

SYNONYMOUS BUT YET DIFFERENT? REVISITING ‘INTERNATIONAL ADMINISTRATIVE LAW’ IN THE GLOBAL ADMINISTRATIVE LAW EPOCH

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ABSTRACT

The core motivation behind this paper is to cull out a few possible conclusions preceding the adoption of a ‘global administrative law’ nomenclature in contemporary discourse, as it appears from existing literature. More precisely, it will deal not with why or how ‘global administrative law’ should be the reference umbrella for the jurisprudence of global governance, but rather, how the ushering in of this terminology has had definitional repercussions for another juxtaposed term, ‘international administrative law’.

TEXT

This short comment paper is begun with the inspiration of trying to ask readers to appreciate a range of meanings that have been put forth for the term ‘international administrative law’ over years and the facets of interaction between these meanings and global administrative law. Particularly, it will be the aim of this paper to make pronounced, the distinction between ‘international’ administrative law and ‘global’ administrative law, as has been put forth in the working paper of Prof. Eyal Benvenisti.² Doubtful that the issues to be discussed hereunder might be, for reasons of repeating a seemingly well-articulated and well-settled issue, the paper will make an attempt to expose a subtle theoretical distinction that the academia has entertained, a distinction that strengthens our collective philosophical justification for an administrative law in the international plane, but nonetheless, by the same token, might pose a cognitive barrier in conceptualising a global administrative law.

Notwithstanding that the term ‘international administrative law’ has been around for more than a century (with differences though, on what it exactly is), taxonomically, the christening of ‘global administrative law’ has revealed an interesting meaning, one perhaps never propounded, that has now been adduced to the term. Though ultimately taking side with the majority on why ‘global’ administrative law would be a more appropriate usage (which is not intended to be the leading purpose of this paper), the paper seeks to facilitate a beginning to the discussion of Prof. Benvenisti’s legal theory, and incidentally, the international administrative law that we have traditionally known in the refurbished age of global administrative law.

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² ‘Public Choice and Global Administrative Law: Who’s Afraid of Executive Discretion?’, IILJ Working Paper 2004/3 (GAL Series), available at <http://www.iilj.org/papers/2004/2004.3%20Benvenisti.pdf>.

The Commonality in Assumptions

Regardless of the notional variations in terminology, the purpose of an administrative law in international activity is something that has been ubiquitously appreciated within the Project and a quick restatement of the aspirations of such a theory would enable better articulation when it comes to making a few nomenclatural choices at a later point of this work.

The relationship between power and discretion, as corollaries to each other, in the context of administrative law that is seen in democracies is something that can be stated as a general rule, applicable to all areas that work on the same parameters. It arises from an innate necessity on the part of those who would have consequences by virtue of an authority exercising discretion. The need is thus, to streamline the discretion conferred. Much of modern administrative law revolves around this principle of accountability.

It is on the same lines that such rules (norms) of administrative law can be seen as applicable to international law.³ Rather, it needs to be asked as to why international law should not adopt such principles of working when international organizations today have established treaty-based bodies, on somewhat comparable (though not equating) lines of the legislature, executive, and judiciary, as seen in municipal laws.⁴ The fact that a structural division of power takes place in these institutions and the consent of a state is limited to the ratification of an instrument, after which the autonomous bodies established thereunder might exercise sufficient power, even to the detriment of a state without its *ad hoc* consent, raises issues similar to the ones we encounter in the municipal law context. This is not to say that the compelling need to streamline transnational activities is confined only to the working of international organizations.⁵ Nor should the subtle balance between the competing logics of whether international organizations are controlled by states or the vice versa (the latter being on the rise today) should be disturbed.⁶ It is just that the phenomenon bears the exact semblance of a democracy

³ As Prof. Benvenisti puts it, “the same rationale that explains the evolution of administrative law within democracies can explain the evolution of most of international administrative law,” at p. 5.

⁴ See Krisch & Kingsbury, ‘Global Governance and Global Administrative Law in the International Legal Order’, 17 EJIL (Vol. 1) 1, 3, 4 (2006), also available at <http://www.ejil.org/journal/Vol17/No1/art1.pdf>.

⁵ See *infra* note 9, where Kingsbury, Kirsch and Stewart primarily refer to intra-IO administration as international administrative law and also their survey of prior literature on how international administrative law has meant different things for people.

⁶ See, Grant & Keohane, ‘Accountability and Abuses of Power in World Politics’, IILJ Working Paper 2004/7 (GAL Series), p. 2 : 99 American Political Science Review 1 (2005), available at http://www.iilj.org/global_adlaw/documents/GrantKeohanePaper.pdf, where the authors point to the two schools of thought, one considering international institutions ‘weak’ and the other considering them ‘uncontrolled’.

where a government is elected in exercise of the collective will of individuals after which the government exercises the power to make decisions that would affect the individual without his consent. The same seriousness with which the rule of law has been established in municipal jurisdictions has evoked tendencies to seek an extension of the same to international activities as a matter of great utility.

Where does the Distinction Arise?

From this purely utilitarian viewpoint of an administrative law construct on the transnational level, I now seek to take up the issue of how outwardly ‘international’ administrative law has only been a less-preferable, alternative term to ‘global’ administrative law, but in retrospect, has in fact accorded a “metamorphosis” stage to global administrative law. A distinction is therefore made between what is ‘international’ administrative law and what is ‘global’ administrative law. The working paper of Prof. Benvenisti, cited hereinbefore, also the backbone of this paper, proceeds on the normative assumption that administrative law as we know in municipal law systems should have its counterpart in international law too. His logic is plain and simple – that where there needs to be a balance of power and actors need to be restrained, administrative law’s ultimate purposes surface. It is debatable if this purpose should be achieved by necessarily involving the application of the same rules and modalities that administrative law might seek to adopt to achieve such ends, and, as the GAL Project shows, mixed responses have come from around the world on this question, depending on the area examined as showing global administrative law tendencies. Maybe, as part of the spectrum of opinions in this regard, it could be said that Prof. Benvenisti however seeks to allay apprehensions in this respect at least on the working of international judicial institutions. In his opinion, when it is said that there is an in-principle need to see the utility of having an administrative law in municipal systems in international activity too, that demands the adoption of a few rules of administrative law.⁷ Indeed, Prof. Benvenisti speaks of *stricto sensu* municipal administrative law rules in international adjudicatory organisations like the ICJ, ECJ and the WTO Dispute Settlement Body (DSB). In fact, he considers international administrative law as a pure adoption of municipal administrative law paradigms, like review, validity questions etc. The fact that Prof. Benvenisti does not see international administrative law and global administrative law as synonymous to each other should explain what can be called an “adoption” model of applying *mutatis mutandis* municipal administrative law tenets to international law. International administrative law, as Prof. Benvenisti understands and agrees, is only one aspect of global governance (which necessitates, though unconsciously, a basis for a global administrative law). He argues that an international administrative law is a prelude to a global administrative law. Proceeding on the Benvenistian theory, the reach of what has been a transformation of an international administrative law to a global administrative

⁷ For a similar view, see Macdonald & Macdonald, ‘Non-Electoral Accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry’, 17 EJIL (Vol.1) 89 (2006).

law is much more, dealing with a myriad forms of activity on the transnational level, involving states, international organizations and individuals (affected by state and international organization decisions). To that extent, Prof. Benvenisti concedes that the reach of global administrative law is larger.

Further, on the right understanding of Prof. Benvenisti's theory, it is not just the ambit of coverage where the two concepts have different subject-matters of interest, but also in the ways and means by which they operate to achieve their intended purposes. International administrative law is constrained by the fact that it is seen and applied only to judicial organisations. In doing so, international administrative law overlooks or does not seek to analyse (or perhaps, defers to global administrative law) the greater part of ascribing accountability, transparency, democracy, fairness and thus legitimacy to international law. That might well be because of the fact that international administrative law replicates the administrative law we have known in domestic law systems where restraint takes a strictly judicial or quasi-judicial colour. But however, it is agreed that global administrative law seeks not merely to confine itself to international institutions but also penetrates national administrative processes and techniques so far as the acts in question are performed as part of a transnational or international activity. Thus, its processes are also varied and the ways it seeks to infuse accountability and transparency are many, in contrast to the monotony of juridification available to international administrative law.

The Three Suitors – Old, Benvenistian and ‘Alternate’ Meanings to International Administrative Law

As the outlining paragraph itself adumbrates, this paper sees that there can be, or rather, there have been three different meanings being adduced to international administrative law in existing literature. However, the first of those meanings is itself a conglomeration of differing perceptions capable of being collectively referred to as the ‘old’ international administrative law, for the convenience of historical categorization. A bibliography of sorts on early twentieth century international administrative law is provided in note 9. The other, ‘Benvenistian’ international administrative law, might appear to share greatly with the ‘old’ school, but significantly, makes a departure in theory because of the adoption model and thus calls for exclusive recognition. The last of these, the ‘alternate’ international administrative law – a term that I use to refer to that school which sees ‘global’ as a better alternative to the term ‘international’ administrative law – is confined to a few lines that appear in the paper of Kingsbury and Krisch⁸, where they fail to see any distinction between international and global administrative law. They proceed from a premise, quite different from that of Prof. Benvenisti, in that, today's institutionalization of the international legal order under treaty regimes does not pose a need to be divorced from implementation issues that flow downwards to national administrative authorities, when accountability will have to be channelled back to such institutions which exercise

⁸ *Op. Cit.*

supervisory and corrective jurisdiction.⁹ They prefer the term ‘global’ as a better alternative to the term ‘international’ because of the transnationalisation of questions that the subject seeks to deal with. Though the paper does not in fact account for the ‘old’ meaning or the Benvenistian philosophy, elsewhere, in their propounding paper, Kingsbury, Kirsch and Stewart submit: “It [global administrative law] includes, as one component, the longstanding field of “international administrative law”, a term used mainly to denote the rules, procedures, and institutions through which international organizations deal with employment disputes and other internal matters.”¹⁰ Thus, though not possible to conclude that the ‘alternate’ school does not see the prevalence of the term international administrative law, the EJIL paper in isolation, might, by quitting the contentious meanings to the term ‘international administrative law’, have offered the simple choice of terminology between international and global administrative law, thus offering international administrative law the status of global administrative law itself.

The fact that Benvenistian international administrative law has not been subjected to an analysis in our colloquy, while Prof. Benvenisti himself has not accounted for the ‘old’ international administrative law, will reveal that the one very term ‘international administrative law’ has elicited different responses over time and across authors. Thus, the three different meanings stand on their own pedestals, without accounting for what the term has stood for in the past. By no means is this to say that there has either been a slack in the review of prior literature or that authors have discarded the meanings previously propounded. Truly speaking, the reason for this scenario is that the Benvenistian and alternate schools have seen the term international administrative law in the light of the emergence of global administrative law and have localised whatever meaning could be adduced to the term within the framework of global administrative law. I however argue that this scenario need not remain so in our otherwise highly harmonious

⁹ Perhaps, the view that Barr and Miller take best reveals the scope of global administrative law. I would quote them for that purpose: “The basic contention is that there is, or ought to be, a global administrative law that governs the conduct of international entities and national governments [emphasis added] in international matters, and that in some way responds to the normative desire, shared in many ways with domestic administrative law, for accountability, fairness, protection of individual rights, and some sense of democratic decision-making,” in 17 EJIL (Vol. 1) 15, 16 (2006).

¹⁰ ‘The Emergence of a Global Administrative Law’, 68 L & Contemp. Probs 15, 28 (2005); see also the authors’ citing Paul S Reinsch, Paul Négulesco and Karl Neumeyer with differing opinions on international administrative law (internal citations omitted); for an evidence of how global administrative law is an assimilation of all the differently perceived contents of international administrative law, (through an example of subjection of erstwhile finality in national judgments against foreign states to international adjudication), see, Lakshmanan, Vydyanathan, ‘Foreign Sovereign Immunity under the UN Convention: Certain Matters of Jurisdictional Importance’, 4th International Conference of the Indian Society of International Law on Private International Law, in association with the Hague Conference on Private International Law and the TMC Asser Institute, Conference Papers Souvenir, p. 129, 143-144 (2006).

understandings of the subject, not to mention the fatherly scepticism from a few quarters.¹¹

Apart from the fact that different meanings have gone unaccounted for,¹² it is equally appropriate here to put for ourselves the question whether regardless of what the old school meant and does mean, a necessity to see two different subjects for articulation in global governance arises, in the form of a Benvenistian international administrative law and a global administrative law. Kingsbury, Kirsch and Stewart's paper comes in handy here. Though they are cautious on the adoption model,¹³ an analysis of what they hold to be global administrative law could go to show that a Benvenistian international administrative law should have had its days during the past fifty years or so when international law entered the rapid phase of institutionalization, starkly revealed by the UN Security Council, the WTO and the EU.¹⁴ Also, the *raison d'être* of an administrative law perception in supranational activities should only obscure the transformation from Benvenistian international administrative law to global administrative law, if the preceding paragraphs on the same are any indication. Doubtless, Benvenistian international administrative law finds firm support in its utilitarian underpinnings which cannot be disputed. I merely argue that international administrative law could have had a more pronounced bearing in the previous century; it suffers from the fact that global administrative law, as a notion, has come to be a better and a more comprehensive alternative. Consequently, international administrative law should not become a duplication of work that is already well catered to under the banner of global administrative law.

¹¹ See generally, Chimni, B S, 'Cooption and Resistance: Two Faces of Global Administrative Law', IILJ Working Paper 2005/16 (GAL Series), setting a few preconditions for the success of a global administrative law.

¹² For yet another assimilative view that global administrative law is a "synthesis of traditional administrative law and international administrative law", see, Andjelkovic, Maja, 'Internet Governance: In the Footsteps of Global Administrative Law', LL.M. Dissertation Paper, University of Kent Law School, available at http://www.iisd.org/pdf/2006/infosoc_int_gov_law.pdf (2006).

¹³ "Direct analogies between national and transnational administrative law must be viewed with great caution", *op. cit.*, at p. 28.

¹⁴ For a historical exposition of institutionalization of international law in the League, see, Kennedy, David, 'The Move to Institutions', 8 *Cardozo L. Rev.* 841 (1987). See also, Alvarez, E José, 'International Organizations: Then and Now', 100 *AJIL* 324 (2006), for an account of how international organizations have grown not just in number, but also in functions, facilities and have ultimately played a pivotal role in the sculpting of international law, and Bowett, *The Law of International Institutions*, Keeton & Schwarzenberger (eds.), 4th Edn., Sweet & Maxwell, pp.1-4 (1982).

If one were to draw conclusions from the overall scheme of the paper, there could be two possibilities that I think which might be well-founded – one, that the two terms, international administrative law (comprising of all the varieties crystallised hereinbefore) and global administrative law, have shown us that the seeming uniformity in conception is not completely true, with *inter se* and interrelated distinctions made as between them, for various reasons and at different points of time; while, on the other, it compels us to engage doubts on the supposed dichotomy between international administrative law and global administrative law as different legal conceptions – dealing with though not disparate, but similarly situated areas of activity. Such attempts at distinguishing the two might be futile, as argued above, if one were to go by the sheer fact that what is asserted as international administrative law is subsumed by a much larger global administrative law. However, I pause here to ponder if the distinction that Prof. Benvenisti has brought out should be relegated without further thought. Having attempted to show the various perspectives to the term international administrative law, some reconciliation may be required between them. Readers might doubt the efficacy of the venture for being highly academic, but the fact that we cannot overlook these distinctions and should rather account for them is something that I hope we will all concur in.
