



**EDITORIAL:
GLOBAL ADMINISTRATIVE LAW AND
THE CONCEPT OF LAW**

**EDITORIAL:
DIREITO ADMINISTRATIVO GLOBAL E O
CONCEITO DE DIREITO**

David Duarte
Francisco Paes Marques
Jorge Silva Sampaio
Rui Tavares Lanceiro
Tiago Fidalgo de Freitas
Número 3, 2015
ISSN 2183-184x

**E-PÚBLICA
REVISTA ELECTRÓNICA DE DIREITO PÚBLICO**

www.e-publica.pt

EDITORIAL:

GLOBAL ADMINISTRATIVE LAW AND THE CONCEPT OF LAW

EDITORIAL:

DIREITO ADMINISTRATIVO GLOBAL E O CONCEITO DE DIREITO

DAVID DUARTE¹

Faculdade de Direito da Universidade de Lisboa
Alameda da Universidade - Cidade Universitária
1649-014 Lisboa - Portugal
davidduarte@fd.ulisboa.pt

FRANCISCO PAES MARQUES²

Faculdade de Direito da Universidade de Lisboa
Alameda da Universidade - Cidade Universitária
1649-014 Lisboa - Portugal
fpaesmarques@fd.ulisboa.pt

JORGE SILVA SAMPAIO³

Faculdade de Direito da Universidade de Lisboa
Alameda da Universidade - Cidade Universitária
1649-014 Lisboa - Portugal
jorgesilvasampaio@fd.ulisboa.pt

RUI TAVARES LANCEIRO⁴

Faculdade de Direito da Universidade de Lisboa
Alameda da Universidade - Cidade Universitária
1649-014 Lisboa - Portugal
ruilanceiro@fd.ulisboa.pt

TIAGO FIDALGO DE FREITAS⁵

Faculdade de Direito da Universidade de Lisboa
Alameda da Universidade - Cidade Universitária
1649-014 Lisboa - Portugal
tfreitas@fd.ulisboa.pt

1. Associate Professor, University of Lisbon, School of Law; Senior Research Fellow, Lisbon Centre for Research in Public Law; davidduarte@fd.ulisboa.pt.

2. Lecturer, University of Lisbon, School of Law; Associated Research Fellow, Lisbon Centre for Research in Public Law; fpaesmarques@fd.ulisboa.pt.

3. Guest Lecturer, University of Lisbon, School of Law; Associated Research Fellow, Lisbon Centre for Research in Public Law; ruilanceiro@fd.ulisboa.pt.

4. Guest Lecturer, University of Lisbon, School of Law; Associated Research Fellow, Lisbon Centre for Research in Public Law; jorgesilvasampaio@fd.ulisboa.pt.

5. Guest Lecturer, University of Lisbon, School of Law; Associated Research Fellow, Lisbon Centre for Research in Public Law; Ph.D. Researcher, European University Institute, Law Department; tfreitas@fd.ulisboa.pt.

In the last decade, Global Administrative Law (GAL) has become one of the most relevant legal accounts of global governance. In spite of this – or *pour cause* –, many aspects of its proposed methods and construction as a field of knowledge are highly contested. Being at a crossroads between Public International Law and Administrative Law, GAL encompasses the structures, procedures, and normative standards for regulatory decision-making, as well as the mechanisms of adjudication and implementation of these standards and other Public Law rules by different global administrative bodies⁶.

This field faces significant dogmatic dilemmas. Indeed, the demarcation of its meaning and scientific realm lacks a uniform characterization⁷. The uncertainty regarding GAL as an object of science is significant and covers a wide range of issues, some intrinsically connected with the most basic features of what can be understood as ‘law’. This reflection was the reason to organize the *I Lisbon International Workshop on Global Administrative Law*, dedicated to the topic of «Global Administrative Law and the Concept of Law». Its aim was to study and discuss the main theoretical concerns raised by GAL, specifically in what the connection with the concept of ‘law’ is concerned⁸, and which are the necessary properties for it to be properly qualified as ‘administrative’. In particular, this approach is confronted with the design of instruments and procedures beyond the established principles of general administrative law and its inherent structuring function⁹. It was therefore focused on an attempt to bridge and couple GAL with Legal Theory.

The convenors invited the submission of paper proposals on the following ques-

6. See BENEDICT KINGSBURY / NICO KRISCH / RICHARD B. STEWART, “The Emergence of Global Administrative Law”, in *Law & Contemporary Problems*, vol. 68: 15, 2005, p. 17. For competing accounts, see ARMIN VON BOGDANDY / PHILIPP DANN / MATTHIAS GOLDMANN, “Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities”, in ARMIN VON BOGDANDY et al. (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law*, Springer: Heidelberg, 2010, pp. 3-32; EYAL BENVENISTI, *The Law of Global Governance*, Maubeuge: Ail Pocket, 2014, pp. 15-86.

7. See CHRISTOPH MÖLLERS, “Ten Years of Global Administrative Law”, in *International Journal of Constitutional Law*, vol. 13, n. 2, 2015, pp. 471-472.

8. For previous accounts, see BENEDICT KINGSBURY, “The Concept of ‘Law’ in Global Administrative Law”, in *European Journal of International Law*, vol. 20, n. 1, 2009, pp. 23-57; ALEXANDER SOMEK, “The Concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury”, in *European Journal of International Law*, vol. 20, n. 4, 2009, pp. 985-995; MING-SUNG KUO, “The Concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury”, in *European Journal of International Law*, vol. 20, n. 4, 2009, pp. 997-1004.

9. See S. CASSESE, “Administrative Law without the State? The Challenge of Global Regulation”, in *New York University Journal of International Law and Politics*, vol. 37, n. 4, 2005, pp. 663-694. See also J. M. SÉRVULO CORREIA, “Administrative Due or Fair Process: Different Paths in the Evolutionary Formation of a Global Principle and of a Global Right”, in GORDON ANTHONY et al. (eds.), *Values in Global Administrative Law*, Oxford: Hart, 2011, pp. 313-361; EBERHARD SCHMIDT-ASSMANN, “The Internationalization of Administrative Relations as a Challenge for Administrative Law Scholarship”, in ARMIN VON BOGDANDY et al. (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law*, Springer: Heidelberg, 2010, pp. 943-963; STEFANO BATTINI, *Amministrazioni Senza Stato. Profili di Diritto Amministrativo Internazionale*, Milan: Giuffrè, 2003, pp. 271-282.

tions (among other topics): (i) what is the concept of GAL as a discipline and as a field of law?, (ii) what are the features of Administrative Law that may be found in GAL?, (iii) is it possible to define boundaries between GAL and other branches of law, such as Public and Private International Law, and what are GAL's recognition criteria?, (iv) what are the comparative advantages of GAL as a legal theory of globalization when compared to its competing normative theories (eg., Global Constitutionalism, International Institutional Law, etc.)?, (v) which concept of 'Administrative Law' is presupposed by GAL?, (vi) what is the relationship between GAL and national and supranational Administrative Law?, (vii) are there virtues and shortcomings of an expansionist vision of GAL?, (viii) under which theoretical assumptions regarding the concept of 'law' may the array of informal arrangements and non-binding regimes in GAL be qualified as legal?

The contributions to this special issue include several articles and comments dealing with the general issue relating the branch of Global Administrative Law and the concept of law's problem. In particular, in the present publication one can find articles of MIODRAG JOVANOVIĆ, GUILHERME VASCONCELOS VILAÇA, RIKE U. KRÄMER, EDOUARD FROMAGEAU, REBECCA SCHMIDT, ANA GOUVEIA MARTINS, and GABRIEL B. PICARD addressing these subjects, and specific comments on each paper respectively by FRANCISCO DE ABREU DUARTE, MIGUEL NOGUEIRA DE BRITO, LOURENÇO VILHENA DE FREITAS, PEDRO MONIZ LOPES, MIGUEL ASSIS RAIMUNDO, JOSÉ DUARTE COIMBRA, and DOMINGOS SOARES FARINHO.

MIODRAG JOVANOVIĆ gives us an overview of the rise of global regulatory regimes within a broader theoretical framework of the international rule of law. JOVANOVIĆ starts focusing on the question of who should be ultimate beneficiaries of the international rule of law, and challenges WALDRON's claim that these should be individuals, rather than states. According to the author, depending on the nature of a particular regime, states could also benefit from the global adherence to the rule of law. Then, he explores what is required for a global regulatory regime to conform to the international rule of law value. Since central to this value has to be the very same idea that exists on the domestic level, that of "bounded government" which is restrained from acting outside its powers, he stresses that a global regulatory regime has to meet a set of procedural and substantive requirements stemming from domestic administrative law, but adapted to peculiarities of the international level. Finally, JOVANOVIĆ tries to show that the capacity of these regimes to excel the rule of law principles immanent to administrative matters is intricately connected to their putative "legality". However, he concludes that jurisprudential effort of conceptualizing global administrative law largely depends on its prior task of settling much broader issues, such as the relation between the core and peripheral concept of international law and the theoretical sustainability of "graduated normativity" of international legal instruments.

The contribution of MIODRAG JOVANOVIĆ is the object of a commentary by FRANCISCO DE ABREU DUARTE, who proposes a new view on the concept of Global Administrative Law, seeing it as more of a didactic concept that contemplates several different complexes Rules of Law, rather than a unitary reality, providing therefore a new segmented theoretical line of thought. Moreover, he also ar-

gues that such new approach can only be made through an independent non-state based conceptualization of International Law.

In his article, GUILHERME VASCONCELOS VILAÇA argues that the global constitutionalism/self-regulation set of alternatives is premised on a deficient conceptualization of transnational law as a normative sphere of its own, refractory to international and domestic rule of law. According to the author, careful analysis both shows that the functional differentiation thesis at the core of autonomous transnational law is unconvincing and that there are resources at the domestic and regional (e.g. European Union) levels to address transnational law. In other words, he suggests that the choice between “doing nothing” or “going global” depends on too strong theoretical assumptions about the nature of world society and functional differentiation.

Among the several critiques addressed by GUILHERME VILAÇA, in his comment MIGUEL NOGUEIRA DE BRITO finds particularly worth of exploring the pointing out the social systems theory’s implicit normative claim that functional differentiation and autopoietic systems “ought to be maintained, never short-circuited”. In this regard he asks if one can adequately confront global risks and the expansive tendencies of the economic system just by means of such a normative claim.

RIKE U. KRÄMER argues that the goal of GAL’s new strand of literature is to capture and embed the discourse about global governance and bring it into the legal realm. She addresses the question of whether all of these new phenomena categorised as global governance can be called proper law. For this purpose, KRÄMER uses the concept of law developed by BENEDICT KINGSBURY as well as the German administrative law concept to shed some light on the question of validity and weight. The author compares KINGSBURY’s position which distinguishes between these two categories with the German distinction between *internal law* (only “law” in exceptional cases but weight attached) and *external law* (law in the proper sense). Moreover, KRÄMER claims that a comparison between KINGSBURY’s concept of law for GAL and the German approach can therefore enhance our understanding of law in the global space.

In his comment on RIKE KRÄMER’s paper, LOURENÇO VILHENA DE FREITAS holds that GAL is not a new source of law, and cannot be confused with administrative law from international sources. He considers it entails the ruling of a global administrative action with direct effect on the people without mediation of national law. Moreover, the author argues that it also can ground administrative action or at least serve as an international limit or parameter to international or national administrative action, and entails the existence of multi-level constitution and legitimacy and global ruling and therefore depends upon the existence of international functional public services or an international or transnational public interest.

EDOUARD FROMAGEAU ARGUES ON HIS PAPER THAT the question of whether GAL exists can receive various answers: GAL may exist as a research project, as a field of studies or as theory. But the capital question for the author is: does GAL

exists as positive law? In order to answer this question, FROMAGEAU analyses the meaning and purpose of the use of the concept of positive law in connection with GAL, with a particular focus on two GAL schools of thought: the Manhattan School and the Italian School.

According to PEDRO MONIZ LOPES' commentary, FROMAGEAU adopts an inferential method aiming at extracting a common concept of positive law in connection with GAL in altogether different, albeit collaborative, schools of thought: the Manhattan school and the Italian school, personified by KINGSBURY and CASSESE. The commentator considers FROMAGEAU makes serious claims over some confusion surrounding the concept of positive law by GAL scholars. Nevertheless the author adopts a relativistic view, under which *legal cultures* are presented as a possible key to explain different concepts of positive law. MONIZ LOPES agrees with FROMAGEAU's conclusion that there is no conceptual unity between the concept of positive law between the referred schools. However, he understands that some possible incoherence and shortcomings could have been highlighted by FROMAGEAU, and tries to place some of his main findings against the background of methodological positivism.

REBECCA SCHMIDT's paper, based on the examination of the powerful, industry-based food safety regulator GlobalGAP, revisits the public-private distinction in GAL. She argues that defining public as practice is the most coherent approach both from a practical as well as from a theoretical point of view. To SCHMIDT using the GAL framework makes it possible to identify acts and processes which are of common concern and ultimately public. To the author, looking at the normative goals of GAL it is striking what significant impacts an actor such as GlobalGAP has on common public concerns. Finally, SCHMIDT considers that under these circumstances 'complying' with GAL principles can be a venue even for formally private actors to create public processes which ultimately better correspond the public character it has in some of its regulatory activities.

The essay of SCHMIDT is the object of a critical analysis by MIGUEL ASSIS RAIMUNDO. According to the commentator, even if the paper is an interesting attempt at going further in a difficult topic of GAL, the presentation of an innovative practice-based approach is weakened by several undefined aspects of how that methodology would work, which have consequences: the criterion seems too generous in the identification of public bodies for the purposes of GAL; specifically, the position commented overlooks the fact that many of the "public principles" GlobalGAP allegedly applies are easily explainable in a purely private law framework. ASSIS RAIMUNDO argues that this entails the real danger of *expanding* the reach of GAL beyond what is necessary or justifiable. Moreover, he considers there are serious doubts as to the *consequences*, namely binding value and enforcement, of the identified GAL principles, in these types of cases.

ANA GOUVEIA MARTINS questions whether it is possible to recognize in the concept of GAL a new field of law or if there 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.

She argues that it is not possible to declare at the present day the existence of a GAL, 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 – therefore, there is only 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. In addition, the author stresses that GAL is not the only way to address global governance's problems, because it is also possible to use in an adapted way the internal administrative and constitutional law, as well the international law.

The commentary on GOUVEIA MARTINS by JOSÉ DUARTE COIMBRA is concerned to identify the main difficulties of GOUVEIA MARTINS' thesis and of those proposals, essentially based 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, on arguing that some of the problems raised in the paper are somehow misleading taking into account the GAL's real perspectives and ambitions.

Finally, GABRIEL BIBEAU-PICARD, adopting a systematic approach, sketches out three ways of questioning the legitimacy of GAL. BIBEAU-PICARD distinguishes between the legal, liberal and democratic forms of legitimacy and analyses their application to GAL. As a main argument, the author argues that there is a necessary connection between legality and legitimacy, and that the legitimacy of GAL is conceptually problematic. He does not aim to deter future research on GAL; however, BIBEAU-PICARD considers this is not possible without a comprehensive legal theory of global governance. Finally, the author also compares the pragmatic approach of GAL with the more ample ambition of global constitutionalism to provide a comprehensive narrative of contemporary international law.

The essay of BIBEAU-PICARD is the object of a critical analysis by DOMINGOS SOARES FARINHO. The commentator considers BIBEAU-PICARD's paper offers fresh field for insights and reflexion as his tour through three chosen legitimacies begs the question of how can one claim that such a normative order is legal. Nevertheless, SOARES FARINHO addresses with special interest BIBEAU-PICARD's 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.

This brief overview of the contributions herein published clearly shows the importance and vitality of the debate about GAL. This debate shows that if it is true that there is already copious scholarship on the existence and benefits of a genuine new branch of law, numerous questions about the normativity of Global Administrative Law continue to be raised, in particular concerning the difficulties identified at the level of the concept of law and, more specifically, the identification of the respective rule of recognition.

As guest editors of this special issue, we would like to thank the Editors of *e-Pública* for giving us the opportunity to publish these articles in a way that resembles the context in which they originated and allows emphasizing their

unity. Our special thanks, of course, go to all the participants of the *I Lisbon International Workshop on Global Administrative Law* who accepted our challenge to transform their papers in the articles appearing herein.
