e-pública
Revista Eletrónica de Direito Público

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COMENTÁRIO SOBRE O ARTIGO AUTO-REGULAÇÃO ADMINISTRATIVA ("DIREITO INTERNO") E DIREITO ADMINISTRATIVO GLOBAL

Lourenço Vilhena de Freitas
Número 3, 2015
ISSN 2183-184x

E-PÚBLICA
REVISTA ELECTRÓNICA DE DIREITO PÚBLICO

www.e-publica.pt

e-Pública **Vol. II** No. 3, Dezembro 2015 (114-120)

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COMENTÁRIO SOBRE O ARTIGO AUTO-REGULAÇÃO ADMINISTRATIVA ("DIREITO INTERNO") E DIREITO ADMINISTRATIVO GLOBAL

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Abstract: In the present commentary it is argued that GAL is not a new source of law, and cannot be confused with administrative law from international sources. In addition, it is considered that it entails the ruling of a global administrative action with direct effect on the people without mediation of national law. Moreover, it is stressed that it also can ground administrative action or at least serve as an international limit or parameter to international or national administrative action, and entails the existence of multi-level constitution and legitimacy and global ruling and therefore depends upon the existence of international functional public services or an international or transnational public interest.

Abstract: No presente comentário defende-se que o GAL não é uma nova fonte de direito e que não pode ser confundido com o Direito Administrativo de fontes internacionais. Além disso, considera-se que implica a decisão de uma acção administrativa global, com efeito directo sobre as pessoas sem a mediação do Direito nacional. Por fim, salienta-se que o GAL também pode fundamentar uma acção administrativa ou, pelo menos, servir de limite internacional ou parâmetro para acção administrativa internacional ou nacional, e implica a existência de uma constituição multi-nível e legitimidade e governança global e, portanto, depende da existência de serviços públicos internacionais ou de um interesse público internacional ou transnacional.

Keywords: Global Administrative Law, concept of law, Verwaltungsvorschriften, Innenrecht, waste management

Palavras-chave: Direito Administrativo Global, conceito de direito, directrizes administrativas, direito interno, gestão de resíduos

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Sumário: 1. Introdução; 2. O GAL não é um novo tipo de direito; 3. O GAL deriva do Direito produzido por OI e, assim, – indirectamente – dos poderes conferidos às OI por Estados; 4. A capacidade hermenêutica limitada da diferença entre direito interno e externo; 5. Conclusão

1. Introduction

The author Rike U. Krämer, in the article Administrative self-regulation (*Innerecht*) and Global Administrative Law, considers that a new category of law is developing – the Global Administrative Law. Quoting Cassese, the author finds three differences in GAL towards different kinds of law: it is not hierarchic, and is sectoral, thus distinguishing itself from international law[2].
And that is a consequence of bringing the debate about global governance to the legal realm and also that brought the debate about global administration[3].
In a subjective point of view GAL brings the need to rethink the administration in a positive way (green light theories) and in a functional way, an administration that exists in the global arena either by formal international organizations, administration based on collective action by transnational networks, distributed administration conducted by national regulators, administration by hybrid intergovernmental-private arrangements and administration by private institutions with regulatory functions[4]. This can allow one to refer to a global administrative space[5]. GAL does not a state centred approach[6] and its nature as law focuses on "social fact condition"[7] and in the HART approach of the rule of recognition (and not the state production) as the criteria for law identification[8].
In an objective point of view, the authors brings the German and continental law difference between external and internal law (referring to the German *Verwaltungsvoerschrift*, i.e. quasi-legislation). Those *verwaltungvorshriften* are less formal than other categories of law and are not seen as having external effect. There are also interpretative provisions (*norminterpretierende Verwlatungsvorshciften*), discretionary powers provisions (*ermessenslenkende Verwaltungsvorshriften*), administrative provisions in areas where law does not yet exists (*gesetzesvertrende Verwaltungsvorshriften*) and administrative provisions the concretize norms (*normkonkretiesierende Verwaltungsvorshriften*). All this provisions could be found in GAL.
The author also refers to the correspondent difference between validity and weight[9] in order to explain the differences in the inner structure of GAL. GAL has in its view either external law rules (*Aussenrecht*) and internal rules (*Innenrecht*)[10].
As a case study, the author focus on the *Landesarbeitsgemainshaft* (LAGA) waste management and the relevance granted to guidelines and soft law on that field, aspects are not seen as law and validity issues but having weight in the legal reasoning. The same, it is implied, that happens in GAL.

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2. Rike U. Krämer, Administrative self-regulation ("Innerecht") and Global Administrative Law, E-Pública - Revista Eletrónica de Direito Público, n.º 6, 2015, p. 10.
3. Rike U. Krämer, Administrative, p. 2.
4. Rike U. Krämer, Administrative, p. 7 quoting Kingsbury, Krisch and Steward, The Emergence of Global Administrative Law, 2005, 15-60, p. 18.
5. Rike U. Krämer, Administrative, p. 7
6. Rike U. Krämer, Administrative, p. 12.
7. Rike U. Krämer, Administrative, p. 12 quoting Benedict Kingsbury, The Concept of Law in Global Administrative Law, 2009, p. 27.
8. Rike U. Krämer, Administrative, p. 13.
9. Rike U. Krämer, Administrative, p. 1
10. Rike U. Krämer, Administrative, p. 3.

Another characteristic of GAL for the author is the bottom up approach and borrowing from national systems[11].
Three aspects of this reasoning can be challenged and subject to scientific debate.
First of all, GAL is not necessarily a new kind of law.
Secondly, GAL does depend from the states in an indirect way.
Thirdly, the difference between internal and external law can explain certain aspects of GAL, but cannot explain all aspects of GAL, namely the GAL from private sources.
It is important to analyse all these aspects.

2. Gal Is Not A New Type Of Law

We disagree from the dominant opinion regarding which the GAL is not a new kind of law.
In fact, the GAL can have a multi-level nature but its inner structure is mostly international law, but sometimes only transnational law.
In our view, GAL corresponds partially to general principles of international law, law (internal and external) from international organizations and law from private sources but binding due to international law rule or decision to those sources. Nevertheless there are GAL areas that correspond to transnational principles of administrative law and the law from private sources, principles that are binding as international costume or that are not binding due to an international law rule or decision, but are binding in several states due to a national law rule or decision and the soft law, either from international public entities or from private international entities.
Therefore, one can conclude that GAL is not a new category of law, and it can either be reduced to international or to national (although transnational) law, and it can be either binding or soft law, as it happens with law in general.
More than a new kind of law, GAL is a scientific field of expertise; it has not an strong identifiable ontological nature, but it has rather an epistemological nature. In this view, GAL analyses the general principles of administrative law that apply to international organizations and other international law subjects and to states, internally, in a transnational way.
If one could however find an ontological characteristic in GAL, it would be twofold: i) the transnational nature of its application; ii) the fact that GAL tends to create rights in the international or national sphere that can be directly invoked by the interested ones (different from classic international law scheme).
Therefore, the norms usually qualified as GAL can only be considered GAL *stricto sensu* if the international norms are self executing and have guarantee mechanisms (panels, administrative international tribunals, national tribunals in UN administration of territories, etc.) or if transnational principles are granted customary international protection or national enforcing and protection. In any case, the question is more about validity than weight. Then there is GAL *latu sensu* that comprises transnational international private law (that is not customary protected under international law) and soft law (the *innerrecht*).

11. Rike U. Krämer, Administrative, p. 9.

But, in any case, as it happens with law in general, GAL is more about the former rules than the latter rules quoted and therefore the *innerrecht* can only explain a small part of GAL and the less relevant of it.
Also relevant to mention is that GAL *stricto sensu* is also called to rule the international administrative activity of international organizations. Activity: i) towards its agents and international employees[12], ii) towards territories that are ruled by those international organization (such East-Timor or Kosovo in state-building situations[13] or the International Seabed Authority in the Area[14]) and iii) activity in its normal international activity and organ functioning towards states (case Shrimps and Turtles of the Panel of OMC or the UN activity[15]) or individuals (case Kadi of the ECJ).

3. Gal Is Derived From The Law Produced By Ios And Hence –Indirectly– From The Powers Conferred Upon Ios By States

Regarding the second point the question raised is that GAL is not an orfan child, it did not appear as a demiurge self-creation, but instead, it is mostly a result of the global constitutionalism and of the multi-level constitutionalism[16]. The delegation of sovereign powers in international organizations at a larger scale, both in terms of perimeter and in terms of in dept of the powers granted, determined the production of administrative rules and principles in an unprecedented way. But this creation is not mainly an unintentional one, it is a result of a direct administrative activity of international and transnational entities that act with sovereign power delegated or transferred by the states or other international subjects of international law.
There is therefore a direct connection between the rise of multi-level constitutionalism, both at an European or global level (OMC for instance) and the rise of global constitutional law.
This does not entail that GAL is also a centralized state produced (directly or indirectly) through delegation in international arena. GAL can also result from non intentional sources like costumary formation. But the precedents that lead to that costumary formation are mostly a result of public entities both international organizations and states (as there is a bottom up effect and the administrative practice of states is relevant for the formation of those principles).

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12. Renuka Dhinakaran, Law of the International Civil Service, p. 137 in IOLR, vol. 8, 2011.

13. Joel C. Beauvais, Benevolent Despotism: A Critique of UN State Building in East Timor, 33, NYUL INT L. & POL. 1101, 1106, 1166 (2001) and William Bain, Between Anarchy and Society: Trusteeship and the Obligations of Power, 153 (2003), Richard Kaplan, A New Trusteeship?: The International Administration of War-Torn Territories, 57-58 (2002), Jarat Jopra, The UN Kingdom of East Timor, 42-43 (2000).

14. Paulo Otero, A Autoridade Internacional dos Fundos Marinhos, Lisboa, 1988, p. 216 e ss. and Satya N. Nandon, Administering the Mineral Resources of the Deep Seabed, p. 2 and ss.

15. Danesh Sarrooshi, The United Nations and the Development of Collective Secutiry, Oxford, 1999, p. 92.

16. Neil Walker, Multilevel Constitutionalism: Looking beyond the German Debate, June, 2009, leqs, Paper no. 08/2009 and Mathias Kumm, The Legitimacy of International Law: A Constitutional Framework of Analysis, 15, EJIL 907 (2004).

4. The Limited Hermeneutic Capacity Of The Difference Between External And Internal Law

Regarding the third point the question is if that GAL has not monopoly of soft law or private sources law formation (non-regulation, self-regulation, hybrid public and private regulation,i.e. Codex Alimentarius, International Standard Organization, International Office of Epizooties, Basel rules, Aarhus convention, etc.)[17]. Those kind of phenomena also occur at a national level, and therefore this cannot be seen as an inner characteristic of GAL. What can be said is that GAL used to a broader extend those kinds of law production sources. But nevertheless, this does not entail, that there is an inner difference between those two kinds of law.

5. Conclusion

Therefore in our view GAL is not a new source of law, and cannot be confused with administrative law from international sources. It entails the ruling of a global administrative action with direct effect on the people without mediation of national law. It can ground administrative action or at least serve as an international limit or parameter to international or national administrative action. It also entails the existence of multi-level constitution and legitimacy and global ruling and therefore depends upon the existence of international functional public services or an international or transnational public interest[18].
GAL also contributes to the legitimacy reinforcement of the international public administrative bodies, through procedural participation and sometimes control by judicial international tribunals.

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17. Carol Harlow, Global Administrative Law: The Quest for Principles and Values, and also Benedict Kingsbury, The Administrative Law Frontier in Global Governance, p. 11.

18. John Morison and Gordon Anthony, The Place of Public Interest, in Values in Global Administrative Law, AAVV, Oxford, 2011, p. 215.