

BOOK SYMPOSIUM

From meditation to action – a research agenda for studying informal global rule-making: remarks on ‘Cosmopolitanism, publicity, and the emergence of a “global administrative law”’

Oliver Westerwinter 

Department of Political Science, University of St. Gallen, St. Gallen, Switzerland and Robert Schuman Centre for Advanced Studies, European University Institute, Fiesole FI, Italy
Corresponding author. E-mail: oliver.westerwinter@unisg.ch

(Received 31 July 2020; accepted 17 September 2020; first published online 28 December 2020)

Abstract

Friedrich Kratochwil engages critically with the emergence of a global administrative law and its consequences for the democratic legitimacy of global governance. While he makes important contributions to our understanding of global governance, he does not sufficiently discuss the differences in the institutional design of new forms of global law-making and their consequences for the effectiveness and legitimacy of global governance. I elaborate on these limitations and outline a comparative research agenda on the emergence, design, and effectiveness of the diverse arrangements that constitute the complex institutional architecture of contemporary global governance.

Keywords: Effectiveness; global administrative law; informal governance; institutional design; legitimacy; transnational public–private governance

In his sixth meditation on cosmopolitanism, publicity, and the emergence of a global administrative law, Friedrich Kratochwil critically engages with the emergence of a global administrative law.¹ He examines whether global administrative law provides a coherent set of principles against which the legitimacy of new forms of law-making at the global level can be assessed and investigates whether global administrative law enhances the legitimacy of these new forms of law-making. Kratochwil finds that it is questionable whether global administrative law provides a coherent and mutually supportive set of rules and that it fails to enhance the legitimacy and accountability of global governance institutions.

Contemporary global governance is characterized by a patchwork of institutionalized cooperation among states and a range of non-state actors.² Whether it takes the form of transgovernmental networks, informal intergovernmental organizations (IIGOs), transnational public–private governance initiatives (TGIs), or

¹See, generally, Kingsbury et al. 2005.

²Lake 2010.

private self-regulation, studies agree that over the past decades, and particularly since the end of the Cold War, informal governance and public–private governance have become important elements of world politics.³ Researchers have argued that these developments pose challenges for the democratic legitimacy and accountability of global governance.⁴ To address these, International Law scholars have proposed global administrative law as a set of procedures to guide standard-setting and rule-making within the new informal institutions.⁵ These procedures, so the proponents of global administrative law suggest, promote the democratic legitimacy and accountability of informal global governance institutions ‘by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make’.⁶

Engaging with these works, Kratochwil starts out by discussing various administrative law systems with a particular focus on the United States, France, and Germany. He emphasizes that each of these systems is deeply embedded in the legal tradition and culture within which it was developed. They are also the ‘result of historical conjunctures, of specific political compromises, and of specific trials and errors’ that led to their creation.⁷ Since they pay insufficient attention to these contextual, historical, and political foundations of domestic administrative law systems, attempts to distill a coherent set of abstract legal principles and substantive values from national contexts to provide a basis for a global administrative law are problematic. Processes and structures that work in a particular country and for a particular set of domestic problems may only work incompletely or not at all at the global level. This casts doubt on the global administrative law project’s potential to provide a coherent set of principles to improve the legitimacy of new forms of global governance.

The second part of the meditation begins with the observation that the administrative space that the global administrative law deals with consists not only of formal intergovernmental organizations (FIGOs), but also of a growing number of informal transgovernmental networks in which national bureaucrats from different countries cooperate to regulate global issues. The global administrative space also contains hybrid public–private forms of governance in which states and FIGOs collaborate with varying mixtures of business and civil society actors. These new forms of global law-making share two features. On the one hand, they are characterized by a common emphasis on problem-solving and ‘getting the job done’. This focus on governance outcomes shifts attention away from the formal processes of law-making and often leads to finding ways to bypass them. On the other hand, the new forms of global law-making are typically of an informal character, which makes the identification of the places where decisions are made difficult. These two features suggest that the new global administrative entities operate outside of, and without much attention to, formal legal processes and values. While this may be effective, it is problematic for their democratic legitimacy. Furthermore,

³See, respectively, Slaughter 2004; Vabulas and Snidal 2013; Westerwinter 2020; Cutler et al. 1999; see also Stone 2011; Avant and Westerwinter 2016; Kahler 2018.

⁴Grant and Keohane 2005.

⁵Kingsbury et al. 2005; Esty 2006.

⁶Kingsbury et al. 2005, 17.

⁷Kratochwil 2014, 176.

new forms of global law-making operate outside of the common traditions of those governed by them and without a clearly defined public underlying them, both of which are necessary for generating legality. Without these preconditions in place, Kratochwil concludes, 'global administrative law is in danger of degenerating into *ad hocery* and technocratic rule' rather than providing a basis for effective and legitimate global governance.⁸

Part three of the meditation continues this line of reflection and explores how far global administrative law enhances the legitimacy of new forms of global law-making by increasing participation, transparency, and accountability. Kratochwil stresses that it is unclear who constitutes the public with respect to particular substantive problems. What is clear, however, is that the interests that are included in the new forms of governance are typically not identical and often not representative of the spectrum of interests of the public(s). As a result, the deliberations that occur in these institutional forums are a weak surrogate for public deliberation and unlikely to enhance the democratic legitimacy of the new forms of global law-making. In fact, they instead tend to further constrain participation and strengthen the positions of the already powerful actors in world politics.

Despite its value and contributions, the meditation has also limitations. In the following, I discuss a few points where I see room for further improvement. In doing so, I adopt an external perspective and discuss Kratochwil's insights from the perspective of theories of institutional design. This constitutes a theoretical outlook that is different from, but complementary to, Kratochwil's focus on practice.

First, Kratochwil refers to new forms of global law-making that include transgovernmental networks, informal intergovernmental forums, as well as public-private governance arrangements in a general fashion, but fails to distinguish between them. Yet, these are distinct institutional forms, and their differences have implications for how severe a problem they constitute for the effectiveness and legitimacy of global governance. For example, IIGOs are intergovernmental organizations in which states participate in regular meetings to make policies and coordinate behavior without a formal institutional support structure.⁹ Examples include the various G groups.¹⁰ TGIs are another new form of global governance. In TGIs, states and/or FIGOs work together with business actors and non-governmental organizations (NGOs) to govern problems.¹¹ Examples include the World Commission on Dams and the International Code of Conduct for Private Security Service Providers' Association.¹²

Focusing on IIGOs and TGIs as two examples of the new forms of global governance, we observe distinct trajectories of their historical development. TGIs have experienced an exponential growth since the late-1990s. By contrast, IIGOs, although increasingly important, are a much less frequent form of global governance.¹³ Furthermore, despite their striking growth, informal forms of global governance are not universal. Some issue areas of world politics have experienced a

⁸Ibid., 197.

⁹Vabulas and Snidal 2013.

¹⁰Gstöhl 2007.

¹¹Westerwinter 2020.

¹²See Dingwerth 2007 and Avant 2016.

¹³Vabulas and Snidal 2013.

stronger trend toward informal global rule-making than others. TGIs are most frequent in the areas of environment protection, social affairs, development, and health, while IIGOs are concentrated in the security domain.¹⁴ The participation, interest representation, and ultimately legitimacy challenges that stem from the participation of private actors in global law-making can be expected to be particularly severe in issue areas where institutional forms that provide for non-state actor involvement are prevalent. The governance of issue areas in which informal but primarily intergovernmental forms of cooperation prevail are less affected by these challenges. Kratochwil's meditation remains largely silent on this important variation. Yet, these differences in institutional design constitute an essential part of the context within which pragmatic decisions are made and are, therefore, likely to shape how the inclusion and exclusion of different stakeholder groups affects the legitimacy and effectiveness of global governance.

The informality and non-state actor participation in new forms of global law-making may not only not improve participation and power imbalances; in combination, they may in fact enhance these problems. As Kratochwil highlights, the argument that the new forms of global law-making can help to solve the legitimacy and accountability problems of governing at the global level is not unproblematic. It is based on a too optimistic assessment of the negotiation practices in informal governance arrangements. Negotiations in informal cooperation forums are by no means inclusive and transparent *per se*, and outcomes are not necessarily more carefully elaborated compared with formal intergovernmental forums. The Kimberley Process on the regulation of 'conflict diamonds', which is part of the universe of public-private governance arrangements that Kratochwil refers to, provides an example. The Kimberley process is an informal network constituted by governments, the diamond industry, and human rights organizations that adopts standards for the global trade in rough diamonds with the aim of preventing 'conflict diamonds' from fueling civil wars in Africa. While in principle all actors with a stake in the regulation of the global diamond business can become involved, in reality access to negotiations and influence over outcomes are skewed toward those actors that have access to relevant information.¹⁵ Outcomes are the result of hard and prolonged bargaining and are often difficult to predict, as illustrated by the negotiations over the Kimberley process compliance of Zimbabwe between 2009 and 2011.¹⁶ The result: an informal governance arrangement that is inclusive on paper but in practice is dominated by a few powerful players with privileged access to information. This may ultimately exacerbate rather than mitigate the legitimacy problems of global rule-making because, in contrast to formal institutional structures, informal networks are largely unregulated so that there are no formal safeguards through which access and voice can be guaranteed for weaker stakeholders. Therefore, stakeholder involvement and deliberation as a potential solution to the legitimacy and accountability challenges of informal global law-making should be treated more carefully. Specifically, it is likely that the positive legitimacy and accountability potential of stakeholder involvement can only be realized if

¹⁴Ibid.; Westerwinter 2020.

¹⁵Westerwinter 2014.

¹⁶Ibid.

certain conditions with respect to the institutional design of informal governance arrangements, such as transparency or equal access to information, are met.

What is more, informal law-making may not only potentially enhance problems of participation and power asymmetries at the global level, it may also have adverse effects on democratic procedures in the domestic context. Kratochwil overlooks this link between informal global law-making and domestic politics, which leads to a truncated discussion of the democracy enhancing potential (or the absence of it) of new forms of global governance. Research on the domestic politics of new global governance emphasizes that informal institutions at the global level privilege the executive vis-à-vis the legislative.¹⁷ In contrast to FIGOs, informal global governance arrangements are not based on international treaties and, therefore, do not require ratification by the legislative to launch cooperation. Thus, particularly government leaders who are confronted with legislative veto players whose preferences diverge from the government's preferences in foreign policy matters may have incentives to choose informal modes of governance to cooperate at the global level since this reduces the domestic transaction costs of cooperation.¹⁸ As a result, as governments turn to informal modes of cooperation, the access to and participation of domestic stakeholders in foreign policy-making may decrease.

If informal institutions at the global level are used by governments to bypass domestic opposition, then informal global governance has the potential to reduce the effectiveness as well as the legitimacy of global governance. It potentially undermines the effectiveness of governance efforts because by excluding relevant stakeholder groups at the domestic level, the expertise and commitment of these groups are absent from both policy-making and implementation. The global problems of today are often characterized by technical and political complexity, which need to be addressed with the resources and competencies of a broad range of actors. Consequently, the exclusion of relevant stakeholder groups at the domestic level may render the identification of effective solutions and their effective implementation a challenge. Furthermore, the lack of access of domestic stakeholder groups to informal global governance reduces the likelihood that their preferences are taken into account. While they may be a welcome strategic instrument for governments, the persistent use of informal modes of governance which lack transparency and procedural safeguards that ensure broad access and participation may further undermine the already problematic legitimacy of global governance.

As these reflections suggest, more theoretical and empirical research is needed to develop the contributions to the study of global governance that are laid out in Kratochwil's meditation on cosmopolitanism. I close by highlighting two areas for future research. First, if the potential of stakeholder involvement to mitigate the legitimacy and accountability problems of informal global law-making hinges on the institutional design of public-private governance arrangements, then scholars need to examine more systematically how the institutional design of informal governance arrangements affects their internal functioning and, thereby, their legitimacy and accountability. Do equal participation rights for all stakeholders enhance the legitimacy of a public-private governance arrangement? Or is it transparency

¹⁷Zaring 1998; Eilstrup-Sangiovanni 2009; Westerwinter et al. 2020.

¹⁸Mansfield and Milner 2012; Westerwinter et al. 2020.

and access to information that allow stakeholders to hold decision makers accountable and facilitate deliberation on a level playing field? To start exploring these questions, researchers need to develop nuanced theories about which institutional design elements of public–private governance arrangements are conducive to democratically legitimate and accountable global governance. They also need to begin to empirically map informal forms of global law-making in terms of their institutional design to identify which combination of design elements has which consequences.

Second, to systematically examine the legitimacy and accountability challenges of new forms of global governance, scholars need to develop a better understanding of the democratic performance of these new forms of governing relative to each other but also, and perhaps more importantly, compared with conventional forms of global governance, such as FIGOs. Do informal forms of global law-making improve the legitimacy and accountability of global governance? Do they diminish it? Is their contribution to democracy and accountability at the global level as good or bad as the contribution of FIGOs? Kratochwil's meditation points us toward these questions but lacks reflections on where and how to look for answers. To address this gap, students of global governance need to develop research designs that allow for empirically investigating the effects of informal and formal modes of governance in a comparative perspective. Taking Kratochwil seriously requires nothing less than developing a comparative research agenda on the emergence, design, and effectiveness of the diverse arrangements that constitute the complex institutional architecture of contemporary global governance.

Acknowledgements. Support from the Robert Schuman Centre for Advanced Studies and the Max Weber Programme at the European University Institute is gratefully acknowledged. I would like to thank Knut Traisbach, Hannes Peltonen, and three anonymous reviewers for helpful comments.

References

- Avant, Deborah. 2016. "Pragmatic Networks and Transnational Governance of Private Military and Security Services." *International Studies Quarterly* 60 (2): 330–42.
- Avant, Deborah, and Oliver Westerwinter. 2016. "Introduction. Networks and Transnational Security Governance." In *The New Power Politics. Networks and Transnational Security Governance*, edited by Deborah Avant and Oliver Westerwinter, 1–18. New York: Oxford University Press.
- Cutler, A. Claire, Virginia Haufler, and Tony Porter, eds. 1999. *Private Authority and International Affairs*. Albany: SUNY Press.
- Dingwerth, Klaus. 2007. *The New Transnationalism. Transnational Governance and Democratic Legitimacy*. Houndmills: Palgrave.
- Eilstrup-Sangiovanni, Mette. 2009. "Varieties of Cooperation. Government Networks in International Security." In *Networked Politics. Agency, Power, and Governance*, edited by Miles Kahler, 194–227. Ithaca: Cornell University Press.
- Esty, Daniel C. 2006. "Good Governance at the Supranational Scale: Globalizing Administrative Law." *Yale Law Journal* 115 (7): 1490–562.
- Grant, Ruth W., and Robert O. Keohane. 2005. "Accountability and Abuses of Power in World Politics." *American Political Science Review* 99 (1): 29–43.
- Gstöhl, Sieglinde. 2007. "Governance through Government Networks: The G8 and International Organizations." *The Review of International Organizations* 2 (1): 1–37.
- Kahler, Miles. 2018. "From Complex Interdependence to Complex Governance." Manuscript: American University.

- Kingsbury, Benedict, Nico Krisch, and Richard B. Stewart. 2005. "The Emergence of Global Administrative Law." *Law and Contemporary Problems* 68 (3): 15–61.
- Kratochwil, Friedrich. 2014. *The Status of Law in World Society: Meditations on the Role and Rule of Law*. Cambridge: Cambridge University Press.
- Lake, David A. 2010. "Rightful Rules: Authority, Order, and the Foundations of Global Governance." *International Studies Quarterly* 54 (3): 587–613.
- Mansfield, Edward D., and Helen V. Milner. 2012. *Votes, Vetoes, and the Political Economy of International Trade Regime*. Princeton: Princeton University Press.
- Slaughter, Anne-Marie. 2004. *A New World Order?* Princeton: Princeton University Press.
- Stone, Randall W. 2011. *Controlling Institutions. International Organizations and the Global Economy*. Cambridge: Cambridge University Press.
- Vabulas, Felicity, and Duncan Snidal. 2013. "Organization without Delegation: Informal Intergovernmental Organizations (IIGOs) and the Spectrum of Intergovernmental Arrangements." *The Review of International Organizations* 8 (2): 193–220.
- Westerwintner, Oliver. 2014. "The Politics of Transnational Institutions: Power, Bargaining and Institutional Choice." Unpublished dissertation manuscript, European University Institute.
- Westerwintner, Oliver. 2020. "Transnational Public–Private Governance Initiatives in World Politics: Introducing a New Dataset." *The Review of International Organizations*. Available at <https://doi.org/10.1007/s11558-019-09366-w>. Accessed 1 July 2020.
- Westerwintner, Oliver, Kenneth W. Abbott, and Thomas Biersteker. 2020. "Informal Governance in World Politics." *The Review of International Organizations*. Available at <https://doi.org/10.1007/s11558-020-09382-1>. Accessed 1 July 2020.
- Zaring, David. 1998. "International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations." *Texas International Law Journal* 33 (2): 281–330.