Global Administrative Law

Towards a *Lex Administrativa*

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Foreword

Benedict Kingsbury*

This collection of papers on public law issues relating to Global Administrative Law brings to English language readers the ideas and approaches of legal scholars in Argentina, Colombia, Ecuador, Uruguay, Venezuela, Italy, Portugal and Spain. The collection has its foundations in the fruitful Ibero-American Forum of Administrative Law, an initiative currently led jointly by the book's editors, Jaime Rodríguez-Arana in Spain and Javier Robalino Orellana in Ecuador.

Global (or at least transnational) regulatory governance has a long history. For example, formally-organized attempts to manage transnational spread of diseases began to be institutionalized with the series of International Sanitary Conferences beginning in 1851, and legal instruments such as the International Sanitary Convention (concerning cholera) of 1892. Basic transnational worker-protection regulation extended from anti-slavery to wider measures, such as the 1906 Berne Convention against the use of white phosphorous in matches, followed by the founding in 1920 of the International Labour Organization. The Bank for International Settlements was founded in 1930, and the International Monetary Fund with tough regulatory authority on exchange rates and balance of payments issues was created along with the World Bank in 1945. However, the rapid growth in global regulatory governance in recent decades, and the heightened impact of such regulatory rules and institutions because of rising global trade and investment flows, has begun to pose qualitatively new challenges of international and national politics and law. Prof. Ferrari's chapter provides a sense of the scale and range of topics now significantly addressed by rule-making and supervisory institutions outside the State but which reach into matters that have hitherto been essentially part of national law and politics. In his chapter, Professor Ballbé analyzes the US original influence in globalization and shows how that role is now seconded by the European Union. Professor Ballbé illustrates his approach with many examples of intervention of the US Administration – in anti-trust and environmental issues for instance – and their subsequent influence in Europe and the whole world. These areas include accounting standards, banking supervision, securities market supervision, standardization by bodies such as the International

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Organization for Standardization (ISO), corporate governance, carbon markets, access to environmental information, food safety, and biotech regulations.

Exercises of regulatory power beyond the State entail some claim for the institutions exercising these powers, that they are exercising legitimate authority. This authority seldom rests on the direct consent of those who are 'governed' in the sense that their interests are affected in these forms of global governance. Insofar as consent is given by States in establishing relevant international institutions, or entering into treaties and other commitments, this is at best a very attenuated expression of the consent and support of relevant publics. The justification of regulatory power exercised by institutions beyond the State presents a substantial problem. Several chapters argue that the design and programmatic operation of global or regional regulatory institutions must be accompanied by the enunciation of general public-law principles for their operation, and advocate that these institutions and principles be embedded in wider normative constructs. A number of these chapters seek to locate these constructs in a higher law derived from one or other particular tradition which may or may not find broad global acceptance: some of the authors propose a *jus gentium* or a universal law of humanity (modernizing only slightly Vitoria and Suarez), or a 'general form of public authority' as suggested in Pope John XXIII's Pacem in Terris, or a more secular International Law deploying such concepts as *jus cogens*, general principles of law, and customary international law.

A particularly ambitious or aspirational strategy to address the growing importance of regulatory power beyond the State is to try to build into regional and global governance the functional equivalents of the full range of key institutions and core organizing principles of power and authority typically existing within States, including inter-institutional principles such as separation of powers and judicial control. The chapter by Fausto de Quadros takes one such approach, arguing for a global constitutionalism with admittedly limited substantive and institutional content under current conditions, but launched as a foundation for the future. There are some reasons, however, to be hesitant about global constitutionalism. Adapting legal ideas developed in the specific context of the State, to apply them to exercises of power beyond the State, is challenging. Transnational governance does not have clear separations of functions analogous to distinctions between legislatures and executives in national systems, nor is there a clearly organized legislative power or a unified hierarchy of authority. There are not clear-cut distinctions between the constitutional and the administrative, nor between public and private. There is no unified polity or unified public which can produce in contested situations

agreement on proper substantive norms, or agreement on processes which all will respect for formulating and applying decisive substantive norms. There is not the kind of carefully balanced structure of institutions, nor a set of agreed core principles to guide and unify these institutions and their interactions, that is found in the constitution of a well-functioning polity. These considerations are so weighty as to raise real doubts both that any general international constitution exists, and that an international constitutionalist approach to global regulatory governance is currently plausible.

A way forward is opened by the idea that much global regulatory governance can be characterized as administration. While the most dramatic acts of formal international governance may be the adoption of a major global treaty, or the taking of a high political decision in the United Nations Security Council concerning war and peace, much of the activity which directly affects individuals, groups, corporations, and States is the more routine making of global or transnational rules and decisions. These routine acts of governance, if less dramatic, are nevertheless very significant. Addressing this routine activity through principles and mechanisms of an Administrative Law character is a strategy proposed by an increasing number of scholars, including many participating in the Global Administrative Law project at NYU Law School which has helped to develop this approach. As the distinguished French Administrative Lawyer Jean Rivero remarked with regard to national administration: Administrative law concerns the exercise of power on a daily basis ('le droit administratif, c'est l'exercice du pouvoir au quotidien'). Several of the authors who believe constitutionalist or higher-law approaches to global governance are ultimately necessary, connect the arguments in their chapters to the more circumspect Global Administrative Law approach by treating Administrative Law as a kind of concrete instantiation of constitutional principles. The chapter by the Spanish jurist and politician José Luis Meilán Gil exemplifies such an approach, moving from broad international and national constitutional values, to more concrete doctrines such as the right to good administration in the European Union's Charter of Fundamental Rights, to specific administrative process rights of legal persons in international, supranational and national law on public procurement and State contracts. This focus on procedures and administration (*lato sensu*) establishes a promising terrain for pursuing practical critiques and reforms in the domain of quotidian power. While intense disputes exist on many substantive policies of global governance, and on overall structural and distributional features of global political and legal order, it is possible that enough unity exists with regard to basic procedural principles and mechanisms as to establish the existence of an incipient body of Global Administrative Law that, while modest

in reach, exerts appreciable normative pull and influence. Professor Jaime Rodríguez Arana follows Meilán Gil and develops the principles of Global Administrative Law giving the reader a broader view. Each of the chapters in this book explores materials that bear on this issue, ranging from specific cases or situations through to broad structures and principles.

In addressing exercises of power beyond the State, the Global Administrative Law project has focused on principles, practices and mechanisms concerned with matters such as transparency, notice, reason-giving, participation, review, legality, and accountability. A concrete illustration of the current significance and future potential of several of these principles, practices and mechanisms is presented in Allan Brewer-Carías's study of procedures within the international criminal police organization Interpol whereby individuals can trigger review of information submitted about them to Interpol by a national police agency, leading potentially to correction or expunging of such information from Interpol's files and international transmission system. This petition and review system (albeit hitherto rarely used ex post in the Commission for Control of Files by individuals, although Interpol's General Secretariat and General Assembly have been embroiled in other ways in major controversies concerning 'red notices' in cases from Kazakhstan, Iran, Argentina and elsewhere) operates directly between the individual and the international agency (with comments from the relevant national police agency). It is intended in part to vindicate Interpol's formal commitments to protect certain basic individual rights and not to transmit information that would be an intervention of a political, military, religious or racial character rather than one for accepted anti-crime reasons. The innumerable practical relationship between State law and international administrative governance structures power beyond the State are exemplified in this case by the design of Interpol's policies and review structures, which are broadly comparable to those applied in French law to databases and privacy, and were put in place and updated in the context of a 1984 agreement that the French State would not apply this law to Interpol database operations in France, where it has its headquarters.

The complexity and potential of two-way relations between global regulatory governance and the core structural concepts and operating systems of national Administrative Law are explored from the perspective of general principles of national systems in the chapters by Juan Carlos Cassagne (Buenos Aires) and Carlos Delpiazzo (Montevideo). Cassagne takes as his starting point the centrality, in Latin American Administrative Law thinking influenced by code-based and legislation-dominated continental European legal systems

(particularly those of France and Spain), of the powers and prerogatives of the State. Incorporating bilateral, regional and global governance into this structure is all the more problematic because of the disunity or diversity of these international structures and their generally unsystematic character. As he comments, however, Administrative Law has long had to deal with regulation by private professional regulatory bodies (e.g. doctors or veterinarians), stock exchanges, employer-union agreements, and other self-regulatory arrangements affecting public interests and effective rights. He notes also the substantial roles of non-positive law in Administrative Law, and in particular the role accorded in many national systems of Administrative Law to general principles of law. Delpiazzo is well known as a proponent of such general principles. The list of general principles elaborated in his chapter begins with legality and human preeminence as general principles of all law, adds cooperation, speciality and participation as structural principles pertaining to administrative organization, and then proposes as general principles of the dynamic operations of administrative activity: equality, security, reason, , good faith, publicity efficacy, responsibility, and control. He notes that most Latin American States have followed similar trajectories in recent decades with regard to several key features of administration. Most have to some extent moved away from State provision (often on a monopoly basis) of many public services, to the State acting instead as regulator, and seeking to ensure that specific objectives such as universal service or reasonable access to services are provided by the partially privatized or wholly private sector. Many national Administrative Law courts have reasserted basic Administrative Law protection of fundamental rights, legality, non-arbitrariness, objectivity and neutrality, against attempts to 'escape' from the control of Administrative Law judges and Administrative Law controls on expenditures and financial accounting, appointment of officials, and State contracts, through creation of private law entities and use of private law modalities. There are some commonalities too in efforts to legislate public ethics (not simply prohibitory measures against corruption), to pursue good administration through best practices and theories that reach across both the private and public sectors, and to enhance participation of interested parties and of the general citizenry in administration through e-administration. Given these degrees of commonality in structures and operations, Delpiazzo proposes that one way to meet the challenges of globalization, and perhaps help build a kind of Global Administrative Law, is through the study of Comparative Administrative Law in Latin America. He endorses four arguments for comparative law work made in the influential writings of Zweigert and Kotz, namely that this provides a useful basis for work of legislation, a tool to use in interpretation, an enrichment of the study of law, and a contribution to the unification of law. But this list is instrumentalist

and functional. Delpiazzo himself repudiates purely problem-solving instrumentalist approaches in Global Administrative Law, and is committed to fundamental rights and to human flourishing and freedom (a kind of Amartya Sen-type capabilities approach) as basic legal values. There are thus some reasons to doubt that traditional comparative law methodologies, seeking to discern similitude and difference among numerous State-focused systems of national Administrative Law, will prove rich enough to directly inform the quite different situations in which global institutions engage in regulatory governance, although it may point to innovative ideas and analogies, and it may have more direct relevance to extra-national sub-regional and regional governance, as Delpiazzo suggests. In addition, comparative national studies may be very important in helping guide global bodies setting standards for national administration: bodies such as international investment, trade and human rights review agencies or tribunals.

Relations between international or global governance norms and specific national legal practices are explored in José Antonio Muci Borjas's critical study of Venezuelan law and practice concerning the enforcement of money judgments of Venezuelan courts against the State. The strictness of the old French-influenced view of separation of powers under which the administrative courts were thought unable to interfere directly with the actions of the State's administrative officials has long been displaced by a view that the division of powers requires collaboration to achieve constitutional objectives. Nevertheless, juridical limits on the means for enforcement of a court's monetary orders against the State, with interest calculated at low rates or in some situations not encompassed at all, provide further incentives for State officials to string out litigation and to delay payment on judgments. This chapter is illustrative of the very specific dynamics of such issues concerning courts and different national or sub-national government agencies in each State; even governments with a budget line item for paying judgment debts (a judgments fund) and practices of virtually automatic payment on final judgments of their own courts, may baulk or need action by the legislature before paying a very large or highly controversial judgment, and this reality may have some influence on the courts. This chapter adopts an increasingly prevalent strategy in invoking 'Global' Administrative Law as an argument for national reform, arguing in this case that standards of fair and equitable treatment in Venezuela's bilateral investment treaties provide both reasons of principle and potential concrete leverage (in cases brought by foreign investors) for reform of this aspect of Venezuela's law and practice.

Colombian lawyers Eduardo Zuleta Jaramillo and Santiago Jaramillo Caro make a similar but broader argument for the significance to

national administration of property and contractual interests of existing international jurisprudence on due process and on the principle of economic equilibrium in State contracts. Drawing from the reasoning of international investment arbitral tribunals and regional human rights courts in economic cases, they propose that national Administrative Law does, or should, now incorporate standards from these cases concerning the duty to base decisions on legally proper considerations and to articulate adequate reasons, certain obligations of transparency or publicity, and requirements not to engage in certain forms of discrimination.

The chapters in this book contribute to the immense task of tracing what are, and what should be, the two-way connections between national and transnational or global administration with regard to specific doctrines and institutional features, broad changes in practices of administration, and evolving general principles of good administration. They offer glimpses of the magnitude of the difficult normative questions posed by global regulatory governance and Global Administrative Law. Who are the likely winners and losers, in the short term and the long term, of moving toward general acceptance of Global Administrative Law principles? Will such a move improve national administration in different specific contexts, from standpoints such more effective functioning, better promotion of individual rights and autonomy, increase in participation or democratic deliberation or republican non-domination or alleviation of extreme poverty and other miseries? Will Global Administrative Law principles help to make exercises of power beyond the State more just under such criteria, or might they help give legitimacy to arrangements which are fundamentally unjust? Such questions are part of the vital agenda for further research and action. It is hoped this book will help to stimulate wider global engagement in framing, researching and answering such pressing questions.

Introduction

This book presents a series of studies in the emerging field of Global Administrative Law. It departs from the original studies of the Institute of International Law and Justice of New York University School of Law, but moves ahead into new aspects, although always keeping a link: a common understanding of the principles of law.

The chapters in this book consider the principles, concepts and expressions of Global Administrative Law from a transversal perspective, covering fields like International Jurisprudence as a means to Global Administrative Law, Global Environmental Law, Global Law and Global Constitutionalism, Human Rights in the Global Administration, Global Administrative Law and the EU Directives, Comparative Law as a means to Global Law, Globalization and the Rule of Law, International Police and Global Procedures, Global Administrative Law and Bilateral Investment Treaties, and US and EU standards for Globalization: that set the pace in the world.

The subjects dealt with in this book are not only connected with the concepts of globalization and Global Administrative Law. Those subjects are linked by common principles of law, which are present in local, regional, communitarian or international arenas. These principles are being codified by treaties and local laws and regulations, or construed by municipal or international case law, or simply applied by the actions, measures and decisions of local instrumentalities and multilateral agencies. In any case, those principles are in permanent interaction and consolidation.

This global process not only enhances the emergence of Global Administrative Law, but it is also creating a broad, almost universal, acknowledgement of principles and concepts that global governance requires.

There is an undeniable process of a global homologation of principles of administrative, comparative and international law under different legal systems.

We are moving towards a *lex administrativa.*

Javier Robalino-Orellana

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Part I. Principles of Global Administrative Law

Globalization and its Impact on the Rule of Law

Juan Carlos Cassagne*

I. Some Globalization Issues

Smoother international trade together with the ever speeding pace of technological change have made an impact on national legal systems in the sense that they have been forced to adjust to the rules of the international markets.

This was first seen in the mercantile law or commercial law of Roman-Germanic origin; it is responsible for diverting the flow of private law and is threatening to undermine the foundations of public law in continental Europe, on which the legal systems of all the Latin American countries have been shaped.

The principle of legality or rule of law – built on the principles of sovereignty and State ownership, or the monopoly of lawmaking – suffered from the downfall of legalistic positivism in Europe after the Second World War, when formal provisions failed to respond to the requirements of the community, mainly because the new legal order was made up of legislation coming from sources other than laws in the material and formal sense.

The breakup of the classical principle of legality was compounded by the development of the legal system of the European Community, which modified the system of normative sources. Additionally, several multinational systems, with the aim of ordering and/or promoting trade on a fair basis between countries (for example, World Bank, IMF, WTO), have also contributed to this breakup by creating rules that were not based on a democratic arrangement or did not have a democratic origin as is the case with legislation produced by national Parliaments. This breakup was also produced by the agencies created by international conferences or treaties, some of which have produced rulings that may or may not be binding.

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Such is the complexity of the current scenario for Latin American public law – although, to a lesser extent than Europe – we suffer from the influence of an international legal system that aims to impose total monism, even if the first country in the world, or the hegemonic power of the United States of America, does not accept it except for certain institutions.

In the light of the principle of legality, or the rule of law, the problem appears with regard to the unity that should characterize any process of globalization of international trade. For that, unity can only be conceived in certain sectors, and cannot be obtained in institutions configured around a different conception of the applicable law.

Thus, the continental legal systems in Europe are based on a system of written rules, aimed at the pursuit of the common good. The domestic law of this system, despite the ups-and-downs of its history, is still produced on a democratic basis. It differs from law in Anglo-Saxon countries, which relies heavily on the role of the judge and the weight of precedent or *stare decisis*.[1] It cannot be ignored, however, that the construction of the legal system of the European Community tends towards the unification of national systems, although these still have their differences and a total merge has not yet been achieved.

In the case of Latin American countries where administrative law has followed the course of continental European legal systems (based, *inter alia*, on the acknowledgment of powers or prerogatives of the State), the idea of global administrative law becomes even more problematic. The globalization of administrative law in Latin America, which is partial and often of a regional character (for example, MERCOSUR, Andean Community of Nations), can only make sense or be possible if it relies on the principles that underpin or undermine the rule of law or principle of legality.

This last statement does not mean, of course, that the existence of international administrative law (as it used to be called), limited to certain supranational institutions, or (as it is now called), a global administrative space[2] in which the norms are applicable to certain sectors of international economy, should not be admitted.

[1] M. Pochard, "Sobre la influencia del derecho continental europeo en los derechos latinoamericanos", *REDA, Derecho Administrativo*, Year 19, (LexisNexis, Buenos Aires, 2007) p. 997-XX.

[2] B. Kingsbury, N. Krisch and R. Stewart, "El surgimiento del derecho administrativo global", *Res Pública Argentina*, Buenos, RAP, Buenos Aires, 2007-3, p. 25-XX.