

# The impact of COVID-19 on global administrative law

Chen, I-Ju

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## **The Impact of COVID-19 on Global Administrative Law**

**I-Ju Chen**

*Assistant Lecturer, School of Law at Birmingham City University. \**

This article has two rationales. The first is to examine global administrative challenges and governmental responses to COVID-19. The other aim is to assess the impacts of the pandemic on a newly-emerging field of Global Administrative Law (GAL). The required measures of COVID-19 control, including national lockdown designation and implementation, have presented challenges which governments have struggled to deal with since early 2020. The problem has been further complicated by the anti-science stance of populist leaders such as Donald Trump and Jair Bolsonaro, who have downplayed the COVID-19 crisis and failed to take prompt and decisive measures of response. Administrative challenges arising from these failed measures revolve around racial inequality, contested access to healthcare systems and affected human rights, as well as impeded cross-border sharing of scientific data for global health efforts. These are the challenges to which a 21st century GAL must respond. GAL can be understood as a regime, which is composed of the legal rules, principles, and institutional norms applicable to processes of administration which are undertaken in approaches that implicate more than purely intra-state structures of legal and political authority. GAL as an emerging international legal regime entails dual insights. On the one hand, GAL is usually termed as global governance; on the other hand, such governance can be regulated by national administrative law. As a result, the discovered impacts of COVID-19 on the development of global administrative law include positive and negative effects. This article concludes that GAL plays a key role in responding to the pandemic as well as providing legal frameworks outlining states' governance.

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## 1. Introduction

The rapid spread of the COVID-19 pandemic has highlighted the extent to which citizens look to state institutions and governments to provide directions and concrete solutions to severe public health threats. The requirements for measures of COVID-19 control including, at their most extreme, national lockdown designation and implementation have presented challenges which governments had struggled to meet. The problem has been complicated by the anti-science stance of populist leaders, particularly Donald Trump and Jair Bolsonaro. Their failures in this respect have not only propelled their countries to the top of the league tables in terms of COVID-19 related deaths but have also inhibited their nations' ability to engage with international efforts to respond effectively to the COVID-19 crisis. These are therefore challenges to which a 21st century GAL must respond.

GAL is an emerging and embryonic international legal regime, which was identified by Benedict Kingsbury<sup>1</sup> in early 2000s. His theory focuses an effort to systematise studies in national, transnational, and international settings that are related to the administrative law of global governance.<sup>2</sup> GAL entails dual insights. On the one hand, GAL is usually termed as global governance; on the other hand, such governance can be regulated by national administrative law.

This article is structured as follows. Section 2 evaluates administrative challenges, particularly caused by populist leaders' policies at a national and international level. Section 3 presents an overview of GAL, followed by a discussion of the impacts of COVID-19 on GAL in Section 4. Section 5 concludes.

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<sup>1</sup> Prof. Benedict Kingsbury, professor of international law and Director of the Institute for International Law and Justice at New York University. He has co-directed a number of international law projects, including the project on global administrative law with Prof. Richard B. Stewart.

<sup>2</sup> Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1, 15 (2005).

## 2. Populist Leaders' Responses to COVID-19 and Caused Administrative Challenges

Populist leaders usually claim to champion<sup>3</sup> the cause of those who feel themselves, for whatever reason to be excluded by the perceived elite or establishment.<sup>4</sup> Populist movements can speak to elements of the political left and the right, which oppose large-size business and financial interests but are also contrary to established socialist and labour parties.<sup>5</sup> Nevertheless, no definition of populism will describe all types of populists since populism is a thin ideology and only relates to a minimal part of a political agenda.<sup>6</sup>

The COVID-19 pandemic saw borders closed in a scale which had not been seen since the Second World War. In terms of populist leaders' responses, those of the Brazilian president Jair Bolsonaro and the former U.S. president Donald Trump are probably the two best documented, although populism is not all they have in common.<sup>7</sup> At the beginning of the pandemic, both Bolsonaro and Trump repeatedly treated COVID-19 as if the coronavirus was not a serious life threat. Additionally, they conveyed disinformation about COVID-19 while thousands of their citizens died and healthcare systems were overwhelmed.<sup>8</sup>

By contrast, not all populist leaders reacted to COVID-19 with this degree of negligence. For example, in Europe, the Italian coalition government led by the populist Five Star Movement under independent Prime Minister Giuseppe Conte, Prime Minister Andrej Babis of the Czech Republic, and Prime Minister Boyko Borisov of Bulgaria took serious and proactive COVID-19 measures which were at least as early as those of several major countries of Western Europe, notably the U.K., France, and Germany.<sup>9</sup>

The administrative challenges arising from these COVID-19 measures fell into two main categories. Firstly, the most existential challenges – race relations, inequality, problematic

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<sup>3</sup> André Munro, *Populism: Political Program or Movement*, BRITANNICA.

<sup>4</sup> Nadia Urbinati, *Political Theory of Populism*, ANN. REV. OF POL. SCI. 119 (2019).

<sup>5</sup> Munro, *supra* note 3.

<sup>6</sup> CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 19-20 (OUP 2<sup>nd</sup> ed. 2017).

<sup>7</sup> Brett Meyer, *Pandemic Populism: An Analysis of Populist Leaders' Responses to COVID-19*, TONY BLAIR INSTITUTE FOR GLOBAL CHANGE RESEARCH PAPER 4 (Aug. 2020).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, at 10.

immigration and healthcare systems – are longstanding issues and not easily resolved, particularly in the U.S.<sup>10</sup> Moreover, the Trump administration failed to address the subsequent economic fallout. These policies in the U.S. consisted of inadequate public health responses; years of slashing safety nets; a failure to help workers; an indifference to state and local struggles; and a failure to help small businesses.<sup>11</sup> With regard to the Brazilian Government, Bolsonaro’s anti-lockdown and social distancing policies led to critical issues undermining human rights and controversial treatment towards independent media in Brazil.<sup>12</sup> The second category of administrative challenges relates to the consequences of expanding enabling state power in a way that undermines democracy and damages economy and security. The rapid spread of COVID-19 has dealt a devastating blow to people’s lives and economic security. As businesses closed and international travel came to a halt, COVID-19 was no longer merely a health crisis but also a global economic crisis.<sup>13</sup>

In summary, administrative challenges arising from several populist leaders’ COVID-19 measures are critical and at national and global levels. This results in the importance of an emerging administrative law for inter-State administrative issues and governance.

### 3. An Overview of GAL

In the early 2000s, research had witnessed the emergence of a global administrative space – a space in which the strict dichotomy between domestic and international regime had considerably broken down, in which administrative functions came to be performed in often complex interaction between institutions and officials on different levels, and in which regulations could be strongly effective regardless of predominantly non-binding forms.<sup>14</sup> GAL, a newly-emerging field of law, begins with this observation that much of global governance can be understood as regulations and administration, and its development is based upon dual

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<sup>10</sup> Hadas Aron & Emily Holland, *The Covid-19 crisis shows the failure of populist leadership in the face of real threats*, LSE PHELAN US CENTRE (Mar. 24, 2020).

<sup>11</sup> Ryan Zamarripa, *5 Ways the Trump Administration’s Policy Failures Compounded the Coronavirus-Induced Economic Crisis*, CENTRE FOR AMERICAN PROGRESS (Jun. 3, 2020).

<sup>12</sup> Reuters & Anthony Boadle, *Brazil’s Bolsonaro sabotaged anti-COVID efforts, says Human Rights Watch* (Jan. 13, 2021).

<sup>13</sup> Mely Caballero-Anthony, *COVID-19 and Global Governance: Waking Up to a Safe New World*, COUNCIL ON FOREIGN RELATIONS RESEARCH PAPER.

<sup>14</sup> Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17(1) EU. J. OF INT’L L. 1 (2006).

insights. One insight is usually termed as global governance and can be characterised as global administrative action.<sup>15</sup> The second insight of GAL is that increasingly such action is being influenced and regulated by national administrative law, which studies the legal rules, principles, and institutional norms applicable to processes of administration of governments<sup>16</sup> as well as domestic administrative court's. However, this latter insight of GAL is contested. This is because this traditional dualist separation between the domestic and the international is not long lasting in the integrated global administrative space. Moreover, the relationship between these two legal regimes requires continuous pragmatic adjustment and re-theorising at fundamental levels.<sup>17</sup>

Overall, GAL can be defined as “comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make”.<sup>18</sup> Nevertheless, this definition, as for every new legal regime at its beginning, is contested since the defining process of GAL will reveal similarities and contradictions between domestic and global administrative law.

Nevertheless it is still the case that, GAL can provide foundations and solutions for administrative challenges of COVID-19 due to its multifaceted approaches to administrative function.

#### **4. The Impact of COVID-19 on the Development of GAL**

This article considers that a positive impact of COVID-19 on the GAL might be a greater level of necessity of GAL for global administrative governance. For such an emerging legal regime, it is important to set out reasons for innovating the adoption of a new body of law.<sup>19</sup>

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<sup>15</sup> Benedict Kingsbury, *Introduction: Global Administrative Law in the Institutional Practice of Global Regulatory Governance*, THE WORLD BANK L. REV. 3 (2011).

<sup>16</sup> Benedict Kingsbury & Megan Donaldson, *Global Administrative Law*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW.

<sup>17</sup> Kingsbury, Krisch & Stewart, *supra* note 2, at 31.

<sup>18</sup> *Id.*, at 17.

<sup>19</sup> Jarrod Hepburn, *The Duty to Give Reasons for Administrative Decisions in International Law*, 61(3) INT'L & COMP. L.Q. 641, 641-645 (2012).

The key reason is the essential purpose of creating GAL. According to Kingsbury, GAL aims to bring long-term changes in the nature of the global political and social order.<sup>20</sup> These increasing changes are expected to refine regulatory arrangements with intentions to overcome collective action problems and market failures and to strengthen global cooperation in combating the pandemic.

Domestic administrative lawyers can help facilitate the development of GAL.<sup>21</sup> Domestic courts have identified several potentially useful instrumental and intrinsic rationales for the duty to give reasons. Moreover, Hepburn addresses four points arising from his previous research on the case-study of the duty to give reasons.<sup>22</sup> First of all, the “accuracy” rationale suggests that forcing administrators to give reasons for their decisions will enable them to make better and more accurate decisions. Secondly, the “review” factor advises that the provision of reasons facilitates review, partially by providing information on the relevant expertise of the initial decision-maker. Thirdly, the “public confidence” rationale suggests that having the duty to give reasons serves as a public demonstration that laws are being applied consistently and carefully. Meanwhile, the “respect” rationale justifies reason-giving on the ground that explaining a decision to an affected party indicates due respect to their intrinsic personhood.<sup>23</sup>

Nevertheless, the unhelpful impact is that the complexity of cross-border administrative challenges intensifies weakness and difficulties to develop GAL. The main difficulty affecting this legal development might be a lack of incentives for governments to further develop GAL during the pandemic. The fact is that COVID-19 has required a significant amount of time and attention on the part of states to contain the outbreak of the coronavirus and protect their citizens’ lives. In this context the development of a novel legal regime during the pandemic is unlikely to be a state priority, with negative consequences for international GAL scholarship. Other obstacles include the difficulties of a delineation of normative demands relating to principles and procedures, without the commitment and support of national governments for this exercise.

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<sup>20</sup> Kingsbury, *supra* note 15.

<sup>21</sup> Jarrod Hepburn, *Global Administrative Law and the Role of Domestic Administrative Lawyers*, ADMINISTRATIVE LAW BLOG (Nov. 29, 2017).

<sup>22</sup> Hepburn, *supra* note 19.

<sup>23</sup> Hepburn, *supra* note 21.

## 5. Conclusion

This article concludes with the observation that a new field of GAL has the potential and indeed the responsibility to respond to the challenges posed by the pandemic at a national and global level.

## List of Abbreviations

GAL – Global Administrative Law

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