

Global Administrative Law

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1. Genesis and meaning of Global Administrative Law (GAL)

Although the term Global Administrative Law (hereinafter GAL) as such appeared only in the twenty-first century¹, administrative law has existed at international level since at least the late nineteenth century.² Indeed, GAL “encompasses most of the subject matter addressed by jurists in the 19th and 20th centuries under the rubric of ‘international administrative law’ [...] But this newer term is preferred to avoid the misleading implication that the field is simply a branch of general international law and thus can be structured in terms of traditional (and now much-contested) criteria for sources of international law and subjects of international law.”³

GAL was launched and theorized in response to the quest for (legal) tools capable of taming and framing global governance.⁴ Since the 1990s, the international legal

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¹ The term ‘global administrative law’ first appears in a legal essay in 2002, when the *Administrative Law Review* devoted a Symposium to the topic (See Charles H Koch Jr, ‘Introduction: Globalization of Administrative and Regulatory Practice’ (2002), in *Global Administrative Law Symposium*, 54 *Administrative Law Review* 411). The concept of global administrative law, however, was adopted and first explained in 2004 by the New York University Research Project led by Richard B. Stewart and Benedict Kingsbury. On the origin of GAL, see Lorenzo Casini, *Global Administrative Law scholarship*, in *Research Handbook on Global Administrative Law*, ed. by Sabino Cassese, Cheltenham, Edward Elgar, 2016, pp. 548 et seq., and Sabino Cassese, *A World Government?*, Global Law Press-Editorial Derecho Global Sevilla, 2018, pp. 109 et seq.

² Frédéric Frommhold Martens, *Le droit international actuel des peuples civilisés* (3 vols, 1883); Pierre Kazansky, ‘Théorie de l’administration internationale’ (1902) 9 *Revue Générale de Droit International Public* 353; Paul S Reinsch, ‘International Administrative Law and National Sovereignty’ (1909) 3 *American Journal of International Law* 1; Umberto Borsi, ‘Carattere ed oggetto del diritto amministrativo internazionale’ (1912) *Rivista di diritto internazionale* 384.

³ Benedict Kingsbury and Megan Donaldson, ‘Global Administrative Law’, in *Max Planck Encyclopedia of International Law* (OUP 2011). See Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 161, and Sabino Cassese, ‘Relations between International Organizations and National Administrations’, in *IISA, Proceedings, XIXth International Congress of Administrative Sciences* (Kluwer 1983).

⁴ Benedict Kingsbury, Nico Krisch and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15. The article has been translated into

context underwent profound changes, due to the emergence of hundreds of international regulatory regimes and institutions: thus, more norms, more procedures, and more disputes developed and occurred beyond the state. Within this framework, international law soon appeared inadequate for the challenge, mostly because of the need for an interdisciplinary method, which the very essence and complexity of global legal problems necessarily mandate. This inadequacy, on the one hand, was experienced in the academic discipline of international law, which often lacked a conceptual vocabulary or framework to understand or theorize the changes triggered by globalization, especially after the end of the Cold War. On the other hand, this inadequacy was also experienced in actual legal practices, largely procedural, which are mainly behind the developments of global law.

As a result, scholars worldwide began to cooperate (and compete) with each other to fill this conceptual gap, triggering phenomena of mimesis and transplants between different fields and disciplines. This generated several world research projects seeking to tame globalization, such as global constitutionalism,⁵ informal international lawmaking,⁶ and transnational legal orders and transnational private regulation.⁷

GAL offered its own response, i.e. that global governance could be productively explained through the lens of administrative law (and domestic public law more generally), which are not alternative to those of international law and other disciplines, but must be used in conjunction with them. Indeed, GAL scholarship owes several insights to political science and sociological studies on globalization,⁸ as well to works in economics, history, and anthropology, that have been crucial in enabling GAL to understand complex concepts such as regulatory regimes, accountability, legitimacy, and governance more generally.

several languages: the French version is in C. Borjes (ed.), *Un droit administratif global? / A Global Administrative Law?*, Paris, Pedone, (2012) 335.

⁵ Jeffrey L Dunoff and Joel P Trachtman, *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2009); Jan Klabbers, Anne Peters and Geir Ulfstei, *The Constitutionalization of International Law* (OUP 2009); A.F. Lang Jr. and A. Wiener (eds.), *Handbook on Global Constitutionalism*, Cheltenham, Edward Elgar, 2017.

⁶ Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds) *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness* (OUP 2012).

⁷ Gregory Shaffer, *Transnational Legal Ordering and State Change* (2014); Fabrizio Cafaggi (ed.), *Enforcement of Transnational Regulation. Ensuring Compliance in a Global World* (Elgar 2012).

⁸ Saskia Sassen, 'The Participation of States and Citizens in Global Governance' (2003) 10 *Indiana Journal of Global Legal Studies* 8; David Held and Mathias Koenig-Archibugi (eds), *Taming Globalization. Frontiers of Governance* (Polity Press 2003).

Like domestic administrative law, the term GAL can thus refer to either a scholarly approach or methodology that academics (and others) may use to analyse various forms of global governance, or to a set of actual norms, ‘practices’, or activities or mechanisms that states, IOs and others, including private bodies, use in various forms of global governance. Such twofold dimension, as shown below, may produce some ambiguities, even in relation to GAL’s role in the putative crisis of international law.

2. GAL and Its Three Branches of Law

The term ‘law’ in GAL means a ‘body of rules’, which in this case regulate international organizations, global hybrid public-private or genuinely private institutions exercising public functions, states and both transnational and domestic civil societies.⁹ Therefore, GAL refers to norms that spread across the entire world, involve international, transnational and domestic levels, and may affect individuals directly. Such set of norms stems from at least three different branches of law: international law, international administrative law (or international institutional law), and domestic public and administrative law.

The first branch is international law, because GAL focuses on phenomena and issues, traditionally belonging to this area of study: take, for instance, rulemaking activity by IOs and all related themes such as compliance and enforcement. From this perspective, GAL integrates the more traditional international law view and analysis. In addition, GAL developed in order to offer responses to the putative crisis of international law: this is the case, for instance, of the increasing administrative action delivered by international institutions and the need to review such action as to try to make decision-making process more legitimate and accountable.

Second, GAL originates, as noted above, from international administrative law (or international institutional law), especially as for the analysis of IOs organization and functions.¹⁰ Since most activities by IOs today can be seen as global administration, it is

⁹ Benedict Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20 *European Journal of International Law* 23. See also L. Murphy, *Law Beyond the State: Some Philosophical Questions*, in «*European Journal of International Law*», 2017, vol. 28, pp. 203 et seq.

¹⁰ See J. Klabbers, *An Introduction to International Institutional Law*, III ed., Cambridge, CUP, 2015; J. Katz Cogan, I. Hurd and I. Johnstone (ed. by), *The Oxford Handbook of International Organizations*, Oxford, OUP, 2016.

thus crucial to understand how these bodies work and what they actually do, as well as to investigate instruments and mechanisms that can help hold them accountable.

A third source is domestic public and administrative law. States and national public administrations are actors operating within global regulatory regimes; and the institutional design, procedures adopted and review mechanisms, all follow models that are typical of—if not directly subject to—administrative law. Thus, this latter plays a significant role in framing the development of global institutions and may help to better address some key questions¹¹. How did IOs and their global regulatory regimes developed? Here the administrative law approach resulted to be fruitful in framing the cases of hybrid public and private solutions, such as in the fields of Internet, public health, environment or sports. How do domestic administrations operate beyond national borders and which impacts do they produce transnationally? In the case of global network, e.g. in accounting and supervising, national administrations – and not governments – participate in the Basel Committee or in the International Organization of Securities Commissions (IOSCO).

GAL, however, bears significant differences from the more familiar state-level administrative law.¹² First, there is often neither coordination nor hierarchy among international regimes, whilst in different domestic legal system any plurality of statutes can always be brought back within the unity of the state order. Second, GAL displays a high degree of self-regulation, as the regulators and the regulated often exist on the same legal plane. Third, decisions taken by independent committees on the basis of scientific criteria and negotiations concluded by means of agreements play a more important role in GAL than in domestic law. Fourth, at the global level, the line between public and private is hardly clear and even more blurred than it appears at the domestic level. Fifth, GAL unavoidably lacks the enforcement mechanisms present within the state; this trait – which represents one of the most significant weaknesses according to GAL’s critics – becomes more evident when we consider the amount of

¹¹ Giulio Napolitano, *Comparative administrative law. Foundations, cases and problems*, Cheltenham, Elgar, 2019.

¹² Sabino Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’ (2005) 37 NYU Journal of International Law and Politics 663, 668 et seq.; also Stefano Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale* (Giuffrè 2003), Jean-Bernard Auby, *La globalisation, le droit et l’État* (L.g.d.j, Paris, 2nd edn 2010), Eyal Benvenisti, *The Law of Global Governance*, The Hague, Hague Academy of International Law, 2014, P. Craig, *UK, EU and Global Administrative Law. Foundations and Challenges*, Cambridge, CUP, 2015, and Elaine Fahey, *Introduction to Law and Global Governance*, Cheltenham, Elgar, 2018.

practices, rules and procedures developed by IOs outside the traditional treaty-law mechanisms.

This coexistence of different branches of law also sheds light on the term “global” that identifies GAL. It refers to the entire world and includes every geographical area. For example, the Internet aims to reach every corner of the world; the Olympic games involve athletes from the whole world; climate change affects the entire planet, though not all states seem to accept this.¹³ Moreover, the term “global” regards both international and national spheres, both international organizations and domestic administrations. In addition, it indicates the coexistence of all the different legal “labels” that are usually adopted to discuss “global governance,” i.e. international, transnational, supranational, and supernational.¹⁴

3. GAL Distinctive Features

GAL focuses specifically on the exercise of (public) power by international institutions and in the ways in which such power can be controlled and reviewed. The emergence of GAL can be therefore compared with other attempts to identify new formulas capable of better describing the exercise of power beyond the state, such as “global polity”¹⁵ or “global summitry”,¹⁶ or of “global experimentalist governance”.¹⁷ From the GAL’s perspective, the concept of polity is particularly relevant because it recalls the idea of a “community of powers”, according to the Greek πολιτεία.¹⁸ Globalization has indeed triggered the increase of global mechanisms of power,

¹³ J. Laitos, *Why Environmental Policies Fail*, Cambridge, CUP, 2017.

¹⁴ See F.G. Sourgens, *Supernational Law*, in «Vanderbilt Journal of Transnational Law», 2017, vol. 50, pp. 155 et seq.

¹⁵ S. Cassese, *The Global Polity. Global Dimensions of Democracy and the Rule of Law* (Editorial Derecho Global/Global Law Press 2012) and Id., *A World Government?*, cit.; see also N. Walker, *Intimations of Global Law*, Cambridge, CUP, 2014, and G.F. Sinclair, *To Reform the World. International Organizations and the Making of Modern States*, Oxford, OUP, 2017.

¹⁶ A.S. Alexandroff and D. Brean, «Global Summitry: Its Meaning and Scope Part One», in *Global Summitry*, 2015, vol. 1.

¹⁷ G. De Búrca, R.O. Keohane e C. Sabel, *Global Experimentalist Governance*, in «British Journal of Political Science», 2014, vol. 44, pp. 477 et seq., and *New Modes of Pluralist Global Governance*, in «New York University Journal of International Law & Politics», 2013, vol. 45, pp. 723 et seq.

¹⁸ The reference here is to the “κοινωνία ἄρχων” examined by M. Foucault, *Le gouvernement de soi et des autres. Cours au Collège de France, 1982-1983*, Paris, Seuil, 2008. The word *polity* first appears in English on the 16th century, from French “*politie*”, which came from Latin “*politia*”, deriving from Greek πολιτεία and πόλις.

fostering the formation of a set of global powers (and counter powers), broadly meant as decision-makers and decision- influencers.¹⁹

GAL, meant here again as a body of norms, presents four main distinctive characteristics.

First, it is a sector-based law.²⁰ This implies that GAL has developed, and is applied, unevenly across different policy domains. Some regimes have a sophisticated level of governing mechanisms, while others hardly so. This asymmetry of course depends on several factors, such as time, scope, institutional design, states' powers, and civil society's role. This feature favours a case study approach, which proves particularly effective in teaching GAL in several universities across the world.

Second, GAL – like domestic administrative law – presents a high degree of hybridity, because public and private elements constantly interact in this field (*infra* section 5.2).²¹ The dialog between public and private plays a fundamental role in driving the growth of global regulatory regimes. And both states and international organizations increasingly form, and operate through, formalized partnerships with private commercial and civil society entities. 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), nuclear safety, environmental protection, the Internet, and sports.²²

Third, GAL develops through cross-references and interconnections between different sectors, as well as through shared norms, institutions, and procedural principles.²³ GAL evolves as a result of emulation, dialog, and conflict between

¹⁹ See R.A. Dahl, *The concept of power*, in «Systems Research and Behavioral Science», 1957, vol. 2, pp. 201 et seq.; J.S. Nye Jr., *The future of power*, New York, Public Affairs, 2011; L. Casini, *Potere globale. Regole e decisioni oltre gli Stati*, Bologna, Il Mulino, 2018.

²⁰ Stefano Battini, *The proliferation of global regulatory regimes*, in Cassese (ed.), *Research Handbook on Global Administrative Law*, cit., pp. 45 et seq., and F. Bignami e David Zaring (ed. by), *Comparative Law and Regulation: Understanding the Global Regulatory Process*, Cheltenham, Edward Elgar, 2016.

²¹ See Lorenzo Casini, “Down the Rabbit Hole”: *The Projection of the Public/Private Distinction Beyond the State*, 12 ICON (2014) 402.

²² These hybrid public and private forms of governance are analyzed in depth in *Global administrative law: the Casebook*, *supra*.

²³ See *Research Handbook on Global Administrative Law*, *supra*.

different bodies of law and different administrative models.²⁴ This feature of GAL norms significantly influences GAL scholarship, which tends to methodological pluralism and favour dialogue and integration. GAL’s scholarly approach can be combined with other projects, which seek to outline the global legal context, such as, for example, “global constitutionalism” or the theory based on the exercise of international “public authority.”²⁵

Fourth, states still play a dominant role in the expansion of GAL.²⁶ They influence both the degree to which global norms and global institutions permeate national legal orders and the scope of these norms and institutions in different sectors. However, while states are capable of influencing this process, it appears that they are no longer capable of stopping it. States of course remain crucial whenever IOs need to enforce their decisions, and this explains GAL’s tendency to develop its own mechanisms in order to ensure effectiveness and compliance: take, for instance, the reputational sanctions such as the “naming and shaming” instrument adopted by UNESCO or the establishment of compliance committees or independent panels or other *ad hoc* bodies monitoring how GAL norms are respected.²⁷

4. GAL in Context: Facing Global Regulatory Regimes

How can GAL fruitfully help face the complexity and fragmentation of thousands of international regulatory regimes? In order to address this question, we can consider global regulatory regimes and their very legal identity under four main dimensions: regulatory, (quasi-)judicial, institutional, and procedural.²⁸

These dimensions foster a sort of separation of powers and functions within global regulatory regimes that resemble those of the enduring point of reference for any

²⁴ See for instance the relationships between GAL and EU law: E. Chiti and B.G. Mattarella (ed. by), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison*, Berlin-Heidelberg, Springer, 2011.

²⁵ A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann and M. Goldmann (eds), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Springer 2010).

²⁶ Cassese, *The Global Polity*, *supra*.

²⁷ See Barbara Marchetti, *The enforcement of global decisions*, in Cassese (ed. by), *Research Handbook on Global Administrative Law*, *supra*, pp. 242 et seq.

²⁸ Carlos Cloa and Lorenzo Casini, *Comparative Regional Integration: Governance and Legal Models*, Cambridge, CUP, 2016.

legal system, i.e. the state.²⁹ As noted above, states are not losing their powers. Since the end of World War II, the number of states has been rising: in 1945, 50 states existed; by 2010, approximately 200.³⁰ International regimes – including private ones (such as Internet or sports) – need states in order to develop further. To establish a global network, almost all IOs and regimes require the creation of domestic “terminals,” which are often public administration bodies that are regulated by the domestic law of the country in which they operate:³¹ this produces forms of “distributed administration”. Moreover, global regulatory regimes grow and develop by adopting legal mechanisms (norms, institutions, procedures) that are mostly “inspired” by state legal systems (in a “mimetic” process). Also, these mechanisms often change once adopted, because states are both regulators and subjects of regulation.

4.1. Taming Global Rulemaking

Norm-making activity at the international level is rapidly accelerating.³² These norms may take several different forms and names: standards, recommendations, guidelines, policies, etc. For example, the International Labour Organization (ILO) was created for the purpose of elaborating rules more flexible than traditional treaties. The World Bank issues important operational policies addressed to the developing countries that receive the Bank’s funds for infrastructural projects. UNESCO too adopts similar instruments; in addition, several significant private regulatory regimes exist.

This growing volume of norms has significant implications for domestic legal orders. To reduce the fragmentation and potential (and actual) conflicts that characterize such multiplication, forms of harmonization have also been developed, such as international standards. Moreover, IOs themselves may need harmonization more

²⁹ Cristoph Moellers, *The Three Branches. A Comparative Model of Separation of Powers*, Oxford, OUP, 2013; Pierre Bonin, Pierre Brunet and Soazick Kerneis (ed. by), *Formes et doctrines de l’Etat. Dialogue entre histoire du droit et théorie du droit*, Paris, Pedone, 2018; Symposium on *Law, polity and the legacy of statehood*, in 16 ICON (2018) 1148.

³⁰ Alberto Alesina and Enrico Spolaore, *The Size of Nations* (The MIT Press 2003); A. Florea, *De Facto States: Survival and Disappearance (1945–2011)*, in «International Studies Quarterly», 2017, vol. 61, pp. 337 et seq., and J. Grzybowski, *To Be or Not to Be: The Ontological Predicament of State Creation in International Law*, in 28 EJIL (2017) 409.

³¹ J. Pauwelyn, R.A. Wessel and J. Wouters (eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness*, Oxford, OUP, 2012.

³² José E Alvarez, *International Organizations as Law-makers* (OUP 2005); S. Block-Lieb and T.C. Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets*, Cambridge, CUP, 2017.

urgently in certain sectors rather than in others. From this perspective, instruments such as recommendations and directives should be capable of ensuring greater harmonization, especially among domestic legal systems. Finally, the proliferation of norms and lawmakers has led international institutions to establish a hierarchy, or several hierarchies, between norms: as a consequence, a rule of “normative supremacy” has been affirmed.³³ This is why some scholars have claimed that a process of “constitutionalization” of specific sectors – such as public health, the WTO or of the UN more generally – has been taking place.³⁴

Moreover, the multiplication of law-makers and the rise of norm-producers outside the traditional democratic circuit, as well as the increasing number of (administrative) activities delivered by global institutions, produce several legal “grey holes”³⁵, and this leads to a crisis of legality. Beyond the state – where regulatory hybridity, with public and private rule-makers, is the most relevant trend – this crisis of legality is extremely evident. The rule of law to states at international level remains problematic.³⁶ the state “is not *just* a subject to international law; it is additionally both a *source* and an *official* of international law.”³⁷

Under this perspective, one element of crisis of contemporary international law may be its inadequacy as a source of constraint on and accountability of complex international and transnational governance mechanisms. At the same time, the vulnerability of international law to – or its dependence on – the powerful actors is not a new issue, which suggests that this element of crisis is not new but an enduring feature. How can GAL thus better face these phenomena? It may provide useful insights from different perspectives. Administrative law has always dealt with the rulemaking activity delivered by national institutions, in terms of procedures, compliance and enforcement.

³³ Dinah Shelton, *Normative Hierarchy in International Law* (2006) 100 *American Journal of International Law* 291.

³⁴ See KLABBERS in this volume.

³⁵ 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). Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *Harv. L. Rev.* 1095 (2009), 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).

³⁶ Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 *EJIL* 315 (2011).

³⁷ Jeremy Waldron, *The Rule Of International Law*, 30 *Harv. J. L. & Pub. Pol'y* 16, 23 (2006).

The analysis of the decision-making process becomes crucial in order to understand these processes and to improve their degree of legitimacy and accountability (*infra* section 5.1). GAL approach can therefore offer some responses to the abovementioned crisis of legality, which characterizes the global legal space as well as domestic contexts.

4.2. Towards the Judicial Review of IOs

A greater body of rules requires more enforcement mechanisms³⁸, as the rising number of international courts and tribunals affiliated with international organizations shows.³⁹ Indeed international courts or tribunals play a key role in developing the regimes of which they are part: consider the case of the WTO and its Dispute Settlement Body.⁴⁰ This may also happen in global private regimes, such as in the case of the Court of Arbitration for Sport (CAS), which plays a crucial role within the sport legal system.

GAL can be fruitful in this case if we consider, for instance, the review-mechanisms traditionally developed in the field of administrative law, as a form of power control.⁴¹ Beyond the state, dispute settlement mechanisms are often used as reviewing bodies to control how international organizations operate: this happens in traditional treaty-based institutions (e.g. the ILO)⁴² and in private regimes (e.g. the internet),⁴³ where we find specific procedures aimed to accord the review of given decisions taken by international institutions.

International courts and tribunals appear to be most effective the more tools they have and the more different functions they perform: dispute settlement, enforcement, administrative review, and constitutional review. This happens when they do not only resemble one type of court, but rather deal with several issues (civil, administrative,

³⁸ J.H.H. Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’ (2004) 64 *Zeitschrift für Ausländisches Recht und Völkerrecht* 547.

³⁹ M. Madsen, *Judicial globalization: the proliferation of international courts*, in Cassese (ed.), *Research Handbook on Global Administrative Law*, supra, pp. 282 et seq.; E. D’Alterio, *Judicial regulation in the global space*, *ibidem*, pp. 303 et seq.

⁴⁰ R. Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, in «European Journal of International Law», 2016, vol. 27, pp. 9 et seq.

⁴¹ We see here a sort of “universal value” of the so called “judicial review”: J. Jowell, *The Universality of Administrative Justice?*, in *The Transformation of Administrative Law in Europe / La mutation du droit administratif en Europe*, Munich, European Law Publishers, 2007, pp. 55 et seq., especially pp. 62 et seq. See also Doreen Lustig and J.H.H. Weiler, *Judicial review in the contemporary world—Retrospective and prospective*, in 16 *ICON* (2018) 315.

⁴² ILO Constitution, Articles 26, 27, 28 e 33.

⁴³ ICANN Bylaws, Article IV, on “Accountability and Review”.

constitutional, and even criminal). This mixed hybrid nature of dispute settlement bodies appears to work extremely well, at least in those regimes in which it is achieved. In other cases, the solution is not found in courts but in faster alternative dispute resolution mechanisms such as arbitration (e.g. investment law). In addition, courts and tribunals play a crucial role in connecting different regimes: this is the case again of the WTO DSB, when it is called upon to decide issues relating to the TBT or SPS agreements, or the case of human rights field.⁴⁴

How do such phenomena fit within the GAL discourse? Although several examples of international courts and tribunals can be understood without adopting an administrative law perspective, the GAL approach may offer fruitful insights. A growing number of practices, norms and procedures – both within and between IOs – establish or design review-mechanisms, often operated by dedicated review-bodies or committees. These review-mechanisms, which can also enhance the degree of accountability of international regimes, may be easily framed according to public and administrative law traditional mechanisms of (quasi-)judicial review.⁴⁵ We see here, once again, the dual nature of GAL, both as a set of actual practices and of scholarly method.

In conclusion, the GAL approach to the study of international judicial activities provides significant insights related to the need for controlling and reviewing how IOs exercise their powers, including the role played by domestic courts.⁴⁶ And this is becoming progressively more urgent, in so far as the traditional regime of privileges and immunities may appear to be out of date. Such regime is indeed under serious pressure,⁴⁷ and even when courts uphold immunity claims extra legal processes can nonetheless be brought to bear that may induce IOs to accept responsibility, as the story

⁴⁴ Laurence Boisson de Chazournes, *WTO and Non-Trade Issues: Inside/Outside WTO*, in «Journal of International Economic Law», vol. 19, 2016, pp. 379 et seq. As for the field of human rights, Monica Heupel and Michael Zürn, *Protecting the Individual from International Authority: Human Rights in International Organizations* (Cambridge, CUP 2017).

⁴⁵ E. Mitzman, *The Proliferation of Independent Accountability Mechanisms in the Field of Development Finance*, 62 *Rivista trimestrale di diritto pubblico* 93 (2012).

⁴⁶ E. Benvenisti and G.W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, in «European Journal of International Law», 2009, vol. 20, pp. 59 et seq., and A. Reinisch (ed. by), *Challenging Acts of International Organizations Before National Courts*, Oxford, OUP, 2010. Also M. Kanetake, *UN Human Rights Treaty Monitoring Bodies Before Domestic Courts*, in «International and Comparative Law Quarterly», 2018, vol. 67, pp. 201 et seq.

⁴⁷ ECtHR, *Waite and Kennedy v. Germany*, Appl. no. 26083/94, Judgment of 18 February 1999. See A. Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts* (2013).

of efforts to achieve accountability for *United Nations Stabilization Mission in Haiti* (UNSTAMIH) illustrate.⁴⁸ On that occasion, the epidemic of cholera was triggered in 2010 by the UNSTAMIH, as the *special rapporteur* Philip Alston could confirm:⁴⁹ but the case before the US domestic court was dismissed because of the immunities regime.⁵⁰

4.3. Understanding supranational bureaucracies

The growth of both regulatory and “judicial” functions at the global level is connected to a significant increase in administrative tasks that are neither legislative nor judicial in nature.⁵¹ This is also enhanced by the role played by domestic administrations in the development of global regimes. The less IOs engage in developing their own administration, the more they will rely on states and national administrations to operate. At the same time, the more a global administration develops, the more likely it will be for IOs to require states to establish a domestic terminal that is entrusted with delivering a given function in that country (and this produces forms of so called “distributed administration”).

Data shows that IOs are constantly adding new offices and employees.⁵² In the last few decades, the number of field offices has been growing steadily, especially in the field of human rights.⁵³ Many global organizations have progressively expanded the scope of their activities; in doing so, they have also created several other new bodies.⁵⁴ A «bureaucratic haze» has now emerged.⁵⁵

⁴⁸ UN Secretary General (www.un.org/sg/statements/index.asp?nid=6615) and *The Economist* (www.economist.com/news/americas/21572819-un-condemns-baby-doc-exonerates-itself-double-standards).

⁴⁹ Alston’s statement is available at <http://chrgi.org/wp-content/uploads/2014/07/Alston-GA-3rd-Cee-statement-25-October-FINAL.pdf>.

⁵⁰ See <https://www.nytimes.com/2017/08/24/world/americas/haiti-cholera-lawsuit-united-nations.html>. T.G. Bode, *Cholera in Haiti: United Nations Immunity and Accountability*, in «Georgetown. Journal of International Law», 2016, vol. 47, pp. 759.

⁵¹ Nico Krisch and Benedict Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in International Legal Order’ (2006) 17 *European Journal of International Law* 1.

⁵² *Yearbook of International Organizations*, edited by the Union of International Associations (UIA): <https://uia.org/yearbook>

⁵³ This rise is emblematic if we consider the number of employees within the UN system: <http://www.unsystem.org/content/personnel-statistics>.

⁵⁴ Tana Johnson, *Organizational Progeny*, Oxford, OUP 2014. See also J. Klabbers, *The EJIL Foreword: The Transformation of International Organizations Law*, in «European Journal of International Law», 2015, vol. 26, pp. 9 et seq.

⁵⁵ Mark Mazower, *Governing the World. The History of an Idea, 1815 to Present*, New York, Penguin, 2012, p. XVII.

GAL proposes a new classification of this institutional complexity and these “global administrations:” traditional or classical international organizations, such as the UN, WHO, ILO, to name but a few; transgovernmental and transnational networks, such as the G-20, the Basel Committee, or the International Competition Network;⁵⁶ hybrid public and private or private international bodies exercising public functions, such as the ICANN, the World Anti-Doping Agency, the ISO or the International Olympic Committee (IOC).⁵⁷ These types may often act together within a given regime and they can also form, through the establishment of “domestic terminals” or in cooperation with states (either governments or domestic public bodies), create forms of “distributed administration”.

GAL scholarship produced hundreds of studies devoted to an analysis of these institutions from this new perspective. Examples include the Global Fund and public health; WADA and sports; human rights; WTO and trade; IFAD; the Basel Committee; forestry; international investment law; international financial institutions; accounting; and the OECD.⁵⁸ By drawing and refining the administrative law literature, GAL provides interesting instruments for the study of the rising number of global hybrid public and private bodies (the «new global rulers»⁵⁹), which now operate in the fields of Internet, sports, environment, finance, to name but a few.

The key role played by the administrative dimension of international law finds further evidence in the rise of emergency actions by IOs in crisis situations. In public health, for example, the SARS crisis required the WHO to operate immediately, beyond its treaty mandate, adopting recommendations and measures addressed and sent by email to airline companies and other private subjects, including individuals.⁶⁰ Other examples stem from the countermeasures adopted by IAEA against the threat of nuclear

⁵⁶ A.-M. Slaughter, *The Chess-board & the Web. Strategies in a Networked World*, Yale, Yale University Press, 2017.

⁵⁷ *Global Administrative Law: The Casebook*, *supra*.

⁵⁸ World Bank Legal Review (2011); International Organizations Law Review (2009); Res Publica Argentina (2007); Symposium: Global Governance and Global Administrative Law in the International Legal Order, 17 *European J. Int'l Law* 1 (2006); NYU J. Int'l. Law & Pol. (2005); Law & Cont. Problems (2005).

⁵⁹ T. Buthe e W. Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton: Princeton University Press, 2013.

⁶⁰ G.L. Burci and B. Toebe (eds), *Research Handbook on Global Health Law*, Cheltenham, Elgar, 2018, and J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 *Harvard International Law Journal* 48 (2016).

terrorism (IAEA Action Plan), the case of natural disaster relief, and the efforts to protect human rights in humanitarian emergencies.

Another element of the putative crisis of international law seems to appear here: that is the rise of emergency actions inadequately regulated by a GAL still in the making. There is a sort of a “vicious circle” in the development of GAL, that is partially connected with the crisis of legality above mentioned. The more IOs grow and need to operate, the more they need some regulation, which is often produced by IOs themselves through non-traditional mechanisms (here again we can mention the multifarious series of guidelines, policies, standards, to name but a few, elaborated by international institutions).

4.4. The Key Role of Procedure

In connection with the three dimensions illustrated above (regulatory, judicial, institutional), the global legal context displays a growing degree of proceduralization. And here is where the GAL approach probably works at its best.

Procedures are, first of all, a device for governing complex organizations and their decision-making processes⁶¹, and this is why global regulatory regimes and global institutions have been increasingly engaged in developing procedures. Most of these procedures are similar to models adopted at the domestic level (such as procedures for granting licenses or permissions, etc.); however, the legal framework of the global arena enables other forms to be detected too, such as “policy-making” procedures.⁶² The same is true of other supranational experiences (see the EU-related “composite” proceedings)⁶³.

Examples of this growing number of procedures may be found in several sectors. For instance, the system built on the World Heritage Convention has progressively

⁶¹ M. Conticelli, *Global administrative proceedings: distinguishing features*, in J.B. Auby (ed. by), *Droit comparé de la procédure administrative / Comparative Law of Administrative Procedure*, Bruxelles, Bruylant, 2016, pp. 979 et seq.

⁶² Javier Barnes (ed.), *Transforming Administrative Procedure – La transformación del procedimiento administrativo*, (Editorial Derecho Global / Global Law Press 2009).

⁶³ A. von Bogdandy and P. Dann, *International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority*, in «German Law Journal», 2009, vol. 11, pp. 2013. See the German studies dedicated to “*Politikverflechtung*” (i.e.. “joint decision-making processes”): F.W. Scharpf, B. Reissert and F. Schnabel, *Politikverflechtung. Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik*, Kronberg i.Ts., Scriptor, 1976.

acquired a significant procedural dimension, which is regulated by the UNESCO Operational Guidelines: there are new forms of cooperation between international institutions, states, domestic administrations and other actors. Other examples of the rise of proceduralization come from the financial field – in which standard-setting procedures have become very complex – and sports, health and the environment.⁶⁴ Indeed, for institutions procedure is a rational way of organizing their activities: the increase of the latter will directly entail the increase of the former. And significant examples to this effect may also be found in private or hybrid public and private regimes, such as the sports system.⁶⁵

Thus, proceduralization beyond the state features interactions between different levels of activity (national, regional and international), different bodies of law (public and private), and a plurality of actors (governments, administrations, international organizations, civil society). Once national borders have been transcended, the notion of proceduralization appears to lose its neutrality much more often than what occurred in the domestic contexts, and it also gains additional functions: it can enhance legitimacy and democratic accountability,⁶⁶ for example, or it can be an instrument to control power (*infra* section 5.1).⁶⁷ This may occur through participatory mechanisms, because procedures are also instruments for representing and negotiating interests.⁶⁸

GAL highlights the procedural dimension of global administration and of the activities delivered by international bodies – both public and private – more generally.⁶⁹ GAL, therefore, tends to develop and refine procedural tools such as participation, consultation, and due process clauses. This massive use of administrative law techniques beyond the state results from several causes: the participation of governments and domestic administrations; public and administrative law techniques

⁶⁴ An overview is in *Global Administrative Law: the Casebook*, *supra*.

⁶⁵ L. Casini, *Il diritto globale dello sport*, Milano, Giuffrè, 2010, and Frank Latty, *La lex sportiva. Recherche sur le droit transnational*, Leiden-Boston, Brill, 2007.

⁶⁶ Niklas Luhmann, *Legitimation durch Verfahren* (Suhrkamp 1969).

⁶⁷ Matthew D McCubbins, Roger G Noll and Barry R Weingast, ‘Administrative Procedures as Instruments of Political Control’ (1987) 3 *Journal of Law, Economics, and Organization* 243; Jerry L Mashaw, ‘Explaining Administrative Process. Normative, Positive and Critical Stories of Legal Development’ (1990) 6 *Journal of Law, Economics and Organization* 267.

⁶⁸ Richard B Stewart, ‘Administrative Law in the Twenty-first Century’ (2003) 78 *N.Y.U. Law Review* 437, and Id., ‘The Reformation of American Administrative Law’ (1975) 88 *Harvard Law Review* 1670.

⁶⁹ Richard B Stewart, ‘U.S. Administrative Law: A Model for Global Administrative Law?’ (2005) 68 *Law and Contemporary Problems* 63.

are well-equipped to balance powers; there is no democratic context; there is a need to guarantee procedural safeguards for addressees. On the other hand, international organizations often adopt instruments deriving from private law. The increasing use of public procurement, for example, triggers the adoption of procedural mechanisms that are capable of ensuring transparency and competition. Similarly, the need to involve civil society and the population affected in the establishment of public-private arrangements requires the use of participatory mechanisms (*supra* section 5.2). Examples of such increasing relevance of the procedural dimension are numerous: take, for instance, the procedures adopted by the UNCHR for the refugee status determination;⁷⁰ or the operational policies set by the World Bank in the field of development;⁷¹ or the importance procedures have in the production of global indicators.⁷² However, the degree of proceduralization still varies significantly, depending on the individual regime under consideration. There are many asymmetries, which derive from the diversity of the functions delivered by different international organizations, but also from the level of involvement of public powers.

5. Beyond Nationalisms: GAL Facing the Up and Down of (Legal) Globalization

In the last decade developments in international law have questioned the common narrative related to (legal) globalization, according to which the emergence and strengthening of global regulatory regimes represents a good opportunity for mankind. The reactions against the 2008-2009 financial crisis, for instance, which was also due to a lack of supervision at international level, brought to new forms of state intervention in

⁷⁰ *Procedural standards for Refugee Status Determination under UNCHR's Mandate*; see M. Smrkolj, *International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination*, in «German Law Journal», 2008, vol. 9, pp. 1779 et seq.

⁷¹ F. Bignami, *Theories of civil society and Global Administrative Law: the case of the World Bank and International development*, in Cassese (ed.), *Research Handbook on Global Administrative Law*, *supra*, pp. 325 et seq., P. Dann, *The Global Administrative Law of Development Cooperation*, *ibidem*, pp. 415 et seq., and Id., *The Law of Development Cooperation. A Comparative Analysis of the World Bank, the EU and Germany*, Cambridge, CUP, 2013.

⁷² K. Davis, A. Fisher, B. Kingsbury e S.E. Merry (ed. by), *Governance by Indicators: Global Power through Quantification and Rankings*, Oxford, OUP, 2012, S.E. Merry, K. Davis and B. Kingsbury (ed. by), *The Quiet Power of Indicators. Measuring Governance, Corruption, and Rule of Law*, Cambridge, CUP, 2015.

this field.⁷³ Another example comes from trade law, where the WTO system has been challenged by the development of regional or bilateral agreements.⁷⁴ Some scholars thus used the image of a “gridlock” in order to indicate the stasis in decision-making processes due to the multi-polarity and regulatory fragmentation, which are taking place at global level.⁷⁵ Furthermore, the comeback of nationalistic policies, together with episodes like Brexit⁷⁶ or the tensions between the US and UNESCO, have placed great pressures on the stability of supranational and international regimes.⁷⁷

GAL may help better deal with the growing rulemaking activities delivered by IOs and the crisis of legality that this multiplication of global rulers produces (*supra* section 4.1). But how can GAL help address these contemporary phenomena? Does the return of nationalistic policies against globalization affect the effectiveness of GAL approach?

Although responses to such questions cannot be simple, GAL seems to maintain its usefulness in facing even these more recent developments of globalization. In the case of world trade, for instance, the use of bilateral agreements has been already criticized because it does not respect principles such as transparency and participation, as well as other procedural mechanisms within the GAL sphere.⁷⁸ Furthermore, GAL may offer a fruitful perspective also in dealing with the global legal challenges raised by new technologies.⁷⁹

GAL – in all its facets – allows better understanding at least two main problems which mark the relationships between global regulatory regimes, international law and

⁷³ G. Napolitano, *The two ways of global governance after the financial crisis: Multilateralism versus cooperation among governments*, in 9 *ICON* (2011) 310; M. De Bellis, *Relative Authority in Global and EU Financial Regulation: Linking the Legitimacy Debates*, in J. Mendes and I. Venzke (ed. by), *Who Should Do What in European and International Law?*, Oxford, Hart, 2018, pp. 241 et seq.

⁷⁴ R.B. Stewart, *State Regulatory Capacity and Administrative Law and Governance Under Globalization*, in N. Parrillo (ed. by), *Administrative Law from the Inside Out. Essays on Themes in the Work of Jerry L. Mashaw*, Cambridge, CUP, 2017, pp. 474 et seq.

⁷⁵ T. Hale, D. Held e K. Young, *Gridlock. Why global cooperation is failing when we need it most*, Cambridge, Polity Press, 2013, especially pp. 34 et seq.; in T. Hale e D. Held (eds.), *Beyond Gridlock*, Cambridge, Polity Press, 2017, several scholar sought to demonstrate that there are cases where the gridlock has been overcome.

⁷⁶ F. Fabbrini (ed. by), *The Law & Politics of Brexit*, Oxford, OUP, 2017.

⁷⁷ G. Harris and S. Erlarger, *US Will Withdraw from UNESCO, Citing Its «Anti-Israel Bias»*, 12 October 2017, available, on <https://www.nytimes.com/2017/10/12/us/politics/trump-unesco-withdrawal.html>.

⁷⁸ F. Nicola, *The Politicization of Legal Expertise in the TTIP Negotiation*, in 78 *Law and Contemporary Problems* (2015) 211; E. Benvenisti, *Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law*, IILJ Working Paper 2016/2 (MegaReg Series).

⁷⁹ Eyal Benvenisti, *EJIL Foreword – Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?*, in 29 *EJIL* (2018) 9.

domestic legal orders: the quest for legitimacy and accountability beyond the (democratic) state, on the one side, and the public and private distinction at international level, on the one other.

5.1. The Quest for Legitimacy and Accountability

The first problem – which is not new, but it certainly becomes more urgent the more global regulatory regimes grow – is how to ensure legitimacy and accountability beyond the state, which it sometimes jointly treated with the issue of democracy.⁸⁰

As for legitimacy,⁸¹ IOs especially and intergovernmental regimes more generally cannot claim to possess the voluntary consensual mechanisms on which private law systems are usually based (e.g. in the case of *lex mercatoria*). Legitimacy founded on the (political) authority of a given international institution,⁸² enhanced by state consensus or at least non-opposition,⁸³ is more common. However, sometimes IOs base their legitimacy on ethical issues, so that it becomes extremely important to ensure their integrity.⁸⁴ In other cases, expertise and technocracy offer the reason for legitimating specific international regimes.⁸⁵ And sometimes we may even find forms of Weberian charismatic legitimacy, such as in the case of sports, where, for instance, IOC often co-opts its members amongst ex Olympic champions.

The two main instruments of legitimacy at the international level, however, are that based on procedure, and that based on the involvement of states. The first one is often ensured through the participation of the affected parties in decision-making

⁸⁰ S. Wheatley, *The Democratic Legitimacy of International Law*. Oxford, Hart, 2010; and R.O. Keohane, «Nominal democracy? Prospects for democratic global governance», in *International Journal of Constitutional Law*, 2015, vol. 13, pp. 343 et seq.; also Benedict Kingsbury, Megan Donaldson and Ricardo Vallejo, *Global Administrative Law and Deliberative Democracy*, in *Oxford Handbook of The Theory of International Law* 526 (Florian Hoffmann and Anne Orford, eds., OUP, 2016).

⁸¹ Here, legitimacy can be broadly understood as a “generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions”: M.C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, in 20 *The Academy of Management Review* (1995), pp. 571 et seq.

⁸² D. Easton, *The Political System. An Inquiry into the State of Political Science*, op. cit., decision-making processes would be driven by “authoritative allocations of values” (p. 129).

⁸³ A. Buchanan and R.O. Keohane, *The Legitimacy of Global Governance Institutions*, in 20 *Ethics & International Affairs* (2006) 414.

⁸⁴ See A. Buchanan and R.O. Keohane, *The Legitimacy of Global Governance Institutions*, op. cit., p. 422 et seq., who mention the UN scandal of “Oil-for-Food”.

⁸⁵ Such as in the case of environmental protection: D. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, in 93 *American Journal of International Law* (1999), pp. 596 et seq., especially pp. 619 et seq.

processes. This may occur in different ways and through different mechanisms: notice and comment; request of advice; creation of consultative bodies or committees. The second type relies on the key role played by states within IOs and their organs. Concretely, this can consist in the involvement of governments (as usually happens) or domestic administrations (as in the case of transnational networks), or even of different levels of public authorities. Both these instruments rely on GAL mechanisms, such as procedural tools or institutional solutions, which resemble those familiar to administrative law.

This plurality of forms of legitimacy in global regimes has also determined the presence of different mechanisms for accountability: supervisory, hierarchical, fiscal, and legal, plus the so called “horizontal” accountability, based on “peer review” mechanisms (although there may be alternative forms based on the market or reputation, albeit less frequently).⁸⁶

First, there is *supervisory* accountability, based on monitoring and oversight instruments. These functions can be attributed to specific bodies, such as the Court of Auditors in the EU; alternatively, one governing body can exercise them over another. When an international administration has developed, there may be specific monitoring bodies or an ombudsman. For example, the EU ombudsman investigates complaints against EU institutions, bodies, offices and agencies.⁸⁷ This type of body has also been applied significantly in other fields, such as human rights⁸⁸ and development finance.⁸⁹

Second, there is a *hierarchical* form of accountability whenever there are central bodies that direct field offices, for instance. This type of accountability is common in IOs and the UN systems, where there are many field offices. In regional organizations, instead, there are usually either specialized agencies (such as in the case of EU distributed agencies, that are independent from the Commission); otherwise, national

⁸⁶ R.W. Grant and R.O. Keohane, *Accountability and Abuses of Power in World Politics*, in 99 *American Political Science Review* (2005), pp. 29 *et seq.*, R.B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 *American Journal of International Law* (2014) 211.

⁸⁷ M. Elisabeth de Leeuw, ‘The European Ombudsman’s Role as a Developer of Norms of Good Administration’, *European Public Law* 17, No. 2 (2011): 349–368.

⁸⁸ L.C. Reif, “Transplantation and Adaptation: The Evolution of The Human Rights Ombudsman”, 31 *B.C. Third World L.J.* 269 (2011).

⁸⁹ B.M. Saper, “The International Finance Corporation’s Compliance Advisor/Ombudsman (CAO): An Examination Of Accountability and Effectiveness From a Global Administrative Law Perspective”, 44 *N.Y.U. J. Int’l L. & Pol.* 1279 (2011-2012).

implementation is ensured by domestic administration.

Third, there is *fiscal* accountability, often ensured through funding mechanisms. The UNESCO Palestine case, for instance, exemplifies how important this issue could be for IOs, as the US withdrawal of funding from that specialized UN agency seriously affected its activity.⁹⁰

Fourth, there is *legal* accountability, which is essentially based on courts and tribunals. As illustrated above, this solution is increasingly common among international regimes. The number of courts is growing, and they are often entrusted with different tasks, as illustrated above (section 4.3).

Lastly, there is the so called *horizontal* accountability based on “peer review” mechanisms. From this perspective, a prime example is given by the Anti-Money Laundering and Counter-Terrorism Financing (AML/CFT) mutual evaluation program, which Financial Action Task Force on Money Laundering (FATF) introduced in order to improve assessment of the adequacy of a country’s AML/CFT framework.⁹¹

As noted above, GAL mechanisms, especially its procedural tools, serve as important instruments for improving both legitimacy and accountability of global regulatory regimes. Participation in the decision-making processes, the duty to give reasons, and judicial review are all significant principles, which help fill in the vacuum produced by the lack of traditional forms of democracy that we may find beyond the state. GAL, therefore, offers solutions to the “accountability dilemma.”⁹² And the key role of procedure becomes relevant also because it may enhance legitimacy and democratic accountability, since procedures allow to represent and to negotiate different interests at stake.⁹³ This, however, does not mean that GAL represents “the” solution to such problems; it may instead be useful for framing them and for avoiding the mechanical transplantation of legal instruments from domestic legal orders into

⁹⁰ L. Casini, *Cultural Sites between Nationhood and Mankind*, in *Community Interests Across International Law*, edited by Eyal Benvenisti and Georg Nolte, Oxford, OUP, 2018, pp. 176-187.

⁹¹ G. Dimitropoulos, “IV.2 Holding National Administrations Accountable through Peer Review: The FATF Case”, in *Global Administrative Law: The Casebook*.

⁹² R.B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, cit.

⁹³ Stefano Battini, ‘The procedural side of legal globalization: The case of the World Heritage Convention’, 9 *ICON* (2011) 340.

international regulatory regimes. Moreover, as some scholars observed, there may also be the phenomena of “over-accountability”.⁹⁴

5.2. The Public and Private Distinction Beyond the State

The second problem is how to deal with the public and private distinction beyond the state.⁹⁵ 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). Private ordering and global transnational regulation have been constantly growing, often using public actors as instruments of their expansion.⁹⁶

GAL – due to its focus on hybrid public and private regimes – contributes to unpacking and better understanding the public/private distinction beyond the state. When this distinction goes international and global, it performs several functions, and operates mainly as a “proxy” for bringing particular 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?

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

⁹⁴ J.E. Gersen e M.C. Stephenson, *Over-Accountability*, in «Journal of Legal Analysis», 2014, vol. 6, pp. 185 et seq.

⁹⁵ Casini, “*Down the Rabbit Hole*”: *The Projection of the Public/Private Distinction Beyond the State*, *supra*.

⁹⁶ Peer Zumbansen, *The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of ‘Context’*, 13 German L. J. 1269 (2012); Graf Peter Callies & Peer Zumbansen, *Rough Consensus And Running Code. A Theory Of Transnational Private Law* (2010).

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.⁹⁷

6. The Future of GAL and its Scholarship: Limits and Opportunities

GAL was conceived as an approach that is inclusive and not exclusive of other methods because it stems directly from the complex reality of global governance. This is its major strength, but, at the same time, it may represent its major theoretical weakness. GAL – with its scholarship – has been always searching for a balance between a normative dimension and a realistic one, between case studies and general theory, and between legal background and other disciplines. GAL is indeed both a descriptor of an empirical phenomenon unfolding “out there” in global governance, as well as a body of scholarship/theory that seeks to understand that phenomenon. Such feature makes GAL different from other IL theories, which connote either a theory and nothing more or a theory and an activist community. From this perspective, GAL resembles national administrative law and other fields of law, where the term indicates both the discipline and the body of laws and practices.

GAL, however, 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. 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.

Furthermore, beside a relevant success in terms of works produced, in its 15 years of life, GAL and its scholarship have displayed two principal flaws: GAL labeling, and

⁹⁷ Davinia Abdul Aziz, *Privileges and Immunities of Global Public-Private Partnerships: A Case Study of the Global Fund to Fight AIDS, Tuberculosis and Malaria*, in «International Organizations Law Review», 2009, vol. 6, pp. 383 et seq.

an underestimation of GAL's complexity. The first flaw affects GAL in its scholarly dimension; the second one mainly refers to GAL as a sophisticated body of actual practices, rules, and procedures and to how such body has been often been considered.

GAL labeling indicates the frequent attitude, especially among young scholars, of invoking GAL either to explain old phenomena that do not actually need GAL to be understood, or because they believe that simply referring to GAL provides a “magic wand” that can solve all conceptual legal problems. In other words, GAL is often summoned superficially, without sufficient explanation of why it is necessary and why international law cannot easily offer a suitable perspective. Other times, GAL principles such as participation and transparency are uncritically supported, without a detailed analysis of all their implications and effects on the decision-making process. Indeed, it has been noted that “GAL has become an attractive brand with which to draw attention to one's writing and hence used whether appropriate or not. When all issues of transnational or international governance become GAL it begins to look awfully like the fate of Multi-Level Governance. It loses its explanatory power and methodological rigor.”⁹⁸

In addition, scholarship sometimes underestimates the complexity of GAL as a legal field, since it requires a multidisciplinary approach both in law itself – international and comparative law, domestic administrative law – and in other disciplines – such as political science and sociology. In particular, GAL scholarship does not always take into account the fact that GAL relies on three different main sources, i.e. international law, administrative law, and international administrative law. If this consideration is omitted, there is a high risk that what is attributed to GAL as a “new” legal phenomenon is actually something that is well-known and rather old in other fields. For example, international law has always studied how international norms have directly affected individuals; when instances of this impact increased significantly over the last decade, and international law was not sufficiently considered when examining them, it could not be implied that the topic was “discovered” by GAL and its scholarship.

Thus, GAL scholarship has not always adopted an approach capable of integrating various perspectives and fields in the name of inclusiveness. On the contrary, shortcuts

⁹⁸ J.H.H. Weiler, ‘Preface to the Symposium on 10 years of GAL’ 13 *ICON* (2015).

have often been found, on the basis of self-referential case studies that begin and end with the same assumption: that the “holy” GAL will save the world. This gave rise to some misunderstandings not only within GAL scholarship, but also among other scholars. GAL and its scholarship, for instance, are viewed mostly and exclusively in the normative dimension, whereas in fact it has a largely positive or empirical set of ambitions too.

Furthermore, the two-fold dimension of GAL – i.e. its being both a set of norms and an academic approach – put this emerging field of study in an ambiguous relationships with the putative crisis of international law. On the one hand, GAL may be considered as a symptom of this crisis: take for instance the increase of regulatory and genuine administrative activities delivered by international institutions, including emergency actions, which highlight all the problems of legality, review, and due process discussed above. On the other hand, GAL itself tries to offer some responses, for example by increasing the degree of transparency and participation, or by adopting accountability mechanisms. And here GAL scholarship tends to follow a normative approach, with all related risks: 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 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.”⁹⁹

In 1936, when Thomas Mann left for America, he wrote that, for a travel around the world (*Weltreise*), it was right to bring with him a “world book” (*Weltbuch*): the Don Quijote:¹⁰⁰ probably the ironic scenes described by Cervantes, with their double reality made of inns/castles, hosts/castellans and mills/giants can still help understand and discover the numerous ambiguities that scholars encounter in the global legal space.

⁹⁹ M. Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, in «Indiana Journal of Global Legal Studies», 2000, vol. 8, pp. 369, 373; John Morison, *Citizen Participation: A Critical Look at the Democratic Adequacy of Government Consultations*, in Oxford Journal of Legal Studies, Vol. 37, No. 3 (2017), pp. 636–659, who examines also the phenomenon of “participatory disempowerment”.

¹⁰⁰ T. Mann, *Meerfahrt mit Don Quijote* (1945), Frankfurt am Main, Fischer, 1995, p. 14.

Therefore, GAL and its scholarship may continue to fruitfully face challenges launched by globalization if they remain inclusive and consistent with its origins, and do not claim to offer solutions or responses, but rather frame problems and raises questions capable to illustrate and unpack such ambiguities.