

Valentina Vadi

Global Administrative Law

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‘New needs need new techniques’.¹

INTRODUCTION

The growing expansion and specialisation of international law has been matched by an increase in the number of international organisations² and international courts.³ International organisations are no longer the mere ‘agents of states’;⁴ rather, they have become new legislators in their own right, and the emerging international law deeply and broadly influences everyday life.⁵ In parallel, international courts and tribunals are contributing to global governance.⁶ While some regulatory regimes have ‘soft’ dispute settlement methods, such as negotiation, mediation, and good offices;⁷ others resort to sophisticated dispute-settlement mechanisms that have compulsory jurisdiction,⁸ review state compliance with international rules,⁹ and contribute to the making of international law.

The growing juridification of international relations suggests that international law is now governing international relations that were previously dominated by power and fear.¹⁰ This process also constitutes a paradigm shift, as international law is no longer conceived as a purely voluntary system based on reciprocity and quasi-contractual agreements;¹¹ rather, it is now conceptualised as embodying the rule of law.¹²

¹ Jackson Pollock, Interview with William Wright, Long Island, New York, Late 1950, reprinted in Pepe Karmel (ed.) *Jackson Pollock — Interviews, Articles and Reviews* (New York: Museum of Modern Art, 1998) at 20.

² See generally José E. Alvarez, *International Organizations as Lawmakers* (Oxford: Oxford University Press 2005).

³ See generally Karen Alter, *The New Terrain of International Law: Court, Politics, Rights* (Princeton: Princeton University Press 2014).

⁴ José E. Alvarez, ‘Governing the World: International Organizations as Lawmakers’, *Suffolk Transnational Law Review* 31 (2007–2008) 596, 597.

⁵ Luis Eslava, *Local Space, Global Life — The Everyday Operation of International Law and Development* (Cambridge: Cambridge University Press 2015) at 4, noting that ‘the international legal and institutional order is becoming increasingly present in the daily running of local administrations and residents’ affairs.’

⁶ See generally Geert De Baere and Jan Wouters (eds) *The Contribution of International and Supranational Courts to the Rule of Law* (Cheltenham, UK: Edward Elgar 2015); Anne-Marie Slaughter, ‘Judicial Globalization’, *Virginia Journal of International Law* 40 (2000) 1103–24.

⁷ See e.g., S. von Schorlemer, ‘UNESCO Dispute Settlement’, in Abdulqawi A. Yusuf (ed.), *Standard-setting in UNESCO, Vol. I: Normative Action in Education, Science, and Culture. Essays in Commemoration of the Sixtieth Anniversary of UNESCO*; (Leiden/Boston: Martinus Nijhoff Publishers, 2007).

⁸ See e.g., Claus-Dieter Ehlermann, ‘Six Years on the Bench of the “World Trade Court”’, *Journal of World Trade* 36 (2002) 605–39.

⁹ Alter (n 3) at 5.

¹⁰ Ming-Sung Kuo, ‘Inter-public Legality or Post-public Legitimacy? Global Governance and the Curious Case

of Global Administrative Law as a New Paradigm of Law’, *International Journal of Constitutional Law* 10 (2012) 1050–75, 1050–51, highlighting that ‘law is now expected to reign in international relations that used to be conducted according to the realist logic of power and interest.’

¹¹ Alter (n 3) at 6.

¹² See generally Christopher May, *The Rule of Law: The Common Sense of Global Politics* (Cheltenham: Edward Elgar 2014).

However, because global governance has a great ‘effect on individuals’ and can ‘directly . . . come into conflict with national social values’,¹³ cultural and political resistance to global governance as conducted by international law regimes has surfaced with regard to the operation of international organisations and their dispute-settlement mechanisms.¹⁴ Critics contend that international organisations prioritise the interests of affluent private actors and powerful states, at the expense of the poor.¹⁵ Therefore, questions have arisen as to whether international governance is a legitimate, democratic, and accountable system.

Global governance has been compared to a Jackson Pollock painting, a vibrant net of colours without any prearranged pattern and yet melting together on a single canvas.¹⁶ How do scholars and practitioners make any sense of this apparent chaos? Several maps and methodologies have been proposed to chart this uneven terrain:¹⁷ among these, global administrative law (GAL) is a theoretical project that sets out to break down the complexity of international relations by using the methods and insights of administrative law.¹⁸ According to some, GAL also constitutes a distinct field of study with the potential to advance the rule of law in global governance, ensure greater accountability on the part of global regulatory and adjudicatory bodies, and promote greater consideration of the public interest. After examining the notion, aims, and objectives of GAL, this chapter examines the promises and pitfalls of this emerging field of study. It then offers some preliminary conclusions.

WHAT IS GLOBAL ADMINISTRATIVE LAW?

There is no single definition of GAL;¹⁹ rather, the concept is fluid and allows for multiple meanings.²⁰ Examining the flourishing literature on GAL, this chapter identifies three principal conceptions of GAL. First, GAL constitutes a method of enquiry: in broad strokes, GAL is a new epistemology, or way of approaching global governance. It invites scholars to think conceptually about significant themes of international relations, offering a point of view and an entry into international law. In

¹³ Joseph H.H. Weiler, ‘The Geology of International Law—Governance, Democracy and Legitimacy’, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht — Heidelberg Journal of International Law* (2004) 547, 550.

¹⁴ See generally Joel R. Paul, ‘Cultural Resistance to Global Governance’, *Michigan Journal of International Law* 22 (2000–2001), 1–84. See also Machiko Kanetake and André Nollkaemper, ‘The International Rule of Law in the Cycle of Contestations and Deference’, *Amsterdam Center for International Law Research Paper* No. 14 (2015) at 7.

¹⁵ Andrew D Mitchell and John Farnik, ‘Global Administrative Law: Can It Bring Global Governance to Account?’, 37 *Federal Law Review* (2009) 237–261, at 243.

¹⁶ Lorenzo Casini, ‘Beyond Drip-painting? Ten Years of GAL and the Emergence of a Global Administration’, *International Journal of Constitutional Law* 13 (2015) 473–77, at 473, analogizing the complex legal framework governing international relations to a Pollock’s painting, ‘a network of lines without any clear logical connection and yet harmoniously linked together on a single canvas.’

¹⁷ See e.g., Steven R. Ratner and Anne-Marie Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’, *American Journal of International Law* 93 (1999) 291, examining legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics among others; Iain Scobbie, ‘Wicked Heresies or Legitimate Perspectives? : Theory and International Law’, in Malcolm D. Evans (ed.) *International Law* (Oxford: Oxford University Press 2010) 58–92.

¹⁸ Casini (n 16) at 474.

¹⁹ Sabino Cassese, ‘Global Administrative Law: The State of the Art’, *International Journal of Constitutional Law* 13 (2015) 465–8, noting that ‘the definition of global administrative law is still highly contested.’

²⁰ See e.g., Edoardo Chiti, ‘Where Does GAL Find its Legal Grounding?’ *International Journal of Constitutional Law* 13 (2015) 486–91, at 487, identifying and critically assessing four main conceptions of GAL.

particular, by treating global governance as analogous to administrative action,²¹ GAL investigates international law through the lens of administrative law concepts such as the rule of law, proportionality, reasonableness, standard of review, participation, and transparency.²² In domestic law, these public law concepts seek to promote the rule of law in decision-making by local administrators and judges; they restrain public power in order to protect individual entitlements. Analogously, GAL proponents argue, at the international level, public law concepts can promote the rule of law by creating an argumentative framework that global regulators and adjudicators can use in regulation and decision-making respectively. In other words, if at the national level, administrative law subjects the exercise of public power to the rule of law, then GAL aims to do the same at the global level.²³

Second, and more ambitiously, some scholars argue that GAL constitutes an emerging field of study. As a distinct field of study, GAL includes the principles, practices, and legal tools that promote transparency, participation, and review of bodies exercising power in global governance. GAL scholars argue that far from being mere instruments of their member states, international organisations have become more like autonomous regulators with their own respective cultures, aims, and objectives and thereby have facilitated the emergence of the global administrative space. This leads GAL proponents to frame international organisations in terms of a global administration, and they argue that a global administrative law governs their operation. If global governance can be understood as regulatory and adjudicative administration, such administration can (or should) be organised and shaped by administrative law principles. According to GAL proponents, global administrative law aims to prevent the abuse of governmental power and addresses the accountability gaps created by the rise of global governance. Therefore, they study GAL as a new regulatory space that has emerged in addition to, and beyond, international law and domestic administrative law.²⁴ They consider GAL, or the *lex administrativa communis*, as ‘[the] process of a global homologation of principles of administrative, comparative and international law under different legal systems’.²⁵

Third, if not a fully-fledged branch of law, GAL certainly constitutes a growing research project,²⁶ studying the internationalisation of administrative law and the administrativisation of international law. A number of administrative and international law scholars have contributed to the GAL project in the United States and elsewhere.

Regardless of which notion of GAL one adopts, it examines the operation of international regimes and their contribution to global governance using the categories of administrative law. Legal scholars have used administrative law tools to scrutinise

²¹ Benedict Kingsbury, Nico Krisch and Richard B. Stewart, ‘The Emergence of Global Administrative Law’, *Law and Contemporary Problems* 68 (2005) 15, 17, suggesting that ‘much of global governance can be understood and analysed as administrative action.’ Benedict Kingsbury and Nico Krisch, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’, *European Journal of International Law* 17 (2006) 1–14, at 2, noting that: ‘The concept of global administrative law begins from the twin ideas that much of global governance can be understood as administration, and that such regulatory administration is often organized and shaped by principles of an administrative law character.’

²² See e.g. Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edward Elgar 2018).

²³ Mitchell and Farnik (n 15) at 242, adding that ‘Much of this criticism relates to a sentiment of mistrust, inspired by a perception of inadequate transparency and insufficient global public or citizen participation in the decision-making of these organisations.’

²⁴ Casini (n 16) at 475.

²⁵ See generally Javier Robalino-Orellana and Jaime Rodríguez-Arana Muñoz (eds), *Global Administrative Law: Towards a Lex Administrativa* (Cameron May 2010) at xvii.

²⁶ See Institute for International Law and Justice, New York University, ‘Welcome to the Website of the Global Administrative Law Project’, <http://www.iilj.org/gal/>, last visited on 8 May 2018.

global governance in several sectors, such as investment,²⁷ trade,²⁸ war,²⁹ water,³⁰ sports,³¹ and cultural heritage,³² among others.

For instance, Van Harten and Loughlin conceptualise investment treaty arbitration as a species of global administrative review.³³ The legal nature of investment treaty arbitration has been subject to extensive debate in international law scholarship and sociological literature.³⁴ Given its hybrid character, this particular dispute settlement mechanism has been compared to a variety of different mechanisms: while some scholars contend that investment treaty arbitration is analogous to commercial arbitration, others have suggested that it is similar to administrative review or other forms of public international law adjudication. Van Harten and Loughlin have provided a seminal contribution to this debate, arguing that investment treaty arbitration is analogous to administrative review. In utilising the analytical lenses of the GAL theory, their argument proceeds as follows: First, arbitral tribunals have a *global* character, because their authority derives from international agreements. Second, arbitral tribunals, like *administrative* courts, settle disputes arising from the exercise of public authority.³⁵ Third, in settling *legal* disputes,³⁶ arbitrators borrow key administrative law principles that guide the conduct of public administrations, such as reasonableness, proportionality, procedural fairness, and efficiency as useful parameters for evaluating the conduct of states and assessing their compliance with relevant investment treaties.³⁷ This analysis has been highly influential and has spurred a healthy debate on the nature of international investment law and arbitration.

What are the aims and objectives of GAL? According to its proponents, GAL aims to ‘provide legitimacy to global administrative processes’, ‘emphasis[ing] the need for ... transparency, participation, reasoned decisions ... and effective review’³⁸ and

²⁷ Gus Van Harten and Martin Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, 17 *European Journal of International Law* (2006) 121, 122; Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford/Portland, Or.: Hart, 2012).

²⁸ See e.g., Richard B. Stewart and Michelle Ratton Sanchez Badin, ‘The World Trade Organization: Multiple Dimensions of Global Administrative Law’, *International Journal of Constitutional Law* 9 (2011) 556–86; Andrew D. Mitchell and Elizabeth Sheargold, ‘Global Governance: The World Trade Organization’s Contribution’, *Alberta Law Review* 46 (2009) 1061–80.

²⁹ See e.g., Daphné Richemond-Barak, ‘Regulating War: A Taxonomy in Global Administrative Law’, *European Journal of International Law* 22 (2011) 1027–69, applying GAL’s methodology to the private security and military industry and using the industry as a case study in GAL.

³⁰ See Bronwen Morgan, ‘Turning Off the Tap: Urban Water Service Delivery and the Social Construction of Global Administrative Law’, *European Journal of International Law* 17 (2006) 215–46.

³¹ Lorenzo Casini, ‘The Making of a “Lex Sportiva” by the Court of Arbitration for Sport’, in Robert C.R. Siekmann and Janwillem Soek (eds) *Lex Sportiva: What is Sports Law?* (The Hague: T.M.C. Asser Press, 2012), 149–71.

³² Valentina Vadi, ‘Global Cultural Governance by Arbitral Tribunals: The Making of a *Lex Administrativa Culturalis*’, 33 *Boston University International Law Journal* (2015) 101–38.

³³ Van Harten and Loughlin (n 27) at 123.

³⁴ See Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’, *American Journal of International Law* 107 (2013) 45; Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge: Cambridge University Press 2016).

³⁵ Stephan Schill, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator’, 23 *Leiden Journal of International Law* (2010) 401, 413.

³⁶ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 17 U.S.T. 1270 (1966), Article 25.

³⁷ Van Harten and Loughlin (n 27) at 146.

³⁸ Mikael Rask Madsen, ‘Judicial Globalization and Global Administrative Law: The Particularity of the Proliferation of International Courts’, *iCourts Working Paper Series*, No. 28, 2015, at 6.

supporting social understandings that promote the accountability of global administrative bodies.³⁹

STRENGTHS

The lack of a fixed definition allows the GAL concept to appeal to a wide audience. Being open to different—at times converging and at times diverging—interpretations, it can easily fit the expectations of different audiences. Depending on the adopted conceptualisation of GAL, it has different strengths and weaknesses: this section examines the strengths of GAL as a method and as a project.

As a method for studying international relations, GAL has three major merits: not only does it make administrative law less provincial, but it also contributes to the evolution of international law and comparative law. Let us examine the three theoretical contributions of GAL. *First*, it can contribute to the progress of administrative law scholarship.⁴⁰ While ‘administrative law has been largely parochial’, because it has tended to be ‘based solely on national rules’, GAL conceptualises ‘administrative law beyond the state’.⁴¹ The internationalisation of administrative law is a fact. As a result of globalisation processes, ‘the state has lost its exclusive power to regulate matters that lie within the traditional realm of administrative law’.⁴² Local administrators can no longer limit themselves to the knowledge of domestic law, but must instead be familiar with a broader set of legal frameworks. Moreover, international law poses vertical constraints on the state’s right to regulate by ‘introducing global interests into the decision-making processes of domestic authorities. . .’⁴³ International rules also ‘bring about change in domestic governance institutions and practices’;⁴⁴ adherence to these international regimes ‘adds[s] a circuit of “external accountability,” forcing domestic authorities to consider the interests of the wider global constituency who is affected by their decisions’.⁴⁵ The internationalisation of administrative law makes administrative law less provincial, attuning it to norms and values shared by the international community, such as the respect for human rights and the fight against corruption, among other globally salient issues. Additionally, the internationalisation of administrative law can protect individuals against abuses of power by domestic authorities and promote administrative responsiveness to the public interest. Therefore, the internationalisation of administrative law has the potential to humanise national administrative law by improving its efficiency, effectiveness, and—ideally—its responsiveness to human needs; it can challenge national administrative law to find new ways to protect individuals against abuses of power. In parallel, GAL has provided administrative law scholars a new field of enquiry.⁴⁶

Secondly, GAL can contribute to the progress of international law. Global administrative law constitutes ‘a discrete set of lenses through which to understand

³⁹ Kingsbury, Krisch and Stewart (n 21) 17.

⁴⁰ Cassese (n 19), 468.

⁴¹ Christoph Möllers, ‘Ten Years of Global Administrative Law’, *International Journal of Constitutional Law* 13 (2015) 469–72, 470.

⁴² Daphne Barak-Erez and Oren Perez, ‘Whose Administrative Law is it anyway? How Global Norms Reshape the Administrative State’, *Cornell International Law Journal* 46 (2013–2014) 455 at 460, focusing on the way in which international norms reshape domestic decision-making processes.

⁴³ Stefano Battini, ‘The Procedural Side of Legal Globalization: The Case of the World Heritage Convention’, *9 International Journal of Constitutional Law* (2011) 340, 343.

⁴⁴ Mavluda Sattorova, *International Investment Treaties and the Promise of Good Governance: Norm and Institutional Design, Internalisation, and Domestic Rule-Making* (European Society of International Law, 10th Anniversary Conference, Vienna, Conference Paper No. 11/2014, 2014), at 3 available at <http://ssrn.com/abstract=2546404>.

⁴⁵ Battini (n 43) at 364.

⁴⁶ Paul Craig, *UK, EU, and Global Administrative Law – Foundations and Challenges* (Cambridge: Cambridge University Press 2015) 568.

reality and a distinct toolkit with which to dissect such reality'.⁴⁷ Such a flexible theoretical framework allows scholars and practitioners to look at international law with fresh eyes, critically assess it in light of administrative law concepts, and 'identify structures' in the chaotic development of international relations.⁴⁸ As Weiler points out, GAL has 'introduced a methodology with which to discuss, critique and ... reform' the operation of international organisations.⁴⁹ This is not to say that GAL constitutes the perfect or ultimate methodology or theoretical framework for investigating international law;⁵⁰ rather, it contributes to the mosaic of existing methods for approaching such an investigation. Therefore, GAL has provided international lawyers with new methods of enquiry for examining their field. More substantively, as the function of administrative law is generally to protect individuals against the excessive, arbitrary, or unfair exercise of public power, GAL can perform a similar function at the supranational level⁵¹ by introducing checks and balances and humanising international law. It can help scholars 'to better understand the functions' and limits of international organisations and adjudicators and to more easily identify 'legal instruments to enhance their legitimacy, accountability, and effectiveness'.⁵² By enhancing the legitimacy, accountability, and effectiveness of global regulation, GAL can promote the (global) commonweal.⁵³

Thirdly, and perhaps more unexpectedly, GAL is contributing to the renaissance of comparative law. International law scholars have traditionally relied on comparative surveys in order to identify general principles of international law.⁵⁴ Administrative law scholars are also familiar with comparative law, traditionally comparing two or more public systems, but GAL merges these parallel traditions. It relies on different domestic systems in order to find various general principles of administrative law through which to evaluate the operation of international organisations and international courts and tribunals.⁵⁵

In summary, as a method of analysis, GAL offers scholars and practitioners a singular way of 'mapping the global disorder of normative orders':⁵⁶ it takes into account the shifting boundaries between different legal fields and the gradual fading of the private/public and national/international dichotomies that have traditionally characterised such legal fields. It is also a useful tool for taking into account the phenomenon of the *glocalisation* of law,⁵⁷ that is, the oscillation of regulation between

⁴⁷ Joseph H.H. Weiler, 'GAL at a Crossroads: Preface to the Symposium', *International Journal of Constitutional Law* 13 (2015) 463–64, 463.

⁴⁸ Möllers (n 41), 472.

⁴⁹ Weiler (n 47) 463.

⁵⁰ But see Casini, (n 16) at 475, arguing that 'Thus, among the numerous attempts to classify IOs and international regimes, the one based on GAL appears to be most helpful in understanding the global legal space.'

⁵¹ Benedict Kingsbury, et al. 'Global Governance as Administration: National and Transnational Approaches to Global Administrative Law', *Law and Contemporary Problems* 68 (2005) 1–13, at 5.

⁵² Casini (n 16) at 477.

⁵³ Richard B. Stewart, 'The Normative Dimensions and Performance of Global Administrative Law', *International Journal of Constitutional Law* 13 (2015) 499–506.

⁵⁴ General principles of law are a source of international law. See Art. 38(1) of the Statute of the International Court of Justice.

⁵⁵ Giulio Napolitano, 'Going Global, Turning Back National: Towards a Cosmopolitan Administrative Law?', *International Journal of Constitutional Law* 13 (2015) 482–85, 482, suggesting that GAL is open[ing] up a new frontier of cosmopolitan administrative law'.

⁵⁶ Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', *International Journal of Constitutional Law* 6 (2008) 373–96.

⁵⁷ See Gunther Teubner, "'Global Bukowina": Legal Pluralism in the World Society', in Gunther Teubner (ed.),

Global Law without a State (Aldershot: Dartmouth, 1994) 3, defining 'glocalisation' as the parallel coexistence of the local and the global level of governance.

the global and the local levels.⁵⁸ Finally, as an academic endeavour, GAL is a well-organised cosmopolitan project that now unites scholars from different parts of the world and with different expertise. It has stimulated a range of international workshops, conferences, and publications that have contributed thought-provoking inputs to international, administrative, and comparative law scholarships.

AGAINST GAL

The vagueness and conceptual indeterminacy of GAL make it a difficult phenomenon to scrutinise and critically assess. Nonetheless, critical views abound.⁵⁹ The various criticisms can be clustered along three different poles. First, critics contest the conceptualisation of GAL as a new branch of law. Second, they claim that, as a method, GAL remains structurally conservative. Third, they contend that, as a project, GAL has a hegemonic bias. This section will briefly scrutinise these criticisms.

The first set of criticisms centres on the defective legal character of GAL. Proponents of GAL suggest that a growing body of global administrative law, based on largely procedural principles of transparency, participation, and review, is emerging to promote greater accountability. However, critics contest the legal nature of GAL. While Kingsbury has proposed relying on a broad notion of ‘law’,⁶⁰ others contend that GAL cannot be considered as ‘law’, because there is no legislative body or public administration in the proper sense of these terms under international law.⁶¹ Moreover, ‘a universal set of administrative law principles is difficult to identify.’⁶²

Second, critics argue that ‘[t]here may be an inherent structural conservatism’ in GAL as a method of enquiry, as it ‘takes a certain set of governmental institutions for granted, and works to reform them through the introduction of such features as transparency, accountability, or judicial review’. Such a reformist approach, however, assumes that it is possible to reform certain institutions from the inside rather than replacing them with something else. Therefore, critics contend that GAL risks ‘provid[ing] more legitimacy to a practice than it deserves’ by ‘suggest[ing] certain modest institutional reform to be sufficient’ and ‘turn[ing] an institutional vice into a virtue’.⁶³ In addition, some critics question whether bureaucratising international law necessarily benefits citizens; to the contrary, they argue that such processes ‘benefit those who can afford to use them, normally states and multinational enterprises’.⁶⁴

Third, far from being a ‘neutral’ approach, critics argue that GAL has a distinct agenda⁶⁵ with clear expectations for how governance should proceed. The concepts used by GAL, such as transparency, participation, and proportionality, among others, are drawn mainly from Anglo-American and continental administrative law. This means

⁵⁸ Rostam Neuwirth, ‘Governing Glocalisation: “Mind the Change” or “Change the Mind”?’ *Hokkaido Journal of New Global Law and Policy* 12 (2011) 215–55.

⁵⁹ See e.g., Carol Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *European Journal of International Law* (2006) 187–214, at 194; Bhupinder S. Chimni, ‘Co-option and Resistance: Two Faces of Global Administrative Law’, 37 *N.Y.U. Journal of International Law & Politics* (2005) 799; Kate Miles, *The Origins of International Investment Law: Empire, Environment and Safeguarding Capital* 335 (Cambridge: Cambridge University Press 2013).

⁶⁰ Benedict Kingsbury, ‘The Concept of “Law” in Global Administrative Law’, *European Journal of International Law* 20 (2009) 23–57.

⁶¹ Ana Gouveia Martins, ‘Global Administrative Law: A New Branch of Law or a Quest for an Academic Grail?’, *E-Pública — Revista Electrónica de derecho público* 6 (2015) 1–28, at 3, arguing that Global Administrative Law represents nothing more than a doctrinal project and ‘a legal holy grail’, and that, therefore, it is not possible to understand it as a new branch of law.

⁶² Harlow (n 59) 187.

⁶³ Möllers (n 41) 471.

⁶⁴ Harlow (n 59) 211.

⁶⁵ Mario Savino, ‘What if Global Administrative Law is a Normative Project?’, *International Journal of Constitutional Law* 13 (2015) 492–8, at 492.

that GAL impels states to conform to principles derived from a limited set of states and to adopt particular principles of good governance. Therefore, critics question whether GAL constitutes a form of ‘legal imperialism’, understood as the grafting onto the global level of hegemonic Western values. Any legal framework, including administrative law, is ‘the product of a political context;’⁶⁶ administrative laws are domestic constructs and reflect the economic, social, and cultural choices of domestic constituencies. If GAL attempts to export the administrative law peculiarities of ‘a certain type of western, liberal model of the state (and its capitalist model of development)’, it ‘could be perceived in developing countries as an instrument to reproduce the dominant position of advanced industrialised countries and their economic actors’.⁶⁷ Local laws that are not market friendly or that pursue important non-economic values, such as environmental protection and public safety, may not be regarded as ‘good’ laws. Therefore, some scholars suggest that GAL should not rely on methodological nationalism;⁶⁸ rather, it ‘should draw, as far as possible, on cross-cultural principles’.⁶⁹ However, the question remains as to whether legal transplants can be imposed, and whether their ‘redistributive and constraining impact on developing economies, state policies, and individual freedoms’ are acceptable.⁷⁰

CRITICAL ASSESSMENT

Global administrative law presents both opportunities and risks. As a method, GAL offers an opportunity to approach international law using administrative law tools and to identify common patterns and structures. Critically assessing the evolution of international law using administrative law criteria such as those of proportionality, reasonableness, standards of review, and others can be a fertile endeavour. Scholars of both international and administrative law have produced inter-disciplinary studies,⁷¹ and therefore it is clear that GAL constitutes one of the available methods to investigate international law.

As a scholarly endeavour, GAL has been successful in terms of opening new fields of academic enquiry and ‘alter[ing] our intellectual landscape in some quite decisive ways’.⁷² As Marks points out, ‘the first and perhaps most striking achievement’ of the proponents of GAL is that ‘they have ... invited us to think about how seemingly disparate issues, structures and processes may be connected.’⁷³ By publishing scholarly outputs and organising international workshops, proponents of GAL have nurtured healthy academic debates.

However, GAL should not be idealised as the sole, let alone ultimate, method for studying international phenomena. Like any other method, GAL also presents pitfalls. As a mode of investigation, GAL risks presenting a Western bias in defining good governance; indeed, good governance can be a patronising concept.⁷⁴ For instance, Kate

⁶⁶ Möllers (n 41) 471.

⁶⁷ Francesca Spagnuolo, ‘Diversity and Pluralism in Earth System Governance: Contemplating the Role for Global Administrative Law’, *Ecological Economics* 70 (2011), 1875–81, 1875. See also Harlow (n 62), noting that ‘administrative law is primarily a Western construct, protective of Western interests. It may impact unfavourably on developing economies’.

⁶⁸ Cassese (n 19) 467, stating that ‘it is not possible to rely on methodological nationalism’.

⁶⁹ Spagnuolo (n 67).

⁷⁰ Savino (n 65) 492.

⁷¹ Giulio Napolitano, ‘Going Global, Turning Back National: Towards a Cosmopolitan Administrative Law?’ *International Journal of Constitutional Law* 13 (2015) 482–5, 483, noting that ‘In the global administrative law project, administrative lawyers established an unusual alliance with international lawyers.’

⁷² Susan Marks, ‘Naming Global Administrative Law’, *New York University Journal of International Law and Politics* 37 (2005), 995–1001, at 1001.

⁷³ *Ibid.*, at 995.

⁷⁴ Miles (n 59) 335.

Miles argues that ‘the current framing of investor-state arbitration as the embodiment of good governance and the rule of law is representative solely of the perspective of political and private elites’.⁷⁵ Despite the popularity of domestic administrative law analogies among international law scholars, these should not be derived from a limited number of countries. If analogies are derived only from a limited number of Western states, and GAL aspires to globalise them, then there is a risk of hegemonic bias. There is also an associated risk that GAL would tend to maintain the established order.⁷⁶

Generally, then, GAL can constitute a useful method for approaching international law, provided that it is not conceived as the sole or ultimate method for scrutinising global governance. International law requires ‘epistemological pluralism’, that is, different methods of enquiry. Only the juxtaposition of different methods and approaches can help scholars and practitioners to decipher the complexity of international law.

CONCLUSION

The recent expansion of international law, the proliferation of international organisations, and the growing number of international courts and tribunals pose new challenges to international law scholars and require new perspectives. Global administrative law constitutes a new approach for addressing, and making sense of, this complexity. This chapter identified three basic meanings for GAL: as a method, as a project, and as an possible new legal order. It then highlighted the pros and cons of GAL. As a method, GAL can constitute a useful toolkit for approaching the increasing complexity of international law. It helps in mapping the contours of international law while also contributing to the evolution of administrative law. It can also contribute to the development of comparative law by opening new horizons for the discipline. Therefore, GAL has stimulated fruitful academic debate.

However, like any other method, unavoidably, GAL also presents pitfalls. This mode of investigation risks presenting and reproducing a Western bias concerning the characteristics of good governance. Moreover, questions remain as to whether GAL constitutes a new branch of law. Critics also point out that it may have some structural conservatism. Importantly, to detect general principles of law, any comparative legal analysis must be extensive and representative, albeit not necessarily uniform or universal. If GAL attempts to export the administrative law peculiarities of a limited number of liberal states, then it could be perceived as an imperialist project.

In conclusion, this chapter has sought to demonstrate that while GAL certainly constitutes a useful approach for studying international law, it does not represent the sole or the ultimate method for doing so. Rather, international law requires ‘epistemological pluralism’, that is, different methods of enquiry. Only the juxtaposition of different methods and approaches (including, but not limited to, GAL) can help scholars and practitioners to decipher the complexity of international law.

⁷⁵ Ibid.

⁷⁶ Marks (n 72) 998, cautioning that ‘progressive concepts can become pacifying ideologies.’