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**INTERESSE PÚBLICO (NORMATIVO) GLOBAL E LEGITIMIDADE:  
UM COMENTÁRIO A GABRIEL BIBEAU-PICARD**

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**Abstract:** The present text corresponds to a developed version of the commentary presented on the November, 28th, 2014, during the Lisbon International Workshop on Global Administrative Law, regarding the paper “GAL as Public Law: The Inherent Legitimacy of Accountability”, submitted by Gabriel Bibeau-Picard, from the University of Paris Panthéon-Assas – Paris II. The text corresponds to the version written for that purpose, which was meant to be a critical discussion of no more than fifteen minutes, where the main aspects of the commented paper were highlighted and some questions were raised, so as to stimulate a further debate.

**Resumo:** O presente texto corresponde a uma versão desenvolvida do comentário realizado no dia 28 de novembro de 2014, durante o Workshop Internacional de Lisboa sobre Direito Administrativo Global, referente ao artigo “GAL as Public Law: The Inherent Legitimacy of Accountability”, submetido por Gabriel Bibeau-Picard, da Universidade de Paris Panthéon-Assas – Paris II. O texto corresponde a uma versão escrita para esse propósito, que pretendia promover uma discussão crítica de não mais de quinze minutos, onde os aspetos fundamentais do artigo comentado fossem realçados, com algumas questões levantadas, de modo a estimular o debate ulterior.

**Keywords:** GAL, legitimacy, accountability, global constitutionalism, public interest

**Palavras-chave:** Direito Administrativo Global, legitimidade, responsabilidade, constitucionalismo global, interesse público

**Summary:** 1. Introductory remarks; 2. Brief Overview of the paper; 3. The GAL definition; 4. The 3 Legitimacies - their usefulness and limits; 4.1. Legal legitimacy; 4.2. Liberal legitimacy; 4.3. Democratic legitimacy; 5. Global administrative law, global constitutionalism, and global public interest

**Sumário:** 1. Notas introdutórias; 2. Breve resumo do artigo; 3. A definição

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**do GAL; 4. As 3 Legitimidades – a sua utilidade e limites; 4.1. Legitimidade Legal; 4.2. Legitimidade liberal; 4.3. Legitimidade democrática; 5. Direito Administrativo Global, constitucionalismo global e interesse público global**

## 1. Introductory Remarks

On a workshop dedicated to Global Administrative Law (GAL) and the concept of law it would be strange if legitimacy were not put on the table. The paper by Bibeau-Picard does just that allowing for a discussion on the very nature of GAL at the same time we revisit the main theories that purport to explain the legal nature of a normative order. Given that global administration as somewhat unanimously achieved the status of a normative order it is paramount that one must question if it is of a legal nature, if it can claim to be law by any set of reasons other than naming itself.

As someone who looks for the legal nature of any normative order through a mix of substantive-procedural fixing of interest-balancing, Bibeau-Picard's paper seem to offer fresh field for insights and reflexion. Not only his tour through three chosen legitimacies begs the question of how can one claim that such a normative order is legal but his proposed convergence of GAL and global constitutionalism seems to take issue with the quality of "publicness" as a quality that can offer legal legitimacy to a set of rules. My interest in connecting this "publicness" appeal with the quest for the existence of a global public interest became my main reading motivation and what the commentary that follows, although raising some issues concerning GAL's name and the three legitimacies chosen, addresses mainly the legal legitimacy that can be brought about through a (constitutionalized) global public interest and how I read that into Bibeau-Picard's paper.

## 2. Brief Overview Of The Paper

Does a Global Administration entail a Global Administrative Law? That is the question. It is a question that is posed by Bibeau-Picard in his paper "Legality and legitimacy in Global Administrative Law"<sup>2</sup>. The author does not answer the question right away. In fact he draws it in another way, by stating that he aims to "examine the claim that there is more to legitimacy than mere accountability"<sup>3</sup> showing from the beginning of his paper he is well aware of the substantive vs. procedural legitimacies debate regarding GAL<sup>4</sup>.

He accepts the evidence of a Global Administration and the necessary consequence of a set of underlying principles that "organize and shape" it. The author then sets about trying to figure out what is the legitimacy of these principles, if there is one, as a previous problem leading to some sort of legality: "this paper is concerned with the legitimacy of global administrative principles inasmuch as

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2. As well as Dyzenhaus in a paper much quoted, namely by the Bibeau-Picard himself. Cf. DAVID DYZENHAUS, Accountability and the concept of (global) administrative law, *IIJ Working Paper* 2008/7 (Global Administrative Law Series) Finalized 09/23/2008 (available at <http://www.iiij.org/publications/documents/2008-7.Dyzenhaus.pdf> - last access on 15.12.01).

3. GABRIEL BIBEAU-PICARD, Gabriel, Legality and Legitimacy in Global Administrative Law, *E-Pública - Revista Eletrônica de Direito Público*, n.º 6, 2015, p. 3.

4. Cf. DAVID DYZENHAUS, Accountability, p. 1; GORDON ANTHONY / JOHN MORISON The Place of Public Interest in GORDON ANTHONY / JEAN-BERNARD AUBY / JOHN MORISON / TOM ZWART, *Values in Global Administrative Law*, Oxford, Hart Publishing, 2011, p. 217.

some form of legitimacy is a prerequisite to legality”<sup>5</sup>.

Bibeau-Picard identifies, from the outset of his paper, three current debates standing on three different legitimacies, which he presents and qualifies: first, legal legitimacy, and then liberal and democratic legitimacies.

Legal legitimacy is equated, following Dyzenhaus reading of Fuller, as inner rationality and inner morality, and liberal and democratic legitimacies hold on a debate with Kingsbury’s positions.

Liberal legitimacy stands on the identification of liberal values in any given normative order with a Hartian rule of recognition being supplemented by a liberal conception of “publicness”.

Finally, democratic legitimacy allows for the attribution of legal quality to a normative order where one can recognize rule-adoption and rule-following by democratic deliberative processes.

Bibeau-Picard is unable to find any of the three legitimacies satisfactory for specific reasons concerning each one of them.

The author then turns to Global Constitutionalism both as a function of Global Administrative Law, in which the latter would foster the former, and a means to comprehensively legitimize GAL.

### 3. The Gal Definition

What’s in a name? Concerning GAL quite a lot<sup>6</sup>. We are first impressed by the fact that most authors use a concept - Law - to refer to an object - Global Administration - without being able to demonstrate that the object actually contains the elements that constitute the concept. So we begin with a kind of “wishful thinking” quality about GAL<sup>7</sup>. It is true that the concept of Law itself is not immune to controversy but regarding GAL it seems we are using it more to convince ourselves than because we have a clear set of attributes by which we define Law and that we find in a Global Administration. But if it is so we are also using GAL to motivate ourselves to explain the legal nature of something that although already has “law” in its name, continually begs us to continue the debate. Bibeau-Picard’s paper first virtue is to clearly set this debate between those we could call the “substantivists” and the “proceduralists”<sup>8</sup>. If GAL is to be Law, and that was my main interest in reading Bibeau-Picard’s paper and in writing this commentary, then we have to know what we are discussing. By centering the discussion on legitimacy it is the very name and nature of GAL that is being discussed. The way in which we, from very early on, understand this and see it as the framework

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5. GABRIEL BIBEAU-PICARD, *Legality*, p. 5.

6. Cf. SUSAN MARKS, *Naming Global Administrative Law* in *New York University Journal of International Law and Politics*, 37, 2005, p. 995 ss. (available at: <http://www.jilj.org/gal/documents/NAMINGGLOBALADMINISTRATIVELAW.pdf> - last access 15.12.01).

7. GABRIEL BIBEAU-PICARD, *Legality*, p. 5; DAVID DYZENHAUS, *Accountability*, p. 1; BENEDICT KINGSBURY, *Benedict, The Concept of “Law” in Global Administrative Law* in *The European Journal of International Law*, Vol. 20 n.º. 1, p. 23 (available at <http://www.ejil.org/pdfs/20/1/1784.pdf> - last access on 15.12.01); GORDON ANTHONY / JOHN MORISON, *The place*, p. 223.

8. In a somewhat similar way to David Dyzenhaus, cf. *Accountability*, p. 21-24.

for the paper strikes me as very important, even if formally we are well within the section dealing with legal legitimacy when this introductory question is fully realized. This formal aspect should be address to clarity.

#### **4. The 3 Legitimacies - Their Usefulness And Limits**

I find the choice of the three legitimacies very interesting as it provides a good summary of the current debate regarding legitimacy in GAL. The arguments raised about each legitimacy however leave me wandering and a little lost concerning some points. One aspect in particular will be especially important later on this commentary: Bibeau-Picard's choice of legitimacies and the framing of the debates they call upon seems to reveal a preference - acknowledged or not - for one side of an important discussion concerning GAL (and Global Constitutionalism for that matter): the place of national law in the construction of Global Law. The debate revolves around what we could call the deductive process - in which we create GAL from common legal principles in national administrative laws - and the pluralist process - in which we allow for different principles of administrative law to cohabit and contend for the constitution of GAL according to the way in which Global Administrations apply them<sup>9</sup>. This is for me a very important discussion and one which links to the conclusions of Bibeau-Picard's paper regarding Global Constitutionalism. The author seems to allow for a deductive-constitutive process of a Global Constitution, actually fostered by GAL - "greater accountability of global regulators could somehow foster the emergence of a global demos"<sup>10</sup> - and I would like to see the author pursue this point further, especially in the context of such an important question as the rise of a global community and its normative implications for pluralism<sup>11</sup>.

Each of the types of legitimacies addressed by Bibeau-Picard reveal an aspect of the discussion concerning the possibility of the emergence of a global political community out of a deliberative process versus the recognition of such global political community based upon a pluralist dialectic background in which different interests and procedures compete to achieve legitimacy (and legality) by rational discourse and acceptance. To this discussion also matters, as I previously mentioned, the emphasis we put on national administrative laws. Bibeau-Picard's paper also helps us to clearly form a picture in which we are given two choices: on the one hand to build GAL's legality on the combination of domestic laws legitimacies and on the other hand to forsake that goal completely and build its legitimacy on the new aspects of the Global Administrations. That is why I will address each one of the legitimacies separately.

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9. The author seems to pass over this discussion, when alluding to the position of Kingsbury and Krisch. Cf., GABRIEL BIBEAU-PICARD, *Legality*, p. 2.

10. GABRIEL BIBEAU-PICARD, *Legality*, p.16.

11. Cf. GORDON ANTHONY / JOHN MORISON, *The place*, p. 225 and their question "No demos, no democracy, no public interest?"

#### *4.1. Legal legitimacy*

Bibeau-Picard discusses legal legitimacy supported on Dyzenhaus reading of the Fullerian “inner morality of the law”. I would like to take issue with the relation between congruence-accountability-generality. If I read the author right congruence as a Fullerian requisite for legality implies a “space for participation of the ruled in the interpretation of the general norm”<sup>12</sup>. This participation will then generate accountability because the ruled will want to control how power conferred normatively is exercised. This demand begs generality.

Generality in GAL functions as a safeguard against exclusion from procedures of global governance of those who could be subjected to that governance. Generality assures that subjects remain custodians, even if indirectly and through representative mechanisms. It is thus difficult to accept its waiver as a prerequisite for legal legitimacy. Demanding it on the deliberative phase but allowing for its omission on the executive phase does not seem to solve the problem: generality still stands as a necessary prerequisite. Such generality must be understood as allowing for a certain amount of subjective discretion on the part of global administration bodies (which however are substantive and procedurally accountable because their competences are normatively attributed to them through a method that comprises generality for the reasons mentioned). I read Bibeau-Picard’s apparent suspicion of the merits of legal legitimacy in this way.

#### *4.2. Liberal legitimacy*

After legal legitimacy, much supported by Dyzenhaus reading of Fuller<sup>13</sup>, liberal legitimacy is introduced by way of Kingsbury, Krisch and Stewart articulating the “Hartian perspective of law as a social fact”<sup>14</sup> with the concept of “publicness”, which in way changes the tune from a natural law legitimacy for GAL to a normativist legitimacy. But we are soon dealing with much more than a Hartian perspective according to the reading of Bibeau-Picard, following Kingsbury, when he says that “[b]asically, the traditional sources of international law are insufficient to qualify global administration as law”<sup>15</sup>. So Bibeau-Picard discusses the requisite put forth by Kingsbury: the concept of publicness acting as a rule of recognition. I am quite in agreement with the conclusions the author extracts from this discussion: given that the liberal values that conform “publicness” are open for debate not only that puts a heavy toll on a liberal legitimacy but opens it up to a transformation onto a democratic legitimacy, as a process that could settle an accepted meaning of publicness in a community. Although I agree with this argument I would have liked to read more on the cases in which there has been a liberal legitimacy to a certain kind of global administration (namely the protection and enforcement of human rights under States and the ECHR) and how that might pose a problem to the argument of necessary transition to a democratic legitimacy.

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12. GABRIEL BIBEAU-PICARD, *Legality*, p. 5.

13. Cf. GABRIEL BIBEAU-PICARD, *Legality*, p. 5.

14. GABRIEL BIBEAU-PICARD, *Legality*, p. 7.

15. GABRIEL BIBEAU-PICARD, *Legality*, p. 7.

#### *4.3. Democratic legitimacy*

The last of the legitimacies that Bibeau-Picard deals with is the democratic legitimacy. Here the author again contends with Kingsbury, this time regarding his argument that GAL strengthens democracy and again comes up dissatisfied with what this type of legitimacy can offer to GAL. I find the author's remark regarding democracy within the context of GAL very much to the point when he states that "GAL offers a mix of forensic-accountability and consumer-accountability where no one is directly accountable to the people «severally and jointly» for the actions of global administrative bodies"<sup>16</sup>.

Regarding this section I take issue with the connection made by Bibeau-Picard between a democratic legitimacy and the normative qualification (or its absence) of the people to whom democracy is referred. In way the author names the problem - "The general public being virtually absent from the equation, this would indeed be a post-public, privatized conception of legitimacy"<sup>17</sup> - but it seems to be left unanswered within the discussion of what to accept as a true democratic legitimacy. For instance, can we have democracy in which "We the people" are not a community that refers to a State, but a community that refers to a purpose (eg: all those who want to enjoy safe and reliable airline trips). Would that be enough to ground a democratic legitimacy for a global legal order? Since this links directly to the last section of Bibeau-Picard's paper, I will come to this point presently.

### **5. Global Administrative Law, Global Constitutionalism, And Global Public Interest**

Given that none of the three legitimacies that Bibeau-Picard diagnosed as the relevant ones in the ongoing debate regarding the legal nature of GAL gave satisfactory explanations<sup>18</sup>, the author moves on to Global Constitutionalism as a tool to address the legitimacy problem of GAL. This is in itself problematic given the incipient theoretical foundations of Global Constitutionalism. Concerning this problem, the author questions the possibility of GAL performing the role of a "small-c constitution" to a global "big-c constitution" but finds apparent unsurmountable obstacles: "In the absence of a «people», as in «We the People», the small-c constitution looks very technocratic. It rests on the crude legitimacy of bureaucratic efficiency mobilizing principles of administrative rationality"<sup>19</sup>. It is not enough to generate legality. At least for the time being. The ultimate conclusion that Bibeau-Picard seems to arrive at then is not so much the inadequacy of the three chosen legitimacies to ground the legality of GAL but their inadequacy to ground them on the current state of the global network of interactions with normative potential. He seems to accept, as we have tried to show, that both the legal and the liberal legitimacies end up at some kind of concept of democratic

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16. GABRIEL BIBEAU-PICARD, *Legality*, p. 11.

17. GABRIEL BIBEAU-PICARD, *Legality*, p. 12.

18. Cf. GABRIEL BIBEAU-PICARD, *Legality*, p. 13.

19. GABRIEL BIBEAU-PICARD, *Legality*, p. 15.



legitimacy but for that legitimacy to hold we still need a global demos to rise up normatively. This is not the end of the story, as he puts it. It merely seems to transfer Bibeau-Picard's concerns on this paper to Global Constitutionalism and to its democratic legitimation, which he argues that could be boosted by global governance concerns regarding accountability, which have been, as his paper well shows, the proto-legal approach to legitimize GAL as law.

On my final comments on Bibeau-Picard's stimulating paper I would like to equate this relation between GAL and Global Constitutionalism under the scope of global normative public interest, if there is such an object. On a constitutional level it is hard to accept such a legitimacy by procedure as we are willing to accept on an administrative level, so if one wants to talk about global constitutionalism one must address the issue of global public interest. Every constitution is about finding the perfect balance between the definition and satisfaction of public interest and the definition and protection of individual liberties. So the question seems to be: more than a legitimation by procedure (*rectius*, accountability) does GAL not imply a legitimation by the result of such procedure, that is, global public interest? One could immediately end this discussion by recalling what Bibeau-Picard points up as a flaw on democratic legitimacy - the presence and even dominance of certain private elites in global administrations<sup>20</sup> - but is there a way to bypass such a criticism?

One way to reconcile some frustration with democratic legitimacy being unable to ground GAL and the absence of a global demos preventing the problem to be solved on a constitutional level is to confirm that there is in fact a chance of determining a global demos, albeit rooted on different characteristics than those we usually associate with Westphalian States. Such is the proposal of Cohen and Sabel when they argue that "if the accountability of global administration depends on arrangements that are elsewhere anomalous and exceptional, then the demos to which it is ultimately accountable may be a comparably anomalous global demos that does not comprise the members of a single ethnically-defined people, nation, or state. Still, the anomalous demos may be sufficiently familiar to give substance to the now-fugitive idea of a global democracy without a global state or nation"<sup>21</sup>. This, I think, goes to the heart of the matter, not only because it offers us an avenue to explore democratic constitutionalism and its limits in a global order, but also to question ourselves - question that Bibeau-Picard leaves open and that begs a follow-up - if the legitimacy of GAL is not all together a conceptually autonomous entity from global democracy, standing on its own set of elements. It seems that we are nowhere near a constitutional foundation for global governance that can ground a specific legitimacy for GAL, but at the same time if we allow for a constitutional foundation of a different kind than the

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20. Cf. GABRIEL BIBEAU-PICARD, *Legality*, p. 12. Also, cf. GORDON ANTHONY / JOHN MORISON, *The place*, p. 217 and 229.

21. JOSHUA COHEN / CHARLES F. SABEL, *Global Democracy*, *New York University Journal of International Law and Politics*, Vol. 37, n.º 4, p. 766 ss. (available at <http://www2.law.columbia.edu/sabel/papers/NYI403Cohen&Sabel.pdf> - last accessed on 15.12.01). See also, for the limits to this approach, Terry MacDonald / Miriam Ronzoni, *Introduction: the idea of global political justice*, *Critical Review of International Social and Political Philosophy*, Vol. 15, n.º 5, p. 521-33.

one we associate with Nation-States (heterarchical, not hierarchical<sup>22</sup>) we might find that a global, normative public interest might ground a global demos and legitimize a global administrative law. Since “GAL and global constitutionalism can only be addressed separately for so long”<sup>23</sup>, it seems mandatory to inquire if existing theories of global democracy - as a constitutional foundation - do not supply a legitimacy criterium for Global Administrative Law. Or, if on the contrary, the failure to ground a global democracy necessarily denies legitimacy to GAL. No global demos, no global democracy, no global public interest, no global administrative law? seems to be the methodological nexus of normative grounding that a legitimacy argument as yet to offer. Even so, Bibeau-Picard’s paper leaves this nexus much more clear to further research.

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22. GORDON ANTHONY / JOHN MORISON, *The place*, p. 237.

23. GABRIEL BIBEAU-PICARD, *Legality*, p. 16.