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Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks

Each of these networks has specific aims and activities, depending on its subject area, membership and history. But taken together, they also perform certain common functions. They expand regulatory reach, allowing national government officials to keep up with corporations, civic organizations and criminals. They build trust and establish relationships among their participants that then create incentives to establish a good reputation and avoid a bad one. These are the conditions essential for long-term cooperation. They exchange regular information about their own activities and develop databases of best practices, or, in the judicial case, different approaches to common legal issues. They offer technical assistance and professional socialization to members from less developed nations – whether regulators, judges, or legislators.

In a world of global markets, global travel and global information networks, of weapons of mass destruction and looming environmental disasters of global magnitude, governments must have global reach. In a world in which their ability to use their hard power is often limited, governments must be able to exploit the uses of soft power – the power of persuasion and information.[8] Similarly, in a world in which a major set of obstacles to effective global regulation is a simple inability on the part of many developing countries to translate paper rules into changes in actual behaviour, governments must be able not only to negotiate treaties but also to create the capacity to comply with them.

Understood as a form of global governance, government networks meet these needs. As commercial and civic organizations have already discovered, their networked form is ideal for providing the speed and flexibility necessary to function effectively in an information age. But unlike amorphous 'global policy networks', in which it is never clear who is exercising power on behalf of whom, these are networks comprised of national government officials – appointed by elected officials or directly elected themselves. Best of all, they can perform many of the functions of a world government – legislation, administration and adjudication – without the form.

No form of government is perfect, least of all at the global level. And even if, as with Winston Churchill's view of democracy, global governance through government networks is the 'least worst' alter-

[8] Joseph S. Nye, Jr, *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone*, New York, Oxford University Press, 2002, p. 9.

native, it still poses many problems that must ultimately be addressed. And indeed, observers of existing government networks, as well as critics of what they could become, have pointed out plenty of problems, as reviewed in the first part of the article below.

To respond to these various charges, and more importantly to ensure that a global governance system of government networks – what I have called a networked world order – is not only effective but also as accountable and just as possible, the members of government networks will need to be responsive to an entire complex of rules, principles and norms. First, they must be accountable to their domestic constituents for their transgovernmental activities to the same extent that they are accountable for their domestic activities. Second, as participants in structures of global governance, they must have a basic operating code that takes account of the rights and interests of all peoples. Third, they should ultimately be directly subject to the international legal obligations that currently apply to their nations as unitary states.

The next part sets forth a menu of possibilities for increasing the accountability of members of government networks to their domestic constituencies, including: 1) developing a concept of dual function for all government officials; 2) increasing the visibility and accessibility of government networks; 3) developing more legislative networks; 4) using government networks to mobilize a wide range of nongovernmental actors; and 5) a customized set of solutions developed by domestic polities themselves. The third section of this paper turns to potential global norms governing members of government networks in their relations with one another. I suggest five such norms: some to operate primarily in horizontal relations between national government officials and others to operate more generally in vertical relations between national government officials and their supranational counterparts. They include global deliberative equality, legitimate difference, positive comity, checks and balances and subsidiarity.

The final part reaches further afield, exploring the concept of disaggregated sovereignty. If unitary states can disaggregate into their component government institutions and those government officials can interact quasi-autonomously with their foreign counterparts, then they should also be able to exercise a measure of sovereignty. Disaggregated sovereignty, however, would be defined as positive sovereignty, as the capacity to enter into international regulatory

Kofi Annan has encouraged the formation and use of such networks from his UN bully pulpit, calling for the 'creation of global policy networks' to 'bring together international institutions, civil society and private sector organizations, and national governments in pursuit of common goals'.[34] More generally, Wolfgang Reinicke and Francis Deng have developed both the concept and practice of the global public interest, promoted and pursued through networks.[35] Reinicke describes global public policy networks as 'loose alliances of government agencies, international organizations, corporations, and elements of civil society such as nongovernmental organizations, professional associations, or religious groups that join together to achieve what none can accomplish on its own'.[36]

A final set of measures to address perceived or actual problems with the activities of existing government networks should come from domestic polities. The citizens of different countries, and their government officials, are likely to have different degrees of concern about these activities. The US debate over citing foreign judicial decisions has been replicated in some other countries, but by no means all, and it has a different resonance depending on the length and nature of a particular country's legal tradition. Similarly, the citizens of some countries might be content with the role of their regulators in global or regional regulatory networks, whereas the citizens of other countries might seek more monitoring of, or direct input into, those networks.

GLOBAL NORMS REGULATING GOVERNMENT NETWORKS

Even if participants in government networks around the world were satisfactorily accountable to their domestic constituents, what duty do they owe to other nations? It may seem an odd question, but if these networks were in fact primary structures of global governance, together with more formal international and supranational organizations, then they would have to be subject to global as well as

[34] Annan, *We the Peoples*, op. cit., p. 70, n. 23.

[35] Wolfgang H. Reinicke and Francis Deng, *Critical Choices: The United Nations, Networks, and the Future of Global Governance*, Ottawa, International Development Research Centre, 2000.

[36] Reinicke, 'The Other World Wide Web', op. cit., n. 23.

national norms. They would be responsible for collectively formulating and implementing policies in the global public interest. Equally important, the participants in these networks would have to develop and implement norms governing their relations with one another. Such norms may seem unnecessary when the principal activity in which these participants engage is information exchange; however, harmonization and enforcement activity requires the development of global ground rules. Finally, these networks should operate on a presumption of inclusivity rather than exclusivity.

What are the potential sources of these norms? First, it is natural to project domestic constitutional principles, developed by visionaries and thinkers from Madison to Monnet. Political philosophers are also relevant, providing first principles that can be adapted to this particular global context. Finally, norms are emerging from contemporary practice that can be generalized, adding an inductive dimension to the project.

It is particularly important to note the informal character of these norms, like that of the government networks they regulate. Proposals for global constitutions are already on the table, most notably from scholars such as Ernst-Ulrich Petersmann, but an actual global constitution suggests a formal global government, even if in fragmentary form.[37] I seek to develop an informal alternative – a set of principles and norms that can operate independently of formal codification, even as the actors and activities they would regulate form and reform in shifting patterns of governance. Both visions seek to underpin world order, but they diverge with respect to world government.

1 Global Deliberative Equality

The foundational norm of global governance should be global deliberative equality. Michael Ignatieff derives this concept from the basic moral precept that 'our species is one, and each of the individuals

[37] Ernst-Ulrich Petersmann, 'Constitutionalism and International Organizations', *Northwestern Journal of International Law and Business*, 17 (1997), p. 398; Ernst-Ulrich Petersmann, 'Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?', *New York University Journal of International Law and Politics*, 31 (1999), p. 753.

who compose it is entitled to equal moral consideration.'[38] His account of the progress of the human rights movement since 1945 builds from this precept, which lies at the heart of human rights, to the recognition that 'we live in a plural world of cultures that have a right to equal consideration in the argument about what we can and cannot, should and should not, do to human beings.'[39]

This idea, that 'all human beings belong at the table, in the essential conversation about how we should treat each other', does not posit utopian harmony. On the contrary, it assumes a world 'of conflict, deliberation, argument, and contention', but to the extent that the process of global governance is, at bottom, a conversation, a collective deliberation about common problems and towards common global objectives, then all affected individuals, or their representatives, are entitled to participate.[40]

This presumption of inclusion lies at the heart of the 'Montreal Consensus' that former Canadian Finance Minister Paul Martin has put forward to counter the 'Washington Consensus' concerning economic development. The heart of the Montreal consensus is a 'more balanced vision of how developing countries and poor countries can share in the benefits of the global economy'.[41] It arises from the perception that developing countries are not threatened by globalization per se as much as by being left out and left behind. The solution is not to reverse globalization itself, but rather to find ways to share the wealth and integration it brings. That, for Martin and the G20, is the essence of global accountability.

A principle or even a presumption of inclusion does not mean that government institutions from all countries will become members of all government networks. Many networks will address problems common only to a group of countries, or a region. And even where the problems themselves are global, government networks such as the G20 reflect a philosophy of representation rather than direct participation.

[38] Michael Ignatieff, *Human Rights as Politics and Idolatry*, Princeton, Princeton University Press, 2001, p. 4.

[39] Ibid., p. 94.

[40] Ibid., pp. 94–5.

[41] 'Notes for an address by the Honourable Paul Martin, to the Royal Institute of International Affairs', Ottawa, 24 January 2001, On G20 homepage (accessed 1 July 2003); available from http://www.fin.gc.ca/news01/01-008e.html.

What such a principle should mean, however, is that all government networks adopt clear criteria for participation that will be fairly applied. These criteria can require a particular degree of economic or political development or a level of performance in terms of compliance with agreed principles. It is also certainly permissible for some nations to move faster or deeper than others in making particular commitments – just as the EU has multispeed integration in which some nations adopt a common currency and others do not. The World Intellectual Property Organization has incorporated a network of some advanced industrial countries alongside its traditional global decision-making processes. Yet countries that want to join such networks and that meet the stated criteria must be allowed in, in some form or other. At the same time, deliberative equality, as an ideal, means that those countries that have decided to join a network receive an equal opportunity to participate in agenda-setting, to advance their position, and to challenge the proposals or positions of others.[42]

More generally, government networks should be explicitly designed to engage, enmesh, and assist specific government institutions. One of the great values of this form of governance is the ability to bolster the court or regulatory agency or legislature of any country – to offer directly targeted technical assistance, political support where necessary, and an all-important sense of professionalism and belonging in a wider global community. That in itself is a form of global deliberative equality.

2 Legitimate Difference

The second principle of transnational governance should be the principle of legitimate difference. As Justice Benjamin Cardozo put it while sitting on the Second Circuit:

> We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would

[42] Joshua Cohen, 'Deliberation and Democratic Legitimacy', in Alan Hamlin and Philip Pettit (eds), *The Good Polity: Normative Analysis of the State*, New York, Blackwell, 1989, p. 74.

violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.[43]

In conflicts of law, the principle of legitimate difference is limited by the public policy exception, whereby a court will not apply a foreign law that would be applicable if it violates a fundamental principle of domestic public policy. The principle of legitimate difference assumes that the public policy exception would be applied only rarely, in cases involving the violation of truly fundamental values. In the US context, fundamental equates with constitutional, in the sense that state courts cannot invoke the public policy exception to bar enforcement of another state's act unless that act arguably violates the constitution itself.[44]

Transposed from the judicial to the regulatory context and from the US to the global context, the principle of legitimate difference should be adopted as a foundational premise of transgovernmental cooperation. All regulators participating in cooperative ventures of various kinds with their foreign counterparts should begin from the premise that 'difference' per se reflects a desirable diversity of ideas about how to order an economy or society. That 'we deal with it otherwise at home' is not a reason for rejecting a foreign law or regulation or regulatory practice unless it can be shown to violate the rejecting country's constitutional rules and values.

The principle of legitimate difference applies most precisely to foreign laws and regulations, but a corollary of the principle is a presumption that foreign government officials should be accorded the same respect due to national officials unless a specific reason exists to suspect that they will chauvinistically privilege their own citizens. An example from the judicial context illustrates the point. In a highly publicized antitrust litigation brought by Sir Freddie Laker against both US and British airlines for trying to drive his low-cost airline out of business, US federal district judge Harold Green decided not to restrain the British parties from petitioning the British government for help.[45] Judge Green was presuming the same good faith on the

[43] *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (NY 1918).

[44] The full faith and credit clause of the constitution requires each state to recognize the acts of another. US Const., art. 4, §1, cl. 1. It is a basic instrument of federalism, knitting the states into one larger polity.

[45] *Laker Airways Ltd. v. Sabena, Belgian World Airlines* 731 F. 2d 909 (DC Cir. 1984).

part of the British executive as he would on the part of the US executive in a parallel circumstance and assuming that the British executive would not automatically ally with its own citizens in a case involving a foreign citizen in a foreign court.

In sum, legitimate difference is a principle that preserves diversity within a framework of a specified degree of convergence. It enshrines pluralism as a basis for, rather than a bar to, regulatory cooperation, leaving open the possibility of further convergence between legal systems in the form of mutual recognition or even harmonization, but not requiring it. At the same time, however, it does not try to stitch together or cover over differences concerning fundamental values, whether those involving basic human rights and liberties or the organizing principles for a social, political, or economic system. At a more practical level, the principle of legitimate difference would encourage the development of model codes or compilations of best practices in particular regulatory issue areas, letting the regulators in different countries figure out for themselves how best to adapt them to local circumstance.

It is also important, however, to be clear as to what a principle of legitimate difference will *not* do. It does not help individuals or government institutions figure out which nation should be the primary regulator in a particular issue area or with regard to a set of entities or transactions subject to regulation. Thus it cannot answer the question of which nation should be in the position of deciding whether to recognize which other nation's laws, regulations, or decisions based on legitimate difference. Nevertheless, it can serve as a *Grundnorm* of global governance for regulators exploring a wide variety of relationships with their transnational counterparts. If regulators are not prepared to go even this far, then they are unlikely to be able to push beyond paper cooperation.

3 Positive Comity

Comity is a long-standing principle of relations between nations. The classic definition for American lawyers is the formulation in *Hilton v. Guyot*: 'neither a matter of obligation on the one hand, nor of mere courtesy and good will on the other . . . comity is the recognition which one nation allows within its territory to the legislative,

executive, or judicial acts of another nation.'[46] 'Recognition' is essentially a passive affair, signalling deference to another nation's action.

Positive comity, on the other hand, mandates a move from deference to dialogue. It is a principle of affirmative cooperation between government agencies of different nations. As a principle of governance for transnational regulatory cooperation, it requires regulatory agencies to substitute consultation and active assistance for unilateral action and noninterference.

Positive comity has developed largely in the antitrust community, as an outgrowth of ongoing efforts of EU and US antitrust officials to put their often very rocky relationship on firmer footing. For decades the US policy of extraterritorial enforcement of US antitrust laws based on the direct effect doctrine, even in various modified forms, was met by diplomatic protests, administrative refusals and a growing number of foreign blocking statutes that restricted access to important evidence located abroad or sought to reverse US judgments.[47] The US government gradually began to change course, espousing principles of comity and restraint in congressional testimony and in its international antitrust guidelines.[48]

[46] 159 US 113, 163–4 (1895).

[47] Beginning with *United States v. Aluminum Co. of America (Alcoa)*, the Sherman Act was held applicable to foreign conduct that had a direct, substantial, and foreseeable effect on US trade and commerce. 148 F.2d 416, 440–5 (2d Cir. 1945). This 'direct effect' jurisdiction quickly became a source of tension with other states that argued that the United States had no right to assert jurisdiction over persons that were neither present nor acting within US territory. Governments whose nationals and interests were affected by US antitrust law filed diplomatic protests and amicus briefs, refused requests for assistance, invoked national secrecy laws, and eventually began passing blocking laws specifically aimed at the frustration of US antitrust enforcement. Spencer Weber Waller, 'National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law', *Cardozo Law Review*, 18 (1999), pp. 1111, 1113–14; see also Joel R. Paul, 'Comity in International Law', *Harvard International Law Journal*, 32 (1991), pp. 1, 32; Joseph P. Griffin, 'EC and U.S. Extraterritoriality: Activism and Cooperation', *Fordham International Law Journal*, 17 (1994), pp. 353, 377.

[48] Spencer Weber Waller, 'The Internationalization of Antitrust Enforcement', *Boston University Law Review*, 77 (1997), pp. 343, 375. By 1988 the Department of Justice stated that it would only challenge foreign anticompetitive conduct that directly harmed US consumers. Robert D. Shank, 'The Justice Department's Recent Antitrust Enforcement Policy: Toward A "Positive Comity" Solution to International Competition Problems?', *Vanderbilt Journal of Transnational Law*, 29 (1996), pp. 155, 165.

In addition, US regulators began relying less on unilateral state action and more on agency cooperation. In the early 1980s, the United States entered into separate cooperation agreements with the governments of Australia (June 1982) and Canada (March 1984). In both agreements, the parties consented to cooperate in investigations and litigation by the other even when this enforcement affected its nationals or the other party sought information within its territory. In return, the parties agreed to exercise negative comity – to refrain from enforcing competition laws where such enforcement would unduly interfere with the sovereign interests of the other party.[49]

In 1991, the United States executed an extensive antitrust cooperation agreement with the European Community.[50] The agreement contained provisions on notification of enforcement activities, as well as on information-sharing and biannual meetings.[51] Most notably, the agreement was the first to include the principle of positive comity. Article V of the agreement provides that if party *A* believes that its 'important interests' are being adversely affected by anticompetitive activities that violate party *A*'s competition laws but occur within the territory of party *B*, party *A* may request that party *B* initiate enforcement activities.[52] Thus, government *B*, in deference to government *A*, is expected to consider enforcement steps that it might not otherwise have taken.[53]

This notion of positive comity is the converse of the traditional idea of deference, or negative comity. Unlike the earlier agreements concluded by the United States with Australia and Canada, the EC agreement focuses less on protecting the sovereign interests of one

[49] Charles F. Rule, 'European Communities–United States Agreement on the Application of their Competition Laws Introductory Note', *International Legal Materials*, 30 (1991), pp. 1487, 1488. The US signed a comparable agreement with Germany in 1976. See Steven L. Snell, 'Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity', *Stanford Journal of International Law*, 33 (1997), pp. 215, 234.

[50] See 'Agreement Regarding the Application of their Competition Laws, 23 Sept. 1991, E.C.–U.S.', *International Legal Materials*, 30 (1991), p. 1491.

[51] Ibid., pp. 1056–9.

[52] See Griffin, 'EC and U.S. Extraterritoriality', op. cit., p. 376, n. 47.

[53] James R. Atwood, 'Positive Comity – Is It a Positive Step?', in Barry Hawk (ed.), *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute*, Irvington-on-Hudson, NY, Transnational Juris Publications, 1993, pp. 79, 84.

jurisdiction against the antitrust activities of the other and more on facilitating cooperative and even coordinated enforcement by antitrust authorities.[54] Where deference would tend towards less affirmative enforcement action, positive comity was designed to produce more affirmative enforcement.[55] While the EC–US agreement reflects the increasing trend towards transnational cooperation in antitrust enforcement, the extent of enforcement coordination and information sharing contemplated by the agreement was unprecedented.[56]

In practice, the agreement has spurred an increase in the flow of information between the parties.[57] In addition, there has been increased enforcement of antitrust objectives, both quantitatively and qualitatively.[58] In coordinating their activities, the parties under the agreement work together to minimize the disruption to international trade that multiple uncoordinated investigations might otherwise cause.[59] Merit Janow, reviewing transatlantic cooperation in competition policy, concludes that 'positive comity is an important doctrine and that it can go some way in ameliorating tensions associated with extraterritorial enforcement and in facilitating enforcement cooperation'.[60] At the same time, she advocates taking a step further toward enhanced comity through 'an integrated or work-

[54] See Rule, 'European Communities–United States Agreement', op. cit., p. 1488, n. 49.

[55] See Atwood, 'Positive Comity', op. cit., p. 84, n. 53.

[56] See Rule, 'European Communities–United States Agreement', op. cit., p. 1487, n. 49.

[57] Joseph P. Griffin, 'EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business', *Law and Policy in International Business*, 24 (1993), pp. 1051, 1063.

[58] See generally Joel Klein and Preeta Bansal, 'International Antitrust Enforcement in the Computer Industry', *Villanova Law Review*, 41 (1996), pp. 173, 179.

[59] See Rule, 'European Communities–United States Agreement', op. cit., p. 1490, n. 49. This increased efficiency has also proven attractive to businesses themselves. In *United States v. Microsoft Corp.*, after learning that both the Department of Justice and the European Commission were investigating their licensing practices, Microsoft agreed to waive its confidentiality rights under US antitrust law to permit the two authorities to exchange confidential information. See Shank, 'The Justice Department's Recent Antitrust Enforcement Policy', op. cit., p. 179, n. 48.

[60] Merit Janow, 'Transatlantic Cooperation on Competition Policy,' in Simon J. Evenett, Alexander Lehmann, and Benn Steil (eds), *Antitrust Goes Global*, Washington, DC, The Brookings Institution, 2000, pp. 29–56, 51.

sharing approach' between US and EU competition authorities, whereby one or the other would be designated the 'de facto lead agency' in any investigation.[61]

Can positive comity be translated from the antitrust context into a more general principle of governance? Two potential objections arise. First is the concern of many within the antitrust community that positive comity is a label with little content. The second objection is a converse concern that to the extent positive comity works, it assumes enormous trust and close continuing relations between particular national regulatory agencies – factors that cannot be generalized.

The response to both these objections is a simplified and less stringent version of positive comity. As a general principle it need mean no more than an obligation to act rather than merely to respond. In any case in which nation *A* is contemplating regulatory action and in which nation *B* has a significant interest in the activity under scrutiny, either through the involvement of its nationals or through the commission of significant events within its territorial jurisdiction, the regulatory agency of nation *A*, consistent with the dual function of regulatory officials developed above, has a duty at the very least to notify and consult with the regulatory agency of nation *B*. Nation *A*'s agency must further wait for a response from nation *B* before deciding what action to take, and must notify nation *B*'s agency of any decision taken.

Even the critics of positive comity acknowledge that, to the extent to which a commitment to positive comity facilitates increased communication and exchange of information between governments, it may have an impact at the margin.[62] This communication and exchange of information in turn lays the foundation for more enduring relationships that ultimately ripen into trust. Thus at a global level, a principle of positive comity, combined with the principle of legitimate difference, creates the basis for a pluralist community of regulators who are actively seeking coordination at least and collaboration at best.

[61] Ibid.

[62] See Atwood, 'Positive Comity', op. cit., p. 88, n. 53.

4 Checks and Balances

Fourth, and for many perhaps first, it is necessary to take a leaf from Madison's book. If, in fact, government networks, or indeed any form of global governance, are indeed to avoid Kant's nightmare of 'soulless despotism', the power of every element of the world order system must be checked and balanced. A system of checks and balances is in fact emerging in many areas, from relations between national courts and supranational courts to the executive of one state challenging the regulatory agency of another in national court. Yet these fragments of evolving experience should be understood and analysed in the context of an affirmative norm of friction and constructive ambiguity in relations among participants in government networks of every kind. The whole should resemble the US constitution in at least this much – a system of shared and separated powers designed more for liberty than efficiency.

Writing about American federalism, David Shapiro has portrayed it as 'a dialogue about government'.[63] The federal system set forth in the constitution frames a perpetual debate in which 'neither argument – the case for unrestrained national authority or the case against it – is rhetorically or normatively complete without the other'.[64] It is the dialogue itself that is a source both of creative innovation and tempering caution. This description also applies to relations between national courts in EU member-countries and the ECJ, a dialogue that lies at the heart of the EU constitutional order. Their debates over both jurisdictional competence and substantive law are matters of pushing and pulling over lines demarcating authority that are constructed and revised by the participants themselves. Each side is checked less by a specific grant of power intended to act as a check or a balance than by the ability of each side to challenge or refine any assertion of power by the other.

Overall, checks and balances must become an accepted part of a global political arrangement among government institutions. Here again, networks of legislators would be a valuable addition to global government networks – to provide a counterweight, where necessary, to networks of regulators or even judges. Thus, for instance, when a

[63] David L. Shapiro, *Federalism: A Dialogue*, Evanston, IL, Northwestern University Press, 1995, p. 108.

[64] Ibid.

network of securities regulators is promulgating a code of best practices, it is not impossible to imagine a similar code issuing from a network of legislative committees from different nations concerned with the same issues. The determination of what a best practice is and whose interests it is most likely to serve would likely be different. Certainly such a possibility would provide a counterweight to the consensus of professional technocrats.

5 Subsidiarity

The final normative principle necessary to structure a global political process of disaggregated national and supranational institutions is subsidiarity. Subsidiarity is the EU's version of Madisonian checks and balances. The term may be unfamiliar, but the concept is not. It expresses a principle that decisions are to be taken as closely as possible to the citizen.[65] Article V of the Consolidated Treaty Establishing the European Community defines the principle of subsidiarity as the criterion for determining the division of powers between the community and its member states.[66]

Projected onto a global screen, the principle of subsidiarity would reinforce the basic axiom of global governance through government networks: even on a global scale, the vast majority of governance tasks should still be taken by national government officials. Within nation-states, of course, subsidiarity may argue for the exercise of power at a lower level still – at the local or provincial level. Yet, once at the level of the national government, the burden of proof to devolve power up to a regional or global entity will require a demonstration

[65] George A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', *Columbia Law Review*, 94 (1994), p. 331.

[66] Consolidated Version of the Treaty Establishing the European Community, Art. 5, *Official Journal C 325 of 24 December 2002*. According to the relevant provisions of this Article:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

that the specific functions needed cannot be adequately provided by national government institutions either coordinating their action or actively cooperating. Finally, within international or supranational institutions themselves, questions of institutional design and allocation of power should depend upon a demonstration of the need for personnel and powers in addition to, or superior to, networks of national government officials.

The value of subsidiarity is that it institutionalizes a system or a political process of global governance from the bottom up. International lawyers, diplomats and global dreamers have long pictured a world much more united from the top down. Even as the need for governance goes global, the ideal location of that governance may well remain local. The principle of subsidiarity requires proponents of shifting power away from the citizen at least to make the case.

To maximize the accountability of the participants in government networks, it would be possible to take a step further and give them a measure of individual, or rather institutional, sovereignty. In a world of disaggregated states, the sovereignty that has traditionally attached to unitary states should arguably also be disaggregated. Taking this step, however, requires a different conception of the very nature of sovereignty. As described in the next section, sovereignty understood as capacity rather than autonomy can easily attach to the component parts of states and includes responsibilities as well as rights.

DISAGGREGATED SOVEREIGNTY

Theorists, pundits and policy-makers all recognize that traditional conceptions of sovereignty are inadequate to capture the complexity of contemporary international relations. The result is a seemingly endless debate about the changing nature of sovereignty – what does it mean? Does it still exist? Is it useful? Everyone in this debate still assumes that sovereignty is an attribute borne by an entire state, acting as a unit. Yet if states are acting in the international system through their component government institutions – regulatory agencies, ministries, courts, legislatures – why shouldn't each of these institutions exercise a measure of sovereignty – sovereignty specifically defined and tailored to their functions and capabilities?

This proposal may seem fanciful, or even frightening, if we think about sovereignty the old way – as the power to be left alone, to exclude, to counter any external meddling or interference. But consider the 'new sovereignty', defined by Abram and Antonia Chayes as the capacity to participate in international institutions of all types – in collective efforts to steer the international system and address global and regional problems together with their national and supranational counterparts.[67] This is a conception of sovereignty that would accord status and recognition to states in the international system to the extent that they are willing and able to engage with other states – engagement that necessarily includes accepting mutual obligations.

Chayes and Chayes begin from the proposition that the world has moved beyond interdependence. Interdependence refers to a general condition in which states are mutually dependent on and vulnerable to what other states do. But interdependence still assumes a baseline of separation, autonomy and defined boundaries. States may be deeply dependent on each other's choices and decisions, but those choices and decisions still drive and shape the international system. For Chayes and Chayes, by contrast, the international system itself has become a 'tightly woven fabric of international agreements, organizations and institutions that shape [states'] relations with one another and penetrate deeply into their internal economics and politics'.[68]

If the background conditions for the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, then sovereignty as autonomy makes no sense. The new sovereignty is status, membership, 'connection to the rest of the world and the political ability to be an actor within it'.[69] However paradoxical it sounds, the measure of a state's capacity to act as an independent unit within the international system – the condition that 'sovereignty' purports both to grant and describe – depends on the breadth and depth of its links to other states.

[67] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Cambridge, MA, Harvard University Press, 1995, p. 4.

[68] Ibid., p. 26. As noted above, Wolfgang Reinicke similarly emphasizes the extent to which globalization, unlike interdependence, penetrates the deep structure and strategic behaviour of corporations and other actors in the international system.

[69] Ibid.

This conception of sovereignty fits neatly with a conception of a disaggregated world order. If the principal moving parts of that order are the agencies, institutions and the officials within them who are collectively responsible for the legislative, executive and judicial functions of government, then they must be able to exercise legislative, executive and judicial sovereignty. They must be able to exercise at least some independent rights and be subject to some independent, or at least distinct, obligations. These rights and obligations may devolve from more unitary rights and obligations applicable to the unitary state, or they may evolve from the functional requirements of meaningful and effective transgovernmental relations. But the sovereignty of 'states' must become a more flexible and practical attribute.

If sovereignty is relational rather than insular, in the sense that it describes a capacity to engage rather than a right to resist, then its devolution onto ministers, legislators and judges is not so difficult to imagine. Judges would respect each other's competence as members of the same profession and institutional enterprise across borders. A fully 'sovereign' court would be entitled to its fair share of disputes when conflicts arise, to negotiate cooperative solutions in transnational disputes, and to participate in a transnational judicial dialogue about issues of common concern. Regulators would be similarly empowered to interact with their fellow regulators to engage in the full range of activities that regulatory networks carry out. And legislators would be directly empowered to catch up.

But if disaggregated state institutions are already engaged in these activities, what difference does it make if they are granted formal capacity to do what they are already doing? The principal advantage is that subjecting government institutions directly to international obligations could buttress clean institutions against corrupt ones and rights-respecting institutions against their more oppressive counterparts. Each government institution would have an independent obligation to interpret and implement international legal obligations, much as each branch of the US government has an independent obligation to ensure that its actions conform to the constitution. As in the domestic context, either the courts or the legislature would have the last word in case of disputed interpretations of international law, to ensure the possibility of national unity where necessary. In many cases, however, international legal obligations concerning trade, the environment, judicial independence, human rights, arms control

and other areas would devolve directly on government institutions charged with responsibility for the issue area in question.

By becoming enrolled and enmeshed in global government networks, individual government institutions would affirm their judicial, legislative, or regulatory sovereignty. They would participate in the formulation and implementation of professional norms and the development of best practices on substantive issues. And they would be aware that they are performing before their constituents, their peers, and the global community at large, as bearers of rights and status in that community.

This idea is not as far-fetched as it may seem. Actual examples already exist or are being proposed. Eyal Benvenisti has raised the possibility of formally empowering sub-state units to enter into agreements.[70] The Princeton Principles on Universal Jurisdiction make the case for establishing clear rules and principles under international law that are directly aimed at national judges, as they are the actual subjects of the international law doctrine. The ambiguity that helps statesmen negotiate treaties is often disastrous for judges, who must actually apply the law.

At first glance, disaggregating the state and granting at least a measure of sovereignty to its component parts might appear to weaken the state. In fact, it would bolster the power of the state as the primary actor in the international system. Giving each government institution a measure of legitimate authority under international law, with accompanying duties, marks government officials as distinctive in larger policy networks and allows the state to extend its reach. If sovereignty were still understood as exclusive and impermeable rather than relational, strengthening the state would mean building higher walls to protect its domestic autonomy. But in a world in which sovereignty means the capacity to participate in cooperative regimes in the collective interest of all states, expanding the formal capacity of different state institutions to interact with their counterparts around the world means expanding state power.

[70] Eyal Benvenisti, 'Domestic Politics and International Resources: What Role for International Law?', in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, New York, Oxford University Press, 2000, p. 109.

CONCLUSION

Members of government networks must interact with their foreign counterparts sufficiently transparently to be monitored by ordinary voters; they must give reasons for their actions in terms intelligible to a larger public; and they must be able to formulate arguments in sufficiently general, principled, 'other-regarding' ways to be able to win the day in a process of deliberative decision-making. Operating in a world of generalizable principles, however, requires a baseline of acceptable normative behaviour. The norms I have prescribed ensure wide participation in government networks, seek to preserve local, regional and national autonomy to the extent possible, and guarantee a wide space for local variation, including local variation driven by local and national politics.

At the loftiest level, these principles could be understood as part of a global transgovernmental constitution – overarching values to steer the operation of government networks. Yet the content of these specific principles is less important in many ways than the simple fact that there be principles – benchmarks against which accountability can be measured. Understanding government networks as a form of government, and then holding them to the same standards and subject to the same strictures that we hold all government, will do the rest.