The Normative Foundations for the Existence of Administrative Law in a Supranational Context

Yukio Okitsu*

This is a work in progress. Please do not cite without the author’s prior permission.

Abstract

The proposed research discusses the possibility and the premise that administrative law can exist and function beyond national borders. As readily observable in the global governance sphere, there are many supranational regulatory bodies and regimes, both public and private, the decisions of which can affect the rights and interests of individuals in the same way as national administrative agencies. It has been argued that such bodies and regimes should be, and are, held to legal rules and principles such as accountability, transparency, and public participation, referred to collectively by some scholars as “global administrative law.” In accord with the concept that such law exists and applies to global administrative action, and perceiving a lack of adequate normative explanation, this research seeks to explain why and how such rules and principles apply beyond the jurisdictional boundaries of domestic legal systems.

To consider this issue, the proposed research will focus on the concept of accountability that could be one of the normative foundations for global administrative law and raise and examine two questions consecutively. First, what is accountability? Second, to whom and to what should global administrative bodies be accountable? Then, I will present a theorized concept of administrative law on the basis of an autonomy model, instead of the more traditional delegation model. A delegation model requires that administrative bodies and their actions be legitimized and delegated by a democratic legislature. In an autonomy model, they do not necessarily need to stem from a single centralized legislature, but could be based on the autonomy under which respective fields of public interests and services function. This will be illustrated by the analysis of sports law as a concrete example.

* Global Research Fellow, New York University School of Law; Associate Professor, Kobe University Graduate School of Law. E-mail: okitsu@swallow.kobe-u.ac.jp.
I. Introduction

1. Background and Context

This research focuses on the possibility and the premise that administrative law can exist and function beyond national borders. As readily observable from a global perspective, there are many supranational regulatory bodies and regimes, both public and private, the decisions of which can affect individuals in the same way as national administrative agencies.\(^1\) It has been argued that such bodies and regimes should be, and are, regulated by legal rules and principles such as accountability, transparency, and public participation, referred to collectively by some scholars as “global administrative law” (GAL).\(^2\)

Although some scholars insist that general principles of law lay a sound foundation for the existence of global administrative law,\(^3\) I believe that it is yet to be explained why and which principles apply beyond domestic legal systems. While in accord with the idea that such law exists and applies to global administrative action, I bring up a question whether global administrative law is really administrative law in its traditional sense. In fact, in the context of global administrative law, it is difficult to conceptualize the traditional underlying principles of

---


administrative law, such as separation of powers, judicial review, and more critically, centralized governmental power that is delegated and restrained by a democratic legislature. If such principles are necessary underpinnings to administrative regimes, perhaps global administrative law cannot be based on legislative delegation, but needs a different source and rationale to support its existence.

2. Objectives

The central research objectives are, therefore, to know whether administrative law can exist, and how it could function in a global legal order, where neither democracy nor separation of powers is found.4

Traditionally, administrative law is conceived of as closely associated with a domestic governmental system based on democracy and separation of powers. Administration should behave on the basis of, and within, a legislative delegation by democratically elected Parliaments. In case an administrative body exceeds its delegated power, independent courts should be able to review the legality of its actions. Thus, administrative law normally functions only with the support of these domestic legal frameworks that correlate to a modern nation state.5 Aside from

---


5 Giacinto della Cananea, Grands systèmes de droit administratif et globalisation du droit [Principal Systems of Administrative Law and Globalization of Law], in TRAITÉ DE DROIT ADMINISTRATIF [TREATISE ON ADMINISTRATIVE LAW] 773, 774-775 (Pascale Gonod, Fabrice Melleray & Philippe Yolka eds., 2011) (relativizing, however, the one-to-one relationship between state and (administrative) law).
differences in the conceptualization and theorization, this is a common understanding of administrative law in both common-law countries, such as the United States and the United Kingdom, and civil-law countries, including Germany, France, Italy, and Japan.6

Studies on global administrative law including this research can potentially change the current understanding of the relationship between administrative law and national governmental systems. In fact, the legitimacy of most “global administrative bodies”7 does not stem from the people of each nation state; nor are their powers delegated by national Parliaments; nor are their actions subject to judicial review by independent courts. In short, there is neither democracy nor separation of powers at this level, and thus no foundation for the existence of traditional administrative law in such “global administrative space.”8

Advocates for global administrative law focus on “the applicability in global governance, whether through national or extra-national institutions, of tools and approaches developed in domestic administrative law to deal with problems of participation, transparency, accountability, and review”9 and also “the construction of adapted or wholly new techniques and approaches

---


7 Kingsbury, Krisch & Stewart, supra note 2, at 17. See also id. at 20-23 (classifying global administration into five types); Benvenisti, supra note 1, at 9-36 (exploring diverse forms of global governance).

8 Kingsbury, Krisch & Stewart, supra note 2, at 18 (“We argue that enough global or transnational administration exists that it is now possible to identify a multifaceted “global administrative space”... populated by several distinct types of regulatory administrative institutions and various types of entities that are the subjects of regulation, including not only states but also individuals, firms, and NGOs.”).

that utilize basic administrative law ideas and values.”\textsuperscript{10} It is interesting to note that this doctrine identifies general elements of administrative law with “transparency and accountability in decisionmaking”\textsuperscript{11} and defines “global administrative law as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.”\textsuperscript{12} It certainly mentions “review,” but legislative delegation, as well as democratic legitimation, seems to escape from its scope.\textsuperscript{13}

The question remains, even if in agreement that global administration should be accountable and transparent, as is domestic administration, upon what legal basis this should be so, and whether the same kind of law as domestic administrative law is applicable.\textsuperscript{14} Naturally, advocates for global administrative law are aware of this problem.\textsuperscript{15} However, the existing

\textsuperscript{10} Id.

\textsuperscript{11} Id. at 4.

\textsuperscript{12} Kingsbury, Krisch & Stewart, supra note 2, at 17. See also Kingsbury, Krisch, Stewart & Wiener, supra note 9, at 5.

\textsuperscript{13} See also Kingsbury, Krisch & Stewart, supra note 2, at 29 (arguing that the focus of global administrative law is on procedural rules rather than substantive rules).


\textsuperscript{15} Kingsbury, Krisch & Stewart, supra note 2, at 56 (“This model [of domestic administrative law] does not fit easily with the structures of international law and global governance. . . .”).
literature on global administrative law on this particular question is lacking,\textsuperscript{16} as it assigns first priority to a pragmatic approach that enables effective checks on global administrative actions rather than its theoretical and normative justification, though some theories are proposed.\textsuperscript{17} The proposed research will address this gap in literature.

\textbf{II. Research Questions and Hypotheses: Accountability as a Key Concept in Global Administrative Law?}

In order to approach this question, I will focus on the concept of accountability as a central issue in global administrative law since most GAL scholars observe that one of the main purposes of global administrative law is to promote and ensure the accountability of global administrative bodies.\textsuperscript{18} In other words, accountability could be one of the normative foundations for global administrative law in that it justifies the mechanisms that can make global governance more accountable and equitable.

However, there are at least two questions to be solved.\textsuperscript{19}

\textsuperscript{16} Richard B. Stewart, \textit{The Normative Dimensions and Performance of Global Administrative Law}, ICON (forthcoming 2014) (manuscript at 1) (on file with author) ("critical examination of GAL’s normative foundations and its performance in securing more accountable and equitable global governance remains rudimentary. This gap needs to be filled.").


\textsuperscript{18} Kingsbury, Krisch & Stewart, supra note 2, at 17.

\textsuperscript{19} I once discussed briefly the questions below in an article in Japanese. See Yukio Okitsu, \textit{Gurôbaru Gyôsei-hô to Akkauntabiritii—Kokka naki Gyôsei-hô wa hatashite, mata ikanishite Kanô ka} [Global Administrative Law and Accountability—How Can Administrative Law exist without the State], 65
1. What is Accountability?

Accountability is such a general word that “often serves as a conceptual umbrella that covers various other distinct concepts, such as transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity.”20 In effect, it seems one of the common notions that could be used without any clear definition in legal and political literature in the English-speaking world,21 including American administrative law.22

That said, the concept of accountability can be defined as the relationship between an account holder and an accounter, in which the latter has the obligation to explain and justify his or her action to the former.23 When applied to administration in a domestic legal and political system, it can be classified into two categories: political (democratic) accountability and legal accountability.

---

20 Bovens, supra note 14, at 449.

21 Interestingly enough, there is no term equivalent to accountability in most languages other than English. See Mel Dubnick, Clarifying Accountability: An Ethical Theory Framework, in Public Sector Ethics: Finding and Implementing Values 68, 69-72 (Charles Sampford & Noel Preston eds., 1998) (illustrating with several languages). In the French translation of the GAL “manifesto” article, the term accountability is kept as an English word, followed by a supplementary explanation in French. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, L’émergence du droit administratif global (Aline Lemoine trans.), in Un Droit Administratif Global? / A Global Administrative Law? 335, 337 & 336 n.3 (Clémentine Bories ed., 2012) (“l’obligation de rendre des comptes” [duty to give an account]).

22 Jerry L. Mashaw, Structuring “Dense Complexity”: Accountability and the Project of Administrative Law, 2005 Issues in Legal Scholarship Article 4, at 1, 15 (“once we unpack accountability, and understand the repertoire of accountability regimes through which accountability can be operationalized, we can better understand both the task of administrative law and its almost perpetual state of crisis and criticism”). See also Richard B. Stewart, U.S. Administrative Law: A Model for Global Administrative Law?, 68 Law & Contemp. Probs. Summer/Autumn 2005, at 63, 63 (“This Article examines the potential for drawing on U.S. administrative law in the development of a global administrative law to secure greater accountability for the growing exercise of regulatory authority by international or transnational governmental decisionmakers in a wide variety of fields.”).

23 Bovens, supra note 14, at 450.
accountability.\textsuperscript{24} In my personal definition, political (democratic) accountability means that the legislature and the government should be accountable \textit{in fine} to the public or the people to ensure their legitimacy, in a presidential or parliamentary system in conformity with their constitution. Legal accountability, in contrast, signifies that governmental and administrative actions should be evaluated by referring to law, or their (domestic) legal order.\textsuperscript{25} From this perspective, I will propose a first hypothesis that administrative law could be reconsidered as a system that ensures the accountability—either political or legal—of administrative bodies by the combination of legislative delegation and review by independent courts.\textsuperscript{26}

From this viewpoint, the GAL project could also be interpreted as a challenge to construct a system that enhances the accountability of global administrative bodies—even when there is no legislative delegation and independent judicial review. Instead, GAL scholars emphasize transparency to and participation by the parties affected by global administrative decisions on the one hand, and on the other, internal review systems such as the inspection panel of the World Bank and the dispute settlement body of the WTO.

However, another problem has yet to be examined.

\textbf{2. To Whom and to What Should Global Governance Be Accountable?}

In my opinion, what is theoretically fatal to the normative foundations of global administrative law is not the absence of legislative delegation and independent courts in global administrative law.

\textsuperscript{24} Cf. Dyzenhaus, \textit{supra} note 14, at 11.

\textsuperscript{25} International law is not necessarily excluded insofar as it is admitted in the domestic legal order.

\textsuperscript{26} The relevance of each factor could be different in each domestic legal system: roughly speaking, civil-law countries, including Germany and Japan, consider legislative delegation (\textit{Vorbehalt des Gesetzes}) as the core of administrative law, whereas in common-law countries, such as the United States, judicial review is likely to be more emphasized.
administrative space, but that of a global public and a unified global legal order. The reasons are that in such a space it is unclear to whom (to which people(s)) and to what (to which law(s)) global administrative bodies should be accountable. To the people in a developing country affected by an investment of the World Bank and/or to the people in a developed country that contributes money? To the internal law of a global administrative body and/or to the general principles of international law?

This problematic naturally cannot escape the eyes of GAL scholars. For example, Benedict Kingsbury, on the one hand, seems to try to solve the problem by adding the normative element of publicness to the concept of (public) law.27 Nico Krisch, on the other, describes the process of establishing a global governance order as a dynamic and pluralistic interaction where multiple constituencies interact with each other.28

A second hypothesis that I would propose here is based on a pluralist approach inspired by these two scholars. It is an autonomy model of administrative law, which could be an alternative to the delegation model. In the autonomy model, administrative bodies and their actions would not necessarily need to stem from a centralized legislature. Instead, they could be based on the autonomy that is conferred upon respective fields of public interests and services. This model is drawn from the territorial autonomy that local governments enjoy vis-à-vis the central government in a national system, and which I would try to develop into functional autonomy (a famous German concept of funktionale Selbstverwaltung).

27 Kingsbury, supra note 3. See also Benedict Kingsbury, International Law as Inter-Public Law, in MORAL UNIVERSALISM AND PLURALISM 167, 188-190 (Henry S. Richardson & Melissa S. Williams eds., 2009).

28 Krisch, supra note 17. See also NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 89-103 & 50 n.109 (2009).
In this model, an administrative body, either global or local, enjoys autonomy within its functional or territorial limit. It can generate law that applies on its internal affairs within its own “jurisdiction,” and make unilateral decisions imposed on its members. However, its internal powers can be legitimated only if this body is governed by its members, say, its “constituency,” in the way that it ensures GAL principles and rules including transparency, participation, reason giving, internal review, etc. In short, a global regulatory body should be accountable to its constituency and its internal law within its autonomy. If these conditions are not met and individual rights are endangered, its internal autonomy could be denied and other external authorities (states, the international society, or competing global administrative bodies (“peer”)) could be entitled to intervene to ensure the rights protection and the rule of law.

As an example, sports law will be analyzed. For sports law is of interest in terms of global administrative law, since sports organizations, such as the World Anti-Doping Agency (WADA), have great powers to affect the rights and interests of individual players. These powers

29 I am using this word following Krisch, supra note 17, at 253.

30 Regarding the role of peers, see Kingsbury, Krisch & Stewart, supra note 2, at 38 & 58.

31 The same might be the case even with states. If a state failed to protect individual rights of its citizens, the intervention by the international society could be justified. This can be exemplified by universal and regional human rights protection systems, such as the UN Human Rights Committee and the European Court of Human Rights, or specifically in environmental law, the Compliance Committee of the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters art.15, Jun. 25, 1998, 2161 U.N.T.S. 447; E.S.C. Dec. 1/7, U.N. Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004)).

32 This choice is also justified by the fact that the governance of global sports issues is primarily “cosmopolitan,” according to Kingsbury, Krisch & Stewart, supra note 2, at 43, and a field where global administrative law par excellence applies.

can be compared to the public powers that states exercise and administrative law regulates. However, the powers of sports organizations, either national or international, do not stem from public law foundations, but rather, from private law. In other words, they can exercise their powers only against those who previously agreed to be subject to those powers through forming contracts. There is no democratic legitimation or legislative delegation involved. Legally speaking, however, decisions made by such organizations should not escape rules and principles drawn from domestic administrative law, such as fair hearing and reason-giving. More concretely, global regulatory sports organizations such as the WADA ought to explain and justify their decisions to athletes and other interested parties on the basis of their internal sports law before their own courts (sports dispute settlement bodies in each country and the Court of Arbitration for Sport in the last resort). However, when decisions exceed their autonomy (for example, fundamental human rights would be affected), the intervention by other external authorities (typically national courts and, under certain circumstances, international courts such as the European Court of Human Rights) should be justified.

III. Expected Results and Contributions

The expected results of the proposed research are the rethinking of the state-centered concept of administrative law and its application to the global administrative context.

---

34 Nevertheless, the Court of Arbitration for Sport plays the role of a reviewing instance at an international level.

35 Under the World Anti-Doping Code, which harmonizes anti-doping policies in all sports and all countries, athletes have the duty to notify their whereabouts information to anti-doping organizations. This duty is alleged to violate the privacy right guaranteed in Article 8 of the European Convention on Human Rights, and its Court of Strasbourg will be ruling on such allegation.
The key to advancing this understanding, in my opinion, can be found in a domestic administrative system. As already stated, administrative law is traditionally closely associated with legislative delegation; this is especially true in civil law countries, such as Japan, France, and Germany. Still, there are private bodies and regimes in society that carry out functions of managing public interests and services but are not directly controlled by national legislation. Even though it tends to escape the eyes of traditional administrative law scholars, the scope of administrative law has recently extended to such private management of public interests and services that may also affect individual rights and interests. However, it is hard to directly apply administrative law to the diversification of management of public interests and services on the basis of a delegation model, in which administrative bodies and their actions are legitimizied and delegated by a sole centralized legislature. The situation is thus similar to that of the global administrative context.

This research will be able to contribute to the study of global administrative law by giving it a new perspective of administrative law based on the autonomy model instead of the delegation model. Indeed, there are some scholars who have already proposed theoretical models detached from the delegation model.  

As for the United States, a different conception has been proposed. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

In addition, the present research would have a great impact on the understanding of administrative law in general. As stated before, there are increasing instances of privatized management of public interests and services, for which it is difficult to apply administrative law on the basis of the delegation model, even at a domestic level. Theorizing administrative law based on the autonomy model might overturn the traditional concept of administrative law and offer a theoretical basis for legal control over such privatization.

At a minimum, it will provide some new perspectives that embrace both domestic and global phenomena, even though it should be emphasized that the autonomy model is still only a hypothesis, and is still open to debate and contribution.