
Global Administrative Law: The Quest for Principles and Values

Carol Harlow*

Abstract

There is currently much interest in the question whether a global administrative law is coming into being and, if so, whether this is desirable or otherwise. This paper addresses the question of principles for a global administrative law. It considers four potential sources and their suitability as a foundation for a global administrative law system: first, the largely procedural principles that have emerged in national administrative law systems, notably the principle of legality and due process principles (Section 3); second, the set of rule of law values, promoted by proponents of free trade and economic liberalism (Section 4); third, the good governance values, and more particularly transparency, participation and accountability, promoted by the World Bank and International Monetary Fund (Section 5); and finally, human rights values (Section 6). The paper ends on a sceptical note, concluding that a universal set of administrative law principles is difficult to identify and not especially desirable. First, administrative law is primarily a Western construct, protective of Western interests. It may impact unfavourably on developing economies. Secondly, the evolution of global administrative law in adjudicative forums is leading to an undesirable 'juridification of the political process'. The paper concludes that diversity and pluralism are preferable.

1 Introduction

The concept of a global administrative law suggests a number of difficult and controversial questions. Is such a system actually coming into being? If so, do we want it? Should it be left to evolve, as national systems of administrative law have by and large been free to do, to develop on its own, possibly subject to a process of cross fertilization unavoidable in the context of globalization? Alternatively, should conscious efforts be made to stimulate a process of harmonization? Has the time now come for a programme of codification of general principles? If so, should the primary actors be international bureaucrats, courts, with the concomitant danger of government by juristocracy, or even academics, some of whom already actively promote either the internationalization of constitutional law or the constitutionalization of international

* Emeritus Professor of Law, London School of Economics.

law? And is there any material on which to work or, to put this differently, are there universally recognized principles, which could legitimately form the basis for such a project? Finally, what is the proper domain of global administrative law? Is it and should it be operative only in global space, emerging as a species of cosmopolitan law? Should the principles be encouraged, as generally advocated by human rights lawyers, to invade national legal and constitutional space? And, if so, how can they be enforced?

This paper addresses only the question of *principles* and whether such principles as can be identified and fitted together are capable of forming the basis for a global administrative law. Section 2 elaborates on the central concept of ‘administrative law principles’. In the subsequent sections, four potential sources of administrative law principles are identified and their suitability as a foundation for a global administrative law system briefly discussed. Section 3 explores the first and most obvious source of administrative law principles: national administrative law systems. These are already the subject of comparative law analysis and, in the limited area of the European Union (EU), of moves towards harmonization stimulated by the European Commission and the European Court of Justice (ECJ). The following sections consider possible alternative sources, more directly related to the global experience. Section 4 considers a rapidly expanding source: a set of rule of law values, utilized in international economic trade law and vigorously promoted by proponents of free trade and economic liberalism. Section 5 considers good governance values, a recent entrant to the global scene. Partly derived from managerial theories of public administration, which swept the English-speaking world during the 1980s, these values have been grafted on to economic liberalism and are today promoted on a global basis by economic agencies such as the World Bank (WB) and International Monetary Fund (IMF). Section 6 deals with human rights values, a rival and rapidly spreading source of values, but only to the extent that these are procedural in character. Thus, many international human rights texts contain due process rights of a type traditionally developed in and protected by classical administrative law systems. As human rights law gains ground, promoted by human rights lawyers as a universal set of values with universal binding force, these procedural rights are gaining status as binding norms of international law. Whether the claim of human rights values to universality is justifiable is examined in Section 7. That section highlights a major finding of the paper: that there is considerable overlap between principles found in these different sources. This then suggests a tentative basis for a system of global administrative law. But notes of caution are sounded in the two final sections. Section 8 hints at grave problems of enforcement, while Section 9 addresses the troubling implications for democracy of the pursuit of globalized principles, made operative through unpublicized trade treaties and transnational machinery for dispute resolution. It touches on, without directly addressing, a further question of capital importance: the effect on national political arrangements of the rapid occupation of global space by legal actors, a topic on which the author maintains a largely negative view.¹ The conclusion

¹ For fuller expression of these views, see C. Harlow, ‘Voices of Difference in a Plural Community’, 50 *American J Comparative L* (2002) 339 and ‘Deconstructing Governance’, 23 *Yearbook of European Law* (2004) 57.

is that considerable scepticism about global administrative law is warranted. Perhaps pluralism and diversity are better options.

Whether global administrative law is anything more than an academic pipe dream is, indeed, a very moot point. Cassese, discussing the thick regulatory mass of international norms that now impinges on national administrative law, feels that it is at least a contingent possibility.² Snyder prefers to talk in terms of a 'system of global legal pluralism', situated in 'a variety of institutions, norms and dispute resolution processes located and produced at different structured sites around the world'.³ Kingsbury, Krisch and Stewart, in a paper written for the global administrative law project,⁴ suggest five potential sites in which global administrative law may be developed and through which it might be spread: (i) inside formal international organizations, notably the United Nations Organization (UN), the Security Council, or the World Health Organization; (ii) in systems of distributed administration set in place under treaty regimes, notably the GATS and WTO, where autonomous dispute resolution machinery has also been established; (iii) by transnational networks of administrative actors engaged in agenda-setting and other joint (governmental) enterprises; (iv) by groups of private institutions or hybrid groupings, which possess delegated regulatory functions, such as the Commission on Food Safety Standards, responsible for the *Codex Alimentarius*; and finally (v), as self-regulatory schemes of apparently private bodies, such as the International Olympic Committee, World Anti-Doping Agency or International Court of Arbitration for Sport. While the authors treat these categories as situations in which a global administrative law may simply *develop*, this author believes with Snyder and Muchlinski that global legal pluralism does more than 'simply provide the rules of the game; it also constitutes the game itself, including the players'.⁵ In other words, the network of legal rules and practices that governs a given global commodity chain inevitably reflects the structure of authority and power in that chain.⁶ One of the arguments of this paper is that, in consequence, the interests and distinctive cultural traditions of Third World countries, too often overlooked, may be eroded by the evolution of such a system.

2 Principles of Administrative Law in National Systems and the EU

The main purpose of this article is, as already indicated, to identify principles that might serve as the basis for a global administrative law. To skip lightly over a semantic argument that occupies much space in works of jurisprudence, it is accepted here

² Cassese, 'Shrimps, Turtles and Procedure: Global Standards for National Administrations', IILJ Working Paper No. 2004/4 at 19.

³ F. Snyder, *Governing Economic Globalisation: Global Legal Pluralism and EU Law* (2002), at 10–11.

⁴ Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 15. See also the Introduction to this Symposium.

⁵ Snyder, *supra* note 3, at 11.

⁶ Muchlinski, 'Globalisation and Legal Research', 37 *The Int'l Lawyer* (2003) 221, at 237.

both that principles contain an ethical dimension, and that the legal order and legal principles both contribute to the formation of community morality and take their values from it.⁷ Nonetheless, a distinction between ‘principles’, which form an essential building-block of a legal system and ‘values’, which are largely formulated outside that system, is helpful. In any discussion of a global legal order, the absence of a recognizable and clear-cut political or constitutional structure makes it particularly appropriate to distinguish what appertains strictly to law from what does not. So far as is possible, therefore, a distinction between ‘principles’ and ‘rights’ on the one hand, and ‘values’ or ‘standards’ on the other, will be adopted in this paper.

The legitimating principles of any Western administrative law system are found in the twin ideals of democracy and the rule of law. Arguably, at least in the present century, these twin ideals should form the background theory of every system of administrative law. This is certainly true of the European Union (EU), generally regarded as the most sophisticated of international political regimes, possessing the most developed transnational legal order. There the twin ideals have matured into constitutional principles, firmly embedded in the political arrangements. They find a mention in the various treaties that act as the EU constitution and were gathered up and reiterated in the Preamble to the European Charter of Fundamental Rights and Freedoms, which affirms that the Union is ‘based on the principles of democracy and the rule of law’. They were swept up again into the European Constitutional Treaty, which would for the first time have given the Charter a legal and enforceable basis.⁸ This can be seen to characterize the long march of the twin values inside Western systems of government and political theory, thence into global and transnational systems of governance, where they are emerging as governing principles of the legal order.

In the context of our subject, the rule of law is arguably the more significant of these two principles. Every Western administrative law system is founded on the rule of law and, while an administrative law system can – and may have to – function outside a system of democratic government, a system of democratic government that does not observe the rule of law is simply paradoxical. The rule of law ideal forms the central background theory against which the principles of administrative law operate, while at the same time acting as a governing principle. It gives rise to a further set of principles, which form the body of administrative law. At constitutional level, for example, the rule of law generates the principle of right of access to a court for dispute resolution; administrative law expands this right as a set of due process principles, including the right to be heard by or make representations to an adjudicator; the right to be heard by an impartial adjudicator; reasoned decisions, and so forth. More detailed rules, typically contained in case law, define a ‘hearing’. This process allows the ambit of the principle to be extended (or contracted) and later reformulated as an administrative procedure by extending a measure of due process to all decision-makers. The legislator may, however, intervene, as occurred significantly with the

⁷ See further P. Cane, *Responsibility in Law and Morality* (2002).

⁸ For the provisions governing interpretation and application, see Part II, Title VII, Arts 111–114. No prediction is made here as to the ultimate fate of this document.

American Administrative Procedure Act (AAPA, below) or with TEC Article 253 (ex 190), which imposes on all EU decision-makers a duty to give reasons.

The key principle of access to a court, together with the due process rights that generally accompany it, are today embodied in many human rights texts – notably Article 6(1) of the European Convention on Human Rights (ECHR), where it has given rise to a copious jurisprudence (detailed consideration of such texts is reserved for Section 6). We should, however, notice that agreement of ultimate values and objectives at the macro-level does not denote the absence at the micro-level of substantial variance. To put this differently, values and principles do not always coincide, a point illustrated later in this article.

Every European system acknowledges the primary function of administrative law as being the control of public power or, as Shapiro calls it, ‘bounded government’.⁹ To put this slightly differently, administrative law subjects officialdom to the rule of law, prescribing behaviour within administrative organizations. This reflects the fact that the main systems of administrative law established themselves during the 19th century, usually in the context of constitutions that placed much emphasis on functional or triadic separation of powers.¹⁰ It follows that administrative law has played an important part in the struggle for limited government. *Marbury v Madison*,¹¹ which established judicial control over ministerial actions, is an almost exact parallel for the later French case of *Prince Napoléon*,¹² while a landmark case in modern English administrative law establishes the plenary jurisdiction of the ‘ordinary courts of the land’ over prerogative governmental powers.¹³ These were all significant cases, establishing the jurisdiction of the courts over acts previously deemed governmental or political. It is not then very surprising to find definitions of administrative law in many systems that stress its *control* function. Cassese’s decisive assertion that administrative law is that branch of law that disciplines public administration and governs its relationship with private parties,¹⁴ would certainly strike a chord with Shapiro, while again in terms very recognizable to Shapiro, it has been said that

Administrative law is the law relating to the control of governmental power. This, at any rate, is the heart of the subject. . . . The primary purpose of administrative law is . . . to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok.¹⁵

⁹ Shapiro, ‘Administrative Law Unbounded’, 8 *Indiana J Global Legal Studies* (2001) 369.

¹⁰ The unwritten, common law British constitution, an apparent exception, is not formally a Separation of Powers constitution, but it strongly recognizes the independence of the judiciary and the embargo on judicial policy-making: see J. Allison, *A Continental Distinction in the Common Law, A Historical and Comparative Perspective on English Public Law* (1996).

¹¹ *Marbury v Madison*, 1 Cranch 137, 2 L Ed 60 (1803).

¹² Conseil d’Etat, 19 Feb. 1875, *Prince Napoléon*, Rec. 155, concl. David.

¹³ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

¹⁴ S. Cassese, *Istituzioni di Diritto Amministrativo* (2004), at 1: *il diritto amministrativo è quell ramo del diritto che disciplina la pubblica amministrazione e i suoi rapporti con i privati*. Compare Piva, ‘An Introduction to Italian Public Law’, 2 *European Public Law* (1995) 299, at 300.

¹⁵ H.W.R. Wade and C. Forsyth, *Administrative Law* (8th edn., 2000), at 4–5.

Throughout the common law world, administrative law has evolved as part of a system of ‘checks and balances’, being set in place by bodies external to the administration. Legislators establish the framework, while much of the substance derives from courts, which are left by and large to develop the principles. In this respect, the French model, where the administrative judge works from *inside* the administration to develop its norms, while much of the regulatory framework derives from the executive, differs sharply.¹⁶ This framework has facilitated the development of an alternative and more administration-centred definition of administrative law as ‘all the law and rules applicable to the administration’.¹⁷ From this perspective, administrative law is more than a ‘command-and-control’ system centred on courts, whose principles are developed in judicial review actions; it includes, and even centres on, the legislation and regulation set in place by government and administrators for the implementation of policy. These perspectives are not, of course, exclusive; in most systems, administrative law is Janus-faced. The second perspective sits uncomfortably, however, with the rule of law ideal adopted by economic liberals and purveyed in global space through the agency of international trade law (Section 3 below).

Again in most systems, administrative law has evolved as primarily concerned with procedure: consequently, its principles are largely procedural in character.¹⁸ Administrative law requires government and administration to stay within the boundaries of legality or, in American administrative law in particular, not to exceed their powers as delegates. From this springs the principle of legality central to all administrative law systems, according to which the administration must act within its powers (in common law parlance, the principle of *ultra vires*; in French *excès de pouvoir*). The administration is usually required also to observe principles of due process.¹⁹ Administrative law should also contain ‘a set of rules prescribing the proper rule-making behavior for administrative agencies; that is, administrative law is a key set of procedures’.²⁰ Lawyers often make the assumption that these principles should

¹⁶ Art. 37 of the French Constitution governs the present division of regulatory function in the modern French system: on the history, see M. Troper, *La séparation des pouvoirs et l’histoire constitutionnelle française* (1980). Anglo-American systems differ, in theory if not in practice, by reference to theories of delegation: on the differences, see Lindseth, ‘The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s’, 113 *Yale LJ* (2004) 1341.

¹⁷ C. Debbasch, *Institutions et droits administratifs* (1976), at 17. See also Jèze, *Les principes généraux du droit administratif* (3rd edn., 1926); L. Duguit, *Leçons du droit public général* (1926); L. Duguit, *Traité du droit constitutionnel* (3rd edn., 1927–1930). See for Italy, S. Cassese, *Le Basi del diritto amministrativo* (3rd edn., 1995), at 13, and for the US, K.C. Davis, *Administrative Law Text* (3rd edn., 1972), at 1: ‘Administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action.’

¹⁸ The four classical sub-categories of review in French administrative law—illegality, irrationality, procedural error, and wrong purpose—are not entirely confined to the procedural, though in practice the procedural grounds for review dominate the case law: see generally, J.-M. Auby, *Traité de Contentieux Administratif* (1984).

¹⁹ It is sometimes said that Italian law does not observe these principles, but see the Administrative Procedures Law 241 of 7 Aug. 1990 and Cassese, *supra* note 2, at 325 ff.

²⁰ Shapiro, ‘The Institutionalization of European Administrative Space’ in A. Stone Sweet, W. Sandholtz, and N. Fligstein, *The Institutionalisation of Europe* (2001), at 94.

be generated – as indeed they often are – through the judicial review process. This assumption is not necessarily correct. If, as suggested earlier, the function of administrative law is the development of a *framework* for administration, in the shape of a body of essential tools for effective policy-making and governance, the practices and procedures need not evolve through case law; they may be juridified without falling entirely within the purview of courts. As already noted, the primary source of American rule-making procedure is the AAPA; a majority of national European systems possess administrative procedure acts, while the genesis of EU administrative procedures lies in a Commission regulation governing competition procedures, though alongside these, general principles have been formulated by the ECJ.²¹ Codification, however, usually provides a significant stimulus for juridification, in the shape of a reassertion of judicial supremacy in the form of enhanced judicial review.²²

But defining administrative law principles is, as the authors of the leading Australian administrative law text tell us, ‘a topic on which few commentators can reach agreement, because it ultimately depends on what they want out of administrative law.’ With this proviso, the authors boldly set out their own stall, calling as a minimum for

a legal system which addresses the ideals of good government according to law. We take those ideals to include openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality.²³

With the word ‘ideals’, we are beginning to move away from the classical core of administrative law and the procedural principles that accompany it. We find added to the typical modern mixture of administrative law *principles* – fairness, legality, consistency, rationality and impartiality – all dependents of the rule of law doctrine, a set of less familiar *values*. Participation, as we shall see in Section 4 below, is particularly ambiguous: strongly protected in American administrative law, weakly elsewhere; initially protected as an *individual* right; today, as Bignami argues, maturing in global space into a right of collective action.²⁴ Again, Scandinavian systems prize open government highly; openness is indeed a protected constitutional value and fundamental right of citizenship.²⁵ A very different attitude obtains in the United Kingdom, which has only just moved from protected official secrecy to freedom of information legislation.²⁶ And whether openness, or (in more fashionable terminology) transparency, is properly an administrative law principle remains a question that receives different

²¹ Lenaerts and Vanhamme, ‘Procedural Rights of Private Parties in the Community Administrative Process’, 34 *CML Rev* (1997) 53. And see generally H.P. Nehl, *Principles of Administrative Law* (1998).

²² Shapiro, ‘APA: Past, Present and Future’, 72 *Virginia L Rev* (1986) 447; Shapiro, ‘The Giving Reasons Requirement’ [1992] *U Chicago Legal Forum* 179.

²³ M. Aronson, B. Dyer, and M. Groves, *Judicial Review of Administrative Action* (3rd edn., 2004), at 1.

²⁴ Bignami, ‘Three Generations of Participation Rights in European Administrative Proceedings’, 68 *Law and Contemporary Problems* (2005) 61.

²⁵ Larsson, ‘How Open Can a Government Be? The Swedish Experience’ in V. Deckmyn and I. Thomson (eds), *Openness and Transparency in the European Union* (1998); C. Harlow, ‘Freedom of Information and Transparency as Administrative and Constitutional Rights’, 2 *Cambridge Yearbook of European Legal Studies* (1999) 285.

²⁶ P. Birkinshaw, *Freedom of Information* (3rd edn., 2001).

answers in different systems from different authors. Legislative protection of access to government information through the apparatus of administrative law, typically an ombudsman, specialist tribunal or judicial review, brings it, however, clearly within the ambit of administrative law.

Recognizing the problem, Michael Taggart sidesteps it by listing openness, fairness, participation, impartiality, accountability, honesty and rationality as ‘public law values... distilled primarily from administrative law’. He also acknowledges ‘much common ground here with constitutional law’.²⁷ But Taggart may be mistaken in characterizing some of these principles as *legal*. While fairness, impartiality, honesty and rationality are unquestionably classical administrative law principles, and openness, as just suggested, can sometimes be a constitutional value, accountability and transparency more probably derive – as we shall see later – from the good governance agenda.

Taggart’s blurring of the administrative/constitutional law boundary is nonetheless significant. As he explains, ‘the recent emphasis on public law *values* allows the influence of administrative law doctrine and values to transcend the limited and uncertain contours of judicial review, and to cast a long shadow over the recently levelled terrain of what was once called public administration’.²⁸ The sudden arrival on the scene of ‘New Right’ politics in the late 1970s, with liberal economic agendas of privatization, liberalization and subsequently regulation, had unwelcome consequences for public law, bringing a diminution in accountability, as private law took over from public law as the control mechanism.²⁹ It brought too an equally unwelcome diminution in the influence of public law and public lawyers.³⁰ By presenting administrative law principles as constitutional values to which the private law system is also subject, control over privatized entities could be maintained. This is a point of cardinal importance in the context of globalization, where much the same struggle for influence and battle over values is taking place in global space.

Kingsbury, Krisch and Stewart have assembled a more complete list of administrative law principles with global administrative law specifically in mind.³¹ This revolves around three different conceptions of the role of global administrative law: a classical accountability or perhaps a delegation model, as discussed above, designed to attach ‘subordinate or peripheral components of an administrative regime to the legitimating center (whether executive or parliamentary)’ and aimed at ensuring the *legality* of

²⁷ Taggart, ‘The Province of Administrative law Determined’ in M. Taggart (ed.), *The Province of Administrative Law* (1997), at 4.

²⁸ *Ibid.* (emphasis mine).

²⁹ On the consequences, see variously: Aronson, ‘A Public Lawyer’s Responses to Privatisation and Outsourcing’ in Taggart (ed.), *supra* note 27; Freedland, ‘Government by Contract and Public Law’ [1994] *Public Law* 86; Freeman, ‘The Private Role in Public Governance’, 75 *NYU L Rev* (2000) 543; Daintith, ‘Contractual Discretion and Administrative Discretion: A Unified Analysis’, 68 *MLR* (2005) 554.

³⁰ Taggart, *supra* note 27. Compare Dubois *et al.*, ‘La contestation du droit administratif dans le champ intellectuel et politique’ in J. Chevallier *et al.*, *Le droit administratif en mutation* (1993). And see M. Freedland and S. Sciarra (eds), *Public Services and Citizenship in European Law, Public and Labour Law Perspectives* (1998).

³¹ Kingsbury, Krisch, and Stewart, *supra* note 3.

administrative action; a rights-oriented, liberal model, introduced below; and a model geared to the promotion of democracy (Section 5 below). The list, which is once more an amalgam of fashionable ‘good governance’ values and classical administrative law principles, recognizes to a limited extent systems outside the common law world. It comprises: accountability, transparency and access to information, participation, the right of access to an independent court, due process rights, including the right to be heard and the right to reasoned decisions and reasonableness. Proportionality and legitimate expectation are the outsiders, brought in from European legal systems.³² These then are the principles and values we should bear in mind.

3 Principles of ‘The Rule of Law’ and Economic Liberalism

In classical administrative law systems, then, the rule of law normally requires that the government acts always within its powers; follows the proper procedures; and provides equality of access to courts and other machinery for adjudication. This ‘thin’ or procedural version of the rule of law doctrine is likely to flourish in economic communities, though the doctrine does not everywhere receive identical interpretation.³³ At global level, the key requirement of the rule of law is a legal order with fixed and stable general principles, together with formal rights of access to courts for the resolution of disputes. The rule of law doctrine may also operate to lock the machinery in place through a process of constitutionalization.

The clearest example of such a process in action may be found in the early days of the European Communities, where the reading of the Treaties in the light of German *ordo-liberal* doctrine as a surrogate constitution, coupled with the judge-made doctrine of supremacy of EC law, has effectively tied the Member States to capitalist economics, obliging them ‘to ensure their economies are organized and run in accordance with the principles of the market and competition’.³⁴ Explicitly articulated in the Treaties, the ‘four freedoms’ (free movement of persons, goods, services and capital, and establishment) have long been read as an economic constitution coupled to an economic concept of citizenship.³⁵ With the ‘thin’ economic version of the rule of law, the freedoms have also influenced the way in which the ECJ set about its task of putting in place principles of administrative law when exercising its judicial review function under TEC Articles 230 and 232. Largely borrowed from national systems, these focused on legality and due process, though common lawyers should note the central place allocated by the Court to the German principle of proportionality.

³² See J. Schwarze (ed.), *Administrative Law under European Influence* (1996).

³³ See F. Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (1986) and the commentary of R. Cotterell, *Law's Community. Legal Theory in Sociological Perspective* (1995), at 164–177.

³⁴ See Seidel, ‘Constitutional Aspects of the Economic and Monetary Union’ in F. Snyder (ed.), *Constitutional Dimensions of European Economic Integration* (1996), at 476 and Streit and Mussler, ‘The Economic Constitution of the European Community: “From Rome to Maastricht”’, in *ibid.*

³⁵ Everson, ‘The Legacy of the Market Citizen’ in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (1995).

The EU is the outstanding, but by no means the only, example of what Gray, inimical to the ideology, has called ‘the late-twentieth-century free market experiment attempt to legitimate through democratic institutions severe limits on the scope and content of democratic control over economic life’.³⁶ The same capitalist, market, economic ideology forms the background values of the WTO and also, with important reservations, the World Bank and IMF, though the scope for action and dissemination of values has so far been less than is the case with the European Union, where a powerful court, firmly installed and imbued with these principles, imposed them directly on the Member States. For Stone Sweet, however, markets ‘are probably the social institutions which are most dependent upon normative underpinnings; it is indeed impossible to imagine markets absent a highly refined, legally-constituted social interest, in the form of civil and property rights, contract and tort law, and mechanisms of formal adjudication by courts’.³⁷ And Petersmann asserts the capital importance of ‘national and international constitutional guarantees of freedom, non-discrimination and the rule of law’ as prerequisites for ‘democratic peace’, claiming for this triad of economic values the status of ‘global constitutionalism’.³⁸ Moreover, the same author directly links the WTO, the rule of law and judicialization, when he says that:

Recourse to domestic court proceedings offers the most effective and most democratic means for the decentralized enforcement of precise and unconditional WTO rules by, and for the benefit of, citizens interested in defending individual freedom and the rule of law against protectionist abuses of government powers.³⁹

Muchlinski, however, distinguishes several variants or degrees of economic liberalism.⁴⁰ ‘Hard libertarianism’ limits its ethical agenda to the protection of private property and basic market freedoms. ‘Neo-liberalism’ emphasizes the benefit of an ‘economic constitution’ based on international free trade but is not opposed to the protection of fundamental rights or the environment.⁴¹ ‘Regulatory functionalism’ accepts governmental regulation and is sceptical of the market as an accountability vehicle; amongst the ranks of regulatory functionalists we find a somewhat unexpected alliance of pro-marketeers and anti-capitalists, accepting as a common position the need for a global code of corporate responsibility. The principles of agency and delegation are used to legitimate regulatory standard-setting in global space; in other words, nation-states, using the foreign affairs powers, implicitly entrust to

³⁶ J. Gray, *False Dawn, The Delusions of Global Capitalism* (1998), at 9.

³⁷ Stone Sweet, ‘What is a Supranational Constitution? An Essay in International Relations Theory’, 3 *The Review of Politics* (1994) 441, at 463.

³⁸ Petersmann, ‘How to Reform the United Nations System? Constitutionalism, International Law and International Organizations’, 10 *Leiden J Int’l L* (1997) 421, at 463.

³⁹ Petersmann, ‘European and International Constitutional Law: Time for Promoting Cosmopolitan Democracy in the WTO’ in G. de Burca and J. Scott (eds), *The EU and the WTO* (2001), at 81–110.

⁴⁰ Muchlinski, ‘Human Rights, Social Responsibility and the Regulation of International Business: the Development of International Standards by Intergovernmental Organisations’, 3 *Non-state Actors and Int’l L* (2003) 123, at 125.

⁴¹ Here Muchlinski cites Petersmann and J.H. Jackson: see, e.g., Jackson, ‘The WTO “Constitution” and Proposed Reforms: Seven Mantras Revisited’, 4 *J Int’l Economic L* (2001) 67.

inter-governmental organizations power ‘to fill out the terms of the “social contract”’.⁴² Thus ‘corporate libertarianism’ or the profit maximization approach is said to inform the policies of bodies such as the WTO or WB when they call for privatization, deregulation and liberalization of global markets; but economic liberalism is increasingly able to accept ‘an ethical floor of responsibilities’ applicable alike to multinational enterprises and in international rule making. This Muchlinski interprets as ‘some kind of constitutionalization’ of intergovernmental organizations. The relevance of this to the present argument is obvious: high on the agenda of proponents of a global administrative law is an over-arching ‘constitutionalization’ of values – notably in respect of the legitimacy of standard-setting in global space, which must be open, participatory, transparent, accountable and ‘constitutionally recognized’.⁴³ In this way, a softer form of economic liberalism is evolving, its authors interested in and supportive of some of the ‘public law’ procedural principles discussed above.

Softer, substantive interpretations of the rule of law doctrine have in any event always existed, aimed at furnishing the rule of law with a moral dimension.⁴⁴ In 1959, for instance, the rule of law formed the centrepiece of a Congress held in New Delhi. Here the International Commission of Jurists signed a declaration that firmly situated the rule of law principle at the heart of a social democratic political agenda.⁴⁵ Significantly, the Congress was not a wholly Anglo-American enterprise; lawyers from 53 countries, many from the developing world, signed the Declaration, which had a strong substantive content, bearing a striking resemblance to the good governance agenda discussed below. There was, too, a significant link at the Delhi Congress with the human rights movement, then in its infancy, whose values, it is suggested later, have a greater claim to a measure of universality than those of economic liberalism. The Declaration expressly recognized the need for strong executive and effective government capable of ensuring law and order and ensuring effective economic and social development; on the other hand, it demanded that the machinery of governance be democratic and subject to limitations on its lawmaking powers, asking for discriminatory laws or laws curtailing civil and political freedoms to be outlawed. Thus, unlike the liberal economic agenda, which professes democracy but actually entrenches a court-oriented rule of lawyers or ‘juristocracy’, the Delhi variant calls for a proper balance between executive and judicial power. It reflects too the classical principles of administrative law.

⁴² Muchlinski, ‘International Business Regulation: An Ethical Discourse in the Making?’ in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (2004), at 99. See similarly Majone, ‘The Rise of the Regulatory State in Europe’, 17 *W European Politics* (1994) 77; G. Majone (ed), *Regulating Europe* (1996).

⁴³ Muchlinski, *supra* note 40, at 146. And see Petersmann, ‘Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationship’, 4 *J Int’l Economic L* (2001) 4.

⁴⁴ Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] *Public Law* 467.

⁴⁵ 2 *J Int’l Commission of Jurists* (1959), at 7–43; International Commission of Jurists, *The Rule of Law and Human Rights – Principles and Definitions* (1966).

In the context of economic liberalism, Weiler breaks the strong link between the rule of law and judges, questioning the legitimacy of judicial power. He sees the WTO, as a direct consequence of the introduction of the Dispute Settlement Understanding (DSU) in 1994, as ‘moving to the rule of law without realizing that it comes with a legal culture which is as integral as the compliance and enforcement dimensions of the DSU shift’.⁴⁶ This culture comprises more than the minimal or ‘thin’ rule of law, summarized earlier as requiring the fixed and stable general principles of law plus formal rights of access to courts for the resolution of disputes. As identified by Weiler, a wider rule of law ideology focuses on the *supremacy* of law as expressed through courts and the *binding* nature of judicial resolutions. It is on this cornerstone that the authority of a transnational or global ‘juristocracy’ is founded, whose rulings are, Cassese argues, capable of penetrating deeply into national legal systems.⁴⁷ Thus, what Weiler anticipates from the new DSU panels is a set of rulings in the rule of law mould of economic liberalism, to be gradually substituted for the negotiated outcomes of political process. In time power may be leached from the national, political institutions of the states that put the machinery in place, as effective machinery for enforcement is put in place at national level (see Section 8 below). The argument that these rulings can be legitimated solely on the basis of a few values or principles such as openness or transparency, plus some form of administrative law machinery for participation, is a weak one. It is hard too to see these practices and principles as ‘constitutionally recognized’; they beg too many questions of accountability.

4 Administrative Law Principles in the Transnational Promotion of ‘Good Governance’ Values

When Landes, an economic historian, drew up a list of measures necessary for growth and development, it included: securing the rights of private property and personal liberty and enforcing contractual rights, but, moving economic liberalism in the direction of its softer derivatives, Landes added stable, responsive and honest government.⁴⁸ This listing represents the nub of good governance programmes.

The interest of the WB in good governance was stimulated by early failures of its structural reform programmes in the developing world. WB-financed programmes were encountering local hostility, which suggested to WB managers that government might be out of touch with the governed. They felt the need for the investment of time and money in public consultation exercises to build public trust in development projects after widespread corruption, disappearance of aid funds, and inadequate audit arrangements in an Indonesian aid scheme made accountability a

⁴⁶ Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’, available at www.jeanmonnetprogram.org/papers No. 00/0090 (Part III).

⁴⁷ Cassese, *supra* note 2. For the concept of juristocracy, see R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitution* (2004).

⁴⁸ D. Landes, *The Wealth and Poverty of Nations* (1998).

serious issue. Consequently (if somewhat implausibly), a WB report of 1989 promoted the idea that 'democratization in the context of a free economy would compel governments to be more accountable, less corrupt and hence more efficient developmentally'.⁴⁹ Even where government was not democratic, good governance seemed to require accountability, if only to the donor states. In this way, participation and accountability emerged as 'good governance values', likely, it was thought, to help counter corruption by co-opting the public to police the progress of projects under way.⁵⁰ And since information and accountability go hand in hand, transparency soon joined the triad of good governance values.

By the early 1990s, economic liberalization was firmly linked to promotion of political liberalism and democratization and belief in good governance was described as a 'new orthodoxy' dominating official Western aid policy and development thinking.⁵¹ For Leftwich, a 'functional neo-liberal theory of politics' had come into being, which linked

[c]oncern with markets and economic growth to its concern with democracy. For it assumes that democratic politics is also *necessary* for a thriving free market economy, and vice versa, for the two are inextricably linked with each other. . . . It follows that neo-liberal political theory holds that democratization in the context of a free economy would compel governments to be more accountable, less corrupt and hence more efficient developmentally, for they would be judged on their performance and thrown out if they did not deliver public goods effectively.⁵²

Good governance had come to comprise an expanding set of requirements, which include: an efficient public service; an independent judicial system and legal framework to enforce contracts; the accountable administration of public funds; an independent auditor responsible to a representative legislature; respect for the law and human rights at all levels of government; a pluralistic institutional structure and a free press.⁵³

While the intimate connection between this 'wish list' and the 'thin' or economic rule of law ideology described in the previous section is obvious, many non-governmental organizations (NGOs) agree on the same agenda. Similarly, the movement for 'cosmopolitan social democracy' unites around a rule of law agenda, comprising promotion of the impartial administration of law at the international level and greater transparency, accountability and democracy in global governance. It adds deeper commitment to social justice in pursuit of a more equitable distribution of the world's resources and human security.⁵⁴ The link between the pursuit of global administrative law and the agenda of cosmopolitan democracy for a 'new world order' lies in the

⁴⁹ World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (1989).

⁵⁰ See S. Mallaby, *The World's Banker* (2004), especially ch. 7, where the influence of anthropologist Scott Guggenheim is noted, together with his conclusion that the key to real development in Indonesia lay 'in building grass-roots democratic institutions under the feet of a dictator'.

⁵¹ Leftwich, 'Governance, Democracy and Development in the Third World', 14 *Third World Quarterly* (1993) 605, at 611. See also Grindle, 'Good Enough Governance: Poverty Reduction and Reform in Developing Countries', 17 *Governance* (2004) 525.

⁵² *Ibid.*, at 609.

⁵³ *Ibid.*, at 605.

⁵⁴ D. Held and A. McGrew, *Globalization/Anti-Globalization* (2002), at 131–132.

concept of participation. Thus, in proposals for a system of global governance put forward by the unofficial Commission on Global Governance, a ‘parliamentary body’, composed of civil society representatives (CSOs), together with a Petitions Council available to ‘international civil society’, figures.⁵⁵ This proposal would strengthen and legitimate the position of CSOs, which, it is argued in Section 5, have most to gain from rights of participation.

Where do good governance values originate? And to what extent can we link them with administrative law? According to Hood, they derive from two main Western traditions of public administration: first, the classical, public service model of public administration, dominated by the notion of public interest – which also occupies a central place in French administrative law;⁵⁶ secondly, from the ‘new public management’ (NPM) reforms that swept through public administration during the 1990s, where the ‘mean and lean’ values of economy, efficiency and effectiveness took precedence over the softer and more humane public service values.⁵⁷ The pre-eminence of ‘mean and lean’ values was a further reason for the move to embed a distinctive set of ‘soft’ values into administrative law.⁵⁸ The vogue for NPM spread rapidly through the English-speaking world and met with some success in Europe⁵⁹ but has always possessed an international dimension, promoted through globalization and the rise of neo-liberal economic theory. Thus, the two main strands of good governance, while by no means identical, at least come together in the standards that they promulgate.

It is these that are reflected in the global good governance programme promoted by the IMF, the WB and the OECD in an interactive website managed jointly with the Commonwealth Association for Public Administration and Management (CAPAM) and the International Institute of Administrative Sciences (IIAS). Participation of the last two is significant. CAPAM is not an international aid organization but a consensual association of sovereign states; the IIAS is a not-for-profit voluntary organization, funded by contributions from national governments, universities and other bodies interested in the administrative sciences. Membership is entirely voluntary. China, Japan and Korea are all state members and the IIAS is a bilingual Anglo-French organization, with a high level of participation from Francophone Africa. Partnership with these bodies operates to legitimate good governance values in a wide range of non-Western countries.

It is the first OECD PUMA Report, *Ethics in the Public Service*,⁶⁰ to which we owe the introduction of good governance standards into EU public administration, following a

⁵⁵ Commission on Global Governance, *Our Global Neighbourhood* (1995), at 66, where democracy is linked to legitimacy and effectiveness and the rule of law is called ‘the administrative value’.

⁵⁶ On this link see Malaret Garcia, ‘Public Service, Public Services, Public Functions, and Guarantees of the Rights of Citizens: Unchanging Needs in a Changed Context’, in Freedland and Sciarra, *supra* note 30.

⁵⁷ Hood, ‘A Public Management for All Seasons’, 69 *Public Administration* (1991) 3. Hood calls the former *sigma* and the latter *theta* values, situating both inside public administration.

⁵⁸ *Ibid.*

⁵⁹ For the spread of NPM in Europe, see D. Farnham *et al.*, *New Public Managers in Europe* (1996).

⁶⁰ See the PUMA Report, *Ethics in the Public Service*, available at www.oecd.org. And see PUMA Policy Brief No 10, *Citizens in Policy-making, Information, Consultation and Public Participation*, available at http://www.sigmaxweb.org/LongAbstract/0,2546,en_33638100_34612958_35063275_119696_1_1_1,00.html.

set of notorious corruption scandals that rocked the EU in 1999.⁶¹ Alarmed, the European Parliament set up a powerful investigation committee of Independent Experts, all distinguished lawyers and auditors. Against this background it is hardly surprising that the Experts heavily underscored the values of accountability and responsibility,⁶² sourced from the PUMA report on ethics. But while the Experts focused on *responsibility* and *accountability*, the Commission's subsequent response in a *White Paper on European Governance*⁶³ singled out as a basis for EU governance five 'good governance' principles: openness, participation, accountability, effectiveness and coherence, though giving accountability a curiously limited meaning.⁶⁴ It drew on theoretical concepts of 'directly deliberative polyarchy', grounded in twin assumptions: first, that effective political oversight by representative institutions is unsuited to multi-level governance; and secondly that responsive administration plus public deliberation can serve as a substitute for democratic institutions to counter popular mistrust of its system of 'governance by experts'.⁶⁵ This reflects Article 46 of the European Charter of Fundamental Rights, which instructs the institutions 'to maintain an open, transparent and regular dialogue with representative associations and civil society'.⁶⁶ If this were to be rendered enforceable by ratification of the Constitutional Treaty, a principle of public consultation would effectively be 'constitutionalized' across the EU in all matters concerning EC law.

⁶¹ These led ultimately to the resignation of the Santer Commission: see C. Harlow, *Accountability in the European Union* (2002), at 53–57; Tomkins, 'Responsibility and Resignation in the European Commission', 62 *MLR* (1999) 744.

⁶² Committee of Independent Experts, *First Report on Allegations of Fraud, Mismanagement and Nepotism in the European Commission* (15 Mar. 1999), para. 9.4.25.

⁶³ European Commission, *White Paper on European Governance* (WPEG), COM(2001) 428 final [2001] OJ C287/1.

⁶⁴ *Ibid.*, at 10 defines accountability as follows:

'Roles in the legislative and executive processes need to be clearer. Each of the EU institutions must explain and take responsibility for what it does in Europe. But there is also a need for greater clarity and responsibility from Member States and all those involved in developing and implementing EU policy at whatever level.'

⁶⁵ Cohen and Sabel, 'Directly Deliberative Polyarchy', 3 *ELJ* (1997) 313; Gerstenberg and Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?' in C. Joerges and R. Dehousse (eds), *Good Governance in Europe's Integrated Market* (2002); Scott and Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', 8 *ELJ* (2002) 1.

⁶⁶ Art. 46 of the European Charter of Fundamental Rights: Final [2000] OJ C364/1, now incorporated as Part II of the European Constitutional Treaty provides:

'The Union institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action.

The Union institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

The Commission shall carry out broad consultations with parties concerned in order to ensure that the union's actions are coherent and transparent.'

The Commission went on to instal new consultation procedures for NGOs (now called ‘civil society organizations’),⁶⁷ yet was clearly anxious about the step that it was taking. Nervously it maintained that:

Participation is not about institutionalizing protest. It is about more effective policy shaping based on early consultation and past experience . . . Creating a culture of consultation cannot be achieved by *legal* rules which would create excessive rigidity and risk slowing the adoption of particular policies.⁶⁸

Here the Commission is disingenuous in pretending that decisions as to ‘which associations should be consulted and whose suggestions should be accepted, or in deciding which associational codes of conduct should pass muster, value judgments are not made’.⁶⁹ A substantial administrative discretion with important political implications is concealed in these evaluations, which should be subjected to the controls of administrative law. It is unlikely that this façade of administrative objectivity will serve for long to deflect judicial review.⁷⁰

So far neither national nor transnational administrative law systems have engaged strongly with the triad of good governance values. The good governance principle of transparency is a democratic right of citizenship, a kind of transparency that courts have been notably unwilling to provide;⁷¹ indeed, classical administrative law systems, set up for the protection of private rights and interests, may actually characterize government information as private property, to which the public has no right of access.⁷² Open government is almost everywhere a legislative introduction and it is a panoply of legislative protections that installs openness as a principle of administrative law. In the United States, the AAPA⁷³ opened up space to interested parties in rule-making procedures, which citizen action groups later claimed in the name of democratic participation. From the perspective of constitutional theory, this raised legitimacy

⁶⁷ WPEG, *supra* note 63, at 16. And see Commission Communication, ‘Promoting the Role of Voluntary Organisations and Foundations in Europe’, COM(97)241 final; Commission Communication, ‘The Commission and Non-governmental Organisations: Building a Stronger Partnership’, COM(2000)11 final; Commission Communication, ‘General Principles and Minimum Standards for Consulting Non-institutional Interested Parties’, COM(2002)277.

⁶⁸ WPEG, *supra* note 63, at 15 and 17 (emphasis mine).

⁶⁹ Bignami, ‘Creating Rights in the Age of Global Governance: Mental Maps and Strategic Interests in Europe’, available at <http://law.bepress.com/commission/expresso/eps/390>, at 21.

⁷⁰ See Case T-135/96 *UEAPME v Council* [1998] ECR II-2335 (challenge by a group not consulted in consultation procedures; successful only on the point of standing).

⁷¹ See notably Case C-68/94 *Netherlands v Council* [1996] ECR I-2169, and for comment Dyrberg, ‘Current Issues in the Debate on Public Access to Documents’, 24 *EL Rev* (1999) 157. And see Curtin, ‘Citizens’ Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?’, 37 *CML Rev* (2000) 7.

⁷² This is particularly the case with England, where the struggle for freedom of information has been bitter and courts have been more inclined to protect official secrecy: see P. Birkinshaw, *Freedom of Information* (3rd edn., 2001). For the EU, where similar limitations obtained, see Harlow, ‘Freedom of Information and Transparency as Administrative and Constitutional Rights’, 2 *Cambridge Yearbook of European Legal Studies* (1999) 285.

⁷³ Administrative Procedure Act, 60 Stat 237 (1946), as amended by 80 Stat 378 (1966) and 81 Stat 54 (1967).

questions, discussed below; from an administrative law perspective, it raised second-order questions of rights of standing and intervention in judicial review applications. In the US, the success was largely short-term,⁷⁴ and a marked reluctance to expand the rules of standing characterizes the jurisprudence of the ECJ.⁷⁵

It is wider recognition of participation as an administrative law principle – a crucial aspect of 1960s and 1970s American administrative law – that Aman sees as most in jeopardy from globalization.⁷⁶ And the counterpart of these earlier American debates is beginning to take shape in global space. The central issue in the celebrated *Shrimp/Turtles* adjudication,⁷⁷ referred to a DSP of the WTO, was the compatibility of American legislation, protective of certain protected species, with WTO rules. In the course of the dispute, those countries most affected by the new legislation claimed that the US had an obligation to apply principles of equal treatment and not to discriminate arbitrarily or unfairly against different countries. This, they argued, must involve a further right of *participation* at the rule-making stage. The Appellate Body (AB) acknowledged the obligation to treat interested parties according to terms of equality and also a principle of good faith, interestingly characterized as both a general principle of law and of international law; but using a ‘thin’ rule of law style of reasoning, the AB stuck closely to WTO procedural rules, requiring the United States only to follow the established consultation provisions.⁷⁸

The question of participation arose again at the second, judicial stage of the proceedings. The Panel had permitted interventions by a cluster of environmental NGOs, attached by the United States to its submissions. Before the AB it was argued that, under DSU rules, these were inadmissible. The AB ruled that the interventions could be admitted to the ‘tentative and qualified’ extent that they had been adopted by the United States. Although this was far from the generous welcome given by some common law courts to *amicus curiae* briefs, it could be the first step for NGOs towards a right of participation in transnational litigation.

Expansive, theoretical notions of participation were not of course at issue before the AB nor should they have been. It is not the task of an adjudicative panel to settle issues of great constitutional import; the danger is rather that they will slip blindly

⁷⁴ To follow the well-known turns, see *Sierra Club v Morton*, 405 US 727 (1972); *Lujan v Defenders of Wildlife*, 504 US 555 (1992); *Friends of the Earth, Inc v Laidlaw Environmental Services*, 528 US 167 (2000). And compare Sunstein, ‘Standing and the Privatisation of Public Law’, 88 *Col L Rev* (1988) 1432; Sunstein, ‘What’s Standing After Lujan? Of Citizen Suits, “Injuries”, and Article III’, 91 *Michigan L Rev* (1992) 163.

⁷⁵ Harlow, ‘Towards a Theory of Access for the European Court of Justice’, 12 *Yearbook of European Law* (1992) 213. And see Case T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] ECR II-2365; Case C-50/00 *Unión de Pequeños Agricultores v Council* [2002] ECR II-2365, with Opinion of Jacobs AG; Case C-263/02P *Commission v Jégo-Quéré et Cie SA* [2004] ECR I-3425.

⁷⁶ Aman Jr, ‘Administrative Law for a New Century’ in M. Taggart (ed.), *The Province of Administrative Law* (1997), at 95. The recognition is generally attributed to the seminal article by Stewart, ‘The Reformation of American Administrative Law’, 88 *Harv L Rev* (1975) 1667.

⁷⁷ *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body WT/DS58/AB/R (12 Oct. 1998), available at www.sice.oas.org/DISPUTE/wto/58abr.asp.

⁷⁸ *Ibid.*, AB ruling at para 16. Compare the ECJ in *UEAPME*, *supra* note 70.

into so doing. It must be remembered that Stewart's argument for a 'reformation' of administrative law, designed to open decision-making to, and make the policy-making process more permeable by, a wider range of participants, took place against the background of American pluralist, democratic theory. Indubitably, courts are powerful in the United States, but they operate nonetheless in the context of a vibrant representative democracy, with vigorous political institutions and interest groups, though also powerful, rooted in a politically active civil society where established and functional political parties operate, their role well understood. This is emphatically not the context in which the NGOs that cluster around the UN and European Commission function. They manoeuvre in situations of 'democratic deficit', where civil society is non-existent or marginal; it is indeed from this very deficiency that they derive such claim as they have to representative legitimacy. For some years unthinkingly accepted, their credentials to stand in as representatives of civil society have recently come under scrutiny.⁷⁹ Why should a system of global administrative law protect such interests? And why should a transnational jurisdiction, weakly legitimated by this type of participation procedure, be allowed to 'trump' the strongly legitimated law of nation-states? These wider questions, crucial to the legitimacy of global administrative law, will be reserved for the final sections of this article.

5 Human Rights as a Source of Administrative Law

Principles: Due Process

Due process rights are accepted by all common law systems⁸⁰ and receive recognition in many others.⁸¹ We should not, however, make the mistake of thinking either that this makes the principles 'universal' or that they take the same shape or have the same scope in every legal system. The ECJ, for example, once surveyed national procedures in competition decisions, where due process rights are widely recognized; they were, however, shown to diverge very greatly and this at a time when the EU 'club' contained relatively few legal orders. Again, the attributes of procedural justice have been said to centre on impartiality, the provision of a hearing and a reasoned decision.⁸² Yet, whereas English law protects the right to a hearing relatively strongly, the right of access to a court, although it has been described as constitutional,⁸³ can be ousted by parliamentary legislation. Again, English law does not recognize a general administrative duty to give reasons, though most administrative

⁷⁹ Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', 18 *Michigan J Int'l L* (1997) 183; Curtin, 'Private Interest Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance', 12 *Social & Legal Studies* (2003) 56.

⁸⁰ Due process rights have their origin in criminal procedure, as the French term, *les droits de la défense*, reveals. In this guise they have a long pedigree, stretching back in Anglo-American culture to Magna Carta through Amendments V, VI, and XIV of the US Constitution.

⁸¹ See for a global survey S. Guinchard *et al.*, *Droit processuel, Droit commun et droit compare du procès* (3rd edn., 2005).

⁸² M. Bayles, *Procedural Justice: Allocating to Individuals* (1990).

⁸³ *R v Lord Chancellor ex p Witham* [1997] 2 All ER 779, at 783–784.

lawyers believe that it should.⁸⁴ As the EC Treaties do contain an obligation for decisions to be reasoned, the ECJ has held that the requirement must be imported into national administrative systems in cases involving EC law.⁸⁵ Similarly, in French administrative law, the chief concern is legality and the focus on the 'rights of the defence'; thus, in administrative proceedings, where penalties are not involved, due process rights may not be available. The ECJ has, however, now adopted and constitutionalized the access principle in the leading case of *Johnston*,⁸⁶ where it held that EC law did not permit the jurisdiction of the courts to be ousted by a preclusive clause in national legislation, where EC law is involved, while France had to give way to EC law in *Heylens*,⁸⁷ a case that established (i) the general principle of effective judicial protection in administrative proceedings, and (ii) a duty to inform parties to an administrative decision of the reasons for that decision. In this way, the constitutionalization of basic administrative procedures as 'general principles of EC law' allowed them to be diffused through national administrations, at least in situations involving EC law, providing the opportunity, not always taken, for 'levelling up' of national law.⁸⁸ Perhaps, as Prosper Weil has argued, a principle that can result in French public administration treating the subject 'as a supplicant to whom one accords or refuses to accord a favor',⁸⁹ is unduly restrictive; perhaps it does not measure up to modern requirements; perhaps it does not pay sufficient respect to good governance values of participation and transparency; perhaps benign 'levelling up' may be warranted. But we should not jump too quickly to this conclusion. Cultural uniformity is not an unconditional good. 'It is not because an institution or rule is to be found only in one, or in a small number of countries, that it is to be adjudged bad; the majority is not always right.'⁹⁰ And where did EC law find its own due process standards, to which France must now conform? In essence they are common law standards, imported by the ECJ, allegedly in response to protests from multinational enterprises, threatening non-compliance with EC competition law and voiced through the UK Government.⁹¹ Moreover, the ECJ has itself come into conflict with the views of the Court of Human Rights in jurisprudence involving Commission practices in competition cases.⁹²

⁸⁴ See the Report of the Committee of the unofficial JUSTICE/All Souls Review of Administrative Law in the United Kingdom, *Administrative Justice - Some Necessary Reforms* (1988), at 71. And see Richardson, 'The Duty to Give Reasons: Potential and Practice' [1986] *Public Law* 437.

⁸⁵ Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097. The duty to give reasons is imposed by the EC Treaty in TEC Art. 253 (ex 190).

⁸⁶ Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651.

⁸⁷ *Heylens*, *supra* note 85.

⁸⁸ Anthony, 'Community Law and the Development of UK Administrative Law: Delimiting the "Spill-Over" Effect', 4 *European Public Law* (1998) 253.

⁸⁹ P. Weil, *Le Droit Administratif* (1973), at 80 (author's free translation).

⁹⁰ Abraham, 'Les principes généraux de la protection juridictionnelle administrative en Europe: L'influence des jurisprudences européennes', 9 *European Public L Rev* (1997) 577, at 582 (author's translation).

⁹¹ Case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063. See generally H.-P. Nehl, *Principles of Administrative Procedure in EC Law* (1998).

⁹² The divergent case law of the two courts is noted by Sherlock at (1993) 18 *EL Rev* 465.

In the present era of human rights supremacy, the best way to constitutionalize due process values or present them as ‘universal’ is in the guise of human rights.⁹³ To pin them more securely into the human rights pantheon, a ‘dignitary’ explanation is often put forward in justification of due process rights. So Lawrence Tribe insists on the ‘intrinsic value in the due process right to be heard, since it grants to the individual or groups against whom government decisions operate the chance to participate in the processes by which those decision are made, an opportunity that expresses their dignity as persons’.⁹⁴ From this standpoint, due process rights are accepted as valuable and even essential, regardless of their effect on outcome.⁹⁵ It is in fact standard practice for modern bills of rights to contain due process provisions, giving them constitutional status as in Amendment XIV to the American Constitution. Due process rights, reflecting classical rule of law preoccupations with equality before the law; the non-retrospectivity principle; an impartial or independent judge; and fair trial; have found their way too into modern human rights texts. Article 10 of the 1948 Universal Declaration of Human Rights⁹⁶ was replicated in ECHR Articles 5 and 6(1). The latter, which provides for ‘a fair and public hearing within a reasonable time by an independent and impartial tribunal’ in any case involving a determination of a person’s ‘civil rights and obligations’ has proved particularly influential in the field of administrative law.

But as due process rights have found a place in human rights texts, their ambit has widened steadily. In Europe, by the 1990s, their tentacles had spread far enough into administrative justice to amount to a ‘developing human right’.⁹⁷ Article 6(1) has generated an expansive jurisprudence, which has bitten deeply into national systems of administrative law as the concept of ‘civil rights and obligations’ has moved into the field of welfare and even touched taxation.⁹⁸ In its name, for example, established and effective land use planning systems have been attacked across Europe, in the hope of transferring planning decisions to an independent judge.⁹⁹ The latest human rights texts take the process still further, adding a ‘fourth generation’ of human rights. These, which take the shape of ‘principles of good administration’, cover the central ground of modern administrative law.¹⁰⁰ Thus Article 41 of Chapter V of the EU Charter of Fundamental Freedoms seemingly extends classical due process rights

⁹³ Gunichard *et al.*, *supra* note 81, at 59–87.

⁹⁴ L. Tribe, *American Constitutional Law* (1988), at 666. See also Mashaw, ‘Dignitary Process: A Political Psychology of Liberal Democratic Citizenship’, 39 *U Florida L Rev* (1987) 433.

⁹⁵ Richardson, ‘The Legal Regulation of Process’ in G. Richardson and H. Genn (eds), *Administrative Law and Government Action* (1994), at 114.

⁹⁶ Art 10 provides:

‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’

⁹⁷ Bradley, ‘Administrative Justice: A Developing Human Right?’, 1 *European Public Law* (1995) 347.

⁹⁸ See generally Hickman, ‘The “Uncertain Shadow”: Throwing Light on the Right to a Court under Article 6(1) ECHR’ [2004] *Public Law* 122.

⁹⁹ *Bryan v UK* (1996) 21 EHRR 342; *Zumtobel v Austria* (1994) 17 EHRR 116.

¹⁰⁰ Kanska, ‘Towards Administrative Human Rights in the EU: Impact of the Charter of Fundamental Rights’, 10 *ELJ* (2004) 296.

dramatically, upholding ‘the right of every person to be heard, before any individual measure which would affect him or her adversely is taken’. And the article goes further still, guaranteeing to the European citizen the ‘right to have his or her affairs handled impartially, fairly and within a reasonable time’. This is a questionable development; it seems to elevate to the level of fundamental freedoms a bureaucratic failure to answer a letter.

From a secure basis in human rights texts, it is a short step to claim universality for due process standards in the name of human rights. The next step is to move due process rights on to a higher plane by claiming them as principles of a universal constitutional law. Perhaps, as comparative constitutionalists hope, we are experiencing a ‘timeless legal convergence, systematizing broadly across cultures and world history’;¹⁰¹ perhaps convergence is ‘limited to international human rights, which one might characterize as the law of humanity’;¹⁰² perhaps we can agree a core Bill of Criminal Procedure Rights, accepted internationally. The idea has, however, certainly received a setback in a recent European judgment. Decisions of the UN Sanctions Committee, a body responsible for ‘listing’ persons and bodies thought to be engaged with terrorism, with a view to freezing their assets, were attacked in the Court of First Instance. Giving the lie to the idea of these due process norms as universal, the Court refused to intervene on procedural grounds.¹⁰³

6 Unity or Diversity in Administrative Law Principles for Global Governance?

The underlying argument of this paper has been that a universal set of administrative law principles, difficult in any event to identify, is neither welcome nor particularly desirable; diversity and pluralism are greatly to be preferred. Administrative law is largely a Western construct, taking its shape during the late 19th century as an instrument for the control of public power. Dominated by a philosophy of control, administrative law has played an important part in the struggle for limited government, its core value being conformity to the rule of law. Central to the rule of law is the idea of bounded government, restrained by law from acting outside its powers, a premise on which both the common law principle of *ultra vires* and the French principle of *excès de pouvoir* are based. This is a framework in which the function of administrative law was seen as the supply of structures and procedures through which, on one view, government policy could be implemented and, on another, government could be controlled.

¹⁰¹ N. Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (2003), at 10. See also Ackerman, ‘The Rise of World Constitutionalism’, 83 *Virginia L Rev* (1996) 771; Guinchard *et al.*, *supra* note 81.

¹⁰² Teitel, ‘New Approaches to Comparative Law: Comparativism and International Governance’, 117 *Harv L Rev* (2004) 2570, at 2593, a critical review of Dorsen *et al.*

¹⁰³ Cases T–306/01 and T–315/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation and Yassin Abdullah Kadi v Council and Commission*, 21 Sept. 2005, not yet reported. Press Release No. 79/05.

This suggests too that the norms of administrative law evolve and are capable of operating inside different value systems. At the same time, however, they are value-laden. In national systems, administrative law functions within the framework of an accepted political system and constitution, to both of which it is very closely linked. The 'background theory' of administrative law reflects these outside values, making it difficult to distinguish the values and principles of constitutional and administrative law. Further, the constitutionalization of norms in domestic systems aimed at allowing administrative law values and doctrine to transcend both the borders of public administration and private management and also of public and private law.¹⁰⁴ In global space, where economic globalization, liberalization and privatization are so closely linked as to be indistinguishable, this progression finds an exact counterpart. As Aman argues, 'a major role for law in the global era is to help create the institutional architecture necessary for democracy to work, not only within the institutions of government but also beyond them in the sphere where the private sector governs.'¹⁰⁵

There is, as the body of this paper has suggested, no shortage of candidates for a set of universal values. Indeed, an ideological battle is raging in global space between proponents of very different views. Hard-line economic liberals promote 'thin' or procedural versions of the rule of law, to be entrenched in a universal economic constitution through international trade law and its institutions (the WTO, WB and IMF). Increasingly they seek to 'juridify' the values, using international or transnational machinery for dispute resolution, especially the ECJ and DSM panels of the WTO, to gain authority, if not always legitimacy. Softer economic theorists incline to a 'good governance' agenda, also attractive to liberals of a different cast of mind, while the movement for cosmopolitan law and social democracy seeks to occupy the same space as economic liberalism but, as indicated earlier, to subvert its values.

Even within the systems in which modern administrative law developed and where it is well understood, there is much disparity of principle. At least four administrative law families have been identified within the EU alone.¹⁰⁶ There are two main structural models: the French, where the administrative judge works from *inside* the administration to develop its norms; and the common law 'checks-and-balances' model, where judicial review is conducted by the 'ordinary' civil courts. In the second wave of Europeanization that took place at the end of the nineteenth century, accompanying trade wars and imperialism, it was French institutions and principles that became the vogue: French law was highly influential in inter-war China and modern Thailand possesses a full-scale imitation of the French *Conseil d'Etat*. The Scandinavian administrative law tradition differs again; here ombudsmen have evolved as the primary institution for the resolution of administrative disputes and share a significant norm-setting function with administrative courts. The office of ombudsman is

¹⁰⁴ Taggart, *supra* note 27.

¹⁰⁵ A. Aman Jr, *The Democracy Deficit* (2004), at 136.

¹⁰⁶ Bell, 'Mechanisms for Cross-fertilisation of Administrative Law in Europe' in J. Beatson and T. Tridimas (eds), *New Directions in European Public Law* (1998).

today accepted by and in widely differing regimes throughout the world.¹⁰⁷ Discussions of globalization and good governance programmes often pass over the existence of separate but equally valid *models* of administrative law, yet it may be easier to ‘transplant’ rule of law principles into hostile terrain through an internal or inspectorial review system than through a court system external to the administration, which falls outside the dominant power structure. This line of reasoning picks up and reinforces the point made earlier that institutions should not be rejected simply because they are ‘first considered curious, then abnormal, finally suspect in terms of the principles of due process’.¹⁰⁸

Much the same is true of administrative law principles. The bias towards Anglo-American legal systems in the lists cited in Section 2 of this article has already been pointed out. It represents a double colonization. The first colonization occurs when an administrative law system absorbs as a *principle* background values of the global governance or human rights movement, notably the ideals of democracy, participation, transparency and accountability, a progression described and discussed in Bignami’s excellent study of the evolution and transformation of participation rights in Europe.¹⁰⁹ The second colonization involves a complex process of ‘cross-fertilization’ or legal transplant, whereby principles from one administrative law system pass into another. Although this may often occur spontaneously, the process has been hastened by the influence of the powerful transnational juristocracy that has recently come into being, working in human rights courts and the EU courts. Principles borrowed from one system – notably the German principle of proportionality – are applied in others, and ‘fed back with a difference’ into the donor system.¹¹⁰ Transformed, they then form part of ‘a common European standard’ – a stage, perhaps, in that ‘timeless legal convergence’ desired by comparative constitutionalists.

There is, of course, no particular reason why administrative law norms borrowed from Western systems should not be successfully diffused throughout the world. The Ottoman Empire possessed an advanced administrative system, whose rules and principles no doubt fell broadly within the definition of administrative law; equally, the rules observed by the sophisticated Chinese mandarin class over a period of several dynasties are also properly labelled administrative law. But these competitor systems have lost ground to, and have been largely overtaken by, waves of Westernization, in the main favouring common law systems. The first came with empire. ‘No organization has done more’, Niall Ferguson reminds us, than the British Empire ‘to impose western norms of law, order and governance around the world’.¹¹¹ A second and less

¹⁰⁷ The International Ombudsman Institute is hosted by the University of Alberta; its reports and further information are available at www.law.ualberta.ca/centres.

¹⁰⁸ Abraham, *supra* note 90.

¹⁰⁹ Bignami, *supra* note 24.

¹¹⁰ Polakiewicz and Foltzer, ‘The ECHR in Domestic Law: The Impact of the Strasbourg Case-Law in States where Direct Effect is given to the Convention’, 12 *Human Rights LJ* (1991) 125, at 142; Schwarze, *supra* note 32; A.-M. Slaughter, *A New World Order* (2004), at 132; Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 28 *University of Richmond Law Review* 100.

¹¹¹ N. Ferguson, *Empire, How Britain Made the Modern World* (2003), at pp. xx–xxii.

direct imposition occurred at the end of the 19th century in response to growth in international trade, in which continental European models were, as already suggested, more influential. Further waves of acculturation occurred at the end of World War II. In countries such as Japan or Ethiopia, Western legal institutions were, for their own good reasons, voluntarily adopted. From this perspective, the transplant of a Western ideology of administrative law represents no more than a further wave of cultural imperialism, mirroring that already taking place in public administration.

Leben sees this process as already under way in the field of EU human rights. The Treaty of European Union 'does not merely require its own members to respect those fundamental freedoms. As we shall see, the Union is going to extend and organize systematically a policy of encouraging and defending democracy, human rights and fundamental freedoms, and the rule of law.'¹¹² Vehicles for promulgation has been the Lomé III and IV Conventions, both of which contain provisions concerning respect for human dignity and human rights. Leben makes the same point about American foreign policy, raising the question of 'the (real or illusory) universal nature of human rights as they have appeared and developed in Europe and the west'.¹¹³ There are crucial questions here about voluntariness, effectiveness and, critically, legitimacy.

Miller attempts an answer to at least some of these questions.¹¹⁴ While some legal transplants are externally dictated – such as IMF, AB and Asian Development Bank agreements, often conditioned on the transposition of Western-style commercial law – others are 'legitimacy generating'. Thus, developing countries 'typically suffer from a weak state apparatus and their populations have little reason to place faith in the rule of law. The prestige of a foreign model may lend rational authority to a process of reform.'¹¹⁵ In the case of human rights law, there is a further element of great significance: legitimacy is generated 'not only because of the rational authority of passage and promulgation according to established procedures, but because it is part of a network of certifiably "good" law adopted by "good" countries'.¹¹⁶

The assumption generally made by advocates of globalization is that the introduction of global standards will help to ensure the legality of the global activities of *all* the leading actors and will in time result in a general 'levelling up'.¹¹⁷ Experience suggests that this is not always the case. There may very well be a growing consensus on 'good governance' standards as listed by Leftwich;¹¹⁸ doubtless the peoples of the world would prefer not to languish powerless in refugee camps, or as the victims of civil

¹¹² Leben, 'Is there a European Approach to Human Rights?' in P. Alston (ed.), *The European Union and Human Rights* (1999), at 70–71.

¹¹³ *Ibid.*

¹¹⁴ Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process', 51 *American J Comparative L* (2004) 838.

¹¹⁵ *Ibid.*, at 857.

¹¹⁶ *Ibid.*, at 863. And see Moscoti, 'Reforming the Laws on Public Procurement in the Developing World: The Example of Kenya', 54 *ICLQ* (2005) 621

¹¹⁷ P. Sands, *Lawless World* (2005).

¹¹⁸ Leftwich, *supra* note 51.

disorder or ecological disaster; they would wish not to live in poverty without access to a decent level of public services; or, at a much lower order in the catalogue of possible misfortune, they would prefer to have bureaucracy respond promptly to their letters. Good governance in this all-embracing sense is, however, simply not obtainable (which is not to say that efforts should not be made to make it more so.) The development space available to developing countries is shrinking rapidly and, at least for the foreseeable future, it may be necessary and even preferable for them to settle for less costly, 'good enough governance'.¹¹⁹ There is a degree of wilful blindness involved, as Weiler reminds us,¹²⁰ in the belief that increased doses of Western-style bureaucracy or due process procedures necessarily benefit *citizens*; to the contrary, the adjudicative methods dear to economic liberals are designedly biased to benefit those who can afford to use them, normally *states and multinational enterprises*, with skilful in-house lawyers. Only wealthy and well-supported individuals could, for example, have pushed their case for return of their frozen funds and assets as far as the European Union courts.¹²¹ There is, too, a measure of hypocrisy in seeking to impose external standards on the poor and under-privileged, which the self-styled 'good countries' are unwilling and sometimes unable to meet. Moreover, we need to realize that, if a legal transplant is not truly voluntary but is, for example, conceded by a developing country as an unfavourable term in a trade treaty, it will not be thoroughly implanted.¹²² Later, this will inevitably result in serious implementation difficulties. Thus, studies of China are beginning to point to seriously defective implementation of the WTO rule of law requirements, put down in some cases to hostility at grassroots level.¹²³

7 Democracy and the Hazards of Juridification

A sceptical, neo-functional or public choice analysis of globalization would see all supranational institutions as 'competence maximizing', in the sense that they seek to aggrandize their own power and increase the scope of their influence.¹²⁴ This is the familiar phenomenon of 'government by organizations for organizations'.¹²⁵ Although Bignami adopts the less cynical approach of historical institutionalism,¹²⁶ she too deduces that rights, including procedural rights, serve the interests of supranational actors, a deduction applied by Bignami to courts and the private parties that

¹¹⁹ Grindle, *supra* note 51.

¹²⁰ Weiler, *supra* note 46.

¹²¹ *Supra* note 103.

¹²² Hunter Wade, 'What Strategies are Viable for Developing Countries Today? The WTO and the Shrinking of Development Space', 10 *Review of International Political Economy* (2003) 4.

¹²³ Mei-Ying Hung, 'China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform', 52 *AJCL* (2004) 77; R. Peerenboom, *China's Long March Toward Rule of Law* (2002).

¹²⁴ Pollack, 'Supranational Autonomy' in Sandholtz *et al.*, *supra* note 20.

¹²⁵ Andersen and Burns, 'The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Governance' in S. Andersen and K. Eliassen (eds), *The European Union: How Democratic Is It?* (1996), at 229.

¹²⁶ Bignami, *supra* note 69.

invoke their assistance in promoting their own agendas, but applicable also to NGOs and interest groups. States also promote as best protecting the interests of their citizens before international tribunals or international bureaucracies those rights and procedures familiar to them as available within the state. To exemplify, the ECJ is pushed in the direction of economic constitutionalism with a view not only to its own status and position but also by its main ‘interlocutors’.¹²⁷ Again, the procedures of international sporting bodies, such as the International Olympic Committee or World Anti-Doping Agency, will tend to replicate the Anglo-American due process procedures familiar to athletes working with the most powerful states and national bodies. Although this set of attitudes is difficult to dislodge, it need not necessarily attract a negative interpretation. Snyder’s view of globalization as a form of ‘legal pluralism’¹²⁸ reflected here is essentially benign and pluralist solutions at least have the merit that they reflect the principle of subsidiarity, according to which decisions should be taken and accounts rendered as close as possible to the decision-maker. This principle, notably missing from the debate so far, is surely the basic and fundamental tenet of any system of global administrative law.¹²⁹

The argument is, however, circular. Other less benign situations provoke fears which may be less concerned with democratic legitimacy than with *accountability*: the potential in the procedures of self-regulating agencies, such as the Commission on Food Safety, for self-interest; the development of transnational networks of governmental officials into self-serving coteries; and so on. Because there is disquiet as to the ability of the nation-state to function either as an adequate source of constitutional legitimacy or as an agent for accountability in the emerging global economy and society, so ‘the development of global power . . . will never be seen as legitimate without some type of public interest oriented scrutiny of such power, judged in the light of values other than purely economic ones’.¹³⁰ Decision-makers all too easily insulate themselves from accountability. Democracy is fragile.

Sceptics of legal globalization are in the main more concerned with structures than with principles. In the modern nation-state, power is ‘billeted’ and powers are ‘bounded’; in global space, power is diffused to networks of private and public actors, escaping the painfully established controls of democratic government and public law. This is a world that is not only ‘inherently less permeable to democratically-grounded values and conceptions of the public interest or collective good, but also less capable of generating the public policy outcomes that people want’.¹³¹ The search for a value system capable of sustaining such an enterprise has been the overarching theme of a paper, which has had, for want of space, to leave the vital issue of democratic politics

¹²⁷ Weiler, ‘A Quiet Revolution – The European Court of Justice and its Interlocutors’, 26 *Comparative Political Studies* (1994) 510.

¹²⁸ Snyder, *supra* note 2.

¹²⁹ See Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’, 97 *AJIL* (2003) 38.

¹³⁰ Muchlinski, *supra* note 42, at 99; Muchlinski, *supra* note 5, at 240. See also Chalmers, ‘Post-nationalism and the Quest for Constitutional Substitutes’, 17 *J Legal Stud* (2000) 178.

¹³¹ Cerny, ‘Globalization and the End of Democracy’, 36 *European Journal of Political Research* (1999) 1.

largely out of account. It must, however, remain highly questionable whether an international society can emerge with a capacity to be in this sense democratic.¹³²

High on the list of sites in which a global administrative law can be said to be evolving stand transnational courts and other, less formal adjudicative arrangements, such as the Dispute Settlement Panels of the WTO. This introduces the perennially vexed question of 'juristocracy' or 'government by judges'. It is axiomatic that the emergence of transnational systems of governance and human rights treaties has led to a general empowerment of judges. The role of the ECJ as a constitution-maker responsible for the selection, creation and promulgation of overarching, general principles of law is, for example, beyond dispute.¹³³ Again, in the context of human rights, Slaughter talks of 'a community of liberal states', whose *courts* are responsible for the promotion of human rights values; she has attempted to construct a typology of transjudicial communication, covering the various ways in which the judges engage in their 'brisk international traffic' in ideas about rights.¹³⁴

But could global administrative law help open space for global politics? In a thoughtful study of the relationship of law with globalization, Aman is optimistic. He sees law 'not just as a source of remedies or rights, as important as they are, but as a means for the creation and sustenance of politics'.¹³⁵ He is optimistic that global administrative law can make a contribution to the creation of a 'political' society, by creating space for democratic deliberation. He warns, on the other hand, against approaches and machinery that seek to 'remove decisions from the political arena for substantial periods of time'.¹³⁶ Yet as this paper has tried to show, this is precisely the approach of those constitutionalists enthusiastic for the development of a global administrative law based on universal principles and moving towards unity. The very real danger is that what will result is a global space in which citizens no longer have 'the freedom – and the forums – to maximize opportunities for experiment and change'.¹³⁷ Instead, they will be presented with juridified institutions and forums in which 'politics become the politics of procedure, a struggle for the power to define, for jurisdiction: the question is not so much whether a weighing of interests has to take place, but rather which authority in the final analysis is empowered to do the weighing'.¹³⁸ This is the clinching argument for pluralism: for diversity as the overarching

¹³² Dahl, 'Can International Organizations be Democratic? A Skeptic's View', in I. Shapiro and C. Hacker-Cordon (eds), *Democracy's Edges* (1999).

¹³³ R. Dehousse, *The European Court of Justice* (1998); Mancini, 'The Making of a Constitution for Europe', 26 *CML Rev* (1989) 595; Weiler, 'A Quiet Revolution – The European Court of Justice and its Interlocutors', 26 *Comparative Political Studies* (1994) 510. For a less favourable account, see H. Rasmussen, *On Law and Policy in the Court of Justice* (1986).

¹³⁴ Slaughter, *supra* note 110, at 132. And see McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' in K. O'Donovan and G. Rubin (eds), *Human Rights and Legal History, Essays in Honour of Brian Simpson* (2000). The second citation is from M.-A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991), at 158.

¹³⁵ A. Aman, *The Democracy Deficit* (2004), at 178.

¹³⁶ *Ibid.*, at 138.

¹³⁷ *Ibid.*

¹³⁸ Koskeniemi, 'The Effects of Rights on Political Culture' in Alston, *supra* note 112, at 114.

value and for subsidiarity as the fundamental principle of global administrative law. Otherwise, the likely contribution of global administrative law will be to stifle what is democratic and legitimate what is not. As Stewart pertinently remarked of an earlier attempt at centralization:

By an irony of inversion, Madison's centralizing solution to the problem of faction has produced Madison's nightmare: a faction-ridden maze of fragmented and often irresponsible micro-politics within the government . . . The attempt to cure Madison's nightmare through new systems of administrative law has produced improvements but may in the end only succeed in entrenching the nightmare.¹³⁹

¹³⁹ Stewart, 'Madison's Nightmare', 57 *U Chicago L Rev* (1990) 335, at 342, 346.