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AND THE RISE OF GLOBAL REGULATORY
REGIMES – SOME THEORETICAL
PRELIMINARIES”**

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Francisco de Abreu Duarte
Número 3, 2015
ISSN 2183-184x

**E-PÚBLICA
REVISTA ELECTRÓNICA DE DIREITO PÚBLICO**

www.e-publica.pt

COMMENT ON MIODRAG JOVANOVIĆ'S PAPER "THE QUEST FOR INTERNATIONAL RULE OF LAW AND THE RISE OF GLOBAL REGULATORY REGIMES – SOME THEORETICAL PRELIMINARIES"

COMENTÁRIO AO ARTIGO DE MIODRAG JOVANOVIĆ "A BUSCA PELO ESTADO DE DIREITO INTERNACIONAL E A ASCENSÃO DOS REGIMES REGULATÓRIOS GLOBAIS – ALGUMAS CONSIDERAÇÕES PRÉVIAS"

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Abstract: This text aims at commenting Miodrag Jovanović's work on conceptualizing and defining the role of the Rule of International Law when applied to new governance realities such as the Global Administrative Law phenomena. For that matter, it builds on the same schematics as provided by the author, exposing a critical overview of his opinion, as well as acknowledging his contribute to the study of these matters. Through this comment, it is proposed a new view on the concept of Global Administrative Law, seeing it as more of a didactic concept that contemplates several different complexes Rules of Law, rather than a unitary reality, providing therefore a new segmented theoretical line of thought. It is argued that such new approach can only be made through an independent non-state based conceptualization of International Law.

Resumo: A presente reflexão procura comentar o contributo de Miodrag Jovanović para o estudo do papel do conceito do Estado de Direito Internacional como fundamento filosófico dos fenómenos geralmente descritos como Direito Administrativo Global. Parte das ideias do autor na matéria, numa aceção crítica do seu pensamento, sugerindo uma reformulação do conceito de Direito Administrativo Global como ideia didática e pedagógica de explicitação de uma série vasta de ordenamentos jurídicos que não encontram verdadeiramente uma unidade sistemática baseada numa única e exclusiva regra de reconhecimento. Para fundamentar tal teoria é adotada uma visão desligada do fenómeno do Estado, admitindo uma nova conceção de Direito pós-nacional independente da existência de uma singular Administração Pública.

Keywords: Global Administrative Law; Rule of International Law; concept of law; non-unitary approach.

Palavras-chave: Direito Administrativo Global; Estado de Direito Internacional; conceito de direito; abordagem não-unitária.

Summary: I. Introductory remarks; II. The "Who" of the Rule of International Law; III. The Global Administrative Law and the Rule of International

nal Law; IV. On the conceptualization of Global Administrative Law

Sumário: I. Considerações introdutórias; II. O “Quem” do Estado de Direito Internacional; III. O Direito Administrativo Global e o Estado de Direito Internacional; IV. Conceptualização do Direito Administrativo Global

I. Introductory Remarks

Miodrag Jovanović, in his recent paper entitled “*The Quest for International Rule of Law and the Rise of Global Regulatory Regimes - Some Theoretical Preliminaries*”, addresses the fundamental question on the theoretical framework that is to be established between the concept of the International Rule of Law, on the one hand, and its role in providing the bounding rules on the regulatory phenomena generally known as Global Administrative Law on the other.

For this purpose, Jovanović entails a three step analysis: In section one it answers the question on the “who” are those that should be targeted by the principle of the International Rule of Law. For this matter, he discusses Waldron’s fundamental premise that individuals are the ultimate target of such principle and not States (that would therefore be bound to the protection of individuals), analyzing the two possible models of analogy between the national and the international rule of law. In section two, Jovanović steps further on the analysis of what should this International Rule of Law mean on the setting of legal boundaries to Global Administrative Law phenomena. For this, he proposes a critique on the traditional Public Law approach, through the establishment of a hierarchy between organs or subjects that characterizes national or state administrative law, replacing it by a general submission to the both substantive and procedural principles that act as true limits to the regulatory bodies activity. In his opinion, this set of principles would work as boundaries and limits to the exercise of power within such institutions. In his final section, Jovanović turns to the theoretical justification of the concept of Global Administrative Law, through its conceptualization within the sources of International Law, providing the reader with the philosophical hypothesis that are to be taken into account. It is given a hypothesis to its conceptualization through reference to the concepts of *core* and *penumbral* aspects of the concept of law.

II. On section I – The Who of the Rule of International Law.

In order to provide a more systematical analysis of the several interesting questions that Miodrag Jovanović raises in his work, I will follow his same schematics in addressing the problems. I will entail, for that matter, a certain methodology of analysis: I will address the problem by showing some of my preliminary remarks on the subject, followed by the acknowledgment of the key points that the author correctly addresses (showing therefore my adherence to such remarks), then finishing by providing my own critical view on some other perspectives on the matter.

In his section 1, Jovanović addresses a key question on the matter of general International Law. Seeing that, during the early years of the study of Public International law, the role of States was seen as the cornerstone of a growing potential international order (that was however hardly deemed as a true Legal Order), the new developments that have been made on the “who” are directly affected by the creation of another level of Law. The role of the individual as a direct target of a

transnational phenomenon of Law is now generally accepted,¹ especially given the rise of integration legal developments such as the European Union² and, to a different extent, the United Nations and its regulatory bodies. However, it is still to be argued to what extent should individuals be submitted to a post-national order of Law, seeing that many of those cases still lack the national fundamental conceptions of the notion of State. It is for that reason that, on the generality of cases, the analysis derives always from “externalizing” the “internal” concepts of Law³. This means that, when one tries to provide a conceptualization of the international principles, both substantive and procedural, that guide a certain regime of Law, it is always easier to establish analogy points between what is, on the national perspective, and what *ought to be* on the international one. And generally speaking, the answers that are provided are deemed right or wrong, applicable or non-applicable, based on the success that those same solutions had, or did not have, on the national level. This comparison is quite clear on the critique that Waldron establishes when comparing individual freedom and State’s sovereignty constraints: State’s role would be therefore to act as an official to respect to international administrative agencies, in the relationship between National and Post-National orders, putting individuals subject to both orders as final target of such norms.

This vision is somehow criticized by Jovanović. There is more to compare between States and Individuals than the mere lack of freedom of the last. In discussing what a State should be, provided that there was no legal order, and based on the schematics of the contractual view of Freedom (provided by Hobbes, Locke and Rousseau), states would find themselves in a similar *state of nature* such as individuals before the construction of State. The author claims that “Sovereignty, in this respect, is the legal construction of state independence in the same way human rights are the legal construction of individual freedom”, arguing therefore that States are generally willing to submit to a general International Rule of Law as individuals once agreed to submit to the States’ national Rule of Law.

To the author, this idea of submission by the States is increasingly easier to note when we speak, not about the traditional international order of law, but about the normative bodies that provide a parallel regulatory role (Global Administrative Law bodies). These have, most of the times, States as main target, that only then address individuals, rendering therefore not always applicable Waldron’s ideas

1. For the classical approach to the problem vide IAN BROWNLIE, *The Place of the Individual in International Law*, in *Virginia Law Review*, 1964, pp. 435–462. On a less traditional view, acknowledging that individuals are entitled to rights but also obligations under international law vide ANDREW CLAPHAM, *The Role of Individual in International Law*, in *The European Journal of International Law* Vol. 21 no. 1, 2010.

2. Especially considering the emission of norms that can be, directly and without any action by the state, entitle individual with rights that can be directly argued in a Court of Law. On the matter of the direct effect of European norms and its primary theorization vide *the Van Gend & Loos judgment* – European Court of Justice, Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

3. As Jovanović very well puts it “Potentials for disagreement enhance with the fact that an “internal” concept needs to be “externalized” in the international sphere”, p. 3.

of individual “targeting”. We could, accordingly to Jovanović, rebuild Waldron’s model in adding a reconstructed analogy where Global Regulatory regimes would be bound through International Rule of Law principles in their relations with States, and only indirectly would individuals benefit from this set of norms. In my opinion, however, Waldron does have a point to highlight: The increasing *individualization (in the sense of the normative targeting)* of International Law is something to take into account when addressing the Rule of Law, especially in the absence, in the great majority of times, of a State like entity on the international law panorama. What I mean by this is the following: If it is true, as Jovanović clearly expresses, that many times States are directly addressed as targets of the regulation, acting as the primary level of regulation, and only to a subsequent level would the individuals be taken into account, it is also true that the development of international law is to avoid this first state level of regulation. The development of International Law seems to be aiming at not only reproducing a new level of Administration, where States intervene as direct targets of the International Rule of Law, but more than that, where individuals are the directly contemplated as possessing substantive and procedural rights.

This seems to be the case when one addresses the development of international judiciary systems, especially when it concerns individuals’ possibility of claiming directly to international administrative bodies (avoiding therefore the State level of action). This would only be directly possible through granting people, in a substantive way, a set of rules and principles that can be argued in Court (or other judiciary organisms). A good example of this, presented by CASSESE in his book⁴, is the one of the *Mumbai Transport System*. On this case, that related to the construction of a huge transport infrastructure on the city of Mumbai, financed and projected by the World Bank, where World Bank would develop a series of measures (some of them of an administrative nature, such as providing information and hearing the potentially affected individuals⁵) that guaranteed an effective participation of individuals before the project at hand. What was especially interesting about the project, was the creation of a judiciary panel where people could present their case, without the intervention of the State. The Panel would then recommend directly to the World Bank the measures that ought to be taken. It seems that, on this case, the relationship established between International Rule of Law and individuals was a direct one: Individuals were under the set of rules and principles, such as the principle of legality, the right to administrative information or the right to the access of Justice, without having the State as either agent or official, or even as a middle level of regulation. Individuals were directly entitled with rights, being the aim of an administrative like entity, the World Bank, that acted precisely under the direct respect of International Rule of Law.

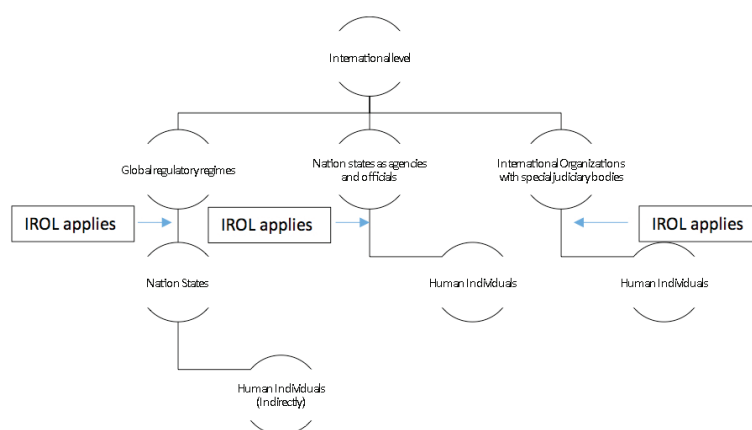
More examples can be found on some other International organizations such as

4. SABINO CASSESE, *Global Administrative Law: An introduction*, in Institute for International Law and Justice, New York University of Law, 2005, p. 11.

5. See the *Policy on Disclosure of Information* from the World Bank, available at : <http://siteresources.worldbank.org/OPSMANUAL/Resources/DisclosurePolicy.pdf>

WHO or the WTO, where especially designed para-judiciary bodies tend to neglect the first state level of regulation, attributing directly rights (among them the fundamental right to access of Justice or the prohibition of the *denial of justice*).

Therefore, and being clear that increasingly more International Organizations provide such direct judicial mechanisms⁶, it is safe to say that one could argue that, when it comes to the role of the International Rule of Law and individuals, the following analogy can take place:



In this sense, individuals are growing “targets” of the International Rule of Law, especially if we take into account the development of regional state like entities that, under a Public International Law regulatory base, seem to develop a direct bounding of individuals to International Rules. In this reconstructed analogy, it seems that International Organizations can sometimes replace the role of States on working as a second level of power between the International Rule of Law and Individuals.

On Section II – The Global Administrative Law And The Rule Of International Law.

On this section II, Jovanović debates the general submission of regulatory bodies, under the key *umbrella* concept of *Global Administrative Law*, to the Rule of International Law. It is rather interesting to point out that, when it comes to asserting a definitive name to the concept, there are several possibilities among the international doctrine⁷.

6. See for example the mechanisms provided by the World Trade Organization, or under International Arbitration Law under the NAFTA agreement.

7. Ranging from International, to Global, to Multi-Level. On the discussion of the pluralistic view on Global Administrative Law, *vide* NICO KRISCH, *The Pluralism of Global Administrative Law*, in *European Journal of International Law*, Vol. 17 - 1, pp. 247–278, as well as INGOLF

The author begins by clarifying his opinion on the definition of regime and on denying the attribution of a legal status to such normative regulatory bodies. In fact, and based on the *Hartian* view of legal system, the author refuses the qualification of such regulatory *regime* (as Jovanović calls it) as a true legal system, providing that it does not possess, for the moment, a true rule of recognition that attributes validity to the norms emitted. The profuse amount of regulatory bodies, on the different aspects of food, fisheries, internet, sports, aviation and so on, do make it increasingly difficult to establish a common rule that could attribute the adjective of a legal order to such activities. This is clear when assessing the differences that are to be established between powers (what is to regulate and what is to sanction), what would be a public like function and what would belong to a private law aspect, or what should be even deemed as hierarchical (in an administrative subordination view) and what should be considered merely cooperative⁸.

However, in my opinion, the line of thought is once again based on the most fundamental mistake: That our national standard way of conceiving law must, in some way, be transposed to the International level. So it is to say, we must conceive something as legal if it respects our preconceived notion of state like administrative Law. I do agree with the Author when it refuses to accept the general and profuse concept of Global Administrative Law as providing a truly new legal system. In fact, it seems difficult or hardly possible to conceive a Rule of Recognition that could bind all of the non-state actors involved, ranging from very alike administrative regulatory bodies (that experience some degree of subordination and of administrative legality), and those that are yet to achieve such level of organization. Having no way to provide such a rule, where all the legality would derive its validity from, it seems difficult to conceive it as a sole, unique legal system. That does not mean, however, that such rule does not exist to some extent. What we must abandon, and Jovanović critic is on point here, are the approaches that base the assessment of legality on some kind of national public law criteria. Examples such as the principle of legality and the level of binding of the norms, could ultimately create a “public para-legal system” that would affect national public goods. And this view, as it was pointed out before, is born from an erroneous starting point which is that there is a difference between Public and Private Law on the International Law domain, which seems yet to be proven.

This being said does not preclude, in my point of view, the possibility of some degree of *legality* in such actions. The International Rule of Law might provide, as Harlow puts it, “the central background theory against which the principles of administrative law operate, while at the same time acting as a governing principle”, therefore acting as some kind of normative justification for the actions that administrative like bodies put into practice. This is to say that, to some extent, the Rule of International Law could function as a set of principles and rules that provide the necessary *axiological glue*, crucial to *identify and distinguish* a true

PERNICE, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, in *The Columbia Journal of European Law Review*, vol. 15, n°3, 2009, p. 3 ff.

8. SABINO CASSESE, *Lo spazio giuridico globale*, Bari, 2003, p. 323 ff.

legal system from some other normative order. It would allow an affirmation such as “This norm belongs to this global administrative law system, and not to this other”. Needless is to say how difficult to achieve this is. In fact, Jovanović puts in a very clear way “Moreover, the rule of law value gives rise to a further set of principles, which form the body of administrative law. This simplified pattern is impossible to replicate at the global level.”⁹ This impossibility is based, according to the Author, on the huge challenges that a standardization of Administrative Law would face when faced against the global perspective: How could one legitimate that a certain vision of Administration is the legitimate one? How could one say “Here I find a legal body that I consider to be of an administrative nature, (according to a set of national preconceived concepts on the notion of Administrative) rendering it therefore part of the legal system that I describe as Global Administrative Law”? It simply cannot be done.

This could lead to the abandonment of the concept of post national administrative law, if one could not conceive Administration and Law in more abstract ways, free from its national constraints.

However, the fundamental mistake is present one more time on this view: The quest for unity in International Law is, in my opinion, a battle lost from its start. It is not possible to conceive a world’s Administration, because the differences between what is to be considered Law, Order or even Administration would change drastically from country to country. If even in Europe one could find several ways of thinking, in an analytic approach, what set of rules and principles serve to describe a certain legal system, if one enlarges the spectrum, along with new cultures and traditions, the result will never be of a unitary nature. This is, however, no obstacle or restraint. It is, on the contrary, the key to the modernization of both Administrative and International Law. It is therefore interesting to see Jovanović attempt to develop a line of thought based on the notion of Rule of International Law, as “bounded government”, rendering possible to some extent the unity between all different regulatory bodies. The idea, to the extent I have understood it, is to provide a governing principle where the several distinct administrative principles may govern, but that provides the criteria, both substantive and procedural, that these administrative principles must respect. It is therefore to create a truly *principle based hierarchy*, between a unitary International Rule of Law (containing standard substantive and procedural principles that apply to all actors in international law) and the volatile administrative characteristics, that vary from conception to conception in the world, and cannot be traced to a single view. The rule of law principles would encompass procedural norms, such as *reasoned decisions*, or *the principle of review* (for example the right to appeal), and substantive norms such as *proportionality*, *mean-ends rationality*, *avoidance of unnecessarily restrictive means and legitimate expectations*.

This is a very tempting idea. It would provide, in a very cinematographic metaphor, a *Rule to Rule them all*. It would permit the general administrative operative concepts such as those of acts *ultra vires*, and the principle of legality, providing

9. MIODRAG JOVANOVIĆ, p. 11.

a truly normative justification of the phenomena. In my opinion, however, it falls once again and determinately on the original error: It derives from the national based unity of conceptualization that simply does not exist in Global Administrative Law. Because the same critique that Jovanović addresses to those who attempt to find a truly administrative set of principles that could be found in every body of Global Administrative Law, given the profuse existence of different law cultures and traditions, can be made to the difficulty on sustaining the legitimacy of the principle of *review* or of *reasoned decisions* as universal principles of administrative law. They are, beyond doubt, Western fundamental premises of the Rule of Law. However, when one begins to unveil the true global context, one must question whether the Western view of what Rule of Law should mean the only one available. This is to say, that there might not be one single International Rule of Law, but many International Rules of Law, depending on the concept of that Law should be understood for.

This leads us to a fundamental conclusion: Is the unitary pathway, through the finding of a universal set of rules or principles, the only one available? Or can we find and distinguish several legal systems, each one bound by its own rule of law, or in an *Hartian* methodology, each one bound by its rule of recognition?

This would mean to say, does it exist one single Global Administrative Law, or several?

This leads to section III and the problem of conceptualization of Global Administrative Law.

Iv. On Section Iii – On The Conceptualization Of Global Administrative Law

In this section, the author provides an insight on the troubling question that is: In conceptual terms how could one describe the several phenomena under the concept “Global Administrative Law”?

To this question, the Author acknowledges the difficulties that are felt to connect such legal reality to the classical binary terms of “this is legal” and “that is not legal”, replacing it for a new relative and more progressive way of looking at legal constructions. In fact, one aspect that is to be highlighted, is the consideration that Jovanović makes concerning the methodology to adopt when addressing a certain legal phenomena. Whether based on Hart’s conception or on a more sociological Weber based approach, one thing is clear in his thought: The approach must be done from the reality to law, this meaning, from the existence of a certain reality to the conceptualization or inscription of such reality to be configured or not as a legal one. For this matter, the Author rests upon the concept of *raw data*, the mere facts that are to be characterized and conceptualized.

It is also object of debate the matter of the role that legal theorists must undertake in defining or conceptualizing Global Administrative Law. Jovanović proposes a more active role of the theorist on the study of a normative background

that could justify a legal implication to such *raw reality*. One approach that is generally taken, and that we criticized before, was the legal conceptualization through principles of national administration in order to spot differences and resemblances that could ultimately serve as foundations to argue “This is something like Administrative Law”. Principles such accountability, transparency and accessibility, which I would add the access to justice, are among those principles target of such construction.

However one could argue whether this approach, a national principle-based theoretical approach, would be the most suitable to such phenomena. In fact, such an approach will be of some use if the system has itself an inner coherence, meaning that we can in fact find, among the several structures that one finds on the general concept of GAL, some common ground that allows such conceptualization. This is no easy task. Especially if we take into account that such findings would not, *per se*, explain the prior normative justification that would permit such principles to be deemed as valid. If there is one system to be found, then that system must possess some kind of rule, of some nature, that allows the principles to join in uniformity and coherence accordingly. This is contested by the Author, to some extent, appealing to contemporary concepts of legality as “relative” or “graduated normativity” saying, for example that “legality does not exhaust in the concept of validity, and, hence, the key question is not whether the norm is valid, but how is valid”.

This idea of several layers of legality, or degrees of normative, is a rather interesting idea: It does provide an answer to the lack of uniformity of such phenomena when compared to strict classical legality where normative justification can be found easily through a set of rules and principles.

But it poses troubling issues.

First, the creation of a *core* of the concept of Law, opposing to the *penumbral* aspect of it, as a metaphor used by Hart and many others to describe essentially the existence of cases that fall outside the straight language meaning of a norm. When used to describe areas of Law that are on the periphery of International Law, that do not possess the core characteristics of the traditional legal systems might be itself an answer to the question that is posed. It might mean that, if we need to go to the peripheral areas of Law, and not be able to establish a true normative justification to the system, that such system does not have in fact the coherence enough to derive validity from a single rule or normative background. And there is nothing wrong in concluding that such unity of legality does not exist. Because if one enters a theoretical approach where *penumbral* areas of Law might coexist with the *core* existence of validity rules, one might ask, in fairness, where do this *penumbral* areas of Law derive their validity from, which is to say, what gives them some but not enough *legality*.

Second and in connection with the first, the absence of such *core like features* might indicate that this phenomena are in fact a growing construction of International Law, and might even be on a *penumbral* concept of Law, but do possess

their own normative justification and their own validity derivations. From this one conclusion can be extracted: To find unity in such *penumbral* areas of Law is to try to fish in such a large ocean, with such variety, that is very unlikely to establish a common type of fish that we could name. Each time we achieve a conclusion on some area of this Global Administrative Law, one might find it immediately denied by a different discovery on a different theme or group of cases.

Therefore we have to conclude in such way: In the absence of a unitary normative justification to what is called Global Administrative Law, one might argue that the solution lies on dislocating such concept of Law from a *core classical approach* to a more *peripheral penumbral approach*. However, it will always be necessary to establish the set of rules or principles that qualify something as *core* or as *penumbral*, which is to say, something that allows this system to be distinguished from the other (to say this is GAL that is not). And even if one argues that this peripheral or *penumbral* side of Law does exist inside one and the same system, one must always be able to identify (and should not give up on that task) the fundamental normative justification of such system. This action will always, in my opinion, require the identification of a certain rule (or set of rules) which provides validity to the norms of the system, at the same time it allows distinction. To find such rule in such complex reality, where unity and coherence seem difficult to find, resembles an impossible task.

Maybe the way to develop the theoretical and conceptual approach to it will be therefore to abandon unitary visions, that are deeply intertwined with national monistic views of Law, and adopt a broader and more contemporary perspective on the concept of Global Administrative Law. This vision would therefore encompass a set of many systems, each one providing its own normative justification with its set of rules and principles, whose alleged uniformity is more of an academic (study based approach) than of a really legal coherent systematics.

This vision does not neglect the value of such concept, in our opinion, rather enhances it as a didactic and academic tool that provides some unity to its study, guarantying some coherent line of thought.

And in this idea would reside the fundamental importance of its conceptualization.
