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OF LAW OR A QUEST FOR AN ACADEMIC GRAIL –
A COMMENT ON ANA GOUVEIA MARTINS**

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RAMO DO DIREITO OU A DEMANDA DE
UM GRAL ACADÉMICO –
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COMENTÁRIO A ANA GOUVEIA MARTINS**

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Summary: 1. Introduction; 2. Brief overview of the paper: a) General remarks; b) The main thesis; c) Two methodological proposals; 3. Critical comments: a) The concept of legal order and the requirements to identify new branches of Law – the case of Global Administrative Law; b) Legal and non-legal norms in transnational space; c) Subjective requirements to the formation of International Customary Law and its relation with Global Administrative Law

Abstract: The text corresponds to the written, revised and updated version of the comment on the paper «Global Administrative Law: a new branch of Law or a quest for an Academic Grail» submitted by ANA GOUVEIA MARTINS, and was presented – as well as the paper itself – during the I Lisbon International Workshop on Global Administrative Law – «Global Administrative Law and the Concept of Law» (2014: 28th November). After a brief introduction (1.) and after presenting the main thesis and some of the doctrinal proposals put forward in the paper (2.), this comment is concerned to identify the main difficulties of this thesis and of those proposals (3.), essentially based (i) on the fact that some key concepts that would allow support that thesis and those proposals had not been accurately established and, on the other hand, (ii) on arguing that some of the problems raised in the paper are somehow misleading taking into account the GAL's real perspectives and ambitions. In doing so, the comment does not exceed the status of a partial analysis of GOUVEIA MARTINS' paper, which is why some of the issues raised by the Author are not even addressed.

Keywords: Global Administrative Law – Legal Order – Branch of Law – Legal Norms International Customary Law

Sumário: 1. Introdução; 2. Breve apresentação do artigo: a) Observações gerais; b) A tese principal; c) Duas propostas metodológicas; 3. Comentários críticos: a) O conceito de ordenamento jurídico e os requisitos para identificar novos ra-

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mos de Direito – o caso do Direito Administrativo Global; *b*) Normas jurídicas e normas não jurídicas no espaço transnacional; *c*) Requisitos subjetivos para a formação do Costume Internacional e a sua relação com o Direito Administrativo Global

Resumo: O texto corresponde à versão escrita, revista e atualizada do comentário ao artigo «Direito Administrativo Global: um novo ramo do Direito ou a demanda de um Gral Académico» de ANA GOUVEIA MARTINS, tendo sido apresentado – assim como o próprio artigo – durante o I Workshop Internacional de Lisboa sobre Direito Administrativo Global – «Direito Administrativo Global e o Conceito de Direito» (2014: 28 de novembro). Após uma breve introdução (1.) e depois de apresentar a tese principal e algumas das propostas doutrinárias avançadas no artigo (2.), o comentário preocupa-se em identificar as principais dificuldades dessa tese e dessas propostas (3.), essencialmente assentes (*i*) na circunstância de no artigo não terem sido estabelecidos com exatidão os conceitos de base que permitiriam sustentar aquela tese e fundar aquelas propostas e, por outro lado, (*ii*) no facto de se considerar que alguns dos problemas suscitados no artigo são relativamente equivocados em relação às perspetivas e ambições do GAL. Ao fazê-lo, o comentário não ultrapassa o estatuto de uma análise parcial ao artigo de ANA GOUVEIA MARTINS, razão pela qual algumas das questões suscitadas pela Autora não são sequer abordadas.

Palavras-chave: Direito Administrativo Global – Ordenamento Jurídico – Ramo do Direito – Normas Jurídicas – Costume Internacional

1. Introduction

ANA GOUVEIA MARTINS – who is a PhD Professor in the Law Faculty of the University of Lisbon, mainly dedicated to the Administrative Law with particular focus on Public Procurement matters² – submitted a paper facing *conceptual* problems around the *scientific status* of Global Administrative Law and its relative boundaries especially with Public International Law and International Administrative Law (also called in the paper as International Institutional Law), but also with phenomena such as Transnational Law and Global Constitutionalism. As it will be seen bellow, ANA GOUVEIA MARTINS clearly adopted the second alternative answering the question outlined in her paper's title – it is argued that Global Administrative Law represents nothing more than a *doctrinal project* and that it is not possible to understand it as a new *branch of Law*; accordingly, the *normative* objects founded by typical Global Administrative Law approaches could and deserved to be inserted in a wide perspective concerning both Public International Law and International Administrative Law. Throughout this conceptual *path*, ANA GOUVEIA MARTINS also critically addresses the famous proposal – that has been originally formulated by BENEDICT KINGSBURY in 2009³ and that was since then subject to a wide-range of criticism⁴ – that suggests to *import* to the conceptual construction around Global Administrative Law some Hartian conceptions, such as the premise concerning the role and function of the *rule of recognition* as the ultimate criterion to identify an autonomous legal system. This comment will not address this discussion: as ANA GOUVEIA MARTINS also outlines, KINGSBURY's arguments are based on an incorrect reading of Hart's concept of *rule of recognition* – the concept of *publicness* laid down by the American scholar openly contradicts the positivist standpoint of Hart's work.

The sceptical approach to Global Administrative Law advanced in the paper and the linkage made with Public International Law's tools are also the basis that support ANA GOUVEIA MARTINS' doctrinal demands in order to (i) construct a method able to apart legal and non-legal norms emerging from transnational spheres and to (ii) enlarge the traditional conceptions regarding the subjective requirements involved with the formation of international customary norms. The aim of this commentary is to critically discuss that sceptical premise con-

2. The main works of ANA GOUVEIA MARTINS include *A tutela cautelar no Contencioso Administrativo (Em especial, nos procedimentos de formação de contratos)*, Coimbra, 2005 [Master's thesis] and *Contributo para uma desconstrução dogmática da teoria do facto do príncipe*, Lisboa, 2012 [PhD thesis, not yet published].

3. The Concept of 'Law' in Global Administrative Law, *The European Journal of International Law*, 20, 1, 2009, pp. 23-57.

4. See, v.g., MING-SUNG KUO, The Concept of 'Law' in Global Administrative Law: a Reply to Benedict Kingsbury, *The European Journal of International Law*, 20, 4, 2009, pp. 997-1004; ALEXANDER SOMEK, The Concept of 'Law' in Global Administrative Law: a Reply to Benedict Kingsbury, *The European Journal of International Law*, 20, 4, 2009, pp. 985-995; using also the concept of *publicness*, even before KINGSBURY's article, but on the basis of the what can today be called the *German approach* to the global governance's concerns, centred on the conceptualizing the exercise of international public authority, see also ARMIN VON BOGDANY/PHILIPP DANN/MATTHIAS GOLDMANN, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, *German Law Journal*, 9, 11, 2008, pp. 1375-1400.

cerning the concept and autonomy of Global Administrative Law and to critically address the two identified demands proposed by ANA GOUVEIA MARTINS. For that purpose, the commentary will proceed as follows: in section 2. the paper submitted will be briefly presented as well as its content and structure, in order to clarify the Author's central arguments; section 3. is reserved to point out some critical remarks.

2. Brief Overview Of The Paper

a) General remarks

Starting with an overview about GOUVEIA MARTINS' paper, it is possible to divide it into two central sections: a descriptive one and a speculative one.

The paper starts with a generic perspective about GAL project, namely based on both NYU and Viterbo schools, *i. e.*, based on the central and representative contributions brought by scholars as KINGSBURY, KRISCH, STEWART, on one hand, CASSESE and BATTINI, on the other, among others.

Within this framework, the paper points out that the emergence of the concept of *Global Administrative Law* grounds both in the phenomena of globalization and "administrativization" of traditional national-States' tasks. Global regulatory regimes such as the Basel Committee of national banks, standards-creation by WTO or actions provided by ICAAN, for example, are thus included over the broad concept of *global governance* and as part of Global Administrative Law field.

Despite the possible ordination of these regimes into different classes, such as the widely-known⁵ division in (i) *International Administration by formal international organizations*, (ii) *Network Administration*, (iii) *Distributed Administration*, (iv) *Hybrid Administration* and (v) *Private Administration*, GOUVEIA MARTINS clearly adopts the view whereby it is not possible to dissolve all this examples in a perfectly distinguishable concept of GAL. Supported by CASSESE's opinion, she argues that there is no a unique global government, but rather several global regulatory regimes, without one single hierarchical order. As she claims, "*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*".

GOUVEIA MARTINS then identifies the *accountability question* as the main challenge of those transnational entities, which leads to what she calls the second premise of GAL project: the claim that in order to "*mitigate democracy deficits*", that kind of transnational entities should endorse and apply principles and mechanisms of and administrative law type. In doing so, she implicitly assumes two

5. See, v.g., BENEDICT KINGSBURY/LORENZO CASINI, *Global Administrative Law Dimensions of International Organizations Law*, *International Organizations Law Review*, 6, 2009, pp. 319-358.

traditional premises established on GAL project: (i) in one hand, the diversity of its sources and the consequent impossibility to adopt classical International Public Law's mechanisms in order to reach its full understanding; (ii) in the other hand, the fact that in the eye of its contents, GAL only includes some procedural rules and guarantees of particulars dealing with those kind of organizations.

Still in a descriptive basis, the paper looks forward the *concept of Law* implied in the GAL projects. In this regard, GOUVEIA MARTINS focus her efforts discussing KINGSBURY's concept of *publicness* and its linkage with Hartian concept of *rule of recognition*. It is argued on the paper that KINGSBURY's approach is based on a misleading understanding of Hart's conceptions. Essentially, it is observed that adopting such a concept of *publicness* implies, in a certain way, a "natural law" perspective about GAL. The idea of *publicness* would work as kind of "*inner morality*" in Fuller's sense.

Moreover, the discussion around the concept of Law implied by GAL project is also the basis that leads ANA GOUVEIA MARTINS to stress that in GAL traditional approaches there is no clear distinction between (real) legal norms and non-legal norms. In other words, the paper embraces the problem of the relevance of *non-binding* instruments (broadly treated as *Soft Law*) that are somehow a distinctive feature of GAL. Facing CASSESE's statement according to which this kind of instruments also exist in domestic legal orders, the paper outlines that we should clearly tell apart the two contexts: nevertheless the fact instruments such as standards, guidelines, codes of conduct also exist in domestic legal orders, GOUVEIA MARTINS ascribes that by the action of the legality principle, these *informal rules* can be controlled in a more effective way and they are, all things considered, regarded as exceptions in the context of public authorities' action.

Taking all of this into account, GOUVEIA MARTINS then embraces the speculative part of her paper, in which this comment will be focused in.

Assuming a frontal sceptical approach, GOUVEIA MARTINS states that "*it is not possible to declare at the present day the existence of a Global Administrative Law, in the sense that there is not a coherent and systematic set of legal rules and principles governing the creation and organization of the entities that act in the transnational space*". Moreover, she argues that "*GAL merely names a doctrinal project of creating a new global order ruled by procedural principles of transparency, participation, review and accountability*". These are the basis that allow the Author to point out a provocative assumption: "*the concept of GAL is misleading and should be accurately characterized as a kind of holy «GRAIL», that is, «Goals Required to an Administrative International Law»*".

Related to this sceptical approach concerning the added-value of the GAL's concept and project, GOUVEIA MARTINS intends to show how the adoption of a broad Public International Law concept – maybe based on PHILIPP JESSUP's concept of *Transnational Law* – would serve to frame some of the objects studied under the GAL perspective.

In fact, as she claims, "*unlike GAL proponents usually argues, international law cannot be identified nowadays with the law established between the governments of States to regulate relations between States*". In order to sustain this conclusion, three different arguments are presented: (i) the first one is the fact that "*the latter part of the 20th century was signalized by the growth of Intergovernmental organizations, non-governmental organizations, civil society groups as well as*

the rise of individuals as subject of international law; (ii) the second, the fact that “normative structure of the international order is currently characterized by an interconnected plurality or network of making entities and sources of law” – in this sense, even in International Public Law, “it cannot be stated that international law is exclusively a consent-based system”; (iii) the final argument deals with the fact that the “subject-matter of international law has continuously expanded over the past decades and entered into several an most distinctive areas such as the regulation of migration and employment, telecommunication, transport, education, environment, health care, food”, etcetera.

This reasoning leads ANA GOUVEIA MARTINS to identify what she sees as the “main problem of Global Administrative Law” and that can be described as problem both of boundaries and ambition: the paper states that the GAL project “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”. Alternatively, GOUVEIA MARTINS claims that “the branch of International Law, including the study of international organizations, has an important role to perform in the analysis of the global entities activities on the global space”.

In other words, it is possible to conclude from GOUVEIA MARTINS’s paper that GAL is nothing more than a *doctrinal project*, unable to offer solid and grounded conceptual framework to the activity of entities that only in a *prima facie* view would not be included in the borders of International Public Law.

b) The main argument of the paper

The previous overview on the paper made already clear what is GOUVEIA MARTINS’s main argument: according to the paper, GAL cannot be seen as a new *branch of Law*. This central conclusion is based on two premises:

(i) According to GOUVEIA MARTINS’s perspective, GAL works nothing more as kind of *ideal concept*, trying to serve as repository of minimal procedural principles that transnational regulatory entities *should ideally follow*. In this sense, GAL would be composed by a set of *ideal obligations* – and that’s the reason why it lacks the *status* of Law. GAL would thereby be seen as a *doctrinal project* – this is why GOUVEIA MARTINS proposes the alternative designation of *GRAIL*, as the set of *Goals Required to an Administrative International Law*;

(ii) On a different level, the lack of *legality* of GAL would be also explained by its non-uniformity and its systematic incoherence: unlike domestic administrative legal orders: according to ANA GOUVEIA MARTINS, even if we take GAL in a stricter sense of procedural requirements, would be impossible to outline a “unitary body of global procedural law”; there is hence no Global Administrative Law, but never more than “a range of global administrative laws or legal regimes”.

c) *Two methodological proposals*

Besides this main argument, the paper includes some *methodological proposals* in order to best understand and study transnational regulatory regimes, even without the help of GAL's premises – as it was underlined above, ANA GOUVEIA MARTINS prefers to adopt an enlarged conception of International Public Law. Especially, she is arguing in the paper that:

(i) It would be useful to “*plainly distinguish the legal rules and non-legal rules*”, even if this starting point would not lead to only conceive to see as *sources of law* only the classical ones;

(ii) In addition, the paper stands for a “*new conceptualization of the classical notion of international custom*”, in order to “*overcome the current dogma of conferring relevance only to state practices*”; it is especially suggested that non-state practices – mainly provided by the action of transnational regulatory entities – should also count as elements to the formation of international customary law.

3. Critical Comments

a) *The concept of legal order and the requirements to identify new branches of Law – the case of Global Administrative Law*

As it has been stressed above, the paper is essentially focused on *conceptual* – somehow: *ontological* – problems around GAL. In this perspective, however, I think to support the main thesis– according to which GAL should be not seen as a new *branch of Law* – some premises are lacking in the paper. More deeply, I think it is also possible to say that the concerns of the Author related to the *legal status* of GAL as a whole raise up issues that are, all things considered, not genuine problems.

Firstly, the concern about if some object would be able to be seen as a *branch of Law* should necessarily start from a definition of a *branch of Law*, i.e., its requirements. ANA GOUVEIA MARTINS repeatedly points out that the main weakness of GAL project is due to its lack of *coherence* and *unity*. Even if this aspect is not clarified in the paper, I think is therefore possible to draw the conclusion that for the Author only a *coherent* and *unitary* set of norms would be able to be seen as a *branch of Law*. However, this assertion is far from convincing. It is indeed sufficient to consider domestic legal orders to easily conclude that *coherence* and *unity* are not necessary requirements of the concept “*branch of Law*”. Taking in special account the case of Administrative Law, it is well established the distinction between *General Administrative Law* and *Special Administrative Laws*. This implies that (domestic) Administrative Law seen as a set has also the aim to cover very different areas and sectors. It is well-recognized nowadays that Administrative Law is far from being a *coherent* and *unitary* branch of Law; no one denies, however, the possibility to seen is as a true *branch of Law*. For this reason, it is hardly acceptable the argument according to which “*the main problem of Global Administrative Law project is that it seeks to find unity of*

problems and solutions for phenomena which main feature is precisely the fragmentation". Applied to domestic legal orders, this conclusion would also lead to the impossibility to construct scientifically General Administrative Law.

On the other hand, that conclusion putted forward by ANA GOUVEIA MARTINS in analysing the global governance regimes will also lead to obstruct a *coherent* and *systematic* construction of Public International Law – the field the Author thinks of which it possible to derive the concepts and solutions to provide an adequate framework to all the phenomena studied as part a of Global Administrative Law. Moreover, I think that the concern of the Author related to the *existence* of GAL as *branch of Law* characterized by its coherence or unity is not a real problem to GAL traditional approaches. As STEWART has summarised recently, "*in contrast to global constitutionalism, GAL is primarily bottom-up in its approach, building from the level of specific regulatory regimes and sectors. Given the current highly disaggregated state of global administration and governance, this approach has important strengths*"⁶. Quoting CHITI's words, it is also possible to state that "*GAL is at times considered as a component of the various legal orders of individuals sectors operating within global administrations (...) Considered from this perspective, GAL is not a unitary body of law. It is rather an array of different sectoral laws (...) The legitimacy of each global administrative legal sectoral regime depends on the structural and functional features of the single legal order in which GAL is positioned*"⁷. In other words, as EUAN MACDONALD maintains, I think it is possible at the same time to ensure "*Global Administrative Law doesn't exist*", but also "*Global administration exists*" and "*Global administrative laws exist*"⁸.

In this sense, I'm truly convinced that the quest for the *existence* of GAL as a new branch of Law is not a problem to the GAL scholars, as well as the *existence* of any branch of Law cannot be seen as a real concern. In fact, concepts such as «Public Law», «Private Law» or «Administrative Law» are only doctrinal agreements to aggregate sets of different norms that are formed by the ways we consider able to produce Law. These concepts are, however, purely doctrinal⁹. They are then *conventional* and, for this reason, they are not able to be subject of a truth-falsehood judgement¹⁰. Implicitly assuming this *inner contingency* of the quest for the *existence* of Global Administrative, it may be said, as CASSESE puts it lately, that

6. RICHARD STEWART, The normative dimensions and performance of global administrative law, *International Journal of Constitutional Law*, 13, 2, 2015, p. 506.

7. EDOARDO CHITI, Where does GAL find its legal grounding, *International Journal of Constitutional Law*, 13, 2, 2015, p. 487.

8. EUOAN MACDONALD, The "Emergence" of Global Administrative Law?, paper submitted to the 4th Global Administrative Law Seminar - «Global Administrative Law: from Fragmentation to Unity» [Viterbo: June 13-14 2008] and available at <http://www.iilj.org/gal/documents/MacDonald.pdf>

9. Stressing the importance of giving a name to the phenomena nowadays called GAL, see SUSAN MARKS, Naming Global Administrative Law, *International Law and Politics*, 37, 2005, pp. 995-1001.

10. About the *conventionality* of legal concepts and also of the legal phenomena itself, see, v.g., ANDREI MARMOR, *Social Conventions. From Language to Law*, Princeton/Oxford: Princeton University Press, 2009, pp. 155 ff.

*“It is now clear that global administrative law is not only global, not only administrative, and not only law. It is not only global, because it includes many supranational regional or local agreements and authorities. It is not only administrative, because it includes many private and constitutional elements. Global administrative law is not only law, because it also includes many types of «soft law» and standards.”*¹¹

This later statement leads me to the second problem I want to address in this commentary.

b) Legal and non-legal norms in transnational space

One of the most critical assessments GOUVEIA MARTINS make to traditional GAL approaches relies on the apparent difficult to make a clear-cut distinction between *legal* and *non-legal* norms. There are no doubts that, as a *normative science*, Law shall only take as subject truly *legal-norms*.

There is however some ambiguity concerning the concept of *legal norm* adopted by the paper. On one hand, it is stated that “*a legal rule creates a legal situation or a legal relationship which involves the application of a legal regime*”; on the other, it is clearly assumed that “*law creates legal rights and legal duties*”.

My point here is not to deeply discuss the concept of *legal norm* and its requirements. I shall only point that the fact that GAL traditional approaches also include the study of *non-legal* norms does not lead to the conclusion – stated in the summary of the paper – according to which is not possible to face GAL as *Law*. In fact, it seems to me ANA GOUVEIA MARTINS – as well as many Authors do when they’re facing the so-called problem of *soft law* – is relatively puzzled with the distinction between *legality* and *bindingness*. From the fact that some principle or some rule is not *binding* it does not lead that they’re not *legal* in its nature. Moreover, as it is widely-known, International Public Law – the arena in which the Author thinks it is possible to insert global regimes’ conceptualization – is a fertile ground to the emergence of such *non-binding* phenomena.

c) Subjective requirements to the formation of International Customary Law and its relation with Global Administrative Law

The second identified doctrinal proposal made by ANA GOUVEIA MARTINS is based on the need to *re-conceptualize* the notion of international custom. In her words, it would be extremely worthwhile to “*overcome the current dogma of conferring relevance only to state practices*”. In this particular, I would like to make two brief remarks.

Firstly, it seems to me that the *dogma* ANA GOUVEIA MARTINS is talking about simply doesn’t exist and the paper makes no effort in order to show it. By the contrary, it is nowadays clearly assumed that non-state practices can also be the basis to the formation of international customary norms¹².

11. SABINO CASESSE, Global administrative law: The state of the art, *International Journal of Constitutional Law*, 13, 2, 2015, p. 466.

12. See, v.g., ROOZBEH B. BAKER, Customary International Law in the 21st Century: Old

On the other hand, it is not clear the connection of this proposal with the central aim of the paper – the claim that we should *re-conceptualize* the requirements related to the notion of International Customary Law does not prove anything concerning the weakness of GAL's traditional approaches, since they do not neglect the importance of the custom as a source of law. By the contrary, GAL is precisely the field in which the *non-state* practices are taken more into account.

Challenges and New Debates, *The European Journal of International Law*, 21, 1, 2010, pp. 173-204.