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GLOBAL ADMINISTRATIVE LAW AND DELIBERATIVE DEMOCRACY

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An early framing of 'global administrative law' (GAL) provisionally 'bracket[ed] the question of democracy' as too ambitious an ideal for global administration.[1] To many, the bracketing of democracy has appeared analytically unpersuasive and normatively dubious. This essay is an initial attempt to open the brackets and bring GAL and democracy into conversation. It addresses two separate observations: first, that democracy currently lacks tools to respond to the globalization and diffusion of political authority; and secondly, that GAL is not presently democratic—it has no room for democratic concerns in its emerging norms. The juxtaposition of democracy and GAL yields insights for the way in which each might contribute to the reimagination of global governance.

Part I presents the idea of GAL and notes some of its contributions to international legal theory, in particular its applications to ideas of administration, law, and justification. Part II explores the way in which GAL's focus on innumerable capillary-level sites of power may open promising terrain for the instantiation of democracy, and particularly deliberative democracy, beyond the state. Part III reverses the perspective, and considers how work on GAL can be enhanced by engaging with, and drawing ideas from, work on deliberative democracy. Part IV briefly notes the rising impact and future potential of democratic striving in the practice of institutional entrepreneurship and GAL lawyering.

1 Global Administrative Law and Its Contributions to International Legal Theory

GAL is the body of law or law-like principles and mechanisms governing the procedural dimensions of an increasingly important global, or at least transnational, 'administration'. As a field of study it has focused on the design of global governance institutions and their interactions with other extra-national and national regulatory bodies, the rules and decisions they produce, and the procedural standards and mechanisms governing their processes, including those relating to transparency, participation, reason-giving, review, and accountability. Unlike other accounts, particularly those tracing a 'constitutionalization' of the world,[2] GAL does not seek to make sense of the entire complex of legal orders and their relation to one another. Rather, it is oriented towards the frayed edges of various orders, the cornucopia of new institutional forms that are springing up and not easily classified within existing categories, and the circulation and metamorphosis of borrowed ideas and principles in the fluid administrative 'space'.[3]

The methodology of GAL is distinctive. GAL scholarship has focused on identifying and mapping global administration and, through an inductive methodology, discerning (and to some

[1] B Kingsbury, N Krisch and R Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15–61, at 50.

[2] See eg [Anne Peters' chapter].

[3] See N Krisch, 'Global Administrative Law and the Constitutional Ambition' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (OUP Oxford 2010) 245–66.

extent developing) procedural norms applicable to it.[4] In a domain of international legal theory increasingly crowded with competing conceptions of the transnational in public law terms[5], GAL is distinct in its renunciation of any comprehensive vision of order, and of any a priori normative foundation. There is nevertheless a normative concern inherent in the GAL project. GAL studies tend to bridge description and prescription. Major elements of GAL are discerned as emergent in institutional practice, and GAL scholarship is to some extent an attempt to systematize and disseminate this practice. The effort in GAL scholarship to typologize, and in some respects encourage adoption of, certain mechanisms, and to name them collectively as GAL, is itself a normative intervention.[6] It also lays bare for more searching normative analysis the realities of governance not captured by more formal doctrinal accounts.

GAL scholarship thus contributes to international legal theory in at least three ways: it draws attention to the rapid expansion and emerging patterns of 'administration'; it offers a fresh angle on debates over the meaning of 'law' in the global context; and it reframes narratives of justification attributed to global decision-making.

1.1 Administration

GAL scholarship has drawn attention to an immense variety of exercises of power by bodies which otherwise have received little or no attention in legal scholarship—the flows of quotidian, often capillary-scale decision-making and rule-making which GAL characterizes as 'administration' in global governance. This 'administration' extends well beyond the conventional field of 'administrative law' within most states. The institutions whose organization and actions are studied range from formal interstate treaty-based institutions,[7] through to less formal networks of regulators or ministries,[8] to hybrid and wholly private transnational bodies often established under national law,[9] and to the 'distributed administration' whereby one

[4] For more on the Global Administrative Law Project, see materials gathered at Institute for International Law and Justice, New York University School of Law, 'Global Administrative Law Project' http://www.iilj.org/GAL.

[5] N Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373–96.

[6] S Marks, 'Naming Global Administrative Law' (2005) 37 *New York University Journal of International Law & Politics* 995–1001. See also C Harlow, 'Global Administrative Law: The Quest of Principles and Values' (2006) 17 *European Journal of International Law* 187–214 (warning about possible ideologies underlying the development of GAL, while stressing that a pluralist understanding of global administration structured around the principle of subsidiarity might be preferable); C Bories (ed), *Un droit administratif global?* (Pedone Paris 2012).

[7] Such as the International Monetary Fund, international and regional development banks, the Organisation for Economic Co-operation and Development, the World Trade Organization, the World Health Organization and other UN 'related organizations' or 'specialized agencies', and regional organizations like as the Association of Southeast Asian Nations, the Organization of American States, the African Union and the League of Arab States. On the relationship between the law of international organizations and global administrative law, see, eg, B Kingsbury and L Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 *International Organizations Law Review* 319–58.

[8] Such as the International Organization of Securities Commissions, the International Competition Network, and the International Network for Environmental Compliance and Enforcement. Networks of this kind are found in dozens of different sectors, from anti-corruption and law enforcement to health and human rights.

[9] Such as the Codex Alimentarius Commission, the Internet Corporation for Assigned Names and Numbers, and the World Anti-Doping Agency.

entity's standards are given practical effect by national entities, NGOs or companies specialized in certification, verification, inspection or audit.

Making these practical exercises of power the object of study opens up a new terrain in asking exactly where, how and with what effects power is exercised. The inquiry is bottom-up. It is not initially constrained by the question which often channels and corrals international law inquiry, namely whether there is a formal international legal source for the power. In this perspective, it is immaterial whether the administration occurs in the interstices of formal treaty regimes, or is based in private contracts, or produces norms or decisions that formally are hortatory or non-binding in character, or whether it is conducted entirely by self-constituted bodies of experts, or in negotiations between interested parties.[10] The concept of GAL in a 'global administrative space' provides an optic for understanding phenomena such as the increasing imbrication of global, regional, national and even 'private' regulation, the proliferation of global regimes targeting the conduct of individuals and firms directly, and the growing importance of 'meta-regulation' in the substantive content of international law.

The focus of GAL on this panoply of quotidian exercises of power is accompanied by inquiry as to the motivation, and normative views, of participants in these exercises of power when they choose to (or are compelled to, or choose not to) adopt specific GAL mechanisms in particular forms.[11]

1.2 Law

The contention that there is an extant 'law' of global administration offers new avenues into perennial debates about the definition and nature of 'law' in transnational governance.[12] Certain GAL-type procedural norms (largely applicable to domestic institutions engaging in administrative activities under, or pursuant to, global regimes) are articulated in treaties, or in customary international law, and are unambiguously a part of the corpus of international law. Others, found for example in the internal rules of procedure of treaty bodies, or articulated in 'general comments' of UN treaty bodies, might in international legal jargon be described (not very helpfully) as 'soft law'. However, some of the most intense generation and refinement of procedural norms is currently occurring within global institutions, both interstate and hybrid/private, as they increasingly modify their practices on consultation, review and disclosure, and codify these changes in more detailed and formal 'policies', 'guidelines' and the like.[13]

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[10] See S Cassese, 'Administrative Law without the State: The Challenge of Global Regulation' (2005) 37 *New York University Journal of International Law & Politics* 663–94.

[11] E Benvenisti and G Downs, 'Toward Global Checks and Balances' (2009) 20 *Constitutional Political Economy* 366–87 (highlighting special interest motivations for the development of some GAL features); E Benvenisti, *The Law of Global Governance* (Brill The Hague 2014).

[12] B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *European Journal of International Law* 23–57; Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (CUP Cambridge 2014) 145–82; Edouard Fromageau, 'La théorie des institutions du droit administratif global. Étude des interactions avec le droit international public' (PhD thesis, Université de Genève / Aix-Marseille Université, 2014).

[13] This phenomenon is particularly visible in the increasing formality of transparency commitments, and in the provision or reform of more structured arrangements for review of internal decision-making. See eg M Donaldson and B Kingsbury, 'Power and the Public: The Nature and Effects of Formal Transparency Policies in Global Governance' in A Bianchi and A Peters (eds), *Transparency in International Law* (CUP Cambridge 2013) 502–32;

These changes may be influenced by domestic constitutional law, or the law of the EU, or be prompted by the way in which domestic law sets procedural thresholds for the global norms or decisions which domestic authorities will enforce.[14]

Over time, this diverse practice may, in conjunction with domestic public law, give rise to broadly cast 'general principles of law', and by that avenue be incorporated within the dominant paradigm of international law, but it does not at present have a clear legal status within that system. Its law-like quality rests on a social fact conception bearing some loose relation to Hartian positivism,[15] an approach which has been vigorously contested.[16] For scholars willing to accept such an expansive view of 'law', GAL may provide a promising site for the elaboration of a new conception of international law writ large: a renewed *jus gentium* or 'inter-public' law, in which sovereign states would nevertheless still play a privileged role.[17] In any case, GAL scholarship directs attention to the resonance of (public) law and legal ideas beyond the formal international–national legal order.

1.3 Justification

By making visible much more of the landscape of institutions and practices of decision-making constitutive of the contemporary transnational order, GAL scholarship invites attention to pressing questions of the justification (or legitimation) of these exercises of power. The orthodox formal account of such exercises of power as delegations by states of their own (democratically or empirically-justified) powers will rarely be sufficient. Nor in most cases is transnational

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E Suzuki and S Nanwani, 'Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks' (2006) 27 *Michigan Journal of International Law* 177–225.

[14] See eg R Stewart, 'US Administrative Law: A Model for Global Administrative Law?' (2005) 68(3) *Law and Contemporary Problems* 63–108 (suggesting that GAL will likely to develop through an iterative and even confrontational 'top-down' and 'bottom-up' approaches); S Cassese, 'Global Standards for National Administrative Procedures' (2005) 68(3) *Law and Contemporary Problems* 109–26 (providing a detailed analysis of some 'top-down approaches' and warning against uncritically transposing conceptions of domestic administrative law to the very different transnational institutional context); N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247–78 (suggesting a pluralist structure for its understanding that is claimed to be not only analytically rigorous, but also normatively preferable); E Benvenisti, 'The Interplay between Actors as a Determinant of the Evolution of Administrative Law in International Institutions' (2005) 68(3) *Law and Contemporary Problems* 319–40 (using a public choice perspective to examine how GAL may be shaped in different institutional settings); and the essays in S Cassese (ed), *Research Handbook on Global Administrative Law* (forthcoming 2015).

[15] B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *European Journal of International Law* 23–57.

[16] On GAL as merely politics, or as good governance practices of a managerial nature, see M-S Kuo, 'Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law' (2012) 10 *International Journal of Constitutional Law* 1050–75; D Dyzenhaus, 'Accountability and the Concept of (Global) Administrative Law' in H Corder (ed), *Global Administrative Law: Innovation and Development* (Clarendon Press Oxford 2009) 3–31; A Somek, 'Administration without Sovereignty' in *The Twilight of Constitutionalism?* (n3) 267–87.

[17] See B Kingsbury, 'International Law as Inter-Public Law' in HR Richardson and MS Williams (eds), *Nomos XLIX: Moral Universalism and Pluralism* (New York University Press New York 2009) 167–204.

power justifiable in any direct way by its advancement of human rights, peace, or the rule of law.[18]

More convincing justifications typically assess inputs, processes, and outputs of global governance institutions. The increasing demands for transparency, participation of affected groups, reason-giving, and rights of recourse or review, all have direct bearing on the inputs to and the processes of power. In that respect such demands may be protective of rights, whether of states, individuals or collective entities. They may also help produce better outputs, by correcting errors and increasing fidelity to the intended purposes for which norm-setting or decision-making power was allocated. These GAL procedures have a normative grounding which can be shared even where there exists little consensus on substantive values or on the ultimate ends to be served by the institutions.

The dual life of GAL as both practice and theory—that is as both a mapping of real-world phenomena and an intellectual framing—means that GAL's normativity is complex and layered. The identification of a unified body of practice, and the placing of this practice under the banner of 'law', suggests a certain normative desirability carried along in the idea of GAL. The identification of GAL as lying in the procedural qualities of existing institutions, and the consequent focus on purely procedural aspects of administration rather than higher order questions of which institution deals with which problems, may work to legitimate a highly uneven institutional apparatus skewed to the interests of the most powerful.[19] At the same time, the internal coherence of GAL and its ability to offer some grip on the status quo demands that it maintain a certain distance from the momentary fluctuations in how institutions decide upon, and justify, their procedures. The procedural norms at the heart of GAL must be at least connected to and animated by some higher end. Whether deliberative democracy might be relevant to that higher end is the question addressed in the following sections.

2 GAL as a Global Terrain for Deliberative Democracy?

As global policymaking becomes extensive and demanding in its institutional forms and far-reaching in its effects, it seems increasingly insufficient to theorize the State as the only possible locus of democracy. Citizens of democracies voice dissatisfaction with the enterprise of

[18] See D Dyzenhaus, 'The Rule of (Administrative) Law in International Law' (2005) 68(3) *Law and Contemporary Problems* 127–66; K-H Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation' (2012) 3 *Transnational Legal Theory* 243–67.

[19] Analytically, it may be difficult to disentangle juridification from more superficial institutional change. Within many international organizations, particularly multilateral development banks, the increasing formalization of internal policies, creation of quasi-independent review bodies, and description of these bodies in terms borrowed from appellate judicial review, gives a quasi-legal veneer even to decision-making that is not fully juridical. In particular, these bodies are called upon to interpret and apply what are often rather loosely-drafted texts, and do so without any apparent intention to adhere to norms of interpretation developed in international law. This trend is part of a pattern of borrowing the garb of law and legal institutions for purely managerial processes. Conversely, the claim to having some legal quality may actually have the effect of imposing internally-felt imperatives of consistency, and normative aspirations that do contribute to a strengthening of procedural norms. See M Donaldson and B Kingsbury, 'Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation' (2013) 14 *Chicago Journal of International Law* 1–51.

perfecting democratic control over an ever-shrinking domain in which policy can still be determined or steered chiefly through their national political systems.[20] It may be possible to reimagine and renew democracy in these new global conditions: on a national scale, democracy has proven resilient in the face of changing functional demands, and understandings of democracy have evolved greatly with the consolidation of the administrative state, the entrenchment of judicial review, and the proliferation of non-electoral modes of oversight and participation.[21] However, the problem of democracy beyond the State is more urgent and more protean than it appeared in earlier eras.

Arguments for global democratic institutions, indeed for top-down global democracy in any form, are met with staunch normative and positive-political skepticism.[22] We contend that, in promoting the bottom-up scrutiny of very specific institutional exercises of power and related issues of institutional design, GAL opens space for investigation of whether bottom-up pathways and minor pro-democratic quotidian inflections in such institutions might hold greater promise. We argue that GAL shares some of the preoccupations central to normative arguments for democracy, and offers a terrain in which aspects of deliberative democracy, in particular, might take root.[23]

Perhaps most basically, democracy is bound up with a concern with self-government. The resonance of democracy as a political ideal for the age of governance can also lie in the fundamental commitment of many people to non-dominance: democracy facilitates resistance to the domination of the many by the few.[24] This has particular salience in global regulatory governance, with overwhelming majorities of people currently exerting little influence, in part because they lack the bureaucratic and political resources of a responsive State or civil society capable of articulating their position in the global sphere, but also as a result of the fundamental inequities in the contemporary economic order. From this perspective, the leveling and

[20] See eg S Battini, 'The Globalization of Public Law' (2006) 18(1) *European Review of Public Law*, available at SSRN: http://ssrn.com/abstract=895263 (distinguishing between 'control' or 'substitution' of domestic authorities' right to regulate as the forms through which this process is operating); and the contributions to the symposium on global public goods in 'Symposium: Global Public Goods and the Plurality of Legal Orders' (2012) 23 *European Journal of International Law* 643–791. The challenges of governance under contemporary conditions are such that some have claimed it is now impossible to understand the settlement of social choices in democratic terms at all, even within the State: see eg E Rubin, 'Getting Past Democracy' (2001) 149 *University of Pennsylvania Law Review* 711–92; E Rubin, *Beyond Camelot—Rethinking Politics and Law for the Modern State* (Princeton University Press Princeton 2005) ch 4.

[21] J Keane, *The Life and Death of Democracy* (Norton London 2009); F Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (CUP Cambridge 2007).

[22] See eg T Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy & Public Affairs* 113–47.

[23] For a brief analysis of the different approaches to 'democracy' in global governance, see S Wheatley, 'A Democratic Rule of International Law' (2011) 22 *European Journal of International Law* 525–48, 528. See also J Bohman, *Democracy across Borders: From Demos to Demoi* (MIT Press Cambridge MA 2007) at 3–5; G de Búrca, 'Developing Democracy beyond the State' (2008) 46 *Columbia Journal of Transnational Law* 221–78. For a fine-grained analysis of the way in which different approaches to democracy could inform transnational food governance issues, see B Adamson, 'The New Zealand Food Bill and Global Administrative Law: A Recipe for Democratic Engagement?' (LLM thesis, University of Toronto, 2012).

[24] See eg S Slaughter, 'Transnational democratization and republican citizenship: Towards critical republicanism' (2014) 3 (3) *Global Constitutionalism*, 310–37.

emancipatory impetus of democracy poses a profound challenge to the existing statist order and the system of international law that sustains it.[25]

Admittedly, 'administration' is at face value an incongruous site in which to look for democratization. However loosely defined, administration is to some extent distanced from fundamental questions about the nature of existing institutions, and about the general direction of the substantive norms being pursued.[26] Yet GAL's focus on the use of procedural norms and mechanisms to secure 'accountability'—that those exercising power can be called to give an account of their actions, and are potentially subject to sanctions when they have fallen short of applicable standards—is one element of operationalizing self-government and non-dominance. Like international law itself, 'accountability' is consistent with a range of more comprehensive normative visions of transnational ordering. Calls for greater accountability of power beyond the State are increasingly framed as a means to overcome the 'problem of disregard' in global governance, seeking to give weight to the interests or the fate or the life-world of individuals and communities affected by such power but improperly undervalued or neglected in its processes.[27]

The realm of 'administration' may thus be important in relation to democratic goals. Moreover, analyzing power in global institutions from the quotidian upward, rather than in a constitutionalist vein from the grand institutions and principles downward, helps to identify key issues in the relations between constitution and administration which bear on locating sites where democratic striving may make a difference. The constitutional emphasis on institutional allocation needs to be blended with the GAL focus on institutional workings and on interactions between institutions in the global administrative space. Higher order norms are often inflected or totally offset by lower order 'administrative' norms and decisions in the routine operations of power systems—particularly power systems beyond a single State, where there is little scope for constitutional review. Jurisdictional logic—in which lower-order decision-making takes place within certain pre-determined constitutionally-set bounds—does not hold nearly as tightly within the global administrative space as it does within robust national legal systems. One corollary of this is that historical and sociological assumptions about how power systems evolve, developed from the experience of these processes during State consolidation and within the State, may no longer hold. Power beyond the State is today organized in different forms— forms that are perhaps more open to adjustment from the lower reaches.[28]

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[25] For one argument about the evolution of the normative core of international law, see B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Receuil des Cours* 217–384. See also the essays in Part One of A Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP Oxford 2012).

[26] On the potential tensions in practice between campaigns for procedural norms and for more comprehensive and substantive transformations, see R Buchanan, 'Perpetual Peace or Perpetual Process: Global Civil Society and Cosmopolitan Legality at the World Trade Organization' (2003) 16 *Leiden Journal of International Law* 673–99

[27] On the 'problem of disregard' see R Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation and Responsiveness' (2014) 108 *American Journal of International Law* 211–70. On permutations of 'accountability' in the global order, see RW Grant and RO Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 *American Political Science Review* 29–43.

[28] P Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP Oxford 2010); 'Supranational Organizations' in I Hurd, I Johnstone and JK Cogan (eds), *Oxford Handbook of Internaitonal Organizations* (OUP Oxford 2015).

In a superficial sense, democracy is a spectral presence in GAL even as it is presently characterized: the separation of powers implicit in the notion of a domain of 'administration' recalls a central feature of Western democracies, and notions of 'publicness' are closely allied with a democratic imperative.[29] More substantively, we may even be tempted to see in GAL procedures some features of deliberative democracy.

Deliberative theories of democracy generally regard open and inclusive deliberation as intrinsically enhancing the democratic legitimacy of governing decisions by ensuring procedural conditions that are supposed to make those judgments somehow those of the collective concerned.[30] These theories typically recommend or require deliberation, participation, and publication. Deliberation is understood with varying degrees of stringency, but requires some form of discourse, rather than merely episodic voting or bargaining, in at least certain stages of the process of reaching decisions about norms. Participation in this deliberation is required under conditions of equality. Publication involves some orientation to 'public' reason, most minimally, the publication of reasons put forward by participants, but sometimes also encompassing substantive characteristics ranging from a loose commitment on the part of participants to reason from a notional general interest, rather than self-interest, to some stricter criterion for the arguments which may be put forward.

GAL norms are concerned with transparency, participation, reason-giving, review and reconsideration, and accountability of decision-makers more broadly. The institutionalization of these principles seems likely to facilitate deliberation, and open up processes of decision-making to larger deliberative communities. Visions of GAL as an instantiation of 'inter-public law' resonate with the notion of public reason by identifying the collective interests being affected even by private governance, moving this governance into institutional sites, and subjecting it to institutional procedures, which require appeals to a general interest rather than purely individual or sectoral interests.

GAL could thus be conceived as fostering in global administration an interlinked web of deliberative arenas—the prerequisites of deliberative democracy. These arenas force actors to explicate and scrutinize heterogeneous interests (national, sectoral, technical or self-avowedly public interests), and eventually to transform their preferences as part of the elaboration of shared interpretations. Deliberative arenas require even non-state and private actors to justify their positions in light of public reasons, and to hold decision-makers accountable for the decisions ultimately reached. Ongoing criticism and experimentation sustain the design and

[29] See 'The Concept of "Law" in Global Administrative Law' (n 15). By *publicness* we mean 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. See J Waldron, 'Can There Be a Democratic Jurisprudence?' (2009) 58 *Emory Law Journal* 675–712. For further analytical elaboration, see also N Walker, 'On the Necessarily Public Character of Law' in C Michelon et al (eds), *The Public in Law: Representations of the Political in Legal Discourse* (Ashgate Publishing Farnham 2012) 9–31; D Dyzenhaus, 'The Public Conscience of the Law' [2014] 2 *Netherlands Journal of Legal Philosophy* 115–26.

[30] That said, there remains a major tension in the theorization of deliberative democracy between the moral legitimacy conferred by ideal procedures and the epistemic advantages of deliberation. On the variety of accounts of deliberative democracy, see J Bohman, 'Survey Article: The Coming of Age of Deliberative Democracy' (1998) 6 *Journal of Political Philosophy* 400–25. See also A Bächtiger et al, 'Disentangling Diversity in Deliberative Democracy: Competing Theories, Their Blind Spots and Complementarities' (2010) 18 *Journal of Political Philosophy* 32–63, at 35–53.

redesign of various institutional arrangements with the goal of nurturing deliberative processes to satisfy democratic legitimacy standards and enhance responsiveness. If GAL actually fosters these deliberative arenas, it would join other 'democratic-striving' approaches to governance beyond the State.[31]

3 Challenges for GAL from Deliberative Democracy

While the project for articulating an aspiration for democratic-striving in GAL holds promise as a form of critique, GAL as presently theorized lacks certain key elements necessary for its administrative sites to be loci of deliberative democracy. GAL has to date renounced any comprehensive theoretical framework through which to judge practice, and has been traced in a wide range of institutional contexts which transcend distinctions conventionally presumed to be essential for deliberative democracy (for example, between public and private authority).[32] Thus, GAL has little to say where there is no (or no agreed upon) pre-existing and defined political community, or no accepted structure of representation.[33] It is these questions which are at stake in the future development of GAL. Despite the affinities between GAL and certain descriptive features of deliberative democracy, there are aspects of GAL which appear to limit the extent to which GAL alone can instantiate any kind of credible deliberative democratic environment. Some of these limitations are inherent in attempts to infuse deliberative democracy into global governance generally; some are particular to GAL.

If progress is to be made, it is useful to ask what ideas about deliberative democracy can offer to the development of GAL. Attention to deliberative democracy in its captious function brings to the fore of the GAL project a series of questions that are not suggested—perhaps not even allowed—by the original framing of GAL. The following sections will introduce these challenges and detail the prospective contributions that attention to deliberative democracy could make to each.

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[31] See 'Developing Democracy beyond the State' (n 23). See also J Cohen and CF Sabel, 'Global Democracy?' (2005) 37 *New York University Journal of International Law and Politics* 763–97; T MacDonald and K MacDonald, 'Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry' (2006) 17 *European Journal of International Law* 89–119; and DH Rached, 'Doomed aspiration of pure instrumentality: Global Administrative Law and accountability' (2014) 3(3) *Global Constitutionalism* 338–72 at 368. But see M-S Kuo, 'Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-C Global Constitutionalism' (2011) 44 *New York University Journal of International Law and Politics* 55–102 (claiming that the GAL approach necessarily entails a technocratic privatization of legitimacy).

[32] For an approach to global administration which begins from Habermasian theory, and works from this theory to make sense of practice, see M Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law)' http://ssrn.com/abstract=2260293 (4 November 2013). See also M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907–31; A von Bogdandy and I Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP Oxford 2014);

[33] It is also not clear what it would mean to take some variant of deliberative democracy, unbounded by the nation-state, as an end of GAL without envisaging some kind of redistributive program that also transcends the nation-state. Narrowly understood, this is a question about what happens to particular accounts of deliberative democracy if we remove the background assumption of the welfare state guaranteeing basic resources for life. But it also goes more generally to questions about the nature of the deliberation which is structurally possible within current practices and supporting conceptions of global administration.

3.1 Subservience to Structure

First, the focus on purely procedural aspects of administration may actually detract from critical examination of 'constitutional' aspects of governance. GAL works within existing institutions, and does not in itself argue for the allocation of particular issues to one institution or type of institution over another.[34] As it develops, GAL might come to preclude questions of major public importance being determined by institutions which are not conducive to some minimal procedural apparatus, including in extreme cases of absolute discretion or purely private, negotiated decision-making. But for now it has little more to say about foundational, structural questions of the allocation of powers to particular institutions.

This is critical as the current global institutional endowment is highly uneven, and likely to be disproportionately shaped by the interests and concerns of more powerful states (and the most powerful factions within states).[35] Institutional sites of decision-making will hence often be highly skewed to particular constituencies, predetermining the terrain of debate in ways that will not themselves be subject to free debate among equals.[36]

GAL is beginning to offer a way forward in focusing serious analytic and normative attention on hitherto-neglected possibilities which are opened up by the holistic view of a global administrative space: inter-relations between institutions, multi-institutional compensatory approaches to participation and to voice and recognition, and cross-institutional review and checking functions. Concerns for deliberative democracy foster and prioritize examination of these structural questions in ways that accountability or other existing GAL imperatives do not.

3.2 Passive Acquiescence to Substantive Norms

Second, 'administration' typically occurs in the shadow of, or in response to, higher order norms or decisions that will not be open to challenge in the administrative process, at least not in any direct way. This is evident in institutions such as the World Bank, which in relative terms have very sophisticated GAL mechanisms. Affected people and NGOs may access certain of the Bank's documents associated with projects, must be consulted on major projects affecting them pursuant to the 'safeguards' policies, and may make requests for inspection to the Bank's Inspection Panel if they believe the Bank has fallen short of what is required by its own policies. But even if a request for inspection is successful and the Inspection Panel engages in extensive fact-finding, including meeting with the complainants and consulting widely in the country

[34] International law itself also contains few resources from which to argue, for example, that certain new international organizations should be created, or that there should be an international organization at all, rather than, say, an informal network or task force, to deal with a given problem.

[35] It is telling that rules of international trade and investment law, which protect primarily commercial interests, are among the sharpest and most detailed GAL norms now in existence. See BS Chimni, 'Co-Option and Resistance: Two Faces of Global Administrative Law' (2005) 37 *New York University Journal of International Law and Politics* 799–827.

[36] De Búrca notes this in her discussion of the limits of participation and deliberation in the World Bank and IMF's Poverty Reduction Strategy Program: 'Developing Democracy beyond the State' (n 23) 235–6. For a broader articulation of this problematic aspect of GAL, see 'Global Administrative Law and the Constitutional Ambition' (n 3) 259–62.

concerned,[37] the question at issue is not an open-ended one. The Inspection Panel is not considering whether or not the contested project should (all things considered) go ahead in its current form, but rather undertaking a narrower forensic inquiry concerning whether or not Bank staff followed internal policies in planning and approving the project. Although Panel recommendations may stimulate broader reflection by the Board and Bank staff about the project, and provide material for NGOs and project-affected people to campaign for cancellation or redesign, they do not go to substantive issues.

Including deliberative democracy as a critical tool accessible to the GAL project could open these substantive issues to debate. It would no longer be sufficient to fulfill procedural norms aimed at accountability and internal rule-following; instead, decisions would have to be justified on broader grounds. Reforms in this direction could draw on explorations within GAL of possibilities for operationalizing ex ante deliberation, organized competition, learning, review, and revision, as a means to achieve bottom-up long-term change in normatively attractive directions.

3.3 Struggles to Align Multiple Systems of Law and Concepts of Representation

Third, the landscape of global administration involves a patchwork of institutional sites with potentially divergent structures of representation and participation. Much global administration occurs through and in the shadow of a dense and sophisticated body of international law that is premised on a theoretical edifice of political affiliation and representation (insofar as it foregrounds formal, statist interaction), but which is not in any obvious sense 'democratic'.[38] Even a minimal norm of equality of states is subject to arrangements in many interstate organizations, such as the United Nations, which privilege some states over others on wholly realist grounds. Global administration also interacts intensively with the national or sub-national public law of particular states, grounded in localized structures of representation which do not adequately capture the rewards and burdens which national decisions may generate beyond the State. GAL has to date not articulated a comprehensive theory of representation, although there are inevitably latent notions of political community and representation at work in the crafting of GAL mechanisms (for example, where institutions are granting standing for participation in an anti-formalist way, on the basis of individuals' exposure to concrete effects of particular decisions, or on a crude corporatist basis by allowing a certain number of participants from

[37] On the Inspection Panel's encounters with project-affected people, see E Brown Weiss, 'On Being Accountable in a Kaleidoscopic World' (2010) 104 *Proceedings of the American Society of International Law* 477–90, at 484.

[38] Despite increasing support for (liberal, electoral) democracy as a substantive norm (for example in the context of civil and political rights, as a criterion of entry into global or regional treaty regimes or institutions, and in the focus on democratization as an objective in development assistance for transitional and post-conflict societies), the prevailing *sources* of international law have not been understood as having any necessary component of actual, rather than formal, popular consent. Constitutional checks on treaty-making are a feature of domestic rather than international law, and violation of constitutional provisions does not necessarily affect the validity of a treaty at international law. Many of the acts and pronouncements that constitute evidence of the existence of customary norms emanate essentially from national executives. On the trajectory of an asserted 'right' to democratic governance, see S Marks, 'What Has Become of the Emerging Right to Democratic Governance?' (2011) 22 *European Journal of International Law* 507–24.

particular sectors).[39] These approaches might in fact be optimal, but there are obvious dangers as well. In a laissez-faire system better-resourced actors will be more able to dominate administrative processes, and crude corporatism may fall well short of reflecting the parties affected by particular decisions.

Insofar as the present structures and sources of international law are to be preserved, democratic ideals and practices must live alongside more formalist structures of representation through consent and delegation, and emanating from national public law. A GAL project taking deliberative democracy as a touchstone would need to consider how best to bridge, reconcile, or restructure these divergent forms of representation, and correct for shortcomings of these forms, rather than aiming to build deliberative democracy on a global scale from a tabula rasa.

3.4 The Sprawl of Administration

Finally, the sheer diversity of 'administration' is an obstacle to articulating compelling normative criteria explaining what procedures should be applied at specific sites.[40] Attention to deliberative democracy provides criteria by which to sort through this dizzying diversity. For example, it is regularly argued in GAL that a pronounced deleterious impact on identifiable individuals or classes of individuals requires notice, consultation and individually-triggered review procedures. The grounds for this are that decisions about the application of sanctions, or the determination of refugee status, may have critical and irreversible effects for particular individuals, and decisions about the allocation of resources in natural disasters or post-conflict situations may be matters of life and death for whole communities. Deliberative democracy adds to this interest-based account a public component—the reasons given must be reasons which could reasonably be given by all parties in a setting of public deliberation, and must speak to and fairly address all of the public(s) involved.

4 Democratic Striving in Global Administrative Lawyering

GAL plays a valuable analytical role complementing conventional paradigms of international law by providing some additional grip on the complex realities of global administration and stimulating avenues for awakening, contestation and reflection upon their ends, forms and procedures.[41] The program of GAL thus offers an alternative to the impasse between grand

[39] Cf N Walker, 'The Post-national Horizon of Constitutionalism and Public Law: Paradigm Extension or Paradigm Exhaustion?' in C Mac Amhlaigh, C Michelon and N Walker (eds), *After Public Law* (OUP Oxford 2013) 241–63. The absence of strict criteria for representation is not the absence of a normative orientation, but rather a normative orientation in its own right: see eg B Kingsbury, 'First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society' (2002) 3 *Chicago Journal of International Law* 183–95.

[40] For some sense of the variation in mechanisms currently applied across different institutions, see the detailed survey of participation mechanisms in S Cassese, 'A Global Due Process of Law?' in G Anthony et al (eds), *Values in Global Administrative Law* (Hart Publishing Oxford 2011) 17–60; Stewart, 'Remedying Disregard in Global Regulatory Governance' (n 27).

[41] See eg AC Deshman, 'Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture' (2011) 22 *European Journal of International Law* 1089–1113 (using a GAL framework to analyze the dispute between the World Health Organization and the Council of Europe over the former's reaction to the H1N1 pandemic, and to explore the conditions, formats and procedures under which

narratives of indulgent legitimation and sheer resistance, by refocusing on those structures of autonomy and rationality which (in however distorted and imperfect a fashion) continue in the life-world of our societies, and by allying itself with the struggles of those for whom the hope of a better future provides the courage to live in the present.[42]

The proliferation of procedural protections in global governance is part of a macro-sociological phenomenon, the massive growth across the world in the number of organizations and in sub-specialist expertise and processes expressed through specialized organizational forms and accompanying codes.[43] In individual cases and perhaps structurally, it has identifiable political causes, including pursuit by global beneficiaries of liberal or neo-liberal programs, expedient responses to external pressures, window dressing, inter-institutional competition, mimesis, and least-cost problem solving. But even if in a particular case the immediate motivations for institutional and procedural reform are wholly strategic, these reforms have effects precisely because the case for greater participation, reason-giving or independent review, for example, is articulated by someone—whether NGOs or states critical of the institution, or staff inside it—as normatively desirable. Highly disparate normative justifications are given by these advocates for procedural change in particular institutions. Some of them are animated by an aspiration aligned to some extent with deliberative democracy—a kind of democratic striving in relation to the specific institution they examine or in relation to the norms of global administration more broadly. This aspiration tinges GAL, not so much in its academic scholarship or its practice as in its advocacy. The activities of institutional entrepreneurship and global administrative lawyering, although by no means explicitly committed to deliberative democratic aims, have in many cases carried within them a modest form of democratic striving with regard to global governance.

In conditions of intensifying globalization and dispersed political authority, deliberative democracy offers one point of departure, a sort of beacon, casting light on what is important, and consequently also on where the dangers for the good governance enterprise in this post-national context lie. Conceived as a regulative ideal, deliberative democracy arguably still provides one meaningful way in which we can make transnational forms of political order at least intelligible from a democratic cosmology, providing an attractive path for their understanding, assessment and critique, focused not only on procedural or institutional aspects of governance but also the *ethos* that should be animating them.

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horizontal review between international organizations might occur); D Richemond-Barak, 'Regulating War: A Taxonomy in Global Administrative Law' (2011) 22 *European Journal of International Law* 1027–69 (using a GAL framework to describe and assess the effectiveness of several regulatory initiatives over private military and security companies).

[42] Cf S Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (Columbia University Press New York 1986), at 15. See 'Doomed aspiration' (n 31) at 372; and M Donaldson and B Kingsbury, 'The Global Governance of Public Law' in C Mac Amhlaigh, C Michelon and N Walker (eds), *After Public Law* (OUP Oxford 2013) 264–85, at 285 (concluding that '. . . the most fruitful engagement with a putative global public law, particularly global administrative law, is one that recognizes its current fluidity, seeing it not as a source of a particular formula for legitimacy or checklist of requirements, but as a field in which these requirements and their foundations are being articulated and contested.').

[43] JW Meyer and P Bromley, 'The Worldwide Expansion of "Organization"' (2013) 31 *Sociological Theory* 366–89; GS Drori, JW Meyer and H Hwang (eds), *Globalization and Organization: World Society and Organizational Change* (OUP Oxford 2006).