1. According to law

Where law is lawful, decision-makers must comply with the law. The ‘success’ of global administrative justice will depend upon decision-makers being committed to ‘legality’ in the sense that decisions are consistent with the existing body of law. In the Introduction to this book it was claimed that a global procedural standard will require cohesiveness. Cohesiveness implies stability, or an anchor to which a standard can be tethered. If a requirement for decisions to be made according to law is incorporated into a model of global administrative justice, that anchor becomes the legal framework in which administrative decisions are made.

A comparative analysis of existing commentary on administrative justice reveals the emergence of a ‘functional approach’ that conceives administrative justice as the legal framework or system for administrative decision-making and adjudication. Canadian scholar Lorne Sossin

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describes administrative justice as ‘the system of decision-making of administrative agencies, boards, commissions and tribunals’. Whilst Sossin has questioned how well Canadian tribunals realistically fit within any administrative justice ‘system’ this functional and systemic perspective of administrative justice appears as dominant discourse in a number of jurisdictions. In Canada at least, the conversation has not ignored normative principles, but focuses on if, and how, normative principles such as ‘adjudicatory ethics’, the ‘rule of law’ or even ‘human centered design’ inhabit and inform the ‘justice system’.

In Europe, the use of administrative justice as a way to describe ‘the system’ is reflected in a series of reports produced by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. The reports, which are titled *Administrative Justice in Europe*, focus on individual countries and provide classification of administrative acts in that jurisdiction, the definition of an administrative authority, the organisation and role of review bodies and the recruitment and role of judges, amongst other things. Similarly, administrative adjudication in Latin America, which largely takes its form from the European civil law model (with some integrated aspects of the common law system), has been described as a *system* of administrative justice.

European civil law countries, or those countries that rely on similar systems, often use administrative justice as a way to describe their constitutional system of administrative courts. For instance, in Italy administrative justice is used as a way to describe a system that provides

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6 Ibid, 1.
judicial protection’ against public administration.\(^9\) The Italian Constitution creates a system of administrative courts\(^{10}\) that are distinct from civil and criminal courts, which adjudicate matters that deal with public administration\(^{11}\) and, according to the Italian Constitution, ‘have jurisdiction over the protection of legitimate rights before the public administration’.\(^{12}\) Administrative justice has also been used to describe France’s Conseil d’Etat, which creates a similar system,\(^{13}\) as do the court systems in other European countries such as Ukraine,\(^{14}\) Spain, Finland, Poland, Greece and Germany.

A functional approach to administrative justice has also translated to the labeling of institutions, public offices and community support and education programmes in terms of administrative justice. Examples include the Foundation of Administrative Justice, which provides educational courses for Canadian tribunals, and ‘the people who appear before them’\(^{15}\) and the Ontario-based Administrative Justice Support Network, which supports ‘people to feel competent and confident to proceed with an appeal before an administrative board or tribunal whether or not they have


\(^{10}\) Regional administrative tribunals (TARs), Council of State, Court of Cassation and Court of Accounts.

\(^{11}\) Although as Elisabetta Silvestri states, the jurisdiction of the court is determined by the nature of the claim, rather than its relationship with public administration or a general concern with public interest: Elisabetta Silvestri, ‘Administrative Justice in Italy’ (2016) III (2) BRICS Law Journal 69.

\(^{12}\) Article 103, sec. 1 of The Constitution of the Italian Republic. Silvestri states that the English translation of ‘legitimate rights’ does not quite reflect the Italian concept of ‘legitimate interests’ (interessi legittimi) as the counterpart of ‘subjective rights’ (diritti soggettivi): ibid, 68.


\(^{15}\) See <http://foaj.ca> (accessed 6 August 2018).
legal representation’. In Kenya, the Ombudsman’s office is called the Commission on Administrative Justice and Ghana’s Commission on Human Rights and Administrative Justice is tasked with investigations of human rights abuse and public maladministration.

Peter Strauss, a US administrative law scholar, takes an even broader approach when he conflates administrative justice with administrative law without distinction. In his book titled *Administrative Justice in the United States*, Strauss refers to administrative justice as entailing ‘an engagement with the institutions of government, their operation and their interaction’, each chapter outlining a particular mechanism of US administrative law. Similarly, references to administrative justice in African statute law indicate that in some African countries the concept is used as a synonym for administrative law. Zimbabwe’s Administrative Justice Act (2004), for example, focuses on identifying administrative authority and action, as well as the action that will constitute a breach of administrative justice, such as acting without jurisdiction, or committing fraud or corruption.

Some jurisdictions rarely describe their administrative law systems in terms of administrative justice. In Australia and the UK, for instance, administrative justice is not generally used as a functional label because the Australian system is defined according to a judicial and merits review distinction, and discussion in these countries has tended to be integrated more clearly with the normative aspects of the concept, which are discussed in Chapter 2. However, the term has been used as a way to describe interactions with decision-making institutions and courts.

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21 Ibid, s. 5(e). South Africa has enacted the Promotion of Administrative Justice Act (3 of 2000).
22 It is interesting to note that in 2007, the then president of the Australian Commonwealth Administrative Appeals Tribunal, The Honourable Justice Garry Downes AM, presented a paper at the Canadian Council of Administrative Tribunals Fourth International Conference titled ‘The State of Administrative Justice in Australia’. Despite administrative justice not having common usage in Australia as a way to define the ‘system’, the paper focused on the institutional and systemic aspects of administrative decision-making and review.
A functional approach that conceives administrative justice as part of a legal framework, or as the system itself, acknowledges that administrative decisions must be made according to law because ‘law’ comprises the rules and regulations that create and support the legal system. This requirement also responds to the need for global procedural standards to be responsive, which in the global space requires an acknowledgement that whilst there may be no overarching legal system that binds all ‘global actors’, law exists in a number of guises and has variable impacts on global decision-making bodies, which is largely dependent on their status and character. The way that law in the global space, defined as international law, internal institutional law, domestic law and ‘global law’, intersects with the UN in a way that creates obligations that are relevant to its administrative decision-making is the focus of the remainder of this chapter.

1.1 LAW IN THE GLOBAL SPACE AND UN ADMINISTRATIVE DECISION-MAKING

The fact that the global space is ‘legally fragmented’ does not mean that it is a place of ‘non-law’. Indeed, the global space offers a number of contenders that claim the status of law within this context.

1.1.1 International Law

International law, which is the body of rules, instruments and principles that govern the interactions of States at the international level, is the most recognised and entrenched form of law that operates within the global space. International law is understood as public international law, including its various iterations, such as customary international law, international human rights law, international refugee law and international humanitarian law.

International law has the capacity to create rights and obligations for bodies such as the UN, which possess international legal personality. International legal personality is the ability to bear rights and obligations in international law, independent of States. Otherwise known as legal capacity, the International Court of Justice (ICJ) established that non-State actors (that is, the UN) may possess some international legal personality but only to the extent of the ‘function they are to fulfil in that legal order’24 or to the extent that States as the subjects of international

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24 Ibid.
law and the ‘true holders’ of international legal personality, confer on them. The ICJ further mapped the scope of international legal personality by stating that ‘the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice’. The limits of the purposes and functions that can be implied from constituent documents and subsequent practice will depend on the particular organisation, but its purposes and functions must be conferred by reasonable implication ‘as capacities required to enable the organisations to discharge their functions effectively’. The ICJ has confirmed this approach in subsequent cases.

According to the ICJ in the WHO case, IOs are subjects of international law and, therefore, are bound by any obligations incumbent upon them under three distinct sources of international law, which are general rules of international law, their own constitutions or under international agreements to which they are parties. Added to these sources are two international instruments that were created subsequent to the WHO case, which create obligations for IOs: the Articles on the Responsibility of International Organizations for Internationally Wrongful Acts and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

The UN is bound by its own constitution, which is the UN Charter, as well as ‘general rules of international law’ as stipulated in the ICJ Statute. Article 38 of the ICJ Statute does not define what comprises such rules and whilst its human rights component continues to attract
debate, it is generally accepted that general rules of international law incorporate both *jus cogens*, which are peremptory norms from which no derogation is permitted, and laws that derive from custom. The latter suggestion encounters difficulty from the fact that the *State* is a fundamental component of customary international law, which makes an assertion that obligations are ‘incumbent’ on an IO problematic. However, two factors point to an obligation for IOs to respect customary international law. First, as made clear in *Reparations*, the UN is considered a subject of international law and therefore, logically, there is no impediment to the extension of its rights and duties to customary international law where they relate to its functions and purposes as ‘specified or implied in its constituent documents and developed in practice’. Second, it is widely accepted that UN resolutions may be evidence of *opinio juris*, which is the first element of customary international law. As Maurice Mendelson notes, ‘IO’s are capable of

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33 According to the Vienna Convention, art 53 peremptory norms of general international law (*jus cogens*) ‘are norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.

34 Guglielmo Verdirame’s interpretation of the general rules of international law is that they are ‘shorthand for customary international law of universal or quasi-universal applicability and for general principles of law’: Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press, 2011) 71.

35 The two components of customary international law, *opinio juris* and State practice, are exclusively relevant to State action.

36 The ICJ has stated that ‘*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain UNGA resolutions’ (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 188) and that these resolutions ‘can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*’ (*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep 226, 1996).

37 An example of UN Resolutions that bind another IO or UN subsidiary body are the UNGA resolutions that have extended UNHCR’s international protection functions to include ‘additional activities’ such as participation in ‘humanitarian endeavours’, involvement in ‘development-orientated assistance’, and to address effectively, through emergency preparedness and response mechanisms, situations that cause or threaten to cause mass exoduses.
contributing to what is conveniently and traditionally called State practice, but which is, more precisely, the practice of subjects of international law’. Contribution to customary international law may not automatically mean that an organisation is bound by it, but it does give weight to the proposition that IOs are bound by customary international law as a principle of general international law. As Verdirame argues, it would be ‘extremely disruptive for the international system to tolerate the presence of actors that are endowed with legal personality, and thus with the legal capacity to operate upon the international plane, but are exempt from a body of universally or almost universally accepted rules’.39

The way that international law interacts with the decision-making of the UN’s subsidiary organs is relevant to a discussion that focuses on decision-making throughout the UN system. Whilst subsidiary organs largely act in a manner that can be described as independent, they cannot be separated from the UN system because their tasks and functions are dependent on the scope of the UNGA’s powers and they facilitate the functions of the UNGA by adopting and carrying out its decisions.40 As a consequence, the UN’s subsidiary organs not only derive international legal personality that is compatible with their objectives and functions from the UN,41 but their acts are attributable to the UN.

The proposition that the legal obligations of the UN and its subsidiary organs do not exist separately finds support in the jurisprudence of the European Court of Human Rights (ECtHR), which found that internationally wrongful acts that are committed by one of the UN’s subsidiary organs are attributable to the UN.42 When the UN or one of its subsidiary organs temporarily administers a territory, such as was the case in East Timor from 1999 to 2002 and in Kosovo from 1999 (albeit in a limited capacity since 2008), it acts as what has been described as a ‘quasi-sovereign’43 because it has complete responsibility for the administration of that territory, including both civil and security matters. Another term for

39 Verdirame, above n 34, 71.
40 Amerasinghe, above n 26, 140–141.
41 Verdirame, above n 34, 62.
42 Behrami and Behrami v France and Seramati v France, Germany and Norway (‘Behrami’) Application Nos 71412/01 and 78166/01 (ECtHR, 2 May 2007).
terrestrial administration is *de jure* administration, which means the administrator is given a formal mandate in the form of a UNSC resolution and/or as part of a treaty, to administer the territory.\(^{44}\) In *Behrami* the ECtHR found that the actions of the NATO Kosovo Force (KFOR) and United Nations Interim Administration Mission in Kosovo (UNMIK), being a failure to detonate mines and false imprisonment respectively, were attributable to NATO and the UN as their subsidiary organs because the UN and NATO had ‘effective control’ of the territory.\(^{45}\)

The significance of the *Behrami* decision is in the court’s finding that ‘UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC’ and ‘[a]ccordingly, the Court notes that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, “attributable” to the UN in the same sense’.\(^{46}\) In other words, if a subsidiary organ’s conduct can be attributable to the UN, and the UN is bound by an international obligation, then that subsidiary organ is capable of violating that international obligation *qua* its position as a subsidiary organ. The UN Legal Counsel supports this interpretation of the Court’s finding by stating:

> As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation.\(^{47}\)

It should also be noted that subsidiary organs are, like the UN as an organisation as a whole, bound to observe the UN Charter. The ICJ has made clear that the ‘political character’ of a subsidiary organ ‘cannot release it from the observance of the treaty provisions established by the Charter where they constitute limitations on its powers or criteria for its judgment’.\(^{48}\)

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\(^{44}\) Verdirame, above n 34, 230.

\(^{45}\) *Behrami*, above n 42, paras 128–143. ‘Effective control’ is the exercise of public functions (legislative, executive or judicial) in a way that amounts to territorial control: ibid, paras 233–235.

\(^{46}\) Ibid, paras 142–143.

\(^{47}\) Unpublished letter of 3 February 2004 by the UN Legal Counsel to the Director of the Codification Division, quoted in *ILC Report* (2004) UN Doc A/59/10, 112; Verdirame, above n 34, 199–200.

\(^{48}\) *Conditions of Admission of a State to Membership in the UN* (Advisory Opinion) [1948] ICJ Rep 57, 64.
Finally, a variety of other non-binding legal instruments may create standards with which the UN is expected to comply in its decision-making. Falling into this amorphous category are non-binding recommendations or ‘soft law’.\(^\text{49}\) Caroline Chinkin describes soft law instruments as ranging from treaties with only ‘soft obligations’ to ‘non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations (“non-legal soft law”), to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles’.\(^\text{50}\) Although soft law is non-binding, its importance to the ‘general framework of international development’\(^\text{51}\) should not be underestimated. A voluntary resolution or other instrument with ‘soft obligations’ does not have to be a legal norm to be politically influential\(^\text{52}\) and may be an important source of rules for administrative decision-making.

1.1.2 Internal Institutional Law

Internal institutional law, or ‘internal law’, which has been described by the International Law Commission (ILC) as comprising the ‘rules of the organization’, attracts the label of law in the global space. The term ‘internal law’ is often used to describe employment relations of the international civil service (that is, an organisation’s secretariat) and as ‘part of the conditions of employment’ for staff,\(^\text{53}\) which is largely considered to be its most important aspect.\(^\text{54}\) More broadly internal law can be defined as ‘the constituent instruments, decisions, resolutions and other acts of the international organization’,\(^\text{55}\) which includes ‘manuals, circulars and other statements issued by the administration which have a


\(^{52}\) Ibid, 84.

\(^{53}\) World Bank Administrative Tribunal Reports [1981], Decision No. 1 at pp 11–12.

\(^{54}\) Amerasinghe, above n 26, 274.

According to law

law making character’56 and the ‘established practice’ of the organisation.57 The internal rules and practices of an IO can also be used to conclude treaties, maintain diplomatic relations, and submit a claim for reparation for injuries. Notably, Amerasinghe claims internal law includes ‘the facilitating of decision-making in organs, especially in formulating rules of procedure’.58

Another way to understand the UN’s internal institutional law is as its ‘own voice’, which is a reflection of the organisation’s functional autonomy. ‘Functional autonomy’ has been described as the ‘distinction, in terms of legal powers and purposes, between an organisation and its member states’.59 Scholars in the fields of international relations and political science, however, tend to situate autonomy in relation to organisational culture and its bureaucratic elements,60 meaning that the autonomy of an IO is understood in relation to its practice, functions and structure. Functional autonomy, therefore, includes ‘institutional autonomy’ and is taken here to mean a combination of ‘legal autonomy’ (that is, international legal personality) and ‘institutional autonomy’. An ability to act and speak autonomously is a constitutive element of international legal personality,61 and as a holder of international legal personality the UN exercises a separate will to member States by taking action that expresses its ‘corporate will’,62 rather than the ‘aggregate opinion’ of member States.63

A question arises as to whether internal institutional law qualifies as law. Whilst some scholars claim that it cannot be law, regardless of

56 Amerasinghe, above n 26, 287.
58 Amerasinghe, above n 26, 373.
60 See e.g. Michael Barnett and Martha Finnemore, Rules for the World: International Organizations in Global Politics (Cornell University Press, 2004).
61 Jean d’Aspremont, ‘The multifaceted concept of autonomy of international organizations and international legal discourse’ in Richard Collins and Nigel D. White (eds), International Organizations and the Idea of Autonomy (Routledge, 2011) 63, 63.
whether the rules are binding. Kelsen has argued that ‘the constituent rules of a juridical person always constitute a “partial legal order” which is to a certain extent separate from – albeit in a relationship with – the “total legal order” under which the juridical person is established’. Although this definition depends on the status of the global decision-making body as a juridical body or ‘person’, a distinction between international law and the internal law of an organisation is generally accepted. Whether it is *sui generis*, a form of law unto itself, or it comprises a sub-category of international law, internal institutional law binds the decision-makers within the UN because it constitutes what Amerasinghe conceives as an ‘institutional’ rather than an ‘operational’ act. An institutional act is one that could be reasonably interpreted by the relevant constitutional texts as having a binding effect and, unlike operational acts, impact internal rather than external parties.

### 1.1.3 Domestic Law

In the global space, domestic law may govern transactions between States, or States and IOs, or may be taken into account in the proceedings of international and domestic courts. The domestic law of States can create rights and obligations for the UN in two ways. First, a global decision-making body may be liable under the domestic law of a State relating to transactions entered into with private parties (for example, local labour laws, contracts for professional services) or for tortious contact. However, liability is dependent on whether that body has been accorded domestic legal personality by the State and to what extent immunities and privileges apply to it. In regards to the former, an IO such

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68 Amerasinghe, above n 26, 274.
69 Ibid, 163–164.
70 See Allied Headquarters in Southern Europe [HAFSE] v Capocci Belmonte, Corte di Cassazione, 5 June 1976 re legal services rendered to NATO.
as the UN may be accorded legal personality by member States according to its constituent treaty or a multilateral agreement such as the Convention on the Privileges and Immunities of the United Nations (‘UN General Convention’). Where the State is a non-member of the IO, legal capacity may be similarly recognised according to multilateral agreements, custom or national legislation, including legislation that implements the treaty or other domestic legislation or through the court processes. If the global decision-making body is not an IO, it may still be accorded domestic legal personality through the usual domestic means, such as recognition by courts. However, characterisation of a global decision-making body as an IO will likely affect a domestic court’s competence to adjudicate and enforce a matter relating to it because certain privileges and immunities will likely apply to it. Privileges (that is, where areas of substantive domestic law do not apply) and immunities (that is, the procedural protection from the legal process of adjudication and enforcement) are often applied to IOs through multilateral (that is, the UN’s position) or bilateral treaties and are absolute or restricted in scope.

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72 E.g. art 104 of the UN Charter.
73 Convention on the Privileges and Immunities of the United Nations (‘UN General Convention’) 1 UNTS 15, art I (1).
75 Ibid, 45–46.
76 E.g. the UK International Organisations Act 1968.
77 See *Arab Monetary Fund v Hashim and Others*, House of Lords, 21 February 1991, 85 ILR1.
78 E.g. in *YY v UNRWA*, 17 August 1957, a Gaza court decided ‘that UNRWA was not an organ of the United Nations’, meaning that the court was competent to hear a claim against it.
79 Reinisch et al, above n 74, 14.
81 E.g. UN General Convention; Council of Europe Privileges and Immunities Agreement: General Agreement on Privileges and Immunities of the Council of Europe, Paris, 2 September 1949, 250 UNTS 14.
83 See Reinisch et al, above n 74, 185–214 for discussion on restricted immunity.
The second way that domestic law can create rights and obligations for
the UN is through consideration of municipal laws as facts before
proceedings in international courts and tribunals, or as evidence of
compliance or non-compliance with international obligations.84 Malcolm
Shaw gives the example of the principle of uti possidetis, where the
constitutional or administrative law of the previous sovereign is taken
into account in consideration of the integrity of colonial defined terri-
tory.85 Shaw also makes the point that domestic laws are often used as
interpretative tools for a State’s legal position on topics of international
importance.86

The UN may need to take account of domestic law when making its
decisions, but due to the organisation’s robust privileges and immunities
and, as discussed above, the restricted way domestic law applies to IOs,
domestic law only has a limited capacity to create rights and obligations
for the UN in its administrative decision-making.

1.1.4 ‘Global Law’

A final, brief mention should be made of global law. Some legal scholars
believe that a global law is emerging from the growing focus placed on
individuals over States in global governance. Giuliana Capaldo describes
this law as embryonic, a gradual integration of various systems.87 For
Neil Walker it is an ‘emergent idea and practice’ that does not exist as a
new and separate legal order, but ‘folds’ existing laws, or dimensions of
laws within its own terms and supplements them with a ‘universal
warrant’.88 Rafael Domingo sees global law as fulfilling a need to ‘order
social relations according to justice’89 as a natural progression from
international to global. Domingo believes that as national law made way
for international law, so will international law give way to a new global
order where the individual, not the State, resides at its centre. Despite its
promise, global law remains an aspiration and could not be said to
currently possess the stability, nor mechanisms, to be considered sui

84 Shaw, above n 51, 97–98.
85 Ibid, 380–381.
86 Ibid, 97.
88 Neil Walker, Intimations of Global Law (Cambridge University Press,
2015).
89 Rafael Domingo, The New Global Law (Cambridge University Press,
2010) 98.
generis. Accordingly, it will not be considered a source of obligations for the administrative decision-making of the UN.

1.2 FROM LAW TO VALUES

Making administrative decisions according to law is crucial to the accountability of decision-making because it grounds decision-making in a legal framework in a way that legitimises it. The stability of law encourages consistency and cohesiveness, and exposes decision-making to the expectations of the rule of law. The requirement that administrative decisions be made according to law is the first of two procedural standards that comprise the model of global administrative justice presented in this book.

But what of values? A positivist sense of law ‘without reference to values or purposes that it serves’ must be questioned in the global space. Without a unifying constitutive source, understanding law within the global space in terms of a purely positivist conception is problematic. Jeremy Bentham and John Austin’s style of positivism relies on a discernible authority that has the power to compel compliance through coercive sanctions. But who is the authority in the global space? Without an overarching written constitution it is also difficult to see how Hans Kelsen might have anchored his grundnorm in the global space. Kelsen’s basic norm is located by reference to a constitution, which rests on objective assumptions about what a law should be. Whilst it is true that constitutionalism is engaged in the possible development of a global constitution, it is an area of legal scholarship that is theoretically immature in that it is focused upon the identification of its source and form. HLA Hart, on the other hand, based his deconstruction of the nature of law on the existence of an identifiable legal system where the recognition of a law by legal officials and courts renders it legitimate. But who are the public officials in the global space? What is the court that crosses jurisdictions?

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Crucially, if moral content, which is arguably a necessary part of any ‘just’ legal system, is undervalued, the door is left open for arbitrary decision-making. When law is absent values, the possibility of the legitimisation of tyrannical legal systems through allowing ‘any well-organized system of centralized order using articulate and identifiable prescriptions and prohibitions [to count] as law’ is increased. Without the presence of a stable legal order, the need for moral content to be an anchor for law in the global space is even more urgent. Dyzenhaus recognises this when he says that whilst a ‘society with a properly functioning legal order will be one largely organized around a set of stable, determinate rules, stability and determinacy are not in themselves moral virtues’. Instead, he claims that ‘legitimacy depends on the values injected into the rules, and evil can be all the worse for being given clear expression and enforced through a stable legal order’.

In his famous 1958 conversation with Hart in the *Harvard Law Review*, Lon F. Fuller argued that the correct way to question legitimacy is not whether the law is legitimate but whether legality is legitimate. By legality, Fuller meant the procedures by which laws are made, rather than the content of the law. The legitimacy of legality requires that those subject to the law perceive that the ‘right procedures’ have been used to develop it. Legitimacy based on the perception of those subject to the laws acknowledges the centrality of the inherently voluntary nature of compliance. Fuller’s ‘right procedures’ find form in the eight criteria of what he calls the ‘internal morality of law’, being generality, publicity, non-retroactivity, clarity, non-contradiction, possibility of execution, constancy and congruence.

Other scholars have similarly called for procedural values to be a determinate for the legitimacy of law. Brian Tamanaha suggests that laws need to be ‘general, clear, certain and public’. Friederich Hayek

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98 Dyzenhaus, above n 96, 130.
declares that laws should be ‘general, equal and certain’ and Joseph Raz describes the core elements of the rule of law as being the absence of arbitrary power, non-retrospectivity, subjection of government to general laws and the independence of the judiciary. Jeremy Waldron argues that a failure to require procedural requirements in law undermines the formal and procedural conditions of a legal system, which disqualifies that legal system from qualifying as law at all. Tyrannical regimes may not exist in the global space but legal positivism risks ignoring questionable characteristics of global decision-making bodies, such as their tendency to be ‘imperial’ and ‘western-focused’, or their violations of procedural and human rights, in favour of functionality.

If the legitimacy of law is contingent on the presence of procedural values, so is the legitimacy of the decision-making that takes place according to that law. The second procedural standard that comprises the global administrative justice model is based on an acknowledgment that administrative decision-making requires procedural values to be legitimate. In Chapter 2 it is argued that those procedural values are based on values the community accepts as just.

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103 Talking about the Nazi regime, Waldron, above n 95, 18 says:
They used retroactive directives, rumors of secret decrees, verbal orders that could override what were formally binding statutes, and they intimidated judges with a general requirement that courts not apply any standards or directives that conflicted with Nazi race ideology (which they treated as natural law) or with the interests of the party or the German people; and they maintained facilities for concentrating and murdering large numbers of people, facilities which were free from anything other than industrial constraints.