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# Global administrative law: The state of the art

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*Global institutions are about twenty years old. These institutions have attracted a great deal of intellectual interest, since scholarship has reacted quickly to global administrative law. And yet, the definition of global administrative law is still highly contested; its relations with international law and constitutional law are not yet settled; and no single account of the field has attained the status of orthodoxy and the literature has yet to capture all the peculiarities of the field.*

Global institutions are about twenty years old, but they have developed rapidly. Indeed, globalization enhances the role of law and of legal systems, because globalization is achieved mainly through legalization. These institutions have attracted a great deal of intellectual interest, since scholarship has reacted quickly to global administrative law. Indeed, there exists today a very rich literature on the subject, and some general accounts and overviews of the field.<sup>1</sup>

And yet, the definition of global administrative law is still very much contested; its relations with international law and constitutional law are not yet settled; and no single account of the field has attained the status of orthodoxy.

The definition of global administrative law is contested by the German school of Heidelberg, whose scholars, such as Armin von Bogdandy, believe that it is more appropriate to speak of the “exercise of international public authority.”<sup>2</sup> Eyal Benvenisti, on the other hand, finds it more appropriate to speak of the “law of global governance.”<sup>3</sup>

The dividing line between administrative and constitutional law is blurred: Gunther Teubner, in his work entitled *Constitutional Fragments. Societal Constitutionalism and Globalization*, observed that global administrative law “is the latest candidate for the constitutionalization of world society” and that “most of the authors avoid the

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<sup>1</sup> Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68(3–4), *LAW & CONTEMP. PROB.* 15 (2005); SABINO CASSESE, *THE GLOBAL POLITY. GLOBAL DIMENSIONS OF DEMOCRACY AND THE RULE OF LAW* (2012); and EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* (2014).

<sup>2</sup> *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS. ADVANCING INTERNATIONAL INSTITUTIONAL LAW* (Armin von Bogdandy et al. eds., 2009).

<sup>3</sup> BENVENISTI, *supra* note 1.

language of constitutionalism and content themselves with general principles of administrative law, without adequately addressing the basis of their validity in the transnational sphere.”<sup>4</sup>

The relations with international law are not yet settled. Scholars of the growing field of global administrative law (GAL) share the idea that it transcends international law, because it also includes national civil societies among its actors. However, international law experts tend to consider global administrative law as a part of their discipline.

No single account of the field has reached the status of orthodoxy, because there are globalists and skeptics. Richard Stewart and Benedict Kingsbury may be considered to fall within the former category;<sup>5</sup> and Eric Posner in the latter.<sup>6</sup>

It is now clear that global administrative law is not only global, not only administrative, and not only law. It is not only global, because it includes many supranational regional or local agreements and authorities. It is not only administrative, because it includes many private and constitutional law elements (although the administrative component prevails, because constitutions and private regulation, involving “high politics” matters or societal interests, resist globalization). Global administrative law is not only law, because it also includes many types of “soft law” and standards.

The rich literature on global administrative law has focused especially on two problems: the reasons for the emergence of global administrative law, and its peculiarities: the “why” and the “how.” However, in both respects, many questions remain unanswered.

As for the *reasons*, one set of explanations is clear: global problems require global institutions. To organize Olympic Games and control doping; to fight global terrorism; to control epidemics, world trade, international finance, the Internet; to protect highly migratory species; or to reduce global warming, one cannot proceed at the national level—one must go global.

Less research has been done on why global administrative law develops to address national problems—for example, on the global institutions established to enhance national democracy or the rule of law, to increase mutual accountability between nations, or to reduce the asymmetries between nations.

As for global administrative law’s *peculiarities*, three in particular have been studied. Global administrative law is de-territorialized. Global regulatory regimes feature legislation (treaties, rules, policies, standards, soft law) without legislatures; dispute settlement functions with only a limited number of courts (but a great number of quasi-judicial reviewing bodies); implementation without an executive branch (through indirect rule, and by monitoring and controlling implementation and enforcement through national bodies). Global administrative institutions lack the usual legitimacy and accountability mechanisms, but possess capacity-based authority<sup>7</sup> and are kept under control through surrogates.

<sup>4</sup> GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS, SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 50 n.31 (2012).

<sup>5</sup> Kingsbury et al., *supra* note 1.

<sup>6</sup> ERIC POSNER, THE PERILS OF GLOBAL LEGALISM (2009).

<sup>7</sup> In this connection, see Tim Büthe, *The Power of Norms, the Norms of Power. Who Governs International Electric and Electronic Technology?* in WHO GOVERNS THE GLOBE? 292 (Deborah D. Avant, Martha Finnemore, & Susan K. Sell eds., 2010).

However, the literature on global administrative law has yet to capture all the peculiarities of the field. I wish to focus on four features of GAL.

First, global administrative law is undergoing constant development, change, and improvement; and this is not a unidirectional or linear process. In reaction to health-care tourism, national actors travel abroad to find patients. Through its *maquiladoras*, the United States exports jobs but also pollution, thus provoking strong reactions from Mexico. A large part of the imports from Mexico to the United States originated in the United States itself. To avoid importing the economic crisis, governments react to globalization by establishing new gates.<sup>8</sup>

Second, the literature on global administrative law underestimates the role played by states in the global space: states are managers of non-state authority, establish networks with international governmental and non-governmental organizations, and are indispensable instruments of global institutions (“more non-State rule requires more State authority, not less”<sup>9</sup>). Global administrative scholars tend to consider global actors as the protagonists, while there is also a deuteragonist: the state. Suffice it to note that the Italian state participates in more than twenty international military (peace-keeping and stabilization) missions around the world.<sup>10</sup> The state and its interaction with global regulatory regimes should be reintroduced into the context of global administrative law.

Third, in the global space, legitimacy and accountability mechanisms and processes are horizontal, not vertical. It is therefore a mistake to search for a *demos* and to bring the same paradigms of the state into global administrative law—a mistake no less dangerous than committed by Theodor Mommsen (1817–1903), who brought the German “*Staatsrecht*” approach into the study of Roman law.<sup>11</sup> Another mistake is to continue using the concept of state sovereignty, challenged by the submission of states to the rules and implementation mechanisms of global law. In Europe, monetary currencies, a symbol of sovereignty, were once thirty-seven, while they are now twenty. Because global administrative law is an entirely new legal entity, it is not possible to rely on methodological nationalism.<sup>12</sup> New paradigms must be developed.

Fourth, because global administrative law is a complex network of cooperative measures after all, it can be expected that new forms of cooperation will develop, called “creative coalitions.”<sup>13</sup> These will include governments, multilateral organizations, business, charities, and non-governmental organizations. It can also be expected

<sup>8</sup> See *The Gated Globe*, THE ECONOMIST, Oct. 12, 2013, available at <http://www.economist.com/news/leaders/21587785-gated-globe>. (visited 30 May 2015).

<sup>9</sup> Philipp Genschel & Bernard Zangl, *The Rise of Nonstate Authority and the Transformation of the State*, Paper presented at the Seminar on the State, Oxford, Nuffield College, Dec. 12–13, 2013.

<sup>10</sup> See Law No. 28 of 2014 (Ital.).

<sup>11</sup> LUIGI CAPOGROSSI COLOGNESI, *STORIA DI ROMA TRA DIRITTO E POTERE. STORIA DELL'ORGANIZZAZIONE STATUALE ROMANA* 11 (2014).

<sup>12</sup> A point advanced by Jean-Yves Chérot & Benoit Frydman, *Avant-propos*, in *LA SCIENCE DU DROIT DANS LA GLOBALISATION*, at vii (Jean-Yves Chérot & Benoit Frydman eds., 2012).

<sup>13</sup> Oxford Martin School, *Now for the Long Term, The Report of the Oxford Martin Commission for Future Generations*, Oct. 2013, available at [http://www.oxfordmartin.ox.ac.uk/downloads/commission/Oxford\\_Martin\\_Now\\_for\\_the\\_Long\\_Term.pdf](http://www.oxfordmartin.ox.ac.uk/downloads/commission/Oxford_Martin_Now_for_the_Long_Term.pdf). (visited 30 May 2015).

that these cooperative measures will be different depending upon the area or field involved, and that they will develop practices and traditions worthy of study, just like judge-made law.

Despite these shortcomings, the literature on global administrative law is making a unique contribution to the progress of administrative law scholarship around the world. During its two centuries of life, administrative law has been largely parochial, because it was studied as a purely national intellectual effort, based solely on national rules. The scholarship on global administrative law adds a new layer and a common language, contributes to the emphasis of similarities against differences, and establishes some unitary features in a field that, since the decline of the natural law doctrine, has been conceived as only national.

It is often lamented that global administrative law is mere technocratic governance and does not involve civil societies. According to Europol, out of 3,600 organized crime groups, only one-quarter can be said to possess a “main nationality,” and some may even operate in a dozen countries. Is not this, too, an important indicator of civil societies’ involvement in globalization?