

Hauser Globalization Colloquium Fall 2008: Global Governance and Legal Theory

NYU Law School

Professors Benedict Kingsbury and Richard Stewart
Furman Hall 324, 245 Sullivan St. (unless otherwise noted)
Wednesdays 2.15pm-4.05pm

Provisional Semester Program - Attached Paper is shown in Bold

- August 27- Teaching Session: Introductory Class (course instructors)
- September 3- **No class** (legislative Monday)
- September 10- Speaker: David Dyzenhaus, University of Toronto, NYU Global Law Professor
Topic: The Concept of (Global) Administrative Law
- September 17- Panel Discussion on the September 2008 ECJ Decision in Kadi. *Furman Hall 900.*
Professors Stewart, Kingsbury, and members of the international law faculty.
- September 24- Speakers: Eyal Benvenisti (Tel Aviv/NYU) and George Downs (NYU)
Topic: Toward Global Checks and Balances
- October 1- Speakers: Nico Krisch (LSE); and Euan MacDonald and Eran Shamir-Borer (NYU)
Topic: Global Constitutionalism and Global Administrative Law (two papers)
- Friday October 3 - SPECIAL SESSION Furman Hall 310, 3pm-5pm*
Speaker: Neil Walker, Edinburgh
Topic: Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders
Background reading: Constitutionalism Beyond the State
- October 8- Speaker: Meg Satterthwaite (NYU)
Topic: Human Rights Indicators in Global Governance
- October 15- Speaker: Janet Levit, Dean, University of Tulsa College of Law
Topic: Bottom-Up Law-Making Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit
- October 22- Speaker: Jack Goldsmith, Harvard Law School. *Furman Hall 900.*
Topic: Law for States: International Law, Constitutional Law, Public Law (paper co-authored with Daryl Levinson)
Guest Commentator: Prof Georges Abi-Saab, Geneva, former Chair of WTO Appellate Body
- October 29- [The IILJ will convene jointly with JILP a conference on International Tribunals, on Wed Oct 29, 9am-5pm, at the Law School. Global governance issues will feature. Students should attend this conference during the regular Colloquium time slot, and are welcome to attend other parts of the conference also. See the IILJ Website for details.]
- November 5- Speaker: Robert Keohane, Princeton and Kal Raustiala (UCLA). *Furman Hall 900.*
Topic: Toward a Post-Kyoto Climate Change Architecture: A Political Analysis
- November 12- Speaker: Jeremy Waldron (NYU). *Furman Hall 900.*
Topic: International Rule of Law
- November 19- Speaker: Benedict Kingsbury (NYU)
Topic: The Concept of 'Law' in Global Administrative Law
- November 26- [No class, session rescheduled due to Thanksgiving break]
- December 3- Speaker: Michelle Ratton-Sanchez, FGV Law School in Sao Paulo**
Topic: The Global Administrative Law Project: A Review From Brazil
- Background readings:
Michelle Ratton-Sanchez, The WTO And The OECD Rules On Export Credits: A Virtuous Circle?
Maira Rocha Machado, FGV Law School in Sao Paulo, Financial Regulation And International Criminal Policy: The Anti-Money Laundering System In Brazil And Argentina

Student paper presentations and wrap up.

Program and papers available at: <http://iilj.org/courses/2008HauserColloquium.asp>

THE GLOBAL ADMINISTRATIVE LAW PROJECT: A REVIEW FROM BRAZIL¹

Preliminary version, October 2008

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1. Introduction

The Global Administrative Law (GAL) project might be considered one of the main analytical and theoretical frameworks on global governance today. Its debate has been launched by a group of professors and scholars at New York University (NYU), having its "Project Overview Article", dated of 2003, first discussed in 2004² and later published in 2005³. After that, a series of roundtables, conferences and seminars took place in North America, Europe⁴ and, later on, in Latin America, Asia and Africa. This has been the dynamics of the work under the project: discussion, publication and inclusion of a broad group of scholars from different legal traditions.

This brief article intends to introduce a few lines on the GAL project and to address a couple of ideas on the potentialities of the dialogue that has been established with Latin

* I would like to acknowledge Rodrigo Pagani and Juliana Bornacosi di Palma for their helpful suggestions and comments on the Brazilian administrative law system. All errors and limitations are solely of my responsibility.

¹ This article takes into consideration the main publications of the Global Administrative Law either published by the journals *Law & Contemporary Problems* (68:3-4), *New York University Journal of International Law and Politics* (37:1), *European Journal of International Law* (17:1) or available in the project website for consultation and upload, counting with contributions from several centers and scholars either reasserting or criticizing the GAL ideas (<<http://www.iilj.org/GAL/default.asp>>, October 2008).

² Roundtable on Project on Administrative Law and Global Governance, at New York University School of Law, dated of January 30, 2004. For further information, see <<http://www.iilj.org/GAL/GALroundtable2004.asp>> (October 2008).

³ KINGSBURY, B., KRISCH, Nico, STEWART, Richard, WIENER, Jonathan (2005). "The emergence of global administrative law." *Law and contemporary problems* 68(3-4): 15-62..

⁴ An annual meeting on GAL takes place in Viterbo, under the partnership of NYU and Instituto di Ricerche sulla Pubblica Amministrazione (IRPA). Besides, also in Italy, as NYU partners: the Inter-University Research Group between University of Rome "La Sapienza" and University of La Tuscia, and the European University Institute in Florence. In Germany, the Bremen Project, a collaborative research between the University of Bremen, the International University (Bremen) and the Bremen University of Applied Sciences. In France, Chaire Mutations de L'Action Publique et du Droit Public at Sciences Po (Paris). And, in the UK, the Global Economic Governance Programme at Oxford University.

American scholars⁵, with an emphasis on the Brazilian context. On this basis, the main purpose here is to improve the understanding about the current status of GAL debate, in Latin America, as well as to favor a better understanding on the contribution the region is likely to make to GAL analysis, both with empirical cases and academic production in the region and/or in Brazil⁶. I will make references mainly to administrative law and international law materials⁷, as well as eventual cross-analysis in these fields.

2. The baselines of the GAL project

The GAL project undertakes basically a threefold analysis:

- ❖ Administrative law concepts might be helpful to better understand global governance processes⁸;
- ❖ Global regulation is composed by a set of public, private and hybrid rules and institutions⁹; and
- ❖ Normative foundations might be found for such global regulation¹⁰.

⁵ The first formal meeting with Latin American scholars took place in Buenos Aires, in March 2007. The meeting was organized by the Institute of Law and Justice (NYU) and University of San Andres. The framing issues paper for this meeting is available at <<http://iilj.org/GAL/documents/BuenosAiresGALWorkshopFramingtheIssues.pdf>> (October 2008).

⁶ An unfortunate reality is the limited cultural interchange among Latin America countries. This greatly impoverishes “a” Latin American overview; so my intent here, when referring to Latin America, will be solely to situate Brazil in this context.

⁷ The Project itself starts with this interdisciplinary approach, having Benedict Kingsbury on the international field and Richard Stewart on the administrative law field.

⁸ “The concept of global administrative law begins from the twin ideas that much of global governance can be understood as administration, and that such regulatory administration is often organized and shaped by principles of an administrative law character”, cf. KINGSBURY, B., KRISCH, Nico (2006). "Introduction: global governance and global administrative law in the International legal order." European Journal of International Law 17(1): 1-14. p.2.

⁹ “We describe this field of law as ‘global’ rather than ‘international’ to reflect the enmeshment of domestic and international regulation, the inclusion of a large array of informal institutional arrangements (many involving prominent roles for non-state actors), and the foundation of the field in normative practices, and normative sources, that are not fully encompassed within standard conceptions of international law”, cf. Ibid. p. 5. The authors hence specify that “(t)he global administrative bodies include intergovernmental institutions, informal inter-governmental networks, national governmental agencies acting pursuant to global norms, hybrid public-private bodies engaged in transnational administration, and purely private bodies performing public roles in transnational administration.” Cf. KINGSBURY, B., KRISCH, Nico, STEWART, Richard, WIENER, Jonathan (2005). "Foreword: global governance as administration - nation and transnational approaches to global administrative law." Law and contemporary problems 68(3-4): 1-13. p.5

¹⁰ KINGSBURY, B., KRISCH, Nico, STEWART, Richard, WIENER, Jonathan (2005). "The emergence of global administrative law." Law and contemporary problems 68(3-4): 15-62., p. 42.

The set of articles in the first axis tries to identify the characteristics, principles and postulates from the administrative law field, as developed in the intra-state level, that may contribute as framing categories to an emerging global regulation¹¹.

As a result, the main principles set by the Project Overview Article turn out to be: transparency, responsiveness and accountability. Further analysis developed under the GAL umbrella added other important references from the administrative law system, such as: court review, rule of law, abuse of power, reasoned decision, legality, participation, among others¹². Dyzenhaus systematizes them in three main categories of administrative law: constitutive (establishing the authority of administrative bodies), substantive (rules enacted by administrative bodies when performing their functions) and procedural (rules defining the way the administrative bodies make their decisions)¹³.

On the second axis, the framework paper defines five types of global regulation, according to the center of production of norms: (i) international organizations; (ii) informal networks of governmental officials; (iii) state agencies charged with the administration of global regimes (“distributed administration”); (iv) hybrid public-private institutions; and (v) private bodies entrusted with governance functions¹⁴. These regulations assume the two perspectives that Stewart has referred to as the “bottom-up” and the “top-down” approaches to global administrative law¹⁵.

¹¹ On this sense, see CASSESE, S. (2005). "Administrative Law without the state? The challenge of global regulation." New York University Journal of International Law and Politics 37(4): 663-694, STEWART, R. (2005). "U.S. Administrative Law: A Model for Global Administrative Law " Law and contemporary problems 68(3-4): 63-108, HARLOW, C. (2006). "Global Administrative Law: the quest for principles and values." European Journal of International Law 17(1): 187-214, DYZENHAUS, D. (2008). The concept of (global) administrative law, Institute for International Law and Justice. (on the principles of administrative law in national systems and the EU, pp. 189-195)

¹² CHIMNI, B. S. (2005). "Cooption and Resistance: Two Faces of Global Administrative Law " New York University Journal of International Law and Politics 37(4): 799-827, DYZENHAUS, D. (2005). "The rule of (administrative) law in international law." Law and contemporary problems 68(3-4): 127-167, STEWART, R. (2005). "The global regulatory challenge to U.S. administrative law " New York University Journal of International Law and Politics 37(4): 695-762, HARLOW, C. (2006). "Global Administrative Law: the quest for principles and values." European Journal of International Law 17(1): 187-214.

¹³ DYZENHAUS, D. (2008). The concept of (global) administrative law, Institute for International Law and Justice.

¹⁴ KINGSBURY, B., KRISCH, Nico, STEWART, Richard, WIENER, Jonathan (2005). "The emergence of global administrative law." Law and contemporary problems 68(3-4): 15-62. p. 20.

¹⁵ Richard Stewart, “US Administrative Law: A Model for Global Administrative Law?”, 68 *Law and Contemporary Problems* (2005) 63; 2.

Another group of papers has been written as to contribute with a descriptive analysis about such array of global regulation. Concerning the regulation by international organizations, there are papers on the OECD, on investment treaties and alike; on informal networks of governmental officials, analysis of the Basel Committees; on state agencies charged with the administration of global regimes (called “distributed administration”), except for the analysis of the U.S. system by Stewart (STEWART 2005), most part of them are cross-analysis on international organizations systems such as the cases of mutual recognition; on hybrid public-private institutions, there are articles examining the Codex Alimentarius example; and, on private bodies entrusted with governance functions, the International Standardization Organization (ISO)¹⁶. Such descriptive works mainly reinforce the perspective that new forms of regulations and the way they interact are emerging, reinforcing the limits of the principles and structures of traditional international law for comprehending and systematizing that “global phenomena”.

The normative axis of the GAL project is appointed as the most vulnerable by critics and the one in which differences of legal culture should be contemplated¹⁷. The foundation of any “normative” element is that it shall be entrusted with governance functions. As a result, it shall be connected to democratic normativeness, under the principles of legitimacy, transparency, accountability¹⁸. A few contributions focused on such

¹⁶ Papers examining such regulations and issues may be found in the compendiums of articles, published at the journals *Law & Contemporary Problems* (68:3-4), *New York University Journal of International Law and Politics* (37:1), *European Journal of International Law* (17:1), as well as in the book CASSESE, S., CAROTI, B., CASINI, L., MACCHIA, M., MACDONALD, E., SAVINO, M. (2008). Global administrative law: cases, materials, issues, IRPA/ IILJ. (available at <<http://www.iilj.org/GAL/documents/GALCasebook2008.pdf>>, October 2008). Most part of the articles may be also found at < <http://www.iilj.org/GAL/default.asp>> (October 2008).

¹⁷ “ (...) global administrative law might be built not so much on a coherent normative x system, but rather on some kind of “overlapping consensus.” The extent to which this might be possible is a question requiring further research and vigorous debate.” Cf. KINGSBURY, B., KRISCH, Nico, STEWART, Richard, WIENER, Jonathan (2005). “The emergence of global administrative law.” Law and contemporary problems 68(3-4): 15-62. p. 51/52.

¹⁸ “The problem of legitimacy raised by this shift of power and authority to extra-state processes and norms are graphically unresolved. So too are the problems of configuring suitable democracy-respecting but functionally effective relationships between national institutions (including national and sub-national administrative agencies and courts) and extra-national or private institutions of global governance. [...] The Global Administrative Law Research Project seeks to tackle such problems from new angles, through its

normative proposals for the GAL governance and their central concerns are connected to accountability and democracy¹⁹. Kingsbury, Stewart and Krish anticipated it in the Project Overview Article declaring that: “Work on the normative issues is likely both to deepen transnational and global democratic theory and to raise challenging questions about its application to specific administrative structures and to the whole project of global administrative law. Normative inquiries will also enrich operational understandings of the place of diversity, equality, and equity in global administrative law. The need for alternative approaches to the currently dominant models of global governance and of administrative law is pressing but is just beginning to be addressed.” (KINGSBURY 2005)

3. GAL contributions to Latin America

There are three main contributions I identify in the GAL debate: its openness and method of work; its role of naming new phenomena and its ability to articulate with the debate on global governance.

A. GAL openness and method of work

One of the notable achievements of the GAL project, amongst those working on global governance issues, is its planned and highly organized method of work. The fact that the project has been developed by a solid group of scholars interested in involving a growing number of academics as well practitioners in the debate, and that it is hosted in a well-known center – the Institute of International Justice and Law – granted an important dimension for the systematization and development of the GAL debate.

Therefore, the project since it was launched in 2004, as previously mentioned, has promoted a number of qualified meetings. Such meetings have been nourished by papers

analysis of global governance as administrative action.” Cf. KINGSBURY, B., KRISCH, Nico, STEWART, Richard, WIENER, Jonathan (2005). "Foreword: global governance as administration - nation and transnational approaches to global administrative law." Law and contemporary problems 68(3-4): 1-13. p. 3.

¹⁹ E.g., COHEN, J., SABEL, Charles (2005). "Global democracy?" New York University Journal of International Law and Politics 37(4): 763-798, HARLOW, C. (2006). "Global Administrative Law: the quest for principles and values." European Journal of International Law 17(1): 187-214, DYZENHAUS, D. (2008). The concept of (global) administrative law, Institute for International Law and Justice.

of distinguished authors from different fields of work. And, together with this idea of involving a growing number of authors, another concern is to broaden the debate beyond the U.S.-Europe transatlantic axis.

It is worth noting that those collaborative papers do not necessarily reinforce GAL standpoints. All the three axes of analysis are under consideration, constant criticism and further descriptive contributions. And this is due to the fact that the project itself was launched with room for debate, aiming to have its analysis sophisticated and criticized by other points-of-view.

In this context, I suspect that a dialogue with Latin America faces one opportunity and two challenges. Firstly, the GAL project has been provoking voices from the South, and the Buenos Aires workshop in March 2007 was one of these opportunities, as well as the lectures of Stewart in Brazil in May (São Paulo) and November (Rio de Janeiro) 2008. However, the first – and most important – challenge on the region is the lack of a critical approach to the global governance debate²⁰ and the unresponsive academic debate on connected issues.

A second challenge for Latin America's academics and practitioners is to develop an authentic regional debate concerning the GAL ideas. Even if we take into account the social, economic and institutional differences of the countries from the region, the historical and cultural similar backgrounds could favor an authentic regional debate or at least a closer interchange of ideas. Nonetheless, there is a lack of knowledge of – and sometimes even respect to – the academic debate developed in one country by the others. This is deteriorated by the restricted opportunities for meetings and common forums – poorer in the law field – as well as by the limited editorial market. This is a deficit to be overcome envisioning the possibilities of fruitful comparative works as suggested both on the Annex 2 to the “Summary of Workshop Objectives and Issues for Discussion” of the

²⁰ LORCA, A. B. (2006). "International law in Latin America or Latin America International Law? Rise, fall, and retrieval of a tradition of legal thinking and political imagination." Harvard International Law Journal 47(1): 283-305.

Workshop on Global Administrative Law Issues in Latin America²¹ and on Section 4 below.

B. GAL sophisticates the available analytical tools

As pointed out by Susan Marks the fact that the GAL project named the process of an emerging global regulation is one of its major contributions to the global governance debate²². The authors of the Project defined that they intended to lighten a set of phenomena not yet systematized, and Susan Marks adds to it that, by naming the process “(it) gives shape and focus to an immense range of large and small questions about the legal control of decisionmaking in the contemporary world.” (MARKS 2005)

By the “naming” work, the GAL project made one step further than the diagnosis by the legalization debate – which in one sense had sophisticated the hard law and soft law debate at the time²³ – and the top-down and the bottom-up analysis²⁴. Opportunely the GAL project not only acknowledges these previous works but it congregates them into one framework, challenging the restrictive categories of the international law system.

Besides that “naming” effort, the GAL project, when compared to other global governance proposals – to remain with a few examples, I quote here the debates on linkage, multi-level governance and constitutionalism – encompasses a larger group of global regulation, stimulating the search for adequate tools to such an heterogeneous group of rules (as to format and origin), but with similar impacts in the reality with which they interact. And, again, as an institutionalized project, GAL production has been

²¹ Available at <<http://iilj.org/GAL/documents/BuenosAiresGALWorkshopFramingtheIssues.pdf>> (October 2008).

²² “(...) the first and perhaps the most striking achievement of those responsible for New York University’s Global Administrative Law Project is that they have *named* a phenomenon. In doing so, they have invited us to think about how seemingly disparate issues, structures and processes may be connected – how they might currently be connected, but also how more integrated global systems might be established in the future.” MARKS, S. (2005). "Naming Global Administrative Law." New York University Journal of International Law and Politics 37(4): 995-1001. p. 995

²³ ABBOT, K., SNIDAL, Duncan (2000). "Hard and soft law in international governance." International Organization 54(3): 421-456. ; GOLDSTEIN *et alli* (2000). "Introduction: legalization and world politics" GOLDSTEIN, J. e. a. (2000). "Introduction: legalization and world politics." International Organization 54(3): 385-399.

²⁴ Levit, J. K. (2005). "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments." The Yale Journal of International Law 30(winter): 125-209.

successful in promoting the contrast before those other proposals on global governance frameworks and in defining its own specificity²⁵.

When we put this in context, the question that comes out is: to what extent the naming and the governance dialogue processes in the framework of the GAL project are relevant to Latin America?

Buenos Aires workshop considered this question and defined five thematic panels to debate the GAL ideas, besides the opening and the closing sessions. The panels dealt with: (1) public-private ordering in the global economy: implications for national and transnational administrative law; (2) transnational investments: treaty-based governance and its implication for government, civil society, and public services; (3) internationalization of human rights: global administrative law implications; (4) anti-money-laundering and governance in Latin America; (5) environmental regulation and governance²⁶. All these panels addressed mainly examples of how global regulation is affecting that range of topic-regulating fields.

The cross-cutting question on “how global regulatory governance, and the emerging global administrative law, is connected to developments in the practice and the conceptualization of public law and the public sphere in Latin American countries”, though, did not count either with an analytical paper on the clear status of the administrative law debate on the region or the international conceptions and global governance debate that it has been developed by the region. This observation has in mind the alerts from Bruno Chimni and Carol Harlow described in the following section.

4. Constraints and challenges faced by the GAL ideas

²⁵ In this sense, NICOLAIDIS, K., SHAFFER, Gregory (2005). "Transnational mutual recognition regimes: governance without mutual government." Law and contemporary problems 68(3-4): 263-318, MACDONALD, E. (2008). The 'emergence' of global administrative law? 4th Global Administrative Law Seminar: Global Administrative Law: from fragmentation to unity? Viterbo.

²⁶ Available at <<http://iilj.org/GAL/documents/BuenosAiresGALWorkshopFramingtheIssues.pdf>> (October 2008).

As previously mentioned, the fact that the project has been developed as an open umbrella, as part of it there are a number of papers commenting and contesting the framework ideas for a global administrative law. Herein I will address four of them that may help to better take the steps towards a GAL work closer to the Latin American debate. They are: (i) the conflict of legal cultures on administrative law; (ii) the normative *vs* the descriptive approaches of the GAL theory; (iii) GAL methodology and developing countries mind-set in the global context; and, last but not least, (iv) the analytical advantages and limits of GAL in comparison to other governance theories. I will examine these points either isolated or in group, whichever most convenient for each case.

A. The conflict of legal cultures on administrative law

According to Richard Stewart “(A) global administrative law must, of course, draw on legal principles and practices from many domestic and regional legal systems and traditions, as well as from sources in international law.” As a result, the main challenges faced by the GAL project is how to look for the most adequate analytical tools and how to outline a normative basis that entangles a varied set of principles and practices based on different cultural backgrounds and diverse legal grounds.

It is important to have in mind, firstly, that administrative law traditions are identified with Western cultures, having two main starting points: one from common law systems, and another from the civil law systems. Textbooks on administrative law – including the Latin American ones – by and large investigate the differences among those systems. Their conclusions are basically that the founding principle for the civil law system is “legality”, and, for the common law system, the “rule of law” and “judicial control”²⁷. Despite that, Cassese – followed by others – identifies a couple of reasons sustaining a

²⁷ CASSESE, S. (1994). Las bases del derecho administrativo. Madrid, Instituto Nacional de Administracion Publica. p. 58 and following pages, describes the formation of “administrative law” as a field of work and the importance of Dicey in defining the categories for the common law system. Janet McLean, on the other hand, appoints to differences amongst the conception of administrative law in different countries adopting the common law system (p. 168), MCLEAN, J. (2005). "Divergent Conceptions of the State: Implications for Global Administrative Law " Law and contemporary problems 68(3-4): 167-187.

convergence among the concepts of administrative law in the civil and in the common law systems²⁸.

Secondly, an alert by the “summary of the workshop and issues for discussion” paper for the Buenos Aires workshop: “There is a serious risk that the emerging practice of global administrative law will be too strongly influenced by developed countries – states with strong institutions, global power and largely consolidated systems of administrative law”²⁹. This statement leads us to question: how different traditions of law influenced and are still influencing the Latin American systems? How will they impact the involvement of Latin American countries in the emerging global administrative law?

In the case of Brazil, it is known that its administrative law system – as most part of its public institutions – was influenced by a combination of both the Western Europe civil law system and the common law system³⁰. Similarly to the exercise made by Richard Stewart concerning the three major phases of the U.S. administrative law (STEWART 2003), Maria Sylvia di Pietro outlines four moments and their landmarks in the Brazilian administrative law system³¹: (i) the colonial period, regulated by the Portuguese system; (ii) the imperial period, distinguished by the autonomous production of rules in Brazil – at the time mainly influenced by the French system; (iii) the period starting with the republic system, in which there were influences from the U.S. model and others, and when the administrative law field started to be understood as a system; and (iv) the ongoing one since the edition of 1988 Constitution. This last stage is identified with the democratic principles, the reform of the state and the influences of the economic openness in Brazil and the increasing interdependence of the world.

²⁸ CASSESE, S. (1994). Las bases del derecho administrativo. Madrid, Instituto Nacional de Administracion Publica. p. 66-73.

²⁹ Available at: <<http://ijl.org/GAL/documents/BuenosAiresGALWorkshopFramingtheIssues.pdf>> (October 2008). In the same sense, the framing paper of the project, KINGSBURY, B., KRISCH, Nico, STEWART, Richard, WIENER, Jonathan (2005). "The emergence of global administrative law." Law and contemporary problems 68(3-4): 15-62. p. 51.

³⁰ Such influence took place mainly on the late 19th century, cf. DI PIETRO, M. S. Z. (2002). "500 anos de direito administrativo brasileiro." Revista Diálogo Jurídico 10: 1-24. p. 14.

³¹ Ibid. p. 3 and ff.

Brazilian administrative law system has had, therefore, multiple phases in the importation of models, with different paradigms and forms of influence. This is a well-known diagnosis; however critical analyses to this phenomenon of transplant are still marginal in Brazil³². Even more unusual are studies co-relating that phenomenon with an international or global perspective – an interdisciplinary exercise required by the GAL project. Definitely, these circumstances may limit the role Brazilian studies in collaborating to a more sophisticated comprehension of administrative law tools on the global level.

Additionally, in a moment of global administrative regulation, the challenge in Brazil would be to change from a completely passive to a somehow active position in the design of administrative models³³. Again, this requires a closer dialogue of, at least, the administrative law field with the international law studies. The latter, as well as the former law field, was mostly based in Brazil on a mimesis of the debate in Northern countries, mainly European ones. The international law field, as supported by Lorca, has lost its importance along the years for the region, impairing its political meaning in the last decades³⁴. This has been a generalized phenomenon in developing countries, resulting in a lack of institutional imagination for their participation in the global governance process³⁵.

³² As an example of this kind of analysis, see FÁRRIA, J. E. d. O. (1999). O direito na economia globalizada. São Paulo, Malheiros, SUNDFELD, C. A. (1999). A administração pública na era do direito global. Direito Global. C. A. SUNDFELD, VIEIRA, Oscar Vilhena. São Paulo, Max Limonad: 157-168, MATTOS, P. T. L. (2007). The Regulatory Reform in Brazil: New Regulatory Decision-Making and Accountability Mechanisms, Institute for International Law and Justice. Available at: www.iilj.org (October 2008).

³³ Conversely, the experience of the U.S. that has been a usual exporter of models and now, due to changes in the global level, is also suffering the influences from abroad in its domestic system. See STEWART, R. (2005). "The global regulatory challenge to U.S. administrative law " New York University Journal of International Law and Politics 37(4): 695-762.

³⁴ LORCA, A. B. (2006). "International law in Latin America or Latin America International Law? Rise, fall, and retrieval of a tradition of legal thinking and political imagination." Harvard International Law Journal 47(1): 283-305. The author identifies four main moments of the trajectory of international law in Latin America: (i) from the 1810s until the 1880s, international law as an instrument in the process of nation building; (ii) from the 1880s until the 1950s, international law as part of the discursive creation of Latin America as well as a language for contesting its definition; (iii) from the 1950s until the 1970s, a period of professional radicalization and fragmentation; and (iv) from 1970 until the 2000s, a period of professional depolitization and irrelevance of international law as a discourse for thinking the region.

³⁵ For an example of movements as such in History, check for RAJAGOPAL, B. (2003). International law from below: development, social movements, and Third World resistance. Cambridge, Cambridge University Press.

B. The accountability focus

The idea of accountability exemplifies the comments above and contributes to a better understanding about the conflicting relation of the simultaneous development of descriptive analysis and normative theories in the GAL field.

Accountability is one of the core issues for the GAL project (KINGSBURY 2006). Stewart defines as essential elements of accountability “adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions made” (STEWART 2005).

In what concerns the structure of the administrative law system in Brazil, although there is a hybrid combination of civil law and common law, these systems were not fully incorporated by the Brazilian legal culture. Legality and procedures were fully integrated into the system, becoming pillars of the domestic administrative law. However, principles of participatory democracy, for example, have been recently incorporated as part of the rule of law system. It has been not only a challenge to implement the recent institutional changes in that sense and to incorporate it in the legal culture³⁶, but also very hard to find the normative basis to evaluate the effectiveness of such mechanisms in the “new democracies” in Latin America³⁷.

C. Normative-descriptive boundaries and developing countries interests

The conflict between the descriptive case-analysis and the normative categories-development has been one of the points confronted by collaborative authors to the projects³⁸. There are a couple of questions up in the air: is it possible to draw on

³⁶ In this sense, see the example of the creation of the telecommunications agency in Brazil and its participatory mechanisms in MATTOS, P. T. L. (2007). *The Regulatory Reform in Brazil: New Regulatory Decision-Making and Accountability Mechanisms*, Institute for International Law and Justice.

³⁷ MELO, M. A. (2005). "Institutional design, normative political theory and accountability." *Revista Direito GV Nov*: 195-207. The author examines comparative political theories and their normative aspects and their impacts in the “new democracies”, claiming for a review of certain normative aspects when the theories are applied in such new contexts (of non-developed countries).

³⁸ In this sense, check for COHEN, J., SABEL, Charles (2005). "Global democracy?" *New York University Journal of International Law and Politics* 37(4): 763-798, MCLEAN, J. (2005). "Divergent Conceptions of the State: Implications for Global Administrative Law " *Law and contemporary problems* 68(3-4): 167-187, HARLOW, C. (2006). "Global Administrative Law: the quest for principles and values." *European Journal*

normative basis before a positive map of the emerging global regulation? To what extent do the first settled normative references have any imperialist impact in the way global administrative law has been drawn? How far may the settled mechanisms be applicable to developing and peripheral countries (as contributors to the debate and players in the global system)?

In that sense, Chimni, in defense of developing countries, reinforces the idea that it is essential to the GAL theory to combine substantive and procedural law – if not inevitable (HARLOW 2006; DYZENHAUS 2008). Chimni makes an important – if not the sole – assessment in the GAL project to the concerns of resistance and change as a mind-set of developing countries in the international system. Accepting or not Chimni thesis, his alert to specificities of developing countries in their enrollment in the global system is thriving.

Focusing on developing countries’ concerns comprehends the analysis of the state and its institutions, the market and its institutions, as well as the civil society movements in developing countries. For that reason, I suggest that before reckoning values and interests – that might be particular to each country in this heterogeneous “developing” group – we explore the naming achievement of the GAL project (MARKS 2005) with reference to developing countries.

The five types of global regulation plotted by the GAL framing paper (KINGSBURY 2005) drive our attention to the fact that in each type of regulation not only the legal features change but also the agents involved and the roles they play. The table below details these aspects:

of International Law 17(1): 187-214, DYZENHAUS, D. (2008). The concept of (global) administrative law, Institute for International Law and Justice.

Table: GAL and role of the agents

	Types of globalized administrative regulation	Regulator	Role of the Regulator	Interaction with the domestic system	Role of the domestic agents	Example
(1)	Administration by formal international organizations	International organizations	Subsidiary legislation, binding decisions	Treaty-based	Negotiation and implementation	WTO, Security Council, FATF, World Bank
(2)	Administration based on collective action by transnational networks and cooperative arrangements between national regulatory officials	Public transnational networks	Non-binding decisions, but with effectiveness	Coordination of policies, Mutual recognition	Cooperation, negotiation and implementation	Basle Committee, WTO code standards, Bilateral Cooperation
(3)	Distributed administration conducted by national regulators under treaty, network, or other cooperative regime	National regulators	Decisions taken in one country on issues of foreign or global concern	Affected by decisions from another country	One makes decisions/ other implements	National environmental regulators
(4)	Administration by hybrid intergovernmental-private arrangements	Hybrid groups	Quasi-mandatory standards	Harmonization	Adoption	Codex Alimentarius, ICANN
(5)	Administration by private institutions with regulatory functions	Private agent	Context-specific, standards	Context-specific harmonization	Adoption	ISO, NGOs

Source: Author, based on (KINGSBURY 2005).

Except for the international organization regulation (1), the systematization of the others (2-5) under one project was a pioneering initiative. I sustain that this has been the major contribution of the GAL project both theoretically and as an analytical tool for developing countries. The naming work let us precise the question: in which levels are developing countries playing a role? What are their tools? Are their domestic agents

aware that they should or could be playing that role? Is there any coordination among domestic agents in developing countries?

Interestingly, the types (2-5) are the levels of regulation to which developing countries have had a more restricted access. Their lack of experience might influence their ability in dealing with those issues, but above all the techniques involved in those highlighted levels are worrisome. The reason is that from top to bottom, the regulation acquires more and more an attainment to the rules defined in the global level. How are developing countries responding to those types of regulation? Are they able to have any influence on their definition and implementation?

There is insufficient information available to address all those questions, not empirically and even less positively. The idea then is to explore the adequate tools to investigate for the most relevant information for developing countries (methodology), in reimagining their abilities and possibilities before such global arrangements and the impacts to their domestic (administrative) system.

Machado and Jorge's comparative study (MACHADO 2007) elucidates how in the level (1) the different agents involved are dealing with that global regulation. Though their examples comprehend two developing countries (in the same region), they identify different outcomes. This kind of empirical study sheds light on important starting points for a more sophisticated analysis of how developing countries are becoming part of this global (administrative) system. This study, for example, inspires further analysis about the institutional design of the agents involved, their methods of work, the differential any previous experience brought to their coordination with the administrative regulation in question and so on. Additionally, the sophistication of the analysis might, afterwards, support the trial of the GAL normative hypothesis.

In the same sense, Chimni's example of developing countries on the negotiation of the Codex Alimentarius (CHIMNI 2005) might be considered an invitation to examine in detail, on a comparative basis, the differences and similarities of the outcomes to the

domestic system of those involved. What is new here is that the Codex Alimentarius is considered a hybrid-type of global regulation (4), which is among those in which developing countries have less experience – and sometimes even less opportunity to access.

A couple of other papers connected to the GAL project also considered the empirical analysis in developing countries such as Kenya, Malaysia and Argentina³⁹. Upon the exercise by authors from different origins examining empirical cases, there is a possibility of drawing on similar concerns in each of the five types of regulation.

I stand up for the advancement on the empirical method of research as the primary technique to understand the movements of integration of developing countries to the global (administrative) level. The results on a case basis, enhanced by comparisons, may bring to the front the diversity of developing countries responses – giving the chance to be surprised by interesting cases of resistance, conciliation and advancements. Otherwise, it might be risky to base the analysis of the new kinds of global regulation – mainly those barely explored by developing countries studies – on biased conceptions, founded on old-fashioned ideas about developing countries position in the world.

5. Prospective ideas for a GAL agenda in Latin America

Based on the lines above there are two axes of work for the development of a GAL agenda in Latin America: one to be undertaken in the national/ regional level, and the other in the global debate under the GAL framework. Both essentially have to take the other into account and take the opportunities to enrich the analysis once developed.

In the first axis, scholars and practioners from the region should seriously take the global governance debate into consideration as to their domestic and to the regional institutional

³⁹ AKECH, J. M. M. (2005). "Development partners and governance of public procurement in Kenya: enhancing democracy in the administration aid." *New York University Journal of International Law and Politics* 37(4): 829-868, MACCRUDDEN, C., GROSS, S. (2005). "WTO government procurement rules and the local dynamics of procurement policies: a Malaysian case study." *European Journal of International Law* 17(1): 151-187.. And, for the studies on Argentinean cases, check the papers presented on the Buenos Aires meeting available at <<http://www.illj.org/GAL/GALBuenosAires.asp>> (October 2008).

structure, as well as with reference to the legal and political cultures of their countries. From the considerations reached in this paper, in a few words, the following research agenda could greatly contribute to build a prosperous debate on the emerging global regulation by the region: (1) a critical debate on the long-established importation model of administrative law and the challenge to advance on the exportation of models and/or global design of administrative regulation; (2) an interdisciplinary work and research, among public and international lawyers, provoking the institutional imagination either to global or to domestic institutions in this new global context; and (3) empirical studies of the five types of regulation, the domestic agents' role and their responses.

On the second axis, the GAL approach to the Latin American law debate may be enriched by a permanent dialogue among the scholars involved. There are two kinds of work that should be prioritized: one with reference to general theory of administrative law models on the region and their conception about the main normative concepts for the GAL theory, and a second one mainly focusing on the five types of global regulation. For the former, an example could be a debate on the accountability methods and procedures under each domestic regulation and the envisioned work towards a global perception of this administrative tool. For the latter, rich contributions may come out from empirical case analyses with a comparative perspective (from the same or from different regions of the world). This may favor the process of contrasting realities and checking the considerations by the researchers involved.

If the GAL framework paper stated in 2005 that “[T]he need for alternative approaches to the currently dominant models of global governance and of administrative law is pressing but is just beginning to be addressed” (KINGSBURY 2005), Latin American scholars should acknowledge this statement the soonest. Agreeing with it does not mean sticking to the project and its announcements, but becoming an interlocutor in building and criticizing this framework that intends to settle a new global thinking.

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