political voice and justice directly and explicitly. Mill, for example, contemplates the intrinsic value of political participation in arguing that the exclusion from participation in decision-making fora—the inability to make one’s *voice heard*—is a matter of ‘personal injustice’.¹⁸³ And elsewhere he remarks: ‘[e]very one is degraded, whether aware of it or not, when other people, without consulting him, take upon themselves unlimited power to regulate his destiny’,¹⁸⁴ thereby hinting at the implications of curtailing individuals’ ability to use their voice politically for matters of social justice.

The nexus between political voice and justice on the basis of public deliberation’s intrinsic value, has been similarly articulated by deliberative theorist Thomas Christiano.¹⁸⁵ Intertwined, as it were, with a deliberative-epistemic argument, Christiano’s claim about public deliberation’s instrumental and intrinsic worth nevertheless renders his account of the value of public deliberation a mixed one. According to Christiano, there are several ways in which the value of public deliberation could be assessed. In instrumental terms, public deliberation is valuable because of its outcomes, and specifically in this context, for its role in achieving more *just* laws.¹⁸⁶ Christiano’s argument, in this sense, tentatively ties the epistemic value of public deliberation with that of justice, insofar as the epistemic notion of the ‘common good’ (as the best outcome of deliberation) overlaps with a concept of justice.¹⁸⁷ The ‘common good’ in this narrative denotes ‘just decisions’. Thus, the epistemic properties of public deliberation which render them invaluable to the process of reaching good decisions, also render them invaluable to achieving justice.

¹⁸³ To quote Mill:

‘Independently of all these considerations, it is a personal injustice to withhold from any one, unless for the prevention of greater evils, the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people’: Mill, *Considerations*, 166.

¹⁸⁴ *ibid.*

¹⁸⁵ T Christiano, ‘The Significance of Public Deliberation’ in J Bohman and others (eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) 243; T Christiano, *The Rule of the Many* (Westview Press 1996).

¹⁸⁶ Christiano, ‘The Significance of Public Deliberation’, 244.

¹⁸⁷ *ibid* 248. He ties these only tentatively given that whilst they appeal to ‘our common sense’, these claims are not broadly supported by empirical research.

Christiano primarily emphasises, however, the *intrinsic* value of public deliberation independently from the outcomes of the deliberative process. His argument proceeds from the recognition that in a complex society there are bound to be disagreements about its terms of association and about the distribution of public goods or ‘collective properties’.¹⁸⁸ Under these conditions, democracy could and should be defended ‘in terms of a principle of egalitarian justice’. In this view, justice requires the equal consideration of individuals’ interests, which must be interpreted and understood not as equality in individuals’ *well-being*,¹⁸⁹ but rather as equality in decision-making processes, or as an ‘equality of means for participating in deciding on the collective properties of society’.¹⁹⁰ In other words, the only reasonable way to implement the principle of equal consideration of interests so as to achieve justice, is by ensuring that each individual has the means to discover and pursue her interests. This is guaranteed, in turn, by securing an equal distribution of *resources* to affect the outcomes of collective decisions,¹⁹¹ which is ensured through robust institutions of discussion and deliberation.

To elaborate, Christiano’s notion of ‘political equality’, i.e., having equal resources for participating in collective decision-making procedures, requires more than having an equal vote in decision-making. Namely, in order to fully participate on equal footing in decision-making processes, individuals are required to have clear conceptions of their interests and how to advance them.¹⁹² However, this is not the obvious starting position of all individuals in society equally. For example, poverty or lack of education can account for individuals’ inability to reach informed decisions about their interests.¹⁹³ Under these circumstances, even if equality in voting power is preserved, those with knowledgeable resources about what their interests are, and about how to take part in the political process so as to advance them, have far greater power than those who can procedurally equally use their vote, but have no, or limited wisdom as to how to use it to their advantage.¹⁹⁴ Public deliberation and the use of voice politically, thus figure in through their *educative* functions: they provide ‘resources for learning and reflection’ that facilitate greater understandings of one’s own interests and those of others.¹⁹⁵ Put differently by Christiano, ‘[i]nstitutions of discussion and deliberation affect the *distribution* of cognitive conditions of understanding among the citizens’.¹⁹⁶

¹⁸⁸ Christiano, *The Rule of the Many*, 61.

¹⁸⁹ For an elaboration on why equality in well-being should be rejected as a political principle see *ibid* 64–68.

¹⁹⁰ *ibid* 59.

¹⁹¹ *ibid* 69–70.

¹⁹² *ibid* 70–71

¹⁹³ Christiano, ‘The Significance of Public Deliberation’, 256.

¹⁹⁴ Christiano, *The Rule of the Many*, 85.

¹⁹⁵ *ibid* 86.

¹⁹⁶ Christiano, ‘The Significance of Public Deliberation’, 256.

Public deliberation thus become a requirement of justice in a democratic political society. It is only in its presence in the process of decision-making that political equality, and therefore justice, can be achieved. A similar argument is made by participatory theorist Peter Bachrach. Like Christiano, Bachrach's argument proceeds from the educative functions of public deliberation as an essential tool for individuals to learn about their political preferences and interests.¹⁹⁷ He recognises, like Christiano, that individuals from lower socio-economic strata are less likely to participate in democratic procedures of decision-making in light of their inability 'to transform moods of bitterness and futility into articulated preferences'.¹⁹⁸ According to Bachrach's underlying premises, individuals become aware of their true interests only once articulated through public discourse, and the latter is only available to those in a position to disentangle themselves from the adversity of ordinary life and engage in political reflection. The task of democratic institutions thus becomes to make public deliberation accessible equally to all.¹⁹⁹

Bachrach hence establishes a similar link between public deliberation and justice, although unpronounced explicitly as such. Open public discussion helps develop one's awareness to her own interests, in order to effectively exercise her right to political participation in decision-making that affects her life.²⁰⁰ Equal access to deliberative forums is therefore a 'strategy for the redistribution of power'. It is thus a means to promoting equality as a 'moral obligation' of the democratic system, or in other words, as a requirement of justice.²⁰¹

The nexus between political voice and justice has been established, alternatively, in neo-republican terms. Offering a slightly different neo-republican interpretation than that of Pettit, Rainer Forst clearly articulates the relevance of political participation and public deliberation to justice by advocating a 'Kantian republican' conception of justice as nondomination.²⁰² According to Forst, the '*political* essence of justice' is grounded in the idea of status, and in the demand '[...] that no person should be subjected to certain norms or normative arrangements that cannot reciprocally and generally be justified to those subjected'.²⁰³ Pettit's

¹⁹⁷ Bachrach, 'Interest, Participation, and Democratic Theory', 40.

¹⁹⁸ *ibid* 42.

¹⁹⁹ *ibid* 42–43.

²⁰⁰ *ibid* 44.

²⁰¹ *ibid* 46 and 52.

²⁰² R Forst, 'A Kantian Republican Conception of Justice as Nondomination' in A Niederberger and P Schink (eds.), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013) 154.

²⁰³ *ibid* 157.

conception of *freedom* as nondomination, is thus replaced by Forst's conception of *justice* as nondomination.²⁰⁴

Forst's conception of justice proceeds from his understanding of the concept as a relational one. The focal point of justice are relationships *between* individuals, and it therefore compels the 'human capacity to oppose relations of arbitrary rule or domination'.²⁰⁵ More specifically, a Kantian republican conception of justice demands that people not be 'subjected to norms that cannot reciprocally be justified'. Put positively, it demands that people have a right to discursive justification.²⁰⁶ Such a right is to be guaranteed through the institutionalisation of deliberative democratic procedures ensuring—in drawing on Pettit's use of the idea of political voice—that no one's voice is ignored, that no person is disregarded, that everyone has 'the effective possibility of participating in practices of political [discursive] justification'.²⁰⁷

E. *The two dimensions of political voice*

The analyses of normative theories of democracy have provided an elaborate account of the normative pull of political voice. They have clarified the objectives that political voice serves within the democratic framework, as these are commonly perceived by the variety of theories examined. Importantly, these analyses have illuminated two distinct, yet inter-related dimensions to this concept of political voice; two dimensions in which it is manifest and acquires normative value. Analyses of the educative and epistemic functions of political voice, have focused on individuals' ability to partake in open, deliberative public dialogue *horizontally*, with other members of their political community. It is this *horizontal dimension* of political voice—embodied in the notion of 'public discourse'—that primarily secures the educative and epistemic goals hitherto discussed, in facilitating the discovery of individuals' own political will, in generating sensibilities of community consciousness, in transforming self-interests into common ones, in attaching the individual to his society, and in contributing to the achievement of decisional outcomes which promote the public interest and the common good. The normative purchase of this horizontal dimension of political voice is grounded, therefore, in the notion of a 'discursive community' and in its fundamental importance for the sustainability of the democratic edifice.

²⁰⁴ *ibid* 161–62. Forst explains that the force of Pettit's idea actually derives from a notion of justice. The freedom Pettit discusses, in other words, is based on individuals' standing as 'agent[s] of justice and justification' (at 162)

²⁰⁵ *ibid* 159.

²⁰⁶ *ibid* 163.

²⁰⁷ *ibid*.

Analyses of the role of political voice in guaranteeing freedom and in achieving justice, emphasise its *vertical dimension*, i.e., individuals' and communities' ability to effectively communicate *vertically* with public decision-makers. The theorists discussed, advance the idea that vertical participation in processes of public decision-making through voice, secures individuals' democratic influence and control over public decisions, which, in turn, guarantee individuals' control over their own destiny, and thus their freedom. Vertical discourse is also indispensable for the ideal of justice. Not only is not having one's voice heard, or the absence of an equality of means for participation in public decisions, an *intrinsic* form of injustice; but it is also most likely to result in unjust decisions, and in the unjust distribution of public resources.

These analyses also reveal the intimate relationship between these two dimensions. They reveal, in particular, the significance of the former horizontal dimension and its associated democratic objectives, for the adequate functioning of the latter vertical dimension and its democratic objectives. Namely, the educative and epistemic functions of the horizontal dimension of political voice, are rationalised as necessary *pre-conditions* for equally exerting effective democratic influence and control, and thus for realising values of freedom and justice. The discovery of one's own political will, and the establishment of a discursive community whose members are conscious of the interests of others and share perceptions of the common good, are all crucial for effective vertical participation in public decision-making. In other words, it is only when deliberative models of collective decision-making in the *horizontal* sense are made available, that they can dictate the operation of the democratic system in the *vertical* sense. And, it is only once individuals have equal access to horizontal public discourse, and thus an equality of means to understand their political interests, that they can then leverage their political knowledge through vertical processes to guarantee that their interests are considered, and ensure just distribution. Whilst these two dimensions articulate different aspects of how, and in what forum, political voice should be employed, and for what purposes, they are nonetheless closely related and to some extent, co-dependent.

This distinction between the two dimensions of political voice, and particularly the significance of the horizontal dimension and its relationship to the vertical one, have been somewhat overlooked by international legal scholars who employ the concept of political voice in the transnational or global contexts. Concentrating more on the vertical dimension, and on its associated democratic deficits under contemporary conditions of globalisation, international legal scholars portray a partial normative picture regarding the significance of political voice across and beyond states. They have indeed justified the expansion of public decision-making

fora in which individuals and communities should have democratic stake, and in which they should be able to legitimately *vertically* participate; but at the same time, they have neglected to discuss how the normative requirements that contemporary conditions give rise to, should affect *horizontal* political voice. Specifically, they neglect to rigorously account for how, in a globalised, inter-connected world, horizontal *discursive communities* should be understood and demarcated, and how their members should be conceptualised, so as to sustain the horizontal dimension of political voice in political arenas that transcend the state.

The unpacking of normative theories of democracy thus sheds new light on the analyses undertaken in Chapter II, and enables revisiting these analyses on the basis of the novel normative dimensions revealed herein. The following section hence proceeds to examine whether normative theories of democracy could offer a point of departure for rationalising the significance of political voice in the inter-state and global dimensions. This is in order to develop an understanding of the ways in which the normative properties of political voice could have equal force in these dimensions, despite democracy being a controversial order of legitimacy in these contexts. As mentioned at the outset, the discussion in the following part will also serve as a baseline against which to properly evaluate, in Chapter IV, the gravity of current challenges posed to the concept of political voice by the advent of new technologies.

3. Theorising political voice across and beyond the state

A. The educative functions of transnational and global public discourse

How then, if at all, can the educative objectives of political voice be normatively fostered from a transnational perspective, to justify the need to protect and promote its use across and beyond borders?

Beginning with the Millian educative argument, Mill clearly contextualises the principles of robust public deliberation and active political participation within the national political community, and in relation to *national* sovereignty. In fact, he directly invokes the centrality of ‘nationality’ to his theory of government in *Considerations on Representative Government*, specifying that ‘[f]ree institutions are next to impossible in a country made up of different nationalities’.²⁰⁸ Mill thus expresses scepticism regarding the ability of people from different descents or religions, or those lacking collective languages, histories, or recollections, to develop a sense of community which could form the basis for the establishment of functioning

²⁰⁸ Mill, *Considerations*, 296.

free political institutions.²⁰⁹ In other words, ‘identity of situation’ and a ‘harmony of feelings’ or ‘sympathies in common’ between members of a polity with shared political institutions, are, according to Mill, preconditions for the success and authority of these institutions.²¹⁰

Moreover, the ‘global’, and discussions of democratisation beyond the state, are obviously contextualised for nineteenth-century Mill quite differently from the way in which we might imagine these discussions taking place in present times. Whereas the contemporary context of globalisation demands contemplating the democratic legitimacy of a fragmented global political order, for Mill it was a matter of legitimising the empire and its despotic rule of foreign subjects.²¹¹ Democracy, in his view—informed perhaps by his long tenure in the East India Company²¹²—is not fit for all. It could work to achieve the educative functions of promoting the mental advancement of a community, only once a society has passed a certain threshold of progress or development to become civilised, and to thereby constitute a national or political society.²¹³ Moving from the national to the global, or rather the imperial, entailed therefore, a shift in normative reasonings as to the appropriate form of political authority within *uncivilised* nations. It also bore implications for international behaviour and for the relations among the civilised and uncivilised.²¹⁴ Namely, whereas Mill fervently argues for self-government in his *own* domestic political context, in the imperial one, he professes sound conviction in colonial benevolent despotism as a form of ‘ameliorative European rule’ over its foreign objects of administration.²¹⁵

Mill’s position in this context, cannot, of course, acquire any form of legitimacy at present (and nor did it in the past as far as this author is concerned). Therefore, in order to contemplate a potential mapping of Mill’s educative argument beyond the state under *contemporary* global conditions, his normative justifications for active political participation and public deliberation need be entertained a-historically.

According to Mill’s educative argument, extensive political involvement through public deliberation and the use voice politically, not only foster an active character, but are conducive as well to enlarging one’s sentiments and conceptions. They are conducive to making one more attuned to the general interests and the needs of others, and to developing in the individual a

²⁰⁹ *ibid* 294–95.

²¹⁰ *ibid* 294–304.

²¹¹ J Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton University Press 2006).

²¹² *ibid* 133; Pitts suggests, in addition, that Mill’s dichotomous perception of European and non-European societies stemmed in part from his uncritical acceptance of his father’s views (at 140).

²¹³ *ibid* 139, 142–43, and 150.

²¹⁴ *ibid* 143.

²¹⁵ *ibid* 162.

sense of unity with others, and the capacity for responsible public action.²¹⁶ Despite being tethered then, according to Mill, to certain preconditions which characterise *national* polities, the need for public deliberation could nevertheless be normatively justified *transnationally*—on the basis of this educative argument—so as to address the challenges associated with the contemporary global environment. This environment is characterised by the presence of threats of a global nature, by the increasing blurring of national boundaries and ensuing interdependence between national communities, and by the joint fate of globally-dispersed individuals. Under these conditions, the notion of ‘community’ is complicated and muddled, insofar as cross-boundary communities are forcibly formed, bound together not by the commonality of religion, language, or history; but rather by the commonality of threats and dominating forces which presently establish an ‘identity of situation’, ‘harmony of feelings’, or ‘sympathies in common’ between individuals from different polities.²¹⁷

Under these circumstances, the Millian educative argument regarding the significance and centrality of political voice for developing a sense of unity with others, assumes even *greater* normative force in the cross-boundary context than in the national one, thus turning Mill’s argument about nationality on its head. In other words, when considering the educative substance of political voice on its own terms, its particular pertinence under contemporary conditions becomes clear: whereas in national settings ‘community consciousness’ is presumed to subsist to some degree by virtue of fellow-citizens’ pre-existing commonalities, in the global arena it is markedly absent, yet forcefully required. This is because, under present conditions, the transnational availability of political voice may facilitate the enhancement of the intellectual and moral capacities that would enable individuals to participate in *global* public life.

Nevertheless, there remains a conceptual, or rather practical difficulty with applying the Millian educative argument to contemporary global circumstances in order to rationalise the significance of political voice across and beyond borders. Mill’s educative argument is ultimately intimately tied to what Thompson has labelled his ‘protective argument’—i.e., participation for the purpose of securing individual interests.²¹⁸ According to Mill, although the deliberative components of politics are necessary elements for a legitimate political regime, they are insufficient unless coupled with the ability to vote and practically influence (by

²¹⁶ Thompson, *John Stuart Mill and Representative Government*, 38; Gouinlock, *Excellence in Public Discourse*, 46; Mansbridge, ‘On the Idea that Participation Makes Better Citizens’, 307–308.

²¹⁷ See Mill, *Considerations*, 294–304.

²¹⁸ Thompson, *John Stuart Mill and Representative Government*.

extension of the suffrage) decision-making processes that affect one's life. Public deliberation and its educative purposes, in his account, are eventually meant to develop in the individual the political, moral, and intellectual intelligence required for informed *voting*, through which citizens can guarantee that their interests are considered. Put in negative terms by Mill:

But political discussions fly over the heads of those who have no votes, and are not endeavouring to acquire them. Their position, in comparison with the electors, is that of the audience in a court of justice, compared with the twelve men in the jury-box. It is not *their* suffrage that are asked, it is not their opinion that is sought to be influenced; [...] Whoever, in an otherwise popular government, has no vote, and no prospect of obtaining it, will either be a permanent malcontent, or will feel as one whom the general affairs of society do not concern.²¹⁹

According to Mill's narrative, in the absence of voting power beyond the state, the discursive elements of democracy and their educative force thus become instrumentally almost insignificant. That is, the educative functions of political voice could only be realised once political voice and vote exist in tandem;²²⁰ when both knowledge and community sentiments could be translated into electoral input in decision-making. Thus, according to a loyal interpretation of Mill, political voice would only acquire normative force within the context of the democratic nation-state.

Contrary to Mill, Arendt's political thought does not centre around a theory of government or democracy per se, thus rendering her educative claims much more amenable to the global context.²²¹ The 'public sphere' in Arendt's philosophy, is not identified exclusively with a *national* public, but is rather conceptualised on a different level of abstraction as any space in which plural men come together in their common affairs, and in which power is generated through collective action. Her idealised 'public realm' is essentially a discursive space rather than a spatial space, clearly untethered to any territorial boundaries.²²² In Arendtian terms, any

²¹⁹ Mill, *Considerations*, 165–66.

²²⁰ Mansbridge, 'On the Idea that Participation Makes Better Citizens', 310: 'Rather, Mill believed that the educative effect of participation works through both vote and public office. Having a vote (not necessarily an equal vote) induces people to come to their own decisions about policy'.

²²¹ Benhabib critiques Arendt on this point, for failing to make clear the way in which her normative vision of the political could be anchored in contemporary political institutions, and to spell out where her concept of the public space is placed in a theory of democratic legitimacy. See Benhabib, *The Reluctant Modernism*, 198–200.

²²² Arendt, *Human Condition*, 198:

'The *polis*, properly speaking, is not the city-state in its physical location; it is the organization of people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be'.

And also at 199: 'The space of appearances comes into being whenever men are together in the manner of speech and action, and therefore predates and precedes all formal constitution of the public realm and the various forms of government, that is, the various forms in which the public realm can be organized';

As put by Benhabib, 'The Embattled Public Sphere', 4:

'it is not a space necessarily in a topographical or institutional sense: a town hall or a city square where people do not "act in concert" is not a public space in this Arendtian sense. But a private dining room in which people

notion of a political delimitation of the ‘public sphere’ by national boundaries is senseless, since the political itself is qualified by her as that which occurs between plural men within that public sphere.²²³

It is almost self-evident then, that Arendt’s educative concepts can easily be understood vis-à-vis the transitional and global contexts, much as in relation to any other. As her understanding of politics points us away from governments and toward ‘civil society’,²²⁴ individuals’ appearance in the public realm and their acting in concert would retain identical normative force in any sphere in which such action produced power to achieve some collective goal—be it the local, the national, the transnational, or the global.²²⁵ Arendt’s educative notion of public discourse as identity building, or as community building for that matter, does not refer specifically to the building of *national* identities or national communities, but rather to any community ‘[...] that recognizes and values actions that accord with its values’.²²⁶

Open transnational or global public discourse in this account, would be of special educative value under contemporary conditions of globalisation. It would empower individuals from distinct geographical, cultural, and social communities, to develop identities vis-à-vis one another, and establish interrelatedness or communities of reference. Transnational public discourse would thus provide for more, and more diverse, opportunities for togetherness, for experiencing the world in common, for developing sensibilities of responsibility toward the other, and for collective action.²²⁷ It is through transboundary public discourse, more so than through any other type of discourse, that individuals can both disclose and become exposed to their disparate existential conditions, and come to see others for who they are and for what they

gather together to hear a Samizdat or in which dissidents meet with foreigners can become a public space; [...] These diverse topographical spaces become public in that they become the “sites” of power—both the space in which power unfolds and the space in which power appears and is sighted’;

And by McGowan: ‘Putting it this way highlights that Arendt’s emphasis on place, on the public space of appearances, is physical but not territorial’: McGowan, *Hannah Arendt: An Introduction*, 167; In quoting Pericles, Fuss describes Arendtian politics in the following: ‘[...] the substance of politics is the space of appearances that distinguishes yet binds men together and that in its living essence is independent of time, place, and physical circumstances’: Fuss, ‘Hannah Arendt’s Conception’, 168.

²²³ See *supra* note 60 and accompanying text.

²²⁴ McGowan, *Hannah Arendt: An Introduction*, 158.

²²⁵ See, however, Benhabib, *The Reluctant Modernism*, 201. According to Benhabib, Arendt’s link of the public space with the space of appearances, ‘[...] presupposes a fair degree of homogeneity and convergence around a certain shared ethos’ (at 201). According to Benhabib then, Arendt presupposes a certain community when speaking about the public space, despite not asserting this distinction in clear terms. Arendt’s public space, according to Benhabib, is thus ‘[...] a space in which a collectivity becomes present to itself and recognizes itself through a shared interpretive repertoire’ (at 201). While this account, does not preclude the possibility of conceptualising the transposition of Arendt public space to the global context, it requires clarifying of the contexts in which such conceptual transposition would seem sensible.

²²⁶ McGowan, *Hannah Arendt: An Introduction*, 158.

²²⁷ *ibid* 159.

have in common. It is revelatory, in that it facilitates, more broadly, the manifestation of human plurality, and maximises the perspectives of others in light of their subjection to common threats, common decisional externalities, or common domination.

Also, Arendt's prioritisation of the educative discursive elements of politics, is entirely removed from the question of suffrage. Political action, or the human ability to begin something anew through acting in concert, is understood by her in completely different terms than those used traditionally to describe such action as manifest in the act of voting. Contra Mill then, an Arendtian conceptualisation of a more democratic transnational and global public sphere, would presumably hinge on the availability of open discursive arenas across and beyond states and the quality of interactions therein, rather than on the availability of individuals' voting rights within these arenas. It would turn on whether individuals in these spaces are acknowledged as parties to the interaction, on whether they have the equal opportunity to voice their objections, and on whether their inputs are recognised.²²⁸

For Arendt, the educative normative force of ensuring political voice across and beyond borders, would therefore be in constituting a 'politicisation' of the global, and in expanding the 'public realm' or the space of appearances to include broader and more diverse publics and political communities. Moreover, the 'politicisation' of the global, i.e., the creation and safeguarding of open communicative channels and discursive arenas across and beyond borders, would be of special value in Arendtian terms, as these would function to 'actualise' power to ensure the endurance and continuity of political communities beyond the state. This task is of particular significance in an already globalised world characterised by fragmented sources of political power.²²⁹

Likewise, participatory democrats' educative vision of political voice could be transposed to the transnational and global contexts to justify the significance of ensuring political voice beyond borders. Echoing Mill in large measure, a generalisation of their educative claims under contemporary conditions, would call for active political participation in transnational and global forums of discourse and decision-making. This would educate individuals to become 'globally public' citizens that consider the interests of remote and distant others, and are

²²⁸ McGowan refers to this as the 'symbolics of the process': *ibid* 162–63.

²²⁹ Arendt, *Human Condition*, 199:

'Its [the public realm's] peculiarity is that, unlike the spaces which are the work of our hands, it does not survive the actuality of the movement which brought it into being, but disappears not only with the dispersal of men [...] but with the disappearance or arrest of the activities themselves. Wherever people gather together, it is potentially there, but only potentially, not necessarily and not forever'.

And at 200: 'What first undermines and then kills political communities is loss of power and final impotence; [...] Where power is not actualized, it passes away [...]. Power is actualized only where word and deed have not powered company, [...] where words are not used to veil intentions but to disclose realities'.

attuned to others' life circumstances and to the implications of decision-making upon them.²³⁰ Deliberation and participation on a transnational or global level, would forge a sense of solidarity, belonging, and new collective identities amongst disparate stakeholders. It would hence facilitate the establishment of forums of collective action beyond the state, that are now necessary in light of the material influence of foreign or global institutions on individuals' and communities' lives.

According to this educative participatory argument, a reorientation of global governance towards participation in cross-boundary public discourse through voice, would also perform legitimising functions. It would contribute to the formation of individual political will in relation to globally-relevant issues, and shape it in relation to the wills of *foreign* others. The deliberative process would thus render intricate global decision-making more apprehensible from the perspective of the individual, and therefore more acceptable. Once institutionalised, global discursive forums would hence be self-sustaining, in that they would foster in individuals exactly those qualities that are required in them for meaningful political participation.²³¹

However, as a matter of practice, several of participatory democrats' educative claims complicate their adaptation to the cross-boundary and global contexts. First, participatory democrats' appeal to the democratisation of the social, could be interpreted in the global context as a demand for eliminating the mediation of the state in global governance.²³² In this view, the institutionalisation of political participation in global governance would ideally entail *direct* communicative and deliberative channels between individuals and between foreign or global institutions of political authority. Such direct channels would empower individuals to directly partake in determining their life course.

Second, participatory democrats theorise democracy as a political culture and environment in which the system as *an entirety* is oriented towards participation.²³³ Thus, in order for participatory institutions on the global levels to be effective, they would need to be part and parcel of one interlocking system in which open and communicative public deliberation is made available in local, national, *and* global authority structures. According to participatory

²³⁰ See Pateman, *Participation and Democratic Theory*, 24–27; Bachrach, 'Interest, Participation, and Democratic Theory'.

²³¹ Pateman, *Participation and Democratic Theory*, 25–27.

²³² Bachrach even goes further in conceptualising democratic participation as a process which is conducted on a *face-to-face* basis, in which people formulate, discuss and decide public issues that affect their lives. See Bachrach, 'Interest, Participation, and Democratic Theory', 41.

²³³ Barber, *Strong Democracy*, 261–64.

democrats, this idea is embodied in the notion of a ‘participatory society’:²³⁴ active political participation and deliberation on the local level is essential for establishing a sense of ‘political competence’. Political competence, in turn, informs and influences more qualified participation on the national level.²³⁵ In generalising this stratified perception of political voice from deliberative arenas within the state to those beyond it, participatory democrats would arguably approach the availability of the former as a precondition for the effectiveness of the latter. In this view, political participation and deliberation have both a gradual and cumulative effect: individuals would generalise from experiences of active political participation in local and national authority structures to the transnational and global political spheres;²³⁶ and the more areas in which they participate, the higher their political competence is likely to be.²³⁷ The success of reforming transnational and global discursive arenas towards more open and deliberative communication and meaningful participation, would therefore turn on how these are institutionalised locally and nationally.

B. *The epistemic functions of transnational and global public discourse*

Can the epistemic functions of political voice be advocated to support its safeguarding beyond national forums, in transboundary or global arenas? Differing somewhat from the educative arguments discussed in the preceding section, the deliberative-epistemic argument is principally about legitimation. In other words, at the crux of claims regarding the epistemic value of public discourse, is the idea that for political decisions to be legitimate, they must result from public deliberation. This is because public deliberation has epistemic properties which yield epistemically correct outcomes—decisions which conform to notions of the common good. Arguably then, in generalising the discussion of the epistemic functions of political voice to the transnational and global levels, the question becomes whether and how political voice should be guaranteed across and beyond borders as a means to *legitimise* transboundary or global decision-making.²³⁸

²³⁴ Pateman, *Participation and Democratic Theory*.

²³⁵ *ibid* 47, 50.

²³⁶ *ibid* 47.

²³⁷ *ibid* 50.

²³⁸ For an application of this argument in the context of international trade law see R Howse, ‘Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization’ (2000) 98 Michigan Law Review 2329; See also R Howse and K Nicolaidis, ‘Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?’ (2003) 16 Governance: An International Journal of Policy, Administration, and Institutions 73, 89, where Howse and Nicolaidis speak of ‘political inclusiveness’ as a means to legitimise the WTO. Although they do not speak of political voice per se, the mechanisms they offer for political inclusiveness are closely related to participation through voice, eg, ‘amicus-type intervention’ and ‘rights to attend hearings’.

Arguably, the answer of epistemic democrats to these questions would be affirmative.²³⁹ According to the epistemic argument, the availability of public deliberation across and beyond borders would be required if domestic policy-making with decisional-externalities, or global policymaking, are to be regarded as legitimate from the perspective of foreign affected stakeholders. This is because, the procedure of transboundary or global public discourse in which voice would be equally guaranteed to affected stakeholders, would ensure the epistemic properties required for epistemically correct, and thus legitimate, outcomes. In other words, the availability of public discourse would ensure the exchange of reasoned validity claims between globally-dispersed consociates that are commonly affected by exercises of political power. This exchange would be performed in a way that would motivate interlocutors to establish normative claims corresponding to a transboundary, or global, view of justice. The establishing of such normative claims is regarded as particularly important given the ‘underdetermined state of knowledge about the normative standards that are appropriate for evaluating institutional design and performance at these levels’.²⁴⁰ Decisions that would survive this process of overcoming ‘moral and cognitive limitations’,²⁴¹ would accordingly be regarded as legitimate from the perspective of participants. Moreover, as the process of inclusive transboundary or global public discourse would presumably maximise the ‘cognitive diversity’ of the deliberating group, the more likely it is to result in ‘collectively intelligent’ outcomes.²⁴²

However, generalising the epistemic argument to apply to decision-making spheres beyond the state, is bound to encounter several difficulties in light of the assumptions

For other deliberative (*non-epistemic*) theories of global politics, see eg: Held, *Democracy and the Global Order*; JS Dryzek, *Deliberative Global Politics* (Polity Press 2006) 23; JS Dryzek and S Niemeyer, ‘Global Politics’ in JS Dryzek, *Foundations and Frontiers of Deliberative Governance* (OUP 2010); JS Dryzek, ‘Transnational Democracy: Beyond the Cosmopolitan Model’ in JS Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (OUP 2000); DF Thompson, ‘Democratic Theory and Global Society’ (1999) 7 *The Journal of Political Philosophy* 111. See also W Smith, ‘Transnational and Global Deliberation’ in A Bächtiger and others (eds.), *The Oxford Handbook of Deliberative Democracy* (OUP 2018) 856; For a taxonomy of deliberative approaches to ‘democratising the global’ see W Smith and J Brassett, ‘Deliberation and Global Governance: Liberal, Cosmopolitan, and Critical Perspectives’ (2008) 22 *Ethics & International Affairs* 69.

²³⁹ See eg, A Buchanan and RO Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20 *Ethics & International Affairs* 405. Buchanan and Keohane focus on the ‘epistemic-deliberative quality’ of global governance institutions to argue for a complex standard of legitimacy which requires global governance institutions to possess epistemic virtues.

²⁴⁰ Smith, ‘Transnational and Global Deliberation’, 857; Smith and Brassett emphasise this point to offer a slightly different version of the ‘epistemic value’ of global public discourse albeit not tying it explicitly to epistemic accounts. They conceptualise voice and public deliberation as a critical tool for ‘deliberative reflection’, i.e., ‘a means for international and global political actors [...] to determine, reinterpret, and in some cases transform the principles and values that regulate their cooperative activities’: Smith and Brassett, ‘Deliberation and Global Governance’, 88. It is viewed as important given the ‘present uncertainty and disagreement about global governance both in theory and in practice’ (at 89).

²⁴¹ Estlund and Landemore, ‘The Epistemic Value of Democratic Deliberation’, 121.

²⁴² See *supra* notes 130–133 above and accompanying text.

underpinning the epistemic argument. Primarily, the epistemic claim is grounded in several ‘situational’ or ‘social-structural’ suppositions, which concern participants’ commitment to resolving conflicts in a discursive fashion on the basis of their pre-existing shared conception of the common good.²⁴³ According to Habermas, for example, the ‘reference system’ for justifying decisions of an ethical-political character, is that of the political community in question and its traditions. This assumption presents an obstacle for justifying cross-boundary political decisions, insofar as the outcomes must be acceptable to the highly heterogeneous social, cultural, and political participants involved.²⁴⁴ Some forms of epistemic claims are therefore likely to rule out the probability of successful deliberation across and beyond borders on the basis of the structural conditions characterising transboundary contexts; and would thus downplay the significance of political voice in these contexts.²⁴⁵

A different epistemic approach, however, would centre on the potential of the deliberative process to shape interlocutors’ standpoint *over time*. If properly institutionalised, deliberative forums beyond the state could, over time, shape the content of participants’ preferences to ‘[focus] the debate on the common good’.²⁴⁶ ‘Common good’, in this sense, must not necessarily reflect a pre-existing, presumably national, conception of justice, but could rather be shaped in accordance with the specific conditions that bind participants together in discussion. In other words, the ‘common good’ could be conceptualised and understood to reflect that which stakeholders who are affected by common threats, decisions, or exercises of power, find to be just in light of the shared circumstances and conditions they all happen to be subject to.

And yet, some epistemic accounts still view the deliberative process as essentially complementary to the process of democratic majority voting. In this view, majority rule is ‘an essential component of democratic decision-making with its own epistemic properties [...] ideally suited to predict which of the two options identified in the deliberative phase is the

²⁴³ See *supra* notes 122–123 and accompanying text.

²⁴⁴ Habermas, *Between Facts and Norms*, 108.

²⁴⁵ Habermas argues in addition, that the success of public discourse requires a ‘background political culture that is egalitarian, divested of all educational privileges, and thoroughly intellectual’, thus presenting additional constraints on the success of transboundary public discourse: J Habermas, ‘Popular Sovereignty as Procedure’ in J Bohman and others (eds.), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) 35, 62. He notes, however, with respect to the global context, that:

‘[i]f the international community limits itself to securing peace and protecting human rights, the requisite solidarity among world citizens need not reach the level of the implicit consensus on thick political value-orientations that is necessary for the familiar kind of civic solidarity among fellow-nationals’: J Habermas (C Cronin trans. and ed), *The Divided West* (Polity 2006) 143.

²⁴⁶ Cohen, ‘Deliberation and Democratic Legitimacy’, 77.

best'.²⁴⁷ Thus, even if discursive process were to be institutionalised across and beyond borders to ensure deliberative 'opinion-formation' and 'communicative power', the process of democratising decision-making remains incomplete in the absence of appropriate mechanisms (such as voting power) to ensure 'institutionally structured political will-formation'.²⁴⁸ According to these epistemic arguments, in the absence of actual voting power in the transboundary and global contexts, transnational political voice has little chance of realising its epistemic potential to democratically legitimise public decision-making.²⁴⁹

This does not detract, nevertheless, from the epistemic potential of 'weak public spheres' to exert indirect influence that would '[make] possible a form of legitimation via a loose linkage of discussion and decision'.²⁵⁰ Even absent institutionalised mechanisms to ensure voting power, the epistemic value of political voice beyond borders endures, perhaps less in its legitimising functions, but in its potential in developing transboundary and global sensibilities of the common good, and thus in improving the likelihood that decision-making will embody broader and more diverse interests.

C. *Freedom beyond the state*

How can a 'democratisation' of the global—in terms of the institutionalisation of political voice across and beyond the state—be validated in republican terms on the basis of the value of freedom?²⁵¹

Despite the ostensibly inextricable link between republican claims of legitimacy, and the domestic institutional structures through which they are to be put into practice, neo-republican theorists debate the application of their normative theory to conditions of globalisation on the basis of their understanding of freedom as non-domination. The point of departure for these

²⁴⁷ Landemore, *Democratic Reason*, 145.

²⁴⁸ Habermas, 'Popular Sovereignty as Procedure', 57; Or elsewhere Habermas, *Between Facts and Norms*, 299: '[t]he flow of communication between public opinion-formation, institutionalized elections, and legislative decisions is meant to guarantee that influence and communicative power are transformed through legislation into administrative power'.

²⁴⁹ Habermas notes in this context that:

'[o]nly within constitutional states do administrative mechanisms exist to insure the equal inclusion of citizens in the legislative process. Where these are lacking, as in the case of the constitutions of international organizations, there is always the danger that the "dominant" interests will impose themselves in a hegemonic manner under the guise of impartial laws': Habermas, *The Divided West*, 141–42.

²⁵⁰ *ibid* 142.

²⁵¹ Laborde explains republican theory's ties to the state in its commitment to the understanding of freedom as 'citizenship in a bounded community'. Republican cosmopolitanism, in that view, 'is an oxymoron because, at the global level, it is not possible to reproduce the practices, institutions and virtue essential to founding and maintaining republics': C Laborde, 'Republicanism and Global Justice: A Sketch' (2010) 9 *European Journal of Political Theory* 48, 49; See also A Niederberger, 'Republicanism and Transnational Democracy' in A Niederberger and P Schink (eds.), *Republican Democracy* (Edinburgh University Press 2013) 302; Pettit refers to this way of thinking as 'republicanizing the causes': Pettit, *Republicanism*, 134.

discussions, is the recognition that globalisation has problematised the central role assigned to the state in securing against domination, or in enabling republican freedom.²⁵²

Two types of responses have primarily been offered by neo-republican theorists in the global context. The one, detailed by Pettit, centres on the ways in which international arrangements enable the subjection of one state (and therefore the subjection of its citizens) to the dominating force of another state, or that of public and private international agencies.²⁵³ According to Pettit, the international lens is vital in complementing his analysis of domination at the state level. It accounts for how individuals' freedom as non-domination is jeopardised not only by the state, but also by foreign entities through the vehicle of the state. Foreign states or other non-domestic private and public agencies, may exercise alien control of another state, either by means of arbitrary active interference in the way in which a state conducts its business, or on the basis of invigilation or intimidation of a state. So long as these means of interference result in the expropriation of control from the hands of individuals in whose name and interests the state—as a corporate agent—acts, they will amount to a source of domination in individuals' lives.²⁵⁴

Republicanising the global for Pettit, thus requires more than an international regime in which international organisations would provide centralised non-dominating restraints on states.²⁵⁵ Nevertheless, such organisations could prove instrumental in promoting the republican cause internationally. This is by providing public forums in which a 'currency of common global reasons' would emerge. This currency would delimitate the scope of considerations that could be brought to the table and adopted in support of global decision-making. Much like in the domestic context then, the role of political voice in the global arena is in gradually institutionalising process norms, so as to '[...] establish a culture in which international law can strengthen and serve as a discipline for inhibiting potential dominators

²⁵² Buckinx and others, 'Domination Across Borders', 6–7.

²⁵³ P Pettit, 'A Republican Law of Peoples' (2010) 9 *European Journal of Political Theory* 70.

²⁵⁴ Pettit further qualifies this analysis by differentiating between what he terms effective and representative states as opposed to non-effective and non-representative ones, concentrating on the former as the objects of his international theory. Effective and representative states are those which succeed in protecting their members against both private and public domination, and are thus worthy of being safeguarded from alien domination by foreign states. Given that non-representative states engage in the domination of their own citizens, alien domination might actually be considered an effective means to guarantee the freedom of these states' citizens. See *ibid.*

²⁵⁵ Pettit entertains the question of whether (1) international organisations could impose non-dominating restraints on states through central regulation and whether (2) these would actually be effective in protecting state-to-state domination. Whilst he is optimistic as regards the former, he doubts the latter. International organisations are thus inadequate in Pettit's account to solve relationships of domination in the international arena by regulating such relationships. *ibid.* 80–82.

and for protecting states from one another'.²⁵⁶ Hence, political voice is a crucial tool in the *global* context, for the safeguarding of individual freedom.

A slightly different rejoinder to the application of neo-republican theory to the global level, is led by James Bohman. Like Pettit, Bohman's account centres on overcoming domination manifest in the transnational arena and born out of its structural features.²⁵⁷ However, unlike Pettit, Bohman deflects his attention from the bilateral, 'agent-relative',²⁵⁸ manifestation of domination that is emblematic of international relations between states, to focus on individuals' statuses and lack of standing in certain domains, which make them vulnerable to domination.²⁵⁹ Contrary, then, to Pettit's dyadic conception of domination—underpinned by a somewhat black-boxed image of the state in international relations—Bohman provides a more systematic account which pierces the sovereign veil, and emphasises the structural features of the international order that enable the domination of individuals and denies them freedom.²⁶⁰

Drawing on both Arendtian and Habermasian political thought, at the core of Bohman's account of 'republican cosmopolitanism',²⁶¹ is the communicative status and power of individuals; their '[...] normative power to address and be addressed by others without loss or dependence', and their corresponding capacity to transform that power into political influence.²⁶² In the domestic context, these normative powers derive from one's status as a citizen. But where the power of arbitrary subjection is transnationally dispersed, individuals' normative powers and status as members of the human political community, need to be reconfigured vis-à-vis other dominating individuals and institutions, regardless of national boundaries and beyond nationality.²⁶³

Republicanising the global for Bohman, therefore entails a commitment to individuals' right of membership in the human political community, and to having the communicative freedom to deliberate and change the terms and distribution of normative powers. It requires an '[...] institutional structure that includes at least some global institutions that do not regard

²⁵⁶ *ibid* 83; He emphasises however, that deliberation in the international arena could only be effective as a democratic tool if set against the backdrop of coalitions of power between weaker states (at 86).

²⁵⁷ J Bohman, 'Domination, Global Harms, and the Priority of Injustice: Expanding Transnational Republicanism' in B Buckinx, J Trejo-Mathys, and T Waligore (eds.), *Domination and Global Political Justice* (Routledge 2015) 71, 73.

²⁵⁸ See Laborde, 'Republicanism and Global Justice', 57.

²⁵⁹ Bohman, 'Domination, Global Harms, and the Priority of Injustice', 73.

²⁶⁰ *ibid* 76.

²⁶¹ J Bohman, 'Nondomination and Transnational Democracy' in C Laborde and JW Maynor (eds.), *Republicanism and Political Theory* (Blackwell Publishing 2008) 190.

²⁶² Bohman, 'Domination, Global Harms, and the Priority of Injustice', 76.

²⁶³ Bohman, 'Nondomination and Transnational Democracy', 202–205; Bohman, 'Domination, Global Harms, and the Priority of Injustice', 84–85.

current boundaries and memberships as fixed for the purposes of common liberty'.²⁶⁴ Accordingly, it demands democracies to extend certain statuses and powers to individuals both within and beyond their borders, so as to '[...] *constitute* the human community as the basis of common liberty that all share'.²⁶⁵

This, for Bohman, is essentially a deliberative task. The right of membership is essentially the right to influence—by initiating deliberation—the terms of cooperation with others, thereby generating political power.²⁶⁶ Central to this commitment, are public spheres that permit the expression and diffusion of public opinion.²⁶⁷ However, in contrast to the national context that is characterised by centralised authority and by a corresponding *unitary* public forum, political authority in the global arena is disaggregated and decentred in form, cutting across varied political borders. It hence establishes principle-agent relationships of a specific character, which require a different mode of legitimation or democratisation.²⁶⁸

Specifically, a democratising effect in the global arena, would not stem from the influence of face-to-face collective deliberation on central authority through the mediation of public opinion. Rather, Bohman understands the global public sphere to be structured as 'a public of publics', decentred much like the political authorities with which it interacts. These publics consist of particular relationships between members that are affected by the consequences of global political authority. Such relationships enable those affected to recognise themselves as such, and to address and be addressed by one another through communicative freedom.²⁶⁹ Communicative freedom in these 'distributive' public spheres can serve to '[...] [recapture] the constituent power of the people, now in a dispersed form, when their constitutive power as citizens has failed.'²⁷⁰

According to Bohman, the task of democratising global governance is thus highly dependent on the role of civil society organisations as new kinds of intermediaries. Their role is in '[socialising] the commons' by sustaining open and free dialogue across various domains and levels. This would guarantee that the new forms of cross-border publicity provided by novel communicative network infrastructures, are sustained as public spheres that can in turn

²⁶⁴ Bohman, 'Nondomination and Transnational Democracy', 212.

²⁶⁵ *ibid* 210.

²⁶⁶ *ibid* 207–208.

²⁶⁷ Bohman, *Democracy Across Borders*, 60.

²⁶⁸ Bohman provides an elaborate account of the how political authority is transformed in the global arena so as to condition the way in which public spheres could be democratised: *ibid* 60–70. He characterises this transformation as a 'reversal of control' between the principal and the agent (at 70).

²⁶⁹ Bohman, 'Domination, Global Harms, and the Priority of Injustice', 71, 77.

²⁷⁰ *ibid* 72.

exert deliberative influence on decision-making processes in global institutions.²⁷¹ Once the publics constituted within these transnational public spheres are also able to regularly provide input, and access influence over polycentric decision-making processes through appropriate institutional structures, then the global arena could be democratised even absent electoral control. In this view, the democratisation of the global is conceptualised as the process of investing individuals with normative powers to ‘[...] shape the very institutions that in turn shape their freedoms and powers’.²⁷² Such process guarantees that individuals’ statuses, rights, and duties, are not arbitrarily altered by institutions’ normative powers short of a deliberative process in which they could jointly partake, and which they could themselves influence and shape.²⁷³ Political voice across and beyond the state, is therefore normatively justified vis-à-vis its fundamental role in ensuring individual freedom.

Both accounts then, although differing in focus, emphasise the significance of ensuring political voice in deliberative fora across and beyond the state. From the standpoint of both states and individuals, the exercise of political voice in the transnational and global contexts is essential for ensuring republican freedom as non-domination. Freedom, in this narrative, is thus the value that grounds the significance of political voice in the transnational and global contexts.

D. *Justice beyond the state*

How could ensuring political voice across and beyond the state be understood to contribute to matters of *global* justice according to democratic theorists? Or put in negative terms, how does the absence of political voice impact on questions of global *injustice*? These questions are arguably difficult ones, given the absence of a clear consensus on what the concept of ‘global justice’ entails. Nonetheless, several theorists from both the deliberative and neo-republican schools have ventured to articulate the relationship between the two concepts.

There are primarily two interrelated ways in which this nexus has been established. The first, is through the neo-republican lens and concept of ‘global *political* injustice’, which is qualified as injustice that results from relations of domination. It centres on questions of power, standing, justification, and participation in the transboundary and global contexts.²⁷⁴ Several

²⁷¹ *ibid* 80–84.

²⁷² *ibid* 91. Bohman builds in his analysis on the Habermasian distinction between communicative freedom and communicative power, with the former transforming into the latter when institutionalised within decision-making processes.

²⁷³ *ibid* 92–97.

²⁷⁴ Buckinx and others, ‘Domination Across Borders: An Introduction’, 1.

theorists have offered varying accounts of global political injustice, and of the role of political voice in safeguarding against it. The second way in which the nexus between political voice and global justice has been established, is by further linking the concept of global political injustice with matters of global *distributive* justice. The argument advanced, is that certain forms of domination which result from the absence of political voice and political standing, are ‘capability-denying’, and thus deepen economic inequalities between the global poor and more affluent constituencies. In this account, political voice is ultimately significant for furthering global distributive justice, over and above global political justice.

Expanding on neo-republican domestic accounts of ‘justice as non-domination’, democratic theorists problematise power-relations beyond the state as matters of global political injustice. In these accounts, notions of injustice are not confined to concerns regarding the equal provision of goods. They rather centre on ‘intersubjective relations’ and ‘social structures’, in which some are arbitrarily subjected to the rule of others without legitimate justification.²⁷⁵ Injustice, accordingly, involves individuals’ lack of standing, and their inability to freely and equally partake in the deliberative processes in which the distribution of goods is determined, and in which the common obligations of members of a community are decided upon. As this account is normatively grounded in the principle of ‘discursive justification’, political voice assumes a prominent role therein as a type of power possessed by individuals, i.e., the ‘power to interpret, shape, and reformulate the contents of common obligations with others’.²⁷⁶ The absence of this power in certain political and social relations, implies injustice.²⁷⁷

Although arguably tethered to the institutional structure of a democratic national polity,²⁷⁸ this account of political injustice has been argued to conceptually apply transnationally, under conditions of globalisation, to constitute *global* political injustice.²⁷⁹ This conceptual extension

²⁷⁵ R Forst, ‘Transnational Justice and Non-Domination: A Discourse-Theoretical Approach’ in B Buckinx, J Trejo-Mathys and T Waligore (eds.), *Domination and Global Political Justice: Conceptual, Historical and Institutional Perspectives* (Routledge 2015) 88.

²⁷⁶ Bohman, ‘Domination, Global Harms, and the Priority of Injustice’, 71, 74.

²⁷⁷ Forst, ‘Transnational Justice and Non-Domination’, 90; Fraser provides a similar account of injustice (as one of three dimensions of injustice) that is not framed, however, in neo-republican terms as domination. See N Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia University Press 2008).

²⁷⁸ Forst explains: ‘Democracy is the form of political order capable of accomplishing this in the right way. The task of democracy is to secure the political autonomy of those who are supposed to be both subjected and authors of binding norms’: Forst, ‘Transnational Justice and Non-Domination’, 98.

²⁷⁹ Fraser, conceptualises this discourse as centring on the meta-issue of the ‘frame of justice’, as a third dimension of justice concerned with the political one of representation. See Fraser, *Scales of Justice*. The political dimension is not simply *applied* to the global context, to problematise new forms of power relations brought upon by globalisation, but is rather born *out of* globalisation in the sense that globalisation has altered ‘the grammar of the argument’ about justice (at 15), to usher in this third question of the frame. In other words, the

to the transnational or global context, is possible on the basis of an understanding of justice in which ‘justice exists wherever relations of political *rule* and social *cooperation* exist and wherever forms of *domination* exist, whether or not they are legally institutionalised’.²⁸⁰ In other words, the presence of political injustice does not depend on the existence of a state as a legally institutionalised form of social and political relations. Rather, political injustice traces conditions of domination which require justification. Global political justice accordingly demands ensuring political voice *across* and *beyond* boundaries.²⁸¹

These circumstances present themselves in various forms in the transboundary arena. One may be epistemically dominated by being denied the status of a “knower”, and the capacity to participate as an equal in the social exchange of information’.²⁸² Alternatively, one may be dominated by virtue of an illegal status as a refugee or immigrant, or by exclusion from decision-making that entails decisional-externalities, such as in the case of those living on river deltas in the context of decisions on climate change.²⁸³ All these instances provide examples of global political injustice, in which people are denied equal participatory access and ‘justificatory power’, or in other words the ability to challenge dominating forces that are transnationally dispersed.²⁸⁴

The concept of global *political* justice further serves to mediate between the significance of political voice across and beyond borders, and matters of global *distributive* justice. According to this neo-republican narrative, the denial of ‘discursive autonomy’,²⁸⁵ or equal participatory access to deliberative and decisional processes in the global arena, has broader distributive effects. In this account, structural relations of domination are ‘capability-denying’ in two respects. First, discursive autonomy (denied by domination), is in and of itself a basic capability; but it is also a mechanism through which individuals’ views about the content of other capabilities that constitute well-being, are defined. Second, domination compromises

political dimension, which includes the question of who is entitled to participate in struggles over questions of distribution and recognition (the other two dimensions), came into play only once the Kelsenian-Westphalian paradigm exploded.

²⁸⁰ Forst, ‘Transnational Justice and Non-Domination’, 100; See also Bohman, ‘Global Harms’, 73.

²⁸¹ As articulated by Forst, ‘[th]e principle of fundamental transnational justice gives every political community the right to participate in cross-border, normative discourses on an equal footing, and affected parties below the state level simultaneously have the right to demand participation in such discourses if the latter would otherwise ignore or perpetuate specific relations of domination’: Forst, ‘Transnational Justice and Non-Domination’, 103.

²⁸² Bohman, ‘Domination, Global Harms, and the Priority of Injustice’, 76.

²⁸³ *ibid* 78–80; Fraser terms these two latter examples of political injustice ‘misframing’: Fraser, *Scales of Justice*, 19.

²⁸⁴ Forst, ‘Transnational Justice and Non-Domination’; Bohman, ‘Domination, Global Harms, and the Priority of Injustice’; Fraser, *Scales of Justice*.

²⁸⁵ Laborde, ‘Republicanism and Global Justice’, 66.

access to ‘basic socioeconomic capabilities’.²⁸⁶ This is because of how it restricts the capacity of weaker constituencies to level their bargaining power, and to further their interests towards rectifying the gross global distributive inequalities. In the words of Cécile Laborde, ‘[t]he radical inequality is partly maintained and reproduced by an institutionalized system of domination of the global poor by affluent countries’.²⁸⁷ The value of transboundary political voice, in this account, is in politically empowering the poor to enable them to meaningfully participate in transnational and global forums of decision-making, and to contest and demand justification, in order to better defend their socioeconomic interests.

4. Conclusion

The normative account of political voice provided in this chapter, is both forward looking in anticipating the discussions of the following chapters, and backward looking in illuminating the former. With respect to the former, this account has clarified important aspects that have been overlooked by the international legal scholarship concerned with political voice deficits. In bringing forth a comprehensive normative account of the democratic objectives ascribed to political voice by normative theories of democracy, this chapter has offered a solid point of departure for contemplating the relevance and importance of political voice for political dimensions beyond the state under the contemporary conditions described by this scholarship.

Particularly, this chapter has exposed the multi-dimensional character of political voice, and its democratic functions and normative thrust within the state. As discussed at great length in Part 2, political voice, primarily in its *horizontal* dimension, serves both educative and epistemic functions. By virtue of its *vertical* dimension, it also secures individuals’ freedom as non-domination and aspects of justice. Importantly, these two dimensions are intimately tied insofar as freedom and justice cannot be adequately guaranteed in the absence of horizontal discursive communities. These discursive communities enable the discovering of individuals’ political will, the development of sensibilities of community consciousness, and the reaching of shared understandings of the common good. Once established, and provided that adequate mechanisms are in place to also guarantee vertical communications between individuals and public decision-makers, individuals can employ their political voice effectively to ensure that their interests are taken into account.

Thus, it is only on the basis of an intricate understanding of the democratic objectives of political voice and their inter-relations, that its normative purchase in the transnational and

²⁸⁶ *ibid* 56.

²⁸⁷ *ibid* 61.

global contexts could be properly explained. Part 3, has offered a rigorous analysis of how political voice could be justified across and beyond borders on the basis of its functions *within* the democratic state, and in light of the present conditions brought upon by globalisation, the expansion of the international order, and the increasing misalignments between decision-makers and affected stakeholders.

At the crux of this analysis, is the notion that our understandings of the horizontal and vertical dimensions of political voice and their democratic objectives, could and should be re-charted to address changing actualities in the exercise of power and political authority. Present conditions demand moving beyond the limited understanding of political voice's horizontal dimension as tethered to national 'publics'. Specifically, the blurring of political frontiers, and the formation of transnational communities of affected stakeholders that are united by common threats and joint fate, now require maintaining the horizontal dimension of political voice also *across* and *beyond* states, not only within them. The educative properties and functions of horizontal political voice, are thus particularly relevant at present for fostering in individuals the political intelligence required for human togetherness, for developing transboundary community consciousness, and a responsibility towards foreign others.

Its epistemic functions are equally important beyond the intra-state dimension. This is because of the difficulties that result from the massive increase in the plurality of interests when moving from the national to the global; and from the diversity in socio-cultural perceptions of what is considered the common good. Conditions of globalisation impose a reality in which daily decision-making by governments and global governance institutions inevitably impact highly dispersed populations. The availability of horizontal political voice beyond borders, is thus accorded particular normative strength as a tool through which notions of the common good could be developed, and could confer greater legitimacy on transnational and global decision-making.

Similarly, circumstances of globalisation have also complicated individuals' capacity to enjoy freedom as nondomination by weakening nation states' power to secure and promote this ideal within their own boundaries. Under these conditions, individual lives are daily influenced, and indeed dominated, by forces from outside the state, and by the novel vertical relationships of power established in transnational and global arenas. These conditions infuse vertical political voice with normative thrust beyond the national setting, as a necessary means to guarantee individuals' control of their life course. This requires expanding the scope of public decision-making fora in which individuals could meaningfully participate through voice. The same stands for the attainment of justice. As in relation to freedom, globalisation has forcibly

drawn attention to political aspects of global injustice, in the sense of individuals' limited capacity to partake—as political agents—in the articulation of collectively binding transnational or global norms. Not only does this form of domination constitute an injustice in and of itself, but it furthermore aggravates global distributive injustices: dominated individuals and constituencies are restricted in their ability to advance their socioeconomic interests through global institutions.

The analyses in Parts 2 and 3 have thus stretched the notion of political voice far beyond its function as an accountability mechanism that legitimises decisional-externalities, or that legitimises the public power exercised by global governance regimes. Rather, it serves much broader democratic objectives and ideals which give rise to particular requirements at present, if these ideals are to be fully realised. Specifically, these ideals require that horizontal political voice be guaranteed not only within the state, but also across and beyond it. The public sphere and the existence of discursive communities should be maintained transnationally or globally. These ideals also require that individuals and communities effectively communicate not only with national decision-makers, but also with transnational and global ones. Whilst these requirements arguably expand on the current demands of global administrative law, they also fall short of demanding a complete democratisation of global arenas.

With these requirements now having been elucidated and normatively justified, the following Chapter IV proceeds to discuss the particular challenges posed at present to political voice by the advent of new technologies. As these threaten both the horizontal and vertical dimensions of political voice within, across, and beyond the state, the extent of their gravity can now be properly assessed by reference to the discussions undertaken in this chapter. In other words, the expansive account of political voice provided herein, serves as a normative benchmark against which to evaluate these new challenges, and against which to consider, in Chapter V, the legal obligations that these challenges should give rise to.

New information and communication technologies and the global 'political voice deficit matrix'

It is perhaps a trite observation that the availability and robustness of political voice has been, and is likely to always be, influenced and shaped by the affordances of information and communication technologies.¹ Given the intimate relationship between political voice and the informational and communicative infrastructures through which it could exist and acquire meaning, it comes as no surprise that the 'digital revolution' has radically altered the terms of the debate.²

The present chapter aims to examine how the broad and sweeping technological transformations pioneered by the digital revolution, contemporarily challenge the presence, availability, and structure of political voice, within, across, and beyond states. These transformations include, *inter alia*, the birth of the worldwide web and the avant-garde affordances of its physicality and mechanics³; the increased interactivity of web experiences brought about by the creation of 'Web 2.0' and social networks⁴; the increasing reliance on big data and algorithms, as the driving agents of economic and governance structures which rely on decentralised, non-market based, and non-propriety mass productions of information and knowledge;⁵ and finally, the rise to power of private information and communication technology (ICT) companies, which control the global infrastructure of information and communication channels.

Set against the backdrop of the normative study undertaken in Chapters II and III, this chapter's enquiry centres, in particular, on how the novel challenges posed by these

¹ This is a different observation than accounting for the role of the media in democracy (although arguably related to it). Whilst the latter is concerned with the role of the press (as an *institution*) in the democratic process, the former is concerned with how certain *technologies*, i.e., the invention of the printing press, the broadcast media, and most recently the internet, have affected and affect, the mechanics of peoples' political discursive interactions. For a discussion of the latter see J Lichtenberg (ed), *Democracy and Mass Media: A Collection of Essays* (CUP 1990).

² For a variety of theoretical approaches contemplating the digital revolution from the standpoint of social theory see F Webster, *Theories of the Information Society* (3rd edn, Routledge 2006).

³ Benkler describes these changes as going 'to the very foundation of how liberal markets and liberal democracies have coevolved for almost two centuries': Y Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006) 1.

⁴ Beer explains the notion of Web 2.0. See D Beer, 'Power Through the Algorithm? Participatory Web Cultures and the Technological Unconscious' (2009) 11 *New Media and Society* 985; See also T O'Reilly, 'What is Web 2.0' available at: <https://www.oreilly.com/pub/a/web2/archive/what-is-web-20.html>.

⁵ For a detailed economic analysis of the novelties of the 'networked information economy' see Benkler, *The Wealth of Networks*; For an analysis of social networking sites see dm boyd and NB Ellison, 'Social Network Sites: Definition, History, and Scholarship' (2007) 13 *Journal of Computer-Mediated Communication* 210.

technological transformations to political voice, affect, in turn, its four democratic objectives. These objectives include: political voice's educative functions, its epistemic functions, its liberating functions, and its equitable functions. The chapter also examines what the consequences of these challenges are for the potential to realise the democratic objectives of political voice within, across, and beyond political boundaries. The overarching purpose of this chapter is to synthesise these different elements in the purpose of defining and characterising what I conceptualise as the contemporary global 'political voice deficit matrix', and demarcate its scope. The chapter will thus provide a comprehensive illustration of the contemporary challenges posed to political voice; and an analysis of the breadth and depth of these challenges' implications for individuals' and communities' democratic well-being.

The notion of a global 'political voice deficit matrix' coined in this chapter, highlights the multidimensional configuration in which political voice deficits manifest themselves in the contemporary informational and communicative environment. This matrix includes the *horizontal* dimension of global political voice deficits, i.e., individuals' and stakeholders' inability to receive pertinent information, and to partake in open, deliberative, public discourse; and the implications of these deficits for the realization of political voice's educative and epistemic functions within, across, and beyond borders. It also includes the *vertical* dimension of these deficits, i.e., individuals' and collectives' inability to effectively partake in public decision-making processes that affect their life course; and the implications of these deficits for the attainment of freedom and justice.

The chapter proceeds as follows. Part 1 will examine some of the technological transformations which contribute to the global 'political voice deficit matrix'. Specifically, it will analyse how ICT companies' commercial model and regulatory control of global informational and communicative infrastructures, results in the fragmentation of communicative spheres and the pollution of information. Part 2, then moves to investigate how the fragmentation and pollution of information and communication channels, adversely impact individuals' ability to partake in open, deliberative, public discourse; and the consequent effects of these adverse impacts, on the realisation of the educative and epistemic democratic objectives that horizontal political voice serves within, across, and beyond political boundaries. This part will then discuss how the undermining of the educative and epistemic functions of horizontal political voice, further impacts individuals' and communities' ability to communicate effectively with public decision-makers. It will thus analyse the adverse impact of *horizontal* political voice deficits on the *vertical* dimension of political voice, and, in turn, its consequences for the realization of freedom and justice within, across, and beyond political

boundaries. In conclusion, Part 3 will discuss the notion coined herein of a global ‘political voice deficit matrix’, and what aspects of the current challenges to political voice this term is meant to denote. This part will thus bridge the discussions in this chapter with the following one, which will discuss the practical and normative suitability of possible legal responses to address and mitigate this global ‘political voice deficit matrix’.

1. ICT companies’ regulatory control of global informational and communicative infrastructures

A prominent aspect of the digital revolution is the rise to power of private ICT companies and their control of the novel infrastructures of information and communication channels. The novel digital technologies made available by the birth of the worldwide web, have effectively altered the consumption of information, and methods of communication, in both a quantitative and qualitative sense. In the quantitative sense, they have laid down the technological groundwork for a transnational communicative infrastructure interlocking spatially dispersed individuals and communities.⁶ In the qualitative sense, these infrastructures have become the principal medium through which individuals manage their social relations. As information and communications thus become *the* central features of the present political economy, users’ participation in digital platforms is becoming almost a precondition for involvement in offline physical life.⁷ These changes considerably diminish the disjunction between cyberspace and the physical space, or between the virtual world and the real world. As captured in the words of Lawrence Lessig some twenty years ago, ‘the old one-to-many architectures of publishing [...] were supplemented by a world where everyone could be a publisher. *People could communicate and associate in ways that they had never done before*’.⁸

Accordingly, some have characterised digital platforms as ‘social infrastructures’, and have equated the private companies controlling them to public utility companies, or even nation

⁶ Not only have digital technologies, in the words of Balkin, ‘[changed] the social conditions in which people speak’, but they have also changed the spatial conditions in which they speak, ‘[cutting] across territorial borders, creating a new realm of human activity’: JM Balkin, ‘Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society’ (2004) 79 NYU Law Review 1, 2; See also DR Johnson and D Post, ‘Law and Borders—The Rise of Law in Cyberspace’ (1996) 48 Stanford Law Review 1367, 1367.

⁷ R Burrows as brought in Beer, ‘Power Through the Algorithm?’, 987, is illustrative of this point: ‘Roger Burrows has suggested that the difference here is that information technologies now “comprise” or “constitute” rather than “mediate” our lives. As he puts it:
... the stuff that makes up the social and urban fabric has changed—it is no longer just about emergent properties that derive from a complex of social associations and interactions. These associations and interactions are now not only *mediated* by software and code they are becoming *constituted* by it’.

⁸ L Lessig, *Code: and Others Laws of Cyberspace* (Basic Books 1999) 4 (emphasis added).

states.⁹ These characterisations denote both the extreme powers wielded by private ICT companies to make decisions which materially influence individuals' lives; and their control of what are increasingly understood as *public spheres of discourse and action*.¹⁰ Importantly, these characterisations highlight the fact that the implications of new digital technologies for political voice cannot be assessed on the basis of the new *technological* features of information and communication channels alone. Rather, these implications predominantly depend on the ways in which such communicative infrastructures are regulated, on who they are regulated by, and particularly, on what the outcomes of these regulatory endeavours are.

The following discussion centres, therefore, on the political economy of new ICT companies, and on the ways in which their commercial business model informs their regulatory control of information and communication channels. Once established, the discussion will then proceed to analyse the *effects* that this regulatory control of information and communication channels has on users' patterns of communications, and on their processing of information and production of knowledge. It expounds, that while these information and communication infrastructures undoubtedly facilitate the expansion of global communications and information flow (in both spatial and qualitative terms), they are nevertheless controlled by private ICT companies in ways that result in the fragmentation of communicative spaces and the pollution of information channels.

A. ICT companies' 'operational logic'

ICT companies' control of digital information and communication channels, is grounded in several features that are predicated on a certain operational logic empowered by opaque algorithmic decision-making and invisible datafication.¹¹ In other words, algorithms or

⁹ KS Rahman, 'The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept' (2018) 39 *Cardozo Law Review* 1621; Referring specifically to Facebook as one example, Chander points out that: 'Facebook has become so powerful and omnipresent that some have begun to employ the language of nationhood to describe it. It boasts a community of some four-fifths of a billion people': A Chander, 'Facebookistan' (2012) 90 *North Carolina Law Review* 1807, 1808. See also KE Eichensehr, 'Digital Switzerland' (2019) 167 *University of Pennsylvania Law Review* 665.

¹⁰ CR Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (Princeton University Press 2017); J Burkell and others, 'Facebook: Public Space or Private Space?' (2014) 17 *Information, Communication & Society* 974; In the context of the regulation of content see H Bloch-Wehba, 'Global Platform Governance: Private Power in the Shadow of the State' (2019) 72 *SMU Law Review* 27.

¹¹ T Gillespie, 'The Relevance of Algorithms' in T Gillespie, P Boczkowski, and KA Foot (eds.), *Media Technologies: Essays on Communication, Materiality, and Society* (MIT Press 2014); Datafication refers to the ability of ICT companies to turn many aspects of the world that have not previously been quantified, into data. In the context of social media, these features together have been termed 'social media logic'— 'the processes, principles, and practices through which these platforms process information, news, and communication, and more generally, how they channel social traffic': J van Dijck and T Poell, 'Understanding Social Media Logic' (2013) 1 *Media and Communication* 2.

‘code’—i.e., ‘encoded procedures for transforming input data into a desired output, based on specific calculations’¹²—are the technological tools employed by ICT companies to orchestrate and structure the information available and visible to users. It is through algorithms that these companies manage users’ communicative interactions. As illustrated by Tarleton Gillespie, algorithms are the tools which ‘provide a means to know what there is to know and how to know it, to participate in social and political discourse, and to familiarise ourselves with the publics in which we participate’.¹³

Importantly, the ways in which algorithms are employed by ICT companies to orchestrate information and communications is dependent on, and tends to, these companies’ commercial business model which is often referred to as ‘data capitalism’.¹⁴ This commercial model is predicated on the rather plain transaction of free communications for users in return for their data.¹⁵ The gathering of users’ data enables ICT companies to capitalise thereon by selling it in the internet-market to advertisers in return for money.¹⁶ As digital platforms function as ‘many-to-many’ media platforms, ICT companies’ commercial logic requires immense amounts of people to constantly engage on their platforms to produce content.¹⁷ The more engagement, the more personal data ICT companies collect from every click, and thus the more data to sell to advertisers in the internet-market, thereby boasting their in-flow of capital.

¹² Gillespie, ‘The Relevance of Algorithms’, 1.

¹³ *ibid* 1; Or as Beer contends: ‘The power of algorithms [...] lies in their programmability: programmers steer users experiences, content, and user relations via platforms’: D Beer, brought in van Dijck and Poell, ‘Understanding Social Media Logic’, 5.

¹⁴ See eg, JM Balkin, ‘Fixing Social Media’s Grand Bargain’ (2018) Hoover Working Group on National Security, Technology, and Law, Aegis Series Paper No. 1814; Mager provides an insightful critique, based on an empirical study, of the ‘tight entanglement of search technology and capitalist society’: A Mager, ‘Algorithmic Ideology: How Capitalist Society Shapes Search Engines’ (2012) 15 *Information, Communication & Society* 769, 770; See also E Van Couvering, ‘The History of the Internet Search Engine: Navigational Media and the Traffic Commodity’ in A Spink and M Zimmer (eds.), *Web Search: Multidisciplinary Perspectives* (Springer 2008) 177. Van Couvering analyses the history of modern search engines, arguing that in origin, search engines ‘developed from the academic discipline of information retrieval’ (at 182), and were non-commercial in character.

¹⁵ According to a *Wall Street Journal* study mentioned by Pariser, ‘the top fifty Internet sites, from CNN to Yahoo to MSN, install an average of 64 data-laden cookies and personal tracking beacons each’: E Pariser, *The Filter Bubble: What the Internet is Hiding from You* (Penguin 2011) 6.

¹⁶ S Vaidhyanathan, *The Googlization of Everything (And Why We Should Worry)* (University of California Press 2012); See also J Lanchester, ‘You Are the Product’ (2017) 39 *London Review of Books* 3: ‘Then there are privacy concerns stemming from the business model of many of the companies, which use private information we provide freely to target us with ads’; See eg, Facebook’s Annual Report (2017) <https://investor.fb.com/financials/?section=secfilings>: ‘we generate substantially all of our revenue from selling advertising placements to marketers’; For an account of this mechanism from the perspective of advertisers see J Turow, *Niche Envy: Marketing Discrimination in the Digital Age* (MIT Press 2006).

¹⁷ Balkin, ‘Fixing Social Media’s Grand Bargain’; Google for example, argues Gillespie, ‘invites users to provide personal and social details as part of the Google+ profile. It keeps exhaustive logs of every search query entered and every result clicked. It adds local information based on each user’s computer’s data. It stores the traces of web surfing practices gathered through their massive advertising networks’: Gillespie, ‘The Relevance of Algorithms’, 4.

Hence, revenues from advertising largely depend on the ability of ICT companies to attract consumers' attention by customising and personalising information and communications, and to tailor them to users' particular tendencies, interests, and desires.¹⁸ In doing so, ICT companies cater to users' natural inclination to be exposed to topics, people, and perspectives they find agreeable,¹⁹ so as to maximise their 'emotional engagement', and subsequently monetise it.²⁰ In the words of Eli Pariser: '[a]s a business strategy, the Internet giants' formula is simple: The more personally relevant their information offerings are, the more ads they can sell and the more likely you are to buy the products they are offering'.²¹

In order to operate effectively in terms of ICT companies' political economy, search engine algorithms, as well as those employed by social networking sites,²² are thus designed to anticipate the user based on: (1) information previously collected, and continuously collected from the user herself (thus contributing to each user's 'algorithmic identity'); and (2) on information collected by way of statistical analysis.²³ To produce personalised results, these algorithms are further required to make malleable evaluative judgements about what information is relevant on the basis of certain criteria. Although these criteria remain largely opaque and black-boxed, they nevertheless produce a certain 'knowledge logic' about what individual users need to know, or who they should come in contact with. In this sense, ICT companies' algorithms are far from neutral or impartial technological tools.²⁴

¹⁸ Pariser, *The Filter Bubble*; Z Tufekci, 'Algorithmic Harms Beyond Facebook and Google: Emergent Challenges of Computational Agency' (2015) 13 Colorado Technology Law Journal 203; See also JG Webster, 'Structuring a Marketplace of Attention' in J Turow and L Tsui (eds.), *The Hyperlinked Society: Questioning Connections in the Digital Age* (University of Michigan Press 2008) 23, 26: '[...] the operative strategy is to attract attention by catering to peoples' preferences and/or to direct attention by exploiting the structures of the environment'.

¹⁹ Sunstein explains how, given the choice to personalise, people tend to self-segregate. See Sunstein, *#Republic*, 1–2, 60–62. See also d boyd, 'Why America is Self-Segregating' (Points, 5 January 2017) <https://points.datasociety.net/why-america-is-self-segregating-d881a39273ab>.

²⁰ Balkin, 'Fixing Social Media's Grand Bargain', 3; See also T Wu, *The Attention Merchants: The Epic Scramble to Get Inside Our Heads* (Knopf 2016).

²¹ Pariser, *The Filter Bubble*, 7.

²² boyd and Ellison offer the term 'social network sites' as the one most accurately describing the actual use that users make of these sites. See boyd and Ellison, 'Social Network Sites'.

²³ Gillespie, 'The Relevance of Algorithms', 7–8; Or see the term 'user profile' in Mager, 'Algorithmic Ideology', 772: 'Based on users' search history, locations and search terms, search engines develop highly detailed 'user profiles' capturing desires and intentions of individuals and groups of users'; Put simply by Sunstein, '[w]e live in the age of the algorithm, and the algorithm knows a lot': Sunstein, *#Republic*, 3.

²⁴ Gillespie refers to the algorithmic process of search results as a 'value-laden process with serious social implications': Gillespie, 'The Relevance of Algorithms'; S Finkelstein, 'Google, Links, and Popularity versus Authority' in J Turow and L Tsui (eds.), *The Hyperlinked Society: Questioning Connections in the Digital Age* (University of Michigan Press 2008) 104, 106; Just and Latzer refer to this process as 'a process that assigns (contextualized) relevance to information elements of a data set by an automated, statistical assessment of decentrally generated data signals': N Just and M Latzer, 'Governance by Algorithms: Reality Construction by Algorithmic Selection on the Internet' (2016) 39 Media, Culture & Society 238, 241.

The operation of algorithms in digital platforms is therefore predicated on a bi-directional, dyadic, and dynamic process between the user and the algorithm, through which information and communications are mediated.²⁵ Users' choices about what and whom they want come in contact with are steered by the algorithm. The algorithm is then triggered and 'tweaked' in response, constantly reorienting users' practices,²⁶ and leading them to 'internalize their [algorithms'] norms and priorities'.²⁷ A prominent knowledge logic which regulates the information and communications ecosystem on social media platforms, for example, is one of 'popularisation' and 'connectivity'.²⁸ Generally speaking, social network platforms share some key technological features, which include a bounded system within which individuals can construct a public profile, communicate a list of mutual connections with other users,²⁹ and share user-generated content in digital form.³⁰ Whereas the typical nomenclatures used to describe these platforms often refer to particular applications—the most prominent of which is Facebook—it is important to understand social media platforms in terms of their function and character, as principle 'information infrastructure[s]' for the distribution of 'news, ideas, and cultural products', constituting a mammoth enterprise of 'people, organizations, and industries that produce and consume digital content'.³¹

In order to enhance the value of the platform for users so as to capture greater attention, their knowledge logic of popularisation is designed to 'push some topics and devalue others'.³² This strategy boosts the popularity of certain users and certain content, to influence what users

²⁵ Mager explains how users 'enter alliances with search engines to reach their goal of conveniently finding web information they want'. Users' practices thus 'contribute to improvements of search algorithms, and also to the "service-for-profile model" Google, and others, performs': Mager, 'Algorithmic Ideology', 778.

²⁶ van Dijck and Poell relate to this feature as 'programmability'. See van Dijck and Poell, 'Understanding Social Media Logic'.

²⁷ Gillespie refers to this as mutually-constitutive process as 'entanglement': Gillespie, 'The Relevance of Algorithms', 21.

²⁸ van Dijck and Poell, 'Understanding Social Media Logic', 6.

²⁹ boyd and Ellison, 'Social Network Sites', 211.

³⁰ Sunstein uses the following definition borrowed from H Margetts and others, *Political Turbulence: How Social Media Shape Collective Action* (Princeton University Press 2015) 5: 'Internet-based platforms that allow the creation and exchange of user-generated content, usually using either mobile or web-based technologies'. See Sunstein, *#Republic*, 22.

³¹ PN Howard and MR Parks, 'Social Media and Political Change: Capacity, Constraint, and Consequence' (2012) 62 *Journal of Communication* 359, 362; In the words of Sunstein, '[m]ost Americans now receive much of their news from social media, and all over the world, Facebook has become central to people's experience of the world': Sunstein, *#Republic*, 2.

³² van Dijck and Poell, 'Understanding Social Media Logic', 6; More generally, according to Webster, the basic strategy of search engines' algorithms is also to 'sort items in terms of their popularity': Webster, 'Structuring a Marketplace of Attention', 27; On Facebook, the EdgeRank algorithm, explains Pariser, operates according to three factors in determining what information users will see first on their news feed. These are: one's affinity with other users, the type of content posted (which is assumed to be personalised as well), and time (how recent the post was). See Pariser, *The Filter Bubble*, 37–38.

find important.³³ ICT companies' platforms thus function as 'spaces of "constructed visibility"',³⁴ on which certain users or content are highly visible, whilst other content or users are rendered *invisible*.³⁵ This process of algorithmic selection is predicated on a circular logic according to which 'popularity fosters further popularity',³⁶ making the visibility regime dependent on interactivity: the more one interacts, or the more a specific content is interacted with, the more likely it is to gain further visibility.³⁷ This particular knowledge logic thus emphasises what is obscured, no less, if not arguably more, than what is seen.³⁸

The knowledge logic of 'connectivity', regulates the mediation of communications and connections between users so as to form particular groups. Whilst digital platforms ostensibly allow users to establish their own customised connections and online communities,³⁹ these platforms' algorithms also operate to personalise social webs. This is a strategy to '[connect] users to content, users to users, platforms to users, users to advertisers, and platforms to platforms'.⁴⁰ This particular knowledge logic generally operates to bring users together under 'connective action frames', which are inclusive for varying personal motives to challenge a given social or political reality, but demand little convergence on ideology or political claims, and 'little [...] reframing to bridge differences with how others may feel about a common problem'.⁴¹ Connective action frames are counter-posed both in concept and operation to the more readily known 'collective action frames', which require collective identification and negotiation to seek a public good.⁴²

ICT companies therefore regulate communications and the flow of information in particular ways. Their regulatory control caters to their business objectives, but operates to the detriment of open, deliberative public discourse between heterogenous members of political

³³ *ibid.*

³⁴ T Bucher, 'Want to Be on the Top? Algorithmic Power and the Threat of Invisibility on Facebook' (2012) 14 *New Media & Society* 1164, 1170.

³⁵ *ibid* 1167: 'Akin to algorithmic logic of search engines, Facebook deploys an automated and predetermined selection mechanism to establish relevancy (here conceptualized as most interesting) ultimately demarcating the field of visibility for that media space'.

³⁶ *ibid* 1176.

³⁷ van Dijck and Poell, 'Understanding Social Media Logic'.

³⁸ As put by Buchner, on Facebook the threat is of invisibility, the possibility 'of not being considered important enough': Buchner, 'Want to Be on the Top?', 1171; For a similar argument as regards Google and the knowledge logic of popularity in the context of information see M Pasquinelli, 'Google's PageRank Algorithm: A Diagram of the Cognitive Capitalism and the Rentier of the Common Intellect' in K Becker and F Stalder (eds.), *Deep Search: The Politics of Search Beyond Google* (Transaction Publishers 2009); on Google's PageRank see also Vaidhyanathan, *The Googlization of Everything*.

³⁹ What Sunstein refers to as individuals' 'architecture of control'. See Sunstein, *#Republic*, 1.

⁴⁰ van Dijck and Poell, 'Understanding Social Media Logic', 9.

⁴¹ WL Bennett and A Segerberg, 'The Logic of Connective Action: Digital Media and the Personalization of Contentious Politics' (2012) 15 *Information, Communication & Society* 739, 744.

⁴² *ibid.*

communities. ICT companies' operational logic is based, most importantly, on the personalisation of information and communications, and on the prioritisation of certain content at the expense of other. This operational logic establishes a particular unprecedented communicative and informational infrastructure, which ultimately warps, impales, and frustrates the horizontal dimension of political voice.

B. *Fragmentation and pollution: ICT companies' digital 'urban planning'*

Despite the unprecedented infrastructural potential of digital platforms to afford increased exposure and interconnectedness, ICT companies' strategy of personalisation, dynamically coupled with individuals' natural tendency to consume information that caters narrowly to their pre-existing interests,⁴³ results in the fragmentation of informational and communicative spaces. This outcome is primarily characterised by the formation of 'filter bubbles',⁴⁴ 'echo chambers', 'gated communities', 'information cocoons',⁴⁵ or 'ideological bunkers'⁴⁶—terms which all express the notion of enclosed spaces in which people are only exposed to certain information, and communicate mainly with their concurring counterparts.⁴⁷

The algorithmic personalisation strategies of ICT companies therefore considerably facilitate and encourage—via the 'choice architecture' they produce—users' ability to immerse themselves in sympathetic informational environments, and to surround themselves with like-minded others.⁴⁸ The most conspicuous effect of personalisation, is thus the erection of virtual barriers between clusters of homogenous individuals and discursive communities, and the reduction in users' exposure to heterogenous publics, countering views, and diverse ideologies

⁴³ Often termed the 'psychology of media choice', this tendency is underpinned by several human characteristics such as people knowing what they like and dislike, and finding comfort in congenial viewpoints. It also stems, however, from the need to filter as a result of the abundance of available information. See Webster, 'Structuring a Marketplace of Attention', 32; Sunstein, *#Republic*, 64; Pariser, *The Filter Bubble*, 11.

⁴⁴ Pariser, *The Filter Bubble*.

⁴⁵ Sunstein, *#Republic*.

⁴⁶ Lanchester, 'You Are the Product'.

⁴⁷ Sunstein, *#Republic*; Webster speaks of fragmentation in terms of the diffusion of attention between media outlets. He considers three conditions for this effect (not discussed herein), which he refers to as 'patterns of attention': the convergence of media delivery systems, the abundance of available content, and the scarcity of consumer attention. See Webster, 'Structuring a Marketplace of Attention'.

⁴⁸ Sunstein, *#Republic*, 71; The term 'choice architecture' is used by Thaler and Sunstein to explain how people's decisions are directed by the way in which their choices are designed, and these are never designed neutrally. See RH Thaler and CR Sunstein, *Nudge, Improving Decisions About Health, Wealth, and Happiness* (Yale University Press 2008); Vaidhyanathan makes use of the notion of 'choice architecture' to explain the ways in which it is used by Google to structure people's choices. See Vaidhyanathan, *The Googlization of Everything*, 88–89; Sunstein speaks of people's tendency to 'homophily', i.e., 'a strong tendency to connect and bond with people who are like them': Sunstein, *#Republic*, 1–2. Fragmentation, is thus the outcome of both 'people's growing power to filter what they see, and also providers' growing power to filter for each of us, based on what they know about us' (at 6).

and topics.⁴⁹ This type of segregation of discursive publics is self-reinforcing and sustaining over time, given that communication with homogenous others tends to amplify interlocutors' pre-existing convictions, driving them to more extreme views than those originally held.⁵⁰

Cass Sunstein explains this process by reference to three empirically-established rationales: (1) a limited (or nearly uniform) argument pool offers a disproportionate large number of claims skewed in the group's original inclination; (2) reputational concerns lead people to 'adjust their position in the direction of the dominant position';⁵¹ and (3) the confidence gained by the agreements of others leads to heightened self-assurance in one's original position.⁵² Taken together, these rationales ensure that under the conditions of segregated communicative spheres—that are created and continuously reinforced by the personalisation of communications by ICT companies—heterogenous groups of people will drift further apart than originally positioned in relation to each other. This increasingly narrows users' perceptions of the scope and boundaries of their communicative communities (or as put by one scholar their conception of 'we'⁵³); ultimately making it more difficult to bridge between diverging sectors of society, and to cross social, cultural, or ideological frontiers.⁵⁴

The effects of fragmentation of communicative and informational spheres, could therefore be usefully theorised and further clarified, through the lens of the discipline of 'urban planning'. Beyond its basic technocratic aspect, the discipline of urban planning is concerned with the socio-cultural considerations underpinning the practice of planning and structuring of urban spaces, and the implications of the latter for social concerns.⁵⁵ It involves, therefore, the integration of social theory with 'spatial consciousness', to recognise the bi-directional associations between space or spatial forms, and between behaviour and social processes.⁵⁶ From a theoretical standpoint then, the lens of urban planning facilitates an understanding of how ICT companies' particular operational logic may be translated into, or produces, a particular 'ordered logic of space'.⁵⁷ This ordered logic of space, in turn, influences patterns of

⁴⁹ Vaidhyanathan writes in the context of Google, explaining that Google, through customization of search results, is 'redoubling' the threat to republican values 'such as openness to differing points of view and processes of deliberation': Vaidhyanathan, *The Googlization of Everything*, 183–84.

⁵⁰ Sunstein refers to this as the effect of polarization. See Sunstein, *#Republic*.

⁵¹ *ibid* 73.

⁵² *ibid* 71–75.

⁵³ Lanchester, 'You Are the Product'.

⁵⁴ This type of process has been discussed by Chua as exclusionary tribalism. See A Chua, *Political Tribes: Group Instinct and the Fate of Nations* (Bloomsbury 2018).

⁵⁵ L Sandercock, *Towards Cosmopolis: Planning for Multicultural Cities* (John Wiley & Sons 1998) 14.

⁵⁶ D Harvey, *Social Justice and the City* (Basil Blackwell 1973) 27.

⁵⁷ M Abel, 'Medieval Urban Planning: The Monastery and Beyond' in M Abel (ed), *Medieval Urban Planning: The Monastery and Beyond* (Cambridge Scholars Publishing 2017) 2.

social and political interaction, thus lending these companies' private regulation a particular 'public' quality.

Namely, ICT companies' personalisation of information and communications, and its resulting fragmentation of horizontal discursive spaces, mirrors (perhaps ironically given their character as the epitome of capitalism) certain feudal 'modalities of medieval urbanism' which have recently seen a revival as a dominant 'paradigm of [physical] spatial organisation' in many contemporary urban sites.⁵⁸ Though far from being a monolithic concept, 'medieval urbanism' refers to certain features which were characteristic of medieval practices of planning, that reflected and supported the social structures of the time. A prominent feature of medieval 'spatial regimes'—that of competing chartered towns—was the 'formation of gated compounds that [were] governed by private bodies', where 'exclusion [was] the foundation of social organisation'.⁵⁹ Chartered towns otherwise constituted 'legal enclaves' in which the city charter guaranteed their inhabitants freedom from feudal serfdom, to the exclusion, however, of the 'mass of rural inhabitants' from the protections the town afforded.⁶⁰ These 'freedoms' could only be accorded to those whose occupation enabled them to be associated with the town's dwellers, thus creating ghettos of homogenous populations. Urban membership, in other words, was 'premised on the management of a secessionary space of internal regulations and codes', resulting in the fragmentation of sovereignty.⁶¹

The same patterns of planning characterised Italian cities in the late Middle ages, as well as some 'Islamic' cities.⁶² It is worth quoting at length one description of such an 'Islamic' medieval city to highlight the particular ordering logic of discursive spaces that is produced by ICT companies' regulatory functions:

The Muslim street is rarely seen as a public passage linking one point of interest with another. The maze of dead-end alleys that insinuate themselves like hundreds of inadvertent cracks in the solidly built mass of medieval Cairo are characteristic. At best, the few principle thoroughfares might define irregular superblocks, but within these superblocks neighbourhood life eats up the public pathways by hundreds of daily encroachments. A city-form anywhere, at any time, is the battleground between public rights and private interest. In the military feudalism that governed the cities of Islam, there was little room for a municipal organization that would regulate and safeguard the public domain.⁶³

⁵⁸ N Alsayyad and A Roy, 'Medieval Modernity: On Citizenship and Urbanism in a Global Era' (2006) 10 *Space and Polity* 1, 3.

⁵⁹ *ibid* 6.

⁶⁰ *ibid*.

⁶¹ *ibid* 7. Alsayyad and Roy compare these medieval forms of urban planning to contemporary practices of exclusion and segmentations of the 'neo-liberal' city.

⁶² In case of the former, noble families established semi-autonomous, 'private pockets' within cities, which resembled in nature the chartered town: *ibid* 7.

⁶³ S Kostof, *A History of Architecture: Settings and Rituals* (OUP 1985) 370.

The passage emphasises the present absence of true and meaningful ‘public control’ over open spaces to the benefit of public interests, which otherwise underpins modern theories of urban planning.⁶⁴ Rather, it signifies the way in which space, in these medieval practices of planning, is ordered primarily by the fragmented nature of personal preferences and private interests. This ordering logic parallels contemporary practices of ‘urban planning’ by ICT companies. It echoes the ways in which discursive spaces are fragmented and segregated as a consequence of the dynamic interaction of these companies’ private commercial interests and users’ private personal preferences.

Beyond the fragmentation of communicative spaces, the customisation and personalisation strategies of ICT companies further result in the fragmentation of information, news,⁶⁵ and knowledge, to ‘[indoctrinate] us with our own ideas’.⁶⁶ Users’ power to filter, coupled with ICT companies’ power to filter, disable the free flow of information between heterogeneous communicative spaces, ensuring that much of the information generated either by users themselves or by agents in the physical world, remains in static disaggregated information pools rather than running without obstruction through the information pipes of online communicative infrastructures. In this information ecology, information is susceptible to several market failures.

First, this information environment creates undue burdens on individuals to assess and evaluate the quality, credibility, and accuracy of information they encounter, in order to ‘[...] locate information they can trust’.⁶⁷ Indeed, new information and communication technologies have undeniably revolutionised information consumption and knowledge production, by markedly increasing both access and quantity. At the same time, however, the removal of traditional information intermediaries, the oversaturation of information, and most of all its fragmentation, diminish individuals’ capacity to capitalise on information as a ‘public good’,

⁶⁴ ibid 371. In a following passage Kostof contrasts this description with the urban history of Florence as a ‘battle of the city to take control of its streets and open spaces’.

⁶⁵ According to Pariser, 36 percent of Americans under thirty get their news through social networking sites. See Pariser, *The Filter Bubble*, 8. In 2010, also explains Pariser (at 61–63), Google News ventured its personalized version to highlight stories that are personally relevant.

⁶⁶ ibid 15; Vaidhyanathan, *The Googlization of Everything*, 182: ‘The consequences of allowing Google to filter the abundance of information for us by giving it information about us includes a narrowing of our focus on the things that matter to each of us and the potential fracturing of our collective knowledge’.

⁶⁷ MJ Metzger and AJ Flanagin, ‘Credibility and Trust of Information in Online Environments: The Use of Cognitive Heuristics’ (2013) 59 *Journal of Pragmatics* 210. The issue of trustworthy information has always been a problem. However, it is exacerbated on digital platforms because individuals confront this problem much more often, and also because many of the traditional intermediaries are removed online.

and benefit from other people's ownership of valuable information for their own, or public use.⁶⁸

The fragmentation of information and communicative spaces—especially when structured along ideological lines—thus moderates the volume of information available (in quantitative terms), thereby reducing users' chances to acquire the meaningful information required for informed decision-making. More importantly yet, it also affects the *quality* of information at hand. If users are exposed only to certain facts about the world, on the basis of both their pre-existing interests and the knowledge logics of popularity and connectivity which ICT companies prompt, then their perception of the world remains constantly prejudiced in favour of what they *already* presume is representative of reality.⁶⁹

This process is further buttressed in the 'filter bubble' by several factors, including people's tendency to rely on others for information, and by the speed at which information travels on ICT platforms.⁷⁰ It is most influenced, however, by confirmation bias —'a tendency to believe things that reinforce our existing views, to see what we want to see',⁷¹ and to publicise and spread information that supports these views regardless of this information's veracity. In a personalised information and communicative environment, confirmation bias is strongly bolstered by what Eli Pariser terms the 'you loop'. The more users express their interest by clicking on certain content, the more visible that content becomes, and the more likely the user is to continue to click on the same content, thus trapping the user in an endless personalised loop of distorted information.⁷² Under these circumstances, individuals' world view is easily deformed, leading them to believe more easily in falsehoods, and rendering them more susceptible to targeted manipulations for both economic and political purposes.⁷³ A segregated communicative environment thus considerably amplifies the adverse effects of

⁶⁸ Sunstein, *#Republic*, 147–48.

⁶⁹ In the words of Vaidhyanathan in relation to Google:

'Google's search functions are not effective in connecting and unifying a diverse world of Web users. Instead, its carefully customized services and search results reinforce the fragmentary state of knowledge that has marked global consciousness for centuries. Over time, as users in a diverse array of countries train Google's algorithms to respond to specialized queries with localized results, each place in the world will have a different list of what is important, true, or "relevant", in response to any query': Vaidhyanathan, *The Googlization of Everything*, 138.

⁷⁰ Mezger and Flanagan, 'Credibility and Trust of Information in Online Environments'.

⁷¹ Pariser, *The Filter Bubble*, 86.

⁷² Pariser, *The Filter Bubble*, chapter 4; In the context of search engines, Vaidhyanathan explains how Google's PageRank determines search results according to 'relevance', which is determined, inter alia, by the search history of a particular user. See Vaidhyanathan, *The Googlization of Everything*, 21. Similarly, at 183: 'Your Web search experiences will reinforce whatever affiliations, interests, opinions, and biases you already possess'; See also Sunstein's reference to a study confirming people's tendency to click on information that reinforces their views. See Sunstein, *#Republic*, 114.

⁷³ In his chapter on 'Cybercascades', Sunstein refers to numerous studies substantiating this notion. See Sunstein, *#Republic*, 98–136.

natural confirmation bias; given, also, that it diminishes the prospects for correcting false information for the same reasons that it tends to spread it in the first place.⁷⁴

According to Pariser, the effects of personalisation and fragmentation are doubly sweeping, as they potentially adversely impact users' curiosity, creativity, and opportunities for learning. Studies in psychology, explains Pariser, demonstrate the significance of 'information gaps' and encounters with puzzling and disturbing facts, for animating curiosity and a desire to learn and understand.⁷⁵ If users are unaware that certain data is being concealed from them given the opaqueness of the process of personalisation and fragmentation of information (it being a form of unconscious regulatory control), and are otherwise inclined to believe that what they see is an accurate account of what is 'out there', they are unlikely to be triggered to search for what they do not know is hidden. By definition then, personalisation stifles the process of learning insofar as the latter is understood as coming upon the *unknown*.⁷⁶ Moreover, explains Pariser, personalisation of information obstructs creative thinking by eliminating almost entirely the possibility of encountering random ideas, and by limiting the scope of data within which we search for solutions.⁷⁷ In Pariser's words, 'without knowing it, we may be giving ourselves a global lobotomy'.⁷⁸

Importantly, the effects of ICT companies' particular algorithmic personalisation do not end in the *online* realm. It is becoming gradually appreciated that 'software is increasingly

⁷⁴ *ibid* 123; For a discussion on the manipulation of users in the commercial context, see TZ Zarsky, 'Privacy and Manipulation in the Digital Age' (2019) 20 TIL 157; According to Pariser, personalisation enables political 'persuasion profiling' given that it enables an understanding of what people respond to. See Pariser, *The Filter Bubble*, 122; See examples on election manipulation: JL Zittrain, 'Engineering an Election' (2014) 127 Harvard Law Review Forum 335; 'Russian Twitter Trolls Meddled in the Brexit Vote. Did They Swing It?' (The Economist, 23 November 2017) <www.economist.com/news/britain/21731669-evidence-so-far-suggests-only-small-campaign-new-findings-are-emerging-all?zid=307&ah=5e80419d1bc9821ebe173f4f0f060a07>; Fake Russian Facebook Accounts Bought \$100,000 in Political Ads' (New York Times, 6 September 2017) <www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html>; E Bell, 'Silicon Valley Helped Russia Sway the US Election. So Now What?' (The Guardian, 29 October 2017) <www.theguardian.com/media/2017/oct/29/media-symbiotic-relationship-facebook-worry-democracy>; C Timberg, 'Russian Propaganda May Have Been Shared Hundreds of Millions of Times, New Research Says' (The Washington Post, 5 October 2017) <www.washingtonpost.com/news/the-switch/wp/2017/10/05/russian-propaganda-may-have-been-shared-hundreds-of-millions-of-times-new-research-says/?utm_term=.cbd1b5fa1801>; C Cadwalladr and E Graham-Harrison, 'Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach' (The Guardian 17 March 2018) <www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>.

⁷⁵ Pariser, *The Filter Bubble*, 89–90.

⁷⁶ *ibid* 91; Vaidhyanathan, *The Googlization of Everything*, 182:

'Learning is by definition an encounter with what you don't know, what you haven't thought of, or what you couldn't conceive, and what you never understood or entertained as possible [...]. The kind of filter that Google interposes between an Internet searcher and what a search yields shields the searcher from radical encounters with the other by "personalizing" the results to reflect who the searcher is, his or her past interests, and how the information fits with what the searcher has already been shown to know'.

⁷⁷ Pariser, *The Filter Bubble*, 94.

⁷⁸ *ibid* 19.

making a difference to the constitution and production of everyday life'.⁷⁹ This observation recognises the ubiquitous fashion in which algorithms are embedded in the 'objects, infrastructures, and processes' utilised by people in their routine tasks. It recognises algorithms' subsequent power to structure, organise, and facilitate our daily mundane experiences and activities.⁸⁰ In the context of information and communications, this largely signifies how mediated communications increasingly supplant, rather than supplement, unmediated forms. As algorithms are 'integral to the operation of communication infrastructures',⁸¹ in that they shape, but more importantly, *enable*, almost all forms of human interaction, the distinctions between space and cyberspace or the real and the virtual are rendered somewhat superfluous.⁸² Importantly, as algorithmic personalisation determines recommendations on online dating sites, or venues for dining and socialising, ICT companies' algorithms are highly determinative of the people that users are likely to meet and interact with in *unmediated* encounters in the physical realm.⁸³ These algorithms are also highly determinative of the preferences, values, and identities users are likely to develop, given that these are heavily influenced by the availability of choices. The narrower the scope of one's choices are, the more likely one is to form her preferences in accordance with these choices. The same, claims Sunstein, pertains to values and identities. One's identity develops in conformity with the normative environment in which one is submersed; and one's values develop to reflect the standards and ideals sanctioned by this environment.⁸⁴

Finally, as ICT companies themselves also function as active gatekeepers and curators of information, they also contribute to the manipulation of information for economic purposes,

⁷⁹ M Dodge and R Kitchin, 'Software, Objects and Home Space' (2008) NIRSA Working Paper Series No. 35, 2; M Dodge and R Kitchin, 'Code and the Transduction of Space' (2005) 95 *Annals of the Association of American Geographers* 162, 162.

⁸⁰ Dodge and Kitchin, 'Software, Objects and Home Space', 3; Dodge and Kitchin, 'Code and the Transduction of Space', 163: '*Coded objects* refers to non-networked objects that use code to function'; And: '*Coded infrastructures* refers both to networks that link coded objects and infrastructure that is monitored and regulated, either fully or in part, by code'; And at 164: '*Coded processes* refer to the transaction and flow of digital data across coded infrastructure'.

⁸¹ *ibid* 177.

⁸² Obviously, what Thompson refers to as 'face-to-face interactions' in which 'participants are immediately present to one another and share a common spatial-temporal framework', are not directly regulated by algorithms: JB Thompson, 'The New Visibility' (2005) 22 *Theory, Culture & Society* 31, 32. However, as human interaction becomes increasingly mediated, or '[...] "stretched" across space and may also be stretched out or compressed in time' (at 33), these mediated forms of interaction replaces, but also affects, face-to-face interaction, thus blurring the boundaries between the virtual and the real.

⁸³ Pariser, *The Filter Bubble*, 9; Put in negative terms by Vaidhyanathan: 'If you do not allow Google to track your moves, you get less precise results to queries that would lead you to local restaurants and shops or sites catering to your interests': Vaidhyanathan, *The Googlization of Everything*, 89.

⁸⁴ Sunstein, *#Republic*, ch. 6.

creating what has been termed by Eli Pariser ‘an antiseptically friendly world’.⁸⁵ ‘In the filter bubble’, explains Pariser, ‘the public sphere—the realm in which common problems are identified and addressed—is *just less relevant*’.⁸⁶ Thus, within this filter bubble, information about issues that are of distinct public concern are potentially ostracised or even made invisible, thereby significantly reducing individuals’ exposure to vital information concerning policy formation, or to the conditions of life of weak and distant others.⁸⁷ Therefore, the power to regulate communications and information flow, is also the power to ‘shape our sense of the political world’,⁸⁸ and to affect the democratic objectives served by political voice.

The drawing of parallels between ICT companies’ regulatory functions and practices of urban planning, is thus more than a conceptual exercise. It serves as an explanatory tool to elucidate the ways in which these companies’ operations structure, in actuality, what Hannah Arendt has termed ‘the space of appearances’, to the detriment of effective political action and voice.⁸⁹ As communications and the consumption of information increasingly move to the digital realm, ICT companies’ planning practices which engineer discursive spaces to resemble modalities of medieval urbanism, increasingly influence individuals’ use of *physical* spaces. The more dominant this influence will become; the less important the actual urban planning practices of physical spaces would be: the *use* of these spaces would be entirely dictated by the configuration of fragmented online discursive spaces.

Importantly, ICT companies’ exercises of these forms of public authority are shielded from public scrutiny. In their capacity as global ‘urban planners’, these companies play a significant political role in forming decision rules about *who* can participate in which discursive arena; and, importantly, *how* this who is determined.⁹⁰ But the ways in which such ‘decisions’ are made remain opaque, as these are based on algorithmic calculations and are protected by intellectual property rights.⁹¹ Furthermore, these companies’ monopolistic status in the global

⁸⁵ Pariser, *The Filter Bubble*, 150.

⁸⁶ *ibid* 148 (emphasis added).

⁸⁷ As Facebook flags journalistic articles exposing human rights violations as political, the company stops their paid circulation, thereby obstructing their diffusion amongst users. See E Bell, ‘Facebook creates Orwellian headache as news is labelled politics’ (The Guardian, 24 June 2018) <<https://www.theguardian.com/media/media-blog/2018/jun/24/facebook-journalism-publishers>>; See also Tufekci, ‘Algorithmic Harms Beyond Facebook and Google’; According to Pariser, this is also sinking the business of traditional media. See Pariser, *The Filter Bubble*, 47–51.

⁸⁸ Pariser, *The Filter Bubble*, 150.

⁸⁹ See Chapter III, footnote 61 and accompanying text.

⁹⁰ For a similar point see N Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia University Press 2008).

⁹¹ E Benvenisti, ‘EJIL Forward: Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?’ (2018) 29 EJIL 9, 74.

information and communications market impedes users' ability to 'exit' or 'opt-out'.⁹² It obstructs their ability to leverage market forces in order to contest the regulatory architectures imposed on them, thus affording these companies 'outsized control over those goods and services that form the vital foundation or backbone of our political economy'.⁹³

2. The global 'political voice deficit matrix'

A. The horizontal dimension

The fragmentation of communicative spaces and the market-place of ideas by ICT companies' algorithmic design, diminishes users' access to open, heterogenous deliberative venues, in which individuals can meaningfully partake in public discursive activities with indefinite others. This form of governance thus disrupts the *horizontal* dimension of political voice. The creation of high-barriered, segregated, discursive communities, prevents users' access to a diversity of opinions, ideologies, topics, and people; and therefore, has ample implications for both the *educative* and *epistemic* functions of political voice.

(1) Obstructing the educative functions of political voice

The educative functions of political voice, as analysed in-depth in the preceding chapter, are concerned both with individuals' ability to develop their own intellectual faculties required for participation in public life; as with their development of community consciousness, and their ability to transform their self-interests into common ones. These require, most basically, a degree of shared understandings between community members, that is predicated on individuals' self-conception as members of that community. They also require that individuals possess a nuanced and complex understanding of their own political interests vis-à-vis themselves, and in relation to others and their interests.

The preceding chapter has firmly established the significance of horizontal political voice for the achievement of these democratic ideals. The variety of normative theories of democracy discussed therein, have all emphasised the contribution of open, deliberative, public discourse

⁹² See discussions in Chapter II and III (see eg, footnote 29 in Chapter II and accompanying text and footnote 1 in Chapter III and accompanying text) of AO Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970).

⁹³ Rahman, 'The New Utilities', 1625; These companies' monopolistic control extends beyond digital platforms. For example, Mager points to how Google has invested in the Android operating system for smartphones in order to build alliances with mobile phone companies and extend its power by being the default search engine on users' mobile phones. See Mager, 'Algorithmic Ideology', 779; Pariser employs the notion of a 'lock-in' effect to describe how the degree to which users are invested in these companies' technologies would prevent them from 'switching' even if competitors offering better services existed. See Pariser, *The Filter Bubble*, 40–41; Vaidhyanathan similarly speaks of the 'network effect': Vaidhyanathan, *The Googlization of Everything*, 19.

to one's ability to reflect on the position of others, to become sympathetic to the general interest or appreciative of the broad and profound implications of political actions, and to develop community sentiments. Deliberative, heterogeneous public discourse, enables interlocutors to compare ideas, to give reasons, to assert one's distinctness by sharing her perspective, and to persuade or dissuade others in the process of cultivating a sense of human togetherness, through which a responsibility for promoting the public interest is moulded.

The fragmentation of knowledge and communicative spaces by ICT companies' regulatory control and operational logic, patently thwart these objectives, generating the horizontal dimension of the 'political voice deficit matrix'. The more homogenous interaction becomes, the more extreme individuals' views become, and the more entrenched they are in their original positions. At the same time, the less likely are individuals to encounter the perspectives of others, and thus the less likely they are to come to terms with those perspectives and sympathetic of them. Equally, the segregation of discursive spheres diminishes individuals' opportunities to form and develop shared experiences with differing others.⁹⁴ This subsequently thwarts the cultivation of community sentiments and community consciousness, and the translation of these sensibilities into collective political action. The smaller and more single-minded one's sphere of interlocutors turns into, the narrower one's perception of the boundaries of her community, and the more restricted her sense of what the public interest and the common good require.⁹⁵

Importantly, the more limited individuals' sphere of information is and the more personalised, and the more it reintroduces one with pre-recognisable facts and ideas and marginalises issues of public concern, the less possible it is for individuals to develop their political intelligence by acquiring new perspectives regarding their own interests, let alone those of others. The opaqueness of personalisation and the elimination of random encounters, impede the habits of curiosity and enquiry, that according to educative proponents are crucial for developing political intelligence. As political preferences are understood to be a product of the process of deliberation rather than to pre-exist as a matter of natural personal inclination, the fragmentation of knowledge and communicative spaces and the shrinking space for political debate, disable individuals' capacity to uncover and express their true political demands.⁹⁶

⁹⁴ Sunstein, *#Republic*, 140.

⁹⁵ See discussion on the educative functions of political voice in Chapter III.

⁹⁶ See Chapter III, footnotes 88–92 and accompanying text.

In thwarting human togetherness and the process of political will-formation, the fragmentation of communicative and informational spheres thus impedes the transformation of self-interests into community ones; a process which forms the basis for political action. As previously discussed in Chapter III, these educative functions of political voice are relevant—under contemporary conditions—across and beyond political boundaries, just as they are within them. In regulating the *global* infrastructures of information and communicative channels, ICT companies impair the attainment of political voice’s educative objectives *in all three* of these political arenas. Not only, then, do these companies’ regulatory functions obstruct individuals’ ability to develop an informed understanding of their political interests as these pertain to *national* political issues; but they furthermore curtail individuals’ ability to receive the relevant information for assessing their interests vis-à-vis *cross-boundary* and *global* decisions, that are no less determinative of their (individuals’) life opportunities. Under these conditions, it becomes more difficult for individuals to participate in transnational or global public life, and to develop political will with regard to transnationally or globally-relevant issues.

Crucially, the fragmentation of communicative spaces and pollution of information channels, frustrate the Internet’s potential to enable meaningful connections between stakeholders of affected communities *beyond* the state, that are becoming increasingly important in the presence of global threats and the blurring of national political boundaries. Thus, whilst the technical infrastructure of the worldwide web provides for unprecedented opportunities for cross-border interactions and exchanges of information, its regulatory control by private ICT companies nevertheless inhibits individuals from distinct geographical, cultural, and social communities, to develop identities vis-à-vis one another, to develop sentiments of solidarity, to establish interrelatedness or communities of reference, and to create new transnational publics bound together by common political objectives. Individuals from distinct geographical, cultural, and political communities are therefore unlikely to experience the world in common. They are unlikely to become exposed to the disparate conditions of foreign others, or to view foreign interests as legitimate vis-à-vis their own. Neither are they likely to develop the common identities that would allow them to form transnational communities, which could be empowered to establish forums of collective action beyond the state and confront common decisional externalities and risks.⁹⁷

⁹⁷ See discussion on the educative functions of political voice in the global arena in Chapter III.

Relatedly, cross-boundary communications between individuals of local communities and their *diasporas*, are also likely to be hampered. Such forms of communications and exchanges of information are undoubtedly significant given the emergence of diasporas—in an increasingly interconnected world—as powerful and influential actors in both local and global politics.⁹⁸ Specifically, diaspora populations have been shown to be important agents who engage in political advocacy in their home states from afar; and may, for example, sustain and prolong conflicts and civil wars in their homelands, and practice ‘long-distance nationalism’. Contrarily, they may also contribute to problem-solving and peace-building, or support institutional reforms and national civil society.⁹⁹ Moreover, diaspora communities have also been shown to assume political roles in global governance. For example, in examining the case study of the Eritrean diaspora and International Commissions of Inquiry, Larissa van den Herik and Mirjam van Reisen demonstrate the roles entertained by diasporic actors in international enquiries as mobilisation forces.¹⁰⁰ Their study analyses the ways in which segments of the Eritrean diaspora who were opposed to the Eritrean government, attempted to leverage the process of an international enquiry to influence global actors, and in turn, local policy.¹⁰¹

These forms of power and agency—‘diaspora mobilization’—‘is the result of individual speech acts, of persuasion and negotiation’.¹⁰² These studies of diasporas as significant political actors support, therefore, the relevance of cross-border communications and information exchange, for the establishment of common identities, and the sense of community and togetherness that are necessary for furthering cross-territorial political objectives shared by local populations and their diasporas. They highlight the fluctuating and fluid character of the notion of ‘political community’ in an interconnected globalised world, and thus the implications of obstructing the horizontal dimension of political voice for the realisation of its educative purposes, within, across and beyond the state.

Given the centrality and dominance of ICT based communications in individuals’ lives, these effects on the educative functions of political voice are by no means marginal. As alluded

⁹⁸ CR Craven, ‘Thinking about Governance *Through* Diasporas: Decentering the State and Challenging the External/Internal Binary’ (2018) SFB-Governance Working Paper Series, No. 76.

⁹⁹ *ibid* 8–9, 12–13, and references to other studies.

¹⁰⁰ L van den Herik and M van Reisen, ‘International Commissions of Inquiry in a Networked World: Unveiling the Roles of Diasporas through an Eritrean Case Study’ (2019) 13 *International Journal of Transitional Justice* 417.

¹⁰¹ van den Herik and van Reisen discuss, for example, how Eritrean diaspora actors issued statements requesting the European Commission to ‘put its preparations for an aid package to the Eritrean government on hold “until such time that the UN Commission of Inquiry on Eritrea has been given full and unfettered access to Eritrea so that it can carry out its investigation and has presented its conclusions.”’: *ibid* 428.

¹⁰² Craven, ‘Thinking about Governance *Through* Diasporas’, 8.

to earlier, a substantial portion of human interaction, and an even greater portion of information consumption, contemporarily occurs on ICT companies' digital platforms. Their monopolistic role in regulating communicative infrastructures, may therefore have extensive consequences for the availability and robustness of discursive communities, and thereby for the educative functions that political voice is meant to serve and sustain.

(2) Obstructing the epistemic functions of political voice

The epistemic functions of political voice involve the contribution of open, horizontal public deliberation, to the *quality* of political decision-making, and the process's potential to result in epistemically-correct decisions from a democratic standpoint. The analysis of the epistemic objectives of political voice undertaken in the previous chapter, has emphasised the imperative role of public deliberation in democratic decision-making, for arriving at 'ideal epistemic situations' in which decisions are made in the promotion of public interests or the common good.¹⁰³ In order for the public deliberative process to satisfy this epistemic objective, it must be confined by democratic principles guaranteeing free, inclusive, and equal discursive exchanges between its participants. According to these democratic accounts, exchanges of opinions and information between heterogenous others, allow individuals to judge the truthfulness of arguments encountered, and to uncover those conducive to society as a whole. In other words, open public dialogue establishes a communicative environment in which interlocutors are required to defend their opinions by reference to justifications which cater to the common good. When the democratic procedural conditions are met, the decisions which result from this process are necessarily those which are 'correct' by independent standards of democratic legitimacy.¹⁰⁴

The pollution of information channels and the segregation of information pools arguably disable the democratic epistemic process. They do so, principally, by thwarting the conditions under which the democratic epistemic process can meaningfully function to achieve its objectives. Foremost, the fragmentation of information pools and communicative spaces frustrates the development of shared, publicly-acknowledged conceptions of the common good, which function as necessary benchmarks against which to reach epistemically-sound decisions. In this communicative environment, it is exactly the community-wide process of public deliberation or exchange of opinions, and the individual or collective concessions it

¹⁰³ See the discussion on the epistemic functions of political voice in Chapter III.

¹⁰⁴ *ibid.*

involves, that is stifled, and without which there are no means for communities to capitalise on information as a public good and uncover the public view of justice.

The potential of the dialogical process to succeed, is highly dependent, moreover, on the ‘cognitive diversity’ of the group. The fragmentation of knowledge and communicative spaces does not generally enable a diversity of perspectives and interpretations that are instrumental for collective problem solving. Not only does fragmentation cause the political process of social debate itself to ebb, but it furthermore disrupts inclusive discursive spaces, and in turn diminishes the group’s probability to reach collectively intelligent decisions. Moreover, as explained in the preceding part, from an individual standpoint, personalisation and fragmentation adversely impact individuals’ curiosity and creativity. They stifle the process of learning and the search for creative solutions, which are conducive to successful collective problem-solving.

Likewise, individuals’ inability to assess and evaluate the accuracy of available information, which often results in distorted views, also hinders the potential of any deliberative process to be a reasoned one. If individuals’ preferences are formed by encounters with false or partial information, they cannot apply the cognitive intelligence required for the process of deliberation to epistemically succeed. This obstruction of reasoned contestations is aggravated by the visibility regime of online platforms, that is structured by principles of ‘connectivity’ and ‘popularity’. Namely, such regimes promote the visibility of certain opinions, facts, and ideologies, in disconnection however, with their coherence, logic, or rationality. The particular knowledge logics that regulate public digital discourse, also run counter to the democratic principles of inclusiveness, freedom, and equality, that are viewed as necessary constraints on the deliberative process for it to succeed in achieving its epistemic functions. Not only do these knowledge logics guarantee that some voices are prioritised over others—impairing the procedure’s inclusiveness and equality—but they also establish a ‘normative’ hierarchy, as it were, to determine the type of voices that are emphasised, and to thwart the notion of free deliberation.

The epistemic functions of the horizontal dimension of political voice are doubly important in the context of domestic decision-making with transnational spill-over effects, and in that of global decision-making beyond the state. According to epistemic deliberative accounts, political decisions can only be legitimate whereby they are the product of a deliberative democratic procedure. From the perspective of foreign affected stakeholders, domestic policy-making which carries decisional externalities, or global policymaking for that matter, may therefore only be legitimised when governed by a deliberative process in which *all* affected

stakeholders took part.¹⁰⁵ It follows, that the fragmentation and pollution of information channels and communicative spheres, have considerable implications not only *within* political borders, but also *across* and *beyond* them: they obstruct the exchange of reasoned validity claims between globally-dispersed and diverse stakeholders. Such exchanges, as discussed in Chapter III, are of particular significance in the context of the increasing prevalence of transnational and global decision-making; contexts in which it is inherently remarkably difficult to establish widespread common views of justice between highly heterogeneous individuals and societies.¹⁰⁶ The fragmentation of communicative spheres and pollution of information, thus exacerbate these intrinsic difficulties by obstructing the one tool that could be used to overcome them—meaningful transboundary, cross-cultural, horizontal public discourse, that would shape, over time, a common, transboundary view of global public interests. This common view would reflect what it is that affected stakeholders find just in light of the shared conditions to which they are mutually subject.

Moreover, as in relation to the previous arguments made on the educative functions of political voice, it is in this global context that the pollution of information has its most adverse effects: it disables the application of reasoned argumentation and cognitive intelligence to complex moral questions. In this context, in which political decisions are often more intricate than in the domestic one, and may involve a larger quantity of competing interests, or a more compound set of implications, the exchange of relevant, trustworthy, accurate information through public debate, is utmost significant for both epistemic and educative reasons.

B. The vertical dimension

The vertical dimension of political voice, i.e., individuals' ability to communicate effectively with public decision-makers and partake in processes of public decision-making which affect their life course, derives its normative purchase from the role it plays in guaranteeing political freedom as non-domination, and in achieving measures of justice.

Whereas this vertical dimension undoubtedly has an independent existence, Chapter III has also expounded its dependence on political voice's horizontal dimension. Specifically, this chapter has argued that the destruction of open, public, heterogeneous discursive spaces, and the ensuing erosion of the educative and epistemic functions of political voice, have further implications for individuals' ability to meaningfully communicate their political interests

¹⁰⁵ See Chapter III, footnotes 239–242 and accompanying text.

¹⁰⁶ *ibid.*

vertically vis-à-vis public decision-makers. Once the educative and epistemic functions of horizontal political voice are eroded, then the process of individual and collective political will-formation is obstructed, and the development of solidarity and community consciousness is thwarted. Accordingly, the epistemic process of reasoned deliberation and the discovery of public interests, is also frustrated. In other words, whereby individuals and communities are unable to unearth their own, or their collective political interests through the horizontal discursive process, they would also be unable to communicate these interests effectively to public decision-makers, or ensure that these interests are considered by them.

Horizontal global political voice deficits therefore also contribute to the creation of *vertical* deficits. They are likely to lead to what Richard Stewart terms a ‘substantive disregard’, i.e., the ‘adoption of decisions that unjustifiably harm or disadvantage those whose interests and concerns have been procedurally disregarded, where decisions have been adopted as a consequence of such disregard’.¹⁰⁷ These vertical deficits thus palpably influence individuals’ prospects for freedom and justice.

(1) Thwarting freedom as non-domination

Recall that the ideal of political freedom is primarily understood herein in neo-republican terms to denote non-domination. This concept of freedom breaks away from the typical liberal, negative understanding of freedom, as the absence of interference, to represent, instead, individuals’ positive power to control their own destiny.¹⁰⁸ Interwoven in a theory of political legitimacy, neo-republican freedom demands that individuals equally exercise a form of control over political decision-makers, and equally determine the particular directions this control should impose. In other words, the outcomes of political decision-making cannot be such that are imposed on individuals by alien or private will.¹⁰⁹

However, in the absence of deliberative models of decision-making in which collectives discover the common good, the opportunities for democratic control are readily frustrated. Under conditions of global horizontal political voice deficits, in which individuals cannot openly and freely converse to discover their collective political interests, individuals are effectively denied the ability to direct the influence on government(s) toward decisions that are

¹⁰⁷ RB Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’ (2014) 108 AJIL 211, 224.

¹⁰⁸ See explanation of freedom as non-domination in Chapter III.

¹⁰⁹ See Chapter III, footnotes 172–173 and accompanying text.

equally acceptable to all;¹¹⁰ and cannot defend their positions on the basis of convergent considerations that are relevant to all those affected.¹¹¹

Importantly, this thwarting of democratic control that is created by *vertical* political voice deficits, and that affects the realisation of freedom, is not limited to the intra-state dimension, but has cross-border effects. This is the outcome of two aggregate conditions. First, as detailed in Chapter II, under contemporary circumstances of globalisation, cross-border communities of stakeholders are routinely affected by decisional externalities of national governments, and by decision-making by global institutions. Where individuals' lives are commonly influenced by globally-dispersed decision-makers, their freedom is jeopardised by institutions other than their own government. And yet, according to neo-republican accounts of freedom, such decisions and decisional externalities could still be viewed as non-dominating, and as preserving freedom, insofar as affected individuals and communities are capable of governing these decisions through a 'currency of common global reasons'. This set of common global reasons would demarcate the scope of considerations that would be viewed as legitimate bases for such decisions, and thus preserve democratic control.

However, in thwarting open and free dialogue between heterogenous members of cross-boundary, decentralised 'publics', current global horizontal political voice deficits destruct the *transboundary* discursive spaces in which such currency could be developed to begin with. These deficits thereby create vertical global political voice deficits that impact the realisation of neo-republican freedom *beyond the state*. As discussed in Chapter III, this is done by impairing individuals' and communities' opportunities to meaningfully and effectively cooperate with others, and acquire the normative powers they need in order to shape the foreign and global political institutions that in turn shape their life course. Somewhat ironically then, whilst the novel technological affordances of ICT companies are often thought of as having the potential to enhance individual freedom both within and beyond the state, these technological affordances are actually found herein to interfere with, and impede the attainment of a neo-republican concept of freedom.¹¹²

These challenges to neo-republican freedom, are further complicated by another form of algorithmic regulation which has become increasingly prevalent in both the national and international arenas—the use of algorithms and big data by public bodies for the performance

¹¹⁰ See Chapter III, footnote 177 and accompanying text.

¹¹¹ See Chapter III, footnote 179.

¹¹² Whereas this chapter has adopted the neo-republican understanding of freedom, this analysis also corresponds to Isaiah Berlin's distinction between 'negative' and 'positive' liberty and his concept of a denial of 'positive liberty'. See I Berlin, 'Two Concepts of Liberty', in *Four Essays on Liberty* (OUP 1969) 118.

of public decision-making.¹¹³ In these contexts, privately-developed software is deployed by governmental actors and institutions of global governance—either directly, or via private contractors—in order to assist in, and perfect decision-making processes which require the analysis of big data. This data is collected, *inter alia*, from users’ activity on private ICT platforms,¹¹⁴ and then processed by algorithms. Within these frameworks, algorithms and computerised processes replace humans in performing certain functions required to produce *public* decisions, such as prioritising information, weighing different inputs, or electing which variables and factors would be determinative of the output.¹¹⁵

Examples are by now abound. Local policing agencies are using algorithm-powered software to predict crime;¹¹⁶ immigration enforcement officers employ them to determine the release or detainment of undocumented immigrants;¹¹⁷ border control officers use algorithms to detect lying at border checkpoints;¹¹⁸ courts rely on algorithms for various assessments in criminal proceedings, including decisions on parole, bail, and sentencing;¹¹⁹ and governments, as well as global governance institutions, depend on their use in administrative decision-making.¹²⁰ Like in the context of ICT platforms, these algorithms—often owned by private ICT companies themselves, but deployed by public bodies—operate according to particular knowledge logics predicated on complicated training data analysis. This knowledge logic

¹¹³ van Dijck and Poell, ‘Understanding Social Media Logic’, 10; For prominent examples see Benvenisti, ‘EJIL Forward’, 56–58.

¹¹⁴ Saliternik calls this ‘non-policy-oriented big data’, and describes it as being most of the data used by public authorities in decision-making processes: M Saliternik, ‘Big Data and the Right to Political Participation’ (2019) 21 *Journal of Constitutional Law* 713, 719.

¹¹⁵ The replacement of human decision-makers with artificial intelligence (AI), in this context, is characterised by Johns as: ‘[marking] an actual or potential breakdown in relations between those imagined as governed and those cast as governing’: F Johns, ‘Global Governance through the Pairing of List and Algorithm’ (2016) 34 *Environment and Planning D: Society and Space* 126, 128; Concerns about the use of algorithms in these contexts are discussed widely in the field of Human-Computer Interaction and research on the explainability of AI. For an overview of research in the field see A Abdul and others, ‘Trends and Trajectories for Explainable, Accountable and Intelligible Systems: An HCI Research Agenda’ (2018) *Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems*, Paper No. 582.

¹¹⁶ See eg, K Lum and W Isaac, ‘To Predict and Serve?’ (*Significance Magazine* Oct 7, 2016) <<https://doi.org/10.1111/j.1740-9713.2016.00960.x>>.

¹¹⁷ D Oberhaus, ‘ICE Modified its ‘Risk Assessment’ Software So It Automatically Recommends Detention’ (*Vice* Jun 26 2018) <https://www.vice.com/en_us/article/evk3kw/ice-modified-its-risk-assessment-software-so-it-automatically-recommends-detention>.

¹¹⁸ For an extensive report on the use of AI in the context of immigration in Canada see P Molnar and L Gill, ‘BOTS at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada’s Immigration and Refugee System’ (International Human Right Program (Faculty of Law, University of Toronto) and the Citizen Lab (Munk School of Global Affairs and Public Policy, University of Toronto) 2018).

¹¹⁹ See eg, J Kleinberg and others, ‘Human Decisions and Machine Predictions’ (2018) 133 *The Quarterly Journal of Economics* 237.

¹²⁰ J Cobbe, ‘Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making’ (2019) 39 *Legal Studies* 636; See also L Denick and others, ‘Data Scores as Governance: Investigating uses of Citizen Scoring in Public Services’ Project Report (Data Justice Lab 2018).

incorporates choices about which information should be visible, meaningful, and determinative of the outcome, and which, accordingly, should not.

In these contexts, however, the knowledge logic of the algorithms employed is often considerably opaquer than that of ICT companies. These types of public decision-making processes habitually make use of inherently ‘black-boxed’ machine-learning algorithms—‘a family of techniques that allow computers to learn directly from examples, data, and experience, finding rules or patterns that a human programmer did not explicitly specify’.¹²¹ Subsequently, the decision-making process is comprised of a complex matrix of human judgement, statistical models, and algorithmic computations, all of which render the process inaccessible from the perspective of stakeholders affected by the outcome.¹²²

The use of algorithms to replace human decision-makers, and the analysis of personal data to replace personal communications between decision-makers and stakeholders, therefore *directly* erodes individuals’ ability to use their vertical political voice to participate in public decision-making processes via: communication with human counter-parts, the articulation of their interests, the making of representations, the receipt of explanations, and the contestation of decisions.¹²³ The use of computerised software to produce an outcome on the basis of opaque computerised calculations and pre-generated data (rather than on information obtained from the affected stakeholder herself through communicative action), expropriates decision-making functions from a human decision-maker with which an affected stakeholder can converse, to a machine with no discursive abilities or qualities.¹²⁴

Algorithmic decision-makers otherwise lack a physical discursive ability which renders the process of individual–decision-maker communication obsolete in the most basic, visceral, sense. Moreover, as these processes increasingly employ machine-learning algorithms, they are also often devoid the *technical* ability to produce an outcome that is coherently and clearly explainable in human terms. When stakeholders thereby find themselves affected by the decisional power wielded by algorithms, they are, in turn, unable to communicate their interests or concerns through voice, nor are they able to effectively scrutinise, contest, or challenge the

¹²¹ A Rieke, M Bogen, and DG Robinson, ‘Public Scrutiny of Automated Decisions: Early Lessons and Emerging Methods’ (An Upturn and Omidyar Network Report. 2018) 9; Cobbe speaks of three types of opacity which have been typically identified: ‘intentional opacity’ arising from companies’ attempt to protect intellectual property; ‘illiterate opacity’ referring to the way in which the system is only understandable to experts in computer code; and ‘intrinsic opacity’ referring to humans’ incapacity to understand the calculations performed by the algorithms: Cobbe, ‘Administrative Law and the Machines of Government’, 639.

¹²² Benvenisti, ‘EJIL Forward’.

¹²³ Saliternik, ‘Big Data and the Right to Political Participation’, 720.

¹²⁴ See eg, ‘*State V. Loomis*’ (2017) 130 Harvard Law Review 1530.

decision to guarantee that their interests are considered.¹²⁵ The use of algorithms in public decision-making processes to replace human judgement, therefore challenges the vertical use of voice in the most rudimentary fashion. It could arguably be considered a structural version of what Richard Stewart defines as ‘procedural disregard’—a ‘[...] failure to provide groups and individuals with access to relevant information and the opportunity to submit evidence and argument on proposed decisions or to play their role in the organization’s decision-making processes’.¹²⁶

The use of algorithms in processes of public decision-making, thus palpably interferes with the conditions necessary for ensuring freedom as non-domination. In the most direct sense, algorithmic decision-making is dominating almost by definition, given that it is not under the democratic control of the affected: the interests and preferences of the latter are not considered by the algorithm as preconditions for action. Nor can affected stakeholders meaningfully contest the use of decisional power whereby it is indeed not guided by these interests and preferences.¹²⁷ This is because, among other things, algorithmic decision-making—especially when involving machine-learning algorithms—is both opaque and unexplainable. It does not afford the open channels of contestation and appeal that are required by neo-republican accounts to ascertain the democratic influence that in turn secures freedom as non-domination.¹²⁸

Here too, the hazards posed to the ideal of freedom as non-domination in the presence of vertical political voice deficits, transcend the domestic arena. First, algorithms are being used, at present, by decision-makers in global governance institutions which affect globally-

¹²⁵ Of course, the same patterns of exclusionary decision-making and the absence of meaningful dialogue between stakeholders and decision-makers, are replicated within online environments themselves. See T Shadmy, ‘The New Social Contract: Facebook’s Community and Our Rights’ (2019) 37 Boston University International Law Journal 307. Shadmy demonstrates how Facebook’s design principles, for example, are intended to draw attention away from how the company itself dominates and mediates interactions online, and from the absence of any meaningful dialogue between the company and its users on issues concerning the platform’s structure and design. This vertical mediation of horizontal relationships is further reproduced in the interactions between administrators of online communities within Facebook and their members. The platform enables these administrators to exercise direct control over group members, and determine unilaterally who and what content will be included and excluded from the group. Such online vertical relationships—grounded on authoritarian notions of control rather than on democratic notions of self-rule—thus institutionalise a specific architecture for social interactions which acclimates users to exclusionary models of decision-making in which rights and duties are being prescribed by ‘unseen forces’ (at 326); For a similar argument in the context of YouTube see L Stein, ‘Policy and Participation on Social Media: The Cases of YouTube, Facebook, and Wikipedia’ (2013) 6 Communication, Culture & Critique 353; For the argument in the context of Google see Vaidhyanathan. *The Googlization of Everything*, 82–90, 111–14.

¹²⁶ Stewart, ‘Remedying Disregard’, 224.

¹²⁷ See discussion on democratic influence and control in the context of neo-republican freedom in Chapter III.

¹²⁸ See eg, the literature on explainability in AI, Abdul and others, ‘Trends and Trajectories’.

dispersed stakeholders.¹²⁹ For example, in a 2018 report, the International Monetary Fund explored the use of machine-learning algorithms for forecasting microeconomic variables as a ‘key to developing a view on a country’s economic outlook’.¹³⁰ According to the report, the view obtained through the aid of the algorithm would be crucial for developing appropriate financial policy measures to respond to financial predictions. Regardless, therefore, of whether the predictions produced by the algorithm prove more accurate than those produced by former models of public decision-making, such predictions present a problem from the perspective of political voice and neo-republican freedom. Individuals and communities in these contexts, are subject to the dominating force of the decision-making algorithm insofar as they are robbed the communicative status and power to exert political influence on the decision-maker. From a neo-republican standpoint, such decisions might constitute forms of ‘arbitrary’ interference in the way in which a state conducts its business, in that they expropriate the control of the state from the hands of individuals in whose name it acts, and deprive them a voice in the decision-making procedure.

(2) Thwarting the realisation of justice

The challenges posed to ideals of justice are complex, and intertwined, as it were, with the challenges thus far examined to the educative and epistemic functions of political voice and to the realisation of freedom. The most plain and direct nexus between the obstruction of political voice and justice, previously articulated in Chapter III, considers the inability to participate effectively in public decision-making processes and to be heard, as a form of injustice in and of itself.¹³¹ According to such accounts, horizontal public deliberation and vertical democratic control over public decision-making processes, have intrinsic values related to concepts of egalitarian justice. In this view, justice requires an ‘equality of means for participating in deciding on the collective properties of society’.¹³² Thus, the combination of the horizontal, and subsequent vertical, dimensions of global political voice deficits, i.e., the obstruction of individuals’ ability to discover and pursue their true political interests and their consequent inability to secure the outcomes of political decisions, result in political injustice.

According to normative democratic theorists, this matrix of horizontal and subsequent vertical political voice deficits is furthermore bound to result in *unjust decisions*. These

¹²⁹ See Benvenisti ‘EJIL Forward’, footnotes 266–72 and accompanying text.

¹³⁰ J-K Jung, M Patnam, and A Ter-Martirosyan, ‘An Algorithmic Crystal Ball: Forecasts-based on Machine Learning’ (2018) IMF Working Paper No. 18/230.

¹³¹ See footnotes 183–184 in Chapter III and accompanying text.

¹³² T Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Westview Press 1996) 59.

decisions are unlikely to reflect notions of the ‘common good’, and unlikely to incorporate and consider the interests of relevant stakeholders. They would thus be inherently unjust regardless of their distributive outcomes.¹³³ A neo-republican view of such decisions would further consider them as *dominating*, in that they subject individuals or communities to certain normative arrangements that cannot be discursively justified to them.¹³⁴ Justice, in this sense, is associated with the neo-republican concept of freedom, to suggest that whereby individuals’ interests and concerns are disregarded, and their voice ignored, not only are individuals unfree, but they are also treated unjustly.

As in the context of political voice’s other functions, here too, the consequences for justice transcend political boundaries. This is first, because the concepts of justice discussed herein trace political relations of inequality and domination regardless of the particular character of these political relations as *intra*-state ones. Political voice deficits would therefore have implications for the attainment of justice in every arena in which individuals and communities are affected by political decisions, and at the same time denied ‘discursive autonomy’¹³⁵ and equal participatory access to the horizontal deliberative process and the vertical public decision-making process. Indeed, as the horizontal and vertical political voice deficits created by ICT companies and by algorithmic regulation are created and sustained *globally*, the realisation of justice is impaired within, across, and beyond boundaries.

As discussed in Chapter III, the denial of ‘discursive autonomy’ has further implications for distributive justice. The horizontal and vertical dimensions of political voice deficits, create situations in which individuals and collectives (particularly weak ones) are less likely to exert the bargaining power necessary in order to guarantee that their distributive interests are met. They are, therefore, less likely to generate the bargaining power necessary to level the playing field with small and strong interest groups that already manage to secure a disproportionate share of the aggregate social welfare. The contemporary challenges to political voice posed by ICT companies and algorithmic control, thus further complicate existing political voice deficits which result from the structural transformations mapped out in Chapter II.

Importantly, individuals and communities are less likely to gain the political clout required to secure their interests against the very interest group that stands at the root of present political voice deficits—private ICT companies themselves. The fragmentation of discursive arenas, the

¹³³ See discussion on political voice and justice in Chapter III.

¹³⁴ See footnotes 202–207 in Chapter III and accompanying text.

¹³⁵ C Laborde, ‘Republicanism and Global Justice: A Sketch’ (2010) 9 *European Journal of Political Theory* 48, 66.

shrinking space for political deliberation, and the use of algorithms in public decision-making, all weaken the political clout of diffused stakeholders, all the while strengthening that of the companies responsible for these conditions. This reality further complicates the challenges thus described to the realisation of justice. The existing imbalances between the ‘regarded’ and the ‘disregarded’, i.e., powerful states and weak political communities, or strong economic actors and vulnerable individuals, are now bolstered by the dominating presence of private ICT companies and their technologies.

3. Conclusion

This chapter has sought to complement the enquiry embarked on in Chapter II. It adds to existing analyses of how political voice is challenged by globalisation and by the structural features of the international order, also the novel challenges raised by technological developments. Most importantly, it sought to elucidate the breadth and depth of the normative implications of these challenges. In order to capture the complexity of contemporary challenges to political voice, and elucidate the spatial and normative scope of their impact, the chapter has coined the notion of a global ‘political voice deficit matrix’.

This notion first accounts for how the *horizontal* and *vertical* dimensions of this deficit matrix are closely intertwined. It emphasises the ways in which challenges to horizontal political voice create novel difficulties with respect to its vertical dimension. Specifically, it highlights the considerable impact of the erosion of horizontal open, deliberative, heterogeneous, discursive public spaces, for individuals’ and communities’ ability to participate vertically in political decision-making; and the consequences of both, for the fundamental ideals that political voice is meant to achieve and secure. In doing so, the idea of a global ‘political voice deficit matrix’ underscores what is often overlooked in the international legal literature problematising the novel forms of vertical power relations established by and through international law.

Second, this notion of a ‘matrix’, also denotes the ways in which the neat allocation between the private sphere and the public one, is obfuscated by how information and communications are controlled, and algorithms are employed, by both public and private bodies. This obfuscation of the public and the private *in and of itself* raises additional independent legitimacy concerns, that exist on top of those resulting from the obstruction of political voice’s democratic functions. These independent legitimacy concerns have to do with the fact that, under the regulatory control of ICT companies, individuals’ and communities’ democratic fate and their potential to realise the ideals of freedom and justice, are largely

determined by *private* entities.¹³⁶ Thus, whereas the operations of ICT companies are private and commercial in character, they also wield public-like regulatory authority and power, to design the architecture of public discursive spaces and engineer political interactions.¹³⁷ Not only then, do the operations of these private entities generate democratic concerns by the very creation of horizontal and vertical political voice deficits, but the mere fact that these deficits are created by *private* entities as opposed to public ones, adds another overarching stratum of legitimacy deficits to the already established multidimensional configuration of this matrix. In this sense, whilst public entities would arguably have a *prima facie* obligation to correct the global ‘political voice deficit matrix’, the ability to assign such obligations to private entities in this context, is questionable. This raises important questions regarding the law’s aptitude to intervene to mitigate these challenges.

The public and the private are also blurred in the global ‘political voice deficit matrix’ by public bodies’ encroachment on the private, in their reliance—in exercising their public functions—on data collected by private means, and on algorithms developed by private companies. This obfuscation has primarily led, thus far, to privacy concerns over the rights of individuals to control their own information and to preserve a private space which public bodies cannot invade.¹³⁸ However, the implications of this muddying of public-private boundaries, far exceed the concern for privacy, as they raise more fundamental questions of democratic legitimacy.

Finally, the notion of a ‘matrix’ also denotes the multidimensional spatial-political scope of contemporary political voice deficits, and demonstrates how the problems that they create cannot be bracketed exclusively as domestic concerns. This is because, under contemporary conditions of globalisation, individuals’ and communities’ life opportunities are determined by multiple sources of political and public decision-making power; because novel communities of affected stakeholders are created which defy national boundaries; and because ICT companies who control and regulate information and communication channels operate globally. The

¹³⁶ ‘Independent’ because they arise from the mere fact that the public and the private are muddled, somewhat regardless of the particular consequences of the exact ways in which they are muddled. For a similar argument see D Lustig and E Benvenisti, ‘The Multinational Corporations as “the Good Despot”: The Democratic Costs of Privatization in Global Settings’ (2014) 15 TIL 125.

¹³⁷ This concern is somewhat distinct from concerns about algorithms as regulatory agents, such as those aired in, eg, Just and Latzer, ‘Governance by Algorithms’. It is also distinct from concerns about ICT companies’ regulation of the content created and exchanged on their platforms, such as those aired in, eg, T Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press 2018).

¹³⁸ See eg, BD Mittelstadt and others, ‘The Ethics of Algorithms: Mapping the Debate’ (2016) 3 Big Data & Society 1.

concept of a global ‘political voice deficit matrix’, thus tries to capture the ways in which impediments to political voice have implications for horizontal and vertical relationships *within* the state, i.e., between members of a national political community and between voters and their governments; but also for horizontal and vertical relationships *beyond* the state, i.e., between individuals from different national communities, between states themselves, and between voters and foreign governments or voters/governments and international organisations.

The global ‘political voice deficit matrix’ therefore raises novel questions not only for those concerned with domestic constitutional and administrative law, but also for international lawyers. Particularly, how, if at all, should international law respond to mitigate or eliminate the causes for this global ‘political voice deficit matrix’? Is it particularly equipped, as a cooperative cross-boundary regime, to address the inter-state and global aspects of this matrix? And in what ways, might international law *itself* be responsible for the novel dimensions of this matrix?

The following chapter therefore embarks on a novel enquiry against the backdrop of the present one. It seeks, in particular, to unpack these questions in order to contemplate the role international law could and should assume to address the trepidations thus far outlined.

The global ‘political voice deficit matrix’: what role for international law?

The global ‘political voice deficit matrix’ analysed in previous chapters, clearly gives rise to domestic concerns, particularly for democratic governments. It is also, however, a matter of global public concern. This claim is both descriptive and normative. It is descriptive in that it identifies the transboundary nature of ICT companies’ regulatory control of global communicative infrastructures, which, together with other structural causes described in Chapter II, give rise to, aggravate, and complicate this matrix *globally*. It is also normative, however, in acknowledging that individuals’ and communities’ inability to receive pertinent and reliable information, and to communicate effectively with relevant stakeholders, entails fundamental societal and political risks not only when denied *within* the boundaries of their own national communities, but also when denied across and beyond them. In other words, the present circumstances of globalisation and misalignment between decision-makers and affected stakeholders, render the *transnational* availability of political voice particularly salient, and its absence particularly concerning.

To the extent that this claim is accepted as both a descriptive and normative matter, the relationship between the notion of political voice and international law requires consideration. What needs to be examined, is whether, how, and to what extent international law constitutes an appropriate and adequate legal framework for addressing this global ‘political voice deficit matrix’ and its challenges. Some aspects related to these questions have already received notable consideration in international legal scholarship, a large part of which has been examined in Chapter II. But as argued therein, this scholarship has mainly focused on the *vertical* dimensions of political voice, i.e., meaningful and effective information flow and communications between public decision-makers and affected stakeholders. These scholars argue, as a matter of fact or exigency, for the extended responsibility of public decision-makers to facilitate the participation of affected stakeholders in public decision-making, through communication and voice.¹ The notion of political voice in these accounts, is therefore

¹ Some notable examples analysed in Chapter II, include descriptive projects in the field of Global Administrative Law which account for the emergence of global administrative norms in response to the development of the international legal order as a form of governance. These include increased standards of, and mechanisms for, participation through voice. See E Benvenisti, *The Law of Global Governance* (Brill

construed incompletely, as a tool or measure through which to legitimise the novel *vertical* relations of power and authority beyond the state, that globalisation has given rise to. The relevant legal principles identified for securing the availability of political voice beyond borders, are, therefore, mainly those governing vertical relations of power in this context, namely, those of global administrative law.

Other accounts that engage with the ‘globalisation’ of political voice, and which *have* paid attention to the significance of its horizontal dimension alongside its vertical one—i.e., the flow of reliable information and the availability of open, deliberative, public discourse between members of a political community—have nevertheless done so without specific recourse to international law as an appropriate legal framework through which to operationalise their critical theory. These accounts offer a political science perspective that critically reflects on the normative force of notions like ‘transnational public spheres’ under conditions of globalisation; and offer to rethink the conceptual applicability of fundamental democratic concepts and principles under these conditions. In painting their accounts in broad strokes, these scholars stop short, however, of linking the notion of political voice to particular *legal* principles that would underpin the institutional changes that they envisage are required in order to accommodate their critiques.²

This chapter offers to merge these existing accounts, and to fill in the gaps left uncharted by their respective focal points. To that end, it examines the potential relationship between political voice and international law, centring on the relationship between the *horizontal* dimension of political voice and international law. It will explore whether, how, and to what extent international legal principles could and should protect and promote the flow of reliable information and the availability of open, deliberative public discourse, within, between, and across borders. In doing so, the chapter sets out to complement existing international legal scholarship, by compensating for the critical oversight resulting from its emphasis on political voice as a legitimising tool in *vertical* relations of power. This emphasis, it has already been argued, fails to account for the fundamental significance of horizontal political voice for the

2014); and B Kingsbury, N Krisch, and RB Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15. Other examples include normative claims regarding the ways in which globalisation and the expansion of the international legal order increasingly require considering the interests of foreign stakeholders, and enabling their participation in public decision-making fora through voice. See eg, E Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 *AJIL* 295; RB Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’ (2014) 108 *AJIL* 211.

² See eg, N Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia University Press 2008) 76 (in Chapter 5 entitled ‘Transnationalizing the Public Sphere’); J Bohman, *Democracy Across Borders: From Dêmos to Dêmoi* (MIT Press 2007).

effective employment of vertical voice, and as such, provides only a partial picture of the measures required for guaranteeing the very ideals that international law aims to guarantee in this context. In other words, increased transboundary participation in processes of public decision-making would hardly be valuable in the absence of meaningful transnational public discourse in which interlocutors can receive reliable information, discover their own political will, develop community consciousness, and engage in epistemically constructive dialogue. These constitute preconditions for the successful mobilisation of political force through vertical participation, and therefore preconditions for the attainment of the normative functions ascribed to vertical political voice—the realisation of freedom and justice.

By focusing on the horizontal dimension of political voice, this chapter also aims to address the specific challenges that are currently and fundamentally posed to political voice by the regulatory dominance of private ICT companies, and that are overlooked when centring only on political voice's vertical dimension. This focus turns the spot light to the impact of actors other than states and governments on the notion of political voice. In addition, by seeking recourse to international *law*, this chapter offers to complement the existing endeavours by political scientists to rethink the idea of public discourse in a globalised world. The emphasis on international law, hence enables contemplating whether the risks associated with the global 'political voice deficit matrix' should give rise to specific international *legal* obligations of states to address and mitigate these risks, and how these may be enforced.

The relationship this chapter offers between horizontal political voice and international law, is one in which the availability and robustness of political voice should be considered as 'community interests' in international law, or their absence a 'common international concern'.³ This is by no means an already accepted position in international law or scholarship, but I argue that it is an important one, and offer it as a normative consideration in the progressive development of international law. Despite the normative nature of this claim, the first section of this chapter will scrutinise its theoretical foundations, and its compatibility with existing competing approaches to the idea of 'community interests' in international law. It will therefore explore the treatment of 'community interest' as a concept in international legal theory and doctrine.

³ As Voigt suggests, there are different approaches to the relationship between the concepts of 'common interest' and 'common concern': C Voigt, 'Delineating the Common Interest in International Law' in W Benedek and others (eds.), *The Common Interest in International Law* (Intersentia 2014) 9, 18–19. In this chapter I follow Voigt's distinction according to which 'common concerns presuppose common interests', but common concerns require collective action. For a detailed account of this distinction see *infra* note 14.

On the basis of these analyses, this section will argue that political voice can, and should, be theorised as a community interest in international law, on the basis of two criteria: (a) it being an interest widely shared by members of the international community; and (b) it being an interest whose transboundary protection and promotion requires the collective action of states. In the context of the first criterion, this section will argue that horizontal political voice is best qualified as an international community interest from the perspective of a cosmopolitan or a Grotian humanity-based view of international law, according to which it is individuals, and not states as juridical entities, which are the ultimate members of the international community. It will also be argued however, that the theorisation of political voice as an international community interest is compelling as an interest of states as members of this community, on a non-universal basis, when considering the interests of democratic states. In the context of the second criterion, this section will argue that the collective action of states, and thus international regulation, are necessary for guaranteeing political voice within and across borders. This is both because of the particular characteristics of the ICT companies who need to be regulated in order to address the global ‘political voice deficit matrix’; and because of the particular characteristics of transnational political voice as the object of regulation.

If the availability and robustness of political voice could rightly be theorised as community interests in international law—whether of individuals or of democratic states—then international law could and should have a role to play in guaranteeing them. The second part of this chapter, will thus proceed to examine what the doctrinal implications of such theorisation of horizontal political voice might be. In particular, what legal obligations, or ‘community interest norms’,⁴ would an understanding of political voice as an international community interest impose on states for its protection or promotion, within, across, and beyond borders, if any? Specifically, this section will draw parallels between the notion of horizontal political voice and the issue of climate change, as a paradigmatic example of a widely recognized common concern in international law, in order to understand the legal obligations that its protection provokes. This section will argue that drawing on the international climate change regime in order to think about addressing the global ‘political voice deficit matrix’ makes eminent sense given the high degree of similarity between the challenges that these two issues give rise to, despite the existing differences between them. To that end, this section will examine the core customary obligation that currently binds states in international climate

⁴ I Feichtner, ‘Community Interest’ in R Wolfrum (ed.), *The Max Planck Encyclopaedia of Public International Law* (OUP 2007) para 2.

change law—the prevention principle—and will explore its potential to serve as a blueprint for internationally regulating the issue of political voice. The third part will conclude.

1. Political voice—a ‘community interest’ in international law?

A. Defining ‘community interests’

The term ‘community interests’ is often discussed in international legal scholarship in the context of what Wolfgang Friedmann called *The Changing Structure of International Law*,⁵ or what Bruno Simma more specifically termed *From Bilateralism to Community Interest in International Law*.⁶ Both seminal titles reflect the ways in which the structure, features, values, contents, and objectives of the international legal regime have broadened and deepened over the past century, to the extent that its functions now exceed the boundaries of a regulatory framework for the protection of state sovereignty and the promotion of the narrow interests of individual sovereign states.⁷

These developments from a ‘law of coexistence’ to a ‘law of cooperation’, are deeply rooted in sociological and political processes in which internal democratisation and the ‘intensification’ of international relations have contributed to the progression of a ‘society’ of states into a ‘community’.⁸ The ‘structural’ manifestation of these developments, to borrow

⁵ W Friedmann, *The Changing Structure of International Law* (Steven & Sons 1964).

⁶ B Simma, *From Bilateralism to Community Interest in International Law* (1994) 250 Collected Courses of the Hague Academy of International Law.

⁷ JHH Weiler, ‘The Geology of International Law—Governance, Democracy and Legitimacy’ (2004) 64 *Heidelberg Journal of International Law* 547; This has been referred to by Benvenisti and Nolte, who emphasise that although the dominant approach in international law today is a positivist one, it does not contradict the idea of solidarity in international law, and the notion according to which ‘states, in certain matters, promote and respect community interests, and, more importantly, they recognize obligations to the human community’. Political realities of recent times, however, have increased ‘efforts to articulate what human solidarity means for international law as a framework to secure a sustainable future for all’: E Benvenisti and G Nolte, ‘Introduction’ in E Benvenisti and G Nolte (eds.), *Community Interests across International Law* (OUP 2018) 3.

⁸ S Villalpando, ‘The Legal Dimension of the International Community: How Community Interests Are Protected in International Law’ (2010) 21 *EJIL* 387; For a detailed account of these developments see Friedmann, *The Changing Structure of International Law*; According to Simma:

‘[...] the element which distinguishes a “community” from its components is a “higher unity”, as it were, the representation and prioritization of common interests as against the egoistic interests of individuals. A mere “society” (*Gesellschaft*) on the contrary, does not presuppose more than factual contacts among a number of individuals’: Simma, *From Bilateralism to Community Interest*, 245.

For a more elaborate sociological perspective on the differences between ‘society’ and ‘community’ see DR Schmidt, ‘The International Community: Conceptual Insights from Law and Sociology’ (2015) *E-International Relations* 1; Besson emphasises the need to distinguish ‘the increasing relevance of community interests in international law’ from ‘other recent developments in the structure of contemporary international law, such as the generality, universality, hierarchy, and constitutionality of international law’: Besson, ‘Community Interests in International Law’, 43.

Weiler's terminology, was the emergence, around the mid-twentieth century,⁹ of international organisations whose goals represented the 'overall interest[s]' of their member states as parts of an international community, rather than these members' parochial goals.¹⁰ Its counterpart 'material' manifestation, was the recognition of 'common assets'—either material, functional, or spiritual—whose very existence requires the definition of a community to whose members such assets commonly belong.¹¹

The emergence of community interests has been differently described by Simma as the emergence of 'a consensus according to which respect for certain fundamental values is not to be left to the free disposition of [s]tates individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all [s]tates'.¹² A broader notion of community interests, often used interchangeably with other concepts such as 'common interests', 'collective interests', 'common concerns', or 'common values',¹³ denotes the idea that there

⁹ Weiler emphasises, however, the geological nature of these developments, as non-linear developments. In this sense, international law's different 'command modes' co-existed throughout history, with different command modes being more dominant than others in different periods in time. See Weiler, 'The Geology of International Law'; Feichtner also emphasises that:

'[c]onceptions of international law referring to notions of community interest are not a phenomenon restricted to modern times. The common good of mankind [...] figured prominently in the theory of international law developed by Francisco Suárez [...] While after the emergence of sovereign States the function of international law was for a long time to ensure the peaceful coexistence of these sovereign States, this law of coexistence has since then increasingly been complemented by international legal rules and principles facilitating the co-operation of States and other actors at the international level': Feichtner, 'Community Interest', para 8.

¹⁰ Weiler, 'The Geology of International Law', 556; In the words of Simma: 'By sheer necessity, the quest to realize community interests has led to an ever stronger institutionalization, or organization, of international society': Simma, *From Bilateralism to Community Interest*, 235; Somewhat complementing these observations about the rise of international organisations, Feichtner observes that community interests have 'effected changes in the generation of international legal norms as well as changes in their enforcement'. She observes in this context, that one such change has been the increasing involvement of non-state actors who represent societal interests in the 'formulation and implementation of international law', and are often 'also the direct addressees' of these community interest norms: Feichtner, 'Community Interest', paras 26–27.

¹¹ Weiler, 'The Geology of International Law', 556–57; For a similar take on the structural and material developments in international law in this context see also Voigt, 'Delineating the Common Interest in International Law', 16:

'What is new, however, is that the structure of international law is undergoing changes—from a network of reciprocal and bilateral obligations to a system that increasingly accommodates the notion of obligations owed to an international community of states—and ultimately of all humankind [...] Simultaneously, we can observe a transformation of the moral stance of international law: from an order that was largely indifferent to the concerns of individuals [...] to a legal order which promotes human rights'.

¹² Simma, *From Bilateralism to Community Interest*, 223; See also Gaja who speaks of 'general interests': G Gaja, *The Protection of General Interests in the International Community* (2011) 364 Collected Courses of the Hague Academy of International Law. According to Gaja, the 'key element' of the analysis of what constitutes a general interest is that 'a [s]tate or other entity is entitled to seek protection of a certain interest even when it cannot claim to be specifically affected by the infringement of that interest' (at 21). Contrary to what is implied in Simma's definition, however, Gaja mentions that '[a] general interest need not be a universal interest, belonging to all States and other entities' (at 22).

¹³ There is disagreement amongst international lawyers regarding the relationship between 'common interest' and 'common concern'. Voigt suggests that: '[t]he semantic difference between "interest"/"concern" suggests a difference in normative meaning and force'. On one hand, 'common concern' might refer to issues whose governance is 'essential for the survival of humankind' whereas 'common interest' refer to issues that are less

are certain interests which ‘can be attributed across borders to individuals or groups of individuals relating to their well-being’.¹⁴ Examples of the most widely-accepted community interests include international peace and security, protection of the environment, and international human rights. These are all identified—in treaties as in jurisprudence¹⁵—as goods or values, the protection and promotion of which, is an interest widely shared by ‘more than one state or by people in more than one state’; and that their protection or promotion cannot be achieved by the unilateral actions of individual states, but rather require international cooperation or collective action.¹⁶

The ‘exact nature’ of community interests, and the international legal process for their identification, remain, however, quite obscure and contested.¹⁷ In particular, international legal scholars offer competing visions of the types of interests that the concept encompasses, and of who constitute the members of the community to which these interests belong. As regards the first, a narrower understanding of community interests considers only the most fundamental values which are *universally* shared by all members of the international community, as

fundamental. On the other hand, the opposite could be said: whereas ‘concern’ might ‘indicate more general issues’, ‘interest’ may imply a specific issue. In this latter view, ‘common concerns’ may be reserved ‘for those issues where despite global attention no specific legal interest can be identified or no concrete commitment is made’: Voigt, ‘Delineating the Common Interest in International Law’, 18. According to Voigt, however (at 19), the main difference is that ‘common concerns require collaborative, concerted *action!* They require cooperation [...] Yet, common concerns presuppose common interests’; Brunnée, on the other hand, conceptualises ‘common interests’ as a broad term encompassing three distinct types of interests: ‘coinciding interest’, which only refer to those interests which individual states might happen to share in common and that propel them to cooperate; ‘shared interests’, which refer to those interests that are stable and long-term; and finally ‘common concern’ only refers to those common interests which are so fundamental that they have crystallised into a rule of international law that imposes specific duties for their protection: J Brunnée, “‘Common Interests’—Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law” (1989) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 791.

¹⁴ Feichtner, ‘Community Interest’. Put differently by Voigt: ‘The essential characteristic of common interests is that they transcend the interests of single states and instead correspond to the needs, hopes, and fears of all human beings [...] Common interests are those that transcend the boundaries of a single state’: Voigt, ‘Delineating the Common Interest in International Law’, 17. This is not to suggest that interests that are considered as common are entirely distinct from states’ individual interests. Rather, as Brunnée suggests, ‘common interests’ broadly termed, include those interests that are the sum of ‘coinciding individual interests’: Brunnée, ‘Echoes from an Empty Shell’, 793.

¹⁵ See eg: *United States Diplomatic and Consular Staff in Tehran, Judgment*, ICJ Reports 1980, p. 3; *Barcelona Traction, Light and Power Company, Limited, Judgment*, ICJ Reports 1970, p. 3; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Judgment*, ICJ Reports 1997, p.7.

¹⁶ Besson refers to this as an: ‘additional, albeit nonnecessary’ dimension of community interests: Besson, ‘Community Interests in International Law’, 39; Feichtner offers a typology of international legal instruments which refer to and protect community interests. These are divided into those protecting common goods such as peace and security in the Charter of the United Nations; those protecting common values such as IHRL treaties; and those protecting common spaces such as The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies and The United National Convention on the Law of the Sea. See Feichtner, ‘Community Interest’.

¹⁷ Besson, ‘Community Interests in International Law’.

community interests or common concerns.¹⁸ These are thought to include a rather restricted group of interests, not exceeding those of peace and security, environmental protection, human rights, and the common heritage of mankind.¹⁹ A broader view, however, which is the one endorsed herein, suggests that community interests are not limited to fundamental interests and to those held by the international community *as a whole*. They include, rather, ‘all values and interests which are shared across borders [in a non-universal manner] and transcend national interests in reciprocal exchanges and benefits between states’.²⁰ In contrast to these two approaches (which despite differing in scope share the same methodological premise of grounding common interests in common *values*), other approaches to identifying community interests include: taking ‘the measure of support that an interest enjoys within the international community as a criterion’; or ‘designating interests as common when they can only be safeguarded through common action’.²¹ The methodological choice of *how* to identify community interests will, therefore, evidently determine the scope of interests that are recognised as such.

As regards the term ‘community’ and identifying who constitute its members, though an ‘evasive concept’,²² two main approaches may be distinguished that are predicated on different perceptions of international law.²³ First, a humanity-based approach to international law,

¹⁸ These are often referred to as obligations *erga omnes*, following the famous dictum of the International Court of Justice in the *Barcelona Traction* case: ‘In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States’: *Barcelona Traction Case*, [32].

¹⁹ Feichtner associates this view with Simma’s position on community interests. Simma mentions solidarity between developed and developing countries as well. See Feichtner, ‘Community Interest’,

²⁰ *ibid* para 4; Besson, ‘Community Interests in International Law’; this approach is also shared by Gaja who refers to such interests as ‘general interests’: Gaja, *The Protection of General Interests*.

²¹ W Benedek and others, ‘Conclusions, The Common Interest in International Law—Perspectives for an Undervalued Concept’ in W Benedek and others (eds.), *The Common Interest in International Law* (Intersentia 2014) 219, 220; For an example of the latter see R Wolfrum, ‘Identifying Community Interests in International Law, Common Spaces and Beyond’ in E Benvenisti and G Nolte (eds.), *Community Interests Across International Law* (OUP 2018) 19. According to Wolfrum: ‘international public law has a subsidiary role and should come into play exclusively for those issues which can only be managed effectively by a common effort of the international community’ (at 21); The former reflects a somewhat legal positivist view of international law, according to which community interests can only be those that have already been accepted in the ‘prescriptive process of treaty and custom’ as common problems, and that states have agreed will be managed jointly: SR Ratner, ‘From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities’ in U Fastenrath and others (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 155.

²² Villalpando, ‘The Legal Dimension of the International Community’, 388.

²³ Simma and Paulus reference Hedley Bull’s distinction between three traditions of thought, two of which are relevant to the issue of community interests as detailed below. See B Simma and AL Paulus, ‘The “International Community”: Facing the Challenge of Globalization’ (1998) 9 EJIL 266.

according to which it is the individual who is ‘the ultimate unit of all law’,²⁴ or ‘the fundamental unit of moral concern’.²⁵ According to this Grotian approach, which was later advocated predominantly by Hersch Lauterpacht and Ruti Teitel, the ‘international community’ is construed as a community of mankind in which the state is not ‘an aim in itself’.²⁶ Community interests in this view, will thus be primarily justified by reference to the interests of individuals, even when those diverge from, or conflict with, the interests of sovereign states, such as in the paradigmatic example of international human rights law.²⁷ A Westphalian approach, on the other hand, views the international society as ‘composed of states’, and ‘[i]ndividuals, in principle, count only as representatives of their collectivity’.²⁸ This approach embodies a more positivist view of international law,²⁹ whereby common interests will be justified by reference to the shared interests of *states*.³⁰

Considering both approaches, the analyses which follow proceed from the common methodological assumptions *already* shared by international lawyers regarding the identification of community interests in international law. Namely, in order to evaluate whether and to what extent political voice can, and should, at present, fit the category of ‘community interests’ or ‘common concerns’ in international law, the following section will examine: (1) whether and to what extent the notion of political voice may be considered a value (or its absence a concern) that is shared across borders either by more than one *state*, or by *people* in more than one state; *and* (2) whether its protection or promotion requires the collective action of states, and thus international legal regulation.

²⁴ H Lauterpacht, ‘The Law of Nations, the Law of Nature and the Rights of Man’ (1943) 29 Transactions Grotius Society 1, 27.

²⁵ Ratner, ‘From Enlightened Positivism’, 159. According to Ratner similar questions are debated in relation to global justice.

²⁶ Simma and Paulus, ‘The “International Community”’, 270; As Simma emphasises: ‘[w]hat all these community interests have in common is that they go far beyond interests held by [s]tates as such; rather, they correspond to the needs, hopes and fears of all human beings, and attempt to cope with problems the solution of which may be decisive for the survival of entire humankind’: Simma, *From Bilateralism to Community Interest*, 244.

According to Ratner, however, Simma’s position is a way to reconcile his positivist views with the belief that ‘international law should serve certain ends of justice’: Ratner, ‘From Enlightened Positivism’, 156. Simma’s position in this respect, according to Ratner, does not fully align with cosmopolitanism.

²⁷ The New Haven School, for example, employs the concept of community interest to evaluate the legitimacy of international law which depends on the accordance of this legal regime with common interests, the most fundamental of which is the realization of human dignity. Feichtner, ‘Community Interest’, para 10.

²⁸ Simma and Paulus, ‘The “International Community”’, 270.

²⁹ See Ratner’s point in *supra* note 26.

³⁰ G Abi-Saab, ‘Whither the International Community?’ (1998) 9 EJIL 248.

B. Conceptualising political voice as a 'community interest'

(1) Political voice as an interest shared by members of the 'international community'

Is political voice an interest or a value that is shared across borders? The answer to this question depends, of course, on how the identity of the members between which it is supposedly shared is established. According to a humanity-based view, international law—in the words of Hersch Lauterpacht—is a law which governs not only the mutual relations between states, 'but is also, in the final analysis, the universal law of humanity in which the individual human being as the ultimate unit of all law rises sovereign over the limited province of the [s]tate'.³¹ This approach is not merely normative, but rather implies certain consequences for the scope of positive international law: if the international legal order 'addresses not merely states and state interests and perhaps not even primarily so',³² then '[t]he nation-state is no longer the sole subject of international law'.³³ Positive international law, in this respect, could appropriately be interpreted as geared towards the protection of the interests of individuals.

In keeping with this view of international law, political voice can duly be theorised as an international community interest of its individual members. Previous chapters have discussed at length the democratic objectives that political voice serves, and its fundamental significance for the attainment of circumstances under which individuals can pursue and realise both individual freedom and social justice. Proceeding from the assumption that the latter two are worthy ideals to pursue in respect of *all* individuals, the conclusion quickly follows that political voice is a significant social capital, and as such an interest in common, universally shared between all members of the international community. In this sense, the existence of, and accessibility to, reliable information and to open, deliberative public discourse, are crucial for individuals, members of *any* and *all* political communities. They are crucial for individuals' ability to develop the political intelligence and community consciousness required for their participation in public life, and for their ability to mobilise the political system to account for their interests. The availability of political voice is equally crucial for the deliberative process to bear fruit and reflect the common good, and for it to have the desired effect of determining the directions in which public policy goes, so as to empower individuals to be in control of their own destinies. Ultimately then, political voice is a fundamental driver for guaranteeing

³¹ Lauterpacht, 'The Law of Nations', 27.

³² R Teitel, 'Humanity Law: A New Interpretive Lens on the International Sphere' (2008) 77 Fordham Law Review 667, 667.

³³ R Teitel, 'Humanity's Law: Rule of Law for the New Global Politics' (2002) 35 Cornell International Law Journal 355, 363.

the political, and consequently material, well-being of individuals within their respective political communities. Its availability, accessibility, and robustness, are public goods which all individuals have a stake in.³⁴

Under conditions of globalisation, it is also the case that political voice is an interest shared by all individuals together, *transnationally*, and not only within the confines of their separate political communities. As argued in previous chapters, this stems from the contemporary nature of the misalignments between decision-makers and spheres of affected stakeholders, which generate spill-over effects so that individual lives are regularly determined by decisions made both by foreign governments and by global governance institutions. Insofar as this reality creates communities of affected stakeholders which defy existing political borders, then political voice—for the same reasons mentioned above—becomes an interest that is literally shared *across* borders.

In other words, part of the interest in question is the availability of reliable information and open, deliberative, public discursive arenas between members of *separate* political communities. Upholding such interest is instrumental for developing a common ethos between individuals who ultimately need to operate collectively *as a community*, given that their interests are jointly influenced by dominating forces or common threats beyond the state. The greater the interdependence between members of separate political communities, the more closely aligned their fates are, and the more important it becomes that political voice is guaranteed to all, and importantly, *between all*. Not only then is it a shared interest of members of the international community of individuals, but it is moreover an essential tool for establishing, strengthening, and sustaining such a community to begin with.³⁵ It is by guaranteeing political voice to all, and between all, that individuals and collectivities may then ensure that their common interests are considered in relevant forums of public decision-making that affect their life course. It is vital for safeguarding both their freedom and forms of social justice, under conditions of increasing global interdependence.

Arguably, however, theorising the political voice as an international community interest from the perspective of a Westphalian approach—as an interest of *states themselves* rather than of their individual members—is more complex. This is because, the characterisation of the

³⁴ As Lauterpacht acknowledges, it is man's welfare 'occupying the centre of the system [of international law]'. Lauterpacht, 'The Law of Nations', 25. One of international law's dual purposes is, therefore, to make 'man's freedom secure from the state'. Lauterpacht, 'The Law of Nations', 29.

³⁵ Schmidt, 'The International Community: Conceptual Insights', 2; As Besson notes: '[c]ommunity interests may also actually contribute to constituting their holders or bearers as a community in the first place': Besson, 'Community Interests in International Law', 39.

political voice as an ‘interest’ to begin with, highly depends on a favourable normative view of democracy as a form of government. From the perspective of non-democratic states, who reject democracy as a mode of political organisation, this would be a challenging proposition indeed, given that a typical feature of non-democratic regimes is the central control by the state of informational and communicative spheres. In other words, for *these* states, the political voice is unlikely to be regarded as an interest which they would want to endorse or actively protect and promote. This is especially so, if such theorisation of political voice then forms the normative groundwork on the basis of which to articulate general positive international legal obligations for states to guarantee it.

This argument notwithstanding, the theorisation of political voice as an interest shared between states is still compelling when considering the interests of democratic states. Democratic states, as Besson articulates, are presumed to be ‘collective agents set up to protect the collective interests of their individual members’.³⁶ In fact, the claim advanced by the democratic theories reviewed in Chapter III is that the very existence of democracies actually depends on the availability and robustness of political voice. According to the educative and epistemic arguments, the availability of reliable information and open, deliberative public discourse, is what binds members of a political community in the first place, and enables them to operate as a community and realise their common interests *as* collectivities. Political voice is, therefore, crucial for democratic states’ continued existence *as democracies*. From this perspective, there is a neat alignment between the interests of democracies themselves as juridical members of the international community, and the interests of their individual constituents.

Insofar, then, as international community interests may be defined as such on a non-universal basis, to refer to a widely shared interest of democratic states, the Westphalian paradigm does not pose considerable impediments to the theorisation thus-far offered. From a different perspective however, it may be argued in this context that such justification only relates to guaranteeing political voice within national boundaries, and therefore only justifies qualifying political voice as a ‘coinciding’ interest of individual democratic states, i.e., an interest which individual democratic states might just happen to share in common. However, the criteria set above for examining whether political voice can be regarded as a community interest, require not only that it be shared by more than one state, but also that its realisation depend on the collective action of states. As will be argued in more detail below, given the

³⁶ Besson, ‘Community Interests in International Law’, 37.

particular ways in which information flow and public discourse are now regulated by ICT companies, it is primarily by operating *collectively* that democratic states may ensure the availability and robustness of political voice even within their own national boundaries, let alone across and beyond them. Hence, insofar as these two criteria are met, political voice may be considered, at present, a community interest shared between the community of democratic states.³⁷

More importantly yet, as the interest in question is the availability and robustness of political voice not only within, but also beyond and across borders, what remains to be considered is whether democratic states have a shared interest in guaranteeing open informational and discursive landscapes transnationally. It is submitted in this context, that democratic states may have such a shared interest not only on the basis of their own individual aims to safeguard the viability of their own democratic architecture and ethos, but also in their shared and common interest as members of the international community of states. This is primarily for two reasons. First, on the basis of the same educative arguments, the availability of reliable information, and open, deliberative public discursive spaces, may serve states *themselves* as members of the international legal society to strengthen the organic unity required between them for their proper collective functioning as an international community.³⁸ This, in turn, is instrumental for the promotion of other established common interests such as peace, security, and human rights, and other collective projects. Therefore, cross-border political voice may well be posited a community interest, in the absence of which, democratic states' ability to operate effectively in a collective fashion on the global stage in order to sustain more than just a 'thin' international system, would be challenged.

Secondly, and relatedly, the viability of open, transnational discursive landscapes, is equally instrumental for legitimising states' collective operations as an international community through global institutions, thus constituting an important factor in guaranteeing the long-term viability of the international legal order. According to the epistemic argument, political voice has epistemic functions and serves as a legitimising tool, in that only those political decisions which result from rigorous public deliberation would be considered legitimate by those affected by them. Thus, the more open, available, and accessible reliable information and transnational discourse become, the more opportunities there are for an

³⁷ Thus, as Abi-Saab suggests, for the 'sake of precision', it is better 'to speak of the degree of community existing within the group in relation to a given subject, at a given moment': Abi-Saab, 'Whither the International Community?', 249.

³⁸ See Besson. 'Community Interests in International Law', 39, as quoted in *supra* note 35.

effective exchange of reasoned validity claims between interlocutors, which, in turn, ensure epistemically correct, and thus legitimate decision-making. The more legitimate foreign or global decision-making becomes in the eyes of affected stakeholders (be these individuals *or* democratic states), the more the long-term stability of global institutions can be guaranteed. The availability and robustness of transnational discursive landscapes may be conceptualised, therefore, as contributing to a better functioning international legal order, which, as Philip Jessup recognised some time ago, is an international community interest in and of itself.³⁹

To conclude this analysis, indeed, the theorisation of horizontal political voice as an international community interest resonates best with a humanity-based approach to international law, according to which it is individuals who constitute the members of the international community and its primary beneficiaries. It is also, however, compatible with more conservative approaches which still view the international community as comprised of state members, and thus international community interests as belonging to democratic states *qua* states. Arguments in support of qualifying political voice as an international community interest thus do not necessarily undermine the Westphalian structure of the international legal regime, and may be accommodated within it, at least as regards democracies.⁴⁰

(2) The protection of political voice as requiring the collective action of states

Whilst this prong of the definition of ‘community interests’ has been classified by some as an ‘additional, albeit nonnecessary’ one,⁴¹ others have emphasised that it is precisely in this dimension that ‘resides the presumption of community, in the conviction that certain necessary things cannot be done, or done well, unilaterally’.⁴² The second criterion required for conceptually qualifying political voice as an international community interest is, therefore, whether its protection or promotion demands the collective action of states, and thus international legal regulation. It is submitted here that whilst the availability and robustness of open, deliberative public discursive arenas are typically thought to be purely a domestic social capital, there are now two main reasons for which their contemporary safeguarding largely

³⁹ PC Jessup, *A Modern Law of Nations: An Introduction* (Macmillan 1956) 2: ‘[...] there must be basic recognition of the interest which the whole international society has in the observance of its law’.

⁴⁰ And, in any case, as Besson aptly argues, community interests are ‘pluralistic and indeterminate’ and ‘may therefore conflict across international law regimes or within each of them, and their identification is likely [...] to trigger reasonable disagreement’: Besson, ‘Community Interests in International Law’, 37. Thus, even where political voice is not regarded as a community interest in the eyes of some states, this view does not necessarily derogate from its status as such.

⁴¹ *ibid* 39.

⁴² Abi-Saab, ‘Whither the International Community?’, 252.

depends on, and requires, a common international enterprise. The first has to do with the precise features of the community interest in question, namely, the availability of, and access to, reliable information and open, public discursive landscapes, not only *within* political borders but also *across* and *beyond* them. The second, has to do with the particular characteristics of the private companies which currently control the architecture of these discursive landscapes, and would need to be regulated in order to secure horizontal political voice in these three arenas. Specifically, these companies' monetising structure, monopolistic status, and political clout, pose challenges to the effectiveness of unilateral state action aimed at their regulation.

Beginning with the second reason, the analyses in Chapter IV have laid-bare the unique monetising structure of private ICT companies, as one which depends on the personalisation of information and communications.⁴³ As explained in detail therein, it is exactly this commercial model—and the algorithms which operationalise it—that create the 'echo chambers' and 'filter bubbles' which impede the free flow of reliable information between heterogenous groups, fragment communicative spheres, stifle random encounters, and ultimately thwart the educative and epistemic functions of horizontal political voice, and hence its potential to ensure effective vertical communications with public decision-makers. Thus, in order to guarantee the availability and robustness of horizontal political voice, and ensure its educative and epistemic functions, any regulatory intervention in these companies' commercial operations would arguably need to either target the very core of their financial model and the algorithms on which it relies, or, alternatively, prevent these companies' operations entirely.⁴⁴ This, however, might prove a daunting task in light of these companies' monopolistic status on the global stage and their significant political clout. That is, any unilateral attempt by single states to apply the necessary pressure on these companies to significantly alter their monetising structure and their IP-protected algorithms, is likely to encounter stark resistance on their part and prove ineffective.⁴⁵ The inability to regulate private information and communication providers unilaterally, calls, therefore, for their international regulation through a collective enterprise.

A prominent example which illustrates this need for international regulation in order to cope with powerful transnational private corporate actors, can be drawn from previous

⁴³ See discussion on ICT companies' 'operational logic' in Chapter IV.

⁴⁴ See eg, the notion in J Horwitz and D Seetharaman, 'Facebook Executives Shut Down Efforts to Make the Site Less Divisive' (Wall Street Journal, May 26, 2020) <<https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499>>.

⁴⁵ As Charney long recognised: '[...] one country usually cannot unilaterally regulate TNC [transnational corporation] power and behavior': JI Charney, 'Transnational Corporations and Developing Public International Law' (1983) 32 Duke Law Journal 748, 749.

unilateral attempts to regulate the tobacco industry prior to the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC). In the final quarter of the twentieth century, the tobacco industry became a ‘fully globalised, transnational enterprise’, with four transnational corporations ‘[controlling] 75 per cent of the world’s cigarette market’.⁴⁶ The widespread use of tobacco, and increasing awareness to its implications for public health, have prompted several tobacco control initiatives in the US and elsewhere during the 1990s.⁴⁷ Attempts to legally curb tobacco sales were met by elaborate lobbying efforts targeted at influencing state policymaking through intense information gathering;⁴⁸ direct political financing of campaigns and political caucuses; the establishment of alliances with smokers’ rights groups and associations in the hospitality industry; and the funding of projects designed specifically to thwart legislative efforts.⁴⁹ By the turn of the century, these extensive efforts proved successful in pre-empting strict local legislation of clean-air acts and laws restricting the access of youth to tobacco, in a considerable number of American states, as well as sustaining low taxation rates on tobacco.⁵⁰ The success of the tobacco industry in resisting regulatory control was due, in large part, to their extensive resources, and their power to form effective coalitions and convince domestic legislators to refrain from developing and adopting anti-tobacco policies.⁵¹

What eventually overpowered the tobacco industry’s success at impeding domestic legislation, was concerted *international* cooperation through a multitude of International Organizations. In the mid-1990s, realising that ‘[...] singular, country-level tobacco control

⁴⁶ K Deland, G Lien, and H Wipfli, ‘The WHO Framework Convention on Tobacco Control and the Tobacco Free Initiative’ in AD Mitchell and T Voon (eds.), *The Global Tobacco Epidemic and the Law* (Edward Elgar 2014) 13.

⁴⁷ See eg, J White and LA Bero, ‘Public Health Under Attack: The American Stop Smoking Intervention Study (ASSIST) and the Tobacco Industry’ (2004) 94 *American Journal of Public Health* 240; For tobacco control initiatives in other countries see footnotes 11–24 in HM Mamudu, R Hammond, and SA Glantz, ‘Project Cerberus: Tobacco Industry Strategy to Create an Alternative to the Framework Convention on Tobacco Control’ (2008) 98 *American Journal of Public Health* 1630.

⁴⁸ As part of this strategy, the industry used Freedom of Information (FOI) requests to overwhelm government agencies; obtain access to scientific data in order to challenge it; to assault scientists involved in scientific reporting on the harms of tobacco; and to ‘anticipate regulatory developments in order to resist them’: G Dimopoulos, A Mitchell, and T Voon, ‘The Tobacco Industry’s Strategic Use of Freedom of Information Laws: A Comparative Analysis’ (2016) *Oxford University Comparative Law Forum* 2, available at: ouclf.law.ox.ac.uk.

⁴⁹ MS Givel and SA Glantz, ‘Tobacco Lobby Political Influence on US State Legislators in the 1990S’ (2001) 10 *Tobacco Control* 124.

⁵⁰ *ibid*; See also AO Goldstein and NS Bearman, ‘State Tobacco Lobbyists and Organizations in the United States: Crossed Lines’ (1996) 86 *American Journal of Public Health* 1137, 1137: ‘[...] the tobacco industry remains exceptionally competent in defeating most states tobacco control legislation. Legislators from tobacco producing states block most federal tobacco legislations’.

⁵¹ Golstein and Bearman, ‘State Tobacco Lobbyists’.

efforts would not be enough to counter an unregulated global tobacco industry’,⁵² the WHO began developing what later became the FCTC.⁵³ The global attempt to regulate tobacco encountered no less resistance on the part of tobacco corporations who now directed their efforts to emphasising the negative economic implications of the FCTC, particularly for developing countries.⁵⁴ And yet, this strategy, as did others, largely failed in the face of concerted international action.⁵⁵

Recognising the massive efforts of the tobacco industry to undermine the treaty process,⁵⁶ and in anticipation of their economic arguments, the WHO leadership elicited the cooperation of the World Bank. In a report issued in 1999 on the economics of tobacco control, the World Bank firmly established that ‘tobacco control can bring unprecedented health benefits without harming economies’.⁵⁷ This report ‘provided perhaps the single most important tool used in preparing for the negotiations on the [FCTC]’.⁵⁸ The negotiation process was further supported by various global partnerships between inter-governmental, civil society, and private organisations.⁵⁹ The global cooperative framework enabled the vast sharing of information and scientific evidence regarding the adverse impacts of tobacco use, its economic and environmental implications, and facilitated the communication of these findings to relevant policymakers world-wide. The FCTC was ultimately hailed a success in reigning in powerful tobacco companies, and bringing the tobacco industry under the regulatory control of the international community.

⁵² Deland, Lien, and Wipfli, ‘The WHO Framework Convention on Tobacco Control’, 14.

⁵³ The development of the FCTC under the WHO’s auspices was possible due to its Constitution according to which the organization can develop binding treaties on health-related issues (ibid 11). The FCTC was adopted in 2003: WHO Framework Convention on Tobacco Control (opened for signature 16 June 2003, entered into force 27 February 2005) 2302 UNTS 166.

⁵⁴ These were coupled, of course, by efforts to ‘[...] divert attention from the public health issues raised by tobacco consumption, attempting to reduce budgets for WHO’s scientific and policy activities, pitting other UN agencies against WHO, distorting scientific studies, and trying to convince developing countries that tobacco control is a “First World” agenda’: S Glantz, HM Mamudu, and R Hammond, ‘Tobacco Industry Attempts to Counter the World Bank Report Curbing the Epidemic and Obstruct the WHO Framework Convention on Tobacco Control’ (2008) 67 *Social Science and Medicine* 1690, 1691.

⁵⁵ Another strategy was the promotion of a voluntary regulatory regime instead of the FCTC. See Mamudu, Hammond, and Glantz, ‘Project Cerberus’.

⁵⁶ The FCTC itself eventually sought to protect its own regime from industry interference by spelling out the parties’ obligations to protect their nationally-developed policies from the interests of the tobacco industry. See the FCTC, art 5(3) and discussion in Deland, Lien, and Wipfli, ‘The WHO Framework Convention on Tobacco Control’, 22–23.

⁵⁷ Glantz, Mamudu, and Hammond, ‘Tobacco Industry Attempts’, 1691.

⁵⁸ Deland, Lien, and Wipfli, ‘The WHO Framework Convention on Tobacco Control’, 17.

⁵⁹ For a discussion on the influence of the Framework Convention Alliance on the treaty negotiation process see HM Mamudu and SA Glantz, ‘Civil Society and the Negotiation of the Framework Convention on Tobacco Control’ (2009) 4 *Global Public Health* 150.

Private ICT companies pose similar challenges to those posed by tobacco companies. Their monopolistic status and political clout cast doubts on the potential of unilateral efforts by single states to impose regulatory measures that would require fundamental changes to their commercial model and monetising structure.⁶⁰ Collective international action on the other hand, might just exert the necessary pressure on ICT companies to force change in this context. This is especially the case given that collective international action is most likely to threaten the most prized asset of ICT companies—(almost) global access to users. In other words, contrary to commodity manufacturing corporations, whose profit margin depends on their ability to lower production costs by reallocating productions to post-colonial settings, ICT companies' monetising structure depends on wide-spread, unfettered access to as many users as possible. Thus, collective international action which would condition such access on deep-seated alterations to the way in which ICT companies organise national and transnational communicative spaces, seems the most viable way forward, and one that would also impede these companies' attempts to artificially move users from one jurisdiction to another in order to avoid regulatory scrutiny.⁶¹

A plausible argument may also however be made against such conclusion. Namely, that given that most monopolistic ICT companies are incorporated and home-based in the US, aggressive action by the US alone would suffice to considerably mitigate the global political voice deficits caused by these companies.⁶² Therefore, the argument would go, the qualification of horizontal transnational political voice as a community interest in international law, is questionable insofar as this qualification relies on this interest being 'an interest whose protection requires the collective action of states'.

Such argument notwithstanding, the safeguarding of horizontal political voice requires the collective international action of states for more substantive reasons too, that have to do with the global features of information and communications *themselves*. The second prong of the analysis which qualifies international community interests as such, would therefore be satisfied even where arguments about the power of the US to regulate ICT companies currently dominating the information and communications market, were to be fully accepted. Namely,

⁶⁰ E Benvenisti, 'EJIL Forward: Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?' (2018) 29 EJIL 9, 75.

⁶¹ Previous attempts by Facebook, for example, included moving users from its HQ in Ireland to its offices in California in order to evade the reach of European privacy law. See A Hern, 'Facebook moves 1.5b Users Out of the Reach of New European Privacy Law' (*Guardian*, 19 April 2018) <<https://www.theguardian.com/technology/2018/apr/19/facebook-moves-15bn-users-out-of-reach-of-new-european-privacy-law>>.

⁶² See eg, the most recent series of antitrust cases filed by the US Department of Justice against Google: <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>.

international cooperation is still required if the flow of reliable information, and open, public discursive arenas, are to be guaranteed *across* and *beyond* borders, for the following reasons.

Given that information is a globally-created resource—to the extent that it is almost impossible today to distinguish between information that is ‘created’ in one jurisdiction from that created in another—unilateral responses to the global ‘political voice deficit matrix’ by individual states is likely to result in a fragmented architecture that may actually thwart the development of *shared* standards for guaranteeing cross-border flow of reliable information and public discursive landscapes. The ideal of transnational, open, deliberative, public discursive arenas, thus hinges on the existence of a *common communicative infrastructure*—an ordered logic of communicative space—which creates and sustains these arenas. As discussed at length in the preceding chapter, ICT companies already own and control such infrastructure, but currently regulate it to the detriment of this ideal. Any regulatory intervention that would aim to facilitate and guarantee it, would thus have to consist of coherent and harmonised global principles which would apply to this infrastructure *as a whole*. Insights from the field of international environmental law are useful in highlighting this notion:

The need for international environmental law is rooted in the fact that man-made boundaries create units artificially dividing what is truly one environment [...]. Since the units are governed by separate political and legal systems, international law must bridge the discrepancy between ecological unity and administrative separation.⁶³

By the same logic, if the availability of, and access to, reliable information and transnational, public discursive arenas require a coherent, transnational communicative environment, arguably it should be administered by common principles rather than by separate regimes and standards. The task of regulating the communicative infrastructure now controlled by ICT companies for the benefit of transnational horizontal political voice, requires, therefore, the regulatory approach underpinning the ‘law of cooperation’. Namely, that which is ‘based on the awareness among legal subjects of the existence of a common interest or common value which cannot be protected or promoted unilaterally, but only by a common effort’.⁶⁴ Such common effort would give rise to positive legal obligations, the specific nature of which is discussed in the following section.

⁶³ Brunnée, ‘Echoes from an Empty Shell’, 794–95.

⁶⁴ Abi-Saab, ‘Whither the International Community?’, 251.

2. Community interest norms—drawing on climate change to discuss international legal obligations in the context of political voice

The principle of community interests or common concern thus constitutes the normative foundation on the basis of which ‘community interest norms’—or otherwise positive legal obligations—could be articulated for the protection of political voice within, across, and beyond borders. What remains to be explored, therefore, are the types of international legal obligations that the recognition of political voice as a community interest might give rise to. Rather than exploring this question in the abstract, this section turns to international environmental law, and in particular, to the field of climate change, for relevant insights.

The comparison to climate change is cogent given the similarities between climate change as a distinct field, and the current challenges that this chapter seeks to address. First and foremost, as discussed in the preceding section, the sets of problems posed by climate change and by the global ‘political voice deficit matrix’, both involve international community interests or common concerns. The addressing of these problems would require international law to ‘bridge the discrepancy between ecological unity [of the environment or the global communicative infrastructure respectively] and administrative separation’. To some extent, this comparison is already evident in the literature concerned with the influence of ICT companies on information and communicative spheres, in the prevailing use of idioms such as the ‘information ecology’, ‘information climate’, or ‘pollution of information’.⁶⁵ In other words, like many of the most pressing concerns in international environmental law, the global ‘political voice deficit matrix’ is a problem which defies borders, and yet is currently primarily (under)addressed nationally.⁶⁶

In addition, the challenges raised in the context of the global ‘political voice deficit matrix’ and in the field of climate change, are both caused primarily by the conduct of *private* actors. ‘Emissions of carbon dioxide and other “greenhouse gases” result from generating and consuming electricity, driving cars, manufacturing products, growing food, and cutting trees—activities that qualify as private rather than governmental’.⁶⁷ Likewise, the current challenges posed to horizontal political voice and transnational discursive spheres, are primarily the product of the private regulatory control by ICT companies of global informational and communicative infrastructures. The challenge for international law in both cases is therefore

⁶⁵ See eg, Benvenisti, ‘EJIL Forward’.

⁶⁶ This is especially the case in the context of political voice given that democratic public discourse is normally regarded, almost by definition, as a national concern.

⁶⁷ D Bodansky, J Brunée, E Hey, ‘International Environmental Law Mapping the Field’ in D Bodansky, J Brunée, E Hey (eds.), *The Oxford Handbook of International Environmental Law* (OUP 2008) 1, 6.

the same: to ‘develop effective ways of regulating these private activities [...] by requiring states to regulate or otherwise influence the behaviour of the relevant non-state actors within their borders’.⁶⁸ This is despite the fact that a considerable difference exists between the characteristics of private actors operating in these two fields. Whereas in the area of climate change there are countless private polluters who contribute to climate-related harm, there is only a limited number of private ICT companies whom exert their regulatory control over global communicative infrastructures.

Another feature in common, is that the problems in question—both in the field of climate change and in the context of political voice—are not only of a political nature, but they also have a *technological* basis.⁶⁹ Similar to how climate change involves technologically-driven outcomes which need to be understood with the aid of science,⁷⁰ the contemporary challenges to political voice are the result of technologically-driven algorithmic design and control of informational and communicative architectures. Consequently, both sets of challenges are also highly dynamic, partly as a result of the fact that technology develops faster than the law which aims to regulate it. Thus, the governance of these challenges arguably requires legal flexibility and a reliance on legal principles rather than detailed legal rules.

Recognising political voice as an international community interest therefore establishes it, much like climate change, as a transnationally *shared* problem. Generally speaking, community interests or common concerns give rise to general duties, i.e., ‘duties owed by everyone in that community’⁷¹ to ‘act cooperatively to address the concern’,⁷² both collectively—via international cooperation, and individually—via domestic measures. Thus, even though the qualification of political voice as a community interest or common concern does not imply, at present, specific rules for the conduct of states, or currently does not translate into a set of concrete legal norms, we can nevertheless contemplate its ‘operational contours’,⁷³ i.e., the *types* of international legal obligations it may, or normatively should, give rise to.

The next section thus turns to the international climate change regime to study the core customary rules which establish and frame states’ legal obligations in the context of climate change mitigation. Given the generality of customary international law, it is frequently

⁶⁸ *ibid.*

⁶⁹ *ibid.* 7.

⁷⁰ *ibid.*

⁷¹ Besson, ‘Community Interests in International Law’, 40.

⁷² Voigt, ‘Delineating *the* Common Interest in International Law’, 20.

⁷³ T Cottier and others, ‘The Principle of Common Concern and Climate Change’ (2014) 52 *Archiv des Völkerrechts* 293, 296.

regarded as ‘the primary source for the promotion and protection of community interests’.⁷⁴ On the basis of this review, the following section will contemplate to what extent this legal framework and its principles can be drawn on by analogy, and serve as a blueprint for addressing also the global ‘political voice deficit matrix’ and its associated risks.

A. *The international climate change regime*

Although much of the international law on climate change is treaty-based, the international climate change regime broadly conceived, also includes customary rules and principles of general international law, as well as other norms and regulations of a softer nature.⁷⁵ Despite the diversity of international legal instruments developed to address the issue of climate change, they are all commonly predicated, to some extent, on the notion of climate change as a community interest or common concern in international law. The conceptualisation of climate change as a common concern, hence very much informs the design and structure of this regime, thereby performing an ‘architectural function’.⁷⁶

The core customary principle in which international environmental law is generally thought to be rooted is the ‘no-harm’ rule,⁷⁷ later developed both in ICJ jurisprudence and in various codification efforts, as entailing states’ obligation ‘to take appropriate measures to prevent harm to the environment of other states or to the global commons’ which emanates from their jurisdiction (i.e., the prevention principle).⁷⁸ The shift from the earlier no-harm rule to the prevention principle, thus signified a paradigm shift in international environmental law, one ‘reflective of a new societal perspective on environmental matters’.⁷⁹ Rather than a purely inter-state, state-sovereignty oriented matter, conserving the environment came to be regarded as a community interest in international law, or the lack of, a common international concern.⁸⁰

⁷⁴ S Besson, ‘Community Interests in the Identification of International Law’ in E Benvenisti and G Nolte (eds.), *Community Interests Across International Law* (OUP 2018) 64.

⁷⁵ D Bodansky, J Brunnée, and L Rajamani, *International Climate Change Law* (OUP 2017).

⁷⁶ Duvic-Paoli employs this concept to describe the principle of prevention. See L-A Duvic-Paoli, *The Prevention Principle in International Environmental Law* (CUP 2018) 304. But this concept too, as she herself aptly argues elsewhere in the book, is also closely related to the idea of international community interests.

⁷⁷ The origins of the ‘no-harm’ rule, are found in the *Trail Smelter (United States v Canada)* (1941) 3 RIAA 1905, and later enshrined in the Declaration of the United Nations on the Human Environment (Stockholm Declaration), 16 June 1972. UN Doc. A/CONF.48/14/Rev.1, and re-stated in Principle 2 of the Rio Declaration on Environment and Development, Annex I to the Report of the United Nations Conference on Environment and Development, UN Doc A/CONF.151/26(Vol. I).

⁷⁸ Bodansky, Brunnée, and Rajamani, *International Climate Change Law*, 41; See *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion, ICJ Reports 1996, p. 226, para 29; *Gabčíkovo-Nagymaros Project; Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, para 101.

⁷⁹ Duvic-Paoli, *The Prevention Principle*, 28.

⁸⁰ Bodanski, Brunnée, and Rajamani, *International Climate Change Law*, 53.

The prevention principle is by now widely thought to enjoy a customary status despite being very weakly rooted in consistent state practice, arguably precisely *because* of its intimate connection to the notion of community interests or common concerns. Namely, the ‘reality in which prevention operates’ is better explained, according to Duvic-Paoli, by ‘[t]heories that consider that custom [...] on occasion, be the result of the recognition that certain norms should exist as a matter of moral imperative’. Thus, certain norms become widely recognised as custom ‘because they represent common international values’.⁸¹ Common international values may therefore ‘represent regularities in discourse rather than regularities in state behaviour’.⁸² In this sense, the prevention principle and its representation of the common interest of the international community, functions to ‘set the terms of international discussions and serve[s] as [a] framework for negotiations’.⁸³

Be its legal status as it may,⁸⁴ operationally, in the context of climate change, the prevention principle is normally associated with an obligation to ‘prevent or minimize climate change damage’,⁸⁵ and ‘extends to relations between all [s]tates, however distant’.⁸⁶ The principle therefore ‘dictates a proactive approach to risk’.⁸⁷ It limits states’ freedom by imposing certain restrictions on lawful conduct, the contours of which have been further specified, *inter alia*, in the ILC’s Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (Draft Articles).⁸⁸ According to the Draft Articles and commentary thereon, the prevention principle requires states to continuously take all ‘appropriate measures’,⁸⁹ or ‘exert best possible efforts’, to identify and prevent (or in any event minimise) transboundary environmental harm which emanates from a state’s territory or area under its

⁸¹ Duvic-Paoli, *The Prevention Principle*, 95.

⁸² D Bodansky, ‘Customary (And Not so Customary) International Environmental Law’ (1995) 3 *Indiana Journal of Global Legal Studies* 105, 116.

⁸³ *ibid* 119.

⁸⁴ There is disagreement in scholarship on the question of whether the principle has acquired a customary law status. See PW Birnie, AE Boyle, and C Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 149.

⁸⁵ RKA Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Brill 2005) 137.

⁸⁶ C Voigt, ‘State Responsibility for Climate Change Damages’ (2008) 77 *Nordic Journal of International Law* 1, 8; Mayer makes the case that although the applicability of the prevention principle to the area of climate change is controversial among states and scholars, it indeed does apply in this context, and its main function is ‘to guide international negotiations by providing a sense of fairness based on well accepted principles’: B Mayer, ‘The Applicability of the Principle of Prevention to Climate Change: A Response to Zahar’ (2015) 5 *Climate Law* 1, 5.

⁸⁷ Duvic-Paoli, *The Prevention Principle*, 199.

⁸⁸ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, ILC Yearbook 2001/II(2). Whilst these do not represent formal rules, they indicate the scope of the obligation.

⁸⁹ *ibid*, art 3.

jurisdiction and control.⁹⁰ States' obligation to prevent harm exists also with regards to the actions of private actors which operate within a state's jurisdiction.

The obligation is therefore one of due diligence, measured by the standard of care expected 'of a good [g]overnment'.⁹¹ This standard of care is translated into unilateral substantive measures, namely, the formulation and implementation of national legislative, administrative, or other policies that would curb greenhouse gas emissions; and into cooperative procedural obligations which include, most notably, the undertaking of environmental impact assessments, and a general duty of notification, exchange of information, and consultation between states.⁹²

The relevant standard of care for states in the context of the prevention principle is further qualified as comprising of three elements. First, a state would fail to act in due diligence if 'it does not act where it otherwise could have'.⁹³ In the context of climate change, almost every state can be characterised as having 'the opportunity to act' to mitigate the cumulative effect of greenhouse gas emissions, and thus mitigate the associated damage to the climate.⁹⁴ Second, there has to be an element of foreseeability in that a link must exist between a state's conduct (or lack thereof), and its consequences for the environment. With respect to climate change, the 'reference point for foreseeability' is existing and developing objective scientific knowledge regarding the harmful effects of greenhouse gas emissions.⁹⁵ Third, the 'appropriate measures' to be adopted by states are required to be proportionate in balancing the interests and circumstances of the regulating state against the risks involved. This involves consideration of both the means at the disposal of the regulating state, and the degree of impact on the climate of the action reviewed.⁹⁶

Importantly, the prevention principle qualifies as an obligation *erga omnes* in that states obligation to prevent harm to the environment is not owed to any one state bilaterally, but rather to the international community as a whole. Put differently by Duvic-Paoli, 'the obligation to protect the environment operates outside the traditional Westphalian structure based on reciprocity'.⁹⁷ The qualification of prevention as an obligation *erga omnes* can be seen as an

⁹⁰ *ibid*, commentary 7 to arts 3 and art 5.

⁹¹ *ibid*, commentary 17 to art 3.

⁹² Draft Articles on Prevention of Transboundary Harm, art 4. This obligation is further operationalized in arts 6–10; Duvic-Paoli, *The Prevention Principle*, 218–24; See also the ILA *Legal Principles Related to Climate Change*, Draft article 7A, and C Schwarte and W Frank, 'The International Law Association's Legal Principles on Climate Change and Climate Liability Under Public International Law' (2014) 4 *Climate Law* 201.

⁹³ Voigt, 'State Responsibility for Climate Change Damages', 10.

⁹⁴ *ibid*; See also Verheyen, *Climate Change Damage and International Law*, 177.

⁹⁵ Verheyen, *Climate Change Damage and International Law*, 181; Voigt, 'State Responsibility for Climate Change Damages', 12.

⁹⁶ Verheyen, *Climate Change Damage and International Law*, 183–85.

⁹⁷ Duvic-Paoli, *The Prevention Principle*, 321.

expression of how the original bilateral no-harm concept rooted in a ‘state-sovereignty-oriented perspective’,⁹⁸ has evolved to resolve matters of common concern. This is reflected as well in the two-pronged, dual structure of the due diligence obligation. This obligation keeps, on the one hand, with the Westphalian architecture of the international community, and its emphasis on state sovereignty and national discretion; but also prescribes the need cooperate internationally in order to attain environmental goals for the benefit of the international community as whole.

B. A potential legal regime for addressing the global ‘political voice deficit matrix’: operationalizing the prevention principle in the context of political voice

As discussed at the outset of this section, the challenges posed by climate change and by the global ‘political voice deficit matrix’ share many features in common. It is precisely on account of these common features that this chapter has turned to the international climate regime’s legal architecture, in order think about the prospect and potential of parallel international legal obligations in the context of addressing the global ‘political voice deficit matrix’. Specifically, this chapter has thus far examined the ‘architectural function’ that the identification of climate change as a common concern performs in structuring the customary international legal obligations of states with regards to climate change mitigation. Assuming that transnational political voice too, can be theorised as a widely shared international common concern or community interest, what requires examination is whether the legal principles underpinning the climate change regime could apply in the context of safeguarding political voice within, across, and beyond borders.

The question of whether the prevention principle is a general principle of international law, and applies in contexts other than that of environmental protection, is unsettled.⁹⁹ It is also, however, immaterial to the present discussion. If we proceed from the basic assumption that duties of prevention operate beyond territorial limits to ‘regulate transnational threats’, and ‘represent the aspirations of international law to protect common universal values’,¹⁰⁰ it may serve as a theoretical basis or blueprint guiding states’ actions also in the context of political voice, and thus may contribute to the construction of a legal framework in this sphere.¹⁰¹ In this sense, there is no necessary need to determine the *formal* applicability of the prevention

⁹⁸ T Cottier and S Matteotti-Berkutova, ‘International Environmental Law and the Evolving Concept of “Common Concern of Mankind”’ in T Cottier, O Nartova, and SZ Bigdeli (eds.), *International Trade Regulation and the Mitigation of Climate Change* (CUP 2010) 21, 21.

⁹⁹ Duvic-Paoli, *The Prevention Principle*, 359–60.

¹⁰⁰ *ibid* 360.

¹⁰¹ *ibid* 302–303.

principle in the context of non-environmental obligations. Rather, suffice to draw on how prevention *operates* in the context of climate change, in order to conceptually think about how its content and scope would apply in the context of protecting political voice, within, across, and beyond borders.

(1) Prevention as an obligation to exercise a due diligence standard of care

Duties of prevention are commensurate with states' due diligence obligations to put forth their best efforts to prevent—or at least minimise—the harm in question. In the context of political voice as thus far discussed, the 'harm' in question would be the one caused to horizontal political voice and national and transnational discursive spheres, from private ICT companies' unencumbered control of global informational and communicative infrastructures. This private regulatory control seriously compromises access to reliable information, and the availability and robustness of open, deliberative, national and transnational public discourse. It thwarts, in turn, the realisation of the four democratic objectives ascribed to political voice: its educative and epistemic functions, and thus its potential to facilitate the realisation of individual freedom and social justice. ICT companies' operations therefore obstruct the realisation of basic common democratic ideals pertaining to all individuals and democracies as such. In this context, and given the 'inbuilt normative (evaluative) component'¹⁰² of the concept of due diligence, its applicability in specific circumstances and with regards to specific harms, requires examination of 'whose expectations count'.¹⁰³ In relation to political voice, it would thus seem that both the expectations of individuals, as those of democratic states, would matter in the course of evaluating the appropriate standard of behaviour that would be owed generally by states.

And yet, the centrality of individuals as beneficiaries of political voice notwithstanding, the obligation of due diligence is ultimately an inter-state one. Thus, the main difficulty associated with the proposition of a positive customary legal obligation to prevent harm to political voice, arises from the fact that unlike the issue of climate change, the notion of political voice derives its normative force from theories of democracy. Therefore, as already mentioned earlier in this chapter, the idea of its protection in the form of a customary obligation that would apply generally to *all* states, may provoke the opposition of non-democratic states

¹⁰² Anne Peters, Heike Krieger, and Leonhard Kreuzer, 'Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates' in Anne Peters, Heike Krieger, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 2.

¹⁰³ *ibid.*

who do not prescribe to this form of government, and thus would not see themselves as bound by a general positive legal obligation to protect it.

Three possible responses may temper this prospective objection. The first, is that the doctrine of customary international law itself does not require a recognition of a custom's obligatory character by all states for it to be generally binding, but rather a 'general recognition by at least most states'.¹⁰⁴ Whether a community interest norm protecting political voice would actually be qualified as a positive customary legal obligation of due diligence, will then depend on how widely it will be endorsed, and on whether the relevant practice and *opinion juris* of states who operate to prevent such harm, are 'sufficiently general'.¹⁰⁵ At the time of writing, this question is, of course, purely normative and conceptual. Indeed, the proposition advanced is not that such a customary obligation *already* exists in the context of political voice, but rather that it could and should exist on the basis of both the basic tenets of customary international legal doctrine, and the normative theorization offered herein of political voice as an international community interest, whether of individuals or of democratic states as members of this community. Anne Peters, Heike Krieger, and Leonhard Kreuzer aptly refer in this context, to the flexibility of the concept of due diligence, and to its importance as a tool through which to further normative ambitions in international relations.¹⁰⁶ In their words, due diligence is 'an important normative tool to address and grapple with the growing transboundary effects and repercussions of governmental and private activities in an increasingly interconnected, contested, and complex international order.'¹⁰⁷

Second and more principally, the customary principle of prevention itself (which does arguably exist today as a matter of positive international law) is predicated on more general principles of international law such as the mutual respect for state sovereignty and for the equal rights and self-determination of peoples, and co-operation among states.¹⁰⁸ The general obligation of due diligence in this sense, requires, most fundamentally, that states take due regard of the interests of other states and not harm them—*be these interests as they may*. It

¹⁰⁴ BD Lepard, *Customary International Law: A New Theory with Practical Applications* (CUP 2010) 7.

¹⁰⁵ Besson, 'Community Interests in the Identification of International Law', 67. As articulated by Gaja, '[s]tates preserve a decisive role in determining whether a rule of international law has come into existence and whether certain interests will be protected and in what way'. Gaja, 'The Protection of General Interests in the International Community', 45.

¹⁰⁶ Peters, Krieger, and Kreuzer, 'Due Diligence in the International Legal Order'.

¹⁰⁷ *ibid* 3.

¹⁰⁸ Whilst it is often cautioned that the term 'general principles of international law' is 'vague and ambiguous, and is best avoided', there is little disagreement about the appropriate use of term to denote such principles as those detailed that are enshrined in the Charter of the United Nations: Michael Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019) 21 *International Community Law Review* 307, 319.

follows that if political voice is duly conceptualised as an interest belonging to democratic states (and/or their citizens), then non-democracies—as a matter of international law—do not have the prerogative to disregard this interest even whereby they themselves do not prescribe to democracy as a form of political organisation. Insofar then, as the harm that occurs to political voice occurs from within the jurisdiction of non-democratic states, they would be no less bound by the due diligence obligation to prevent such harm than democratic states would. To explicate further, we might analogise from international responses to the meddling by non-democratic states such as Russia in US democracy via ICT companies’ platforms in 2016. This Russian conduct was very much couched as a violation of international law, despite the fact that Russia itself does not constitute a democracy (at least in the Western liberal understanding of it).¹⁰⁹ Any potential Russian claim according to which its acts should be considered lawful given that Russia itself does not prescribe to Western democracy, and therefore is not required to prevent harm to the democracy of other member states, would arguably not convince even the most positivist of international lawyers.

Finally, it should be noted that states like China, which indeed truly do not prescribe to the Western notion of democracy and its ideals, do not permit ICT companies to operate within their jurisdiction to begin with. This is precisely because these companies’ operations considerably challenge the state’s control over discursive and communicative spheres, which is a key feature of non-democratic regimes. Therefore, when it comes to non-democratic states like China, the proposed legal framework imposing due diligence obligations would not, in any case, be of concern, since it would only apply in practice to states from whose jurisdiction ICT companies can be shown to operate. To take this point further, it may be suggested that insofar as a state enables ICT companies to operate from within its jurisdiction (as will be detailed below), it may well be seen as implicitly consenting to some form of democratization of communicative and discursive spheres. If so, such a state would then be barred from professing an outright objection—based on its so-called non-democratic character—to its responsibility to exercise due diligence to prevent the harm that is externalized on democracies from within its jurisdiction. This proposed framework solves the potential tension which may arise between

¹⁰⁹ See, eg, Press Release, The White House, Office of the Press Secretary, Statement by the President on Actions in Response to Russian Malicious Cyber Activity and Harassment (Dec 29, 2016) available at: <https://obamawhitehouse.archives.gov/the-press-office/2016/12/29/statement-president-actions-response-russian-malicious-cyber-activity>. Several grounds have been offered on the basis of which to conceptualise such activities as a violation of international law. These include violations of a state’s *domaine reserve*, a usurpation of a governmental function, or a violation of self-determination. For a detailed discussion see: JD Ohlin, ‘Did Russian Cyber Interference in the 2016 Election Violate International Law’ (2017) 95 Texas Law Review 1579.

the notion of a general due diligence obligation to protect the democratic ideal of political voice, and the non-democratic character of certain states to which this obligation would apply.

If so, the theorisation of political voice as an international community interest (or its absence a common concern) may imply a general obligation to prevent the ‘democratic harm’ done by ICT companies when occurring from a state’s jurisdiction, regardless of the degree to which said state sanctions democracy as a form of government. In other words, the adoption of an idle stance towards the detrimental operations of private ICT companies, would be seen as constituting an omission which has spill-over effects that infringe upon the protected interests and legitimate expectations of individuals and democracies alike: it hinders the potential of individuals to further their political interests and realise individual freedom and social justice, and impedes critical democratic functions.

From the perspective of democratic states in particular, this theorisation of political voice indeed creates an interesting alignment between two sources of obligation which lead to parallel responsibilities: their duties to protect their own citizens from ‘democratic’ harm, which arise out of the basic exchange of obligations between citizens and their government according to the idea of the social contract (and at least according to some, also from international human rights law¹¹⁰);¹¹¹ and their duties towards foreign others, arising out of their international obligations to prevent harm.¹¹² In fact, these two sources of obligation tightly overlap in the context of the global ‘political voice deficit matrix’, given the corresponding overlap between the democratic interests of local and foreign individuals and states, in maintaining and accessing open, deliberative, transnational discursive spheres. Whereas in other contexts, a state’s obligations to prevent harm to its own citizens might clash with their duties of prevention towards foreign others (given contradicting interests),¹¹³ in the case of protecting political voice, local and foreign interests of individuals and of democracies coincide and align.

¹¹⁰ Though relevant to the claims made in this chapter, a discussion on the relationship between human rights and democracy remains out of the scope of this study.

¹¹¹ Democracies, in this context, facilitate the provision of ‘inherently public goods’ by private bodies. According to Dorfman and Harel these are goods that ‘cannot be fully specified and realized apart from the state institutions providing these goods’: A Dorfman and A Harel, ‘The Case Against Privatization’ (2013) 41 *Philosophy & Public Affairs* 67, 90.

¹¹² There are also other logics which could be at play here for grounding states’ obligations towards foreign stakeholders. See eg, Benvenisti, ‘Sovereigns as Trustees’, or the notion of solidarity, in, for example, H Krunke, H Petersen, and I Manners, *Transnational Solidarity: Concept, Challenges and Opportunities* (CUP 2020).

¹¹³ Such a situation is discussed by Benvenitsi, and solved by suggesting the restricted Pareto Criterion. See Benvenitsi, ‘Sovereign as Trustees’.

The due diligence standard of care in this context, would generally require states to be proactive in preventing the associated harms to political voice, insofar as these harms can be thought of as emanating from their own [states'] jurisdiction. As in the area of climate change, prevention efforts would need to consist of both substantive actions to formulate and implement policies that would restrict ICT companies' operations; and procedural efforts to facilitate international cooperation in this sphere. Broken down into the three elements which determine the appropriate standard of care relevant to governments' due diligence duties, states would first be seen as failing to act in due diligence if they did not act where they otherwise could have. Like with respect to climate change, in the context of political voice too, every state could be viewed as having the *capacity* to act, either by formulating and implementing certain standards that would constrain ICT companies' operations within their own jurisdiction; and/or by cooperating internationally to formulate such standards so as to ensure transnational coherence, and to guarantee that the flow of reliable information, and open, deliberative public discourse, are available and protected transnationally. The second element of foreseeability also applies relatively easily in this regard. It is reasonably evident that states' failure to act to regulate these companies has direct consequences for the availability and robustness of political voice within and across borders. The analyses in Chapter IV lend unequivocal support to this conclusion.

The third element of due diligence, would consider whether the measures required from states to prevent the risks associated with the global 'political voice deficit matrix', are proportionate to the degree of harm caused by their inaction (or to the degree of positive impact these measures would have on securing political voice and open transnational discourse). This is arguably a difficult question in the context of political voice. First, as in the context of climate change, the behaviour of one state alone cannot guarantee all together the prevention of harm to the global informational and communicative landscape and environment.¹¹⁴ Second, democratic and non-democratic states are expected to have differing views regarding the appropriate balance of proportionality that should be struck between their own interests and the collective benefits accrued from their individual action.

Specifically, non-democracies are likely to view the measures required to regulate ICT companies as unproportionate to the degree of harm caused by their inaction. Democratic states, on the other hand, are likely to interpret the proportionality element differently. For

¹¹⁴ See the discussion above in Part 1 of this chapter. For this argument in the context of climate change, see Verheyen, *Climate Change Damage and International Law*, 184.

democracies, the degree of positive impact from imposing regulatory measures on ICT companies in terms of their democratic benefits, is likely to outweigh the economic burdens associated with this regulation, and to apply evenly between states.¹¹⁵ Therefore, the clear ‘disjuncture’ that often exists in the context of climate change ‘between individual and collective rationality’, exists to a much lesser degree in the context of a duty to prevent harm to political voice, from the perspective of democracies.¹¹⁶

In sum, if we accept the premise that duties of prevention exist outside of the context of international environmental law, and could apply more broadly to regulate transnational threats or uphold international community interests, then the prevention principle and its constitutive elements would delineate states’ obligation to address the global ‘political voice deficit matrix’. In practical terms, this due diligence requirement would mean that in order to fulfil their appropriate standard of care, states would be expected to take all measures necessary to formulate standards or impose appropriate restrictions on ICT companies within their own jurisdiction. They would also need to cooperate internationally in order to commonly develop these standards, and to implement them so as to safeguard the availability and robustness of open, deliberative communicative spaces and flow of reliable information.

¹¹⁵ The imposition of regulatory constraints on ICT companies might not obviously result, for most states, in the same economic burdens associated with actions to curb greenhouse gas emissions. Likewise, the economic benefits accrued from the uninhibited commercial operations of ICT companies are arguably more evenly distributed between states than in the context of climate change. See in this regard, a study of Facebook’s economic impact that has been commissioned by the company and shows a fair distribution of economic gains from Facebook’s activities between states (even though the US still stands apart as the major economic beneficiary of the company’s operations): Deloitte, ‘Facebook’s Global Economic Impact, A Report for Facebook’ (2015) available at: <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-global-economic-impact-of-facebook.pdf>. This report’s findings have been questioned, however, by some economists. See eg, R Albergotti, ‘Facebook Touts Its Economic Impact, But Economists Question Numbers’ (*Dow Jones Institutional News*, 2015).

¹¹⁶ D Snidal, ‘Coordination versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes’ (1985) 79 *American Political Science Review* 923, 931. This ‘disjuncture’ in the field of climate change gives states a clear incentive to default on the cooperative duties or to ‘cheat’. The issue of climate change therefore poses a classic ‘prisoner’s dilemma’, in which the ‘[p]ursuit of individual self-interest by states [...] results in their being worse off than if both abstain from pursuit of their narrow self-interest and cooperate [...]’. The dilemma persists even if cooperation is achieved, because both states will continue to have strong incentives to defect and the system is likely to return to the stable noncooperative and deficient equilibrium’: Snidal, ‘Coordination versus Prisoners’ Dilemma’, 926. It is precisely in order to solve this dilemma, that treaty regimes have introduced the principle of ‘common but differentiated’ responsibilities. See the Paris Agreement to the United Nations Framework Convention on Climate Change, Paris 12 December 2015, in force 4 November 2016, UN Doc. FCCC/CP/2015/10/Add.1. The global ‘political voice matrix’, by contrast, poses a coordination problem more than it poses a prisoner’s dilemma type collective action problem. For a discussion on the difference between coordination and collective action problems see: E Benvenisti, ‘The WHO—Destined to Fail?: Political Cooperation and the COVID-19 Pandemic’ (2020) Legal Studies Research Paper Series, Paper No. 24/2020, Faculty of Law, University of Cambridge.

(2) The jurisdictional element of the prevention principle applied in the context of ICT companies' multijurisdictional operations

As a customary obligation, the prevention principle applies, at least in theory, to *all* states. In practice, however, the question remains: which states are those in whose jurisdiction ICT companies operate, and from which the harm to political voice and transnational discursive spheres is caused? And, under what circumstances would these states' responsibility to prevent the harm in question be engaged? In other words, to whom would the obligation to prevent such harm apply in practice today? Whilst these may seem trivial or superfluous questions, they in fact testify to the complexity of the issue at hand: ICT companies operate on internet platforms. Their operations are thus by nature multijurisdictional, and may not necessarily neatly map on to Westphalian allocations of state jurisdiction, control, and responsibility in international law. Given that the prevention principle contains a jurisdictional element in that state's duties to prevent harm only arise once harm is caused from within its own jurisdiction, the application of the principle in the context of political voice requires examination to determine on whose territory, or within whose jurisdiction these companies operate, and whether a state's responsibility exists with regards to such operations.¹¹⁷

This question has obviously yet to be examined in the present context, but relevant insights and analogies can be usefully drawn from existing international legal discussions on 'internet jurisdiction', particularly in the context of cyberoperations. The starting point of these discussions was the more rudimentary question of the applicability of international law in general, and of specific international legal principles, to 'cyberspace'.¹¹⁸ This question arose because of the perceived misalignment between the 'territoriality focused paradigm' of international law and its allocation of jurisdiction and responsibilities, and the 'a-territorial' features of cyberspace.¹¹⁹

International dialogue on these principled questions took centre stage amongst the members of the UN Group of Governmental Experts (GGE), whom managed to agree, in their 2013 report, that, as described by one scholar, 'cyberspace is not an unregulated space, where states are free to behave as they please', but rather, that 'it is governed by the same international

¹¹⁷ This is a conceptual question, but also a practical one at present, as all major ICT companies in question are incorporated in the US. In terms of the specific companies existing today, we can thus ask whether we can think of them as 'operating' within the jurisdictions of states other than the US, in a way that would give rise to widespread international legal obligations of various states.

¹¹⁸ See, famously, DR Johnson and D Post, 'Law and Borders—The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367.

¹¹⁹ DJB Svantesson, *Solving the Internet Jurisdiction Puzzle* (OUP 2017) 4.

legal principles that govern the “physical” spaces’.¹²⁰ The 2013 report even went on to specify that ‘[s]tate sovereignty and international norms and principles that flow from sovereignty apply to [s]tate conduct of ICT-related activities, and to their jurisdiction over ICT infrastructure within their territory’.¹²¹

And yet, even such rudimentary understanding failed to crystallize in the years that followed, as the UN GGE process reached a dead-end following its last session in 2017.¹²² In particular, disagreement still persists as to the particular ways in which international legal principles apply in this arena, and the extent to which they apply.¹²³ For some, given that cyberspace is a novel domain of activity, the absence of state practice and *opinion juris* call into question the applicability of customary international legal rules to this domain.¹²⁴ Others, in contrast, vehemently reject this position, arguing that ‘in the absence of a limitation to a particular context’, ‘we should be sceptical about a supposition that the application of international law rules is “domain” specific’.¹²⁵ Furthermore, it is often argued (with particular relevance to our context), that seeing as ‘cyberspace’ consists of nothing more than ‘a set of information and communication technologies’ which are ‘made up of physical components or hardware’, cyberspace can hardly be conceptualised as a novel ‘domain’.¹²⁶ Rather, ‘cyber activities occur on territory and involve objects, or are conducted by persons or entities over which [s]tates may exercise their sovereign prerogatives’.¹²⁷

¹²⁰ A Henriksen, ‘The End of the Road for the UN GGE Process: The Future Regulation of Cyberspace’ (2019) 5 *Journal of Cybersecurity* 1, 2; This is still the position reflected in the writings of some scholars. See eg, D Akande, A Coco, and T de Souza Dias, ‘Old Habits Die Hard: Applying Existing International Law in Cyberspace and Beyond’ (*EJIL:Talk!*, January 5, 2021); N Tsagourias, ‘The Legal Status of Cyberspace’ in N Tsagourias and R Buchan (eds.), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015) 13, 13; and HH Koh, ‘International Law in Cyberspace’ (2012) 54 *Harvard International Law Journal* 1, clarifying the US position on this question.

¹²¹ UNGA ‘Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security’ (24 June 2013) UN Doc A/68/98, para [20].

¹²² With states such as China, Russia, and Cuba failing to accept the draft report. See E Benvenisti, ‘State Sovereignty and Cyberspace: What Role for International Law’ (*GlobalTrust* blog, August 30, 2017); and Henriksen, ‘The End of the Road’, 2–3.

¹²³ Henriksen, ‘The End of the Road’, 2; Akande, Coco, and de Souza Dias, ‘Old Habits Die Hard’.

¹²⁴ See eg, the position of Israel’s Deputy Attorney General brought in: Akande, Coco, and de Souza Dias, ‘Old Habits Die Hard’; see also Benvenisti, ‘State Sovereignty and Cyberspace’, comparing this stance to the ILC’s decision to exclude confined aquifers from the definition of an ‘international watercourse’.

¹²⁵ Akande, Coco, and de Souza Dias, ‘Old Habits Die Hard’.

¹²⁶ *ibid.*

¹²⁷ MN Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyberoperations* (CUP 2017) 12. The position expressed in the Tallinn Manuals and by other international legal scholars entirely coheres with the notion of jurisdiction in international law as the ‘legal instantiation of sovereignty’ (see Tsagourias, ‘The Legal Status of Cyberspace’, 18–19), and with the territorially-centred paradigm of jurisdiction according to which ‘a state has the exclusive right to regulate all that occurs in its territory for the simple reason that it occurs in its territory’: Svantesson, *Solving the Internet Jurisdiction Puzzle*, 4.

These latter arguments and reasonings regarding the ultimate ‘physicality’ of cyber-related activities make imminent sense in the present context. The fact that ICT companies operate on Internet platforms and in multiple jurisdictions does not dictate the conclusion that they operate in a ‘law-free zone’.¹²⁸ The internet, as submits Constantine Antonopoulos, ‘has a *physical* dimension because of the interconnection of different computer systems, their accessibility and the transmission of information to and from such systems by using the standard Internet Protocol (IP)’.¹²⁹ ICT companies thus may be perceived as operating from the territory or jurisdiction of any state which allows them access to users within their (states’) territory, by virtue of the fact that these users access ICT companies’ platforms and services *via* the physical ICT infrastructure located within these states’ jurisdiction.

If ICT companies can thus be seen as operating from within the jurisdiction of every state from which users engage on digital platforms, it thereby follows that any harm afflicted on political voice and on the availability of open, transnational, discursive spheres, would be understood as harm that occurs from within the territory or jurisdiction of each of these states. There seems to be no need, therefore, to contemplate whether the principle of due diligence ‘has crystallised for cyberspace’.¹³⁰ This principle and the international legal obligations it gives rise to, would apply in the context of these companies’ operations in the same manner that it applies in other contexts. Namely, any state which grants ICT companies such as Facebook access to users within its jurisdiction, may be seen as facilitating the harm that these companies’ operations cause to transnational discursive spheres and to the political voice of foreign individuals, from within their jurisdiction. Such states may therefore be seen as having correlative due diligence obligations to prevent this harm. This conclusion naturally follows from the organising logic of the prevention principle which aims to balance states’ territorial sovereignty with other states’ territorial integrity. The fact that the particular conduct in questions occurs on internet platforms should not make a difference regarding the ways in which the law operates to create and sustain this balance.¹³¹

¹²⁸ Koh, ‘International Law in Cyberspace’.

¹²⁹ C Antonopoulos, ‘State Responsibility in Cyberspace’ in N Tsagourias and R Buchan (eds.), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015) 55, 55 (emphasis added).

¹³⁰ Akande, Coco, and de Souza Dias, ‘Old Habits Die Hard’.

¹³¹ This follows the underlying logic of the ICJ in the *Corfu Channel Case*: ‘every [s]tate’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states’: *Corfu Channel Case (United Kingdom v. Albania)*, *Merits*, ICJ Reports 1949, p. 4, 22; It also coheres with existing approaches to the question of jurisdiction and allocation of rights and responsibilities for internet-based activities as those expressed, for example, in the French case *LICRA & UEJF v. Yahoo! Inc. and Yahoo France*. The Paris Court treated harm created on Internet platforms as ‘local’ given the site’s local accessibility; See *LICRA v. Yahoo! Inc. and Yahoo France* (Tribunal de Grande Instance de Paris, 22 May 2000), affirmed in *LICRA & UEJF v. Yahoo! Inc. & Yahoo France* (Tribunal de Grande Instance de Paris, 20 November 2000), brought and discussed

(3) Prevention as an obligation *erga omnes*

The final feature of the prevention principle which requires mentioning in the context of its ‘operational contours’, and its application to political voice, is this obligation’s *erga omnes* character. Obligations of an *erga omnes* character, as the ICJ famously noted in its *Barcelona Traction* dictum, are those which ‘all [s]tates can be held to have a legal interest in their protection’.¹³²

Such qualification therefore adds another dimension to the ‘architectural functions’ of the prevention principle, as a legal tool employed to further international community interests; a dimension relating to how states’ obligation to prevent harm to political voice may be enforced in practice, and by whom.¹³³ This question is at the focus of the following chapter. Suffice to mention at this point, that the qualification of the prevention principle as an obligation *erga omnes*, may prove to be particularly important in the context of harm to political voice. Harm in this context, like in that of climate change, can hardly be ‘bilateralised’. In other words, the *erga omnes* character of the obligation may empower states which have stronger democratic incentives and more resources, to mobilise the international legal system to protect political voice, and to safeguard the availability and openness of deliberative transnational discursive spheres.

3. Conclusion

This chapter has aimed to examine whether, and to what extent, international law is an adequate and normatively desirable legal framework through which to address the global ‘political voice deficit matrix’. The starting point of this analysis was the supposition that the global ‘political voice deficit matrix’ is a global cause for concern. This is both because of it being a global phenomenon in the empirical sense, but also, more importantly, because of the widespread, shared, and indiscriminate normative implications of this matrix for individuals, communities, and democratic states, across the globe.

Once identified as a global cause for concern, the chapter endeavoured to analyse what role international law could and should assume to address it. It has suggested, in this regard,

in U Kohl, ‘Jurisdiction in Cyberspace’ in N Tsagourias and R Buchan (eds.), *Research Handbook on International Law and Cyberspace* (Edward Elgar 2015) 30, 38; See also Antonopoulos, ‘State Responsibility in Cyberspace’. According to Antonopoulos: ‘the application of this area of international law [state responsibility] to cyberspace is not impossible, mainly as a result of establishing responsibility on the basis of the breach of the obligation of due diligence on the part of States’ (at 56).

¹³² *Barcelona Traction, Light and Power Company, Limited*, ICJ Reports 1970, p. 3, para 33.

¹³³ An important distinction should be made here between the *erga omnes* character of these norms and peremptory *jus cogens* norms: the fact that these norms are of an *erga omnes* character does not imply that they amount to *jus cogens* norms, the derogation of which is impermissible.

that political voice could and should be theorised as an international community interest, or its absence a common international concern. Whereas such theorisation pioneers a novel vision of the relationship between what is, essentially, a democratic principle, and international law, it nevertheless remains faithful to existing international legal theory and practice which have engaged with the notion of international ‘community interests’, and have sought to define and characterise them. The first part of this chapter has argued, in this context, that political voice could be understood either as an international community interest which belongs to *individuals* as members of the international community; but also—in keeping with more traditional understandings of the international legal regime—as an international community interest which belongs to democratic states as members of this community. This is because of the fundamental significance of political voice and its availability and robustness, for individuals’ and communities’ political and material well-being; because of its vitalness for the continued sustainability of democratic states as effective democracies; and also because of its contribution to a better functioning international legal order, and to the enduring legitimacy of this legal order in the eyes of those subject to its power and authority.

The theorisation of political voice as an international community interest has prompted an analysis of its doctrinal implications. It has established the normative groundwork on the basis of which to examine what international legal obligations this concept might give rise to if accepted as such. In order to think about this question, the chapter has turned to the field of climate change for relevant insights. The turn to climate change makes ample sense given the many similarities between the challenges arising in this field and those raised by the global ‘political voice deficit matrix’. Not only is climate change a paradigmatic example of an international community interest, but like the global ‘political voice deficit matrix’, it is also highly dynamic, also driven by the conduct of private actors, and also requires extra-legal expertise for its understanding and addressing.

The turn to the international law on climate change has yielded an analysis of the customary international legal obligation standing at its crux—that of the duty of prevention—and its potential applicability in the context of political voice. This analysis has suggested that insofar as political voice may be characterised as an international community interest, then a legal obligation of due diligence should arise for states to prevent the harm caused to this interest by the commercial endeavours of private actors operating from within states’ jurisdictions. This obligation would require that states exert their best effort to prevent, or at least minimise, the threat and harm to political voice by intervening to regulate ICT companies and curb their unencumbered control of global information and communication channels.

The chapter has also grappled, however, with the potential difficulties of this analysis, specifically in relation to non-democratic states that are unlikely to view political voice as a community interest that should give rise to any general legal obligations for its protection. Several rejoinders have been offered to this justifiable concern. First, in relation to the applicability of customary legal obligations, it has been recalled that these may constrain all states whereby a general recognition of the practice's binding character by *most* states exists.¹³⁴ More importantly yet, the chapter has also argued that there are other constraining principles in international law that underpin the notion of due diligence, and that would mandate that non-democracies respect the interests of democracies and their citizens, regardless of the extent to which they (non-democracies) endorse democracy as a political regime. Insofar as these states enable ICT companies to operate from within their jurisdiction and elicit harm to an interest which democratic states consider their own, then a due diligence obligation to prevent this harm should apply to them as well. This framework keeps with basic Westphalian tenets in that it coheres with general principles of international law such as state sovereignty and respect for the self-determination of peoples, and avoids the imposition of customary obligations to protect political voice upon states who wish to retain control of communicative and discursive arenas, and thereby do not enable ICT companies to operate from within their jurisdiction to begin with.

Having then considered how the application of the prevention principle to the context of political voice would operate in practice, the chapter has drawn attention to some particularities which result from the jurisdictional issues associated with ICT companies' internet-based operations. To address these particularities, the chapter has turned to scholarship on the application of international legal principles to cyberspace, and to literature on internet jurisdiction, for relevant insights. It has suggested that ICT companies may be seen as operating from within the physical ICT infrastructures of every state which grants these companies access to users within their jurisdiction. Thus, whereby harm to political voice and transnational discursive spheres results from these companies' operations, and this harm is externalised, states' duties of prevention are engaged.

The theorisation of political voice as an international community interest, thus constitutes a first step in establishing it as an issue that could and should attract the attention of international legal scholarship and practice. This attention is required now more than ever. The

¹³⁴ Non-democratic states nevertheless may position themselves as 'persistent objectors' to such practice, in which case the due diligence obligation to prevent harm to political voice will not bind them.

following chapter accordingly sets out to contemplate possible avenues for the enforcement of states' duties of prevention in the context of political voice. It will centre on two such avenues: enforcement via international adjudication, and enforcement via domestic courts.

The global ‘political voice deficit matrix’: implementing inter(national) law

The present chapter will examine two pathways for ensuring that states uphold their legal obligation to safeguard horizontal political voice: (1) international enforcement of states’ obligations to prevent harm to political voice through the application of the laws of state responsibility and international adjudication; and (2) domestic enforcement of these obligations through litigation in national courts. These two pathways are not intended as an exhaustive list of avenues for the enforcement of states’ international legal obligations. They nevertheless account for two prominent enforcement strategies which occupy a central place in international legal scholarship.

Prior to proceeding to these discussions, it is worth noting that the enforcement of states’ obligations to prevent harm to political voice would obviously be facilitated if these were translated into more specific conventional commitments. States’ customary due diligence obligations to prevent harm are painted in extremely broad strokes, and thus often require further detail and concretisation in order to be successfully implemented. This would especially be the case in the context of the global ‘political voice deficit matrix’, the effective addressing of which would require the positive development of clear standards that the regulation of global information and communicative infrastructures should meet.

Specifically, while it may be relatively evident that the current algorithmic design underpinning ICT companies’ regulatory control of these infrastructures, are harmful to the flow of reliable information and open, deliberative public discourse; it is perhaps less clear what exactly is the nature and content of the shared standards that should be developed in order to ensure these ideals, and how they should be operationalised. The customary principle of prevention may therefore only take us so far in addressing the global ‘political voice deficit matrix’. The appropriate standards for addressing this matrix through the regulation of ICT companies, would best be developed through treaty regimes, or other forms of more detailed softer regulatory tools. A conventional regime would also circumvent the concerns that were raised in the previous chapter as regards the imposition of customary due diligence obligations on non-democratic states for the protection of political voice.

Here too, climate change may prove as a useful framework to draw inspiration from. For instance, the architectural design of the Paris Agreement, which consists of national contributions complemented by an administrative framework to ensure effective international cooperation, may be a suitable template that would only require some adjustments in order to fit the present context. For example, such a treaty regime might prove most conducive to the task of developing *shared* international standards and principles that could potentially apply to the global infrastructure of information and communication channels as a whole. Based on the theorisation of political voice as an international community interest, such a treaty could determine states' legal obligations to condition ICT companies' access to national users, on certain fundamental changes to their commercial model that would prevent the fragmentation of communicative spheres, and thus guarantee the availability of reliable information, and robustness of open, deliberative, public discourse. These legal obligations would be developed in view of harmonised, shared international standards, that would ensure the transnational availability of political voice not only within borders, but also across and beyond them.

As in the context of climate change, these obligations would best be developed with the aid of technological knowledge regarding the algorithmic design driving these companies' operations. The case of climate change demonstrates the significance of expert knowledge for the framing or representation of the challenges which require addressing. Namely, the constitution of climate change as a *global* environmental risk, which could only be addressed via global collective action, was very much the product of novel scientific perceptions of the climate crisis.¹ These perceptions shifted from an understanding of the earth's climate as 'an aggregation of local weather conditions over various spatial areas', to its understanding 'as an integrated, global system [...], an ontologically unitary whole capable of being understood and managed on scales no smaller than the global itself'.² This shift in scientific understanding thus re-framed the risks of climate change, establishing it as a global cause for concern. Similarly, in the context of the global 'political voice deficit matrix', a technological understanding of the particular ways in which ICT companies' algorithms operate, and their effects on the structuring of information flow and discursive spheres, is crucial for: (1) the framing of the challenges they pose in terms of 'global common concerns'; and (2) for developing standards and principles for these companies' regulation that would adequately address the particularities of their algorithmic design.

¹ CA Miller, 'Climate Science and the Making of a Global Political Order' in S Jasanoff (ed), *States of Knowledge: The Co-Production of Science and the Social Order* (Taylor & Francis 2004) 46.

² *ibid* 52, 54.

Given the dual structure of such a treaty—of national obligations immersed in an international cooperative framework—the embracing of a substantive role for enforcement by civil society and polycentric action, as in the context of climate change, may also prove necessary for ensuring that states fulfil their national and international obligations. Like in climate change, ‘strengthening [a] transnational regime complex’ that would engage directly with sub-, and non-state actors, and mobilise political pressure on governments on the basis of their treaty commitments, would arguably contribute to influencing the behaviour of states and would stimulate action.³ This is especially the case given the opaqueness associated with ICT companies’ algorithms and commercial operations, and absence of sufficient political debate on the sweeping effects of their regulatory control. The involvement of non-state actors has the potential of promoting greater public awareness of precisely that which is concealed by the very nature of these companies’ elimination of public spheres of transnational discourse.⁴

Finally, such a treaty regime would also benefit from the involvement of ICT companies themselves in the design of its principles, given the profound implications such a legal regime would have on their commercial endeavours. Like in the context of climate change negotiations, where the involvement of private stakeholders was a prominent component of the development of the Paris Agreement, here too, eliciting the involvement of ICT companies might prove a necessary step in order to guarantee the viability and success of such a treaty regime.⁵ Not only will their involvement in its design enhance the legitimacy of such a treaty and thus its potential effectiveness,⁶ but it also might potentially circumvent fervent lobbying

³ See in the context of climate change, KW Abbott, ‘Strengthening the Transnational Regime Complex for Climate Change’ (2014) 3 *Transnational Environmental Law* 57, 60.

⁴ For an analysis of the importance of non-state actors in the context of climate compliance see E Dannenmaier, ‘The Role of Non-State Actors in Climate Compliance’ in J Brunée, M Doelle, and L Rajamani (eds.), *Promoting Compliance in an Evolving Climate Regime* (CUP 2012) 149.

⁵ Whilst non-state actors did not formally participate in the drafting of the Agreement itself, they ‘made submissions on matters under consideration by Parties’: A Savaresi, ‘The Paris Agreement: Reflections on an International Law Odyssey’ (2016) European Society of International Law Conference Paper Series, Conference Paper No. 13/2016. This is in recognition, reflected in the Agreement itself, of the importance of integrating non-state actors in climate governance: C Streck, ‘Filling in for Governments? The Role of the Private Actors in the International Climate Regime’ (2020) 17 *Journal for European Environmental & Planning Law* 5.

⁶ According to Ryngaert, and much in line with the more general claims made in this dissertation, ‘international rules forfeit their legitimacy if those who are governed by them had no opportunity of participating in their making’: C Ryngaert, ‘Imposing International Duties on Non-State Actors and the Legitimacy of International Law’ in C Ryngaert and M Noortmann (eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Taylor & Francis 2010) 72, 72.

efforts on their part and the exercise of political pressure against the advancement of such a treaty.⁷

A treaty of this kind remains, however, a distant possibility at present. For this reason, other enforcement strategies should be explored in order to give more substantive content to the conceptualisation of problems that this thesis has thus far engaged in. In other words, this chapter has an instrumental goal: it seeks to assess how the legal obligations thus far offered to address and mitigate the global ‘political voice deficit matrix’, may be operationalised.

This enquiry begins by examining what is perhaps the most straightforward enforcement strategy of international legal obligations—horizontal inter-state enforcement. This section will centre on the *erga omnes* character of the principle of prevention, to explore: (1) to what extent states may ensure that other states, who fail to meet their obligations to prevent harm to political voice, may be held to account for this failure in international courts; and (2) given the current lack of consensus in international law regarding the existence of a ‘general right of standing’, to what extent the *erga omnes* character of the prevention principle may, in any case, incentivise states to uphold and abide by their due diligence obligations.

The chapter then proceeds to examine the role that *national* courts may assume in vindicating states’ obligation to prevent harm to political voice. Continuing to draw on international climate change law as a comparative tool, the second part of the chapter turns to climate change litigation in domestic courts—and in particular to the *Urgenda* judgements—to explore domestic courts’ treatment of the prevention principle, and how it has been used to challenge the legality of governments’ climate policies. It will then discuss how the same strategies may be employed to formulate legal claims that can be brought to domestic courts to challenge governments’ failure to prevent harm to political voice. Part 3 will conclude.

1. Horizontal international enforcement: vindicating states’ obligation of prevention through the laws of state responsibility and international legal proceedings

An important feature of states’ due diligence obligation of prevention is the *erga omnes* character of this obligation.⁸ The *erga omnes* character of this norm thus shifts us away from

⁷ As in the context of the tobacco industry discussed above, and as in the first decade of climate negotiations in which ‘corporations positioned themselves almost exclusively in opposition to climate change regulation’: Streck, ‘Filling in for Governments?’, 12.

⁸ As Gaja carefully notes, ‘a general interest also need not belong to the international community. In the description of the theme of the course, reference is made to general interests not of the international community, but in the international community’: Gaja, ‘The Protection of General Interests in the International Community’, 22. In the previous chapter I have chosen to use the term ‘international community interests’ rather than ‘general interests’, however, my interpretation of such interests coincides with that of Gaja, as interests which are widely shared across borders, albeit not necessarily *universally* so; as evident from the distinction made in the previous chapter between democratic and non-democratic states.

the realm of bilateral relations and enforcement, towards collective action and enforcement. But what does a conceptualisation and characterisation of the duty to prevent harm to political voice as a duty *erga omnes*, mean in practice for the potential to enforce such a duty in international law? Two implications of the *erga omnes* concept will be examined and discussed in what follows. First, the *erga omnes* concept has effects in the field of international legal standing, albeit perhaps limited ones. According to the ‘broad approach’ interpreting the ICJ’s dictum in the *Barcelona Traction* case, breaches of *erga omnes* obligations trigger ‘special rights of response’; a general right of standing to institute proceedings in the ICJ against the violating state, where consent to the Court’s jurisdiction can be established.⁹ If so, the *erga omnes* concept may expand the possibility to vindicate the obligation to prevent harm to political voice, given that it accords a broad right of standing to all states to initiate international legal proceedings against any state who fails to fulfil it.

And yet, as a matter of international legal practice, states rarely assert such general right, and ‘[...] the Court has yet to admit a claim based on a violation of an obligation *erga omnes*’.¹⁰ In other words, whilst enforcement via the laws of state responsibility and the initiation of international legal proceedings against states who fail to meet their obligations, remain a doctrinal possibility,¹¹ its *pragmatic* likelihood seems questionable on the basis of existing practice.¹² It is not expected, therefore, that states who do not consider themselves as harmed by other states’ failure to uphold their due diligence obligations in the context of the protection of political voice, will rush to vindicate these obligations in international courts. For this reason, the broader role that the *erga omnes* concept may play in framing international relations and politics, is also worth considering in the context of discussions on the implications of this concept for possibilities of enforcement. The second implication examined, therefore, concerns the way in which the *erga omnes* character of states’ obligations to prevent harm to political

⁹ CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 158; J Crawford, *State Responsibility: The General Part* (CUP 2013) 367.

¹⁰ Tams, *Enforcing Obligations Erga Omnes*, 159. There are several counter-arguments to the broad approach presented, for example, that the *Barcelona Traction* dictum has not been followed by consistent and conclusive jurisprudence developing it, and is thus of limited effect and relevance; that as an obiter dictum its *legal* effect is limited; that it is the ‘international community’ who is the beneficiary of such obligations and thus it is only this community, acting collectively (perhaps via the UN and its organs), that has a right or reaction to violations of obligations *erga omnes*; and that the *erga omnes* dictum needs to be interpreted in light of general international law which is based on the idea of individual interests and remains agnostic to the idea of general rights of standing: see *ibid*, Chapter 5.

¹¹ According to article 48 of the Articles on the Responsibility of States for Internationally Wrongful Acts 2001, any state is entitled to invoke the responsibility of another state if the obligation breached is one owed to the international community as a whole. Whether this can be done specifically by way of instituting contentious ICJ proceedings is, according to Tams, ‘a matter of ICJ institutional law’: *ibid* 160.

¹² This is especially the case given that, in any case, the Court can only exercise jurisdiction over such a claim whereby both parties to the proceedings have consented to it: *ibid*.

voice, might impact the cooperative tendencies of states, and their de facto upholding of this duty on a widespread basis. Both implications will be considered in turn.

A. Erga omnes and standing to institute international legal proceedings

Article 48 of the Articles on the Responsibility of States for Internationally Wrongful Acts 2001, determines the right of any state to invoke the responsibility of another state if the obligation breached is one owed to the international community as a whole.¹³ However, the *erga omnes* effects on standing remain unclear and contested since the ICJ's limited pronouncements in the *Barcelona Traction* Dictum; and have been interpreted both broadly and restrictively. International law has thus yet to provide a conclusive answer as to whether the right in article 48 to invoke a state's responsibility, can be translated into a general right of standing to initiate international legal proceedings against states in breach. Hence, it remains dubious whether the characterisation of political voice as an international community interest, and the ensuing qualification of the obligation to prevent harm to this interest as an obligation *erga omnes*, have any practical meaning in terms of the potential for material enforcement of this obligation at the international level.

Proponents of the restrictive approach often justify their cautious treatment of the *erga omnes* concept by referring to inconsistencies in the Court's approach to this question since 1970. They argue that the Court's reluctance to clarify its dictum in the past several decades is a testament to the concept's limited bearing on issues of standing.¹⁴ However, argues Tams rather convincingly, the Court's jurisprudence since 1970 has provided 'a wealth of information about the correct interpretation of the [*erga omnes*] concept', and its implications in the field of standing, as supporting the 'broad approach'.¹⁵

Tams analyses in detail the views expressed by individual members of the Court in dissent or separate opinions, and interprets them in the broader context of the judgments in question. He concludes that, on balance, these views support, either expressly, or by implication, a broad reading of the *Barcelona Traction* dictum. For example, whilst the majority judgments in the *Nuclear Test* cases do not discuss the *erga omnes* effects on standing, the separate and dissent opinions largely support the view that the breach of *erga omnes* obligations provide general

¹³ Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II(2).

¹⁴ See C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Collected Courses of the Hague Academy of International Law*, as brought in Tams, *Enforcing Obligations Erga Omnes*, 180.

¹⁵ *ibid* 180.

rights of standing.¹⁶ In the *East Timor* case, certain expressions of the Court itself, together with several ones made by Judges Weeramantry and Ranjeva, equally strengthen this position.¹⁷ Judge Schwebel's dissent in the *Nicaragua* case and Judge Weeramantry's separate opinion in *Gabčíkovo*, similarly imply, though indirectly, a particular understanding of the *erga omnes* as one that affects the rules of standing.¹⁸

If we accept Tams's analysis at face value then, issues of jurisdiction notwithstanding, a reasonable argument can be made in favour of the doctrinal possibility of enforcing the obligation to prevent harm to political voice, by initiating proceedings against states who fail to uphold this obligation. As Maiko Meguro points out in the particular context of environmental harm (from which this chapter continues to draw inspiration), 'the concept of *erga omnes* obligations has drawn the attention of international lawyers who have found therein a means to expand the standing necessary to bring such cases before international courts'.¹⁹ Meguro draws particular attention both to the *Whaling in the Antarctic Case* and to *ad hoc* Judge Dugard's dissent in *Certain Activities*.²⁰ In the *Whaling Case*, points out Meguro, Australia claimed a legal interest and thus standing before the ICJ, based on the *erga omnes* character of the obligations under the International Convention for the Regulation of Whaling, as protecting the collective interests of resource conservation. Meguro indicates that in the

¹⁶ According to Tams, these opinions were strongly divided between Judge de Castro, whose dissent clearly rejected 'the view that all [s]tates have standing in disputes involving obligation *erga omnes*', and Judge *ad hoc* Barwick who, in equal clarity, argued for the right of each state to vindicate its right to see obligations *erga omnes* observed before the Court. The joint dissenting opinions of Judges Onyema, Dillard, Jiménez de Aréchaga and Waldock, as well as the separate opinion of Judge Petrán were less clear on the matter, but still, according to Tams, cautiously endorse the idea that the *erga omnes* status of an obligation may imply a general right of standing. See *ibid* 180–82.

¹⁷ In the *East Timor Case*, the interpretation of *erga omnes* was entertained both in the context of its effects on standing and in the context of its effects on the indispensable third party rule. In the context of the latter, the Court dismissed the idea that the third party rule would be modified when obligations *erga omnes* were involved (see Tams, *ibid* 183, quoting para 29 of Judgment), but as Tams points out (*ibid* 185), this pronouncement did not prejudice the question of the concept's effects on standing. In that respect, according to Tams, the Court seems to suggest that if it weren't for the indispensable third party rule, Portugal could have brought a claim on the basis of the *erga omnes* character of the obligation breached. This, according to Tams (*ibid* 186), also seemed to be the position of Judges Weeramantry and Ranjeva: all states have a legal interest in the observation of *erga omnes* obligations and whereby these are violated the court should grant general standing.

¹⁸ In *Gabčíkovo*, in the context of discussing the applicability of the rules of estoppel in cases involving *erga omnes* interests, Judge Weeramantry acknowledged other states' legal interest in the subject matter of the dispute, and the possible effects of their existence on the question of estoppel. By implication, his interpretation, as Tams argues, might also have bearing on the rules of standing. See *ibid* 190–92.

¹⁹ M Meguro, 'Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy' (2020) 33 *Leiden Journal of International Law* 933, 936.

²⁰ See, respectively: *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, ICJ Reports 2014, p. 226, and *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2018, p. 15 (Judge Dugard, Dissenting Opinion) as discussed by Meguro, *ibid* 937.

context of the loss of gas sequestration too, *ad hoc* Judge Dugard characterises the obligation to prevent such loss as an obligation *erga omnes*.²¹

But as Tams carefully points out, in reality, states have thus far rarely initiated proceedings on the basis of their general right of standing alone; and they are not expected to routinely do so in the future. However, this does not necessarily mean that the *erga omnes* concept, and the applicability of a general right of standing, have no role to play in shaping states' behaviour, or their cooperative tendencies, so as to impact the degree to which the obligation to prevent harm to political voice could be widely upheld. Game theoretical analyses, for instance, go some way in showing that the *potential* subjection to enforcement mechanisms alone, may impact states' motivation to cooperate in way that may positively influence wide adherence to the norm in the international arena. I turn to these analyses next.

B. Game theory and erga omnes obligations

The use of game theoretical analyses to explain the effects of international law on states' behaviour, has gained prominence since the turn of the century. Although specific enquiries into the effects of *erga omnes* have been less prevalent,²² other studies of public good games can be drawn on to shed light on the effects that the *erga omnes* character of a norm, and in particular, of the general right of standing it affords states, might have on states' behaviour, and thus on the potential for widespread upholding of states' duties of prevention. Public good games, as a subset of game theoretical analyses, are N-person games that are usually used in order to model the behaviour of multiple actors who seek to achieve a common goal. It has the same properties as the classic prisoner's dilemma, but describes a 'public good' from which all may benefit. Seeing as the duty of prevention aims to ensure the provision of public goods (in our context, horizontal political voice), the public goods game is an appropriate model for discussing the effects of the *erga omnes* character of this duty.

The fundamental problem according to instrumental or rationalist approaches to the question of enforcement in international law, is that 'enforcement actions are almost always costly to the sender'.²³ Thus, the basic assumption is often that '[a] potential enforcer will not act if the costs of enforcing are higher than the benefits of inducing compliance by the target';

²¹ Meguro, 'Litigating Climate Change through International Law', 937–38.

²² Perhaps only Posner deals with this question in some form. See EA Posner, 'Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law' (2009) 165 *Journal of Institutional and Theoretical Economics* 5.

²³ A Thompson, 'Coercive Enforcement of International Law' in JL Dunoff and MA Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations* (CUP 2012) 502, 511.

a problem which is ‘exacerbated in the multilateral context, where free-riders incentives make individual states even less likely to bear the burden of enforcement’.²⁴ In the context of multilateral settings and the enforcement of obligations directed towards guaranteeing public goods, individual actors are therefore assumed to contribute to the maintenance of a public good only when the expected benefits of this contribution outweigh its costs.²⁵ In these scenarios a collective action problem is generated.

In our particular context, this means that a state would be inclined to contribute to the prevention of harm to political voice only when the benefits of this contribution exceed its associated costs. Such contribution may take two forms. First, a state might contribute directly to the ‘first order public good’—in this case, the availability of open, deliberative transnational discursive arenas—by observing its own duties of harm prevention. Second, and perhaps more relevant to the current discussion, a state might contribute to the ‘*second order* public good’—the implementation of changes needed to guarantee the first order public good. In our case, the second order public good would be *erga omnes* enforcement, or the initiation of international legal proceedings against free-riding states who fail to fulfil their duties of harm prevention.²⁶ Hence, insofar as the costs of acting upon a state’s general right of standing outweigh the benefits accrued by these actions, states are unlikely to engage in *erga omnes* enforcement; and indeed—as Tams points out—current jurisprudence indicates that they typically do not do so.

Nevertheless, some studies suggest that in large groups where trust between actors is low—as is expected amongst states in the international arena—the establishment of a sanctioning system may alter states’ expectations of other states’ behaviour. In other words, the availability of sanctions improves the elementary cooperation between actors because it reduces fear of defection; and it especially does so where trust between players is low. On the basis of these findings, it may be argued that the *erga omnes* character of the duty to prevent harm, and the general right of standing it affords, have important roles to play in the context of enforcement (broadly conceived), even despite the fact that states normally don’t actually act upon their general right of standing. That is, the mere fact that the *possibility* of sanctions exists, will indirectly affect states’ expectations of other states’ cooperation in a way that will induce

²⁴ *ibid.*

²⁵ T Yamagishi, ‘The Provision of a Sanctioning System as a Public Good’ (1986) 51 *Journal of Personality and Social Psychology* 110, with reference to M Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1965).

²⁶ *Ibid* 111 (emphasis added); See also J Elster, ‘*The Cement of Society: A Study of Social Order*’ (CUP 1989) 41, brought in A Thompson, ‘The Rational Enforcement of International Law: Solving the Sanctioners’ Dilemma’ (2009) 1 *International Theory* 307, 311: “Punishment is almost invariably costly to the punisher, while the benefits from punishment are diffusely distributed over all members. It is in fact, a public good.” Thompson refers to this problem as the ‘sanctioners’ dilemma’.

cooperative behaviour, and thus contribute to more widespread upholding of the duty to prevent harm to begin with.²⁷

Relatedly, some scholars also contest the general assumption of rationalist approaches that the costs of enforcement will likely outweigh the benefits of compliance. Thompson for example, argues that under certain conditions, the benefits of compliance will outweigh the costs of sanctions, especially in the long term. ‘In a repeated game’, he argues, “‘community enforcement’ can be sustained’. This is because, ‘even agents who care about their own utility [...] have an incentive to punish those who violate social rules, for fear that violation will spread and cooperation will break down’.²⁸ In addition, Thompson also points to other gains that states might accrue from engaging in enforcement activities, such as reputational gains as ‘defender[s] of international law’, or domestic political gains by enforcing rules that are important to domestic constituents.²⁹ The latter gains, for example, may therefore be particularly relevant in the context of enforcing states’ duty to prevent harm to political voice, given the strong interests of domestic constituents in its protection.

Moreover, and contrary to the assumptions made by rational choice theories about actors’ reliance on cost-benefit analysis when choosing whether or not to intervene to punish free-riders, Fehr and Gächter also show that in situations of social dilemmas, ‘those who cooperate may be willing to punish free-riding, *even if this is costly for them and even if they cannot expect future benefits from their punishment activities*’.³⁰ The results of their experiment demonstrate that where opportunities for punishment exist, they positively influence cooperative behaviour; and that this behaviour is also sustained over time.³¹ As put by authors of another study supporting the same conclusion, ‘the *threat* of sanctions may be sufficient to sustain cooperation’.³² These results correspond to Posner’s conclusion that ‘[e]rga omnes

²⁷ M Sefton, R Shupp, and J Walker, ‘The Effects of Rewards and Sanctions in Provision of Public Goods’ (2006) CAEPR Working Paper No. 2006-005, at 18: ‘the threat of sanctions may be sufficient to sustain cooperation’. See also Engel and Kurschilgen who demonstrate how ‘the legal character of a norm becomes instrumental as soon as there are sanctions’: C Engel and M Kurschilgen, ‘The Coevolution of Behavior and Normative Expectations: An Experiment’ (2013) 15 American Law and Economics Review 578, 600.

²⁸ Thompson, ‘The Rational Enforcement’, 315; The study by Sefton, Shupp, and Walker supports the conclusions that in a repeated game, ‘where it appears that the mere threat of being sanctioned sustains contributions [...] the opportunity to sanction enhance[s] group performance’: Sefton, Shupp, and Walker, ‘The Effects of Rewards and Sanctions’, 2. They go further to show that those most willing to sanction are ‘those who contribute more than the group average’ (at 3). This may indicate therefore which states are more likely to act upon their general right of standing in the context discussed.

²⁹ In making this argument Thompson extends the arguments of Guzman in A Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008), to the sanctioner. See *ibid*.

³⁰ E Fehr and S Gächter, ‘Cooperation and Punishment in Public Good Experiments’ (2000) 90 American Economic Review 980, 980 (emphasis added).

³¹ *ibid*. See Results 1 through 6.

³² Sefton, Shupp, and Walker, ‘The Effects of Rewards and Sanctions’, 18 (emphasis added).

norms reduce the incentive to free ride’, and ‘facilitate collective enforcement of norms that create public goods’.³³ They also correspond to Thompson’s argument that ‘rules that carry normative weight [...] are more likely to elicit robust decentralized enforcement’.³⁴

These studies therefore all support the idea that the general right of standing afforded by the *erga omnes* character of the principle of prevention, may in and of itself encourage cooperative behaviour, even in a scenario in which acting upon these rights of standing provides no specific future private benefits. These studies thus signal that the *erga omnes* character of the principle of prevention is not merely a window dressing despite the fact that cases of proper *erga omnes* enforcement via international adjudication are far and few between. Rather, they go to show that when it comes to horizontal international enforcement, the *erga omnes* character of the norm, and its threat of potential sanctions, may have the effect of ensuring that more states de facto observe and uphold their legal obligations.

These conclusions notwithstanding, international horizontal enforcement is still not expected to be a sufficient avenue through which to guarantee the availability and robustness of horizontal political voice. For this reason, another avenue, namely, enforcement in domestic courts is explored next.

2. Domestic enforcement: vindicating states’ obligation to prevent harm to political voice through litigation in national courts

On 20 December 2019, the Dutch Supreme Court issued a landmark decision confirming lower courts’ rulings which acknowledge the positive obligations of the Dutch government to take measures to prevent harm to climate change, and ordered the government to reduce greenhouse gas emissions by at least 25% compared to 1990 levels until the end of 2020. The claim was first submitted to Dutch courts by the Urgenda Foundation, a Dutch NGO, on behalf of 886 Dutch citizens in the District Court of The Hague. The District Court’s ruling was later affirmed by the Court of Appeal and Dutch Supreme Court. The courts accepted the plaintiffs’ claim, rendering the judgment the first to legally require a state to take climate change precautions.³⁵

Continuing to draw inspiration from the field of climate change, this section will examine how domestic courts, and the *Urgenda* judgments in particular, have employed the principle of prevention to interpret and enforce states’ legal obligations to mitigate climate change damage.

³³ Posner, ‘Erga Omnes Norms’, 6, 13.

³⁴ Thompson, ‘Coercive Enforcement’, 513.

³⁵ *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, Supreme Court of the Netherlands (Civil Division), 20 December 2019, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007> (English Translation).

The *Urgenda* case serves as a unique example of the role that litigation in domestic courts may play in helping enforce states' international due diligence obligations to prevent harm to international community interests. This analysis will therefore be later relied on in order to contemplate how states' legal obligation to prevent harm to horizontal political voice, may also be enforced via domestic courts.

A. Domestic courts as enforcers of international legal obligations

Much has been written about the role of domestic courts in enforcing international law. 'The growing significance of international law before national courts', argues Anthea Roberts, 'requires consideration of [...] the increasing importance of domestic judicial decisions in the development and enforcement of international law'.³⁶ In this context, in the past decade international legal scholars have pointed to a growing trend in domestic courts' changing attitudes towards their own role within the international legal order, from defenders of national interests to reviewers of their executive branches in defence of international law.³⁷ So central this role of domestic courts has become, that 'national case-law has a more profound effect for the actual application of international law, and the protection of the international rule of law, than do the decisions of international courts and tribunals'.³⁸ Domestic courts otherwise fulfil an 'international judicial function' in determining, interpreting, and developing international legal rights and obligations.³⁹

From a functional perspective, the distinction between national and international courts thus becomes quite blurred.⁴⁰ One of the central international judicial functions of domestic courts, is to 'review the legality of national acts in light of international obligations and to ensure rule-conformity'.⁴¹ This is most often done either by giving international legal obligations direct or indirect effect in domestic jurisprudence, or, 'where an international obligation has not fully

³⁶ A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 57, 57–58.

³⁷ As put by Nollkaemper, 'national courts of a substantial number of states [...] have become a major institutional force in the protection of the international rule of law': A Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 1; See also E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241, 243: '[...] references to foreign law and international law are being transformed from the shield that protected governments from judicial review to the sword by which government's (or governments') case is struck down'; And, Y Shani, 'Should the Implementation of International Rules by Domestic Courts be Bolstered?' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 200, 200: '[...] both domestic and international courts may now serve as guardians of international legality'.

³⁸ Nollkaemper, *National Courts*, 8.

³⁹ A Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 Loyola of Los Angeles International and Comparative Law Review 133.

⁴⁰ Nollkaemper, *National Courts*, 9.

⁴¹ *ibid*, 10.

been made part of the national legal order', by interpreting national law consistently with international legal obligations.⁴² Whilst these two strategies are arguably different in principle, their outcomes may nevertheless be exactly the same: they will both result in the municipal application of international law standards.⁴³

An important context in which domestic courts tend to use the legal tool of consistent interpretation, is when they review the executive's exercise of discretion. In these contexts, governments' scope of discretion is evaluated not only by reference to domestic requirements, but also by reference to international legal standards and principles. Importantly, such use of consistent interpretation has enabled giving effect to international legal obligations which cannot normally provide a basis for *individual* claims before domestic courts.⁴⁴ This context and its effects are especially relevant to the enforcement of states' international climate change obligations, and to the application of the prevention principle which stands at the crux of the present analysis.

B. Litigating international climate change law in domestic courts: the case of Urgenda

Despite the increasing role of domestic courts in enforcing international law, their role in enforcing international *environmental* law has been considerably more limited given the general position that its rules 'protect rights of states only'.⁴⁵ Recent cases which have been filed in domestic courts, and which challenge the adequacy (or legality) of governments' climate policies, have thus mainly relied on a 'rights strategy' rather than on general international legal principles in order to circumvent the issue of standing.⁴⁶ This strategy, as explains Maiko Meguro, 'consists in the invocation [...] of violations of environmental law through the legal categories of international human rights law'.⁴⁷

Given the need to rely on international human rights law as the basis for private claims in the context of climate change, domestic courts' reference to the customary principle of prevention and to states' due diligence obligations, is limited. It has also been suggested that this is a result of that fact that the direct effect of the prevention principle 'will be difficult to prove given the generally vague nature of the obligation'.⁴⁸ And yet, these limitations notwithstanding, the case of *Urgenda* demonstrates how the prevention principle may be

⁴² *ibid* 139.

⁴³ *ibid* 140.

⁴⁴ *ibid* 142–45.

⁴⁵ *ibid* 91.

⁴⁶ Meguro, 'Litigating Climate Change through International Law'.

⁴⁷ *ibid* 935.

⁴⁸ L-A Duvic-Paoli, *The Prevention Principle in International Environmental Law* (CUP 2018) 170.

referenced by domestic courts as an evaluative tool in the assessment of states' legal obligations—international or domestic—and their interpretation. Thus, even if the principle of prevention does not confer, in and of itself, a private right of standing, the *Urgenda* judgments attest to the important role it may play in ensuring that governments safeguard international community interests such as the availability and robustness of open, transnational, discursive spheres.

In its initial claim, *Urgenda* argued, *inter alia*, that the Netherlands failed to meet its obligation to prevent causing more than proportionate damage to the climate from its territory. In doing so, claimed *Urgenda*, the Netherlands has breached its duty of care according to the Dutch Civil Code. On the basis of these claims, the Dutch District Court proceeded to examine 'whether and if so, to what extent, the [Dutch] State is subject to an obligation towards *Urgenda* to pursue a reduction target higher than the current one for the Netherlands'.⁴⁹

The District Court rejected *Urgenda*'s claims that were based on the Netherlands' *international* obligations of prevention, arguing that although binding upon the state, these are legal obligations towards *other states*, and therefore do not generate individual rights on which *Urgenda* can directly rely.⁵⁰ Nevertheless, the Court went on to emphasise, a state's international legal obligations 'have a "reflex effect" in national law'.⁵¹ Hence, whilst *Urgenda* may not be able to derive direct rights from these legal obligations, the latter still 'hold meaning' in the context of examining whether the state has met its *domestic* duty of care.⁵² Namely, the Court concluded, a state's international legal obligations constrain the state's discretionary power, and frame the scope of this duty of care.⁵³ The principle of prevention (among others), thus constitutes 'an important viewpoint in assessing whether or not the State acts wrongfully towards *Urgenda*'.⁵⁴

⁴⁹ *Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, Hague District Court, 24 June 2015, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>, (English Translation), para [4.34.]

⁵⁰ *ibid* [4.42]. This conclusion may be questioned. For example, the Tribunal of Rotterdam in the *Mines de Potasse* litigation found that the no harm principle regulated also the relations between the citizens of the two states and not those of states alone. This however was later reversed by the Court of Appeal of the Hague. See Duvic-Paoli, *The Prevention Principle*, 168.

⁵¹ *Urgenda Foundation v. The State of the Netherlands*, para [4.43.]

⁵² *ibid* [4.52.]

⁵³ *ibid* [4.55.; 4.63.]

⁵⁴ *ibid* [4.63.]

The District Court's judgment was upheld both the Court of Appeal and the Dutch Supreme Court on different grounds.⁵⁵ These judgments nonetheless remain instructive in several respects. First, the principle of prevention was employed by the courts in tandem with scientific reports drafted at the international level as an evaluative tool to assess whether the government has made sufficient efforts to mitigate harm to the environment. Rather than relying strictly on national benchmarks to evaluate the legality of the executive's conduct, the Court of Appeals acknowledged that when it comes to *transnational* threats such as climate change, international law and the prevention principle play a role in determining the scope of individual governments' obligations. The reference to the prevention principle thus highlights the notion of the shared responsibility of states—as members of an international community—to address issues that impact the international community as a whole. This point was reiterated also by the Dutch Supreme Court which referred to the principle of prevention in the context of the Netherlands' claims that its contribution to the global climate change problem was negligible. When it comes to matters which have cross-boundary impact, the Supreme Court maintained, each state can be held accountable to uphold its *own* obligation to prevent harm.⁵⁶

The ways in which the principle of prevention was used by the Dutch courts, thus reflect the recognition (even if implicit) that although the judgment is rendered only with respect to the specific plaintiffs represented by Urgenda, it nevertheless has material consequences that transcend national boundaries; and it is precisely because of these transboundary consequences that international legal principles should be applied to question or constrain the executive's discretion.⁵⁷ In other words, the notion of prevention is captured as a 'global norm to take

⁵⁵ Both the Court of Appeal and Supreme Court relied on the Netherlands' obligations under the European Convention of Human Rights (ECHR), and its failure to ensure Dutch citizens' right to life (article 2) and the right to private and family life (article 8).

⁵⁶ *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, paras 5.7.1 and 5.7.5; See also A Nollkaemper and L Burgers, 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case' (*EJIL:Talk!* 6 January 2020).

⁵⁷ See on this point CW Backes and GA van der Veen, 'Urgenda: The Final Judgment of the Dutch Supreme Court' (2020) 17 *Journal for European Environmental & Planning Law* 307, 315: 'The point the Supreme Court therefore appears to be arguing [...] is not so much the State's obligation to avert actual threats to the current inhabitants of the Netherlands as much as it is about State's obligation to do its "minimal fair share" in combating a global threat'; See also Meguro on the Supreme Court judgment: 'By constructing the legal reasoning in this way, the judgment brought back the pattern of legal thinking whereby a state is held responsible based on a legal threshold, which is *internationally* determined, rather than simply exercising its own discretion to determine what would work the best for the state within the jurisdiction': Meguro, 'Litigating Climate Change through International Law', 949.

action’,⁵⁸ and it is on the basis of this norm that domestic courts may be inclined to accept arguments regarding governments’ obligation to contribute to global efforts.⁵⁹

Yet the Dutch Courts’ use of the principle of prevention is instructive in another, more fundamental way. That is, although the Court relied primarily on the legal framework of international human rights law, and the principle of prevention was ostensibly used merely as an interpretive tool, it was in fact the broader notion of prevention of harm which underpinned the entire judgment and the Supreme Court’s allocation of responsibility.⁶⁰ What the Supreme Court ultimately determined, was that the Dutch state had a legal obligation to take preventative action against climate change. Harm prevention was thus regarded by the Court as a consideration that the government *must* take into account when forming policies. In this sense, the legal construct of human rights was useful only in determining *to whom* the state’s obligation to prevent harm was owed. It otherwise served only as a pragmatic tool for solving the issue of standing, given that the plaintiffs were individuals rather than states.

If so, the prevention principle, as a concept, still played an important role in framing the Dutch domestic courts’ response to climate change litigation, regardless of the particular cause of action on which the litigation was based; and despite the fact that the prevention principle was not acknowledged as creating substantive legal obligations under domestic law. The Dutch courts’ references to this principle, is therefore informative in contemplating what role domestic courts may assume in furthering efforts to protect horizontal political voice, an analysis to which I turn next.

C. Domestic courts as guardians of horizontal political voice and transnational discursive spheres

Like in the context of climate change, domestic courts may assume central international judicial functions as guardians of the international community interest of political voice, and as important agents of change in its protection and promotion. In fact, the performance of these international judicial functions, would constitute a further manifestation of domestic courts’ traditional role as ‘guardians of the domestic legal order’⁶¹ and protectors of political voice

⁵⁸ See the arguments made with regards to the Paris Agreement in BJ Preston, ‘The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)’ (2020) *Journal of Environmental Law* 1, 15.

⁵⁹ See Preston’s analysis of the *Urgenda* judgments in *ibid* 15–16.

⁶⁰ The Supreme Court did not give direct effect to this principle, but rather based the Netherlands’ primary legal obligations on its international human rights duties. See *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*.

⁶¹ E Benvenisti and GW Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’ (2009) 20 *EJIL* 59, 61.

within democracies. These functions may be achieved either by giving effect to international legal principles within the domestic legal order, or by employing such principles as evaluative and interpretive tools to constrain governments' latitude and discretion in responding to ICT companies' operations.

Within the first strategy, and notwithstanding the Dutch courts' assertions on the matter in *Urgenda*, national courts would recognise political voice as an international community interest, and give effect to the principle of prevention by acknowledging this principle as providing also *private* rights of standing. In doing so, courts would allow a basis for *individual* claims against governments who fail to fulfil the due diligence obligations to exercise all possible efforts to prevent, or at least minimise, harm caused to political voice. Such recognition would be entirely coherent with cosmopolitan, or humanity-based approaches to international community interests. These approaches view these interests as belonging directly to individuals as 'the fundamental unit[s] of moral concern'.⁶² It would also be coherent with the novel paradigm underpinning the prevention principle as operating to protect international community interests.⁶³ It would therefore be particularly fitting in the context of political voice (as in that of climate change), in which the harm caused ultimately impacts individual lives more than it impacts the interests of states per se as corporate machineries.⁶⁴

Within the second strategy, national courts would employ the principle of prevention as 'a relevant consideration for the executive when exercising its discretion'.⁶⁵ Referencing the principle of prevention as an evaluative and interpretive tool, national courts thus may demand that governments, in forming their policies, 'conform to global standards',⁶⁶ and take into consideration the basic requirement to exercise all possible efforts to prevent harm to political voice. Moreover, courts may also engage the due diligence standard of care that the principle of prevention prescribes, as a yardstick to assess whether *specific* actions taken by governments are satisfactory. The legal framework of harm prevention would therefore be instrumental in anchoring shared international legal responsibilities, which domestic courts may determine that individual governments cannot unilaterally chose to opt-out of.

Importantly, as domestic courts also engage in communication and coordination with courts in other jurisdictions *via* such reference to international legal principles, they are also

⁶² Ratner, 'From Enlightened Positivism' 159.

⁶³ See footnotes 79–80 in Chapter V and accompanying text.

⁶⁴ Indeed, in the context of climate change, it is exactly this approach which drives the recent 'right based' strategies of recent environmental litigation.

⁶⁵ Benvenisti, 'Reclaiming Democracy', 252.

⁶⁶ *ibid* 242.

particularly well placed to influence the protection and promotion of political voice on a global scale.⁶⁷ The protective role of domestic courts is therefore effectuated not only by way of inducing positive governmental action within their *own* jurisdiction; but also, by way of prompting courts in other jurisdictions to do the same.

Accordingly, the stronger domestic courts' motivation to coordinate with foreign courts is, the more potential they have to ensure the broader and more effective protection of transnational discursive spheres on a global scale. Interestingly, when it comes to the prevention of harm to political voice, domestic courts may seem to have particularly strong incentives to employ international legal principles as a communicative strategy through which to coordinate with foreign courts. They therefore have great potential as influential constructive agents of change. This is because, as Benvenisti explains, what underpins inter-judicial cooperation and reference to international law is not necessarily domestic courts' '[deference] to other communities' values and interests', but rather, their efforts to strengthen domestic democratic processes. Domestic courts' use of international law to constrain executive action, is motivated by courts' desire to 'reclaim the domestic political space that is increasingly restricted by the forces of globalization'.⁶⁸ Therefore, argues Benvenisti, reliance on international law and inter-judicial cooperation, can be expected in domains in which 'judicial alliances could facilitate confrontation with foreign actors that seek to preempt the domestic political process'.⁶⁹ Regulating ICT companies in the aim of preventing harm to political voice and transnational discursive spheres is a paradigmatic example of such domain. This is palpably because, as a subject matter, the issue of open, deliberative, discursive spheres, stands at the heart of domestic democracy. In the absence of such discursive spheres, courts' broader efforts to stimulate and revitalise domestic democracy may have limited effect. In other words, the protection of political voice translates into the protection of the democratic process itself.

Reliance on international legal principles by domestic courts to constrain executive action, would also increase the 'normative value' of political voice and the principle of prevention as normative concepts. Reference to these legal norms, especially when used widely by courts within multiple jurisdictions, would thus '[reframe] political demands in [a] legitimizing framework',⁷⁰ thereby generating a positive signal to civil society regarding the legitimacy of

⁶⁷ Benvenisti, 'Reclaiming Democracy'.

⁶⁸ *ibid* 244.

⁶⁹ *ibid* 268.

⁷⁰ BA Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009) 134.

pursuing legal claims to vindicate these norms.⁷¹ Court rulings may therefore serve as focal points for civil society organisations to coordinate action, and frame their demands around the principle of prevention and the due diligence standards it prescribes for protecting political voice.⁷²

The role of domestic courts as guardians of political voice thus exceeds the relatively narrow role that they assume as adjudicators of legal claims. They may promote legal frameworks which can serve as ‘resources in social mobilization’, and hence also function as important change agents with meaningful positive impact on mobilization processes by civil society and potential litigants.⁷³ Their role, in this sense, is arguably more central than that of international tribunals. It is also particularly important in the context of protecting and promoting horizontal political voice, given that, as a normative concept, political voice is currently unrecognised as an international community interest, or as granting any individuals rights which potential litigants could recognise themselves as entitled to. Therefore, the more this normative concept is formally accepted by national courts as generating legitimate legal claims, the more the value of this norm can be confirmed in ‘public consciousness’.⁷⁴

3. Conclusion

Having theorised, in the previous chapter, the notion of political voice as an international community interest; and having identified the principle of prevention as the core customary norm in international law on the basis of which it would be possible to ascribe legal obligations to states for its protection and promotion, this present chapter has examined the merits of two pathways for enforcing such obligations. Its purpose has been to provide a concrete and operative analysis of two strategies which potential litigants—states or individuals—may pursue in order to ensure that governments undertake all necessary efforts to prevent, or at least minimise, the harm generated to political voice and transnational discursive spheres from the commercial operations of private ICT companies and their regulatory control of global communicative infrastructures.

⁷¹ *ibid.* Simmons’s prominent study offers a ‘domestic politics theory of treaty compliance’ (at 125). Although she focuses on international treaties and the roles that they play in influencing domestic politics, her analysis is instructive in thinking about the influence of customary obligations and their use by domestic courts.

⁷² Simmons has termed this the ‘educative or framing function of law’: Simmons, *Mobilizing for Human Rights*, 143.

⁷³ *ibid.* 139.

⁷⁴ Simmons speaks of the law as ‘framing new interests’, and thus as performing an ‘educative’ function: *ibid.* 143.

The first strategy examined, was the horizontal enforcement of states' international legal obligations via international adjudication in international courts. This analysis has centred on the *erga omnes* character of the duty to prevent harm to matters that are of common international concern. The chapter has examined what the legal implications of this particular feature of the obligation to prevent harm to political voice are, and how they may impact the potential to enforce such obligations on the international plane.

According to the broad approach in international legal scholarship, obligations of an *erga omnes* character trigger a general right of standing to institute proceedings in the ICJ against states in breach. The *erga omnes* character of these obligations thus has the potential to quantitatively expand the possibility to vindicate them via international adjudication. And yet, not only is this broad approach a contestable one in international legal jurisprudence, but more importantly, as a matter of international legal *practice*, states rarely rush to assert their general rights of standing, and are not expected to do so when it comes to protecting political voice and transnational discursive spheres either. This recognition thus puts into question the very viability of this strategy of enforcement.

Such recognition notwithstanding, the *erga omnes* character of the duty to prevent harm to political voice is still significant from a functional perspective. Namely, game theoretical analyses of public good games show that the possibility of sanctions that is afforded in this case by the *erga omnes* character of the duty to prevent harm, and by the general right of standing it confers on states, may operate to influence states' tendency to uphold their legal duty to prevent harm in the first place. In this sense, the *erga omnes* nature of the obligation is not merely a hollow feature. It is important for matters of 'enforcement' (broadly conceived) insofar as it fosters cooperative behaviour in states, and raises the likelihood that they will contribute to the *first order* public good in this context: the availability and robustness of political voice, and the provision of open, deliberative transnational discursive arenas.

The second strategy explored, and the one arguably with more potential to guarantee that states abide by their duties to prevent harm, was the enforcement of states' international legal obligations via litigation in domestic courts. This section has turned once more to the field of climate change as a valuable source of inspiration, and examined how domestic courts have employed the principle of prevention to adjudicate climate change claims brought against governments. In particular, this section has considered the *Urgenda* case, and the Dutch courts' application of the principle of prevention in their legal analyses. It has shown that although the courts have not relied on this principle directly to assign legal responsibility, it nonetheless

featured prominently as an evaluative and interpretive tool to assess the legality of the Dutch government's conduct.

The *Urgenda* judgments were therefore particularly instructive in contemplating what role domestic courts may assume in furthering efforts to protect the international community interest of horizontal political voice. This final section of the chapter has referred to the legal reasonings underpinning the *Urgenda* judgments, to suggest that similar legal rationales can be employed by domestic courts to hold governments to account whereby they fail to uphold their duty to prevent harm to political voice. Contrary to what the Dutch District Court determined with regard to the applicability of the principle of prevention in domestic law, this section has first suggested that this principle may be used to grant individuals private rights of standing against governments who fail to protect political voice as an international community interest that belongs, ultimately, to individuals. Alternatively, the principle of prevention may be employed by courts to constrain governments' latitude and discretion, and demand that they conform to global standards in forming policies, and that they take into consideration the basic requirement to exercise all possible efforts to prevent harm to political voice. Furthermore, domestic courts may refer to the due diligence standard of care prescribed by the principle of prevention as a benchmark to evaluate particular government conduct in this arena.

Finally, this section has suggested that the traditional role of domestic courts as guardians of political voice, may transcend the distinctive role assumed by them as adjudicators of specific legal claims. First, domestic courts may, and in the present context are particularly likely to, engage in inter-judicial dialogue and coordination with courts in other jurisdictions, and thus contribute to the wider adherence of governments to their respective duties of prevention. Second, courts may also increase the normative value of the notion of political voice, help shape the legal frameworks on the basis of which political and legal demands can be made, and therefore exert positive impact on processes of social mobilization by civil society actors. The chapter has hence concluded that domestic courts are particularly significant agents of change in the promotion and protection of political voice and transnational discursive arenas.

VII

Conclusion

This research has explored the challenges that novel digital technologies pose for the democratic principle of the ‘political voice’, and how international law could and should address these challenges. It explained how and why the availability and robustness of political voice within, across, and beyond borders, are threatened at present by the regulatory endeavours of private ICT companies, and outlined why this should concern international law and lawyers. On the basis of these analyses, it identified an appropriate international legal framework through which this challenge could potentially be addressed, and examined avenues for its potential effective enforcement.

A three-pronged argument

The main argument advanced in the five substantive chapters of this research, can usefully be summarised as comprised of three prongs.

The first prong, is a descriptive-analytical claim regarding the circumstances which create and sustain political voice deficits; and how these extend, under conditions of globalisation, to the transnational and global levels. In this context, the research has undertaken, in Chapter II, a descriptive analysis of existing international legal literature, and has categorised circumstances creating political voice deficits as pertaining to the ‘intra-state’, ‘inter-state’, and ‘global’ dimensions. The ‘intra-state’ dimension relates to how the globalisation of markets and the international legal architecture exacerbate domestic democratic failures, and hinder individuals’ ability to partake in domestic decision-making processes. The ‘inter-state’ dimension relates to how the global diffusion of power and political authority create increasing misalignments between governmental decision-making and spheres of affected stakeholders: whilst individuals’ lives are regularly influenced by decisions made by foreign governments, they are yet unable to meaningfully participate in, and impact these decisions. Finally, the ‘global’ dimension relates to how the transfer of regulatory authority from the state to global governance bodies, complicates individuals’ ability to influence decisions at the global stage, which constrain their life opportunities.

Adding to this descriptive-analytical claim, the research investigated, in Chapter IV, how political voice deficits are also fashioned at present, by the global commercial operations of

private actors, namely, those of private ICT companies. In this context, Chapter IV has carefully examined broad social science literature on the operations of ICT companies. It lay bare how the digital infrastructures controlled by them have become the principal medium through which individuals communicate and manage their social and political relations; and how the particular ‘public’ qualities of their regulatory endeavours in this arena—as a new form of global governance—lead to the fragmentation of transnational communicative spheres and the pollution of information. These outcomes, in turn, adversely impact both the horizontal, and consequently, the vertical dimensions of political voice and its four democratic functions, thus adding to existing political voice deficits analysed in Chapter II, and creating a global ‘political voice deficit matrix’.

The second prong of the argument, is an analytical-normative claim according to which this global ‘political voice deficit matrix’—particularly its horizontal dimension—is a cause for concern for international law, and should be placed on the international legal agenda. This claim is grounded in an analysis of theories of democracy and the international legal theory and doctrine of ‘international community interests’ or ‘common international concerns’. Normative theories of democracy, which have been examined in-depth in Chapter III, establish the significance of political voice as an indispensable democratic tool. They assign it four democratic functions: an educative function, by enabling individuals to recognise their own political interests and develop a sense of community consciousness; an epistemic function, by enhancing the potential of political decisions to promote public interests and the common good; a liberating function, by securing neo-republican freedom; and an equitable function, by facilitating the attainment of social justice.

On the basis of this study, Chapter III has further engaged in a normative analysis of how these rationales for securing political voice within the domestic democratic context, extend beyond the state as well. It has explained how conditions of globalisation not only create misalignments between public decision-makers and affected stakeholders, but also lead to the formation of new transnational ‘political communities’ of stakeholders, bound together by their subjection to common risks and common sources of power and influence. Political voice and its educative and epistemic functions, are thus transnationally relevant. This normative analysis has then been ‘picked up’ in Chapter V which argued that political voice, based on its democratic functions and their transnational relevance, should be theorised as an interest that is shared across borders, and thus as an ‘international community interest’.

The final prong of the argument, is a doctrinal-analytical claim regarding the potential role of international law in mitigating the challenges that the research describes and theorises.

Here, Chapters V and VI explored whether and how international law, as a legal framework, is equipped to address the political voice deficits created by ICT companies. Following the theorisation of political voice as an international community interest in Chapter V, this chapter has further examined the international legal obligations that could arise from such theorisation. Specifically, in drawing inspiration from international climate change law, the chapter has examined whether and how this field's core customary obligations—the international legal principle of prevention and its due diligence requirements—may apply to address transnational horizontal political voice deficits. It has concluded in this context, that states could and should be understood as bound by due diligence obligations to prevent, or at least minimise, the harm caused to political voice by the operations of ICT companies from within their territories or jurisdictions.

Based on this analysis of international legal theory and doctrine, the research has investigated, in Chapter VI, how these international legal obligations may be enforced. It has considered two possible avenues for enforcement—horizontal enforcement on the international legal plain via the application of the laws of state responsibility and international adjudication; and the enforcement of international law in domestic courts. As regards the former, the research has centred on the *erga omnes* character of the principle of prevention, to contemplate whether it expands on states' ability to enforce this obligation against states who fail to uphold it. The complex conclusion was that in strictly jurisprudential terms, it is debatable whether the *erga omnes* character of the principle of prevention confers a general right of standing in international courts. And yet, considering the effects of *erga omnes* more broadly, it might still positively impact states' cooperative tendencies in a way that contributes to a general adherence to the norm.

In its final section, the research argues that the more promising avenue for enforcement is through domestic courts. Drawing on the *Urgenda* case, this final section has examined to what extent the principle of prevention may be applied by domestic courts to dictate or constrain governmental action in areas of 'common international concern'. This analysis has concluded that domestic courts may serve as important guardians of political voice, with the potential to ensure its availability and robustness within, across, and beyond borders.

What next?

This dissertation paves the path for several avenues of future research:

- (1) **The role of international law in creating and sustaining horizontal political voice deficits.** The international legal scholarship analysed in Chapter II expounds how

international law's structural deficiencies help create and sustain political voice deficits. These analyses all centre on the *vertical* dimension of these deficits: on the challenges posed to vertical information exchanges and communications between public decision-makers and affected stakeholders, within and beyond the state. They overlook, however, international law's role in creating the *horizontal* dimension of these deficits.

In centring on how *private* ICT companies fashion such horizontal political voice deficits, this research also gives rise to important questions regarding *international law's* role in this context, which have been left out of its scope. Namely, this research alludes to the ways in which international law itself, facilitates the uncontrollable and monopolistic power of private ICT companies to regulate transnational discursive spheres in ways that cater exclusively to their private interests. This issue is set in the broader context of international law's failure to treat private companies as regulatory actors who often wield forms of public power; its failure to consider them as international legal subjects, and to impose on them legal responsibilities. Much has been written about this failure and its implications in the field of human rights. This research exposes yet another implication: the creation of horizontal political voice deficits and their consequences for individuals' democratic well-being and for the viability of democracy itself.

Future research should thus widen the lens adopted herein, to question, more broadly: do the structural deficiencies of international law, as a legal framework, also create and shape horizontal political voice deficits? If so, how? And what are the implications?

- (2) **The legal responsibility of private ICT companies.** This first issue leads us directly to the second research avenue paved by this dissertation: exploring the legal responsibilities of private companies to prevent, or at least mitigate, the harm caused to political voice by their commercial activities and regulatory endeavours.

Chapters V and VI have examined how *states*, in applying international legal principles, could prevent the harm caused to political voice and transnational discursive spheres. This focus on the role of states is justified given the above-noted failings of international law, which still regards only states as its primary subjects, whilst enabling private commercial actors like ICT companies to fly under its radar. This does not mean, however, that private actors do not have the capacity, or the interest, to partake in regulatory initiatives which would mitigate the harmful consequences of their own actions. In fact, for the past several decades transnational corporations have been engaging in self-regulation, co-regulation, and meta-regulation in the fields of human and labour rights, in response to public pressure

and the regulatory threats imposed on them by states. Normative studies in political science even suggest that such forms of private transnational regulation might prove more effective in achieving the intended consequences of international legal regulation.

Future research should thus widen the scope of enquiry of possible regulatory responses to the challenges posed to political voice by ICT companies, to consider how these companies *themselves* might partake in efforts to curb the adverse consequences of their own activities. One example of self-regulation, would be for these companies to notify their users regarding their personalisation strategies, much like tobacco companies give notification of the harmful consequences of smoking. Research in this area would draw on empirical, theoretical, and normative research in the fields of new governance and transnational private regulation, which advance an expansive view of private actors' regulatory capacities and their potential.

- (3) **The use of algorithms in public decision-making.** In Chapter IV, the research has touched briefly upon another way in which novel digital technologies create political voice deficits, namely, by the use of algorithms in processes of public decision-making. The challenges posed by the use of algorithms—and machine-learning algorithms (MLAs) in particular—in public decision-making, merit, however, further attention.

Present legal research in this field centres on whether the use of MLAs in public decision-making is compatible with administrative law principles which provide the relevant legal framework for addressing questions regarding the legitimacy of these processes. Administrative law principles, however, are fundamentally grounded in the deeper axiomatic and implicit assumption that the public decision-maker is *human*. Thus, even if the use of MLAs in public decision-making was made fully compatible with administrative law principles, such use would arguably still raise legitimacy concerns given that the basic assumption of a human decision-maker no longer applies.

Future research avenues should thus explore the legitimacy concerns raised by the use of algorithms in public decision-making; and examine what legal rules or principles should complement administrative law principles in order to ensure the continued legitimacy of these processes in the eyes of affected stakeholders, and thus the continued viability of democracy amid technological advancements.

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