The Policy Impact of International Financial Regulatory Regimes above the States. New forms of Global Administrative Governance?

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❖ Introduction

In the traditional times of Public International Law we talked about governments. Nowadays we talk about governance. It is well known that international law was a state-centered discipline.[2] However, over the decades more actors became involved in the international arena producing what Joerges Christian points out, that nowadays "everybody seems to talk and write about governance."

Although the concept is far from having reached a consensus it has emerged from an older concept of transnational law. Transnational legal process describes the theory and practice of how public and private actors - nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals - interact in a variety of public and private, domestic and international to make, interpret, enforce, and ultimately, internalize rules of transnational law.

The concept of transnational law coined by Phillip Jessup in 1956 is therefore decades old.[3] Jessup defined it as "all law which regulates actions or events that transcend national frontiers". Henry Steiner and Detlev Vagts later translated this concept into a casebook, to bridge the gap between the domestic and international legal worlds. Government networks are typically identified as part of the larger phenomenon of "transnationalism".[4] Dan Bodansky argues that governance is more than coordinated problem solving. It is defined by the presence of authority and the ability to exercise power.[5]

If we look at both concepts of "governance" and "transnational law", although contentious, they are not much different. Both seem to involve relations between

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[2] Lori F. Damrosch *et al*., International Law xix, (4ed. 2001)
[3] Philip Jessup, Transnational Law, New Haven, Yale University Press, 1956. Harold H. Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996)
[4] Anne-Marie Slaughter, *the Accountability of Government Networks*, 8 Ind. J. Global Legal Stud. 347 (2001) Administrative agencies are networking with their counterparts worldwide. These "government networks" or "transgovernmental regulatory networks" are increasing attention and concern.
[5] Daniel Esty, *Legitimizing Supranational Governance: The Role of Global Administrative Law*, draft paper presented, 8 Yale Law School (2005)

governments and other actors, and relations that go beyond the national borders of a State. Consequently, “governance” seems to be something else than the mere coalition of national governments at the international level, and something else more than governance of state behavior.[6] It is not about a global government, inexistent today, but maybe about “shared government”, as decisions and regulations are not more a matter of only one government either in developing countries or in developed countries.

Then, we can talk about governance as shared governance among governments and other actors, predominantly formal or informal international organizations, and multinational corporations. Although NGOs have gain some space in specific subjects, they are still outside the final decision-making processes, and within most international regulatory regimes that are economic oriented, they are still in a primitive status.[7]

On one hand, globalization has eroded the boundaries that separate governors from the governed, has eroded the distinction between the public and the private, has opened the game to many different players, has made domestic financial markets become cross market and multilateral cooperative; has in fact transformed law and politics.

On the other hand, problems exceed domestic regulatory capacities so national officials tend to delegate power to international authorities considered to be more specialized and effective to solve them. As a consequence, we have witnessed an explosive development of a great variety of international economic and social regulatory regimes created in response to the rise of a global market economy and encompass a wide variety of subject areas such as trade, finance, banking, safety, etc.

Some of these regimes are bilateral, other multilateral, some regional, some global, some of them have been established by treaties, some others by networks. As a product of this growing exercise of regulatory authority, Kingsbury, Krisch and Stewart affirm that a Global Administrative Law (GAL) emerged.[8]

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[6] Benedict Kingsbury *et al*, *The Emergence of Global Administrative Law*, 46 IILJ Working Paper 2004/1 (Global Administrative Law Series), state that traditionally, the subjects of International Law are States. Correlatively, governance is the governance of states behavior.

[7] This is not to say that in some other issues as environmental matters, non-governmental organizations have played a key role as for example in the first stages of the celebration of treaties like the case of the Montreal Protocol of 1987.

[8] Benedict KINGSBURY, Nico KRISCH and Richard B. STEWART, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* 15 (2005)

The idea of global administrative law presumes the existence of global or transnational administration.[9] We do not have international financial regulators in a strict sense; we have domestic regulators dealing with each other on a bilateral, plurilateral or multilateral basis. The main reason for bringing up the concept of "global governance" is that it is said that much of global governance can be understood and analyzed as administrative action: rulemaking, decision making, and adjudication, between competing interests.[10] The same as in the domestic arena, administrative action at the global level has both legislative and adjudicatory elements. In addition, "global administrative law" is seen as a tool to accomplish accountability in global governance.

These international regimes have specific bodies that act as administrative agencies comprising rulemaking, enforcement, and adjudication functions.[11] The main critique these regimes or global networks face is their lack of legitimacy and accountability. To whom and how they are accountable, how they can enforce those recommendations they make.

Administrative Law represents a critical tool for legitimizing supranational governance.[12] Global regulatory governance can always be achieved through the application of domestic administrative law. [13]

[9] Kingsbury *et al*, *supra* note 8.
[10] Kingsbury *et.al supra* note 8.
[11] Eleanor D. Kinney, *the Emerging Field of International Administrative Law: its Contents and Potential*, 54 Admin. L. Rev. 415 (2002). The author also states that public international organizations engage in extensive law making. The foundational law of all public international organizations is international treaties and other agreements between countries. Most public international organizations issue interpretations and guidance for the implementation of treaties by states parties. Some organizations have the authority to make rules that are binding on governments and individuals. For example, the World Health Organization through its World Health Assembly has always had authority to issue its binding International Health Regulations to promote and protect global public health. Moreover, Public international organizations have tribunals and other arrangements to resolve disputes between nations and, in some cases, between individuals. Transgovernmental networks play an increasingly important role in international regulation. There is a nearly universal perception that these organizations and networks are inaccessible and unaccountable to ordinary people, although not necessarily to international corporations whose interests they often appear to promote and serve. Accessibility is a crucial issue with international regulatory bodies.
[12] See *id.* at 5. The differences in the context of governance at the national and supranational levels are significant. Policy making at the international scale can be improved an endowed with greater legitimacy through adoption of a set of rules and procedures that are associated with good governance. GAL, as the structure which facilitates collective action, could emerge as an essential pillar of legitimacy for the efforts being undertaken across the world to manage interdependence. Much work remains to be done in fleshing out appropriate rules and procedures on an institution by institution (and even issue-by-issue) basis.
[13] Kingsbury *et al*, *supra* note 8.

In domestic administrative law, the theories of competence and attribution of responsibility for illicit or licit acts are elementary. Public officials are individualized for accountability, and it is easy to find the wrongdoer of a decision taken. When we are in the international domain, with the interaction of multiple actors and complex bodies the situation becomes more complicated.

Apart from a question of accountability, there is a question of promoting democratic values. It is said that the development of global administrative law, by expanding transparency and opportunities for participation and input, could work to strengthen the application of representative democracy by making international regulatory decisions and institutions more visible and accountable.[14] Variations between national democratic systems in the means of operationalizing democratic control are connected to different ways of managing the discretion which effective administration requires, including through parliamentary control, executive controls administrative law procedures and judicial review. Despite these differences, administrative law in all these jurisdictions is centrally concerned with ensuring democracy.[15]

National administrative law in many countries has a democratic component. By establishing principles and mechanisms to control the exercise of the administrative power, it promotes democracy, even in Latin American countries where most administrative acts date since the end of military regimes or early democracies. Through the years, constitutional law reforms together with the celebration of supranational treaties have enlarged the protection of the citizen toward the power of the State.

Administrative Law guarantees the accountability of administrators to the Legislative, as the major representative body of the peoples. However, we need to acknowledge that the sociological practice of the norms in some countries with recent and weak democracies is different from the written established norms, and there are still some vestiges of non democratic conducts in the Administration. Moreover, it is common to find that democratic rules are so disperse in the legal system and with a confusing method making it difficult for the common citizen for the assertion of his/her rights when affected by a public action or inaction.

[14] Richard Stewart, *US Administrative Law. A Resource for Global Administrative Law?* 1, draft paper presented in the Globalization and Its Discontents Colloquium, Spring 2004.
[15] Kingsbury *et al*, *supra* note 8.

There is already a concept of global administrative law (GAL). Global administrative law comprises the set of normative standards for regulatory decision making and rulemaking procedures, including standards for transparency, participation and the rule-governed mechanisms for implementing these standards, applicable to formal intergovernmental regulatory bodies (World Trade Organization, World Bank) to informal intergovernmental regulatory network (Basel Committee of National Bank Regulators), and to regulatory decisions of national governments.[16]

Global Administrative Law would encompass the totality of global rules governing administrative action and the traditional concept of "international administrative law". GAL would include substantive law that defines the powers and limits of regulators (for example Human Right Treaties) and case law defining the conditions under which state organs can interfere with individual liberties, and the operation of existing or possible principles, procedural rules and reviewing and other mechanisms relating to accountability, participation and assurance of legality in global governance.[17]

Although the concept of GAL is being shaped around these specific features, we affirm that is not also that new. The same as the case of the concept of "global governance" that finds its antecedents in the concept of "transnational law" of 1960's, during the same time, Wolfgang Friedmann talked about new fields of international law: international constitutional law, international labor law, and *international administrative law*, based upon the administrative relations of the international organizations, *both to their staff and to outsiders*.[18]

Global financial regulation has become a form of rule of law. The problem for lawyers is that this rule of law has few of the formal characteristics of the rule of domestic law ranging from the whole process to promulgation and enforcement.

What comes out from this crucial interaction are domestic policies, regulations and administrative practices guidelines, standards to be implemented and enforced by domestic regulators. This soft law may be more effective that many hard law instruments even though I believe that the distinction between soft law standards and hard law standards is nowadays futile.

[16] Kingsbury, *supra* note 6..
[17] *id.* At 6.
[18] Wolfgang Friedmann, *The Changing Structure of International Law*, 365-81 (1964)

In this framework, international financial regulatory bodies/networks of different types and nature were created or reformulated to promote financial stability and prevent systematic risk (e.g. the Basel Committee on Banking Supervision, the Financial Stability Board (ex FSF), the highly political and state centered forum – the G20 that appears to be making policy and such policy making is the opposite of international law).

However, the global financial crisis in the aftermath of the financial shocks of 2007-2008 was a challenge to three of the most promising institutions of international law: the WTO, the IMF and the international network of regulatory agencies such as the Basel Committee and the International Organization of Securities Commission, and it was a challenge they failed to meet.

The standards development process they follow is quite different from that of a legislative or governmental body or a domestic regulator. “Soft” international regulations – like the expert and technical Basel Committee recommendations- get filtered into domestic regulatory systems and while not legally binding, national governments and lawmakers are factually bound to implement them and are lately assessed. Global standards impact them and affect state and non state actors differently. Global financial regulation now works like a legal system, even as it is propounded by institutions that do not claim to be acting with the force of law.

Who benefits from the systematization of international financial regulation? We all do. Nonetheless, I believe many concerns arise from this crucial interaction and the primitive questions on *how* are we governed and *who* governs are brought up again. Furtherrrmore, the informality in which these networks work can be seen as a license for powerful nations to pursue their national interests.

Here a question comes. Can domestic administrative law principles be legitimate bases for the regulation of Global Networks? If not, should global administrative law standards be developed to legitimate Global Networks? Greater transparency, legitimacy, accountability, efficacy need to be encouraged at theglobal level. However, the ultimate need will rest on the domestic level. Consequently, a shift in the paradigm of administrative law is required to successfully reconcile inconsistencies between the global and the domestic order.

International regulatory regimes are of different types and are not structured as democratic governments with the classic separation of powers. Hence, they are different in nature, states and non state actors participate and they are different from one to each other, with different concerns, domestic laws, interests, cultures, power. As Stewart holds, some of them have been created by treaties, and possess both administrative and judicial bodies (e.g. WB Inspection Panel or the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea), others only possess administrative bodies, some others only judicial bodies (e.g. WTO, HR treaties, Bilateral investment treaties); others, as Eyal Benvenisti points out, the fact that they do not have explicit administrative norms prescribed in the legal instruments establishing an international institution, does not necessarily mean that the institution will not have one. Second, these regimes are not structured as democratic governments with the classical separation of a legislative, an executive and an independent judiciary power. [19] Hence, the international regulatory bodies are different in nature and the states and non-state actors that participate are different, with different domestic laws, different concerns and interests, different cultures, power, strengths, weaknesses, threats, and opportunities.

So a preliminary question is: Is it possible to consider the emergence of a new branch of law called GAL[20] applicable to all international regulatory regimes in order to make them accountable? The answer to this question is apparently simple. We cannot create a universal, administrative law for the diversity, asymmetries and complexity that each of the international regulatory regimes present. Additionally, it is not possible to transfer "domestic administrative law" entirely to these international structures. Other than, maybe we can try to find some basic common principles that apply to these regimes. It is said that Global Administrative Law would then be the application of certain principles of domestic administrative law to the international regulatory regimes to promote accountability, the main critique that these regimes receive among scholars. However, we still cannot find contributions analyzing the possible application of these principles to a particular body, the approaches haven't thrown specific results yet, and they were much concentrated in the case of the EU Comitology.

[19] Eyal Benvenisti, *Public Choice and Global Administrative Law: Who's Afraid of Executive Discretion?* paper presented in the Globalization and Its Discontents Colloquium, Spring 2004.
[20] GAL comprises a set of normative standards applicable to formal regulatory bodies, to informal ones and to regulatory decisions of national governments; it would include the substantive law and the case law.

The purpose of this paper, is first to find out if there is a basis to consider the existence of the field of global administrative law and governance, and second to analyse the possible impact of international financial regulatory regimes above the States.

- The basis of a Global Administrative Law and Governance?

It is said that there are two possible approaches to answer this question:

The top-down approach is the more traditional international way. Individuals, groups and states would participate in global administrative procedures at the global level; the review of decisions would be performed by independent international bodies, and this would include the review of domestic decisions forming part of decentralized global administration. But this would pose new difficulties: it would require a legalization and institutionalization of administrative regimes that so far are characterized by strong informality modes of cooperation, and powerful states and economic actors will oppose as they will see reduced their discretionary influence.

The bottom-up approach seeks to ensure legality, accountability and participation in global administration through extending and adopting the tools of domestic administrative law. In some civil law countries, whenever there is a lacunae in administrative law, the judiciary will search for norms of what they call civil law corpus, and this is done either by a “subsidiary” application of the norm (this is the direct transposition of the civil law norm to the act of the administration) or by an “analogue” application of the norm (applying the norm to the case with some adaptations due to the different relations that regulate, the former between individuals, and the latter between individuals and the State).

It would apply domestic administrative law principles of transparency, notice and comment procedures and review not only to the domestic administrative decisions, but also to the participation of domestic administrators in these global regulatory bodies. It would also extent the review powers of domestic courts to include international decisions directly affecting individuals. However, in this point I find a big obstacle. Domestic courts cannot review the decisions of international organizations that can invoke the immunity of jurisdiction doctrine. Besides, it is said that less demanding procedural requirements and a greater level of deference by reviewing bodies might be applied to decisions taken by national officials in the context of global decision making because of imperatives of confidentiality, flexibility, and speed in

international negotiations. Or the other may around rigorous requirements and less deference. Moreover, since global administration is made up of domestic regulators cooperating, and since it often depends for its effectiveness on domestic implementation, such a bottom up approach might actually be quite effective in ensuring accountability. However, there are inequalities among countries, and the question to which public should global administration be accountable? The relevant public is different from the sum of the national publics.[21] Individual participation and individual standing to trigger review are not easy to accommodate. Therefore, GAL while drawing some concepts from domestic administrative law must start from different structural premises in order to build genuinely global mechanisms of accountability.[22]

I believe we cannot create a universal administrative law for the diversity, asymmetries and complexity that each regime presents. Also it is not possible to transfer "domestic administrative law" entirely to these regimes. Other than, *we may try to find some basic common principles that apply to them to promote accountability.* In domestic administrative law, public officials are individualized for accountability and it is easy to find the wrongdoer of a decision taken. When we are in the international domain, with the interaction of multiple actors, the situation becomes more complicated.

Apart from the question of accountability, there is a question of promoting democratic values. National administrative law in many countries has a democratic component. By establishing mechanisms to control the exercise of the administrative power, it promotes democracy, even in Latin American countries were most administrative norms dates since the military regimes or early democracies although there are some vestiges of non democratic conducts in the administration. Democratic rules may be dispersed in the system making it difficult for the common citizen to assert of his/her rights whenever affected by public action or inaction.

There are two important issues with accessibility: *geographic accessibility* as it is difficult for individuals to influence any process if the location is far away and *cognitive accessibility* due to the highly technical nature of much of international regulation and individuals who lack the education background and relevant technical expertise cannot have meaninful input to a decsion making process.

[21] Kingsbury, *supra* note 6.
[22] Kingsbury, *supra* note 6.

Domestic courts cannot review the decisions of international organizations that can invoke the immunity of jurisdiction doctrine. Also, the question is to which public should global administration be accountable?

Therefore GAL while drawing some concepts from domestic administrative law must start from different structural premises. It is clear to me that GAL is being shaped by the Northern and Western initiatives and I do not stand alone in this.

It seems that western states and institutions impose their own values to the developing world and what the developing countries then won´t accept is the way that is being shaped, that is without their participation. Chimini affirms that Global administrative law like substantive international law is being shaped by an emerging transnational capitalist class to realize its interests.[23] A global state is in the process of emerging constituted by a range of international institutions that regulate social, economic and political life of states; third world states are in particular compelled to cede sovereign economic, social and cultural space to international institutions. It is the dominant classes at the global level that will exercise the maximum influence on the evolution of GAL, the transnational corporation is better situated to use GAL to its advantage.[24]

The same scholars of the Global Administrative Law Project recognize that many of the emerging mechanisms of GAL stem from Northern and Western initiatives, and any attempt at justifying the need for such a body of law must thus face the challenge of its intellectual and political bias towards the North. Also they identify that the models of administrative law they use throughout the project are of European and American origin, and are closely connected with the rise of the liberal state and the expansion of its administrative activities in the 19th century."[25] In this paper I will take into account those models of European and American origin but with a different broader perspective. If I take the case of the local administrative law I consider to know better, the Argentinean one, we received the influence of U.S, France, Italy, and Spain. The same thing happened to other newly independent states that received the influence of older and imperialist states. But even within Europe, the administrative law

[23] B.S.Chimini, *Global Administrative Law: Winners and Losers*, Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance, paper presented at NYU Conference 2 (April, 2005)
[24] *id.* at 4
[25] Kingsbury *et al*., *supra* note 6.

of France for example is very much different than the administrative law in England, as we will see later on this paper.

Carol Harlow starts her essay stating that shaping Administrative law as we know it today is essentially an Anglo-American and European enterprise. We should not let us persuade that there is "one western model" of administrative law. But the classical administrative law systems that developed in Europe and the United States during the 19th century had in common that they functioned in the context of a state and a constitution, and against the background of political systems that dictated their values and shaped their principles.[26]

This reminds me of going through the same critiques that we have heard during the last years regarding the fact that the externalization of human rights norms allows western states and institutions under the guise of respect for human rights to impose their own values in the developing world. Imperialism dressed in a transnational outfit, an effort to disguise the imposition of "our norms" on "others".[27]

It should not be assumed that these are truly shared values.[28] Other than in GAL, I think that after the weaken of the local States due to corruption, lack of capacity building, transparency, ineffectiveness and inefficiency in the administration of funds, lack of credibility in the institutions, crisis of representativeness that the developing world societies present, they are shared values. What developing countries won't accept is the way, the no transparent procedure in which it is being shaped, without their participation.

Cassese observed that the effect of constitutionalising these procedural norms at a transnational level will be to "denationalize" national systems. National systems will be required to respect the procedural obligations of consultation, transparency, reasonableness and proportionality which seem to be emerging as universal global values.[29] Nonetheless, I do not think that will imply to denationalize national systems as if we take the bottom-up approach, we will see that they are the same principles of global administrative law that are already established locally, and they are in an

[26] Carol Harlow, *Principles of Global Administrative Law*, Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance, paper presented at NYU Conference 1 (April, 2005)
[27] Robert Malley et al., *Constructing the State Extra-territoriality: Jurisdictional Discourse, the National Interest, and transnational norms* 103 Harv. L. R. 1273 (1990)
[28] The Human Rights corpus is fundamentally Eurocentric. *Are Human Rights Universal? Or is the West imposing its philosophy on the rest of the world?* Boston Sunday Globe (April 29,2001) (contributions by Makau Mutua and John Shattuck)
[29] Harlow, *supra* note 26.

interrelation. Maybe what it will produce is more respect to those principles at a domestic level, in the daily practice of the administration; maybe they will be reinforced.

Administrative law is different everwywhere because it is linked to the history of the place and the culture in which is immerse. If I take the case of Argentina our local administrative law has the influence of the US, France, Italy and Spain. But even within Europe, the administrative law of France for example is very much different from the administrative law in England. American administrative law is inextricably linked with the history of the relationship of the market to the state. This relationship has varied over time, from the laissez-faire economic philosophy that typified federal involvement (or the lack thereof) in the nineteenth and early twentieth centuries, to the interventionist approaches taken by the federal government during the New Deal and beyond. Indeed, modern administrative law is, in large part, a product of federal attempts to regulate private enterprises through the creation of federal administrative agencies and administrative processes designed to control and legitimate agency power. New blends between the public and the private indicate how globalization has changed the nature of the relationship of markets to the state, creating a democracy deficit and necessitating new roles for administrative law.[30]

If we look at continental law systems, administrative law is different. In France there is a strong conception of separation of powers where the judiciary is prohibited from controlling the administration. The control is exerced by the Conseil d´Etat created in 1799 by Napoleon first with a consultative function and later with jurisdiccional power. Therefore, it is a system of "double jurisdiction" that means that when the relationship invoked is between an individual and the state the Conseil the Etat intervene and when the relationship is among individuals, the civil law jurisdiction will be applied. Also, we must acknowledge that there are different systems to control the constitutionality of the laws.

However, in Italy, also Europe, there is also a "double jurisdiction" system, but the jurisdiction of the administrative tribunal (Consiglio di Stato) will be determined by the invocation of the violation of a "legitimate interest" (intesse legittimo) and the

[30] Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 10 Ind. J. Global Legal Stud. 125 (Winter 2003). See also the following publications from the same author: Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: from Government to Governance*, 8 Ind. J. Global Legal Stud. 379 (2001). Alfred C. Aman, Jr., *Globalization, Accountability, and the Future of Administrative Law*, 8 Ind. J. Global Legal Stud. 341 (2001)

judicial body will have jurisdiction only when there is a violation of a subjective right (diritto soggettivo). Therefore, it will be the nature of the right violated and not the parties involved (there are these different categories of rights) what will determined the jurisdiction.[31]

In U.S. Administrative Law the conception of separation of powers is different. In the Federalist No. 47 the interpretation is that Montesquieu did not mean that the departments of state ought to have no partial agency in or no control over the acts of each other. On the slightest view of the British Constitution, the Legislative, Executive, and the Judiciary departments are by no means totally separate and distinct.[32] Therefore, the Judiciary controls the Administrative.

The common law system generally looks more to the process than the continental system adopted by many transitional legal cultures.[33]

These examples show the complexity that each system can present and the difficulties that we will have to overcome in our study. However, these complexities do not affect the examination of the basic principles of administrative law in which these regimes stand.

Moreover, we can affirm that no matter in which system we are, one shared goal of administrative law is to promote national public interest, and administrative law function is not only negative, to prevent unlawful or arbitrary administrative exercise of coercive power against private persons [34] but also positive. Administrative law offers both "affirmative" (power directing) and "negative" (power checking) functions.[35] And this is also no matter in which system we are.

The same happens in Argentina where administrative law presents a double jurisdiction system. This means that when an individual has a claim to the State, he/she has to present the claim to the Administration that provoked the grievance and then after the highest authority has issue its verdict and before some expiry dates he/she can then go to the Judiciary to claim for his/her rights.

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[31] For a detailed comparative study see HECTOR MAIRAL, CONTROL JUDICIAL DE LA ADMINISTRACIÓN PÚBLICA, V. I, Depalma, Buenos Aires (1984)
[32] ALEXANDER HAMILTON ET. AL, THE FEDERALIST. WITH THE LETTERS OF BRUTUS 235-236, edited by Terence Ball. Cambridge, UK ; New York : Cambridge University Press (2003)
[33] Charles H. Koch, Jr., *Globalization of Administrative and Regulatory Practice*, 54 Admin. L. Rev. 409 (Winter 2002)
[34] Stewart, *supra* note 14
[35] Esty, *supra* note 5

The core of traditional Administrative Law was directed at controlling abuse of power by a neutral organ to protect citizen's rights from arbitrary governments. Today there is a move towards the positive realization of public goods. Therefore, Administrative Law would then become more administrative than judicial.

However, no matter in which system we are, one shared goal of administrative law is to promote national public interest.

- Can Administrative Law Principles legitimate the work of Global Networks?

There is a need to find Administrative Law principles that can be applied globally to legitimate the work of these global networks that I have already said face a serious democratic deficit and legitimation crisis. Administrative Law can be used to counterbalance this lack.

A principle is a whole set of standards other than rules. A principle is a standard to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. Principles have a dimension that rules do not: the dimension of weight and importance. When principles intersect with each other, one must resolve the conflict taking into account the relative weight of each other. Rules do not have this dimension. It is not always clear from the form of a standard whether it is a rule or a principle.[36]

In the field of international law, Wolfgang Friedmann stated that general principles of law include:

1) General principles of interpretation
2) Procedural standards of fairness and due process in international law
3) Substantive general principles (Principles taken from national legal systems of sufficiently applicability to give body and substance to the many newly developing fields of international law. For example, the public law contract (contract administrative) as known in both systems of common law and civil law, he said, will have increasing importance for the law of the international concession, and other international economic development agreements, in which the interests of the host state and of the

[36] Ronald Dworkin, the model of Rules, 35 University of Chicago Law Review 14 (1967)

foreign investor have to be balanced in a manner comparable to the relation between governments and private contractors in national affairs. [37]

Distinguishing values from principles, Oliver lists as principles of English administrative law procedural impropriety, irrationality and illegality while her values include autonomy, dignity, respect, status and security. For Kingsbury et al. their values list for GAL includes: accountability, transparency, access to information, access to courts, participation, reasoned decisions, rationality, legal certainty and legitimate expectation.[38]

1. *Publicity, transparency, participation, and access to information. Informality of the procedure.*

The principle of publicity is an essential component of democracies. The decisions should be documented in a written record so that it can be later examined by the competent organs. Publicity is also a condition for the exercise of an action or appeal. A decision process open to the public for participation is also fundamental, and provides legitimacy to the decisions adopted. These are at the same time principles of transparency.

Daniel Esty commented that the Internet provides a mechanism for providing access at a very low cost, and welcomes that the WTO launched a website that provides access to most WTO documents and WTO has begun a series of workshops at which NGOs and business leaders exchange views. I agree. Although several international efforts have being focused on the issue of information communication technologies in the least developed countries, they still encounter difficult to access, and lack of capacity building.[39]

Participation is not the same everywhere too. Participation is a mechanism of social control of the system, and the parallel system (as there is one system of rules but also other of parallel norms and practices that runs at the same time). The public hearings or “les enquêtes publiques” of the French system are of recent history in Latin America, and the real tradition in these countries is the opposite of publicity. [40] Even

[37] Friedmann, *supra* note 18.
[38] Harlow, *supra* note 26.
[39] For example the Global Compact project, the support of the WB to projects on ICT.
[40] AGUSTÍN A. GODILLO, LA ADMINISTRACIÓN PARALELA, Civitas, S.A, 3a reimpresión, Madrid, (2001)

when there are some modern mechanisms enacted by law, the truth is that they are used as mere mechanisms to legitimize decisions adopted beforehand.

Another institution of recent creation is the Ombudsman (originated in Sweden) as a solicitor of citizen's interests and as an independent organ from the three branches of government to control the abuses of the administration.

We also need to remember that there is a principle that has been shaped in civil law systems which is what is called" informality" in favor of those who are being administrated, noticing that the severity of the formality or "proceduralization" could exacerbate rather than alleviate these potential sources of governance failure. [41]

The principles of access to information, public participation and access to justice have been gathered in the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted on 25th June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the 'Environment for Europe' process. The Aarhus Convention is not only an environmental agreement but also a Convention about government accountability, transparency and responsiveness.[42]Additionally, the UN Convention against Corruption[43] applied to public officials, foreign public officials, officials of a public international organization acknowledges that corruption is no longer a local matter but a transnational phenomenon, and the Convention seeks to promote integrity, accountability and proper management of public affairs and public property.

On the other hand, at a regional level, the Inter-American Convention against Corruption is the first international commitment for Good Government promotion and the largest cooperation system against impunity. The most important Convention's precedents were the Summit of the Americas (Miami, December 1994) and the First World Conference on Ethics in Government. This Convention came into force on the thirteenth day from the date in which the second ratification instrument would have been deposited, condition that was fulfilled on March 6, 1997.[44]

Finally I want to mention the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. On 21 November 1997, OECD Member countries and five non-member countries, Argentina, Brazil, Bulgaria,

[41] Esty, *supra* at note 5.
[42] See http://www.unece.org/env/pp/
[43] See http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf
[44] See http://www.oas.org/juridico/english/publica4.htm

Chile and the Slovak Republic, adopted the Convention and the US is party to the Convention since 1998.[45]

2. Notice and comment. Reasoned decision-making

It is important for agencies to provide place for notice and comment, an opportunity to be heard, and that a record be made after the hearing. It is usually said that agencies learn from the suggestions of outsiders and often benefit from their advice, and it is a feature of good governance.

The difference between Rulemaking and Adjudication is important in the US system of Administrative Law as due process does not apply if the proposed action is not adjudicative. The default position is that rulemaking is informal (only if a hearing and on the record are required by the organic statute then we go to formal rulemaking), not subject to notice and comment; but after notice, the agency must give interested parties an opportunity to participate in the process by submitting written data (no oral presentations). In Adjudication, the default position is that it is formal. After the case Pension Benefit Guaranty Corporation v. LTV Corp (1990)[46], for informal adjudication the only thing that APA requires is that the agency supplies an explanation that can survive the Arbitrary and Capricious test; does not have to provide notice and comment.

However, in other systems, although it is important to give notice and opportunity to comment, there is no complex issue on making it depend on the nature of the action of the administration (if it is rulemaking or adjudication).

That the decisions be reasoned is another fundamental principle. The administration usually enjoys some discretion but even in the cases of broader discretionary power, the act never is absolutely discretionary, rather there is always at least one aspect that is regulated (pouvoir liee). Should the agency have too much discretionary power the fear is the abuse of it. Should the agency not have power of discretion at all, it will cause difficulties in the management of governmental issues that may require rapid and efficient actions.

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[45] See http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html#text

[46] STRAUSS *ET.AL*, ADMINISTRATIVE LAW: CASES AND COMMENTS 472, 10th ed. (2003)

3. Principle of legality. Proportionality

Articles 20 and 28 of the Fundamental Law of Bonn establish the principle of legality, separation of powers, protection of the citizens with independent tribunals, and responsibility of state for illicit acts. In the Spanish Constitution the principle of legality is found in Articles 9.3 and 103.1. This principle means that the Administrative must respect the laws of the legislative and other norms (Constitution, laws, treaties, custom, general principles, rules and administrative orders) implying the subjugation of the administrative organ to the legislative organ.[47]

In France, le droit administrative is a special autonomous discipline, originated in the jurisprudence of the Conseil d' Etat. The sources of the legality are written and unwritten (like the general principles of law) recognized by the Conseil d'Etat such as: non retroactivity of the administrative acts, right to the defense, discretionary power, illegality by the quality of the actor of the act, illegality by the goal pursued or because of the forms, the object, the reasons expressed.[48] There are some exceptions like the exceptional circumstances and the government acts, and an action called "le recours pour excés de pouvoir" to control the legality of the administrative acts.[49]

Nevertheless, the goal of public interest is the element of the legality. The notion of public interest can be susceptible of a political approach or a legal one.[50] The goal of a public interest is a condition to the legality of the act. The choice of the means how to achieve it can be left with some discretion to the Administration.[51]

The principle of legality attributes at the same time prerogatives to the administrative power, and there has been a shift from the idea of a negative linkage of the administration which meant that the Administrative could do everything that was not prohibited to a positive linkage of the administration (positive bindung) that means that the Administrative can only do what it is permitted within the boundaries of the law,

[47] SANTAMARIA PASTOR, JUAN ALFONSO, PRINCIPIOS DE DERECHO ADMINISTRATIVO 51-55, Madrid, Centro de Estudios Ramón Areces (1990)
[48] ANDRÈ DE LAUDABÈRE, TRAITÉ DE DROIT ADMINISTRATIF 99, 13. éd., Paris: Librairie générale de droit et de jurisprudence (1994)
[49] JEAN RIVERO, DROIT ADMINISTRATIF 100, 13. éd., Paris: Dalloz (1990)
[50] GEORGES VEDEL, DROIT ADMINISTRATIF 516, V.1, 12e éd. mise à jour, Paris : Presses universitaires de France (1992)
[51] *id*. at 520

taken from the Austrian Constitution of 1920 and the Fundamental Law of Bonn (article 20 section 3).[52]

The principle of illegality (should be of legality) or the ultra vires principle, central to the practice of judicial review, depends on the idea of a government confined to operate within the framework of the law.[53]

Substantive standards are proportionality, means-ends rationality, rational relation between means and ends. Proportionality is central issue in the jurisprudence of some human right regimes, also in national court decisions on global governance.[54]

The principle of proportionality evolved in Germany. To satisfy the requirement of proportionality, an act or decision must be appropriate for its objectives. In the test of corresponding test of "reasonableness" used in many common law jurisdictions, a decision is judged unreasonable only if it is "so unreasonable that no reasonable administrator would have taken it. This leaves greater scope for administrative action. The balancing test of proportionality opens the way to synoptic dialogue and hard look judicial review.[55] The test in civil law systems can be applied in a different manner.

4. Due Process of Law

Due Process of law or the concept of fundamental justice in Canadian Administrative law is another fundamental principle, no matter in which jurisdiction we are. Procedural fairness may be ensured by several means. The Due Process clause of the Amendments V and XIV in the US Constitution has a "substantive" (what actions the government can take) and a "procedural" component (how the government must take certain actions).[56]

It has been said that while due process rights are common to all common law systems, we should not make the mistake of thinking that this makes them universal. Nor we should think that they take the same shape or have the same scope in every legal system.[57] This is true partially as in other systems, civil law jurisdiction we also

[52] EDUARDO GARCÍA DE ENTERRÍA Y TOMÁS RAMÓN FERNÁNDEZ, CURSO DE DERECHO ADMINISTRATIVO 416, 9. ed. Madrid: Civitas (1999)
[53] Harlow, *supra* at note 26.
[54] Kingsbury, *supra* at note 6.
[55] Harlow, *supra* note 26.
[56] JOHN. H. REESE, RICHARD H. SEAMON, ADMINISTRATIVE LAW, PRINCIPLES AND Practice 335, (2nd ed. 2003)
[57] Harlow, *supra* note 26.

find the due process as a principle of a high rank. Due process can also be seen as a human right.

5. Judicial Review

It is a common principle of Administrative Law everywhere, that there should be place for a review by an independent body of the administrative decision by the person suffering legal wrong. However, what it defers are the levels of standing to seek review (any person, only those with an alleged specific, concrete injury, a subjective right that was violated, third parties belonging to persons or groups more indirectly affected by regulatory decisions, etc.) and the body which has jurisdiction over these matters.

In the U.S., the Supreme Court has said that judicial review of administrative action is the rule, and non-reviewability an exception which must be demonstrated.[58]

The injury not necessary needs to be actual can also be a threat, imminent and not conjectural or hypothetical.[59]

It is a simple principle of Administrative Law that administrative action should be reviewable in the courts upon a reasonable basis not to substitute the judgment of a judge for the judgment of an administrative official or body, but for the purpose of protecting citizens against unlawful, arbitrary or other wrongful acts.[60]

A standard of review generally cannot eliminate the risk that the court will substitute its preferences. Yet the only kind of review that does not entail that risk is no review, and that is the one "standard" clearly incompatible with the will of Congress.[61]

At a domestic level, generally a person cannot get judicial review of an agency action until she has exhausted administrative remedies except where a statue modifies it. The agency ought to have an opportunity to correct its own mistakes before it is haled into federal court.[62]

However, the scope of review (if only questions of law, issues of fact, mixed questions) and what can be reviewed (if only the final decision or the previous steps taken by the administration towards the final decisions) is something that can vary

[58] Reese and Seamon, *supra* note 56
[59] *id.* at 575
[60] RUSSELL HORACE, ELEMENTARY PRINCIPLES OF ADMINISTRATIVE LAW
[61] Merrick B. Garland, *Deregulation and Judicial Review* 98, 505 558 Harv.L.Rev. (1985)
[62] Reese and Seamon, *supra* note 56

among the different systems but what is important is the basic principle of judicial review. There are reasons that make judicial control of the Administration necessary towards the constant risks in totalitarian regimes to concentrate and reinforce public prerogatives. Even among countries with a long history of democracy, judicial review is considered indispensable to legitimate the prerogatives of the Administration considering that for the Administrative it is not so important the legitimacy of its conduct as it is the achievement of a positive result towards a specific problem. Accordingly, the search for independent tribunals that can be either judicial or administrative in countries with double jurisdiction (Conseil d' Etat in France or the Consiglio di Stato in Italy), different than Argentina or the US where the system is of a single jurisdiction.[63]

- *The doctrine of delegation of powers in Administrative Law. Some basic premises*

First we have to acknowledge that there may be differences depending on presidential constitutional systems or parliamentary systems in the doctrine of the delegation of powers.

The basic premise in presidential systems is that Congress cannot delegate legislative power to the President but at the same time a hermetic sealing-off the three branches of government from one another could easily frustrate the capability of effectively exercising the substantive powers. There exists an extensive system of check and balances to control delegations. First, it is checked whether the statute that delegates is valid or whether the delegation is too broad in scope that does not provide even an intelligible principle for the administration. Second, if the action of the administration is within the power delegated by Congress.

Courts are reluctant to declare unconstitutionality of delegations of legislative power to agencies. (In US this happened only twice with *Panama Refining* and *Shelter Poultry*. The Supreme Court has long held than an ambiguous principle in a statute delegating power to an agency can gain "meaningful content from the purpose of the Act, its factual background and the statutory context" in *American Power & Light Co,* deferring to the agency's reasonable interpretation of a statute containing only an

[63] Mairal, *supra* at note 31

ambiguous principle. In Argentina[64] for example, it happened the same, only a few times the highest tribunal has declared a delegation unconstitutional)

New forms of administrative law will be developed to address the issues presented by the new network and economic incentive methods of regulations.[65]

Certain decisions might even be delegated to "non political" actors whose knowledge, expertise, and neutrality and insulation from politics is prized. The modern American administrative state reflects this approach to policy making.[66]

As Justice Story stated, the general rule of law is, that a delegated authority cannot be delegated." The non-delegation doctrine was designed to institutionalize the legislature, which would be composed of elected officials, as primarily responsible for the exercise of government power. [67]

Delegations at the domestic level are necessary for government. Pragmatically it is necessary to delegate in order to run government. Congress will seek for technical expertise in a particular field, and besides Congress cannot regulate everything in every detail. Therefore, Congress just lays down the general policy and standards that animate the law, leaving the agency to refine those standards, to fill in the blanks. What is more, it ensures that courts charged with judicial review power will be able to test that exercise against ascertainable standards.

At an international level, another delegation occurs, contravening the principle of local administrative law that those who exercise power delegated by Congress cannot subdelegate. Also at an international level the delegation is to an unelected official, whereas domestically, it is easy to know who officially elected is exercising the delegated power. Therefore, although a delegation in practice occurs to international organizations, the delegation doctrine can be applied for judicial review but will need some necessary adaptations.

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[64] Argentina Constitution Section 76 provides that the legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress. The phrase "save for issues concerning administration and public emergency" are the ones that till today are being controversial especially when it is a country that has lived in a permanent emergency during the last decades.

[65] Stewart, *supra* at note 14

[66] Esty, *supra* note 5

[67] John J. Coughlin*, the History of the Judicial Review of Administrative Power and the Future of Regulatory Governance*, 38 Idaho L. Rev. 89 (2001)

Why is this important? Because Global networks create standards that impact on local administrative law. Sometimes the global interest represented by the Global Network outweights their domestic interests and they will accept being bound by the decision especially where the Global Network is able to bring global economic and political pressure to bear on the nation.

It is essential to regulate and control these networks that form a kind of supranational governance although not explicitly recognized.

Global Netwoks are organized around achiving a special task or principle or addressing specific problems. However they have some basic commonalities:

1) They interact through more or less informal meetings;
2) The results of these meetings are often guidelines or standards, and
3) These guidelines or standards are not legally binding *but are factually or politically binding* for member states and non members. These standards may come close to being as binding as legally binding decisions made by a government.

Therefore, it is important to look at the structure of each particular Global Network to analyse this situation as most of them lack a concrete treaty that codifies tasks or principles.

We take the case of the Basel Committee on Baking Supervision as a primarily standard setter.

- INTERNATIONAL REGULATORY REGIMES: The Case of the Basel Committee

The Basel Committee represents an exemplary case study of the challenges involved in seeking accountability, transparency and democratic legitimacy from the decision making undertaken by informal networks. Yet it also serves to illustrate how Administrative Law principles and mechanisms might be applied to these bodies.

Basel Committee representatives are national civil servants (central banks representatives) addressing international subject matter. At the international level the delegation is to an unelected official with a special expertise whereas domestically is

the opposite. The delegation of powers doctrine at the domestic level will need some necessary adaptations and review.

The primary mode by which the Basel Committe engages in global governance is by developing and promulgating recommendations for banking sector regulations amongst members in an informal setting.

Initially the recommendations were intended to apply only for the G10 countries, but soon became apparent that other countries would have to follow in order to participate in crucial financial markets. The functionality and efficacy of the recommendations relies on members reaching common ground and consensus with one another. These recommendations must be implemented into law at the domestic level under the relevant national administrative rule making procedure. Therefore the ultimate need for greater transparency, accountability, legitimacy and efficacy will rest on the domestic level of financial regulation or regulators. These recommendations impact on the internal order and indirectly on the people who will have to have some form of participation. Developing countries are specially impacted by these global standards because they are often not able to meet the high standards set by developed countries and may be unable to compete internationally. The economic consequences that result from a breach of a global standard can sometimes hit companies and states harder than a breach of a legally binding international law.

In Europe the Basel standard has been transposed into EU law. How are those standards enforced? In the long run the trajectory is inevitable towards formality and codification.

The Committee reports to the Central Bank Governors and Heads of Supervision of its member countries. The earliest policy development meetings lacked transparency and were conducted with no invitation for the public, NGOs or non member states. However, when the time to revise the original 1988 Bank Capital Standards Recommendations arrived the BC undertook multiple rounds of notice and comments to increase participation and transparency.

Basel I is a model of global governance and an ideal example of a transnational regulatory network requiring banks to maintain certain levels of capital or assets in the belief that this provides banks with an equity cushion that allows them to remain solvent in the event of major losses. Protection of American Banks in the global market

place was important at the time of Basel I since the US banking industry was coping with increasing competition from Japan and Germany banking sector. The Basel process could be viewed as an attempt by the G10 to ensure continued hegemony over the developing world.

Initialliy, Basel I seemed like a success: most of the Basel Committee member states adopted the regulation and many non members did that “voluntarily” too. In fact they had little choice. Participation in the markets that matter requires some countries to meet Basel standards. Moreover, the IMF and World Bank increasingly look to national implementation of the Basel Standards.

Basel II finalized in June 2004 and attempted to address such issues imposing higher capital requirements on banks.

Demands for revision of Basel II arose in the international community in response to an economic crisis that was distinctly global in nature requiring global solutions in 2007-2009. But the circumstances giving rise to Basel III are similar to those preceding the adoption of Basel I.

In December 2010 the Basel Committee on Banking Supervision would issue the Basel III Framework, a series of global regulations to respond to the financial crisis of 2007-2009. The recent financial crisis has left the global economy severely weakened and challenged the three most promisive institutions of international law: the WTO, the IMF and the international network of regulatory agencies Basel Committe and the International Organization of Securities Commissions (IOSCO - a network regulator for the securities market developed in 1984 as a much less selective organization that operates on an informal structure). It was the Basel Committee that set the standards that Bear Stearns, Lehman Brothers and the big European Banks met in practice and it was Basel II that did not sufficiently keep the banks solvent.

But is this financial network democratic legitimate? Can Administrative Law principles be a legitimate basis for the regulation of these Global Networks? If not must Global Administrative Law be developed to legitimate them? Let´s see.

The basis for any democratic legitimation consists of 2 elements: 1) people elect representatives and 2) people control those representatives. Therefore any Global Network lacks any direct democratic legitimation. Members are not elected by

the people and these networks are not controlled by the people or judicial review. Citizen's participation is non existent. Legitimation can be achieved through procedure (a decision making process that is open to the public and allows for public comment will lead to broader acceptance and legitimation of GNs decisions) and through expertise, rationality and efficiency.

No matter the differences in every legal regime there are some common principles that may be applied: fairness, publicity, participation as a mechanism of social control, reasoned decision making, proportionality between means and ends, due process, transparency, accountability, legal certainty, equity, reasonableness and judicial review can guarantee a certain level of control (alhough a standard of review generally cannot eliminate the risk that the court will substitute its preferences).

The application of these principles towards Global Networks provides some legitimacy to the decisions adopted. But domestic Administrative Law principles can conflict with the tasks or principles of the Global Networks. Then in this case other principles should be developped.

The international governance mechanism that appears to be making policy is the G20 created in response to the financial crisis of late 90´s. It embodies the classical international relations heads of state making international policy. G20 appears as an informal forum that promotes open and constructive discussion between industrial and emerging market countries on key issues related to global economic stability. G20 was conceived as a complement to G7 not as a replacement and it appears that networks are working for the G20 rather than guiding it.

G20 promise to reform the Financial Stability Forum (FSF), a body meant to coordinate the work of IOSCO and Basel Committee; it enlarged it, renamed it as Financial Stability Board (FSB) and called for it to be a stronger entity.

G20 has little to do with law. It has no legal status, it was never formalized by a treaty, it has neither administrative agency nor secretariat, it has remained a poticized organization and during the crisis the G20 has contributed to a response differently from WTO, BC, and IOSCO. Hence, political not legal or expert institutions have been leading the response to the crisis.

Basel Committee has enlarged its membership to include G20 members. This ensures more legitimacy but carries out problems to reaching consensus quickly. Greater accountability and legitimacy in international rule making will imply losses to efficiency, more difficulties in reaching consensus and other costs but it is highly necessary. Closed membership and informality facilitates deal making among countries that matter and contribute to a sense of exclusion in the developing world.

As of January 2013 we have a BCBS Charter as a culmination of the meetings held in 2012 to examine whether the Committee´s governance could be improved through increased transparency and formalisation of its existing modes of operation.

The correct approach to understanding the BC´s operations is to see its domestic and international existence as being fused together and becoming truly transnational. What we need to study are the points of intersection. What the BC demonstrates is that “top down” approach of Administrative Law principles is complemented by “bottom up” extension of domestic Administrative Law, even where this expansion does not involve explicit judicial review of transnational governance decisions.

The Group of Governors and Heads of Supervision (GHOS) is the oversight body of the BC. The BC reports to the GHOS. The GHOS appoints the BC Chairman from among its members.

The structure of the Basel Committee is the following:

The Committee, the ultimate decision making body of the Basel Committee is the one who establishes guidelines and standards, meeting four times a year. Then we have groups that report directly to the Committee composed of senior staff members, working groups that consist of experts from Basel Committee members, and task forces that undertake specific task for a limited time. The chairman directs the work of the Basel Committee and is appointed by the GHOS for a term of three years that can be renewed once and monitors the work of the Committee and represents the Basel Committee externally and finally the Secretariat located at the BIS in Basel that supports the work of the Committee and the rest of the structure.

It is stated in the Charter that the Committee expects standards to be transposed into local legal frameworks through each jurisdiction´s rule making process within the pre-defined timeframe established by the Committee.

Last but not least important it is stated the consultation with non-member authorities by participating in Basel Committee bodies, or within the Basel Consultative Group or the International Conference of Banking Supervision or the Financial Stability Institute that assist supervisors around the world in implementing sound prudential standards or within regional groups.

Also the Basel Committee cooperates with other international financial standard setters and public sector bodies with the purpose of achiving an enhanced cooperation in the Joint Forum and finally it is stated a compulsory process for Basel Committee standards that is the consultation process issuing a public invitation to interested parties to provide comments within a specif timeframe.

- Some reflexions:

The role of domestic administrative law may need to be reconceptualised to deal with the incursion of these global norms. There is a need for reconciling inconsistencies between global and domestic Administrative Law and this can be done through the analyses and application of the general principles of law.

It is not necessary that the principle should be accepted by the legal systems of all member states; it would be sufficient if the principle were accepted by most member states and the principles must be drawn from a variety of different sources and legal systems. But it is imposible to analyse every legal system worldwide.

What is more, not every general principle can be fully applied to these institutions. For example in the G8 judicial review is probably inimaginable or undesirable because it would slow down and impede decision making. However a more transparent decision making process would be possible and beneficial.

Moreover, credible and durable global standards require real enforcement mechanisms. The former FSB (FSF) outlined specific measures for non complying jurisdictions and later had been pulled back. FSB has been established to coordinate at the international level the work of national financial authorities and international

standard setting bodies and to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies in the interest of financial stability.

Members have agreed to undergo assessment under the Financial Sector Assessment Program (FSAP- a joint IMF and WB effort introduced in May 1999 to increase the effectiveness of efforts to promote the soundness of financial systems analysing the resilience of the financial sector, the quality of the regulatory and supervisory framework, and the capacity to manage and solve financial crisis) every 5 years and membership within the FSB comes with an obligation to “implement international financial standards”. FSB members have committed to undergo peer review.

It takes major crisis for serious reform to occur. Neither the sole focus on national administrative law nor exclusive reliance on new mechanisms within international organization is sufficient.

International mechanisms ought to be designed to enhance, rather than supplant domestic Administrative Law. One should be sensitive to developing administrative rules that will work for the wide range of administrative processes that are ocurring at the international level.

International institutions can deploy Global Administrative Law to protect citizens from their own governments where such governments have weak domestic Administrative Law and high risk of regulatory capture. Regulatory harmonization is not always imperialism. National administrative process can improve transparency in international negotiations and international administrative process can help to overcome weaknesses in domestic level to improve transparency.

As we said, the Basel Committee has increased transparency and improved opportunities for public participation. The Basel process should open up further.

Exploring the Basel process in depth helps to reveal nascent elements of Global Administrative Law. The interactive processes of domestic and international administrative review are mutually reinforcing.

How individual rights might be better protected?

A body that has created mechanisms for access to individuals is the World Bank Inspection Panel. Access to justice is a human right. Due process is a human right. Judicial review when a partie indivudual is affected could be within a non judicial mechanism, a global administrative jurisdiction, and a specialized administrative jurisdiction for that regime and the scope of the review, if only for questions of law or also for questions of facts or both, which tests to be applied. How this might be structured and implemented is another remaining question.

International negotiations sometimes enable government leaders to do what they privately wish to do but are powerless to do domestically and they are unlikely to self impose restrictions.

More focus on principle based international standards rather than detailed rule-based ones should be done. Legal scholars play an important role in this area to help improve our understanding of international administrative governance and how it matters for policy-making above the state.

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