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ACTORES PRIVADOS E PRÁTICAS PÚBLICAS NO DIREITO ADMINISTRATIVO GLOBAL”

COMENTÁRIO A REBECCA SCHMIDT

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1. Introduction

Rebecca Schmidt’s paper goes far in the attempt to map the foggiest areas of Global Administrative Law (GAL): in general terms, those areas in which, besides the absence of clear international and binding rules, we have the additional element of complexity given by the presence of entities and bodies difficult to classify according to the public-private divide.

The task undertaken by the Author is a difficult but necessary one, and it is carried out with conviction, and with a distinctive trait which in my view, clearly brings value to the paper: an analysis of a certain sector of private rulemaking and decisionmaking (which coincides with the area of intervention of GlobalGAP), to try and ascertain whether or not the features of GAL are present here.

As the Author puts it at a given moment, the question from which the paper departs is “whether formally private actors qualify as global administrative bodies, capable of producing GAL” (see section 2.1, page 7). The Author then goes on to state that her particular perspective is that this question should be answered using what is called a “practice-based approach” (see section 2.2, pages 8 ff). After analysing GlobalGAP’s activity, the Author concludes that the said practice-based approach pays off, since it makes possible to see how GlobalGAP carries out activities “of common concern” and uses “GAL principles (...) in order to respond to such concerns and thus to create proper public practices”; and although the Author does not go so far as to state that GlobalGAP is a global public regulator, she does finish by stating that, due to the impact of this entity’s activity on common public concerns, “it seems necessary to require compliance with public requirements such as the GAL principles” (see section 4., page 26).

I would like to make this comment an opportunity for a reasoned and open debate on a number of questions that Rebecca Schmidt’s paper suggests. As we know, while writing a review – like this text – one should not criticise the thesis the Author presents, but rather the arguments and/or methodology that support it. Therefore, my aim is not to criticise the thesis (I have no reason to do so, it is

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a perfectly viable thesis, in theory), but to ask whether the arguments and methodology used by Rebecca Schmidt are sufficient to support it.

There are two main points which in my view are not entirely convincing in Rebecca Schmidt's paper, and I will consider them in turn, in the following sections. Firstly, I believe the approach on the "publicness" of the "GAL principles", and of GlobalGAP's activity, takes a poor perspective of *private* law and *private* bodies; in short, the paper does not do enough to demonstrate that GlobalGAP's activity and the rules by which it abides can't be considered *private law*, *private activity*, and so on (section 2. of this comment). Secondly, I think the theoretical consistency of the "practice-based approach" applied in the paper is quite doubtful, in purely methodological terms (section 3, par. a), of this comment), and in what regards the *consequences* of applying such a framework of thought (section 3, par. b), of this comment). We finish with some concluding remarks (section 4. and last of this comment).

2. Global Law Or Global *Public* Law? The Shortcomings Of The Approach On Private Law And Private Bodies

Benedict Kingsbury's paper "The Concept of 'Law' in Global Administrative Law", undoubtedly one of the centerpieces of the Global Administrative Law (GAL) movement, and an important reference for the text I am commenting, begins with a provocative question: "What justification is there for using the term 'law' in the theory and practice of the emerging field designated 'global administrative law'?"²

I would submit that Rebecca Schmidt's paper, in addition to that question, prompts another radical question: what justification is there for using the term 'administrative' in 'global administrative law'?

In fact, it can be questioned whether Rebecca Schmidt's text doesn't prove that (quite to the contrary of her argument, I think) the topic should be *global law*, and not global *administrative* law. I'll briefly try to explain why.

In her paper, the author begins by accepting that the public-private divide is relevant, even in the international realm; and then she clearly makes the claim that GlobalGAP *has implemented GAL principles, as such*, that is, as *public principles, directed at creating public practices* – for example when she states that "GlobalGAP has spent considerable efforts to implement GAL principles into its governance framework" (section 4.2, page 25), or that "GAL principles were used by GlobalGAP in order to respond to such [common] concerns and thus to create proper public practices" (Conclusion, page 26).

However, it is submitted that for Rebecca Schmidt's claim, regarding the "publicness" of GlobalGAP's activity and the law it is "submitted" to, to be accepted, the Author would have first to demonstrate two things which she has not demonstrated: that the "GAL principles" mentioned are *public* law principles, meaning they are fundamentally *different*, in some relevant way, from principles of private law; and that they are or have been implemented by GlobalGAP, or are applica-

2. BENEDICT KINGSBURY, "The Concept of 'Law' in Global Administrative Law", *European Journal of International Law*, 20, (1), 2009, pp. 23-57 (p. 23).

ble to it, as *public law principles*.

On this regard, the paper does not give enough attention to the fact that the purported “public principles”, “GAL principles”, “public practices”, etc., are *absolutely common in private law environments*, and therefore, they can’t, in my opinion, be used to draw conclusions on the “public” character of GlobalGAP’s activity – at least, they are clearly *sufficient* to reach that conclusion.

There is indeed a lack of solid and consistent elements in the GlobalGAP case analysis, that would allow us to state that the principles implemented by that body derive, in any relevant way, from *public law*.

Take the example of **review**. Quite interestingly, the text offers us the indication that there is a review mechanism within the GlobalGAP certification scheme (see section 3.2, par. c), page 17, and section 4.2, pages 24-25). When we consider these rules (which the Author clearly admits to being *voluntary* rules, based upon *contract*), we do see things that are consistent with review mechanisms of a public nature: the decision is taken by the certifier and it is appealable before that entity, and in case the appeal is unsuccessful, further appeal is possible before the GlobalGAP secretariat. It is not hard to recognize that this is *similar* to review procedures that occur in functionally equivalent contexts in domestic (public) laws.

However, there is a problem: private law offers many examples of review procedures, and also of many of the other aspects presented by Rebecca Schmidt as “GAL principles”.

On the general point that finding a review procedure in a private context is absolutely common, let’s take a simple example: when you go to a restaurant and the waiter denies you something you think you are entitled to, you ask to speak to someone in charge, say, the manager. Obviously the waiter, on 99,9% of times, will call whoever is in charge, and in some of these cases, the person in charge will trump the waiter’s decision, and say you are right, and in others, they will maintain the decision.

If we analyse this situation, we can find all the features of a review procedure: but it is a review procedure that flows entirely from private law. To make the parallel more accurate, we can even add this: imagine the restaurant in question is part of a multinational corporation, which has approved a “Costumer Charter” stating that patrons have the right to ask for the manager when they are dissatisfied with a waiter’s decision. Here we have a formalized review procedure; created by general rules (the hypothetical “Costumer Charter” of the franchise); affecting a multitude of costumers in numerous countries of the world; and in a sector whose practices clearly deal with matters that affect *common interests* – the fact that practices of the food industry affect the health of all the users who consume the food, and thus are of common concern, is a basic assumption in Schmidt’s text (and I agree with it; I simply don’t see why and how we can consider that everything that is of *common concern* has to do with *public law*). But regardless of all these attributes of this “review procedure”, can this, in any way, be considered a matter concerning GAL?

What is said about review procedures can be said, in my view, regarding all other GAL principles Rebecca Schmidt’s paper refers to (mainly in section 4.2 of her paper).

Procedural participation and *transparency* are absolutely common in private

law, profit-driven, activities. As we see every day, companies pay more and more attention to the feedback they receive from costumers and to giving information on their activities (see McDonald's recent campaign that invites patrons to visit their restaurant's kitchens). They also try to design their products with significant input from those costumers, sometimes actively promoting this participation (for example, in campaigns where companies ask costumers what they would change in a product). The products are increasingly a "collaborative" effort, where the stakeholders' interests are present. Is this Global Administrative Law?

The giving of *reasoned decisions* is present, also, in many private law contexts: for example, when two private entities are negotiating a contract they are bound to giving extensive information to each other³, and if they reach the advanced stages of that negotiation, and one of them withdraws from the talks, it is a common principle of most domestic (private law) systems that reasons must be given, or it is possible that *culpa in contrahendo* applies⁴. Also, when a party to a contract applies a contractual penalty to the other party, or terminates the contract on grounds of non compliance – in modern private law, these are all situations that demand giving reasons, for reasons of good faith. Can this be considered within the realm of Global Administrative Law?

Finally, *substantive standards* such as *proportionality*, *means-ends rationality*, *avoidance of unnecessary strict means* and *consideration of legitimate expectations* are all clearly present in western societies' private law. In fact, some of those principles or standards (like the consideration of legitimate expectations, which derives from the principle of good faith and fair dealing) were even developed and became part of private law's *acquis* long before they started being mentioned by public lawyers. *Proportionality*, for example, emerges as a principle in the law of contract, acting, for example, as a limit to contractual penalties⁵, and also in the rule that contracts may only be terminated on grounds of non compliance if the non compliance is *fundamental*⁶, thus excluding immaterial flaws. *Means-end rationality* is absolutely essential, these days, in Corporate Law, in order to ascertain, for example, if a manager has fulfilled his/her duties under the so-called "business judgment rule" – in fact, the said rule is currently considered

3. See for exemple sections II.–3:101 and following of the *Draft Common Frame of Reference* on the Law of Contracts, prepared by the "Study Group on a European Civil Code", included in *Principles, Definitions and Model Rules of European Private Law – Outline Edition*, edited by CHRISTIAN VON BAR, ERIC CLIVE, HANS SCHULTE-NÖLKE ET AL., Munich: Sellier, 2009, available at https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf (last accessed 30 October 2015). The DCFR is not, of course, legally binding, but it was prepared as a sort of synthesis of the European states' laws of contract, by a particularly prestigious set of law professors, and therefore it is a valid tool for making statements about the common European tradition and principles of private law.

4. For a detailed analysis of pre-contractual liability through the lens of International Private Law and Comparative Law, including the issue of the unilateral end of negotiations, see PAULA GILIKER, *Pre-contractual liability in english and french law*, The Hague: Kluwer Law International, 2002, pp. 45 ff. and 105 ff.; DÁRIO MOURA VICENTE, *Da responsabilidade pré-contratual em Direito Internacional Privado*, Coimbra: Almedina, 2001, pp. 241 ff. (for civil law countries) and 290 ff. (common law countries).

5. A common trait of the private laws of contract: see for example article 1152 of the French *Code Civil*, § 343 of the German *BGB*, article 1384 of the Italian *Codice Civile*, or article 812 of the Portuguese *Código Civil*.

6. See *Draft Common Frame of Reference*, section III.–3:502.

a relevant standard in all contexts where fiduciary duties exist, be it in private or public organizations⁷.

As we can see, private law clearly offers at least *similar* legal principles to the ones mentioned by the Author. And the fact that they are “used” or applied by private entities appears to be due to the simple fact that the application of these private law institutes *allows for good, fair and responsible business*. Customers of private entities keep coming back if they are well treated, if they have access to information, if they are offered due opportunity to complain about something, and so on. The literature confirms that the reasons that lead the food industry to create certification schemes are related to (private law) rules like civil liability and reputation damage⁸, as Rebecca Schmidt also acknowledges.

This relates to a topic that has been sharply referred to by Benedict Kingsbury, when he rightly quoted Fuller’s statement that some of the elements of law are present in “managerial directives”, but only “for reasons of efficacy rather than because they instantiate the reciprocity in relations of ruler and ruled (...)”⁹. That is: review, transparency, proportionality, means-ends rationality, etc., are also used in private law and by private bodies, *because they serve private law and private bodies’ purposes*. This, I think, has little or nothing to do with public law. It should be noted that my point is not to deny that Rebecca Schmidt’s “public principles” are global. My point is that it is very hard, with the elements brought to the paper, to see them as “administrative” or “public” in any relevant way, when they are applied by a private body, through a purely voluntary contractual basis.

To sum up this point: it is submitted that in order to prove the argument that GlobalGAP, a private entity, “uses” review procedures, transparency, reasoned decisions, etc., as elements and principles of a *public* nature, the Author was required to demonstrate that those principles *can only be found*, as such, in *public* law and public bodies’ activities, or, at least, that those principles *apply differently to a body such as GlobalGAP* than they do in “normal” private law and private bodies.

It is my view that not only this demonstration was not carried out, but also that the Author does not feel that it is necessary. This, I believe, is in some way relat-

7. MANUEL A. CARNEIRO DA FRADA, “A “*business judgment rule*” no quadro dos deveres gerais dos administradores”, in Faculdade de Direito da Universidade de Coimbra (Ed.), *Nos 20 anos do Código das Sociedades Comerciais. Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier*, Vol. III (Vária), Coimbra: Coimbra Editora, 2007, pp. 207-248; DAMJAN DESPOTOVIC, *Fiduciary Duties and the Business Judgment Rule*, University of Tilburg (Masters Thesis), 2010, available at ssrn.com (last accessed 30 October 2015); NIGEL WILSON, “Corporate Social Responsibility, The Business Judgment Rule And Human Rights In Australia — Warm Inner Glow Or Warming The Globe?”, *Monash University Law Review*, (38), 3, 2012, pp. 148 ff., available at <http://www.austlii.edu.au/au/journals/MonashULawRw/2012/26.pdf> (last accessed 30 October 2015). See also PAULO CÂMARA, “Vocação e influência universal do *corporate governance*: Uma visão transversal sobre o tema”, in AA/VV, *O Governo das Organizações - A vocação universal do corporate governance*, Coimbra: Almedina, 2011, chapter 1.

8. PAUL VERBRUGGEN/TETTY HAVINGA, “The Rise of Transnational Private Meta-Regulators”, Research Paper no 71, Vol. 10/Issue 16 (2014), Osgoode Hall Law School Legal Studies Research Paper Series, available at ssrn.com (accessed October 2015), p. 6.

9. BENEDICT KINGSBURY, “The Concept of ‘Law’ in Global Administrative Law”, *European Journal of International Law*, 20, (1), 2009, p. 39.

ed to the methodological approach of the paper, and the role played, in the paper, by the “practice-based approach” towards public practices, to which I turn to in the following section.

3. Some Remarks About The “Practice-Based Approach”

a) Why is the “practice-based approach” a better one? And what does it actually consist of?

Having come to this point, of course it must be said that I suspect Rebecca Schmidt would admit that the purely private examples given above – like the example of the “review procedure” of the waiter’s decisions – would *not* fall under the scope of GAL in any relevant way. However, Schmidt’s analytical framework makes it difficult to explain *why* this is so.

This difficulty, in my view, emerges from the fact that the criterion which is offered by the Author as decisive for setting the scope of “GAL public bodies” and “public acts” – the “practice-based approach” – is *too open und undefined*. Such a criterion basically assumes that in matters having any sort of relation to the common good, the existence of certain “apparently public” factors (review of decisions, reasoned decision-making, etc.) is sufficient reason for assuming that those bodies and practices are of a public nature, and therefore are not only *aligned* with GAL, but should be *subjected* to the “GAL principles” (the meaning of this is also unclear, as I will argue ahead).

In fact, the Author criticises formalistic approaches (like Benedict Kingsbury’s), which demand a linkage between private bodies and a public institution so as to apply GAL to those private bodies. As the Author mentions (see section 2.1, page 8), her analysis, unlike the said “formalistic” approach, makes it *easier* to include private bodies and acts in GAL.

But what can be asked is this: can the chief argument for defending the “practice-based approach” be that it *more easily* encompasses private bodies? Should a given theory be defended simply because it maximizes the scope of application of GAL? If that is the case, how do we defend against the argument that Schmidt’s paper simply aims at *artificially enlarging* a certain scientific field of study (that of GAL)?

It is submitted that the identification of areas that pertain to the *province of GAL* (to adapt Taggart’s well known phrase) should be *materially* justified, and based on criteria that are (as much as possible) *objective, verifiable*. If these two prerequisites (material justification and objective criteria) are not verified, we will end up saying that everything that has to do with activities taking place outside the strict sphere of intimacy belongs to the realm of public law – and I believe nobody wants this. If we expand GAL beyond what is justified, the consequence is that we will treat private matters with public law’s concepts and instruments, and this is wrong. Furthermore, private actors will most certainly be *absolutely surprised* that their activity falls under the scope of GAL – a very serious problem, since, as I will say, it is very unclear what are the consequences of being “subjected” to GAL principles.

In light of what has been said, it seems highly questionable that the “prac-

tice-based approach” is sufficient to allow the qualification of GlobalGAP’s activity as “public”. The theoretical purpose of this practice-based approach seems to be a surrogate for the requisite of social consensus in the formation of a customary rule. In other words, Rebecca Schmidt tells us that a practice should be considered as “public” if it has certain “publicness” features, which are indicated by *practices*, and in that case, we have (public) law.

However, there are problems with this argument: the first, as mentioned above, is that the “publicness” features identified by the Author are *common* to private law actors and activities. Rebecca Schmidt’s framework would mean that you will apply “GAL principles” to virtually all NGO’s, big companies, corporations and associations which represent and regulate industry interests with global reach, and so on. In other words: a massive expansion of “public” bodies.

The second problem is that it is unclear exactly what is the relevant “practice” to be taken into account, and under which criteria. It seems clear that if you refer to practices, you are talking about some sort of a *factual* appreciation: practices are things that happen in the world. This raises two issues, both of them, in my view, unanswered by the paper. The first: *whose* version of what is a “public practice” prevails? Is the way in which GlobalGAP views its own activity relevant, or in other words, is a body public if it views *itself* as public (a matter of self-image)? Or is it public if *someone else* views it as undertaking public practices? If the latter is the case, who is the relevant subject? Academics, like Rebecca Schmidt and myself? Courts of law, or international quasi-judicial bodies? Legislators? International Organizations? Other public bodies? The general public? All of the above?

The second issue is this: reading Rebecca Schmidt’s paper, one does not find any solid evidence that would support that GlobalGAP is considered – by itself or by any other actor – as carrying out a public activity ruled by public law. The Author states that GlobalGAP has implemented, or used, “GAL principles” or “public principles”, but we have absolutely no information about the *intention* of GlobalGAP: for all we know, they provide for a certification scheme simply because their associates think it’s good for business and want to implement corporate social responsibility standards. What about third-party actors? The same absence of any solid element to support the claim that GlobalGAP’s activity is “public” can be found: the paper does not point out a single court decision (international or domestic), a single formal position by any State or other public body, claiming that GlobalGAP (or entities alike) should be treated like a public actor and subjected to certain consensual public law procedural or substantive standards – we have positions of States claiming that GlobalGAP’s activity was bad for their domestic economies and laws, but this obviously can be said of many for-profit multinational corporations.

In fact, the only clear claim that GlobalGAP’s activity is of a public nature, and should therefore be considered subjected to certain public law principles, appears to be made by the Author. I would submit that this is insufficient to reach any relevant conclusion.

b) What are the actual legal consequences of the identification of a public body and public acts through the practice-based approach?

Finally, it is submitted that Rebecca Schmidt's paper leaves an important question to be answered. The reader does not fully grasp the actual consequences of the "qualification" or identification of a certain private body as a "public body" for the purposes of GAL.

Apparently, the alternative is the following: either this operation has a purely theoretical and possibly forward-looking purpose (and in this case, we would say something like "GlobalGAP is treated, by the law, as a private body, but it falls under the scientific category of a GAL public body, so it should be subjected to its principles, and if this is not the case, we should make changes in the existing law"), or it has a dogmatic meaning, and what the Author is saying is that it is possible, *in the current state of law*, to consider GlobalGAP a public body, subject to public law principles, which can be argued against GlobalGAP, if it fails to comply with them.

I would say the paper under comment seems to talk what we could call "the language of public law", meaning the language of norms that apply regardless of the opinion and consent of a certain (public) body. For example, Rebecca Schmidt talks about "setting normative requirements" to the activity of these private bodies (pages 3, 9); GAL bodies "subjected to procedural GAL and the publicness requirement if their practices call for it" (page 9); activities "redefined" as public (page 17); and the "growing necessity to take regulators such as GlobalGAP out of their club-like structures and connect them with the array of stakeholders they impact" (page 20). All of these references have in common that they give an idea of Global GAP being *submitted, even against its will*, to a certain number of legal principles.

However, in spite the language and concepts used clearly point to a framework of legal principles, we are left in total doubt as to the possibility of *enforcing* the public principles GlobalGAP is allegedly submitted to. But the enforcement problem is crucial: its absence leaves several important questions unanswered.

For example, let's return to the example of the review procedures in the certification procedure set up by GlobalGAP. Given the fact that this review is foreseen in a purely contractual scheme, we could ask ourselves what would happen if GlobalGAP simply eliminated the review procedure. If this entity were truly "submitted", or "subjected", to a "public principle" of review, in the same way a public domestic body is, it should be possible for a producer to enforce such a principle. But how does it work in a GAL context? What does it mean to say that GlobalGAP is "submitted" to public law principles, when from the data presented in the paper, there is not one single element that would differentiate this situation from any other private contractual arrangement with an international character? Is it realistic to speak about the submission to public law principles when, most probably, any review body that analysed a claim emerging from the relationship between GlobalGAP and its associates would end up applying the law of the contract, that is, the domestic law both parties indicated as applicable in the contract?

Of course, it is well known that the nature of the international order does not allow for a direct equivalence between domestic and international ways of enforce-

ing rules and principles: we probably have to admit that when GAL principles are in play, enforceability and accountability must adopt different schemes¹⁰. But one thing is to admit this, and another is to ignore the problem altogether. In fact, even in light of the complex character of global law, in which sociological and economic considerations often play a more important role than in domestic laws, we must insist that legal theories are a normative construction, a specific kind of *angle* through which we see the world, which is not the same angle of sociology or economy¹¹. And in the angle of law (even global law) the aspects of binding force, ways of enforcement, consequences of the breach of rules or principles and questions alike are essential.

These are probably some of the “significant normative and practical problems” that legal writers have referred to as one of the problems of applying GAL to private bodies¹², as Schmidt is aware of (see page 7). However, the reader is surprised by the fact that these problems are simply mentioned, but not specified, let alone addressed, in the paper. Future research on this topic would seem an important and necessary test to the Author’s positions in order to establish the true consistency of the “practice-based approach”.

4. Conclusion

Rebecca Schmidt’s paper is an interesting attempt at going further than others have gone in a very difficult topic of GAL. A detailed case analysis clearly enriches the literature on private global regulation.

Some doubts remain, however, on key points of the Author’s theoretical framework. The presentation of an innovative practice-based approach is weakened by several undefined aspects of how that methodology would work, and this is not without consequences: the criterion seems too generous in the identification of public bodies for the purposes of GAL; specifically, the Author’s position overlooks the fact that many of the “public principles” GlobalGAP allegedly applies are easily explainable in a purely private law framework. This entails the real danger of *expanding* the reach of GAL beyond what is necessary or justifiable. Moreover, there are serious doubts as to the *consequences*, namely binding value and enforcement, of the identified GAL principles, in these types of cases. Without clarification of these issues, any claim that entities such as GlobalGAP are *subjected* to GAL principles seems bold, to say the least.

10. See, for example, FRANCESCA SPAGNUOLO, “Diversity and pluralism in earth system governance: Contemplating the role for global administrative law”, *Ecological Economics*, 70, 2011, pp. 1875 ff. (p. 1876).

11. GIACINTO DELLA CANANEA, “Grands systèmes de droit administratif et globalisation du droit”, in PASCALE GONOD, FABRICE MELLERAY and PHILIPPE YOLKA, *Traité de droit administratif*, t. 1, Paris: Dalloz, 2011, pp. 773 ff. (p. 778).

12. The quote belongs to BENEDICT KINGSBURY/NICO KRISCH/RICHARD B. STEWART, “The Emergence of Global Administrative Law”, *Law and Contemporary Problems*, vol. 68, pp. 15 ff. (p. 23).