

## Foreword

In his masterpiece *Der Mann ohne Eigenschaften* (1930), Robert Musil ironically baptized the Austro-Hungarian Empire as “Kakania”, a title formed by taking the initial letters of the two labels adopted by that State: *kaiserlich* (Imperial) and *königlich* (Royal). Describing it as the “State since vanished that no one understood”, Musil noted that Kakania was at once “*kaiserlich-königlich*” (*k-k*, or “Imperial-Royal”) and “*kaiserlich und königlich*” (*k & k*, or “Imperial and Royal”):

“[...] but to be sure which institutions and which persons were to be designated by *k.k.* and which by *k. & k.* required the mastery of a secret science. On paper it was called the Austro-Hungarian Monarchy, but in conversation it was called Austria, a name solemnly abjured officially while stubbornly retained emotionally, just to show that feelings are quite as important as constitutional law and that regulations are one thing but real life is something else entirely. Liberal in its constitution, it was administered clerically. The government was clerical, but everyday life was liberal. All citizens were equal before the law, but not everyone was a citizen. There was a Parliament, which asserted its freedom so forcefully that it was usually kept shut; there was also an Emergency Powers Act that enabled the government to get along without Parliament, but then, when everyone had happily settled for absolutism, the Crown decreed that it was time to go back to parliamentary rule”.

The description of Kakania shows the decadence of the form of the imperial State that had survived until the early 20<sup>th</sup> century, and was then overwhelmed by the rise of mass society and destroyed during the two World Wars. Since then, the historical and political context has been profoundly transformed; yet the idea of Kakania, with its inner contradictions, still seems to be a useful metaphor for understanding the legal issues and challenges with which States are confronted in an age of globalization. Just as it was a century ago, the very idea of the State is under transformation; its centrality to the notion of public powers has become illusory, and new forms of governance are emerging. The conceptual juridical tools built during the 20<sup>th</sup> century no longer appear sufficiently refined in order to address the problems raised within the contemporary global arena; and some “cornerstones” of modern legal jurisprudence, such as the idea that administrative law is essentially and only national in nature, are vanishing; just as did the “misunderstood State” evoked by Musil.

Today almost all human activity is subject to some form of global regulation. Goods and activities that are beyond the effective control of any one State are, in almost all cases, regulated at the global level. Global regulatory regimes cover a

vast array of different subject-areas, including forest preservation, the control of fishing, water regulation, environmental protection, arms control, food safety and standardization, financial and accounting standards, internet governance, pharmaceuticals regulation, intellectual property protection, refugee protection, coffee and cocoa standards, labour standards, antitrust regulation, to name but a very few.

This increase in the number and scope of regulatory regimes has been matched by the huge growth of international organizations: nowadays over 2,000 IGOs, and around 40,000 NGOs, are operating worldwide. In the environmental area alone, for instance, there are – amongst many others – the International Whaling Commission, the UN Framework Convention on Climate Change Secretariat, the UNEP Ozone Secretariat, the Secretariat of the Convention on Biodiversity, the Secretariat of the Convention on International Trade in Endangered Species, the Basel Convention Secretariat, the UN Secretariat of the Convention to Combat Desertification, the FAO/UNEP Secretariat on the Rotterdam Convention on Prior Informed Consent, the UNEP Convention on Migratory Species Secretariat, the International Tropical Timber Organization; not to mention the large number of interested NGOs.

There are, of course, great differences among the various different types of regulatory regimes. Some merely provide a framework for State action, whereas others establish guidelines addressed to domestic administrative agencies, and others still impact directly upon national civil society actors. Some regulatory regimes create their own implementation mechanisms, while others rely on national or regional authorities for this task. To settle disputes, some regulatory regimes have established judicial (or quasi-judicial) bodies, or refer to those of different regimes; while others resort to “softer” forms, such as negotiation.

Within this framework, the traditional mechanisms based on State consent as expressed through treaties or custom are simply no longer capable of accounting for all global activities. A new regulatory space is emerging, distinct from that of inter-State relations, transcending the sphere of influence of both international law and domestic administrative law: this can be defined as the “global administrative space”. IOs have become much more than instruments of the governments of their Member States; rather, they set their own norms and regulate their field of activity; they generate and follow their own, particular legal proceedings; and they can grant participatory rights to subjects, both public and private, affected by their activities. Ultimately, they have emerged as genuine global public administrations.

One of the key factors in identifying the administrative nature of the organization and activities of these global regulatory institutions is the absence of any effort to make them legislative or judicial in nature (within the traditional conceptual structures of international law); and this alone gives rise to particular problems in terms of their legitimacy and accountability. In other words, the

structures, procedures and normative standards for regulatory decision-making applicable to global institutions (including transparency, participation, and review), and the rule-governed mechanisms for implementing these standards are coming to form a specific field of legal theory and practice: that of global administrative law. The main focus of this emerging field is not the particular content of substantive rules generated by global regulatory institutions, but rather the actual or potential application of principles, procedural rules and reviewing and other mechanisms relating to accountability, transparency, participation, and the rule of law in global governance.

Some specific characteristics of the emerging global administrative law can already be identified.

Firstly, it is sectoral, due to the presence of many different global regulatory regimes. This feature stems directly from the very origin of global regulation itself, which follows first of all the emergence of a specific public aim that cannot be achieved by the actions of one State alone. This sectorality itself has effects on the organization of global governance, with the variety of regimes producing various forms of global administration: from formal international organizations (such the WTO) to private institutions with regulatory functions (such the ICANN). This lack of unity, however, is to some extent counterbalanced by a strong inter-connection between different sectors: for example, global bodies are formed by other international institutions (such the Codex Alimentarius Commission, created by the FAO and the WHO); agreements or networks are established that connect different regimes (as is the case of agreements between the WTO and the WIPO, or between the WTO and the WHO); and dispute settlement bodies created by one regime can be used to resolve disputes raised within another: (the WIPO Arbitration and Mediation Center addressing disputes involving internet domain names provides one example).

Secondly, global administrative law addresses a wide range of actors – States, domestic public administrations, global institutions, NGOs, citizens. The role of States within the global arena has become increasing multifaceted, and there is a constant interaction between the global and national levels; indeed, global administration cannot plausibly be said to exist in isolation from the national level. It is for this reason that an examination of the decision-making processes of IOs reveals a plurality of techniques of joint action and mutual conditioning. In other words, there is no clear way of separating, either analytically or empirically, the global from the national.

Thirdly, global administrative law operates beyond State borders and, in so doing, becomes divorced from any constitutional basis (which is, otherwise, one of the main characteristic of national administrative law). At the global level, there is no government or higher authority; only a plurality of sectoral “sub-governments”. The absence of a constitutional foundation to global administration and administrative law again gives rise to new – and quite

particular – issues of legitimacy and accountability.

Fourthly, and in a profoundly related manner, the primary focus of global administrative law is aimed at increasing the various protection mechanisms in operation to ensure that the institutions of global governance are properly responsive to the interests of those on whom their activity impacts. The lack of constitutional basis, discussed above, and, indeed, of any realistic possibility of achieving a “global democracy” anytime soon, compels the emphasis of other legitimacy- and accountability-promoting mechanisms, such as, for example, the spread of principles transposed from national legal orders (transparency, participation, duty to give reasons, review, etc.).

Lastly, from a strictly legal perspective, the global administrative space is both international and administrative: in this way, the global legal order might actually begin to appear as *Kakania*, as at once – in a sense – “imperial” and “royal”. To prevent the theoretical study of these going the way the vanished Empire described by Musil, the coexistence of both international and administrative law aspects must neither be denied nor conceptualized as a rigid dichotomy; rather, it should simply be recognized, accepted, and confronted as a new challenge, necessitating the development of a new set of conceptual tools.

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This book is an attempt to analyze global administrative law through the elaboration and examination of a number of different cases and case studies.

The architecture of its contents mirrors the characteristics of this emergent field.

The first chapter addresses one of the most important activities of global administrations: standard-setting. Global standards provide a clear example of the spread of global regulatory regimes, and of the ways in which they interconnect; in addition, they illustrate well the various interactions between the global and domestic levels. Moreover, these standards can be set either by private bodies (such as, for example, in the accounting sector), or by formal IGOs (such as the labour standards approved by the ILO).

The public-private distinction is also evident in the second chapter, in which the various forms of governance existing within the global order are illustrated. The different sections of this chapter demonstrate both the sectorality and the complexity of global administrative law, incorporating analyses of hybrid governance solutions (the ICANN and the WADA); multipolar conflicts (the Chinese textiles affair involving the WTO and the EU); shared powers (the Patent Cooperation Treaty); mutual recognition (the free movement of professionals); joint decision-making processes (fisheries governance); and

transgovernmental networks (the Basel Committee).

Moving from the structure of global regimes to the activity of global administrations, chapters three and four address the application of different legal principles within global regulatory governance.

Chapter three examines the increasing spread of principles, established by global bodies, which must be respected within national administrative procedures. Examples of most of these can be found within the WTO system, such as the duty to disclose information (here dealt with in relation to anti-dumping duties), the duty to give reasons (definitive safeguard measures), and transparency (subsidies and countervailing measures). Other important principles present within the global context are the legality (as shown by the Compliance Committee of the Aarhus Convention), the reasonableness and the proportionality (applied by the NAFTA Binational Panel), and the review of discretionary power (such as the case of Bilateral Investment Treaties' disputes resolved by ICSID arbitration).

Chapter four is wholly dedicated to the issue of due process. It thus examines a number of cases in which global bodies, such as the ITLOS, the World Bank Inspection Panel, and the World Bank Office of the Compliance Advisor Ombudsman (CAO), have relied upon this principle. But it considers also cases in which this principle has received a weaker defense than within the domestic orders (such as in the Security Council's actions in relation to the "war on terror").

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

The analysis of judicial globalization leads directly on to another issue of real significance: the enforcement of global decisions, either administrative or "judicial" in nature. From this perspective, chapter six focuses on five examples that highlight the difficulties that might be encountered in relation to the implementation of such decisions, which might in some circumstances be granted only in an incomplete or ambiguous manner.

The presence of many sectoral regimes does not, however, only give rise to

varied forms of cooperation or interaction; it also creates conflicts. This happens in particular when separate jurisdictions reciprocally overlap, as is brought out in the four examples presented in chapter seven, dealing with the relations between global law and EU law, the Shengen Information System, the governance of cyberspace, and the international antitrust regime, respectively.

Finally, the last chapter moves from the general perspective that informs the preceding ones, focusing on the specific field of global security. This example is strongly representative of the increasing importance of global administrative law, illustrating the extent to which it has begun to affect even those functions traditionally viewed as forming the core of State sovereignty, and fundamentally political in nature.

While the structure of the book appears similar to that followed in the first edition, published in 2006, this new edition makes some important changes. The earlier version actually represented something of an experimental attempt to demonstrate the relevance of global administrative law issues, collecting the cases and materials used for courses on Global Administrative Law taught by Professor Sabino Cassese at the University of Rome “La Sapienza” and at the *Institut d’Etudes Politiques* in Paris. In this edition, three sections have been removed, while nine new ones have been added. Most importantly, however, each of the forty-one sections has been considerably extended, and now they all follow the same basic schema: each has a section on the relevant background; a list of materials and sources (with hyperlinks wherever possible); an analysis of the example in question; and a discussion of the various issues to which it gives rise, enabling each author to flag some basic theoretical problems, and to highlight the relations between the different topics examined in the book. Each section concludes with list of recommended further reading, relating specifically to the topic with which it dealt. Lastly, a general bibliography provides an overview of the most relevant works on global legal issues, and particularly global administrative law, divided into twelve different categories.

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

Amongst these, perhaps the most pressing is the need – given the vast

increase in the scope and importance of the activities of IOs – to begin examining, from a specifically administrative law perspective, not only the regulations that such bodies generate and the procedural rules that guide this, but also their organizational structure and the broader web of institutional relations within which they are implicated. One result of such an examination would be to point up the areas of overlap between global administrative law and international institutional law; another would be to enable the field to move beyond the fairly narrow, US-influenced procedural model of administrative law that has, until now, informed much of the scholarship, and to complement this view with a broader, more European perspective.

Moreover, there are other significant examples of innovative governance methods, mechanisms and principles, of which any fully-rounded theory of global administration would have to take account. They can be found in specific organizations (such the ISO) or in specific sectors (such as those of health or environmental regulation, fields in which new international institutional models are emerging), both of which provide important evidence of the emergence and development of this new field.

Ultimately, the most important factor to consider is that the emergence of global administrative law should be seen as a great opportunity to create a more just legal order, wherein the weaker actors in global governance can have their claims heard and satisfied through the use of the protection mechanisms of administrative law. Global administrative law is not, in fact, intended to help powerful States entrench their position of domination in, and control of, the global legal order; on the contrary, it is meant to level the playing field, ensuring that global regulatory bodies are responsive to the interests of all of those upon whom their activities impact; and that those – increasingly important – areas of global governance that escape the jurisdiction of both public international and domestic administrative laws are not thereby beyond the reach of the rule of law altogether.

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