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# The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury<sup>†</sup>

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## 1 Introduction

The Global Administrative Law (GAL) project is based on the recognition that the most important recent developments in international law have enhanced its administrative dimension.<sup>1</sup> What can be observed today, from the preparation of side agreements to the GATT all the way down to the regulation of foodstuffs in the European Union, is an increase in transnational regulatory cooperation and in joint efforts at implementation. The new world of international law is the world of loosely coupled, but often highly interactive and effective, mutual engagements between and among national and international bureaucracies. GAL concerns itself with identifying, where possible, their legal form and with establishing control. Owing to its broad sweep, global administrative law appears to offer a re-description of particularly impor-

tant parts of international law.<sup>2</sup> It actually draws a picture of international law which has come under the dominating sway of administrative rationality.

As the project unfolds, the concept of administrative law is given a more American twist.<sup>3</sup> The focus lies, hence, not so much on individual acts<sup>4</sup> but rather on the establishment and exercise of regulatory authority.<sup>5</sup> Rights receive less attention than the organization of good governance. Guarantees of transparency and participation are seen to be *regulatory* modalities of respecting the interests of stakeholders and affected groups.<sup>6</sup> Consequently,

<sup>†</sup> Kingsbury, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury', 20 *EJIL* (2009) 23, <http://ejil.oxfordjournals.org/cgi/reprint/20/1/23>.

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<sup>1</sup> See, generally, Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *Heidelberg Journal of International Law (ZaöRV)* (2004) 547.

<sup>2</sup> See Krisch and Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', 17 *EJIL* (2006) 1.

<sup>3</sup> For a similar observation see Harlow, 'Global Administrative Law: The Quest for Principles and Values', 17 *EJIL* (2006) 187, at 209; Krisch, 'Global Administrative Law and The Constitutional Ambition', in M. Loughlin (ed.), *The Twilight of Constitutional Law* (forthcoming, 2010).

<sup>4</sup> This is not always the case. The declaration of refugee status by the UNHCR is an individual administrative act.

<sup>5</sup> See Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *L and Contemp Probs* (2005) 15, at 16.

<sup>6</sup> On the pedigree of 'governance' from the pluralistic transformation of American administrative law into an instrument of participation and agreed-upon rule-making see the highly perceptive comments

a broad range of phenomena enters the purview of GAL, ranging from administration by formal organizations, such as the World Health Organization, over collective action by transnational networks of national regulatory officials all the way down to private institutions with regulatory functions, such as ISO.<sup>7</sup>

The range of phenomena studied involves a departure from the basic analogy which lent plausibility to the project in the first place. In the exemplary case, a legislature delegates regulatory authority to an agency which, after giving notice, scheduling hearings, and providing reasons, adopts an implementing regulation. In the international context, a Treaty typically takes the place of legislation, and a general act adopted by an international organization the place of the regulation. Accordingly, acts by the United Nations Security Council, which have increasingly come to be of a more general nature,<sup>8</sup> would derive their authority from the delegation effected by all acceding signatory states of the UN Charter.

If I understand the GAL project correctly, its very point is to emphasize that what used to be the paradigmatic make-up of the modern ‘regulatory state’ is merely a limiting case of how administrative processes have come to be re-enacted on a global scale. Remarkably enough, the paradigm shift amounts to a ‘decentring’ of the image of delegation

of authority to rule-making and rule-applying bodies. Not only can regulation on the basis of delegation no longer be considered to be the paradigmatic core of administrative law, no other relationship can plausibly claim to play this role. Individual acts by the Security Council are just as paradigmatic an instance of GAL as standard-setting by the Codex Alimentarius Commission. The absence of a paradigm reveals the ‘rhizomatic’ quality of this situation.<sup>9</sup> There is neither system nor centre, but merely a number of family resemblances among different processes.

## 2 Meta-management or Law?

Against this background, it is all the more surprising that the normative thrust of global administrative law is relatively straightforward. Indeed, the project is animated by the confidence that from the mush of the decentred paradigm will emerge ‘the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, by providing effective review of the rules and decisions they make’.<sup>10</sup> Thus, GAL links the description of variegated phenomena with the pursuit of a limited normative agenda committed to core principles of the rule of law and to the values associated with ‘good

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by Shapiro, ‘Administrative Law Unbounded: Reflections on Government and Governance’, 8 *Indiana J Global Legal Stud* (2001) 369, at 376.

<sup>7</sup> See Kingsbury *et al.*, *supra* note 5, at 20–23.

<sup>8</sup> See Alvarez, ‘Hegemonic International Law Revisited’, 97 *AJIL* (2003) 873; Scheppele, ‘Law in a Time of Emergency: States of Emergency and the Temptations of 9/11’, 6 *U Pennsylvania J Constitutional L* (2004) 1001.

<sup>9</sup> See G. Deleuze and F. Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (trans. B. Massumi, 1987), at 3–26.

<sup>10</sup> Kingsbury *et al.*, *supra* note 5, at 17. See also *ibid.*, at 28.

governance'.<sup>11</sup> Hence, global administrative law has set for itself quite pragmatic objectives, which are incidentally far more modest than the claims made by those advancing in one way or another the cause of constitutionalization.<sup>12</sup>

While this modesty deserves praise, the broad base of reference creates a problem of its own. The question arises whether the use of *legal* vocabulary does not distort underlying social facts. For example, it is one thing to conceive of the Agreement on Phytosanitary Measures in terms of substantive administrative law and the review of its observance by dispute settlement bodies as a quasi-judicial process; it would be quite *another* matter, however, to describe the coordination of state educational systems in the course of the 'Bologna process' in the language of administrative law. Ostensibly, an informal coordination process of the latter type is too far removed from the self-conscious application of legal procedures to pass as instance of a legal process. The Bologna process is about managing convergence. It may count as administration, broadly understood, that is, as cooperative conduct engaged in by state administrations in order to get things done, the relevant

actions, however, are not specifically constituted by administrative law, but rather by the broader legal background conditions of human life. Moreover, it is difficult to see why they are relevant to administrative law if they do not give rise to the adoption of legally binding administrative acts. Coordination processes are often simply cases of transnational management – an observation which could be extended to include the operation of the world's core financial institutions.<sup>13</sup> The problem that arises for the GAL project is that owing to its practical ambition it is inclined to describe processes which do not give rise to legally binding acts as though they were constituted by administrative law, while these very same processes can equally plausibly also be described as mere instances of permissible conduct.<sup>14</sup>

It may be objected that any distinction between administrative acts, on the one hand, and generally permissible conduct, on the other, is informed by a domestic example, which must not be slavishly followed in the global context.<sup>15</sup> Aside from the ostensible lack of coolness associated with relying on domestic analogies, it is difficult to understand why GAL should ignore the important conceptual lessons which can be learned from the evolution of its domestic predecessor. The alternative to such learning is not palatable. Describing law-abiding conduct

<sup>11</sup> For apt remarks as regards this more limited agenda see Marks, 'Naming Global Administrative Law', 37 *Int'l L and Politics* (2005) 995. Harlow, *supra* note 3, at 198–203, goes to great pains to distinguish rule of law principles, such as legality and limited powers, from good governance values, such as transparency and participation. She sees the latter as originating from World Bank and International Monetary Fund policies and denies them the stature of genuine administrative law principles. I can imagine that American scholars would have a different take on this.

<sup>12</sup> For self-conscious modesty see Krisch, 'Postnational Constitutionalism?' (manuscript 2008); see also Krisch, *supra* note 3.

<sup>13</sup> See, e.g., on the Poverty Reduction Strategy of the International Financial Institutions de Búrca, 'Developing Democracy beyond the State', 46 *Columbia J Transnat'l L* (2008) 221, at 264–266.

<sup>14</sup> For a discussion of this problem see Kelsen, 'Die Lehre von den drei Gewalten oder Funktionen des Staates', 17 *Archiv für Rechts- und Wirtschaftsphilosophie* (1923–24) 374.

<sup>15</sup> My bet is that Krisch would raise this objection.

in terms of law is not truly illuminating. An account of lawful behaviour is not an account of the law establishing what is lawful behaviour. For example, public regulators increasingly draw on the work of private standard-setting bodies.<sup>16</sup> While the adoption of those standards may indeed reflect the effort to comply with national administrative rules of reason-giving, it is not clear why the work done by such bodies should count for more, legally speaking, than permissible conduct which draws on, and generates, expertise. Moreover, convergence on private standards for the reason of signalling trustworthiness is not a paradigmatic instance of administrative law. It also remains unclear whether one is confronted with legal rules when it comes to ‘learning processes’ or, at the output level, an identification of ‘best practice’ for the purpose of benchmarking. The classification as ‘soft law’, which is rightly avoided by GAL, merely epitomizes a predicament.<sup>17</sup>

The problem does not go away when one turns to processes of review. The question arises again why legality should be the default descriptor and not meta-management or, for that matter, managerial supervision.<sup>18</sup> Much regulatory governance is taking its cue from non-binding rules. As Krisch points out,<sup>19</sup> World Bank measures

which are supposed to implement resettlement policies for indigenous people are subject to review by an Inspection Panel. The findings of the panel are not binding. But this does not mean that they would be irrelevant to the optimization of the task. They can be understood as acts of meta-management aimed at increasing rationality.

Hence, global administrative law is necessarily confronted with the task of having to explain which of the phenomena it studies are to be described as law. Interestingly, as my remarks below will try to explain, the prevalence of certain traditions of legal thought, rather than offering a ready solution, may indeed pose an additional obstacle.

### 3 Kingsbury’s Intervention: Anglo-American Horizons

In his most recent article, Kingsbury addresses the descriptive challenge.<sup>20</sup> He is aware of the problem caused by the project’s broad sweep:<sup>21</sup>

The term GAL is applied to shared sets of norms and norm-guided practices that are in some cases regarded as obligatory, and in many cases are given some weight, even where they are not obviously part of national (state) law or standard interstate law.

Kingsbury settles for a position that he himself associates with the legal positivism of H.L.A Hart. His position is indeed remarkably close to what in certain circles of Anglo-American legal theory has

<sup>16</sup> On accounting standard-setting see S. Cassese *et al.* (eds), *Global Administrative Law: Cases, Materials, Issues* (2nd edn, 2008), at 9–13.

<sup>17</sup> See Klabbbers, ‘The Redundancy of Soft Law’, 65 *Nordic J Int’l L* (1996) 167.

<sup>18</sup> A similar challenge was formulated by Dyzenhaus, ‘Accountability and the Concept of (Global) Administrative Law’, IILJ Working Paper 2008/7.

<sup>19</sup> Krisch, *supra* note 3, at 20.

<sup>20</sup> See Kingsbury, ‘The Concept of “Law” in Global Administrative Law’, 20 *EJIL* (2009) 23.

<sup>21</sup> *Ibid.*, at 26.

come to be known as ‘inclusive legal positivism’.<sup>22</sup> It is the type of legal positivism which allows moral principles to figure among the ‘positive’ standards governing the creation or identification of valid law.

First, Kingsbury endorses, with explicit reference to Hart, a ‘social fact’ conception of law.<sup>23</sup> One social fact considered relevant by a Hartian positivist is the existence of a rule of recognition for identifying valid laws. The existence of such a rule – in fact, any social rule – depends on its relevance for the conduct of a group of people, notably judges. The relevance is manifest in that the rule’s application is guided by a critically reflexive attitude with regard to the adequacy of compliance and correctness of application.<sup>24</sup> Certain conduct counts as a violation, certain interpretations are dismissed as false. As the apostles of the Hartian persuasion tirelessly emphasize, the rule can be a social rule only if there is sufficient convergence – in other words, a convention – as to the discriminations made on the basis of the reflexive attitude governing its application.

The criteria contained in a rule of recognition with regard to secondary rules of law-making are constitutive of what

is then called sources of law.<sup>25</sup> Kingsbury does not leave readers in the dark when it comes to explaining what these sources are in the case of GAL: treaties, fundamental customary international law rules, and general principles of law. In a sense, this set appears to cover the conventional sources of public international law.

So far, so good. Secondly, however, Kingsbury ‘stipulates’ that also certain principles associated with ‘publicness’ are to be part of the rule of recognition.<sup>26</sup> Publicness is introduced, above all, as a principle which anchors legitimacy in collective self-legislation.<sup>27</sup> Kingsbury’s reference to Rousseau’s idea of the people as a whole legislating for the people as a whole (which was to become Kant’s idea of a synthetically unified will of the people<sup>28</sup>) would therefore strongly suggest that GAL is

<sup>25</sup> It should be borne in mind that, according to legal positivists, sources of law cannot be tantamount to sources of confusion: see Himma, *supra* note 22, at 129, 145. In other words, a legal system based upon the second-order rule that ‘all good laws are valid laws’ would be too indeterminate to constitute a relevant social fact, unless of course the meaning of this rule were further specified by conventions.

<sup>26</sup> See Kingsbury, *supra* note 20, at 30, 57. Readers need not be reminded of the fact that ‘publicness’ is a part of the long-established inventory of liberal legal theory: see R. M. Unger, *Knowledge and Politics* (1975), at 73–74.

<sup>27</sup> More cautiously, the principle of publicness has been recently explained by Waldron. He believes it to refer to the ‘fact’ that law represents ‘a set of norms made publicly and issued in the name of the public, norms which ordinary people can in some sense appropriate as their own, *qua* members of the public’: see Waldron, ‘Can There Be a Democratic Jurisprudence’, 08-35 NYU Public Law & Legal Theory Research Paper Series (2008), available at: <http://ssrn.com/abstract=1280923>, at 14.

<sup>28</sup> See I. Kant, *The Metaphysics of Morals* (trans. M. Gregor, 1996), at 91.

<sup>22</sup> For a very helpful introduction see Himma, ‘Inclusive Legal Positivism’, in J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002), at 125–165; see also Coleman and Leiter, ‘Legal Positivism’, in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (1996) 241, at 251–252.

<sup>23</sup> See Kingsbury, *supra* note 20, at 29.

<sup>24</sup> See H.L.A. Hart, *The Concept of Law* (2nd edn, 1994), at 94–95; P. Winch, *The Idea of a Social Science* (4th edn, 1965), ch 2.

eventually based upon political autonomy. The latter, however, is sadly conspicuous by its absence in the rhizomatic transnational context in which GAL is supposed to operate. Hence, Kingsbury is quick at listing a number of more concrete principles of GAL the relationship of which to the overarching principle of publicness and, *a fortiori*, universalization<sup>29</sup> is at best only intuitively clear. Among these principles figure prominently legality, the rule of law, rationality, proportionality, and human rights.<sup>30</sup> The underlying idea appears to be that no people with ‘mature reason’ (Kant) would adopt laws incompatible with freedom (hence, rationality and proportionality along with the rule of law) or equality (hence, the principle of legality). The regulative principles that flesh out the meaning of what are necessary components of the *volonté générale* are presented as principles underlying any law, and, hence, any public law. As an idea, self-legislation is preserved therein, in disembedded form, and transposed to even the most opaque global legal developments.

Owing to the stipulated nature of publicness, the amendment to the rule of recognition infuses GAL with a natural law component.<sup>31</sup> Apparently, advocates of GAL are really not so much into *ius*

*gentium*, even though they often claim to proceed by induction, but rather into *ius naturae*. They uncover those necessary principles without which there would not be law. The result is natural administrative law, or NAL.

That GAL is an extension of NAL is reconfirmed by Kingsbury’s desire to show that stipulated principles are all the more relevant the less weight institutionalized principles have. The less there is in terms of *ius gentium* or *ius publicum (trans)nationalis* the more reviewing bodies are encouraged to rest their faith on the publicness of law.<sup>32</sup> Through the use of principles of publicness, along with Fuller’s internal morality of law, GAL is supposed to become a self-fulfilling prophecy. It will lend the semblance of law to administrative practices once they have been made to comport with principles of rationality and legality.<sup>33</sup>

But one should not rush to premature conclusions. Maybe Kingsbury is correct in insisting on being a legal positivist. It is the very point of modern ‘inclusive legal positivism’ to allow moral principles – or principles of political morality – to pass as positive law as soon as through some method of ‘incorporation’ they have become part of the set of the conventions of recognition. In the case of GAL, this would suggest that the principles of publicness are to be seen as part of a social rule of recognition which is generally adhered to globally.

It is at this point that one may wonder whether Kingsbury has chosen the best characterization of GAL. As Kingsbury himself is acutely aware, there is no global rule of recognition.<sup>34</sup> GAL is practised

<sup>29</sup> See Kingsbury, *supra* note 20, at 14.

<sup>30</sup> See Kingsbury, *supra* note 20, at 31–33.

<sup>31</sup> Hence, e.g., the ‘legal positivism’ advocated by Waldron, *supra* note 27, is not the type of legal positivism which tries to offer an alternative to normative political philosophy. Rather, in this case certain commendable features of legal positivism are made subservient to a certain vision of how law is supposed to work in a good society. This is reminiscent of the legal positivism of the Republic of Weimar, where it was also understood to be the attitude of those supporting democracy: see I. Maus, *Zur Aufklärung der Demokratietheorie* (1994).

<sup>32</sup> See Kingsbury, *supra* note 20, at 57.

<sup>33</sup> See *ibid.*, at 39–40.

<sup>34</sup> See *ibid.*, at 31.

at various sites with various and perhaps even shifting conventions.<sup>35</sup> Not even the chieftains of the critical attitude, namely judges, are to be found in every context. Much of GAL may therefore be up for grabs or of merely functional or regional relevance. Yet, one may speculate whether Kingsbury believes that at all the various sites at which administrative authority is exercised the one convention is adhered to according to which the principles of publicness are part of GAL. For very good reasons, Kingsbury is reluctant to make such a claim. Rather, when explaining why publicness ought to matter, NAL emerges at the heart of GAL.<sup>36</sup>

'Publicness' is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence.

This statement strongly suggests that publicness is *ius naturalis*, for it is presented as part of the necessary elements of law.<sup>37</sup> The mention of 'democratic jurisprudence' is followed by a reference to Waldron, who candidly admits that 'democratic jurisprudence is bound to be a value-laden jurisprudence',<sup>38</sup> for it is supposed to explore the connection between the value of democracy and the concept of law. Even if, however, the perceived necessity were historically

relativized and taken to be a necessity which exists only in a certain era, which is the era of 'democratic jurisprudence', such an observation would definitely go beyond invoking a convention. It appears even doubtful whether Kingsbury would be really interested in such a relativization, for it would raise the question what we are to make of our principles of publicness as soon as GAL affects members of non-democratic societies. Are we to suspend them? I doubt that this would be recommended by advocates of GAL.

I think it is not unreasonable to conclude, then, that NAL feeds into GAL. Far from being a positivist, Kingsbury turns out to be another defender of 'the Grotian tradition' in international law who has no qualms about seeing adjudication, also in international law, embedded in a broader moral compass.<sup>39</sup> This involves also embracing a not exclusively source-based conception of international law and the recognition, in the manner laid out by Lauterpacht, that moral background principles invariably enter the domain of the legal processes.<sup>40</sup>

## 4 The Adjudication Paradox

The question arises, hence, why Kingsbury does not want to admit openly of his *ius naturalis* agenda. Instead, we see the

<sup>35</sup> Kingsbury, (*ibid.*, at 57) speaks of 'specific rules of recognition in particular governance regimes'.

<sup>36</sup> *Ibid.*, at 31.

<sup>37</sup> Natural law is that part of law for which reason understands the necessity of its existence: see S. Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (trans. M. Silverthorne, ed. J. Tully, 1991), at 8.

<sup>38</sup> Waldron, *supra* note 27, at 10.

<sup>39</sup> See H. Lauterpacht, 'The Grotian Tradition in International Law', 23 *British Yrbk Int'l L* (1946) 1. For a similar observation that Kingsbury supports a morally more ambitious conception of international law than he is ready to concede see Scheuerman, "'The Centre Cannot Hold": A Response to Benedict Kingsbury', in H.S. Richardson and M.S. Williams (eds), *Moral Universalism and Pluralism* (2009) 205, at 214.

<sup>40</sup> See H. Lauterpacht, *The Development of Law by the International Court* (1958), at 396–397.

‘stipulation’ of publicness forced into an unhappy marriage with a ‘Hartian positivist, at least in a loose sense’.<sup>41</sup> What motivates such a move?

The explanation lies, I suspect, in the embarrassment involved in endorsing NAL *publicly*, for it must appear to be like giving *carte blanche* to reviewing bodies. The well-trained and carefully selected few come to define the law in an area where publicness would require that much regard be given to the many. Defending NAL is pragmatically difficult to square with NAL’s own most cherished principle of publicness. A remarkable inconsistency resides in a natural law position the substance of which, i.e., self-legislation, is inimical to its form, i.e., timeless reason. This form notoriously tilts the balance of power in favour of those few who pretend to be in the know.<sup>42</sup> Therefore, supporting NAL *threatens* to give the lie to the commitment to publicness. Self-legislation involves choice. As events, choices fall within historical time. They do not emanate from purportedly timeless reason. Even if a strong case can be made that NAL’s more specific principles are merely formal conditions to be met by any *volonté générale*, it is nonetheless clear that their application implicates interpretative elaboration. This is likely to be the task of adjudicating bodies. They are the ones believing strongly that they are always and already in the know. They usually have a great time drawing

on law without testing whether what they invoke also avails of a pedigree. They are likely to reason from intuitively attractive premises because for them this is an indispensable component of prudent problem-solving. An adjudicative practice which proceeds without regard for sources itself needs to be recognized as a source of law. Otherwise, NAL would never descend to the earth.

Remarkably, the realization of a non-source-based conception of law presupposes its opposite. Generally, it is the paradox of adjudication<sup>43</sup> that the attainment of pragmatic objectives (‘problem-solving’) with the usual low-key attitude towards foundational issues inadvertently creates a molehill of distressingly tricky questions. Not by accident, legal theory arises as a consequence of, and in response to, adjudication. The latter, however, would not have any authority if it were not for *conventional rules* requiring deference to what might strike one as bold expositions of law.<sup>44</sup> NAL is not only in conflict with what it endorses substantively, but also

<sup>41</sup> Kingsbury, *supra* note 20, at 30.

<sup>42</sup> Kingsbury (*ibid.*, at 28) explains his preference for legal positivism quite straightforwardly as following from the need to ‘provide a baseline acceptability in the absence of agreement on content-based (or truth-based) criteria for determining what law is’.

<sup>43</sup> This is paradoxical, for it is they who are supposed to apply the law. How can they cash in on their promise to say what the law is if they are not concerned about what it is they call ‘law’?

<sup>44</sup> This explains why, contrary to the expressed confidence of those calling themselves legal pragmatists, there can be no ‘legal pragmatism’, that is, a jurisprudence which does not address what type of justification there might be for having recourse to law without sources. The usual suspects are natural law theory, romantic historicism, and evolution of rationality. The first has much currency, but remains notoriously intuitionistic; the second is intellectually fascinating, but dead; and defending the third would require very detailed study of the development of legal institutions. On pragmatism see Dworkin, ‘Pragmatism, Rights Answers, and True Banality’, in M. Brint and W. Weaver (eds), *Pragmatism in Law and Society* (1991) 359.



with the circumstances necessary for its realization. The convention of bowing to courts is essential, however fanciful their findings may be. Kingsbury may have been aware of this Catch 22. GAL is a bootstrapping exercise the success of which depends on denying what it truly is. The Hartian outlook bestowed upon it by Kingsbury is part of the strategy.

## 5 Towards a Clearer Formulation of Relationships, or Jellinek *Redivivus*

The paradox is inescapable. But recognizing it is not sufficient to overcome the predicament posed by GAL's remarkable sweep.

Using contemporary Anglo-American legal positivism in order to explain GAL's concept of law reveals how remarkably deficient this version of legal positivism is. The role of coercive sanctions remains largely unaccounted for. This is part of Hart's legacy. He ventured to explain the meaning of obligation, even legal obligation, without regard to sanctions, and accorded general voluntary obedience priority over enforcement as a constitutive element of the concept of law.<sup>45</sup> In a sense, the broad sweep of GAL is a manifestation of the little relevance attributed to coercion within this tradition of legal scholarship.<sup>46</sup>

The point is not that coercion is a necessary component of the concept of law – even though for anyone working within the Kantian tradition it undoubtedly is – but rather that in concentrating on the role played by normative standards in legal reasoning this type of positivism has come to formulate a rather impoverished concept of law. By contrast, an emphasis on coercion, which is still present in Kelsen's concept of law, recognizes, even if in an admittedly one-dimensional way, that the concept of law presupposes a certain relationship.<sup>47</sup> Unless it is understood that, when it comes to law, people stand in a specific relationship to one another, the analysis of conventional sources of obligation remains locked into the ante-chamber of jurisprudence. I take it that the lack of attention paid to this question by contemporary Anglo-American legal positivism also explains why it is so stale despite its remarkable analytical rigour.

Much of GAL, as it stands, is concerned with identifying conventions of rule-making and uncovering instances of cross-jurisdictional review.<sup>48</sup> The progress which the project has made along these dimensions is astounding. Nonetheless, taking GAL seriously as law would also presuppose focussing sharply on whether a legal relationship is at stake. At any rate, this was the question underlying the development of modern public law doctrine on the European continent.<sup>49</sup>

<sup>45</sup> See Hart, *supra* note 24, at 24, 83–86.

<sup>46</sup> It is quite telling that the most useful and brilliant B.H. Bix, *Dictionary of Legal Theory* (2004) does not have an entry for 'sanctions'. When it comes to 'coercion' the reader is referred to 'duress'. It is amazing to see this happening in a legal culture where the criminal justice system is a far cry from being lenient or mild. It reveals something about the mentality of the discipline.

<sup>47</sup> It is, of course, not the case that the element is not paid attention to by some working in the Anglo-American tradition: see, e.g., L. Fuller, *The Principles of Social Order: Selected Essays* (ed. K. I. Winston, 1981), at 234; M. Oakshott, *On Human Conduct* (1975), at 121.

<sup>48</sup> See Kingsbury, *supra* note 20, at 42–47.

<sup>49</sup> See D. Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (1987), at 302–303.

Legal relationships involve rights.<sup>50</sup> It is not essential that the distribution of rights and obligations reflect reciprocity. A legal relationship obtains even where one gives directives and others are thereby obligated to comply.<sup>51</sup> Having a right involves the ability to alter a person's legal situation.<sup>52</sup> Where all work towards the accomplishment of a common objective without anyone making authoritative determinations a legal relationship does not exist. There is, using a simple example, no legal relationship between courts borrowing from one another's jurisprudence. There is also clearly no legal relationship between a person receiving unemployment benefits and the European co-ordination process influencing the substance of national social legislation. The Basel Committee, even though extremely effective in generating compliance, has no rights *vis-à-vis* the states participating in its accounting system.

On a descriptive level, the clarity of the project would be enhanced if a distinction were made between legal and non-legal relationships. The intelligibility of GAL could be even further improved by the construction of ideal types which capture the *status* of ordinary people *vis-à-vis*

institutions of global governance.<sup>53</sup> Often, their status may well be tantamount to receivership. Quite perceptively, Jellinek called this the *status subiectionis*.<sup>54</sup> I also suspect that the *status activus* of political co-determination is rarely to be found.

Normatively, it would be helpful to distinguish law (or non-law) as it is from law as it ought to be and to describe the respective status relations correctly. Despite much hubbub about civil society group participation, a *legal* analysis is most likely to attest that the relationship of participation may not often avail of a firm legal base. Conversely, one should not commit the fallacy to infer from the non-regulated nature of relationships that they ought to be immune to NAL. Juridification is often required in relations which are characterized by power asymmetries which reflect the influence of tradition, wealth, or prestige.

## 6 Conclusion

Owing to its current broad sweep, GAL often leaves relationships in precisely the unclear state in which they are encountered in practice. The analytical surplus is limited. Matching the opacity of practice on the level of theoretical reflection means underachieving what a theory is supposed to achieve. Currently, GAL is wary of binary distinctions, for it seeks to avoid 'simple' transpositions of command-based conceptions of administrative law to

<sup>50</sup> See G. Jellinek, *System der subjektiven öffentlichen Rechte* (2nd edn, 1905), at 42.

<sup>51</sup> For a similar intervention see von Bogdandy, Dann, and Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German LJ* (2008), available at: [www.germanlawjournal.com/pdf/Vol09No11/PDF\\_Vol\\_09\\_No\\_11\\_1375-1400\\_Articles\\_von%20Bogdandy\\_Dann\\_Goldmann.pdf](http://www.germanlawjournal.com/pdf/Vol09No11/PDF_Vol_09_No_11_1375-1400_Articles_von%20Bogdandy_Dann_Goldmann.pdf).

<sup>52</sup> See Jellinek, *supra* note 50, at 43. I understand that this statement would require further qualification as regards so-called 'privileges'.

<sup>53</sup> In his work Jellinek (*ibid.*, at 86–87) famously distinguished several such *status*: along with the *status libertatis* created by negative rights also the *status activus* of citizens and the *status positivus* of those having positive rights against the state.

<sup>54</sup> See *ibid.*, at 86.

the transnational level.<sup>55</sup> Doing so would seem to be unimaginative and naïve. Modern times have no time for old ways of thinking.

This attitude misses the mark of what received doctrines have accomplished. They have guarded legal scholarship against premature idealizations. The ameliorative stance in public international law, of which GAL partakes, notoriously invites perceiving a normative

system as though it is moving into a desirable direction (typically, more *ius cogens*, more human rights, etc.). As a result, it does not contribute much to describing law as it is.<sup>56</sup>

I am afraid that the principles of NAL will not be well served if GAL abstains from determining legal relationships. Intelligent legal reform presupposes sober accounts of the law as it is or, even more importantly, as it is not.

<sup>55</sup> See Kingsbury, *supra* note 20, at 27. See also Krisch, *supra* note 3, at 13, stating that GAL does not take domestic administrative law as its norm, but merely as inspiration and contrast.

<sup>56</sup> See Weil, "Towards Relative Normativity in International Law?", 77 *AJIL* (1983) 413.