**INTRODUCTION TO THE SPECIAL ISSUE OF THE *WINDSOR*
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**TRANSNATIONAL AND COMPARATIVE ADMINISTRATIVE LAW:
PAPERS FROM THE SIXTH ADMINISTRATIVE LAW DISCUSSION
FORUM, QUÉBEC CITY**

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On May 25 - 26, 2010, Université Laval, the University of Windsor Faculty of Law and the University of Louisville Brandeis School of Law, hosted the Sixth Administrative Law Discussion Forum. These discussion fora, which have become an international academic success, have been held in a variety of venues in North America and Europe since the early 1990s. They are an initiative of Russell Weaver, Professor of Law & Distinguished University Scholar at the University of Louisville. The fora provide an opportunity for thoughtful exchange among administrative law academics on contemporary issues that cut across national borders.

The discussions reflected in this collection of papers touch on a variety of major administrative law themes. In addition, they examine local aspects of problems that transcend regional and national borders, and show connections and preoccupations between jurisdictions and indeed between countries. Because “transnational and comparative law” is a distinguishing theme of the University of Windsor, Faculty of Law, it was particularly appropriate to publish these papers in the *Windsor Yearbook of Access to Justice*. The conference organizers and participants were enthusiastic about the opportunity to do so.

This year’s forum centred on two topics: “The New Regulation,” which included a variety of regulatory issues that affect not only Canada and the US, but also Europe; and “The Differences between Adjudicative Structures” which brought attention to European decision-making models and North American debates about internal and external structures of administrative adjudication. Through the lens of these two broad themes flowed a rich and contextualized discussion of topics ranging from accountability and consultation in the regulatory context, to challenges posed by the structural role of decision-making agents and processes in an administrative state. The authors of this collection of papers are notable scholars in the field who have addressed these issues with perspicacity and candour. Offering both theoretical grounding as well as practical insight on a host of administrative law challenges, their work will prove of interest to academics, policymakers and practitioners alike. The following is a brief overview.

The collection opens with a look at administrative law judges and the structure of agency decision-making in the United States. In “Neither Fish Nor Fowl:

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Administrative Judges in the Modern Administrative State,” Russell Weaver and Linda Jellum examine the proposition that administrative law judges should possess greater independence in agency decision-making, including the power to render the final decisions in cases made by executive agencies. At the heart of their discussion lies the difficult question of the extent to which the executive branch of government should be allowed to ensure that adjudicative decisions conform to agency policy and political concerns. Weaver and Jellum highlight the difficult trade-offs between independence, political control and accountability that exist in agency adjudication even with the reforms that were brought to formal administrative proceedings by the *Administrative Procedure Act* in 1946. Their article discusses the advantages and disadvantages of various alternatives to the current system in order to explore the ability to import into a greater degree of judicial independence and impartiality to administrative decision-making in the United States.

In “The Merits of ‘Merits’ Review: A Comparative Look at the Australian Administrative Appeals Tribunal”, Michael Asimow and Jeffrey S. Lubbers explore whether it would be beneficial for the United States to create a national appeals tribunal model like that used in Australia. After a thorough discussion of the Australian system, as well as a look at administrative adjudication in the UK, the authors conclude that an independent US Social Security Tribunal, similar to the Australian Social Security Appeals Tribunal could be helpful in addressing challenges that exist at the hearing stage of Social Security adjudication. These challenges include: an overwhelming caseload, problems surrounding efficiency, accuracy and consistency of the decision-making process, and issues related to the hiring and management of administrative law judges.

The issues of independence and its often cited counterpart, accountability, are addressed in detail in the subsequent three articles. In “A Wavering Commitment? Administrative Independence and Collaborative Governance in Ontario’s Adjudicative Tribunals Accountability Legislation”, Laverne Jacobs examines a new piece of Ontario legislation designed to ensure the accountability of adjudicative tribunals through various forms of reporting while concurrently preserving their decision-making independence. Jacobs outlines the requirements of this unique statute and the concepts of independence and accountability as they are found in Canadian administrative law. She argues that the legislature’s goal of bringing the executive branch of government and tribunals together to achieve accountable, internal tribunal governance is laudable. However, the statute tends to favour the enforcement of accountability measures from the outside rather than fostering elements of internal tribunal culture that could lead to more authentic and durable measures of accountability. Moreover, the statute fails to address many contemporary concerns relating to accountability and independence, including the need for accountability on the part of the executive branch of government in order to ensure that the public is served adequately by adjudicative tribunals.

Continuing the discussion of independence and accountability, Herwig C.H. Hofmann examines these two values in the context of the European Union. In his article entitled, “Agency Design in the European Union”, Hofmann discusses the prolific creation of administrative agencies in the EU. He asserts that one of the main reasons for this “agencification” is so that agencies may assist in implementing EU

policies within networks of EU and Member State actors. Hofmann notes that the independence of EU agencies is enabled by their expertise -- their ability to provide technical and/or scientific assessments. Their expertise has also allowed them to be viewed as a means of providing high-quality decisions that transcend political influence. Yet, EU agencies remain accountable to political bodies of the EU and to Member States. Hofmann reflects on the variety of useful ways in which accountability may be demanded from EU agencies, including *ex ante* and *ex post* supervision, and increasing transparency.

Politics and political accountability are inescapable in any administrative state. In “Politics and Policy Change in American Administrative Law”, Richard Murphy explores the daunting question of the extent to which political preferences should be allowed to affect the discretionary judgment of agencies. Using the 2009 US Supreme Court decision of *FCC v. Fox Television Stations Inc.*¹ as a point of departure, Murphy examines the contested relationship between the politicization of agency decisions and policy change. He asserts that political preferences should affect some regulatory choices but should not distort expert administrative judgments.

The next two papers address accountability and evaluation of administrative action from fresh new perspectives. Much overlooked in discussions of administrative agency accountability is their success or failure in achieving the policy purposes for which they were created. In their essay, “The Elusive Search for Accountability: Evaluating Adjudicative Tribunals”, Lorne Sossin and Steven Hoffman address this question. Using Ontario’s health-related adjudicative tribunals as a case study, they reflect on the challenges involved in pursuing empirical inquiry to evaluate adjudicative tribunals -- challenges which become particularly acute when the goal is to assess their societal impact. Yet, as Sossin and Hoffman note, despite legal and methodological hindrances and the absence of empirical studies that evaluate the external impact of tribunals, empirical data is undoubtedly important. It may demonstrate performance benchmarks, ensure the appropriate use of public funds, ensure continuous quality improvement and identify reasons for reform. The authors conclude with an optimistic outlook, noting promising methodologies that have been used to evaluate specialized courts and possibilities for the measurement of outcomes.

In many jurisdictions, judicial review of administrative action is the most traditional accountability mechanism. Can judicial review keep up with the various regulatory reforms that have been brought about through the theory of new governance? In “Reinventing Regulation/Reinventing Accountability: Judicial Review in New Governance Regimes”, William D. Araiza analyzes this fundamental but underexplored issue. In his essay, Araiza notes the challenges that new governance principles raise for the determination of standing to challenge administrative action, looking to other jurisdictions for possible ways of addressing them. More broadly, Araiza argues thoughtfully for a reconceptualization of the notion of judicial review in order to provide adequate judicial supervision of forms of new governance regulations, such as ongoing agency management of public-private collaboration, without overstepping the realm of judicial competence.

Following these papers on accountability are a set of three papers focused on processes of public participation in the administrative state. In “Implications of the Internet for Quasi-Legislative Instruments of Regulation”, Peter L. Strauss explores

¹ 129 S. Ct. 1800 (2009).

the place that the Internet has started to occupy within agency rulemaking processes in American administrative law. Discussing initiatives such as enactment of the *E-Government Act*² of 2002, emphasis on improving government transparency by the Obama Administration and the development of the new government portal *regulations.gov*, Strauss suggests that the Internet explosion has the potential to offer much greater input by the public in the consultation processes of agency rulemaking.

The theme of using consultation to improve the democratic legitimacy of executive branch regulations continues in the next article by France Houle. In “Implementing Consultation during Rule-Making: A Case Study of the *Immigration and Refugee Protection Regulation*”, Houle presents the findings of an empirical study designed to find out more about civil servants’ perceptions of mandatory consultation processes adopted pursuant to a federal Cabinet directive³ requiring consultation during the creation of regulations. In contrast to the United States, consultation during the rulemaking process is still at a relatively early stage of development in Canada. Houle conducted interviews with civil servants in 11 different divisions of Canada’s federal Department of Citizenship and Immigration to gain a better understanding of their knowledge about stakeholders, how they approached consultation, the reasons underpinning consultation and of procedural aspects of the consultations. Houle’s research findings lead her to suggest a re-examination of the federal government’s current guidelines.

Hoi Kong rounds out this set of papers on designing effective consultative processes for the creation of regulations with a look at the municipal zoning bylaw context. In “The Deliberative City”, Kong asserts that concerns about the legitimacy and effectiveness of rulemaking gain special force when it comes to municipal law. On a theoretical level, he argues that developments in municipal consultation processes find their most appropriate normative foundation in a civic republican conception of legitimate state action. On a practical level, he examines the ward council – a municipal institution in Québec – and discusses the ways in which ward councils offer a civic republican response to the democratic deficit that can be noted in the consultative processes used in the development of zoning bylaws.

The last piece in this special issue is as much an invitation to further reading as it is a conclusion. In “Comparative Administrative Law: Outlining a Field of Study”, Susan Rose-Ackerman and Peter L. Lindseth discuss their new edited collection⁴ which contributes to the renaissance of comparative administrative law. In this overview of their book, they highlight administrative law themes that offer points of connection across jurisdictions. Such themes include constitutional structures and administrative law; administrative independence; process and policy; administrative litigation; public-private relationships and transnational administration in the European Union. Rose-Ackerman and Lindseth state that their hope is that their

² Pub. L. No. 107-347, 44 U.S.C.

³ *Cabinet Directive on Streamlining Regulation*, Treasury Board of Canada Secretariat, Cabinet Directive on Streamlining Regulation, Section 2.0, online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/ri-qr/directive/directive01-eng.asp>>.

⁴ Susan Rose-Ackerman and Peter L. Lindseth, eds, *Comparative Administrative Law* (Cheltenham UK: Edward Elgar, 2010).

book of essays will generate interest in the field of comparative administrative law. We are certain that it will do so.

In conclusion, the Sixth Administrative Law Discussion Forum was an opportunity for fruitful discussion on transnational and comparative administrative law themes. These themes, which are pervasive and uniting, included independence, transparency, politicization and consultation. They dealt with the effectiveness of a range of administrative law tools, places for improvement and means for providing such improvement. From a very successful conference, we are delighted to present this engaging set of essays which we are confident will make a valuable contribution to administrative law scholarship across jurisdictions.

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