Remedying the accountability gap in global administrative law

1. Public participation at the global level

Both the paper presented by Jean-Bernard AUBY and that submitted by Laurence DUBIN and Rozen NOGUELLOU raise a number of very interesting issues which all deserve to be debated at length. However, the role of a discussant is to highlight just one or two topics which are particularly worthy of debate. I have chosen, therefore, to focus on the issue of 'accountability' which plays such a prominent part in both essays.

As Jean-Bernard has pointed out in his paper, global administrative law theory assumes that agencies ought to be accountable to a certain extent to the legitimate political powers and to the citizens. Laurence and Rozen have explained that this accountability can take the shape of participation by private individuals in the decision-making process.

In order not to take up too much of the time set aside for the discussion, I will not try to summarise the thorough and illuminating research conducted by Laurence and Rozen into the involvement of private individuals in the decision-making process in the EU, the WTO and the OECD. Suffice it to say that, although the record of each is different, in all three organisations participation by private individuals is piecemeal and consultative rather than decisive. Although private individuals are sometimes consulted, their participation is not as widespread, nor as effective, as in the *interest representation model* prevalent in national jurisdictions, like the U.S.

From the point of view of accountability this is rather disappointing. Laurence and Rozen blame the limited participation by private individuals on its perceived rationale. The organisations seem to regard public participation as a principle of good governance rather than a democratic necessity. However, in order to prevent global administrative law from becoming the prerogative of technocrats it is important that the administered play an active role. For the sake of the discussion I will therefore recommend two ways of achieving this, *i.e.* introducing the American *notice & comment* procedure and reliance on judicial review.

2. Introducing *notice & comment* as a means to bridge the accountability gap

The *notice & comment* procedure of § 553 of the Administrative Procedure Act applies to rulemaking and consists of the following three stages:[1]

1) If an agency intends to make rules on a particular topic, it must give *notice*, *i.e.* announce to the public that it is going to make these rules. This announcement will contain an outline of the proposed rules and an explanation of the policy choices underlying them. It will also provide an estimate of the costs and an assessment of the potential impact of the rules on business.

2) After the announcement the agency will then invite the general public to submit *comments* on the proposed rules. Although this *comment* part of the proceedings is written, agencies often hold oral hearings on different locations around the country

[1] See generally ALFRED C. AMAN & WILLIAM T. MAYTON, Administrative law, second edition, St. Paul, 2001, pp. 37-60; ERNEST GELLHORN & RONALD M. LEVIN, Administrative law and process, St. Paul, 2006, pp. 323-328.

where interested parties are invited to give testimony. Not surprisingly, the Internet nowadays also plays an important part in these proceedings.

3) The proceedings are completed with the publication of the final rules and the rulemaking record, which should set out the comments made to the agency and the way in which it has dealt with them.

The *notice & comment* procedure guarantees effective involvement by interested individuals and organisations. There are two factors that enhance this effectiveness even further.

First, regulatory agencies in the U.S. are subject to Congressional oversight.[2] If the organisations that have participated in the *notice & comment* procedure are not satisfied with the outcome, they can always turn to Congress to get a more favourable result. This happened, for example, when the National Highway Traffic Safety Administration issued the safety belt interlock rule, which required the car manufacturing industry to install in every car a device that would prevent it from starting unless the safety belts were all buckled. Not surprisingly, this was anathema to many Americans and their interest groups and they put pressure on Congress to repeal the rule. Congress did so by amending the Motor Vehicle Safety Act, the legislation which serves as the basis for the rulemaking activities of the agency.[3]

Second, rulemaking is subject to judicial review. Interest groups that are dissatisfied with the outcome may go to Court in order to try to get their way. Courts are of the view that agencies should not limit themselves to relying on their own expertise but should also use the input provided by private individuals. The Courts therefore tend to scrutinize the rulemaking record to see whether the agency has done justice to the comments made. Involvement by private individuals in the rulemaking process serves as a proxy for democracy, because its purpose is "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." [4] Agencies are, of course, aware of the fact that Courts tend to have a hard look at the record and this may encourage them to pre-empt judicial review by accommodating the interest group concerned.

<u>3. Using judicial review as a means to bridge the accountability gap</u>

Laurence and Rozen have rightly pointed out that within the WTO judicial review is regarded as an alternative to participation by individuals in the rulemaking process. Thus, several WTO panels and the Appellate Body have allowed interest groups to participate in the proceedings by submitting *amicus* briefs. This suggests that the judicial process can serve as a vehicle for interest participation at the global administrative level.

Such an approach would find support in the experiences within the U.S. Americans are widely regarded as being more litigious than other people.[5] What is probably less well known is that this litigiousness may have been created by constitutional design. Thus, the American law professor Robert Kagan has explained that the litigiousness of the American people, which he

[2] TOM ZWART, Independent regulatory agencies in the U.S., in TOM ZWART & LUC VERHEY (eds.), Agencies in European and comparative perspective, Antwerp, 2003, pp. 3-17.
[3] The case and its context are described in: JERRY L. MASHAW & DAVID L. HARFST, The struggle for auto safety, Cambridge, 1990.
[4] *Batterton v. Marshall*, 648 F.2d 694 at 703 (D.C. Cir. 1980).
[5] See generally JETHRO K. LIEBERMAN, The litigious society, New York, 1981.

calls ‘adversarial legalism’, is caused largely by the structure of American government.[6] According to Kagan there are two phenomena that induce adversarial legalism.

First, since the 1960s the demands the citizens have on the state have increased enormously, mainly as a result of the civil rights movement. Nowadays the citizens expect the government to combat pollution, to protect consumers, to promote public health and to encourage fundamental rights. This requires a very active state.

Second, the American system of government is characterised by ‘limited government’. Since its establishment, citizens in the U.S. have opposed big government and high taxes. Consequently, the American system of government is hyper-pluralistic. Government authority is fragmented and cut through by multiple vertical and horizontal lines.

The new demands for an active government had to be translated, therefore, into a system different from the more centralized bureaucracies that are common in Europe. The solution adopted by Congress was to delegate the necessary authority to private individuals and the judiciary. American law is characterised by legislation that contains many due process requirements and legal rights, which may be enforced by private individuals in courts. American citizens therefore may assist Congress in enforcing its Acts as ‘private attorney-generals’. At the same time the judiciary is politically responsive. Consequently, private individuals and non-governmental organizations regard bringing court cases as a way to participate actively in the political process. In a sense, therefore, the U.S. is a ‘litigant democracy’.

Reliance on the Courts would, in my view, also fit well in a global administrative setting where representative bodies are weak or lacking altogether. The ‘litigant democracy’ model can be introduced at the global administrative level, provided there is access to court. This presumes two things, *i.e.* the existence of a court and access to it.

Some international organisations have their own courts. As Sabino CASSESE has demonstrated, those who do not sometimes ‘borrow’ the dispute resolution tribunals of other organisations.[7] In addition, it is conceivable to set up an International Administrative Court, supported and shared by those international organisations which do not insist on having one on their own.

As far as access to those Courts is concerned, private individuals should be allowed to challenge the rules made by the organisation. This could be achieved by saying so in so many words in the rules themselves, and by keeping the standing barriers low.[8] Creating the opportunity for non-governmental organisations to file *amicus* briefs would add to the potential of this ‘litigant democracy’ model. As Jean-Bernard has rightly pointed out, the global administrative tribunals, by drawing on both American and European administrative law, would create a powerful mix which would certainly benefit the administered.

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[6] ROBERT A. KAGAN, Adversarial legalism, The American way of law, Cambridge, 2001.

[7] SABINO CASSESE, Le droit administratif global: une introduction, Dr. Adm., juin 2007, manuscript, p. 7.

[8] I agree with Justice Scalia that in a national system a low standing barrier is likely to undermine the separation of powers, see ANTONIN SCALIA, The doctrine of standing as an essential element of the separation of powers, (1983) 17 Suffolk University Law Review 881. However, since there is no similar doctrine at the global level, Courts can play a constructive role by compensating for the weakness or the non-existence of a representative body.

5. Conclusion

As Laurence and Rozen have demonstrated convincingly, the opportunities for public participation in the decision-making at the global level are very limited. Consequently, the organisations concerned fail to meet the essential accountability requirement identified by Jean-Bernard. In my view, there are two ways in which this accountability gap could be remedied. First, a process akin to the American *notice & comment* procedure could be introduced at the global level. Second, rulemaking could be subjected to judicial review to create a 'litigant democracy'. I commend both methods for the discussion.

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