

ACCESS TO JUSTICE, LEGAL CERTAINTY AND
ECONOMIC RATIONALITY
(2011)

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Introduction

My aim in this chapter is to say some words about “access to justice” as a global value, and to consider its relationship with related ideas of “legal certainty” and “economic rationality.”¹ I have chosen “access to justice” as the focal point for the chapter as it is perhaps the sole value that can at least be argued to have a global reach.² Although the value is at its most advanced in developed and democratic States, it also exists in a procedural sense in failed and rogue States, in frontier economies, in developing and underdeveloped States, as well as in primitive societies and indigenous tribes. This means that access to justice is a procedural value with a global relevance—even if its workings may vary significantly from context to context.

The chapter’s main point is, that in order for access to justice to be a meaningful value in global administrative law,³ it must correspond with wider notions

* Publicado en GORDON ANTHONY, JEAN-BERNARD AUBY, JOHN MORISON y TOM ZWART (editores), *Values in global administrative law*, Oxford (UK) y Portland, Oregon (USA), Hart, 2011, pp. 363-372.

¹Or convenience. There are many possible variations, which we will mention later.

²Although we shall see—both in this subject and others—that values are so much entrenched in each language’s choice of words, that translation sometimes becomes an issue by itself, thus making it difficult to deal with global values in a meaningful way. Yet mankind has always been making that effort, and it certainly is worth it. Language and its implied values, not so clear to foreigners, is just another difficulty to surmount.

³Formerly, the more modest “international administrative law” was preferred, for it merely suggested something which went over national boundaries; “global” suggests universality, completeness, no country excluded. If this is the case, one must explain whether *failed or rogue* States are included in global administrative law, as well as States that may fall somewhere between different categories. I would argue that global administrative law, in order to have meaning, must restrict itself to States that have the minimum qualities of *Rechtsstaat*, *État de Droit*, *Estado de Derecho*, or *rule of law*, and that have enough *control over their territory* to impose the order for that rule of law to prevail. That may exclude a hundred or more independent or sovereign countries, at any given moment. See, however, S Flogaitis, “The General Principles of Law in the Jurisprudence of the United Nations Administrative Tribunal,” forthcoming, § III: “The United Nations Administrative Tribunal... has proven from its early days... that there is a Global Administrative Law, that there is

of substantive justice and fairness.⁴ As we will see, substantive justice can be achieved only where there is a respect for the ‘rule of law’ and a corresponding certainty in decision-making in public law.⁵ Without that, access to justice will remain as an essentially procedural construct that does not give full weight to related rights such as the protection of property.

a common ground in all legal systems of the world and this is because at the end of the day there is only one legal science, the one created by the Romans as it was understood and further developed through adaptations by the various nations around the Globe, especially through general principles of law, that specific way of understanding the man and the world.”

In any event, we may of course have a debate about the list of such countries, but the exercise is unnecessary if we admit the limits of the word “global.” When, in 1962, I undertook the task of defining administrative law, traditional and even contemporary notions always included the characterisation of its being exclusively “internal,” “domestic,” “national,” municipal, local, etc, as opposed to international. I decided at that time to omit such characterisation: See GORDILLO, *Introducción al derecho administrativo*, Buenos Aires, Perrot, 1962. However, it was obvious, even then, that there were international elements of administrative law and I developed the idea in the second edition of the work. (Buenos Aires, Abeledo-Perrot, 1966.) See, too, the various editions of GORDILLO, *Tratado de derecho administrativo*, 1st and 10th edns., Buenos Aires, Macchi, 1974; Buenos Aires, FDA, 2009. In the second volume, recent editions currently include such chapters as “International Administrative Justice.” See *La defensa del usuario y del administrado*, 9th edn., Buenos Aires, FDA, 2009, ch. XVII.

Estas versiones se actualizan en el tomo *Hacia un derecho administrativo global*.

⁴There are different variations such as natural justice, fairness, substantial due process of law, reasonableness, proportionality, according to each one’s country or language. In Argentina, we use the words reasonableness, interdiction of arbitrariness, and also due process of law in both procedure and substance. Occasionally we use the word *fairness* in its original language. The French and Portuguese translation of fairness as equitableness is slowly gaining ground in Latin American Spanish too. See further SÉRVULO CORREIA, ch. 14 of this volume.

⁵The non native English speaker is mystified by the fact that the words which are commonly used in other languages to convey the meaning of *Rechtssicherheit*, *sécurité juridique*, etc., do not translate well into English into the more direct “safety” or “security.” In English both “safety” and “security” have usually been associated with physical protection from criminal acts of a predominantly private nature (burglary, theft, more recently national security), and those wishing to translate *Rechtssicherheit*, *sécurité juridique*, etc, into English have first toyed with the idea of *legal certainty*, of which mostly the antonym *uncertainty* seems satisfactory to this foreigner, and later *legal predictability*, of which yet again *unpredictability* looks more satisfactory to the foreign ear. When we foreigners worry about *Rechtssicherheit*, *sécurité juridique*, etc, we worry about the legal system and the State itself: We worry about physical criminal acts of private individuals, of course, but we worry more about decisions by the State and the legal system. The native English speaking people have managed not to have to worry about that choice of words, by creating and keeping a system and a State that are meant precisely to provide a modicum of certainty, predictability, and confidence in the legal system. That is why also rule of law is so hard to translate into other languages, where *Rechtsstaat* and *Estado de Derecho* are more apt than, say, *Imperio de la ley*, *gobierno de la ley* or the unskillful sounding “*Regla del derecho*” which someone has unfortunately tried.

Perhaps the lack of meaning of the direct nominal translation of *Rechtssicherheit*, *sécurité juridique*, etc, as “legal security” and “legal safety,” probably an abomination to the contemporary English native speaker, is indicative that for the English speaking people the notion is so obvious (if forced to, then: Legal predictability, legal certainty) as not to have merited the ruminations of other languages. That says a lot about both kinds of systems.

*Access to justice*⁶

So, it may be said with only a limited degree of certainty that one of the few fundamental values that has a global reach nowadays is the basic human right of access to justice, or procedural due process of law. For instance, at the time of the making of the first Draft Constitution for the European Union an agreement was reached between countries with a prevailing judicial system and those with independent administrative tribunals:⁷ There would be a difference in wording but not in essence, and that is why the French version is a different translation of the same ideas.

Una explicación en castellano de este problema lingüístico y conceptual, *supra*, t. 9, *Primeros Manuales*, Libro II, cap. VII, pp. 614-5.

The 2003 English version of Article II-47, which was made Article 11-107 in 2004, and which now has effect under the terms of the Treaty of Lisbon,⁸ states:

[The] right to an effective remedy and to a fair trial: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public⁹ hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.¹⁰

⁶When we mention access to justice we assume that the rule of law does also exist. Otherwise it is simply not possible to comment on other values such as the economic rationality we are going to explain. See for instance PIA HEIKKILA, "Afghans swap poppies for wheat as food costs soar" in *The Guardian*, 13 May 2008 at 5.

⁷See European Group of Public Law, "Proposal on the Debate on the European Constitution" in (2002) 14 *Revue Européenne de Droit Public/ European Review of Public Law* 1451-99; and GORDILLO, "The Draft EU Constitution and the World Order" in *The Constitution of the European Union/La Constitution de l'Union Européenne*, London, Esperia Publications Ltd, 2003, at 281-94. See, too, GORDILLO, "El control jurisdiccional en el mundo contemporáneo" at www.tcadf.gob.mx/congreso/internacional/control_jurisdiccional.html; E. GARCÍA DE ENTERRÍA and T. R. FERNÁNDEZ, *Curso de Derecho Administrativo*, Buenos Aires, Thomson/Civitas-La Ley, 2006 at 618-A and 618-B, paras XXIV.1 and XXIV.2.

⁸Art. 6 TEU. The corresponding version that now has binding force of law is Art. 47 of the Charter of Fundamental Rights of the European Union.

⁹Obviously, the universal value is here that the aggrieved individual has a right to access all parts of the proceedings, in order to avoid any "Kafkaesque" process: It cannot be secret for the parties, it must be public. But, even if the words "public hearing" are used here (which cannot be translated as *enquête publique* or *audiencia pública*, in this case), it is not meant that the process itself should always be free to the public in general. Whether or not, or to what extent, it is depends on the nature of the process and national legislation and general principles of law, which vary considerably from one country to another. The tribunal's deliberation, on the contrary, is almost always not public in either sense, although there are countries with a tendency to make some court deliberations public. (Eg, the Swiss Federal Court.)

¹⁰In international administrative organisations and tribunals, advice and representation is also undertaken by colleagues within staff associations, without cost to the staff member.

Legal aid¹¹ shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.¹²

The French version states:

“Droit à un recours effectif et à accéder à un tribunal impartial.” “Toute personne dont les droits et libertés garantis par le droit de l'Union ont été violés a droit à un recours effectif devant un tribunal dans le respect des conditions prévues au présent article. Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable par un tribunal indépendant et impartial, établi préalablement par la loi. Toute personne a la possibilité de se faire conseiller, défendre et représenter. Une aide juridictionnelle est accordée à ceux qui ne disposent pas de ressources suffisantes, dans la mesure où cette aide serait nécessaire pour assurer l'effectivité de l'accès à la justice.”¹³

At the risk of being obvious, direct translations were made of “independent and impartial tribunal,” viz “un tribunal indépendant et impartial;” and “access to justice,” viz “l'accès à la justice.” On the other hand, the following words have not been meant to be a direct translation, although they are roughly comparable: “effective remedy,” ie “recours effectif;” “to a fair trial” ie “à accéder à un tribunal impartial;” and a “fair hearing,” ie “équitablement.”

Both versions agree that an independent and impartial tribunal should provide, within a reasonable time, fair or equitable¹⁴ public access to justice for all,¹⁵ by either an “effective remedy” or a “recours effectif.” The French word *recours*, as with its direct Spanish direct translation *recurso*, may have an implicit distinction in Latin America, evoking the absolute monarchy of the *Ancien Régime* which some countries not in Latin America still consider their way of government (Saudi Arabia): A limited access to judicial or jurisdictional review. Any such ambiguous distinction is, however, tentatively being prevented by the emphasis put on “effective.”

Anyway, in some countries judicial review may also be limited; or at least have some judicial deference to administrative adjudication by administrative tribunals (Canada);¹⁶ while in some other countries it has evolved to allow for more intensive review and full access to justice (Spain).

¹¹ Legal aid is the second phase after formal access to justice is established. Since Roman times access to justice does not favour the needy. The tendency nowadays is to try to make justice really accessible both to the well-to-do and the needy.

¹² www.european-convention.eu.int/DraftTreaty.asp?lang=EN.

¹³ www.constitution-europeenne.info/special/part_2_fr.pdf.

¹⁴ That is to say, due process of law in substantive sense. (Fairness, etc.)

¹⁵ Viz, due process of law in a procedural sense. (Access to an impartial and independent tribunal.) So, the relevant provision of the Charter of Fundamental Rights of the European Union intends to assure both procedural and substantial process of law. For the purpose of analysing its global reach, we are distinguishing between the two senses.

¹⁶ It should be noted that this applies to judicial review of adjudication made by impartial and independent administrative tribunals, of which there are about 5,000 in Canada.

So we might say that in practice both versions tend to be equivalent, even if they are not meant to be direct translations of each other. Obviously, a very careful evaluation has been made of the different versions, which further explains the added emphasis in the phrase “in compliance with the conditions laid down in this Article.” This is meant to assure an homogeneous, yet nationally adaptable, interpretation of the different texts.

International organisations, some as large as the United Nations (UN) (with almost 40,000 employees worldwide), all have independent and impartial administrative tribunals available to their staff and even former staff members.¹⁷

However, third parties have to suffer their otherwise general immunity from either international or national jurisdictions, which the organisations’ legal departments always defend before local courts. These third parties usually have access to conventional arbitration proceedings, not to national or international courts or tribunals.¹⁸ If that is applied to companies, it would seem to be above the threshold of access for all; however, it is quite frequently also applied to individual contracts for personal employees, who may not be as well-protected as an organisation with the recourse to arbitration.

*Justice*¹⁹ or *substantive due process of law, etc, legal certainty*,²⁰ *economic rationality or convenience*²¹

A citation from Radbruch may be a starting point to develop another line of reasoning. Radbruch stated that there are legal values above the normative system:

¹⁷ See S. FLOGAITIS, “The General Principles of Law in the Jurisprudence of the United Nations Administrative Tribunal,” n° 3 above, at § I. “There is a terrain which is by definition Global and Universal: The legal system of the United Nations, the place where all civilizations come together; [rules] ‘which have been decided upon by representatives of the nations of the world, and therefore is universal by definition.’” See also GORDILLO, “Tribunales administrativos internacionales” in Universidad Austral *Cuestiones de procedimiento administrativo*, Buenos Aires, Rap, 2006, at 803-06. Also, “La justicia administrativa internacional” in GORDILLO, *Tratado de derecho administrativo*, vol. 2, *La defensa del usuario y del administrado*, 9th edn, Buenos Aires, FDA, 2009, ch. XVI.

¹⁸ National courts sometimes try to assert local jurisdiction over these bodies when there is no other venue that can provide access to justice against them. (Germany, France, USA, etc.)

¹⁹ The word justice does not present translation problems, albeit that it has a very deep and different resonance in one’s mind and culture. It can be traced to the notion of substantive due process of law and natural justice, and that is what prompted Justice Jackson of the US Supreme Court to say at the height of the Cold War, in 1952, that if he had to choose between American laws without due process of law, or Soviet laws with due process of law, he would undoubtedly choose the second.

²⁰ *Legal certainty* is the usual English translation of the original *Rechtssicherheit*, which can also be translated as *sécurité juridique*, *seguridad jurídica*, etc. To those of us who are non-native English speakers, the English *legal certainty* does not seem to be wholly satisfactory, even if we feel more at ease with the antonym *uncertainty*. But this is a problem that we have to tolerate: It is not, after all, our own language.

²¹ GÉRARD TIMSIT has kindly reminded me that many people would adopt a rather extensive interpretation of the words “economic rationality,” namely absolute free market self-regulation and the absence of the principle of solidarity that pervades the Welfare State. Thanks to this kind

“Human rights that surpass all written laws.” His now accepted perception of law was that there are both “statutory lawlessness and supra-statutory law,” as translated from his masterfully titled, *Gesetzliches Unrecht und übergesetzliches Recht*.²² He dealt mainly with three values: Purposiveness, justice, and legal certainty. Without going into Radbruch’s view on purposiveness for now, I suggest that the other two values, legal certainty and justice or fairness,²³ have to be considered as values in contemporary global administrative law, even if many issues will forever be contentious²⁴ in some cases.

There is also a factor which Adam Smith called “tolerable security of property” and “tolerable administration of justice.” In his view, capital provided with those protections would lead to economic growth and the “wealth of nations,” which we all know is not necessarily true in every case. But there is still more to that.

J. BRADFORD DELONG explains “Reverse the process, however, and you get the poverty of nations.” (Emphasis added.) That is why a “large net flow of capital from rich to poorer nations simply never materialized.”²⁵ In fact, the principal

suggestion, my use of the word is therefore firmly linked to the Welfare State and solidarity, but also within the context of the rule of law, *Rechtsstaat*, *État de Droit*, etc. Social and economic equality have to be pursued, but this does not mean that all and any regulation is conducive to that end. That depends on the efficiency of regulation, on its lack of corruption and its reasonableness, or it may have unintended consequences. The same is true for national security, the public interest, and so on.

²²RADBRUCH, “Statutory lawlessness and supra-statutory law” (2006) 26 *Oxford Journal of Legal Studies* 1. (Translation by B. LITSCHIEWSKI PAULSON and STANLEY L. PAULSON.) See also RADBRUCH, “Five minutes of Legal Philosophy” (2006) 26 *OJLS* 1. (Translation by B. LITSCHIEWSKI PAULSON and STANLEY L. PAULSON.) RADBRUCH’s work represents the first major step in the current formulation of the idea, although it has also roots in the common law world, in Ihering, and even in the old Roman law, where Cicero referred to as universal law, as opposed to the dominant explanation of the legal system provided by scholars and jurists, not practitioners, lawyers, praetors. See App A, “Cicero the Outsider” in A. WATSON, *The Spirit of Roman Law*, Athens and London, University of Georgia Press, 1995, at 195-200, specially 197-99. The prevailing exposition of the old Roman system is further explained at 71, 73, 79, 83, 89, 93, and ch. 8, “Jurists and Reality” at 88-100. FLOGAITIS also says, in this tradition of legal thinking and its evolution, that “Modern administrative law has evolved from a very positivistic branch of law into the branch of law par excellence which is the law of general principles, those ideas and rules which derive from a certain conception of the man and the world.” See “The General Principles of Law in the Jurisprudence of the United Nations Administrative Tribunal,” n° 3 above, at § I.

²³That is to say, substantial due process of law, reasonableness, etc.

²⁴For instance, the question whether social improvement should be led by normative or judicial bodies, as in the case of the diverse forms of discrimination. See A. GORDILLO, “The administrative Law of International Organisations: Checks and Balances in Law Making-The Case of Discrimination” in *Internationalisation of Public Law/ L’Internationalisation du Droit Public*, London, Esperia Publications, 2006, at 289-312. This has also some relationship to the subject matter I deal with in “Statutory Limitations of International Administrative Tribunals” in XXth Anniversary, Inter American Development Bank, Administrative Tribunal, Washington DC, 2003; “Restricciones normativas de los tribunales administrativos internacionales” in D. AHE (ed.), *El derecho administrativo de la emergencia, II*, Buenos Aires, FDA, 2002, at 285-98.

²⁵Or, when it did, it did not always contribute to the overall wealth of the recipient nation. Old memories still relive the initial times of colonialism, as retold by BARACK OBAMA in *Dreams from My Father, A Story of Race and Inheritance*, New York, Three Rivers Press, 2004, at 400-01, 409-12, 414. Examples, of course, abound and differ widely.

outcome was *an enormous flow of capital from the periphery to the rich core.*" (Emphasis added.)

"The reason is... that the core... offers a form of protection for capital against unanticipated political disturbances." It can be argued, then, that at least partly it is these "institutions... that have made the core so wealthy."²⁶

Flight capital from poor to rich nations, by foreigners and nationals who are better off in developing nations, is born out of the fact that they feel developed countries can provide them with a "tolerable security of property," even if the rules may change.²⁷ Yet they are not expected to change as unpredictably and to such an extent as they may do in frontier economies, underdeveloped or most developing countries. They may adhere to the Welfare State or not, foreign or national capital does not care; what it does care about is a certain measure of legal predictability.²⁸ When that is highly endangered or even disappears, capital flees from those places to more secure shores.

That is why Adam Smith's qualification of "tolerable" highlights well the zone of uncertainty around words in any language. In any case, the rule of law, due process of law, access to justice, etc, are not merely good legal values; they can also make good long-term economic sense even in the Welfare State.

It is thus economically irrational, or at least economically highly inconvenient in the short or long term, not to have those legal values, because capital goes where it feels there is a tolerable security, and flees those countries where that sense of security falls below what they think is admissible.²⁹

Some countries such as Argentina have occasionally had the idea that one can make a fundamental legal distinction between long-term investment and temporary investment, trying to help the former and hinder the other. Sunken investments cannot of course summarily flee a country; but a country that does not comply with the minimal requirements of due process of law cannot reasonably expect more sunken investment to be made in them. Even then, sunken

²⁶"Gambler's ruin," *Buenos Aires Herald*, 3 June 2008, at 6.

²⁷According to current international banking regulations on prevention and detection of money laundering, banks have the duty to "know" their clients. This leads to certain documents being asked of prospective foreign non-resident aspiring account holders, and sometimes also of lengthy interviews where one of the questions is: "Why do you want to bring your capital here?" If the customer is at a loss to provide an answer, a helpful "capital protection" will be provided: That, and no other, is the reason for capital flow from developing countries to central ones or even developing ones which provide such "tolerable security." (Uruguay.) That goes to show the need to establish legal protection of property, predictability, etc, to be universally required as fundamental values above any legal system, at least as a matter of principle.

²⁸For that reason, even socialist countries that provide some predictability, such as China, receive foreign investments even though they do not have developed concepts of the rule of law or the administration of justice.

²⁹Nor is it enough to invoke the public interest, which is a notoriously imprecise "concept." It can have very bad consequences if it is not tempered with the rule of law and procedural and substantial due process of law. On public interest see further Anthony and Morison, ch 9 in this volume.

investment can be sold at a loss to locals friendly to the government,³⁰ if the owner does not trust the legal system, and so he or she flees the country anyway.

In Russia, “[o]ver \$30 billion of foreign capital fled since the August war in Georgia and the ruble’s decline against the dollar spooked investors.”³¹ Its own previous weak rule of law and then its intervention in Georgia meant to its own nationals and foreigners alike that recent axioms did not apply anymore. The tolerable security of property, the tolerable administration of justice, seemed not applicable for the time being. Whatever the reasons for the country’s actions, it included —after the fact— lack of economic rationality; as things turned out, it was economically inconvenient not just in the long term, but in the very short term too.

Or, to express RADBRUCH’s thought in today’s words, that which is not just, fair and predictable is not good either for the public interest, national security or convenience of the national economy.³² In a similar vein, FLOGAITIS stresses that in the case law of the UN administrative tribunal, “Fairness, rationality, good administration, *non venire contra factum proprium* are principles which the Tribunal has established as interconnected.”³³ (Emphasis added.) As the tribunal stated in Judgment 951, Al-Khatib (2000), “It would not be in the interest of the Agency to make decisions that are patently unjust or irrational and to act thereon.”³⁴

Of course, not only does reality change and so does its perception and public policy by regulatory agencies of every kind and level, but so too, in turn, do the rules and regulations, both local and global, that guide any given economic activity: We are now suggesting a focus on economic activities. The chance for both groups and individuals to effectively challenge regulatory decisions is part of normal democratic behavior, as much in economic activities as in civil liberties.

³⁰ Or “oligarchs,” to use the contemporary terminology adopted in Russia in 1990s. Opposition leaders in Latin American countries have now also started to use the Spanish equivalent of the term to describe the same phenomenon, albeit as exists on a smaller scale. See, for instance ELISA CARRIO, interview in *La Nación. Enfoques*, 11 January 2009 at 1, 2 and 5.

³¹ G. L. WHITE, “Russian economic recovery tested,” *The Wall Street Journal*, 20 October 2008 at 10. See also L. HARDING, “Moscow’s old communists rejoice as oligarchs look to a future of *nyet* profit,” *The Guardian*, 21 October 2008 at 13: “Spooked foreign investors have fled, because of the global credit crisis but also because of the war in Georgia and the Kremlin’s interventions in the market.”

³² The case has been made recently that the same applies to the national public interest in any of its forms, for instance national security considerations, not just economic convenience. See notice of an OECD 2008 report about an arms deal with Saudi Arabia, in the *International Herald Tribune*, 18-19 October 2008 at 3.

³³ FLOGAITIS, n° 3 above, at 4.

³⁴ The case has been highlighted by FLOGAITIS, n° 3 above, at § III, 4 and is also applicable, necessarily, in nation States; not that all countries can be counted to rely on such interconnectedness in the practicality of each one’s system: But those countries that do not adhere to this line of reasoning necessarily pay the price in their own economic downturn.

However, predictability or legal certainty is not enough if it is also fundamentally unfair, for there is an “immemorial law that denies validity to the criminal dictates of inhuman tyrants.” In such cases justice should prevail over legal certainty. The criminal dictates of inhuman tyrants have not disappeared, but they do not seem to be accepted as something which the law would encompass.

Some minimal principles of economic rationality in normal circumstances include currency stability or inflation control, fiscal surplus, open economies³⁵ and the rule of law. They began to appear as rather universal indications of long-term economic rationality or convenience for the public good. Yet in a moment of financial panic, an intervention³⁶ by the United States and *an ad hoc* informal or virtual network³⁷ of European countries and organisations has been made. That seems to prove that no easy solution really exists to satisfy everyone.

Standards and values (such as access to justice, fairness and natural justice,³⁸ the rule of law, and so on), do not automatically solve cases but they can provide guidelines. I suggest including economic rationality or convenience for the country’s economy among them, in the sense that no long-term economically sound idea or lasting solution is born out of the realm of due process of law.³⁹ I fully understand, of course, that current policy issues perhaps make that, at least momentarily, a somewhat unrealistic suggestion.⁴⁰

³⁵ There is a wide range of opinions as to the proper balance between tolerable freedom of the market and tolerable State intervention. See G. TIMSIT, “La reinvention de l’État-Suite,” 2008, 74 *Revue internationale des Sciences administratives*, 179.

³⁶ Some developing countries at times express satisfaction that their own intervention is deeper than in developed countries. But regulation is only as good or bad as the regulators are able and honest, or inefficient and corrupt. Intervention in developed countries mostly fulfils the requisites of efficiency and honesty; intervention in some underdeveloped countries does not.

³⁷ While I do not pretend to represent their thoughts, I am indebted to PAUL CRAIG and THUMEN KOOPMAN for their comments on this point. The theory of networks registers such informal use: See for instance A. L. BARABASI, *Linked*, New York, Penguin, 2003; and D. J. WATTS, *Six Degrees. The Science of a Connected Age*, New York, Norton, 2003. And on networks see CRAIG, ch. 4 in this volume.

³⁸ As PAUL CRAIG has pointed out to me, if due process of law in both procedural and substantive sense is accepted, then that is a huge body of law indeed. That is why one always needs to bear in mind Justice Jackson’s words at n° 22 above.

³⁹ In the same sense, the OECD made an International Anti-Bribery Convention, ratified by individual countries, Art. 5 of which prohibits considerations of national economic interest, whether short term or long term, when prosecuting foreign bribery. Of late, the need has been observed also to include in such prohibition considerations of “national security” or “national public interest:” no pro-bribery decision can really be considered to be in the national public interest or national security; no more than convenience for the national economy. See notice of the 37 nations OECD 2008 special report, referring to Serious Fraud Office investigation of an arms deal with Saudi Arabia, in the *International Herald Tribune*, 18-19 October 2008 at 3. And for judicial consideration see the decision of the UK House of Lords in *R (Corner House) v Director of the Serious Fraud Office* [2009] 1 AC 756.

⁴⁰ That is obvious when my own idea corresponds up to a point with ADAM SMITH’s ideas, which were later overshadowed by KEYNES, who was then superseded by others, only to be given partial credence again later on, and so on. The story has not ended yet.

Be it the old ideas about stability and open markets or the current ideas, not necessarily opposed, of State intervention⁴¹ in acute crisis, economic rationality or convenience has to be factored in as a guiding value in global administrative law. The tolerable security of property that ADAM SMITH suggested for the wealth of nations, if absent, translates into flight of capital and poverty for the national economy and a substantial part of its population. The long-term well-being of a country, or the wealth of nations, depends to a large degree in its compliance with universal values of administrative law.⁴² It is just one reason why long-term economic rationality or long-term convenience for the country's economy, with the above explained caveats,⁴³ has to be included in the search for values in global administrative law.

⁴¹ Again, a crucial factor is what kind of intervention? If it is inept and corrupt, as in countries whose administrations share those characteristics, it will almost always be deleterious. In a similar vein, the first 2008 government proposal for US intervention was rejected by Congress, who considered it to be an attempt to introduce absolute discretionary powers, thereby adding a constitutional issue to the economic one. Checks and balances provided the answer: Intervention without discretionary powers.

⁴² A majority of writers and all international tribunals adhere to such values, as well as developed countries, and they are explained in, for instance, FLOGAITIS, n° 3 above. But the question remains whether they are real or not in all countries of the world, as I explained at the beginning of this chapter.

⁴³ As a rule of thumb, developed societies tend to have smaller numbers of people under the level of poverty or in indigence, compared to developing or underdeveloped ones. When developing countries want to reduce inequality and foster growth without regard to the rule of law and other legal values, they usually do not achieve those ideals. They just promote more poverty and more inequality.