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# **Riding the Accountability Wave? Politics of Global Administrative Law**

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## INTRODUCTION

The old certainties of administrative law – its location, nature, and purpose – are dissolving; administrative law is now much more varied, diverse, and diffused. As Sedley (1997) argues, this “systematic dispersal of the sites of power beyond the confines of what we had learned to recognise as the state, old certainties of public law are no longer there” (Sedley 1997: Foreword).<sup>1</sup> No doubt there are some lurking in a law school here and there who would take exception to this stretching of the boundaries of administrative law. But there can be little doubt that one of the striking transformations in the industrialized and newly industrialized world is that the exercise of public power is now taking place in sites outside the formal structures of governmental power, a process which decentres and fragments the state.

Decentring, in this context means that governance is located in multiple sites, engage a number of non state actors, and deploys a range of techniques of governance that move beyond the traditional structures of public law (see Jayasuriya 2001a; Offe 1996). These new modes of governance — such as public-private partnerships — and the growing importance of transnational non governmental standard setting organizations challenge our conception of the state as a coherent and unified centre; this in turn suggests that conventional mechanisms of accountability to regulate the exercise public power will be transformed.<sup>2</sup> For instance, the thrust of a substantial literature on regulatory governance at the global or the national level is towards a search for substitute mechanisms of accountability and monitoring outside formal governmental institutions,<sup>3</sup> all of which invariably raise fundamental challenges about the application of what amounts to a new administrative law in these new modes of governance.

The development of these new modes of governance is the outcome of a complex set of structural forces that come under the generic label of neo liberalism. Although it is not within the scope of this paper to examine the nature of these new forces, it is possible to identity four crucial determining factors or drivers: first, the growing trend towards privatization and deregulation of key areas of economic and social governance leading to new public-private governance arrangements that sit uneasily with traditional conceptions of administrative law; second, the influence of non governmental — often transnational — agents in the management and regulation of domains considered as public governance; third, the growth of independent

administrative agencies —such as central banks and financial supervisory bodies — often connected to transnational policy networks; fourth, the development of transnational regulation, administrative rules, and adjudication such as the World Trade Organization (WTO) or bilateral investment treaties producing hybrid forms of national and transnational governance. Of course, these determining factors cannot be simply reduced to neo liberalism as each of these has its own independent effects on neo liberalism. But what is clear is that the thrust of this process is towards a decentring of governance and administrative regimes.<sup>4</sup>

The decentring of public governance is a structural process occurring in countries with established systems of administrative law as well as those with much less secure or non existent foundations of administrative law. Nevertheless these issues are much more pressing in newly industrialising countries where the evolution of administrative law differs sharply from that which occurs in developed democracies. In established democracies these new mechanisms are layered on older instruments of administrative law while in developing and newly industrialized countries such as China these decentred sites are a primary component of the emerging new regulatory state.<sup>5</sup> And again, in countries such as post authoritarian Indonesia, it may simply be about constituting rather than reconstituting the public domain.

Such deep seated changes in modes of governance are of course laden with complex questions about the nature and role of public law principles in these new decentred sites. However, this is not simply a question of extending public law principles to these new sites of public power, but rather one of constituting and defining what is ‘public’ in these new sites of governance. And here, notions of accountability play a leading role and this paper develops the concept of ‘accountability communities’ which give expression to, and make those who exercise public power accountable.<sup>6</sup> Accountability, it seems is everywhere, and is invested with virtuous qualities.<sup>7</sup> Hence these new mechanisms of administrative law are at the same time about establishing systems of political rule through which new political relationships are constituted within these new modes of governance.<sup>8</sup> And one of the defining characteristics of this extension of public law norms and principles to the new modes of governance is that accountability remains anchored to specific technical or instrumental goals of the transnational policy regimes, especially to those such as the WTO seeking to promote a specific conception of economic order.

The paper advances three key propositions:

- first, administrative law in these decentred sites of governance operates through the explicit constitution of a public domain in various specialized functional policy and private orders;
- second, systems of accountability are vital dimensions through which the public domain is reconstituted, that is, they serve to organize and constitute a system of political rule;
- third, an implication of this reconstitution of the public domain is that it leads to growing instrumentalization of law. This may prove attractive to political leaders in East Asia particularly in the case of China because it reinforces and facilitates a technocratic form of politics which may well influence the future trajectories of post authoritarian political regimes in the Asian region.

### **Global administrative law and the exercise of public power**

We examine these issues through the prism of global administrative law (Kingsbury, Krisch, and Stewart (2005) which fits into the broader process of state decentring. What is significant about global administrative law is that it locates — partially and imperfectly as the case may be — notions of *review*, *monitoring* and *participation* in the administrative acts of international public agencies, as well as through the actions of international non governmental organizations such as standard setting organizations. In fact a striking development over the past two decades in Asia is the intersection between international law, regulation, and national governance. In this regard, what is of special interest to us are that the new forms of transnational regulation are not the easily identifiable hard law of international treaties; rather it is more likely to appear in the shape of regulatory standards and even privately organized or monitored public standards (Jayasuriya 2005 1999; Hall and Biersteker 2001; Slaughter 1997; Zaring 1998; Haufler 2001). As one example of this transnational regulation, we may cite the entry of China into the WTO and the concomitant legal changes that this has required in national system of administrative law. Other examples are the emergence of new dimensions of transnational regulatory governance that range from networks of central bankers (e.g., the East Asian Central Bankers network<sup>9</sup>), public-private partnerships

(e.g., the Global Fund for Malaria eradication<sup>10</sup>), and also private standard setting organizations around issues such as promotion of various codes of labour standards.<sup>11</sup> These standard setting organizations have gained in significance for governing production chains that cross national jurisdictions. These organizations are especially relevant for understanding the governance of emerging transnational production processes in China.<sup>12</sup>

These are diverse forms of rule making but Kingsbury, Krisch, and Stewart (2005) have argued that these processes can be subsumed under the rubric of global administrative law in that they go beyond traditional conceptions of international administrative law. These focus on “administrative procedure, on principles of reasoned decision making, and on mechanisms of review” (Kingsbury, Krisch and Stewart 2005: 28). A prime determinant of this is that the “members of different national communities are increasingly subject to the effects of measures adopted by the authorities of different national communities” (Battini 2006: 8). But more significantly these forms of global or transnational regulatory change may well be one of the crucial drivers of administrative law in developing and newly industrializing countries that are likely to have relatively weak or underdeveloped administrative law systems.

Proponents of global administrative law have clearly identified an emerging trend in global governance towards the use of instruments of administrative law rather than the more conventional tools of international treaty. This development points to an emerging administrative and regulatory system that transcends the traditional dualisms of municipal and international law where transnational relationship takes place, and regulatory spaces created through the utilization of administrative agreements. What characterises various decentred sites of governance? It is this boundary, crossing and spanning nature of administrative law, which compels us to rethink the way we conceptualise emerging forms of post-national statehood. These are much more like networks where at any given level “a boundary can be defined, separating governmental and non governmental institutions or public employees from private individuals but the significance of the boundary will depend on the microanalysis of the interactions that occur across it, and on either side” (Rubin 2005: 50).

However, the identification of such boundary spanning features of the new modes of governance is not unique to the global administrative law perspective, and has

much in common with other perspectives such as transnational regulatory governance or legal pluralism (Teubner 1997; Jayasuriya 2001b; Snyder 2004) that have identified a similar emergence of new forms of transnational regulatory or policy fields that cut across all domains of governance. This much is now familiar. However, the distinctive feature of the concept of global administrative law is that it brings to this debate a focus on public law principles and values in the context of the development of international regulatory activity. But for us the crucial point is that public power is constituted in these networks which span the conventional national and governmental boundaries of public law. In short, it makes us focus much more squarely on forms of public power and authority in these new sites of governance.

One aspect of this new form of public power is captured by the growth of various forms and practices of accountability. Emerging mechanisms of accountability systems are at the heart of making various forms of global public power accountable in diverse forms of global administrative law ranging from the WTO dispute resolution mechanisms to various private standard setting organizations such as labour or international accounting standards. Accountability is the glue – albeit not the only one – that holds together the various elements within a transnational regulatory sphere. For this reason some have argued that we are in the midst of a new accountability revolution, or what Goetz and Jenkins (2004) call a ‘new accountability agenda’.

It is this new accountability agenda that is increasingly the focus of many developmental programs within the World Bank and the IMF (Jayasuriya 2006), new institutional forms such as citizen report cards introduced in Ho Chi Minh City,<sup>13</sup> and the emergence of specialized global accountability networks such as the ombudsman network (Harlow and Rawlings 2006). Now, while at one level, it is entirely unexceptional to say that administrative law is about accountability, what lies at the core of any notion of administrative law is the notion that public officials and agencies be held accountable to those affected by their administrative decisions. Accountability is not simply about the identification and enumeration of a set of good governance elements; but a system of political rule and authority, making this highly significant as a form of global public law established and enforced within and beyond the national state.

Insofar as accountability practices create spaces of transnational public authority, they become a distinctive dimension of global administrative law. The notion

that these forms of administration and regulation are about political authority and rule is a dimension that is in fact obscured in the literature. But how do we go about defining the nature of this political relationship, and more importantly what is to represent the public in the extension of accountability to various decentred modes of governance? Here, what counts in the various forms of transnational regulation or administration is not so much the identifiable elements of administrative law—such as review and monitoring—but the way these elements combine to constitute a set of relationships between the national and international, and between public and private spheres. This foreshadows a more distinct political conception of public law as an “assemblage of rules, principles, canons, maxims, customs, usage and manners that condition and sustain the activity of governing” (Loughlin 2003: 30).

Yet, this very political dimension of administrative law as a practice of political governance or rule is rarely acknowledged in the technocratic vocabulary that is used by both policy makers and academic literature. It is a striking omission especially in the context of countries such as China where we find that notions of administrative law — global or otherwise — are no longer anchored in a recognizable conception of democratic determination or the rule of law. This is not just merely a theoretical lacuna in the literature; the deeper political fact is that these new forms of administrative law enable principles such as fairness and participation to be readily divorced from more substantive and thicker versions of the rule of law. These developments may indeed reinforce what Peerenboom has called a thin version of the rule of law (Peerenboom 2002).

More importantly, what does this reconstructing of notions such as participation within new modes of governance tell us about the changing nature of the state and the emerging system of administrative rule making? Take for example the cases of the Poverty Reduction Strategy Papers (PRSP) of the World Bank and the IMF and labour standards. These examples will be elaborated below, but in brief the PRSP is a nationally formulated policy document that provides mechanisms for consultation and deliberation. In a similar fashion the monitoring and surveillance of labour standards by private and public organisations within private regimes effectively transplant public law principles in private regimes.

## **ACCOUNTABILITY COMMUNITIES AND THE RECONSTITUTION OF THE**

## **PUBLIC DOMAIN**

The examples cited earlier reinforce the point that transnational administrative rules are not a matter of searching for substitutes for accountability, but shape new forms of political authority within and beyond the state. Clearly it is a system of emergent transnational administrative legality which makes the practice of accountability the object of governance. What we see here is the development of specific instruments of accountability such as the IMF standards on transparency or the incorporation of audit and accountability mechanisms to the governance structures of for example the PRSP. Global administrative law is a beast of a particular kind because accountability becomes a method of not just allowing redress for those affected by administrative decisions but also a way of determining the nature and role of the 'accountability community' to which 'account' must be given. This therefore helps to constitute the 'public' to which this accounting is to be given.

But it is a 'public' defined in terms of the objectives of the private or functional policy regime rather than in terms of notions of political representation of interests. And this serves to facilitate the development of a form of technocratic accountability in terms of the broader goals of transnational policy regimes. One can cite a brief example to substantiate this proposition, and it pertains to World Bank programs such as the PRSP that often give pride of place to notions of participation or collaborative governance in an effort to enrol stakeholders in the structures and process of governance. In a similar way, various IMF and OECD programs have been developed to promote and enforce greater transparency in the financial and commercial practices of developing and newly industrial countries (Soederberg 2001; Rodan 2004). However, as Rodan (2004) has argued, these notions of transparency remain confined to a restricted notion of economic, rather than political transparency.

Leaving aside arguments about the effectiveness or otherwise of such programs, in the context of the argument it is important to note that these programs involve a structure of political authority that defines the 'public' in functional or policy terms and implicitly ties this 'public' accountability to technocratic rationales. The simple point is that within these programs, accountability is a political process which itself defines the limits and boundaries that constitute the 'public'. However, the more substantive question at stake here is the process through which the 'public' is defined in these



global regulatory regimes. The public itself is now the focus of concerted political action through which new boundaries and definition of the publicness are asserted, contested and regulated (Newton 2006).

Global administrative law reconstitutes the public domain by creating various forms of 'publicness'. This takes place even within the private economic domains through organizations and networks such as accounting standard bodies or labour standard monitoring agencies. This way of conceptualising administrative law recalls Rubin's metaphor of a network in which accountability actors form an important node of regulatory authority within a transnational network, whereby it can include private standard setting bodies, adjudicating tribunals such as the WTO dispute resolution mechanisms, or the international criminal tribunal for the former Yugoslavia (ICTY). In short these are 'accountability communities' that establish forms of public authority within organizations or networks that span boundaries between the national and transnational or the public and private. Network metaphors are however limited in picturing the organization of political relationships and this is crucial to the role of accountability communities.

Accountability communities constitute a public domain which shapes the organization of political authority that is so crucial to the activities of governing. An example of this is provided by PRSP of the World Bank and the IMF. The PRSP is nationally 'owned' and provides an administrative framework for the formulation and deliberation of policy strategies on poverty reduction through which the social standards and objectives of international financial institutions such as the IMF/World Bank are implemented. This implementation is through specific governmental agencies in conjunction with the participation of non governmental groups (Weber 2004). The PRSP is not just a policy strategy only; it is also a road map of the participatory and audit process required for the PRSP to qualify for World Bank/IMF approval. The PRSP in turn is linked to the so-called Comprehensive Development Framework (CDF), and is viewed as a method of giving concrete shape to some of the key objectives of the CDF (Cammack 2001). In this sense the PRSP establishes a particular accountability community as it explicitly calls for dialogue and participation with a range of both government and non governmental stakeholders. In fact, the World Bank constantly reaffirms that the PRSP is not simply about producing a public document, but is itself a

means of furthering a dialogue or deliberation on poverty related issues.<sup>14</sup> ‘Ownership’, figures high on the recent policy lexicon of international development agencies. For this reason priority is placed on the enrolment of stakeholders into the policy making process.

But this incorporation of stakeholders is intended to facilitate a deliberation on poverty reduction issues: PRSP is not only a new mode of governance but also creates new structures of authority within the multilevel jurisdiction (Jayasuriya 2006). Another prominent example in this context is the World Bank’s one billion dollar Kecamatan Development Program (KDP) that was implemented across villages all over Indonesia. KDP sought to promote ‘community empowerment’ through the development of participatory mechanisms. A major justification for KDP was that targeting the ‘community’ in this way would lead to convergence between participation and more efficient policy making as it would prevent the capture of the policy making apparatus by patronage networks (Carroll 2006).

This view of participation as accountability promotes a particular understanding of individuals as ‘problem solvers’ enmeshed in social networks or in communities outside the formal representative structures of the state that lead to the marginalization of political contestation that takes place within the formal political arena in favour of participation within a managed civil society. Consequently, what these examples highlight is that this participation takes place outside the ‘political society and the boundaries of the ‘public’ are defined in terms of the pursuit of a particular configuration of macro economic objectives.

Participation itself becomes an important goal in various international programs such as the implementation of social funds or the promotion of localised participation such as the initiative on grass roots democracy in Vietnam (UNDP 2006). The purpose of participation and deliberation in these programs is problem solving or the effective management of policy rather than the achievement of a legitimate political consensus (Steele 2001).<sup>15</sup> In other words, participation is not seen as an end in itself; rather, it is seen in an instrument for pursuing technocratic aims of the policy regime. In this sense participation becomes not just a method of scrutiny and monitoring but a process that moulds an accountability community.

Accountability communities can also form around standards set by private organizations. This private standard setting involves ‘what might be called “soft enforcement,” that is, reputation and transparency to leverage public pressure to ensure the commitments made by the firm are upheld’ (Haufler 2001: 3). Labour standards in particular, represent an interesting example of the development of transnational accountability communities around international NGOs and monitoring organizations (Arthurs 2001). The rapid growth and influence of these standard setting organizations needs to be understood as accountability communities within complex transnational production chains incorporating public law principles within new governance structures. An important example of such public law incorporation is to be found in the development of various forms of corporate conduct that have evolved in the aftermath of “of several well-publicized scandals involving child labour, hazardous working conditions, excessive working hours, and poor wages in factories supplying the major global brands, multinational corporations have developed their own ‘codes of conduct’” (Locke, Qin and Brause 2006: 3).

Reinforcing these codes of conduct denotes a shift within the ILO from labour rights to the protection of labour standards, towards an emphasis on substance rather than process, and greater attention to decentralized systems of enforcement (Alston 2004).<sup>16</sup> As Alston argues, this “trajectory has involved a gradual hardening of initially soft standards , an incremental strengthening of supervisory processes and the adoption, with the acquiescence of governments and other actors, of innovative promotional and other measures” (Alston 2004: 461). Decentralized systems, such as the use of instruments of code of conduct help to constitute accountability structures but limited only to a public domain located within private economic orders. In effect this means that that, as Alston indicates, this shift towards core labour standards is detached from a conception of political rights and empowerment and increasingly becomes a flexible notion to be incorporated in various policy regimes such as bilateral trade agreements such as the US-Cambodia agreement on access for garments or private economic order such as through corporate and NGO codes of conduct).

The Cambodia-US bilateral textile trade agreement which included labour standards is especially revealing on this score (Polaski 2004). The agreement suggested that there be substantial compliance with international core labour standards. As a result

of this agreement the Cambodian government, together with the ILO,<sup>17</sup> and the Ministry of Commerce requires registration with the inspection regime of the ILO's Better Factories Program in order to export. This inspection regime is innovative and has led to more effective compliance with core labour standards. Yet the focus on 'better factories' has been at the expense of the expansion of representative politics in the political domain which of course would be central to a notion of labour rights.

In the Cambodian case the approach of the Better Factories Program, as Hughes (2007) has cogently argued, has led to a separation between issues of standards and wider power relationships between labour and employers. These effects are similar to other standard setting programs such as the OECD Guidelines for Multinational Enterprises. The OECD guidelines are voluntary codes of conduct but they establish what are called National Contact Points (NCPs) that police these guidelines.<sup>18</sup> The NCP system allows non governmental organizations to have a monitoring role in private economies. But such an incorporation of public law principles is located within the private economic order leading to the creation of a form of economic constitutionalism.

The crucial point is that enforcement of international standards requires the creation of accountability communities and these communities exercise a form of public power within private spheres of economic order. For example, it has been argued that accountability is merely a question of subjecting those exercising public power to monitoring and greater scrutiny. From this there develops a line of reasoning suggesting that political, not just administrative, accountability can be found "whenever they perform the democratic function of enabling democratic 'stakeholders' to exercise some degree of political control over the 'public' decision-making processes that impact upon their lives" (Macdonald and Macdonald 2006: 30). Hence various forms of non electoral accountability mechanisms are developed which have been central to what might call to emerging notions of reflexive global regulation, although this reflexive regulation is itself a form of political rule.

It is readily apparent that the Macdonald and Macdonald (2006) argument recognises that what is novel here is the exercise of public power in sites within private domains or outside formal governmental structures. But what these arguments about non electoral accountability miss is — as Hughes (2007) indicates clearly with the Cambodian case — the impact of the reconstitution of the public domain on the form of

representation as well as the nature<sup>19</sup> of contestation allowed within these new sites of public governance. For this reason the shift towards emphasis on principles and procedures rather than on rights reconstitutes representation outside political structures and subordinates it to the functions or goals formulated within various public or private policy regimes.

Clearly, the emergence of private standard setting organization such as labour standards and monitoring mechanisms or new codes of corporate governance reflects the development of new forms of public power. In much of the literature on diffused or dispersed governance and transnational regulation there is an assumption that public law principles are now secured through different systems of accountability (Freeman 2006; Keohane and Grant 2006; Macdonald and Macdonald 2006)<sup>20</sup> Therefore, for some like Dorf and Sabel (1998) the new global accountability cascade represents the triumph of the politics of pragmatism; experimentalism as politics becomes significantly focused on issues of puzzling rather than power. But this preoccupation with technical analysis of regulation tends to neglect the more important political questions: how is the public domain reconstituted and how are new forms of political rule are organized? Hence we need to be more circumspect about the growing interest in notions such as responsive regulation or other ways of describing decentred regulatory activities all of which in one way or another highlight the importance of accountability as an expression of public law principles but only at the expense of obscuring the wider political relationship that underpin these practices of accountability.

Such a focus would lead us to ask why certain forms of accountability tend to become privileged over others. As Harrington and Turem (2006) argue in a related context, we need to “locate ‘accountability’ in concrete sites and contexts, and allows us to see the relationship between distinct accountability discourses and broader social, political, economic, and legal relations they are part of” (Harrington and Turem 2006: 201). Framing the issue in these terms has the distinct virtue of identifying and analysing developing forms of accountability and public law in terms of “how it is understood, shaped and ultimately mobilized as a powerful political symbol to legitimate a certain type of regulatory regime” (Harrington and Turem 2006: 201). Simply put: no essential meaning’ can be attached to accountability practices. Instead different understandings of accountability are mobilized in various social and political contexts which have implications for our understanding of the nature of state

transformation.<sup>21</sup>

These new forms of accountability are mediated by the ongoing process of neo liberalization, but in a way that is more complex than those suggested by simple explanations of neo liberalism as a direct cause of the tilting of governance arrangements towards a more pro market direction. The impact of neo liberalism is more indirect and is felt through the relocation of key notions such as transparency, fairness, and review, within functional policy regimes. For this reason it is as much about the process of state “construction as it is about destruction” (Harrington and Turem 2006: 205). After all what is distinctive about the perspective of accountability as a mode of political regulation is the transformation of the relationship between citizen and state, or in effect what Nettl (1968) termed ‘stateness’.<sup>22</sup> It follows that an understanding of state transformation needs to be at the forefront of the analysis of emerging transnational regulation.

This managerial approach turns political conflict into issues of technocratic management such that there are “no parties with projects to rule, no division of powers, and no aspiration of self-government beyond the aspiration of statehood aspirations identified precisely as what we should escape from” (Koskeniemmi 2007: 29). Evidence of this technocratic politics can be found in the developmental programs committed to the pursuit of good governance; this is but only to the extent that it ensures the successful achievement of developmental objectives. In fact, even when administrative grievance procedures are enshrined within these programs they become incorporated in a way that subordinates conventional rule of law objectives to broader governance objectives. Hence for example, in the PRSP there is a constant emphasis on notions such as fairness and participation in the formulation of policies, but these administrative dimensions of law are made subordinate to various macro economic policies that are themselves beyond contestation (Jayasuriya 2006).

None of this is to suggest that political change is not possible within these regulatory regimes, but rather to make more explicit that the forms it takes are constrained and limited. It is limited for the reason that in the recent shift from ‘hard’ international law to various forms of administrative law in the shape of various policy regimes there is a fundamental paradox: the incorporation of some public law principles into the regulatory regime at the same time subordinates these principles to various

specific broader policy objectives in policy regimes such as those pertaining to the environment, trade, or public health.

However, this does not mean, as we have argued, that there is no conception of the ‘public’ in these transnational regulatory domains, but as Keohane and Grant (2006) argue, these various practices of accountability substitute for democratic politics. But their analysis is persuasive only to the extent that they regard both democracy and accountability as concepts more akin to a responsiveness than to the consternation and conflict of representative democracy. What their analysis overlooks is that accountability becomes a method of ordering political relationships that involve the allocation of material stakes, the mobilization of ideological principles, and the exercising of political authority. The broader point that I want to make is that the development of new transnational administrative standards has created a public domain within private economic orders at the expense, or in place of, the representative sphere of political society. In this sense the process described above is analogous to what some have described as the judicialization of politics<sup>23</sup> (Hirschal 2006) though my argument would suggest that this judicialization takes place in sites outside the formal governmental apparatus as well. At a more normative level, it is clear that in a complex and globally interdependent world such processes will be of growing importance but we need to build robust forms of representation and contestation within these new modes of governance.

## **LEGAL INSTRUMENTALISM AND TECHNOCRATIC POLITICS**

From the foregoing it is clear that the diffusion and fragmentation of public law create new methods and forms public monitoring, review, and even grievance mechanisms, that lie outside the formal governmental process. The burgeoning academic literature on law and new governance has produced a veritable proliferation of terms such as ‘responsive regulation’, ‘reflexive regulation’<sup>24</sup> or ‘democratic experimentalism’, ‘transnational regulation’ to identify these mechanisms. Yet this literature has failed to provide a more comprehensive examination of the ramifications of these new modes of governance for the normative project of the rule of law, especially in developing countries.

Taking the case of global administrative law, the normative understanding of the rule of law is challenged on at least three fronts. First, new forms of global regulation

have multiple sources and are increasingly fragmented, and challenge the rule of law assumption about the notion of legal supremacy and a single source of sovereignty. Second, new types of global law often depend on new forms of representing a ‘public’ — defined in functional or policy terms — and challenge the rule of law as somehow linked to, or connected with, notions of political representation’ n. Third, transnational legal regulation works through increasingly flexible, soft forms of standard setting and challenges the notion of rule of law as consisting of legal predictability and certainty. But what really is a striking departure from various conceptions of the rule of law embodied within these new modes of governance is its explicit legal instrumentalism. Not only is legal instrumentalism important, but the suggestion here is that it may well constitute a neo liberal version of the rule of law that may resonate with the possible direction of East Asia’s post authoritarian political transformation.

To get to the guts of this argument we need to look at the nature of administrative law. Administrative law – decentred or otherwise – presents difficulties for the normative theory of law because “modern governments generally employ ‘tactics’ rather than laws, and thus has a tendency to use the law tactically or as ‘instruments of managerial policy’. This in turn has meant that positive law often forms part only – and not necessarily the constitutive part – of an administrative scheme, and this presents obvious problems of legal interpretation” (Loughlin 2003: 27). In a liberal democratic society this suggests that administrative law reflects a combination of two kinds of association — what Oakeshott (1975) called a ‘purposive and enterprise organisation’ directed at achieving policy goals and objectives, and ‘civic association as a non purposive civic association’. This has always been a balancing act but the shift towards decentred sites of public law has tilted the balance towards an ‘enterprise’ mode of association.

In pivotal policy regimes such as the WTO, administrative law is subordinate to the policy and managerial goals of the regime (Howse 2002). As we have shown, even rights issues such as labour standards are now incorporated and subordinated within the broader frame of a policy regime such as a bilateral trade agreement. Similarly, the development of forms of transnational judicialized governance such as the WTO dispute settlement mechanism or the Court of Arbitration for Sport set up to determine dispute in sports are highly specialized policy specific forms of judicialized governance. Nothing is more illustrative of this instrumentalism than the fact that in those cases



where international agencies promote the ‘rule of law’<sup>25</sup> it is often in the service of broader policy objectives such as secure property rights (Trubeck and Santos 2006). Taken together with the development of specific accountability communities administrative law takes on an instrumental and functional role that has tilted sharply towards making the law subordinate to technocratic objectives.

In a recent provocative statement Tamanaha — writing mostly in the context of the United States — has noted that legal instrumentalism has become such a pervasive feature that “individuals and groups within society will endeavour to seize the law, and fill in, interpret, and apply the law, to serve their own ends” (Tamanaha 2005: 3). In essence the argument is that law is pushed towards what Damaska (1986) illuminatingly calls “a policy impending mode of law”.<sup>26</sup> Legal instrumentalism leads to the advance of private good at the cost of its “manifestation as *public* power that is to be wielded in furtherance of the *public good*. The legitimacy of the law, its claim to obedience, is based upon this claim” (Tamanaha 2005: 65). Consequently the problem for Tamanaha with this growing instrumentalization of law is that it is at the expense of the diminution of the public good which saps the legitimacy of the rule of law. There is much to offer in this account of contemporary trends. Yet, Tamanaha’s account of legal instrumentalism remains a story of the triumph of instrumental theories of jurisprudence that have limited relevance for our understanding of the relationship between global administrative rules and legal instrumentalism in the newly industrializing countries of Asia

However it is useful to use Tamanaha’s account to frame the discussion of legal instrumentalism presented here. In this context there are two problems with his argument and both relate to the fact that what counts is not legal instrumentalism *par se* but the tilting of the balance between instrumentalism and non instrumentalism versions of law so that that the new administrative law is subordinate to the kind of policy regimes analysed above. First, instrumentalism needs to be located within the historical context of neo liberalism. Indeed what is distinctive about the nature of legal instrumentalism in a neo liberal context is the explicit subordination of law to the policy or technocratic objectives of policy regimes, especially those relating to economic governance. Hence the direction of processes as global administrative law reflects the operation of social political forces which have created a more explicit form of legal instrumentalism. In particular, I would suggest that the emergence of instrumentalism

reflects a basic reorientation of political authority rather than a shift away from a conception of the public good.

But how does this play in terms of the wider debates over the historical evolution of the rule of law particularly in the ‘hard case’ of China? Well for one it alerts us to the fact that the rule of law itself needs to be contextualized by embedding it within a broader set of social political forces. Intriguingly in the case of China we see that what we have identified as a tendency towards legal instrumentalism may well provide the foundations for the growing importance of legalism in the institutions of new governance particularly those linked to, or operating within, a transnational context. However, this requires that if “we are to understand the likely path of development of China’s system, and the reasons for differences in its institutions, rules, practices and outcomes, we need to rethink rule of law” (Peerenboom 2002: 5). In this exercise legal instrumentalism is part of a wider understanding of legalism as an exercise in state building. It is a nice twist to the Weberian model of legal rationality (Weber 1925) where instead of legal rationality being the outcome of a process of historical evolution, it becomes a set of routines and practices that are used to create particular instrumental forms of governance.

The second and potentially more serious problem with Tamanaha’s argument is that it depends on a vague notion of the public good and assumes that most forms of instrumentalism provide avenues for the promotion of private agendas as against the public good. But the focus on the public good deflects our attention away from the fact that it is the nature of public power that is at issue rather than the pursuit of private interests at the expense of the public good. Hence the question is the nature of the structural relationship between rulers and ruled within these new forms of governance. In fact, as we have seen, practices and systems of accountability emerging in new sites of public governance are forms of political rule that depend on the mobilization of certain conceptions of the public good.

The nub of the argument here is that ‘accountability communities’ whose functions are aligned to the objectives and goals of specialized policy and legal regimes lead to a form of politics that is essentially technocratic. To simply call this ‘legal instrumentalism’ misses the more important point that it is instrumentalism of a *particular* kind, especially in relation to the ‘accountability cascades’ of transnational

regulation, that facilitates technocratic forms of political rule. Take for example the case of labour and social standards that depend on an ‘accountability community’ that extends public law norms to the private economic domains. Certainly this falls within the ambit of what Morgan (2006) calls ‘technocratic accountability’ that is, “the delegation of the communicative processes of revelation, explanation and justification to an arm length, neutral and independent institution” (Morgan 2006: 246). However, delegation may not be the crucial issue; rather as we have — in the case of labour — it is the way ‘publicness’ itself is constructed so as to embody notions of representation that favour certain ways of managing and organizing conflict in preference to others. Hence it is an understanding of technocratic problem solving within the policy making process rather than the robust contestation of interests within the formal political arena.

Nevertheless these technocratic ‘accountability cascades’ may well serve to further important norms of participation and responsiveness within various policy regimes. In the case of China we find that complex birth control policies and programs are usually associated with coercive command and control regulatory techniques. However as Greenhalgh and Winckler (2005) point out, the birth rules were designed in terms of meeting international standards of quality care and choice. And they add that “most remarkably this included an emphasis on the program itself on human rights, partly to mobilize the public against program abuses, partly to provide birth workers with concrete standards of conduct” (Greenhalgh and Winckler 2005: 149). Similarly Hughes (2007) points out that in Cambodia the Better Factories Program is quite consistent with, and perhaps even reinforce, various neo patrimonial tendencies within the Cambodian state in the period after the UN intervention. In a similar fashion Rodan (2004) has pointed out how the Singaporean government has selectively used various practices of transparency to reinforce its own authoritarian rule. His work points out the malleable character of the concept of transparency once it is removed from a conception of political empowerment to the transparency of commercial relationships.

In both these instances of Cambodia and Singapore legal instrumentalism furthered the extension of public law norms but only to the extent that these norms were confined within the technocratic objectives of the program. Such forms of technocratic accountability narrows political contestation to specific issues of administrative participation and efficiency. It is however, beyond the brief of this paper to explore the politics of ‘accountability cascades’, but it may suggest, particularly in the case of

China, a political strategy to contain the permissible extent and nature of conflict and means for addressing it. More speculatively it might in the Asian context present a possible post authoritarian regime trajectory that centres on a configuration between neo liberalism, technocratic accountability, and new forms of legalism.

## **CONCLUSION: GOVERNANCE AND STATE TRANSFORMATION**

Accountability, “involves social interaction and exchange, in that one side, that calling for the account, seeks answers and rectification while the other side, that being held accountable, responds and accepts sanctions” (Mulgan 2003: 555). In this sense what we could term ‘accountability cascades’<sup>27</sup> — some of which are driven by global regulation and rules — take place within varied and diffused sites of power in and outside the state. Therefore these forms of accountability seek to extend the norms of public law to new sites of governance. In this sense, such new institutional processes in the region constitute a form of political participation such as avenues for questioning and potentially influencing the exercise of state power that institutionalize certain rights to information, institute standards of conduct or grievance procedures. At the same time, it reconstitutes the public domain within these new sites of governance in ways that marginalise political contestation. As such the new administrative law may well be intimately linked to the restructuring of politics outside of formal political system. Furthermore, it may reflect the deeper process of the judicialization of politics that occurs within decentred sites of governance.

The implication of this for the rule of law is that it may well reinforce a form of legal instrumentalism that lends support to what Peerenboom has called a ‘thin theory of the rule of law’. He argues that “a thin theory stresses the formal or instrumental aspects of rule of law – those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non democratic society, liberal or theocratic” (Peerenboom 2002: 3). It is important to locate these developments in the context of the operation of the fragmented policy and legal regime produced not just by global rules but also as an outcome of the broader process of neo liberal restructuring. In fact, within these policy regimes it may be possible, as Greenhalgh and Winckler (2005) argue with respect to Chinese birth control program, that various forms of participation and notions of choice will be allowed to operate but within the constraints of the instrumental or technocratic

management of the policy regime.

As such, the new modes of governance such as standard setting organizations analyzed in this paper reflect a modification or refinement in methods of political rule that may well suggest a deeper process of state transformation in Southeast Asia. Global administrative law is part of a wider process of state transformation that involves new technocratic institutions pertinent to the refinement of political rule. Global accountability cascades establish new forms of stateness that suggest different ways of defining relationships between individual and the state. Administrative law of the old or the new variety is as much about expanding state power as it is of limiting and constraining executive power. In short, understanding this 'statecraft' is an important issue for any future research agenda.

This process of state transformation may well suggest the development of a form of regulatory neo liberalism which may indicate, as Peck and Tickell (2002) have usefully argued, that neo liberalism be seen as an ongoing process of economic and political change. Their work suggests a useful dividing line between what they call 'rollback' and 'rollout' neo liberalism. The former represents the early deregulationist thrust of the Thatcher and Regan era while rollout neo liberalism represents a surge in the re-regulation of newly deregulated markets. This distinction has the virtue of placing emphasis not on marketization but on market making. Market making in turn, is joined at the root with various practices of regulation and re-regulation. In the Asian context this does not mean that state intervention diminishes or is less marginal, but that intervention within this new regulatory economic order takes a different form and ideological tone from that of the developmental state of post war period. For this reason the new administrative law may be crucial to the remaking of state structures in the Asia Pacific.

## **ENDNOTES**

1. See also Aman (1997) for an overview of the some of these changes in the nature of administrative law.

2. For example one of the main thrusts of the New Public Management (NPM) movement is to move towards giving greater autonomy and flexibility to a range of public sector agencies. It is clear that the NPM is having a substantial impact on the restructuring of the public sector in developed as well as developing countries, and, indeed, its core themes have been embraced by the World Bank.
3. For a broader analysis of changes in global governance see Jayasuriya (2005).
4. For a discussion of this in the context of the multi level governance see Hooge and Marks (2003). They identify the importance of specialized functional agencies and organizations as emerging respatialization of governance.
5. In fact because of the absence of an older layer of administrative law in many parts of Asia it may well be that new modes of administrative law become adopted more quickly than in established liberal democracies.
6. An excellent overview of different notions and practices of accountability can be found in Dowdle (2006).
7. Therefore it has been argued “increased interconnectedness of both accountability issues and solutions demands new ways of organizing, mobilizing and, most of all, of learning. There is a need to join up the dots: to raise awareness of the history of accountability and how today’s accountability wave can most effectively be mobilised to shape societal outcomes” (Zadek 2005 in *Open Democracy*).
8. Another way of expressing this is — as David Kennedy does in his book on humanitarian intervention — as a form of rulership. See Kennedy (2004).
9. On East Asian financial networks and cooperation see Amyx (2004).
10. For more information see <<http://www.theglobalfund.org/en/about/malaria/default.asp>>. Accessed 23 May 2005
11. See for example Jenkins, Pearson, and Seyfang (2002) for an overview of corporate codes of conduct.
12. In particular emerging systems of regulating labour standards have gained particular importance and visibility especially in the context of the booming Chinese economy.
5. See Vietnam Development Report (2005). For more details on participatory programs see UNDP (2006). According to UNDP (2006), “Citizens should be active in deciding local planning priorities and participating in decision-making forums for government and public services. Furthermore, the aim of participatory democracy is not just to get everyone around the table, but also to improve the quality of deliberation and participation in these new public arenas”. (UNDP 2006: 5). Here participation is the capacity of citizens – through empowered citizenship – to air grievances and monitor the activities of administrative agencies. On reform policies within the state see Painter (2005)
14. For the World Bank’s view on Participation see World Bank (1996).
15. As Steele notes, a fundamental distinction between deliberative models of democratic legitimacy and problem solving lies in the fact that in the latter ‘the subject matter of deliberation is more likely to be an individual decision for action, rather than the adoption of a formal legal standard or other law. This means that participation of this type is likely to be a requirement of law (if law is involved at all), instead of being a part of the process of legislation’ (Steele 2001: 417).
16. For a response to Alston arguments on labour rights, see Langille (2005). But Langille’s argument fails to tackle the real normative differences between locating public authority within private orders and the enhancing claims to labour rights through politically

empowerment. The broader context here is the collapse of class politics in both developed and developing societies.

17. The program is built around a series of random inspections and uses both ILO standards and Cambodian labour law to provide a checklist of more than 500 items. For an overview of the Better Factories program see <<http://www.betterfactories.org/ILO/default.aspx?z=1&c=1>> accessed 26 May 2007. The best analysis of this is in Hughes (2007).
18. Any interested party such as a NGO who believes that violation of the guidelines has occurred can take the issue up with NCP of the country where the alleged violation took place or the NCP of the country where the company has its headquarters. For the Guidelines see [http://www.oecd.org/document/28/0,2340,en\\_2649\\_34889\\_2397532\\_1111\\_00.html](http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1111_00.html)> accessed 26 May 2007.
19. Macdonald and Macdonald (2006) make much of non electoral accountability but less attention is paid to the more crucial issue of representation though their work is notable for its close analysis of how standard monitoring organizations fare in relation to various notions of democracy. For this reason this is a much more sophisticated work than those which democratic deliberation and experimentalism in various forms of labour standard monitoring. In this context see the work of Fung, O'Rourke and Sable (2001).
20. For example, Freeman argues that: "Rethinking what accountability requires is necessary because public law tends to define accountability as formal and hierarchical, whereas public-private arrangements function as horizontal networks" (Freeman 2006: 109-110). See also Freeman (2003). But, what is the relevant public in this context and what forms of contestation are allowed and what is disallowed?
21. It should also be clear that these new global accountability regimes differ, and cannot be easily subsumed under the heading of horizontal and vertical accountability in the way proposed by O'Donnell in his approach to democratic transitions. Vertical accountability refers to the relationship between citizen and the state established through regular competitive elections; horizontal accountability refers to the checks and balances on executive power within the state (O' Donnell (1994).
22. The benefit of this formulation is that it allows us to focus on the process of state transformation and state building and the processes through which new notions of stateness are created. Instead of locating the impact of neo liberalism on some quantum of state power this approach allows us to explore how globalization changes the internal architecture of the state.
23. See Ginsburg (2003) for an analysis of the process of judicialization in East Asia.
24. For reflexive regulation see Teubner (1983) which is probably one of the most sophisticated statements on self regulatory regimes.
25. We need to recognise the influential role of law and economics jurisprudence in these forms of legal instrumentalism.
26. Though he did not use this to refer to the common law regimes and for this reason it is intriguing to see how much of what he described as a 'policy implementing mode' can now be applied to all kinds of different legal jurisdictions.
27. I use the term 'accountability cascade' because it has a connection to what Lutz and Sikkink (2001) call 'justice cascades' in global governance.

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