View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Indiana University Bloomington Maurer School of Law

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Journal of Global Legal Studies

Volume 6 | Issue 2 Article 1

Spring 1999

# Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest (Earl A. Snyder Lecture in International Law)

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

Follow this and additional works at: http://www.repository.law.indiana.edu/ijgls


Part of the Administrative Law Commons, and the International Law Commons

Recommended Citation
Aman, Alfred C. (1999) "Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest (Earl A. Snyder Lecture in International Law)," *Indiana Journal of Global Legal Studies*: Vol. 6: Iss. 2, Article 1.
Available at: http://www.repository.law.indiana.edu/ijgls/vol6/iss2/1

This Lecture is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Global Legal Studies by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.


JEROME HALL LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

# Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest

ALFRED C. AMAN, JR.*

*On February 3, 1999, Dean Aman delivered the third annual Snyder Lecture at the University of Cambridge in the Lauterpacht Center for International Research.*

It is a great personal pleasure to be back in Cambridge and to have the honor of presenting this year's Snyder Lecture. I have had the good fortune of having spent two full sabbatical leaves in Cambridge as a Visiting Fellow at Wolfson College. During those leaves I experienced the intellectual stimulation of this Center and Professor Sir Eli Lauterpacht's warm hospitality. It was always a pleasure to have the opportunity to attend the Center's very active seminar series. So, it is a double pleasure to be back, both in Cambridge and here, again, at the Center.

Shortly after I became dean at Indiana in 1991, I took a trip to Washington, D.C., to meet the person who was then the President of our Board of Visitors. Having arrived a bit early at his office, I used my extra time to call some alumni in the area and introduce myself as the new dean. The very first person I called was Earl Snyder. When I introduced myself to Earl, he said he was very pleased to hear from me and that he had just made a substantial gift. "Thank you," I said; "to Cambridge," he continued. I knew that deans were supposed to engage in fund-raising, and I thought I must have done something terribly wrong. On the other hand, I was, of course, very pleased, indeed, to know that we had "lost out" to Cambridge. As we talked, however, it became clear that Earl thought of Cambridge and Indiana as being linked and his gift to Cambridge was intended to fund an Indiana University (IU) law student each year to do research at this Center. I am happy to say that since that time at least seven of our students have had the honor and the opportunity to work here and another will soon be on the way. Later, in the

* Dean and Professor of Law, Indiana University School of Law—Bloomington.

course of our Capital Campaign, Mr. Snyder made a gift directly to our law school designed to support a faculty lecture every year, usually to be given by a member of the Cambridge law faculty in Bloomington, but occasionally by a member of our faculty and delivered in Cambridge. I am happy to say that I am the first IU beneficiary of this policy, and it is my great pleasure and honor to be here tonight.

The inaugural Snyder lecture was delivered in Bloomington by Professor Sir Eli Lauterpacht in 1997.[1] His topic was "International Law and Private Foreign Investment," and in his lecture he used foreign investment as a paradigm for the remarkable changes that have taken place in international law during the last five decades.[2] Professor Philip Allott gave last year's Snyder lecture, also in Bloomington. His topic was "The True Function of Law in the International Community."[3] His talk was, in fact, no less than a discussion of the role of law in the future of humanity.[4]

My focus shall be on U.S. domestic law, specifically domestic public law. It may seem that I am straying a bit from the focus of this lecture series, but I hope it will become clear that even a talk on domestic law must, of necessity, consider issues that are international and global in scope. Indeed, what I hope to show is that it is important to conceptualize from a global perspective areas of the law we once thought of as purely domestic. This is because the line between the global and the domestic is often blurry at best and in many contexts simply no longer exists. Moreover, much is at stake in the way lawyers and policymakers conceptualize so-called "domestic" issues today, especially when we focus on issues of democracy and what I shall call a global public interest. Democracy, or the democracy deficit, as well as the creation and furtherance of a global public interest shall be my themes this evening.

One way to capture the problem posed by global forces for domestic legal regimes is suggested by an approach to harmony taken by the twentieth century composer, Charles Ives. As Henry and Sidney Cowell point out in their biography of Ives:

---

1. Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 IND. J. GLOBAL LEGAL STUD. 259 (1997).

2. *Id.*

3. Philip Allott, *The True Function of Law in the International Community*, 5 IND. J. GLOBAL LEGAL STUD. 391 (1998).

4. *Id.*

> The germ of Ives' complicated concept of polyphony seems to lie in an experience he had as a boy, when his father invited a neighboring band to parade with its team at a baseball game in Danbury, while at the same time the local band made its appearance in support of the Danbury team. The parade was arranged to pass along the main street as usual, but the two bands started at opposite ends of town and were assigned pieces in different meters and keys. As they approached each other the dissonances were acute, and each man played louder and louder so that his rivals would not put him off. A few players wavered, but both bands held together and got past each other successfully, the sounds of their cheerful discord fading out in the distance.[5]

Unlike Ives's musical experiment, however, the global economy is not going to march off into the distance, and the dissonance is not likely to fade away. Domestic public law reforms that are developed without reference to global issues run the risk of unnecessarily duplicating the musical collisions that Ives's music sought to capture. It may appear that the global marching band and the domestic public law trend toward greater reliance on markets are beginning to play the same tune. This, however, may not always be the case, especially if domestic law reformers fail to conceptualize domestic policy explicitly in global terms. If markets and the private sector in general are viewed much as they were in pre-global times, democracy as well as a global conception of the public interest will suffer.

For years U.S. public law debates have been dominated by the question of which *public* institution should be responsible for certain kinds of policymaking—the court or the legislature. To the extent that courts make decisions that have broad legislative impact, they undermine democracy and the legitimacy derived from decisionmaking by elected legislators. The democracy problem inherent in globalization, however, is more fundamental. It involves more than a debate over which *public* institution—the court or the legislature—is best suited to decide certain kinds of legal issues. What is at stake when the "globalizing state" delegates power to the market and various non-State private actors is a far more striking choice between some democracy (or participation) and none at all. While one might argue that there is a

---

5. HENRY & SIDNEY COWELL, CHARLES IVES AND HIS MUSIC 144 (Oxford Univ. Press 1969).

democracy problem if unelected federal judges play too active a role in resolving legal policy issues, the democracy deficit created by globalization is of a whole different order of magnitude. Indeed, the problems of democracy can be exacerbated when the State seeks to meet the demands of global competition by relying heavily on the market and market incentives.

Deregulation and privatization were widespread responses to the global economy throughout the West.[6] On some occasions, deregulation in the United States involved the wholesale substitution of the market for regulation, as in the deregulation of oil prices at the wellhead and, eventually, natural gas prices. In other instances, deregulation involved the use of the market as a regulatory tool, as in the Clean Air Act of 1990.[7] Moreover, deregulation has resulted in the use of the market more as a metaphor than as the creation of a real market as, for example, when responsibility is delegated to private providers to manage what once were public tasks, such as the prisons.

These market uses are often driven by declining governmental revenues, brought about by lower taxes and State attempts to cut regulatory costs and increase global competitiveness. However, more is involved here than simply doing more or the same with less. These deregulatory reforms, as well as new voluntary regulatory regimes now developing in various industries, are taking place in a global context—one in which the State is decentered, not only by increasingly intense global competition, but also by global technologies, global problems, and various non-State actors whose power and influence do not map onto any single political jurisdiction.

One can conceptualize these various deregulatory reforms and voluntary regulatory regimes as something akin to the delegation of responsibility and policymaking power to the market. This is a far cry from the pooled sovereignty of the European Community or, in effect, a delegation of State sovereignty to a supranational bureaucracy in Brussels. Yet the use of the market by U.S. policymakers and government decisionmakers in many contexts represents more than just a desire to remove public controls and let the chips fall where they may. There is an expectation that the impersonal, abstract forces of the market will achieve certain policy goals and do so relatively inexpensively.

---

6. *See* ALFRED C. AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA (Cornell Univ. Press 1992); Alfred C. Aman, *The New Administrative Law*, *in* THE PROVINCE OF ADMINISTRATIVE LAW (Michael Taggart ed., 1998).

7. Clean Air Act Amendments of 1990, 42 U.S.C. § 7502 (1995).

Since our delegations are to the abstraction of the market and not to a public supranational body such as the European Commission, the democracy deficit that results is an even more significant problem than that encountered by the European Union (EU). This is largely because of the State action doctrine in the United States.[8] The State action doctrine governs, for example, the extent to which our due process clause and its procedural protections might apply to the exercise of power by governmental bodies. It does not apply to actions taken by private entities no matter how large or powerful. Moreover, the return to or even the use of the market implies a divide between private ordering and State intervention that creates a strong presumption in favor of private action, usually without any direct public input or accountability, other than what the market itself might produce. Thus, when one delegates to the market to achieve greater efficiencies in various governmental services, a greater return on our social security funds, or a more cost-effective approach to our welfare program, or when one defers to more market-oriented voluntary and regulatory regimes in emerging global industries, matters once thought to be public may now be seen as private as well, oftentimes jeopardizing the application of such fundamental public law values as participation and transparency.

The early days of the deregulation movement in the United States illustrate the purity with which market approaches were pursued and the skepticism legislators and policymakers often expressed regarding the law. The first serious effort at deregulation focused on the airline industry. The legislative goals of the 1978 Airline Deregulation Act[9] were to abolish price and entry regulation in the industry and to eventually close down the Civil Aeronautics Board (CAB).[10] Though the original architects of deregulation never intended that it occur without the application of the antitrust laws, there was, to a large extent, reluctance on the part of the Justice Department in the 1980s to enforce the antitrust laws once the CAB and its regulations were abolished and market forces presumably could take over completely. It is interesting to note how the closing of the agency played in the press. On January 1, 1985, the Washington Post noted:

---

8. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.1 (5th ed. 1995).

9. Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705-54 (1978).

10. *See id.* The Airline Deregulation Act ("ADA") called for a cessation of the Civil Aeronautic Board's authority to determine rates and practices of all air carriers by January 1, 1983, and for a complete abolition of the agency by January 1, 1985. *See id.* § 1551(a)(2)(3).

> The Civil Aeronautics Board flew into the sunset yesterday to the soulful notes of a lone Marine bugler playing "Evening Colors," the tune sounded during sunset flag lowering ceremonies at U.S. military bases throughout the world.
>
> "I declare the Civil Aeronautics Board closed forever," said CAB Chairman Dan McKinnon, banging a gavel that had been given to him by Sam Rayburn, who in 1938 introduced the bill setting up the agency. McKinnon had been a page for the former House Speaker.
>
> Then Lance Cpl. Robert Gibson of Columbus, Ohio, part of the Marine color guard participating in the closing ceremony, sounded his bugle. When Gibson hit the last notes, Alan M. Pollack, the CAB's public affairs director, took the agency seal down from the wall for donation to the Smithsonian Institution.
>
> It was a bittersweet final meeting for the CAB, the first federal regulatory agency ever to go out of business.[11]

The dramatic closing of the agency, complete with a color guard, taps, and images of flying into the sunset, suggests a degree of finality, not only to the end of this agency, but to regulation itself. In fact, over the past twenty years, we have learned that in most contexts, deregulation has come to mean lesser degrees of some kinds of regulation and new mixtures of regulatory and market approaches, combinations that usually privilege competition. I do not mean to make the argument once made by Ogden Nash: "Progress might have

---

11. Stuart Auerbach, *46-Year-Old CAB Goes Out of Existence: Chairman Bangs Final Gavel at Bittersweet Session*, WASH. POST, Jan. 1, 1985, at D1, *available in* 1985 WL 2140582. This discussion on deregulation draws on my paper given at a conference on deregulation in Europe, the United States, and Japan on November 6, 1998 at the European Law Center in Liege, Belgium, entitled "Deregulation in the United States: Transition to the Promised Land, A New Regulatory Paradigm or Back to the Future" (on file with author) (to be published with the proceedings of this conference by the Law Center at Liege).

been all right once, but it has gone on too long."[12] Rather, deregulation usually requires additional regulation so that a transition to a more market-oriented or procompetitive regime can develop. However extensive the deregulation of a given industry, the removal of a regulatory regime alone rarely creates the conditions necessary for a competitive market to develop and function. Moreover, some deregulation is really more a form of delegating public responsibilities to private entities, not the relinquishment of public control in favor of private control. This kind of reform is really the development of new public-private partnerships that may appear more "private" than they really are. Deregulation is, in effect, a process, and it usually triggers other evolutionary processes designed to favor competition, and many times consolidation, but not necessarily to eliminate the need for various forms of law and, ultimately, a new regulatory paradigm.

In short, quite apart from the kind of deregulation involved, it has become clear in recent times that markets do not emerge full blown when old-style regulations are removed. In fact, new rules are often necessary. Whether it be in telecommunications, airlines, or the energy industries, we are in the process of developing new regulatory paradigms for agencies deeply rooted in the past, but whose technologies now take them into the future and, of necessity, require reconceptualizing the role of the State to solve problems that now are increasingly global in scope. I shall return to the procedural implications of these changes below.

For now, it is important to emphasize that deregulation of and delegations to the market do not take place in a vacuum. They need to be understood as part of a major reconceptualization of the State, as it comes to terms not only with global competition but with the fact that it must deal with issues, technologies, and actors whose problems, influence, and power do not map onto its own territory or political geography. Against this backdrop, it is important to understand the evolving relationship between the public and the private. To the extent we see the public and the private in the same way as we did in previous, more national, and internationally-oriented eras, we will substantially limit opportunities for democratic participation in issues that affect us all, whether or not they are performed by public or private entities.

In addition to the "democracy problem" inherent in globalization, especially when our responses take the form of resort to the market, there is

---

12. Sheryl Ramstad Hvass, *Law and the Art of Knowing Yourself*, 21 HAMLINE L. REV. 1, 7 (1997) (quoting Ogden Nash).

a second and closely related issue I wish to raise tonight—the creation and furtherance of a global public interest. Is it possible to solve or at least mitigate the effects of the democracy problem in a way that encourages and facilitates a discourse that includes serious consideration of issues and problems that transcend the borders of any single State or jurisdiction? One could, of course, increase democracy by simply renationalizing our responses with little regard for how they might linkup with or harmonize with other legal regimes. Can law, particularly domestic law, however, encourage a political discourse that goes beyond national interest and seeks to consider the interests of humankind, conceived of from a global point of view? Furtherance of the idea of a global public interest requires an approach to governance at the local level that allows for the development of policies that transcend the borders of any one State. This means the ability to cooperate and linkup with other legal systems, but it also requires the involvement, in a realistic way, of non-State actors whose area of interest and influence is not limited by a particular, political geography.

With these related issues in mind—the global democracy deficit and the creation and furtherance of a global public interest—let me now explore more fully the concept of globalization by analyzing various contexts, the dynamics of which are driven by different combinations of State, non-State, and market power. These various forces help create an analytical framework that can integrate international law, domestic law, voluntary regulatory action, and market forces in ways that further democracy and the quest for a global public interest.

## I. FOUR ASPECTS OF GLOBALIZATION

Globalization is a widely-used term that refers to a multiplicity of extraterritorial activities. As I have argued elsewhere, I mean to refer:

> [T]o complex, dynamic legal and social processes that take place within an integrated whole without regard to geographical boundaries. Globalization thus differs from international activities which occur between and among States, and it differs from multinational activities that occur in more than one nation-State. The area of integration involved might be the entire globe, or it might be a region or portions of regions around the world. The major

> distinguishing characteristic of global activities is that the areas of integration are largely oblivious to State boundaries, and the processes of globalization often occur with little or no direct agency of the State.[13]

This does not mean, of course, that States are not involved in the sociolegal dynamics that those transboundary processes trigger. Indeed, as I will now discuss, there are various ways of analyzing the dynamic interactions that global processes and problems trigger among States, non-State actors, and markets. There are at least four significant contexts of globalization which, I believe, provide a framework for understanding law from a global and domestic perspective.

### *A. The Comparative-International Model*

The first element of this framework is what I will call the comparative-international model of globalization. This perspective highlights the importance of individual States and individual legal systems, their interaction with each other, and their increasing interdependence. In a sense, the dynamics triggered by global processes encourage greater economic interdependence among States, and States remain central to our analysis. The idea of interdependence among quite separate and distinct States is a very important part of our discussions on globalization and, of course, a significant facet of today's global political economy.

The comparative or international model of globalization is, thus, State-centered and focuses on the respective national interests of States as they deal with global issues. It begins with the proposition that the increase in world trade or a global conception of problems such as the environment ultimately require State solutions, often in the form of multinational treaties, such as the General Agreement on Tariffs and Trade (GATT)[14] and the Montreal Protocol on Ozone Depletion.[15] Though these are international treaties with global effects, triggered in large part by global processes and problems, they are the

---

13. Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 VAND. J. TRANSNAT'L L. 769, 780 (1998).

14. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700.

15. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10 (1987).

product of State negotiations and seek to further the *national interests* of the States involved.

*B. Globalization As Americanization*

Closely related to this State-centered view of globalization is one that also focuses primarily on State law, but one State in particular, the United States. From this perspective, globalization is synonymous with Americanization. It recognizes that another part of the dynamic is often the need for at least a modicum of uniformity among rules that apply to actors who operate in multiple jurisdictions simultaneously. In the implicit regulatory competition that ensues, whose law and whose approaches are likely to prevail? American ideas about law often emerge. Various approaches to commercial law designed, for example, to introduce some uniformity into transnational contractual arrangements often are viewed as largely American in nature, as are organizational approaches to transnational litigation that center on large law firms. As Martin Shapiro has written, however:

> It may be not only American economic power, but some particular receptivity of common law to contract, and other commercial law innovation that is the engine of globalization in this sense. It is widely believed in Europe that European Community legal business flows to London because English lawyers are more adept than civil law lawyers at legal innovation to facilitate new and evolving transnational business relationships.[16]

In his Snyder lecture last year, Phillip Allott also noted how important Americanization was in the dynamics of globalization. As he said:

> The people of the United States bear a very heavy responsibility for the future of humanity—an imperial responsibility. It is the same kind of responsibility that the British exercised, for better and for worse, in the nineteenth century; that Rome exercised in the last century B.C. and the first and fourth centuries A.D.; that Greece exercised at the

16. Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 39 (1993).

> time of Alexander, in the fourth century B.C. It is a responsibility based on the sheer facts of American military and economic and cultural power, and the extent of American economic and political and military investment in the rest of the world . . . .[17]

To the extent that legal harmonization or convergence occurs, one view is that the laws around the world are becoming more and more like our own. Some of this may be due to the globalization of nonmarket values such as democracy, participation, and transparency in some legal processes, processes which begin to resemble more closely an American approach to legal issues, though one which, I am sure, shares many similarities with other legal systems, such as the United Kingdom. Other aspects of the influence of the American legal model may be due to the economic pressures on governments to liberalize or deregulate, thereby adopting rules and regulations designed largely to infuse competition into markets once dominated by State monopolies. Still other reasons for Americanization may have to do with the extent to which U.S.-based companies and firms are persuaded to invest in countries abroad. Before making such commitments, these firms seek to ensure a modicum of legal security. In so doing, they often export important aspects of the American legal model. The same is true of companies who wish to do business in the United States. It is important that their laws come up to the U.S. standard, as in securities or banking law, for example.

In short, there is pressure for a kind of harmonization that favors an American approach to issues. But this approach to globalization is also State-centered and, in a sense, represents another version of the comparative international perspective, one that can, on occasion, involve an almost hegemonic extension of U.S. values and legal approaches abroad.

### *C. Globalization As Denationalization*

Quite apart from the United States' role in globalization or a State role in general, a third dynamic created by globalization is one that emphasizes

---

17. Philip Allott, *The True Function of Law in the International Community*, 5 IND. J. GLOBAL LEGAL STUD. 391, 391 (1998).

*denationalized* responses to global issues and, in so doing,[18] stresses the relative insignificance of place, especially in matters involving economic issues. Because of the liberating effects of technology and the relatively free flow of capital around the world, private decisions involving production, finance, and investment can occur increasingly free of direct State involvement. Transnational corporations move their production activities from location to location around the world, often loosely affiliating with various independent contractors to obtain the services or materials they need. They seek out the most cost-effective relationships as possible in what are usually the long value chains connected with the production and marketing of goods and services. They may locate research and development in one country, component assembly in another, final assembly in yet another country, and distribution networks in still another. They also decide how much to customize globally conceived products for local markets.

Thus, markets are largely conceptualized in a denationalized way. This is not to say that specific cultures or places are not relevant when it comes to customizing one's products, but the very basis of the business operations involved and their organization and web-like structures take place in a manner largely oblivious to territory or specific State jurisdictions. The investment necessary to build or expand a manufacturing or distribution facility freely flows across national borders. The financing for this investment also is created increasingly without regard to any single place and by a global financial industry located in various interconnected global cities.

The end result of these new networks of investment, finance, and production is that they help to create relatively integrated markets for the goods produced, and they produce new and multiple sets of relationships or economic networks that transcend the geography of States. As Professor Jost Delbrück has argued:

> Today's financial markets are globalizing rather than internationalizing (which they did in earlier decades) since, for instance, the movement of capital has largely become independent of the sovereign control of state agencies. Thus, it seems globalization as distinct from internationalization

18. Both sections C and D of this paper rely on and draw from one of my previous articles. *See generally* Aman, *supra* note 13.

> denotes *a process of denationalization of clusters of political, economic and social activities.*[19]

As these companies become denationalized, so too does the law that governs them. Perhaps the primary example of such denationalized law is the extensive development of arbitration proceedings seeking to resolve disputes between companies doing business transnationally. These processes may, to some extent, occur within the shadow of the State, and may depend on the legal preconceptions brought to bear on a problem by the arbitrator involved. Nevertheless, the primary orientation to such issues is, essentially, denationalized.

This relatively private, denationalized approach to law also shows up in the ways in which various companies seek to resolve certain environmental, health, and safety concerns. For example, after the tragedy in Bhopal, various companies doing business in India and elsewhere did not seek to depend only on the legal requirements of the State in which they operated.[20] They imposed their own safety standards that often were significantly higher than those of the host country.[21] Similarly, certain standards involving child labor have been developed voluntarily by the corporations involved, rather than imposed by the States in which they do business.[22] This is sometimes a more likely avenue for reform, given the race to the bottom aspects such regulation may trigger. Indeed, an increasingly common trend among non-State actors is that they now lobby transnational corporations directly for environmental, labor, health, or certain global safety reforms, bypassing the State altogether.[23]

In short, globalization not only involves States and State-centered attempts to deal with certain issues, it also triggers a series of denationalized forces and approaches to global issues. This, in time, encourages an approach to law that seeks to transform the international-comparative approach to law into a more denationalized set of largely private, market-oriented rules and norms.

---

19. Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 10-11 (1993) (emphasis added).

20. Michael S. Baram, *Multinational Corporations, Private Codes, and Technology Transfer for Sustainable Development*, 24 ENVTL. L. 33, 46-47 (1994).

21. *Id.*

22. Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1973 (1996).

23. *Id.* at 1968-69. For an excellent discussion of the role of non-State actors in international issues, see Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 IND. J. GLOBAL LEGAL STUD. 191 (1997).

There is another important aspect to the denationalized perspective on globalization that is less focused on voluntary, often market-centered actions, and more on what we might call a global sense of the public interest. In other words, that interest is not viewed solely or primarily through the lens of national interests. As Jost Delbrück has written:

> At least ideally, [there is] the prospect that globalization is to serve the common good of humankind, e.g., the preservation of a viable environment or the provision of general economic and social welfare. In this sense, globalization is a normative concept since it is related to a value judgement, i.e., that the common good is to be served by measures that are to be subsumed under the notion of globalization.[24]

Though the interests involved may be global in nature, I do not believe they can be accomplished completely by non-State actors. It is necessary to bring the State back in, though in new ways and in creative partnerships with the private sector and non-State actors. In other words, the creation of a global public interest approach at the local level will require new combinations of power and various public-private partnerships, and it will, of course, involve the State in new partnerships with non-State actors.

### *D. Globalization and Domestic Law: Transforming the Local*

A fourth element of our framework for understanding globalization recognizes the denationalized aspects of global processes, but not to the exclusion of an important role for States to play. The concept of what I call the "globalizing State" stakes out a somewhat middle ground between a fully State-centered or Americanized version of the State and a wholly denationalized, stateless approach to globalization. It seeks to take the State into account—bring it back into the picture—but not necessarily in a State-centered way. This concept assumes that the line between the global and the local is blurry at best and often irrelevant. The global and the local in this construct are modalities of a single, dynamic system, not simply an arrangement of parts and a whole. State power does not disappear in this conception of globalization, but its power is more fragmented. The State

---

24. Delbrück, *supra* note 19, at 11.

exists, but it is decentered. The fact that global problems, processes, and economic activities do not map onto the territory or jurisdiction of any one State does not render State power meaningless. However, under these conditions, levels of power are layered by networks of actors and rules derived from international law, the domestic law of other States, as well as from the denationalized, voluntary global legal regimes that non-State actors have been developing in various industries and contexts. These bodies of rules and law, as well as the market forces that drive them, are influential for global actors, but often, initially, have little to do with the purely State-centered approaches to law of any one jurisdiction.

The globalizing State is a dynamic concept, and the term "globalizing State" is double-edged.[25] The State itself is an agent of globalization, furthering certain processes of this emerging new economic order through, for example, policies designed to attract and retain investment. In so doing, however, the State is also in the process of being transformed by the very processes it seeks to further. Like the transnational enterprises with which it deals, the State is affected and ultimately changed in fundamental ways by the increased fragmentation of its powers that it shares outright with other States and with non-State actors. Sharing responsibilities with private actors, domestically speaking, often can mean what once was public is now private. These new partnerships require a redefinition of what is public and what is private and new ways of thinking about how the public can participate in decisionmaking processes that involve private entities.

We cannot assume that such changes do not require new ways of thinking about domestic law, how it might be shaped in a way that remains relevant for the global world in which we live, and how it contributes to the furtherance of democracy and the creation of a sense of the public interest that is truly global in scope. If the State is to do more than further a narrow economic conception of the problems involved, a conception premised largely on notions of global competition rather than global cooperation, much less a sense of a global public interest, law reform requires, I believe, an approach to public law that extends public law protections to the new partnerships now being created. With this goal in mind, let me now turn to U.S. domestic law, specifically the Federal Administrative Procedure Act (APA).

---

25. Aman, *supra* note 13, at 812-16.

## II. TAKING A GLOBAL PERSPECTIVE ON ADMINISTRATIVE LAW

State-centered approaches to law reform are apparent both in proposals designed to erect walls around the country with protectionist legislative proposals as well as in those dealing with globalization by, in effect, asking other countries and markets simply to take our system on its own terms. Still, other reforms might be based on that premise, but wish our system to be as market-oriented as possible. Thus, deregulation and a minimalist procedural approach are often proposed as the best ways of competing in the global economy. Whatever the motivation, the idea of competition increasingly drives regulatory reform in the United States. When one adds the twin goals of furthering democracy and a global sense of the public interest, however, reforms that are State-centered, focused narrowly on economic efficiency, or based on what I would call pre-global senses of the public and the private, can easily be discerned. I plan to propose some reforms of the U.S. APA with the twin goals of democracy and a global public interest clearly in mind.

### *A. The APA*

Three years ago, the APA turned fifty. There were many symposia marking this milestone and various reforms and amendments to this Act were suggested.[26] The most common reform advocated was to include in the APA some form of cost-benefit analysis. Some of these cost-benefit reforms seek not only to maintain regulation that is deemed necessary, but also to ensure that it is as efficient as possible.[27] Others define costs and benefits in ways that substantially limit the creation of any new regulations, often by utilizing complex procedures to make new rules impossible to promulgate in anything remotely resembling a timely fashion.[28] This view has aptly been described as a form of "paralysis by analysis."[29] For the most part, however, a patchwork quilt of cost-benefit and risk-benefit approaches have been

26. Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1484-1527 (1996).

27. Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 38 (1998).

28. *Id.* at 50.

29. *Id.*

developing as individual statutes have incorporated their own versions of cost-benefit reform for the particular regulatory program involved.[30]

It may seem that this is a kind of progress—staving off the deregulators with reforms designed to make government, in the words of the Gore Report, "work better and cost less."[31] Yet, in many ways it is a continuation of a long-standing debate in American administrative law between government intervention into the market and a relatively *laissez faire* approach to the economy. The words "cost" and "benefit" are capable of interpretations that allow for this age-old debate to continue, albeit in a slightly new form. Thus, the 104th Congress's proposals for cost-benefit reform would, if passed, have represented a form of procedural *laissez faireism* by requiring so much procedure that a kind of prospective deregulation would have occurred to all those agencies to which it applied.[32] A softer view of costs and a more flexible approach to benefit would allow government to proceed, albeit cautiously, largely as before.

There are a number of reasons why economically-based reforms have such saliency today. First, global competitiveness concerns can reinforce ideological preferences for minimalist government—especially when one talks of federal regulation of various aspects of the economy and the environment. But quite apart from politics or ideology there are the very real limits experienced by governments when low tax policies are in effect for a significant period of time. Cost considerations are not limited solely to costs incurred by the regulated. Government costs also have risen, and agency budgets have declined, making new, cost-effective ways to achieve public interest ends increasingly important. To finance themselves, some agencies have resorted to new and extensive fee structures.[33] Other reforms have sought to create procedures designed to limit litigation by reaching a true consensus on a rule in the process of its formulation.[34] Still, others have sought to delegate their responsibilities to the market in the form of

---

30. *Id.* at 75.

31. AL GORE, NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (Sept. 7, 1993).

32. *See generally*, Paul Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COL. L. REV. 258 (1978).

33. Alfred C. Aman, *A Global Perspective on Current Regulatory Reforms: Rejection, Relocation, or Reinvention?*, 2 IND. J. GLOBAL LEGAL STUD. 429, 459 (1995).

34. *Id.* at 455.

deregulation or to contract out certain responsibilities to various private actors.[35]

There are limits to the extent to which we can view citizens as customers and agencies as businesses. Whether we see these reforms as furthering the "cost-benefit" State or the "administrative" State,[36] such approaches are based primarily on a State-centered approach to law and the problems with which they deal. This State-centered approach, in my view, fails to take into account the dynamic global context described above and within which domestic public law reform should be considered.

Rather than just focusing on making administrative law more efficient, I wish to change the focus of administrative law reform and argue that from a global perspective, more pressing reforms are now in order. In so doing, I want to emphasize the more traditional roles of administrative law: ensuring fairness, public participation and transparency in the resolution of disputes, and the creation of public policy. This is not to deny that sensible cost-effective reforms are not important, but that an economic discourse alone will not adequately provide the basis for a kind of global governance that successfully integrates distinctive domestic legal approaches with international and global approaches to global issues. Nor will they give us the tools necessary to link legal structures in ways that increase the possibility for cooperative approaches, rather than unitary competitive responses, to global issues.

### *B. The APA and Public-Private Partnerships*

As I have argued above, the globalizing State is a decentered State that can no longer deal with many of today's concerns by exercising power in a monopolistic manner. From a global point of view, it often may need to share power with other States more fully, and in certain proceedings, to incorporate the approaches into issues devised by nongovernmental entities whose range of influence and concerns transcend any single jurisdiction and whose perspectives and influence are global in scope. This may take the form of recognizing that certain domestic laws need to be synchronized with international law strategies, thereby avoiding unnecessary regulatory competition and a race to the bottom. On other occasions, cost and regulatory

35. *See id.* at 442.
36. *Id.*

effectiveness may mandate the creative use of market incentives to carry out tasks governments no longer can do or do as well. But were we to allow only a narrow economic sense of global competitiveness to drive these reforms as well as a view of the private sector that fails to understand the new partnerships the globalized State must now create, democracy would suffer.

With this perspective in mind, I set forth three reforms of the APA that should be considered. First, we should extend its coverage to private entities carrying out essentially public duties. In other words, the APA should cover more than just governmental agencies. Second, the APA should devise procedures that open up the processes of contracting out public duties to private entities. Third, I believe that there should be a requirement in all rulemaking proceedings that the international and global implications of a proposed policy be considered explicitly—a kind of global impact statement, if you will. The National Environmental Policy Act (NEPA) required environmental impact statements;[37] we should require global impact statements as well.

Now, none of these reforms will solve all of our problems, but such an approach will begin to take account of the fact that the complex dynamics of globalization require an integration of the public and the private and a much more explicit recognition of the importance of domestic law to global governance.

*1. Extension of the APA*

The APA by its own terms applies only to agencies. Section 551(1) defines agency as "each authority of the Government of the United States . . . ."[38] What happens when a governmental responsibility is contracted out or delegated to a wholly private entity? For example, it has become common to contract out the management of prisons at both the federal and state level to private management companies. It is possible that our state action doctrine might trigger due process protections, but such a decision is contingent specifically on finding governmental involvement in these actions. It may be that this will be the case, especially when prisons are involved, but the extension of the APA to such activities should not be restricted only to prisons, but to all private entities to whom governmental responsibilities have

37. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c) (1994).

38. Administrative Procedure Act of 1946, 5 U.S.C. § 551(1) (1996).

been delegated. Current approaches to welfare are involving the private sector in new ways with private firms, in some cases, deciding welfare eligibility.[39] Various proposals to reform social security now seek to utilize the market and private entities in what is, for that program, a new approach.[40]

Triggering the APA need not require the "full panoply" of extensive and costly adjudicatory procedures that were devised in an earlier era for rate-making cases or the application of command and control regulation. A separate procedural provision designed for private actors could be crafted, one which not only emphasizes flexibility, but also public involvement and the basic public law protections of notice, participation, transparency, and some form of accountability. Indeed, creative disclosure requirements designed to inform the public just how certain markets work would also further these goals. Such an approach would lessen the democracy deficit caused when matters are deemed private, and would also leave room for the creation of a discourse that could, depending on the issues involved, further public interest goals that are global in outlook.

Closely related to the amendment of Section 551 of the APA that we are proposing is an extension of the Freedom of Information Act to private entities.[41] It, too, represents a bright divide between public and private and applies only to government agencies. Section 552 thus requires "each agency" to make certain information available to the public.[42] Yet, information increasingly important to individuals is held by private entities and, particularly when they are carrying out public functions, it would make sense to include these entities in the coverage of this Act as well. Not unlike an early draft of a British Freedom of Information Act (FOIA),[43] such an approach could recognize that individual interests in information do not begin and end with government entities.

---

39. *See* Nina Bernstein, *Giant Companies Entering Race to Run State Welfare Programs: Powers Like Lockheed Explore New Profit Area*, N.Y. TIMES, Sept. 15, 1996, at 1.

40. *See* Richard W. Stevenson, *Fed Chief Warns of Painful Choices on Social Security*, N.Y. TIMES, Jan. 29, 1999, at A1.

41. Administrative Procedures Act of 1946, 5 U.S.C. § 552(a) (1996 & Supp. 1998).

42. *Id.* § 552.

43. YOUR RIGHT TO KNOW: THE GOVERNMENTS'S PROPOSALS FOR A FREEDOM OF INFORMATION ACT, 1997, Cmnd. 3818, at 2.2.

*2. Contracting Out*

The informal rulemaking proceedings in Section 553 of the APA are elegantly simple.[44] They provide for notice and comment. A decision to contract out governmental services may not even be covered by these rulemaking provisions,[45] but even if it is, the provisions of a contract between a government agency and a private provider of services are not likely to be considered fully. This is especially true if the policy decision involved is viewed narrowly, as only the decision to contract out, not necessarily the details of the contract. Even if the details are noticed, its day-to-day implementation may not be visible to the public. The market logic of this approach is that you give certain responsibilities to private providers and review only the bottom line every few years or so, when the contract comes up for renewal. This increases their efficiency and impresses upon them that whatever the tasks are to which they agreed are their responsibilities and theirs alone. But such an approach assumes a distinction between administration and policymaking that does not exist in reality.[46] The process of administration inevitably involves policymaking, especially when emergencies or unusual circumstances arise. Thus, noticing the full details of a proposed contract with a private provider should be a minimum requirement of the privatizing process, but these contracts themselves may need to be subject to frequent review. Levels of accountability should be higher than those of normal market transactions, and contract renewals should be required every three to five years.

*3. A Global Impact Statement*

Such relatively minor changes could go a long way toward recognizing new ways of carrying out public responsibilities and need not diminish the opportunities for public participation and transparency. More fundamentally, however, the administrative rulemaking process should include an explicit direction to consider seriously the global implications of proposed rules. This

---

44. Administrative Procedure Act of 1946, 5 U.S.C. § 553 (1996).

45. Section 553 of the APA provides exemptions from its general rulemaking procedures. Among these is one granted for "matter[s] relating to . . . contracts." 5 U.S.C. § 553(a)(2). This exemption has, however, generally been construed narrowly by the courts.

46. Mark Aronson, *A Public Lawyer's Responses to Privatisation and Outsourcing*, *in* THE PROVINCE OF ADMINISTRATIVE LAW 40, 56-58 (Michael Taggart ed., 1997).

would not only encourage parties to the proceeding to present their perspectives on these matters, but also impress upon the decisionmakers involved that they are part of a complex national, international, and denationalized set of processes. Not all issues can be resolved in any one proceeding, but effective policymaking requires at least the consideration of the global implications of the rules involved. If, for example, stringent environmental regulations will shut down certain industries and move them offshore, what impact is this likely to have on global pollution? Are we to be the beneficiaries of this pollution by then being allowed to buy these imported goods at a lower cost than if they were produced here while others bear the pollution costs, but we enjoy the cheaper goods? Are there or should there be international efforts undertaken to try to achieve limits on certain pollutants that are global in nature? What efforts are underway? Will they be initiated? Such questions can help create a global discourse and a debate on the global public interests related to domestic regulatory proposals. Requiring they be explicitly considered by the agency involved may not only facilitate global awareness, but also facilitate global politics and discourse that are necessary preconditions for the creation of public policy that is meaningful on the global level.

## CONCLUSION: NEW TECHNOLOGIES, NEW PROBLEMS

The APA was based on the procedural needs of a whole host of New Deal agencies created in the 1930s and 1940s. It was, in many ways, based on a model of regulation that was economic in nature, applied on an industry-by-industry basis, and characterized by State-centered regulatory authority, usually exercised by independent regulatory commissions—agencies designed to be above the political fray in exercising their decisionmaking responsibilities. As I have argued, a few simple changes might make its provisions relevant for some of the newer forms of power now being contemplated and exercised. But the technologies of the industries of the late twentieth and early twenty-first century are substantially different in structure than those that existed when the APA was created. Vice President Gore spoke of the differences between the Industrial Age and the Information Age and there certainly is something to this distinction, especially when one looks at

the technologies on which these new industries are based.[47] The Internet and the various information-based industries that it has spawned are global in scope, almost by definition. Messages on the Internet are instantaneously global. The global nature of the technology makes any discussion of regulation, much less the procedures that may be involved, necessarily global. This does not mean, however, that our goals of furthering democracy and a sense of a global public interest automatically follow.

What the APA of the future will look like is not easy to discern, but I believe it should include within its scope private entities carrying out public functions, a requirement that the global implications of domestic policies be considered if not coordinated with international strategies to deal with global problems, and an evolving sense of how public participation and transparency might be facilitated by the very technologies that are raising new issues, given their undeniably global characteristics. As new technologies and new mixtures of public and private power spawn new issues, I do not believe they can or should be resolved in ways that require that we all play the same tune or march to the same drummer. There will be new players—new States, new regions, new non-State actors as well as established and traditional participants involved in an increasingly global discourse, one that deals with issues that go beyond the jurisdiction of any one State. The challenge for law—and domestic public law in particular—is to create the processes necessary for this discourse to occur in a democratic way and to enhance the ability of our respective legal systems to listen sympathetically and creatively to one another and, hopefully, in ways that will further the public interest of humankind.

47. *See* Vice President Albert Gore, The Technology Challenge: What is the Role of Science in American Society?, Address Before the American Association for the Advancement of Science (Feb. 12, 1996) (transcript available at the American Association for the Advancement of Science Meetings Information website (visited Mar. 4, 1999) <http://www.aaas.org/meetings/gore.htm>).