

Global Administrative Law

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Opening address

WORKSHOP ON GLOBAL ADMINISTRATIVE LAW
UNIVERSITY OF CAPE TOWN
18 MARCH 2008
TREVOR A MANUEL, MP
MINISTER OF FINANCE, REPUBLIC OF SOUTH AFRICA

I want to express my sincerest appreciation to the law schools of the University of Cape Town and of New York University for having initiated this joint venture on Global Administrative Law (GAL). I recognise that GAL, as a branch of law, is still in its nascent stage. However, as would be self-evident to all here present, this area of work is in desperate need of development and recognition. I am distinctly privileged to join with you here though, I should warn in advance, I can at best proffer a distinctly non-lawyer's perspective on the law.

We are obliged to accept that the development of globalisation is a given. As the author George Monbiot reminds us, 'Everything has been globalised except our Consent . . . Democracy alone has been confined to the nation state. It stands at our national border, suitcase in hand, without a passport.'¹

Persuasive as Monbiot's imagery is, he tends towards a rather fatalistic view of the role of the nation state within a globalising world. Within the same broad theme, Roberto Mangabeira Unger argues rather differently. He suggests that we (as society or a nation state) should refuse to accept the view that globalisation is there on a take-it-or-leave basis and that all we can do is have more or less of it on its own terms.

He proposes that we should work together with other powers sharing the same vision to reform global economic arrangements and to reshape world political realities.²

Unger's arguments are far more agreeable. What we have to do though, is to revisit the basic precepts of governance itself. Much of the role of the modern state and its intergovernmental relations is the product of the ravages of the Second World War. On the one hand, there was the definition of the responsibility of the state to its citizens. William Beveridge in a 1942 report to the British Government on proposals to rebuild the country after the war, highlighted the 'five giant evils of want, disease, ignorance, squalor and idleness' and thus laid the basis for the modern

¹ *The Age of Consent*, 2003.

² *What Should the Left Propose*, Verso, 2005.

welfare state. Few could argue against the place of these challenges and the associated recognition of fundamental human values as central to the purpose and objectives of democratic governments. Here in South Africa, we adopted a Constitution some 54 years after the Beveridge Report that states at the heart of its preamble

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is protected by law;

Improve the quality of life of all citizens and free the potential of each person;

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.³

Let me assume that most democratic governments accept, with some variation in form and articulation, the values espoused in our Constitution. It is also important to recognise that our Constitution has been developed and will no doubt be further extended through a swathe of legislation, that the Executive is held accountable to a legislature and that legislation is subjected to review by a series of courts, with the Constitutional Court at its apex.

So, both the values and the checks and balances are tested for compliance. This is the heart of the functioning of our democracy.

The Constitution entreats us, however, to build this South Africa ‘able to take its rightful place as a sovereign state in the family of nations.’ This part of the mandate presents us with a series of challenges.

- Firstly, this ‘family of nations’ may not have the same emphasis of values or indeed the same timelines for implementation as our democracy may instruct;
- Secondly, what if this ‘family of nations’ tends to treat us as a lesser member, and
- Thirdly, the decision-making rules in various parts of this family are so vastly different – in some of our shared institutions the principle of one-nation-one-vote is accepted; in others decision-making is on the basis of shareholding with the wealthy enjoying the lion’s share; in some account is taken of demographic and other weighting considerations; and in yet others, we are excluded from all decision-making yet may be bound by or affected by their deliberations and outcomes.

³ The Constitution of the Republic of South Africa, Act 108 of 1996.

As a practical injunction, therefore, the invitation from Unger ‘that (we) work together with other powers sharing the same vision to reform global economic arrangements and to reshape the world political realities’ is exceedingly resonant.

So for example, we have participated actively in the International Task Force on Global Public Goods to secure an agreement on the key shared imperatives of our time. The Task Force agreed to identify:

- *Preventing the emergence and spread of infectious diseases*
- *Tackling Climate Change*
- *Enhancing international financial stability*
- *Strengthening the international trading system*
- *Achieving peace and stability, and*
- *Generating knowledge*

as the uniting values and as an agenda for implementation. By virtue of the global nature of these issues, we recognise that much of the work must be led by multilateral agencies.

But we also agreed that there must be a significant reform programme of the governance and accountability of these institutions.

At around the same time as Beveridge laid the basis for the modern welfare state, John Maynard Keynes was involved in Bretton Woods, New Hampshire, to lay the basis for a raft of global institutions to deliver a better world. Three pillars were agreed to – the first was the International Clearing Union, which would later become the International Monetary Fund. Keynes’s proposals were far-reaching, they included a World Central Bank and a global currency to maintain full employment and provide liquidity. The second pillar later became the International Bank for Reconstruction and Development, commonly known as the World Bank. The third pillar was designed to stabilise primary commodity prices and address trade issues, and was called the International Trade Organisation. Whilst this pillar was agreed to at Bretton Woods, it met so much resistance on the floor of the US Senate, that it was abandoned before being put to the vote. The World Trade Organisation was eventually established in 1995. In respect of the IMF and the World Bank, there was reasonable agreement between Keynes and the US representative Harry Dexter White on structure and decision-making, but this was eventually overturned by the US Treasury which pushed for a voting structure based on a blend of voting power between the scale of members’ contributions and the principle of the equality of states. These complexities live on.

Let me digress and share with you some illustrations of the complexity of decision-making in those multilateral bodies where Finance Ministers participate.

1. The arrangements in the IMF and the World Bank are characterised as follows in a recent paper for the Bretton Woods Project: ‘The 47

countries of Sub-Saharan Africa, despite counting for 25% of the Fund's membership, hold just 5.6% of the vote and two seats on the board. On the other hand the 27 members of the European Union hold 32.1% of the voting power and 7 seats on the board, not including Switzerland's chair and votes. The United States has maintained its grip on power at the institution, holding its own seat on the executive board and wielding 16.8% of the voting power. This makes the USA the only country that can singularly veto decisions on quota adjustment and changes to the Articles of Agreement.⁴

2. In the United Nations, where we participate through the Economic and Social Commission and similar bodies, the norm is one-country-one-vote. The norms are similar in the General Assembly, whose powers are essentially persuasive. In contrast, the UN Security Council has five permanent members, four of whom must support a resolution for it to pass, and 10 non-permanent members who serve for a non-renewable two-year term. A provision exists for seven nonpermanent members to block a resolution, though it is worth recording that this has never happened.
3. The WTO has around 150 members, and most decisions require the consensus of all its members. Decision-making is unbelievably complex – two-thirds of member states must vote in support of the accession of a new state; but, in order to build a consensus the chairperson or the director general holds consultations with groups of around 30 countries, in a process now known as the 'green room'.
4. The Financial Action Task Force is the body charged with responsibility to oversee action to prevent money laundering and terrorist financing. It essentially is a club of 32 member states, which invites countries to join. It was established in 1989, and still operates without a Constitution. Yet there are resolutions of the UN Security Council which are mandatory on all states. Amongst the powers assumed by the FATF is the right to draw up a list of Non-cooperating Countries and Territories – until a recent change of modus, there were 21 countries placed on that list, placed there because they are deemed not to comply with the '40 plus 9 Recommendations' of the FATF. The meetings of the FATF are meetings of officials from treasuries and tracking agencies, yet they have this enormous power, including the imprimatur of UN Security Council Resolution 1373, which commits all member states to comply with the FATF recommendations.

⁴ 'Bridging the democratic deficit'; Chowla, Oatham and Wren for the Bretton Woods Project, February 2007.

5. The OECD, of which South Africa is an associate member, has an enormous intellectual resource. It conducts peer reviews of its members and uses its collective and comparative knowledge of fiscal systems and institutions to pursue particular reform agendas. The OECD has, for example, been actively campaigning against tax havens. Its reach extends way beyond its members.
6. The Financial Stability Forum was established in the wake of the Asian Financial Crisis and is made up exclusively of G7 countries. The participation of selected developing countries, such as South Africa, has on occasion been invited for work in task teams. We remain excluded from the inner sanctum, for no apparent reason.
7. The G20 comprises the G7 plus 12 countries, and the European Union. The meetings involve both the Finance Ministers and Central Bank Governors – that is challenge enough in one country, let alone twenty times. The forum exists for an exchange of information, for mutual evaluation and for the development of new norms and standards. South Africa chaired the G20 last year and our agenda focused on widening ‘fiscal space’ for collective priorities, both national and regional or global, issues relating to commodity price trends and the reform of the Bretton Woods Institutions.

My invitation to all of you is ‘Navigate that’!

Complex as these arrangements may appear, their coexistence and arrangements for decision-making go to the very heart of defining Global Administrative Law. For purposes of discussion, let’s agree on a flawed assumption, that all states accede to these institutions of their own volition, and thus ought to be bound by rules and agreements. The essence of the endeavour is to reform decision-making and effect a better alignment between domestic and global administrative law.

But law works because the principle of subjection is respected and implemented. I outlined earlier that in respect of the Bretton Woods Institutions, the USA has a veto right over key decisions. There are also various specific instances where the United States has declined to sign up to norms applicable to other member states. Let me share a few examples:

- In 2003, 138 countries signed a treaty establishing the International Criminal Court. The USA renounced its support.
- The 1997 Treaty banning landmines was signed and ratified by 136 countries. The USA has still not signed it.
- The USA has proposed reopening talks on the treaty banning torture.
- Vice President Al Gore signed the Kyoto Protocol, but the Senate voted against it and President Clinton did not submit it to Congress. It was ruled out-of-bounds by the Bush Presidency since 2000.

This is but an abbreviated list that speaks to a strong tendency towards unilateralism. Yet, this unilateralism is also paradoxical given that at a time when the military power of the USA is unrivalled, its citizens are extraordinarily insecure. Perhaps the truth is that the US needs multilateralism even more than smaller, weak states do. However, it chooses to remain outside the door, declining to join the family.

The arena of multilateral decision-making is fraught with perhaps intractable legal challenges, including the inter-relationship between global agreements and law applicable in sovereign states, the limited sanctions available to the non-financial multilateral bodies and the tardiness of decision-making, where the protracted negotiations in the Doha Round of the WTO are just the most visible instance of a pervasive pattern.

Let us remind ourselves of the task at hand – we have to find solutions to poor decision-making structures and to find resonance for a body of applicable law. The present arrangement feels very Italian – Italy has had xyz (and it really is xyz, your guess is as good as mine) governments since World War 2, there are long periods when the Italians went about their daily lives without a government in place. In fact, the present is again such a time. The cynics would argue that Italy exists and functions to prove the theorem that governments are neither necessary nor helpful. We do not want to adopt the same posture in respect of the global community.

Dominique Strauss-Kahn is currently the Managing Director of the IMF. In an earlier life he described the same problem thus, ‘To master globalisation, we have to answer three basic questions. What institutional architecture do we need for international governance? How can we achieve legitimacy in decision-making? How can we arbitrate between domains?’⁵

The political challenge is thus to build an appropriate architecture of institutions that are well positioned, rational, and well-governed. More importantly, we must give consideration to the alignment of these institutions in a manner that will both support clear decision-making and improve on the alignment between global agreements and domestic legislatures – together these comprise the *sine qua non* for improving on the legitimacy of these institutions. Moreover, we have to give consideration to bringing poor, underdeveloped countries in the same arena with large, wealthy and well-resourced states to give effect to decision-making that is both equitable and appropriate. This is a distinctly political task, one that is essentially about the reshaping of the arrangements of global decision-making. In the process, we must find ways of limiting the power

⁵ Dominique Strauss-Kahn, *La flamme et la Cendre*, 2002 at 155.

and political space to opt out, either through non-participation in global initiatives or unilateral action.

We must remain mindful of the reality that for the bulk of the poor in many poor countries, and indeed for the poor in both developed and developing countries, there has been little or no improvement of the quality of livelihoods. We have seen a decade or more of unprecedented rapid economic growth globally. But inequality of incomes has increased and humanity remains deeply divided. So, while whole political systems can opt out, or attempt to opt out, large swathes of humanity are so disaffected by the sweeping changes of new and newly distributed wealth that their dreams are not of participation and progress but of revenge.

The current administrator of the United Nations Development Programme, Kemal Dervis, argued these points in his book entitled *A Better Globalisation* where he writes

At a time when democracy has triumphed as the model for human political organisation, it is clear that legitimacy must be part of what defines the international system. Legitimacy in our time requires a certain degree of global democracy, but at the same time realistic global governance cannot ignore existing power in economic and military relationships. Any blueprint that ignores the resources controlled by the various actors and their relative weights in the world will lead to nowhere. The reform agenda, therefore, must try to balance three divergent requirements;

- More global democracy that in some fundamental sense recognises the equal value of all human beings,
- The ability to work with existing nation-states that have legal status as sovereigns and remain fundamental units of the international system, and
- The need to take into account the divergent economic and military capabilities of these nation states.⁶

I would add a fourth to Dervis's list of divergent requirements, a legal system that is trusted and tested, that aligns the responsibilities at both a global and sovereign level, and a system capable of compelling the commitment of states in the interest of the global good. Such a legal system is, of course, this whole nascent and visionary branch of philosophy you have elected to call Global Administrative Law.

But the application of the tenets of Global Administrative Law will remain checked by this complex maze of powerful multilateral bodies with their vastly divergent decision-making processes. So the reform agenda must be advanced, although it is a murky terrain of compromise and expediency. There have been major reform attempts in respect of the large multilaterals, including

⁶ Kemal Dervis, *A better Globalisation*, 2005 at 45.

- A huge report on the reform of the United Nations commissioned by the former Secretary General, Koffi Anan, which was released in early 2005. The grounds are very strong – the title of the report is ‘A more secure world: our shared responsibility’. The proposals relate to the revitalisation of the General Assembly and the Economic and Social Council (ECOSOC), it also proposes significant changes to the Security Council to improve on its composition to reflect current realities. This is the point where the support, especially of the distinguished group of the five permanent members disappears, their special status has to vanish; whilst on the other hand, the rivalry between prospective new members has retarded a valuable pressure point from the developing world.
- Similarly, the discussion of the reform of the Bretton Woods Institutions has proceeded in fits and starts. The fundamental problem to date has been that those who wield the voting power have not, for some decades now, needed the services of these institutions.

The subject of global financial governance acquired great topicality in the wake of frequent, costly and widespread financial crises during the 1990’s. It became clear that the very rapid and dynamic growth of global private financial markets – characterised by a number of major imperfections – had not been accompanied by sufficient development of global public institutions to provide an appropriate framework that would help ensure both global financial efficiency and stability.⁷
- Kemal Dervis has proposed far-reaching reforms. He explains,

A radical but desirable step would be to make the top governance of the Bretton Woods institutions and other global economic institutions part of the overall framework of a reformed and renewed United Nations. The system of constituencies and weighted voting has worked well for the Bretton Woods institutions, allowing them a considerable amount of adaptation and flexibility. Without destroying the positive features of the existing system that, on the whole, has served them well, it is desirable, however, to bring the Bretton Woods institutions under the broad, legitimising umbrella of the United Nations.⁸
- He then proceeds to set out the details for a new United Nations Economic and Social Security Council, to operate alongside a radically reformed Security Council. Part of his proposal is that this new Council be charged with the responsibility of managing the appointment of the heads of the World Bank and the IMF so that appointment by mere birthright is relegated to history.

Now, I should share with you the fact that few commentators are neutral to this proposal. Those who hail from the world of foreign affairs

⁷ *The Reform of Global Financial Governance Arrangements*, prepared for the Commonwealth Secretariat, Stephany Griffith-Jones and Jenny Kimmis.

⁸ *A Better Globalization*, 2005 at 96.

frequently respond with a 'hallelujah!', whilst those steeped in the traditions of the Bretton Woods world tend to ask, 'What was he thinking?' I am of the view that such active responses are good, they suggest that the proposals are being considered.

The overall difficulty is whether the appropriate people are listening and engaged and whether at least a partial modernisation of these 62-year-old institutions will be supported. The intractable problem is that any reform requires a realignment of powers and functions. Even when policymakers are persuaded by the necessity of reform, they tend to argue that such reform can only be supported if it leaves their power base, which may have had some underlying rational basis at the time of the inception of these institutions, entirely unscathed.

Perhaps the present financial crisis will compel a different behaviour. We continue to live in hope, whilst we align with others to argue for significant reform.

We do so in the firm belief that a better world is both desirable and attainable. Undoubtedly, such a better world needs a major institutional realignment, but it also needs a supporting legal framework. Both are imperative and should be developed simultaneously.

So Global Administrative Law is an idea whose time has come. It is an endeavour which merits the strongest political support. It is an aspiration with which the world's citizens will identify, in every dimension of their lives that reaches from one national border across another. It is a branch of law whose development will facilitate both the construction of the institutions and arrangements that are required for sufficient legitimacy of the systems of global cooperation, and the emergence of a practical sense of democratic participation, which is the minimum requirement for public consent to the unfolding globalisation.

There is much work to be done. I wish you well in your deliberations, both in this conference and beyond.

Thank you.

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