

# Does global administrative law challenge classical international law?

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NOT so long ago it was only very recently, in the year 2005 a new project called Global Administrative Law (GAL) was developed by New York University School of Law. During last two years there have been significant developments in the area. Scholars from all across the Atlantic seem to have an interest in developing this new field of law at the global level. There have been number of symposiums where scholarly articles on this particular area were produced. In 2005, Law and Contemporary Problems, one of the leading journals of International Law has published an special issue on GAL. This trend continued in the following years. Both European Journal of International Law and New York University Journal of International Law and Politics have covered this extensively in their special editions in the year 2006. The concept GAL is nevertheless still unclear. The project undertaken by the New York University School of Law was to initiate an effort to systematize studies in diverse national, transnational and international settings that relate to the administrative law of global governance. This brief article investigates whether there is an existence of any such body of law at the global level, and if so, then how GAL can be defined or at least conceptualized; and whether, as many fear, GAL challenges the idea of classical international law. But first of all let me briefly go through how the concept of GAL emerged.

The emergence of GAL is due to a large increase in the trans-governmental regulation and administration designed to address the consequences of globalized interdependence. Today, it is true that, there are plenty of issues where national government is helpless to regulate and to act on alone. States are, for example, powerless to unilaterally limit the use of greenhouse effect-producing gases, to unilaterally prevent the spread of financial crisis, and also, for instance, to control alone fishing of migratory fish species. In the areas such as these, states benefit by giving up their regulatory powers to other global public authorities. It is apparent from the existence of large area of regulatory bodies that administration at global level is now a matter handled not only by state organs, but also by other sub-state level organs and multifaceted inter-governmental organs. It would be hard to find any area of human activity, which is totally untouched today by the ultra-state global rules. International security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labour standards and cross-border movements of populations including

refugees all these areas are now covered by global regulations.

Take Southern Bluff Tuna case as an example. Southern Bluff Tuna is one of the fish species that has been listed in Annex-I of the United Nations Convention on Law of the Sea (UNCLOS). Article 64 of UNCLOS states that the coastal states and other states whose nationals fish in the region for highly migratory species listed in Annex-I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region both within and beyond the exclusive economic zone. For Southern Bluff Tuna, Australia, Japan and New Zealand concluded a voluntary agreement on Tuna fishing in 1985, which was non-binding by its nature. However, in 1993 eventually these three nations signed a binding Treaty Convention for the Conservation of Southern Bluff Tuna (CCSBT), which came into force in 1994. The treaty not only binds the parties but also requires the parties to cooperate in deterring Tuna fishing by nationals, residents or vessels of any state or entity not party to the Convention where such activity adversely affects the attainment of the objectives of the Convention. A monitoring body was established within the Convention called "Commission". The Commission has legal personality with a Secretariat with Staffs, which includes not only member states but also other fishing entities whose flag ships fish Tuna. The Commission gathers statistical and scientific information, and provides binding decision establishing quota on annual catch limits.

That means the Commission regulates rules governing catch limits on Southern Bluff Tuna limiting state's sovereign right to regulate on Tuna fishing at its coast. When Japan was in conflict with the other contracting parties over its experimental fishing programme, which crossed the quota, the latter sought interim measures from the International Tribunal for the Law of the Sea (ITLOS). The ruling of ITLOS prescribes that Japan's experimental fishing programme had to respect the catch limits decided by the Commission of CCSBT. Now, the distinctive features of administrative law can be found from the case that there is an organization vested with authoritative powers, that the organization adopts administrative decision addressed to both constituent parties and other actors, and that judges are empowered to settle dispute between regulated actors.

Global administrative law has indeed certain fundamental distinctions from national or domestic administrative law. First of all there is a lack of exclusivity among international regimes. For example, rules governing Tuna fishing are rooted

in the treaty for the protection of Tuna on one hand; and on the other hand general regime of the law of the sea is also applicable here. The Commission also applies decisions adopted by other international organization such as Food and Agricultural Organization (FAO). That means three different international orders are intertwined. Secondly, GAL has high degree of self-regulation, where regulators and regulated exists on the same plane. They take collective decisions to submit themselves to the shared rules. Thirdly, decisions are made by independent committee in GAL based on scientific criteria. Negotiation plays a very significant role where states, sub-state actors, international and inter-governmental organizations, NGOs participate. Decisions in national or domestic administrative law are made by representative body, which are mainly political decisions based on command and controls. Due to the role played by various organs in the regulation, in GAL issues relating to public and private spheres are hardly clear although one can see the transparency in global administrative rules, where consensus and cooperation are predominant.

As said above, there is a lack of exclusivity in global administrative regulation there is, in fact, more than one regulatory authority in several sectors while each body also has different responsibility within the same sector. For example, regulations on the use of sea are adopted by International Maritime Organization (IMO), International Sea Bed Authority (ISA), International Tribunal for the Law of the Sea (ITLOS), and so on; environmental issues are regulated by World Meteorological Organization (WMO), United Nations Framework Convention on Climate Change (UNFCCC), Global Environmental Facility (GEF) and the respective implementing bodies such as UNEP, UNDP and World Bank; regulations on economic and financial areas are conducted by International Monetary Fund (IMF), the World Bank, the Basel Committee on Banking Supervision, Financial Stability Forum (FSF), Financial Stability Institute (FSI), the Committee on Payment and Settlement Systems, the Egmont Group, the Financial Action Task Force on Money Laundering (FATF), the International Organization of Securities Commissioners (IOSCO), the International Association of Insurance Supervisors (IAIS), and the International Accounting Standard Board (IASB). There are also additional coordinating bodies created by these regulatory bodies, for example, Joint Forum was established in 1996 between International Organization of Security Commissioners and International Association of Insurance Supervisors.

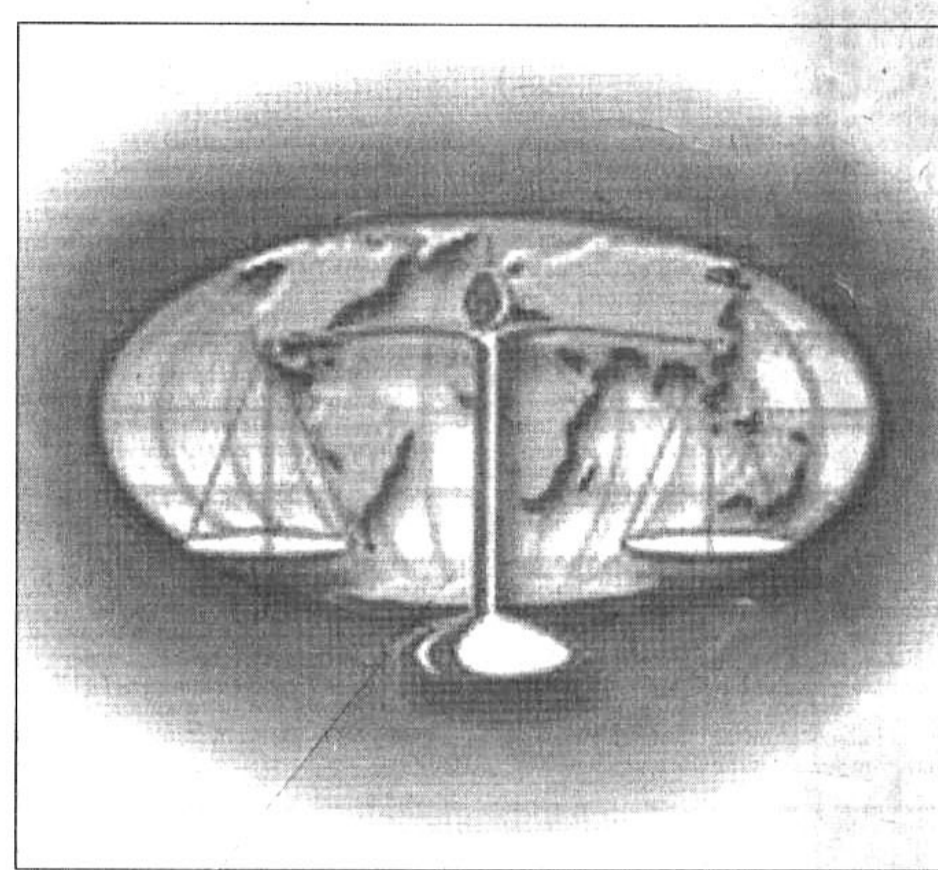
The way GAL is conceptualized is the development of cooperation and connections through

association in the federative form. Actors include first of all states states associate to form a ultra-state body, for example, United Nations, and then the body itself promote other agreements, for example, IMO promote agreements in the areas of security and protection of marine environment and the maritime transport of nuclear materials. Secondly, sub-state organs may also join to establish international bodies, for example, national bodies for the regulation of financial markets are associated in the International Organization of Securities Commissioners (IOSCO), national insurance regulating bodies come together in the International Association of Insurance Supervisors (IAIS), International Competition Network (ICN) bring together national competition authorities and so on.

At the third level there are global organizations acting either alone or by forming other authoritative body. For instance, the Commission on Phytosanitary Measures was established by FAO; International Centre for Settlement of Dispute was established by the World Bank. Fourthly, different global organizations get together to establish another global organization for example, Financial Stability Institute was set up by the Bank for International Settlements and the Basel Committee on Banking Supervision; the Codex Alimentarius Commission was set up by FAO and WHO; International Trade Centre (ITC) was established by WTO and the United Nations Conference on Trade and Development (UNCTAD).

There are both organizational and functional tie amongst the organizations. Organizational tie can be exemplified in WTO's director general's participation on the Executive Board of the UN, and also in the appointment of the Secretary of UNFCCC by the Secretary General of the UN. Functional tie is found, for example, in the network of agreements between the World Intellectual Property Organization (WIPO) and WTO, in close cooperation between Universal Postal Union, the International Civil Aviation Organization and International Telecommunication Union. So different global regimes are connected with each other and become strengthened as each lends their institutions to others for the resolutions of disputes. Global Administrative Law is sharing of rules at the global level, which demonstrates that states capture global organizations and at the same time global organizations also capture states in a cooperative manner.

GAL moves to hold up the global issues that bridges the gap between private and public international law. GAL is a new shift from classical international law since rules are not directly promulgated by states through their direct participation in promulgating legal norms based on



free consent in the traditional sense of treaty making. Mainstream international lawyers, thus, fear whether the emergence of GAL will eventually threaten the sovereignty of states in making law at the global level. The development of international law suggests that the theory of consent is being more and more gradually transformed into consensus. Today there are thousands of issues where states cannot act alone. States are now more interdependent on each other than ever. This is for the benefit of the states themselves to solve their global problems at a global level through cooperation. Although global administrative legal order is held up by a complicated system of norms, for example, taking norms arising out of treaties, unilateral norms, externally imposed norms, and norms created by the institutions, international treaties concluded by the states and ratified through appropriate national organs which are still the basis of all

global level law making in addition to other sources of international law found in Article 38 of the Statute of International Court of Justice. The basic feature of GAL ensures principles of legality, the right to participation of various actors in formation of norms, duty to be heard from others, the right to access administrative documents, the duty to give reasons for administrative decisions, the right to decide based upon scientific and testable data and the principle of proportionality. In a single word GAL ensures transparency. Thus, although clearly GAL is a shift from classical international law, it is hard to draw a conclusion that the development will at the end threaten sovereignty of states.

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## HUMAN RIGHTS advocacy

# The rights of the senior citizens

Many governments have support systems in place for elderly persons such as social security and free or discounted medical care, for example. However, most of these systems were built on the premise that there will always be significantly fewer older persons than younger or middle-aged individuals living at one time. Because of declining death rates, therefore, these systems are beginning to feel a strain that will only increase over time. Additionally, the older-person support ratio is falling in both more and less developed regions, which could further lessen the ability of societies and governments to care for their aging populations.

These demographic trends create unique challenges for all people, particularly for the governments of nation-states around the globe. Elderly individuals are often subject to discrimination and abuse because they are perceived as easily taken advantage of. There is also a prevalent belief among many that elderly persons are worthless in today's fast-paced, globalised and increasingly industrialised world. Obviously, with the number of elderly people on earth at any one time rising rapidly, there is an increased urgency to address the rights and roles of elderly persons in our world.

### Rights at Stake

The rights of aged persons can be broken down into three main categories: protection, participation and image. Protection refers to securing the physical, psychological and emotional safety of elderly persons with regard to their unique vulnerability to abuse and ill treatment. Participation refers to the need to establish a greater and more active role for older persons in society. Image refers to the need to define a more positive, less degrading and discriminatory idea of who elderly persons are and what they are capable of doing. Regional intergovernmental organizations in particular have begun to deal with these categories of rights in some detail in their recommendations and treaties.

Special consideration for the rights of the elderly has been granted relatively recently in recommendations and treaties between international instruments, like the Council of Europe. These more detailed recommendations and agreements on the rights of the elderly, however, are all based upon the fundamental premises established in documents



PHOTO: DAVID A. MCKEE

like the Charter of the United Nations and the Universal Declaration of Human Rights. In Article 25, paragraph 1, of the Universal Declaration of Human Rights it is established that:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Elderly persons' right to security is particularly vulnerable to violation. For example, a component of the right to security is the right to healthcare if one, due to old age, is unable to afford or pursue healthcare on one's own. Although many countries currently have universal healthcare systems, these systems are beginning to feel the strain of an increasingly aged population, and there is some question about how these systems will be maintained in the future. In other countries, like the United States, where there are only federally and state-subsidized healthcare programs for those who are indigent, disabled

or elderly, rising healthcare costs are threatening the survival of these systems. These rights are related to the right to an adequate standard of living, which is often affected in the case of the elderly, due to lack of an adequate support system for them.

Elderly individuals also have the right to non-discrimination. Elderly people should not be thought of as useless to society simply because some of them may need more care than the average person. These stereotypes of the elderly can lead to degrading treatment, inequality and, sometimes, abuse.

Similarly, elderly persons' right to participation is sometimes threatened due to prevailing negative images societies hold of the aged. The aged are often not given the same opportunities as others to be productive members of society. Governments are obliged to aid in creating a more positive image of the abilities and strengths of older populations as well as solid opportunities for elderly people to participate in the ongoing creation of their societies.

The elderly's right to be free from torture or cruel, inhuman or degrading treatment is also often threatened. People sometimes take

advantage of the vulnerability of elderly persons. People in old age, particularly older women, are often victims of neglect and physical and psychological abuse. Additionally, elderly refugees during humanitarian crises often fall victim to the torture and abuse that is sometimes inflicted upon civilian populations.

Who is most at risk for having their rights, as elderly persons, violated?

Elderly women are at the greatest risk for having their rights violated. In general, women are historically more vulnerable toward violence due to their traditionally subordinate position in most cultures. Coupled with the negative image many cultures hold of elderly people, being a woman can make one particularly susceptible to violence and abuse. Considering that 55 percent of older persons are women and that, in the oldest old category 65 percent are women, special consideration must be given to the effect of sex on the likelihood of rights violation and abuse.

ILO Recommendation No. 162 concerning Older Workers (1980) (section II, paragraph 5(g))

This recommendation states that older workers must enjoy equality of opportunity and treatment with other workers without age discrimination, including access to housing, social services and health institutions, particularly when this access is related to occupational activity or employment.

### National Assistance, Protection and Service Agencies

Much is currently being done on an international level to prepare for the ensuing crisis of our world's aging population. It is widely recognised that the elderly are often victims of discrimination and abuse and that their unique needs are often not sufficiently met by their governments and communities. Additionally, societies have still not clearly established a new, more active role for our world's elderly citizens in creating culture and community, nor have many programs been developed to enable the elderly to more actively participate in society.

In fact, most of what has been accomplished in protecting the rights of the elderly has been done, thus far, in an intergovernmental international or regional setting. Many governments of nation-states, unfortunately, are experiencing serious crises in implement-

ing or maintaining protection programs for their elderly citizenry. For example, currently, in the United States, the social security system is at risk of being overhauled and privatized, or, some fear, eventually dismantled. Additionally, Medicare, a healthcare system for people ages 65 and older, sometimes does not sufficiently cover the healthcare costs of those elderly people who are indigent, nor does it cover the cost of prescription medications. Furthermore, the cost of these medications is rapidly rising. Many elderly citizens, unable to afford their medications, will skip doses. Some of these medications are necessary to the survival of these individuals.

Even in countries that have well-established universal healthcare systems, like Canada and most European countries, rising healthcare costs have caused governments to make cutbacks in services offered to their citizens. Also, these governments have an interest in keeping the prices of prescription drugs down primarily because they cover the majority of the cost of these drugs. Therefore, new medicines that could be beneficial to citizens often are delayed in their entrance into the market because of negotiations over costs between drug companies and governments. Furthermore, the wait for nonessential surgeries and medical procedures can be years in some countries with universal healthcare.

Regardless of these problems, there are many national nongovernmental organizations that perform advocacy and policy-related work for elderly individuals. In 1989 the World Medical Association adopted the Declaration of Hong Kong on the Abuse of the Elderly. This declaration assesses the abuse of the elderly against their frequent background of dependency on others for assistance and their tendency toward pathological problems, motor disturbances, psychic and orientation disorders. The World Medical Association, therefore, establishes that the elderly have the same rights to care and welfare as all other human beings. Physicians have a responsibility to prevent the abuse of their elderly patients. They also are obliged to report suspected cases of physical and psychological abuse to the proper local authorities. Additionally, in order to ensure the protection of the elderly, they should be able to freely exercise their right to choose their own physician.

Source: Human Rights Education Associates.

## RIGHTS investigation

# Myanmar: UNHRC must pressurise authorities to release detainees

Amnesty International urged the United Nations Human Rights Council to address the situation in Myanmar with resolute action by calling on the Myanmar authorities to release all those detained for participating in peaceful assemblies.

"We urge the Council to strongly condemn the ongoing grave human rights violations in Myanmar and to demand an immediate halt to the violent repression of peaceful demonstrations," Amnesty International said in a statement presented at the special session on Myanmar. "It is the duty of the Myanmar government to account for all those detained by its law enforcement agents, military and other security forces. Detainees should not be held in secret places of detention, and must be granted access to independent lawyers, medical personnel and to family members."

"The Myanmar government has a duty to account for the whereabouts of those detained and to guarantee their safety from torture or other ill-treatment."

AI fears that the risk of torture and other ill-treatment in Myanmar remains high as widespread patterns of abuse of detainees, particularly during interrogation and pre-trial detention have become entrenched in Myanmar in a culture of total impunity spanning decades.

AI urged the Myanmar government to release all prisoners of conscience, numbering over 1,150 before the current crisis. The releases must include the more than 150 people arrested in August at an early stage of the current crisis, unless they are charged with a recognisably criminal offence.

Amnesty International called on the UN Human Rights Council, as a matter of urgency, to ensure that the Special Rapporteur on the Situation of Human Rights in Myanmar continues his important task by documenting the current situation including visiting the country and reporting to this Council, the General Assembly and the Security Council.

"While the Security Council must continue to focus on the situation in Myanmar and the threat it poses to peace and security in the region, the Human Rights Council should complement the Security Council's efforts by resolute action to address ongoing grave human rights violations in the context of the crackdown against peaceful protests," said Amnesty International.

Given the serious, long-standing human rights concerns in Myanmar, Amnesty International believes that it would be a positive contribution to the UN's consideration of Myanmar, if the High Commissioner for Human Rights, Louise Arbour, were to visit the country.

Source: Amnesty International.