



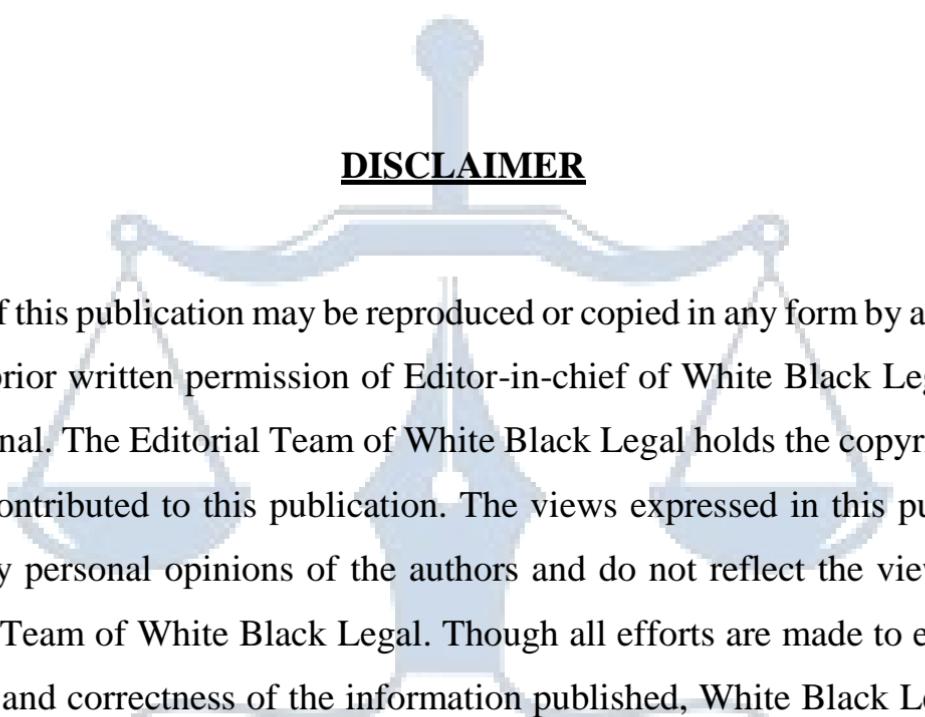
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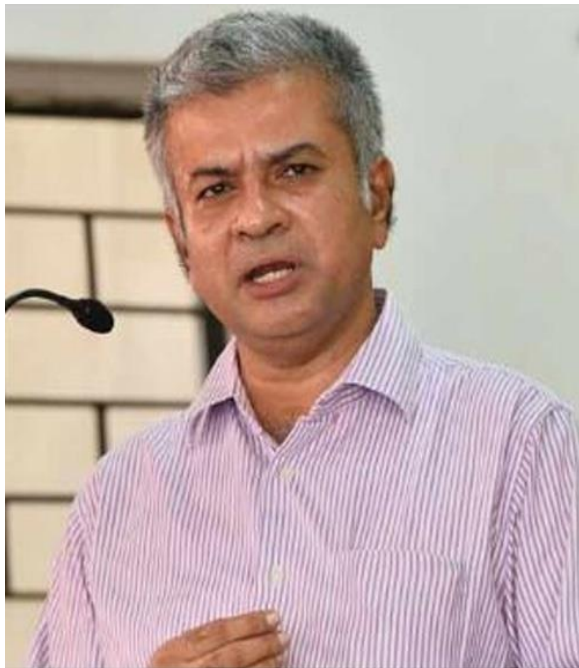
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With this thought, we hereby present to you

THE MORALITY OF ADMINISTRATIVE LAW AND THE CREATION OF A “LEVEL PLAYING FIELD” IN INTERNATIONAL LAW

AUTHORED BY - RISHI RAGHAVAN

Abstract

The purposes of this article are two-fold, with both the objectives being interrelated: the first is to determine both the moral basis of administrative law, and subsequently why this basis itself is moral. And the second purpose is to contend that the moral basis and principles of administrative law are crucial for fostering a just and equitable global order i.e. a “level playing field” in international law, advocating for a legal framework that prioritizes the common good. Ultimately, this article seeks to answer whether the International court of Justice conforms to the universally accepted principles of the rule of law and administrative law. The article aims to answer this by firstly, discussing the interplay between morality and the law in general and secondly, determining the morality that makes administrative law possible and viability of the morality. Lastly, the article moves to the application of the principles of administrative law and its moral basis in international law and how it helps in creating the “level playing field” by examining the decisions of the International Court of Justice which is in harmony with the administrative law principles.

Keywords: Administrative law, the rule of law, morality, International Court of Justice, level playing field, international law

Introduction

The moral dimensions of administrative law have a pivotal place within contemporary legal discourses, especially as societies find themselves caught up within the balance between fair and arbitrary use of power. Administrative law essentially oversees the activities of public agencies, thus shaping the implementation of policies, however, as these agencies wield significant power, the question of how they exercise this power—legally and morally—becomes paramount. How do public agencies balance the imperatives of efficiency and legality with the moral obligation to uphold principles of fairness? What mechanisms can ensure that State actions are not only lawful but also just? Given that the ethical implications of decision-making demand critical scrutiny, on a global scale, it is pertinent to ask these questions. In a nutshell, ‘law’ can be defined as nothing but an ordinance of reason for the common good, made by a person who cares for their community, and promulgates the same¹. Therefore, by its generic or classical definition, law finds its basis through morality i.e. for the ‘common good’ of the community or alternatively law is related to morality in the setting forth of those virtues that are related to the common good². When we look at morality as a set of rules for the general regulation of behavior by mutual agreement³, it does not narrow down what set of rules can be attributed to the regulation of law rather than behavior, and thus it becomes important to examine what are the moral principles which are to be attributed to law. To this query, Fuller states that to maintain a system of legal rules, it must be (1) general in nature; (2) published/publicized so that the public may be aware of it; (3) be prospective in nature, rather than retrospective; (4) understandable and clear; (5) compatible with each other and not contradictory and confusing; (6) able to be followed by the people; (7) consistent and not fall prey to constant changes; (8) administered as announced⁴. These principles are the inner morality of ‘the morality that makes law possible’⁵. He further states that law has an internal morality, which includes a minimal morality of duty and a higher morality of aspiration, and out of the both, the morality of duty cannot be compromised as a legal system which violates this morality is in a “Pickwickian” sense like a void contract being a type of contract i.e. when the minimum morality of duty is not followed there exists no legal system

¹ Summa Theologiae Q.90; Arthur Scheller Jr., *Law and Morality*, 36 MARQ. L. REV. 319, 320 (1953)

<https://scholarship.law.marquette.edu/mlr/vol36/iss3/12>

² *Id.* at pg. 322

³ AMARTYA SEN & BERNARD WILLIAMS (Eds), *UTILITARIANISM AND BEYOND* 110 (Cambridge University Press 2010)

⁴ LON. L. FULLER, *THE MORALITY OF LAW: REVISED EDITION* 39 (Yale University Press 1969)

⁵ John E. Murray Jr., *Introduction to the Morality of Law*, 10 VILL. L. REV. 624, 626 (1965)

at all⁶. However, the above eight principles apply to the law in general and of course to administrative law to an extent, but keeping in mind that the term "law" is predicated analogously and not univocally of the types of law⁷, and therefore there exists another morality associated with administrative law.

The morality that makes Administrative Law

Scholars have defined Global Administrative law as “the operation of existing or possible principles, procedural rules and reviewing and other mechanisms relating to accountability, participation, and assurance of legality in global governance.”⁸, and its aim is to identify the bodies which have to follow the principles of that which form global administrative law⁹. Thus, now comes the time to ascertain the ‘morality’ of said principles which ensure the legitimacy of global governance and also to identify the bodies which are required to follow them. In cases, where the bodies, say for example the International Court of Justice has failed to adhere to the principles, it is also pertinent to establish whether the legitimacy of the body itself crumbles or whether the principles which were to be used itself were not moral in the first place.

Administrative law is said to have distinct principles which are essentially the central ingredients of the rule of law¹⁰. Coined by A.V. Dicey, the rule of law has three meanings¹¹, the first of which is that no one is to be punished unless there is a distinct breach which has been established in a legal manner¹², i.e. a person cannot be punished for actions which do not constitute a violation of an established law or in other words rule or a person is not to be penalized for breaking a made-up law. For his second meaning, Dicey states that every man, by ordinary law whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals¹³, that is to say no one is above the law and lastly, for the third meaning Dicey states that the rule of law is a legal spirit which

⁶ *Supra* note 4 at pg. 39

⁷ JAMES BERNARD MURPHY, *AQUINAS AND MODERN LAW* Ch. 4 (Routledge 2013)

⁸ Benedict Kingsbury, Nico Krisch & Richard B Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS*, 29 (2005)

⁹ B.S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 *NYU Journal of International Law and Politics* 799, 804-805 (2005)

¹⁰ Cass R. Sunstein and Adrian Vermeule, *The Morality of Administrative law*, 131 *Harvard law Review* 1924, 1925 (2018)

¹¹ TOM BINGHAM, *THE RULE OF LAW* (Penguin UK 2011)

¹² ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, 109-110 (Liberty Classics 1982)

¹³ *Id.* at pg. 114

Dicey states that the rule of law is a legal spirit which is a special attribute of the English institutions and has evolved through judicial decisions rather than from the principles of the constitution as done in foreign countries¹⁴. Therefore, the principles (of rule of law) which provides the basis for morality of administrative law is three-fold as firstly, there is to be supremacy of regular law rather than a prevalence of arbitrary power; secondly, there is to be equal administration of the law to all people; and thirdly, the rule of law is to be used as a formula to show that the constitution is formed as a consequence of the rights of the individuals as defined by the Courts¹⁵.

What makes the rule of law moral?

As stated previously, morality helps set rules for the regulation of behavior¹⁶, however Fuller argues that a rule of conduct cannot be moral if it fails to take into consideration the nature of man¹⁷. Due to civil wars and human rights crises there has been an international push to promote rule of law¹⁸; however the fierce enthusiasm for this promotion is not always with respect to creating a fairer world as in an increasing number of places, promoting the rule of law has become a fundamentally imperialist agenda, in which powerful foreign administrators govern societies that have been pronounced unable to take on the task of governing themselves¹⁹. Despite such an immoral basis for promotion, we still value the rule of law as upholding it in the system means that the power which is exercised will likely not be unfair and arbitrary. Moreover, the rule of law then works to shield us from coercion in three ways. Firstly, submitting to a legal society prevents the unpredictable and uncontrollable predatory coercions of anarchy, which is in consonance with the Fullerian doctrine of the laws being consistent. Secondly, by observing and knowing the law which again follows another Fullerian doctrine of publicizing laws, we can avoid the penalties imposed on those who break the law. And thirdly, the rule of law limits factions from subverting the system and indulging in coercion for their own advantage²⁰.

¹⁴ *Id.* at pg. 115

¹⁵ *Id.* at pg. 121

¹⁶ *Supra* note 3

¹⁷ Edwin W. Tucker, *The Morality of Law*, by Lon Fuller, 40 Indiana Law Journal 270, 277 (1965)

<https://www.repository.law.indiana.edu/ilj/vol40/iss2/5>

¹⁸ See Brooks, Rosa Ehrenreich. *The New Imperialism: Violence, Norms, and the 'Rule of Law*. 101 Michigan Law Review 2275, 2278 (2003) <https://doi.org/10.2307/3595358>

¹⁹ *Id.* at pg. 2280

²⁰ Noel B. Reynolds, *Morality and the Rule of Law*, BYU Scholars Archive,

Therefore, it can be said that the rule of law is moral because compliments a moral ideal that law provides protection and recourse against the arbitrary exercise of power²¹.

How can a Level playing field be created in International Law

In international economic law a level playing field is a trade-policy term for a set of common rules and standards, which prevents inequalities that curtail fairness between the players²². When it comes to international law as a whole, a level playing field is created when there exists the application of rule of law principles by relevant bodies such as the United Nations and the International Court of Justice, and also by being in line with the object of administrative law. This is an approach I recommend, especially considering that the concept of rule of law is at the heart of the international organization's mission and moreover the United Nations itself in its report, requires that there be adherence to the supremacy of law, accountability to law and fairness in its application, legal certainty, avoidance of arbitrariness and procedural and legal transparency²³. This report on the rule of law also addresses the need of strategies for the better redressing of administrative law challenges²⁴. In fact the United Nations General Assembly have adopted a declaration to reaffirm its commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law²⁵ and also reaffirms the principle of administrative justice²⁶. Therefore, looking at the application of rule of law following the same principles in both the domestic (as put forth by Dicey) and international spheres, and in turn ultimately also further the object of administrative law by curtailing arbitrary power, a level playing field can be created between the nations, wherein powerful and influential nations cannot influence the decisions of bodies such as United Nations and International Court of Justice in an arbitrary manner. Now, given the focus of the article being administrative law on an international scale, this part seeks to provide an overview on whether the object administrative law is carried on by international

²¹ See GERALD J. POSTEMA, *LAW'S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW*, 17-19 (Oxford University Press 2022)

²² Marios Tokas, *The concept of the level playing field in International Economic Law*, *Journal of International Economic Law* 1, 1 (2024) <https://academic.oup.com/jiel/advance-article/doi/10.1093/jiel/jgae026/7749854>

²³ United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: report of the Secretary-General*, S/2004/616, 23 August 2004, Pg. 4 <https://www.refworld.org/reference/themreport/unsc/2004/en/42867>

²⁴ *Id.* at pg. 12

²⁵ United Nations General Assembly, *Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels* A/RES/66/102, Pg. 1 (2012) <https://documents.un.org/doc/undoc/gen/n12/478/66/pdf/n1247866.pdf>

²⁶ *Id.* at pg. 3

bodies in resonance with the rule of law.

Resonance with the principles of rule of law and the object of Administrative Law

This section will provide an overview of cases where the International Court of Justice, the judicial body of the United Nations has created a level playing field by upholding or resonating with the principles adopted in the report and declaration²⁷. However, before doing so, it is important to understand why the decisions of the International Court of Justice have been examined to note whether the driving object of administrative law and the principles of rule of law have been followed at the international level. Firstly, as mentioned, the International Court of Justice is the principal judicial organ of the United Nations²⁸, and largely follows the same core principles as the United Nations, and subsequently these international courts and tribunals are tasked to advance and uphold the principles of rule of law in international and national levels²⁹. This task is in line with the object of administrative law as well and therefore it is essential that the International Court of Justice's decisions reflect the same principles, making it necessary to examine its resonance with the rule of law. And secondly, on a similar note as the first point the meaning of 'international administrative law' states that it is a set of rules in international law pertains mostly to the activities of international organizations in the execution of their mandates. This is a whole system of 'administering' or 'executing' the substantive law of international organizations, which support international public interests is the purpose of international law³⁰. And again this 'mandate' means the commitment to adhere to promote fairness in the legal systems³¹. With this understanding, the article moves on to the judgments of the Court.

Arguably, the principle of supremacy of law which asserts that law should prevail over individuals and that no one or government is above the law, is the most important principle in creating a level or equal playing field. And in practice on an international level it can be

²⁷ *Supra* note 16

²⁸ Philippe Couvreur, *Upholding the Rule of Law at the International Level: The Role of the International Court of Justice*, UN.ORG (Sept. 10, 2024 2:40PM)
<https://www.un.org/en/chronicle/article/upholding-rule-law-international-level-role-international-court-justice>

²⁹ *Supra* note 17 at pg. 5

³⁰ PETER QUAYLE, *THE ROLE OF INTERNATIONAL ADMINISTRATIVE LAW AT INTERNATIONAL ORGANIZATIONS*, pg. 88-102 (BRILL 2021)

³¹ *Supra* note 22 and 24

illustrated by the decisions made by the International Court of Justice. An illustrative case that emphasizes the importance of the supremacy of law is Military and Paramilitary Activities in and against Nicaragua, between Nicaragua and the United States of America. In this case, Nicaragua filed this suit against the US in 1984, alleging that US military and paramilitary activities in and against Nicaragua violated international law. Nicaragua contended on the basis that there were principles conceived against foreign interference in the domestic affairs of sovereign states that prohibits foreign interventions. It was noted by the International Court of Justice that the United States supported the Contras, a rebel group attempting to overthrow the Nicaraguan government, and had conducted military operations on Nicaraguan territory. Nicaragua claimed that said acts of the United States amounted to a violation of its sovereignty and international law, especially of the United Nations Charter and custom of international law³². In its 1986 ruling the International Court of Justice confirmed Nicaragua's claims that the United States had violated customary international law surrounding the infringement of the sovereignty of another State. The Court determined that the actions of the U.S. amounted to unlawful use of force and that American support of the Contras was contrary to the principle of non-intervention and the US had wrongful intervened in the affairs of another country³³. This judgment underscores the point that international law reigns over the unilateral actions of states, underlining the notion that even the mightiest states must comply with legal obligations based on treaties and customary practices. The court based its decision, not only on specific circumstances of that particular case but also on broader aspects that underscore the supremacy of law. In this regard, the International Court of Justice put forth the need for states to respect rights of other states, irrespective of the latter's political or military power. This principle plays a paramount role in the pursuit of international peace and stability since it enforces a legal framework through which states can negotiate their differences without resorting to violence. The Nicaragua case served as a strong reminder that breaches of international law, especially by powerful states, do so at the cost of weakening the legal order and can have far-reaching implications for global governance³⁴.

³² Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, Pg. 21-22

³³ *Id.* at pg. 146

³⁴ *Id.* at pg. 106

The Court also ordered the US to pay reparations for all injury caused to Nicaragua by the breaches of obligations³⁵ which brings us to another principle that is accountability for the illegal actions. Accountability constitutes a most important principle within the purview of both domestic and international law, working towards ensuring that in matters of violation of individuals rights and international law, those responsible, no matter how 'mighty' are held accountable. Accountability mechanisms not only ensure administration of justice but also deter future violations of such rights by the strengthening of the applicability of rule of law. In that sense, the International Court of Justice has played a significant role in advancing these principles through its decisions. One case that well epitomizes the above principle is the order of the International Court of Justice on Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip. On 29 December 2023, the Republic of South Africa filed in the Registry of the Court an Application instituting proceedings against the State of Israel concerning alleged violations in the Gaza Strip of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide³⁶. At its core, the case makes the point that states have the responsibility to prevent and punish acts of genocide, further postulating that accountability is not only an ideal but a legal necessity. According to the International Court of Justice, Israel as a party to the convention is obliged to satisfy these responsibilities even against the complexities conflict³⁷. The principle of accountability extends beyond mere compliance with legal norms and Israel understands as they claim that they have in place the necessary mechanisms to examine and investigate allegations of wrongdoing by its military forces and to ensure accountability³⁸. The principle also involves a proactive commitment to preventing violations and rectifying injustices. The International Court of Justice's rulings have the potential to establish important precedents that influence the behavior of states and their willingness to adhere to international standards.

Lastly, taking a look at the case of Armed Activities on the Territory of the Congo between Democratic Republic of the Congo and Uganda, we can see that this case this emanated from a suit filed by the Democratic Republic of the Congo, wherein Uganda was accused of conducting military operations and supporting armed groups (similar to that of the earlier

³⁵ *Id.* at pg. 149

³⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, Order dated 24 May 2024, Pg. 2

³⁷ *Id.* at pg. 3 and 4

³⁸ *Id.* at pg. 11

discussed case of Nicaragua³⁹ in the DRC and committing wide-scale violations of human rights and loss of life. In 1999, the DRC filed a suit against Uganda before the International Court of Justice, claiming that actions of Uganda constituted violations of international law, including breaches of sovereignty, non-intervention principles, and human rights violations. This case was also pivotal in not only dealing substantively with the legal issues involved but also in illustrating the International Court of Justice's commitment to judicial fairness. The International Court of Justice, in its judgment delivered in 2005, found that Uganda had violated several obligations under international law, including the obligation to respect the sovereignty of the Democratic Republic of the Congo and not resort to armed force against that country. The acts of Uganda carried out in DRC-most of which were providing support for anti-government militias-violated international law, with an aspect of large-scale suffering and destruction⁴⁰. Crucially, the ruling of the International Court of Justice underscored Uganda's obligation to provide reparations for the damage inflicted, illuminating the principle that accountability is vital for the pursuit of justice and the maintenance of judicial fairness.

Conclusion

The exploration of administrative law's moral dimensions, particularly within the context of international governance, reveals a commitment to the rule of law, excluding its imperialist enterprises, is necessary to create a level playing field. As illustrated through the cases examined, the legal standards are in line with the object of administrative law and the principles of rule of law which embraces robust moral framework which supports equality between nations. The moral obligations inherent in administrative law demand that public agencies not only act within the confines of the law but also strive to uphold fundamental principles of justice and accountability. At the heart of administrative law lies the imperative for fairness and supremacy of the law, and as stated by A.V. Dicey in his work that the rule of law emphasizes that no individual, regardless of their status, is above the law. This principle is quite important in the sphere of international law, wherein disparities in power oftentimes may lead to biases in how states are treated. The decisions examined in this article by the International Court of Justice to abide by international legal standards that enforce a level playing field and

³⁹ *Supra* note 20

⁴⁰ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2005, pg. 26

are necessary to ensure both global order and justice. Moreover, the obligation that such states bear through the discussed cases is in the matter of providing reparations for wrongful acts, not only to correct injustice perpetrated in the past but to create a practice of respect and adherence to international norms. It helps states earn trust in international organizations and enhances the legitimacy of decisions made by those states, thus constituting part of a framework of more just global governance. The morality inherent in administrative law reaches into the realm of decision-making. As previously discussed, Fuller's principles of legality emphasize that laws should be clear, publicly accessible, and stable. These principles hold particular importance within administrative contexts, where bureaucratic decisions can profoundly affect individuals and communities alike. It is essential to ensure that administrative processes are both transparent and fair, as this is vital for maintaining the rule of law and promoting an equal footing for all. In conclusion, the morality that makes administrative law is essential for nurturing a just and equitable international order. The principles of legality, fairness, and accountability establish a strong foundation for tackling the use of arbitrary power. The International Court of Justice and the United Nations not only underscore the importance of legal compliance but also express a wider ethical vision that prioritizes the common good. As societies continue to grapple with the challenges imposed by state power, the principles of administrative law and the rule of law must evolve to ensure that justice goes beyond being a legal requirement as it needs to transcend and become a moral imperative that guides the actions of public domestic and international agencies.

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