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George Katrougalos

Global Administrative Law and Democracy

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GLOBAL ADMINISTRATIVE LAW AND DEMOCRACY

By George Katrougalos*

Abstract

One of the fundamental contributions of the movement of Global Administrative Law is the affirmation that the latter constitutes "a battlefield, a place and an instrument of conflict in itself, resulting from the moves of different players, who coordinate through hierarchy, cooperation and/or competition". Is this game of power without primary rules, a legal game of thrones? More specifically, is the political non-accountability of transnational governance an inevitability? Or, is it possible to impose overarching principles, such as democracy to the multi-polarity of the global arena? A possible reply could be that democracy is as an unfeasible promise under actual state of international affairs.

However, the basic argument of this paper is that this stance is normatively problematic and politically unacceptable. It is a different story to deterritorialize administrative law from its state base and quite another to disconnect it completely from its historical normative, democratic constitutional foundations. The absence of a global polity or global demos does not preclude the application of democratic principles even at the new global administrative space. Moreover, the related policy choices have important repercussions on internal administrative law and popular sovereignty, as well.

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1. Introduction

Globalization entails a dispersion of competences away from the state in both vertical (transfer of sovereign functions) and horizontal (involvement of private actors) directions. Thus, the traditional kelsenian legal universe is gradually transformed to a non Euclidean "multiverse" system of governance, "*a spontaneous process, pushed by private interests and actors in a thoroughly pragmatic process, accountable to no-one*"[1].

Global administrative space is increasingly occupied by transnational private regulators and hybrid bodies involving states, international or inter-state organizations, which are not under the control of the nation states. Because of this trend, global governance implies an increased recourse to informality, as "*many institutions, procedures and instruments escape the grasp of established legal concepts*"[2].

One of the fundamental contributions of the movement of Global Administrative Law (GAL) is the affirmation that the latter constitutes "*a battlefield. (…) in the hands of multiple political, institutional and economic actors, who struggle, interact and bargain. It's a place and an instrument of conflict in itself, resulting from the moves of different players*"[3] , who "*coordinate through hierarchy, cooperation and/or competition*"[4].

Is this game of power without primary rules? In other words, is it possible to impose overarching principles, such as rule of law or democracy to the multi-polarity of the global arena, despite the undeniable breach of the link between sovereignty, territoriality and regulation? More specifically, is the political non-accountability of transnational governance inevitability?

Constitutionalism has subordinated the national administration to the principle of legality, under both a constitutive and a limiting function: "*first, no public authority may be exercised that is not based on public law (constitutive function); second, public*

[1] *M. Koskenniemi*, Global Governance and Public International Law, 2004, 37 Kritische Justiz 241, 244.
[2] A. von Bogdandy, Ph. Dann and M. Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, GERMAN LAW JOURNAL, No. 11, 2009.1376.
[3] *G. Napolitano*, Conflicts in administrative law: Struggles, games and negotiations between political, institutional and economic actors, Paper for the IRPA-NYU JMC Seminar on "Toward a Multipolar Administrative Law A Theoretical Perspective" New York, September 9-10, 2012.
[4] *F. Cafaggi*, Rethinking private regulation in the European regulatory space, Working Paper LAW No. 2006/13.

authority is controlled and limited by the substantive and procedural standards provided by public law (limiting function)."[5] It is possible that the constitutive function has become obsolete at the level of transnational governance, due to the spontaneous, not entirely public and sometimes voluntary character of regulation[6]. However, the second, limiting function is still operative, although new devices and control mechanisms, analog but not identical to the national ones should be introduced.

The fact that rule of law should also delimit transnational governance is not disputed, at least at the procedural level[7]. (For obvious reasons: Otherwise, global governance would be just a phenomenon of power, not of law.) This is not the same with democracy. GAL has tried to recast till now the administrative rationality into the transnational public law leaving outside democracy as an unfeasible promise under actual state of international affairs.

The basic argument of this paper is that this stance is normatively problematic and politically unacceptable. It is a different story to deterritorialize administrative law from its state base and quite another to disconnect it completely from its normative, democratic constitutional foundations. The absence of a global polity or global demos does not preclude the application of democratic principles even at the new global administrative space. Moreover, the related policy choices have important repercussions on internal administrative law, as well.

2. Is Democracy superfluous in the global arena?

GAL is shaped by principles of an administrative law character, decoupled from the constitutional foundation of national administration law. Issues of accountability in the global administrative space have constantly been on the focus of the literature from the

[5] *A. von Bogdandy, Ph. Dann and M. Goldmann*, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, ibidem, (note 2), cf. *A. von Bogdandy*, Globalization and Europe: How to Square Democracy and Globalization, 15 EUR. J. INT'L LAW 885 (2004).

[6] On whether there can be self-constituting public authorities see *D. Dyzenhaus*, Accountability and the concept of (Global) administrative law, Global Administrative Law Series, IILJ Working Paper 2008/7.

[7] See, *S. Cassese,* A global due process of law?, Paper presented at New York University Hauser Colloquium on Globalization and its discontents, September 13, 2006.eg. cf. *J. Nijman and A. Nollkaemper,* Beyond the Divide, in J. Nijman and A. Nollkaemper (Eds.), New Perspectives on the Divide Between National and International Law, Oxford: Oxford University Press, 2007, pp. 341-360.

beginning[8]. Still, the prevailing opinion maintains that GAL can be organized and shaped by rules of an administrative law character, "*beyond Democracy*"[9].

For instance, in their seminal paper, 'The Emergence of Global Administrative Law', Benedict Kingsbury, Nico Krisch and Richard B. Stewart take as central the question of the accountability of the rulemaking global administration but suggest it should not be based on democratic principles but on more limited and pragmatic modes: "*protecting rights, and building meaningful and effective mechanisms of accountability to control abuses of power and secure rule-of-law values*" [10].

In the same line, Sabino Cassese suggests that the lack of democratic accountability before a representative body '*actually increases the pressure on global administrative law towards greater openness, participation and transparency'*, features which '*may make up for the democratic deficit caused by the absence of a constitutional foundation to global administrative law*'[11].

In other words, GAL project's focus predominantly on procedural guarantees, or, in the best case, with narrower political ideals, such as legal accountability. I will try to provide at the following section a refutation of the political (*below, 2.1*) and normative (*below, 2.3*) justifications of this choice, before presenting some proposals for a different path (*below, 3*). However, speaking about Democracy, it is necessary to explain how this principle can function in the global arena, in relation with other, parallel ways of legitimacy (*below, 2.1*).

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[8] See, for instance, *C. Harlow,* Accountability as a Value in Global Governance and for Global Administrative Law' in Gordon Anthony, J-B. Auby, J. Morison and T. Zwart (eds), Values in Global Administrative Law, Hart Publishing, 2011.167, *J. Ferejohn,* Accountability in a Global Context, IILJ Working Paper 2007/5, *G. de Búrca*, Developing Democracy Beyond the State, Columbia J Transnat'l L 2008.101, *R.O. Keohane*, Global Governance and Democratic Accountability', in D. Held & M. Koenig-Archibugi (eds), Taming Globalization: Frontiers of Governance, Polity, Oxford 2003*, A. von Bogdandy*, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', 15 European Journal of International Law (2004) 885, R. Wolfrum and V. Roeben (eds), Legitimacy in International Law (2008), at 899, *D. Dyzenhaus*, Accountability and the concept of Global Administration, Global Administrative Law Series IILJ Working Paper 2008/7, *N. Petersen*, Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht, 2009.

[9] *S. Cassese,* New paths for administrative law A manifesto, ICON 2012, 2–13.

[10] *B. Kingsbury, N. Krisch, R. B. Stewart*, The Emergence of Global Administrative Law, 68 Law and Contemporary Problems 15, 2005.18, at 51.

[11] *S. Cassese*, 'Administrative Law Without the State? The Challenge of Global Regulation'37 New York University Journal of International Law and Politics 2005 663, pp. 687-8, 669.

2.1 Which kind of Democracy?

The concept of democratic legitimacy is essentially idiosyncratic in comparison with other forms of legitimization (legal, procedural/formal, or results oriented)[12]. Above all, democracy is a normative principle that defines not only the outputs of an administrative process, but also its sources, its ethos and its functional modes. It both constitutes and qualifies a regime as "democratic". Thus, it cannot be reduced to accountability, which is only one of its attributes.

The latter is a generic term about ways of exercising controls of the exercise of power, usually ex post facto[13]. Moreover, it has two facets, a democratic and a legal one. The democratic accountability of an agent means that her principals may sanction her, typically by revoking her through elections, if she has failed to satisfy predefined norms and goals. Legal accountability is instrumental and it stands as *'a general term for any mechanism that makes institutions responsive to their particular publics'*[14]: the agent is required to take or abstain from certain actions and legally justify them in a legal forum[15] . Reason giving and accompanying legal accountability operate either as a supplement or substitute for the democratic one. Legal accountability is usually identified with the introduction of due process of law guarantees and institutions of good governance, such as transparency and judicial review.

In simple words, democratic accountability implies the possibility to "throw the rascals out", an option not allowed by the legal one. Nonetheless, even this much stronger sense of accountability is only a component –and not the most important one- of democracy. The latter implies, in addition, some degree of co-authorship of law and policies on behalf of the respective demos. A system of governance in which rulers are held perfectly accountable by the ruled, yet cannot influence the decisions of the former, is a very impoverished version of democracy, if it still can qualify as such. For the same

[12] Cf. *J. Black,* 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes' Regulation & Governance 137, 2008, p.145.
[13] D. Curtin, L. Senden, Public Accountability of Transnational Private Regulation Chimera or Reality?, Amsterdam Centre for European Law and Governance Working Paper Series 2011 – 06.
[14] *R. Mulgan*, Holding Power to Account: Accountability in Modern Democracies, 2003
[15] *J. Ferejohn*, Accountability in a Global Context, IILJ Working Paper 2007/5

reason, to the extent that "participation of stakeholders" does not imply actual decision-making but only a general right to be heard is a weak substitute for self-government[16].

(The historical evolution of Athenian democracy marks illustratively the passage from mere accountability to self-government[17]. The initial phase was Aisimnitia (Αισυμνητεία), a kind of enlightened despotism, under which the affairs of the Polis in crisis were turned over to a wise governor, such as Solon of Athens, Thalis of Miletus, Pittakos of Mytilene. Aisimnitia implied full responsibility for reforms, without any kind of accountability for its sage-author. It was only after the reforms of Solon, who "*gave to the Demos the most necessary power, to elect the authorities and make them accountable*"[18], that Athens became "democratic". This was still a version of Schumpeterian democracy, as the Athenian Demos was not yet empowered to decide autonomously on all important decisions. It was after the reforms of Cleisthenes that Demos acquired full powers and became, in the words of Thucydides, *"αὐτόνομος"* -self-governed, possessed of its own laws-, *"αὐτόδικος"* -possessed of its own courts- and *"αὐτοτελής"* -autonomous, which in itself constitutes a whole entity-[19]).

Although a universally uncontested definition of democracy does not exist, its essence remains *'the ideal of government by act of the people'*[20], or even simpler: *'rule by the people'*[21], where a community exercises collective self-determination, by taking decisions that shape its destiny jointly[22]. Even for neo-republicans who reject the majoritarian democracy of 'ancients', the primary good – nondomination – depends on

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[16] *C. Möllers*, Patterns of Legitimacy in Global Administrative Law: Trade-offs between due process and democratic accountability, paper presented to the Second Global Administrative Law Seminar, Viterbo, June, 9-10 June 2006, p. 3.

[17] See *C. Castoriadis,* Philosophy, Politics, Autonomy, Essays in political philosophy, nY oxford: oxford university press, 1991, p. 105-106*, G. Kontogiorgis*, La démocratie comme liberté, in D. Damamme (éd.), La démocratie en Europe, L'Harmattan, Paris, 2004, in Pasqual Perrineau, Bertrand Badie (éd.), Le citoyen, Presses de Sciences Po, Paris, 2000

[18] "αποδιδόναι τω δήμω δύναμιν, το τας αρχάς αιρείσθαι και ευθύνειν", *Aristoteles*, Politika, 2, 1274α15-21, cf. *Plutarch*, Solon, 13:2.

[19] Thucydides definitions resonate with Rousseau's views : "when the people as a whole makes rules for the people as a whole, it is dealing only with itself; and if any relationship emerges, it is between the entire body seen from one perspective and the same entire body seen from another, without any division whatever. Here the matter concerning which a rule is made is as general as the will which makes it. And this is the kind of act which I call a law … law unites universality of will with universality of the field of legislation." *J.J. Rousseau,* Social Contract (trans. Cole), Bk II, ch. 6.

[20] *F.W. Michelman*, Brennan and Democracy, Cambridge Mass.: Harvard University Press 1998, p. 4.

[21] *R. A. Dahl*, Democracy and Its Critics (New Haven: Yale University Press, 1989, p. 83, cf. *A.-M. Slaughter*, Judicial Globalization, VIRGINIA JOURNAL OF INTERNATIONAL LAW, vol. 40, 2000, p. 1103-24.

[22] J. Aart Scholte "Civil Society and Democracy in Global Governance" CSGR Working Paper No. 65/01

the capacity of citizens to form the terms of their common life together'[23]. Equally for proponents of deliberative democracy, self-government remains central, although combined with other axiological elements, such as equal autonomy of all[24].

It is true that control of power and rule of law does not presuppose democracy, as clearly shows the case of Rechtsstaat. Nevertheless, since the Enlightenment and especially after the French and the American Revolutions, the predominant source of legitimization of the authority has been progressively linked with the principle of democracy. According to Amartya Sen, in our age the latter has been endorsed as a 'universal commitment' and as the 'normal' template of government[25]. Therefore, as it is cogently remarked, democracy may not be the only source of legitimacy for public power, but other sources are likely to serve as complements, not substitutes for it[26].

The universalization of democracy as an indispensable element of legitimacy has been the result of a bottom up process, of centuries of political struggles. In Jeremy Waldron's words, *"The people themselves—the peoples themselves—in various ways indicated that they were no longer willing to be ruled, and no one should be willing to be ruled, without these layers of guarantees.[27]"* Waldron is speaking in the former citation primordially about human rights. I think, however, that his analysis is valid also for the principle of self-government, since he presents rights as originally a democratic idea as well as democracy in rights-based terms.

We can now confront the principal justification for the eclipse of democratic principle at the transnational level, which seemed, prima facie, irrefutable: Which global "demos" will lend democratic legitimacy to the global administrative space? In the absence of a cosmopolitan political community, isn't a chimera to seek for democratic accountability? Still, under the light of the above, the universalization of democracy, as a globalized bottom-up associative procedure, does not presuppose the existence of a

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[23] *P. Pettit*, Republicanism: A Theory of Freedom and Government, Oxford: Oxford University Press, 1997, pp. 7-ff, 183 ff.
[24] Cf. *J. Habermas*, Between Facts and Norms, Cambridge, Mass., MIT Press, 1996, pp. 121 ff, 136, 159.
[25] *A. Sen*, Democracy as a Universal Value, Journal of Democracy 10, 1999, 3 -17.
[26] *A. von Bogdandy*, 'Globalization and Europe: How to Square Democracy, Globalization, and International Law', 15 European Journal of International Law, 2004, p. 885 cf. *J. Black*, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes' op.cit., p. 145-146
[27] *J. Waldron*, "Partly Laws Common To All Mankind": Foreign Law In American Courts, IILJ International Legal Theory Colloquium Interpretation and Judgment in International Law and available at: http://iilj.org/courses/2008IILJColloqium.asp

unified polity. The single-agent requirement is in fact dispensable: *All peoples, all Demoi have a claim to be self-governed, a claim that is incumbent on all the agencies that have dealings with any of them*. Waldron affirms that the peoples of the world have, thus, constituted themselves as a single community, so far as this demand is concerned[28]. I think that this cosmopolitan assertion is not necessary for the validity of the claim. In so far as the demand of self-government has become a demand of the Demoi of practically all nation-states, it can function as a universal categorical imperative and a global institutional benchmark without the precondition of the latter constituting a single unity.

Transnational processes complicate both the form and content of democracy, blur the lines between rulers and ruled as they promote new forms of private or semi-private regulation, in a way that cannot functionally satisfy the aforementioned ultimate criteria of democracy: public autonomy and 'self-government'. Under these circumstances, the global polity (already a term used very liberally) is not democratic, but "*the empire of "ad-hoc-cracy": global regulatory regimes do not follow a common pattern; they are not uniform because they have to balance, area by area, national diversity and global standards"*[29].

Despite that, democracy should be a political and normative desideratum for the global administrative space. First, because despite the "national diversities", it represents a 'universal commitment'. Second, and more importantly, because otherwise the global regulatory regimes will be captured by the stronger political and economic interests, to the detriment of the democratic foundations of nation states.

2.2 Political reasons

Besides the absence of a cosmopolitan political community, there are some additional arguments, which defend a non-democratic character of the GAL. Although I recognize the accuracy of their descriptive content, I deduct from them almost diametrically opposite conclusions.

[28] *J. Waldron*, Law and Disagreement, OUP, 1999, Chs. 10-11.
[29] *S. Cassese*, The global polity Global dimensions of democracy and the rule of law sevilla • 2012.

(1) Such law corresponds to the emerging concept of the state as "*a promoter, as a facilitator, as a risk regulator, and as the helmsman of economy and society*"[30].

It is, certainly, true, that even domestic administrative law is changing, reflecting the gradual transformation of modern capitalism from a normatively "embedded" to an "unleashed" version[31]. A new administrative law is emerging, characterized by a redefinition of what is public and what is private and the relationship of markets to the state[32]. Privatization of important public functions, complementarity of private and public actors and national-transnational hybridity remove vast areas from state monopoly. It is, however, important that these policy choices must remain within the democratic public dialogue and accountability.[33] A primary role for administrative law both at domestic and transnational levels should be to provide transparency and democratic oversight to these areas, even though they might now be designated as private or semi-private.[34]

Democracy is not just limiting public power, but exerts political control, through regulation and oversight, over economic power as well. Globalization has changed the nature of the relationship of markets to the state at all levels. Whereas the conciliation of democracy and capitalism became possible in last century's welfare state by the political control of national markets, this has never occurred at the level of international transactions. Therefore, the importance of some kind of democratic control and accountability at transnational level is crucial. Greater flexibility will result to the surrender of political self-determination to market forces[35].

In the absence of such a democratic oversight, as Offe and Preuss remark, "*markets hold policy makers to ransom: as soon as they adopt an activist approach to*

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[30] *S. Cassese,* New paths for administrative law A manifesto, ibidem, pp. 2,

[31] Cf. D. Nicol, The Constitutional Protection of Capitalism, Hart Publishing, Oxford and Portland, Oregon, 2010.

[32] *A. C. Aman, Jr.*, The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism and Democracy, 31 VAND. J. TRANSNAT'L L. 1998, p. 769, the same, Globalization, Democracy and the Need for a NewAdministrative Law", 10 Indiana Journal of Global Legal Studies 125, 2003.

[33] M. Shapiro, Administrative Law Unbounded: Reflections on Government and Governance, 8 IND. J. GLOBAL LEGAL STUD. 2001.369, at 372.

[34] *A. C. Aman, Jr.*, The Limits of Globalization and the Future of Administrative Law: From Government to Governance, 8 IND. J. GLOBAL LEGAL STUD. 2001.379.

[35] *M. Koskenniemi*, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Modern Law Review 1, 23

the solution of social problems through policy-making, they may be 'punished' by the adverse reactions of economic actors, such as investors or employers, on whose activities policy-makers depend for their tax base as well as their political support enables economic actors to make extensive use of this mechanism of 'punishment' and thus to disable the making of public policies the main actors"[36].

(2) '*Power has shifted to "technocrat–guardians" who are shielded from political influence*'[37].

Key issues are, indeed, removed from the domestic political agenda through *"deliberate technocratic depolitization"*[38] . The insulation of the Central Banks, for instance, from political decisions of the legislatures is one of the most indicative examples. It is, nonetheless, very doubtful if this trend has enhanced the epistemic quality of decision making[39] or it has just degenerated important political decisions into "pervasive bureaucratic micromanagement."[40] There is hardly any neutral, value-free technical choice or Pareto optimality of 'one best way'. Any expert decision is founded on political criteria and has redistributive effects which should be politically challenged in terms of their fairness and appropriateness.[41]

Efficiency alone, or any Pareto-optimal technocratic solutions, legitimised by output considerations, cannot be accepted as equivalents to democracy, not only because of their inconsistency with the normative character of the principle but primarily because they are based on a unsound cyclical foundation: in order to identify optimal results, one should first define the public goods related to them and their teleology. How can this possibly be founded on non-political, technical fundaments?

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[36] *C. Offe, U. Preuss*, The Problem of Legitimacy in the European Polity. Is Democratization the Answer? Constitutionalism Webpapers, ConWEB No 6/2006.
[37] *S. Cassese*, New paths for administrative law, A manifesto, ibidem, pp. 2, 4.
[38] *Anne-Marie Slaughter*, The Accountability of Government Networks, 8 IND. J. GLOBAL LEGAL STUD. 349 (2001)
[39] *R.O. Keohane, S. Macedo, A. Moravcsik*, Democracy-Enhancing Multilateralism, in «International Organization», no. 63, Winter 2009, 26.
[40] *M. Shapiro*, Administrative Law Unbounded: Reflections on Government and Governance, 8 IND. J. GLOBAL LEGAL STUD. 2001.369.
[41] *Ch. Joerges*, Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance, in Ch. Joerges and E. Vos, EU Committees: Social Regulation, Law and Politics, Oxford and Portland, Hart Publishing 1999.3, 6 ff,, *C. Offe, U. Preuss*, The Problem of Legitimacy in the European Polity. Is Democratization the Answer? Constitutionalism Webpapers, ibidem, note 36.

Rule of law is not a substitute for democratic decisions, either. The judicial accountability mechanisms may, instead, lead to a 'juridification' of global governance, narrowing further the space for democratic decision making[42], as it is clearly illustrated by the WTO's recent evolution. This does not so much establish a "juristocracy", but rather isolates further the political decision-making from nationally accountable institutions: we cannot have equation of control by law and control by democratic politics, especially when "law" itself (i.e. the global regulation) is not democratically instituted[43]. Therefore, by the introduction of elements of rule of law, such as, for instance, an improvement of transparency or introduction of some forms of consultation, one might get, at best, what Stewart calls '*administrative law lite'*[44], not democracy.

> ***(3) Global bodies are established in order to keep national governments under control, or to provide services or pursue goals that governments alone are unable to. Therefore, they place limits on the activities of national executives. In this regard (…) they are on the same "side" as the people, formally speaking at least***[45].

A balancing of powers which engage in checks and balances is meaningful only if the involved agents are really antagonistic. On the contrary, the transnationalisation processes, at least at the level of the transnational economy, are politically one-dimensioned: neo-liberal orthodoxy for deregulation of financial and social rules as a necessary precondition to efficiency and economic growth has become the prevailing ideology of global governance, through not only the direct interventions of the World Bank and the International Monetary Fund, but also the free-trade treaties of WTO[46]. Moreover, rule-conforming behavior is not produced only by "legal" instruments but

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[42] Cf. *C. Harlow*, "Global Administrative Law: The Quest for Principles and Values",) 17, European J of International Law 2006, 187-214, cf., more generally, *B. Zangl, M. Zürn* (Eds), Verrechtlichung - Baustein für global governance?, Dietz, Bonn, 2004

[43] Cf. *M. Shapiro*, '"Deliberative", "Independent" Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?' (2005) 68:3 Law & Contemporary Problems 341.

[44] *R. B. Stewart*, 'U.S. Administrative Law: a Model for Global Administrative Law?, ibidem.

[45] *S. Cassese*, What is Global Administrative Law and why study it?, RSCAS Policy Papers RSCAS PP 2012/04, p. 6.

[46] Cf. *D. Nicol*, The Constitutional Protection of Capitalism, Hart Publishing, Oxford and Portland, Oregon, 2010.

also by "policy" documents or other "soft law" means. This "rule-oriented' landscape" [47] does not merely affect internal economic policies but results to the supersession of the traditional public values of administrative and constitutional law by a new global ideological setup of very different nature.

It corresponds to a supranational economic constitution, based on a coherent set of constituent principles such as monetary stability, open markets, freedom of contract and liability[48]. This "policy coherence" is far away from the Keynesian compromise most of the modern constitutions outside the Anglo-Saxon world endorsed in the aftermath of the Second World War. In this sense, there is a latent revision of the fundamental principles regulating domestic economic activity, without direct public consent and under minimal political control. For instance, the empirical research shows that in almost all jurisdictions the ex post legislative scrutiny of negotiated rules of WTO's Uruguay Round Agreements clearly was largely perfunctory[49]. In front of the unified logic of unleashed markets, the national demoi do not have any substantial influence and their citizens have any reason to feel politically dispossessed.

Finally, another dimension of unequal power relations created by global governance is the "attenuation of sovereign equality" of poorer and developing countries. For instance, Chimni critiques the GAL from a Third World perspective arguing that, in the absence of a critique of the substance of its rules, it may legitimize unjust laws and institutions, irresponsive to the concerns of developing countries and its peoples[50].

In the light of all the above, my basic argument is that we need a democratic theory of GAL not so much because the transnational order must become democratic but

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[47] *J. Jackson*, Sovereignty, the WTO and Changing Fundamentals of International Law Cambridge University Press, Cambridge, 2006, 205-6

[48] *E.U. Petersmann*, European and International Constitutional Law: Time for Promoting 'Cosmopolitan Democracy' in the WTO in G. de Burca / J. Scott (eds.), The EU and the WTO: Legal and Constitutional Issues, Oxford 2001, 81-110, p. 88, cf. *B. Hoekman and M. Kostecki*, The Political Economy of the World Trading System, 2nd edn (Oxford University Press, Oxford, 2001, 1 ff.

[49] *J. Jackson / A. Sykes* (eds.), Implementing the Uruguay Round, Oxford, 1997, cf. *R. Howse*, How to Begin to Think About the "Democratic Deficit" at the WTO, 2003, *M. Fakhri*, Reconstruing WTO Legitimacy Debates, Notre Dame Journal of International & Comparative Law, Vol. 2, No. 1, p. 64, 2011.

[50] *B. S. Chimni*, 'International Institutions Today: An Imperial Global State in the Making', 15 EJIL 2004, p. 1, the same, 'Cooption and Resistance: Two Faces of Global Administrative Law', IILJ Working Paper 2005/16, available at www.iilj.org/papers/2005.16Chimni.htm. Cf. also *N. Krisch*, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16 European Journal of International Law 2005.369

because nation states must remain democratic. If the latter cannot regulate the basic parameters of their national economies and the consecutive loss of political power won't be compensated through additional channels of supranational devices, democracy within nation states will decline[51].

Hence, the main issue is to democratically control the transnational economic power. Even Kelsen was stressing the fact that 'private' law created in a contract is *"no less the arena of political power than the public law created in legislation and administration*"[52]. Now that globalization *"gets in the way of national democracy*"[53], the re-politicization of the global economic relations, even if they acquire a private or semi-private form is imperative.

By neglecting to face the challenge as it is, we risk to bypass the basic political problem posed by globalization, what Rodrik calls the "Globalization Trilemma": From the tension between national democracy and global markets stem three options: We cannot have (1) hyperglobalization, (2) democracy, and (3) national sovereignty all at once, although we can have any pair of them. In this sense, the possible political outcomes are a) to have 1 and 3, by restricting national democratic legitimacy, b) to have 2 and 3, by limiting globalization or c) to have 1 and 2, i.e. "globalize democracy" by moving the forum of democracy from national to global level[54].

This is even more imperative for Western societies, as output legitimacy, driven by the safeguard or improvement of the individual and collective welfare is currently undermined by the uneven economic processes.

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[51] Cf. W.D. Coleman and T. Porter, 'International Institutions, Globalisation and Democracy: Assessing the Challenges', Global Society, vol. 14, no. 3 2000 , pp. 388-90, P.G. Cerny, Globalization and the Erosion of Democracy, European Journal of Political Research, vol. 36, no. 1 1999, pp. 1-26; B. Holden (ed.), Global Democracy: Key Debates, London, Routledge, 2000.

[52] *H. Kelsen*, Introduction to the Problems of Legal Theory, Oxford, Clarendon Press, 1994, p. 95-96, cf. D. Curtin, L. Senden, Public Accountability of Transnational Private Regulation Chimera or Reality?, ibidem.

[53] *D. Rodrik*, The Globalization Paradox: Democracy and the Future of the World, New York: W.W. Norton & Co., 2011, p. 190, 200 ff.

[54] *D. Rodrik,* The Globalization Paradox, ibidem, note 53

2.3 Normative reasons

Administrative law is the law that controls executive power. GAL has shown its mutation, as it goes beyond its traditional cradle, the nation state[55]. But does the fact that the administrative law goes beyond the state mean also that it should go beyond democracy? Power still shapes the relations of persons and entities in the global arena, although not in the same ways than at national level. For this reason, GAL should limit and control this power, although the modalities of the control should have to mutate, so as to reflect the new landscape of power.

(1) "Power, not authority, is central in the global arena. Power can be exercised through authoritative means (such as the "command and control" models familiar to domestic administrative systems), but also through agreements, contracts, incentives, standards and guidelines"[56]

Diffusion of power in the transnational space is an undeniable fact, although it occurs widely also at domestic level. Whether power constitutes or not legal authority depends on the context. Authority is the legal capacity to unilaterally define the legal or factual situation of a governed subject. This capacity can also occur through a non-binding act which only conditions its subject, by exerting informal pressure to it or by establishing non-binding standards which are followed because of their benefits or because non observance implies some kind of cost[57].

In any case, as Napolitano remarks, "*the first key-factor in order to prevail in the struggle for administrative law is to conquer the power to rule*[58]" through organizational design, procedural devices or the creation of a decision-making environment capable of channeling future decisions in the desired way: For instance, "*stacking the deck" in favor of specific interests groups will allow those interests*

S. Cassese, New paths for administrative law, A manifesto, ICON, v. 10, n. 3, 2012.603, the same, What is Global Administrative Law and why study it?, RSCAS PP 2012/04.

[56] *S. Cassese*, New paths for administrative law, A manifesto, ibidem.

[57] *A. von Bogdandy, Ph. Dann, M. Goldmann*, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities GERMAN LAW JOURNAL ol. 09 No. 11, 2009.1376, cf. *K. W. Abbott, D. Snidal*, Hard and Soft Law in International Governance, 54 INTERNATIONAL ORGANIZATION, 2000.421.

[58] *G. Napolitano*, Conflicts in administrative law, ibidem.

groups to over-represent their point of view in the regulatory debate, giving them an appreciable advantage at the moment in which the agency will assume its decisions. (…) Executives usually play a big role both in the making of a rule "beyond the State" and in its transposition into the national legal order. This way, they can try to shape specific features of administrative law, overcoming or at least reducing the role of parliaments[59]*."*

Should GAL remain neutral about these strategies, without any kind of control or axiological stance? Administrative law, at least in the European tradition of the Social State of Law, arbitrates the tension as much between unilateral political authority and individual freedom as between unleashed economic power and societal autonomy. At domestic level, the freedom of market actors has been controlled by public regulation for reasons of general interest. Whereas the conciliation of democracy and capitalism became possible in last century's welfare state by the democratic, political control of national markets, something similar has never established at the level of international transactions. The inexistence of a democratic regulation of the international markets at ecumenical level, does not only mean inability of political power to rein the private global players. It signifies also a progressive upset of the domestic balance between market and state that is creating an internal democracy deficit.

So, normatively speaking, the basic question is the following: should we de-publicize or re-publicize GAL? If we embrace the first option, "*administrative law scholarship must (…) be prepared to study administrative law less as a mechanical structure than as a market, where many intersecting negotiations take place*"[60]. On the contrary, the reconfirmation of "publicness" of GAL would imply its reconnection with some elements of constitutionalism, such as rule of law or the democratic principle, which will enhance its potential to limit power, without linkage with a nation-state[61].

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[59] Ibidem.

[60] F. Bignami, From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law, 201159 Am. J. Comp. L. 859, at 872.

[61] See on that *A. von Bogdandy, Ph. Dann, M. Goldmann*, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities ibidem, cf. *B.-O. Bryde*, International Democratic Constitutionalism, in Ronald Macdonald et al. eds Towards World Constitutionalism, 2005.103, *M. Kumm*, The Legitimacy of International Law: A Constitutionalist Framework Analysis, 15 EJIL 2004.907, *A. Peters*, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, 19 LEIDEN JOURNAL OF

Pluralism or constitutionalism?

Hence, the crucial normative dilemma for GAL turns to be the choice between the adoption of some overarching principles of constitutional character (especially rule of law, democratic principle) or the recognition of a fully open-ended pluralist global order. It is clear that at the present state of international affairs a coherent, hierarchically structured transnational order cannot exist. Many scholars consider that postnational realm constitutes a "heterarchy"[62]. Before this assertion and the impossibility to normatively reconcile the conflicting demands of accountability of national, international and global audiences, it is often advised that we should look for pragmatic and pluralist solutions.[63]

Along this line, Krisch argues that instead of seeking an impossible hierarchical "constitutional" settlement of the issue of democratic governance, we should opt for a pluralist, heterarchical model, more adequate to the context of the global space[64]. Krisch claims that although in a constitutional vision hierarchy is inherent, something similar is not feasible at ecumenical level. Hence, we could '*eschew constitutionalism's emphasis on law and hierarchy*' for '*more pluralist models, which would leave greater space for politics in the heterarchical interplay of orders*'[65] .

An additional argument for pluralism is that even without overarching principles, the actors involved in global governance are expected to keep each other in check

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INTERNATIONAL LAW 2006.579, *Ch. Walter*, Constitutionalizing (Inter)national Governance, 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 2001.170.

[62] Etymologically speaking, instead of "heterarchy" one should use the term "polyarchy". The former means in Greek not lack of hierarchy, but a hierarchy imposed by above, by an external or alien factor (heteros –ἑτερος- is the «other" in Greek).

[63] *N. Krisch*, 'The Pluralism of Global Administrative Law', 17 The European Journal of International Law 2006, p. 247, 248.

[64]" *If we take seriously the multiplication of polities and their pluralist, heterarchical character, we will not conceive of any overarching, unifying polity, institution or framework of rules (…)This pluralist structure might resemble an 'archipelago'168 and will be hard to navigate, but this difficulty is only a reflection of the undecided, diverse character of postnational society in which a recognition of the need to cooperate coincides with the insistence on local, particular allegiances and values". N. Krisch,* The Case for Pluralism in Postnational Law LSE Law, Society and Economy Working Papers 12/2009 www.lse.ac.uk/collections/law/wps/wps.htm, *the same*, Beyond Constitutionalism: The Pluralist Structure of Postnational Law, Oxford University Press, Oxford 2010.

[65] *N. Krisch*, Beyond Constitutionalism, op. cit. p. 14–17

through mutual contestation[66]. Vertical accountability will be combined to horizontal accountability (inter-institutional accountability"[67], in order to ensure factual mechanisms of control. Public authorities do check each other, both at domestic and transnational level. However, this pattern does not fulfill the same function as democracy, because the result of concurring and opposing forces does not necessarily keep power under *democratic* control. The division of powers inside the State functions to check and balance powers, which all have as higher input popular sovereignty. This is not the case with transnational entities, which can easily be captured by special interests. In this sense, the fragmentation of global regulatory regimes could result to a feudal equilibrium, favoring the strongest actor, either politically or economically. For instance, E. Benvenisti and G. W. Downs remark "powerful states labor to maintain and even actively promote fragmentation because it enables them to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to opportunistically break the rules without seriously jeopardizing the system they have created[68]."

Cassese has also underlined the fragmentary character of the global public space, by criticizing the expression "multilevel governance" as misleading, insofar as there is no clear-cut separation of competences between national governments and global institutions, structured within a definite hierarchy.[69] Not only there is no global government, but rather several global regulatory regimes, but also the global law transforms the domestic law, it does not merely supersede them[70]. One could discern,

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[66] *B. Kingsbury*, Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law, 104 JOURNAL OF INTERNATIONAL LAW AND DIPLOMACY 98, 2005.68, N. Krisch, The Pluralism of Global Administrative Law, 17 EJIL 2006.247

[67] *G. O'Donnell*, Horizontal Accountability in New Democracies, in Andreas Schedler, Larry Diamond, & Marc F. Plattner eds, The Self-Restraining State, Power and Accountability in New Democracies 1999. 29.

[68] *E. Benvenisti , G. W. Downs*: The Empire's New Clothes. Political Economy and the Fragmentation of International Law, in "Stanford Law Review", 2007 – 2008, vol. 60, pp. 595 – 631. Cf. the remarks of Keohane and Nye on the –now obsolete- "club model" of international governance in the framework of international organizations. *R. O. Keohane and J. S. Nye, Jr.*, "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy," Paper for the American Political Science Convention, Washington, D.C., August 31-September 3, 2000, available at http:www.ksg.harvard.edu/cbg/trade/keohane.htm, cf. *C. Barfield*, Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization, AEI Press, 2001.

[69] S. Cassese, What is Global Administrative Law and why study it?, RSCAS PP 2012/04.

[70] As is the case with European and national law. See I. Pernice, The Treaty of Lisbon: Multilevel Constitutionalism in Action, Columbia Journal of European Law 15 (2009), 349

however, some emerging hierarchies in the international legal order, without this to signify a move towards a global constitution as a unified 'higher' law[71].

Cassese himself has shown how global law has contributed to this trend[72]: After a hierarchy has developed within each individual regulatory regime, it is possible to be extrapolated among different regulatory regimes as well. For example, the European Court of Justice, in the Kadi and Yusuf cases[73] recognized the primacy of international jus cogens over European law. Hence, the metaphor of "multilevel constitutionalism" [74] is not without merits.

It is, nevertheless, undeniable that designing a global constitutional frame, destined to embrace universal substantive and procedural principles, would be an impossible project, not only due to the lack of a global demos but because of the vast multitude of prevailing conflicting values in various parts of the world, especially outside the Western democracies. Still, this divergence and the development of a plurality of governance's loci does not infer impossibility of the recognition of global overarching principles, emerging from the common constitutional tradition of nation-states and the need of legitimization of the transnational order[75].

If we don't have some guiding normative principles for resolving conflicts between international, transnational and legal orders and actors, then the issue will be simply settled according to the prevailing balance of power. The outcomes of such a 'solution' would not satisfy any standard of fairness, taking into account the inherent inequality of

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[71] *A. Peters,* Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, 19 Leiden Journal of International Law 2006.579.

[72] *S. Cassese*, What is Global Administrative Law and why study it?, ibidem, p. 8.

[73] European Court of First Instance, Yassin Abdullah Kadi v. Council of the European Union and Commission of the
European Communities, 21 September 2005, case 315/01, in Rec., 2005, pp. II-3649; European Court of First Instance,
Ahmed Ali Yusuf e Ali Barakaat International Foundation v. Council of the European Union and Commission of the
European Communities, 21 September 2005, case 306/01, in Rec., 2005, pp. II-3533.

[74] "Multilevel constitutionalism" corresponds to the German concept of Verfassungsverbund, developed by I. Pernice. In a parallel line of research, the Research Centre on "Transformations of the State" (Staatlichkeit im Wandel) at the University of Bremen underlines the relevance of WTO and more generally the impact of world trading system to multilevel regulation.

[75] R. Hülsse, 'Even clubs can't do without legitimacy: Why the anti-money laundering blacklist was suspended' (2008) Regulation & Governance 459

global relations[76]. One could combine the assertion of a fragmented politically global space with the normative imperative to introduce rule of law and democracy at the global space in some form of 'constitutional pluralism'[77].

As we cannot have a global constitutionalism, based on a universal Grundnorm, or even a generally accepted rule of recognition, our constitutional arrangements will be, inevitably, pluralistic. This does not preclude the recognition of some common constitutional 'jus gentium'. In this line, Mattias Kumm's proposal for a 'cosmopolitan constitutionalism' does not seek to construct hierarchies between different levels of law but puts forward the affirmation of some fundamental overarching norms, such as rule of law and democracy, that are meant to direct the solution of conflicts[78].

3. Perspective

The major problem for a democratic transnational order is the absence of a global 'demos'[79]. Democracy and public autonomy are exercised within an existing Polity frame which is still lacking at this level. The presence of a durable self-identified political community, a 'common world' in the sense of Hannah Arendt, is an essential precondition for representative democracy, based on the rule of majority. It is true that global challenges, such as the environmental issues, bring forth a sense of commonality of a common future fate of all mankind. Still, the decisive factor in order to have the conditions for a majoritarian decision is the preexistence of a common public space, i.e.

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[76] Cf. *N. Krisch*, More Equal Than the Rest? Hierarchy, Equality and US Predominance in International Law, in M. Byers and G. Nolte (eds), United States Hegemony and the Foundations of International Law, 2003, p. 135.

[77] *N. Walker*, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 317. 13

[78] *M. Kumm*, The cosmopolitan turn in constitutionalism: on the relationship between national constitutional law and constitutionalism beyond the state' in J.L. Dunoff & J.P. Trachtman (eds.), Ruling the World? Constitutionalism, International Law and Global Government,Cambridge: Cambridge University Press, Cambridge,CUP 2009. In this sense of "constitutionalization" beyond the state see also *A. von Bogdandy*, Constitutionalism in International Law: Comment on a Proposal from Germany, 47 HARVARD INTERNATIONAL LAW JOURNAL 2006.223-242 the same, Globalization and Europe: How to Square Democracy and Globalization, 15 EUR. J. INT'L LAW 2004.885, *J. Klabbers, A. Peters and G. Ulfstein* (eds.), The Constitutionalization of International Law, Oxford, OUP 2009, *E.-U. Petersmann*, Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism, in Christian Joerges and Ernst-Ulrich Petersmann eds. Constitutionalism, multilevel trade governance and social regulation, 2006.5.

[79] C. Offe, U. K. Preuss The Problem of Legitimacy in the European Polity. Is Democratization the Answer? Constitutionalism Webpapers, ConWEB No 6/2006.

of a commonality of basic values of "overlapping consensus" that constitute the foundation of the community.

In the absence of such cosmopolitan community, it is no possible to have global representative democracy in the foreseeable future. Therefore, the mere 'uploading' of a conception of national democracy at supranational level or extrapolation from electoral mechanisms in national democracies is not the solution. Since there is no global demos, the only possible democratic legitimacy is through the political mechanisms of national democracy, enhanced with functional devices which take into account global interests (*below, 3.1*). Moreover, new institutional tools should be devised, aimed to ensure more democratically responsive global regulatory governance *(below, 3.2)*.

3.1 Democratic limitative procedures at national level

It is vital to impose democratic limitations to the development of global space. Teubner, better than others, has shown that the basic constitutive function of transnational regimes was to promote the institutional conditions for their autonomy vis-à-vis the national states[80]. "*To dismantle such nation-state boundaries has become the primary constitutional aim of transnational regimes. Today's global constitutionalism thus aims to accomplish two things: to break down the close structural coupling between the function systems and nation-state politics and law and to enable function specific communications to become globally interconnected. (...) It has produced not only specific political regulations but also fundamental constitutional principles. In the economy these have aimed at giving global corporations unlimited options for action, abolishing government shareholdings in corporations, combating trade protectionism and freeing business corporations from political regulation (...)* ***Limitative constitutional norms are now needed, rather than constitutive ones.****"*[81]

Hence, at the present state of affairs, the basic yardstick for qualifying the democratic quality of transnational policies is their impact on national democracies[82]. The asymmetry between capacities for political action and social participation at

[80] *G. Teubner*, Constitutional Fragments: Societal constitutionalism and globalization, Oxford, OUP, Chapter 4, Transnational Constitutional Norms: Functions, Arenas, Processes, Structures
[81] Ibidem, p. 76-78, emphasis added..
[82] Cf. 107 See *A.-M. Slaughter*, A New World Order, Princeton, Princeton University Press 2004, p. 219 ff..

national and transnational levels results to a disjunction between global socioeconomic and political processes, on the one hand, and local processes of democratic participation, on the other[83]. The governance of global space is especially democratically deficient when it comes to private regulatory mechanisms [84].

Nevertheless, globalization is inevitable, but not linear. It can be shaped and transformed by political rules. Democracies have the right to protect their social arrangements, and when this right clashes with the requirements of the global economy, it is the latter that should give way[85]. Simultaneously, rules and standards should be constructed at the transnational level so as to ensure the optimal provision of global public goods, such as climate or environmental protection.[86]

Parallel to any measures aimed to remedy the existing democratic deficit of institutions of global governance, it is even more important to introduce political and juridical means for containment of unchecked intrusion of transnational rules to national legal orders, without an explicit previous popular consent. In this sense, it will be necessary to re-center regulation[87], not in the sense of returning to national governments a control monopoly, but so as to ensure a democratic oversight on diffused regulatory strategies[88]. Such oversight may be deemed higher in the case of sensitive areas, as core labour standards[89], or in transnational regimes that involve the

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[83] Cf. *J. Habermas*, The Crisis of the European Union in the Light of a Constitutionalization of International Law EJIL, 23, 2012, No. 2.

[84] *L. A. Dickinson*, Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law, in William and Mary Law Review, 2005, vol. 47, p. 135;, *J. Aart Scholte*, Civil Society and Democracy in Global Governance" CSGR Working Paper No. 65/01.

[85] *D. Rodrik*, The Globalization Paradox, ibidem,, p. xix

[86] *D. Bodansky*, What's in a Concept? Global Public Goods, International Law, and Legitimacy, The European Journal of International Law Vol. 23 no. 3, Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 Yale LJ 2006.1490.

[87] Cf. *J. Black*, Decentring regulation: Understanding the role of regulation and private regulation in a postregulatory world, Current legal Problems, 54, 2001.103 ff, *the same*, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes, in Regulation & Governance, , vol. 2, 2008. 137.

[88] Cf. *S. Benhabib*, The Rights of Others, Cambridge: Cambridge University Press, 2004, p. 217-221.
C. Scott, Analysing regulatory space: Fragmented Resources and institutional design, Public Law, 2001, 329 ff.; State recentered as vital actor

[89] *T. Macdonald and K. Macdonald*, Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry, 17 European J. of International Law 2006.91, *J. Salzman*, Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development, 21 Michigan Journal of International Law 769, 2000.805.

privatization of functions that traditionally have been regulated within the public sphere[90].

The establishment of procedures and devises for containment of superimposition of norms lacking democratic legitimacy is not unfeasible or unrealistic. For instance, it has been suggested that the outcome of the WTO's Doha Round of negotiations and any consecutive treaties should be the object of a referendum at national level[91]. Needless to say that in EU every modification of the Treaties should be subject to a similar popular ratification, even in countries that do not have similar explicit constitutional obligation.

Besides the reconfirmation of the democratic character of constitutional settlements, similar procedures could contribute to the gradual formation of a global (or at least regional) public space, since the related political issues would be discussed horizontally in all involved countries. The creation of a similar public discourse arena, overlapping and complementing the national ones, is a functional prerequisite for the emergence of an eventual cosmopolitan deliberative democracy[92].

3.2 Constituting democratic decision-making and enhancing accountability at transnational level

Grant and Keohane distinguish two models of legitimacy of international institutions: In the 'participation' model, the '*performance of power wielders is evaluated by those who are affected by their actions*' and they are viewed as 'instrumental agents of the public', while in the 'delegation model', ''.[93] Krisch adds a third way of legitimacy, related to the functioning of the organisation according to practices of public autonomy that concretise the idea of self-legislation and enjoying, thus, actual social support[94].

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[90] *J. Freeman*, Private parties, public functions and the new administrative law, in D. Dyzenhaus, Redrafting the rule of law, Oxford, Hart, 1999. 331

[91] *R. Howse*, How to Begin to Think About the "Democratic Deficit" at the WTO, ibidem.

[92] See *J. Cohen and Ch. F. Sabel*, "Global Democracy?", 37 New York University Journal of International Law and Politics 2005.763, *J. Delbrück*, Exercising public authority beyond the State: transnational democracy and/or alternative legitimation strategies?, in Indiana Journal of Global Legal Studies, vol. 10, 2003.29, *R. Falk, A. Strauss*, On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty (2000) 36 Stanford J. of International Law 191.

[93] *R. Grant, R. Keohane*, Accountability and Abuses of Power in World Politics, 99 American Political Science Review 2005.29. They mention also different types of practices and institutional mechanisms for constraining, directing, and influencing the exercise of power, such as force or its threat, negotiation and the threat of exit or "go it alone" power. Cf. *K. Abbott and D. Snidal*, The Governance Triangle, Regulatory Standards, Institutions and the Shadow of the State, 2007.

[94] *N. Krisch* ,The Case for Pluralism in Postnational Law, ibidem.

Delegation amounts to state consent and supervision, whereas the two other types of legitimacy to other forms of accountability, open to wider publics. Problems of democratic accountability may occur either on the absence of efficient control mechanisms but more often are due to "*substantive disregard, an exercise of power that unjustified harms or unjustly treats some of those affected*"[95]. As Stewart remarks, "*the appearance of procedural legitimacy may veil and further entrench that disregard (…since) The problem is (not so much lack of accountability but) rather disproportionate accountability to (…) and well organized economic interests, to the detriment of less cohesive societal interests.*"[96]

For example, procedural mechanisms such as the Basel II, which may be used primarily by organized business and financial interests result may to an even greater disregard of the weak and vulnerable. In other contexts, there is the danger of bias and capture, as stronger and better organized actors exert greater sway in the informal, opaque, negotiation-driven networks of transnational decision making than more weakly organized general societal interests. Hence, the asymmetry between transnational capacities for political action and social participation results to a disjunction between global socioeconomic and political processes and substantive representation of interests[97].

Therefore, besides their internal structure and procedural mechanisms, legitimacy requires that these institutions provide the preconditions for effective public examination of and debate over their core purposes and their performance in carrying them out. In its Final Report, the International Law Association Committee on Accountability of International Organizations equates accountability with greater transparency and other practices that promote "internal and external scrutiny and monitoring"[98].

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[95] *R.B. Stewart,* Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance, IILJ International Legal Theory Colloquium Interpretation and Judgment in International L http://iilj.org/courses/2008IILJColloqium.asp.

[96] Ibidem, p. 12, p. 56.

[97] Cf. *J. Habermas*, The Crisis of the European Union in the Light of a Constitutionalization of International Law EJIL, 23, 2012, No. 2.

[98] *A. Buchanan, R. O. Keohane*, The Legitimacy of Global Governance Institutions, 20 Ethics and International Affairs, 2006.405.

Different combinations of these tools, adapted to the idiosyncrasy of various institutions and the specificity of global regulatory problems can be introduced in order to promote democratic decision making and responsiveness to disregarded societal interests. For instance, the delegation type of legitimacy should be democratically enhanced by the improvement of the representation of poorer and developing countries in the respective international organizations[99]. Shifts in quota shares to developing and to under-represented countries are already under discussion in the IMF, but the reform is far from remedying the existing inequalities[100]. Of even greater importance would be the reintroduction of some form of minority blocking mechanism to a panel or Appellate Body decision in WTO, preventing that decision from becoming binding WTO law.

In hybrid, semi-public institutions, the creation or expansion of participation rights could be an alternative solution. In some cases where the addressees of transnational regulation could be delimited and specified with accuracy, one could claim that they constitute, in a minimal sense, a specific demos, although not the kind of demos we have become accustomed to in national democracies[101]. Along this line, Held envisions a quasi-federal political structure in which all those affected by a particular issue have a right to participate in decisions on it, combined with a principle of subsidiarity[102].

However, it is not easy to establish international structures of democratic participation as thick and representative as those of the national level. Providing groups or diffuse societal representatives of interests with participation prior to decision-making, eg. by granting them voting membership in a collegial authority or rights of questioning decisions is enhancing the democratic function of transnational institutions,

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[99] See, for instance, *J. S. Nye Jr*. "Globalization's democratic deficit: How to make international institutions more accountable" Foreign Affairs July/August 3, 2001, *R.O. Keohane*, 'Global Governance and Democratic Accountability', in D. Held & M. Koenig- Archibugi (eds), Taming Globalization: Frontiers of Governance (Oxford: Polity, 2003) 130, 145, *M. de Bellis*, Global standards for domestic financial regulations. Concourse,competition and mutual reinforcement between different types of global administration, 6 GLOBALJURIST ADV. (2006), available at http://www.bepress.com/gj/advances/vol6/iss3/art6/

[100] Cf. *G. Napolitano*, The Two Ways Of Global Governance After The Financial Crisis Multilateralism vs. Cooperation Jean Monnet Working Paper 16/10

[101] Cf. *D. Curtin, L. Senden*, Public Accountability of Transnational Private Regulation Chimera or Reality?, Amsterdam Centre for European Law and Governance Working Paper Series 2011 – 06.

[102] *D. Held*, Democracy and the Global Order (Cambridge: Polity Press, 1995, *the same*, Democratic Accountability and Effectiveness from a Cosmopolitan Perspective 39 Government & Opposition 2004.365, 382.

to the extent that a majority of the stakeholders could be efficiently and fairly represented.

Nonetheless even where global bodies purport to provide representation, there is the danger of bias and cooption in the selection process to the detriment of less cohesive societal interests. Besides, hierarchies of social power operate in civil society no less than in other political spaces. Civil society is itself a site of struggles to be heard and its inadequate representation can reproduce or even enlarge structural inequalities and arbitrary privileges connected with class, gender, nationality, race, religion, urban versus rural location, and so on.[103]

Short of the impossibility to have genuinely democratic governance at global level, it is still possible to increase openness and transparency. Nevertheless, none of these practices satisfies the minimum elements of an accountability mechanism. They '*might provide a substantial degree of informal responsiveness to those domestic or global economic and social interests that are organized and able to take advantage of the opportunities provided by these mechanisms to monitor and influence regime-level decisions…Indeed, it is questionable whether mechanisms that do not provide assurances of legality can properly be regarded as administrative law; arguably they can at most be regarded as tools of administrative governance'* or, at best, *'administrative law lite'*[104].

4. Conclusion

GAL is a predominantly procedural version of global interest representation administrative law and it will remain so. The aim of this paper was to underline that it should expand its scope, so as to embrace at least two overarching principles, rule of law and democracy. This is necessary first for containing the corrosive impact of unchecked transnational regulation to national democracies and, second, for improving the representation of the disadvantaged in global regulatory governance. Both are essential

[103] *J. Aart Scholte*, Civil Society and Democracy in Global Governance, CSGR Working Paper No. 65/01.
[104] *R. B. Stewart*, U.S. Administrative Law: a Model for Global Administrative Law?' 68 Law and Contemporary Problems 2005.63, 104-105.

elements for securing the legitimacy and successful functioning both of domestic and transnational systems of governance [105].

As Weiler suggests, at the supranational level "*democracy can be measured by the closeness, responsiveness, representativeness, and accountability of the governors to the governed*"[106]. Hence, the core of the democratic principle, in the sense that there must be an ultimate link between the decision making and the will of the people, at least through their representative governments, can and should be promoted.

[105] *R. B. Stewart,* Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance, ibidem (note 95), p. 56.
[106] *J. H.H. Weiler*, The Constitution of Europe", "Do the new clothes have an Emperor? and other essays on European Integration", Cambridge University Press, 1999, p. 81, cf. also *J. H. H. Weiler and I. Motoc*, Taking Democracy Seriously: The Normative Challenges to the International Legal System, in S. Griller (ed.), International Economic Governance and Non-Economic Concerns-New Challenges for the International Legal Order, Wien, Springer, 2003, p. 68-69.

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