

GLOBAL ADMINISTRATIVE LAW

2018/2019

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Prof. Doutor Miguel Prata Roque

FICHA DE UNIDADE CURRICULAR / ACADEMIC ABSTRACT

I. CURRICULUM

DIREITO ADMINISTRATIVO I (1st semester)

Part 1 – Scope and Function of Global Administrative Law (GAL)

Period: 1st October 2018

1.1. General remarks

- 1.1.1. A branch of Public Law
- 1.1.2. Exercise of juridical supremacy
- 1.1.3. Prosecution of collective demands
- 1.1.4. Separation of powers and rule of law

1.2. Historical background and building-up

- 1.2.1. Ancient period
- 1.2.2. Roman period
- 1.2.3. Medieval age
- 1.2.4. Modern age (v.g., absolute monarchies)

- 1.2.5. Liberal State
- 1.2.6. Welfare State
- 1.2.7. Global State
- 1.2.8. The praetorian genesis of Administrative Law – the French case
- 1.2.9. A (exclusive) territorial law?

Period: 8th October 2018

- 1.3. Comparative administrative systems
 - 1.3.1. The influence of political systems over administrative systems
 - 1.3.1.1. Oligarchy
 - 1.3.1.2. Parliamentary democracy
 - 1.3.1.3. Presidential democracy
 - 1.3.1.4. Semi-presidential democracy
 - 1.3.2. Executive primacy system Vs judiciary primacy system
 - 1.3.2.1. The French model
 - 1.3.2.2. The Saxon model
 - 1.3.3. Concentrated system Vs deconcentrated system
 - 1.3.3.1. The Chinese model
 - 1.3.3.2. The American model
 - 1.3.4. Objective primacy system Vs subjective primacy system
 - 1.3.4.1. The French model
 - 1.3.4.2. The German model
 - 1.3.5. Double jurisdiction system Vs single jurisdiction system
 - 1.3.5.1. The Portuguese model
 - 1.3.5.2. The Brazilian model

Period: 15th October 2018

- 1.4. Modalities of Global Administrative Law (GAL)
 - 1.4.1. Global Administrative Law (GAL) as an umbrella-branch

- 1.4.1.1. Birth and principological basis
- 1.4.1.2. Specificities
- 1.4.1.3. Parametric force and multilevel method
- 1.4.2. International Administrative Law
 - 1.4.2.1. Scope and function
 - 1.4.2.2. Sources of normativity
 - 1.4.2.3. Specially, European Administrative Law
- 1.4.3. Administrative International Law
 - 1.4.3.1. External administrative cooperation
 - 1.4.3.2. Extraterritorial acting
- 1.4.4. Administrative Law of the International Organizations
 - 1.4.4.1. Birth of international administrative unions
 - 1.4.4.2. Organizing and functioning principles
 - 1.4.4.3. The (lack) of democratic legitimacy
- 1.4.5. Transnational Administrative Law
 - 1.4.5.1. Multi-based administrative situations
 - 1.4.5.2. Transnational choice of law
 - 1.4.5.3. Transnational competence
 - 1.4.5.4. Transnational recognition

Part 2 – Global Networks: the Subjects of Global Administrative Law (GAL)

Period: 22rd October 2018

- 2.1. Crash of the state-centered administrative model
 - 2.1.1. Administrative execution as a state monopoly
 - 2.1.2. Globalization and its implications
 - 2.1.3. A new start for the prohibition of interference principle
- 2.2. Global networks

- 2.2.1. Concept
- 2.2.2. Science, technology, technocracy and global governance
- 2.2.3. General theory of private transnational entities
- 2.2.4. Public boundaries for private activities

Period: 29th October 2018

- 2.3. Classes of transnational subjects
 - 2.3.1. State and infra-state administration
 - 2.3.2. Foreign administration
 - 2.3.3. European administration
 - 2.3.4. International administration
 - 2.3.5. Individual and private collective entities
 - 2.3.6. Hybrid transnational entities
 - 2.3.6.1. The emergence of global “*fora*”
 - 2.3.6.2. ICANN
 - 2.3.6.3. World Anti-Doping Agency
 - 2.3.6.4. “*Codex Alimentarius*” Committee
 - 2.3.6.5. Interpol

Period: 5th November 2018

- 2.4. Immunities and the limits of global jurisdiction
 - 2.4.1.1. The concept of international immunities
 - 2.4.1.1.1. Absolute immunity theory
 - 2.4.1.1.2. Relative immunity theory
 - 2.4.1.1.3. Functional immunity theory
 - 2.4.1.2. The limits of global jurisdiction
 - 2.4.1.3. Extraterritorial jurisdiction
 - 2.4.1.4. Exclusion of substitutive powers

Parte 3 – General Theory of Administrative Acting

Period: 12th November 2018

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3.1. Reality and human action: the concept of relevant administrative facts

3.2. Action (“*actus reus*”) and will (“*mens rea*”)

3.2.3. Intended action

3.2.2. Exclusion: automatism and reflex effects

3.2.3. Intent vs recklessness vs negligence

3.3. The concept of administrative relation

3.3.1. Instrument for the democratization of administrative procedure

3.3.2. Right/duty Vs power/submission

3.3.2. The discontents of the institute: its overtaking

3.4. The concept of (transnational) administrative situation

3.4.1. The quest for a comprehensive institute

3.4.2. Administrative nature

3.4.3. Transnational nature

3.4.4. Types of (transnational) administrative situations

Period: 19th November 2018

3.5. Types of administrative acting

3.5.1. Unilateral acting

3.5.1.1. Administrative acts

- 3.5.1.2. Administrative by-laws
- 3.5.1.3. Administrative plans
- 3.5.1.3. Real acts
- 3.5.2. Bilateral acting
 - 3.5.2.1. Public contracts
 - 3.5.2.2. Negotiated procedural acts
 - 3.5.2.3. Technical standards
- 3.5.3. Non-formalized acts
 - 3.5.3.1. Verbal acts
 - 3.5.3.2. Administrative promises
 - 3.5.3.3. Administrative information

Part 4 – The general principles of Global Administrative Law (GAL)

Period: 26th November 2018

4.1. The formation of transnational general principles

- 4.1.1. Non-legislative sources of GAL
 - 4.1.1.1. Jurisprudence
 - 4.1.1.2. Doctrine
 - 4.1.1.3. Technical standards
- 4.1.2. Cross-fertilization and boomerang effect

4.2. The rule of law (principle of normativity)

- 4.2.1. New sources of normativity
- 4.2.2. Multileveled administrative methodology
- 4.2.3. Open concepts: the role of administrative interpretation
- 4.2.4. Technicality and blanked administrative rules: the technical standards
- 4.2.5. Bound powers and discretionary powers

Period: 3th December 2018

4.3. The principle of burden avoidance

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- 4.3.1. Search for major effectiveness
- 4.3.2. Utilitarian purposes: the maximization of national public resources
- 4.3.3. Promotion of economic growth and international trade
- 4.3.4. Transnational competence and transnational recognition (*see below 8-9*)

4.4. The principle of procedural participation

- 4.4.1. Right to be informed
- 4.4.2. Right to participate
- 4.4.3. Right to a prompt procedure

4.5. The principle of open administration

- 4.5.1. Right to access to administrative documents
 - 4.5.1.1. Concept of administrative documents
 - 4.5.1.2. Causes of exclusion
 - 4.5.1.3. Causes of restriction
- 4.5.2. Right to a rationale grounding
- 4.5.3. Right to transparency
- 4.5.4. Right to internal and external democratic control

Period: 10th December 2018

4.6. The principle of contradictory

- 4.6.1. Right to an administrative double appreciation
- 4.6.2. Right to effective judicial review

4.7. The principle of good governance

- 4.7.1. Economic concept Vs juridical concept of good governance
- 4.7.2. Inter-generational solidarity and reasonable use of public resources
- 4.7.3. Administrative efficiency
- 4.7.4. Administrative sustainability

Period: 17th December 2018

Delivery of written papers and evaluation

DIREITO ADMINISTRATIVO II (2nd semester)

Period: 4th March 2019

Part 5 – Administrative organization

5.1. Public legal entities

- 5.1.1. Creation by law or international convention
- 5.1.2. Geographic scope: transnational, national, regional, local
- 5.1.3. Nature: specially, private legal entities pursuing administrative goals
- 5.1.4. Absolute lack of competence

5.2. Administrative bodies

- 5.2.1. Single vs collective administrative bodies
- 5.2.2. Distinction between administrative bodies and public services
- 5.2.3. Relative lack of competence

5.3. Office holders

- 5.3.1. Juridical imputation of personal will
- 5.3.2. The relevance of misjudge and error by office holders
- 5.3.3. Types of designation
 - 5.3.3.1. Election
 - 5.3.3.2. Nomination
 - 5.3.3.3. Cooptation
 - 5.3.3.4. Inherence
 - 5.3.3.5. Inheritance
 - 5.3.3.6. Lottery
- 5.3.4. Statute of office holders
 - 5.3.4.1. Exclusivity
 - 5.3.4.2. Incompatibilities
 - 5.3.4.3. Disciplinary regime
 - 5.3.4.4. Prevention of corruption and money laundering: e.g., codes of conduct

5.4. Public servants

- 5.4.1. *Idem* (5.4.1.; 5.4.2.; 5.4.3.; 5.4.4.)
- 5.4.2. Obedience and legitimate disobedience

Period: 11th March 2019

5.5. Typology of public administration

- 5.5.1. Direct administration
 - 5.5.1.1. Steering power
 - 5.5.1.2. Supervising power
 - 5.5.1.2.1. Inspecting power
 - 5.5.1.2.2. Revoking power
 - 5.5.1.2.3. Substituting power

- 5.5.1.3. Disciplinary power
- 5.5.1.4. Organizing power
- 5.5.2. Indirect administration
 - 5.5.2.1. Pursuit of state objectives
 - 5.5.2.2. Escape from public binding
 - 5.5.2.3. Public companies
 - 5.5.2.4. Public institutes
 - 5.5.2.5. Superintendence power
 - 5.5.2.6. Designation/resignation power

Period: 18th March 2019

- 5.5.3. Autonomous administration
 - 5.5.3.1. Pursuit of specific and own public interest
 - 5.5.3.2. Federative authorities
 - 5.5.3.3. Regional authorities
 - 5.5.3.4. Local authorities
 - 5.5.3.5. Public universities
 - 5.5.3.6. Public associations (e.g., professional associations; religious associations; sport associations)
 - 5.5.3.7. Types of guardianship
 - 5.5.3.7.1. Scope: legal guardianship vs merits guardianship
 - 5.5.3.7.2. Inspective guardianship
 - 5.5.3.7.3. Revoking guardianship
 - 5.5.3.7.4. Substitutive guardianship
 - 5.5.3.7.5. Sanctioning guardianship
- 5.5.4. Independent administration
 - 5.5.4.1. Distinction from indirect and autonomous administration
 - 5.5.4.2. The U.S. model of independent agencies
 - 5.5.4.3. Clash between expertise/technocracy and democracy
 - 5.5.4.4. Public legal entities Vs administrative bodies: the case of the elections committees

- 5.5.4.5. Independent regulatory agencies
- 5.5.4.6. Guarantees of impartiality and statute of independent office holders

Period: 25th March 2019

Part 6 – Administrative procedure

6.1. Administrative procedure as a dynamic process towards a rational decision

6.2. The prevail of general principles

6.3. Codification of administrative procedural law

6.3.1. National codification

6.3.2. European codification

6.3.2.1. The European Code of Good Administrative Behaviour

6.3.2.2. The ReNEAUL Model Rules on EU Administrative Procedure

6.3.2.3. The EU Administrative Procedure Law (Resolution 2012/2024, European Parliament, 15th January of 2013)

Period: 1st April 2019

6.4. Phases of administrative procedure

6.4.1. Instruction

6.4.1.1. Choice of competent body

6.4.1.2. State of necessity

6.4.1.3. Delegation of powers

6.4.1.4. Substitution

6.4.1.5. Right to participate

6.4.1.6. Right to obtain information

- 6.4.1.7. Right to a prompt procedure
- 6.4.2. Hearing
 - 6.4.2.1. Right to be heard
 - 6.4.2.2. Right to present documents
 - 6.4.2.3. Right to translation and access to an interpreter
 - 6.4.2.4. Right to prior hearing
- 6.4.3. Decision
 - 6.4.3.1. Individual Vs collective decision
 - 6.4.3.2. Rationale grounding
 - 6.4.3.3. Requisites of final decision
 - 6.4.3.4. Notification
 - 6.4.3.5. Right to be informed of impugnation guarantees
- 6.4.4. Subsequent decision
 - 6.4.4.1. Suspension
 - 6.4.4.2. Modification
 - 6.4.4.3. Revocation
 - 6.4.4.4. Annulment

Period: 9th April 2015

6.5. Invalidity of administrative acts and regulations

- 6.5.1. Types of faults
 - 6.5.1.1. Usurpation of powers
 - 6.5.1.2. Deviation of (discretionary) powers
 - 6.5.1.3. Incompetence
 - 6.5.1.4. Intent fault
 - 6.5.1.5. Relevant error
 - 6.5.1.6. Breach of procedural formalities
- 6.5.2. Types of consequences
 - 6.5.2.1. Irregularity
 - 6.5.2.2. Inexistence

- 6.5.2.3. Invalidity
 - 6.5.2.3.1. Nullity
 - 6.5.2.3.2. Annulability
- 6.5.3. Rehabilitation of unlawful administrative acts

Period: 23th April 2019

Part 7 – Transnational choice of law

- 7.1. The scope and function of public choice of law
 - 7.1.1. Spatial delimitation of the exercise of public power
 - 7.1.2. Effectiveness range Vs validity range
 - 7.1.3. Methods of transnational choice of law
 - 7.1.3.1. Unilateral conflictualism
 - 7.1.3.2. Multilateral conflictualism
 - 7.1.3.3. Substantialism
 - 7.1.4. The choice of relevant connection links
 - 7.1.4.1. Acting location
 - 7.1.4.2. Effectiveness location
 - 7.1.4.3. Headquarters of public entities
 - 7.1.4.4. Domicile of head-office of the citizen/private company
 - 7.1.4.5. Choice of the subjects
 - 7.1.5. Transnational fraud

Period: 30th April 2018

- 7.2. Enforcement of national administrative law to foreigners
- 7.3. Enforcement of foreign administrative law
- 7.4. Enforcement of global administrative law

7.5. Control of transnational administrative law

- 7.5.1. The legality of foreign acts according to the legal order of origin
- 7.5.2. The legality of foreign acts according to the legal order of reception
- 7.5.3. The legality of foreign acts according to the global legal order

Period: 7th May 2019

Part 8 – Transnational competence

8.1. Concept of transnational competence

- 8.1.1. Distinction between jurisdiction and competence
- 8.1.2. Immunities (*see above 2.3.7*)

8.2. Setting of transnational competence

- 8.2.1. Extraterritorial acting of public administration
- 8.2.2. Principle of legality (rule of law)
- 8.2.3. Principle of effectiveness
- 8.2.4. Refusal of exorbitant transnational competence
- 8.2.5. Typology of competence norms

Part 9 – Transnational recognition

Period: 14th May 2019

9.1. Relevance of transnational recognition

- 9.1.1. Administrative Vs judicial recognition
- 9.1.2. Automatic Vs conditioned recognition
- 9.1.3. Indirect recognition: the case of standardization

9.1.4. Direct recognition

9.1.5. Recognition of foreign judicial decisions

9.2. Supervenient surcease of foreign administrative acts and sentences

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9.2.1. Types of supervenient surcease

9.2.2. Consequences of supervenient modification

9.2.3. Consequences of supervenient revocation

9.2.4. Consequences of superveniente change of law

Part 10 – Analysis of relevant transnational jurisprudence

Period: 21th May 2019

Evaluation: 28th May 2019

II. EVALUATION REGIME

The evaluation regime will be the following:

- Oral evaluation: 50%
- Written paper on a specific subject of the curriculum: 50%

The written paper must be delivered until 8th December, 2018 (Direito Administrativo I) and 7th May, 2019 (Direito Administrativo II), according to the following requisites:

- a) Maximum of 50 pages (excluding bibliography and other addenda);
- b) Communication of the subject of the paper until 15th October, 2018 (Direito Administrativo I) and 18th March, 2019 (Direito Administrativo II), for prior approval;
- c) Written in English;

d) Signature of a commitment of originality.

All approved students can present themselves to an oral exam in order to improve their grades. The oral exam has a minimum duration of 15 minutes.

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The non approved students can present themselves to an appeal season. The appeal will comprehend an oral exam with the minimum duration of 15 minutes.

III. LITERATURE

Portuguese (General)

- DIOGO FREITAS DO AMARAL, *Curso de Direito Administrativo*, Volume I (colaboração de Luís Fábrica, Carla Amado Gomes e Jorge Pereira da Silva), 4ª edição Almedina, Coimbra, 2017
- DIOGO FREITAS DO AMARAL, *Curso de Direito Administrativo*, Volume I (colaboração de Pedro Machete e Lino Torgal), 3ª edição Almedina, Coimbra, 2016
- MIGUEL PRATA ROQUE, *A Dimensão Transnacional do Direito Administrativo – Uma visão cosmopolita das situações jurídico-administrativas*, AAFDL, Lisboa, 2014
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- PAULO OTERO, *Direito do Procedimento Administrativo*, Volume I, Almedina, Coimbra, 2016

English (and Other Languages)

a) Global Law

- A. CLAIRE CUTLE, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*, Cambridge University Press, Cambridge, 2003
- ALBERTO MARTINELLI, *La Democrazia Globale – Mercati, Movimenti, Governi*,

Università Bocconi Editore, Milano, 2004

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- ANNE-MARIE SLAUGHTER, *A Global Community of Courts*, in «Harvard International Law Journal», 44 (2003), 191-219

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- BOAVENTURA DE SOUSA SANTOS / CÉSAR RODRÍGUEZ-GARAVITO, *Law and Globalization from Below – Towards a Cosmopolitan Legality*, Cambridge University Press, Cambridge, 2005

- CHRISTINE SCWHÖBEL, *Global Constitutionalism in International Legal Perspective*, Martinus Nijhoff Publishers, Leiden, 2011

- DAVID KENNEDY, *The mystery of global governance*, in «Ohio Northern University Law Review», 34 (2008), 827-860

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- GÜNTHER TEUBNER, *Global Law without a State*, Ashgate Publishing Company, 1997

- GÜNTHER TEUBNER, *Constitutional Fragments – Societal Constitutionalism and Globalization*, Oxford University Press, Oxford, 2012

- JEAN-BÉRNARD AUBY, *La Globalisation, le Droit et l'État*, Montchrestien, Paris, 2003

- JOSEPH STIGLITZ, *Globalization and its Discontents*, Norton & Company, Inc., New York, 2003
- LARRY CATÁ BACKER, *Constitutionalism: An Introduction to a New Global Legal Ordering*, in «International Journal of Global Legal Studies», 16 (2009), 85-172
- MAGDALENA BEXELL (*et alia*), *Democracy in global governances: the promises and pitfalls of transnational actors*, in «Global Governance», 16 (2010), 81-101
- MALCOLM SHAW, *Theory of the Global State – Globality as an Unfinished Revolution*, Cambridge University Press, Cambridge, 2000
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- ROBERT KEOHANE, *Governance in a partially globalized world*, in «American Political Science Review», 1 (2001), 1-13
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b) Transnational Administrative Law

- ALFRED C. AMAN (Jr.), *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism and Democracy*, in «Vanderbilt Journal of International Law», 31 (1998), 769-870
- ALFRED C. AMAN (Jr.), *Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest*, in «International Journal of Global Legal Studies», 6 (1999), 397-420
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