

## FOREWORD

In the last quarter of a century, the process of globalization has impacted upon legal institutions as much as the economy. Global regulatory regimes have been established in almost all subject areas, from arms control to health and environment, from food and agriculture to labour, from the use of oceans to financial and accounting standards, to name but a very few.

Intergovernmental organizations, global standards and global courts have developed at an extraordinary pace because global problems (such as terrorism, the environment, and trade) require global solutions. International organizations produce standards or guidelines addressed to national governments or directly to civil societies. They perform inspections and controls. They issue guidelines to ensure compliance. They oversee and coordinate the action of national governments. Moreover, alongside these global institutions, there are regional organizations, like the European Union, Mercosur and ASEAN, which cover Europe, South American and South-East Asia respectively.

Global regulatory regimes come in different sizes. Some encompass all of the world's States: for example, the United Nations brings together 193 national governments. Others have a more limited number of members, but are nevertheless open to worldwide participation. Above all, they are not isolated from, but are rather interconnected with national governments, which are represented in supranational bodies, both in political and administrative terms. Their regulatory outcomes are closely related to national proceedings and practices: domestic agencies must ensure the enforcement of global standards. As a consequence, national governments, once the only rulers of the world, are now weaker, because they must adjust to global standards, but also stronger, because they can act in areas that were once outwith their control.

These global regulatory regimes have two peculiarities. In the first place, they do not form a unitary legal order. While domestic legal systems are unitary and are subject to general principles that regulate all aspects of government and civil society, the global space, in spite of its regulatory density, is fragmented: indeed, there are around two thousand "self-contained" regulatory regimes. In order to address this fragmentation, many regulatory regimes establish links with each other (giving rise to what is known as a "regime complex"): agriculture and food control, trade and the environment, labour and trade. Through to these links, global principles and rules are transplanted from one regime to another.

Secondly, the global regulatory space has developed principles and rules that are mainly administrative in nature, relating to the due process of law,

procedural fairness, transparency, participation, duty to give reasons, and judicial review. The entire arsenal of administrative law, as it is known to national governments, can be found in the global space. Global regulatory regimes, therefore, are more developed from an administrative perspective than they are from a constitutional one. This does not mean, however, such “global administrative law” is identical to national administrative law; on the contrary, it displays several particularities.

First, global administrative law is not hierarchical: there is no single regulatory regime that has supremacy *vis-à-vis* the others, and nor are global regulatory regimes hierarchically superior to national governments. Therefore, cooperation, “bargaining” and the government by contract are the rule, and majority decision-making is replaced by unanimity or consensus, with shared powers and networking dominating the scene. This makes the global administrative machine somewhat fluid and confusing.

Second, notwithstanding some areas of overlap, global administrative law should be distinguished from traditional international law. “*Ius gentium*”, “*Ius inter gentes*” and the law of the nations refer to the law established between the governments of States to regulate relations between States as legal entities. Despite displaying some features to the contrary, this law is still largely non-hierarchical; obligations arise on a voluntary basis and are contractual in nature. Global law, on the other hand, consists largely of the rules produced by international organizations of different kinds. International law is mainly based on transactions, while global law has developed a more robust hierarchy of norms. This hierarchy originally developed within each individual regulatory regime; it is now also emerging among the different regulatory regimes.

Third, global administrative law is sectoral, due to the presence of many different global regulatory regimes. This feature stems directly from the very origin of global regulation, which is a response to the emergence of a specific public aim that cannot be achieved by the actions of a single State. This sectorality itself has effects on the organization of global governance, with the variety of regimes producing various forms of global administration – ranging from formal international organizations (such as the WTO) to private institutions with regulatory functions (such as the ICANN). This lack of unity, however, is to some extent counterbalanced by a strong inter-connections between different sectors: for example, global bodies can be formed by other international institutions (such the Codex Alimentarius Commission, created by the FAO and the WHO); agreements or networks can be established that connect different regimes (as in the case of the agreements between the WTO and the WIPO, or

between the WTO and the WHO); and dispute settlement bodies created by one regime can be used to resolve disputes raised within another: (the WIPO Arbitration and Mediation Center addressing disputes involving internet domain names provides one example).

Fourth, the public-private divide is blurred at the global level (there exist many significant cases of “hybridization”: see, for instance, the ICANN, the WADA, the IUCN, the WIPO, the ISO, etc.), and does not follow the domestic paradigm of government regulating business.

Fifth, the global and the national levels interact in a number of different ways: for example, national governments act as law-makers at the global level, but they are also the addressees of global substantive and procedural standards. A global administrative law has thus developed with the aim of encouraging – or, sometimes, compelling – global regimes to ensure and promote the rule of law and procedural fairness, transparency, participation, and the duty to give reasons throughout all areas of their activity. Global administrative law, therefore, addresses a wide range of actors – States, domestic administrations, global institutions, NGOs, and citizens. The role of States within the global arena has become increasing multifaceted; global administration cannot plausibly be said to exist in isolation from the national level. It is for this reason that an examination of the decision-making processes of IOs reveals a plurality of techniques for facilitating joint action and mutual conditioning. In other words, there is no clear way of separating, either analytically or empirically, the global from the national.

Sixth, global administrative law lacks enforcement powers and procedures, and is, therefore, obliged to have recourse to non-compulsory means of ensuring compliance with global standards (for example, retaliation in the world trade regulatory regime), or to rely on the cooperation of national authorities for its implementation. Compliance in the global space is, therefore, “induced”. Global regulatory regimes have various means for ensuring their own effectiveness, using surrogates to implement their standards: retaliation, authorizing controlled self-enforcement (in particular, the certification and accreditation mechanisms applied to the implementation of global food standards, forestry rules, ISO standards, etc.), and the introduction of incentives for compliance. Implementation and enforcement may also be left to national governments acting as instruments of global institutions. As a consequence, dispute settlement by compulsory adjudication remains, as yet, the exception rather than the rule within the global legal order. Traditional diplomatic relationships and negotiations survive and operate side-by-side with compulsory and binding adjudication by supranational courts and the non-binding decisions of different quasi-judicial bodies.

Seventh, while there is a well-developed administration, governed by a well-developed set of administrative laws, in the global space, there is as yet no constitutional law; the discourse of constitutionalism remains, for the time being, more appropriate to national legal systems. However, a process of constitutionalization is arguably already underway at the global level through the strengthening of international civil society, the creation of a global public sphere, the growing number of transnational networks and the proliferation of global courts. There is, however, no government in this global constitution; and nor, more generally, is there real evidence of the emergence of the type of overarching institutional and/or normative unity that constitutionalism is usually thought to imply. This is why global law remains, for the time being at least, largely administrative and not constitutional in nature.

Lastly, from a strictly legal perspective, the global administrative space is both international and administrative: as such, the coexistence of both international and administrative law aspects must neither be denied nor conceptualized as a rigid dichotomy; rather, it should simply be recognized, accepted, and confronted as a new challenge, necessitating the development of a new set of conceptual and institutional tools.

This complex network of global organizations and procedures has been studied, in the last quarter of a century, by many scholars around the world. A global administrative legal scholarship has progressively emerged, strengthened through the establishment of the Viterbo Global Administrative Law Seminar Series as a “forum” for scholars from various parts of the world working in the field (<http://www.irpa.eu/category/gal-section/gal-seminars/>). In this way, a network of scholars is emerging that matches in complexity and scope that of the organizations that they study.

Born in 2005 from a collaboration between the Tuscia University of Viterbo (Professors Giulio Vesperini and Stefano Battini), the University of Rome Sapienza (Professor Sabino Cassese) and the New York University School of Law (Professors Benedict Kingsbury and Richard B. Stewart), the aim of this annual GAL seminar – held in Viterbo, Italy – is to provide an opportunity for scholars from all over the world to explore and contribute to the development of these emerging themes. Each year, a general topic is chosen as the overarching theme of the Seminar. Nine months in advance a worldwide call for papers is issued to invite scholars to submit paper proposals. Since the first GAL seminar, the best papers presented have been published in leading legal reviews and journals. The topics of previous Seminars included *Global Administrative Law and Global Governance* (2005); *Accountability within the Global Context* (2006);

Participation of Private Actors in Global Administrative Law (2007); Global Administrative Law: From Fragmentation to Unity? (2008); Legality Review in the Global Administrative Space (2009); The Financial Crisis and Global Regulatory Governance (2010); Private and Private-Public Regulation: Global Administrative Dimensions (2011); and Indicators as a Technology of Global Governance (2012).

As the results of these seminars demonstrate, global administrative law scholarship is important not only for the cooperation that has been established between different national legal academies, but also for the “de-nationalization” of the study of law that it has produced. This is not the least relevant aspect of the globalization of law.

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This book is an attempt to analyse global administrative law through the elaboration and examination of a number of different cases and case-studies. The architecture of its contents mirrors the characteristics of this field. In order to fully grasp global administrative law, however, it is important also to have a sound understanding of the broader governance context in which it is situated. This volume attempts to provide this also.

The first chapter examines the emergence of administrative law beyond the State and the rise of global administration. On one hand, it focuses on the notion of the State and the implications for this of the formation of a global administrative space. Topics analysed include the concept of “the State” in a globalized world; the application of this concept to the Palestinian case; and the rise of the global regulatory State in the South. On the other hand, it deals with the proliferation and differentiation of IOs, offering a classification of global institutions into four different types: formal intergovernmental organizations (e.g., the UN, WIPO, UNESCO, WHO, ILO, UNICEF, IOM, or even ASEAN); hybrid public-private organizations and private bodies exercising public functions (e.g. ICANN, the WADA, ISO, or the Global Fund); transgovernmental and transnational networks (such as the G-8, the International Conference on Harmonization (ICH), ASEAN International Investment Agreements, or the Basel Committee); complex forms of governance, such as hybrid, multi-level or informal global regulatory regimes (e.g. global and national proceedings under the International Patent Cooperation Treaty, decision-making procedures in fisheries governance, the composite interaction of UNESCO advisory bodies in the World Heritage Convention, or the clean development mechanism).

The second chapter addresses one of the most important activities of global administrative bodies: standard-setting. Global standards are generally addressed to national governments; this does not, however, mean that private parties are not affected by them. For example, the food that we eat is subject worldwide to the standards of the above-mentioned Codex Alimentarius Commission. The standards established by the Forced Labour Convention (1930) are addressed to national governments, but also affect private individuals. Such standards provide a clear example of the spread of global regulatory regimes, and of the ways in which they interconnect; in addition, they illustrate well the various kinds of interactions between the global and domestic levels. These standards can be set either by private bodies (as happens, for example, in the accounting sector), or by formal IGOs (such as the labour standards approved by the ILO); they can be considered either as regulatory devices (e.g., international accounting standard setting, the ICAO Standards, or the IAEA standards), a technology of global governance (as in the cases of the PISA Rankings in educational performance, the Rule of Law Index or quality standards for pharmaceuticals) or both (as in the case of credit ratings).

Analysing, this time, the *activity* of global administrative bodies, the contributions in chapter three illustrate the increasing spread of principles established by global actors and/or global norms, which must be respected within national administrative procedures. The main examples can be found within the WTO system, such as the duty to disclose information (here dealt with in relation to antidumping duties), the duty to give reasons (definitive safeguard measures), and transparency (subsidies and countervailing measures). Other important principles in the global context include legality (as demonstrated by the Compliance Committee of the Aarhus Convention), reasonableness and proportionality (applied by the NAFTA Binational Panel), and the review of discretionary power (as with, for example, the resolution of disputes relating to bilateral investment treaties by ICSID arbitration panels). A central focus of many contributions is also on participatory rights: many global bodies, such as the ITLOS, the World Bank Inspection Panel, and the World Bank Office of the Compliance Advisor Ombudsman (CAO), have relied – albeit in different ways – upon principles of participation and due process.

In connection with the increasing activities of IOs there is another issue of real significance: the enforcement of global decisions, whether “administrative” or “judicial” in nature. From this perspective, chapter four focuses on five examples that highlight the difficulties that might be encountered in the implementation of such decisions, which can, in some circumstances, result in some global norms or findings being only partially or ambiguously enforced.

Chapter five considers another fundamental topic in contemporary global governance: the rise of judicial globalization. Since the 1990s, the number of international courts and tribunals has grown rapidly. Previously, there were only a handful of operative international courts; in the last fifteen years, however more than twenty new permanent adjudicative mechanisms – and quasi-judicial bodies – have been established. One of the most important global dispute settlement bodies is that of the WTO, reflected in the attention it receives in various contributions to this volume. This chapter, however, broadens this focus significantly, analysing other examples of courts or quasi-judicial bodies, such as the international administrative tribunals, the ITLOS, ICSID arbitral tribunals, and the alternative dispute resolution mechanisms created by the ICANN. Lastly, the impact of human rights law – namely of the European Convention of Human Rights and its Court – on supranational regimes is also considered.

The presence of many sectoral regimes, however, does not only give rise to various forms of cooperation or interaction; it also creates conflict. This happens, in particular, when separate jurisdictions reciprocally overlap, as is brought out in the four examples presented in chapter six, dealing with the relations between global law and EU law, the Schengen Information System, the governance of cyberspace, and the international antitrust regime, respectively. Furthermore, these conflicts can often play out before global or national courts.

Within the many functions performed by IOs and their regimes, one of the most significant is the promotion of democracy through different means. This is why chapter seven examines global dimensions of democracy, by taking into account four different perspectives: *promoting democracy and human rights globally*, such as the case of the United Nations Democracy Fund (UNDEF) and the European Instrument for Democracy and Human Rights (EIDHR), the OAS, and the Foreign Aid Standards and the Electoral Democratic Standards elaborated by the Venice Commission; *civil society and multinational corporations*, such as the OECD Guidelines for Multinational Enterprises to Responsible Business Conduct; *the media*, in cases relating to internet censorship and to Wikileaks; and *global security*, examining, for example, the reconstruction of Iraq and the limits on the use of force.

As noted above, alongside global institutions and global regulatory regimes, a range of different regional organizations have emerged. Amongst these, the EU represents undoubtedly the most legally sophisticated example of integration. Chapter eight, therefore, examines the significance of Europe in the global legal space. To this end, several cases are examined, such as the EU's external action after the Lisbon Treaty, the EU comitology reform, the relationship between the EU and the UN Convention of the Law of the Sea, the European System of

Financial Supervision, the Data Protection Directive as a model for global regimes, and the interactions between EU and global administrative law more generally.

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While the structure of the book appears to be similar to that of the first and the second editions (published in 2006 and in 2008 respectively), this new edition introduces some significant changes.

The original version was something of an experimental attempt to demonstrate the relevance of global administrative law issues to contemporary legal scholarship, collecting the cases and materials used for courses on Global Administrative Law taught by Professor Sabino Cassese at the University of Rome “La Sapienza” and at the *Institut d’Etudes Politiques* in Paris. In the second edition (2008), each of the forty-one sections was considerably extended, and they all followed the same basic structure: an introductory or background section; a list of materials and sources (with hyperlinks, wherever possible); an analysis of the example in question; and a discussion of the various issues raised by the case, enabling each author to flag some basic theoretical problems, and to highlight the relations between the different topics examined in the book. Each contribution concluded with a list of recommended readings, relating specifically to the topic with which it dealt. Lastly, a general bibliography provided an overview of the most relevant works on global legal issues, and particularly global administrative law, divided into twelve different categories.

The 2012 edition has adopted the same basic structure for each section, but the number of cases and materials has been significantly increased. There are now over 160 separate contributions, i.e., four times the number of the second edition.

In particular, the methodology for expanding and improving the Casebook project has been twofold. Firstly, the scope of the volume has been enlarged through the introduction, within each area investigated, of the most relevant and up-to-date features of global administrative law. Secondly, the largely “Italian perspective” that characterized the previous editions has been enriched by the participation of a range of foreign authors in the most recent iteration of project. The Casebook, originally conceived in Rome and New York, now draws on insights from many different corners of the world. Authors include professors and fellows from the US, Australia, Germany, the UK, Greece, Spain, the Netherlands, Singapore, France, Poland, Colombia, and many others; with the involvement of leading institutions such as the University of Oxford, New York



University School of Law, the Max Planck Institute in Heidelberg, the EUI in Florence, the National University of Singapore, Universidad de Los Andes, the University of Amsterdam, and Sciences-Po in Paris. Nevertheless, the Italian perspective still plays a crucial role in developing global administrative law, as evidenced by the recent contribution by a number of Italian scholars entitled *Global Administrative Law: An Italian Perspective* Robert Schuman Centre for Advanced Studies, Global Governance Programme, RSCAS Policy Paper 2012/04, by S. Cassese, S. Battini, E. D’Alterio, G. Napolitano, M. De Bellis, H. Caroli Casavola, E. Morlino, L. Casini, E. Chiti, and M. Savino, elaborated in cooperation with the Global Governance Programme at the European University Institute of Florence (<http://globalgovernanceprogramme.eui.eu/research-publications-2/policy-papers>).

The issues covered in the Casebook have, as noted above, been extended to include crucial new areas of global regulation, as well as more general and overarching themes. In particular, the work includes a chapter on democracy in the global legal order, dedicated to an examination of the techniques and objectives that underpin the representative process and the protection of human rights. Another new chapter is dedicated to the status and role of Europe in the global legal space. Last but not least, the work opens with a section focused on the emergence of global administration, from both a structural and an organizational perspective, in order to help orient the reader through the analyses that follow.

In conclusion, this third edition aims to offer a more refined resource for the study and practice of global administrative law. Nevertheless, it is clear that the task that it sets itself is far from complete in its present iteration. Although most of the significant issues raised by global administrative law (such as accountability, participation, transparency, and due process) are examined in detail in this volume, there are – and there always will be – important aspects of the field omitted, which future editions will undoubtedly have to confront.

*Sabino Cassese*

*Bruno Carotti*

*Lorenzo Casini*

*Eleonora Cavalieri*

*Euan MacDonald*

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