

NAMING GLOBAL ADMINISTRATIVE LAW

SUSAN MARKS*

There is something about the act of naming that seems to work a kind of magic. When in the 1960s and 70s people began to insist that the practice of abduction, secret detention, torture, and eventual murder which had developed in parts of Latin America be called “disappearance,” and that “disappearance” be understood in this context as having a transitive inflection, they did not only cause a new entry to be added to our dictionaries. They turned a series of private, at any rate not widely known, histories into a big public issue. They established the systemic significance of events which until that point could be imagined as disconnected or aberrant. They mobilized a constituency for investigation, action, and institutional change. Many of the same things might be said about the person who looked at a whole range of developments to do with the enhanced interconnectedness of people and processes at distant localities and, for better or worse, called this “globalization.” Or the person who alerted us to the importance of variability among living organisms and ecological complexes, and to the erosion of that variability, and termed the category “biodiversity.”

From this angle, the first and perhaps most striking achievement of those responsible for New York University’s Global Administrative Law Research Project is that they have *named* a phenomenon. In doing so, they have invited us to think about how seemingly disparate issues, structures and processes may be connected—how they might currently be connected, but also how more integrated global systems might be established in the future. With “global administrative law” comes an agenda for conceptual reflection, empirical study, and institutional redesign that gives shape and focus to an immense range of large and small questions about the legal control of decisionmaking in the contemporary world. Linked to this, some of the many other valuable things about the project and its associated activities have to do, for me, with the way

* Fellow, Emmanuel College, Cambridge. I am grateful to Nigel Parke for his comments and suggestions.

they have pushed us to reach new levels of specificity on matters that have tended to be addressed in vague or sweeping terms, the way they have emboldened us to find openings in some of the more daunting-seeming or at any rate durable of our traditional analytical boundaries, and the way they have helped us to put aside a number of deep-rooted myths, like the myth that there are no real democracy or legitimacy deficits in global governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts.

I could go on, but let me instead use this occasion to highlight what I think might be some dangers of this important venture—or rather, some features which might limit its capacity to achieve its full potential. For however much an act of naming may open up the terrain of academic enquiry, it is as well to remind ourselves that the reverse may also occur. In his book *On the Name*, Jacques Derrida asks what happens when one gives a name: “What does one give then? One does not offer a thing, one delivers nothing, and still something comes to be”¹ Precisely a new noun phrase like global administrative law seems to create a thing. It seems to bring an object into being, with a solidity and even a monumentality that risk putting in the shade disputes over process, agency, and orientation. These reifying effects are not inevitable, but it does take conscious effort to keep conflict and contingency in view. With this in mind, I wish to highlight three facets in particular of the global administrative law research project, as currently framed. And having just said that one of the great things about this project is that it pushes us to be specific about matters that we have more often treated sweepingly, I should admit straight away that my comments will actually be pitched in rather abstract terms. What interest me are certain general issues revolving around the way we conceptualize the problems of global administration and the ideas that inform our engagements in this field.

My first set of points relates to the nature of the analytical challenge we face with global administrative law. Here the danger I want to highlight is that of treating as technical or cultural that which needs rather to be considered as political.

1. Thomas Dutoit, *Introduction* to JACQUES DERRIDA, *ON THE NAME*, at i, xiv (Thomas Dutoit, ed., 1995).

I use the term “political” in a broad sense to refer to the sorts of questions B.P. Chimni has raised²—questions about public priorities and social projects, and about the bearing of choices that are made for the allocation of available goods and opportunities, both within countries and across the world. What I have in mind is the way we tend to speak as if the issues faced in global administrative law revolve around weak systems and divergent values. Thus we call for more work on strengthening procedures and clarifying norms, without fully registering that, depending on how the procedures and norms are structured, some people in some countries will benefit, while others will face deepening deprivation. Likewise we call for better understanding of the scope of consensus with regard to the principles of global administrative law, and for an end to Western bias in accounts of them, without fully registering that those principles are everywhere subject to contestation and dispute. If there are limits to the consensus that exists at any given moment, that is not only—or perhaps even primarily—a matter of cultural difference; it’s because, again, global administrative law is bound up with distributive stakes. My simple point then is that we need to avoid addressing issues in a way that occludes awareness of the political significance of the processes under review.

The second aspect on which I would like to comment relates to the way we understand and present historical change within global administrative law. The concern I want to register here has to do with the temptation we all face to analyze events as stories of progress. Of course, everyone is aware of setbacks and contingencies and unforeseen problems, but I think it may be valuable to recognize that we retain nonetheless a strong investment in the idea of the present as in some sense the overcoming of the past. If we recognize this, we may become more alert than we would otherwise be to the ways in which the “play of dominations” goes on. Let me give an example, inspired by an article I read some time ago about the Internet. The author of this article, Jodi Dean, wanted to challenge the notion gaining currency in some quarters that the Internet is, or has the potential to become, a new global public sphere, insofar as it lends publicity to power and opens to scru-

2. See B. F. Chimni, *Co-Option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 799 (2005).

tiny by citizens things that would otherwise remain hidden.³ For Dean, the situation we confront today is rather one in which the operations of power are frequently all too transparent. In her words:

We know full well that corporations are destroying the environment, employing slave labor, holding populations hostage with their threats to move their operations to locales with cheaper labor. All sorts of horrible political processes are perfectly transparent. The problem is that people don't seem to mind, that they are so enthralled by transparency that they have lost the will to fight (*Look! The chemical corporation really is trying . . . Look! The government explained where the money went . . .*).⁴

Almost without exception contributors to New York University's research project have stressed the importance of transparency as a check on arbitrary power, and clearly it must be a key element in any system of global administrative law. But here we receive a reminder that it can also be co-opting. It can help to forestall emancipatory change, sustaining exploitation with a fresh legitimating ideology. So what I am suggesting is again a familiar point, that we need to remain alert to the way progressive concepts can become pacifying ideologies. However valid and indeed precious as a strategy for curbing abuses in global administration, transparency is not an end in itself and must not be allowed to appear so.

The third and final cluster of issues I would like to mention relates to the normative dimensions of global administrative law, and specifically to the significance of democracy. One way of approaching that significance, reflected in the joint paper prepared by Benedict Kingsbury, Nico Krisch, and Richard Stewart, is to say that, given the difficulties which stand in the way of the democratization of global administration, we should "bracket questions of democracy" and focus on attaining the more feasible but still important aim of building meaningful and effective mechanisms to control abuses of power and se-

3. Jodi Dean, *Why the Net Is Not a Public Sphere*, 10 *CONSTELLATIONS* 95 (2003).

4. *Id.* at 110.

cure rule of law values.⁵ A somewhat similar proposal is made by Ruth Grant and Bob Keohane, who argue in their article that “strict analogies from domestic democratic politics should be regarded with skepticism, and we should resist the temptation to narrow the issue of accountability to that of democratic control.”⁶ I find the distinction underpinning this analysis between a participation model of accountability and a delegation model very helpful. But I must say I wonder about the assumption that we need to give up on democracy and make delegation our primary model. If we do that, then to my mind we risk losing a key part of the reason for pursuing accountability in the first place. We may ensure that businesses receive reasons for decisions and opportunities to challenge those decisions yet do relatively little to connect ordinary people with all these entities that affect their lives. Is this unavoidable?

It is, of course, true that strict analogies from domestic democratic politics should be regarded with skepticism. But it is also the case that few argue for such analogies. Moves to enhance the democratic character of global decisionmaking processes are widely understood to pose an immense imaginative challenge, and to depend on the design and construction of new kinds of institutions and procedures. What then of the claim that democracy needs to be bracketed in discussions of global administrative law because the social basis for global democratization is lacking? That there is no global public or demos is said to be reflected in the fact that “only a very small minority of people in the world identify and communicate with other people on a global basis or even follow world events very closely.”⁷ But if identification, communication, and interest in current affairs are the criteria, then (speaking at least of my own country) I am not sure about the existence of a *national* demos! More seriously, we know that political communities are not themselves naturally occurring entities, but are partly constituted and reconstituted through law. The point here is not just the imagined character of all communities, but

5. Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 48-51 (Summer/Autumn 2005).

6. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *AM. POL. SCI. REV.* 1, 14 (2005).

7. *Id.* at 6.

the specific significance of international law and institutions with regard to global associational life.

Let me mention one final consideration which bears upon the necessity of bracketing democracy in global administrative law. This has to do with the fundamental question of what we consider democracy to be, what sort of concept we think it is, and what function we see it performing. In the accounts to which I am responding here, democracy is a descriptive term for a form of government that has been adopted in some countries, referred to accordingly as “democracies”—a form of government characterized by certain procedures and institutions, and especially the holding of periodic multiparty elections. This, of course, is a very familiar way of speaking about democracy, but equally obviously it is not the only way. We can also use democracy not as a description of a form of government, but rather as a critical concept, a tool for evaluating and reforming political arrangements by reference to particular principles, among them principles of anti-paternalism, inclusion, and equality.

Behind this alternative usage are three observations worth recalling here. One is that, if we define democracy by reference to institutions and procedures, we beg the question of what it is about those institutions and procedures that makes them distinctively democratic. Only by moving to the level of principles can we adequately explain and evaluate democratic claims. Linked to this, secondly, there is democracy’s function as a critical concept. While it may sometimes make sense to speak of democracy *tout court* in contradistinction to highly authoritarian political systems, more commonly democracy is a relative matter, rather than an absolute one. The key issue is how existing arrangements may be made *more* democratic. The third observation, especially pertinent in conditions of intensifying globalization, is that democracy has no privileged site. Whereas modern democracy developed historically in connection with nation-state governance, the dispersal of political authority in today’s world means that the prospects for national democracy depend inescapably on the prospects for global democracy. Indeed, they depend on the recognition that democracy belongs wherever public agendas are set and policies framed. If we follow an approach informed by these three points, it may well be that the obstacles held to stand in the path of bringing democracy to bear in global affairs will

begin to fall away. In their place may come a new appreciation of the possibilities for global administrative law to contribute to the democratization of global governance and a new awareness too of the urgency of that endeavor.

At the beginning of these remarks, I spoke about the magic of naming. Part of that magic has to do with the way naming is not just a matter of sticking on labels. At least where we are speaking of social phenomena, it changes what is named. An element within a new conceptual framework is something different from what it was when considered as an isolated phenomenon; it has new features, prompts new enquiries, orients action in new directions. If at one level global administrative law was already there, an inchoate concept waiting for linguistic embodiment, at another level that linguistic embodiment surely alters our intellectual landscape in some quite decisive ways. With that in mind, let me end by observing that, whatever else has been or may in the future be accomplished by New York University's project, one thing at least seems clear. The issues it encompasses will never be quite the same again.

