Indiana Journal of Global Legal Studies

Volume 8 | Issue 2 Article 4

Spring 2001

# Introduction: Globalization, Accountability, and the Future of Administrative Law Symposium

Alfred C. Aman
*Indiana University Maurer School of Law*, aaman@indiana.edu

# Introduction

# Globalization, Accountability, and the Future of Administrative Law

ALFRED C. AMAN, JR.*

Global processes complicate both the form and content of democracy. They rearrange the lines between public and private entities, multiply the number and range of institutional sites in any one decision-making process, blur the lines between decisionmakers and the participants in that process, encourage the creation of transnational networks of various types, and promote new forms of regulation, which are often voluntary in nature. Globalization thus yields intended and unintended effects on institutions and democratic participation within nation-states, resulting in a number of externalities, the foremost of which might be called the democracy, or accountability, problem in globalization.

All of the articles in this Symposium focus on this problem. The first three, by Professors Anne-Marie Slaughter, Martin Shapiro, and myself, were initially presented as papers at an Association of American Law Schools (AALS) conference, which was organized by Professor Charles H. Koch of the College of William and Mary Law School, entitled "Emerging Themes in Administrative Law," held in Washington, D.C. on March 2 and 3, 2000. The authors constituted a panel dealing with globalization and administrative law. In addition to addressing voluntary corporate codes of conduct in the field of labor law, the fourth article, by Professor Adelle Blackett, provides a substantive case study of many of the procedural issues raised in the first three papers.

As the articles in this Symposium suggest, the democracy problem stems from the disjunction between global, economic, and political processes on the one hand, and the opportunities for democratic participation that exist at the local and international level on the other. The resolution of such disjunctures is often left to the market or to voluntary forms of regulation; however, in many contexts, such privatizations only intensify the democracy problem.

* Alfred C. Aman, Jr. is the Dean and the Roscoe C. O'Byrne Professor of Law at the Indiana University School of Law–Bloomington.

When regulation is delegated to the private sector, the public is no longer involved in decisionmaking in the same ways, nor is the kind of information likely available that would make public participation meaningful.

The democracy problem in globalization is increasingly a feature of modern life at the international and domestic levels of governance, in the United States and abroad. International and domestic lawyers must reconceptualize the role of administrative law in the various decision-making processes that are now shaped by global processes at the transnational and domestic levels. We offer this Symposium in furtherance of that effort.

In the first article, "The Accountability of Government Networks,"[1] Professor Anne-Marie Slaughter examines the history of transgovernmentalism and sets forth a typology of transgovernmental networks. She discusses three types of networks in particular—those that develop in the context of established international organizations, those consisting of national regulators that emerge under the umbrella of an overall agreement negotiated by heads of state, and those networks of national regulators that evolve outside any formal framework, what Professor Slaughter calls "agencies on the loose."[2] Each of these networks create their own accountability concerns; however, as Professor Slaughter notes, the word "accountability" is not self-defining. It is a complex concept that differs from context to context. Professor Slaughter analyzes the meaning of accountability in each of these networks, noting that the accountability of transgovernmental interaction within international organizations once had much to do with the "club model" aspect of such organizations, one that has now broken down. Nevertheless, the current outreach activities of the World Trade Organization, the United Nations, or the Organization for Economic Cooperation and Development may not be enough and, to their critics, often seem too little too late. Transgovernmental activity within the framework of executive agreements is even less visible than that occurring within established institutions and the results they reach are sometimes subject to the charge of "transgovernmental collusion," particularly when certain domestic constituencies are disfavored under pressure from the top.[3] Finally, as Professor Slaughter notes, transgovernmental networks that arise outside the framework of international organizations and executive agreements are most

1. Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 349 (2001)

2. *Id.* at 361.

3. *Id.* at 364.

likely to spawn fears of runaway technocracy.[4] Key issues may be removed from the domestic political agenda through "deliberate technocratic depolitization."[5]

Professor Slaughter thus calls on domestic administrative lawyers to turn their attention to transgovernmental regulatory issues and, specifically, to "issues involving the ways in which regulatory networks most frequently exercise power—through the distillation and dissemination of authoritative and credible information to their members throughout the world."[6]

Professor Martin Shapiro's essay, "Administrative Law Unbounded: Reflections on Government and Governance,"[7] resonates with the themes sounded by Professor Slaughter. He too focuses on the impact of global processes on the State and raises two perennial and fundamental administrative law questions: who shall govern and how? Professor Shapiro answers these questions by examining the implications for administrative law of two forms of boundary erosion—the boundary between government and governance and the boundaries between national, supra- and subnational regulatory regimes. To highlight some of the implications of boundary erosion between government and governance, he examines several of the approaches to administrative law that underlie the European Union's (EU) "comitology" process. In particular, he discusses the role that experts and nongovernmental participants play in the lawmaking process, concluding that so many interests are now represented on various committees, and experts are so favored over nonexperts, that the end result is not only that the distinction between government and the governed has been eroded, but that such governance can easily degenerate into "pervasive bureaucratic micromanagement."[8]

The same trends can be found in U.S. administrative law. Indeed, Professor Shapiro argues that the move from government to governance was greatly facilitated by the pluralistic theory underlying administrative law. This theory can accommodate the participation of so many diverse interests and groups in agency decisionmaking that the government has gradually become less a decisionmaker and more a facilitator among these various groups. The problem that emerges from these trends is nothing less than an

4. *Id.* at 365.
5. *Id.*
6. *Id.* at 368.
7. Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369 (2001)
8. *Id.* at 374.

undermining of democracy: "As public policy decisionmaking is diffused among various government and nongovernment actors in an amorphous, non-rule-defined manner, democratic accountability is destroyed."[9]

Professor Shapiro also examines the implications for democracy of a second kind of erosion—that which occurs when national governments lose authority to both supra- and subnational governments. As he notes, the two are often linked. When nation-states lose power to supranational agencies, such as the EU, it makes it easier for states within States to seek independence on their own. Moreover, transnational, or global, governance raises even greater problems for administrative law since there are few processes established to deal with transnational questions, and the processes that do exist tend to be elitist and opaque.[10]

My own paper, "The Limits of Globalization and the Future of Administrative Law: From Government to Governance,"[11] focuses primarily on the domestic side of administrative law. Given the collapse of such distinctions as global and local, and public and private, many of the accountability problems at the international level exist at the domestic level of governance as well. This is particularly the case when various traditional public services are undertaken by the private sector. Indeed, the relationship between the public and private sectors should be reconceptualized and, as at the international level, procedures governing the creation and dissemination of information must be devised.

To put market trends and public/private partnerships in perspective, I argue that the manner in which policymakers conceptualize globalization will have much to do with how they conceptualize administrative law, at both the international and domestic levels of government. Specifically, I examine various conceptions of globalization and the relationship of markets to law that each of these conceptions implies. I argue that increased reliance on markets and various forms of privatization removes important areas that once were public and places them in the private sector. A primary role for administrative law is to provide transparency and participation to these areas, even though they might now be designated as "private."

In reaching this conclusion, I examine three approaches to the relationships of markets to law. The first is a laissez-faire conception of the

---

9. *Id.* at 372.

10. *Id.* at 374.

11. 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).

market, an approach that sees markets as essentially all encompassing and as superior to law. Accountability comes from market processes alone and, implicitly, such processes are sufficient for governance purposes. Market populism substitutes for democratic participation. This view of globalization assumes processes that are linear in nature and inevitable in result. The second conceptualization of globalization and the relationship of law to markets takes the opposite approach. It assumes that, where there is the political will, states and lawmakers can resist those aspects of globalization with which they disagree. I conclude by focusing on a third and more transformative approach to administrative law, one that conceptualizes globalization as neither inevitable nor linear in nature, and one that recognizes that global forces cannot simply be legislated into extinction. Global forces can be shaped and transformed to benefit the public interest ends of various constituencies on the ground, as it were. Indeed, administrative law should transform globalization by democratizing various uses of the market that carry out public functions.

"Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct,"[12] by Professor Adelle Blackett, provides a case study of some new transnational forms of regulation—which are largely voluntary in nature—in the context of labor law. In so doing, she contextualizes various accountability themes and, in particular, demonstrates how a specific conception of globalization can shape or distort law-reform efforts. She does this by focusing on voluntary corporate codes.

Professor Blackett's article first places these codes in historic perspective and then examines their advantages and shortcomings. She notes that the new voluntary approaches to labor law fail to meet the traditional goals of labor regulation in large part due to the way in which globalization is conceptualized. Professor Blackett argues that these various voluntary approaches often reinforce a conception of globalization that largely minimizes the role of the State and assumes "a linear development across undifferentiated terrain."[13] As Professor Blackett notes, such an approach "overlooks the importance of place in the globalization process."[14] Not all countries are the same, and a one-size-fits-all approach does not work.

12. Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401 (2001).

13. *Id.* at 424.

14. *Id.*

Professor Blackett connects voluntary corporate codes of conduct in the context of labor relations with an economic view of globalization that de-centers the State. Indeed, she is critical of these voluntary codes because they often seem simply to extend management power. This occurs in domains that could be dealt with by either legislation or collective bargaining agreements, instead of through voluntary corporate codes. She then focuses on how one might bring the State back into the regulation process and, to that end, suggests some thoughts for the developing framework of the United Nations Global Compact (Compact). This Compact would focus on the global citizenship aspects of the corporations involved; while acknowledging criticism of this approach, Professor Blackett suggests that the Compact has the potential to escape narrow, corporatist approaches to representation and to focus attention on the developing world. A more transformative approach to globalization would challenge narrow economic conceptions of globalization and promote a more cosmopolitan democracy.

The articles in this Symposium set forth an important set of questions and a research agenda for the future. They are all premised on the belief that it is possible to transcend narrow conceptions of globalization if we introduce more accountability into the global processes that currently shape transnational and domestic law. This is a challenge that cannot be met wholly from within the framework of a single nation-state nor, indeed, from within a single profession or academic discipline. This Symposium, however, suggests some perspectives and approaches to accountability that may help us respond in imaginative ways to the analytical challenges facing us as we seek to maintain flourishing democratic institutions in the global era.