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Administrative law's global dream: Navigating regulatory spaces between "national" and "international"

Peer Zumbansen*

Sabino Cassese, Bruno Carotti, Lorenzo Cassini, Eleonora Cavalieri and Euan MacDonald (eds. with the collaboration of Marco Macchia and Marino Savino). *Global Administrative Law. The Casebook*. 3d. ed. IRPA-IIIJ, 2012. 1401 pages. €3.97 (ebook).

1. Emerging global regulatory regimes and law's

turn to methodology

What would happen in someone's dream of a "global" administrative law (GAL)? Would there be tightly knit procedures according to which organizations of global reach would come to their decisions? Would these procedures be transparent, accessible? Would there be processes to hear those affected by the organizations' acts— both before and after implementation? Would there be courts with competence to submit such acts to judicial review? As any student of "domestic" administrative law knows, the devil lies both in the detail and in the overall embeddedness of this body of norms and rules in an encompassing legal-political culture, shaped by constitutional values and frameworks. Anyone, in fact, assessing the scope and aspiration of an administrative law system,

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cannot ignore the complex political realities of which administrative law is but a part. The administrative process and the law that it spawns are very much products of dialectical tension between timeless constitutional doctrines and rational administrative principles, on the one hand, and the demands for pragmatic governmental action constrained by politics in the historical context of the moment, on the other. It is a complex mixture of rational political theories and raw political hopes and fears. It reflects various attempts to deal collectively with a wide range of societal problems, some of which may or may not be capable of resolution by market processes. Administrative law often is a bundle of contradictions—thereby expressing the substantive and procedural contradictions in our own culture.¹

We find in this quote from Alfred Aman as if under a magnifying glass the elements that a global administrative law would have to reflect on, be aware of and build on. At the same time, here are the elements that render such a project illusory from the start. The emergence of a fragmented transnational landscape of organizations— whether we mean international,² transnational,³ hybrid, a mixture of public and private actors, regimes or networks,⁴ or even harder to categorize assemblies of evolving governance structures⁵—suggests a stark contrast between the national “here” of historically evolved, never resting administrative governance regimes and the global “there” of inchoate reconfigurations of political sovereignty, disaggregation,⁶ and fragmentation.⁷ Does this turn our dream of a global administrative law into a nightmare? Or, is it possible that a continuing engagement with the “substantive and procedural contradictions” that haunt this project as much as they have been shaping administrative law all along might allow us—over time—to gain a better understanding of how to connect domestic regulatory experiences, including their explicit and implicit assumptions, idiosyncrasies, and path dependencies, with a search for a legal theory of the global? From the point of view that an exploration of a project

such as GAL triggers a wider reflection on the relationship not only of (say, domestic) administrative law to other legal fields (such as constitutional⁸ or international⁹ law), but also of law to other disciplines that theorize global governance today,¹⁰ such a project becomes squarely placed in a legal theoretical and interdisciplinary context. At the heart of the project, then, there is a more fundamental inquiry into the place and role of law *as such* in the evolving transnational regulatory order. Precisely because many of the reference points of domestic administrative governance, as they have been elaborated with a focus on advanced capitalist rule of law systems,¹¹ are less easily identified in the present global space, the inquiry into the contribution of law to wideranging global governance analyses provides a most welcome opportunity to submit the intriguing mixture of legal doctrine and policy, that the global administrative law project encapsulates, to a legal theoretical investigation.

As we witness the globalization of law in a myriad of fields today, one of the challenges is how to distinguish between the “new” and the “well known”. While many of the institutional transformations that mark the emergence of hybrid transnational governance actors, such as semi-fluid political networks in economic governance,¹² or agents with an ambiguous regulatory mandate such as credit rating agencies, suggest at least a novel stage in institutional evolution, the resulting difficulties for law are, on closer view, not all that unknown. This raises the question of how to contextualize the question concerning the role of law. Whereas we might approach it from both a historical and comparative angle, here too the task will be one of framing the question in an adequate manner as to be actually able to catch a glimpse at least of the intricacies of a legal culture’s location, past, and presence.

As regards the task of depicting the “context,” then, of a project as

ambitious and multifaceted as global administrative law, there is today indeed a wealth of investigative strands being pursued in search of a better understanding of how law can cope with an increasing denationalization of legal-political, regulatory institutions.¹³ Unsurprisingly, such inquiries are undertaken from a host of different disciplinary perspectives, without it always being obvious which framework offers the central analytical toolkit. Instead, what emerges as one of the hallmarks of present global governance analysis is the almost seamless integration of complementary perspectives and categories.¹⁴ “Administrative governance”, however, redirects our attention squarely to what have been the nuts and bolts of instituted and exercised political authority. In that regard, administrative law has regularly been perceived as a core dimension of state practice and of rule creation and implementation.¹⁵ More recently, however, administrative lawyers began scrutinizing this self-understanding in a context of farreaching state transformation, prompting a thorough reconsideration of administrative law’s “province” in this new environment.¹⁶ Whereas administrative law for a long time has been described as the law governing “the processes and mechanisms of the welfare and regulatory states,”¹⁷ the changes in conceptualization and delivery of “public” services,¹⁸ the role of private actors in public governance¹⁹ and the resulting ambiguities of political representation, transparency and accountability²⁰ have contributed to a new context of administrative governance.²¹

We can thus see that the “province” of administrative law had come under scrutiny well before the field had started to leap into the global realm. And it is for this parallel challenge of administrative law—occurring both domestically and transnationally— that investigations into the future of administrative law will need to connect these dimensions in a way that brings out the specific qualities of local institutional change and the increasing border crossing nature

of regulatory challenges and the way regulatory responses are being formulated in light of these.

In his remarkable book, published in 2010, Alasdair Roberts addresses the “governmental reform that spanned thirty years.” He suggests “[c]all[ing] it the era of liberalization.”²² What is in fact remarkable about this observation is that he focuses on governmental reform in a number of countries—such as Deng’s China, Thatcher’s Great Britain, and Reagan’s United States—and recognizes a common theme. He finds that the phase that he depicts as having started around 1979–1980 with Deng’s reforms—“economic liberalization was at first a revolutionary doctrine”—has been succeeded by one during which “center-left politicians,” such as Clinton and Blair, “as well as those on the right” helped turn it into an “orthodoxy.”²³ Why is this remarkable? Because Roberts purports to write a book about “global capitalism” but not about a capitalism in a detached, global realm, but one that can and, arguably, should be traced back to “the architecture of government” on the ground. His analysis is all the more remarkable that it reminds us of the multitude of different architectures of government with regard to market regulation, something that political scientists and political economists have long been exploring through the lens of the so-called “varieties of capitalism.”²⁴ This approach recognizes the challenges arising from a “global space,” which we might choose either to embrace²⁵ or to regard with more trepidation.²⁶ In line with the latter, Roberts seeks to trace globalization phenomena very concretely in the sticky local, regional, national, and transnational structures of governmental and non-governmental interaction, agency activity, rule-creation, and policy making. By mapping and localizing global capitalism’s DNA this way, Roberts provides material that aids in further understanding of how, through changes on the ground, in local and national governments, and through transnational governmental interaction, “global” markets become global, how regulatory

regimes form through the interaction of public and private actors, and what role independent regulators, standard-setting organizations, and courts play in this formation.²⁷ Among the scholarly formulas and labels that have been applied to this emerging regulatory landscape, the term “transnational governance” has gained increasing traction over the years.²⁸ Lawyers have been actively involved in the ongoing efforts of making sense of these developments and in rethinking foundational assumptions regarding law’s place in a discursive context that seems to allocate for law merely a place among several social ordering mechanisms. In that regard, it is no surprise that scholarship on “global constitutionalism,” “global legal pluralism,” or “global administrative law” has been fast expanding, and is not showing any sign of fatigue just yet. To be sure, the intriguingly interdisciplinary nature of the scholarship that is being produced under the just mentioned headings betrays a particular moment in legal academic writing. Authors working in these fields, along with an increasingly noticeable voice of practitioners contributing to the debates,²⁹ write with a clear commitment to confronting the problems in a single disciplinary analysis as they arise out of the complexity of the regulatory processes under scrutiny. The expansion of hybrid, non-traditional regulatory governance forms on a global scale can be taken to suggest that a legal theory of globalization through, say, *transnational law*, will have to concern itself not only with the promises, and limits, of applying domestic legal frameworks to global governance regimes, but—above all— with the methodological presuppositions and consequences of law’s reorientation and adaptation to these developments today. It is through this lens that we find ourselves engaging with the various *legal* responses formulated by scholars and practitioners with regard to the increasingly complex global regulatory landscape.

2. Learning to cope: Theory through problem solving

That our endeavor should be primarily a methodological one seems even more poignant as we discover ever more evidence that suggests that lawyers must seriously retool and rethink their approaches to teaching, researching and practicing law in this global context. In that vein, in the 2011 Montesquieu Lecture at Tilburg University, William Twining outlined five basic premises that ought to inform legal scholars' engagement with the phenomena of globalization in the years to come:³⁰

- the whole Western tradition of academic law is based on several kinds of assumptions that need to be critically examined in a changing context;
- we lack concepts, and data to generalise about legal phenomena in the world as a whole: analytic concepts that can transcend, at least to some extent, different legal traditions and cultures;
- comparison is the first step to generalisation and more sophisticated and expansive approaches to comparative law are critical for the development of a healthy discipline of law;
- we need more sophisticated normative theories that are well-informed and sensitive to pluralism of beliefs and differences between value systems; and,
- especially, we need improved empirical understandings of how legal doctrines, institutions and practices operate in the "real world."³¹

Contrasting these observations with the way in which law and global governance have been intersecting of late, what we find is a stupendous array of complex, interwoven and constantly updated regulatory regimes, that evolve in correlation to the governance problems raised by border-crossing problems, disputes over jurisdiction and forum with regard to multinational company's human rights violations,³² corporate codes of conduct regarding workers' rights³³ or corporate social responsibility (CSR),³⁴ climate change,³⁵ or food security and food safety.³⁶ Arising from this panoply of manifold regulatory regimes, in themselves

intricate and specialized, is a growing awareness that, in fact, viable legal solutions cannot emerge from high-level, conceptual assertions of global law but must, rather, follow from very close and involved engagements with the problem arenas themselves.

The foregoing observations inform a growing number of projects that aim at mapping the increasingly dense territory in an effort to identify the inroads for legal doctrinal analysis as well as for the development of adequate, context-sensitive regulatory responses from a legal perspective. One such project, which from its beginnings around 2005 has been perceived as having a particularly ambitious scope and comprehension,³⁷ is the Global Administrative Law Project. Since the days of its inception, the program has evolved considerably—in terms of both areas of doctrinal analysis and theoretical reflection. The new edition of the GAL Casebook gives a powerful testimony of this development, even if its strength can be seen to lie more in the presentation of extremely helpful and accessible case-studies and area-analyses, while offering less of an engagement with some of the strands of critical engagement, which surfaced over the past few years, including inquiries into the “politics” of the project,³⁸ its constitutional dimension³⁹ and epistemological foundations,⁴⁰ or a self-critical assessment of the project’s ability to include alternative, including “Southern” perspectives in its conceptual elaboration.⁴¹ Given the nature of the offered text as a distinctive “case book,” an extensive theoretical engagement was allegedly not the editors’ mandate nor aspiration. And yet, that GAL remains an intellectual project of considerable conceptual weight and practical usefulness would be a trite observation and is certainly underscored not least by the thoughtful and informative “Foreword,” which also provides a helpful guidance through the rich content of the voluminous book that follows. In it, the editors note that “[t]his book is an attempt to analyse global administrative law through the

elaboration and examination of a number of different cases and case studies. The architecture of its contents mirrors the characteristics of this field” (unpaginated). In addition, however, the editors observe that “[i]n order to fully grasp global administrative law . . . it is important also to have a sound understanding of the broader governance context in which it is situated” (unpaginated). Arguably, this would then be the framework within which the ensuing case studies are situated. At the same time, what could be meant by this “framework,” and by the observation offered by the editors that the case studies have to be read with “a sound understanding of the broader governance context in which it is situated”? Would this not be true for any legal analysis in just about every setting—be that a local or a transnational, global one? In fact, this awareness of the *context* has always been a crucial aspect of administrative law and, as such, has informed some of the most pertinent studies on the nature, ambition and reality of this field—to this very day.⁴² A legal field that finds its regulatory subjects and objects in the fragmented space of global regulatory interaction today faces a formidable challenge when pressured into conceptualizing its understandings of the larger governance context in which its own rules are being formulated and implemented. The idea and practice of administrative law have always comprised the need to repair a ship on the high seas, the acknowledgement of the urgency of state/bureaucratic action in response to societal needs, the pull of “*Sachzwänge*” (objective constraints, for lack of a more fitting translation), and of regulatory demands and time confinements.⁴³ The intricacies of administrative process and practice, especially the tension between the elaboration and implementation of the “rules of the game,” on the one hand, and the particular normative ambiguities—“in whose name?,” “in favor of what interests?,” “whose accountability?”⁴⁴—on the other, have forever captured the imagination of legal scholars as well as political scientists and

governance theorists. It is the embeddedness of administrative structures in historically evolved political economies and distinct national legal cultures⁴⁵ that underscores the importance of this emphasis on context. As administrative law rules are historically shaped and a result of complex adaptations over time, such norms and principles can offer an intriguing insight into the correlations between state function, constitutionalization, and the interplay of public and private norm creation bodies. From this, we would assume a first and necessary step to take towards the elaboration of conceptual elements for global administrative procedures to consist in the design of an adequate comparative law framework. And, indeed, recent advances in *comparative* administrative law show an avid interest in adapting a comparative methodology, traditionally focused on “administrative organization and judicial review,” to the changes in administrative governance, including its privatization, proceduralization, and transnationalization.⁴⁶ But, while the scope of administrative law might have been undergoing significant transformation, the underlying premise—namely that administrative law should both guide the rule creation of public authorities addressing ever more diverse societal needs and the elaboration and consolidation of “liberal democratic norms of social organization and public authority”—continues to inform the ongoing adaptation efforts.⁴⁷ The bigger challenge lies, admittedly, in how this comparative law methodology can adequately address the emergence of transnational regulatory governance, hybrid regulatory interaction, and other outflows of the “disaggregated state.”⁴⁸ Given the intricacies of transnational regulatory governance in terms of its diverse and multipolar and hybrid actor structure, on the one hand,⁴⁹ and its fragmented epistemological and constitutional basis on the other,⁵⁰ it becomes necessary to move beyond a “deep appreciation of the historical diversity of national legal traditions and a familiarity with the many ways in which legal transplants can be transformed

in the process of migration of one place to the other.”⁵¹ The transnational dimension of administrative governance in pressing regulatory areas today requires a different approach to the elements of place and space in that the particular nature of the transnational space of precarious and fragmented legitimacy, accountability and enforcement must be addressed in its own right. At the same time, the acknowledgment of how elaborations of aspiring “global” administrative law principles have their—often unreflected—roots and backgrounds in particular national frameworks, remains a crucial complement in the effort of conceptualizing a transnational legal pluralist methodology.

3. Global administrative law through case-studies: The bold move beyond administrative comparisons

At the center of the following remarks is the third, revised and significantly expanded edition of *Global Administrative Law: The Casebook*, edited by Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri, and Euan Macdonald, published online in 2012.⁵² While available as an e-book, its PDF-format counts an impressive 1400 pages. The new edition constitutes a formidable scholarly and educational achievement: it is authored by a truly transnational cohort of both highly renowned and emerging, early-career scholars, who have managed to conceptualize and to execute wide-ranging, theoretically informed and practice-related “case studies” through which the fast-evolving area of GAL continues to gain contours and structure. This in itself is a highly laudable enterprise. Yet, what makes the project even more relevant is the way in which the editors and authors have opted for a format, which offers both students and instructors succinct yet highly accessible studies in a broad spectrum of regulatory areas. The online availability at an

entirely negligible cost (of 4 euros) further optimizes the usability of the book as a great number of references and background materials are electronically linked to the text so that the “book” becomes a truly unbounded research and study tool.

The real value of this enormous work will likely become even more strikingly apparent through a continued use in the training of administrative law students and global governance scholars. The studies included in the book bespeak a sharp awareness on the part of the editors and authors of pressing governance challenges that scholars, practitioners, politicians, activists, and citizens are today concerned with. At the same time, the book impresses through an uncompromising stance taken by its contributors in the debate over the state and prospects of administrative governance: by choosing to present a great number of detailed and in themselves highly complex illustrations of how administrative law principles are being tested in the context of an increasingly border-crossing, transnational array of regulatory concerns today, the authors squarely position themselves in the *law, globalization, and global governance* discourses we identified earlier in this essay. Consequently, a particularly important test standard for their project will be how the tension between national–international administrative law elements is thematized and addressed. Rather than offering traditional, in-depth comparative administrative law analyses between different jurisdictions, the editors and the contributors to the book can instead show and scrutinize the prospects and limits of administrative law principles that originated within different domestic, national frameworks for their applicability in the context of border-crossing governance constellations. But, in order to make it possible to study the different actors and processes of the evolving global realm in their own right, “more nuance is required.”⁵³ An analytical perspective that is of crucial importance here is one that identifies the structural elements of an evolving

global regulatory arena, an arena above all marked by a fast-growing array of public, private and mixed governance actors. Such description can be understood as the testing ground for the applicability of inherited administrative law principles with which the GAL scholars confront the proliferating phenomena of “global administration.” That observations regarding this global arena are intriguingly tied to those made in the domestic realm, is illustrated, for example, by Antonio Cassese, the inspirer and co-editor of this project, when he writes that “in the global polity, hybrid and private bodies are as numerous as public bodies.”⁵⁴ This echoes an observation made earlier by Harry Arthurs:

The basic paradigm, the central assumption, the crucial structure that dominates the way most lawyers, judges, law professors—even most people—think about law is this: law is formal; it exists as a thing apart from society, politics, or economics; law has the capacity to achieve, and does achieve, results by encouraging or discouraging behavior, by attaching specified consequences to behavior that facilitate it, deter it or undo its harmful effects; law is made and administered by the state; and access to law is provided in courts by legal professionals—lawyers and judges—who invoke a body of authoritative learning in order to argue and decide cases... When law is invoked, the power of the state is mobilized to accomplish law’s purposes: the aggrieved contracting party is made whole, the murderer is sent to prison. Throughout society, contractual obligations and personal security are thus reinforced.⁵⁵

Cassese points to the limits of attempts to continue thinking about administrative law along those lines: “while constitutional law is still organized around a center (Parliament, the government, a supreme court), administrative law has lost its center and has become fragmented and multipolar.”⁵⁶ Thereby, however, he effectively underlines the importance of connecting the two levels of analysis: the socio-legal analysis that forward-looking administrative law scholars such as Aman, Arthurs, Cane, Cassese,

Harlow, or Taggart have been applying to the evolution of administrative governance shows that, while not being simply exportable or transposable from one context (or, level) of governance to another, it can still illustrate in how many ways the proliferation, fragmentation and dehierarchization of “global” governance is tied to the processes of “state transformation” on the ground.⁵⁷ In other words, this perspective can show the local origins of “global” phenomena that have been an important focal point of those globalization scholars, who have convincingly been rejecting the depiction of globalization as an allegedly autonomous outside force, which takes hold of a nation state that itself has no agency left.⁵⁸ And it is on that basis that the debate around GAL can more fruitfully be connected to parallel investigations into the legitimacy foundations of contemporary law.

As such, it comes as little surprise that this introspection by administrative lawyers into the foundations and anchoring points of their field occurs in close proximity to vibrant discussions around chances (as well as limits) of (“comparative,” “global,” as well as “transnational”) constitutionalism. But, despite the fact that these discussions are already shaping and influencing the future evolution of administrative law, a strong focus of global administrative law theory remains on the identification and consolidation of workable principled approaches to an emerging theory of administrative governance for transnational actors, norms and processes. The newly issued casebook is nothing short of a powerful testament to this effort as well as to the impressive if not overwhelming diversity and complexity of transnational regulatory arenas that can be studied through an administrative law lens. As mentioned earlier, the here presented book offers a “case study” approach and includes a much welcomed selection of highly relevant regulatory fields. In building on the early explorations of identifying basic administrative law principles,⁵⁹ the case book’s editors and contributors have found an elegant

and sophisticated way both of interrogating and further unfolding the challenges arising in the effort of identifying overarching norms, frameworks, and principles. The book structures the search for such overarching themes in an inquiring, investigative manner through a number of chapters, that focus— respectively—on a contrasting study of states and “global administrations” (including organizations, networks, hybrid regimes), on “standards,” on “principles,” on “enforcement,” on “judicial globalization,” on “conflicting jurisdictions,” and— finally—on “global dimensions of democracy.” A concluding chapter investigates the developments of administrative governance specifically in the realm of the European Union, here complementing an already impressive and continuously growing number of focused studies on this particularly rich example of governance innovation.⁶⁰

The case studies collected in this book testify to a truly remarkable commitment to concrete and thoroughly researched analysis of some of the most pressing challenges facing domestic and transnational regulatory actors today. A striking feature of the book is its “real time” embeddedness in the continuing evolution of the areas it focuses on not only by the here displayed choices among different problem areas but also by the already mentioned insertion of links to online sources and materials. As for substance, what makes this collection so intriguing is the selection of focus areas and the resulting juxtaposition of different regulatory contexts and cultures of legal-political governance. To highlight an example: Rene Urueña’s analysis of independent regulatory agencies in a chapter entitled “GAL and the domestic regulatory state: Challenges from the South” introduces the reader and, ultimately, student, to the intricate connections between the state transformation in advanced industrial and post-industrial economies which gave rise to an increasingly technocratic de-politicized administration of key resources and utilities and the export of this governance moment to emerging economies in, say, Eastern

Europe and Latin America. In this vein, see also Nicola Ferri's case study on the interplay between economic governance and environmental protection in the Arctic ("Melting Ice and Exclusive Zones"), Joanna Langille's analysis of the Technical Barriers to Trade (TBT) Agreement's confining impact on domestic discretionary regulation, or Isabel Feichtner's investigation into the, eventually transnational, politics of local energy market regulation ("Just Political Restrictions? *Vattenfall v City of Hamburg, Moorburg Power Plant*"). What these case studies show is how a search for a "global" administrative law cannot proceed without engaging, again and again, the complex interpenetration of local and transnational norms, actors, and processes—an engagement which will continue to prompt scholars for years to come to pay close attention to the intricacies involved, rather than trying to formulate all-encompassing conceptual frameworks and, even less, universalizable principles.

The compelling and, for both students and instructors in abundant, yet potentially overwhelming form of this collection makes it a very useable and effective tool for the study of particular agencies, procedures, individual cases, and regimes. Surely, its comprehensive nature (as noted, the volume comprises approximately 1400 pages) lends itself to a selective approach in classroom use, but at the same time the book's division into well-reasoned subsections allows for a manageable navigation of these complex waters. The nature of the undertaking is, as its subject, in constant movement. Hence, the collaboration of so many authors, at different stages in their careers and working out of a wide array of countries, bodes well for a project with such a tall order to meet. One is tempted to compare the volume with a piece of performance art, where the "essence" reveals itself eventually in the execution, which alone might cause considerable trepidation for the lawyer, student or classroom educator. But, as these case studies amply

demonstrate, there is tremendous merit in plowing into the thick of fast evolving regulatory arenas, and to do so by drawing on background and applied scholarship to keep the analytical framework sufficiently receptive for future adaptation and change.

4. Context, once more

The foregoing remarks could not do more than offer but a cursory glimpse into a field—"global administrative law"—that constitutes, to be sure, one of the most intriguing and challenging conceptual "legal field" projects today and into the Case Book under review, a collection of teachable materials that provide a powerful illustration of how this field could be conceived in the best tradition of "law in action," "law in context," or "living law." But, with these keywords, we might also have identified a dimension that still needs to be addressed in a more straightforward manner. That is, again, the question of the nature of the *context* in which such a project is being formulated, theorized, and put into action. The investigation into GAL's context cannot be one pursued in an exclusively "theoretical" realm, detached from how the field is already being taught in the classroom. There is doubtless great value in using GAL not only to widen the conceptual and doctrinal horizon of administrative law as it has been taught and studied at law schools, but also as a way of forcefully exposing students (and faculty) in public law to the complexities of transnationalizing governance regimes. GAL thus offers a much welcomed opportunity to shortcircuit anxiety-ridden routines in domestically oriented public law instruction in an increasingly globalized context. The Case Book might, however, proceed too much on a phenomenological basis. Moving from case

study to case study, students—depending, certainly, on the accompanying instruction in the classroom—might or might not learn about the deeper issues raised by global governance phenomena—not only for administrative law, but, in fact, for law as such. From that perspective, then, any course in GAL aspiring to cover at least a portion of the materials contained in the new edition of the Case Book would need to be a course in legal theory, comparative law, and legal methodology. The book, however, does not explicitly address or engage with that dimension of the project. This creates the risk that students will be following a no doubt intense program during which they are confronted with fascinating case studies covering a no less than stupefying array of cases and regulatory areas, without, however, being given neither the time nor the informed space to at least attempt to place all of this in perspective. But, the fact that “perspective” and “context” of global administrative law are per se open to an ongoing, captivating intellectual investigation which raises cutting-edge questions of methodology, empirical research, and the contestatory nature of legal knowledge as it informs and justifies governance, should prompt rather than deter faculty and students to engage in that inquiry alongside their work on individual case studies. Picking up on the editors’ choice to conclude the Case Book with a section specifically on the EU (and its transformation in the context of globalization), we might want to highlight the incorporation of the fascinating chapter on “new forms of governance” in the Craig’s and de Búrca’s textbook on EU Law,⁶¹ demonstrating how a doctrinal analysis of substantive law requires, in fact, a thorough engagement with the theoretical dimensions of the field in a larger context of law and regulatory governance.

But, then, how are we to strike a balance between very specialized case studies and an accompanying theoretical reflection on the context, in which these

developments occur? To be sure, this question might really be one about the both implicit and explicit normative assumptions that inform the field. In other words, the question becomes one of how to think about the normative foundation of the fragmented, administrative governance universe that becomes visible through the detail of the collected case studies. This question, then, is one that has received considerable attention in recent years, mainly under the headings of *comparative* as well as *global* constitutionalism. While comprehensive efforts are undertaken to expand, refine, and consolidate a *comparative* approach to the constitutional law in the present context,⁶² another approach has been focusing on the ubiquitous “fragmentation of law”⁶³ and its far-reaching consequences for constitutional law. Unsurprisingly, the jury on the future of constitutional law in a global, post-national era is still out—just as it should be. The constitutional question must, arguably, always remain *unanswered*.⁶⁴ But, that is not to say that it must or should not be asked. And that has been done in very enriching and inspiring manners over the recent past. Whether the focus has been on identifying⁶⁵ or on refuting⁶⁶ a principled approach to theorizing the constitutional dimensions of multi-level judicial dialogue as part of examining the possibilities of a global constitutionalist framework, it is obvious that the *judicialization* of global governance concerns remains one of the most pressing issues from a constitutionalist perspective. Meanwhile, the prospects of a constitutional order remain meager as long as the constitution, a constitutional text, framework, or symbolism, stay moored to a particular model of the state, the transformation of which is regularly seen as triggering an “internal erosion” of constitutionalism.⁶⁷ Whether, then, one investigates the gist of constitutionalism in relation to its territorial reach⁶⁸ or its regulatory function, its normative-procedural foundation of the rule of law⁶⁹ or its role in keeping the field’s political orientations open for change and adaptation,⁷⁰ all this seems to point to its survival, of sorts. To be sure, thinking

of administrative governance in its mind-boggling transnational diversity⁷¹ today in total separation of its constitutionalist dimensions might not prove productive. The challenge, instead, is to keep the synapses of an ever-faster proliferating regulatory landscape of public, private and hybrid institutions open for constitutionalist investigation, without this having to be an end-game. Yet, what can be meant by testing, scrutinizing and exposing administrative governance from a constitutionalist perspective today? Surely, we cannot mean to merely re-deploy the *judicial review* perspective, without paying due regard to the level of sophistication at which this problem has come to be treated on the level of domestic administrative law.⁷² Rather than rebuilding a two-sided universe with the legislator on one side and the administration (and, tribunals) on the other, a constitutionalist investigation into administrative governance today would need to attempt a continuing short-circuiting of administrative and constitutionalist discourses as they respond to developments in the “real world.” Disregarding, for a moment, the institutional architecture of this administrative-constitutional universe, we can better appreciate the relevance of the concerns regarding the prospects of a viable transnational institutional framework under consideration of *politics* or, the *political*⁷³ as a driving force of today’s constitutionalist inquiry. Where a constitutionalist program presses for a more contextual reconfiguration of politics, there can very well be disagreements regarding a—more versus less state-institutions based—institutionalization of an emerging system of rule-making, implementation, enforcement, and adjudication. What such disputes show, however, is that iterations of administrative governance in the global realm cannot permanently exclude a more thorough engagement with the parallel constitutionalist debates.

5. Post scriptum

Recently,⁷⁴ in an—as usual—thought provoking reflection on the “Integration Through Law” (ITL) project, as it was developed at the European University Institute (EUI) in the 1980s,⁷⁵ Joseph Weiler remarked how the volume’s scholarship engaging with the formative period of the European project was “not just a study of the European polity but, contemporaneously, a study of the study of the polity.”⁷⁶ As he holds this to be true also for the EU-related scholarship at the EUI over the years, he added another, related observation, maintaining that the ITL project helped with the establishment of the identity of the European University Institute’s Law Department, centrally marked by a commitment to scholarship “which was European, comparative and contextual.” One of the characteristics of EU scholarship, as highlighted by Professor Weiler—and, since 2013, the EUI’s newly appointed *president*—is its interdisciplinarity. Surely, seen already against the rich and layered background of the methodologically groundbreaking approaches taken in the ITL project, an interdisciplinary take on EU law can best be explained with reference to the complex *nature* of the studied object itself, which to this day has defied a unifying, all-settling definition. As a keen observer posited a few years ago:

This struggle over concepts and labels has not been simply an intellectual exercise divorced from any real consequence. It has reflected, rather, a broader political, legal, and cultural struggle—one that persists in Europe to this day—over how best to come to terms with what European institutions *are* (and *have been*), as well as what they might realistically *become* in the future—all in relation to what it means, precisely to be “European” within this broader institutional framework.⁷⁷

It is this emphasis on the embeddedness of EU “law” in the EU that is not the answer, but the necessary acknowledgement of the existence of a conundrum. As is the case with EU law being at all times a study of law of an

entity that itself is forming through the elaboration of “its” law, a project such as global administrative law needs consciously to reflect on its underlying conundrum, namely the evolving nature of a global realm and the conundrum that is law itself—in that context as well as in the contexts in which we have been engaging with law.

Notes

- ¹ Alfred C. Aman Jr., *Administrative Law and Process* at vi–vii (2d. ed. 2006).
- ² Jose E. Alvarez, *International Organizations: Then and Now*, 100 *Am. J. Int'l L.* 324 (2006)
- ³ Samuel P. Huntington, *Transnational Organizations in World Politics*, 25 *World Politics* 333 (1973); Gregory Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, University of Minnesota Legal Studies Research Paper No. 09-23, available at <http://ssrn.com/abstract=1426123> (2009)
- ⁴ Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, in *Transatlantic Regulatory Cooperation* 469 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth eds., 2000); Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality – The Viability of the Network Concept*, 3 *Eur. L.J.* 33 (1997).
- ⁵ Timothy J. Sinclair, *Passing Judgment: Credit Rating Processes as Regulatory Mechanisms of Governance in the Emerging World Order*, 1 *rev. int'l Pol. Econ.* 133 (1994); Dieter Kerwer, *Rules that Many Use: Standards and Global Regulation*, 18 *governAnCe: int'l J. Pol'y, Admin. & Institutions* 611 (2005).
- ⁶ Anne-Marie Slaughter, *The Real New World Order*, 76 *foreign AffAffs* 183 (1987).
- ⁷ Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World, in the twilight of Constitutionalism?* 3 (Petra Dobner & Martin Loughlin eds., 2010).
- ⁸ See, e.g., Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, in *Comparative Administrative Law* 117 (Susan Rose-Ackerman & Peter Lindseth eds., 2010).
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- ¹² See, e.g., the contributions to *Government and Markets: toward a New theory of Regulation* (Edward Balleisen & David Moss eds., 2009).
- ¹³ See, e.g., Gunter Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 *Am. J. Comp. L.* 145 (1997); Saskia Sassen, *The State and Globalization, in the Emergence of Private Authority in Global Governance* 91 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002); Saskia Sassen, *Globalization or Denationalization?*, 10 *rev. int'l Pol. Econ.* 1 (2003); Karl-Heinz Ladeur, *Globalization and Public Governance – A Contradiction?*, in *Public Governance in the Age of Globalization* 1 (Karl-Heinz Ladeur ed., 2004); Marc Amstutz, *The Letter of the Law: Legal Reasoning in a Societal Perspective*, 10 *german L.J.* 361 (2009); Larry Catá Backer, *Governance without Government – An Overview, in Beyond territoriality. transnational legAI Authority in An Age of Globalization* 87 (Günther Handl, Joachim Zekoll & Peer Zumbansen, eds., 2012)
- ¹⁴ For a very cursory overview, see, e.g., Peer Zumbansen, *Governance: An Interdisciplinary Perspective*, in *Oxford Handbook on Governance* 83 (David Levi-Faur ed., 2012).
- ¹⁵ Ross CrAnston, *legAI foundations of the Welfare State* 103 *et seq.* (1985); Michael Taggart, *The Province of Administrative Law Determined?*, in *The Province of Administrative Law* 1 (Michael Taggart ed., 1997); Peter Cane, *Administrative Law as Regulation*, in *Regulating Law* 207 (Christine Parker, Colin Scott, Nicola Lacey & John Braithwaite eds., 2004).
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- ²³ *Id.*
- ²⁴ See the contributions to the landmark volume *Varieties of Capitalism. the institutional foundations of Comparative Advantage* (Peter A. Hall & David Soskice eds., 2001). See, of course, also the contributions to critically build on and engage with that approach: Bob Hancké, *Varieties of Capitalism Revisited: Globalisation and Comparative Institutional Advantage*, *la lettre*

- de la régulation 1 (1999); *Beyond Varieties of Capitalism. Conflict, Contradictions, and Complimentarities in the European Economy* (Bob Hancké, Martin Rhodes & Mark Thatcher eds., 2007); *Debating Varieties of Capitalism. A Reader* (Bob Hancké ed., 2009).
- ²⁵ Martin Wolf, *Why Globalization Works* (2004).
- ²⁶ Adam Gearey, *Globalization and Law, Trade, Rights, War* (2005).
- ²⁷ On this, see also the excellent collection of essays in *Handbook of Transnational Governance. Institutions and Innovations* (Thomas Hale & David Held eds., 2011).
- ²⁸ See, e.g., the contributions in *Private Authority and International Affairs* (A. Claire Cutler, Virginia Haufler & Tony Porter eds., 1999), the emergence of Private Authority in Global Governance (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002), and *Transnational Governance and Constitutionalism* (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., 2004). For masterful, recent analysis, see both Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 *And. J. Transnat'l Law* 501 (2009), and Marie-Laure Djelic & Kerstin Sahlin, *Reordering the World: Transnational Regulatory Governance and Its Challenges*, in *Oxford Handbook on Governance*, *supra* note 14, 745.
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- ³⁰ William Twining, *Globalization and Legal Scholarship*, with an Introduction by Willem J. Witteveen 37 (2011).
- ³¹ *Id.*
- ³² Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, 43 *NW. J. Int'l L. & Bus.* 43 (2005); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 *Hastings L.J.* 61 (2008); Richard Meeran, *Tort Litigation against Multinational Corporations for Violations of Human Rights: An Overview of the Positions Outside the United States*, 3 *City U. Hong Kong L. Rev.* 1 (2011); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 *Hastings L.J.* 61 (2008).
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- ³⁷ Nico Krisch, Benedict Kingsbury & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law & Contemp. Prob.* 15 (2005).
- ³⁸ Susan Marks, *Naming Global Administrative Law*, 37 *N.Y.U. J. Int'l Law & Pol.* 995 (2005); Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 *Eur. J. Int'l L.* 187 (2006); Alexander Somek, *The Concept of "Law" in Global Administrative Law: A Response to Benedict Kingsbury*, 20 *Eur. J. Int'l L.* 985 (2009).
- ³⁹ Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, in *The Twilight of Constitutionalism?*, *supra* note 7, 245.
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- ⁴⁹ Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 *And. J. Transnat'l L.* 501 (2009); Gregory Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, University of Minnesota Legal Studies Research Paper No. 09-23 (2009), <http://ssrn.com/abstract=1426123>; Gregory Shaffer & Terence Halliday, *Transnational Legal Orders*, manuscript 2012, on file with author.
- ⁵⁰ Gunther Teubner, *Fragmented Foundations: Societal Constitutionalism beyond the Nation State*, in: *the twilight of Constitutionalism?*, *supra* note 7, 327; Gunther Teubner, *The Project of Constitutional Sociology*, 4(1) *Transnat'l Legal Theory* (forthcoming 2013).
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- ⁵⁵ Harry W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* 1–2 (1985), esp. Chapter “Paradigms of Law.”
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- ⁵⁷ See e.g., the contributions to *Transformations of the State?* (Stephan Leibfried & Michael Zürn eds., 2005).
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- ⁵⁹ Krisch, Kingsbury & Stewart, *supra* note 37.
- ⁶⁰ Carol Harlow, *Three Phases in the Evolution of EU Administrative Law*, in the *Evolution of EU Law*, *supra* note 46, 439; *EU Administrative Governance* (Herwig C.H. Hofmann & Alexander H. Türk eds., 2006); Paul Craig, *EU Administrative Law* (2d. ed., 2012).
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