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Rethinking Global Administrative Law: Formulating a working definition of "global administrative action"

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Abstract

Global administrative law (GAL) aims to plug the "accountability deficit" in global institutions by projecting national administrative law principles onto the global scale. Global administrative action has been provisionally delineated as "rulemaking, adjudication, and other decisions that are neither treaty-making nor simple dispute settlements between parties". But the concept has not yet been defined. The paper adopts a "bottom up" approach by analysing the domestic administrative law of America, New Zealand, and South Africa in order to construct a definition of global administrative action. The paper presents a working definition of the concept.

Word Count

The text of this paper comprises 7, 164 words (excluding footnotes).

Subject and Topic Keywords

Global administrative law – Working definition – Global administrative action

I. Introduction

This paper tries to rethink global administrative law (GAL) by attempting to formulate a working definition of global administrative action. The methodology of the paper is therefore prescriptive. To date references to global administrative action in GAL scholarship have only outlined the concept rather than defined it; outlining generally concerns sketching the essential features of something, while defining focuses on the process of definitively stating the meaning of something. This paper will discuss this difference in more detail further below.

The structure of the paper will proceed in three main parts as follows. First, the paper will briefly discuss global administrative action in the context of GAL. This part will briefly explain the emergence of GAL and the problem of the accountability deficit on the global scale. The paper will then set out the provisional delineation of global administrative action and thereafter explain the difference between delineation and definition. The paper will further expand on this difference by justifying the need for a working definition of global administrative action. Second, the paper will conduct a comparative analysis of administrative law in America, New Zealand, and South Africa. Before doing so, the paper will explain the difference between the top down approach and the bottom up approach in developing GAL principles. The limitations of both approaches will be briefly discussed. The paper will then justify the use of the bottom up approach in formulating a working definition of global administrative action. The comparative analysis will follow focusing on the fundamental structures in each jurisdiction, their key phrases, and case authority dealing with these phrases. This comparative analysis will provide the building blocks in formulating a working definition. Third, the paper will attempt to formulate a working definition and will thereafter briefly reflect on the influence that each jurisdiction has had on the draft definition.

A. Global Administrative Action

1. The Emergence of GAL and the Accountability Deficit

In Kingsbury et al *The Emergence of Global Administrative Law*,[1] published in 2005, the authors provided the scholarly basis for the establishment of the GAL Research Project at New

[1] Benedict Kingsbury, Nico Krish and Richard B Stewart "The Emergence of Global Administrative Law" (2005) 68 *Law and Contemporary Problems* 15 – 61.

York University School of Law.[2] This Project is designed to systematise research efforts into a diverse range of national, transnational, and international contexts that relate to the application of administrative law to global governance.[3]

According to the authors, there is evidence of a large increase in transnational governmental regulation and administration in fields such as security, environmental protection, and banking and finance regulation, amongst others.[4] The problem is that much of the implementation of these regulations is determined by global administrative bodies that are neither subject to the direct control of national governments nor to the state parties to the treaty that creates them.[5] But these bodies nonetheless exercise considerable power over private parties and nation states.[6] This lack of direct control has created what the authors refer to as an "accountability deficit" and GAL aims to plug this deficit by projecting national administrative law principles onto the global scale.[7] The authors then claim that the above developments caused them to define GAL as comprising the following:[8]

> … 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.

In defining GAL, the authors propose that global governance can be analysed by reference to administrative action.[9] The authors argue that domestic law presumes that there is a shared sense of administrative action despite the fact that (a) the phrase is negatively defined as not being legislative or judicial in nature and (b) the boundaries between these categories do not fit neatly into watertight compartments.[10] The authors point out that in global governance,

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[2] At 15.
[3] At 15.
[4] At 16.
[5] At 16.
[6] At 16.
[7] At 16.
[8] At 17.
[9] At 17.
[10] At 17.

which occurs beyond the nation state, the institutional setting is much more "variegated" making a common understanding difficult to achieve.[11]

2. Provisional Delineation of Global Administrative Action

Crucially, the authors state that "[a]s a matter of provisional delineation, global administrative action is rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties."[12] The authors give some examples of heavily regulated global administrative bodies as being the World Trade Organisation, the International Monetary Fund, and the Basel Committee.[13]

One of the authors of the above article, Professor Kingsbury, has expanded on the concept of global administrative action.[14] Kingsbury states as follows:[15]

> Legal activities by public entities other than states in the global administrative space can be divided into categories on somewhat similar lines.
>
> (1) The institutional design, and legal constitution, of the global administrative body (a public entity, other than a state)
>
> (2) The norms and decisions produced by that entity, including norms and decisions that have as their addressees, or otherwise materially affect:
>
> - other such public entities
> - states and agencies of a particular state
> - individuals and other private actors.
>
> (3) Procedural norms for the conduct of those public entities in relation to their rules and decisions, including arrangements for review, transparency, reason-giving, participation requirements, legal accountability and liability.

[11] At 17.
[12] At 17 footnote omitted.
[13] At 18.
[14] Benedict Kingsbury "The Concept of 'Law' in Global Administrative Law" (2009) 20(1) *The European Journal of International Law* 23 – 57.
[15] At 34.

Kingsbury referred to the above as "categories of global administrative action".[16] Again, it is notable that the author deliberately avoided the use of "definition" in explaining global administrative action but instead referred to "categories" of the concept. These categories concern the constitutive documents of a global body, the substantive norms and decisions that materially affect various stakeholders both public and private, and the procedural norms arising out of the production of the substantial norms and decisions.

3. Delineation v Definition

It is clear that the authors of *The Emergence of Global Administrative Law* only go as far as delineation but not definition. This is so despite Professor David Dyzenhaus' characterisation of their efforts as amounting to a "provisional definition of global administrative 'action'".[17] However, the dictionary meaning of "delineation" and "definition" explains the difference between these words and this paper argues that to date there has been no attempt at a definition of global administrative action. "Delineation" has been defined to mean "a drawing in outline".[18] In contrast, a "definition" means "the action or process of stating the meaning of a word or word group".[19] This paper seeks to take the matter further by formulating a working definition of global administrative action. The meaning of a definition and its value will be explored more fully immediately below.

4. Justification for Working Definition

K. M. Sharma's article entitled *The Dilemma About the Proper Definition of Law: Do Arguments About it Constitute a Wasteful Diversion of Intellectual Energy?* provides a clear explanation of what a definition is as well as its purpose and value.[20] The author's introductory paragraphs read as follows:[21]

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[16] At 34.
[17] David Dyzenhaus "Accountability and the Concept of (Global) Administrative Law" (2009) *Acta Juridica* 3 at 5.
[18] *Webster's Third New International Dictionary Unabridged* (Merriam Webster Inc, Springfield Massachusetts, 1993) at 597.
[19] At 592.
[20] K. M. Sharma "The Dilemma About the Proper Definition of Law: Do Arguments About it Constitute a Wasteful Diversion of Intellectual Energy?" (1968-1969) 4(1) *Portia Law Journal* 41 – 47.
[21] At 41.

> To define is to limit, to discover the limits and boundaries of a particular idea we have in mind. A definition attempts to distinguish a particular idea or thing from other ideas or things. As part of such a distinguishing process, a definition may also include a description of the things or ideas defined. The purpose of such a definition is to facilitate better communication.
>
> The value of a definition is directly dependent upon the need for such a definition and the extent to which the idea or thing defined is capable of being limited. Thus, simple things in life do not need to be defined, although a definition would not in any way hurt the usage of words depicting them.

Global administration action is not one of the "simple things in life". But it is also not too complex to be defined; the concept is capable of being limited; it has already been provisionally delineated; it has also been placed into the various categories. This paper argues that global administrative action is "neither too simple to need a definition nor too complex to be capable of one."[22]

The real value of a definition lies in the need to probe those factors that have brought the concept into being.[23] In this regard, Sharma asks as follows: "Should not a definition not only constitute an explanation but also probe beneath the mirage of the label into the constituent factors which have brought forth the phenomena?"[24] Regarding labelling and naming, Susan Marks' *Naming Global Administrative Law*[25] points out that naming a concept is more than merely giving it a label. Rather, the act of giving something a name actually changes what has been named.[26] The newly named concept "has new features, prompts new enquiries, orients action in new directions".[27] Although the concept of global administrative action has already been named, it has not spurred much debate nor has it prompted new enquiries into exactly what it entails. The concept has been referred to in only a few scholarly articles and even then only by way of tangential reference often in a footnote.[28] If, as Sharma suggests, a definition

[22] At 42.
[23] At 43.
[24] At 43.
[25] Susan Marks "Naming Global Administrative Law" (2005) 37 *New York University Journal of International Law and Politics* 995 – 1001.
[26] At 1001.
[27] At 1001.
[28] See Bryce Adamson "The New Zealand Food Bill and Global Administrative Law: A Recipe for Democratic Engagement?" (2014) 8(1) *Vienna Journal on International Constitutional Law* 58 – 85 at 62 and Richard Stewart

ought to probe beneath the surface of a concept and if the undefined concept of global administrative action has already been named but not sufficiently probed, then it is clear that there is real value to be had in defining global administrative action.

To the question "Why probe?" would be the answer: "Because of the need to determine whether 'global administrative action' can actually exist or whether it is a mirage" and perhaps also "Because of the need to determine whether the concept has been correctly named". This is not a circular argument nor does it elide the distinction between naming and defining a concept. It is to do justice to Sharma's suggestion that definitions ought to probe beneath the "mirage of the label" into the constituent factors that gave it life. Why did Kingsbury use the phrase "global administrative action" as opposed to something broader like "global decision-making" or "global governance action"? Why did the author appropriate the phrase "administrative action", which is capable of definition and has been defined in South Africa, and then prefix it with "global" without any attendant definition? A provisional delineation is hardly a robust tool with which to probe the constituent elements of a concept; to probe necessarily implies some level of depth in the content of the idea being probed and, by their very nature, outlines do not have depth.

Sharma's article describes a definition as being a "shorthand statement of the views of law entertained by the definer".[29] There are usually two types of disagreement over an attempted definition. The first amounts to mere "word-quibbling" while the second concerns "deep philosophical differences".[30] The former type involves semantic disputes over the use of words in the definition and are generally a waste of intellectual energy; the latter does not concern the form of the definition but rather fundamental differences over the definer's view of the law as reflected in the definition.[31] Sharma views the latter type of argument as being as welcome as a spring shower.[32]

This paper focuses specially on global administrative action. It offers a working definition not only to probe beneath the surface of the concept into the constituent factors that brought it forth

"Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness" (2014) 108 *American Journal of International Law* 211 – 270 at fn 19.
[29] Sharma, above n 20, at 44.
[30] At 44.
[31] At 44.
[32] At 47.

in the first place but also to spur further debate over the definer's view of the law as reflected in the definition.

B. Comparative Analysis of Domestic Administrative Law

1. Top Down and Bottom Up

The use of comparative law analysis in order to develop the principles of GAL is not without precedent. Wuertenberger and Karacz's *Using an Evaluative Comparative Law Analysis to Develop Global Administrative Law Principles*[33] used the comparative law analysis applied by the European Court of Justice in respect of European Union administrative law principles in order to locate GAL principles.[34] But it is also possible to use domestic administrative law principles as a model for GAL. Stewart's *US Administrative Law: A Model for Global Administrative Law?*[35] described both a "bottom up" approach in terms of which domestic administrative law principles are projected onto the global scale[36] and a "top down" approach in terms of which treaty-based regimes would adopt more transparent procedures in order to enhance the accountability of global bodies.[37]

The authors of *The Emergence of Global Administrative Law* also discuss these two approaches to GAL. The authors identify various constraints in respect of the bottom up approach. This approach may be productive but it is limited by the following: (a) the relative informality of global administrative institutions, (b) the multi-level system that exists on the global scale as decisions can often be attributed to domestic, foreign, and international actors at once, and (c) the role that private actors play in global administration.[38] But these limitations must not be overstated. As will be shown further below, in South Africa, the law on administrative action recognises the major role played by private bodies in exercising public power and seeks to subject that power to administrative control. Furthermore, the authors were grappling with a newly minted concept. Likewise, the concept of global administrative action has not received

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[33] Thomas D. Wuertenberger and Maximilian C. Karacz "Using An Evaluative Comparative Law Analysis to Develop Global Administrative Law Principles" (2008 – 2009) 17 *Michigan State Journal of International Law* 567 – 599.
[34] At 594.
[35] Richard B. Stewart "US Administrative Law: A Model for Global Administrative Law?" (2005) 68 *Law and Contemporary Problems* 63 – 108.
[36] At 71 – 72.
[37] At 72.
[38] Kingsbury et al, above n 1, at 53 – 54.

much detailed attention by GAL scholars. In addition, the authors also identify pitfalls with the top down approach. They argue that this approach might produce far greater democratic problems than one based on a bottom up approach.[39] It would also face many of the same challenges as the bottom up approach such as the diffusion of decision-making in a multi-level system, amongst other concerns.[40]

2. Justifying the Bottom Up Approach

This paper appropriates the bottom up approach in order to formulate a working definition of global administrative action. The reason for this is primarily that the national administrative systems discussed below began to develop the concept of administrative action some time before the emergence of GAL was first noticed by American scholars. The law often values that which is first in time. In this regard, there is a legal concept of "priority", which concerns the status of being earlier in time.[41] There is also the maxim known by the expression "earlier in time, stronger in right".[42] This paper promotes the value of priority by focusing on what came first. The American Administrative Procedure Act was enacted in 1946, the New Zealand Judicature Amendment Act in 1972 and the Bill of Rights Act in 1990, and the South African Constitution in 1996 as well as its administrative justice statute in 2000. In contrast, GAL was first noticed in 2005 making it a comparatively recent phenomenon.

Despite all its limitations, this paper would appropriate the bottom up approach in defining global administrative action. Adopting this approach would also be to follow the logic of GAL scholarship, which is, in part, about projecting national administrative principles onto the global scale.

3. America

This paper has already noted the establishment of the GAL Research Project at the New York University School of Law. It is for this reason that this paper begins the comparative analysis with a discussion of administrative law in America.

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[39] At 57.
[40] At 57.
[41] Brian A Garner (Ed) *Black's Law Dictionary* (10th ed, Thomas Reuters, Minnesota, 2014) at 1386.
[42] At 1946.

(a) Fundamental structure

There are four fundamental structures of US administrative law. The first is that a deliberative and elected legislative body enacts original legislation and delegates their implementation to executive officials.[43] The second is that a discrete administrative body implements the law by way of adjudication, rulemaking, or other types of administrative decision.[44] The third is that an independent court or tribunal reviews these decisions based on their conformity with the four corners of the delegation and other applicable prescripts.[45] The fourth is that the transparency of the decision-making process is bolstered by public access to government records.[46]

The Administrative Procedure Act 1946 (APA) has been incorporated into the United States Code (Code).[47] The APA provides for two basic types of procedures for decision-making, namely, notice-and-comment rulemaking and adjudication by way of a hearing.[48] The APA also sets out four basic thresholds for judicial review: (a) the agency's compliance with the procedural requirements, (b) the sufficiency of the evidence on record in support of the agency's factual determinations, (c) whether the agency action conforms with constitutional and statutory authority, and (d) whether the agency's exercise of discretion is unreasonable in the sense of being arbitrary or capricious, amongst other grounds.[49]

(b) Agency action

In terms of the Code, administrative action is referred to as "agency action". In this regard, "agency" is defined to be "each authority of the Government of the United States, whether or not it is within or subject to review by another agency".[50] The definition lists various exclusions such as the Congress and the courts of the United States.[51] "Rule" is defined as follows:[52]

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[43] Stewart, above n 35, at 73.
[44] At 73.
[45] At 73.
[46] At 73.
[47] The US Code is available on <https://www.law.cornell.edu/uscode/>, accessed on 15 May 2015.
[48] Stewart, above n 35, at 74.
[49] At 74.
[50] 5 U.S. Code § 551(1).
[51] 5 U.S. Code § 551(1)(A) and (B).
[52] 5 U.S. Code § 551(4).

> [T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing

Notably, a "rule" concerns the implementation of law. The Code also defines "rule making" as being "agency process for formulating, amending, or repealing a rule".[53] The Code sets out the notice-and-comment procedure required for the making of rules, which has broad application.[54] The procedure is as follows:[55]

> **(b)** General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> **(1)** a statement of the time, place, and nature of public rule making proceedings;
>
> **(2)** reference to the legal authority under which the rule is proposed; and
>
> **(3)** either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, this subsection does not apply—
>
> **(A)** to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
>
> **(B)** when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

[53] 5 U.S. Code § 551(5).
[54] 5 U.S. Code § 553(a).
[55] 5 U.S. Code § 553(b) – (c).

> **(c)** After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

The remainder of the section concerns time-barred procedure for the publication or service of the rule and the right of petition for interested parties in respect of the issuance, amendment, or repeal of a rule.[56] Section 556 deals with hearings, the burden of proof, evidence, and the record of the hearing as the basis of the decision, amongst other issues. Section 557 concerns initial decisions, review by an agency, submissions by the parties affected, and the keeping of a record and its contents, amongst other issues.

(c) Case authority on agency action

The US Supreme Court has recently dealt with an issue arising from the APA in *Perez v Mortgage Bankers Association.*[57] The Supreme Court overruled a decision of the US Court of Appeals for the District of Columbia Circuit in *Paralyzed Veterans*, which had held that agencies had to use the notice-and-comment procedure when adopting a new interpretation of a regulation that differed significantly from the interpretation previously adopted.[58]

Perez concerned rulemaking and the distinction between legislative and interpretive rules. Legislative rules are issued through the notice-and-comment procedure and have the "force and effect of law".[59] Interpretive rules are generally not issued by this procedure; they are designed to advise the public of the agency's interpretation of the statutes and rules that it administers; these rules do not have the "force and effect of law and are not accorded that weight in the adjudicatory process".[60] The dispute was whether mortgage loan officers were

[56] 5 U.S. Code § 553(d) – (e).
[57] *Perez v Mortgage Bankers Association* 575 U. S. ____ (2015).
[58] At 1.
[59] At 2.
[60] At 2.

exempt from the Fair Labor Standards Act, which empowered the Secretary of Labor to "define" and "delimit" categories of administrative exemption. The current regulations were promulgated in 2004 using the notice-and-comment procedure. Prior to this, the relevant division within the Department had issued an opinion letter in 1999 and again in 2001 both of which stated that such loan officers were not exempt. After the current regulations were promulgated the Mortgage Bankers Association (MBA) requested an opinion regarding exemption and, in 2006, the Department issued an opinion letter stating that loan officers were exempt. But in 2010 the Department issued another interpretation stating that they were not exempt. The MBA filed a complaint that the 2010 interpretation was inconsistent with the 2004 regulations and was arbitrary and capricious.[61]

During the course of its reasoning, the Supreme Court justified its overruling of *Paralyzed Veterans.* Justice Sotomayor held that *Paralyzed Veterans* had conflated the definition of rulemaking with the procedures to be followed in making rules.[62] The procedural provisions of the APA exempt interpretive rules from the notice-and-comment procedure.[63] Justice Sotomayor then held as follows:[64]

> Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.

The APA provides for the "full extent" of judicial review of agency action based on procedural correctness.[65] *Paralyzed Veterans* effectively created a "judge-made procedural right" not ordained by Congress.[66]

The above case provides a useful tool in formulating a working definition of global administrative action by not only clarifying the distinction between legislative and interpretive rules but also the distinction between the procedures to be used in producing them. The case is

[61] At 4 – 5.
[62] At 7.
[63] At 7 – 8.
[64] At 8.
[65] At 8.
[66] At 8.

also of assistance as a cautionary note against conflating the definition of rulemaking with the procedure to be used in making the rule.

4. New Zealand

(a) Fundamental structure

Sir Geoffrey Palmer's recent book entitled *Reform: A Memoir* describes New Zealand's "Constitution" as being "unique" and "odd".[67] Palmer also notes that New Zealand does not have a "Constitution" in the same sense as America.[68] In New Zealand, laws can be changed by a simple parliamentary majority except for a provision in the Constitution Act 1986 and five provisions in the Electoral Act 1993.[69] Palmer outlines the constitution as follows:[70]

> In a nutshell here is how the constitution of New Zealand works. The Parliament passes laws, levies taxes and controls government expenditure. Elections are required to be held every three years and they are held under a system of mixed-member proportional representation (MMP). The Cabinet, the members of whom must be members of Parliament, governs. Members of Cabinet must maintain the confidence of Parliament in order to remain in office. The public service operates under the authority of ministers and must carry out their decisions. The courts operate independently of both Parliament and the executive branch of government, which consists of Cabinet and the public service. Parliament creates the law and the courts decide disputes according to these statutes, but the role of interpreting the law in any particular case falls to the courts, not to Parliament. If the result is not to Parliament's liking, it can amend the law. The judiciary is shielded by law from interference by ministers. The judiciary is the main protector of the important constitutional norm of the rule of law. Clearly, public power is not distributed evenly among these three branches of government. Parliament has most power. (Footnote omitted)

[67] Geoffrey Palmer *Reform: A Memoir* (Victoria University Press, Wellington, 2013) at 337.
[68] At 338.
[69] At 338.
[70] At 339.

This part of the paper will limit its discussion of administrative law to the relevant phrases contained in legislative enactments and the court's interpretation of these phrases.

(b) Administrative determinations

Part 1 of the Judicature Amendment Act 1972 is entitled "[s]ingle procedure for the judicial review of the exercise of or failure to exercise a statutory power". Section 3 provides for the interpretation of words and phrases used in the Act. A "decision" includes a "determination or order". Notably, the Judicature Modernisation Bill had its first reading on 5 December 2013.[71] The Minister of Justice stated that the Bill contains six parts, five of which are intended to result in new Acts.[72] Part 3 of the Bill enacts the Judicature Amendment Act 1972 as a "stand alone" Act, namely, the Judicial Review Procedure Act.[73] This new Act will continue the processes and procedures but will update the language.[74] The Attorney-General described the Bill as a "monumental reform".[75] The Bill was read for the first time and referred to the Justice and Electoral Committee.[76] The second reading took place on 18 February 2015.[77] The current version of the Bill defines "decision" as including "a determination or an order".[78] The wording has not changed.

The International Covenant on Civil and Political Rights 1966 (ICCPR), which was ratified on 28 December 1978.[79] The ICCPR provides for the right to an effective remedy.[80] The ICCPR also provides that each state party undertakes in relevant part as follows:[81]

> To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

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[71] (5 December 2013) 695 NZPD 15299.
[72] At 15299.
[73] At 15300.
[74] At 15300.
[75] At 15303.
[76] At 15304.
[77] See <http://www.parliament.nz>, accessed on 30 May 2015.
[78] Judicature Modernisation Bill, cl 424.
[79] See <http://www.justice.govt.nz/>, accessed on 29 April 2015.
[80] Art 2 para 3(a).
[81] Art 2 para 3(b).

New Zealand has incorporated the ICCPR into its domestic law by way of the Bill of Rights Act 1990. The long title of the Bill of Rights Act 1990 clearly states that the Act affirms New Zealand's commitment to the ICCPR. Section 27 provides for the right to justice. Section 27(1) reads as follows:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

This paper is of the view that "determination" is the key word that triggers the operation of the right to natural justice in respect of conduct on the part of a tribunal or public authority. Section 27(2) refers to those rights, obligations, or interests "affected" by the determination in question.

(c) Case authority on determinations

The Court of Appeal has interpreted the key words contained in section 27(1) of the Bill of Rights Act. In *Chisholm v Auckland City Council*[82] the court held that "determination" has an "adjudicative connotation" to it.[83] The court also held that the subsection is "not expressed on the basis of a determination which may have some indirect general impact on another person's rights etc."[84] The court further held that "public authority" and "tribunal" are conceptually linked and that this reinforces the view that section 27(1) is adjudicative in nature.[85]

The Court of Appeal's interpretation in *Chisholm, supra,* was qualified by the same court in *Combined Beneficiaries Union Inc v Auckland City COGS Committee.*[86] The majority held that "determination" is a "general, open-ended term".[87] The majority also held that it was possible that the use of "determination" was intended as a narrower term than "decision", which is used in the Judicature Amendment Act.[88] The majority then extended the meaning of the phrase

[82] *Chisholm v Auckland City Council* 2005 NZAR 661 (CA).
[83] Para 32.
[84] Para 32.
[85] Para 32.
[86] *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2009] NLR 56 (CA).
[87] Para 15.
[88] Para 15.

"rights, obligations, or interests" in section 27(1) to include "claimed" rights, obligations, or interests, and even "discretionary determinations".[89] The majority then qualified the judgment in *Chisholm, supra*, by holding that that "[c]ourt's use of the word "adjudicative" was not intended to suggest that the s 27(1) right is narrower than the common law right to natural justice."[90] The majority held that the *Chisholm* court used "adjudicative" in order to place emphasis on the fact that the public authority's or tribunal's determination must directly affect a person's rights, obligations, or interests before the right to natural justice becomes operable.[91]

5. South Africa

(a) Fundamental structure

As will be seen below, unlike New Zealand, South Africa has enacted a stand-alone statute dealing with administrative justice and this statute specifically defines administrative action.

The Constitution of the Republic of South Africa 1996 (Constitution) contains a Bill of Rights in Chapter 2. Section 33 provides for the constitutional right to just administrative action. Section 33(1) provides that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair." Section 33(3) obliged Parliament to enact legislation specifically providing for the review of administrative action. Parliament duly complied with this obligation by enacting the Promotion of Administrative Justice Act 2000 (PAJA).[92]

Notably, the courts developed jurisprudence on the nature of administrative action prior to the enactment of the PAJA. This paper will briefly discuss some of these cases before turning to the statutory definition of administrative action.

(b) Pre-PAJA administrative action

In *Nel v Le Roux NO and Others*[93] the Constitutional Court dealt with summary sentencing procedure and held that it constituted judicial action and not administrative action for the purposes of the administrative justice clause of the Interim Constitution 1993.

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[89] Para 17.
[90] Para 43.
[91] Para 43.
[92] Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).
[93] *Nel v Le Roux NO and Others* (CCT30/95) [1996] ZACC 6 (4 April 1996).

In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[94] the Constitutional Court held that administrative action under section 33 of the Bill of Rights excluded legislative decisions taken by deliberative and elected legislative bodies exercising original powers under the Constitution.[95]

In *President of the Republic of South Africa v South African Rugby Football Union*[96] the Constitutional Court dealt with neither judicial nor legislative action but rather with the conduct of the President in appointing a commission of inquiry into the administration of rugby in South Africa.[97] The court held that section 33 of the Bill of Rights uses the adjective "administrative" to qualify "action" and that what really matters is the function being performed rather than the functionary.[98] Crucially, the court held that the national executive's responsibilities arising from the implementation of legislation are administrative in nature and justiciable. Further to this, the implementation of legislation will ordinarily constitute administrative action for the purposes of section 33.[99]

(c) Administrative action under PAJA

The enactment of the PAJA marked a watershed moment in South African administrative law. This is so because the statute provides aggrieved persons with a primary cause of action against administrators in cases of unjust administrative action.[100] But the task of determining the content of administrative action has proved to be a major challenge for the courts. Section 1 defines administrative action and the relevant part reads as follows:

> "administrative action" means any decision taken, or any failure to take a decision, by –
> (a) an organ of state, when –
> (i) exercising a power in terms of the Constitution or a provincial constitution; or

[94] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17 (14 October 1998).
[95] Paras 26 – 27 and 45.
[96] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11 (10 September 1999).
[97] Para 140.
[98] Para 141.
[99] Para 142.
[100] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15 (12 March 2004) para 25.

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect …

The definition continues by excluding various public functionaries from its ambit such as the legislative functions of Parliament.[101] The definition is multi-layered in the sense that it contains various other keywords such as "decision", "failure", and "empowering provision", which are themselves defined elsewhere in the section.[102]

(i) Decision

The definition of "decision" is wide and the relevant part of the leading sentence refers to "any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision".[103] The definition proceeds to list some specific iterations of a decision such as the "making, suspending, revoking or refusing to make an order, award or determination"[104] and the more general "doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly".[105]

One difficult question arising from the above is whether, in general, the making of regulations by an organ of state such as a Minister constitutes administrative action. The Constitutional Court in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* grappled with this question.[106] The Chief Justice said that it did.[107] But there was no clear majority view on this issue. Five justice agreed that the PAJA was applicable to regulation-making in the case at hand but not necessarily generally; only one of these justices concurred

[101] PAJA, s 1(dd).
[102] Cora Hoexter *Administrative Law in South Africa* (2nd ed, Juta, Cape Town, 2012) at 196.
[103] PAJA, "decision" s 1.
[104] PAJA, "decision" s 1(a).
[105] PAJA, "decision" s 1(g).
[106] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14 (30 September 2005).
[107] Paras 120 – 135.

fully with the reasoning of the Chief Justice. The five remaining justices held that it was unnecessary to decide whether the PAJA was applicable; one of these justices nonetheless assumed that the statute was applicable.[108] This issue has still not been authoritatively resolved by the highest court of the land. However, the Supreme Court of Appeal, which is the court immediately below the Constitutional Court in the hierarchy, has taken it as given that regulation-making constitutes administrative action for the purposes of the PAJA.[109]

The High Court in *Bhugwan v JSE Limited*[110] has offered some practical guidance on the nature of an administrative decision. The court held as follows:[111]

> [F]or a decision to have been taken which is capable of review, all or at least some of the following steps must have been completed in the decision-making process:
>
> 1. Save where an authority legitimately acts cohersively or of its own accord, a final application, request or claim must have been addressed by a subject to an authority which exercises statutory or public powers to exercise those powers in relation to a set of factual circumstances applicable to the subject;
> 2. All relevant information, either presented by the subject or otherwise reasonably available must have been gathered (which may require an investigative process) and placed before the authority which is to make the decision;
> 3. There must have been an evaluative process where the authority considers all of the information before him or her, identifies which components of such information are relevant and which are irrelevant and in which the authority assigns, through a process of value judgments, a degree of significance to each component of the relevant information, regard being had to the relevant statute or other empowering provision in terms of which the authority acts;

[108] Hoexter, above n 102, at 201 fn 230.
[109] See *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* (232/08) [2009] ZASCA 87 (10 September 2009) para 10.
[110] *Bhugwan v JSE Limited* (08/32943) [2009] ZAGPJHC 33 (31 July 2009).
[111] Para 10.

> 4. A conclusion must have been reached by the authority, pursuant to the evaluative process, as to how his or her statutory or public power should be exercised in the circumstances; and
> 5. There must have been an exercise of the statutory or public power based on the conclusion so reached.

The above quote helps to understand the requirements for an administrative decision from a practical perspective. The main elements of decision-making would be the examination of information, the application of the mind to this information in order to sort the relevant from the irrelevant, the reaching of a conclusion based on the relevant information, and the exercise of statutory or public power based on the conclusion. But the definition of administrative action goes further and includes the failure to take a decision and "failure" in this regard "includes a refusal to take the decision".[112] This further definition arguably adds a layer of complexity to the definition of administrative action.

The Constitutional Court has recently held that the definition of administrative action even includes unjust administrative action on the part of an administrator. In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*[113] the court dealt with two decisions arising from an application submitted to the Eastern Cape government to establish a private hospital in that province. The first decision refused the application and the second approved it.[114] The department argued that it was entitled to ignore the approval as a non-decision.[115] The majority of the court rejected this view and in doing so held that the question was rather whether the approval constituted administrative action for the purposes of the PAJA.[116] The majority held further that an approval granted under unlawful dictation is still a decision and it has legal effect until set aside by a court of law.[117] The majority held that the definition of administrative action includes unjust administrative action and covers not only decisions but also the failure to take a decision.[118] The definition of "decision" includes the phrase "required to be made"

[112] PAJA, s 1.
[113] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* (CCT 77/13) [2014] ZACC 6 (25 March 2014).
[114] Para 69.
[115] Para 87.
[116] Para 90.
[117] Para 92.
[118] Para 93.

and the majority read this as meaning that a decision exists even if the administrator is required to make it but has not, in fact, made it.[119]

The case is useful in formulating a working definition of global administrative action because it establishes that even an unlawful decision or the failure to take a decision can nonetheless constitute administrative action. Likewise, a global administrative body's failure to take a decision can also be viewed as a species of global administrative action and these bodies ought to be held accountable for such failure under the principles of GAL.

Finally, in the context of decision-making, the PAJA's definition of administrative action draws a distinction between organs of state exercising a public power or function in terms of the Constitution or legislation, on the one hand, and natural or juristic persons exercising a public power or function in terms of an "empowering provision", on the other. An "empowering provision" is defined to be "a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken".[120] It is clear that a private actor is still subject to administrative control.

(ii) Direct, external legal effect

The phrase "direct, external legal effect" was borrowed from German federal administrative law.[121] The use of "direct" refers to whether or not the administrative decision is final and ripe for judicial review;[122] "external" refers to the desire to exclude internal policy decisions and procedural affairs from the scope of judicial review;[123] and "legal effect" is linked to the phrase "adversely affects" in the definition of administrative action.[124]

C. Working Definition of Global Administrative Action

The following working definition does not claim to be a comprehensive and universally accepted definition of an unsettled concept like global administrative action. Instead, the definition must be seen as an attempt to prompt further enquiries and spur more debate over

[119] Para 94.
[120] PAJA, s 1.
[121] Hoexter, above n 102, at 227.
[122] At 229.
[123] At 233.
[124] At 234.

the exact nature of global administrative action. It is clear from what follows that the concept of global administrative action can actually exist and is not a mirage. But it was only possible to reach this conclusion after having gone through the process of not merely delineating but rather defining the concept.

1. Working definition

> "global administrative action" means any final decision made, or any failure to make such a decision, by an organ of global governance, excluding a treaty-making body, when that organ exercises a power in terms of its constitutive documents and the exercise of power has a direct, external legal effect on the rights or interests of any person;
> "global governance" means the coordination of decision-making, including rulemaking, beyond a single national administrative system;
> "organ" means any authority such as a board, body, or committee exercising a power sourced in its constitutive documents;
> "person" means any public entity, state agency, natural or juristic person, or other private actor materially affected by global governance; and
> "rulemaking" means the process for formulating, amending, or repealing a rule.

2. Brief Reflections

The working definition borrows substantially from South African administrative law. This is because South Africa is the only country of those discussed that specifically defines the phrase "administrative action".

(a) Global administrative action

The South African influence on the working definition of "global administrative action" is evident in the references to "final decision", "failure to make a decision", and "direct, external legal effect". The inclusion of not only "rights" but also "interests" was sourced from New Zealand law since the PAJA's definition only refers to rights. The reference to "constitutive documents" was inspired by both the PAJA's definition of "empowering provision" and Kingsbury's categories of global administrative action discussed further above.

(b) Global governance

The reference to "decision-making" in the definition of "global governance" was influenced by all the comparative jurisdictions. All three countries referred to decisions of some kind. The American influence can be seen in the phrase "including rulemaking". The US Code provides for the procedures involved in making rules.

(c) Organ

The use of "organ" was partly borrowed from the phrase "organ of state" in the PAJA. The US Code inspired the reference to "authority". The phrase "board, body, or committee" was taken from American scholarship. Kingsbury's categories of global administrative action refers to a global administrative body. The use of "board" and "committee" was inspired by the examples of global administrative bodies discussed further above such as the World Bank, International Monetary Fund, and the Basel Committee.

(d) Person

The definition of "person" is an amalgam of the PAJA's definition of "administrative action", which refers to natural or juristic persons, and from Kingsbury's categories of global administrative action, which include public entities, state agencies, and private actors.

(e) Rulemaking

The definition of "rulemaking" is taken directly from the US Code. Notably, in *Perez, supra,* the Supreme Court appeared to refer to "rules" and "regulations" interchangeably. The department's "regulations" were promulgated using the notice-and-comment procedure, which applies to "rulemaking". Further to this, South African case law arguably regards the making of regulations to be administrative action for the purposes of the PAJA. This paper has deliberatively refrained from including a reference to regulations in the working definition. It has adopted a cautious approach by only referring to "rulemaking".

II. Conclusion

This paper has ambitiously tried to rethink GAL scholarship by attempting to formulate a working definition of global administrative action. The methodology of the paper is therefore prescriptive. To date references to global administrative action in GAL scholarship have only outlined the concept rather than defined it. The main challenges faced by this paper were to justify not only the need for a working definition but also the use of the bottom up approach in formulating such a definition.

This paper sought to do a number of things. First, the paper briefly discussed global administrative action in the context of GAL. This part briefly explained the emergence of GAL and the problem of the accountability deficit on the global scale. It also set out the provisional delineation of global administrative action and thereafter explained the difference between delineation and definition. The paper then further expanded on this difference by justifying the need for a working definition of global administrative action. Second, the paper conducted a comparative analysis of administrative law in America, New Zealand, and South Africa. Prior to this, the paper explained the difference between the top down approach and the bottom up approach in developing GAL principles. The limitations of both approaches were briefly discussed. The paper justified the use of the bottom up approach in formulating a working definition of global administrative action based on its priority. The comparative analysis of the above jurisdictions provided the building blocks in formulating the working definition. Third, the paper attempted to formulate the working definition and thereafter briefly reflected on the influence that each jurisdiction had on the draft definition.

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