"Deliberative," "Independent" Technocracy v.

Democratic Politics: Will the Globe

Echo the E. U.?

Martin Shapiro

The building blocks for a future trans-national and sometimes global, administration law are not difficult to identify although there are quite a number of them. Some can be derived almost entirely from past U. S. experience. The E.U., lying somewhere between an international treaty based organization and a constitutional federalism, is particularly instructive, and the WTO and NAFTA share the free trade aspects of the E. U. Finally parallel or converging developments in administration and its law in
a number of advanced post-industrial states also are highly suggestive of future trans-national developments.

The first great building block is regulation. Health, safety, environmental, consumer protection and labor regulations designed to mitigate the down sides of capitalist free markets have been a major feature of the political economies of individual states for a long time. They had multiplied enormously by the late 20th Century due in part to the great ideological upswing in environmentalism and fear of risk and in part to the movement away from socialism toward markets and thus the perceived need for more market regulation.

By the 21st Century some of this blossoming of regulation had moved on from parallel national development to trans-national arenas, most notably the E. U. which moved from

clearing away a dense web of national regulation inhibiting cross-border trade to itself creating a dense web of trans-national regulation. Both WTO and NAFTA are now showing a comparable potential. The dynamic of extended free trade and extended regulation is simple enough. Differing national regulations are an impediment to trade. Differences in costs to producers imposed by differing national regulations lead to competitive advantages and disadvantages among national trading partners and fears of deregulatory competition among them in a "rush to the bottom" of regulation to gain competitive advantage. The obvious answer is leveling the playing field through the substitution of trans-national for national regulation. Both in free trade areas organized as federal states and those organized somewhere further toward the pure treaty based international organization, this movement of regulation making "upward" leads to issues about which level of governance shall do how much of the implementation of the trans-national regulations made.

Long and detailed study, mostly of American experience, has made it clear that policy making and policy implementation can never be wholly separated. The problem is particularly acute in government regulation, as opposed to service delivery, because the matters being regulated experience rapid and complex economic and technological change and incredible variation in detail over time and place. In regulation the devil is in the details. Failures of regulation are most obvious at the pit face where regulations are actually being implemented. Given the complexity of what is being regulated and the consequent complexity of the necessarily over general regulations being written, the attainment of regulatory goals and purposes depend heavily on the many and continuous detailed interpretations of the general rules

that must be made by implementors. So, alas, policy making from on high and administration from the bottom is never wholly feasible, even if desirable.

If administrative law is, among other things, the set of rules for the making and implementation of regulation, then as we anticipate the growth of trans-national regulation with endemic problems of which level of governance does how much of what, we may anticipate the growth of transnational administrative law.

Because much of this regulation will be of relatively high tech economic activity we can also anticipate that this growing trans-national administrative law will encounter the same issues that the administrative law of high tech national regulatory schemes have faced in the past. At least for those high tech states pretending to democracy, one central issue has been democracy versus technocracy. Precisely because what is being regulated is technologically complex and rapidly changing it is obvious that regulators must have high technical skills themselves. You cannot regulate what you can't understand. It has become widely recognized, however, that by virtue of the very specialization of knowledge demanded for the achievement of high technological skills, experts are themselves special interest groups whose perspectives and self-interests render them nonrepresentative of the demos as a whole. There is an inevitable tension between democratic control of public policy, including regulatory policy, and regulation by experts. This tension is a second major building block of a trans- or global administrative law.

This tension is aggravated along a number of dimensions. One traditional solution: having the experts "on tap but not on top" does not work very well. Given one set of people who know something and another who don't, and our normal western belief that brain surgeons, not the man off the street, should do brain surgery, the experts supposedly on tap are likely in reality

to end up on top. The non-experts on top may seek to shield themselves by soliciting rival expertises, but ultimately such a tactic will render the policy discourse more and more elaborately technical and further and further beyond the comprehension of the non-expert. Faced with deciding something they clearly cannot understand, the non-experts must either appear arbitrary or seek consensus among contending experts thus again reversing who is really on top.

A second solution, apart from contending experts, was the proclamation of a special expertise topping other expertise. This approach can be seen in the traditional, now largely defunct, British civil service tradition of the "administrative class," and in talk of "leadership" in professional military and "diplomacy" in professional diplomatic corps. In such settings there is the admission of the need for, but denigration of, specialized experts and preference for the generalist who can see the big picture and coordinate the tunnel visions of all the experts. The general is called the general and commands precisely because he is not, or no longer is, the infantry man, the artillerist or tanker but because he can coordinate all arms.

However much this view has survived in the military, it has largely gone from the general public service, a victim of the dreaded new public management. It was precisely such corps of elite, generalist, career civil servants, so targeted by the "Yes Minister" television series, that was the epitome of the hated bureaucracy that NPM was to destroy and replace with a new set of people with "management" skills directed at getting the job done, that is producing the particular service assigned to their particular agency to produce. (There seems to have been little attention among NPM types to the fact that in the private sector they so wish to emulate the big bucks go not to managers who produce services, but to corporate strategists.)

Moreover the generalist high civil servant, serving the public interest rather than the narrower interests of technological specialists or the clients who seek to capture them, are, from the perspective of currently in vogue rational choice acolytes, a mere fiction. There really is no public interest but only the special interest of whatever actor is projecting that interest onto the public. The civil service mandarinate has the disadvantage of not having the technical knowledge to understand what it is doing without the advantage of actually pursuing any public interest beyond its own interest in cultivating its own perquisites, perquisites most easily defended by maintaining the status quo.

As Ezra Suleiman notes in a recent book,[1] the concomitant of this withdrawal of faith in a public service mandarinate has been the politization of the executive strata of the public service. In order to make government more politically responsive and responsible, more and more government executives should be politically appointed. In one sense this move does address the problem of democracy versus technocracy. It seeks again to put the technocrat on tap but not on top and to place on top that genuinely non-expert, generalist, reflector of the public's perspectives, the politician. Political executives, however, may find themselves even more easily captured by the experts than civil service mandarins because they do not spend as much time in government executive positions as do senior civil servants and so have less opportunity to learn how to keep experts on tap. Moreover the very distrust of government that led to the politization of the executive, exacerbates the distrust when political executives are perceived by the public as using executive office for partisan advantage.

An acute problem at national levels, the balance between technocratic and democratic government is even more acute at transnational levels. National, technocratic bureaucracies are

embedded, and, at least formally, subordinately embedded in national governments that, in democratic states, are directly electorally accountable to the people. At transnational levels technocratic administration is likely to precede directly electorally accountable government. Even if we do not subscribe to functionalist or neo-functional theories of international organization, certainly our immediate practical experience with transnational organizations support this point. The EU with its thick web of regulation and notorious "democratic deficit" is an obvious example. It is difficult enough to put the expert on tap but not on top when there is an elected, politically accountable top, much harder yet when there isn't.

The U. S. and the E. U. provide instructive examples of the two ends of the spectrum. In the U. S. the New Deal ushered in a renewed respect for the virtues of an executive branch dominated by a super-democratic President, F.D.R. In administrative law that led to a sweeping judicial deference to the so-called "expertise" of the newly expanded and empowered bureaucracy. At this stage technocracy is seen as a virtue because it is supposedly subordinated to a President with the greatest democratic mandate in American history. The reformation of American administrative law consists of an upwelling of judicial suspicion of technocracy. The judges' weapon is the introduction of participation and transparency requirements on the technocrats which, in effect create a new variety and level of democratic control over bureaucracy, substituting the pluralist democracy of interest groups surveillance for the electoral democracy of Presidential control.[2] This pluralism supplemented by policy intervention by the judges themselves as virtual representatives of the non-expert demos.[3] The next, and inevitable stage, in this evolution is a resurgence of technocracy. Under interest group scrutiny the

government learns to armor its policy choices in real rather than assumed expertise and litigation becomes the clash of opposing experts offered by government and interest groups.

The result is far more thoroughly tested and justified government policies but also the much complained of long delays in and high costs of decision. A second result is the retreat of the judge as lay assessor of agency performance as the very records demanded by judges become far too technically complex for the judges to understand. Thus the very developments in administrative law designed to subject technocrats to democratic control have rearmed the technocracy. At best what is achieved is a kind of competition among technocrats, some in government and some employed by interest groups rather than the previous monopoly of the technical granted to government by the old judicial deference to administrative expertise. There may be some offsetting democratic pressure from alleged increased Presidential partisan influence on regulatory decisions, but, if so, it occurs not with the assistance of, but in the teeth of, an administrative law that requires agencies to pretend that their decisions are fully technically justified.

In the E.U. comparable dynamics of judicial demands for transparency, participation and full justification may be emerging,[4] but the far more obvious trend has been an attempt to recruit technocratic legitimacy for government regulation as a substitute for democratic legitimacy.[5] The Council is the general law maker for the Union. It is not directly elected. Its members are delegates, typically cabinet members, of the member states. Given the parliamentary form of all those states, such delegates are indirectly democratic in that they are members of and sent by the elected governments of the member states. Further democratic elements are that voting on the Council on most questions reflects population with the delegates of more populous states casting

more votes and the increasing role of the directly elected Parliament in the law making process. Yet for a variety of reasons, most notably the only incipient development of Union-wide political parties, the E.U. itself enjoys a far less democratic law making process than do each of its member states.

As the experience of all developed modern states makes clear, secondary, detailed norms, called rules in the U.S. and delegated legislation in the U.K. are a vital element in regulation. It is the rule making process that was transformed by the transformation of U. S. administrative law. In the E. U. the Council passes a great deal of regulatory legislation that delegates the making of such rules to committees. Typically each particular Council enactment of this sort creates an ad hoc committee, ad hoc in the sense that it is created solely to draft rules for this one statute. The membership of each such committee is chosen by the E. U. Commission and must consist of technical experts from each of the member states. Initially committee proceedings were totally opaque. Now some elements of transparency have been added. The Commission itself is a non-elected technocratic body. If the expert committees and the Commission agree on a draft rule, it becomes law. If not, the committee draft is subject to a kind of legislative veto device wielded by the Council. The "comitology" process thus exhibits an extremely attenuated democratic control over technocratic decision making.

This vice is celebrated as a great virtue by the defenders of comitology.[6] They argue that precisely because the E.U. government as a whole is deficient in democratic legitimacy, there is a need to substitute technocratic for democratic legitimacy. Indeed regulatory decisions should be kept out of politics entirely and instead made purely on objective, technical grounds, that is on considerations of technological feasibility and economic efficiency. Any untoward

consequences of such objective decisions, for instance geographically or sectorially concentrated employment losses, should be handled by compensatory measures enacted by the political process rather than politically motivated "distortions" of the objective regulatory process. Their very objectivity will recruit publicly perceived legitimacy for comitology generated rules.

As a purely practical matter, it is greatly to be doubted that European publics endow technical bureaucracies with very high levels of legitimacy. Whatever endowment there has been has been gravely drawn down by the Mad Cow, French blood and other such episodes, and by recent Commission scandals. All modern governments are highly technocratic, and the contemporary withdrawal of popular trust in government hardly distinguishes between its political and technocratic elements. Indeed anti-E. U. sentiment is far more often expressed as anger with the Eurocrats than as distaste for its explicitly political organs. Technocrat legitimacy may be a very weak reed to substitute for democratic legitimacy.

More generally the hope of separating regulatory decisions into purely technical, non-political ones to be handled by technocrats and compensatory ones to be handled politically seems a hollow one. First it seems highly improbable that all regulatory questions have single, fully known, technically and economically correct solutions totally devoid of discretionary elements. It seems very late in the day to argue for a wall of separation between politics and a policy science. Secondly it would seem utopian to expect that politicians, who will ultimately be held responsible for the costs imposed by regulation, will wait until after regulation has done the damage and then scurry around trying to make repairs by compensatory welfare programs. Isn't it more likely that they will seek to head off the damage by intervening in the regulatory process. Regulation frequently involves gaining diffuse benefits involving concentrated costs, e.g.,

cleaner air at the cost of less profits and fewer jobs in the auto industry. Geographically elected politicians, and E. U. politicians are geographically elected, are likely to be particularly sensitive to such regulations, but all elected politicians are necessarily more concerned with concentrated costs no matter what the diffuse benefits than are technocrats. Voters are more likely than technocrats to weigh such costs more heavily than such benefits.

Thirdly, and the growing demands for, and attempts at, comitology transparency foreshadow this point, interest groups, aware that the devil is in the details and the advantages of getting in early, are not going to be prepared to wait around until their particular interests are damaged by "objective" technocratic decisions and then limit themselves to seeking compensation from the politicians. They want into the earliest stages of the regulatory process, and if they are told that those stages are technical, they are more than happy to offer their own technical experts to assist.

The E. U. comitology process obviously is particularly instructive for anyone considering the future growth of trans-national or international regulation and its concomitant administrative law. Given the difficulties of achieving political consensus among nation states, particularly where proposed transnational regulatory decisions potentially concentrate costs in some to achieve benefits for all, the appeal of trans-national committees of experts fashioning objective regulatory norms is obvious. Some would argue that the current stage of E. U. comitology is a good model for future international regulatory regimes and for other trans-national schemes beyond the E. U. And at their pure first stage, the E. U. committees were subject to no administrative law and no judicial review at all. I would argue that comitology points more to a problem than a solution. The long and hard campaign of the E. U. Parliament to intervene in the

comitology process and the recent Commission initiatives[7] toward greater committee transparency indicate that many Europeans do perceive comitology as raising rather than resolving democracy versus technocracy issues.

The comitology process also yields another major building block for imagining a global administrative law. For in its origins the comitology process was designed not to empower technical experts but to empower nations. The committees consist of members from each of the member states. While these persons are chosen by the Commission and are not literally representatives or delegates of their home states, they are almost invariably drawn from experts serving directly in their national governments' civil services, researchers in government financed research organizations or faculty serving in government controlled universities.

The logic was simple enough. If the Council is the meeting place of the member states, then committees wielding the delegated law making powers of the Council should also be the meeting place of the member states. What this logic does not quite comprehend is that when the meeters are not nationally elected politicians but national technical experts responsive to universal professional norms, it is not nationalism but professionalism that is likely to dominate the meeting. A French nuclear engineer and a Greek nuclear engineer are far more likely to see eye to eye than a French and a Greek politician, and the eye they see with is likely to be nuclear engineering. Thus what may have been intended as the projection of national political interest becomes an elevation of technocracy with all the professional deformation or parochial perspectives endemic to specialized expertise.

Experts chosen on a national basis will not, of course, be totally free of national bias. Nor will all of them be dependents of their home governments. Some committee members will

be drawn from among relatively independent academics and even some from private sector employment–even employment by the relevant regulated industries. Yet, without formal mechanisms for committee participation by NGO affiliated experts and by national and transnational politicians, it is fairly obvious that the dominant norms of comitology will be expert norms. Expert norms are not necessarily the norms of the rest of us.

Most international or multi-national regimes are going to be, at best, indirectly democratic, governed by persons representing elected governments rather than themselves elected. Precisely because political consensus in such regimes is perceived as difficult to achieve, there is a strong temptation to move toward more easily achieved expert consensus with a national basis for the choosing of the experts serving as a screen of national representation behind which a transfer of decisional power occurs from national (sometimes democratic) regimes to various technocracies whose norms, paradoxically, are both universal and parochial.

U. S. experience suggests one, highly problematic, counterweight. The flourishing of transnational NGOs and networks is much celebrated. And nationally defined interest groups are learning to act on the international scene. Just as U. S. Administrative law opened the closed circle of government experts to rival interest group affiliated experts, so future international or multi-national comitology regimes might provide transparency and participation rules fostering expanded pools of experts. That is precisely the movement that I believe is at its early stages in the E. U. comitology process. But of course the U. S. experience also points to the dangers of regulatory inertia lurking in the potential battles of the experts fostered by interest group participation in expert decision making. The intersection of national interest representation and

the empowerment of experts is one requiring careful attention by those constructing transnational regulatory regimes.

Yet another building block in our construction of a global administrative law is the current appeal of the discourse of "deliberation." From true believers comes the assertion that policy decisions can be reached not by bargaining, log rolling and compromise among the differing fixed interests of the various players at the table, but instead by a discussion at the table which can result in transcending interest aggregation to arrive at an unselfish achievement of truly good conclusions. As noted earlier, a

major feature in the collapse of faith in bureaucratic government has been the conclusion that the public interest" is a will-o'-the-wisp that is beyond definition or achievement by any one, let alone a specialized, expert bureaucracy under pressure from interest groups and electorially oriented politicians. The vogue in deliberation is a reassertion of faith in the public interest–one that cleverly substitutes procedural definition of it for a substantive definition that is impossible to obtain. If only there is enough talk, we take it, as a matter of faith, that the public interest will emerge.

There are a number of reasons to be agnostic if not atheistic about deliberation. Most fundamentally, there is little reason to believe that people with substantial, long-term, material interests in achieving a particular outcome are going to abandon those interests and dedication to those outcomes as sweet reason emerges from the talk fest.

Moreover there is the serious methodological question of how we could ever discern whether a particular discussion had shifted from an interest aggregation to a deliberative mode. Pluralist and deliberative models of decision making both prescribe the same observable

procedures. All concerned interests are to have a seat at the table. A maximum exposition of relevant data and the most scientifically valid analysis of that data possible should be achieved. All relevant questions should be asked and answered. And, in many versions, the resulting decision should be subject to a further independent (judicial) review. If all these things have been observed, have we observed a perfect pluralism, presumably leading to Paretan optimality, or a good deliberation presumably leading to converging and reordering of particular interests that achieves the public interest. The only way we could tell would be to calculate what particular policy would have been achieved by mere interest aggregation and compare that imagined outcome with the actual one. If all the procedural norms have been met and the actual outcome is different, and objectively better, than the imagined one, then we would conclude that deliberation had occurred. Both imagining the aggregation outcome and objectively evaluating the actual one would appear to be beyond our current research capacity.

Quite apart, however, from the inherent difficulties of the deliberative vision, a grave danger lurks that is well illustrated by E. U. developments. The great friends of the comotology process previously described are wont to defend it on the grounds that while the Council engages in national interest aggregation, the committees are deliberative, precisely because they are composed of subject matter experts dedicated to achieving economically and technologically best policy outcomes.[8] The whole paraphernalia of "deliberation" is employed as a cover for technocratic government. Indeed a

kind of super deliberation is imagined in which very knowledgeable people, devoid of any interests except the interest in truth, talk together. It is not even necessary to transcend the selfish interests brought to the table because all those interests are excluded in favor of

disinterested, scientific decision makers. We are back to the New Deal blind faith in agency expertise or rather to an attempt at reviving a European faith in the public service serving the public order that has severely eroded.

In transnational regimes, the desire to transcend national log rolling, the need to establish some sort of non-electoral legitimacy and the very real technical complexity of transnational regulatory issues create a natural push toward technocratic government under the camouflage of deliberation.

Next to be considered is a complex of interacting regulatory ideas and practices that combine to achieve an opaque regulatory process not easily subjected to any set of exterior norms. One element of this complex is the disenchantment with command and control regulation. Preferred substitutes are government provided financial incentives, the construction of regulatory markets (e.g., transferable pollution licenses), "soft law," "open methods of coordination," such as government pronouncements and jaw boning, "benchmarking," negotiated, mediated or consensual rule making and, even more, intimate and direct forms of corporatism, such as government ownership of significant stock holdings or public directorships. Only one such device, regulation by reporting and publication requirements render regulation more transparent. . The rest tend to add up to a kind of big soft pillow that is very hard to punch legally. No one has ever quite broken the law or ever quite obeyed it because, indeed, nothing is ever quite the law. Regulation ceases to be a regiment and becomes a chat room.

The metaphor may suggest a solution. Perhaps the chat can all be put on line and thus subject to some degree of public scrutiny and even democratic control. But the languages in which regulatory chats are conducted tend to be highly complex, technical ones that privilege

those with the greatest resources and highest incentives to attain fluency. Here again the growth of transnational NGOs, and particularly those opposing multinational business enterprise, may provide a window into transnational regulatory corporatism.

Our faith in NGOs, however, is partly built on American pluralist experience and that experience is in turn partly built on the American practice of private causes of action in regulatory matters. The further we move from command and control regulation, the more difficult it is to frame judiciable private actions and so the less likely that interest group control can serve as a surrogate for direct electoral control.

Next, again drawing on U. S. and E. U. experience, it is worth contemplating the vogue in "independent agencies." There was a time, within the memory of living man, in which American independent agencies were out of vogue. There was much talk of "capture" and much talk of the need for Presidential coordination of executive branch policies–coordination rendered difficult by the independence of the independent agencies. Much of the regulation that was the target of deregulation was the regulation conducted by the alphabet independent agencies. Indeed in the curent American business scandal, questions are raised about why prosecutors rather than the S.E.C. have led the way.

American experience with independent agencies looks much better from the other side of the Atlantic than this one.[9] The recent U. S. relative happiness with the Federal Reserve has obscured earlier Presidential complaints about its potential for disrupting any possibly coordinated government financial management of the economy. The dismantling of the ICC and the FPC and the sporadic travails of the FCC largely have been ignored in Europe. Perhaps most importantly all Europeans, and indeed probably most Americans, think that the EPA is an

independent agency, rather than what it really is–a cabinet department denied an official seat in the cabinet. Nor do most Europeans understand that the American independent agency was rendered quasi-independent of the President not by Congressional design but by Supreme Court opinion, and that many of them were designed not to be politically neutral but to institutionalize a partisan balance between the two major political parties.

The rather misunderstood U. S. experience is supported by a further misunderstanding. One of the thrusts of the New Public Management movement has been the creation of new independent agencies designated to administer or implement certain government programs while policy making, and political responsibility for those programs is retained by cabinet departments. Like the scientific deliberation vision of comitology, the goal is a separation of politics and administration. The agency approach has been most extensively followed in the U. K. where, with some quibbles, it is viewed as relatively successful and certainly more successful than some of the privatization schemes.

What those favoring independent agency development is the European Union tend to neglect is that NPM concentrates on agency development for the service delivery rather than the regulatory functions of government. . There is a fairly obvious, although not necessarily correct, argument in favor of government adopting business organization and practices where it is delivering goods and services to consumers--an argument that does not apply where it is regulating business, rather than doing business.

So far the potential risks to policy coordination posed by the proliferation of E. U. independent agencies has been camouflaged by the insistence that these agencies are only information gathering as opposed to command and control regulatory entities. In reality some of

the agencies do have some regulatory functions, such as drug licensing and most are engaged, not perhaps in command and control regulation, but in a variety of "soft" regulation modes.[10] Certainly at best it would be naive to assert that the European Environment Agency was not regulating when it gathers data and publishes an analysis of that data purporting to show that French industrial pollution is adversely affecting German vineyards.

The E. U. independent agencies parallel comitology not only in the purported separation of politics or policy and administration but in the masking of technocracy by national representation in a transnational body. Typically each independent agency is staffed by technical experts but supposedly overseen by a board composed of one director representing each member state. Given the high tech subject matters of the agencies, there can be little doubt about who is in control as between everyday, career technicians and occasionally appearing lay boards of directors. And, like comitology of course, the basic raison d'étre of the agencies is the substitution of technocratic legitimacy for a supposedly deficient democratic legitimacy.

When we take all of these building blocks together we can certainly build a very dismal castle. Future transnational regulatory regimes are likely to arise in relatively high tech or otherwise complex spheres of activity. They are likely to face the usual national paradox. Member states will not become member states without strongly institutionalized member state representation in the regulatory bodies. And, given the near impossibility of creating genuine, direct electoral responsibility for such bodies, national representation will provide the only available means of achieving any sort of democratic legitimacy. Yet if the institutional structure of the regime is highly politicized in the sense of providing for veto-like or near veto-like powers, or even very strong log rolling capacities, for participating states, the substantive,

transnational rationality of the regulations produced will be at grave risk. The difficult of achieving electorally based legitimacy, the high tech nature of the sought-after regulation and the potentially disruptive force of national political interests may, á la the E. U., provide a heightened appeal for technocratic government. Turning over key decisions to technical experts with one or more drawn from each member state can provide the appearance of national representation while in reality achieving only the representation of the interests the technical experts derive from their particular expertise.

Given current anti-command and control sentiment and the resulting vogue in soft-law and quasi-corporatist regulatory negotiation, technocratic decisions may be conveyed by various murmurs among insiders, that is among the regulators and the regulated, that by their very nature are difficult for the supposed regulatory beneficiaries to follow, let alone, challenge. In response, those transnational interests with the resources to organize well will, with more or less success, form NGOs that will seek to bull their way into both the technocratic decision processes and the corporatist negotiation processes.

Given that one appealing mode of moving toward technocracy with a sop to national interest and or the promise of neutrality among national interests is the independent agency with some sort of nominal board of directors of national representatives, independent agencies are likely to proliferate creating both severe problems of coordination and an extreme diffusion of authority that renders any sort of democratic accountability even more difficult.

And finally the technocratic corporatist non-democratic nature of these transnational regulatory networks will be disguised and lauded as the newest triumph of deliberation,

deliberation that, by definition, produces the best, most rational, achievement of the shared values of mankind.

All other things being equal, the role of judicial review in the regimes I have imagined would be minimal with judges of whatever transnational courts might be established deferring to technocratic expertise once they had assured themselves that minimal procedural requirements had been met. But all other things are not equal. Environmentalism may have been the great religious movement of the late 20th Century. Human rights may well be the great religion of the early 21st. And, with the fall from grace of socialism, human rights also, quite apart from its intrinsic appeal, provides a convenient channel for venting anti-capitalist sentiment. Rightly or wrongly, many human rightists believe that judges are a better potential target for their 'ism than other policy makers, and that judges waving the rights baton are likely to be successful in imposing the rightists' preferences on both the technocratic and democratic benighted. Moreover the human rights movements, while still notably busy trying to assure negative rights– that is, rights against government misconduct, is also more and more involved with the promotion of positive rights, such as the right to employment, subsistence, housing, health care and so on. These "new property" rights are heavily implicated in transnational regulatory regimes. Thus it reasonably may be anticipated that future transnational regulatory institutional arrangements are likely to include reviewing courts with some sort of mandate to defend positive rights against regulatory deprivations. The ECJ has proclaimed its dedication to human rights but without saying whether its vaguely stated vision encompasses positive rights.

So far the regulatory transparency and human rights jurisprudences of the ECJ have not intersected. There is enough here, however, and in the recent proliferation of transnational

courts and flourishing of transnational arbitration tribunals, to suggest that future transnational regulatory regimes will provide for judicial review that might serve as some check on technocratic and neo-corporativist "deliberative" governance. The pessimist, however, might expect that there may be just enough judicial review to further legitimate such governance without really ameliorating its insider trading.

One historical lesson, however, that politicians repeatedly appear singularly blind to, is that the junk yard dog of judicial review, once unleashed, is likely eventually to have a much larger bite than anticipated. Perhaps a future transnational administrative law will emerge that opens sufficient transparency and participation that transnational technocracy will achieve some meaningful level of pluralist, even if not electoral, democracy.

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