

Anomalous Administrative Law and Traces of Global Government:
A Possibility for Democracy?

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Global Administrative Law:
National and International Accountability Mechanisms for Global
Regulatory Governance

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1. Sober Contemplation of a Fantastic Possibility¹

If the very idea of a potentially democratic world government beyond the Westphalian nations but without the support of a global state is a utopian fantasy, then the burden of KKS is that the most sober and painstaking assessment of global administrative reality compels attention to just such a fantastic possibility. As so often it's the most careful and responsible patrons who break the most china in the intellectual boutiques.

In particular KKS advance two claims and a provocative speculation. The first assertion is that to a substantial, and growing, extent, rule making directly affecting the freedom on action of individuals, firms, and nation states (and the making of rules to regulate this rule making) is taking place, undemocratically but not unaccountably, in global settings created by the world's nations but no longer under their effective control. Call this the global government is in the making claim. It is relatively uncontroversial in the fields that KKS till, but it is regarded as counterintuitive, not to say nearly impossible

¹ This note grows out of and at times draws directly on a continuing collaboration with Joshua Cohen, and especially on a current paper on "Democracy Beyond the Nation State," presented to the conference "Democracy and Global Justice," at Washington University, April 1-2, 2005. For obvious reasons please report egregious errors to me alone, but kindly notify us both of subtle ones.

even on adjacent plots—for example, among philosophers investigating whether norms of distributive justice are globally applicable. The second assertion is that increasing the accountability of world government will require elaboration and diffusion of new forms of governance beyond the principal agent relations that deeply shape our ideas of the effective and legitimate delegation of authority. Call this the new accountability thesis. It is controversial, or at least conceptually underdeveloped in KKS's home precincts, and variously regarded as utterly implausible (in much economics) or nearly self evident (in the organizational sociology of the modern corporation or public school) in other domains. The third, and most tentative assertion is that new forms of accountability that prosper legitimately at the global level could be (re)introduced into national regimes, helping to re-invigorate democracy there by addressing long-standing problems regarding the legitimacy of delegating legislative authority to administrative agencies, and by extension increasing the overall (multi-level) democratic potential and accountability of the emergent global order. Call this the democratic boomerang hunch. Where the two claims are backed by KKS's own lived experience of global institutions and careful sifting of the relevant evidence, the hunch seems to grow out of the logic of their argument, and perhaps from their hopes, but not from their secure convictions: given their warranted beliefs about global government in the making and the spread of new accountability, the democratic boomerang is a possibility, but not, to them, an especially realistic one.

I am convinced by KKS's claims and believe that they can be clarified and extended in ways that add cogency to the democratic boomerang hunch. In this brief note, therefore, I argue that the global government in the making claim, by its emphasis on accountability, helps resolve a persistent puzzle, in what might be called the philosophy of globalization or the political theory of sovereignty beyond the nation state, regarding the conceptual possibility of a world government that is more than a confederation of nations but much less than a unitary global state (Part 2); that the new forms of accountability anticipate learning among principals and agents in ways that blur the distinction between the two roles, cannot be encompassed within an enlarged conception of the agent as the principal's trustee, and yet (as explicitly recognized by close students of EU governance formed in the principal-agent tradition) are easily

reached by apparently modest changes in current administrative practice (Part 3); that the forms of participation native to the new accountability create the possibility—but surely not the inevitability—of interactions between world publics and world government roughly analogous to the reciprocal shaping of state and nation or demos that gave rise to modern mass democracy (Part 4). Whether these interactions take place, and if so, whether they will give rise to a new form of democracy nationally and globally are still very open questions. But on this reading of KKS, stipulating the facts as they present them and hewing to structure of their argument, dismissing the possibility of global democracy, as often done, by saying “no demos, no democracy” is no more helpful than responding to the chicken and egg problem by saying, “no chicken, no egg.”

2. “A Distinct Global Administrative Space”

KKS reject “the classical dichotomy between an administrative space in national polities and inter-state coordination in global governance.” In their view

The rise of regulatory programs at the global level and their penetration of domestic counterparts means that the decisions of domestic administrators are increasingly constrained by substantive and procedural norms established at the global level; the formal need for domestic implementation then does no longer provide for meaningful independence of the domestic from the international realm. At the same time, the global administrative bodies making those decisions enjoy too much de facto independence and discretion to be regarded as mere agents of states. ... {Hence} international lawyers can no longer credibly argue that there are no real democracy or legitimacy deficits in global administrative governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts. National administrative lawyers can no longer insist that adequate accountability for global regulatory governance can always be achieved through the application of domestic

administrative law requirements to
domestic governmental regulatory decisions

Since KKS also reject the realist idea of an international anarchy of sovereign states, and its utopian inversion, a globe-circling state of cosmopolitan citizens, they are in fact breaking with the analytic categories which arose in Weimar debates and became—as Koskenniemi has elegantly shown—the foundations of the US variant of international relations theory. This break of course has antecedents, most notably, for present purposes, in the work of Keohane and Nye on the decline of the “club” system of inter-governmentalism. To underscore the distinctiveness of the KKS formulation, and provide further justification for their emphasis on accountability, let me briefly contrast their view of the space for world government with two others, one quite similar, the other apparently contrary.

The first is Anne-Marie Slaughter’s view of informal, de facto global governance formed by networks of administrators, tribunals and quasi tribunals. AMS and KKS agree substantially on the empirical accounts of global administrative development. The core idea derives from the Chayes and Chayes view of new sovereignty as “the capacity to participate in the international and transgovernmental regimes, networks, and institutions that are now necessary to allow governments to accomplish through cooperation with one another what they could once only hope to accomplish acting alone within a defined territory.” [AMS **40 STJIL 283**] But AMS is at great pains to avoid any characterization of the imbalance between (increasing) international constraint on domestic law and (decreasing) domestic constraint on international law making that yields the clear declaration above. Thus in recent writing AMS both

Vigorously and successfully demonstrates the effectiveness and growing importance of international tribunals and quasi tribunals (especially those able to hear complaints presented directly by private parties) independent of the states party to their authorization, refuting the claim by Posner and Yoo that only tribunals recognized to be fully controlled by their founding authorities can be effective, and

Argues that the independent tribunals are substantially constrained by their chartering members’ influence over appointments, dockets, and their own participation (generally, in the

lingo of principal-agent theory, to which we turn in a moment, the principal's power to recontract with their agents), as well as the background socialization of officials.

Of course all institutions, legal and otherwise, are constrained by their contexts. But we cannot examine the logic of *any* institution unless we take the constraints as provisionally or heuristically fixed and focus on the operation of rules and routines given those constraints. Because AMS, for many understandable reasons, resists the intellectual and political commitments which come with fixing the degree on constraints on global governance with the analytically requisite precision, she has to treat the new administrative developments as largely informal, transformative in their effects but almost inexistent from the point of view of the balance of power between the domestic and international levels. Right or wrong, and I go with right, the KKS formulation forcefully directs attention to the features of global administration to which we will have to attend if (as AMS has helped us see) there is indeed a distinct phenomenon under that name.

A second useful point of reference for highlighting the world government in the making claim is Nagel's recent argument that anything like world government with authority requiring legitimation, and triggering demands for distributive justice, is, despite the undeniable intensification of global interdependence, a practical impossibility. With the compression required for current purposes the argument goes like this:

There is no short list of normative principles from which universally applicable norms of justice can be derived. (the monism view, derived from debates about Rawls).

Rather, norms of justice (beyond the humanitarian standards or negative rights that are effective even in the absence of any organized cooperation) apply to our dealings only when, in recognition of our mutual dependency, we jointly assume political obligations; and the regulative principle to be applied in such cases varies according to the nature of the political obligations (what Rawls calls the political view of justice).

There could in theory be (infinitely) many constellations of political obligations, with corresponding norms of justice, on the notional continuum between humanitarianism and a world state that

makes all humanity subject to and therefore empowered to authorize democratically the same Hobbesian sovereign (Josh Cohen and I call this the pluralist political view, but it might as well be called the political view read to mean what it says).

But Nagel argues that the *only* situation triggering political obligations is the one in which all authorize the sovereign to make and enforce the same rules for all,

And given the evident impossibility of achieving Hobbesian sovereignty on a world scale, neither the increase in global interdependence, nor the increasingly explicit efforts to co-ordinate response to the higher order effects of this globalization, trigger political obligations—without which moral norms of distributive justice have no applicability either.

Of course most attendees of this conference, not to mention all attendees of any meeting of the World Social Forum, or most of the officials of the World Bank or IMF who have been yelled at by persons who have attended the World Social Forum, will recognize at once that philosophy's recent obsession with norms of distributive justice has blinded the able philosopher to the possibility (announced in the pluralist political view) that organized interdependence and cooperation in the absence of a state create political obligations and trigger normative demands that are greater than humanitarianism but may yet fall short of the full measure of equal respect and consideration that underpin explicit redistribution. A common name for the processual obligations arising from organization of interdependence and cooperation is accountability (including transparency, reason giving, standing of those affected). And once there is a rational for norms more demanding than humanitarianism on the process side, there is also a case for norms more demanding than humanitarianism on the outcome side: that is, for claims to a fair distribution of benefits and burdens. So we can understand the world government in the making claim as asserting both that global administrative law is an independent source of rules for individuals, firms and states, and that a condition of its being so is that it address accountability concerns arising from the political obligations it creates.

3. Accountability

But in just what way are the new rule-making institutions accountable? KKS give at best a fragmentary answer. At the outset, starting of course with the title of their paper, the suggestion is that we are on familiar terrain: global administrative law simply applies at the world level the procedural safeguards honed over the last century in the domestic administrative law regimes of the rich democracies. But upon reflection—writing is of course of way of thinking—they come to different conclusion:

Anomalous forms of domestic administrative law – informality, networks, cooperative structures – dominate the global level, and while in the domestic context the problems they create can perhaps remain unsolved without too much harm so long as most important regulatory programs are carried out through traditional legally binding instruments, this condition does not hold true globally.

Why these “anomalous” forms of administrative law, rather than the standard ones, diffuse is clear:

“Domestic administrative law is, despite all changes in recent decades still built around a core of command-and-control administration: of rules and decisions binding on private actors, emanating from a defined administrative actor. In global administration, no such core exists: most of it consists of international institutions with the power to make recommendations but not binding rules, or of regulatory networks with informal decision-making procedures and agreements. ...[All in all] the use of tools from domestic administrative law faces important limits, stemming mostly from the different structure of global administration: from the informality of its institutions, its multi-level character, and the strength of private actors in it.”

But what tools—what form of administration—will work when “command-and-control administration” through “rules and decisions binding on private actors, emanating from a defined administrative actor,” won’t? I take this mean, what kind of administration is possible

in world where principles can't usefully give commands to subordinate agents? To respond to that question I need to say a word about a key possibility condition of principal-agent relations, and about the class of accountability mechanisms that will work when that condition doesn't obtain.

The key condition is simply that *some* actor among those seeking to coordinate their efforts have a precise enough idea of the goal to either give precise instructions to the others or reliably recognize when their actions do or don't serve the specified end. So long as at least one actor can survey the space of possible solutions with the precision required by this condition, principal-agent relations are possible, though it turns out to be trickier than one might think to identify who is the principal and who the agent. If solutions can only be identified as they are pursued; if, in other words, actors have to learn what problem they are solving, and what solution they are seeking, through the very process of problem solving, then principal agent relations are impossible.

Let me illustrate this general point, and suggest (as concretely as the format of this note will allow) an alternative to principal agent administration by contrasting two recent discussions of accountability. The first, by Grant and Keohane, arose in the context of discussion with KKS and is a deliberate effort, prompted by the manifest difficulties of applying domestic accountability standards globally, to situate and transcend principal-agent analysis. But because it assumes an *ex ante* knowable world, it winds up, as I will show in a moment, exhibiting varieties of the principal-agent relation, not limits and alternatives to them. The second piece of writing, by Phedon Nicolaides, takes for granted the universal applicability of principal agent analysis, but, responding to actual developments in EU governance, relaxes this assumption and "discovers" a model of administration that provides accountability even in the absence of a clear specification of initial goals. [Phedon Nicolaides with Arjan Geveke and Anne-Mieke den Teuling. *Improving policy implementation in an enlarged European Union: the case of national regulatory authorities*. Maastricht: European Institute of Public Administration, 2003.]

The Grant Keohane view has been presented to this conference, so I will assume knowledge of the ambitious project of which it is a part and focus on what I take to be a confusion about the domain of principal-agent relations, and so, if you like, an illustration of the grip of this scheme of analysis even on those who are aware of its limits. Table 1, taken from Grant and Keohane, captures the essentials.

Two General Models of Accountability for Nation-States

	<i>Who is entitled to hold the powerful accountable?</i>	
<i>Power-wielders regarded as:</i>	<i>Those affected by their actions – Participation</i>	<i>Those entrusting them with powers – Delegation</i>
<i>Instrumental agents</i>	Ia “Direct” Democracy Actions of power-wielders are what those affected (the people) instructed them to do in this contingency.	IIa Principal-Agent: Power-wielders act as faithful agents of principals who empower them.
<i>Discretionary authorities</i>	Ib Populist: Policies followed by the power-wielders lead to outcomes approved by those affected; which leads those affected to confer additional powers.	IIb Trustee: Power-wielders perform the duties of their offices faithfully.

In direct democracy the electorate writes a detailed rule for elected officials, and they execute it. This is a principal agent relations where the agent essentially has no discretion. Think assembly line. Populism, as presented here, is a machine for a producing unaccountable officials: populist successes on this view ultimately result in a grant of power to the populist leader so great that she can, as the grim Brecht joke goes, more easily replace the people than the people can replace her. This leaves Burkean trusteeship as a candidate alternative to the principal agent relation. But a glance at Burke’s *Letter to the Electors of Bristol* and a moment’s reflection will suggest that this is not so.

You will recall that in the *Letter* Burke readily admits that he knows nothing about the particular affairs of Bristol or its electors: he has, he says, entered the contest just before the election, and can not be

expected to have any of what we would call local knowledge. But, he goes on to say, he does understand the connection between a city such as Bristol and England, and between England and its Empire, and between the many parts of the unwritten British constitution. This, and not local knowledge, is what will serve his electors, and he appeals on this basis for their votes. Burke in office can indeed be thought of as a trustee, but not a trustee of the interests of the electors of Bristol. The latter are the maker of a trust, which is controlled not by them, but by Burke, the trustee. The beneficiary of the trust is England, or the English people. Today we would say Burke is a technocrat—he understands complex relations that escape laypersons whose knowledge is purely local. The electors of Bristol (wisely) decided to delegate their control powers over the polity to him, to exercise on behalf of all citizens, citizens of Bristol of course included. In this sense the nominal agent has become the knowing principal, the actor with the effectively directive knowledge of what to do. This is a case of matching players to scorecard in a principal agent game, not playing another sport.

Consider next the work of Nicolaidis on policy implementation in the EU. The aim is simply to apply the tested and true principal agent framework to the ramshackle structure of the EU. Two oddities need to be taken into account. The first is that the principal, the EU, has multiple agents, the national administrative authorities. Agents being what they are, each of these will interpret the principal's instructions—a directive, say—in a self serving way; and the principle will of course be determined to minimize this agent "drift." The second, empirically motivated oddity is that the principal is presumed to have only a vague or provisional idea of its own goals. Thus sometimes self interested drifting by national administrative agencies will reveal possibilities that the principal has overlooked, and prefers more than any of the options entertained *ex ante*. In other words, the principal can sometimes learn from the agents. Since accountability cannot under these circumstances be established by comparing rule to performance—the performance is going to change the rule—how can it be achieved? The device is simple:

Accountability is strengthened not when the actions of the agent are constrained but when the agent is required to

explain and justify his actions to those who have the necessary knowledge to understand evaluate those actions. We conclude, therefore, that effective delegation must confer decision-making discretion to the agent, while effective accountability mechanisms must remove arbitrariness from the agent's actions by requiring him to (a) show how he has taken into account the impact of his decisions on others, (b) explain sufficiently his decisions and (c) be liable to judicial challenge and, preferably, to some kind of periodic peer review. The latter is very important because only peers have the same knowledge to evaluate the agent's explanations.

Accountable behavior in this setting no longer entails compliance in the sense of rule following, but rather provision of a compelling explanation for choosing, in the light of fresh knowledge, one way of achieving the common (sub)goal over others. At the limit principal-agent accountability gives way to peer review, in which decision makers learn from and correct each other even as they set goals and performance standards for the organization....

4. The Democratic Boomerang (to be supplie)