

Functionalism! Functionalism! Do I Look Like Functionalism?

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Abstract

In his EJIL Foreword, Jan Klabbers argues that the contemporary application of functionalism, understood as organizations being assigned functions, in order both to realize the common good and to deepen inter-state cooperation, is something of a theoretical straitjacket. However, can functionalism really be described as a 'one-size-fits-all' concept? It is the contention of this Comment that there are, in fact, different manifestations of the concept, including neo-functionalism and formal or informal functionalism. New realities in this field also reflect an evolved conception of functionalism, such as the increasing diversity of actors affected by, and influencing, international organizations, as well as the fact that institutions have become authorities in their own right. As a consequence, we may also observe the emergence of principles, often referred to as global administrative law principles, aimed at dealing with these new realities. The article recognizes that a functional orientation in designing the mandates of international organizations has contributed to overlaps and inefficiency. However, it argues that efforts have been made in pursuance of greater efficiency.

Tribute should be paid to Jan Klabbers for his fine article on the transformation of international organizations law. He adroitly demonstrates how the enduring theory of functionalism has shaped this body of law. In his article, Klabbers traces the origins of functionalism in the early years of the 20th century through the writings of two US-based authors, Paul Reinsch and Frank Sayre. According to Klabbers, subsequent authors such as David Mitrany did not diverge from this early conception of functionalism. The meaning of functionalism that he maintains is that organizations are assigned functions in order both to realize the common good and to deepen inter-state cooperation. Interestingly, Klabbers adheres to this carefully crafted interpretation of functionalism and applies it to the world of international organizations as they exist in the 21st century. For him, the contemporary application of this functionalism is

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something of a theoretical straightjacket. His principal contention is that the theory, centred as it is on a principal–agent relationship, fails to deal (adequately or at all) with issues of responsibility and accountability that concern actors others than the membership of the organization. He also contends that functionalism has weak explanatory power in regard to the internal dynamics of organizations.

1 Functionalism as a ‘One-Size-Fits-All’ Concept?

These propositions raise many questions. First, can functionalism be described as a ‘one-size-fits-all’ concept that may be applied ‘to each and every kind of organization, regardless of that organization’s functions, regardless also of its politics, its role, its structures, its mechanisms, and the contribution it can be said to make (however flimsily) to the global common good’?¹ Klabbers seems to suggest that it can and in fact praises the intrinsic strength of this concept, which, one cannot deny, has remained predominant in international relations. However, it is important to highlight that different manifestations of this concept have emerged, such as neo-functionalism.² The latter is more nuanced in that it gives a greater role to non-state actors. While member states have a significant place in neo-functionalist integration, other influences on the process of integration are also recognized as being important. For example, the secretariat of the organization itself has an interest in this process and will play a role in shaping the direction. In particular, according to neo-functional theory, these non-state actors take advantage of the ‘spill-over’ effects of the international organization, and the membership cedes more power to these ‘third parties’.³

Also noteworthy is the proliferation of accountability mechanisms that provide recourse for ‘third parties’ who have been negatively affected by the activities of international organizations. These might not be formal mechanisms but, rather, ‘accountability in whatever form’⁴ and may even be forms of self-regulation.⁵ Nevertheless, in addition to the representation and/or reparation these mechanisms offer for third parties, they can result in a recalibration of the behaviour of the organization concerned. This phenomenon is difficult to square with functionalism, given that, in the normal course of events under principal-agent theory, ‘accountability mechanisms

¹ In response to a question posed by Alison Duxbury, see J. Klabbers, ‘Alison Duxbury and Ian Johnstone: A Rejoinder’, *EJIL: Talk!* (21 August 2015), available at www.ejiltalk.org/alison-duxbury-and-ian-johnstone-a-rejoinder/ (last visited 31 August 2015).

² E. Haas, *The Uniting of Europe* (1958).

³ See Schmitter, ‘Neo-Functionalism’, in A. Wiener and T. Diez (eds), *European Integration Theory* (2003) 45.

⁴ Klabbers, ‘The EJIL Foreword: The Transformation of International Organizations Law’, 26(1) *European Journal of International Law (EJIL)* (2015) 9, at 75.

⁵ Examples might include the World Bank’s Inspection Panel or the World Trade Organization’s (WTO) *amici curiae* procedure. On the former, see Boisson de Chazournes, ‘The World Bank Inspection Panel: About Public Participation and Dispute Settlement’, in T. Treves *et al.* (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 187. On the latter, see Boisson de Chazournes and Mbengue, ‘The Amici Curiae and the WTO Dispute Settlement System: The Doors are Open’, 2 *The Law and Practice of International Courts and Tribunals* (2003) 205.

are the devices principals use to control the agent'.⁶ These mechanisms provide evidence for the proposition that actors other than the members of the organization can exercise control, to a greater or lesser extent, over an organization's direction of travel. Independent review and compliance mechanisms have had a major impact on the opening up of international financial institutions towards individuals. For example, this trend towards 'publicness'⁷ led the World Bank to decide in 2010 that information in its possession should in principle be made available.⁸ This constituted a major turning point for an organization that had been very secretive.

Is it not possible to distinguish formal functionalism from informal functionalism – the former being linked to the exercise of functions and the latter considered tantamount to the realization of objectives? Is it not necessary to reconcile the two by saying that the exercise of functions should be assessed against the satisfaction of objectives? Can it really be the case that organizations are trapped in their functionalist habit?

2 Authority amidst Functions ...

Throughout the 20th century, a large number of international organizations were created. Forged around the inter-state cooperation concept, international institutions have moved beyond their originally envisaged *raison d'être*. Having pierced the veil of inter-state cooperation, *stricto sensu*, these institutions have become authorities in their own right. A good example is the administration of Kosovo's territory by the United Nations (UN) as envisaged by Resolution 1244 of the UN Security Council in 1999.⁹ This action constituted a major foray into a state's territorial exclusivism. It can also happen when international organizations directly interact with non-member actors. To illustrate how the range of activities an organization engages in can evolve in this context, we need only think of international organizations that are involved with peacekeeping activities during armed conflicts, economic reconstruction efforts involving multiple private actors, organizations that enter into contractual relations and procurement activities, institutions that engage in human rights dialogue with a wide array of actors or the monitoring of elections, for example.

In response, new principles are emerging to deal with these new realities in the world of international organization. Significantly, these principles – often referred to as global administrative law principles¹⁰ – provide a means for 'answerability'. Greater emphasis should be placed on these principles as they potentially can and should

⁶ Johnstone, 'Are Functionalism's Flaws Fatal', *EJIL: Talk!* (20 August 2015), available at www.ejiltalk.org/reply-to-klabbers-article/ (last visited 31 August 2015).

⁷ On this concept, see Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20(1) *EJIL* (2009) 23.

⁸ Boisson de Chazournes and Fromageau, 'Balancing the Scales: The World Bank Sanctions Process and Access to Remedies', 23(4) *EJIL* (2012) 963, at 965.

⁹ SC Res. 1244 (1999).

¹⁰ See Kingsbury, *supra* note 7; Kingsbury, 'Introduction: Global Administrative Law in the Institutional Practice of Global Regulatory Governance', 3 *World Bank Review* (2011) 3.

influence the evolution of the immunities and privileges regime as well as rules on the international responsibility of international organizations.

While global administrative law does not offer a panacea, it does focus our attention on the use of power and, in particular, encourages recourse to legal tools that control the exercise of public authority by international institutions.¹¹ Public authority is no longer exclusively the prerogative of so-called ‘formal’ international organizations. As a matter of fact, global institutions can fall through the cracks of public international law because they do not conform to our formal categories, and, in turn, some of their activities can be hidden from view. Examples of new missions, organs or programmes that exceed the mandate of existing international organizations abound.¹² Moreover, where international organizations do not have the financial or technical capacity to engage in certain activities, non-state actors may provide assistance. New types of institutions can be created that involve public and private actors.¹³ Viewing these phenomena through the lens of authority reveals new governance realities that would otherwise remain blind spots in a functionalist perspective.

3 Functionalism and Politics Cannot Live Apart ...

If functionalism has not yet transformed¹⁴ – which is debatable – are we still living with the same functionalism that was originally conceived in the early 20th century? Is functionalism not a polysemic concept or at least a concept that has an evolving content? It seems that functionalism can be understood as being linked to the exercise of certain functions by organs of an international organization, and one can also speak of functionalism as being aimed at increasing integration among the members of an organization towards the ultimate goal of supranationalism. There is, furthermore, an understanding of functionalism that seeks to ‘clinically isolate’ sectoral cooperation from political considerations. With respect to the latter, David Mitrany considered that functional cooperation would prevent haphazard politics from leading to conflicts.¹⁵

As can be noted, politics is present in each of these views of functionalism. Indeed, functionalism does not prevent the discussion of politics.¹⁶ Politics is discussed but under different guises and not just from the perspective of governments. I will not dwell on discussions of functionalism as a principal-agent theory. Others have done it,

¹¹ See E. Fromageau, *La théorie des institutions du droit administratif global: étude des interactions avec le droit international public* (PhD thesis, University of Geneva, 2014).

¹² See Boisson de Chazournes, ‘Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies’, 6(2) *International Organizations Law Review* (2009) 655. E.g., the International Fund for Agricultural Development conducts activities beyond those initially foreseen. Moreover, the World Anti-Doping Agency has various mechanisms for the purposes of oversight and sanctioning misconduct.

¹³ *Ibid.*, at 656.

¹⁴ See Klabbbers, *supra* note 1.

¹⁵ D. Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (1943).

¹⁶ Klabbbers, *supra* note 4, at 79–80.

and they have done so with distinction.¹⁷ Briefly summarized, functionalism defines the principal as the membership of an organization and the agent as the organization itself. Consequently, not only is the principal collective in nature, but it also forms part of the agent, since principals are invariably represented in a plenary organ of an international organization.¹⁸ As such, given that the principal is constituted of political actors, which in turn form part of the agent, politics is intrinsic to the activities of the organization. Moreover, one should not forget that functionalism was notably conceived as ensuring peace among nations. The politics of small steps ('*petits pas*'), as articulated by Jean Monnet at the creation of the European integration project, was aimed at developing a trend towards a political community. It was indeed a political project. The experience of the European Union shows that more politics could in fact shape and improve functional integration.

It has not been possible to separate views on functionalism from their political context or from political motivations. We often draw from our own experience in testing ideas. One vivid moment in my memory is the proceedings before the International Court of Justice with respect to the Request for an Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.¹⁹ The question asked of the Court by the World Health Assembly dealt with whether a state that uses nuclear weapons in armed conflict would be in violation of its obligations under international law, including the World Health Organization's (WHO) Constitution, having regard to the health and environmental effects of such use.²⁰ For some states, organizations such as the WHO are established solely to fulfil those tasks that are spelled out in their constituent instruments, subject to a restrictive construction of implied powers. In addition, it was argued that questions with a strong political flavour should not be dealt with by a specialized agency. For others, given that issues can be complex and cut across different institutional competences, as envisaged at the time of the creation of the UN system,²¹ international organizations should be able to use more wide-ranging tools and techniques to fulfil their role. This would imply that political choices must be made.²² As has been pointed out, '(i)nter-agency agreements and joint projects abound'.²³ There are also certain, fundamental, issues with which all organizations should have common cause – issues that transgress the technical domain in which the organization is constituted to specialize.²⁴ Moreover, in any event, it is very difficult to

¹⁷ See I. Johnstone, 'Are Functionalism's Flaws Fatal', *EJIL: Talk!* (20 August 2015), available at www.ejiltalk.org/reply-to-klabbers-article/ (last visited 31 August 2015).

¹⁸ See J. Klabbers, 'The Transformation of International Organizations Law', *EJIL: Talk!* (18 August 2015), available at www.ejiltalk.org/the-transformation-of-international-organizations-law/ (last visited 31 August 2015).

¹⁹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request of the World Health Organization)*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 66.

²⁰ *Ibid.*, at 2.

²¹ See Abi-Saab, 'Cours Général de Droit International Public', 207 *Recueil des Cours* (1987) 9.

²² See L. Boisson de Chazournes and P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (2009), at 11–12.

²³ Leary, 'The WHO Case: Implications for Specialised Agencies', in Boisson de Chazournes and Sands, *supra* note 22, 112, at 119–20.

²⁴ Such as 'social development, the environment and promotion of women'. Leary, *supra* note 23, at 119.

distinguish between technical issues and political issues given that the former invariably have a political dimension to them.²⁵

4 Functionalism As a Hurdle for International Organizations

Functionalism is mostly analysed from an outsider's perspective, with an emphasis placed on the restraints and limits caused by functionalism. It is also interesting to assess the situation from an insider's point of view. Is functionalism not also an obstacle for international organizations themselves? It restrains their scope of activities. In addition, from a system-wide perspective, one cannot but notice that a functional orientation in designing the mandates of international organizations has contributed to their multiplication and to overlaps in their mandates.²⁶ This has consequences for normative activities as well as activities in the field. It creates a duplication of efforts, diverging interpretations as well as negative competition in regard to access to resources.

International organizations have had some success in a common effort to overcome these situations of duplication and access to resources. Strengthening relations between international organizations is one solution.²⁷ Another way is to give a 'holistic flavour' to the exercise of functions. The Working Group on Indigenous Populations and Access to Genetic Resources, which was established by the World Intellectual Property Organization, is a step in this direction, as are the multifaceted activities of the anti-tobacco programme developed by the WHO. They underline the need to disentangle functionalism as well as the value of linkages in interpreting the scope of the mandate and functions of each organization. For example, the social/trade interface is an area that is in need of being dealt with in a more efficacious manner. Dealing with the latter in a comprehensive manner could represent an important watershed for functionalist theory. Neither the World Trade Organization nor the International Labour Organization has yet to engage with this interface in such a manner. In short, effectiveness is putting functionalism to the test. There are many more examples of this type. In these instances, the satisfaction of objectives should have primacy over the exercise of functions. Jan Klabbers' article on the transformation of international organizations law is an admirable piece of scholarship that provides fascinating insight and analysis from an expert in the field. It challenges accepted dogmas and raises new questions that provoke academic debate. In fact, is functionalism not already transformed? I would consider it so.

²⁵ Klein, 'Reflections on the Principle of Speciality Revisited and the "Politicisation" of the Specialised Agencies/Quelques réflexions sur le principe de spécialité et la "politisation" des institutions spécialisées', in Boisson de Chazournes and Sands, *supra* note 22, 78, at 78.

²⁶ Marchisio, 'Possibili strumenti per coordinare le organizzazioni internazionali', in M. Vellano (ed), *Il Futuro delle Organizzazioni internazionali: Prospettive giuridiche*, Editoriale Scientifica (2015) 125, at 127.

²⁷ For an endeavour in this direction, see, e.g., the idea of common premises/one office, which is supported by the United Nations Development Group, available at <https://undg.org/home/guidance-policies/delivering-as-one/standard-operating-procedures-non-pilots/common-premises/> (last visited 31 August 2015).