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Ana Gouveia Martins
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DIREITO ADMINISTRATIVO GLOBAL: UM NOVO RAMO DO DIREITO OU A DEMANDA DE UM GRAL ACADÉMICO?

ANA GOUVEIA MARTINS[1]
Faculdade de Direito da Universidade de Lisboa
Alameda da Universidade - Cidade Universitária
1649-014 Lisboa - Portugal
anamartins@fd.ul.pt

Resumo: O presente artigo debruça-se sobre a questão de saber se é possível discernir no conceito de Direito Administrativo global um novo ramo do Direito ou se, ao invés, se trata de um simples projecto académico e doutrinal que não pode ser qualificado como Direito, ainda que constitua uma abordagem relevante face a um fenómeno que carece de análise e reflexão teórica e doutrinal. Empenhado em fundamentar um conceito amplo de Direito, que inclua no seu seio códigos de conduta, meras recomendações e outras práticas e instrumentos que não se enquadram nas fontes tradicionais do Direito Internacional, Kingsbury preconizou uma aplicação modificada e ampla da teoria positivista de H.L.A. Hart, a qual, contudo, está longe de ser convincente.

Concluímos no sentido de que não é possível afirmar perante o actual *status quo* a existência de um Direito Administrativo Global, nem mesmo numa acepção restritiva que ignore a ausência de regras e princípios gerais de Direito administrativo substantivo e organizacional, uma vez que não é possível identificar sequer um corpo unitário mínimo de regras administrativas procedimentais.

Em suma, consideramos que a expressão de Direito Administrativo Global é equívoca e susceptível de induzir em erro já que, no mínimo, a designação adoptada deveria ser usado na forma plural (Direitos administrativos globais), realçar que se reporta não apenas a fontes legais mas também a simples práticas (Direitos e práticas administrativas globais) e, acima de tudo, constitui uma espécie de Santo Graal jurídico: um projecto doutrinário que visa garantir a submissão da actuação dos actores no espaço global a um conjunto de princípio procedimentais e alguns de cariz substantivo independentemente da sua consagração em fontes de Direito internacional ou do Direito interno.

É inegável que o projeto Gal tem o mérito de promover uma análise cujo enfoque não se circunscreva às fontes formais de direito e a outras formas de concertação formal, salientando a necessidade de obter um conhecimento mais vasto e profundo sobre o modo como o fenómeno de regulação global está efectivamente a desenrolar-se e a urgência em o submeter a análise doutrinária e reflexão teórica.

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1. Professor (Ph.D.) at University of Lisbon, Law School (Faculdade de Direito da Universidade de Lisboa) and researcher at CDIP – Lisbon Centre for Research in Public Law (Centro de Investigação de Direito Público); anamartins@fd.ul.pt.

No entanto, não compartilhamos a visão de que projeto GAL é a única via para lidar com as questões e desafios que a regulação global suscita.
Para fazer face a estas questões revela-se da máxima importância reconhecer a necessidade de incentivar a adaptação do Direito administrativo interno e do Direito constitucional, bem com do Direito internacional às novas realidades emergentes. Em particular, preconizamos uma reconceptualização da noção clássica de costume internacional a fim de superar o dogma enraizado sobretudo nos ordenamentos anglo-saxónicos de conferir apenas relevância às práticas estaduais como elemento do uso, o que deixou de ser aceitável, tendo em consideração a crescente dinâmica de desnacionalização. Outra via que poderá ser explorada passa por convocar a noção de princípios gerais de direito internacional de modo a poder induzir da existência de determinados princípios procedimentais em determinados regimes internacionais e no direito interno de diversos Estados a sua consagração como princípios gerais do direito internacional.

Abstract: The present article discusses whether is possible to recognize in the concept of 'global administrative law' (GAL) a new field of law or it is simply an academic and doctrinal project that cannot be qualified as 'law', although it can set up a valuable approach to a phenomenon that needs doctrinal analysis and theoretical reflection. Endeavoring to support the concept of law in GAL project, as including also codes of conduct, mere recommendations and other practices and instruments that are not encompassed within standard conceptions of 'international law', Kingsbury has proposed to use a positivist theory of law based on H.L.A. Hart doctrine with some extensions or modifications, view which is, however, far from convincing.
We conclude that it not possible to declare at the present day the existence of a Global administrative law, even in a stricter sense, bypassing the lack of general constitutive or substantive administrative rules, since it cannot be stated the existence of a unitary body of global procedural law. In sum, we argue that the expression GAL is inaccurate and misleading since, as a minimum, the designation adopted should be used in the plural form ('Global administrative laws') and highlight that it concerns not only laws but also simple practices ('Global administrative laws and practices') and above all it should be accurately characterized we as a kind of a legal holy GRAIL (Goals Required to a kind of Administrative International Law): a doctrinal project which aims to ensure the placing under a set of procedural principles and some substantive standards the actions of actors in the global space regardless of their consecration in sources of international law or domestic law.
It is undeniable that Gal project has the merit of promoting research centered not only in formal sources of law and formal arrangements, emphasizing the need to get a wider and deeper understanding of how the phenomenon of global regulation is actually being developed and the urgency in subjecting this phenomenon to doctrinal analysis and theoretical reflection. Nonetheless, we do not share the view that GAL project is the only way to address problems and challenges that global governance has risen up. To address these issues proves to be of utmost importance to recognize the need to promote the adaptation of internal administrative law and constitutional law, as well of international law to the new emerging realities. In particular, we advocate a new conceptualization of the classical

notion of international custom in order to overcome the current dogma of conferring relevance only to state practices as evidence of a general practice, which is no longer acceptable, considering the increasing dynamism of denationalization. Another possibility that deserves further investigation is the recourse to the notion of general principles of law in order to aloud the recognition of the main principles of procedure law in certain global regimes and in major legal systems as general principles of international law.

Palavras-chave: o conceito de Direito administrativo global; conceito de lei na teoria de Hart; projeto político e doutrinal; Direito internacional público; costume internacional e princípios gerais de Direito internacional.

Key words: the concept of Global administrative law; the concept of law in Hart Theory; doctrinal and political project; International law; international custom and general principles of international law.

1. Introduction

It has been announced almost a decade ago 'the emergence of a Global Administrative Law'[2]. Ever since 2004, when KINGSBURY, KRISCH and STEWARt proposed the concept of 'global administrative law' to designate a new and emerging field of study, it has been subject to legal scholarly research not only in United States of America but also elsewhere[3].

Naming this field of studies as 'Global administrative law' induces to believe it is possible to declare at the present day the existence of a new global order, a whole organized and systematic set of general constitutive, substantive and procedural administrative rules and principles, seemingly counterposed to domestic administrative orders and distinctive of the classical international law.

However, global law founders propose to define 'global administrative law' 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"[4].

Therefore, it becomes essential to define clearly the concept of Global administrative law.

Secondly, the present article discusses whether is possible to recognize in the concept of 'global administrative law' (GAL) a new branch of law or it is simply an academic and doctrinal project that cannot be qualified as 'law', although it can set up a valuable approach to a phenomenon that needs doctrinal analysis and theoretical reflection.

2. Presenting The Announced Concept Of Global Administrative Law

The concept of GAL is based on two fundamental assumptions.

First of all, it departs from the premise of that much of what is usually termed "global governance" can be reappointed as administrative action.

Secondly, that such action is itself often being shaped by administrative law-type

2. Cf. BENEDICT KINGSBURY/NICO KRISCH/ RICHARD B. STEWART, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1, *Global Administrative Law Series* in www.iilj.org, published also in *Law and Contemporary Problems*, N.º 68, Summer/Autumn 2005, pp.15 ff.

3. The referred authors founded the Global Administrative Law Project at the Institute for International Law and Justice (IILJ) – New York University School of Law NYU School of Law. In Italy it must be emphasized the establishment of the Viterbo Global Administrative Law Seminar Series as a 'forum' for scholars from various parts of the world working in the field. The Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht at Heidelberg has also a GAL project with case studies of international administration focused in developing a legal framework for the legal analysis of the public authority exercised by international institutions within the context of global governance phenomena. In France a professorship was established under Professor Jean-Bernard Auby at Sciences Po (Paris), La Chaire Mutations de L'Action Publique et du Droit Public (MADP) concerning also this theme.

4. Cf. KINGSBURY/KRISCH/STEWART, *The Emergence*, p. 17.

principles, rules and mechanisms[5].

2.1. First premise: Global governance as administrative action

Regarding the first premise it has an underlying implicit assumption that not only is conceivable the exercise of administrative function beyond domestic orders but also that is possible to regard as administrative entities global bodies since they perform activities in matters that are accomplished by the administration on the national level. "*One of the key factors in identifying the administrative nature of the organization and activities of these global regulatory institutions is the absence of any effort to make them legislative or judicial in nature (within the traditional conceptual structures of international law)*"[6].

The central idea is that 'administrative' actions and regimes are in fact being developed in the 'global space' by a wide and diversified range of entities[7].

The point of departure is the realization that regulatory functions, encompassing especially rule-making but also adjudications and other specific decisions related with management, overseeing and implementation "*that are neither treaty-making nor simple dispute settlements between parties*"[8], are pursued no longer exclusively by domestic entities but also by transnational and global bodies. Since "*global problems (such as terrorism, the environment, and trade) require global solutions*"[9] the state has lost his monopoly on regulatory power and the administrative law that rules the relationship between citizens and domestic administrative bodies is nowadays a 'multipolar administrative law'[10] established and shaped by multiple national, infra-national, supra-national bodies, both public and private, that reflects an interaction, and at times fusion, of domestic and international administrative law and action or even solely international law and activities.

On the other hand, the states are no longer the main subjects of global regulatory regimes that are addressed also to individuals, corporations and non-governmental organizations[11] and sometimes without any intermediation of the national entities. There are even cases where genuine private regulatory bodies set up rules, develop standards and certification mechanisms directly addressed to other privates, without any intervention of public authorities, domestic or international, phenomenon that has been pointed as international 'private governance'.

The Project has identified five main types of globalized administrative regulation, although emphasizing that many of them may often be combined or overlapped[12]:

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5. Cf. KINGSBURY/KRISCH/STEWART, *The Emergence,* pp. 16-17.

6. LORENZO CASINI, *Beyond the State: The Emergence of Global Administration,* in *Global Administrative Law: the Casebook*, 3rd ed., S. CASSESE e al., IRPA-IILJ, 2012, p. 28.

7. See the classical work of SABINO CASSESE, *Administrative law without the State? The challenge of global regulation*, in *Journal of International Law and Politics*, XXXVII-4, 2005, pp. 663-694.

8. See KINGSBURY/KRISCH/STEWART, *The Emergence,* p.17.

9. S. CASSESE e al., *Foreword, in Global administrative law: cases, materials, issues*, 3th edition, 2012, p. XXIII

10. S. CASSESE e al, *Towards a multipolar administrative law: a theoretical perspective*, Jean Monnet Working Paper n. º 5/13, p. 1.

11. KINGSBURY/KRISCH/STEWART, *The Emergence*, pp. 23 ff.

12. See KINGSBURY/KRISCH/STEWART, *The Emergence,* p. 20. Some GAL researchers present different classifications, such as the one proposed by LORENZO CASINI, *Beyond, p*. 29 ff., that distinguishes 4 types of global institutions: (1) formal intergovernmental

(1) *International Administration* by *formal international organizations,* which corresponds to the traditional model of intergovernmental international institutions established by treaty or executive agreement (e.g., the UN, WHO, ILO, UNICEF, IOM)
(2) *Network Administration*, based on collective action by *transnational networks* and *cooperative and coordination arrangements* between national regulatory officials (e.g., the G-8, Basel Committee of national bank regulators and mechanisms of mutual recognition of national regulatory standards based on a bilateral arrangement between national regulators or promoted by WTO), whose distinctive feature lays in the informality of cooperation and the absence of a binding formal decision-making structure ;
(3) *Distributed Administration* conducted by *national regulators* under treaty, network, or other cooperative regimes (e.g., the Basel Convention on transboundary movement of hazardous wastes), characterized by domestic action on issues of foreign or even global concern such as domestic regulation with extraterritorial effects or implementation of international regimes by domestic agencies. The main characteristic is the complexity of the involvement of actors at the international and at the domestic levels and the fact that they are subjected to mechanisms and procedures established by informal or multi-level global regulatory regimes.
(4) *Hybrid Administration*, by *hybrid intergovernmental-private arrangements* (e.g., the Internet Corporation for Assigned Names and Numbers – ICANN - and the Codex Alimentarium Commission) that combine governmental and private actors in the composition of the entities or in the exercising of its functions;
(5) *Private Administration*, by genuine private institutions with regulatory functions (e.g., International Organization for Standardization – ISO - and the World Anti-Doping Agency).

The presented taxonomy reveals a broad understanding of the concept of administrative bodies at which underlies a generous conception of regulatory functions or administration as including not only formal recognized or assigned powers to regulate in a binding form (*e.g.* treaty norms, authority decisions adopted by International Organizations either taking the form of specific decisions either of general rules) but also non-binding agreements, guidelines, recommendations, informal norms, best practices, informal interpretations and technical advice[13]. It is stated unequivocally that "*with some exceptions, global administration consists mostly of administrative bodies with the power to make recommendations but not binding rules, or of regulatory networks or other intergovernmental co-*

organizations, (2) hybrid public-private organizations and private bodies exercising public functions, (3) transgovernmental and transnational networks, including both fully public – or transgovernmental – networks, and hybrid public-private networks, and (4) complex forms of governance, that goes beyond the concepts of institution and networks such as hybrid, multi-level or informal global regulatory regimes.

13. KINGSBURY, *The Administrative Law Frontier in Global Governance*, in *Proceedings of the American Society of International Law*, n.º 99, 2005; BENEDICT KINGSBURY/ LORENZO CASINI, *Global Administrative Law Dimensions of International Organizations Law*, International Organizations Law Review, 2009, pp. 349 ff.

operative arrangements with informal decisionmaking procedures"[14].
Within this framework, it becomes clear the reason why founders of the global administrative law consider that traditional sources of public international law, based on State consent as expressed through treaties or custom and general principles, although being recognized as suitable sources of this new field of law, are no longer capable nor "*sufficient to account for the origins and authority of the normative practice already existing in the field*"[15].
Thus, given the existence of a 'global administration' that plays functions pointed as administrative that are intended to rule the action of states, individuals, firms and NGO, the next step is the recognition of a 'global administrative space', a regulatory space that transcends international law and domestic administrative law, "*distinct from the inter-State relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each*[16].
Nevertheless, the emergence of a global administrative space was not followed by the institution of a general and unitary body of global administrative law. Quite the contrary, it is well recognized that global administrative law is characterized by being sectoral and fragmented due to the existence of various types of regulatory regimes of different nature that covers several areas and the presence of distinctive actors that perform highly decentralized regulatory functions.
As clarified by Cassese: "There is no global government, but rather several global regulatory regimes (from health to labor, to trade, to sea, to banking), without one single hierarchically superior regulatory system. The Global Polity is the empire of "ad-hoc-cracy": global regulatory regimes do not follow a common pattern. This highly a-systematic system has been nicely encapsulated in the formulation "governance without government" (a formulation which already dates back twenty years). What unifies this mosaic of legal orders is the *wechselseitige Eigennutz* (reciprocal interest)"[17].

2.2. Second premise: the existence of an increasing body of procedural principles and mechanisms of an administrative law type which must be respected within global and national administrative action

The increasing powerful regulation performed by global administration bodies and the lack of a coherent system of global law raises severe problems of legitimacy in global governance. In fact, unlike domestic administration that is entirely subjected to administrative law - which rules the legal constitution and the institutional organization of administrative entities, defining and delimitating its tasks and competencies and, in particular, the conditions that enable the exercise of public authority by private entities under delegated powers (constitutive administrative law), the functioning and the procedure itself of acting (procedural administrative law) and the relationship between administration bodies and other

14. KINGSBURY/KRISCH/STEWART, *The Emergence,* p. 53.
15. KINGSBURY/KRISCH/STEWART, *The Emergence*, p.29.
16. KINGSBURY/KRISCH/STEWART, *The Emergence*, p.25.
17. S. CASSESE, *What is Global Administrative Law and why study it? in* RSCAS Policy Papers 2012/04, *Global Administrative Law: an Italian Perspective*, June 2012, p.2.

administrative entities and private actors, namely the assigned regulatory powers to the former (substantive administrative law) - global administration bodies are often solely subjected to the fragmented rules that were established by its founders and without any delegation of state powers able to trace a warrant for their actions on behalf of the people that will be affected and, thus, without the inherent democratic mechanisms of political and legal accountability.

This concern leads to the key question presented by the global law project: the question of the accountability of global administration and the need of conceptualizing mechanisms that can ensure legal control of global regulation in the contemporary world to mitigate democracy deficits.

Therefore, the second premise of global administrative law project is that global entities and global regimes have already established an increasing body of procedural principles and mechanisms of an administrative law type which must be respected within global and national administrative procedures[18]. This means that global regulation bodies are not just developing administrative functions but, at the same time, they are using and being regulated to some extent by typical processes of an administrative law character teleologically directed to promote greater accountability in decisionmaking and rulemaking[19].

These include rules and mechanisms requiring transparency (*e.g.* the duty to disclose information and the duty to give reasons), procedural participation and consultation (*e.g.* adoption of notice-and-comment procedures in rule-making and the recognition of the right to be heard), decisions review (*e.g.* entitlement to have administrative decisions reviewed by a court or by other independent body) and some substantive standards as proportionality, means-end rationality, avoidance of unnecessary restrictive means and legitimate expectations.

Some of these procedural principles and mechanisms are established by national administrative law and are applied by the domestic courts when reviewing global regulations, by the parliaments when implementing global rule-making or overseeing over administrative action developed by national officials in global administrative networks or by administrative bodies themselves when participating in these networks[20].

Others are enshrined in treaties and are applied by international courts[21] (*e.g.*,

18. KINGSBURY/KRISCH/STEWART, *The Emergence,* pp. 34 ff. and pp. 37 ff..; KINGSBURY, *The Administrative,* p. 144.

19. Emphasizing this duality, see STEFANO BATTINI, *Le due anime del diritto amministrativo globale*, in *Il diritto amministrativo oltre i confini,* Milano, Giuffrè, 2008, pp. 1 ff. .

20. KINGSBURY/KRISCH/STEWART, *The Emergence,* pp. 31 ff.; KINGSBURY, *The Administrative*, p. 146.

21. The importance of domestic and international judicial review can be observed in the judicial proceedings instituted before national courts and the ECFI that challenged the legality of European Union regulations that implemented U. N. Security Council sanctions addressed to European citizens deemed to be responsible for threats to international peace and, thus, included in a list, without due process. Security Council´s sanctions committee, known as the Al-Qaida Sanctions Committee, bowed to pressure and reacted by striking some claimants from the list and amending the general procedure established by guidelines in order to grant to individuals, although through his national government, the right to present a demand to be delisted. See DAVID DYZENHAUS, *The Rule of (Administrative) Law in International Law, Law and Contemporary Problems*, n.º 68, Summer 2005, pp. 127 ff.. Guidelines of the committee for the conduct of its work were adopted on 7 November 2002, and amended on 10

European Court of First Instance in the European Union – ICFI- and the European Court of Human Rights) or global administrative reviewing bodies (*e.g.* the WTO Appellate Body[22]) upon domestic administrations and global administrations.

The main example are World Trade Organization (WTO) agreements, that establish requirements to disclose information (*e.g.* concerning antidumping duties) and promote transparency (which is a general principle of the original GATT - article X - *e.g.* concerning subsidies and countervailing measures, expanded to the new realms of GATS[23] - article III - and TRIPS[24] - article 63º -), the duty to give reasons (*e.g.* relating to definitive safeguard measures), the duty to follow a notice and comment procedure (*e.g.* relating to setting standards for product safety), the duty to conform to requirements of reasonableness, proportionality, confidentiality and fair process (*e.g.* concerning certification and control proceedings as for foreign products).

It is argued that besides these cases, "more fragmentary but significant normative practice is already evident, and may be expected to develop further, in the practice of many other bodies", such as intergovernmental agencies and nongovernmental agencies whose actions affect private parties directly[25].

The functions of the World Bank Inspection Panel is presented as an example of the former[26], as it may issue reports and recommendations in cases of allegations

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April 2003, 21 December 2005, 29 November 2006, 12 February 2007, 9 December 2008, 22 July 2010, 26 January 2011, 30 November 2011, and 15 April 2013.

22. In *United States-Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp–Turtle)*, the Office of United States National Marine Conservation imposed an embargo on the importation of shrimp from countries that used fishing methods harmful to marine turtles. India, Malaysia, Pakistan, and Thailand claimed that this domestic administrative decision has violated Article XI of the General Agreement on Tariffs and Trade 1994 (GATT 1994), which establishes the prohibition on arbitrary discrimination between countries. The WTO Appellate Body upheld the claim arguing that in the course of the certification it was not granted process neither formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, nor it was provided the right to receive notice of a denial of certification, the right to a formal written, reasoned decision and the right for review. In doing so, the principle of due process was imposed upon a state administration. See S. CASSESE, *Global standards for national administrative procedure*, in *The emergence of global administrative law, Law and Contemporary Problems*, LXVIII-3-4, 2005, pp. 109-126.

23. General Agreement on Trade in Services (GATS) was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT) and is the first multilateral trade agreement to cover trade in services and works as a framework, specifying the obligations of the members concerning non-discrimination, transparency and domestic regulation.

24. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a multilateral agreement on intellectual property administered by the WTO.

25. KINGSBURY, *The Administrative,* p.147.

26. Another example is given by the construction of the theory of 'indirect effect' by the WTO Panel. Although recognizing direct effect - under which obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals - is not imposed as a basic feature of WTO law, in the Report of the WTO Panel of 22 December 1999, *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152/R, at para. 7.72., footnote n.º 661, the panel notes that "The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals" and adds at para. 7.78 that it " may, thus, be convenient in

of non-compliance with the WB policies presented by individuals or collective entities, although cannot halt or modify non-conforming projects.

Review mechanisms and procedural principles established in the International Olympic Committee´s drug code under the supervision of the World Anti-Doping Agency are the most impressive example of adopting of voluntary codes of conduct by the latter, but it is recognized that most of the nongovernmental organizations and private entities are not subject to any procedure or accountability mechanisms or its practice is episodic and fragmented and relies in a voluntary basis.

"The pattern that emerges from these and other, often embryonic mechanisms is not yet coherent: such mechanisms and principles operate in some areas and not in others, and diverge widely in their forms. Yet the overall picture is of widespread, and growing, commitment both to principles of transparency, participation, reasoned decision and review in global governance, and to tempered but reasoned principles related to protecting security information, commercial confidentiality, and negotiating effectiveness"[27].

In sum, the main purpose of the 'Global Administrative Law' movement is to discover and to promote the application and developing of such principles and mechanisms of accountability in global space through the "*building of a global administrative law"*[28].

Different normative conceptions of the role of Global Administrative law, related to different models of international ordering (pluralism, solidarism and cosmopolitanism patterns) are, thus, presented: insurance of internal administrative accountability, protection of private rights (which may include the rights of states) and promotion of democracy[29]. Nonetheless, they all share the same scope: assessing "the operation of existing or possible principles, procedural rules, review mechanisms, and other mechanisms relating to transparency, participation, reasoned decisionmaking, and assurance of legality in global governance"[30].

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the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect". The theory of 'indirect effect' is based on a consistent interpretation approach according to which, when domestic law is open to more than one interpretation, the one to be chosen is that consistent with the international agreements which are part of state law.

27. KINGSBURY/KRISCH/STEWART, *Foreword: Global Governance as Administration - National and Transnational Approaches to Global Administrative Law,* LXVIII- 3-4, *Law and Contemporary Problems*, 2005, p. 4.

28. KINGSBURY/KRISCH/STEWART, *The Emergence,* pp. 26-29.

29. *Ibidem*, pp. 42 ff.

30. The conception of the scope of GAL seems to be shared by the Viterbo scholarship. S. CASSESE e al., , Foreword, p. XXIIII, state that "*the global regulatory space has developed principles and rules that are mainly administrative in nature, relating to the due process of law, procedural fairness, transparency, participation, duty to give reasons, and judicial review*. At XXVI, the authors add that "*there is a well-developed administration, governed by a well developed set of administrative laws, in the global space*» which requires "*the development of a new set of conceptual and institutional tools*». Also S. CASSESE, *What,* p. 14, declares that a "*global administrative law has thus developed, in terms of which global regimes are encouraged, and sometimes compelled, to ensure and promote the rule of law and procedural fairness, transparency, participation, and the duty to give reasons throughout all areas of their activity*». On a critical assessment of the project's politic agenda and ability to include alternative, including 'Southern' perspectives in its conceptual elaboration, see CAROL HARLOW, *Global Administrative Law: The Quest for Principles and Values*, European

As stressed by DAVID DYZENHAUS, "GAL scholars have focused on equivalents or potential equivalents to procedural administrative law, thus neglecting constitutive or substantive administrative law. Moreover, that focus has been couched in an idiom of accountability. From the perspective of a domestic administrative lawyer, it seems then that GAL scholars operate with the implicit assumption that global bodies are public legal authorities that make substantive legal decisions, so that they can turn to the question of how best to make the bodies accountable"[31].

Indeed, the field of global administrative law does not encompass the totally of global rules governing global administrative action, being clearly assumed that it does not cover constitutive or substantive administrative law, option that is justified by the argument that "conceiving the field in such broad terms would likely generate an unmanageable research agenda at this early stage in its development, and would obfuscate the normative commitments entailed in work on global administrative law"[32].

3. The Concept Of Law In Gal Project

It has been noted that GAL researchers for a long time have adopted a pragmatic approach, assuming that a global administrative law exists and directing their attention into case studies and area-analyses focused exclusively in assessing the question of the accountability of the global administration entities, bypassing the question of the concept of GAL and its legal status[33] and other theoretical analyses[34].

However, since it is argued that global administrative law sources are not limited to the formal sources of international law – treaty, custom and general principles of law – and also "includes informal institutional arrangements (many involving prominent roles for non-state actors) and other normative practices and sources that are not encompassed within standard conceptions of 'international law'", such as "norm-guided practices that are in some cases regarded as obligatory, and in many cases are given some weight, even where they are not obviously part of national (state) law or standard inter-state law"[35] , to ground the normative basis for this assumption has revealed to be crucial.

Endeavoring to support the concept of law in GAL project, KINGSBURY has

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Journal of International Law, n.º 17, 2006, pp. 187 ff. ; SUSAN MARKS, *Naming Global Administrative Law*, *New York University Journal of International Law and Politics*, 2005, pp. 37 ff., and B.S. CHIMNI, *Co-option and Resistance: Two Faces of Global Administrative Law*, New York University Journal of International Law & Politics, n.º 37, 2005, pp. 799 ff..

31. DAVID DYZENHAUS, *Accountability and the concept of (Global) Administrative Law*, IILJ Working Paper 2008/7, Global Administrative Law Series, p.2.

32. *Ibidem*, pp. 26-29.

33. DAVID DYZENHAUS, *Accountability,* p. 5.

34. To an assessment of the epistemological foundations of the GAL project, see INO AUGSBERG, *Observing (the) Law: The 'Epistemological Turn' in Public Law and the Evolution of Global Administrative Law*, in *Regulatory Hybridization in the Transnational Sphere*, Jurcys/Kjaer/Yatsunami eds., 2013, p. 11.

35. BENEDICT KINGSBURY, *The Concept of 'Law' in Global Administrative Law*, in European Journal of International Law, XX, , n.º 1, 2009, p. 26

proposed to use a positivist theory of law based on H.L.A. HART doctrine, avoiding, for obvious reasons, classical models of positivist theories which clearly distinguishes legal orders from other normative orders (as religion and moral order) and legal authority from other sources of authority or relevant influence based on the concept of a command power of a determinate sovereign backed by efficacious and legal sanctions.

Accordingly to the Hartian theory, the legal system is a system of social rules[36] and there is no logically necessary connection between law and coercion or law and moral. The law nature and its functions can only be understood considering the viewpoint of the community whose law it is. A legal system comprises two elements: primary rules and secondary rules. *Primary rules* are standards of behavior for the society, rules that impose duties or obligations on individuals. *Secondary rules* are concerned with the primary rules and include: (i) rules of recognition, (ii) rules of change and (iii) rules of adjudication. The character of a legal system derives, therefore, from the union of primary rules with the secondary rules.

'*Rules of recognition'* are necessary in order to provide an authoritative statement of all the primary rules and to delimit the boundaries with moral, etiquette or private wish. Hart states that the foundations of a legal system consist of adherence to, or acceptance of, an ultimate rule of recognition which determines which rules are binding and by which the validity of any primary or secondary rule may be evaluated rule[37]. Every legal system inevitably contains one, and only one, rule of recognition. According to Hart, a simplest version of the rule of recognition in the English system is whatever the Queen in the Parliament enacts is law. Legal laws are binding because rules of behavior are commonly obeyed by the citizens and they are accepted by the community (or at least, by a substantial part of it, namely by officials), in the sense that the rule of recognition that sets out the criteria of legal validity is commonly accepted from 'the internal point of view', *i.e*., the inner point of view of individuals who are governed by the rules of the legal system and who accept these rules as standards of conduct (and not as just habits)[38].

The function of '*rules of change'* is to allow legislators to create, modify or extinguish primary rules if these rules are found to be defective or inadequate or to assign private parties the right to create or alter primary obligations. Besides conferring this power of changing the primary rules on a person or institution, these rules usually establish the procedures to be used in exercising that power[39].

'*Rules of adjudication'* enable courts to resolve disputes over the interpretation and application of the primary rules, i.e., to determine whether a rule has been satisfied or violated on a particular occasion according to a specified method[40].

Departing from the consciousness that 'Global administrative law' is not an es-

36. In the dual sense that the rules are 'social' because they regulate the conduct of members of societies and also they are derived from human practices. For Hart's theory of social rules, see H.L.A. HART, *The Concept of Law*, Clarendon Press, Oxford, 1994, pp. 54-56 and pp. 86-88.

37. H.L.A. HART, *The Concept*, p. 110.

38. H.L.A. HART, *The Concept*, p. 110.

39. H.L.A. HART, *The Concept*, p. 95.

40. H.L.A. HART, *The Concept*, p. 97.

tablished field of normativity and obligation in the same way as 'international law' and that "there is no single legal system of GAL or global governance law with a common rule of recognition" - as a "convincing rule of recognition for a legal system that is not simply the inter-state system has not been formulated" - Kingsbury argues that there are "different rules of recognition within different social-institutional-sectoral groupings in specific practice areas of global administrative law"[41].

The central idea is that the lack of a general rule of recognition is not an obstacle to a positivist approach since it is possible, by an extension or modification of the Hartian theory, to regard the rule of recognition as encompassing not only the classical sources of international law (treaties, customary international law and general principles of law) but also the key concept of '*publicness*'. By '*publicness*' "is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society". So, the rule of recognition is understood as including "a stipulation that only rules and institutions meeting publicness requirements immanent in public law (and evidenced trough comparative materials) " may be considered as law, as, for example, the principles of legality, rationality, proportionality, rule of law and protection of human rights[42].

KINGSBURY's view is far from convincing. First of all, as ALEXANDER SOMEK has pointed, the amendment to the rule of recognition by an additional element of publicness "*infuses GAL with a natural law component*" and the result is a kind of "*natural administrative law, or NAL*"[43].

We are not rejecting the possibility of a *jus naturalae* approach neither stating that the definition of law must be strictly positivist. We just are emphasizing that KINGSBURY's proposal to consider '*publicness*' as a rule of recognition is not conceivable in HART's theory[44] due to the fact that HART's rule of recognition is a rule of positive law, not just an extra-legal juristic hypothesis. In fact, the existence of a rule of recognition is the feature which distinguishes which things are law and which are not, and also provides a means for identifying the law in a morally neutral approach.

According to KINGSBURY's theory, it seems that simple practices are regarded as law, even when we cannot find an authoritative source and a rule of recognition, just because they were produced in a way that is regarded as promoting values of publicness and accountability at the global space. On the contrary, if there is a practice that does not fit in the goals required by GAL project, it seems it cannot be considered as a social fact originating law although it consists in an established practice accepted by the global regulators and the public affected. KINGSBURY clearly states that the rule of recognition is understood as including «*a stipulation that only rules and institutions meeting publicness requirements immanent in public law (and evidenced trough comparative materials»*

41. KINGSBURY, *The Concept*, pp. 29-30.

42. KINGSBURY, *The Concept*, pp. 30-31.

43. ALEXANDER SOMEK, *The Concept of 'Law' in Global Administrative Law: A Response to Benedict Kingsbury*, European Journal of International Law, n.º 20, 2009, p. 990.

44. Kingsbury's approach was also criticized by MING-SUNG KUO, *The concept*, for "reconstructing Hart's positivism in light of Fuller's concept of 'inner morality of law'".

may be considered as law[45]. However, we stand that it could not follow from the mere fact that a rule does not fit publicness that it is not law.

Secondly, and most important perhaps, KINGSBURY recognizes himself that there is no common rule of recognition in GAL or global governance law – which is critical when endorsing HART's theory of law as a social fact since the HART's thesis that a rule of recognition, and only one, exists in every legal system is the distinctive mark of his positivistic theory of law.

Thirdly, some practices of GAL entities can be regarded as a social rule and, thus, as a legal rule, as long as they generate an internal sense of obligation felt by addressees which "*is justified (and perhaps required) by what is intrinsic to public law as generally understood*"[46]. The addressees seem to be identified among the regulators and not among individuals subject to regulation or other interested parties[47], which would be hardly compatible with HART's theory. The truth is that there is some ambiguity in the presentation of the theory and it is doubtful which is actually the position sustained.

On one hand, it is claimed that both "*internal attitudes actually held by leading participants and by those dealing with and critically evaluating them and their practices*" is a basic presupposition of the existence of law[48]. On the other hand, it is stated that it is required "*an internal sense of obligation toward it, as well as agreement among key officials that the source from which it comes is a source capable of generating legal rules"* and that operationalization "*in terms of entities rather than publics is likely to be juridically much more practicable*" despite global public entities are not commonly an adequate representative of the relevant publics which are affected[49].

Applying this concept of law, it is stated, for example, that the guidelines, recommendations, best practices, informal committee or secretariat interpretations produced by international organizations can be regarded not as soft law but instead as legal norms based on HART's theory of law. "*To be a legal norm, the norm must originate in an authoritative source, which ordinarily involves creation or endorsement of the norm by an inter-state organ (IO) and/or some acceptance of the norm by states (thus the sectoral normative order may be significant in practice for the status of a particular norm which is part of that order, or falls outside it.) As to relatively technical areas of very specific IO practice the set of authoritative sources and their application in doubtful cases may be determined by the recognition practice of the key actors in the specific community of expertise on the subject matter and normative regime involved. Thus there is a rule of recognition in Hart's sense, but for these purposes it is not a general rule of recognition covering the whole of international law, but a rule of recogni-*

45. This is expressly assumed by the author, so we cannot say that publicness is just a descriptive and ideal criterion as he regards publicness as including the very rule of recognition.

46. KINGSBURY, *The Concept,* p. 30.

47. Criticizing Kingsbury conception of law for grounding the rule of recognition "not on the publics where the notion of publicness is substantiated, but instead» on the "entities which exercise regulatory powers», see MING-SUNG KUO, *The concept of 'law' in global administrative law: a reply to Benedict Kingsbury,* in *European Journal of International Law*, XX - 4, 2010, p. 1000.

48. KINGSBURY, *The Concept,* p. 29.

49. KINGSBURY, *The Concept,* p. 29 and p. 56.

tion among a narrower set of specialized actors. Where the norm-generation or norm-acceptance is only shakily related to the will of states, a relevant factor for outsiders in deciding what weight to give to the norm may be the ways in which it was produced, that is adherence to standards of publicness and desiderata of GAL"[50].

Fourthly, we think that is useful and necessary to distinguish legal norms and non-legal norms, binding ('hard') and non-binding ('soft') law, as it is indispensable to separate the level of how each global regulatory entity actually develops its activities and how 'it ought to be' developed.

Referring to the clear-cut dichotomy between legal and non-legal prescriptions in domestic orders, Cassese raises the issue whether in the global space we must concede "*that anything that is not binding is, ipso facto, not law*", holding that if "*there is an area of law in which the Latin motto "ubi societas, ibi ius" holds true, then surely this must be the global arena*"[51]. As respects to the dichotomy binding ('hard') and non-binding ('soft') law he argues that "*a formally binding commitment to obey a rule*" is not "*the only means of producing rule-conforming behavior",* sustaining that even *"in domestic legal orders, not all rules are binding or compulsory. National legislation also establishes incentives and issues guidelines; it seeks not only to compel, but also to promote, to correct, to educate, and so on"*[52].

In our opinion this is a misleading way of putting these questions. The issue of the legal or non-legal nature of a certain act or instrument and its bindingness or non-bindingness is not merely an academic exercise of classification. A legal rule creates a legal situation or a legal relationship which involves the application of a legal regime. The law creates legal rights and legal duties. Once there is a legal duty the addressed is obligated to comply. Once there is a legal right it is recognized the power to demand their respect by the others subjects or, at least, the right to damages compensation (liability).

There is a great difference between accomplishing procedural requirements policies in a voluntary basis and be subjected to the legal duty to do so. If, for example, the World Bank decides not to perform an environmental impact assessment or other procedural requirements that are established in policy instruments, it has not committed an unlawful act of which may emerge civil liability or other legal mechanism of legal review. The fact that Private parties are allowed to ask for compliance does not mean that they have the legal right to demand compliance as all depends on the will of the author of the policy to prosecute it or not, as well

50. KINGSBURY/ CASINI, *Global Administrative Law Dimensions,* pp. 353-354.

51. CASSESE, *What,* p.4. He gives the example of many World Bank 'legal' instruments that "are simply referred to as "policy" documents; yet in many cases these can scarcely be considered less important than statutes passed by national parliaments. They regulate important aspects of the Bank's activity, such as the duty to perform an environmental impact assessment, and all relevant procedural requirements. Private parties in India or South Africa can appeal to these standards, and ask that global and national governance bodies comply with them."

52. CASSESE, *What,* p. 5. "An example from the global arena is provided by the standards generated by the Codex Alimentarius Commission. These are not, in and of themselves, compulsory; they are, however, in effect given binding force by the World Trade Organization. One authority produces rules, another endows them with binding force. The rule is not binding from its inception, rather only becoming so because another authority imposes conformity upon those under its jurisdiction."

to establish or maintain internal mechanism designed to ensure it.

The concept of soft law is well known by International law practitioners, albeit its status, existence and utility are highly controversial and debated[53]. But one thing is certain. Rather than attempting to qualify every single practice as hard international law, it is assumed the need for assessing, case by case, the legal nature of an instrument using substantial, procedural and formal criteria.

For instance, if a memorandum of understanding is agreed by the International Monetary Fund (IMF) and a State in the context of its request for financial support from the IMF[54], the nature assigned to the agreement is crucial in order to determine the rules applicable to that relationship, particularly what are the consequences in case of non-compliance and whether is possible to either party unilaterally modify the conditions contemplated for implementing of financial support.

The dominant thesis argues that there isn't any agreement and thus the funding is based in mere unilateral acts of the State and the Fund[55]. Sir Joseph Gold, the formal Legal Counsel of the IMF, has declared letters of intent avoid using promissory language because the Fund's stand-by arrangements are not considered to be a contract, but an instrument of soft law, which lacks agreed legal bindingness. Thus, if the letter of intent sent by the government to IMF in request of the exercise of its rights to utilize the general resources of the IMF bore the characteristics of being an unilateral act by the government and the Fund arrangements shares the same nature, these acts would be unilateral acts with a mere political nature, not formally binding the State or the IMF. Hence, a unilateral act may be revoked unilaterally by its author.

On the contrary, if the State intended to make a public declaration that it should become bound according to its terms, the International court of Justice considers that an intent to be bound, "*confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration*"[56] and thus cannot be revoked unilater-

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53. JAN KLEBBERS, "*The Redundancy of Soft Law",in Nordic Journal of International Law* n.º 65, 1996, pp. 167 ff quoting the pertinent literature. We consider that instruments of soft law should be an object of analysis by International law although they can not be qualified as formal sources of this legal order.

54. *E.g.*, the *Memorandum of Economic and Financial Policies*, agreed between the Portuguese authorities and IMF in 17 May 2011 under the Extended Fund Facility.

55. This thesis is supported on the Article XXX, al. b) of IMF Agreement, that suggests the unilateral nature of the traditional instrument of Credit 'stand by': "Stand-by arrangement **means a decision of the Fund** by which a member is assured that it will be able to make purchases from the General Resources Account in accordance with the terms of the decision during a specified period and up to a specified amount". In addition, paragraph 23 of the Guidance on the Design and implementation of IMF Conditionality: Preliminary Considerations, IMF, 2002, establishes: "Nature of arrangements. Fund arrangements **are not international agreements** and therefore language having a contractual connotation will be avoided in arrangements and in program documents". See LEONIE F. GUDER, *The administration of debt relief by the international financial institutions:a legal reconstruction of the HiPC initiative*, Berlin/Heidelberg/New York, 2008, pp. 152 ff. In the same sense, see EDUARDO CORREIA BAPTISTA, "*Natureza jurídica dos memorandos com o FMI e com a União europeia*" in Revista da Ordem dos Advogados, 71, II, april/june 2011, pp. 480 ff

56. See *Nuclear Tests (Australia v. France)*, Judgment, December 20, 1974, *I. C. J. reports*1974, p. 267, paragraph 43.

ally.

It is also possible to consider that, regarding the intense negotiations and the need to reach to an agreement between both sides, the State and IMF actually conclude a treaty, in which case they are subjected to the *pacta sunt servanda* principle and cannot revoke or modify the conditions established in the agreement without mutual consent.

Thus, it seems clear that a binding or non-binding act or agreement produces different effects and has distinctive consequences. The consequences of non-compliance with the conditions prescribed by an act or agreement of nature policy are just political. The injured party for breach of conditions can employ means of extra-juridical sanctions, such as public criticizing in the media, breaking off of diplomatic relations or interruption of current negotiations and other forms of retorsion but surely cannot demand civil liability or require in a judicial court compliance with the conditions that were set out.

Regarding the argument that the law does not have the monopoly of producing rule-conforming behavior, it is undeniable that there are several non-legal means to promote compliance and that they can be extremely effective. For example, standards produced by private entities are implemented by the introduction of incentives for compliance and certification and accreditation mechanisms. But standards are not law.

Indeed, there are distinctive types of authority. The private authority in global governance exercised by non-state actors namely, 'market authorities' (*e.g.*, private market institutions engaged in the setting of international standards) and 'moral authorities' (*e.g.,* environmental non-governmental organizations), is non-state based (it is not a public authority nor derives from any power delegation of the state) and its origin does not come from law but from legitimacy. They have (i) 'discursive power', related to the (re)framing of discourses, *i.e.,* the power to influence and embody international relationships and politic discourse with the values, ideas and concepts that they defend, (ii) 'decisional power', concerning to policy making and political influence and (iii) 'regulatory power', referring to rule-making and standard-setting. They take decisions, make rules, and develop policies and practices that are recognized as legitimate by the subjects, as they were entitled to do so, due to factors such as credibility, persuasion, expertise and trust[57].

The fact that the State also develops its functions by non-authority models of command and control, using instruments to incentive and promote conducts that not have a binding or compulsory nature is not comparable to this phenomenon. First and foremost because the state action relies not from the referred forms of authority based on legitimacy but on the law and the accomplishment of its public functions (legal authority). When the State gives subsidies or concludes contracts this activity is ruled by specific legal norms and is subjected to the general principles, constraints, limits and controls of the administrative activity. Furthermore, at least in legal systems that have an administrative law, the States make use of the same forms and techniques developed historically to command and control activities: the practice of administrative acts, the emission of admin-

57. R. B. HALL /T.J. BIERSTEKER, *The emergence of private authority in global governance*, Cambridge University press, 2002, pp. 4-5.

istrative rules and the celebration of administrative contracts. By virtue to the legality principle, the informal or non-binding arrangements have a very limited and narrow scope of action.

4. Preliminary And General Conclusions: Gal As A Grail (Goals Required To A Kind Of An Administrative International Law)

In this regard, we must conclude that it not possible to declare at the present day the existence of a Global administrative law[58], in the sense that there is not a coherent and systematic set of legal rules and principles, counterposed to domestic administrative laws, governing the creation and organization of the entities that act in the transnational space, defining the scope of its responsibilities and regulatory competencies and the means and forms of the exercise of powers and duties.

On the contrary, we must be aware that GAL merely names an academic project to promote and develop a new global order ruled by procedural principles of transparency, participation, review and accountability.

Even in a stricter sense, bypassing the lack of general constitutive or substantive administrative rules, it cannot be stated the existence of a unitary body of global procedural law[59]. There are some entities acting in the international or global field, besides the domestic administrations, that are subject to some accountability mechanisms and some who are not. Within the former case, some are legal mechanisms, some are voluntarily adopted and others derive merely from non-binding practices. Identified and positive legal mechanisms are not uniform and vary according to the applicable legal regime.

Thus, there is not a global administrative law but a range of global administrative laws or legal regimes and practices. At a minimum, the designation adopted should be used in the plural form ('Global administrative laws') and highlight that it concerns not only laws but also simple practices ('Global administrative laws and practices').

On the other hand, GAL project is built on two types of analysis: a descriptive analysis of the *status quo* - related to the observation and description of the phenomenon of global regulation by other entities besides the states and the emergence of some principles and mechanisms governing its action - and a normative analysis. The normative analysis is concerned with 'what it ought to be' (and, thus, argues the referred phenomenon should be pointed as administrative regulation and the existing principles and mechanisms should be regarded as admin-

58. LUÍS COLAÇO ANTUNES, *O Direito administrativo sem Estado,- Crise ou fim de um paradigma?*, Coimbra editora, 2008, p. 64, argues that is not possible to recognize the existence of a global administrative order due to the fact that relationships in global space are often regulated by soft law and the legal norms are fragmented and plural.

59. KINGSBURY/ KRISCH/ STEWART, *Foreword,* pp. 2-3, state that the "growing commonality of these administrative law-type principles and practices is building a unity between otherwise disparate areas of governance". However, at 13, they conclude that "Global Administrative Law is emerging in different ways in different settings involving different types of regimes and subjects of regulation, building different structures and procedures of accountability, to suit different needs, in response to different actors and incentives".

istrative ones) and 'how it ought to be' controlled: by the applicability or adaptation , whether through domestic or non-national institutions, of procedural (and some substantive) tools and techniques developed in domestic administrative law (in a bottom-up approach) or at the global level (in a top-down approach) to guarantee participation, transparency, accountability, and review, including the construction of "*wholly new techniques and approaches that utilize basic administrative law ideas and values*"[60].

Considering the normative thesis, we argue that the adoption of the expression GAL is inaccurate and misleading and should be accurately characterized as a sort of an academic holy *GRAIL: Goals Required to a kind of an Administrative International Law*.

5. The Role Of Gal And The Need To Recognize An Important Role To The Development And Adaptation Of Domestic Administrative Law And Constitutional Law, As Well To International Law

It is common ground that globalization has brought radical changes not only in economy, social and culture matters but also at the international relations level and its legal order and practices that affected deeply the domestic legal orders. Globalization has implied the opening of both local and international perspectives to a broader outlook of an interconnected and interdependent world which rules do not depend anymore structurally on state governments. In particular, if historically administrative law has sprung from national states and was thus fundamentally state law, nowadays we assist to a denationalizing dynamic caused by regional integration phenomena, such as European integration, the development of international law towards models not based in state consent and the rise of private actors playing in the global space that has blurred the traditional dichotomies of national and international law, on the one hand, and public and private law, on the other.

The discovery of complex and transnational legal relationships is not however new. In 1956 Philip Jessup presented the definition of transnational law as "all law which regulates actions or events that transcend national frontiers"[61], pointing out the emergence of complex legal structures of cross-border relationships and the need to integrate and consider the role of supra-states or substates entities and private actors (individuals, corporations and associations) in the international legal field. Mindful that "the term of international is misleading since it suggests that one is concerned only with the relations of one nation (or state) with other nations (or states)"[62], he proposed the term 'Transnational law' that "includes both civil and criminal law aspects, it includes what we known as public and private international law, and it includes national law, both public and private"[63] "and other rules which do not wholly fit with those standards categories"[64].

The idea itself of a 'global law without the State' was defended earlier in consid-

60. KINGSBURY/ KRISCH/STEWART, *Foreword,* p. 3.
61. PHILIP JESSUP, *Transnational law*, Yale University Press, New Haven, 1956, p. 2.
62. *Ibidem*.
63. *Idem,* p. 106.
64. *Idem*, p. 3.

eration of the emergence of private law regimes creating private codes of conduct and even private 'constitutions' regulating their own law-making procedure[65].
The proclamation of GAL as a new field of law postulates, therefore, the need to justify its autonomy by reference to existing ones and to define and clarify boundaries between GAL and other branches of law, such as International Law, International Institutional Law (or, as it is also designated, International Administrative Law) and even other normative theories, as Transnational Law and Global Constitutionalism. Indeed, it is of utmost importance formulating their relationship to GAL in terms of strict separation or, on the contrary, recognizing, as we argue, an interconnection and even an overlapping of field of studies.
Unlike the GAL proponents usually argue, International Law can be no longer identified with the law established between the governments of States to regulate relations between States. Indeed, the large majority of international public law scholars also recognize that the term 'international law' is not exclusively applicable to inter-governmental relations, although it can be observed that Anglo-Saxon scholars tend to sustain a rather restrictive approach in this matter.
First, the latter part of the 20th century was signalized by the growth of Inter-governmental organizations (IOs), civil society groups or movements as well as the rise of individuals as subjects of international law, such a way that many advocates that is should be defined as the law that rules the international community, or, in another point of view, the international society. A tendency towards recognizing even to NGO's or private companies international legal personality and a legal status in modern doctrine is visible[66].
Second, the normative structure of the international order is currently characterized by an interconnected plurality or network of entities and sources of law. It cannot be stated no longer that international law is exclusively a consent-based system. Several manuals of international law dedicate particular attention to the normative decisions produced by International organizations in the chapters concerning sources of international law[67] and their role as law-makers has been

65. GUNTER TEUBNER et al., *Global Law without the State*, Aldershot, Darmouth, 1997.

66. KARSTEN NOWROT, *Legal consequences of globalization: the status of non-governmental organizations under International law*, in *Indiana Journal Of Global Legal Studies*, n.º 6, 1999, pp. 579 ff.; ANNA-KARIN LINDBLOM, *Non-governmental organisations in International law,* Cambridge University press, 2005, pp. 79 ff.; MALCOLM SHAW, *International Law*, 4th ed. , Cambridge University press, 2005, pp. 191-195; JAN KLEBBERS, *International Law*, Cambridge University press, 2013, 4th reimp. 2014, p. 37 and pp. 88-89; JÓNATAS MACHADO, *Direito Internacional: do paradigma clássico ao pós-11 de setembro,* 3ª ed., Coimbra editora, 2006, pp. 271-275; DOMINIQUE CARREAU/FABRIZIO MARRELLA, *Droit International,* 11th ed., A. Pedone, Paris, 2012, pp. 465 ff.

67. For instance, MALCOLM SHAW, *International Law*, pp.; JAN KLEBBERS, *International Law*, p. 38; NGUYEN QUOC DINH/PATRICK DAILLIER/ALAIN PELLET, *Droit International Public*, 7th ed., LCDJ, Paris, 2002 pp. 364 ff. ; DOMINIQUE CARREAU/FABRIZIO MARRELLA, *Droit International*, pp. 265 ff.; JÓNATAS MACHADO, *Direito Internacional,* pp. 129-130; JORGE MIRANDA, *Curso de Direito Internacional Público*, 2n ed., 2004, Principia, Cascais, p. 47 ff.; MARIA LUISA DUARTE, Direito Internacional Público e ordem jurídica global do século XXI, Coimbra editora, 2014, pp. 143 ff. See also VERHOEVEN/DOMINICÉ/VALTICOS, *Les activités normatives et quasi normatives des organisations internationales,* in *Manuel sur les organisations internationales*, RENÉ-JEAN DUPUY, 2nd ed., 1998, Academie de Droit International, Martinus Nijhoff Publishers, pp. 413 ff.

subject to specific studies[68]. We cannot subscribe, thus, the view that the field of studies that is specialized in the analysis of the law of international organizations, usually known by the expression 'international institutional law' or 'administrative international law', is focused mainly in their "internal features (like the relations between international organizations and their employees)"[69]. Moreover, it has been proposed recently that 'international institutional laws' is a broader and more generous concept than the expression 'law of international organizations' since it allows into its scope not just formal organizations but rather all sort of institutions that exercise public authority at the international level[70].

On the other hand, the role of non-governmental organizations and other private actors in the making of international law is also being debated[71]. It is also important to stress that general principles of international law were conceived historically as a new source of international law that cannot be traceable back to expressions of consent by states since they have their roots in human society. As pointed out by ANTONIO CASSESE, the Permanent Court of International Justice and the International Court of Justice "relied on principles of legal logic or general jurisprudence" that "were not identified through a detailed investigation of the legal systems of the various members of the international community" and thus, "they were not applied *qua* general principles obtaining in *foro domestico*, but as general tenets capable of being induced from the rules of international law or deduced from legal logic"[72].

Third, the subject-matter of international law has continuously expanded over the past decades and entered into several and most distinctive areas such as the regulation of migration and employment, telecommunication, transport, education, environment, health care, food, animal protection, energy networks, licens-

68. V.E.YEMEN, *Legislative powers in the United Nations and specialized agencies*, Leiden, Sijthoff, 1969; JOSÉ E. ALVAREZ, *International organizations as law-makers*, Oxford University press, 2006.

69. CASSESE, *Administrative law without the State?,* p. 668, footnote n.º 43. In the same sense, KINGSBURY/ KRISCH/ STEWART, *The Emergence of Global Administrative Law,* p. 28, albeit considering it as one component included in the field of GAL and recognizing the existence of others perspectives, define 'international administrative law' as "the rules, procedures and institutions through which international organizations deal with employment disputes and other internal matters". Initially, the first observers of the phenomenon of the emergence of IOs as new subjects of International Law had focused on the nature and the content of the norms created by IOs, naming the new field of studies as 'international administrative law'. PAUL NÉGULESCO, *Principes du Droit International Administratif* , in *Recueil des cours de l'Académie de droit international*,T. 51, I, 1935, p. 593 had proposed that International administrative law was " a branch of public law that, examining the legal phenomena which together constitute international administration, seeks to discover and specify the norms that govern this administration and to systematize them ". Afterwards, scholars start to study the nature of the OI, theirs administrative structures and institutions, their responsibilities and competences and their procedures, regardless of being external or internal actions, adopting the expression 'the law of international organizations' or 'international institutional law'. For an analysis of the evolution of this field of studies and its autonomy, see JAN KLEBBERS, *The paradox of International Institutional Law*, in International Organizations Law review, n. º 5, 2008, pp. 1 ff.

70. JAN KLEBBERS, *The paradox,* pp. 22-23.

71. ANNA-KARIN LINDBLOM, *Non-governmental,* pp. 366 ff..

72. ANTONIO CASSESE, *International law in a divided world*, Claredon Press, Oxford, 1986, p. 173.

ing of medicines, consumer protection, to name but a very few, that largely go beyond traditional intergovernmental relationships. Though, international public law covers the vast normative framework concerning all the different subjects of international law and matters that are object of normative regulation.

In our opinion, the main problem of Global administrative law project is that it seeks to find a unity of problems and solutions for phenomena which main feature is precisely the fragmentation, the sectoral nature of the regimes and the broad range of entities involved. The differences are remarkable in terms of the nature of the actors (private and public, national, infra-national or supra-national), the addressees of the global regimes (states, domestic agencies or officials or directly individuals and corporations), the powers (rule-making, adjudications, control, supervision, management, coordination, cooperation, participation, implementation), the forms of acting involved (treaty norms, non-binding agreements, unilateral normative decisions, guidelines, recommendations, best practices, informal interpretations) and the different degrees of regulation density and correlative diversified needs to supplementary regulation and implementation mechanisms (created among global administration or relied on national authorities).

We argue that it is not convenient and may even prove to be harmful and counterproductive to deal with realities that are not identical and, thus, deserve differentiated solutions, as they could share the same nature. As Prosper Weil has once stated: "At a level of global comparison all human being resemble: at the level of fingerprints no man is similar to another"[73]. Precisely for that reason, we consider that others approaches are preferable, as the one proposed by Max Plant researchers, focused in developing a legal framework for the legal analysis of the public authority exercised by international institutions or , as we argue, the development of international law.

Our proposal to plainly distinguish the legal rules and non-legal rules does not involve, yet, that we should adopt a restrictive view of the global phenomena and focus exclusively in the analyses of classic international sources of law or domestic laws in a rigid and compartmentalized way.

The GAL project has undoubtedly highlighted a new field of studies and therefore, has catch the attention of legal experts and also of global actors to serious questions and concerns about the legitimacy and the legality of the new global order and boosted the development of hundreds of studies on specific issues that tended not to be addressed or were treated in vague terms.

Nonetheless, we do not share the view that GAL project is the only way to address problems and challenges that global governance has risen up. To address these issues proves to be of utmost importance to recognize the need to promote the adaptation of internal administrative law and constitutional law, as well of international law to the new emerging realities.

EBERHARD SCHMIDT-ASSMANN made a plea to a reconstruction and reshaping of national and international law in order to achieve a redefinition of the expression of 'international administrative law', understood as the administra-

73. PROSPER WEIL, *Le droit international économique*, in *Écrits de droit international*, PUFF, Paris, 2000, p. 96.

tive law originating under international law[74].

This does not mean by no way that the solution consists exclusively in turning back to the reinvigoration of the state or the role of the law, although in some matters it may be the right path to follow. For instance, in certain areas where issues of enormous importance and impact are being treated by informal arrangements, without any substantial and legitimate ground for it, a legal framework or a greater institutionalization should be established either by the state (or by other subject of international law), either by legal experts and researchers (e.g., formulation of doctrinal criteria to requalify an agreement deemed to be political in a treaty)[75].

We suggest that the branch of international law, including the study of international organizations, has an important role to perform in the analyses of the global entities activities on the global space. As is stressed by JAN KLEBBERS, the exercise of authority, on the global level, outside regular legal structures "pose challenges not just by throwing up new fields for regulation, but also, more fundamentally, by forcing international lawyers to rethink the tools of their trade, as "many of the classic concepts and categories of international law (…) have become outdated"[76].

In particular, we advocate a new conceptualization of the classical notion of international custom in order to overcome the current dogma of conferring relevance only to state practices as evidence of a general practice, which is no longer acceptable, considering the increasing dynamism of denationalization. In particular, we suggest that it should be explored the possibility of non-state practices, namely acts accomplished by global regulators (*e.g.,* IO's, ONG and private actors), to acquire the force of law (*opinio iuris*) and thus, being recognized as international customary law[77]. The notion of 'bilateral' or 'local' custom, under-

74. EBERHARD SCHMIDT-AßMANN, *The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship, in German law journal*, IX-11, 2008, p. 2077.

75. AN KLEBBERS, *International Law*, pp.38-39 notes that "where political action, including governance, in lo longer the sole prerogative of the states and their duty authorized representatives, a different criteria" for distinguishing between law and non-law is required. The author suggests "the better view is to propose a 'presumption of binding force'; normative utterances should be presumed to give rise to law, unless and until the opposite can somehow be proven. Thus, banking rules adopted by the Basel Committee or fisheries standards set under auspices of the Inter American Tropical Tuna Commission should be considered as law, unless it can be demonstrated that no normative effects were intended, or that not all relevant stakeholders were involved in the process of setting the standards."

76. JAN KLEBBERS, *International Law*, p. 16.

77. IAN BROWNLIE, *Principles of Public International law*, 5th ed., Claredon Press, Oxford, 1998, p. 5 states that material sources of custom are very numerous and include also, besides state practices, "*the practice of international organs"* and adds at footnote 15 that *«Custom apart from the practice of states may be influential, e.g., in the general law of sea*". NGUYEN QUOC DINH/PATRICK DAILLIER/ALAIN PELLET, *Droit International Public,* pp. 325-328 advocate that the practice can be performed by any subject of international law: states, but also IO, international courts, ONG and even private actors. At p. 327 the authors clearly sustain that practices performed by ONG, national liberation movements and even transnational private companies can be a source of international custom provided that there is not a strong objection from the major subjects of international law. Focusing specially in OI's, see GERARD CAHIN, *La coutume international et les organisations internationals (L'incidence de la dimension institutionelle sur le processus coutumier*), A. Pedone ed., 2001.

stood as a practice accepted as law by a circumscribed circle of key actors, well-known and accepted in International Law as a legitimate source of international custom, can be developed to cover these cases.

Another possibility that deserves further investigation is the recourse to the notion of general principles of law in order to aloud the recognition of the main principles of procedure law in certain global regimes and in major legal systems as general principles of international law.

In sum, GAL project has the merit of promoting research centered not only in formal sources of law and formal arrangements, emphasizing the need to get a wider and deeper understanding of how the phenomenon of global regulation is actually being developed and the urgency in subjecting this phenomenon to doctrinal analysis and theoretical reflection.

However, besides the descriptive thesis, we disagree with the normative thesis underlying GAL due to the fact that it seems too much general and suffers in general from a lack of rigor. We consider that GAL is not a global order distinct from International law and domestic law. It cannot be also restricted as a branch of international law as it encompasses the activity of actors at the domestic levels. Thus, GAL should be understood as a field of studies that is based upon a multidisciplinary perspective as long as it is recognized it is not centered in the concept of law. GAL researchers can provide a major contribution to the gathering and processing of information from existing practices and non-binding instruments on which to base the emergence of a custom or a general principle of law and even another normative theories[78] to react against the phenomenon of global governance and the exercise of public authority that threats individual rights and collective self-determination without any constraints and controls.

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78. It should be stressed the emergence of other theories concerning the normative basis for the imposition of procedural requirements towards global actors. For instance, EYAL BENVENESTI, *The normative basis for the law regulating global governance institutions*, in The law of global governance (forthcoming), Global Trust Working Paper 4/2014, in http//global trust.tau.ac.il/publications, tried to ground accountability obligations of global governance bodies toward individuals affected by their policies by exploring three possible principles as possible candidates for such obligations: the rule of law, human rights and trusteeship.