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Diversity and pluralism in earth system governance: Contemplating the role for global administrative law

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ABSTRACT

This article aims to explore whether procedural rights and administrative law mechanisms – such as, for example, the right to a hearing, the duties to provide a reasoned decision and to disclose relevant information – can enhance the accountability and democratic legitimacy of earth system governance.
The democracy-enhancing potential of such mechanisms and rights – which in the national context have proved to be beneficial in strengthening citizens' participation and the acceptance of decisions – can be limited in the global arena, by a number of factors. One of these factors is "legal imperialism", understood as the grafting onto the global level rules and institutions that impose the hegemony of western values.
In fact, administrative law mechanisms, being a construct of a certain type of western, liberal model of the state (and its capitalist model of development), could be perceived, in developing countries as an instrument to reproduce the dominant position of advanced industrialized countries and their economic actors.
The analysis suggests that in order to realize their democracy-enhancing potential, these mechanisms should draw, as far as possible, on cross-cultural principles, and be supported by financial and technical instruments enabling "developing countries" and marginalized groups to engage in dialog with the most powerful actors.

1. Introduction

Procedural rights and administrative law mechanisms, which in domestic legal systems have been deployed to legitimate and control public power (Harlow, 2006), are increasingly used in many areas of earth system governance (Biermann, 2005, 2007).

According to Biermann et al. (2009: 19), earth system governance can be understood as comprising "the formal and informal rules, rule-making systems, and actor-networks at all levels of human society (from local to global) that are set up to steer societies towards preventing, mitigating, and adapting to global and local environmental change". As such, earth system governance requires a multilevel analysis and a transdisciplinary approach, which traverses the borders of academic disciplines and goes beyond traditional environmental policy analysis, combining the study of environmental factors with social processes. From a legal perspective, research on earth system governance can be seen as part of the effort to identify, design and help build new principles and mechanisms of law to address the consequences of globalized interdependence in fields such as environmental protection, food safety, biodiversity conservation, and forest degradation.

Today national environmental regulators concerned with these issues are often part of government networks (for example, the Commission for Environmental Cooperation of North America or the European Environment Agency), hybrid intergovernmental–private administrations (such as the Codex Alimentarius Commission) and other cooperative regimes that apply mechanisms and rights typical of the state-system. More precisely, some version of procedural rights that entitle citizens to access information and participate in rule-making procedures, are increasingly granted by a number of global regulatory bodies dealing with earth system governance.

Examples include the right to access information, which is granted, for instance, by the Cartagena Protocol on Biosafety (see Art. 23.1.b) and the Code of Conduct for Responsible Fisheries (see Art. 7.1); the right to participate in standard-setting procedures, which is provided by the Codex Alimentarius Commission (see Part 3 of the Procedural Manual) and the Programme for the Endorsement of Forest Certification (see Art. 3.4.1. of the Rules for Standard Setting); the right to know the reasons on which decisions are based and the right to judicial review, both provided by the Aarhus Convention (see Articles 6.9 and 9).

This "procedural turn" (Gupta, 2008) in earth system governance can be explained by the attempt to boost the legitimacy of standards and certification mechanisms established beyond the state (Kingsbury et al., 2005). As a matter of fact, the instantiation of procedural safeguards, by forcing global regulators to be more transparent and to provide an account (Dryzek and Stevenson, 2011, this issue; Mitchell, 2011, this issue) for their policy choices, might improve their democratic legitimacy and accountability.

However, the use on a global level of procedural safeguards and administrative law mechanisms aimed at strengthening citizens'

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participation, though lauded by some scholars as a positive development in terms of deliberative democracy (see, *e.g.*, Esty, 2006), has been criticized by others as "an interpretation which transforms substantive rules to the disadvantage of the third world countries" (Chimni, 2005:7). From this perspective, the use of administrative law, instead of being an instrument of democratic legitimation, can result in "imperial governance" (see Hardt and Negri, 2000).

In this article, I draw on the earth system governance conceptual framework (as elaborated by Biermann et al., 2009, 2010, see also Biermann and Gupta 2011–this issue), to investigate how global administrative law (Kingsbury et al., 2005) can enhance equal participation and democracy beyond the state. While acknowledging the emergence of a body of global administrative law to promote the accountability and legitimacy of earth system governance, this article advances the idea that administrative law techniques used in the global context are not neutral, but reflect the dominant position of specific industrialized countries and their economic actors. I argue that, in order to enhance the democratic quality of earth system governance, a pluralistic approach to global administrative law is necessary. This approach should favor the development of administrative law mechanisms based on cross-cultural principles and enforceable basic procedural rights.

The paper contains five sections. Following this introduction, the second section seeks to disaggregate the concept of global administrative law into two separate variables in order to consider whether, and to what extent, global administrative procedures can serve deliberative democracy in earth system governance. The third section describes how procedural norms and rights established at the global level can become a prop for the dominant position of advanced industrialized countries. The fourth section examines whether, and how, diversity and pluralism are taken into account in determining how global administrative law can be shaped and implemented in earth system governance. The final section contains concluding remarks.

2. The Janus-Faced Nature of Global Administrative Law and its Implications for Earth System Governance

As Habermas (2001) reminds us, functional equivalents to the 'administrative state' – for example, openness in the decision-making processes and expert participation in rulemaking – are required to grant the legitimacy of "post-national constellations". It is important to note, however, that the legitimacy-enhancing potential of such administrative law-type mechanisms can be nullified by power inequalities in global governance, a point not sufficiently highlighted by those emphasizing the role of such mechanisms in securing more democratic earth system governance.

In their seminal paper, Kingsbury et al. (2005) proposed that much of global governance can be understood and analyzed as administrative action. In particular, they drew the attention of many scholars of global governance to mechanisms of administrative law increasingly available on the global level. Five years later, a body of global administrative law has developed. This nascent body of law includes principles, procedures and mechanisms that promote the accountability of global administrative bodies, by ensuring that they meet adequate standards of participation, procedural openness, legality, reasoned decision and review (Kingsbury, 2009).

Underlying this is the existence of legal instruments, which are not formally binding but regularly applied by domestic administrations and at times invoked by private parties before national courts or global (quasi-)judicial bodies. An example concerning earth system governance is the Operational Policies and Procedures of the World Bank, which include safeguard policies designed to prevent adverse effects on the environment. Though being referred to as "policies", these are, *de facto*, "administrative norms" (Cassese, 2005a: 113), which are obligatory for national authorities and can be invoked by private parties before an "inspection panel", thus providing some sort of judicial review.[1]

The actors addressed by this "embryonic field of global administrative law" (Kingsbury et al., 2005: 15) are not only states and international organizations, as in the classical models of international law (*jus inter gentes*), but also companies, collective entities (*e.g.*, NGOs) and individuals. The latter, though being profoundly affected by global administrative decisions (for example, decisions on risk assessment made by the Codex Alimentarius Commission or the World Trade Organization), can rarely make demands on global bodies to report on their activities, nor can they impose costs. In other words, they do not stand in a direct legal relationship with global regulators.

Therefore, unlike domestic legal orders, where power-wielders are accountable to the public mainly through electoral mechanisms, in the global arena – where there is neither government nor "demos" – accountability relationships necessarily rest on different bases (Keohane, 2006; Grant and Keohane, 2005). Proponents of global administrative law emphasize that one of these bases can be found in certain principles and mechanisms of administrative law that might serve to enhance the legitimacy of global institutions (which Scharpf, 1997 calls 'input legitimacy'). Such principles for example grant affected parties the right to have their views considered before decisions are taken, or to access relevant information and have a reasoned decision. More specifically, as Cassese (2006:685) observed, global administrative law ascribes to citizens two fundamental rights deriving from domestic administrative law: the right to participation, and the right to defense (*i.e.* the right to appeal to a judicial authority for the review of a decision).

While the right to defense is granted in only a few cases, *e.g.*, within the framework of the Aarhus Convention (Article 9), participatory rights are increasingly recognized in many areas of earth system governance. Examples include water, land and forestry governance, where local communities, especially in the developing countries, have been more and more involved in resources management, development programs and policy implementation (albeit with contradictory results, see, *e.g.* Agarwal, 2001).

However, the democracy-enhancing potential of these procedural rights and safeguards, which according to Daniel Esty (2006:1496) "in the realm of supranational governance […] takes on special significance", can be limited by a number of factors. One is the inequality of power between the various global actors (for a detailed analysis of the different ways that power operates in global governance, see Barnett and Duvall, 2005).

Indeed, as Chimni (2005:3) clearly puts it, "power plays a key role in the framing, invocation, and implementation of administrative law", so that "for disadvantaged countries and marginalized sectors of the population the exercise of these rights is often a theoretical possibility". In this light, the adoption of administrative law mechanisms at the global level is likely to result in the legitimization of a given international dynamic of power rather than in greater accountability.

To put it differently, mechanisms and principles of global administrative law, though advertised as a step forward in the democratization of global regulatory regimes, can be used as a prop for the dominant position of powerful actors which enjoy the technical and financial means fully to exploit them (Chimni, 2004). Climate change negotiations are a prominent example of this situation. Here, mechanisms to allow for the participation of NGOs in policy deliberation and decision-making procedures exist (see, for

[1] The World Bank Inspection Panel was officially established with two resolutions of the International Bank of Reconstruction and Development (I.B.R.D. Res. 93–10, Sept. 22, 1993) and the International Development Association (I.D.A. Res. 93–6, Sept. 22, 1993). Its main task is to carry out independent investigations of Bank-financed projects in order to determine their compliance with the Bank's policies and procedures and, if needed, make a finding of harm (Section 16, 22).