

GLOBAL ADMINISTRATIVE LAW: WINNERS AND LOSERS

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I

This paper is written as a response, from a third world perspective, to a seminal article written by Benedict et al on ‘The Emergence of Global Administrative Law’. The idea is to determine the identity of “winners and losers” of “global administrative law” (GAL). I argue that the determination of the identity of winners and losers of GAL depends in a crucial way on the following overlapping factors: (i) the character of international law and institutions that GAL is an integral part of; (ii) the definition of GAL adopted viz., whether broad or narrow; (iii) the notion of administrative justice that informs GAL and its links with international human rights law; and (iv) the relationship of GAL to global social movements (GSMs)¹.

The paper is divided into six further sections. In Section II it will be argued that GAL needs to be understood and developed in the matrix of the fact that it is an inextricable part of contemporary international law and institutions that have an imperial character. At least one implication is that “thick” administrative structures are part of international law and institutions that lack sustained legitimacy, or which is the same, suffer from democracy deficit.

In Section III it is contended that there is a need to consider two alternative definitions of GAL viz. the broad and the narrow definition. The broad definition, in contrast to the narrow definition adopted by Kingsbury et al, rests on an understanding that globalization has transformed the nature of international law and institutions and that GAL needs to be given meaning amidst concepts such as global democracy and global citizenship. However, I concede that even a GAL narrowly conceptualized within a dualistic framework of international law is helpful in pushing the global democratic agenda.

¹ I conclude that GAL like substantive international law is being shaped by an emerging transnational capitalist class (TCC) to realize its interests. Speaking in terms of the north-south divide the losers will be the marginal and disadvantaged people in the third world. However, given the fact that it is the TCC fractions in the developed world are more influential in shaping international substantive and administrative law the third world business class may not often gain from GAL.

In Section IV the notion of global administrative justice is introduced to embed, at the individual level, a human right to administrative justice. In this context the idea of ombudsman is proposed in relation to particular legal regimes. Where other private actors are concerned the principles and procedures of GAL also need to be brought into play. At the inter-state level the notion of administrative justice should *inter alia* mean a right to effective participation in the framing of standards and rules. In the latter context, it is argued, the distinction between soft law and hard law does not stand to reason.

In Section V the possible role of Global Social Movements (GSMs) in the implementation of GAL is briefly discussed. It is argued that the experience of administrative law in third world countries like India testifies to the fact that for the disadvantaged and marginal sections of the population the use of administrative law is most often a theoretical possibility. It is the powerful and educated social classes that take advantage of administrative law. In the event it is left to social movements to demand transparency, accountability and responsiveness from state agencies on behalf of the poor and disadvantaged. While the internal experience is not entirely relevant at the global level it does underline the role of power in the framing and invocation of GAL and the need in this regard for assigning a watchdog role to GSMs.

In Section VI an instance of administrative decision making by an international agency with grave implications for the life and liberty of individuals is examined. The reference is to Refugee Status Determination (RSD) undertaken by UNHCR without always adhering to the safeguards that the principles and procedures of administrative law demand. While this matter is now receiving some attention the situation remains disturbing. The case of UNHCR RSD emphasizes the usefulness of even a narrow definition of GAL. It also underlines the necessity for speaking in terms of a human right to administrative justice. The possibility of an ombudsman is also touched upon, a suggestion made by some refugee law scholars. However, given the politics of GAL its principles and procedures will not have support where the victims are nationals of the third world.

Section VII contains some final reflections on the question of winners and losers of GAL.

II

Character of Contemporary International Law and Institutions: Emerging Global State and GAL

Character of contemporary international law

I have argued elsewhere that contemporary international law has an imperial character (Chimni 1999; Chimni 2004). This characterization *inter alia* rests on evaluation of recent developments in the field of international economic law, the laws relating to the use of force, and international migration and refugee law. These developments have together laid the foundation of a world order in which the north-south divide continues to grow, the powerful states are less constrained in the use of force against third world states, and have constructed fortress Europe and fortress America to keep out both economic migrants and asylum seekers. The phrase “global apartheid” has often been used to describe the existing world order. If this characterization has a core of truth it is easy to overstate the role GAL can play in the democratization of international law. While it is important not to take a nihilist view it is equally significant to recognize the limits of GAL.

The emerging global state

At the national level the nature and content of “rule of law”, and thereby administrative law, is *inter alia* shaped by the nature and character of the state. For instance, administrative law has a different nature and character in liberal democratic states as opposed to states that are not democracies; in the latter case administrative law is somewhat underdeveloped and does not impose serious constraints on the working of the government administration. Non-democracies do not take seriously the ideas of transparency, accountability and responsiveness. This understanding is embodied in the WTO Appellate Body in the *EC Hormones* case where it established a legal link between democratic sentiment, in the form of “consumer anxiety”, and trade law. The *EC Hormones* case, in other words, suggests that GAL can assume different colors depending on the nature of national legal system (Chimni 2000: 1758; Perez 1998: 563, 572). In short, *a theory of administrative law anticipates a theory of state*.

Recent developments relating to international institutions can be described in various ways depending on the political theory employed to appreciate the empirical

developments. In the era of globalization international institutions are increasingly playing a significant and intrusive role, in particular vis-à-vis third world states. I would argue that *a global state is in the process of emerging* constituted by a range of international institutions that regulate social, economic and political life of states; third world states are in particular compelled to cede sovereign economic, social and cultural space to international institutions (Chimni 2004)². If it is correct that a global state is in the making, then it stands to reason that GAL is taking shape; conversely, the emergence of GAL is evidence of the emergence of a nascent global state.

What then needs to be theorized is the character of the emerging global state and its meaning for private actors. It is my contention that the character of the emerging state is imperial and this fact colors GAL; a transnational capitalist class (TCC) shapes international law and institutions to its advantage. Characterizing the global state and identifying the classes that exercise influence over it is important in the context of GAL for at least two reasons: first, it is the dominant classes at the global level that will exercise the maximum influence on the evolution of GAL. Second, it helps stress the fact that some actors are in a better position to use GAL for the defense of their interests. Thus, for example, a key agency of the TCC, the transnational corporation is better situated, given its huge resources, to use GAL to its advantage.

The dominance of the TCC can be, broadly speaking, be seen in the forms that global administration is assuming. These include: (i) the state becoming an administrative unit of the international institution; (ii) the state borrowing and introducing standards

² Thus, for example, Kingsbury et al note:

The World Bank's policies on good governance, whether designated as 'advice' or as conditions of financial aid to developing countries, have generated extensive codes of principles and rules for the organization and procedures of domestic administration, ranging from measures to combat corruption to practices of greater transparency and procedural guarantees for market actors. Given the dependence of many countries on aid, these World Bank norms have effectively transformed, or are in the process of transforming, domestic administration in large parts of the world. Comparable conditions imposed by the IMF on financial assistance to developing countries have had similar effects (Kingsbury et al 2004: 21-22).

from informal government and non-government networks without wider debate within nation states; and (iii) the international body taking administrative decisions without always adhering to fundamental principles and procedures of administrative law when it affects rights of marginal people, in this case asylum-seekers. The overall objective is to create a unified global economic space, to establish uniform global standards that ensure the free mobility of goods, capital and services, protect the interests of international finance capital, and ensure the immobility of human bodies, in particular of asylum-seekers.

State as an administrative unit

Today a GAL is emerging in which states themselves are seen as administrative units occupying 'an intermediate position' in the regulation of market actors. Thus, for example, in the context of WTO Stewart writes:

... there are emerging signs that the DSB [i.e., Dispute Settlement Body] regards member states as administrative agencies within this system. In order to promote a reasoned and predictable system of international trade regulation, the DSB has required member states that adopt trade-restrictive measures to provide decisional transparency, opportunity for affected parties to be heard, and reasoned justifications for decisions made. These rulings very much resemble those of U.S. courts reviewing administrative agency decisions. The *transformation of member states into regime administrative agencies* that must establish institutions and adopt decisional procedures to promote a rational and open system of trade regulation will be further intensified with implementation of the TRIPS and GATS agreements. The DSB will no doubt play a significant role in this implementation process through review of member state compliance (Stewart: 44. Emphasis added)³.

³ 'Professor della Cananea has shown how the WTO DSB is developing a body of requirements for Member State decision making in domestic trade-related regulatory administration that amounts to a globalized system of administrative law at the domestic level. These developments will intensify as TRIPS and GATS are fully implemented. These systems of administrative law are designed and required to ensure effective implementation of regime norms in member states with the objective of effective and consistent regulation of public and private market actors' (Stewart 2005: 48).

However, even when states occupy an intermediate position it is obviously difficult to capture GAL in the national administrative law format as the latter assumes a nation-state, representative democracy and active judicial intervention. Whereas at the global level there is no global state or parliament or equivalent of domestic courts (other than perhaps the case of the WTO DSB) that has jurisdiction over administrative law matters.

On the other hand, if the thesis of an emerging global state is accepted we would need to theorize its consequences in relation to global democracy and the need for judicial intervention. Among other things, as I will argue below, it calls for a broader definition of GAL than provided by Kingsbury et al. For the distinction between substantive rules and GAL is blurred when a state turns into an administrative agency of an international institution. While in the case of the first world this may at best be true in the context of WTO alone it applies in many other contexts (viz., the international financial institutions) so far as the third world is concerned. In the circumstances what perhaps also needs to be discussed are issues such as transparency, participation and accountability in treaty making as opposed to mere discussion of narrow administrative law issues based on a dualistic construction of international law (Battini 2004).

International regulatory networks

It is now customary to say that the State is no longer the exclusive participant in the international legal process even though it remains the principal actor in law making. The globalisation process is creating 'a multitude of decentered law-making processes in various sectors of civil society, independently of nation-states' (Teubner 1997: xiii). Global laws without the state are, however, 'sites of conflict and contestation, involving the renegotiation and redefinition of the boundaries between, and indeed the nature and forms, of the state, the market, and the firm' (Picciotto and Haines 1999: 360). Thus, for example the work of the Basel Committee has been crucial in regulating the liquidity and solvency of banks in individual jurisdictions in the United States and the European Union (Wiener 1999: chapter 3)⁴. On the other hand, the Basel Committee norms get implanted

⁴ The work of the Basel Committee led to legislation (the Foreign Bank Supervision Enhancement Act of 1991) being enacted by the US to incorporate the guidelines suggested by it and which may lead to the exclusion of third world banks from operating there (Id: 76).

in the third world without any serious discussion in democratic representative bodies⁵. Is one being over critical? Zaring sums up the situation well:

In some ways this proselytization represents a “best practices” approach to harmonization that is almost dialectical in its purity, whereby practices are compared and debated at organization meetings, after which the most attractive ones are selected and then recommended to regulators across the globe. In other ways, because these practices are devised by the developed world and spread to the developing world, the proselytization achievement of IFROs is, as Jonathan Macey puts it, nakedly imperialistic (Zaring 2004: 4)

GAL has therefore an important role to play in ensuring participation, transparency and accountability in these regards. It has in such cases also to ignore the distinction between “hard law” and “soft law” for the distinction is most often a function of power⁶. As Zaring notes with regard to the soft law emerging from international financial regulators:

... the problem is a First World/Developing World problem; a problems where the haves, speaking for the global economy, develop common regulatory standards over which the have nots have little (but not no) say. Financial regulatory cooperation in this way clarifies the prospects of the new global administrative process. It is a process open to the sophisticated, but not to all (Zaring 2004: 46).

International bodies and marginal individuals/groups

There are international bodies, such as in the WTO, which have an effect on the rights of the private actor, chiefly the corporate actor. But there are also international agencies such as the UNHCR that take administrative decisions that have serious consequences for the life and liberty of individuals. If the latter has not received the same attention it is because both the ruling elite in the first and third worlds are not greatly interested in the fate of asylum-seekers/refugees. In short, the emerging TCC, often through sheer neglect, determines what is worthy and what is not worthy of application of

⁵ Editorial “Basel II and Containing Risk”, *The Hindu*, 4 March, 2005.

⁶ The best example of it is the debate in the 1970s and 1980s around the establishment of a new international economic order.

the principles and procedures of GAL. The imperial character of international law and institutions, in other words, comes to determine the nature and content of GAL.

A fragmented GAL: Towards a “composite administration”

The image of GAL that emerges from even a cursory review of its different contemporary forms is that of fragmentation. In the circumstances, in the absence of the possibility of active judicial intervention (as in the case of EU), the idea of GAL at best would seem an imposition on the concerned field of action⁷. But this line of thinking needs to be resisted. For the absence of supranational institutions does not mean that administrative decisions of international agencies or private organizations are without serious consequences for individuals, firms, NGOs and states. Indeed, the need for a developed GAL is even more important given the democracy deficit that characterizes international institutions⁸.

Even at the domestic level ‘regulatory agencies generally operate at one remove from elected legislatures’. Therefore, ‘a central issue for administrative law is how to ground the administrative exercise of regulatory authority in electorally-based representative government or provide surrogate mechanisms of democratic accountability and responsiveness’(Stewart 2004: 11). This act of grounding becomes even more important, for instance, in the case of international regulatory networks and organizations for ‘they operate at an even further remove, often involve many nations and, in many cases, international non-state actors as well’ (Ibid). There is, in other words, the clear need to identify ‘basic process rules’ that may be ‘recognized as a common standard of reference in various fields of policy implementation’ at the international level (Nehl 1999: 4).

Nehl has used the phrase “composite administration” to describe EU administrative rule and decision making since core EU institutions are in place. However, its use is not entirely inapposite at the global level. The fact of fragmentation cannot take away from the fact that a complex network of administrative bodies with significant rule

⁷ For as has been observed in the case of EU ‘...the activity of the courts is widely seen as the focal driving force in establishing and juridifying standards of “good administrative practice”.....’ (Nehl 1999: 18).

⁸ On how to think about “democracy deficit” in the WTO see Howse nd.

and decision making powers are in place. The phrase “composite administration” helps draw the attention of the ordinary citizen, NGOs, firms and the government to the fact that there is thickening web of administrative rules and decision-making mechanisms in place that need attention. Further that this “composite administration” needs to be subject to fundamental procedural rules such as ‘the right to access to information, the right to be heard, the principle of care and the duty to give reasons’ that constitute ‘principles of good administration’ (Nehl 1999: 5)⁹.

But how is this goal to be achieved in the absence of judicial intervention. Perhaps, as Stewart has pointed out, we ‘need to an even greater extent than in a purely domestic context, *to liberate ourselves from a court centered conception of administrative law*’ (Stewart 2004: 10. Emphasis added). One possible alternative is to rely on GSMs to monitor and protest the violation of the right to administrative justice. I return to this issue after briefly considering the matter of definition of GAL in the backdrop of the above discussion.

III

Conceptualization of GAL: Broad and Narrow Definitions

GAL can be defined either in a narrow or a broad manner depending on the political theory used to give meaning to developments in the area of international law and institutions in the era of contemporary globalization. In his well known book on *Administrative Law* Craig draws attention to the fact that ‘an adequate understanding of the nature and purpose of administrative law requires us to probe further into the way in which our society is ordered. At the most basic level it requires us to articulate more specifically the type of democratic society in which we live and to have some vision of the political theory which that society espouses’ (Craig 2003: 3).

Kingsbury et al offer a narrow definition of GAL on the basis of a dualistic understanding of international law viz., that international law does not directly address

⁹ The latter two, as Nehl points out, have in the case of EC Law ‘gained increasing relevance in reviewing discretionary decision-making inasmuch as they have come to operate in a “compensatory function” or as a counter balance for (allegedly) reduced individual protection’ (Nehl 1999: 10). It should for that very reason have even greater place in GAL.

private entities and individuals (Battinni 2004)¹⁰. According to Kingsbury et al: ‘we may identify global administrative action as all rule-making and adjudications or other decisions of particular matters that are neither treaty-making nor simple dispute settlement between disputing parties’ (p.5)¹¹. The narrow definition of GAL thus incorporates the understanding that GAL represents merely an early departure from the continuing dualistic understanding of international law. It explains the search for examples of such departures to see if certain principles and best practices of administrative law can be brought to bear on them. Thus, for example, we can look at the work of the Codex Alimentarius Commission or that of the Basel Committee or the World Bank’s Inspection Panel. The idea is to identify all those agencies and mechanisms that should be subject to emerging principles and good practices that should/are coming to form part of GAL.

A broad definition of GAL goes beyond a dualistic understanding and takes into account the emergence of a nascent global state¹². It rests on the understanding that globalization has transformed the nature of international law and institutions undermining the idea of dualism. It has, among other things, turned nation states (albeit, as noted earlier, in specific contexts) into administrative agencies, compelling consideration of the idea of global democracy and global citizenship. This theoretical matrix is much more demanding in terms of defining GAL. The broader definition of GAL does not therefore, in the face of democracy deficit that characterizes international institutions and bodies,

¹⁰ ‘Implementing a U.S.-style system of administrative law at the level of international regulatory regimes will require, at a minimum, an institutional structure with distinct legislative, administrative, and independent reviewing bodies. Such a structure involves higher degree of institutional differentiation and legalization than currently found in most treaty-based regimes’ (Stewart 2004: 34).

¹¹ GAL is not about ‘the specific content of substantive rules, but rather the operation of existing or possible principles, procedural rules and reviewing and other mechanisms relating to accountability, participation, and assurance of legality in global governance’ (Kingsbury et al 2004: 14).

¹² For as Craig writes, ‘concepts such as accountability, participation and rights do not possess only one meaning’ and therefore ‘differ depending upon the type of democratic regime within which they subsist’ (Ibid).

necessarily exclude from view substantive rules; *the strict separation between substantive law and administrative law is difficult to sustain* in the face of a redefined dualism.

Separation of Substantive Rules and GAL

The broad definition runs up against the objection that if the focus of GAL is substantive rules it loses its *raison d'être* and edge. It cannot certainly be denied that the separation has merit, especially if seen as one move in a strategy of complex internationalism to push the global democratic agenda forward. It helps identify administrative spaces that presently escape democratic control. To put it differently, while radical critique of the existing international law and institutions is necessary it is naïve to believe that radical reconstruction of existing international law and institutions is possible. Change can only be brought about in an incremental manner. To that extent the narrow GAL definition and project is welcome.

However there is a downside to the exclusive emphasis on administrative law in contrast to substantive law. Even accepting that a narrow definition of GAL makes sense it is submitted that a complete separation between substantive and procedural rules is problematic.

First, to reiterate, from a third world perspective it limits the scope of possible reform. Indeed, it could be argued that in the absence of a simultaneous critique of substantive law GAL goes to legitimize unjust laws through taking focus away from their reform and instead talking of the democratization of administrative decision-making process. Surely, the norms relating to accountability, participation etc cannot be viewed in strict isolation from the substantive rules. The agencies/mechanisms that are to be made the subject of GAL are an internal part of substantive law. If the substantive law has an imperial character the potential that GAL holds for democratizing international laws is rather circumscribed. To put it differently, a restrictive definition of GAL deploys a truncated conception of global democracy.

Second, there is no unique way of classifying developments as representing GAL or from a GAL perspective. Thus, the *Shrimp Turtle* report of the WTO AB may either be seen as an important positive administrative law development as Kingsbury et al do or as an interpretation which transforms substantive rules to the disadvantage of the third world countries in the name of ensuring transparency, accountability and deliberative

democracy¹³. I have argued elsewhere that the WTO AB Report in the *Shrimp Turtle II* case (*United States- Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*) legitimizes unilateral trade measures to realize domestic environmental goals through linking it to a consultative process ignoring the fact that this process is itself subject to power dynamics (Chimni 2001; Schaffer 2005)¹⁴. More significantly, on my reading of *Shrimp Turtle II* case, the affected state cannot in the final analysis prevent a state taking a unilateral trade measure as the obligation is only to negotiate and not to arrive at an agreement (Chimni 2001). It is generally conceded that the *Shrimp-Turtle* cases have come a long way from the *Tuna*

¹³ Kingsbury et al observe: ‘A striking effort to promote forum state protection of the interests of the affected states is the first WTO Appellate Body ruling in the Shrimp/Turtle case. In order for process-based import restrictions to be admissible under GATT, the Appellate Body ruled, prior multilateral negotiations were necessary and the countries affected were entitled to some form of due process as well as consideration of their interests and local circumstances in specific decisions applying such restrictions taken by US administrative authorities’ (Kingsbury et al 2004: 21).

¹⁴ As Schaffer has noted :

....process-based review also raises serious concerns, in particular, because processes can be manipulated to give the appearance of consideration of affected foreigners without in any way modifying a predetermined outcome. Even if international case-by-case review were possible (which it is not), it will be difficult, if not impossible, for an international body to determine the extent to which a national agency actually takes account of foreign interests. Powerful actors can thus go through the formal steps of due process without meaningfully considering the views of the affected parties. In the shrimp-turtle case, the U.S. Department of State simply revised its procedural rules to comply with the Appellate Body’s criteria, while still requiring developing country shrimpers to use U.S.- mandated “turtle excluder devices” if they wish to sell their shrimp in the U.S. market’ (Schaffer 2005).

However he later adds:

The WTO Appellate Body, within the institutional constraints that it faced, attempted to foster second order institutional processes of less-biased participation that involve reduced coercion and increased inclusion of affected parties (Ibid).

I do not go along with the latter conclusion.

Dolphin cases in legitimizing unilateral trade measures for environmental protection. The idea of a prior due process should be given meaning only in that background.

Third, often the private actors hurt through the operation of substantive international law are not the actors involved in the violation of a legal obligation. Thus, for example, the WTO Dispute Settlement System (DSS) clearly affects the rights of private actors and individuals. Private parties may be made to bear the costs of non-compliance by a member state with the decision of the WTO Dispute Settlement Body. However, the WTO dispute settlement system does not give these actors an opportunity to be heard; neither can they seek compensation from concerned state actors (Alemanno 2004: 11)¹⁵. The unfairness of this kind of situation has led scholars like Charnovitz to suggest a reform of the WTO DSS:

One reform that is conceivable would be for the WTO to give private actors a right to defend themselves before a WTO panel. The need for this does not come up often. But when it does, the affected private actor lacks any right to respond.... (Charnovitz 23).

In short, to leave the private actor completely out is problematic. According to Charnovitz things are already changing: ‘The new relationship between the trading system and the individual actor is beginning to be recognized in WTO jurisprudence. The Section 301 panel cut through the fog by explaining that “it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix”, and by pointing out that the multilateral trading system is “composed not only of States but also, indeed mostly, of individual economic operators”’ (Charnovitz 26)¹⁶. To

¹⁵ Therefore, according to Alemanno: ‘Regardless of their origin, all economic operators affected by the non-compliance with a DSB’s decision should be entitled to seek compensation before the Courts of the losing Member who consciously and persistently chooses not to give effect to the WTO ruling. As a result, both the private parties directly affected by the WTO violation and those affected by the sanctions imposed as a result of the non-compliance, would be allowed to claim damages before the Courts of the losing WTO Member’ (Alemanno 2004: 31).

¹⁶ Alemanno suggests ‘that allowing individuals to seek compensation of damages deriving from non-compliance by the losing Member may be a valuable solution to strike a more fair balance between the interests of the WTO actors: its Members and their private business operators. Thus, the invokability of DSB’s reports could improve the

put it differently, the difference between substantive law and GAL has already begun to blur.

Fourth, in some institutions like WTO ‘the perspective of implied powers is dominant and the attribution of powers in the Agreements is not decisive for the actual exercise of legal powers’ (Kuiper 2002: 106). Kuiper notes that while ‘a certain measure of decentralization or delegation in decision-making within the WTO is inevitable and desirable for reasons of specialization and efficiency in decision making. Nevertheless, it may also be desirable that such decisions agreed at lower level receive some kind of benediction of “imprimatur” at the higher level, precisely in order to enhance legitimacy and transparency’ (Id: 109). Further, ‘the WTO presently abounds in “decisions” which have no legal basis whatsoever, are not presented in a standard legal format, but nevertheless purport to be “decisions”’ (Id: 106). All this again suggests that a sharp distinction between substantive and administrative rules is often difficult to maintain.

Fifth, to continue with WTO example, there are substantive rules that do not clearly specify to whom powers are delegated. In such cases decision-making eludes the grasp of GAL if attention is not paid to substantive rules. Thus, for example, it is not easy to understand the process through which WTO Appellate Body (AB) members are selected. There is a clear lack of transparency here. While some substantive norms with regard to qualifications etc are in place the process of selecting AB members is opaque. Leave aside ordinary citizens even those who concern themselves with WTO matters are not aware of the intricacies of the so called consultative process that is said to be the basis of selecting members of the AB. Transparency is crucial here not merely because of the power that AB has in the WTO dispute settlement system but because these powers are being exercised by persons whose selection process is little understood.

IV

Towards Global Administrative Justice

The notion of “administrative justice” is important to introduce in the context of the determination of winners and losers. Even accepting the partial separation thesis the question to be asked is how the notion of “administrative justice” can be embedded in

relationship that private operators have with the multilateral trading system without modifying its flexible nature’ (Alemanno 2004: 31).

international law and institutions¹⁷. Perhaps the most effective method is to root the notion of “administrative justice” in international human rights law. But can we talk of a ‘human right to administrative justice’?

Towards a human right to administrative justice

Bradley has argued in the EU context for a ‘human right to administrative justice’ ‘constructed on three pillars, namely, the right (or access) to judicial review; the requirement of an open, fair and impartial procedure; and full factual and substantive judicial control of the correctness of an administrative measure in instances of importance to the individual’ (Nehl 1999: 17 fn.5; Bradley 1995: 347). In the case of GAL two of these conditions do not mostly exist. However a human right to administrative justice at the global level may be advocated even without the possibility of exercising the right to access judicial review. The lack of possibility of enforcing the right is a separate issue; indeed, the human right to administrative justice needs to be the foundation of GAL precisely because positing it helps capture the problems that arise in the absence of active judicial intervention. The use of the language of rights in the context of administrative justice is a synoptic reference to a relevant range of human rights that create the pressure for establishing appropriate institutional mechanisms where their violations can be considered.

Thus, for example, reviewing cases from New Zealand and Australia on Article 3 of the Convention on the Rights of Child (CRC) Dyzenhaus writes:

... these cases together evoke the two important themes of jurisprudence on international human rights norms. First, there is the theme that a public commitment to membership in the international human rights community must, on pain of conviction of hypocrisy, be given domestic legal force. Second, there is the theme that when international human rights are in issue, they must be given

¹⁷ Which are the institutional mechanisms for the application and development of GAL: three types of mechanisms are singled out: ‘domestic institutional mechanisms used to check global administrative action; mechanisms adopted by transnational and international institutions to provide checks on their own work; and mechanisms constituted by the disciplines defined by global rules and institutions on the operation of distributed governance by states, hybrid governance, and private governance’ (Kingsbury et al 2004:16).

special weight when it comes to balancing their demands against the demands of other considerations, for example, public policy. Human rights cannot be considered in the sense of being thought about, only to be dismissed. There is a kind of logic to taking human rights seriously which requires them to be given special weight in the deliberations of public officials (Dyzenhaus: 19).

Effective participation in rule making: The Codex Alimentarius Commission

‘Building a roster of objective, scientifically based food-safety standards was seen as a potential safeguard for developing countries against developed nation efforts to disguise trade barriers as safety standards’ (Steinberg and Mazarr: nd). Yet it has not so worked out in practice. Steinberg and Mazarr have cited the following reasons for the influence of developing countries remaining weak: (1) developing countries most often do not participate in the meetings given the inability to meet the travel and other expenses of participants¹⁸; (2) members from developing countries have received little support from their governments¹⁹; (3) developing countries have held few leadership positions in the primary committees²⁰; and (4) the complexities involved in ‘tracking implementation requirements’²¹.

¹⁸ ‘In a 2000 survey of Codex and/or ISO members in the developing world, 81 percent replied that they did not attend meetings as often as they felt necessary, and the overwhelming reason given was the cost of attendance. In 1997, for example, only a small percentage of developing countries that were member states sent delegations to Codex, while most developed member states were represented’ (Steinberg and Mazarr nd: 6).

¹⁹ ‘Finally, as in other forums, developing state members of Codex have often received *little meaningful support from their home countries*, in the form of technical information, financial assistance, or coalition-building efforts. The lack of effective civil society institutions supporting and/or critiquing government policy on food-safety issues is a striking gap’ (Steinberg and Mazarr nd: 6).

²⁰ ‘Developing states *hold few leadership positions*. Of the primary committees listed on the Codex Web site, only two are hosted by developing or transition economies, and these are upper-middle tier nations—Hungary and Mexico. This pattern is common to standard-setting bodies. In the related case of ISO, for example, in recent years developing countries comprised about 75 percent of membership but held only about 2 or 3 percent of the secretariat positions and committee chairs’ (Steinberg and Mazarr nd: 6).

²¹ ‘*Tracking implementation requirements* has proven to be difficult, partly because of the great complexity of a system in which international Codex standards sit uneasily on top

Steinberg and Mazarr have recommended a number of strategies to increase the presence and participation of developing countries. These include: (1) creating a trust fund to ‘subsidize developing country participation and capacity building’. In addition meetings may be held in the region in order to reduce travel costs; and (2) establishing an effective mentoring program ‘whereby developed country delegations offer advice, for example on the drafting of papers, to developing countries, sometimes via e-mail between meetings’ (Steinberg and Mazarr nd: 7). The overall idea is to encourage deliberative democracy in the rule making process. As Habermas persuasively argues the legitimacy of rule making depends not merely on the fulfillment of technical procedures but on the observation of the substantive norms of communicative action (allowing free and informed participation) in the process leading to a decision in pursuance of “common interests” (Chimni 2005).

Need for Regime Ombudsman

The goal of administrative justice immediately conjures up the image of a global ombudsman. However, it is without doubt a utopian idea today. What is practical is to think of an office of ombudsman in the context of specific legal regimes. In a later section where the Refugee Status Determination activity of the UNHCR is considered this idea, advanced by some refugee scholars, will be touched upon.

V

Enforcing GAL: Lessons from Administrative Law in India

In the absence of the possibility of active judicial intervention to implement GAL it is arguably left to GSMs to promote mechanisms of accountability by pressing for transparency and responsiveness that cannot be disregarded if institutions are not to lose legitimacy in the eyes of the global public. GSMs, in other words, are the possible guardians of the principles of GAL. The experience of third world countries is of relevance here as access to judicial review of administrative rule and decisions is not practicable for a vast majority of its people. It is merely a theoretical possibility.

of dozens of conflicting national ones. The Codex itself might demand 20 yearly committee meetings, held all over the world, each with its own highly technical information to be digested and decisions to be made (Steinberg and Mazarr nd: 6)

Writing of India, for example, Baxi has observed that ‘administrative law in India is an archive of violent social juridical exclusion of suffering of the Indian “masses” and a saga of solicitude for the Indian “classes”’ (Baxi 2001: xiii):

We have to realize that the great utterances of courts on fairness, freedom from arbitrariness and natural justice have little or no relevance for the untouchables, adivasis, landless laborers, bonded labor, casual and contract labor, undertrials and prisoners, beggars and ‘vagrants’, mentally sick (‘lunatics’) and many other allied groups of underprivileged and deprived (Baxi 2001: xxiv)²².

He talks about the ‘boundless manipulability’ of administrative law by the “middle classes” to stop it from realizing its ‘benign potential’ (Baxi 2001: xiv-xv). Therefore the central question is ‘how do we re-imagine, refashion, retool administrative law doctrines and methods (technologies) in ways which will truly begin to protect and promote the rights and interest of the impoverished masses of India?’ (Baxi 2001: xxvii).

Baxi suggests, a la Stewart, that ‘we ought to bear in mind that courts are not the only agencies for combating and controlling excesses of public power’ (Baxi 2001: xxxiv). Indeed, according to him, ‘it is doubtful that courts have been the decisive instrumentalities of generating an ethic of power anywhere in the world’ (Id: xxxv). At one point he goes on to say that ‘taken in its entire context, the appearance and reality of judicial arbitrariness presents a grave threat to the development and impact of administrative law jurisprudence towards the growth of an ethic of public power’ (Id: xxxvii-xxxviii). He suggests exploring feasible alternative options of administrative law (Id: xxxviii). One alternative option is, in my view, to assign a watchdog role to GSMs.

Their role can prove critical at the global level where judicial intervention is not often a possibility. GSMs can be alert to violation of the right to administrative justice and compel transparency, accountability and responsiveness in international institutions

²² He goes on to write: ‘How the vital and germinal principles and techniques of judicial control of administrative action can be extended to more than half of India’s downtrodden and exploited humanity is a question that the contemporary and future generations of Indian students, scholars, judges and lawyers must continue to ask when they turn to administrative law’ (Baxi 2001: xxiv).

that suffer from serious democracy deficit²³. The GSMs have played an effective role, for instance, vis-à-vis World Bank by bringing pressure on member states (albeit it has not made a substantial difference to the basic role the Bank plays in international economic relations)²⁴. The World Bank's 'opening to civil society can be traced to its need to respond to its demands from funders for increased transparency and responsiveness' (O'Brien et al 2000: 218).

What is more problematic is operationalizing the watchdog role of GSMs beyond pressurizing member states of international institutions. One possibility is the formation of *global teams* of individuals and NGOs to monitor administrative decision-making in specific institutions.

VI

GAL and the Third World: UNHCR and Asylum-Seekers²⁵

I now turn to an area of administrative decision making by an international agency—the UNHCR-- that has been 'little studied' (Kagan 2005: forthcoming). The UNHCR carries out refugee status determination (RSD) with grave implications for the life and liberty of an individual²⁶. The numbers for which RSD is conducted has steadily grown:

²³ 'In the past, most international institutions relied on the formal membership of national governments as a proxy for this broad participation. In practice, however, this approach falls short on both effectiveness and legitimacy grounds for three reasons. First, many governments, especially in the developing world, lack the expertise and resources needed to participate meaningfully in international organizations. Second, governments do not always fully reflect the interests and perspectives of all stakeholders (particularly from civil society) thus depriving the institutions of important information necessary to carry out their tasks and to gain broad acceptance. Third, the procedures and processes employed by these organizations create barriers to participation for developing countries and for civil society constituencies' (Steinberg and Mazzar nd: 2).

²⁴ The reasons for which would of course take us into the realm of substantive law and policies.

²⁵ This section relies heavily on the work of Michael Kagan, including his forthcoming article on RSD performed by UNHCR in *International Journal of Refugee Law* (Kagan 2005: forthcoming).

²⁶ 'The stakes in refugee cases are grave; an incorrect decision can lead a person to detention, torture, execution, or other severe human rights violations. Unstructured and

The number of individual RSD applications received by UNHCR offices worldwide nearly doubled from 1997 to 2001. UNHCR performed RSD in at least 60 countries in 2001, nearly all in the developing world, and received approximately 66,000 individual refugee claims, more than the United States, five times more than Australia, and about as many as Austria, Belgium, Denmark, Greece and Spain combined. UNHCR RSD predominantly affects urban refugee populations, and is particularly common in the Middle East (Kagan 2005)²⁷.

Most of the RSD of UNHCR, as has been noted, is done in third world states²⁸. The UNHCR may be either solely responsible for RSD or the government may be taking decisions but relying often on UNHCR assessment of cases (Ibid). The UNHCR steps in only when a government is 'unwilling or unable to do so' (Ibid). 'In 2001, more than half of the states where UNHCR performed RSD were in fact parties to the Refugee Convention' (Ibid).

UNHCR RSD facilitates protection for refugees in three principal ways: 'promoting the principle of *non-refoulement*, assisting in the promotion of durable solutions, and identifying refugees in need of social and economic assistance' (Kagan

unreviewable credibility assessments lead to inconsistent decision-making and great risks of mistaken refusals to protect people in danger' (Kagan 2005: forthcoming a).

²⁷ 'Backlogs of pending cases at UNHCR offices have grown as well, with more than 70,000 people waiting for UNHCR to decide their cases at the end of 2001' (Kagan 2005).

'UNHCR was solely responsible for RSD in at least 48 countries. Twenty-six of these countries were parties to the 1951 Refugee Convention. UNHCR was the world's largest individual RSD decision-maker in 2003, receiving more new applications for protection than Germany (50,563), the UK (49,369) or the USA (43,338). 56,392 refugee claims were filed with UNHCR in 2003. *Each claim can involve several family members, so the exact number of people affected is actually likely much larger*' (Emphasis added).

²⁸ 'Although most of this activity has been in the geopolitical south, UNHCR has also occasionally offered its RSD services as a means of resolving refugee protection conflicts in wealthy countries. In one of the most controversial recent examples, UNHCR performed RSD in Nauru to resolve the crisis over the Australia-bound asylum-seekers who were rescued at sea by the Tampa in 2001. UNHCR also offered to perform RSD to help resolve the British-French dispute over the Sangette camp near Calais in 2002, though in that case the governments did not accept' (Ibid).

2005: forthcoming). Through RSD ‘the U.N.’s refugee agency effectively decides among asylum-seekers who can be saved from deportation and in some cases released from detention, who can get humanitarian assistance, and often who can apply to resettle to third countries’ (Ibid).

In the last decade some studies have appeared that have pointed to the lapses in the conduct of RSD by UNHCR (Alexander 1999: 251; Kagan 2005). Both academics and NGOs have concluded that the RSD done by UNHCR fails to meet basic fairness procedures (Alexander 1999; Kagan 1993; Kagan 2005; Human Rights Watch 2002). At the 55th annual session of the UNHCR Executive Committee meeting in Geneva in October 2004, a joint statement by NGOs noted:

[W]hile recognizing the important role played by UNHCR in asylum determination procedures in many countries worldwide, NGOs have concerns that some of UNHCR’s refugee status determination (RSD) practices in some countries in Africa, the Middle East, and Asia do not always meet the standards of fairness to which UNHCR urges states to adhere. This includes *the use of secret evidence; failure to provide reasons for rejection to unsuccessful applicants; the lack of independent appeals processes; denial of the right to legal counsel; and the use of untrained interpreters*. NGOs feel UNHCR’s role in RSD can potentially compromise the organization’s mandate to protect refugees and reiterate that refugee status determination is the responsibility of states. UNHCR should not see its role in RSD as a substitute for government-run procedures. UNHCR should make it a priority that governments take over these activities and build their capacity to do so. We call on UNHCR to initiate public consultations on the new draft refugee status determination procedures (Emphasis added)²⁹.

²⁹ NGO Statement on International Protection, UNHCR’s Executive Committee, 4-8 October 2004, 8 October 2004. Alexander observes: ‘Far-reaching developments in administrative law in many countries over recent decades have flowed over into the field of refugee status determination. Whilst there are considerable variations, modern systems of administrative law have the general aims of ensuring fair, transparent, and lawful decision-making by government, ensuring that decision-makers are accountable, and recognising the rights and interests of people who are affected by government decisions. These improvements have occurred in the context of the development and increasing

In a separate joint statement about UNHCR's Evaluation and inspection program, NGOs called for an independent assessment of UNHCR's RSD work:

[W]e would like to strongly recommend, as was suggested at a previous session of the Executive Committee, that *an independent evaluation* be carried out on UNHCR's refugee status determination (RSD) activities. As noted in our statement on International Protection to EXCOM, we are concerned that UNHCR's role in RSD can potentially compromise the organisation's mandate to protect refugees. UNHCR currently conducts RSD in more than 60 countries and more than half of these are parties to the 1951 Convention.

We would suggest that such an independent global evaluation be carried out by a team that includes international human rights lawyers, international and national NGOs working on refugee issues, academics, and legal aid practitioners. The issues that should be examined in the evaluation include an inventory of the RSD procedures that are applied in each UNHCR field office, with an examination of the possible solutions to the political, financial, and human resource constraints that

prominence of international human rights law, which lays down standards for governments about the processes for determining the rights and obligations of people. Thus, the mechanisms in many countries include:

- administrative tribunals, which carry out external review of the merits of a decision,
- judicial review of decisions by the courts,
- ombudsmen, who can investigate administrative processes,
- freedom of information laws, enabling people to have access to information held on government files, both in relation to themselves individually and in relation to general government policies.

These developments appear to have had little impact on the administrative systems of UNHCR or the United Nations system in general' (Alexander 1993-4).

In 2001, UNHCR explained international legal standards regarding RSD appeals:

A key procedural safeguard deriving from general administrative law and essential to the concept of effective remedy has become that the appeal be considered by an authority different from and independent of that making the initial decision (cited by Kagan 1993: 48).

contribute to RSD procedures that do not fulfill practices advocated by UNHCR. The evaluation should recommend rights-based RSD procedures to be followed consistently by all field protection officers with a mechanism to ensure their implementation³⁰.

In a study done by *Human Rights Watch* that *inter alia* looked at UNHCR RSD in Nairobi it made the following recommendations

- UNHCR should provide all asylum seekers with written information in their own language on: i) the legal standards to be applied; ii) a realistic indicative timetable for each stage of the determination process; and iii) when applicable, detailed reasons for rejection. For purposes of accountability, both the asylum seeker and the officer conducting the interview should sign this written information indicating that it was transmitted and received.
- UNHCR should post a notice board indicating by case number as made known to each asylum seeker (individual identities should not be disclosed) the progress of processing for each asylum seeker's file. If confidentiality concerns still prevent being able to post individualized tracking systems aligned with each asylum seekers' case number, then at least a generalized tracking system should be posted, indicating the progress of all files submitted on a given day.
- UNHCR offices should have adequate personnel and resources so that status determinations are fair and efficient, keeping in mind the particular difficulties and needs of applicants (Human Rights Watch 2002).

Academics such as Kagan have suggested that 'clear standards of transparency' should be established. The 'UNHCR can take several steps to improve the standards and transparency of its RSD work:

- Publish clear guidelines for field office mandating them to follow procedural standards advocated by UNHCR for states.

³⁰ NGO Statement on Evaluation and Inspection Activities, UNHCR's Executive Committee, 4-8 October 2004, 10 October 2004.

- Publish all currently internal policies and procedures (whether local or global) concerning RSD, unless there are compelling reasons to keep a particular section internal.
- Create a UNHCR RSD ombudsman office, and publish an annual or biannual report assessing and detailing RSD procedures used at its various offices.

If the UNHCR does not do so *inter alia* would ‘erode UNHCR's moral authority’. UNHCR could also, both Alexander and Kagan suggest, establish ‘an independent UNHCR RSD Appeal Tribunal staffed by independent refugee law experts to publish rulings on selected cases emanating from field offices that raise important legal issues’:

All rejected asylum-seekers would continue to enjoy an appeal of right in local field offices. This tribunal would be a tertiary appeal level (rather than an automatic appeal) that would select cases from field offices that raise important issues. Its decisions would be binding on UNHCR offices, allowing UNHCR to develop an evolving body of jurisprudence from real cases. It would be similar to having an international refugee court, but since this tribunal would only hear appeals from U.N. offices, it would lack the political downsides implied in having a U.N. agency reviewing decisions by governments. Nevertheless, its precedents could be persuasive guidance for domestic courts hearing refugee cases.

In recent years, UNHCR has repeatedly announced a commitment to improve its RSD activities³¹. UNHCR has indicated that it has drafted a new Handbook governing its RSD work³². Critics complain that ‘to date, UNHCR has not made public any of these

³¹ http://www.rsdwatch.org/index_files/Page441.htm

³² In October 2003, UNHCR’s Director of International Protection Erika Feller told the UNHCR Executive Committee:

This autumn, the Department will issue a procedural standards directive for refugee status determination under UNHCR's mandate. The purpose of the latter is to promote greater harmonization in UNHCR's RSD procedures and to improve standards of due process, integrity and oversight.

On October 7, 2004, Feller told the Executive Committee:

DIP [Department of International Protection] has also increased its operational support to the field on RSD-related matters, even while it is

documents referred to in these official statements about reform, although NGOs have called on UNHCR to initiate public consultations’³³.

VII Conclusions

The emergence of GAL is to be welcomed. It *inter alia* draws attention to a range of rules adopted, and decisions taken, by international bodies and non-state organizations that affect the rights of private actors, often without adhering to the basic principles and procedures of administrative law. This situation calls for urgent attention and rectification. However, from a third world perspective GAL has a limited role in injecting the elements of equity and justice in international law and international institutions. While this is no reason for neglecting the development of GAL, it is important to understand its limits. Equally, one needs to appreciate the opportunity GAL offers powerful states in legitimizing unjust legal regimes. In the circumstances, a broader definition of GAL that does not rigidly distinguish between substantive rules and dispute settlement on the one hand and administrative rule and decision making on the other would be helpful in dealing with the concerns of the poor world.

There are problems however even if a narrow definition of GAL is accepted. First, there is once again the issue of the rigid separation of substantive and procedural rules, this time from the point of view a narrow conception of GAL. Second, third world states and its people do not often have the resources (both material and human) or the power to make developed states or international regulatory agencies conform to the principles of GAL. It would be a pity if GAL merely advances the interests of the corporate sector, both domestic and transnational. Third, it is the citizens of the third world that are often the victims of non-adherence to principles of GAL, as is the case

assessing the results of the field testing of the Procedural Standards for RSD Under UNHCR's Mandate, which were issued at the end of last year and distributed for initial implementation among Field Offices. We are also undertaking a concerted analysis of the role of RSD in UNHCR's global protection strategies, with a view to seeing where we should be strengthening our efforts, as well as where RSD might not be the correct response.

³³ Ibid.

with RSD of UNHCR. In such instances there is little interest in the first world to develop GAL.

Yet, the GAL project needs to be pursued. It must however be embedded in international human rights law, the foundation on which to establish a human right to administrative justice. There is also the need to think of specific measure such as the creation of the office of Ombudsmen with respect to specific regimes. Thus for example the office of Ombudsmen may be helpful in the case of UNHCR RSD activity.

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Annex I

RSD Applications to UNHCR

2003	56,392
2002	44,240
2001	65,911
2000	68,583
1999	60,190
1998	106,560*

Annex II

Countries where UNHCR Performs RSD

2003

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<u>State</u>	<u>Applications</u>
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Afganistan	64
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Algeria	1
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Azerbaijan	878
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Bahrain	1
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Bangladesh	49
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Bosnia/Herzegovina	739
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Cambodia	91
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Cameroon	1,356
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China	60
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Congo	536
DRC	631
Egypt	6,680
Eritrea	201
Hong Kong	390
India	643
Indonesia	230
Iran	38
Jordan	3,566
Kenya	4,195
Kuwait	14
Lebanon	674
Libya	391
Malaysia	14,747
Mauritania	133
Morocco	64
Niger	45

Oman	-
Pakistan	5,779
Paraguay	8
Qatar	30
Rwanda	1,702
Saudi Arabia	128
Serbia/Montenegro	138
Sierra Leone	6
Singapore	9
Somalia	318
Sri Lanka	14
Syria	1,660
Thailand	4,025
Timor-Leste	14
Togo	329
Tunisia	67
Turkey	3,952

Turkmenistan	40
UAE	81
Uruguay	18
Uzbekistan	422
Yemen	1,235

Source: http://www.rsdwatch.org/index_files/Page393.htm