
The Concept of 'Law' in Global Administrative Law

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Abstract

What constitutes 'law' in the efflorescent field of 'global administrative law'? This article argues for a 'social fact' conception of law, emphasizing sources and recognition criteria, but it extends this Hartian positivism to incorporate requirements of 'publicness' in law. 'Publicness' is immanent in public law in national democratic jurisprudence, and increasingly in global governance, where it applies to public entities rather than to identifiable global publics. Principles relevant to publicness include the entity's adherence to legality, rationality, proportionality, rule of law, and some human rights. This article traces the growing use of publicness criteria in practices of judicial-type review of the acts of global governance entities, in requirements of reason-giving, and in practices concerning publicity and transparency. Adherence to requirements of publicness becomes greater, the less the entity is able to rely on firmly established sources of law and legal recognition. 'Private ordering' comes within this concept of law only through engagement with public institutions. While there is no single unifying rule of recognition covering all of GAL, there is a workable concept of law in GAL.

1 Introduction

What justification is there for using the term 'law' in the theory and practice of the emerging field designated 'global administrative law'? It was fairly observed of one of the pioneering efforts in the late 19th century that:

[t]he concept of international administrative law (*internationales Verwaltungsrecht*) as originally conceived by Lorenz von Stein in 1866 described an ensemble of legal rules based partially on international sources and partially on domestic sources dealing with administrative activity in

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the international field as a whole. Von Stein's interest, here as elsewhere, was to capture and describe the reality of public administration rather than its underlying legal basis.¹

A similar assessment could be made of the concept of 'global administrative law' (GAL) as used in the burgeoning renewal of this field in the early 21st century.² The broad ambit given to GAL in these recent works reflects an inductive methodology that begins with analysis of highly diverse arrangements and norms actually found in the practice of global governance,³ and with dynamic interactions among these as well as rapid change, rather than with problems of their legal basis or taxonomical efforts to delineate their precise legal characters.⁴ This wide approach to the relevant phenomena, and investigation of connections that may tie them together apart from unity of legal sources, also provides a foundation for positive social science assessment of the causes and consequences of global administrative law phenomena, and for philosophical and political normative assessments of which interests are served and disserved, and what the implications have been or might be in relation to various conceptions of justice. These phenomena must also be examined from the standpoint of their legal basis and other qualities associated with law.⁵ This is the focus of the present article. The method used here is one which seeks to build mutual elucidation and interrogation between theoretical propositions and materials concerning practice.

To situate the argument, a very brief introduction to current views of global administrative law is offered. The idea of the emerging global administrative law is animated in part by the view that much of global governance (particularly global regulatory

¹ Vogel, 'Administrative Law: International Aspects,' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1992) 22, at 23. One of the clearest statements by Lorenz von Stein of his own approach is von Stein, 'Einige Bemerkungen über das internationale Verwaltungsrecht', *6 Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich* (1882) 395. On work on international administration in this period and its legal theory, see M. Vec, *Recht und Normierung in der Industriellen Revolution: Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung* (2006).

² For cautions about lack of a clear legal structure and about over-extension in GAL approaches see, e.g., Schmidt-Abmann, 'The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship', *9 German Law Journal* (2008) 2061; and von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field', *9 German Law Journal* (2008) 1909, esp. at 1918–1921. Bogdandy also criticizes GAL approaches for embracing a proto-federalism which is unrealizable outside special situations such as the EU, and for seeking to distinguish administrative activities from other activities of international public authorities whereas such authorities tend not to be characterized by such a differentiation in practice.

³ This methodology is articulated, e.g., in Cassese, 'Administrative Law without the State: The Challenge of Global Regulation', *37 NYUJILP* (2005) 663; and Stewart, 'The Global Regulatory Challenge of U.S. Administrative Law', *37 NYUJILP* (2005) 695.

⁴ Different jurisprudential approaches underlying divergent orientations to these questions are surveyed in Michaels and Jansen, 'Private Law Beyond the State?: Europeanization, Globalization, Privatization', *54 AJCL* (2006) 843. See also the contributions to C. Möllers, A. Voßkuhle and C. Walter (eds), *Internationales Verwaltungsrecht* (2007), including Ladeur, 'Die Internationalisierung des Verwaltungsrechts: Versuch einer Synthese', in *ibid.*, 375, and Ruffert, 'Perspektiven des Internationalen Verwaltungsrechts', in *ibid.*, 395.

⁵ Notable studies to pursue such an undertaking include Yamamoto, 'The Positive Basis of International Administrative Law' (English summary), *76:5 Kokusaiho Gaiko Zasshi* (1969), at 152 (at 680 of continuous volume pagination), in which the stated objective is 'to clarify the autonomous and positive basis of international administrative law'.

governance) can usefully be analysed as administration. Instead of neatly separated levels of regulation (private, local, national, inter-state), a congeries of different actors and different layers together form a variegated 'global administrative space' that includes international institutions and transnational networks, as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects.⁶ The idea of a 'global administrative space' marks a departure from those orthodox understandings of international law in which the international is largely inter-governmental, and there is a reasonably sharp separation of the domestic and the international. In the practice of global governance, transnational networks of rule-generators, interpreters and appliers cause such strict barriers to break down. This global administrative space is increasingly occupied by transnational private regulators, hybrid bodies such as public-private partnerships involving states or inter-state organizations, national public regulators whose actions have external effects but may not be controlled by the central executive authority, informal inter-state bodies with no treaty basis (including 'coalitions of the willing'), and formal interstate institutions (such as those of the United Nations) affecting third parties through administrative-type actions. A lot of the administration of global governance is highly decentralized and not very systematic. Some entities are given roles in global regulatory governance which they may not wish for or be particularly designed or prepared for. For instance, national courts may find themselves reviewing the acts of international, transnational and especially national bodies that are in effect administering decentralized global governance systems, and in some cases the national courts themselves form part not only of the review but of the practical administration of a global governance regime.⁷ Global administrative law is emerging as the evolving regulatory structures are each confronted with demands for transparency, consultation, participation, reasoned decisions and review mechanisms to promote accountability. These demands, and responses to them, are increasingly framed in terms that have a common normative character, specifically an administrative law character. The growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance. The sense that there is some unity of proper principles and practices across these issue areas is of growing importance to the strengthening, or eroding, of legitimacy and effectiveness in these different governance regimes. Endeavouring to take account of these phenomena, one approach understands global administrative law as the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make.⁸ This is described as 'global' rather than 'international' to avoid implying that

⁶ Kingsbury *et al.*, 'Foreword: Global Governance as Administration', 68:3–4 *Law & Contemp Probs* (2005) 1.

⁷ Kingsbury, 'Weighing Global Regulatory Decisions in National Courts', *Acta Juridica* (2009).

⁸ Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68:3–4 *Law & Contemp Probs* (2005) 15.

this is part of the recognized *lex lata* or indeed *lex ferenda*, and instead to include informal institutional arrangements (many involving prominent roles for non-state actors) and other normative practices and sources that are not encompassed within standard conceptions of ‘international law’. The normative practices addressed under the GAL moniker in the current literature go beyond the recognized sources of ‘international law’. The term GAL is applied to shared sets of norms and norm-guided practices that are in some cases regarded as obligatory, and in many cases are given some weight, even where they are not obviously part of national (state) law or standard inter-state law. The analysis is further complicated because global administrative law is practised at multiple sites, so GAL norms are also meshed with other sources of obligation applicable to that site – sources which may include the national law of the place, the constituent instrument and regulations of the norm-applying institution, contracts establishing private rights, or rules of international law on other matters. If a claim to ‘law’ is made in applying the label GAL in some of these situations, it is a claim that diverges from, and can be sharply in tension with the classical models of consent-based inter-state international law and most models of national law.⁹ This provides all the more reason to take steps toward the careful elucidation of the concept(s) of law that is (or are) implicated in the prevalent understanding of GAL.

Three elements of the approach that will be taken here to the concept (or concepts) of law may be stipulated at the outset. First, the concept of law is here not regarded as unrelated to normative evaluation: ‘this is what it means to be law’ is not a value-neutral statement. The articulation of a concept of law to clarify and describe the phenomenon to be evaluated is an element in the evaluation of law.

Second, concepts of law may have *political* significance.¹⁰ The concepts of law actually held by judges or jurists or relevant officials or the wider public vary within each national system, and the variation is vast across the heterogeneous domains of global governance. Some embrace positivist concepts in their rhetoric, but not in their practice (thus a judge may articulate a concept of law that separates law from morality, but then incorporate moral considerations into the announced decision). Others embrace non-positivist concepts of law, such as that developed by Ronald Dworkin. Some derive concepts of law from political theory; others derive concepts of law from other concepts. The choice among such approaches is a political choice with political implications. Attempts to establish agreement on the applicable concept of law, or at least overlap among competing concepts of law, are particularly important in situations where there is no single agent who can decisively resolve the issue for practical purposes, even *pro tem*.¹¹

⁹ See Krisch and Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’, 17 *EJIL* (2006) 1, at 10.

¹⁰ An argument for this view is presented in Kingsbury, ‘Legal Positivism as Normative Politics’, 13 *EJIL* (2002) 401.

¹¹ The last few sentences are much influenced by ideas in Liam Murphy’s work, including ‘The Political Question of the Concept of Law’, in J. Coleman (ed.), *Hart’s Postscript* (2001), 371; Murphy, ‘Concepts of Law’, 30 *Australian Journal of Legal Philosophy* (2005) 1; and Murphy, ‘Better to See Law this Way’, 83 *NYU Law Review* (2008) 1088. On political issues relating to GAL, see Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, 17 *EJIL* (2006) 187.

Third, understanding global administrative law as 'law' involves not only questions of validity ('is this a valid legal rule?'), but also assessments of weight ('what weight should Public Entity X give to a norm set by Public Entity Y?'). Whereas positivist thought within a unified legal system has focused on the binary validity/invalidity, or binding/non-binding, the absence of a very organized hierarchy of norms and institutions in global governance, and the dearth of institutions with authority and power to determine such questions in most cases, means the actual issues in global administrative law often go to the weight to be given to a norm or decision. Law is a social practice, and it is a feature of the particular social practices involved in GAL that both validity and weight are important. A useful concept of law in global administrative law must elucidate both aspects.

2 The Case for Positivist Concepts of 'Law' as a Starting Point for GAL

What kinds of approach to the concept of law might be fruitful in addressing global administrative law? The exercise of power beyond the state is fundamentally different from exercise of power by the state and its agencies within the national legal and political order. Only limited direct analogies may be drawn in the global administrative space from concepts of administrative law that apply within the state. Global administrative law cannot be understood as a simple transposition to the global administrative space of the functions performed, let alone of the specific rules and institutional interactions, that have been painstakingly made and remade in the crucibles where national administrative law is produced and refined. In the same way, concepts of law that make sense (if at all) only within the state, or by direct delegation from the state, simply do not address many of the phenomena clustered and studied under the label 'global administrative law'. Some theorists regard this as a limitation of these phenomena; either they are not law at all, or they must be radically rethought to align with existing concepts of law. No doubt there is much sloppy thinking in the practice and especially the legal theorization of global governance. But it is also highly possible that the limitation is not simply (if at all) in the phenomena, but rather in the state-based concepts of law. Taking this possibility seriously calls for the primary focus to be on concepts of law that do not begin and end with the state.

Command theories, under which law consists in the commands of a single determinate sovereign (a person or institution) backed by efficacious sanctions, are unlikely to produce very fruitful or comprehensive results in addressing global administrative law. Hobbes's command theory, for example, reflects his central interest in the legal and political theory of the state as the most likely protector of civil peace against the risks of horrific civil war. This is by no means to say that Hobbes's legal theory does not have much to contribute to international law – his ideas about the relations of natural law and civil law have been interpreted by Noel Malcolm as providing some foundation for a legal theory of international relations,¹² and others have sought to extrude

¹² Malcolm, 'Hobbes's Theory of International Relations', in N. Malcolm, *Aspects of Hobbes* (2002), at 432–456.

a general theory of rule of law from Hobbes's remarks on promulgation and other pertinent procedural requirements of law and legality.¹³ Hobbes was particularly interested in the marks of authority necessary to distinguish laws from situations where private persons with enough power 'publish for Lawes what they please without, or against the Legislative Authority'.¹⁴ The basic idea that determinate identification of the authoritative source for law in any context is essential to the concept of law, and that law emanating from an authoritative source is law properly so-called without regard to its moral content or other substantive attributes, has continued to inspire positivist jurisprudence.

In proposing that a social practice consisting of primary norms of behaviour and secondary rules for recognizing, adjudicating on, and changing the primary rules could be a legal system, provided that the key officials involved accepted the same rule of recognition and felt an internal sense of obligation to obey the rules quite separate from the threats or rewards they associated with compliance, H.L.A. Hart made a decisive break from the Hobbesian (and Austinian) dependence of the concept of law on sovereignty, while retaining the positivist focus on sources and recognition as central to the concept of law. Hart's theory of law thus provides a more promising starting point for a modern positivist approach to the concept of law in international law and in GAL.¹⁵

Disagreements about concepts of law help explain, and justify, the prevalence of positivist concepts of law in international law writing and practice. Positivist concepts, in which the authoritative source of the norm (in state consent) is decisive for its status as law, provide a baseline acceptability in the absence of agreement on content-based (or truth-based) criteria for determining what is law, and in the absence of an agreed political theory (such as a primal commitment to equal concern and respect in relation to every human individual) that could support any other approach to law. There may indeed be ethical or political reasons to favour a positivist concept of law in

¹³ Dyzenhaus, 'Hobbes's Constitutional Theory', in I. Shapiro (ed.), *Leviathan* (forthcoming 2009). See also Gauthier, 'Hobbes: The Laws of Nature', 82 *Pacific Philosophical Quarterly* (2002) 258.

¹⁴ *Leviathan*, ch. 26, at 189 (R. Tuck (ed.), 1996.) Hobbes asserted that 'auctoritas, non veritas, facit legem'. Joseph Raz's influential view that the concept of law cannot and should not be based on any political theory, but must instead be defended by reference to other concepts, culminates in a concept of law resting on authority. In many global governance situations legal authority seems to exist without an author, and indeed Joseph Raz's account of authority does not appear strictly to require an author. This raises a question calling for further scholarly exploration, as to the validity of the assumption in much legal theory that an author is a necessary predicate for legal authority.

¹⁵ H.L.A. Hart, *The Concept of Law* (1961). The approach taken to international law in chapter 10 of *The Concept of Law* does not seem to provide the basis for a concept of international law now. It was perhaps tenable to say in 1961 that a set of rules, not unified by any rule of recognition and hence not a 'system' in his sense, might nevertheless be a bounded set, given that the rules he addressed were associated with perhaps 100 states and a small number of significant inter-state organizations. The dominant line among international lawyers now is to update chapter 10 by proposing a rule of recognition and developing the institutional capacities for adjudication and change, so as to render international law a unified system, rather than the mere set of rules Hart concluded it was. See also Capps, 'Methodological Positivism in Law and International Law', in K. E. Himma (ed.), *Law, Morality, and Legal Positivism* (2004), 9; and Ulrich Fastenrath, *Lücken im Völkerrecht* (1991).

the context of international law; this may well be the best way to promote basic order, or non-intervention, or peace, or affirmative liberty for democratic choice or other forms of collective self-government and individual freedom.¹⁶

In relation to global administrative law, it is proposed that an extended positivist concept of law should be adopted. Several features of Hart's positivist jurisprudential approach in *The Concept of Law* and other works are important to specifying this concept of law in GAL, including Hart's emphasis on social practices, sources of law, and recognition.¹⁷

(i) *A 'Social Fact' Conception of Law.* A condition for the existence of law must be the internal attitudes actually held by leading participants and by those dealing with and critically evaluating them and their practices. Attitudes of relevant officials (of state, courts, and entities exercising international public authority) help establish: fragmented rules of recognition (see (iii) below); specific determinations as to the content and applicability of a putative primary rule and as to whether it is within the scope of such a secondary rule of recognition; and structures for adjudication or resolution of such questions and for establishing new or altered rules in a norm-governed way. Criteria for being a rule or principle of law include a requirement of an internal sense of obligation toward it, as well as agreement among key officials that the source from which it comes is a source capable of generating legal rules.¹⁸ Hart thus provides a methodology for empirical identification of law.

(ii) *Sources of Law.* GAL includes and is shaped by treaties and fundamental customary international law rules, and invokes ideas of *jus cogens*, general international law, and general principles of law. It may also derive from national law in certain circumstances. But a concept of law based on such a catalogue of sources alone is inadequate. Further considerations, bearing also on sources, will be noted in (iii) and (iv) below.

(iii) *Recognition and Rules of Recognition in GAL.* Hart was right that the unity of international law calls for a unity of understanding and of justification. To the extent that it goes beyond recognized international law, there is no single legal system of GAL or global governance law with a common rule of recognition. A convincing rule of recognition for a legal system that is not simply the inter-state system has not been formulated, the institutions for 'adjudication' are often non-judicial and sometimes absent, and the processes of change are not easily articulated in terms of rules. 'Global administrative law' is not an established field of normativity and obligation in the same way as 'international law'. It has no great charters, no celebrated courts, no textual provisions in national constitutions giving it status in national law, no significant long-appreciated history. It is possible over a long period that such a unity

¹⁶ Kingsbury, 'Legal Positivism as Normative Politics', 13 *EJIL* (2002) 401.

¹⁷ A positivist concept of law framed in Razian rather than Hartian terms could also be defended.

¹⁸ Hart also emphasized the separability of law from morals, and the importance of efficacy of the legal system as a whole; both of these issues are of considerable importance to the concept of law in GAL, but they will not be further considered in this paper.

will develop. But at present, any claims within GAL to be law do not rest on a rule of recognition, shared among relevant participants, that identifies and delimits a unified legal system of GAL. There may well exist, however, different rules of recognition within different social-institutional-sectoral groupings in specific practice areas of global administrative law. There certainly exist recognition practices in such areas, so that recognition is important to law, even if a single shared rule of recognition is difficult to distil.

(iv) *Extending Hart's Positivism: Qualities Immanent in Public Law.* The Hartian elements of a concept of law already mentioned are necessary but not sufficient. More is now required for law that frames and regulates public authority, as GAL does. Hence an extension (or perhaps a modification) of this positivist approach is proposed.

The key idea is that in choosing to claim to be law, or in pursuing law-like practices dependent on law-like reasoning and attractions, or in being evaluated as a law-like normative order by other actors determining what weight to give to the norms and decisions of a particular global governance entity, a particular global governance entity or regime embraces or is assessed by reference to the attributes, constraints and normative commitments that are immanent in public law.¹⁹ These norms have multiple specific sources, but they are discernible from the practices of public law in different national systems and in transnational and public-international law arenas. They are not simply choices that could have been made or not made in each venue, although in many cases they may have started to obtain prevalence and purchase that way. Rather, as the layers of common normative practice thicken, they come to be argued for and adopted through a mixture of comparative study and a sense that they are (or are becoming) obligatory. Where they have not been adopted by a great political decision (that is, where they are not directly applicable by treaty or a decisive resolution of the relevant international organization, etc), the usual case for them is that they are justified (and perhaps required) by what is intrinsic to public law as generally understood. This view is in some tension with Hart's position as ordinarily understood. Certainly a claim that the exercise of public authority in the global administrative space brings with it requirements to adhere to public law norms seems much more consistent with Lon Fuller's view than Hart's. But the potential alignment with the above-mentioned elements of Hart's concept of law is much closer, if the rule of recognition is understood as including a stipulation that only rules and institutions meeting these publicness requirements immanent in public law (and evidenced through comparative materials) can be regarded as law. It may thus be possible to be a Hartian positivist, at least in a loose sense, and also to accept these

¹⁹ Kingsbury, 'International Law as Inter-Public Law', in H. Richardson and M. Williams (eds), *Moral Universalism and Pluralism* (2009), 167, and the commentaries on that paper by Scheuerman, "'The Center Cannot Hold": A Response to Benedict Kingsbury' (*ibid.*, 205), Baynes, 'Cosmopolitanism and International Law' (*ibid.*, 219), and Sreenivasan, 'Democracy and International Law: A Peril from the "Public"' (*ibid.*, 240). See also von Bogdandy, Dann, and Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008)1375.

publicness requirements as necessary to law. GAL as a social practice has not yet gone so far: typically, compliance with publicness considerations becomes more and more important in determining weight (perhaps even rising to be requirements of validity) the less the established sources criteria are met, the more doubt there is about recognition, the greater the levels of resistance, and the greater the extent to which individuals or other private actors and their basic rights and welfare are affected. The next sections of this article will give some substance and detail to this argument in relation to GAL.

3 Publicness: General Principles of Public Law

Jurisprudential practices in modern democratic states do not accept that emanation from an agreed source of law is sufficient for law, even in environments where the prevailing concepts of law hold emanation from an accepted source, and a unifying rule of recognition, to be necessary. More than this is now required of law. 'Publicness' is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence.²⁰ By publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such.²¹ This quality of aspiration to publicness is, as Jeremy Waldron has observed, what Weber misses in his means-oriented definition of the state (as the monopolist of legitimate violence), and what analytical jurisprudence misses in its formal analysis of legal systems. These statements about publicness are modernized and narrower statements of more sweeping arguments made by Rousseau:

when the people as a whole makes rules for the people as a whole, it is dealing only with itself; and if any relationship emerges, it is between the entire body seen from one perspective and the same entire body seen from another, without any division whatever. Here the matter concerning which a rule is made is as general as the will which makes it. And *this* is the kind of act which I call a law ... law unites universality of will with universality of the field of legislation.²²

The quality of publicness in law as specified in this article, should be distinguished from the stronger claim that generality is a requirement for a rule (or decision) to be a rule (or decision) of law. Rousseau argued both for publicness and for a requirement of generality. Such a requirement could lead to the view that much administration (particularly retail case-by-case administration, rather than wholesale administrative

²⁰ J. Waldron, 'Can There Be a Democratic Jurisprudence?', November 2008 version, NYU PILT Research Paper 08-35 (SSRN).

²¹ This claim seems to sit uneasily with the role of many national democratic legislatures in adjusting entirely particular and private matters by legislation – the vast number of private bills in the US Congress and state legislatures, for instance. But these private bills are classified as private, in the US Congressional Record for example, precisely to distinguish them from public laws, which do indeed present themselves as oriented in the direction of the public good.

²² *Social Contract* (trans. Cole), Bk II, ch. 6.

rule-making) is not law at all. This view, which has had many supporters, will be considered (and qualified in relation to GAL) in section 5 below.

The idea of law being wrought by, and for, the whole society overlaps with an approach to administrative law in many national systems that emphasizes public service and an objective of the public good, an approach projected also into administration extending beyond the state. Thus Soji Yamamoto defined international administrative law in terms of 'a legal norm inhering in the existing international communities, which realizes continuously *service public international* established by multilateral administrative treaties and influences variously the national administrations through the administrative actions of international institutions'.²³ This idea of a particular purpose for international public authority, namely the pursuit of some conception of the public good (*salus populi*) that is specified and controlled by processes that are not simply those of a national public, does not yet have anything like the significance in GAL that the concept of *service public* has in, for example, French administrative law. Nevertheless, it is an idea that is likely to be carried forward as mechanisms and modalities develop for specifying public entities meeting requirements of publicness in GAL.

General principles of public law combine formal qualities with normative commitments in the enterprise of channelling, managing, shaping and constraining political power. These principles provide some content and specificity to abstract requirements of publicness in law. Principles potentially applicable within any system of public law, and in relations between different systems of public law, may include to different degrees some of the following.²⁴ This is merely an indicative list, without any comparative or doctrinal analysis, but it is sufficient to suggest that the principles embodied in such a conception of public law are significant.²⁵ More detailed elements, or requirements, of publicness are the object of much GAL research and practice – some of these (particularly review, reason-giving and publicity/transparency) will be considered in section 4 of this article, as part of a discussion of specific activities of public global administration.

(i) *The Principle of Legality*. One major function of public law is the channelling and organizing of power. This is accomplished in part through a principle of legality – which can mean actors within the power system are constrained to act in accordance with the rules of the system. This enables rule-makers to control rule-administrators. The agent is constrained to adhere to the terms of the delegation made by the principal. In a complex system of delegation, it is often preferable to empower third parties to control the agent in accordance with criteria set by the principal, creating the basis for a third-party rights dynamic even in this principal-agent model. In the case of interstate institutions, the states establishing the institution often style themselves as

²³ Yamamoto, *supra* note 5.

²⁴ A quite different set of principles is developed for a similar purpose in von Bogdandy, *supra* note 2. He sees 'a future for general principles of international public authority, less as a source of law, but as condensed comparative legal arguments' (at 1938).

²⁵ See generally D. Dyzenhaus (ed.), *The Unity of Public Law* (2003), esp. Taggart, 'The Tub of Public Law', in *ibid.*, 455.

principals (severally or collectively), with the institution as agent, but their direct control of the agent may be attenuated. Many actors in global governance are primordial, or at least are not delegates. Their claim to legality means their adherence to 'law', including elements of law manifested in requirements of publicness.

(ii) *The Principle of Rationality*. The culture of justification has been accompanied by pressure on decision-makers (and in some countries, on rule-makers) to give reasons for their decisions, and to produce a factual record supporting the decision where necessary. This is part of both political and legal culture. In both contexts it leads those institutions with review power into continuous debates about whether and on what standard to review the substantive rationality of the decision: manifestly unreasonable, incorrect, etc. Review, and reason-giving, are derived in Section 4.

(iii) *The Principle of Proportionality*. The requirement of a relationship of proportionality between means and ends has become a powerful procedural tool in European public law, and increasingly in international public law, although some national courts (for instance, in the UK) have only slowly accepted unfamiliar arguments based on it.

(iv) *Rule of Law*. The demand for rule of law can mean many things. The dominant approach is proceduralist,²⁶ meaning a general acceptance among officials (and in the society) of particular deliberative and decisional procedures, including the publicity maxim, discussed in Section 4. This is prima facie in tension with a conception of the rule of law as simply a structure of clear rules, reliably and fairly enforced, without regard to their substantive content (the 'rule book' conception); and with 'the ideal of rule by an accurate public conception of individual rights' (the 'rights conception').²⁷ Proceduralists argue for adhering to procedures even at the price of unsatisfactory outcomes – but face problems in explaining why any decision taken in accordance with prescribed procedures should not then be part of the law which adherents of the rule of law must uphold.²⁸ David Dyzenhaus has argued for an approach which shifts the focus of rule of law from law (and rules), to the element of ruling – so a breach of procedural requirements is not unthinkable, but involves a compromise of legality that must be carefully weighed.²⁹

(v) *Human Rights*. Basic rights protection is almost intrinsic (or natural) to a modern public legal system. This category overlaps a lot with the previous four categories, but is listed separately to leave scope for arguments that some human rights (perhaps of bodily integrity, privacy, personality) are likely to be protected by public law as an intrinsic matter (without textual authority), yet without being subsumed into 'rule of law'.

²⁶ An illustration is Fallon, 'The Rule of Law as a Concept in Constitutional Discourse', 97 *Columbia Law Review* (1997) 1.

²⁷ Dworkin, 'Political Judges and the Rule of Law', in R. Dworkin, *A Matter of Principle* (1985) 12.

²⁸ Waldron, 'The Rule of Law as a Theater of Debate', in J. Burley (ed.), *Dworkin and His Critics* (2004), 319, at 323.

²⁹ See Dyzenhaus, 'Aspiring to the Rule of Law', in T. Campbell, J. Goldsworthy and A. Stone (eds), *Protecting Human Rights: Instruments and Institutions* (2003).

4 Three Categories of Public Global Administrative Activity and the Concept of ‘Law’

The comparative study of general principles immanent in public law indicates a trend requiring publicness as part of the concept of (public) law. The emerging principles and practices of GAL, in operational contexts, add to this evidence and provide greater specificity. This section examines publicness criteria in three basic categories of GAL, constructed by structural analogy from David Dyzenhaus’s distinction among three different categories of administrative law within a national system.³⁰ Constitutive administrative law is what constitutes the legal authority of any administrative body; in national systems this generally requires a delegation of the authority to act, made by another body that has the authority to delegate a power of the state to act. Substantive administrative law is that established by the administrative body, including its more general (legislative-type) and more particular (adjudicative- or decisional-type) acts. Procedural administrative law governs how the administrative body can act.

Legal activities by public entities other than states in the global administrative space can be divided into categories on somewhat similar lines.

- (1) The institutional design, and legal constitution, of the global administrative body (a public entity, other than a state)
- (2) The norms and decisions produced by that entity, including norms and decisions that have as their addressees, or otherwise materially affect:
 - other such public entities
 - states and agencies of a particular state
 - individuals and other private actors.
- (3) Procedural norms for the conduct of those public entities in relation to their rules and decisions, including arrangements for review, transparency, reason-giving, participation requirements, legal accountability and liability.

These categories of global administrative action will now be considered in more detail, from the standpoint of issues concerning the requirement of publicness and its operational meaning in applicable concepts of law.

1 The institutional design, and legal constitution, of the global administrative body (a public entity, other than a state)

Institutional design, and constitutional rules of public entities, are obviously of central importance to the realization of substantive justice (the promotion of human dignity, liberty, capabilities, equality, fairness, welfare, etc.). They are also important to the actual realization of public law values and of the purposes of global administrative law (these probably on average also support the better pursuit of substantive justice, but not necessarily, and studies on these questions are only just beginning). Institutional design and constitutional-type rules (including rules of organizational procedure) can

³⁰ Dyzenhaus, ‘The Concept of (Global) Administrative Law’, *Acta Juridica* (2009).

define some of the conditions and costs of exit and voice, shaping strategies of key actors. A constitution which allows for deliberative decision-making in a legislature-like assembly may produce more and better assessment of arguments and public reasoning, but the decision itself may then lack coherent reasons or clarity. A decision process with representation of all key affected interests may succeed even if closed, but a less representative body may function successfully if its rules allow for high transparency and wide consultation with relevant civil society and industry groups. The adequacy of review by a tribunal will depend on rules concerning its jurisdiction, *locus standi*, hearings process, and appointment of its members. A body with a strong lawyerly dispute settlement tribunal may come in practice to shift more of the law-making function to the tribunal, empowering lawyers and legal approaches to the detriment of other actors. Rules of procedure in a deliberative body allowing wide civil society participation may enable new agendas to be taken up quickly, or they may encourage defection by powerful interests to make decisions in a more amenable forum. From a normative standpoint, institutional design should enhance the possibilities of substantive achievement and good process; insights from GAL, especially when combined with work on positive political theory, provide some guidance about different approaches as well as some prescriptions. Institutional design should also take account of other pathways not captured in the GAL framework or standard rationalist institutionalist logics, such as encouraging imaginative leadership by major political figures in areas of cosmopolitan values (such as environmentalism and climate change) where imaginative actions going beyond pure pursuit of national or sectoral political interests are plausible and may make a difference.

Constitutive power is exercised internationally, most obviously in the constitution of international organizations. The logic, and problems, of *pouvoir constituant* and *pouvoir constitué* hold in such circumstances. In the constituting process of creation of intergovernmental organizations, the problem of representation in the constituent assembly is solved by sending designates chosen by the executive branch of each participating state, nowadays also with some space just inside or outside the margins of the assembly for 'civil society organizations', who may themselves operate certain systems of representation *inter se* and *vis-à-vis* their members or supporters. The state representation is deepened if the constitution is a treaty requiring national parliamentary ratification or other wider deliberation. Once constituted, the institution and its agencies typically separate to a certain degree from the original constituting powers. The institution will likely adopt rules of procedure, assert implied powers, claim or refuse responsibility (for example, in relation to breaches of rights of individuals), create subsidiary bodies, engage in joint institution-building with other institutions, and in general take part in a kind of constitution-making which has implications for the creation and application of both substantive administrative law and procedural administrative law.

Embedding such institutions in a stronger and deeper international constitutionalism is much more challenging.³¹ The aphorism 'no democracy without a demos' has

³¹ On the irreducible plurality of approaches to these problems, see Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', 6 *ICON* (2008) 373.

a parallel in the claim that there can be ‘no constitutionalism without a polity’. If there is no completed global polity and nothing approaching a global demos, some scholars believe that institutions, norms, accountability-enhancing measures and associated discursive and reflexive processes operating outside, across and within national polities may help to establish the social and political conditions for global constitutionalism.³² Whether these institutions and modalities have anything like the strength to bear this burden, outside the European Union and some other special situations, is doubtful in the near term, but this approach nevertheless represents an important motivating aspiration for practical work in this field. Aspirations to constitutionalism are also open to contestation, however. Their telos, the sense of direction toward structural and substantive goals and toward realization of choices such as giving primacy to values over virtues and to rights over responsibilities,³³ is not necessarily reflective of goals that have been agreed or command general support in the current state of the world. Constitutionalism also implies a coherence of structure which global legal and institutional arrangements do not currently have and are unlikely soon to get. It may imply too that a specified minimum set of core functions have been allocated to relevant institutions or actors and are to some extent being performed. But there is not a globally shared political history that produces a tradition of understanding about those functions. For example, there is no global comparator to the history of the legislative power that developed as a political idea and practice in strands of Western political thought, so it is very difficult to see a shared understanding of what a global legislative power might consist in. While constitutive power is certainly exercised internationally, international constitutionalism in its richer forms is still, at most, in *statu nascendi*. Nonetheless, the constitutionalist commitment to publicness is being operationalized.

2 *The norms and decisions produced by a global administrative body (a public entity, other than a state) affecting different kinds of actors*

- A. The substantive external output of global administrative bodies may be further divided into three categories, depending on the kind of actor it is addressed to or otherwise affects. Publicness requirements can apply in each category.
- (i) Substantive norms and decisions that have as their addressees, or otherwise materially affect, other global administrative public entities (apart from states).

The field of international standardization provides many illustrations. The World Trade Organization (WTO), whose Technical Barriers to Trade (TBT) Agreement provides that states benefit from a rebuttable presumption of WTO compatibility where their technical restrictions on imports comply with ‘international standards’, has issued a Code of Good Practice for the Preparation, Adoption and Application of Standards. This in effect sets guidance on the ways in which the International Organization for Standardization (ISO) must operate if ISO standards are to operate as a safe

³² See, e.g., Cohen and Sabel, ‘Global Democracy?’, 37 *NYUJILP* (2005) 763.

³³ Such a critique of the EC/EU is the subject of recent work by J.H.H. Weiler.

harbour under WTO rules. The International Social and Environmental Accrediting and Labelling Alliance (ISEAL), which consists of eight such organizations including the Forest Stewardship Council (FSC), largely follows the ISO, and has promulgated a code of practice for social and environmental standard-setting. This requires, for example, two rounds of public comments on proposed standards, and a public written response to each material issue raised in such comments. All of these bodies require that standard-setting strive for consensus among a balance of interested parties. ISEAL defines consensus for this purpose as 'General agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process seeking to take into account the views of interested parties'. The FSC (established in 1993), in turn issues an intricate set of standards, the Principles and Criteria for Forest Management, which include detailed standards for specific regional forests, and certifies timber and timber products as conforming to these. Membership in the FSC is open to all organizations and individuals who subscribe to the FSC's principles. Its General Assembly is organized in three chambers (economic, social, environmental), each of which has equal voting power in the Assembly, and each of which is further divided into a Northern and Southern chamber with equal voice. Since 2002, Government forestry management organizations have also been permitted to join.

- (ii) Substantive norms and decisions that have as their addressees, or otherwise materially affect, states and agencies of a particular state.

This category is illustrated by one of the seminal GAL cases, the *Shrimp-Turtle* decisions in the WTO Appellate Body.³⁴ The US prohibited import of shrimp from India, asserting that Indian shrimp vessels did not meet US statutory requirements concerning protection of turtles. The WTO Appellate Body did not hold that the US acted contrary to GATT in refusing to treat Indian shrimp in the same way as identical shrimp from elsewhere, even though the text of GATT might have seemed to call for this. The Appellate Body deferred to a US public law decision that demand from US markets for shrimp was not going to be permitted to more grievously threaten turtles. But the Appellate Body held that the way in which the US authorities took their legal decision was arbitrary or unjustifiable, in so far as the US did not provide India with proper notice of its plans to find Indian vessels non-compliant, an opportunity to contest these proposed findings in advance, or a reasoned written decision it could challenge. In effect, the US process did not meet some of the requirements for publicness in law, as these requirements were not limited to a public comprised of US citizens, but included affected Indian interests as well.

- (iii) Substantive norms and decisions that have as their addressees, or otherwise materially affect, individuals and other private actors.

This is becoming an increasingly important element of global regulatory governance. Significant issues for the concept of law in GAL can arise from situations where

³⁴ WTO Appellate Body, 12 Oct. 1998, (1999) 38 ILM 121.

the global regime confers rights on individuals, as these rights and their legal validity in turn have implications for legal obligations of other actors, and they also have implications for the weight to be given to rights-respecting or rights-disrespecting norms and decisions of global governance entities. Where a global regime imposes burdens on individuals, an examination of that institution's conduct by reference to GAL criteria is increasingly likely, whether or not there is a direct transitivity (i.e. whether or not the global rule or decision can directly be challenged.) The reform of the Security Council's listing procedures for certain individuals and groups suspected of involvement in terrorist financing, enacted in Security Council Resolution 1822 (30 June 2008) ahead of the anticipated decision of the European Court of Justice in the *Kadi* case (September 2008), illustrates the application of several elements of 'publicness', and possibly even a sense of obligation to enact these. These provisions include an obligation of states seeking listing to provide to the Security Council a detailed statement of the case, with an indication of parts of the statement suitable for public release, as well as procedures to revisit earlier listings and add statements of reasons. They also include provisions for persons listed or delisted to be so notified within one week where practicable, a procedure for annual review of existing listings, and encouragement of use of the existing (non-transparent and not entirely satisfactory) procedure for delisting.

B. The most obvious contrast between these three categories of 'substantive' norms and decisions relates to the possibility of review triggered by the addressed or otherwise affected interest. In international relations, it is extremely rare for a judicial-type body to have competence in a challenge by one international organization to the work of another. Occasionally this may be achieved collaterally, as with the challenge by the European Commission in the European Court of Justice to Ireland's invocation of the jurisdiction of an international arbitral tribunal in the MOX Plant case (the arbitral tribunal suspended its work pending the ECJ decision, although technically the ECJ decision would apply only to Ireland's conduct). The horizontal nature of IO relations means that separate review bodies even with simply political functions are not often available. As institutional hierarchies develop to manage this situation, more formalized review may develop with it, bringing in great scope for publicness criteria to operate also in the initial challenged administrative action. The topic of review as an element of publicness will be addressed more fully below.

A second distinction concerns the applicability of Rule of Law protections. It can be argued that these protections apply only to individuals, not to states or IOs, and hence come into play only in the third of the categories listed above.³⁵

C. Treating all three categories of substantive norms and decisions together, this kind of administrative action raises basic questions about the applicability of the kind of requirements that Lon Fuller described as an 'inner morality' of law. These

³⁵ This argument has been explored by Jeremy Waldron in a draft paper, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (October 2008).

requirements are 'inner' to law itself, in the same way as the public law requirements discussed in this paper are. So if in a particular administrative situation Fuller's indicia are not present and realistically could not be, from his standpoint this gives reason to doubt that 'law' is involved. He labelled these eight requirements as:

that law should be general – generality; that law should be promulgated or public – publicity; that there should not be abuse of retroactive law – non-retroactivity; that law should be understandable – clarity; that law should not be contradictory – non-contradiction; that law should not require conduct 'beyond the powers of the affected party' – possibility of execution; that law should not be so frequently changed that the 'subject cannot orient his action' – constancy; that 'actual administration' should be congruent with the 'rules as announced' – congruence.³⁶

Fuller observed that many managerial directives concern primarily the relationships within the administration (superior-subordinates, etc), only collaterally affect the citizenry, adhere only to some of the elements of inner morality that are indicative of law, and adhere to even these elements for reasons of efficacy rather than because they instantiate the reciprocity in relations of ruler and ruled that call forth the need for law as the distinctive mode of order in modern liberal states. David Dyzenhaus has recently applied this analysis to invite more searching examination of the degree to which concepts of 'law' (and hence legality) are really invoked by ideas of administrative law, at least in its various Anglo-American forms.³⁷ Significant parts of national administrative 'law', and especially the substantive legal-type outputs (norms, guidelines, decisions) of administrative agencies, do not adhere to all or even most of Fuller's criteria. *Can they nevertheless make a claim as law?* (This is a conceptual question. It folds into, but does not subsume, questions that arise repeatedly in GAL: to what extent *do* they, and to what extent *should* they, make claims to be law?)

One answer suggested by US debates on this question, is that intransitive legislation, which confers powers on agencies but in such general terms that it creates really no basis for effective review of any sort, becomes transitive when these powers are used *in concreto* by the administrative body acting in relation to individuals. At that moment, the duty to adhere (more or less) to the requirements for inner morality of law takes hold. Legality is then invoked as the way of framing and understanding the relation between the ruler and the ruled, the administrator and the administrated, the governor and the governed. Dyzenhaus argues that the particular claim to legitimacy that is made by invoking legality, depends on adherence to the requirements of the inner morality of law, requirements that may seem largely formal but nevertheless have considerable significance and bite. Adherence to these requirements is what makes putative law legal.³⁸ Such adherence is achieved and achievable only within a system or order, but it is not being part of a legal system

³⁶ L. Fuller, *The Morality of Law* (rev. ed., 1969). This summary distillation is quoted from D. Dyzenhaus, 'The Concept of (Global) Administrative Law', IILJ Working Paper 2008/7, www.iilj.org.

³⁷ Dyzenhaus, 'The Concept of (Global) Administrative Law', *supra* note 30.

³⁸ Thus, Dyzenhaus is able to argue in this and other works that rule by law depends on there being rule of law.

that makes putative law legal. Legality here consists not merely in ex-post accountability (such as by judicial review or judicial determination of legal liability), but in fidelity to law on the part of the officials involved. This means fidelity to the constitutive, substantive and procedural administrative law, even if each is not equally subject to review, as each (to the extent of claiming to be law) makes the claim of legality.

This Fullerian process of rendering transitive the intransitive, works to a reasonable extent in a state where rule of law generally prevails. But does it work outside the state? Dyzenhaus suggests that better and more accurate practices of authorization, or delegation of authority, will be necessary if there is to be much constitutive administrative law beyond the state. This admonition is indicative, however, of a fundamental problem. Much (not all) of the practice of global governance cannot adequately be theorized as authorized or delegated by states or by entities deriving their own authorizing or delegating powers from states. If in many cases (not all) global governance agencies cannot be understood as having this kind of constitutive administrative law (they may of course have other kinds of constitutive law), on what basis can their substantive administrative output, or claimed controls on their procedures, be made transitive or regarded as legal? The legal character of putative global administrative law in such circumstances, like the legal character of administrative law in democracies, is determined not by transitivity, but by Hart's test plus the further requirement of publicness (which includes the principle of legality).

This article argues for the extension to global governance, in adapted form, of the requirements of *publicness* that are more and more intrinsic to the understanding of what law is in modern democratic states. This approach is comparable to Lon Fuller's, in that publicness is immanent in law, so the choice to use law (or law-like structures) and so benefit from the value added by using law, brings with it the requirements of publicness. Publicness (like Fuller's inner morality of law) is readily expressed as an attribute of law, but it may also inform the very concept of law, for example by being incorporated into a Hartian rule of recognition determining what counts and what can count as law in a particular legal system. The requirements of publicness bring a unity between the institutions of law production, the qualities of the substantive law produced, and the procedures of law production. It may thus avoid some of the challenges of intransitivity that Fuller's inner morality of law faces. It may also avoid problems about international law applying Rule of Law protections to states and to inter-state organizations. For if it is unreasonable to argue that states generally (as opposed to weak or disadvantaged states) should be permitted to insist that all rules of international law be clear, be promulgated to them, be general rather than particular, and so on, they may still insist that the international law conform to requirements of publicness. If inter-state law has elements more nearly approximating self-legislation, more like the Athenian assembly or Rousseau's ideal type of law-making in a very small and insulated polity, it is still reasonable that this self-legislation adhere to the desiderata of publicness. If an IO has no entitlement not to be abolished or have its budget cut arbitrarily by decision of the member

states,³⁹ it may nevertheless be in the general interest that requirements of publicness apply to these decision processes.

3 Procedural norms for the conduct of those public entities in relation to their rules and decisions, including arrangements for review, transparency, reason-giving, participation requirements, legal accountability and liability

This is the core of global administrative law as ordinarily understood. These procedural norms give more precision and meaning to the general principles immanent in public law that were introduced in Section 3. The first conceptual problem in assessing this practice is to determine whether an accepted category of sources and a rule of recognition exist within that specific global governance regime or cohort of participants and experts. The second problem is determining whether and to what extent a quality of publicness is built into the prevailing concept of law and the practice in that regime or cohort. A further question then is whether these elements are understood as determinative of the validity of the claim to law, or as factors going rather to weight.

These issues concerning the application of procedural norms have been examined in an increasingly rich set of GAL studies, including important work on accountability and on participation by Richard B. Stewart, Sabino Cassese, and other scholars. This section will consider, from the standpoint of the Hartian requirements and the publicness requirement in the applicable concept of law, three other areas in which procedural norms may be emerging across diverse substantive regimes of global regulatory practice. These are review, reason-giving, and publicity/transparency.

A Review

Review mechanisms are of particular importance to the present inquiry, because in determining their procedures and decisions, review bodies frequently take implicit (and on occasion explicit) positions on elements of the applicable concept(s) of law, including the identification and relevance of social practices, sources of law, recognition of norms, and elements of publicness. This point can be illustrated by considering a few recent examples of review in global governance, which for convenience will be organized by reference to the systemic relations between the reviewing body and the reviewed entity.

³⁹ Whereas individuals in it, such as José Bustani when he was dismissed arbitrarily as Director-General of the Organization for the Prohibition of Chemical Weapons in 2002, have personal rights to protection under basic ROL principles; rights which in his case were to some extent vindicated by the ILO Administrative Tribunal, which covers OPCW staff. *In re Bustani*, ILO Administrative Tribunal Judgment No. 2232, 16 July 2003, awarding damages (he had not sought reinstatement). For commentary see Klabbbers, 'The *Bustani* Case Before the ILOAT: Constitutionalism in Disguise?', 53 *ICLQ* (2004) 455; Dunworth, 'Towards a Culture of Legality in International Organizations: The Case of the OPCW', 5 *International Organizations Law Review* (2008) 119.

1 *Review of a Global Governance Entity's Administrative Action by a Separate Tribunal within the Same Entity*

A representative example is the European Court of First Instance decision in *OMPI v. Council*,⁴⁰ which the Council of Ministers decided not to appeal. This decision annulled the designation, under a Council Regulation directed at terrorist financing, of the OMPI as an organization whose assets were to be frozen by member states. The ground for this annulment was infringement of the right to seek effective judicial protection. The CFI noted that it had not received clarification as to the grounds on which the UK national authorities had proposed, and the Council had agreed, to include the OMPI in the EU's terrorism financing list, and so it was 'not in a position to review the lawfulness of the contested decision'. Neither the general right to a hearing, nor the general requirement to state reasons for a decision, were applied by the court as grounds for annulment, mainly on the ground that these funds would be spirited away or intelligence sources would be compromised. In the absence of such protections, the procedural due process requirement of access to a tribunal was of heightened importance.

2 *Review of a Global Governance Entity's Administrative Action by a Separate Tribunal within a Different Non-national Global Governance Entity*

Such situations are relatively uncommon, for the time being, for reasons explained below. The International Court of Justice (a principal organ of the UN) periodically finds itself asked to take account of actions by non-UN inter-governmental organizations, for example actions of regional and sub-regional organizations in the Americas with reference to armed conflicts in Central America in the 1980s, and actions of NATO relating to the Balkans in the 1990s. The ICJ has been more assertive in reviewing actions of some UN organs and specialized agencies, particularly under its advisory jurisdiction. Some of its most specific statements on procedural principles of global administrative law have come in its extensive jurisprudence reviewing decisions of the United Nations Administrative Tribunal and similar bodies, for example its interpretations of obligations of such tribunals to state reasons.⁴¹ More dramatic are cases in which the ICJ considers whether an IO has acted outwith its competence, as in its (limited) consideration of UN Security Council measures against Libya in the *Lockerbie* case,⁴² or its more searching consideration of the proper scope of World Health Organization activities (including by reference to a principle of speciality for UN specialized agencies) in refusing the WHO request for an advisory opinion in the *Nuclear Weapons* case.⁴³ The ICJ also reviews arbitral awards on a similar set of grounds,

⁴⁰ T-228/02, 16 Dec 2006.

⁴¹ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal (1972–1973)*, Advisory Opinion of 12 July 1973. Its jurisdiction in relation to UNAT was eventually terminated (later, in 2009, UNAT became the United Nations Appeal Tribunal).

⁴² *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. USA)*, ICJ Reports (1994) 6. See also Brownlie, 'The Decisions of the Political Organs of the United Nations and the Rule of Law', in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994), 95.

⁴³ Bothe, 'The WHO Request', in L. Boisson de Chazournes and P. Sands (eds), *International Law, the International Court of Justice, and Nuclear Weapons* (1999) 103.

ranging from failure to state reasons,⁴⁴ to excess of jurisdiction or corruption. More controversial has been roles of non-UN tribunals in collateral review of UN conduct or attribution of conduct to the UN, usually in cases in which the UN was not a party, such as the European Court of Human Rights decision in *Behrami* (2007), concerning liability of the UN for actions by UN peacekeeping forces in the Balkans.⁴⁵

3 Review of a Global Governance Entity's Administrative Action by a National Tribunal

Two decisions of the French Conseil d'Etat illustrate the application of publicness criteria in relation to France's participation in the decentralized inter-state network known as the Schengen Information System (SIS). The formal posture in both cases was judicial review of France's denial of visas where the French denial was the result of the persons having been listed in the SIS by other countries party to the Schengen agreements allowing free movement across borders in the Schengen zone. Thus Ms Hamssaoui, a Moroccan citizen and resident, who was denied a visa to visit family in France because of a report on her in the SIS, succeeded in having this denial annulled because she was not given reasons for the report nor even the name of the country which had entered the report.⁴⁶ In another case, where German officials had listed Ms Forabosco (a Romanian citizen living in Bucharest and seeking a French visa) on the SIS, on the basis that she had earlier been denied asylum in Germany, the Conseil d'Etat in effect applied the principle of legality in determining that the German officials had made a legal error, because refusal of asylum is not a legally permitted reason under Article 96 of the Schengen Agreement for reporting a person on the SIS. The bold step of a French court in reviewing the act of a German official was partly based on the French court's understanding that national courts seised of a case had a governance role in correcting erroneous SIS reports, a preferable governance arrangement than requiring her to institute parallel proceedings in German courts.⁴⁷

4 Review of a National Entity's Administrative Action by an International Tribunal

International tribunals seldom have power to annul a national administrative action directly, other than in special situations such as direct international administration of territory. International tribunals may be built into the national legal system, so

⁴⁴ *Case Concerning Arbitral Award of July 31, 1989*, 1991 ICJ 53. See Dissenting Opinion of Judge Weeramantry, at 164–165: 'The necessity for reasons in an arbitral award is of course obvious as it removes any appearance of arbitrariness in the Tribunal's decision. It is a long-established and well-respected rule... There have been occasional instances of major international arbitrations in which no reasons have been given for the award, as for instance in the Portendick arbitration of 1843 between France and Great Britain in which the arbitrator was the King of Prussia. However, such award without reasons immediately attracted criticism from learned publicists even at that early stage in the evolution of international arbitral law. The Portendick arbitration was criticized by Fauchille, and in 1897 when President Cleveland failed to give reasons for his decision in the Cerruti arbitration between Colombia and Italy, this was criticized by Darras.' (Footnotes omitted.)

⁴⁵ *Behrami and Behrami v. France*, ECHR (Grand Chamber), Application Number 71412/01, (2007) 45 EHRR SE10.

⁴⁶ Conseil d'Etat, 9 June 1999, No. 198344, Mme Hamssaoui.

⁴⁷ Conseil d'Etat, 9 June 1999, No. 190384, M et Mme Forabosco.

that their decisions have more or less directly operating effects there, but usually there is some scope for national judicial assessment before that happens. This is true for enforcement of foreign arbitral awards under the New York Convention, or for enforcement of binational panel decisions under Chapter 19 of NAFTA; and even in those European Court of Human Rights countries where the courts had shown the most willingness to give direct effect to European Court of Human Rights decisions (such as Spain), the courts now assert the power to make their own review. National tribunals with some foreign (internationally-appointed) judges such as the Bosnian Constitutional Court, or hybrid national-international criminal tribunals which may have some collateral jurisdiction over certain administrative decisions (such as allocation of resources and counsel to the defence, or translators, or detention facilities), may be built into the national system partly for these reasons.

But international tribunals often have jurisdiction to evaluate national administrative acts, to order compensation for their consequences, to treat some of them as nullities for certain international purposes (for example, an internationally unlawful expropriation decree may be treated as not depriving the lawful owner of title), and in some cases to articulate or trigger international law obligations of other actors not to recognize or give effect to these national acts (as with certain acts of South Africa in South-West Africa after UN termination of the mandate).

Significant problems can arise, however, in routinizing review by international tribunals of national administrative acts. These include problems concerning the legal competence, practical expertise, and workload-capacity of the tribunal; the proper standard of review; and the legitimacy of the review by reference to criteria of rule of law and democracy. Adherence to criteria of publicness – in the institutional design and resourcing of the tribunals, and in their operation and jurisprudence – provides one valuable frame for assessing and mitigating these problems. Two examples will be given. The first concerns review by international human rights bodies of national administrative decisions affecting national civil servants. The second concerns review of national administrative decisions by investment arbitration tribunals.

(i) Due Process Rights of National Civil Servants in Employment Matters: Review by International Human Rights Bodies

Several major human rights treaties specify due process rights that have been important in the review and reform of national administrative procedures affecting individuals, including Article 14 of the ICCPR and Article 6 of the ECHR. Article 14(1) of the ICCPR provides: ‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’ Most of the remainder of Article 14 is concerned with criminal matters, as to which the provisions are quite detailed. But determining the reach of these opening two sentences of Article 14(1) in relation to non-criminal administrative proceedings involves difficult problems, which are compounded by differences among the equally authoritative texts of the ICCPR in several different languages. The UN Human Rights Committee has recently taken

a relatively expansive approach to Article 14(1), but warnings have been sounded about the potential (so far not an actuality) for it to be swamped by such cases. In *Lederbauer v. Austria*⁴⁸ the Committee endorsed the views it had expressed earlier in *Perterer v. Austria*,⁴⁹ which seemed to elide a potentially important distinction between the first two sentences of Article 14(1). The Committee opined that the guarantee of equality before the courts in the first sentence encompasses impartiality, fairness and equality of arms, and that this applies whenever a judicial body (including a tribunal) has the task of imposing disciplinary measures on civil servants. Thus some elements from the second sentence seem to be imported into the first sentence. The Committee was clear, however, that the requirement that procedures before national tribunals be conducted expeditiously was a component of the right to a fair hearing, that is the right framed in the second sentence.⁵⁰ If a tribunal is constituted, the right to equality before it follows. What, however, is the scope of the right to have a hearing before a tribunal? As a textual matter, this calls for consideration of what is encompassed, and not encompassed, by 'a suit at law'? The fact that a state has set up a tribunal, indeed a tribunal designed to be independent and impartial, does not necessarily mean that proceedings within its competence are a suit at law. In *Y.L. v. Canada*⁵¹ the Committee indicated that whether a claim was a suit at law depended on the nature of the right in question, or on the particular form which the Canadian legal system provides for its adjudication. Three members of the Committee stated that the claim to a pension by a soldier dismissed from the army for mental health reasons was not an ordinary labour rights claim because of the military element, and that the Pension Review Board was 'an administrative body functioning within the executive branch of the Government of Canada' and hence not a court or tribunal. Thus this was not a suit at law.⁵² A more recent individual opinion points to indications in the *travaux préparatoires* that the second sentence of Article 14 did not necessarily apply to determination of rights by an administrative tribunal or office, so they need not be independent or provide public hearings; the 'suit at law' occurs only where the decision is appealed to or reviewed by a court or tribunal having a judicial nature.⁵³ The Committee itself has not taken a definitive position in its recent cases.

One reason for this is that the UN Human Rights Committee has thus far been unable to separate the question of its own institutional role and capacities to deal with individual petitions, from the question of the meaning of the substantive provisions of the ICCPR. The Committee feels itself obliged to give detailed consideration to the admissibility and merits of every petition that meets its procedural requirements and makes a colourable claim to violation of rights enumerated in the ICCPR, so the more broadly the Committee interprets Article 14(10) as regards administrative proceedings, the greater the flood of individual petitions it may receive against states parties to

⁴⁸ Communication 1454/2006, 11 Sept. 2007, at para 7.2.

⁴⁹ Communication 1015/2001, 20 July 2004.

⁵⁰ *Lederbauer*, para. 8.1.

⁵¹ No. 112/1981, 8 Apr. 1986.

⁵² Concurring Op. Graefrath, Pocar and Tomuschat, in *YL*, para 3.

⁵³ *Indiv Op. Wedgwood*, in *Lederbauer*, paras 4.1-4.10.

the first Optional Protocol. The ICCPR is cognizable within the legal systems of many of its states parties, and interpreting the ICCPR as one source of principles for protecting rights within administrative proceedings might assist national courts and other national institutions in playing a useful role in reforming or remedying unsatisfactory procedures. The ICCPR might also provide guidance for non-national bodies engaged in administrative proceedings affecting individuals, for example inter-governmental organizations.

The European Court of Human Rights is a court (unlike the Human Rights Committee, which is not), and has a much greater resource base and capacity. It is notable, however, that the European Court of Human Rights has taken a narrower view of the scope of application on civil service issues than has the UN Human Rights Committee. In *Pellegrin v. France* the Court decided that Article 6 of the ECHR does not reach employment issues concerning public servants exercising sovereign powers of the state, in this case a police officer.⁵⁴ Textual differences between the English versions of the relevant treaties may be relevant to this holding.⁵⁵ But beyond the textual differences may lie a more fundamental difference as to the proper role of the international body, and the appropriate scope of review. These considerations can readily be expressed, and understood, by reference to criteria of publicness.

(ii) *Review by Investment Arbitral Tribunals of National Administrative Action*

Investment arbitral tribunals review national administrative acts with increasing frequency, although nothing approaching a uniform standard of review or articulate assessment of the functional competence and position of such tribunals has yet emerged.⁵⁶ To give one illustration, a North Atlantic Free Trade Agreement (NAFTA) Arbitral Tribunal used customary international law in *Pope & Talbott Inc v. Canada* in considering whether the Canadian government's administrative dealings with this softwood lumber producer met the international minimum standard.⁵⁷ However, even with regard to the international minimum standard a state must observe in its dealings with aliens in relation to their property, an area on which there are numerous legal decisions and bodies of state practice over many decades, debates are rife as to how the law now applies to various kinds of administrative actions, as indicated by the tensions between the *Pope & Talbott Inc v. Canada* tribunal and the three NAFTA state parties who together issued a note of interpretation, in effect, challenging the

⁵⁴ No. 28541/95, 8 Dec 1999.

⁵⁵ Article 6 of the European Convention on Human Rights in its French text closely tracks the French text of the second sentence of Article 14 of the ICCPR – the rights apply in 'contestations sur ses droits et obligations de caractère civil'. The English text, however, retains the word 'civil' which was dropped during the drafting process of the English text of the ICCPR: 'In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

⁵⁶ For an extensive discussion reviewing numerous arbitral awards, see B. Kingsbury and S. Schill, 'Investor-State Arbitration, Fair and Equitable Treatment, Proportionality, and the Emerging Administrative Law of Global Governance' (ICCA, 2009).

⁵⁷ *Pope & Talbott Inc v Canada*, NAFTA Arbitral Award on the Merits of Phase 2, 10 April 2001, www.naftaclaims.com/disputes_canada_pope.htm.

tribunal's approach.⁵⁸ Such uncertainty is rife with regard to detailed standards for the evaluation of actions of global governance actors not involving the well-established law on state treatment of aliens.

B Reason-giving

A requirement that reasons be given for certain types of decisions, and for the adoption of certain norms, is found in many areas of global governance practice. Normative and functional reasons for this requirement are readily identifiable. Governance mechanisms can be arrayed along a spectrum between essentially political and essentially legal modes of operation, based upon the degree of commitment to deliberation and reason-giving in their decision-making. A purely political mechanism, such as the casting of votes in a secret ballot, involves no obligation to give any reasons or to seek to persuade anyone else. Conversely, a judicial mechanism usually involves an obligation to state reasons and a considerable effort to make these reasons convincing to the parties and to the relevant audience. In between are modalities that are more political but have a deliberative rather than arbitrary decisionist mode of operation. In developing such an analysis, John Ferejohn has hypothesized that purely political mechanisms (such as electoral choices) that play a vital part in national democracies can seldom be routinized in global administration, where democratic legitimation of political decision-making is not achievable. As a substitute, actors with the power (individually or in coalition) routinely to impose political decisions must usually give reasons to overcome the legitimacy deficit that otherwise would generate contestation or non-cooperation from necessary parties.⁵⁹

What is the status of the reason-giving requirement as law in the areas of global governance where it applies? Djibouti's dispute with France concerning the Convention on Mutual Assistance in Legal Matters between France and Djibouti of 1986 (one of many such treaties among different states), illustrates the blend of established positive law and a wider sensibility that may be aligned with publicness. Article 17 of the 1986 bilateral treaty specified that 'Reasons shall be given for any refusal of mutual assistance'. Article 2 of the treaty permits non-disclosure of the file where essential interests of the state could be compromised. The underlying refusal by the French investigating judge to turn over to Djibouti a copy of the file on her investigation of the murder of Judge Borrel in Djibouti, was determined by the ICJ to have been a decision in good faith. Key to this determination was that the investigating judge had stated the grounds on which her decision was based, and upon analysis the ICJ found these were proper grounds for a refusal under Article 2 of the Convention.⁶⁰

⁵⁸ NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001; *Pope & Talbot v Canada*, NAFTA Arbitral Award in Respect of Damages, 31 May 2002, www.naftaclaims.com/disputes_canada_pope.htm.

⁵⁹ J. Ferejohn, 'Accountability in a Global Context' (International Law and Justice Working Paper IIIJ 2007/5, Global Administrative Law Series, Institute for International Law and Justice, New York University School of Law, 2007) www.iilj.org.

⁶⁰ *Djibouti v. France*, ICJ, 2008, para 147.

As regards the reason-giving requirement in Article 17, the ICJ determined that this required substantive reasons, and it would have been insufficient for France just to refer to Article 2 of the treaty as its reason. The court gave two arguments for this, which are not necessitated by the treaty text and move moderately in the direction of publicness. Giving substantive reasons would allow (or press) the requested state to substantiate its own good faith in refusing the request; and the reasons would enable the requesting state to see if its letter rogatory could be modified so as to avoid the obstacles. France's failure to do this through official channels was the only violation the ICJ found of the treaty.⁶¹

C *Publicity/Transparency*

Publicity – openness to all to know – is a requirement given by Hobbes for the sovereign to make effective law. It is also a requirement of liberal Benthamite positivism, part of a project to make law and legal decisions knowable to all, and in making it knowable, to increase accountability of particular makers or adjudicators of law to others who have some claim on them. When Woodrow Wilson called for an end to 'secret diplomacy' and a new order of 'open covenants, openly arrived at' (a norm still embodied in the UN Charter requirement that treaties be registered with the UN Secretary-General for publication in the UN Treaty Series), he had in mind that this publicity, in causing leaders to take more account of public sentiment and to defend their international commitments in public debates, would democratize foreign policy and dampen diplomatic tendencies to bellicosity. Almost every public institution of global governance currently faces demands to increase the openness of its decision processes: the Basel Committee of central bankers now publishes drafts of its proposals to receive comments from interested private sector groups before adoption, NAFTA arbitral tribunals now accept amicus briefs from third parties, and so on.⁶² Some of the justifications given for this are entirely non-instrumental, but most of the justifications relate to improving the quality of the law or decision (through better information, or reduced risk of venality or co-option or regulatory capture),⁶³ to strengthening the overall legitimacy of the institution and hence support for it, or to improving the overall quality and impact of the laws and the law-governed behaviour through sociological mechanisms such as the 'civilizing effect of hypocrisy',⁶⁴ the reinforcement of latent inclinations or aspirations to do the right thing,⁶⁵ or 'blowback'.⁶⁶

⁶¹ *Ibid.*, at para 152.

⁶² Charnovitz, 'The Emergence of Democratic Participation in Global Governance (Paris, 1919)', 10 *Indiana Journal of Global Legal Studies* (2003), 45; Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', 18 *Michigan Journal of International Law* (1997) 183.

⁶³ M. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (2006).

⁶⁴ Elster, 'Deliberation and Constitution-Making', in J. Elster (ed.), *Deliberative Democracy* (1998) 97.

⁶⁵ R. Goodin, *Motivating Political Morality* (1992).

⁶⁶ Goodman, 'Humanitarian Intervention and Pretexts for War', 100 *AJIL* (2006) 107. See generally Goodman and Jinks, 'Incomplete Internalization and Compliance with Human Rights Law', 19 *EJIL* (2008) 725.

This political commitment to publicity as an element going to the legitimacy of governance is often expressed as a requirement that legal rules and decisions be made publicly accessible if they are to qualify as law. This claim has not completely dominated the field, but it has had the effect of raising doubts about the law-quality of much secret or unpublicized state practice which a century ago would probably have satisfied the sources test for international law pedigree.⁶⁷ Many inter-state agreements and understandings on security matters and intelligence are kept secret, but much of this practice – for instance, the silent transfers of suspects without extradition processes, or promises to share intelligence information – is not generally analysed as making international law or generating international legal obligation, in the way that other state practice is thought to do. The IMF keeps not only the deliberations of its own Board secret, but also many pieces of 'advice' to, and understandings with, borrowing countries. It seems to accept that doing this means these materials cannot easily be jurisgenerative. A different kind of case is the WTO Appellate Body, which issues important rule-based opinions employing legal reasoning just as a court does, but has had to resist characterization as a court issuing judgments, not only for WTO structural reasons, but also because it has until recently been constrained to hold almost all of its hearings behind closed doors, and has thus been debarred from modern requirements of openness to the public in legal courts.⁶⁸

What Kant called the 'formal attribute of publicness', the 'transcendental principle of the publicity of public law' was applied by him not to acts, or policies, but to the maxim governing particular acts or policies: 'all actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public'.⁶⁹ By 'public' Kant seems to have meant an ideal, rational public.⁷⁰ This principle of publicity is a necessary (but not sufficient) condition for doing justice to others.⁷¹ 'A maxim which I may not declare openly without thereby frustrating my own intention, or which must at all costs be kept secret if it is to succeed, or which I cannot publicly acknowledge without thereby arousing the resistance of everyone to my plans, can only have stirred up this necessary and general (hence *a priori* foreseeable) opposition because it is itself unjust and thus constitutes a threat to everyone.'⁷²

⁶⁷ Société Française pour le Droit International, Colloque de Genève, *La pratique et le droit international* (2004).

⁶⁸ In 2005 the Appellate Body for the first time held such a session in public, with the agreement of the disputing parties, and it repeated the experiment in 2008. Many other international rule-making and decision-making bodies try to find a way of both being jurisgenerative and not too constrained by the public, by avoiding publicity for their documents and proceedings while also not keeping them formally secret – they want to be part of international law, but they fear that their good work as technocratic experts will be slowed down by NGO agitators or self-serving industrialists.

⁶⁹ I. Kant, *Perpetual Peace* (1795), Appendix, in H. Reiss (ed.), *Kant's Political Writings* (1991), 125 and 126. The phrase 'transcendental principle of the publicity of public law' is used in other translations but not Reiss's.

⁷⁰ Gosseries, 'Publicity', in *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/publicity> (first published 12 Jan. 2005).

⁷¹ As Kant points out, the person who has decisive supremacy has no need to conceal maxims.

⁷² Kant, *supra* note 69, Appendix, in Reiss, *supra* note 69, at 126.

Framing this in terms of maxims leaves scope for the important idea that there can be public legal agreement that certain acts or classes of acts ought to be non-public (or secret) to protect privacy interests or for other reasons. Indeed, there are good arguments for secrecy or non-publicity in certain activities of global legal governance. Non-publicity is widely thought to enable better deliberations among judges, arbitrators and other small groups of legal decision-makers. Secrecy during negotiations may reduce problems of political leaders 'playing to the gallery', utilizing either particularistic reasons that do not take into account other interests and reasons, or 'plebiscitory' reasons that meet the tests of public reason but are too shallow.⁷³ Confidentiality of commercially sensitive information is essential to monitoring and inspection regimes for private facilities under the Chemical Weapons convention and other arms control agreements. Governments and other public authorities may also have good constitutional-type reasons to limit their affirmative duties to generate and provide certain kinds of information. Thus some of the states parties to NAFTA realized that constitutional uncertainties meant they were unable to specify to foreign investors whether a particular issue was within the regulatory competence of federal, or instead of provincial or state, governments; accordingly they sought to ensure that no such duty of 'transparency' would be imposed by NAFTA chapter XI.

5 Generality of Law and the Problem of Administration

Is generality a requirement of law under modern conditions?

Hobbes saw no need at all for laws to be general in scope. 'For all Lawes are generall Judgements, or Sentences of the Legislator; as also every particular Judgement, is a Law to him, whose case is judged.'⁷⁴ Kelsen, focusing on the validity of each norm by reference to its authorization for a logically prior norm, had no difficulty incorporating the action of an official (where duly authorized) in relation to an individual, into the concept of law.⁷⁵ Joseph Raz likewise incorporates particular orders (governed by general norms) into his concept of law, although with a strong preference that they be derived from general norms (thus enabling people to plan).

Jeremy Waldron has taken a stand against this jurisprudential position, arguing on Rousseauian lines that generality can be an important protection against arbitrariness and tyranny, and for equality and liberty.⁷⁶ This can be framed simply as a desideratum of rule of law. But if pressed further, to become part of the very concept of law (meaning here an evaluative concept of what law is), considerable problems arise about the legal status of much administration.

A. V. Dicey's emphasis on ordinary (private) law rules and actions and his concomitant suspicion of a special *droit administratif* as a means for controlling public administration, influenced legal theory and practice in England and many other countries

⁷³ Luban, 'The Publicity Principle', in R. Goodin (ed.), *The Theory of Institutional Design* (1996) 154.

⁷⁴ *Leviathan*, *supra* note 14, at 197.

⁷⁵ Alexander Somek, 'Kelsen Lives', 18 *EJIL* (2007) 409.

⁷⁶ Waldron, 'Can There Be a Democratic Jurisprudence?', *supra* note 20.

for decades.⁷⁷ Lists of the attributes of law of the kind produced by Lon Fuller also left doubt that much quotidian administration, even if governed by law, should itself be regarded as law. Such views influenced the thinking of international lawyers. Sir Robert Jennings, for example, shortly after retiring as President of the International Court of Justice called for a reorientation in international law scholarship and policy: 'it is the relatively underdeveloped political and administrative side in international law which inevitably inhibits the full development of the legal side.'⁷⁸

Such a view is evident in the International Court of Justice's 1954 advisory opinion, which was concerned with Chapter XV of the UN Charter in relation to UN staff matters. The ICJ commented that the UN General Assembly had 'a power to make regulations, but not a power to adjudicate on, or otherwise deal with, particular instances'. A threefold categorization is implied here: law-making, adjudication, administration. One distinction is between making regulations and adjudicating particular instances; this aligns with the sharp contrast drawn in many national legal systems between legislation and adjudication (so that in these systems a judicial decision, which applies to a single instance, is not legislative – it is not a formal source of law.) A second distinction is between making regulations (legislating) and dealing non-judicially with particular instances (administration). This classificatory structure thus divides the general (legislation) from the special (dealing with particular instances by way of adjudication or administration.)

It may be doubted whether the exclusion of a great amount of global governance practice from the domain and concept of law is normatively desirable. A feature of much global governance is that there is not the degree and specificity of functional differentiation that exists in some national governmental structures. Law-making and administration thus may at times be the same thing. In this context, it is doubtful that a strong insistence on generality as part of the concept of law is useful for purposes of global administrative law. But is generality nonetheless a necessary requirement for such a concept of law? Three observations are offered by way of partial answer. First, generality as a requirement of the higher levels of law in a chain of authorizations (what might be called the arteries and veins) does not necessarily extend to legal actions taken at what might be called the capillary level, where actions are of high

⁷⁷ Dicey, 'Droit administratif in Modern French Law', 18 *LQR* 303 (1901); A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (8th edn., 1915), especially chapters 4 and 12. See J.W.F. Allison, *A Continental Distinction in the Common Law* (1996), at 18–22 and 152 et seq., on Dicey and subsequent English debates on the role of the general courts in a rule of law system, and on the need to preserve their independence and the separation of powers, in tension with the need for much more specialist expertise than the general courts have to both regulate and sensibly facilitate good public administration. Dicey's denunciation of administrative law was really focused only on 'the principles which governed disputes between the State and its subjects as determined by courts other than the regular courts applying the civil and criminal law (*contentieux administratif*)' – E.C.S. Wade, 'Preface', in A.V. Dicey, *Law of the Constitution* (9th edn., 1950 printing), xvi–xvii.

⁷⁸ Jennings, 'International Lawyers and the Progressive Development of International Law', in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 413, at 422.

specificity and modest range, yet such actions may well be regarded as law, either for the reasons given by Hobbes and Kelsen or because they meet the other requirements for law. Second, a requirement of generality is difficult to apply without a theoretical and practical account of jurisdiction, which while reasonably uncomplicated for many national legislatures, can be immensely challenging in global governance. Third, the requirement of generality may be considered an element of particular jurisprudence for some legal systems or some types of legal systems (such as legal systems of democratic states with elected and productive legislatures of virtually plenary competence as well as elected executive leaders with power over administration). Generality is not a necessary requirement for a general concept of law applicable to all law as such, and as indicated above there are good reasons why it is not necessarily part of the particular jurisprudence of the law of global administration.

6 The Challenges of ‘Private Ordering’ for a Concept of Law in GAL

The proliferation of non-state norms (including inter-firm norms, standardization processes, internal norms of MNEs and IOs, inter-organizational arrangements), and non-state dispute settlement structures (such as arbitration, ethics committees, state-industry-NGO bodies like the Montreal Protocol compliance committee, etc), the increasingly variegated and dense structures of communication between entities, and the complex management of information flows, are part of the purported domain of global administrative law. But the sphere of ‘private ordering’ poses challenges as to whether any concept of ‘law’ is applicable even if some of the procedures and patterns of behaviour and justification seem analogous to other spheres of global administrative law. In this sphere, particular doubts about the applicability of the publicness requirements must arise.

Gunther Teubner, wrestling with the problem of identifying law in 21st century practices such as *lex mercatoria* or the law of cyberspace, argues for a concept of law that is more radically unmoored from the state.⁷⁹ While it is sometimes posited that ‘New world law is primarily peripheral, spontaneous, and social law,’ in fact this body of law is increasingly organized and institutionalized, by specialized and expert social sub-spheres. Whereas the formal state-based law, in its applications to global governance (particularly through international law), lacks organized sanctioning power and authentic definition of infringements of law on the basis of known rules, i.e. it is becoming more spontaneous in style.

In the global economy, without a global political system and insofar as there are not global legal institutions (which do occupy increasing parts of the field), the unexpected method of making law has been the self-validating contract. Durkheim pointed

⁷⁹ Teubner, ‘Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?’, in K.-H. Ladeur (ed.), *Public Governance in the Age of Globalization* (2004) 71; G. Teubner (ed.), *Global Law Without a State* (1997).

out that the binding force of contract must be established in wider social contexts than the contract itself. But Teubner claims that in global economic legal practice, the paradox of self-validation has been brilliantly concealed through:

- (1) time – iterative legal acts, making a recursive mutual constitution of legal acts and structures; a present contract refers to a pre-existing standardization of rules and a future of conflict regulation, making a self-production process
- (2) hierarchy – primary rules of contract, with supposedly meta-rules, i.e., secondary rules of identification and interpretation (and entangled hierarchy)
- (3) externalization – using non-contractual mechanisms, e.g., the International Chamber of Commerce, business associations (quasi-courts, quasi-legislatures) even though actually empowered by contract, make a non-official legal order which nevertheless is law because it is premised on the binding/non-binding dichotomy. This is not by delegation of state power, or by delegation of global public power from international law. This *lex mercatoria* is self-legitimizing, it is buttressed by, but does not depend on, recognition by other legal orders (i.e., that kind of recognition is not constitutive).

But the 'law' he refers to emanates from the operations of heterarchical, connectionistic, network-type communications linkages in organizations and professions, and a weakly-coordinated multiplicity of decentrally-organized legal decision bodies. This makes it very difficult to say in advance which norm actually applies, except in the actually decided or settled case (thus potentially violating the condition of generality, if generality is required to be 'law'). Hence, the identification of the applicable legal norms is weak, and there is a lack of clarity about who the real decider is (so on a question of humanitarian intervention, it includes the media, professional bodies, NGOs, MNEs, various parts of several governments, as well as NATO, the Security Council, etc). There are not adequate corrective or control mechanisms (e.g., by judicial review, or by state regulators, or by foreign ministries) for this to be an adequate mode of law in many areas of global governance.

The theoretical solution proposed by Teubner is a dynamic dualism, between formally organized rationality and informal spontaneity, with neither having institutionalized primacy. Hitherto, such dualism has functioned mainly within the separate states, in the economy (institutions are enterprises, spontaneity is market) and in politics (government is the institution, public opinion is spontaneous). But globalization may be strengthening the spontaneous side of dualisms, so that the institutions are no longer 'condemned to freedom'. Liberal democracies thrive because of the counterpoise between institutions and spontaneous informal ordering in different social fields. This counterpoise emerged in the economic sector in Britain in the industrial revolution, and in politics via the French and US revolutions. Highly rationalized institutions are checked by, but cannot themselves totally control, the decentralized multiplicity of spontaneous communications processes.

This dynamic really operates only in the general economy and in general politics, not so much in other social fields even within a single state. Realization of this kind of democratic counterpoise in global governance forces would depend on a high degree

of autonomy and differentiation of different social fields. There may be a few specialist fields in which spontaneous global order is emerging around depoliticization, debureaucratization, and non-economic competition (such as competition for status, or for pre-eminence in sheer quality of output); but these are rare.

Global law is not underdeveloped and structurally deficient law, but is fully fledged – it lacks political and institutional support at global level, but has strong structural coupling with highly specialized discourses and socio-economic processes. It is pluralistic, but pluralism is of discourses and networks, not ethnies. ‘Legal pluralism is then defined no longer as a set of conflicting social norms but as a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal.’ Identification of law (including decentralized heterarchical law, not just state law) should be a matter of code, not function. It would be wrong to collapse into ‘law’ every kind of social constraint such as global commercial customs, organizational routines of MNEs, or negotiating constraints. However, the test of validity Teubner proposes for this kind of governance is simply one of social coding: legal pluralism is ‘a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal’. This is a formal view, which has the great merit of not reducing law merely to function. As he points out, law cannot simply be any arrangement of norms that perform such functions as social control, conflict resolution, coordination of behaviour, shaping expectations, accumulation of power, private regulation, or disciplining and punishing bodies and souls. However, rejection of the relevance of such functional criteria limits the bases on which any content criteria for valid law might be generated. This is a major problem in the absence of a unified and adequate system of authoritative sources, an absence that is probably unavoidable given his assumption of pluralism of normative discourse and networks. Teubner recognizes that the ability of diffuse global governance sub-systems to identify legal norms, or authoritative deciders, is weak. His idea is that such norms emerge in relatively autonomous cross-border social sub-systems, and are in effect self-validated through practices in these sub-systems that stretch the law over time, operate internal hierarchies, and externalize from the parties to arbitration bodies, professional and business associations, etc.

The areas of normative practice addressed in the last few paragraphs are often labelled ‘private ordering’. Analysis of them often begins not with government and governmentality, nor with any claim for the autonomy of the political, but instead with spontaneous orderings in the private sector. However, the writings on contemporary juridification of scholars such as Christian Joerges, Niklas Luhmann, Gunther Teubner, and others do not stop with the private actors. This work anticipates that private orderings and official regulation will proceed not independently, but interdependently. Even if the rate of technological and market change is so quick that official regulation cannot keep pace, still a demand for elements of public regulation accompanies the more and more complex administration of matters affecting a wide public, particularly issues about risk. They can be understood as beginning with private ordering and advancing towards a conception of the public and of public law. Indeed, many of the central issues are about the interaction between formally public institutions and

officials – regulators, legislators, courts, etc – and the unofficial practices. The unofficial practices are dubbed 'private orderings', but in many cases they are not simply private. It is in their linkages that global administrative law operates.

The kind of administrative linkage, and the 'law' of such linkages, advocated in some of this writing moves away as far as practicable from rigidified Weberian bureaucracy, and toward the open and flexible models of European Union comitology, the EU's Open Method of Coordination, or perhaps the evolving governance of cyberspace. But even if the form of administration is not particularly Weberian, the new forms are still subject to Weber's insight about administration necessitating the deformation of law. This particular approach to transnational juridification thus casts doubt upon the place for public law in any traditional sense.⁸⁰ But Teubner's alternative account of law beyond the state does not overcome the basic problems of sources, recognition, specification of a legal system, and other jurisprudential concerns at the level of concepts. Teubner tries to deal with the problem through anti-foundationalist analysis of discourses and social practices. Teubner's strategy is to shift practice out of domains of morality, or ordinary politics, and into sub-specialized communities of interest and expertise that are barely accessible to civil society or even to most of the educated elite. It is difficult to see this as a normatively attractive concept to espouse for law beyond the state under modern democratic conditions. Instead, it is normatively important to emphasize and build the (tempered) requirements of publicness in law. The adoption of an inter-public approach to international law provides the conditions for this to be effectively pursued.

7 Conclusion: Global Administrative Law as Inter-Public Law

Global administrative law is made by entities that are themselves public – operating under their own constitutions, adhering to their own public law, and oriented toward publicness as a requirement of law. They apply global administrative law in their own practice, and seek to insist on it in the practice of other public entities, at least to the extent that this influences the weight they will give to the norms and decisions of those external entities.⁸¹ The most important of these public entities are likely to be states. They are accustomed to the operation of the principles of public law of the kind in the

⁸⁰ One response has been to revive a sources-based definition of private law, and of public law, then to call for a dialectical relationship between them. See, e.g., in Moellers, "Transnational Governance without a Public Law?", in C. Joerges, I.-J. Sand and G. Teubner (eds), *Transnational Governance and Constitutionalism* (2004) 329, at 337: "The discussion on transnational constitutionalism can be reconstructed by a distinction between two forms of laws. A private law framework defines law as the result of spontaneous co-ordination efforts. A public law framework defines law as the result of a political process, which is not autonomous, but is intentionally steered ... But an adequate theory of law needs a dialectical synthesis of both approaches." See also Michaels and Jansen, *supra* note 4.

⁸¹ Cf institutionalist approaches to theories of law, such as M. Hauriou, *La théorie de l'institution et de la fondation* (1925); S. Romano, *L'ordinamento giuridico* (1917).

indicative list sketched earlier. They are each equipped with a raft of institutions operating in a public law environment, and which will be involved in the international law process. Associations and citizens' groups within the state bring similar public values to their participation in international law. However, there is no strong reason to limit the category of global public entities – and of participants in inter-public law – to states. As interactions among all such global public entities increase, situations where they bump up against each other multiply, generating conflicts of laws arrangements in the public law sphere.

As the discussion in this article has implied, the operationalization of this view would probably be pursued primarily by specification of the relevant (types of) public entities, rather than by routine specification of *publics*. In relation to any particular entity (and especially states), what it means to be a 'public' entity would routinely be evaluated by reference to the relevant entity's legal and political arrangements, which may derive from national law, inter-state agreement, self-constitution, or delegation by other entities. This is similar to the ICJ's conclusion in the *Barcelona Traction* case (1970) that the identity and core governance rules of a 'corporation' depend simply on the national law of the corporation. Thus one state may have a corporatist system, with political groups organized and represented by profession or industry or university, while another state has a mixed system of ethnic and territorial groupings and representation. One global industry governance association may have only regional peak groups as its members, another may have a multitude of local corporations and consumer groups. Global administrative law accepts the heterogeneity of forms and categories of public law entities, and potentially applies to all of them.⁸² No robust commitment to political equality among these entities can be expected; any prescription of equality would probably operate only to rule out egregious exclusions and abuses. Political equality would be at best a regulative ideal. Participation rules would also be loose. As at present is the case in global governance, some of the public entities are virtually self-appointed.⁸³

Operationalization in terms of entities rather than publics is likely to be juridically much more practicable (much in the way that self-determination in international law has generally been applied to juridical units such as colonially-defined territories with arbitrary borders, rather than to ethno-linguistic peoples). In practice, public entities and publics will often go together. But situations in which the public entity is not an adequate representative of the relevant public are common. For example, a public entity with governing power may decide an issue, with full participation of its public under a deliberative model, and careful framing of arguments and reasons so as genuinely to encompass all of those who spoke; yet the decision may be taken by an entity whose public is not the public truly affected.

⁸² Consider the slowness of international law, and indeed of many national public law systems, to deal in a sophisticated way with political parties.

⁸³ Thanks to Jeremy Waldron for discussion of these issues.

For practices within each of the public entities of global governance, and between them, principles of global administrative law exert an increasing normative pull. These principles arise from shared practices in various public law systems, and are carried into these global public entities through the use of law or law-like techniques in the constitution, substantive norms and decisions, and regulative procedural principles followed by these entities. There is probably not yet a single unifying rule of recognition covering all of GAL (beyond what is encompassed in established international law), but there are specific rules of recognition in particular governance regimes or sectors, and these regimes or sectors increasingly overlap or mesh with one another (in small part through the activities of self-styled global administrative lawyers!) The normative practice of global administrative law involves an increasing commitment to publicness, the meaning of which is becoming more and more fully defined through this normative practice. The pressures and incentives to adhere to requirements of publicness become greater, the less the entity is able to rely on firmly established sources of law and legal recognition to ground its activities and resolve its problems. There is probably no widely shared commitment to generality, nor to other trappings of 'democratic' jurisprudence such as courts or representative legislatures, although these are the directions in which practice may be developing. 'Private ordering' poses special problems, and falls within this concept of law only where it engages with the regulative activities of public institutions.

The choice of any particular concept of law is in part political, and in part conceptual. It has been argued that a Hartian positivist approach, extended to bring into the concept of law requirements of publicness, satisfies both political and conceptual criteria in the challenging conditions under which GAL operates. The methodology used in this paper has been to integrate theoretical considerations with extensive consideration of practical materials. This reflects the view that purely conceptual or analytic jurisprudential reasoning, and abstract philosophical investigations, are productively deepened, problematized, and transformed when closely confronted with practice, acutely so in the unassimilated and often perplexing circumstances of global governance. Theoretical analysis in turn helps to give meaning, guidance and coherence to unruly practice. The conclusion from this very preliminary investigation is that, although the picture is uneven, it is reasonable to claim that there is 'law' in global administrative law. More boldly, analysis of global administrative law unmoored from the state may enrich legal theory – including the possibilities of incorporating into Hartian approaches to the concept of law, and even into the rule of recognition, a requirement of publicness.