

Public Law and Globalization: Retrospective and Perspective

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II Semestre, a.a. 2022/2023

Days:

8 maggio 2023, 11:00-13:00, Aula Terrazza

15 maggio 2023, 11:00-13:00, Aula 2

22 maggio 2023, 11:00-13:00, Aula 2

29 maggio 2023, 11:00-13:00, Aula 2

5 giugno 2023, 11:00-13:00, Aula 2

12 giugno 2023, 11:00-13:00, Aula 2

due incontri di discussione dei papers, TBD

I. Introduction

This course introduces students to the legal institutions that characterize globalization, with an emphasis on public law. There is both a retrospective and a perspective.

It can be helpful to say at the outset, for the sake of clarity, that:

- the public law viewpoint differs from that of private law not simply because it considers the discharge of public functions and powers and the guarantees concerning them, but also because it gives weight to collective and public interests, including the protection of the environment, as distinct from individual interests;
- analytically, a distinction should be made between regional institutions and processes, such as those characterizing both Europe and the Americas, and global regimes;
- using both a retrospective and a perspective, the course intends to discuss both the received view that globalization is recent and the idea that globalization is likely to decrease rapidly, in the next few years. The pandemics that spread worldwide since the end of 2019 provides a good example.

The course employs a variety of legal sources, including treaties, quasi-legislative rules, deliberations, and judicial decisions. It also includes both legal academic writing and social science literature that illuminate issues and legal disputes. Methodologically, the course intends to provide all participants with opportunities to apply their critical skills to the analysis of old and new issues concerning globalization. Each session will thus be based on various texts and materials previously circulated. There will be also some indications for further reading. Finally, after the six sessions (between April and May) illustrated here, there will two sessions for the discussion of the papers elaborated by participants, at the end of June.

II. Course assessment

Classroom participation is an important part of the assessment. There is a set of guidelines for this purpose. Most of the assessment (70%) is based on the papers that each participant is expected to elaborate on a topic chosen together with the teacher. These papers will serve as a good practice for the preparation of the dissertation.

III. General resources

General resources on public law and globalization include:

- JB Auby, *Globalization, Law and the State* (Hart, 2019, 2nd edn)
- S. Cassese, *The Global Polity. Global Dimensions of Democracy and the Rule of Law* (The Global Polity, 2012), accessible at <http://es.globallawpress.org/wp-content/uploads/02-TheGlobalPolity.pdf>
- P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (OUP, 2015)
- G. della Cananea, *Due Process of Law Beyond the State* (OUP, 2016)

1. Globalization and Public Law: An Outline

3 April 2023, 11:00-13:00

There is a rich literature, in law, international relations, and political philosophy, showing the increasing degree to which the whole world lives under a single set of legal rules concerning, among other things, food safety and the circulation of capitals. Such single set of rules has become more evident in the last two or three decades. However, it can be helpful to put things in perspective. For this purpose, there will be a discussion of treaties among sovereigns in various epochs, with a view to discussing the school of thought according to which legal rules shape the space, with regard to both land and sea.

Materials:

- early treaties between Rome and Carthage
- Treaty of Tordesillas (1494)
- Treaty of Berlin (1885)

Readings:

- C. Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum* (1950, reprinted Telos, 2006) (excerpts)

Further readings:

- G. Marramao, *The exile of the Nomos: for a critical profile of Carl Schmitt*, 21 *Cardozo Law Review* 1567 (1999-2000)
- I. Augsberg, *Carl Schmitt's Fear: Nomos, Norm, Network*, 23 *Leiden Journal of International Law* 741 (2012)

2. Regional Integration: A Europe of Rights

17 April 2023, 11:00-13:00

No international organization has attracted as much scholarly attention as the European Community, now transformed into the European Union (EU), because it has evolved from a (relatively) traditional interstate system into a quasi-federal polity. There is, however, another important regional organization; that is, the Council of Europe. It is important, first, because it has a broader, and more differentiated, membership but at the same time, it imposes the respect of certain values and principles. Second, it has an original and well-functioning judicial system for the protection of individual rights and liberties, with effects that transcend the regional dimension. For some, this realizes the Kantian conception of justice.

Materials:

- European Convention on Human Rights (1950)
- European Court of Human Rights, *Jabari v. Turkey* (2000)
- Council of Europe, Parliamentary Assembly Opinion n. 300 (2022)
- Council of Europe, Committee of Ministers, Resolution (2022)2.

Readings:

- A. Stone Sweet and C. Ryan, *A Cosmopolitan Legal Order* (CUP, 2018), chapter 3.

Further readings:

- I. Kant, *Perpetual Peace: A Philosophical Sketch* (1795, reprinted Project Gutenberg, 2016)

3. Regional Integration: The EU, the UN and the Fight Against Terrorism

8 May 2023, 11:00-13:00

There are several connections between international and supranational authorities, both institutional and functional. But there are also some important differences, concerning their membership and values. The latter have become evident, for example, in the context of the ‘fight against terrorism’. In this respect, there is a more complex interplay between collective and individual interests, including global security and the protection of property and reputation, as well as a different relevance of the rule of law. The *Kadi* saga, which involved national, EU and UN law, is a good example of this.

Materials:

- United Nations Security Council Resolution 1373 (2001)
- Advocate-general Maduro, Opinion issued in case C-402/05, *Kadi*
- European Court of Justice, Judgment in case C-402/05, *Kadi*

Readings:

- E. Cannizzaro, *A Machiavellian Moment - The UN Security Council and the Rule of Law*, 3 *International Organizations Law Review* 189 (2006)
- G. della Cananea, *Global Security and Procedural Due Process of Law between the United Nations and the European Union*, 15 *Columbia Journal of European Law* 511 (2009)

Further readings:

- G. de Burça, *The European Court of Justice and the International Legal Order after Kadi*, 51 *Harvard Journal of International Law* 1 (2010)
- D. Halberstam and E. Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 *Common Market Law Review* 13 (2009)

4. Global Trade and its Discontents

15 May 2023, 11:00-13:00

The literature on global trade is predicated on the assumption that the WTO system (1994) serves to enhance the liberalization of exchanges concerning goods and services and that it is dominated by its founders, that is the states, especially the most powerful ones. However, from the first point of view, the WTO system is a body of rules that provides private actors – such as firms and associations – with the opportunity to challenge the decisions taken by national authorities. As a result, interests that differ from free trade are recognized and protected, including ‘environmental resources’. The ‘shrimps and turtles’ saga provides an interesting example.

Materials:

- GATT 1994, *Chapeau* (article XX)
- WTO, Summary of the ‘Shrimp’ case
- Appellate Body, report on ‘*Shrimp*’ (1998) (excerpts)
- WTO, paper on liberalization of trade (2012)

Readings:

- B.S. Chimni, *WTO and Environment: Legitimation of Unilateral Sanctions*, 37 *Economic & Political Weekly* 133 (Jan. 12-18, 2002)

- S. Cassese, *Shrimps, Turtles and Procedures: Global Standards for National Administrations, Law and Contemporary Problems* 109 (2005)
- G. Shaffer, *The Democratic Legitimacy of Extraterritorial US sanctions on Environmental Grounds: the WTO Shrimp-Turtle Case*, 94 *Proceedings of the Annual Meeting (American Society of International Law)* 84 (2001)

Further readings:

B. Kingsbury, N. Krisch, R.B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Legal Problems* 15 (2005)

5. The WHO and the Pandemics

22 May 2023, 11:00-13:00

Although legal scholarship tends to focus on the areas of globalization that are characterized by the existence of more or less binding rules as well as by judicial mechanisms for ensuring their respect, there is awareness that the paradigm of adjudication is often inadequate for the management of global issues. We encounter this phenomenon, for example, in an increasingly important area of global law; that is, health. Thus, in speaking about health we have to consider that there are obligations stemming from both international treaties and secondary sources, such as the World Health Regulation, but that there are not necessarily judicial mechanisms to enforce them. The question that thus arises is how compliance can be induced, for example in the context of the recent pandemics.

Materials:

- World Health Organization, *International Health Regulations* (2005)
- Independent Panel, *Covid-19 – Report Summary* (2021)

Readings:

- A. von Bogdandy and P.A. Villareal, *International Law on Pandemic Response: A First Stocktaking in light of the Coronavirus*, *MPIL Research Paper* No. 2020-07 (2020)
- E. Pils, *China's Response to the Coronavirus: Fighting Two Enemies*, *Verfassungsblog* 25 May 2020

Further readings:

C. Liu, *The World Health Organization. A Weak Defender against Pandemics*, 28 *Virginia Journal of Social Policy and Law* 174 (2021).

6. Environmental Protection

29 May 2023, 11:00-13:00

This session addresses a currently controversial issue; that is, the nature and effects of environmental regulation based on global standards. This issue has recently become important for a number of reasons. First, concern over the environment – with regard to human conduct – has grown in the economic policy agenda of national governments and multilateral institutions. Secondly, in partial contrast with such concern, the objectives and targets set out by policymakers are too vague and weak, according to some critics, while others deem that the real problem concerns compliance. Thirdly, and consequently, there is the question whether monitoring mechanisms suffice, as opposed to judicial or quasi-judicial mechanisms. Two international regimes will be considered more closely, the Aarhus Convention and the Glasgow Climate Pact.

Materials:

- Aarhus Convention (1998).
- Court of Justice of the EU, Case C-204/09, *Flachbau Torgau v Germany* (2012)
- Glasgow Climate Pact (2021)

Readings:

D. Weaver, *The Aarhus Convention and Process Cosmopolitanism*, 18 *International Environmental Agreements: Politics, Law and Economics* 199 (2018)

Further readings:

M. Lee and C. Abbot, *The usual suspects – public participation under the Aarhus Convention*, 66 *Modern Law Review* 80 (2003)

R.B. Stewart, *Environmental Regulation and International Competitiveness*, 102 *Yale Law Journal* 2039 (1993)