Transnational Governance and Democratic Legitimacy

A Conceptual Overview

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1. Introduction

In an ever-more interdependent world, the need for more, regional and global, collective action has increased drastically. The range of public goods has expanded, and now includes sustainable development and growth, halting of the proliferation of weapons of mass-destruction (WMD), as well as financial stability and combatting of global poverty. New forms of cooperation have developed, which include governments, International Organisations (IOs), non-governmental organisations (NGOs), the corporate sector, and – even – (powerful) individuals as actors. Most of these collaborations fall under the generous heading of "transnational governance", a catch-all concept encompassing multiple forms of institutional innovation, and often informal ways to address transborder problems and challenges. Since transnational governance involves more than states and formal treaties, it raises the question of the democratic quality of the procedures of decision-making, and hence the legitimacy of the policy outcomes.

This paper maps out and examines the main academic approaches to the issue of democratic legitimacy of transnational governance. Much of the academic debate centres around the European Union's democratic legitimacy, and the opportunities and possibilities to overcome the EU's generally recognized "democratic deficit." The majority of reservations regarding the EU's postnational democracy equally apply to the even bigger challenge of global or transnational governance. In conjunction with the debate on the need, or chimera, for a cosmopolitan democracy, we can look back on two decades of inspired academic debate on why and how transnational governance can be imbued with both a democratic spirit and democratic procedures, assuring the legitimacy, and thereby effectiveness of (regional and global) collective action.

A further purpose of this paper is to offer conceptual guidelines for the case-studies that complete this Study. It argues that democratic legitimacy can be analysed through five prisms: (1) representation; (2) accountability; (3) transparency; (4) effectiveness; and (5) deliberation.

Representative democracy is the model based on the experiences of states, and it remains the standard. Governments claim democratic legitimacy because they are elected by their people. Although this may appear to be a straightforward model, it becomes more complex once we examine the assertion that even supranational institutions are legitimized, as decisions are made by diplomats representing their elected governments. The question then arises: when does the chain of representative legitimacy break down? Moreover, should we see representation (one man, or even

one country: one vote) as the alpha and omega of democracy, particularly given the absence of a coherent "people" (or demos) on the regional and global level?

Accountability assumes that decision-makers can be asked to take responsibility for the initiatives, actions, and policies they have agreed to. When things go well, legitimacy is bestowed on decision-makers, while if and when things go wrong, it should be clear who should bear the brunt of criticism, and who should be called upon to make amends. The lack of accountability is quickly becoming a recurrent problem in transnational governance, giving rise to the dystopia of the G-zero, the notion that on a global level, no-one is really in charge, and no-one can be held accountable for initiatives and policies that emerge from IO's, networks, groups, and informal bodies and structures.

The factor of transparency presupposes that those who shape and make decisions are prepared to explain their motives (interests), as well as the broader aims, to justify their actions. All the stakeholders engaged in transnational governance are supposed to openly acknowledge their participation, explicate their goals, and provide openness about the strategies and resources they use. Transparency is required to assure a certain measure of public scrutiny, and is a prerequisite to accountability. Offering openness also paves the way for the "level playing-field", which is necessary to ensure that democracy is not just achievable for actors with deep pockets.

The prism of effectiveness is based on the idea of output legitimacy. Considering transnational governance is generally new, and often technical in nature, it tends to be judged on the basis of performance and usefulness, rather than on its procedural democratic credentials, or on normative aspects such as justice and fairness. Though understandable, examining its efficacy is a rather precarious way to appraise the democratic legitimacy of transnational governance.

Lastly, deliberation is a new, and somewhat vague, aspect of democratic legitimacy. Based on the work of Jürgen Habermas, deliberation presumes a process of reason-giving, a practice based on give-and-take, and of critical scrutiny of arguments, strategies, and objectives. It is based on the ideal that governance processes are not only transparent, but also open and accessible to most, if not all, who have a stake in dealing with problems collectively.

This paper examines the problem of democratic legitimacy of transnational governance by looking carefully at, and through, these five prisms. It concludes that they all have their merits; and that postnational democracy can only be achieved by taking their concerns seriously, and taking concrete measures to address them.

2. Innovations of Transnational Governance

When does a paradigm shift? What does it take to change the parameters we use to analyse economic, social, and political processes? Or are the discussions about conceptual and theoretical issues merely a matter of fads and fashions, hiding the "fact" that our world will forever be based on the Realpolitik of states, national interests and international anarchy? The academic debate on the relevance and future

of transnational governance covers a wide range of perspectives, from Daniel Drezner, who suggests that Great Powers still determine most (if not all) of the major rules and regulations that govern international affairs, to former United Nations Deputy Secretary General Mark Malloch-Brown, whose book The Unfinished Global Revolution (2011) claims that national governments are no longer equipped to address complex global problems.[1]

Arguably, it was opened by the seminal work edited by James M. Rosenau and Ernst-Otto Czempiel, Governance Without Government: Order and Change in World Politics (1992). In this book, the main questions were introduced that continue to guide research on transnational governance: What is the role of states and International Organizations in a new, globalizing world order? And what does democracy and citizenship mean in a postnational context? Apart from this academic debate – which is, or at least should be, based on rigorous, disinterested study –, we can recognize a political debate on the desirability of transnational governance. Even if global problems could be effectively tackled by transnational governance, is giving up state-based democracy and sovereignty not too high a price to pay? Should the state encourage and participate in transnational governance, or only accept it as a necessary evil? The answer to these questions largely depend on one's understanding of what makes a "good society", and, hence, one's political beliefs or even one's ideology.

Against the background of these on-going academic and political discussions, there is one constant: a remarkable institutional innovation in global politics. Both academics and policymakers acknowledge that states – especially small and medium-sized states – are seriously challenged by a wide variety of problems that fall outside of their territorial jurisdiction. From health and disease to financial regulation, and from climate change to cybercrime, global problems can no longer be effectively handled by states. Even classical international cooperation, be it through intergovernmental organizations and/or treaties, seems to have reached its limits, and perhaps even its nadir. Gabriel Goodliffe and Stéphan Sberro recently argued that the G20 summits have "degenerated into ritualised exercises in sterile debate, empty grandstanding and vacuous promise-making, bringing the organisation's effectiveness and even relevance increasingly into question."[2]

A similar damning conclusion is now drawn on the usefulness of intergovernmental negotiations to tackle climate change. After two, more-or-less ineffective global summits (Copenhagen in 2009, and Durban in 2011), the December 2012 Doha Climate Change Summit (Qatar) again failed to reach consensus on extending the Kyoto Treaty. In Doha, more than 17.000 participants – including NGOs, experts, business leaders, and celebrities – debated the urgency of addressing climate change.

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[1] Daniel W. Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton, N.J.: Princeton University Press, 2008); and Mark Malloch-Brown, *The Unfinished Global Revolution: The Pursuit of a New International Politics* (London: Penguin, 2011).

[2] Gabriel Goodliffe and Stéphan Sberro, "The G20 After Los Cabos: Illusions of Global Economic Governance", *The International Spectator*, vol. 47, no. 4 (December 2012), p. 2.

However, behind the scenes, the real players, being the Heads of State and Government, did not reach a consensus, apart from promising to meet again in France, in 2015. This public display of the limits of intergovernmental negotiations is only the latest in a long, and slightly depressing series, starting with the launch of the World Trade Organization's (WTO) Doha round in 2001; a round of multilateral talks that has come to nought, and has almost completely run out of steam.

Given the obvious and increasing inadequacies of existing intergovernmental frameworks, political space has opened up for institutional innovation, particularly for private actors like NGOs and companies to engage in their own norm-setting, rule-making, implementation, monitoring, and enforcement activities and competences. Academic literature on these new modes of regulations and private authority is flourishing.[3] And rightfully so, since the institutions that matter most to solving global challenges and problems are no longer the "usual suspects", but the transnational governance institutions that are the focus of this Study. Despite the fact that governance innovation is far from new (the older transnational governance set-ups date from the Middle Ages),[4] it remains hard to shed the intellectual shackles of state-based thinking. This may not apply to the well-informed academic and policymaking elite, but it certainly affects most media reporting and the collective imagination of the interested layman. What we see on TV and read in newspapers are "summits", in an EU or UN configuration, of toothless political leaders grappling with challenges that are clearly too hard to handle.

But these summits are merely the visible top of the global policy-iceberg. What is underreported, and thereby invisible to the inquisitive public eye, are the transgovernmental policy networks that develop new capacities to attend to shared problems, build frameworks for collective action based on market incentives, in addition to moral suasion. This is not to say that these new policy networks are always effectively managing globalization's challenges. As this analysis on the legitimacy of transnational governance will bear out, most initiatives are beset with the all too familiar problems of competing interests, the asymmetry of power and information, and the level of transaction costs. Still, understanding the nature, scope, and impact of transnational governance innovations is a prerequisite to help policymakers in their efforts to cope with the new trials related to globalization. And, as this Study suggests, this should occur, preferably, by complying with a basic standard of democratic legitimacy.

Before examining the five prisms of democratic legitimacy, a brief academic review of the key concepts and assumptions of this Study is called for. For the definition of "governance", it follows the description of Thomas Hale and David Held: "[T]he process and institutions, formal and informal, whereby rules are created, compliance

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[3] Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford and New York: Oxford University Press, 2012); and Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002).

[4] Avner Greif, *Institutions and the Path to the Modern Economy: Lessons from Medieval Trade* (Cambridge: Cambridge University Press, 2006).

is elicited, and goods are provided in pursuit of collective goals."[5] Hale and Held define "transnational" as follows: "[A]ctivities, institutions, actors or processes that cross at least one border, especially when actors other than national governments are involved."[6] Perhaps the most tricky and open question concerns the definition of "innovation", mainly because historians will rightly contest that transborder governance is new, given that these kind of arrangements have come and gone at different times and places. For example, the Hanseatic League was a "late-medieval network of economically largely independent long-distance trade merchants which was based on trust, reputation and reciprocal relations (…) By institutionalizing the rules of conduct, they facilitated cooperation, promoting and ensuring a peaceful culture of negotiation and exchange based on the honesty and reliability of the members."[7] Given the historical example of the Hanseatic League network, we should perhaps be more hesitant in using the labels "new" and "innovative." In a way, transnational governance harks back to the pre-modern era, a period not yet dominated by states. As Stephen J. Kobrin suggests in his seminal article Back to the Future: Neomedievalism and the Postmodern Digital World Economy: "The neomedieval should be seen as an inter-temporal analog of comparative political analysis. It allows us to overcome the inertia imposed by our immersion in the present and think about other possible modes of political and economic organization."[8]

Indeed, overcoming intellectual inertia and opening up thinking space on new economic and political configurations are the objectives for this Study. However hard it may be to imagine a viable democracy "beyond the state", we should acknowledge two things. First, history offers us many examples of political legitimacy in widely divergent times and places. Second – and perhaps most important –, we may have no choice but to envision, and work hard toward designing and creating, "new", "innovative" and preferably democratic transnational governance arrangements. Given the déconfiture of traditional intergovernmentalism, academics, policymakers and the wider public may have few alternatives to embracing the wide variety of transgovernmental networks, arbitration bodies, multi-stakeholder initiatives, voluntary regulation systems, and finance mechanisms. Perhaps the only real alternative to transnational governance is what Roger Scruton labels "local sovereignty", based on small communities taking local responsibility.[9] Be it

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[5] Thomas Hale and David Held (eds), *Handbook of Transnational Governance: Institutions and Innovations* (Cambridge: Polity Press, 2011), p. 12. Other definitions can be found in James Rosenau's ground-breaking work *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992), co-edited with Ernst-Otto Czempiel.

[6] Hale and Held (2011), p. 15.

[7] Margrit Schulte Beerbühl, "Networks of the Hanseatic League", *EGO – European History Online* (13 January 2012). Internet: http://www.ieg-ego.eu/

[8] Stephen J. Kobrin, "Back to the Future: Neomedievalism and the Postmodern Digital World Economy", *Journal of International Affairs*, vol. 51, no. 2 (Spring 1998), p. 365. See also Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford: Oxford University Press, 2006).

[9] Roger Scruton, *Green Philosophy: How To Think Seriously About the Planet* (London: Atlantic Books, 2012).

impractical, as small groups will have difficulties in dealing with multinational corporations or tackling climate change, Scruton's alternate vision of democratic localism fits well in the neo-medieval metaphor, and should warn us that transnationalism may also have its drawbacks and opponents.

So, how can transnational governance be imbued with a democratic spirit and democratic procedures, assuring the legitimacy of collective action?

3. Representation – The Limits of Electoral Rectitude

Representative democracy is the model based on the experiences of states; it remains the standard. Governments claim democratic legitimacy because they are elected by their people. It informs eminent distinctions between "state" and "non-state", and between "public" and "private".[10] Our familiarity with the state and representative democracy hides the fact that this historically specific manifestation of authority is only one of many. As Hans Krause Hansen argues: "[T]he making and contestation of authority are basically relational, socially constituted, and challenge conventional social distinctions".[11] The state is unique in the sense that it is accountable through public institutions, and that its authority relies on the active participation of citizens in one public sphere. Non-state actors, on the other hand, may rely on a variety of smaller groups and "micro-spheres". Through elections, citizens select their "representatives", usually involving clear procedures regarding accountability and transparency (see sections 4 and 5).

Although this may look like a straightforward model, it becomes more difficult once we examine the claim that even supranational institutions are legitimized, since decisions are made by diplomats and politicians representing their elected governments. The question then arises: when does the chain of representative democratic legitimacy break down? This is a particularly pertinent question since legitimacy is by its very nature a subjective concept (based on what the Germans call Rechtsgefühl). Even the state has often taken centuries to penetrate "its" territory with public authority, forming the identity of "its" people within the now well-known (and slightly shop-worn) Westphalian mould. Formally, representative democracy may legitimize decisions, all the way up from the local, national, regional to the global level. Yet, if this link of representation (or delegation) is not subjectively felt and experienced, "democratic legitimacy" turns into a mere label, or even a charade or deception. Especially postmodern scholars like Jean Baudrillard emphasise the alleged "crisis of representation", arguing that the very practice of representation presupposes clear interests and a solid identity, which can be taken for granted.

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[10] Sonia Alonso, John Keane and Wolfgang Merkel (eds), *The Future of Representative Democracy* (Cambridge: Cambridge University Press, 2011).

[11] Hans Krause Hansen, "Investigating the Disaggregation, Innovation, and Mediation of Authority in Global Politics", in Hans Krause Hansen and Dorte Salskov-Iversen (eds), *Critical Perspectives on Private Authority in Global Politics* (Houndsmills: Palgrave Macmillan, 2008), p. 5.

Baudrillard and other critical theorists claim that the latter assumptions are wrong, which would make representative democracy organized fraud.[12]

Representative democracy's troubles have deepened by the on-going economic and financial crisis. This crisis has shown that national authorities do not possess the instruments to prevent and deal with major shocks in the economic and financial system, and are under pressure of international bodies such as the IMF and the European Central Bank (ECB) to endorse austerity measures that may benefit the interests of businesses, rather than those of the general public. Therefore, in a recent conference of the presidents of European national parliaments, it was discussed whether the "legitimacy of representative democracy, including Parliaments, is being put into question, as those institutions are perceived as being reduced to rubber-stamping policies devised by technical bodies with no democratic legitimacy or accountability."[13]

The crisis of representative democracy can also be explained by examining the changing political culture in most Western societies. Whereas the process of representation used to be firmly anchored along a left-right continuum, most deeply entrenched social, cultural, and ideological chiasms and antagonisms have reduced, or even disappeared. As a result, citizens are increasingly guided by short-term personal advantages, adding to the growing number of swing voters. Franklin Rudolf Ankersmit observes that "most of the dramatis personae of representative democracy – the political party (…), the legislative power, the executive power – are all on their way out."[14] Ankersmit therefore foresees a new form of "plebiscitary democracy", in which the role of citizens is limited to passively approving or rejecting the performance of bureaucrats and experts in elections.

These practical problems and theoretical obstacles explain the complications national authorities and International Organizations face in designing credible and workable models of representative democracy. The debate within the EU on how to arrange qualified majority decision-making (in the Council of the European Union) has been longstanding and painstaking. From 2014 onward, there will be needed a "double majority" of 55% of the member states representing 65% of the population of the EU to adopt an act. In the IMF, decision-making is even more byzantine, since it uses a complicated quota system principally based on the financial weight (and contribution) of its member states. The UN Security Council system of five permanent members (with veto power) and ten (non-veto) rotating members, is particularly glaring and unsatisfactory. In these three cases – the EU, IMF and UN Security Council –, the debate centres less around the need for reform in decision-making than on the manner

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[12] Jean Baudrillard, *Simulacra and Simulation* (Ann Arbor: The University of Michigan Press, 1994); and Jenny Edkins and Nick Vaughan-Williams (eds), *Critical Theorists and International Relations* (London/New York: Routledge, 2009).

[13] "Is Representative Democracy in Crisis? Challenges for National Parliaments", *European Conference of Presidents of Parliament Background Paper* (5 July 2012), p. 2.

[14] Franklin Rudolf Ankersmit, *Political Representation* (Stanford: Stanford University Press, 2002), p. 128.

in which this is to be achieved. For all three, it is clear that representation (and delegation) alone fails to generate democratic legitimacy.

Although the idea of representative democracy is still alive and well (witness the debate on beefing up the European Parliament,[15] or on the re-arrangement of quotas and voting procedures in the IMF), the practice of this model faces harsh criticism. The theory that an elected official can be relied upon to be the stand-in for a varied and complex community of constituents on an equally varied and complex set of issues, has become hard to sustain.[16] Since ideology guides neither the electorate nor politicians, the need for more feedback-loops than one vote every four to five years is evident. So we search for alternatives. Does the crisis of representative democracy suggest that non-state actors – from NGOs to lobby groups, and from civic groups to multinational corporations – should play a bigger role in policymaking, on all levels? Or should we acknowledge that today's policy environment calls for different forms of democratic legitimacy than delegation?

4. Accountability – Who to Blame?

One of the newer political nightmares revolves around the want of accountability of the economic and political elites for the events and developments in both their direct vicinity, and the world at large.[17] Especially when things go badly, our political leaders claim to be blameless, as if they are merely innocent bystanders and "policy-takers". "Don't blame us, blame the international financial markets!" has become the standard excuse of western policymakers, exonerating them from responsibility and hence from criticism. The problem is that this justification is no longer tenable. By not taking responsibility, national authorities implicitly acknowledge that they are becoming increasingly powerless, and that they lack the instruments and strategies to regain at least a modicum of control over the lives and destinies of those who have elected them into office.

The principle of accountability is a key element of democratic legitimacy, since it surmises that government officials — whether elected or appointed by those who have been elected — are (and can be held) responsible for their decisions and actions. Without accountability, elections and representative democracy have no meaning, and government would become unreliable, autocratic, or worse. This principle also involves putting in place sanctions just in case things indeed go wrong. As Christopher Rude and Sara Burke argue: "Accountability without sanctions for institutional failure is not meaningful if the objective (…) is to create more socially

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[15] See Juan Mayoral, "Democratic Improvements in the European Union Under the Lisbon Treaty", *EUDO/EUI* (Fiesole, February 2011).

[16] Jeremy Gilbert, "Postmodernity and the Crisis of Democracy", *Opendemocracy.net* (May 28, 2009).

[17] Ian Bremmer and Nouriel Roubini, "A G-Zero World", *Foreign Affairs*, vol. 90, no. 2 (March/April 2011).

responsible and democratic institutions."[18] In less enlightened times, this used to be called "Let's kick the bastards out!"

Given the active and important role of International Organizations and non-state actors in transnational governance, accountability has become a requirement for all bona fide players, and not just for states. One could even argue that, since non-state actors lack plebiscitary legitimacy, they have to go the extra mile to publicly justify their cause, policies and procedures. Even terrorist organizations like Hamas now worry about their accountability, referring to the Islamic notion of al-shoura (consultation), derived from the Qur'an and the Sunna.[19] And NGOs, who face a serious "accountability deficit", are concerned about the issue as well.[20] Advocacy groups like Greenpeace and Human Rights Watch claim the moral high ground, although a clear mandate from a significant slice of (global) society is non-existent. As L. David Brown suggested (in 2008): "Civil social actors are among the many agencies for whom there are relatively few standards of transnational legitimacy and accountability (…) The transnational context has few established authorities that can create widely accepted laws and regulations, few mechanisms for articulating commonly held values and norms".[21]

This, however, is rapidly changing. NGOs not only have to account for the money they spend as contracted agents or donors, they also have to comply with a long (and growing) list of national laws and regulations, besides self-imposed ethical principles and guidelines. The INGO Accountability Charter is an example of the latter, and an initiative of international NGOs to demonstrate their commitment to accountability and transparency. As INGO acknowledges, the Charter is developed "as a response to increasing pressure from the media, businesses and governments", and aims to create *"balanced relationships with its diverse stakeholders, empowering these to hold it to account over its decisions, activities and impacts, with a view to continuously improve the organization's delivery against its mission."*[22] The Council of Europe's "Code of Good Practice for Civil Participation in the Decision-Making Process" (2009), is just another example of the development of new standards that makes NGO accountability possible.[23]

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[18] Christopher Rude and Sara Burke, "Towards a Socially Responsible and Democratic Global Economic System: Transparency, Accountability and Governance", *Friedrich Ebert Stiftung Briefing Paper*, no. 15 (New York, November 2009), p. 3.

[19] Ghazi Ahmad Hamad, "The Challenge For Hamas: Establishing Transparency and Accountability", *DCAF Working Paper* (Geneva, 2006), p. 3.

[20] "International NGOs must address their accountability deficit", *Povertymatters Blog, The Guardian* (February 9, 2012).

[21] L. David Brown, *Creating Credibility: Legitimacy and Accountability for Transnational Civil Society* (West Hartford: Kumarian Press, 2008), p. 20.

[22] INGO Accountability Charter (Internet: ingoaccountabilitycharter.org/). Charter members include Amnesty International, Greenpeace, Oxfam, Cordaid, and Transparency International.

[23] Internet: http://www.coe.int/t/ngo/code_good_prac_EN.asp?

These codes of conduct emerge because NGOs themselves acknowledge that their accountability is an asset, adding to their credibility and social power.[24] Given the absence of an official electoral mandate, non-state actors have to assure that at least their accountability is in order. But, as a 2006 UN Report on NGO accountability argues, "The question of organizational accountability is seen as a bureaucratic hurdle at best, and at worst as a threat to achieving an NGO's aims. Some fear that any toughening of accountability may lead to an overbearing influence from funders and governments, which could then lead to co-optation and a deflection of original purpose, or lead to the stymieing of innovation and reducing the diversity of NGOs."[25] What is more, NGOs also fear that too much accountability may result in a so-called "compensation culture", in which any failure to achieve the stated objectives will lead to litigation. This explains why many NGOs and non-state actors may only pay lip-service to accountability, and why most of the arrangements remain based on good intentions, self-regulations, or, at worst, window-dressing.

But transnational governance obviously is not limited to value-based advocacy groups, but also involves lobbies, corporations, and the media. Most western governments, as well as the EU and UN, have their own codes of conduct, registration systems, or even a Lobbying Accountability and Transparency Act (like the United States, 2006). But ultimately, accountability is about answerability and responsibility. Not taking responsibility for one's actions directly undermines democratic legitimacy. Recent experiences with collapsing banks and financial institutions have taught that some non-state actors (i.e. corporations) are "too big to fail", since their continued existence makes them "systemic".[26] By freeing these financial institutions from the ultimate accountability of the market – since they cannot (be allowed to) go bankrupt –, their legitimacy is seriously undermined, making them vulnerable to fierce criticism.

5. Transparency – Creating Glass Houses

Transparency is essential to accountability, and vice versa. Accountability requires transparency, because the general public has need of the disclosure of information to make policymakers assume responsibility for their decisions and activities. Transparency requires that the decisions and actions of those in government are open to public scrutiny, and that the public has a right to access such information. Both concepts are central to the very idea of democratic (transnational) governance. The objective is to create a translucent, honest, and fair process of deliberation, policy and decision-making, as well as implementation. In short: transnational governance should be a house of glass, clear and accessible. Characteristically, reality looks markedly different.

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[24] Peter van Ham, *Social Power in International Politics* (London/New York: Routledge, 2010).

[25] Jim Bendell, *Debating NGO Accountability* (New York/Geneva: United Nations NGLS Development Dossier, 2006), p. xi.

[26] George G. Kaufman and Kenneth E. Scott, "What Is Systemic Risk, and Do Bank Regulators Retard or Contribute to It?", *The Independent Review*, vol. 7, no. 3 (Winter 2003).

International Organizations (especially those with an economic and financial focus, such as the IMF, World Bank, and the OECD) have been instrumental in turning transparency into an established global norm. Under the guise of neo-liberal marketization, transparency has been considered crucial to creating a level playing field for state and non-state actors. Using labels like the "publicity principle" and the "right to information", the transparency imperative has become a crucial part of the modern management attitude based on surveillance and control. The basic view is that citizens – like consumers – should have sufficient and reliable information in order to make good decisions. Transparency is a prerequisite for a functioning market, as well as for a functioning democracy. As we will discuss later (Section 7), transparency is also required for a public opinion to be formed within a public sphere. Ever since the Enlightenment (from Kant and Rousseau to Mills), access to information has been considered an important civil right.

The US Federal Freedom of Information Act (1966) is only one of many codifications of that important right, making transparency the global standard. Particularly during the Cold War, the US has actively used its influence in International Organizations (especially the IMF and the UN) to promote transparency as a means to democratize the non-western world, encouraging a new social contract between state and society in autocratic regimes still clinging to secrecy and nepotism.[27] These were the times of Confidence and Security-Building Measures (CSBMs) between the US and the Soviet bloc, creating transparency on nuclear missile sites, troop movements, on top of military research and development, particularly in the field of chemical and biological weapons. Where trust is low (e.g. between Iran and the West), transparency offers opportunities to remove fears and create confidence.

As accountability, transparency does not come spontaneously, but takes hard work. The NGO Transparency International has been at the frontline of working towards "a world in which government, business, civil society and the daily lives of people are free of corruption." By exposing corrupt regimes and bringing the culprits to justice (along with seizing their illicitly gained riches), Transparency International is one of the watchdogs keeping governments, businesses, and NGOs on their toes (and hopefully honest)[28]. This drive towards transparency has benefitted from the practice and mantra of "management" that now dominates all institutions and bureaucracies. This has resulted in what is labelled an "audit society", based on the dual principles of accountability and transparency.[29] Consequently, set-ups like the International Accounting Standards Board (IASB) and the International Financial Reporting Standards (IFRS), as well as the standards devised by the Basel Committee on Banking Supervision, are crucial parts of the global "rules of the road".

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[27] Magnus Thor Torfason and Paul Ingram, "The Rise of Global Democracy: A Network Account", *American Sociology Review*, vol. 75, no. 3 (June 2010).

[28] Sam Moon and Tim Williamson, "Greater aid transparency: Crucial for aid effectiveness", *ODI Project Briefing*, no. 35 (January 2010).

[29] Michael Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1997).

However, what aspects of state and non-state actor behaviour merit transparency? During the Cold War, early reporting on troop movements was considered essential, whereas few care about this matter today. Clarity on decent bookkeeping rules has always been deemed important, whether this was the 16th century East India Company's accounting system, or today's IASB standards and interpretations. The areas of transparency therefore may change over time, reflecting the values and interest of a society. If transparency is not high on the agenda, it often indicates that society as a whole is not really interested in the issue at hand. Many corporate lobbies and NGOs invest heavily in making society care, and have successfully added social, environmental, and gender problems to the list of issues that require openness and public scrutiny. For example, most international corporations now feel obliged to elaborate on their "environmental and social footprint", especially in low-wage countries in Africa, Asia, and Latin-America. [30] This has given rise to new transnational governance arrangements like the Global Reporting Initiative (GRI) and the Carbon Disclosure Project. Most big international accounting firms now offer these kinds of "balanced sustainability reports" to their clients, indicating that monitoring "sustainability transparency" has become routine, like financial reporting.

Given transparency's contribution to democratic legitimacy, one could presume that more will surely be better. More transparency offers more openness, scrutiny and accountability. However, the downside of unrestrained openness became clear during the WikiLeaks imbroglio of 2010, when thousands of secret documents were placed online, ranging from the US Department of Defense Counterintelligence Analysis Reports, diplomatic cables on nuclear disarmament and climate change negotiations, to information on the BP oil scandal (of April 2010). The question was raised whether full transparency and the continued pressure of accountability undermines diplomatic and transnational cooperation. During every policy process, stakeholders make compromises and often murky deals to reach their objectives. A certain measure of confidentiality and even concealment is surely conducive to reaching agreement. One could even argue that one of the reasons why intergovernmental negotiations break down so often (as we have seen with the WTO Doha round, and the numerous Climate Change Summits), is the reluctance of governments to lose face. And one of the reasons why transnational governance is flourishing may well be because it ensures a certain level of discretion, if only for the reason that both the media and the general public often remain unaware of what is going on.

6. Effectiveness – When Doing Right is Not Enough

Colloquial speech suggests that "nothing succeeds like success", especially if we deal with "fair weather" arrangements. The trivial truth in these statements is that if things go well, especially during times of growing prosperity, the level of public scrutiny and accountability drops, and the verdict is relaxed. High levels of effectiveness (real or imagined), assure that sleeping (watch)dogs lie quietly, and that other markers of democratic legitimacy – representation; accountability; transparency – become

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[30] Sidney Tarrow, *The New Transnational Activism* (Cambridge: Cambridge University Press, 2005).

somewhat less pertinent. This psychological process especially applies in times of great uncertainty and crisis. If immediate action is called for (to deal, for example, with a major financial crisis or an existential security threat), the call for effectiveness eclipses other democratic practices and requirements. We may accept an unrepresentative UN Security Council, as long as it performs its job well. The same applies to most transnational governance institutions, whose claims to representing global interest and opinion are shaky (to say the least), and whose accountability and transparency often leaves much to be desired (the G7 and G20 come to mind). It even applies to the EU, whose grandiose Euro-project was only seriously questioned when the consequences of a Europe-wide monetary union proved a mixed blessing, particularly for southern member states.[31] This not only undermines the trust in the EU as an institution, but also – and arguable more importantly – in the effectiveness of liberal democratic systems to cope with globalization as well.[32]

Effectiveness is, therefore, a much-cherished route towards democratic legitimacy, an avenue most often taken if other options are unavalable or problematic.[33] However, how do we identify effectiveness? Can we measure it, or do we simply "recognize it when we see it?" As we know, success has many fathers; and if things go right, states, International Organizations, NGOs, and corporations are keen to claim recognition of their essential role. The still obscure Internet Corporation for Assigned Names and Numbers (ICANN) may serve as an example. ICANN is a non-profit private organization responsible for essential parts of Internet supervision. ICANN's representative legitimacy is non-existent, and efforts to make it more "democratic" were soon discarded. Its main credentials are its continued effectiveness in dealing with domain ownership issues in a technical and fair way. Turning ICANN into a UN-based institution, in order to boost its "democratic credentials", is widely seen as a step backwards, risking incompetence for the delusion of democracy. Some states would love to bring ICANN under their "democratic" control (such as Russia, India, and China). For now, ICANN's claim to effectiveness seems to be sufficient to weather these challenges to its independence.[34] Recent proposals to turn ICANN into a sui generis institution (i.e., not a classical IO, and not officially linked to the UN), and possibly moving from California to Geneva, should therefore be monitored carefully, and judged on the merits of its impact on ICANN's effectiveness and legitimacy.[35]

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[31] Paul Krugman, "Crash of the Bumblebee", *The New York Times* (July 29, 2012).

[32] Duha Altintag and Naci Mocan, "Joblessness and Perceptions About the Effectiveness of Democracy", *IZA Discussion Paper*, no. 4930 (Bonn, May 2010).

[33] See also the debate on "goal attainment" as a mode of effectiveness, Oran Young, *International Governance: Protecting the Environment in a Stateless Society* (Ithaca: Cornell University Press, 1994); and on "throughput legitimacy" (as a procedural aspect of legitimacy, Vivien A. Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output *and* 'Throughput'", *Political Studies* vol. 61, no. 1 (March 2013).

[34] Jonathan J.S. Koppell, "Pathologies of Accountability: ICANN and the Challenge of 'Multiple Accountabilities Disorder'", *Public Administration Review*, vol. 61, no. 1 (January/February 2005); and Kendra Srivastava, "U.S. and U.N. Battle for Internet Control", *Mobiledia* (June 20, 2012).

[35] Kevin Murphy, "Chehade Rules Out Move to Geneva", *Domainincite.com* (April 5, 2014).

How different the picture looks when things go wrong. No credit ratings agency has proclaimed a mea culpa, acknowledging that it has failed – either by incompetence or mendacity – to warn for the unacceptable risks banks have taken over the past few years.[36] Although these ratings agencies have, arguably for the first time, come under scrutiny of an indignant public opinion, this sector of transnational governance has shown neither the will, nor the capacity for self-cleansing. European and American financial regulators differ markedly on the best course of action, and the Basel Committee's framework for banking supervision ("Basel III") has, again, proven very lenient. Probably due to the non-existence of a credible (and better) alternative way to regulate the powerful and unruly financial sector, the current system of transnational financial governance remains untouched, despite its proven catastrophic track-record.

All this makes effectiveness an ambiguous, even somewhat awkward, element of democratic legitimacy. Has the time come to acknowledge that the world is too messy, too inter-connected and too dynamic to leave decisions in the hands of representative, accountable and transparent, but also sluggish and technocratic, decision-makers? Should we make a calculated trade-off between accountability and transparency on the one hand, and effectiveness on the other, as the recent WikiLeaks-debate may have suggested? Is effectiveness perhaps the principal reason why innovation in transnational governance has sprung up? This should make us cautious of nipping these new approaches to dealing with new challenges in the bud for the sake of procedural democratic principles. These dilemmas are awkward since they invoke memories of non-democratic theorists (like Michels, Pareto and Mosca)[37] who would happily sacrifice a bit of democracy for the sake of action and result. The allure of effectiveness certainly feeds on discontent with established diplomatic practices, and should therefore be approached with some caution.

7. Deliberation – Let's Argue!

Deliberative democracy is based on the value of public debate that is inclusive of a wide variety of different perspectives, including those of groups that tend to be excluded. Based on the work of political theorists like Jon Elster, Jürgen Habermas and Seyla Benhabib,[38] democratic legitimacy has been interpreted as a process devoid of power inequalities, based on public reasoning and non-manipulative dialogue. Transparency is a prerequisite for deliberation, since all participants are supposed to weigh arguments based on accurate and relevant information available to all. Diversity is equally important, since legitimacy is derived from the conscientious and equal consideration of all arguments and positions. Although deliberative democracy

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[36] United States Senate, Permanent Subcommittee on Investigations, *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse* (Washington DC, April 13, 2011).

[37] Robert A. Nye, The Anti-Democratic Sources of Elite Theory: Pareto, Mosca, Michels (London/Beverly Hills: Sage, 1977).

[38] Jon Elster (ed), *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998); Jürgen Habermas, *The Theory of Communicative Action* (Boston: Beacon Press, 1984); and Seyla Benhabib, "Towards a deliberative model of democratic legitimacy", in Benhabib (ed), *Democracy and Difference* (Princeton, N.J.: Princeton University Press, 1996).

has its critics,[39] it is clear that the appeal of a radical, participatory democracy is growing. The concept of "people power" underwrites concepts such as public diplomacy, place branding, and crowd sourcing. James Surowiecki's notion of the "wisdom of crowds" suggests that decisions taken by a large group, even if the individuals within the group are not always that intelligent, tend to be better than decisions made by small numbers of so-called "experts."[40] And, even in case the decisions are not "better", Habermas would argue that the practice of free moral discourses amongst equal citizens will contribute to their emancipation, which may be seen as a value and goal in itself.

Deliberative democracy has its roots in the Greek agora, or assembly, which was the centre of artistic, spiritual and political life of the city. Here, citizens could speak up, and make up their minds. Through delegation, the ideal of the agora is reflected in representative democracies, most notably by public debates in parliament.[41] The rise of the Internet in particular has opened new opportunities to broaden the public sphere, and to facilitate access to the agora. Modern media – from blogs to Facebook to Twitter – allow an unprecedented connectivity between people worldwide, eliminating borders for everyone who has access to the web on a laptop or smartphone. The consequences of these developments are not merely technological, but also social and political. Just as the Greek polis was constituted through action and speech (in the agora), modern media may equally create a new transnational (or cosmopolitan) community of active citizens.[42] The Internet already offers previously ignored and powerless non-state actors a cheap and easy way to get their voices heard, and to organize themselves to prepare for collective action. Surely, the rise of NGOs and a wide variety of advocacy groups can be explained this way. Deliberation generates democratic legitimacy by claiming that, regardless of outcome and accountability, all relevant voices have been heard. This process in itself is expected not only to produce the wisdom of crowds, but create the basis for a new cosmopolitan citizenship.

The concepts of deliberative democracy raises some fundamental questions on the feasibility, desirability and its possible dangers? Since a truly global agora is practically impossible (just imagine "town hall meetings" with a few million participants), much will depend on the practical, procedural rules of deliberative democracy. Here the UN Global Compact (UNGC) offers insight into the challenges to offer a fair deal for all. The UNGC (set up in 2000) is the UN's largest forum for discussion aimed at implementing the UN's Millennium Goals, involving governments, companies, labour organizations, and a motley crew of civil society representatives. During numerous meetings and Summits, this UN-based agora

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[39] Charles Blattberg, *Patriotic Elaborations: Essays in Practical Philosophy* (Montreal: McGill-Queen's University Press, 2010).

[40] James Surowiecki, *The Wisdom of Crowds* (New York: Doubleday, 2004).

[41] Christian Reus-Smit, "The Constitutional Structure of International Society and the Nature of Fundamental Institutions", *International Organization* vol. 51, no. 4 (Autumn 1997).

[42] Andrew Linklater, Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era (Cambridge: Polity Press, 1998).

opened its doors to any participant who was "serious about its commitment to work towards implementation of the Global Compact principles throughout its operations and sphere of influence, and to communicate on its progress."[43] This very openness has raised the criticism that the UNGC is not just a non-accountable talking-shop, but even offers opportunities for companies to "bluewash" their policies, and a way to avoid binding rules and regulations.[44] The lack of transparency in the rules of the debate, the absence of any accountability and sanctions, plus the window-dressing involved in participating in such a "noble" arrangement, has undermined the credibility and effectiveness of the UNGC.

Experiences with the UNGC can be considered part of a learning process, the first few steps en route towards cosmopolitan citizenship. These experiences have taught that modern technological means do not suffice to get access to the global public sphere, and to be heard and taken seriously.[45] Established political and economic elites will not hand over the keys to power without a fight. This explains the continued struggle of the World Social Forum, setting itself against the "elitist" World Economic Forum,[46] as well as the rise of the Occupy-movements across the world. Creating cosmopolitan citizens is a long-standing process, with ups and downs, requiring both opportunities (modern media) and political determination by an engaged elite (social movements). Functioning agoras remain fairly small in size, and rarely acquire a post-national basis (the EU and its European Parliament come to mind as a moderate success). Innovations in transnational governance make noteworthy case-studies, offering insight into the development of cosmopolitan citizenship, and reclaiming legitimacy by rekindling the oldest argument in the history of democracy: participation.

As Kurt A. Raaflaub argued, Athenian democracy in the middle of the fifth century was a remarkable system: "exhilarating, capable of mobilizing extraordinary citizen involvement, and achievement, enormously productive and at the same time potentially greatly destructive."[47] At that time, few imagined the triumph democracy would achieve throughout world history. Currently, reconfigurations of democratic legitimacy are essential to ensure the development of transnational governance. Although not (yet) "exhilarating", this process certainly is "potentially destructive", particularly for established, state-based models of democracy.

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[43] Internet: http://www.unglobalcompact.org/aboutthegc/faq.html.

[44] Global Policy Forum Europe (ed.) *Whose Partnership for Whose Development? Corporate Accountability in the UN System Beyond the Global Compact* (August 2007).

[45] Evgeny Morozov, *The Net Delusion: The Dark Side of Internet Freedom* (New York: PublicAffairs, 2011).

[46] Internet: http://www.fsm2013.org/ and http://www.weforum.org/

[47] Kurt A. Raaflaub, "Introduction", in Kurt A. Raaflaub, Josiah Ober and Robert Wallace (eds), *Origins of Democracy in Ancient Greece* (Berkeley and Los Angeles: University of California Press, 2007), p. 3.

8. Conclusions

The five prisms of legitimacy suggest that it is not analytically helpful to develop a list of criteria to measure or judge transnational governance's democratic credentials. Going through a simple check-list would not do justice to the intricate dynamic between the aspects of democratic legitimacy, as discussed above. A better system of representation may open opportunities for deliberative democracy, but undermine effectiveness; more accountability and transparency may result in deadlock and a reluctance to compromise. The importance of trade-offs between the five elements of legitimacy should be acknowledged. An increase or improvement of one or two legitimacy-markers will not always result in more democracy, on the contrary.

These nuances should make it easier to avoid simplistic recommendations on how transnational governance's legitimacy could be improved. It also sensitizes us to the truism that legitimacy is contextual, and that legitimacy depends both on the case at hand, and the actors involved. Democracy means something different when managing nuclear weapons than regulating banks. Not only are procedures markedly different, so are the expectations of (for example) transparency and accountability. Legitimacy is also grounded in national traditions. Needless to say, *Rechtsgefühle* vary between nations and continents, between political and religious creeds, and between classes.

Taken together, the conclusion can be drawn that the democratic legitimacy of transnational governance is highly circumstantial and complex. One of the main drivers of transnational governance is to be found in the flexibility and agility of new cooperative arrangements to solve shared problems. Since established multilateral processes are either too slow or ineffectual, transnational governance fills a gap and services a perceived need for at least basic "rules of the road." One could certainly argue that effectiveness – getting things done, creating results – is the main driver of governance. This implies that imposing the other markers of legitimacy on these informal, often transitional, processes (representation, accountability, etc.) may be unfair and unwise. However, the effectiveness of transnational governance structures may equally benefit from a boost in legitimacy due to greater accountability, transparency, and access of (all) stakeholders. It is all a matter of balance and nuance.

Two provisional conclusions present themselves. First, we should accept that transnational governance may not (and perhaps never will) have perfect democratic legitimacy, yet that it should pass a certain minimum requirement. An institution may be "good enough", may possess sufficient credentials, based on the five markers identified in this Study. What is more, striving for perfection (i.e., more accountability, transparency, openness, etc.), may well be counterproductive, forcing an ideal type on an inherently murky and sub-optimal social reality. Second, we should acknowledge the organic nature of transnational governance. The institutional architecture that is emerging is less Bauhaus than Gaudi. Institutions and arrangements come and go, flourish and dwindle depending on their relevance and effectiveness. It is political Darwinism in action. This implies that transnational governance's spontaneity is an asset, as is its rootedness in people power. Not always, but certainly often enough, it caters to ordinary needs and tastes, needs and tastes that are all-too-often forgotten and watered down by political elites negotiating on "our

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behalf." In this sense, transnational governance is a valuable antidote to what Roger Scruton calls the "dangers of internationalism."[48] Internationalists are "only too happy to transplant people from place to place, to abolish local attachments, to shift boundaries and customs in accordance with the inexorable demands of economic progress", whereas the cosmopolitan "is a nationalist – a believer in his own nation. But also a believer in all the other nations that have captured a corner of the earth".[49] For transnational governance to experience a democratic turn, the further development of cosmopolitanism will be essential.

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[48] Roger Scruton, "The Dangers of Internationalism", *The Intercollegiate Review*, vol. 40, no. 2 (Fall/Winter 2005).

[49] Scruton (2005), p. 35.