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**ACCOUNTABILITY AND THE CONCEPT  
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# Accountability and the Concept of (Global) Administrative Law

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## ABSTRACT

Participants in the debate about global administrative law (GAL) generally make an explicit or implicit decision to inquire into the GAL phenomenon by bypassing the question of the concept of GAL, by which I mean they choose to avoid the question of its status as law. This is not to say that there has been no theoretical work done on GAL. Rather, theorists have adopted a deliberately pragmatic stance: they ask theoretical questions about how to make GAL work rather than about the conceptual question of its status. Their central question is: ‘Given the existence of global administrative agencies that are in the business of making binding decisions, how can we ensure that the agencies are accountable to the various constituencies affected by their decisions?’ I propose in this paper adoption of a different question, framed by attention to Lon L. Fuller’s work on legality. ‘Do the practices of GAL exhibit sufficiently the formal features of law—those that make administrative law, but also every other kind of law, legal?’ That question forces a focus beyond the GAL project’s predominant concern with ‘procedural administrative law’, understood as procedures that make bodies accountable to various constituencies. The wider focus looks to both the legality of the substantive decisions (whether they are ‘substantive administrative law’), and to the authority of the bodies that make them (where ‘constitutive administrative law’ is located). In regard to the second issue, the interesting question arises whether there can be self-constituting public authorities, that is, bodies whose public legal nature is not owed to any positive constitutive source such as a statute, but to the fact that its decisions are regarded as legally binding. I also argue that for GAL the problem that arises in global space for its status as law is not the absence of a global demos, but the absence of a global state. I suggest that even the second absence is not a serious obstacle in the way of GAL becoming law.

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<sup>1</sup> Professor of Law and Philosophy, Toronto. I thank all who participated in the discussion of a draft of this article at the Global Administrative Law conference in Cape Town and Mike Taggart for written comments. In the Fall of 2008, I also had the privilege of having the paper discussed in the Hauser Globalization Colloquium at New York University’s Faculty of Law and I thank Benedict Kingsbury for an illuminating presentation of its arguments and flaws, and all those who participated in the discussion afterwards, especially Eyal Benvenisti, Lorenzo Casini, Nikhil Dutta, Devika Hovell, Sharon Margalioth, and Richard Stewart, as well as Eran Shamir-Borer for an illuminating exchange of e-mails. I owe a general intellectual debt in my ruminations on international law and global administrative law to the work of Jutta Brunnée and Stephen Toope on the potential contribution of Lon L. Fuller’s theory of legality to international law.

## Accountability and the Concept of (Global) Administrative Law

The alternative diagnosis of the present state of administrative law would view its disjointed and fragmented condition as a passing, interim phase. Such a view may be justified because history suggests that the conceptual vacuum created by the disintegration of the traditional model will not remain long unfilled. We may be unable to see beyond the shards of the immediate present and are thus forced to talk of 'pragmatic compromise' in order to conceal our embarrassment; but the law cannot be reduced entirely to a process of interstitial adjustment or social engineering.

Richard B Stewart<sup>1</sup>

### I. INTRODUCTION

Is there such a thing as global administrative law (GAL)? In exploring this question, my inquiry is into what it would take for the decisions of global administrative bodies to qualify as law. This inquiry is complicated by the fact that in seeking to understand GAL, we have to contend with difficulties that attend any attempt to understand domestic administrative law. Those of us who teach administrative law in common law countries<sup>2</sup> have to struggle with the fact that our students will have done courses such as torts, contracts, property in which, whatever the inherent difficulty of the subject matter, at least there is a body of law that one can point to as to what has to be mastered or deconstructed, whatever one's approach. In contrast, it is not so clear what the 'law' in administrative law is, because the law elements of a domestic administrative law regime are quite complex.

First, there is the law that constitutes the authority of administrative bodies, since they must be able to trace a warrant for their actions on behalf of the state to a delegation to them so to act by a body which itself has authority so to delegate. I will call this 'constitutive administrative law'. Second, there is the law the bodies themselves make when, acting within their authority, they make decisions in order to implement their mandate. These decisions can be more general, or more legislative, that is, at the level of establishing general policy in order to carry out the body's statutory mandate, or more particular or adjudicative, that is, in deciding what in discrete situations is required by that mandate. I will call this 'substantive administrative law', that is, the law established by the body.<sup>3</sup> Third, there is the law developed to govern the way that administrative bodies make their decisions. In common law legal orders, this body of law can have

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<sup>1</sup> Richard B. Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1669, 1811.

<sup>2</sup> I hope this is not just my problem!

<sup>3</sup> Though it must be borne in mind that even in common law legal orders, decisions at the particular level may have no binding force beyond the case they decide; that is, there is generally no presumption that they will serve as precedents.

multiple sources. It comes from principles developed by judges in reviewing the decisions of administrative bodies, from the constitutive statutes of the bodies, from legislated, general administrative codes, from constitutional law (both written and unwritten), and often is developed by the bodies themselves. I will call this 'procedural administrative law'. It is important to keep in mind the idea of governance or control, since the point is not simply that there are procedures but also that the procedures are designed to assure accountability both to the delegating authority and to those affected by the decisions, with the assurance guaranteed ultimately by the institution of judicial review.

In the late twentieth century, scholars of administrative law confronted again a perennial problem of administrative law that arises because of the unavoidable fact that much of the substantive law made by administrative agencies is made on the basis of constitutive statutes which more or less hand the task to the agencies of developing their own legal regimes, and which moreover do so in ways that seem not obviously amenable to judicial review. The article from which the epigraph to my contribution is taken, Richard B. Stewart's 'The Reformation of American Administrative Law', is the single most important contribution to this round of the debate.

The central questions of this debate are highly relevant to the current debate about GAL, since GAL shares the problematic features of domestic administrative law that brought the problem of the legality of administrative law in the late twentieth century once more into focus. In addition, the problem is compounded in GAL by the fact that however unaccountable to law the modern administrative state might be, in democracies the delegations of authority to agencies have democratic legitimacy and there are available in principle democratic and political, if not legal, mechanisms for ensuring control.

However, while in the debate about domestic administrative law the question whether administrative regimes had lost the quality of being legal was often central, the equivalent question, whether the global activity they study is or has achieved the quality of being legal, has not figured prominently in GAL scholarship. Instead, GAL scholars have focused on equivalents or potential equivalents to procedural administrative law, thus neglecting constitutive or substantive administrative law. Moreover, that focus has been couched in an idiom of accountability. From the perspective of a domestic administrative lawyer, it seems then that GAL scholars operate with the implicit assumption that global bodies are *public legal authorities* that make *substantive legal decisions*, so that they can turn to the question of how best to make the bodies accountable.

For example, in their framework essay, 'The Emergence of Global Administrative Law', Benedict Kingsbury, Nico Krisch and Richard B. Stewart state that the 'conceptualization of global administrative law presumes the existence of global or transnational administration'<sup>4</sup> and they claim that 'enough global transnational administration exists that it is now possible to identify a multifaceted "administrative space"'.<sup>5</sup> Their definition of GAL is that it comprises:

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<sup>4</sup> Benedict Kingsbury, Nico Krisch, Richard B. Stewart 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15, 18.

<sup>5</sup> *Idem*.

The mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.<sup>6</sup>

And their provisional definition of global administrative ‘action’ is ‘rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties’.<sup>7</sup>

In sum, once Kingsbury *et al.* have allayed the concern that there is such a thing as GAL by pointing to the existence of a decision-making global administration, they can move to the question they take to be central—the question of the accountability of that administration through mechanisms including law.

In this regard, Kingsbury *et al.* identify three different ‘normative conceptions of the role of global administrative law: internal administrative accountability, protection of private rights or the rights of states, and promotion of democracy’.<sup>8</sup> The first, they say, is the normatively least demanding of the three: it takes a given order for granted and merely seeks to ensure that the various components and agents within that order perform their appointed roles and conform to the internal law of the regime. On this basis, the justification for administrative law is merely functional: it is an instrument to uphold and secure the cohesion and sound functioning of an institutional order that is justified independently.<sup>9</sup>

The second is normatively more demanding. If the rights are the rights of individuals then there is a problem that arises out of the fact that one of the causes of pluralism in global society is that the ‘social basis for a global administrative law based on human rights is largely absent’.<sup>10</sup> The idea of states’ rights might, they suggest, be better suited to a pluralist international order, since states would themselves determine whether their conceptions of rights would be more collectivist or individualist. And such a conception might even be useful to individualistic states ‘in organizing the representation of individuals or of social and economic group interests on the global level’.<sup>11</sup>

The third is the democratic strand, which they say is normatively the most demanding. Hence, it is better to pursue a more pragmatic approach by focusing on the other justificatory roles: ‘controlling the periphery to ensure the integral function of a regime, protecting rights, and building meaningful and effective mechanisms of accountability to control abuses of power and secure rule-of-law values’.<sup>12</sup> This move to pragmatism is, as we will see, typical of the theoretical inquiries into GAL, where by pragmatism is meant abandoning neither theory nor normative questions, only the search for some unifying set of principles, and with it the distraction of conceptual questions of the order, ‘Is GAL really law?’

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<sup>6</sup> Ibid 17.

<sup>7</sup> *Idem.*

<sup>8</sup> Ibid 43.

<sup>9</sup> Ibid 44.

<sup>10</sup> Ibid 46.

<sup>11</sup> Ibid 47-8.

<sup>12</sup> Ibid 51.

I will argue, however, that there is more to the first conception of accountability than Kingsbury *et al.* suggest, since accountability to the internal law of the regime is more normatively demanding than a functionalist or instrumental view of such accountability can envisage. As they correctly see, a truly functionalist or instrumental account of accountability to law requires an independent justification for it to justify anything at all. That is, the justification must come from whatever goals or purposes law is instrumental to, for example, democracy or some social welfare program.

Put in a slogan, my argument is that one cannot have rule by law without the rule of law. More elaborately, rule by law cannot be merely instrumental to some set of external purposes or values, since it also has to be rule in accordance with the rule of law, and that rule carries its own special legitimacy. In fact, I would venture, there would be little reason to be concerned with what global administrative agencies do as a *legal* phenomenon, in contrast to a phenomenon of *power*, if the claim, implicit or explicit, that their decisions have legal authority did not entail a further claim to some special legitimacy that transcends what is ordinarily conveyed by the idiom of accountability.<sup>13</sup> That further claim, or so I will argue, cannot be understood apart from an inquiry into whether the decisions are authentically legal. Thus one cannot avoid the conceptual question about GAL, but not because conceptual questions should drive our inquiries. Rather, the normative questions we have to ask as *lawyers* are questions that entail conceptual commitments, in particular, in the terms of the epigraph, a commitment to not reducing our understanding of law ‘entirely to a process of interstitial adjustment or social engineering’, a reduction that conceals beneath talk of pragmatism our ‘embarrassment’ about having given up on what we might think of as the yearning for the rule of law—a yearning for the legitimacy of legality.

In the following section, I will set out in more detail the issues involved in the question of the concept of GAL. As I will indicate, difficulties arise in part because of questions about the concept of domestic administrative law which seem to make debate about GAL even more intractable than debate about international law. Then, I will explore further the complexity of the main question the GAL project seems to confront—the question of accountability—in order to suggest that the question needs to be rearticulated if it is to get an appropriate answer. The outlines of a possible answer will be sketched in the final sections, which are based on a discussion of Lon L. Fuller’s distinction between legal order and managerial order.

## II. INTERNATIONAL LAW AND GAL

In the debate about whether international law is really law, the skeptics on this score often have their doubts because international law seems to lack characteristics of what they take to be the concept of law, notably, the centralized, hierarchically organized, law-applying and law-enforcing institutions that are found in domestic legal orders. By

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<sup>13</sup> As Eran Shamir-Borer pointed out to me, some bodies might not only refrain from making this claim but also deliberately avoid it by framing their outputs as advice, not binding decisions. This issue is of course an old one in the common law of administrative law—do only ‘decisions’ and thus not ‘advice’ attract review? The issue has by and large been resolved by scrutiny of the impact of the ‘advice’. If the ‘advice’ plays a significant role in leading to a non-optional change in the normative situation of the parties to whom it is addressed, it counts as a ‘decision’. I return to this topic in the last section.

contrast, the believers--those who have no such doubts--often argue that the fact that international law lacks these characteristics does not detract from its status as law; rather, the lack positively contributes to our understanding of law.

For example, believers may argue that what makes international law such is that it lives up to certain formal characteristics of legality that give law its unique normative character and that these do not depend on the existence of centralized, hierarchically organized, law-applying and law-enforcing institutions. They may also claim that it follows from that argument that international law helps us to understand better the concept of law in domestic legal orders. We can henceforth focus on law's normativity, unblinkered by the structure of the institutions of domestic legal orders. In other words, such believers make the theoretically ambitious claim that an understanding of the legal status of international law gives us better access to the concept of law.

The debate about GAL may not seem to have much in common with the debate about the concept of international law, despite the fact that the idea of a law that exists in global space seems intuitively to overlap with the idea of a law that exists in international space, that is, with international law. Rather, participants in the GAL debate generally make an explicit or implicit decision to inquire into the GAL phenomenon by bypassing the question of the concept of GAL, by which I mean they choose to avoid the question of its status as law. This is not to say that there has been no theoretical work done on GAL. Rather, as I have already indicated, the theorists have adopted a deliberately pragmatic stance: they ask theoretical questions about how to make GAL work rather than the conceptual question of its status. Their central question is: 'Given the existence of global administrative agencies that are in the business of making binding decisions, how can we ensure that the agencies are accountable to the various constituencies affected by their decisions?'

There might seem to be at least one compelling reason to avoid the kind of conceptual debate in which international lawyers on occasion engage. In that debate, whether or not one thinks that international law must share all the institutional features of domestic law if it is to vindicate its claim to be law, it is undoubtedly the case that domestic law generally is law. I say 'generally' because not all areas of domestic law have an unproblematic claim to be law and perhaps the area which is most problematic is administrative law.

As we know, administrative law exists within domestic legal orders as a result of the development of the administrative state, the legal regime that governs the activities of public officials when, for the most part, these officials carry out tasks delegated to them by domestic legislative bodies. However, as I have indicated, it is not so clear what is meant by law in the locution 'administrative law', a factor which Kingsbury *et al.* note in their framework paper when they say that that while domestic administrative law 'presumes a shared sense of what constitutes administrative action', it is 'defined primarily in the negative—as state acts that are not legislative or judicial', a problem compounded by the fact that 'the boundaries between these categories are blurred at the margins'.<sup>14</sup> Their counsel that we should take debates in domestic administrative law as the theoretical background to debates about GAL, since all theorizing needs to 'work

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<sup>14</sup>Ibid 17.



against some background, and the background of administrative law is particularly rich', is complicated by this factor.<sup>15</sup>

Of course, Kingsbury *et al.* do not in fact doubt administrative law's existence as law. But I suspect that such negative definitions, which, as we have seen in the last section, persist into their own definition of GAL, trail the serious doubts expressed in the work of such famous theorists of the rule of law as AV Dicey and FA von Hayek. Both regarded administrative law's claim to be law with the kind of skepticism that is displayed towards international law's claim for precisely the reasons expressed by Kingsbury *et al.*, namely, administrative law is neither legislative nor judicial, but something different.

One might think that the administrative law skeptics need not be taken seriously since their opposition to domestic administrative law was often driven by their political distaste for the welfare state whose establishment led to the growth of the administrative state and its law. However, their concerns about whether domestic administrative law can be fitted within a theory of the rule of law continue to bother nearly all administrative lawyers, as one can see not only in the debate mentioned in the Introduction, but also in the images of administrative law found at the beginning of leading textbooks. Consider for example the following:

A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power. This, at any rate, is the heart of the subject, as viewed by most lawyers. The governmental power in question is not that of Parliament ...<sup>16</sup> As a second approximation to a definition, administrative law may be said to be the body of general principles which govern the exercise of powers and duties by public authorities.<sup>17</sup>

Providing a satisfactory definition of administrative law is not an easy task. At its most general, it is the field of law that has as its concern the statutes (other than the Constitution), principles and the rules that govern the operations of government and its various emanations.<sup>18</sup>

Hence, some administrative lawyers cheerfully eschew definition and attempt another route, for example:

Defining administrative law is a topic on which few commentators can reach agreement, because it ultimately depends on what they want out of administrative law. We know what we want. As a minimum, we want a legal system which addresses the ideals of good government according to law. We take those ideals to include openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality.<sup>19</sup>

That is, this group asks the pragmatic question how domestic administrative law regimes can be made to function as well as they can, rather than being preoccupied with the conceptual task of getting the definition right. Given this kind of pragmatism, one might

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<sup>15</sup> Ibid 58.

<sup>16</sup> HWR Wade and CF Forsyth, *Administrative Law* (2000, eight edition) 4.

<sup>17</sup> Ibid 5.

<sup>18</sup> David J. Mullan, *Administrative Law* (2001) 1.

<sup>19</sup> Mark Aronson, Bruce Dyer, and Matthew Groves, *Judicial Review of Administrative Action* (2004, third edition) 1.

then find the pragmatism of the GAL project unsurprising. Whatever the questions that face the GAL project, these questions should not include the conceptual question whether GAL is law. That question may be bypassed since domestic administrative law not only bypasses the conceptual question whether it is really law, but also successfully bypasses it.

Now it may strike one that conceptual questions do not generally give rise to productive inquiries, so that it is better to escape the tyranny of arid concepts and focus on more pragmatic issues, in the context of GAL, the deeply pragmatic question about how to make the law-producing global administrative bodies accountable. As it happens, I share a generally pragmatic orientation to legal theory and doubt whether purely conceptual inquiries illuminate any legal issues. Nevertheless, just as to an outsider in the debate about international law it does seem to me that the conceptual question continues to haunt international law despite attempts in that discipline to take a pragmatic turn, so it seems to me that the same sort of question will continue to haunt the GAL project.

Notice for example how the pragmatism of the last quotation in a sense disappears by the third sentence: ‘At a minimum, we want a legal system which addresses the ideals of good government according to law’. In this sentence, administrative law gets defined as a body of law which lives up to the ideals of the rule of law, ideals which in the fourth sentence are understood in a quite ambitious fashion. This is no accident, as can be seen from the fact that in the GAL project, the main question of accountability soon and, in my view, inevitably runs into two further questions: *the democracy question*, ‘Can there be accountability of global administration in the absence of democracy?’; and *the state question*, ‘Can there be accountability of global administration in the absence of a state?’

The democracy question might seem not so much a conceptual as a political question. For example, in a Westminster-style democracy, public officials are responsible ultimately to cabinet ministers, who are responsible in turn to parliament, which is responsible in turn to the people. The question in GAL is thus whether these lines of accountability can be dispensed with since there is no people, no parliament and no cabinet, or whether functional substitutes exist or have to be created in order to ensure accountability. But these lines of accountability are, to emphasize, political not legal.

Consider for example, the plausible claim that a monarchical legal order where the most important political lines are missing—from the head of state to parliament to the people—can have administrative law, properly so called. Even if that claim and the inference are correct, the question of the state cannot be dealt with in like manner. Even in a bare monarchical legal order in which there is administrative law, one assumes that there is accountability to the law of the state. One assumes, that is, that the public officials the monarch has put in place to implement his will know that will because it is expressed in law and not only consider themselves bound to implement law and not something else but are also constrained by law itself to do so. That assumption holds even if the will of the monarch is that the public officials make some or much of the law that they implement. They still have to have a legal warrant for their rule-making and, one may further assume, there will be some legal mechanism for ensuring both that the warrant exists and that they implement the rules rather than doing something else.

Hence, there seems to be a conceptual link between accountability to law and the existence of a state which make the state’s absence in the global context highly problematic for a claim that there is GAL, and problematic in a different way than

problems caused by the absence of a global democracy. That is, the absence of a global democracy is problematic because it creates a dearth of political accountability, but not the dearth of legal accountability caused by the absence of a global state.

So I wish to explore the possibility that the kind of strategy which some international law believers have adopted is fruitful for understanding the concept of GAL. That is, in attending to the question why GAL is or could be law, perhaps despite the lack of existence of a global state, we might understand better not only the concept of domestic administrative law—why domestic administrative law is law—but also the concept of law itself. Three preliminary points are in order.

First, my argument in no way undermines the various more empirical inquiries inspired by the GAL project that attempt to explore the actual practices that seem to make up the field of GAL. If there is anything to my argument, at most it sets out a research agenda for such inquiries that might incline them to ask questions in addition to the question, ‘Can global administrations be made sufficiently accountable to the right constituencies to ease concerns about the law the agencies make?’ For the question it poses is, ‘Do the practices of GAL exhibit sufficiently the formal features of law—those that make administrative law, but also every other kind of law, legal?’ And that question forces a focus both on the legality of the substantive decisions (whether they are substantive administrative law), and on the authority of the bodies that make them (where constitutive administrative law is located). In regard to the second issue, the interesting question arises whether there can be self-constituting public authorities, that is, bodies whose public legal nature is not owed to any positive constitutive source such as a statute, but to the fact that its decisions are regarded as legally binding.

Second, the development of this formal account is intended to do more than identify features that are already at least implicit in the practices of GAL. To the extent that practices fail to exhibit these features, they are defective, so that the formal account is one with a normative point. Put differently, to the extent that the practices fail to exhibit these features, they fail to exhibit the quality of being law, the quality of legality. They thus also fail to have the legitimacy that is associated with law. My argument here does not depend on an overestimation of law’s legitimacy, since it is perfectly consistent with a claim that the democratic or other forms of political legitimacy, when they can be had, are a far more significant source of normativity. Nevertheless, I want to argue that attention to the normativity of law, more precisely, to the special legitimacy of legality is important to an appreciation of both domestic and global administrative law. I do not want to imply though that this special legitimacy is apolitical. The contrast is better put between democratic and legal legitimacy since legal legitimacy is a kind of political legitimacy. Moreover, as I will suggest, the kind of political legitimacy that legality produces is more consistent with democratic forms of government than monarchical, so even that distinction will have to be softened.

Third, I do not provide an answer to the state question, either by claiming that we can have GAL in the absence of a global state or that a global state has to be established if there is ever to be GAL. Rather, in the final two sections, I suggest a way of framing that question, one which I will show implicates a further question, whether we can have GAL in the absence of global legal order.

### III. THE ACCOUNTABILITY QUESTION

I have already indicated that the question which seems most pressing in the debate about GAL is how to make the global administrative agencies accountable. More precisely, the question is how to make them accountable in the right way since, as Ruth W. Grant and Robert O. Keohane note in their influential article, ‘Accountability and Abuses of Power in World Politics’,<sup>20</sup> such agencies are always accountable to at least one group, the group that set them up or which has power over their budget, and so on.

For Grant and Keohane, the problem posed by the accountability question is the absence of global democracy. That question has to be addressed, they argue, in light of a distinction between two models of accountability, each of which presupposes a different account of political legitimacy. In the ‘participation’ model, the ‘performance of power-wielders is evaluated by those who are affected by their actions’ and they are viewed as ‘instrumental agents of the public’, while in the ‘delegation model’, ‘performance is evaluated by those entrusting ... [power wielders] with powers’ and the power wielders are viewed as ‘authorities with discretion’.<sup>21</sup> These two models complicate the picture because ‘power wielders can be called to account for failing to fulfill their official duties or for failing to serve the interests of those affected by their actions. And they can be called to account by those who authorized them as well as by those affected by them.’<sup>22</sup>

In their view, legal accountability is only one of seven different accountability mechanisms. For them, it is the ‘requirement that agents abide by formal rules and be prepared to justify their actions in those terms, in courts or quasi-judicial arenas’.<sup>23</sup> It falls mainly within the delegation model, though may include a participatory element in a legal system that allows citizens to ‘sue powerful entities for failures of responsibility’.<sup>24</sup>

Largely missing though from their account is the idea of legitimacy. It is not that the *word* is missing, only that on their analysis legitimacy seems to be merely a synonym for the accountability achieved through the political mechanisms of democracy. Since there is no global demos, the point of their analysis is to identify functional equivalents to democratic mechanisms. Hence, law’s legitimacy is equated with the accountability brought about for the most part by the delegation model, where, recall, ‘performance is evaluated by those entrusting ... [power wielders] with powers’ and the power wielders are viewed as ‘authorities with discretion’.

Grant and Keohane do see that there is an element of justification to law, but, on their delegation model, the justification is to those who delegated the authority not to those subject to it. They also see that law can’t be altogether squeezed into the delegation model; law does involve a participatory element that comes about when citizens sue agencies. But what this thought misses is the possibility that because legal decisions, decisions that have or aspire to carry the force of law, have to be justified primarily to those subject to the decisions, the direction of justification is to the subjects. In domestic administrative law, that direction often entails duties of reason-giving, impartiality, hear

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<sup>20</sup> Ruth W. Grant and Robert O. Keohane, ‘Accountability and Abuses of Power in World Politics’, (2005) 99 *American Political Science Review* 29.

<sup>21</sup> *Ibid* 30-1.

<sup>22</sup> *Ibid* 42.

<sup>23</sup> *Ibid* 36.

<sup>24</sup> *Ibid* 36.

the other side or hearings, and so on, that make legal decisions properly so called ones in which there is by definition participation by the subjects.<sup>25</sup>

Now Grant and Keohane are political scientists concerned with the accountability of the power holders in global organizations and not with the specific legal questions of the GAL project. It would thus be unfair to tax them with not paying particular attention to GAL. However, it is significant they do not consider that law might carry its own legitimacy, perhaps even a legitimacy that is not entirely reducible to mechanisms of accountability, since inattention to this possibility seems almost a mark of the logic of inquiry in much GAL scholarship. Indeed, in some GAL scholarship, legal accountability and democratic accountability is almost elided.

For example, Sabino Cassese, in 'Administrative Law Without The State',<sup>26</sup> argues that when administrative law moves into global space, it has to manage without the constitutional foundation of domestic administrative law.<sup>27</sup> Thus, there arises the issue of the accountability of global administration, because there is 'no intermediary between a representative body and the executive', that is, the government or cabinet.<sup>28</sup> But, Cassese suggests, this lack of accountability before a representative body 'actually increases the pressure on global administrative law towards greater openness, participation and transparency', features which 'may make up for the democratic deficit caused by the absence of a constitutional foundation to global administrative law'.<sup>29</sup> Here we can see that the pragmatic turn comes about because of a kind of equation of control by law and control by democratic politics, perhaps because Cassese's image of domestic administrative law regimes is one in which 'unilateral', 'political' decisions are made of the 'command and control' sort.<sup>30</sup> It may be, that is, that the more one's image of administrative law is one of top down administration, the more one will be drawn to the thought that the appropriate mechanisms of accountability are democratic rather than legal, so that where there is no democracy, functional substitutes have to be found for the political mechanisms of democracy.

But in GAL the allure of this thought is not confined to those who have this image of domestic administrative law, which might go to show that in GAL the legal regimes are by nature top down. For example, Nico Krisch says that the question posed by GAL is 'whether and to what extent ideas from domestic administrative law can help us solve accountability problems in global governance' that is, 'to whom global governance should be accountable'.<sup>31</sup> In contrast with the accountability mechanisms made available

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<sup>25</sup>For a sustained analysis of this phenomenon, see Genevieve Cartier, *Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue* (SJD Thesis, University of Toronto, 2004).

<sup>26</sup> Sabino Cassese, 'Administrative Law Without the State? The Challenge of Global Regulation' (2005) 37 *New York University Journal of International Law and Politics* 663.

<sup>27</sup> Ibid 687-8.

<sup>28</sup> Ibid 688.

<sup>29</sup> Idem.

<sup>30</sup> Ibid 669.

<sup>31</sup> Nico Krisch, 'The Pluralism of Global Administrative Law', (2006) 17 *The European Journal of International Law* 247, 248, his emphasis. As Benedict Kingsbury pointed out, I neglect in the text Krisch's deliberate attempt to shift the contours of debate from an international or global paradigm formed by Hobbesian ideas that international order is the global equivalent of the state of nature composed of warring individuals, the difference being only that it is states rather than individuals that are in conflict, or at least potential conflict. The shift is accomplished through focusing on the pluralism of groups and on the individual conceived as a cosmopolitan being, rather than the self-interested rational competitor. I am

by the ‘unitary, hierarchical basis on which domestic administrative law rests’ in GAL, accountability mechanisms will have to be forged in a context inescapably structured by pluralism, and thus resistant to ‘constitutionalizing’ attempts to force the global order into a ‘coherent, unified framework’. Not only does the context itself resist such attempts but they are normatively undesirable, as they ‘downplay the extent of legitimate diversity in the global polity’.<sup>32</sup>

Following Grant and Keohane, Krisch argues that the accountability question is not whether global bodies should be accountable, ‘whether public power should be accountable as such, since they are all accountable to some constituency’. Rather the question is ‘accountable to whom?’, ‘the question of the constituencies of global governance’. But, as he recognizes, this question is not limited to the global level. It is also a ‘central (though often less visible) element of domestic administrative law systems’.<sup>33</sup>

According to Krisch, the constituency question is not usually addressed in domestic administrative law because the answer appears both ‘obvious, and constitutionally mandated’. The two main constituencies are the individuals whose rights and interests are affected by decisions and ‘the people’, since administrative action is supposed to serve democratic purposes, that is, the common good. However, the constituency question does arise, for example, in the balance between a federal entity and the sub-federal entities, or in the problem of agency capture by powerful private interest groups, though it seems moderated by the fact that the democratic constituency is paramount, ‘ultimately decisive’, which reflects the ‘aspiration to coherence, unity and normative hierarchy characteristic of modern constitutionalism’.<sup>34</sup>

In the global context, Krisch finds that three constituencies are candidates for answering the accountability question: the national community, the international community, and the cosmopolitan or global community of individuals.<sup>35</sup> In that context, given its inescapable plurality, all have to be accommodated, a fact that leads to two problems—a lack of certainty and power disparities.<sup>36</sup> Yet, as Krisch notes, these problems exist in the domestic context as well, reflecting in part a degree of plurality in them. Thus he suggests that in both contexts it is helpful to recognize the ‘provisional and contestable nature of regulatory decisions’, as such recognition can limit claims to legitimacy, opening up space for ‘less powerful actors to articulate their position’. In addition, ‘substantive and procedural norms’ can be devised to limit the influence of power.<sup>37</sup> Still what seems primarily missing to him is the ‘electoral processes that check

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guilty of this omission but would like to caution, first, against, too quickly supposing that Hobbes conceived of the problem of the state of nature as individualistically as is commonly supposed or that his understanding of the individual is as is commonly depicted. He may be close to Krisch in both respects. The second and consequent caution is that, even with these changes, Hobbes would argue that the problem of the state of nature does not change, though that problem will be correspondingly different. For some ideas in this regard, see my ‘*Leviathan as a Theory of Transitional Justice*’, in Jon Elster and Melissa Williams, eds., *NOMOS* volume on *Transitional Justice* forthcoming, and Noel Malcolm, ‘Hobbes’s Theory of International Relations’, in Malcolm, *Aspects of Hobbes* (2004) 431.

<sup>32</sup> Ibid 248.

<sup>33</sup> Ibid, 250-1.

<sup>34</sup> Ibid 251-3.

<sup>35</sup> Ibid 253-6.

<sup>36</sup> Ibid 274-5.

<sup>37</sup> Ibid 276.

parliamentary law-making as well as government action'. Most of 'the burden of ensuring accountability' lies on these processes and standard administrative law mechanisms of procedural participation and judicial review perform only 'particular, limited functions'.<sup>38</sup> His conclusion is that it might be best, given the pluralism of GAL, to abandon a search for principle. Instead, one should look for pragmatic solutions, a prescription which is not only prudent but perhaps morally preferable, even 'politically advantageous', as it 'might open up space for the political transformation of a structure of global governance whose legitimacy is far from settled'.<sup>39</sup>

The same turn to pragmatic politics is taken, perhaps rather more reluctantly, by Richard B. Stewart, in his article 'U.S. Administrative Law: a Model for Global Administrative Law?'<sup>40</sup> Stewart sketches three kinds of accountability possible in GAL: accountability to the law of the particular regime; accountability to those subject to regulation to ensure that 'their rights are secured and their interests respected'; accountability to the broader public, either domestic or global.<sup>41</sup> When it comes to accountability in US domestic administrative law, he identifies accountability for legality, a principle of democratic self-government, and more broadly, the goal of 'promoting responsiveness and securing accountability to social interests and values'.<sup>42</sup> The latter creates a 'surrogate process of representation through legal procedures' to compensate for the fact that electoral politics provides only a limited form of accountability. The judiciary is the 'vital cockpit in administering this conception'. Courts seek to promote, a form of dialogic rationality in the administrative process by requiring the agency to articulate and justify its exercises of power by reference to legally relevant public norms invoked by outside parties and the agency itself, and by examining the sufficiency of the agencies' responses to the data, analysis, and comments submitted by outside parties and the justifications that it gives for its policy choices.<sup>43</sup>

Stewart notes that in the absence of such mechanisms, one might get what will be considered 'administrative law lite'—public access to information, mechanisms that promote decisional transparency, opportunities for public comment and input, attendance at meetings, all of which 'might provide a substantial degree of informal responsiveness to those domestic or global economic and social interests that are *organized and able* to take advantage of the opportunities provided by these mechanisms to monitor and influence regime-level decisions'.<sup>44</sup> The problem here, he notes, is that these substitutes will seem to 'elevate accountability to interests over accountability for illegality', thus inverting

the order of development and of priorities in US administrative law, which gives precedence to assuring agency compliance with the Constitution, statutes, and the agency's own regulations over review of the exercise of discretion. ...Indeed, it is questionable whether mechanisms that do not provide assurances of legality can

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<sup>38</sup> Ibid 277.

<sup>39</sup> Ibid 278.

<sup>40</sup> Richard B. Stewart, 'U.S. Administrative Law: a Model for Global Administrative Law?' (2005) 68 *Law and Contemporary Problems* 63.

<sup>41</sup> Ibid 64.

<sup>42</sup> Ibid 74-5, emphasis removed.

<sup>43</sup> Ibid 75, note omitted.

<sup>44</sup> Ibid 104-5.

properly be regarded as administrative *law*; arguably they can at most be regarded as tools of administrative governance.<sup>45</sup> Still he cautions that it ‘would be exceedingly parochial to think that there can be no genuine system of administrative law without the sort of judicial review that has been the centerpiece of US and, increasingly, European models of administrative law’.<sup>46</sup> It is, he says, ‘quite possible that a combination of elements of transparency and participation, when combined with other mechanisms of accountability, can function successfully without independent legal review’,<sup>47</sup> and thus perhaps one should set one’s sights on ‘functional superiority or the best that can be achieved’.<sup>48</sup>

Are these counsels to give up the search for principle counsels of a wise and necessary prudence or is too much being given up? In order to answer this question, I will turn to a discussion of Lon L. Fuller’s distinction between legal order and managerial order.

#### IV. FROM MANAGERIAL DIRECTION TO LAW?

I suggested earlier that the state question is a much more difficult question for GAL than the democracy question, since accountability to law seems to presuppose the existence of the state, but not of democracy. And it presupposes the existence of the state because without the state there is no constitutionally based, unitary system of law. My quick example earlier of a monarchical regime in which there is no democracy but in which there is administrative law was intended to illustrate the point; and it was meant to evoke Lon L. Fuller’s famous thought experiment of Rex, the bungling monarch, who fails to make law despite his zeal as a legal reformer.

From Rex’s mistakes, Fuller derived his list of the principles of the internal morality of law: 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*.<sup>49</sup>

The last principle is clearly the most relevant to a discussion both of the concept of domestic administrative law and of GAL. Fuller said of it that it was the ‘most complex’ of all the principles, both because congruence could be destroyed or impaired in various ways and because the ‘procedural devices designed to maintain it take, of necessity, a variety of forms’.<sup>50</sup> In the USA, he noted, it was chiefly the judiciary that is entrusted with preventing discrepancy between rules and administrative action. But he emphasized that that there would be ‘serious disadvantages’ in any system that looked solely to the courts ‘as a bulwark against the lawless administration of the law’.<sup>51</sup>

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<sup>45</sup> Ibid 105.

<sup>46</sup> Idem.

<sup>47</sup> Idem.

<sup>48</sup> Ibid 106.

<sup>49</sup> Lon L. Fuller, *The Morality of Law* (1969, revised edition), 39, 46-91.

<sup>50</sup> Ibid 81.

<sup>51</sup> Idem.



According to Fuller, the ‘most subtle element’ in the task of maintaining congruence lay in the problem of interpretation. ‘Legality requires that judges and other officials apply statutory law, not according to their fancy or with crabbed literalness, but in accordance with principles of interpretation that are appropriate to their position in the whole legal order’.<sup>52</sup> And he thought that the rule in *Heydon’s* case, to understand a law you must understand the ‘disease of the commonwealth’ it was meant to cure, gives one the best guide to these principles.<sup>53</sup>

In a well known article, Edward L. Rubin argued that much of administrative law could not be said to comply with Fuller’s criteria of legality.<sup>54</sup> In particular, Rubin argued that in the USA the legislation that makes up the bulk of what I called constitutive administrative law is not law in Fuller’s sense, which Rubin takes to be a more or less accurate sense of the Western legal tradition. The reason is that much constitutive administrative law is ‘intransitive’ in that it does not directly affect the rights of individuals, nor indeed sets out a determinate content for officials to apply. Rather, as I pointed out in the Introduction, it simply gives to officials the authority to develop substantive administrative law in accordance with a very broadly sketched mandate.<sup>55</sup>

Given this, we are left with the uncomfortable choice between simply declaring much of domestic administrative law not to be law because it does not fit with a ‘premodern’<sup>56</sup> conception of law, or reformulating our concept of law in order to account for the brute facts of legal practice, that is, by taking the pragmatic (or as Rubin would put it, Realist) turn.<sup>57</sup> Put in this way, there is of course no choice. And Rubin was well aware that to take the pragmatic turn is to give up on the quest, which unites scholars as different as HLA Hart, Ronald Dworkin, and Fuller, to explain law’s normativity.<sup>58</sup>

However, this quest is not so easily forsaken, as Peter L. Strauss pointed out in a comment on Rubin.<sup>59</sup> In particular, Strauss argued that the intransitivity of much modern legislation is tolerable ‘because it exists within a system that does give legal obligations or restrictions more precise shape before the citizen is asked to act or subjected to penalties for unwanted behavior ...’<sup>60</sup> The important point is that Fuller was seeking to describe the ‘morality of a system, not its particular elements’ and, in the systemic context, Fuller’s analysis still seemed, according to Strauss, ‘apt’.<sup>61</sup>

Strauss’s rejoinder to Rubin still leaves us stuck with the problem of the lack of a system in GAL. That is, there is a problem for any attempt to transplant Fuller’s insights about the internal morality of law to the global regime, as global administrative bodies do not operate in anything like a legal order of the sort we encounter domestically. However, it is important to keep in mind is that what makes a legal order such, according to Fuller,

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<sup>52</sup> Ibid 82.

<sup>53</sup> Ibid 82-3.

<sup>54</sup> Edward L. Rubin, ‘Law and Legislation in the Administrative State’, (1989) 89 *Columbia Law Review* 369.

<sup>55</sup> Ibid 380-5.

<sup>56</sup> Ibid 385.

<sup>57</sup> Ibid 379-80.

<sup>58</sup> Idem.

<sup>59</sup> Peter L. Strauss, ‘Legislative Theory and the Rule of Law: Some Comments on Rubin’ (1989) 89 *Columbia Law Review* 427.

<sup>60</sup> Ibid 445, his emphasis.

<sup>61</sup> Idem.

is not that it is a system or an order. Rather, it is that the order complies substantially with legality-- the principles of the internal morality of law. In this regard, Fuller distinguished between two forms of social ordering that he thought are often confused, 'law' and 'managerial direction', with the distinction being as follows:

The directives issued in a managerial context are *applied* by the subordinate in order to serve a purpose set by his superior. The law-abiding citizen, on the other hand, does not *apply* legal rules to serve specific ends set by the lawgiver, but rather *follows* them in the conduct of his own affairs, the interests he is presumed to serve in following legal rules being those of society generally. The directives of a managerial system regulate primarily the relations between the subordinate and his superior and only collaterally the relations of the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen's relations with other citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed.<sup>62</sup>

Fuller thought that five of the eight principles are at home in the managerial context: generality, publicity, clarity, non-contradictoriness, possibility of execution, and constancy are all important if the superior is to communicate his wishes and the subordinate is successfully to carry out them out. But, in the managerial context, generality is a matter of expediency—there is no justification for complaint if the superior directs the subordinate to depart from some general order; and that entails that there is 'no room for a formal principle demanding that the actions of the superior conform to the rules he has himself announced'; that is, there is no formal requirement of congruence. The principle against retroactivity simply has no application—no manager would order someone to do something on his behalf yesterday.<sup>63</sup> Further, Fuller suggested that insofar as the managerial direction does rely on the five principles at home in its context, they function as 'principles of efficacy, 'instruments for the achievements of the superior's ends'. They thus do not seek to maintain the relationship of reciprocity between ruler and ruled which is 'part of the very idea of a functioning legal order'.<sup>64</sup> (For instance, when it comes to legal order, 'intelligibility' far better than 'clarity' captures Fuller's idea that the law must not only contain a clear direction to the subject, but also one which the subject can understand as directed to serving his or her interests, on some suitably wide or public understanding of interest.)

Put differently, while Fuller's internal morality of law was for him manifested in a system or whole social order, what makes law legal is not its systematicity but its substantial compliance with the internal morality of law.<sup>65</sup> Particular managerial orders, while not being part of some overarching system, will become more law-like the more they operate in accordance with the morality of law. An analogy might be the way in which private or privatized administrative bodies have been made subject to judicial

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<sup>62</sup> Fuller (n 50) 207-8.

<sup>63</sup> Ibid 208-9.

<sup>64</sup> Ibid 209.

<sup>65</sup> As I will suggest in the next section, this will require development of a kind of legal order, but I take this to be different from the creation of a legal *system*. For reasons that I will not go into here, the idea of system and the associated idea of authentic rules as rules that are valid by a system's ultimate criteria for validity are among the animating ideas of legal positivism and my argument in this essay is an implicit critique of legal positivism.

review because they make law-like claims on those subject to their power. My point, however, is not that judicial review is what makes the decisions of such bodies more law-like, but that what makes them more law-like makes them also fit for judicial review.

By the title of his famous essay, ‘The Forms and Limits of Adjudication’,<sup>66</sup> Fuller of course recognized that adjudication was but part of legal order. He did suppose that ‘legislative determinations often only can become effective if they are of such a nature that they are suited for judicial interpretation and enforcement’.<sup>67</sup> And he noted that it is in the ‘field of administrative law’ that these issues ‘become most acute’,<sup>68</sup> not least because of the problem he identified of ‘polycentricity’, the fact that law will be used in a complex society to resolve problems that require decision makers to take into account the implications of their decisions for other, sometimes many other, issues, and also to base their decisions on factors that are not amenable to adjudication.<sup>69</sup>

Fuller’s focus on adjudication naturally raises the customary concern that legal theorists often cannot think of law except by squeezing it into an archaic and distorting mould, in terms of which a judicial determination is the proper endpoint of any legal process. And he did claim that ‘All are agreed that courts are essential to the rule of law’.<sup>70</sup>

This focus on courts is considered problematic in domestic administrative law, a problem that becomes even more acute in GAL.

But it is important to recall Fuller’s point above that that there would be ‘serious disadvantages’ in any system that looked solely to the courts ‘as a bulwark against the lawless administration of the law’, and second, to note that Fuller’s emphasis on adjudication was not primarily as mechanism for settling disputes. Rather, Fuller saw adjudication as a ‘form of social ordering, as a way in which the relations of men to one another are governed and regulated’.<sup>71</sup> Its ‘essence’, for him, lay in the ‘mode of participation it accords’ to the party affected by a decision<sup>72</sup> such that one could say that the ‘process of decision ... is institutionally committed to acting on the basis of reasoned argument’.<sup>73</sup>

Another way of making this point is to see that it is a mistake, one which Fuller unfortunately did much to encourage, to understand his theory as a purely procedural theory. Rather, it is a theory about the formal attributes of legality, all of which require procedures to be realized.<sup>74</sup> That there has to be process is one thing, but judicial review is just the process we traditionally associate with the reason rather than the fiat of law.<sup>75</sup> One might then agree with Stewart, writing in 2005, that it ‘would be exceedingly parochial to think that there can be no genuine system of administrative law without the sort of judicial review that has been the centerpiece of US and, increasingly, European

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<sup>66</sup> In Kenneth Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (2001, revised edition) 101.

<sup>67</sup> *Ibid* 102.

<sup>68</sup> *Ibid* 103.

<sup>69</sup> *Ibid* 126, ff.

<sup>70</sup> *Ibid* 114.

<sup>71</sup> *Ibid* 105.

<sup>72</sup> *Ibid* 107.

<sup>73</sup> *Ibid* 113.

<sup>74</sup> I owe this observation to Jeremy Waldron.

<sup>75</sup> See Lon L. Fuller, “Reason and Fiat in Case Law” (1945-1946) 59 *Harvard Law Review* 376.

models of administrative law'.<sup>76</sup> But one would also have to recall Stewart's concern of 30 years before that talk of 'pragmatic compromise' often serves to 'conceal our embarrassment' occasioned by the fact that we know that the law, if it is to retain its claim to be law, 'cannot be reduced entirely to a process of interstitial adjustment or social engineering'.<sup>77</sup> That claim, as I understand it, is a normative claim to be an authority over those whose lives law purports to regulate because it is law.

Consider, for example, how in apartheid South Africa the lives of black South Africans was for much of apartheid governed by law only in the sense that the officials who made decisions affecting them were given authority by statute to do so. The Black Sash, a group of white women who came together in the mid 1950s to protest against the erosion of the constitution and the rule of law in South Africa, began in the late 1950s to work within the law of apartheid by setting up advice offices that assisted the victims of such laws to navigate the terrain of regulations and discretion that ruled their lives.<sup>78</sup> The volunteers in the advice offices would, with the help of paid interpreters, work to try to make sense of the bewildering mass of laws and regulations which often left those who came for advice with little or no sense of what their rights were under law. The advice provided a resource to challenge the decisions of the officials whose power over black South Africans was otherwise wielded in an arbitrary fashion.

Over time, the Black Sash developed from their offices a set of materials that offered a unique tool for understanding and criticizing the operation of the apartheid state. Their work ultimately provided the basis for the most significant victories in public interest lawyering in apartheid South Africa, decisions that did not strike great blows for civil liberties, but rather were exercises in statutory interpretation that stabilized apartheid law so that those subject to it could know with some certainty what their rights were under that law.

Notably in *Komani NO v Bantu Affairs Administration Board, Peninsula Area*,<sup>79</sup> the Appellate Division held that a black man qualified to live in an urban area was entitled to have his wife live with him and in *Oos-Randse Administrasieraad v Rikhoto*,<sup>80</sup> the same Court held that workers who were sent back annually from the cities to the rural areas and then had to enter into a fresh contact with their employers were, nevertheless, continuously employed and thus had a right to live in the urban area in which they worked.

There is of course something counterintuitive in the suggestion that stabilizing the administrative law regime of apartheid law was a good.<sup>81</sup> But much of what seems counterintuitive rests, I think, on the image of administrative law as a top-down system of achieving ends, where accountability to the law of the particular administrative regime serves only the instrumental purpose of achieving the substantive ends it was put in place to achieve.

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<sup>76</sup> See n 47 above.

<sup>77</sup> See n 2 above.

<sup>78</sup> For accounts, see Cherry Michelman, *The Black Sash of South Africa* (1975) chapter 5, and Kathryn Spink, *Black Sash: the Beginning of a Bridge in South Africa* (1991), especially chapter 3.

<sup>79</sup> 1980 (4) SA 448 (A).

<sup>80</sup> 1983 (3) SA 595 (A).

<sup>81</sup> I owe much here to Kristen Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust', an essay which examines the phases of the Nazi persecution of the Jews, forthcoming in the *University of Toronto Law Journal*.

The promise of law that was realized in the two decisions of the Appellate Division just mentioned was not just that many black South Africans henceforth knew what the law was that regulated their lives. They also knew what legal rights they had, rights which could be said to entail recognition of black South Africans as having agency within a space that was supposed in terms of apartheid doctrine to be exclusive to white South Africans, and thus deeply undermining of that doctrine. Such recognition of course was rife with contradiction. As suggested, it was hardly an unambiguous moral good to stabilize the law of apartheid. But that ambiguity is my point. In order for the regime that regulated the lives of black urban dwellers to be a regime of law, it had also to be a regime that delivered to some extent on the promise of the rule of law.

Similarly, the intransitive, constitutive statutes of the domestic administrative state are best viewed not as failures to make law on Fuller's criteria. Rather, they should be seen as incomplete laws, whose completion occurs at the point where, through administrative decision-making, the legislation becomes transitive and thus also complete, a point which requires substantial compliance with the internal morality of law.

The analogy for global administrative agencies is that their decisions will become law-like only when at the point of contact with those whose lives they regulate, whether states or individuals, these legal subjects are offered a reasoned justification for the decisions which does not depend for its authority on some initial act of state consent, but, rather, on the legal quality of the decision. I suspect that in order for that to happen, practices of establishment of such agencies might have to change in order to bring about changes in the process of authorization and delegation of authority. Perhaps as commonalities occur in the institutional design of a large number of such agencies, it may be the case that something like a global administrative law order starts to emerge, an order that transcends the legal regime of any particular agency.

But wherever such speculation might take us, it gets its direction through seeing that compliance with the internal morality of law does more than promote accountability of law-makers to legal subjects. The quality of legality for the subjects presents them with reasons for action that go beyond the fact that the agencies can be said to following their managerial mandate. As I pointed out in my discussion of Grant and Keohane, legality is not just a matter of complying with formal rules; it involves by definition a participatory element, one which we can note will blur the distinction we saw Stewart draw earlier between accountability for legality and accountability to social interests and values.

That necessary blurring is what I think Fuller was after when he spoke about the relationship of reciprocity that legality establishes between ruler and ruled. It is a way of understanding the rule of law which is pre-democratic but which could be said to be a precursor of the modern idea of democratic legitimacy. It is certainly an understanding of law that can be argued to be crucial to the full realization of democratic legitimacy, which is why, as I indicated earlier, it can be said to be both political and not sharply distinct from the kind of accountability we associate with democracy, as well as a better fit with democracy than with monarchy.<sup>82</sup>

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<sup>82</sup> See Lars Vinx, *Legality and Legitimacy: Hans Kelsen's Pure Theory of Law* (2007). I reject therefore John Ferejohn's view, reported by Richard Stewart that 'reason giving and accompanying legal accountability operate as a substitute for democratic electoral and legislative control'. See Richard Stewart, 'Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance',

I want thus to suggest that there is a problem with the idiom of accountability. Accountability, as it is commonly used, is a term of art developed in a political science literature about ways of exercising controls of the exercise of power. In that idiom law is simply one among many mechanisms that can be used to promote accountability, which is why suing a power holder in court seems the principal means law offers to those subject to power.

In his most recent paper, Stewart points out that the term is rather loosely used for both before the fact controls, like elections or interest group participation in administrative rule making, and after the fact controls, like the ability to withdraw budgetary support or to sue in a court of law. In his opinion, the term would be better confined to after the fact controls.<sup>83</sup> But if participation in rule-making exercises should not count as an accountability mechanism, it also follows that the *audi alterem partem* rule of administrative law—hear the other side—is not about accountability, since it is a before the fact of decision opportunity to try to influence the outcome.

However, the problem with the idiom goes deeper than its loose use. It seems inept to describe legality, since the ability of legal subjects to hold officials to account for the content of their decisions is only part, though a very important part, of a practice of legality. The very thought that legality is about a content that officials transmit on behalf of those to whom they are accountable, so that a failure to deliver the right content is the reason for holding them to account, is precisely the ‘transmission belt’ conception of administrative law that Stewart viewed as both paradigmatic and deeply flawed in ‘The Reformation of American Administrative Law’.<sup>84</sup>

Legality does not enter the picture only after the fact, since it is constitutive of the roles that legal authorities occupy. To say of officials that they are accountable to law is to miss out on an aspect of their participation in legality that is far better captured in Fuller’s idea that there is an obligation of ‘fidelity to law’.<sup>85</sup> When administrative officials exhibit such fidelity in making their decisions, they are abiding by the set of principles that ensure a relationship of reciprocity between those who wield legal authority and those subject to the authority. Part of that obligation is to produce a content such that it is clear to subjects what they have to do, but it is only part. Moreover, they do not in this process ‘transmit’ a content—they produce one in a way that is conditioned by their sense of how best to serve the principles. Appropriate content is to a significant degree conditioned by the requirements of legality, so that congruence is not simply congruence with the content of declared positive law, with substantive administrative or other positive law from the past, but also with what I called earlier constitutive and procedural administrative law.

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International Legal Theory Colloquium, New York University Law School, available at <http://iilj.org/courses/2008IILJColloquium.asp>, 24-5. Rather, these are pre-democratic devices that have affinities with democratic controls, but whose meaning and operation are distorted if they are seen as second rate functional substitutes.

<sup>83</sup> Ibid, 18.

<sup>84</sup> Stewart (n 2) 1675. For insightful comment on this earlier essay in the light of present concerns about accountability, see Jerry L. Mashaw, ‘Structuring a “Dense Complexity”’: Accountability and the Project of Administrative Law’, (2005) *Issues in Legal Scholarship*, Article 4 in ‘The Reformation of American Administrative Law’.

<sup>85</sup> Lon L. Fuller, ‘Positivism and Fidelity to Law- A Reply to Professor Hart’, (1958) 71 *Harvard Law Review* 630.

Stewart may be well on the way to accepting something like this argument when, in his most recent paper, he highlights what he calls the ‘problem of disregard’, under which he collects the harms suffered by both groups and individuals when global regulatory bodies make decisions that disregard or give inadequate consideration to the interests of the groups and individuals.<sup>86</sup> Disregard, he says, has both a substantive aspect—‘disadvantage, harm, injustice or inequitable treatment’—and a procedural and institutional aspect—‘failure by global regulatory authorities to take into account and give adequate weight in decisionmaking to those disadvantaged’. The two aspects are linked since a ‘central purpose’ of procedural regard is ‘to ensure that the affected are fairly or appropriately treated in the decision made, in accordance with applicable decision norms’.<sup>87</sup> Stewart adds that procedure must have an affect on substance—it may not produce a manifestly unjust decision. However, procedure does not collapse into substance, since decision makers will still have a ‘wide latitude in striking the balance among competing considerations, interests and values in given situations’. That latitude, nevertheless, is ‘disciplined by a practice of giving public reasons for the choices made’.

Such a practice may not only discipline particular decisions but also promotes a degree of consistency in successive decisions, limiting to some degree measures dictated by raw power or ad hoc bargains. And, a norm and practice of responsible decisionmaking justified by publicly stated reasons may, like other rule-of-law structural norms and practices, indirectly serve to promote further regard for those affected.<sup>88</sup>

In sum, the search for principle, for a principled account of law’s authority, cannot be abandoned, even temporarily.

There is thus an analogy between the debate about whether international law is really law and the debate about GAL precisely because both international law and GAL make claims to be law which require us to do without assumptions that we take for granted when inquiring into domestic legal regimes. As we have seen, GAL poses an especially sharp challenge in this regard just because domestic administrative law has itself a conceptually difficult claim on the status of law. But, just as in the case of international law, so difficult cases of law might give us better access to the concept of law than do uncontroversial cases of law (domestic legal orders) through explaining why the central question for legal scholars is the legitimacy of legality.<sup>89</sup>

How to achieve all of this--the hard work of GAL--is not something I’ve dared to say anything about so far. My contribution has been an attempt at some thoughts about what it is we are trying to achieve. I would like however to go out if not with a bang than with something better than a whimper. So I close with a thought experiment that might have some prospect of empirical validation.

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<sup>86</sup> Stewart (n 83) 5.

<sup>87</sup> *Idem*.

<sup>88</sup> *Idem* footnotes omitted.

<sup>89</sup> For doubts about this kind of endeavor, see Carol Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *European Journal of International Law* 187.

## V. A BRAVE NEW WORLD FOR GAL?

Consider how English lawyers and judges confronted in the nineteenth century the problem of responding to a growing administrative state which seemed for historical reasons to be beyond the reach of the law. They found in company law the tools out of which they would eventually fashion what the common law world came to think of as administrative law. These lawyers turned, as it were, administrative bodies that exercised power into bodies that made law. Another way of putting this point, which assumes that for public officials to act validly they must have a legal warrant for that action, is to say that the lawyers brought these bodies within the space of the state--the *Rechtsstaat*. A third way would be to say that the lawyers made the bodies (at least potentially) into properly public bodies. The officials who staffed the bodies came to see their task not only as service to the interests of the individuals affected by their decisions, but also as requiring a public justification of why the officials' interpretation of their legislative mandate represented a reasonable articulation of the public interest.

The idea of publicity here has three aspects—there is the public delegation of authority, the justification in public of the exercise of authority, and the fact that the decision thus justified has to represent a reasonable interpretation of the public interest. The first amounts to constitutive administrative law; the second happens in accordance with procedural administrative law; the third amounts to substantive administrative law. The idea of publicity links the three in a way that explains the expectation in the intuition sketched in the last section that process, if it is worth anything, will discipline substance.

Now GAL does not face the doctrinal dearth that beset the English lawyers. If anything, there is a doctrinal plenitude. Not only is there the resource of the domestic administrative law systems of the common law world, but also both the rule making jurisprudence developed in US administrative law<sup>90</sup> and the rich and much older resource of European administrative law. But even if we assume that the procedural tool kits of domestic administrative law are adaptable to the global context, there remain the problems of the dearth of a global demos and, more importantly on my argument, the dearth of a global state. Why, one might ask, should global administrative agencies be willing to subject themselves to the rule of procedural administrative law? Further, even if they were willing, what institutions would take the role of providing an independent review mechanism?

One answer to both questions is that domestic courts or international courts like the European Court of Justice might exercise a jurisdiction over the decisions of global administrative agencies that would require such adaptation,<sup>91</sup> and require it not only in the sense that more appropriate procedures are followed, but also in that the agencies develop the institutional framework that makes the procedures meaningful in that good process leads to good substantive decisions. This answer presumes that the relative weakness of global administrative agencies in getting their decisions to stick might drive

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<sup>90</sup> Stewart (n 41).

<sup>91</sup> See the September 2008 decision by the European Court of Justice in *Kadi* and my 'The Rule of (Administrative) Law in International Law' (2005) 68 *Law and Contemporary Social Problems* 127. I am not committed to any view about where it is most appropriate that independent review mechanisms are located. The answer to such a question may in fact be highly context-dependent.



global law reform. Rule by law eventually begets rule of law if the entity that wishes to rule by law is not strong enough to enforce obedience to its commands.

This answer captures something important about the actual evolution of legal order in that it is probably undeniable that sheer power or lack thereof has to play a significant role in any socio-historical account of a certain sort, one that focuses on the external factors that create the context in which important agents act. What it neglects is an account of the internal dynamic of legal space, once the agents have for whatever reasons entered that space. Here are two examples.

First, there is the story of Brian who decides as a philosophy graduate student to publish a report on philosophy graduate schools in the USA that can inform the choices of undergraduates seeking to apply to graduate school in ways he would have found helpful.<sup>92</sup> Over time the report becomes ever more comprehensive and with the help of the Internet, its rankings of departments both overall and by subject matter and its evaluations of individuals achieve both a certain fame and a certain notoriety. Not only do students use the report, but department heads begin to rely on it in their negotiations with deans and provosts for more resources. The report starts to become, that is, the equivalent of Standard and Poor for philosophy departments, and not only in the US since Brian has extended its reach to much of the English-speaking world.

Such a story could not unfold if the content of the initial reports—what we can think of as the report's substantive outputs—were not widely considered to be sound, the only basis for the report's growing influence and legitimacy. But widely is not universally. Aggrieved departments and individuals bitterly contest unfavourable evaluations; hence the notoriety that accompanies the influence. So Brian finds himself at a certain point compelled to turn the report from basically a one-man show into a rather complex organization, with editorial boards, committees, procedures, mechanisms for complaints, and so on. The report is henceforth issued by an agency, with a serious claim to be independent, impartial, follow rules of natural justice.

Here we can say that for the continued legitimacy of the substantive outputs Brian found himself required to move his report into a space disciplined by law. His initial authority was self-constituting, the authority that comes from delivering expert opinions that are quickly recognized by many individuals who are their subject as both generally sound and as having a weight that goes beyond mere advice. It is this last factor that is perhaps most important. That the opinions, whatever Brian's initial intentions, get accorded this weight is what requires the move into legal space. Continued substantive legitimacy is not self-sustaining once the point is reached of becoming authoritative, that is, changing the normative situation of those subject to its judgments. At that point, Brian has become an authority and authority requires the procedures we associate with legality.

Consider now a slightly different example. Several powerful philosophy departments decide to issue a report of Brian's sort by concluding an agreement as to how to issue a public evaluation of each other, which includes procedures to safeguard against bias—one cannot rate oneself, and so on. These reports of course contain an implicit judgment about all the excluded departments. But since excellent graduate students are making comparative choices between departments in that group and at least those that are genuinely competitive with it, the group starts to report on those

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<sup>92</sup> Of course many will recognize that the story is based on a real example, but I do not claim that its details track that example.

departments it considers competitive. With time, its net inevitably get casts wider--to the departments considered competitive with the second group, to the third group, to the fourth group until it is issuing a comprehensive rating of all departments.

This example differs from Brian's story in that whatever departments outside of the group thought about the substantive judgments, or about the group's claim to be an authentic elite, at least from the time the group started to cast its net wider, the excluded departments were subject to the power of a self-constituting agency. The judgments had authority within the group, constituted by the group's agreement. But those outside of the group found themselves in virtue of the reputation or claimed reputation of the departments in the group subject to something more than advice—to power.

Because the group has power, it might decide to go it alone. But this decision would create a tension in its operation. Recall that the founding purpose of the initial agreement was to serve the interests of graduate students by giving them good advice. With time and with the wider scope, not only do other purposes supervene (for example, the evaluations of departments start to count in internal university decisions about the allocation of resources), but advice turns into something more weighty. At this point, a retreat to the founding purpose and to the initial limited scope is not possible. The group has to become an agency of the sort that Brian's report evolved into because it cannot avoid its transformation into an authority.

In my view, something is missed in this story, as well as in Brian's, if one tells it purely in terms of a narrative of power whereby at a certain point of weakness the power holder has to adopt the discipline of legality. For the full story requires a more internal account of what it takes to be a legal, public authority. If that is right, then rule by law is never simply the kind of command and control associated by Fuller with managerial order. Rule by law always involves to some extent the rule of law and compliance with legality cannot be explained wholly, perhaps even significantly, by the play of power and self-interest, since legality exercises its own force—the force of normativity.

Now imagine that Brian's or the group's success leads to emulation in other disciplines. The structures adopted by philosophy are duplicated over and over again, perhaps improved upon in ways by others that lead to adaptations to the philosophy agency's structure. We would have, in my view, something like a legal order emerging even if it is not the case that we imagine a further possibility--that the commonality of structure leads these different agencies to establish an über-board that oversees the procedural structure of the agencies and decides complaints in regard to procedural matters.

So my tentative conclusion is that one can have administrative law not only in the absence of democracy, but also in the absence of a state. What has to be present is at least an embryonic form of legal order, which is possible, at least initially, even when the authority of the administrative agencies is self-constituting, either by one self or by several.

In addition, my guess is that a fair amount of the institutional developments that are studied under the rubric of GAL represent variations on one of the two stories told in this section. But even this guess turned out to be wildly wrong, it could, I think, be shown to be so only by empirical work that pays attention to the connections, or lack thereof, between the different modes of administrative law—constitutive, substantive, and

procedural.<sup>93</sup> Such work would thus not focus mainly or exclusively on one mode—the procedural. Moreover, this work would also have to be attentive to the possibility that, if there is a connection, the connection comes about through the idea of legality and its legitimacy. One will miss this possibility if one regards the main question of GAL as about procedural administrative law and reduces that question to the issue of accountability.

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<sup>93</sup> As suggested in the text, in the case of GAL constitutive administrative law might be wholly missing because the authority of global agencies is self-constituting. While I cannot go into this fascinating topic here, it is likely that legal positivism is much more prey to any from the absence of a positive source for legal authority than a Fullerian account because in the latter the interesting problems are about how authority is exercised and not, or at least not primarily, about authority's source.