
“Down the rabbit-hole”: The projection of the public/private distinction beyond the state

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This article deals with two of the greatest “dualisms” present in contemporary legal systems: the distinction between international law and domestic law on the one hand, and the distinction between public law and private law, on the other. The evolution of these two great dualisms is linked to the emergence of global public interests, the strategic role played by states and domestic administrations in the global arena, and the need to control and review how global hybrid institutions exercise their increasing powers. This contributes significantly to the emergence of multipolar administrative law, in which both public and private traits, and both domestic and international dimensions, constantly interact. Beyond the state, public and private law finds new ways of combining, borrowing tools and imitating solutions. In particular, when the public/private distinction goes international, it operates as a technology of global governance: it is a “proxy” for bringing given values into a new legal context and for recreating a “familiar” legal endeavor beyond the state. But this projection can be problematic: like in Lewis Carroll’s “rabbit-hole,” there is no guarantee that, when the values and legal mechanisms behind them are moved from one level to another, they will remain the same.

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Alice started to her feet, for it flashed across her mind that she had never before seen a rabbit with either a waist-coat pocket, or a watch to take out of it, and, burning with curiosity, she ran across the field after it, and was just in time to see it pop down a large rabbit-hole under the hedge. In another moment down went Alice after it, never once considering how in the world she was to get out again.

Lewis Carroll, *Alice's Adventures in Wonderland*, 1865

1. "Über die zwei großen 'dualismen'" in contemporary legal systems

In the late 1930s, Carl Schmitt observed that the two great dualisms within contemporary legal systems were the distinction between international law and domestic law on the one hand, and that between public law and private law on the other. He considered that both these dualisms were internally linked by the evolution of the concept of statehood and by their common opposition to *ius commune*.¹ Over seventy years later, these distinctions appear to be much more complex, because they have been deeply transformed;² but, above all, these dualisms incorporate two of the main features of "multipolar" administrative law, where the trait of "multipolarity" can be considered as relating to several aspects and problems such as the development of basic principles of administrative law beyond the state triggered by globalization, the blurring line between what is public and what is private, and the emergence of hybrid forms of governance, the proliferating relations between different actors (agencies, corporations, non-governmental organizations (NGOs), individuals, etc.) which currently dominate the global legal landscape, and the crisis of legality enhanced by the growth of norm-making activities beyond the state.³

The first feature is the public/private divide.⁴ This may be traced to the very origins of administrative law, which materialized as a "special" type of law, distinct from the

¹ Carl Schmitt, *Über die zwei großen "dualismen" des heutigen rechtssystems* [1939], in CARL SCHMITT, POSITIONEN UND BERICHT 261 (1988). In this work, written for the *MÉLANGES GEORGES STREIT*, Schmitt moves from the notion of private international law and its relationships with states to deal with these two dualisms. His thesis on the *ius commune* must of course be contextualized within that period and within his broader conceptual framework.

² See Inger Johanne Sand, *Globalization and the Transcendence of the Public/Private Divide—What is Public Law under Conditions of Globalization?*, in *AFTER PUBLIC LAW 201* (Cormac Mac Amhlaigh, Claudio Michelon, & Neil Walker eds., 2013).

³ See Sabino Cassese, *New Paths for Administrative Law: A Manifesto*, 10 INT'L. J. CONST. L. 603 (2012). See also Jean-Bernard Auby, *La bataille de San Romano. Réflexions sur les évolutions récentes du droit administratif*, 57(11) ACTUALITÉ JURIDIQUE—DROIT ADMINISTRATIF 912 (2001); more generally, see MARTIN LOUGHLIN, *THE FOUNDATIONS OF PUBLIC LAW* (2010), who examines the emergence of administrative law within the new architecture of public law (pp. 436 *et seq.*). See also William Lucy, *Private and Public: Some Banalities About a Platitude*, in *AFTER PUBLIC LAW*, *supra* note 2, 56; and *COMPARATIVE ADMINISTRATIVE LAW 493 et seq.* and 595 *et seq.* (Susan Rose-Ackerman & Peter Lindseth eds., 2010).

⁴ Here and elsewhere in this article, the terms "public" and "private" refer to the legal regime, the kind of actor or sometimes both. On the public/private distinction, see *THE PUBLIC-PRIVATE LAW DIVIDE: POTENTIAL FOR TRANSFORMATION?* (Matthias Ruffert ed., 2009) [hereinafter *THE PUBLIC-PRIVATE LAW DIVIDE*], and GIULIO NAPOLITANO, *PUBBLICO E PRIVATO NEL DIRITTO AMMINISTRATIVO* (2003). At the international level, see Horatia Muir Watt, *Private International Law Beyond the Schism*, IILJ Working Paper 2012/1 GAL Series, and Matthias Goldmann, *A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and Not Law)*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260293.

more ancient private law.⁵ Today, states and intergovernmental organizations (IGOs) have been increasing their use of private law instruments; new public and private bodies have been established at international level; global private regimes often see states intervening and acquiring more powers within contexts which were originally based only on consensus and mutual agreements (as happened with the Internet and sports).⁶ Private ordering and global transnational regulation have been constantly growing, often using public actors as instruments of their expansion.⁷

The second feature is the development of administrative law beyond the state.⁸ This phenomenon, which has been expanding significantly since the 1990s with the rise of globalization, is twofold: on the one hand, it implies that domestic administrations operate beyond national borders (in the case of accounting and supervising, for instance, with the Basel Committee and the International Organization of Securities Commissions (IOSCO)); on the other, it means that norms produced by international regimes apply to national public bodies to an increasing extent.⁹

Three examples easily illustrate how these two “dualisms” interact, with respect to three different fields: sport, Internet, and cultural property.

First, the case of the World Anti-Doping Program and the World Anti-Doping Agency (WADA) is a prime example of a formally private source of norms that shows a high degree of “publicness.” Governments participate both in drafting the Code, through extensive consultations, and in its final adoption, through the WADA decision-making process and the Final Declaration at the World Conference on Doping. The UNESCO Convention against Doping in Sport expressly refers to the WADA and its Code and requires states to

⁵ Alfred C. Aman Jr., *Politics, Policy and Outsourcing in the United States: the Role of Administrative Law*, in ADMINISTRATIVE LAW IN A CHANGING STATE, ESSAYS IN HONOUR OF MARK ARONSON 205 (Linda Pearson, Carol Harlow, & Michael Taggart eds., 2008), which underlines the “not structural, but political” character of the public and private distinction (*id.* at 218). See also THE PUBLIC LAW/PRIVATE LAW DIVIDE, UNE ENTENTE ASSEZ CORDIALE? LA DISTINCTION DU DROIT PUBLIC ET DU DROIT PRIVÉ: REGARDS FRANÇAIS ET BRITANNIQUES (Mark Freedland & Jean-Bernard Auby eds., 2006) [hereinafter THE PUBLIC LAW/PRIVATE LAW DIVIDE]; THE PROVINCE OF ADMINISTRATIVE LAW (Michael Taggart ed., 1997); and JOHN W.E. ALLISON, A CONTINENTAL DISTINCTION IN THE COMMON LAW: A HISTORICAL AND COMPARATIVE PERSPECTIVE ON ENGLISH PUBLIC LAW (1996). More recently, see Gerdy Jurgens and Frank van Ommeren, *The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependant Divide*, 71 CAMBRIDGE L. J. 172 (2012).

⁶ See Thomas Schultz, *Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT’L L. 799 (2008), and Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (Wada)*, 6 INT’L ORG. L. REV. (SPECIAL ISSUE: SYMPOSIUM ON “GLOBAL ADMINISTRATIVE LAW IN THE OPERATIONS OF INTERNATIONAL ORGANIZATIONS”) 411 (2009).

⁷ See Peer Zumbansen, *The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of ‘Context’*, 13 GERMAN L. J. (SPECIAL ISSUE: SYMPOSIUM ON “TRANSNATIONAL PRIVATE REGULATORY GOVERNANCE: REGIMES, DIALOGUE, CONSTITUTIONALIZATION”) 1269 (2012); GRAF PETER CALLIES & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE. A THEORY OF TRANSNATIONAL PRIVATE LAW (2010); formerly, Avery Katz, *Taking Private Ordering Seriously*, 114 U. PENN. L. REV. 1745 (1996).

⁸ On these aspects, see JEAN-BERNARD AUBY, LA GLOBALISATION, LE DROIT ET L’ÉTAT (2d ed. 2010), and Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBLEMS 15 (2005); lastly, UN DROIT ADMINISTRATIF GLOBAL? / A GLOBAL ADMINISTRATIVE LAW? (Clémentine Bories ed., 2012). More generally, on the international law/national law divide, see NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW (André Nollkaemper ed., 2007).

⁹ A large number of cases regarding these issues is collected in GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK (Sabino Cassese et al. eds., 3d ed. 2012). See also Jeroen Van Der Heijden, *Friends, Enemies, or Strangers? On Relationships between Public and Private Sector Service Providers in Hybrid Forms of Governance*, 33 LAW & POL’Y 367 (2011).

align their anti-doping legislation with the Code's principles. States' ratification of the UNESCO Convention triggers a mechanism of implementation of WADA's policies and regulations that produces significant effects in the domestic context: most of the countries established their own national anti-doping agencies.¹⁰ What is the actual legal status of the WADA Code? It is a key reference in international sports arbitration, including the Court of Arbitration for Sport (CAS); but how do courts relate to it?

Second, the Internet is ruled by a peculiar legal entity, the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit corporation governed by Californian law. Within ICANN, there is a specific Governmental Advisory Committee (GAC), which brings together representatives of each government of the world. The role of the GAC has become progressively more important, which led to significant structural reforms within the organization. The events surrounding the ".xxx" domain name for pornographic contents—with states stepping into the decision-making process to influence ICANN—is a clear proof to that effect.¹¹ What kind of law regulates hybrid bodies like ICANN? What kind of institutional devices can be adopted to balance public power and private actors? Is a formula like GAC replicable in other fields?

Third, the system built on the 1972 UNESCO World Heritage Convention has progressively acquired a significant procedural dimension, which is regulated by the UNESCO Operational Guidelines.¹² There are new forms of cooperation between international institutions, States, domestic administrations and other actors. The procedure for proposing additions to the World Heritage List must involve all relevant actors and a key role is played by private advisory bodies—international NGOs—in including world sites on the list. What kind of procedural devices can accord state and people participation? What happens if UNESCO Operational Guidelines are violated?

Beyond the state, therefore, public law and private law find new ways of combining, borrowing tools, and imitating solutions:¹³ at the international level, "hybridization" is at stake.¹⁴ The more complex the legal system, in terms of its norms, institutions, and procedures, the more blurred the distinction between public and private: ¹⁵ the

¹⁰ See *infra*, Section 3.1.

¹¹ See *infra*, Section 3.2.

¹² See *infra*, Section 3.3.

¹³ See Michel Rosenfeld, *Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 INT'L J. CONST. L. 125 (2013); Alain Supiot, *The public-private relation in the context of today's refeudalization*, 11 INT'L J. CONST. L. 129 (2013); Peter Goodrich, *The Political Theology of Private Law*, 11 INT'L J. CONST. L. 146 (2013); and Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT'L J. CONST. L. 162 (2013).

¹⁴ See Colin Scott, Fabrizio Cafaggi, & Linda Senden, *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, 38 J. LAW & SOC. 1 (2011), and Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J. LAW & SOC. 20 (2011). See also Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 29 OSGOOD CLPE RESEARCH PAPER (2012).

¹⁵ Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982), indeed highlighted that "[t]he public/private distinction could approximate the actual arrangement of legal and political institutions only in a society and economy of relatively small, decentralized, nongovernmental units" (*id.* at 1428).

result is a “context” which is neither public nor private, neither national nor international.¹⁶ For this reason, it would be preferable to use the term “distinction” in this context, instead of “divide” or “dichotomy.”¹⁷

The study of such distinction beyond the state, however, raises some paradoxes and contradictory trends. First of all, if public law and private law beyond the state become extremely close and ever more intertwined, is the distinction still useful?¹⁸ Or should a new paradigm be designed to accommodate all these legal interactions and to explain their connection with global governance? Second, as the criteria according to which public law and private law can be distinguished mostly rely on the presence and on the very idea of the state, how can this distinction be determined beyond the borders of national legal systems?

When the public/private distinction goes international and global, it performs several functions, and operates mainly as a “proxy” for bringing given values into a new legal context and for recreating a “familiar” legal endeavor beyond the state: these values may consist, for instance, in the immunities regime or in the adoption of enforcement mechanisms, as well as in freedom of contract and mutual agreements. States may use this proxy to retain their sovereignty; private actors may see it as an effective way to organize their powers. But this national-to-international transposition can be problematic: for how long will international organizations be able to enjoy immunities in a way similar to that experienced by domestic public authorities many decades ago? Why should private actors feel compelled to adopt public law principles? The fact is that beyond the state, the public/private distinction is like Lewis Carroll’s “white rabbit”: it is the “key” to access another dimension, but doing so, there is no guarantee that once the values and legal mechanisms behind them are moved from one level to another, they remain the same.

The analysis will now focus on the hypotheses of interactions between public and private beyond the state (Section 2), on the main processes of interbreeding that can be detected at the global level (Section 3), and on the reasons for this interbreeding (Section 4).¹⁹

¹⁶ Peer Zumbansen, *Neither “Public” nor “Private,” “National” nor “International”: Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 J. LAW & Soc. 50 (2011).

¹⁷ Jurgens & van Ommeren, *supra* note 5, at 173.

¹⁸ The decay of the distinction is portrayed by Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). Moreover, in the English tradition, the usefulness of the divide has been challenged: see Carol Harlow, “Public” and “Private” Law: Definition without Distinction, 43 MOD. L. REV. 241 (1980); DAWN OLIVER, COMMON VALUES AND THE PUBLIC-PRIVATE DIVIDE (1999) and Dawn Oliver, *What, if Any, Public-Private Divides Exist in English Law?*, in THE PUBLIC-PRIVATE LAW DIVIDE, *supra* note 4, 1. Different positions, more favorable to the relevance of the distinction in the British context, are in THE PUBLIC LAW/PRIVATE LAW DIVIDE, *supra* note 5.

¹⁹ This study will of course consider mainly hybrid public-private forms of governance (e.g., the Internet, sports, the environment, health, standardization, cultural property, and international investment): most of the cases examined will be taken from those fields, though some examples will come from more traditional contexts of international law or from transgovernmental networks. All these regimes are analyzed in depth in GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK, *supra* note 9, I.C. “Hybrid Public-Private Organizations And Private Bodies Exercising Public Functions”. See also ENFORCEMENT OF TRANSNATIONAL REGULATION, ENSURING COMPLIANCE IN A GLOBAL WORLD (Fabrizio Cafaggi ed., 2012).

2. The public/private distinction at the international level: a first approach

The public/private distinction is multifaceted and implies the existence of several different perspectives and relationships, which can often all appear together in a single field:²⁰ this is the case of international investment law and arbitration, where "antinomies of public and private" present a foundational nature;²¹ or of cultural property law, where public and private legal instruments play several different roles.²²

First, the distinction may refer to the legal regime, mirroring the more usual distinction between public law and private law. At international level, it is worth distinguishing between "a private law framework," meaning "the result of spontaneous co-ordination efforts," and "a public law framework," where law can be defined "as the result of a political process, which is not autonomous, but is intentionally steered."²³ Such a distinction echoes the Kelsenian approach in which public law brings power (*Macht*) and sovereignty (*Herrschaft*) into the picture, while private law would rely on a more "democratic" autonomy.²⁴ As recently observed, "law that regulates the vertical relationships between the state and private parties shall be deemed public whereas law that applies to horizontal dealings among private parties shall be labeled private";²⁵ this definition may work perfectly at the national level, but it becomes much less tenable in light of the hybridization that dominates the global legal space. In fact, "private law beyond the state is bound to be less coherent and hierarchical, at least to some degree, than private law within the state. This raises new problems for those who seek clear and predictable answers."²⁶

Second, the public/private distinction may refer to the legal status of the actors involved; here, the nuances in differentiation between public bodies, private bodies

²⁰ Lucy, *supra* note 3, at 61 *et seq.*

²¹ See Alex Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 J. INT'L ECON. L. 469 (2011), and Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L COMP. L. Q. 371 (2007). More generally, see THE EVOLVING INTERNATIONAL INVESTMENT REGIME (José E. Alvarez & Karl P. Sauvant eds., 2011), and STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009).

²² John Henry Merryman, *THINKING ABOUT THE ELGIN MARBLES. CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW* (2d ed. 2009), esp. *id.* at 142 *et seq.*; Eric Jayme, *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 VAN. J. TRAN'L L. 927 (2005); Lorenzo Casini, "Italian Hours": *The Globalization of Cultural Property Law*, 9 INT'L J. CONST. L. 369 (2011); and Francesco Francioni, *Public and Private in the International Protection of Global Cultural Goods*, 23 EUR. J. INT'L L. 719 (2012).

²³ Christoph Moellers, *Transnational Governance without a Public Law?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 329, 337 (Christian Joerges, Inger-Johanne Sand, & Gunther Teubner eds., 2004).

²⁴ See HANS Kelsen, *REINE RECHTSLEHRE* (2d ed. 1960), Eng. transl., *PURE THEORY OF LAW* (Max Knight trans., 1967), esp. *id.* 280–281, where he states that "private law represents a relationship between coordinated, legally equal-ranking subjects; public law, a relationship between a super- and a subordinated subject, that is, between two subjects of whom one has a higher value as compared with that of the other." On these aspects, see Norberto Bobbio, *La grande dicotomia* [1974], in NORBERTO BOBBIO, *DALLA STRUTTURA ALLA FUNZIONE. NUOVI STUDI DI TEORIA DEL DIRITTO* 122 (2007).

²⁵ Rosenfeld, *supra* note 13, at 126. See also MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* esp. 154 *et seq.* (2003).

²⁶ Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, in *BEYOND THE STATE: RETHINKING PRIVATE LAW* 69, 117 (Nils Jansen & Ralf Michaels eds., 2008).

exercising public functions and fully private bodies become relevant. In this context, the criteria often proposed to distinguish between public and private organizations are based mainly on the entities' ownership arrangements, their source(s) of financial resources, or their models of social control.²⁷ Similarly, EU law has intervened to define "body governed by public law."²⁸ However, the public and private distinction based on the legal status of actors may be difficult, especially at domestic level (the UK Human Rights Act 1998, for instance, provides with a definition of "public authorities").²⁹ Beyond the state, public actors often act as "private" ones, especially when they are subjected to a given regime: this happens, for instance, with states that aim to include their national sites on the World Heritage List. Whenever global institutions develop procedures, participation may be accorded to every addressee indistinctly, whether they are either public or private.³⁰

This latter scenario leads us to a third hypothesis, which is when the public/private distinction hinges upon the interests at stake.³¹ Such a perspective justifies public intervention in pursuit of a public interest. In these cases legal systems allow special measures to be taken, or derogations from private law to be made: the most ancient example is perhaps that of expropriation, which provides evidence of the supremacy of the public interest over private ones. However, beyond the state, the public interests dynamics become much more complex, due to the interplay between several actors—including governments—and to the high degree of "hybridization" which makes it hard to detect what is actually public and what, instead, private.

The labels "public" and "private," therefore, may refer in turn, or simultaneously, to the legal regime, the legal status of actors, or the interests at stake. Not surprisingly then, scholars listed possible set of interactions between public and private at the international level.³² Amongst these, relevant examples come from claims in tort or other liability issues, when States seek to sue IGOs (e.g., the case of Haiti attempting to sue the UN because of a cholera epidemic):³³ globalization produced a "cascade" effect

²⁷ See James L. Perry & Hal G. Rainey, *The Public–Private Distinction in Organization Theory: A Critique and Research Strategy*, 13 ACAD. MGMT. REV. 182 (1988). A broader perspective in KENNETH J. MEIER & LAURENCE J. O'TOOLE, *PUBLIC MANAGEMENT: ORGANIZATIONS, GOVERNANCE, AND PERFORMANCE* (2011).

²⁸ See Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 2004 O.J. L. 134, art 1(9).

²⁹ See e.g. *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank*, 26 June 2003 (House of Lords) [2003] UKHL 37.

³⁰ Sabino Cassese, *A Global Due Process of Law?*, in *VALUES IN GLOBAL ADMINISTRATIVE LAW* (Gordon Anthony *et al.* eds., 2011).

³¹ See Gordon Anthony, *Public interest and the three dimensions of judicial review*, 64(2) N. IR. LEGAL Q. 125 (2013).

³² See also Lucy, *supra* note 3, at 63 *et seq.*, who lists five ways of distinguishing public and private: public law v. private law; matters of general concern v. matters of individual concern; public goods v. private goods; realm of the state v. realm beyond or free from the state; public realm of politics, law, and the market v. private realm of family, the household, and intimacy.

³³ See the statement by the UN Secretary General (Feb. 21, 2013), www.un.org/sg/statements/index.asp?nid=6615; and also *Justice in Haiti: Double Standards*, THE ECONOMIST (Mar. 2, 2013), available at www.economist.com/news/americas/21572819-un-condemns-baby-doc-exonerates-itself-double-standards.

on tort law, because it both increased the number of claims against states (and international organizations) and favored the view of liability as an instrument of accountability.³⁴ Another significant example is when public actors pursue private interests, such as in the case of sovereign wealth funds: indeed, questions arise as to how these funds should be regulated, whether they require specific discipline, or whether they may be likened to general forms of foreign investment.³⁵

However, the usefulness of concretely applying these categories—which stem directly from reality and from what can be observed in the global legal space—mostly rely on understanding *how* and *why* such interactions take place, as well as when they are used. With regard to this latter aim, it becomes important also to verify whether there are cases when hybridization should or could happen but did not.

3. The public/private distinction beyond the state from a multipolar administrative law perspective: three processes of interbreeding

Three cases can shed light on *how* the public/private distinction beyond the state is shaped and unfolds: the first relates to the regulatory dimension; in particular, to the norms produced at international level; the second refers to the institutional design of the phenomenon, namely to the rise of global public and private partnerships; and the third concerns one of the most significant trends in the development of global regulatory regimes, i.e., proceduralization.

All of these hybrid public–private processes of interbreeding demonstrate several facets of what can be defined as multipolar administrative law: from experimentation with new forms of participation to a less clear separation between society and administration. As a matter of fact, states and national public administrations are actors operating within global hybrid public–private regimes, and they act in accordance with mechanisms for both consensus and authority. The institutional design, procedures adopted and review mechanisms, all follow models that are typical of—if not directly subject to—administrative law. It can be further stated that global hybrid regimes provide for the direct application, to private entities or individuals, of norms and decisions made by ultra-state bodies, usually without any intermediation on part of states.

Thus administrative law plays a significant role in framing the development of global public and private regulatory regimes. It enables better comprehension of the relations between legal orders: "The majority of legal orders (from the most ancient, pertaining to territorial groups, to the most recent, such as the sports legal system

³⁴ See CAROL HARLOW, *STATE LIABILITY: TORT LAW AND BEYOND* 42 *et seq.* (2004).

³⁵ See Larry Catá Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 *TULANE L. REV.* 1 (2008); Maurizia De Bellis, *Global Standards for Sovereign Wealth Funds: The Quest for Transparency*, 1 *ASIAN J. INT'L L.* 349 (2011).

and sectoral legal orders) operate in the context of administrative law” and the latter, therefore, “must address them.”³⁶ In addition, the dynamics linked to the dialogue between private autonomy and public powers give rise to an ever-increasing degree of direct involvement of governments and domestic authorities in global regimes; this indicates that the significance of public administration and the related law is constantly growing within these contexts. Lastly, the administrative law perspective can bring useful tools to examining global institutions, in terms of their organizational and procedural aspects and review mechanisms.

However, administrative law cannot be considered either as self-sufficient or as the sole perspective. In several cases, the same problem can be explained either through the application of administrative law tools or through private law.³⁷ For example, in cases of dispute resolution through arbitration, one may investigate the phenomenon having regard to private law, civil procedure, and private international law, without any need to turn to public law: also, participation and transparency in the decision-making processes can be seen as forms of fiduciary duties; and many legal problems may be solved through private law mechanisms—such as tort or liability claims—instead of administrative law-type review mechanisms. Multipolar administrative law stems from emulation, dialog, and conflict between different bodies of laws, different administrative models, and methodological pluralisms: the administrative law approach can be combined with other projects, which seek to outline the global legal context, such as, for example, “global constitutionalism”³⁸ or the theory based on the exercise of international “public authority,”³⁹ or on the concept of Informal International Law-making (IN-LAW),⁴⁰ as well as on research projects focusing on “Transnational Private Regulation” and “Transnational Business Governance.”⁴¹

3.1. The hybridization of international regimes: the emergence of global law?

The dialog between public and private plays a fundamental role in driving the growth of global regulatory regimes; in particular, through a reciprocal mimetic process.

Intergovernmental regimes use private law mechanisms to advance growth: among the many examples, the International Atomic Energy Agency (IAEA) has developed a complex set of rules based on standards, agreements, and memoranda of understanding, to establish global norms capable of limiting states’ discretion in a sensitive

³⁶ MASSIMO SEVERO GIANNINI, 1 DIRITTO AMMINISTRATIVO 97 (3rd ed. 1993) (my translation).

³⁷ See, for instance, Muir Watt, *supra* note 4.

³⁸ See CHRISTINE E.J. SCHWÖBEL, GLOBAL CONSTITUTIONALISM IN INTERNATIONAL LEGAL PERSPECTIVE (2011); RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (Jan Klabbers, Anne Peters, & Geir Ulfstein eds., 2009); and the journal GLOBAL CONSTITUTIONALISM, published since 2012 by Cambridge University Press.

³⁹ THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS. ADVANCING INTERNATIONAL INSTITUTIONAL LAW (Armin von Bogdandy et al. eds., 2010).

⁴⁰ INFORMAL INTERNATIONAL LAWMAKING (Joost Pauwelyn, Ramses Wessel, & Jan Wouters eds., 2012).

⁴¹ See respectively Scott et al., *supra* note 14, and Eberlein et al., *supra* note 14.

sector.⁴² The regulatory framework no longer relies solely on traditional instruments of international law (such as treaties and conventions), but is enriched with other legal tools based on consensus. Similarly, private regimes turn to public law instruments and their "language" so as to build more sophisticated (and powerful) models of governance: hierarchies of norms, "constitutional" instruments, review mechanisms. In recent years, all major global private regimes—such as the Internet, sports, accounting—have been increasing their degree of "publicness," a quality related to the adoption of public law instruments, the involvement of states and public bodies—namely, the public administration—and the presence of global public interests which demand mechanisms for ensuring democratic accountability (this latter phenomenon is typical of private standard setting⁴³).

Thus, the distinction based on the notion that private law is consensual and public law is authoritarian requires refinement. On the one hand, private regimes develop forms of enforcement that cannot easily be labeled as purely consensual, a fact that becomes increasingly common in complex legal systems:⁴⁴ in the case of sport, for instance, the multi-degree mechanism of review having the Court of Arbitration for Sport at its apex is formally ruled by *ad hoc* clauses between all the parties involved; however, for athletes and sporting institutions, no concrete alternatives to signing those clauses exist. On the other hand, the absence of political authority beyond the state prompts intergovernmental organizations to adopt norm-making procedures based on negotiations and participation (from this perspective, accounting and banking standards offer prime examples⁴⁵).

As a result, norms produced within global regulatory regimes tend to appear extremely hybridized—at once public and private, national and international—and they allow us to infer the existence of a global law without the state.⁴⁶ Indeed, the emergence of a hybrid global law blurs the dividing line between national law and international law and fades the monism/dualism dichotomy.⁴⁷

From the regulatory perspective, therefore, the public/private interbreeding beyond the state seems to overcome the view according to which the two great dualisms were similar in contrasting the formation of *ius commune*. On the contrary, the emergence of

⁴² See Wolfram Tonhauser, *IAEA Technical Standard Setting*, Paper presented at A Global Administrative Law Perspective on Public/Private Partnerships, Accountability, and Human Rights, Geneva, Mar. 20–21, 2009, available at <http://www.iilj.org/GAL/documents/GALch.Tonhauser.pdf>.

⁴³ HARM SCHEPPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE. PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* (2005), and Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in *THE POLITICS OF GLOBAL REGULATION* 44 (Walter Mattli & Ngaire Woods eds., 2009). More recently, Janelle M. Diller, *Private Standardization in Public International Lawmaking*, 33 MICH. J. INT'L L. 481 (2012).

⁴⁴ ENFORCEMENT OF TRANSNATIONAL REGULATION, *supra* note 19.

⁴⁵ MAURIZIA DE BELLIS, *LA REGOLAZIONE DEI MERCATI FINANZIARI* (2012).

⁴⁶ GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997). Regarding non-state law, more recently, see INTERNATIONAL GOVERNANCE AND LAW. STATE REGULATION AND NON-STATE LAW (Hanneke van Schooten & Jonathan Verschuuren eds., 2008).

⁴⁷ See Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 INT'L J. CONST. L. 397 (2008); and Hisashi Owada, *The Problems of Interactions Between International and Domestic Legal Orders*, 23 SING. ACAD. L. J. 1 (2011).

hybrid global regulatory regimes, where both pairs of distinctions (public and private on the one hand, and international and national on the other) are blurred, appears to favor the creation of global norms that transcend such dichotomies. However, the public/private distinction maintains its usefulness, especially because, if not mistaken or misunderstood, it can favor the establishment of more effective, accountable, and democratic regulatory regimes. In other words, hybridity can and should be unpacked in order to realize whether it is the result of pursuing the most powerful interest, instead of the very public interests that required the emergence of a global regime.

This is why it is essential first to analyze and understand how these norms are produced; how private law and public law mechanisms interact; and how the different interests at stake are represented. Second, this hybrid law often consists of numerous and diverse documents, such as guidelines, standards, codes of conducts, principles. Setting aside the question of whether these can or cannot be considered law and under what conditions of legality and legitimacy,⁴⁸ it is important to verify which remedies can be taken against these norms, which nevertheless prove to be extremely effective. Indeed, the more hybrid global regimes are, the higher is the level of compliance that their norms appear to achieve. This may be due to the peculiar law-making processes and to the interaction between the public law and private law tools present in these regimes.

Among the numerous examples that include standard-setting and norm-making in several sectors—from accounting to food safety—two cases clearly related to these dynamics come from, respectively, sports and museums.

The first one is the above-mentioned case of the World Anti-Doping Code, which offers a prime instance of a formally private source of norms which nevertheless show a high degree of “publicness.”⁴⁹ This “public” character is based on many factors, including the fact the UNESCO International Convention against Doping in Sport expressly refers to the Code and requires states to align their anti-doping legislation with its principles.⁵⁰ States’ ratification of the UNESCO Convention triggers an

⁴⁸ Benedict Kingsbury, *The Concept of “Law” in Global Administrative Law*, 20 EUR. J. INT’L L. 23, 34 *et seq.* (2009), and David Dyzenhaus, *Accountability and the Concept of (Global) Administrative Law*, in ACTA JURIDICA 2009, GLOBAL ADMINISTRATIVE LAW 3 (2009), who examine respectively HERBERT L.A. HART, *THE CONCEPT OF LAW* (1961), and LON L. FULLER, *THE MORALITY OF LAW* (1964); *see also* JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010). *See also* Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L. J. 1865 (2008), and Laurence Boisson de Chazournes, *Governance et régulation au 21ème siècle: quelques propos iconoclastes*, in LAURENCE BOISSON DE CHAZOURNES & ROSTANE MEHDI, *UNE SOCIÉTÉ INTERNATIONALE EN MUTATION: QUELS ACTEURS POUR UNE NOUVELLE GOUVERNANCE?* 19 (2005).

⁴⁹ On the concept of “publicness” at the global level, *see* Benedict Kingsbury, *International Law as Inter-Public Law* in NOMOS XLIX: MORAL UNIVERSALISM AND PLURALISM 167, 175 *et seq.* (Henry R. Richardson & Melissa S. Williams eds., 2009), and Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, in FROM BILATERALISM TO COMMUNITY INTEREST. ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 79 (Ulrich Fastenrath et al. eds., 2011).

⁵⁰ UNESCO International Convention against Doping in Sport, Oct. 19, 2005, 2419 U.N.T.S., art. 3 enables governments to align—the principles of the World Anti-Doping Code are “the basis” for national measures—their domestic policy with the Code, thereby harmonizing global sports regulation and public legislation in the fight against doping in sport. On these aspects, *see* Casini, *supra* note 6.

implementation mechanism of WADA's policies and regulations that produces significant effects in the domestic context: for instance, since the US ratified the Convention in August 2008, the public relevance of the US Anti-Doping Agency has been rising (as the well-known and shocking story of Lance Armstrong demonstrated); in the UK, a specific non-departmental body was created in 2009 to comply with the World Anti-Doping policy.

The second example is the one of standard setting for museums. The International Council of Museums (ICOM), a non-governmental organization created in 1946, which has formal relations with UNESCO and enjoys consultative status in the United Nations' Economic and Social Council, governs the system of museum management.⁵¹ One of the most important documents produced by ICOM is the Code of Ethics for Museums, which sets minimum standards of professional practice and performance for museums and their staff. In joining the organization, ICOM members undertake to abide by this Code. However, the scope of this Code exceeds ICOM membership, because many countries, such as Italy, have enacted statutes or regulations which expressly refer to the Code.⁵² Although ICOM and the Code are formally private, they implicate—like the World Anti-Doping Code—a number of elements of "publicness," such as the public mission carried out by museums or the public nature of many of ICOM's members.

These examples both represent a similar product, i.e. formally private regulation with which states comply, also due to a certain number of public elements at stake: governments participate in the norm-making process; domestic orders enact legislation in accordance with global norms; and the regimes themselves may have public actors as their members. However, they show significant differences as to the reasons why such regulatory hybrid public-private regimes were created: in the case of anti-doping, the hybridization was necessary to better pursue relevant global public interests, especially since the International Olympic Committee (IOC) and the other sporting institutions had failed to deal with doping effectively; in the case of museums, a phenomenon of self-regulation developed, based on best practices, which progressively moved from a transnational dimension to a global one.

This kind of dynamics may occur often, and vary according to the specific kind of sector or regime;⁵³ the legal output, however, tends to be similar. In other circumstances, hybridization may not occur, due to different reasons that can relate to the need to ensure the full independence of the private actors that deliver a specific function: non-hybridization may depend on historical and technical reasons—such as in the case of international sports federations, which have always been private although the Court of Arbitration has often likened them to governmental entities—or also on

⁵¹ With its headquarters in Paris, ICOM has around 28,000 members in 137 countries (see www.icom.museum/hist_def_eng.html).

⁵² See, for Italy, the Atto di indirizzo sui criteri tecnico-scientifici e sugli standard di funzionamento e sviluppo dei musei, adopted with the Decree of the Ministry for Cultural Property of May 10, 2001.

⁵³ The case of the German Corporate Governance Code, for instance, displays many similarities to the example of the World Anti-Doping Code as a phenomenon of hybrid law making: see Zumbansen, *supra* note 16, at 63 *et seq.*

the need to accord freedom of expression (such as in the case of credit rating agencies, which display an interesting case of private standard-setting where hybridization could occur—and is sometimes prospected—but has not yet taken place).⁵⁴

3.2. The rise of global public–private partnerships: towards a “hybrid” global administration?

Both states and international organizations increasingly form, and operate through, formalized partnerships with private commercial and civil society entities.⁵⁵ Public–private partnerships (PPPs) involving intergovernmental organizations as one of the partners are important in the global governance of areas such as public health (e.g., Global Fund and Alliance, formerly the Global Alliance for Vaccines and Immunisation),⁵⁶ nuclear safety, environmental protection, the Internet, and sports.⁵⁷

For example, the Global Fund has close links with the World Health Organization (WHO), but is, in formal legal terms, a Swiss foundation. Its Board comprises donor and recipient states, and representatives of groups affected by HIV and other infectious diseases that the Global Fund combats; it has a sophisticated independent review system, and links to some very large funding sources such as the Gates Foundation. Other examples are the Internet Corporation for Assigned Names and Numbers (ICANN), the World Anti-Doping Agency (WADA), and the International Organization for Standardization (ISO).

This type of institution encompasses both hybrid public–private and fully private bodies exercising public functions. Data shows that the number of this type of international institutions has been growing constantly, connected to the emergence of a fragmented global civil society: there are now over 55,000 NGOs, while there were around 13,000 in the 1980s.⁵⁸ They can be defined negatively, as being non-formal intergovernmental organizations. In positive terms, they constitute a very interesting example of how the use of private law instruments to fulfill public functions is widespread at the international level, too. To a certain extent, bodies like the International Union for Conservation of Nature (IUCN), the International Red Cross and Red Crescent Movement (IRCRCM), and the Codex Alimentarius Commission can be also included in this category.

⁵⁴ Monica R. Das Gupta, *The External Accountability Gap of Private Regulators: Accountability Paradoxes and Mitigation Strategies: The Case of Credit Rating Agencies*, 1 INT'L PUB. POL'Y REV. 37 (2005). However, regulatory intervention in the field is increasing: see the recent EU Regulation No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, 2013 O.J. L 146.

⁵⁵ BENEDICT BULL & DESMOND McNEILL, *DEVELOPMENT ISSUES IN GLOBAL GOVERNANCE. PUBLIC–PRIVATE PARTNERSHIPS AND MARKET MULTILATERALISM* (2006).

⁵⁶ Gian Luca Burci, *Public/Private Partnerships in The Public Health Sector*, 6 INT'L ORG. L. REV. (SPECIAL ISSUE: SYMPOSIUM ON “GLOBAL ADMINISTRATIVE LAW IN THE OPERATIONS OF INTERNATIONAL ORGANIZATIONS”) 359 (2009).

⁵⁷ See GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK, *supra* note 9, I.C. “Hybrid Public–Private Organizations and Private Bodies Exercising Public Functions.”

⁵⁸ UNION OF INTERNATIONAL ASSOCIATIONS (UIA), *YEARBOOK OF INTERNATIONAL ORGANIZATIONS* (48th ed. 2011).

These forms of global public–private partnership are triggered by the need to increase the effectiveness, legitimacy, or accountability of the global regimes to which these bodies belong. The use of private instruments and the involvement of private actors within more structured forms of agreement can bring in further resources, and can enable the involvement of affected parties: in the cases of the WHO, United Nations Conference on Trade and Development (UNCTAD), United Nations Development Programme (UNDP), United Nations Children's Fund (UNICEF), and the World Bank, for instance, public–private partnerships are also seen as an important tool for development.

Cooperation may take different shapes: in some cases, such as the WADA, governments do not participate directly in the governing bodies of the institutions, but they appoint delegates for each continental area; in other cases, such as in the IUCN, states are members of the association; in others yet, such as the ICANN, a specific Governmental Advisory Committee brings together representatives of each government. The case of the ICANN is highly significant because the role of the GAC has become progressively more important—as the “.xxx” case above illustrated (Section 1)—and this led to important structural reforms of the organization.⁵⁹

Together with the rise of foundations, associations, and similar bodies in which public and private actors interact on an institutional level, there is a surge in contractual activity (e.g., in public procurement⁶⁰). Moreover, the number of memoranda of understanding concluded by international organizations and these hybrid institutions is constantly increasing.

International organizations' growing engagement in hybrid public–private bodies raise significant issues of accountability,⁶¹ and prompts several questions: what kind of law regulates these hybrid bodies? Are they international organizations? What is the role, if any, of the national law of the states where their headquarters are located? More generally, what institutional devices can be adopted to balance public power and private actors? Under what conditions should international organizations engage in PPPs and associated private law instruments? And how can “regulatory capture” be avoided?

These problems are significantly similar to those that habitually arise within domestic legal orders, especially since the development of “government by contract.”⁶²

⁵⁹ Jonathan Weinberg, *Governments, Privatization, and “Privatization”: ICANN and the GAC*, 18 MICH. TELECOMM. TECH. L. REV. 189, esp. 196 *et seq.* (2011), available at www.mttlr.org/voleighteen/weinberg.pdf. See also MILTON L. MUELLER, *Networks and States: The Global Politics of Internet Governance* (2010).

⁶⁰ See Hilde Caroli Casavola, *Global Rules on Public Procurement*, in *GLOBAL ADMINISTRATIVE LAW: AN ITALIAN PERSPECTIVE* 51 (Sabino Cassese et al. eds., 2012) [hereinafter *GLOBAL ADMINISTRATIVE LAW*], and Elisabetta Morlino, *Procurement Regimes of International Organizations*, in *GLOBAL ADMINISTRATIVE LAW* 59.

⁶¹ Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORG. L. REV. (SPECIAL ISSUE: SYMPOSIUM ON “GLOBAL ADMINISTRATIVE LAW IN THE OPERATIONS OF INTERNATIONAL ORGANIZATIONS”) 319 (2009).

⁶² Terence Daintith, *Regulation by Contract: The New Prerogative*, 32 CURRENT LEGAL PROB. 41 (1979); IAN HARDEN, *THE CONTRACTING STATE* (1992); Mark Freedland, *Government by Contract and Private Law*, PUBLIC L. 86 (1994); JEAN-PIERRE GAUDIN, *GOUVERNER PAR CONTRAT* (1999); Jody Freeman, *The Private Role in Public Governance*, 75 NYU LAW REV. 543 (2000); Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52(3) ADMIN. L. REV. 814 (2000); and Aman Jr., *supra* note 5, at 205 *et seq.*

Responses to these phenomena in the realm of national administrative law may thus be of some relevance even to the radically different contexts in which international organizations operate. Administrative law may assist in addressing problems such as: what kinds of oversight mechanisms could such public bodies use, in relation to PPPs? Will these be sufficient to ensure adequate accountability and legitimacy?

In addition, how can these public–private mechanisms fit within the traditional regimes of immunities applied to international organizations?⁶³ The Global Fund, for instance, enjoys privileges and immunities in Switzerland where it is based and in the US where most of its funds are, but should other states (particularly, the developing countries in which it operates) accord similar immunities or otherwise recognize the Global Fund as a public international organization? Where PPPs directly affect fundamental human rights or other interests of persons, it is apparently becoming orthodox practice for the extension of the regime of immunities and privileges to PPPs (on the condition of a delegation or some similar link between these and the relevant public international organization) to be accompanied by duties to observe rights and guarantees for individuals or legal persons; these duties are similar to those imposed on cognate national public bodies, including rights of access to information (such as in the case of the UK in relation to human rights).

All these examples confirm that treating a distinction between public and private as rigid and obvious risks “conceal[ing] both the complexity of its political history and important potential areas of overlap and compromise in the future.”⁶⁴ There is considerable imprecision, and tension, about what it means to be “public” in global governance. Due to the absence of a decisive referent (beyond the simple inter-state nature of international organizations), the public and democratic interests at stake in the use of PPPs by international organizations require scrupulous procedures, subjected to administrative law mechanisms such as transparency and participation. This leads us to the third form of interbreeding between public law and private law beyond the state.

3.3. The key role of proceduralization: a new field for the public/private distinction?

Proceduralization is, first of all, a device to govern complex organizations and their decision-making processes. From this perspective, procedures are neutral as to the public/private divide. Multinational corporations have plenty of procedural schemes and handbooks of procedure: this does not imply that they are public administrations:

⁶³ Davinia Abdul Aziz, *Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria*, 6 INT’L ORG. L. REV. (SPECIAL ISSUE: SYMPOSIUM ON “GLOBAL ADMINISTRATIVE LAW IN THE OPERATIONS OF INTERNATIONAL ORGANIZATIONS”) 383 (2009).

⁶⁴ Aman Jr., *supra* note 5, at 218; Michael Taggart, “The Peculiarities of English”: Resisting the Public/Private Law Distinction, in *LAW AND ADMINISTRATION IN EUROPE. ESSAYS IN HONOUR OF CAROL HARLOW* 107 (Paul Craig & Richard Rawlings eds., 2003).

indeed, private law knows several procedural tools.⁶⁵ In some way, procedures display the same neutrality as bureaucrats, meaning "not someone in a government office, but . . . the representative of an anonymous order Our age has rightly been called the administrative age. The administrative officers are as characteristic of an industrial society as are the factories themselves."⁶⁶ In fact, the "direction of any large corporation presents difficulties comparable in character to those faced by an administrative commission. Rates are a concern, likewise wages, hours of employment, safe conditions for labour, and schemes for pension and gratuities. There must follow the enforcement of pertinent regulations as well as the adjudication of claims of every nature made not only by employees but also by the public. This is in fact governance."⁶⁷

Data shows that global regulatory regimes and global institutions have been increasingly developing procedures. Most of these can be likened to the models adopted at the domestic level (such as procedures for granting licenses or permissions), but the more complex legal framework of the global arena enables detection of other forms, such as "policy-making" procedures;⁶⁸ the same is true of other supranational experiences (see the EU-related "composite" proceedings).

Examples come from several sectors: from finance to sports, from health to environment. The system built on the World Heritage Convention, for instance, has progressively acquired a relevant procedural dimension, which is regulated by the UNESCO Operational Guidelines for the Implementation of the World Heritage Convention:⁶⁹ there are forms of cooperation between international institutions, states, domestic administrations, and other actors; the procedure for proposing additions to the World Heritage List must involve all relevant actors;⁷⁰ and the Operational Guidelines also detail some common elements and practices for effective management, such as ensuring a thorough and shared understanding of the property by all stakeholders.⁷¹

Thus proceduralization beyond the state displays the multipolar character of contemporary administrative law, due to the presence of different levels of activity

⁶⁵ Carlo Lavagna, *Considerazioni sui caratteri degli ordinamenti democratici*, 5 RIV. TRIM. DIR. PUBBL. 392 (1956), for example, underlined the high number of procedural provisions set forth in the civil code and aimed at regulating different forms of private actions in collective endeavors (*id.* at 421); similarly, EMILIO BETTI, *TEORIA GENERALE DEL NEGOZIO GIURIDICO* 300 (2d ed. 2000 [1943, 1950]). As to international organizations, see Jochen von Bernstorff, *Procedures of Decision-Making and the Role of Law in International Organizations*, 9 GERMAN L. J. 1939 (2008), and *THE ANATOMY OF INFLUENCE. DECISION MAKING IN INTERNATIONAL ORGANIZATIONS* (Robert W. Cox & Harold K. Jakobson eds., 1974).

⁶⁶ RAYMOND ARON, *DEMOCRACY AND TOTALITARIANISM: A THEORY OF POLITICAL SYSTEMS* [1958] 235 (Roy Pierce ed., Valence Ionescu trans., 1990), trans. of RAYMOND ARON, *SOCIOLOGIE DES SOCIÉTÉS INDUSTRIELLES* (1958).

⁶⁷ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 10–11 (1938).

⁶⁸ Javier Barnes, *Towards a third generation of administrative procedure*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 3, 336, and *TRANSFORMING ADMINISTRATIVE PROCEDURE—LA TRANSFORMACIÓN DEL PROCEDIMIENTO ADMINISTRATIVO* (Javier Barnes ed., 2009).

⁶⁹ See Diana Zacharias, *The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution*, 9 GERMAN L. J. 1833 (2008), and Stefano Battini, *The World Heritage Convention and the Procedural Side of Legal Globalization*, 9 INT'L J. CONST. L. 340 (2011).

⁷⁰ See *Operational Guidelines for the Implementation of the World Heritage Convention* (2013), ¶ 64 available at <http://whc.unesco.org/en/guidelines/>.

⁷¹ *Id.* ¶ 111.

(national, regional, and international), different bodies of law (public and private), and the plurality of actors (governments, administrations, international organizations, civil society).⁷² Once national borders have been transcended, the notion of proceduralization appears to lose its neutrality and gains additional functions: it can enhance legitimacy⁷³ and democratic accountability, for example, or it can be an instrument to control power.⁷⁴ This can happen because procedures are also instruments for representing and negotiating interests, through participatory mechanisms.⁷⁵

Furthermore, global private regimes tend to develop and refine procedural tools, such as participation, consultation, and due process clauses. In doing so, they are often resonant of administrative law techniques (see, e.g., the Internet or sports), for several reasons: governments and domestic administrations are part of the game; public and administrative law techniques are well-equipped to balance powers;⁷⁶ the absence of a democratic context; a need to guarantee procedural safeguards for addressees.

Beyond the state, therefore, a dual relationship between proceduralization and the public/private distinction can be seen.

On the one hand, increasing interactions between public and private in terms of regimes and institutions favor the growth of procedures. These include rule-making and adjudicatory activities. They can be “administrative” but also “quasi”-judicial, as is the case with the ever-growing number of arbitration proceedings. Relationships between public and private actors can create new forms of procedures and develop techniques in ensuring procedural rights (e.g., when states or the government must be consulted, such as in the cases of World Heritage Protection or the World Anti-Doping regime).⁷⁷ Finally, the rise of proceduralization is also due to the creation of multi-level (international, regional and national) systems of governance.⁷⁸

⁷² Saskia Sassen, *The Participation of States and Citizens in Global Governance*, 10 IND. J. GLOBAL LEGAL STUD. 5 (2003).

⁷³ NIKLAS LUHMANN, *LEGITIMATION DURCH VERFAHREN* (1969), where the concept of procedure is analyzed as a social system, an instrument capable of giving legitimacy to legislative, judicial, and administrative functions. This theory was criticized by JÜRGEN HABERMAS, *LEGITIMATIONSPROBLEME IM SPÄTKAPITALISMUS* (1973) (both position have been discussed by Jiří Přibáň, *Beyond Procedural Legitimation: Legality and Its “Inflexions”*, 24 J. LAW & SOC. 331 (1997)). See also Jürgen Habermas, *Deliberative Politics: A Procedural Concept of Democracy* (trans. of *Deliberative Politik—ein Verfahrensbegriff der Demokratie*), in JÜRGEN HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* 287 (William Rehg trans., 1997), trans. of *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates* (1992), and JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 239 (Ciaran Cronin & Pablo De Greif eds., Ciaran Cronin trans., 1998), trans. of JÜRGEN HABERMAS, *DIE EINBEZIEHUNG DES ANDEREN. STUDIEN ZUR POLITISCHEN THEORIE* (1996).

⁷⁴ Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); Jerry L. Mashaw, *Explaining Administrative Process. Normative, Positive and Critical Stories of Legal Development*, 6 J. L. ECON. & ORG. 267 (1990).

⁷⁵ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1670 (1975) and Richard B. Stewart, *Administrative Law in the Twenty-first Century*, 78 N.Y.U. L. REV. 437 (2003).

⁷⁶ Cassese, *supra* note 3; the point was already highlighted by Kelsen, *supra* note 24, at 280–281.

⁷⁷ Cassese, *supra* note 30.

⁷⁸ Eberhard Schmidt-Aßmann, *Structures and Functions of Administrative Procedures in German, European and International Law*, in *TRANSFORMING ADMINISTRATIVE PROCEDURE*, *supra* note 68, 47.

On the other hand, proceduralization becomes an instrument for improving the effectiveness, accountability and legitimacy of these forms of public and private interactions. This means that here procedures transcend the neutral discourse of "more norms, more institutions, then more procedures," to represent a means of enhancing the connections between the public and private spheres: they can bring public powers into private regimes; they can introduce private actors into intergovernmental negotiations; they can offer a "market" where private and public actors can strike a deal.

The questions to be raised are numerous: Does this public-private interbreeding affect the very notion of procedure? How does this coexistence of public and private elements transform the procedural mechanisms traditionally adopted at the domestic level? How does the blurring line between rule-making and adjudicatory activities beyond the state influence the effectiveness of procedural tools?

The degree of proceduralization, however, is still very much diverse depending on the individual regime being considered. There are many asymmetries, to the extent that it would not be possible to build a "universal set of administrative law principles."⁷⁹ These asymmetries derive from the diversity of the functions delivered by different international organizations, but also from the level of involvement of public powers. In almost all global regulatory regimes, indeed, procedural principles such as participation, due process, and the duty to give reasons, are first established in norms (see, for instance, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters for the environment, or the World Anti-Doping Code). When these principles are to be applied, the more public the international regime, the more their enforcement will be delegated to states (as with the Aarhus Convention). In private regimes, instead, observance of these principles is usually directly ensured by international bodies (this is the case of sports or the Internet), which enhances the degree of proceduralization of these very regimes.

4. The reasons for the public/private distinction beyond the state and its functions

The analysis of three significant processes of interbreeding between public and private that take place at the global level showed how the projection of this distinction beyond the state operates, and in which dimensions: regulatory, institutional, and procedural. It is now crucial to deal with "what this purported" public/private "distinction is for, that is, *why* we want to make it all," beyond the state.⁸⁰

The reason for this growth of hybrid public and private legal phenomena at the global level is not the same as that true for the national context.⁸¹ At the global level, we

⁷⁹ Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187 (2006).

⁸⁰ RAYMOND GEUSS, PUBLIC GOODS, PRIVATE GOODS 107 (2001).

⁸¹ See Daphne Barak-Erez, *Three Questions of Privatization*, in COMPARATIVE ADMINISTRATIVE LAW, *supra* note 3, 493, and Jean-Bernard Auby, *Contracting out and "public values": a theoretical and comparative approach*, in COMPARATIVE ADMINISTRATIVE LAW, *supra* note 3, 511.

can find not only all the traditional reasons which prompt public authorities to adopt private law instruments—the growth of public procurement is a significant example in point. Beyond the state, it is often private law that requires public law to strengthen its effectiveness, not least because any international regulatory regime needs the support of states to develop. Hybrid public–private global bodies can be created both to admit public powers into relevant fields as well as to enhance their legitimacy, through the involvement of private actors within the institutional design (as in the case of NGOs’ committees). Thus, at the global level, due to the absence of a dyadic state–society relationship, the relationship between public and private actors may find its reasons either in an attempt to strengthen existing powers and maintain the *status quo*, in an effort to enhance legitimacy and accountability of a given regime, or even both.⁸²

Once again, the case of sport offers relevant examples of all these dynamics. On one hand, the IOC system progressively evolved towards forms of accountability and participation inspired by public law, so as not to lose its supremacy over the sports world; as a result, today, the Olympic System has reached a highly sophisticated degree of institutionalization and regulation (for example, take the rules governing the Olympic bid), although within a regime which remains, at the international level, essentially private. On the other hand, as illustrated above, the anti-doping regime, which originated as fully private, was progressively hybridized due to the increasing role played by governments and domestic authorities, concerned about the protection of fundamental rights and health of athletes.⁸³

The relationship between these two poles may become unavoidable when common public good requires public intervention, but this intervention also affects private rights (such as in the case of the environment or cultural heritage). The case of “global public good” sheds light on the difficulties related to the adoption of the public–private distinction beyond the state; and the very conceptualization of the “global commons” is indeed powered by the need to protect public interests which are greater, in global terms.⁸⁴ And to pursue such interests, a set of norms and procedures can be established, through decision-making processes that often involve complex forms of public–private partnerships. This happens in the case of the World Heritage Convention, for example, where the role of the UNESCO non-governmental advisory bodies (namely the International Council on Monuments and Sites (ICOMOS) and the IUCN) within the system has been growing in the last few decades.⁸⁵ And similar dynamics occur in the field of environment and health, or in the intellectual property regime.⁸⁶

⁸² On these issues, Deirdre Curtin & Linda Senden, *Public Accountability of Transnational Private Regulation: Chimera or Reality?*, 38 J. L. & Soc’y, 163 (2011).

⁸³ An overview in FRANK LATTY, *LA LEX SPORTIVA. RECHERCHE SUR LE DROIT TRANSNATIONAL* (2007), and in LORENZO CASINI, *IL DIRITTO GLOBALE DELLO SPORT* (2010).

⁸⁴ See Gregory Shaffer, *International Law and Global Public Goods in a Legal Pluralist World*, and the other contributions to 23 EUR. J. INT’L L. (SPECIAL ISSUE: SYMPOSIUM “GLOBAL PUBLIC GOODS AND THE PLURALITY OF LEGAL ORDERS”) (2012), and Inge Kaul, *Global Public Goods: Explaining Their Underprovision*, 15 J. INT’L ECON. L. 729 (2012).

⁸⁵ Eleonora Cavalieri, *LE.15 The Role of Advisory Bodies in the World Heritage Convention*, in GLOBAL ADMINISTRATIVE LAW: THE CASEBOOK, *supra* note 9, *ad vocem*.

⁸⁶ As illustrated by Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, 7 J. INT’L ECON. L. 279 (2004).

As mentioned earlier, the development of regulatory regimes beyond the state appears to follow a path of "mimesis": on the one hand, public law looks to private law for agreements, foundations, arbitrations, but, on the other, private law imitates public law in introducing instruments such as norm-making processes, review mechanisms, procedural guarantees, and other mechanisms to ensure accountability.⁸⁷ This imitative process, however, is not new: in 1949, Vittorio Emanuele Orlando wrote on the crisis of international law and on its need to productively look to notions and tools developed by public law, as the former appeared to be *minus quam perfectum* than the latter, exactly as public law appeared to be less perfect than private law, which had older origins.⁸⁸ The relations between public law—and administrative law in particular—and private law possess a cyclic character, insofar as at the national level, the former has been growing by affirming its special character, but at the same time borrowing and modifying private law instruments;⁸⁹ once beyond the state, it is the latter that borrows public and administrative law mechanisms.⁹⁰

The basic reason for the multiplying interbreeding between public and private law at the international level seems, therefore, to be linked to the main legal features of the global arena, on one hand, and to the role of states, on the other.

First, the global arena lacks a democratic context and requires the development of legitimacy and accountability mechanisms: this favors forms of hybridization between the public and the private because public authorities will seek consensus through agreements and other consensual instruments, and private regimes will look to tools developed in the context of public law—such as reviews, participation, transparency, etc.—to strengthen their own legitimacy and power. In both cases, the result is a greater interaction between public law and private law, with new combinations and problems.⁹¹ However, such hybridity can often hide a "dark" side: public actors may involve private interests and stakeholders to strengthen their powers or because they have been "captured" by stronger private powers; also, private actors can use

⁸⁷ Annelise Riles, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AM. J. COMP. L. 605 (2008), for instance, observes that "global private law" is "not a radical departure from state law, but really more of the same" (*id.* at 629); Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. INT'L L. 513, 516 (2008). See also Christiane C. Wendehorst, *The State as A Foundation of Private Law Reasoning*, in BEYOND THE STATE: RETHINKING PRIVATE LAW, *supra* note 26, 145, and Jürgen Basedow, *The State's Private Law and the Economy Commercial Law as An Amalgam of Public and Private Rule-Making*, in BEYOND THE STATE: RETHINKING PRIVATE LAW, *supra* note 26, 281.

⁸⁸ Vittorio Emanuele Orlando, *La crisi del diritto internazionale*, RASS. DIR. PUBBL. 1 (1949).

⁸⁹ See NAPOLITANO, *supra* note 4, and THE PUBLIC-PRIVATE LAW DIVIDE, *supra* note 4.

⁹⁰ As observed by FEDERICO CAMMEO, 1 CORSO DI DIRITTO AMMINISTRATIVO 49 (1914), at the beginning of the twentieth century, administrative law used to adopt instruments already regulated by private law: the opposite phenomenon is currently taking place at the international level, where private regimes tend to develop public law-like frameworks.

⁹¹ An interesting case comes from the public participation standards applied by multilateral development banks (MDBs) to the private sector: see Daniel D. Bradlow & Megan S. Chapman, *Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards*, 4 ERASMUS L. REV. 91 (2011).

public law tools—such as participation—as “manifestos” or merely as formal requirements that do not significantly affect the actual decision-making process, which will continue in its present state behind “closed doors.” Among the problems caused by the emergence of transnational governance, in fact, is that “maximizing transparency and participation for the interested minimizes transparency and participation for the disinterested.”⁹²

Second, governments play a crucial role in this process, and this contributes towards the transformation and hybridization of legal tools, whether public or private. For instance, procedures for rule-making must be adapted when these rules are addressed to states, and review mechanisms may encounter limits when governments are their subjects. This triggers the development of new instruments, tailored to fit the relationships between states, international organizations, and civil society. Not surprisingly, therefore, the more states participate in a global regime, the less it will develop as an autonomous legal system: in the case of the IOC and the global sports regime, for instance, the fact that states are not (at least neither formally nor directly) stakeholder actors, favored the establishment of a complex set of norms and procedures, including a world “supreme court” for sport, the Court of Arbitration for Sport; in the case of the World Heritage Convention, instead, the preeminent role played by states—first of all as the only parties entitled to submit the candidacy of a site to be inscribed on the World Heritage List—determined the formation of a regime with weak enforcement and sanctioning powers. In sum, beyond the state, public actors themselves contribute to modifying the way in which public law and private law can be combined and perceived.

Lastly, it emerges that the public/private distinction—although not viewed in the same way in different domestic legal orders—tends to be reproduced at the international level to ensure the establishment of certain values. The distinction operates as a technology of global governance: it is a “proxy,” capable of bringing given values and the legal instruments for protecting them to the international level. This may happen, for instance, when states insist on the immunities and privileges regime and whenever they purport to not cede sovereign powers. But it may also occur when global private regimes—such as that of sports—develop a complex system of governance that can keep governments out of the game. Once the distinction is considered multifunctional and a “proxy,” it is less important to endorse one value or another—such as democracy, legitimacy, or freedom of association—while it becomes crucial to unpack the diverse purposes that the public/private distinction may acquire. Beyond the state, sometimes what is public can act as private, and vice-versa: see for instance, the procedure for selecting the Olympic Host Cities, where an international private body, the IOC, sets the rules for a bid in which the only competitors are municipal public authorities endorsed by their national governments.⁹³

⁹² See Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369, 373 (2000); and Martin Shapiro, “Deliberative,” “Independent” Technocracy v. Democratic Politics: Will the Globe Echo the EU?, 68 LAW & CONTEMP. PROBS. 341 (2005).

⁹³ See CASINI, *supra* note 83, at 154 *et seq.*

This is why, at the global level, the notion of "public authority" has also been used to refer to private actors.⁹⁴

5. Public and private interbreeding beyond the state; perils and opportunities

In 1831, writing to Blosseville from New York, Alexis de Tocqueville observed that "le droit administratif et le droit civil forment comme deux mondes séparés, qui ne vivent point toujours en paix, mais qui ne sont ni assez amis, ni assez ennemis pour se bien connaître." In 1915, Dicey recalled this sentence in his *Introduction to the Study of the Law of the Constitution*, insisting that "for the term *droit administratif* English legal phraseology supplies no proper equivalent."⁹⁵

Today, public law and private law are extremely close. The process of imitation that drove administrative law to private law for support for the regulatory state may appear to have slowed down.⁹⁶ But its repercussions are still profuse, and hybrid public-private entities and arrangements dominate domestic legal systems. Beyond the state, the dialectic between these two "poles" becomes even more intense. The interaction between the other two poles—national and international—triggers new relationships and enhances the dynamics of mimesis. Imitation is no longer only one-way, with public law borrowing instruments from private law. At the same time, this seems to enhance the links between domestic law and international law, but also to blur the distinction between the "national" and the "international" in favor of genuinely global legal phenomena.

There is a "mutual" process in which both couples of poles imitate each other: private regimes adopt public law tools and vice versa; international law looks to domestic law instruments and vice versa. Such a multipolar process is amplified by the horizontal links that exist between different regimes, and by their borrowing mechanisms.⁹⁷ Once projected beyond the state, the public/private distinction serves as a technology of global governance: it is a "proxy," capable either of consolidating power and retaining sovereignty or of bringing other values to the international level. In both circumstances, the projection of this distinction to the international level appears to act as an effective "stabilizer."

Each of the three processes of interbreeding analyzed above can be related to the multipolar character of administrative law.

First, regulatory hybridity is closely connected to the crisis of legality, which characterizes the global legal space as well as domestic contexts (Section 3.1). This crisis is

⁹⁴ Goldmann, *supra* note 4.

⁹⁵ ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 214–215 (8th ed. 1982 [1914]).

⁹⁶ See Carol Harlow, *The "Hidden Paw" of the State and the Publicisation of Private Law*, in *A SIMPLE COMMON LAWYER. ESSAYS IN HONOUR OF MICHAEL TAGGART* 75 (David Dyzenhaus, Murray Hunt, & Grant Huscroft eds., 2009).

⁹⁷ Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *VAN. J. INT'L L.* 1 (2002).

also due to the multiplication of law-makers and the rise of norm-producers outside the traditional democratic circuit, as well as to the increasing number of activities delivered by administrative agencies: there are, therefore, several legal “grey holes.”⁹⁸ Beyond the state, this trait is extremely evident: as already observed in the 1960s, “[i]n so far as the rule of law enters international relations, it exists only at the sufferance of the major power holders and to the extent that the latter find it advantageous to submit to its working.”⁹⁹ Many things have changed since then, yet the applicability of the rule of law to states at international level remains problematic:¹⁰⁰ the state “is not *just* a subject to international law; it is additionally both a *source* and an *official* of international law.”¹⁰¹

From this point of view, the hybridization of public law and private law towards a genuine global law may be considered an instrument to ensure power in the hands of the most powerful actors, i.e., a way to strengthen the parties that already rule a given regime: hybrid norm-making beyond the state can produce more “grey holes” and exacerbate the crisis of legality in which administrative agencies operate; hybridization would therefore risk favoring what some scholars have labeled the “refeudalization” of public and private, where government by men would prevail over government by laws.¹⁰² However, in such cases the public/private distinction can contribute to attenuating the crisis of legality by helping to build some principles of hierarchical normativity, based on values and interests. To this end, the basic and traditional distinction according to which “all rules of law whose immediate purpose is the promotion of the rights of individuals are parts of the private law”¹⁰³ still appears to be useful. If national legal systems can put a limit on privatization and retain a core of

⁹⁸ This terminology comes from Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1 (2004), and DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* (2006). It is analyzed in detail by Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009), who explained—quoting Dyzenhaus—that grey holes “arise when ‘there are some legal constraints on executive action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit government to do as it pleases.’ Grey holes thus present ‘the façade or form of the rule of law rather than any substantive protections.’” (*id.* at 1096).

⁹⁹ Otto Kirchheimer, *The Rechtsstaat as Magic Wall*, in *THE CRITICAL SPIRIT: ESSAYS IN HONOR OF HERBERT MARCUSE* 287 (Kurt H. Wolff & Barrington Moore Jr. eds., 1967), reprinted in *POLITICS, LAW, AND SOCIAL CHANGE. SELECTED ESSAYS OF OTTO KIRCHHEIMER* 428, 446 (Frederic S. Burin & Kurt L. Shell eds., 1969). Kirchheimer was responding to Abram Chayes, *A Common Lawyer Looks at International Law*, 78 HARV. L. REV. 1396 (1965), who suggested that “most great disputes between states, even when they involve important legal elements, are not justiciable and for much the same reason that most disputes between organs of our government not involving invasions of private right are not justiciable” (*id.* at 1409). More recently, see Jeremy Waldron, *The Concept and the Rule of Law*, 43 GEORGIA L. REV. 1 (2008), and David Dyzenhaus, *The Legitimacy of the Rule of Law*, in *A SIMPLE COMMON LAWYER*, *supra* note 96, 33.

¹⁰⁰ Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L L. 315 (2011).

¹⁰¹ Jeremy Waldron, *The Rule Of International Law*, 30 HARV. J. L. & PUB. POL’Y 16, 23 (2006).

¹⁰² Supiot, *supra* note 13, at 138 *et seq.*

¹⁰³ FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW. AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, 1 ENGLAND, FRANCE AND GERMANY* 14–15 (1893), who also recalled the famous line by Ulpian: “Publicum ius est quod as statum rei Romanae spectat, privatum quod ad singulorum utilitatem” (*Institutiones*, I, § 4).

activities as inherently public (such as in the Israeli Supreme Court case regarding prisons),¹⁰⁴ then hybrid public–private regimes could progressively build a set of public values which would require further legal protection within the regime itself: “separating public from private is an inevitable task in *any* legal system. To form a government is to agree first and foremost on those decisions a collective will make together and those it will leave for its constituents.”¹⁰⁵

Second, the proliferation of hybrid public–private institutions at the global level confirms the growing complexity of administrative organization beyond the State (Section 3.2). This too supports abandoning the idea that administrative law can be used at the international level only with respect to its procedural aspect, and through principles of participation, transparency and review: a notion deriving from the supremacy of the American administrative law perspective, but one that is gradually giving way to a more comprehensive view of the administrative phenomenon (not only globally, but in American legal scholarship itself).¹⁰⁶ The growing numbers of international organizations and of public–private partnerships requires administrative law tools too, to better frame the coexistence of public and private elements. However, such institutional hybridization should not be pursued to endow private entities with immunities, instead of ensuring the protection of public interests: the extension of the immunities regime to private bodies should be always seen as an instrument of last resort, as it risks according too much power to those institutions and because it reduces the effectiveness of liability claims—which can often be invoked to fill accountability gaps.¹⁰⁷ And sometimes even the use of public law tools can be considered not enough: in the case of the Internet, for instance, despite the fact that ICANN established an Accountability and Transparency Review Team (ATRT) in 2010, to evaluate its mechanisms for public input, accountability, and transparency, in 2011 some states—such as India—continued to request that Internet governance be placed “under the auspices of the UN.”¹⁰⁸

Third, the procedural dimension beyond the state shows perhaps the highest degree of hybridity, due to the “neutral” nature of proceedings as an instrument for designing institutions. Procedures become the “battlefield” in which all these hybrid norms are produced and all these hybrid actors play their roles. Here, the public/private distinction is even more ambiguous, to the extent that its usefulness may appear to be low. As for the regulatory dimension, the distinction can be relevant once it is applied to the interests at stake. Yet, procedures in the global legal space resemble the “interest

¹⁰⁴ HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance, Nov. 19, 2009, unreported (Isr.), available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm. The case is discussed by Resnik, *supra* note 13, at 165 *et seq.*

¹⁰⁵ Christian Turner, *Law's Public/Private Structure*, 39 FLORIDA ST. U. L. REV. 1003, 1005 (2012).

¹⁰⁶ See JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION. THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

¹⁰⁷ An analysis of these issues with regard to global health is given in Lisa Clarke, *Responsibility of International Organizations under International Law for Acts of Global Health Public–Private Partnerships*, 12 CHI. J. INT'L L. 55 (2011–12).

¹⁰⁸ See Joe Waz & Phil Weiser, *Internet Governance: The Role of Multistakeholder Organizations*, 10 J. TELECOMM. & HIGH TECH. L. 331, 332 (2012).

representation model” of administration, so that all different interests will be assessed to take the best possible decision.¹⁰⁹ However, as illustrated above, beyond the State, the adoption of administrative law-type procedural tools—such as transparency, participation, and review—can sometimes be only a “panacea,” which may even have negative implications for democracy and accountability.¹¹⁰

Thus, the two sets of questions raised at the beginning of this article (Section 1)—related to the doubtful usefulness of the public/private distinction once these two poles are so hybridized, and to the very possibility of making such a state-centered distinction in a context where there are no states—find possible answers.

The public/private distinction beyond the state is indeed useful, insofar as it is accepted not as a rigid dichotomy capable of identically reproducing itself in all contexts. On the contrary, we have sought to demonstrate that globalization has increased the ways in which public and private law interact at the international level, that there are several criteria for drawing such a distinction, and that what is highly relevant is to understand why hybridization may or may not take place. Analysis of national legal contexts has already demonstrated that the public/private distinction is a “multifunctional” and “context-dependent” divide rather than a dichotomy.¹¹¹ When the public/private distinction moves from the national level to the international and global levels, it operates mainly as a technology of governance and a “proxy” for bringing given values to a new legal context, and for re-creating a “familiar” legal endeavor beyond the state. Regardless of what these values are, both states and private actors may use this proxy as an effective way to organize, manage, and protect their powers. However, this functional approach produces several implications: once values and the legal mechanisms behind them are moved from one level to another, it is unlikely that they will remain the same. And sometimes, what appears to be an instrument for maintaining the *status quo*—such as states’ attempts to retain their sovereignty—may have significant spill-over effects: the current outcry against IGOs’ immunities regime is only one example of this kind of problems.

As to the role of the State, the global level cannot offer the same coordinates as those consolidated at the domestic level, where the distinction between public law and private law can be placed within the state/society dialectic. The very emergence of global public good appears to stem from the difficulties in building a similar dyadic relationship beyond the state—where there is neither a “global state” nor a global civil society—given that the latter can be more visible in some regimes, such as the environment, but much less in others, such as finance. However, once it is recognized that the public/private distinction can be usefully applied to drive different processes of interbreeding at the global level, the role of the state changes. The state is no longer an indispensable concept for building the public/private divide; it is an actor within the global arena and it contributes towards incrementing the ways in which public

¹⁰⁹ Stewart, *The Reformation of American Administrative Law*, *supra* note 75.

¹¹⁰ Shapiro, *Administrative Law Unbounded*, *supra* note 92, at 373 *et seq.*; Curtin & Senden, *supra* note 82, at 187.

¹¹¹ Jurgens & van Ommeren, *supra* note 5.

law and private law can interact. As a matter of fact, the presence of the state has no longer been considered as the sole condition for building a legal system as well as to produce law.¹¹²

Finally, the relationship between the two great dualisms, once both firmly anchored to domestic legal systems and aimed at resisting the formation of *ius commune*, appear to be significantly transformed. Not only are both the public/private and the national/international divides more blurred, but they jointly interact in a common global legal space, towards the formation of a genuine global law, "neither 'public' nor 'private', 'national' nor 'international'."¹¹³ In this context, no matter how blurred they may be, such distinctions remain extremely useful because they appear to transcend their contexts of origin. These two dualisms, though profoundly modified and reframed, represent fundamental features of multipolar administrative law and they assist to further understand how it operates: the interbreeding processes analyzed above confirm the need to "abandon the public law regime paradigm, to de-publicize the approach adopted by administrative law scholarship and to study the ambiguities and the richness of the interconnections between public and private law."¹¹⁴

In conclusion, the perils and opportunities of this interbreeding are manifold, but they can be summarized in two main concurring scenarios. There is a risk that this "mimesis" may trigger a negative dynamic, where "doubles" of legal tools, either public or private, represent "nasty" and less virtuous reproductions, which are capable—like in Dostoevsky's novel—of progressively consuming the original ones. Should this happen, the international dimension may become an instrument to favor the strongest interests, discriminate against less powerful actors (such as developing countries) and weaken the effectiveness of domestic legal systems. This kind of process may produce negative effects on both great "dualisms" and may lead to strong reactions: states—especially through domestic courts—could overreact against the development of international regimes to protect fundamental rights.

But there is also an opportunity to develop a positive process of transformation, in which the continuous borrowing and lending between public and private can produce *ad hoc* tools that are suitable for dealing with global issues: public law and private law will move from their original mutual indifference—where "ne sont ni assez amis, ni assez ennemis pour se bien connaître"—toward a "mutual friendship." The public/private divide may be "replaced by polycontextuality," because "contemporary social practices can no longer be analysed by a single binary distinction, neither in the social sciences nor in law; the fragmentation of society into a multitude of social segments requires a multitude of perspectives of self-description. Consequently, the distinction of state/society which translates into law as public law vs. private law will have to be substituted by a multiplicity of social perspectives which need to be

¹¹² See Joseph Raz, *The Identity of Legal Systems*, in *ESSAYS IN HONOUR OF HANS KELSEN CELEBRATING THE 90th ANNIVERSARY OF HIS BIRTH* 795, esp. 811 *et seq.* (1971); formerly, Louis L. Jaffe, *Law Making by Private Groups*, 51 *HARV. L. REV.* 201 (1937), and SANTI ROMANO, *L'ORDINAMENTO GIURIDICO* (1918).

¹¹³ Zumbansen, *supra* note 16.

¹¹⁴ Cassese, *supra* note 3, at 608.

simultaneously reflected in the law.”¹¹⁵ World politics appear to go beyond the friend-enemy distinction;¹¹⁶ rather, they appear to sail towards more sophisticated “politics of friendship.”¹¹⁷ The case of the G-20’s Financial Stability Board framework and its relationships with private actors seem to confirm this trend, because “the intermeshing of regulatory networks of multinational corporations creates an autonomous governance framework, which then intermeshes with autonomous networks of states and vice versa.”¹¹⁸ Within this context of “borrowing instruments” and “transmissions links,”¹¹⁹ many public, private, and hybrid regimes and actors will be interconnected, sometimes knowing where they belong, and sometimes appearing to be “not particularly well acquainted” with each other.¹²⁰

¹¹⁵ Gunther Teubner, *State Policies in Private Law? A Comment on Hanach Dagan*, in *BEYOND THE STATE*, *supra* note 26, 411, at 413.

¹¹⁶ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* [1936] (Georg Schwab trans. 1996).

¹¹⁷ JACQUES DERRIDA, *THE POLITICS OF FRIENDSHIP* [1994] (George Collins trans. 2006). *See also* Van Der Heijden, *supra* note 9.

¹¹⁸ Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 *IND. J. GLOBAL LEGAL STUD.* 751, 799 (2011).

¹¹⁹ Wendehorst, *supra* note 87.

¹²⁰ CHARLES DICKENS, *OUR MUTUAL FRIEND* (1865).