

Are we positive about positive law in a global sphere?
A comment on Edouard Fromageau's "The concept of
positive law in global administrative law"

Algumas dúvidas a respeito do conceito de direito
positivo num perímetro global. Um comentário a "The
concept of positive law in global administrative law" de
Edouard Fromageau

PEDRO MONIZ LOPES

VOL. 2 Nº 3 DEZEMBRO 2015

WWW.E-PUBLICA.PT

**ARE WE POSITIVE ABOUT POSITIVE LAW IN A GLOBAL SPHERE?
A COMMENT ON EDOUARD FROMAGEAU’S “THE CONCEPT OF
POSITIVE LAW IN GLOBAL ADMINISTRATIVE LAW”**

**ALGUMAS DÚVIDAS A RESPEITO DO CONCEITO DE DIREITO
POSITIVO NUM PERÍMETRO GLOBAL. UM COMENTÁRIO A “THE
CONCEPT OF POSITIVE LAW IN GLOBAL ADMINISTRATIVE LAW”
DE EDOUARD FROMAGEAU**

PEDRO MONIZ LOPES¹

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

Summary: 1. Introduction; 2. A brief overview of Fromageau’s paper; 3. Kingsbury: amending the rule of recognition is justified for good purposes?; 4. Cassese: going beyond positive law is doing without the concept of positive law?; 5. Conclusions.

Abstract: The text which is now being commented was presented by Edouard Fromageau in the international workshop “*Global Administrative Law and the concept of law*” held at the University of Lisbon, School of Law on 28 November, 2014. It was initially commented by Guilherme Vasconcelos Vilaça (University of Xi’an Jiaotong). I had the opportunity to very briefly intervene in the Q&A session.

In this paper, 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 Benedict Kingsbury and Sabino Cassese. Along the way, Fromageau makes serious claims over some confusions surrounding the concept of positive law by GAL scholars. Nevertheless he adopts a relativistic view, under which *legal cultures* are presented as a possible key to explain different concepts of positive law. His conclusion is that there is no conceptual unity between the concept of positive law between the Manhattan school and the Italian school. I fully agree with the conclusion. Nevertheless, I understand that some possible incoherences and shortcomings could have been highlighted by Fromageau along the way. I intend to place some of his main findings against the background of methodological positivism, mainly within the dichotomy of describing and creating (or intending to create) law.

Keywords: Global Administrative law; positive law; legal positivism; sources of law.

1. Master of Laws, University of Lisbon, School of Law. Guest lecturer and PhD candidate, University of Lisbon, School of Law. Associated research fellow, Lisbon Centre for Research in Public Law. plopes@fd.ulisboa.pt

1. Introduction

Edouard Fromageau, a Senior Research Fellow at Max Planck Institut – Luxembourg, submitted a paper titled “*The concept of positive law in Global Administrative Law: a Glance at the Manhattan and Italian Schools*”.² This paper explores the two main schools of thought on this emerging topic, the Manhattan School (B. Kingsbury *et al.*) and the Italian School (S. Cassese *et al.*), and aims at detecting a juxtaposed conceptual unity of positive law under these views in connection with Global Administrative Law (GAL). Simultaneously, the paper constitutes an attempt to link the theoretical aspect of legal theory with the realistic view of the multi-shaped procedures of what is commonly known as GAL. One would not be overstating if one considers GAL to have become the *flavor of the month* (of the decade, if you will), given the amount of authors that are currently jumping on the wagon disserting about overcoming the state-centered conception of law, the informality of global administrative procedures, the legal relevance of *soft law* (e.g., recommendations, regulatory networks and inter-governmental cooperative arrangements) and the preferential relevance of the individual in an international global scale. This is not to say, evidently, that one should not acknowledge the legal relevance of, for instance, “(i) the transboundary networks of national agencies emerging more or less spontaneously outside the realm of international organizations; (ii) networks of national agencies acting with symbolic and secretarial assistance of international organizations; (iii) expert and administrative staff implementing the objectives of international organizations and (iv) arrangements in which actors from civil society play a significant role and which often lead to a hybridization of public and private governance.”³ It seems to me, however, that not everything that is legally relevant is necessarily law *per se*.

In the GAL project, dogmatic and systematic *Handlungsformen der Verwaltung* of traditional Administrative Law seem to be dissolved along the way as this *broad sweep* of transnational governance phenomena is altogether framed as (global) administrative law. As A. Somek puts it, within this bundle of conducts, individual acts issued by the Security Council are just as paradigmatic an instance of GAL as standard-setting by the Codex Alimentarius Commission: “*there is neither system nor centre, but merely a number of family resemblances among different processes*”.⁴ Amid this GAL frenzy and taking into account the

2. The author obtained a dual Ph.D. in public international law from the University of Geneva (Switzerland) and Aix-Marseille Université (France) in 2014 with a doctoral thesis focused on the interactions between global administrative law and public international law from an institutional perspective.

3. This typology is foreseen in O. DILLING / M. HERBERG / G. WINTER, *Transnational Administrative Rule-making* in O. DILLING / M. HERBERG / G. WINTER (Eds.), *Transnational Administrative Rule-making – Performance, Legal Effects and Legitimacy*, Oxford and Portland, 2011, pp. 4 ff.. See also B. KINGSBURY / N. KRISCH / R.B. STEWART, *The Emergence of Global Administrative Law* in L&CP, Vol. 68, Summer/Autumn, 2005, p. 53.

4. See A. SOMEK, *The Concept of “Law” in Global Administrative Law: A Response to Benedict Kingsbury*, in Eur. J. Int’l L., Vol. 20, n.º 4, 2009, p. 986. Others, such as C. HARLOW, understand that a universal set of administrative law principles is, not only difficult to identify, but also not especially desirable. See C. HARLOW, *Global Administrative Law: the Quest for Principles and Values*, in Eur. J. Int’l L., Vol. 17, no.1, 2006, pp. 211 ff..

conjunction of multi-shaped formal and (most particularly) informal activities, it is relevant to pause for a minute, take a deep breath, and consider whether *all* or *some* of GAL is law in the first place.

2. A Brief Overview Of Fromageau's Paper

Fromageau presents us with a very interesting semantic and pragmatic query about both the meaning of concept and the purpose of the use of the concept “positive law” in connection with GAL: his intents coherently mix the requirement for scientific terminology in legal theory with the realistic approach to the legal phenomena as framed under the most famous two schools of GAL. And even though he intentionally oversteps the boundaries of the strictest concept of legal science *qua* legal normative science, his use of *legal cultures* as a factor for understanding a possible – albeit ultimately inexistent – conceptual unity among different cultural views on GAL, under the influence of D. Nelken, seems promising.

Fromageau seems to accept – something which to me is quite evident – that the authors who dabble into GAL quite frequently misuse the concept of positive law or, which may be even more problematic, shape this concept in order to accommodate the field of study under development. It is not irrelevant to note that Fromageau ends his paper by mentioning that he focused on the *view of the creators of GAL*. Highlighting this aspect seems important, as it strengthens the argument that the GAL project is, to a certain extent, a “*self-fulfilling prophecy*” substantiated by the increasing number of authors that wish and strive for its existence.⁵ This methodological inversion carried out by GAL scholars may be subject to criticism under the positivist tradition, at least under two main aspects: a conceptual one and a methodological one.

Under the conceptual aspect, one must acknowledge that different conceptions of modern legal positivism exist. They usually overlap in the following features: (i) the content of law as something contingent and not necessarily materially bound by a pre-legal normative political or moral content (Inclusive Legal Positivism); (ii) the content of law as something contingent and necessarily not materially bound by a pre-legal normative political or moral content (Exclusive Legal Positivism);⁶ (iii) law *qua* a conjunction of human acts of will statically composing a body of norms which is subject to dynamic mechanisms of creation and derogation; (iv) law *qua* enacted law under procedural requirements set forth by the relevant legal system and; (v) law *qua* the *law that is*, never to be mixed with the *law that ought to be* (or the *law that some find more politically useful to be*).⁷ While addressing the history of the positivist tradition, Fromageau rightly

5. A. SOMEK, *The Concept of “Law” in Global Administrative Law: A Response to Benedict Kingsbury*, in Eur. J. Int'l L., Vol. 20, n.º 4, 2009, p. 990.

6. See J. COLEMAN / B. LEITER, *Legal Positivism*, in D. PATTERSON (ed.), *A Companion to Philosophy of Law and Legal Theory*, Oxford, 1996, pp. 251–252.

7. The concept of law *qua* positive law (the only one scientifically relevant for positivists) is the enacted law, irrespective of being statutory or customary law. See J. AUSTIN, *The Province of Jurisprudence Determined*, London, 1832, p. 175. See also A. SCHIAVELLO, *Il Positivismo Giuridico dopo Herbert L. A. Hart – Un' Introduzione Critica*, Torino, 2004, pp. 51 ff..

highlights this last aspect – *law as it is* versus *law as it ought to be* – in his paper as the *lowest common denominator* of positivism. But this *lowest common denominator* of positivism leaves open the question of whether it is feasible to sustain a concept of positive law *in connection to GAL* different than the one sustained in general legal theory (whichever it is). This is relevant to assess the validity of Kingsbury’s dual concept of positive law, put under scrutiny by the principle of universality held dear by the positivist tradition. On this topic, I suspect that Fromageau makes an empathic reading of what he interestingly depicts as Kingsbury dual positivism (separately applicable to both international law and GAL), mainly his *extended positivist concept of law* applied to GAL.

The second aspect (the methodological one) seems critical to me. Fromageau does not distinguish, in his paper, between the three main types of positivism as described by N. Bobbio: (i) theoretical positivism, (ii) ideological positivism and (iii) methodological positivism.⁸ Even though Fromageau is more interested in discussing the theoretical aspect of legal positivism as applied to GAL (*i.e.*, a specific concept of positive law and the separation of *law as it is* from *law as it ought to be*), the input of methodological positivism would certainly be relevant for his purposes. Methodological positivism defines the boundaries of legal science. The latter is an activity the outcome of which is an evaluative description of the normative reality. Therefore, *positive law* – whatever it encompasses – should not be *affected* or *constructed* by the legal scientist just as any other object of science should not be affected by the one performing acts of science. To put it in a kelsenian fashion, law should be dealt with as a *datum* that is subject to some kind of epistemological constructivism by legal scholars – *e.g.*, legal dogmatics – but the *legal discourse of law* should never be mixed with the *meta-discourse of the legal theorist or the legal practitioner*.⁹ Yet this is precisely what underlies the GAL project. I do not think Fromageau stresses this enough. The requirements of methodological positivism are compromised insofar GAL is seen as an *academic enterprise* politically oriented to *improve* the law, under the view that law’s functions are something necessarily external and aprioristical to the law itself.

Last but not least, methodological positivism is also compromised if one loses track of the *unity* of the object of legal science by over-inclusion of its components. Here enters Cassese’s post-positivistic stance on the extension of the field of legal analysis from *law in the books* to *law in action*. On this point, Fromageau clearly states the *unclear* nature of Cassese’s concept of positive law. I would have appreciated him addressing the concepts of *soft law* against the background of his own concept of positive law, but that would transcend the scope of his paper. I suppose, nevertheless, he could have gone further by addressing the dilution of the concept of positive law this view presupposes.

Fromageau concludes for the *fundamental different* accounts of positive law by

8. See N. BOBBIO, *Il Positivismo Giuridico. Lezioni di Filosofia del Diritto*, Torino 1961, (Portuguese translation “O Positivismo Jurídico. Lições de Filosofia do Direito” by M. Pugliese, E. Bini e C. E. Rodrigues), São Paulo, 1999, p. 234.

9. See R. GUASTINI, *Normativism or the Normative Theory of Legal Science: Some Epistemological Problems*, in S. PAULSON/B. PAULSON (eds.), *Normativity and Norms – Critical Perspectives on Kelsenian Themes*, Oxford, 2007, pp. 321 e ff..

the Manhattan and Italian Schools. In my view – and I suspect this could be shared by Fromageau –, none of them can be realistically labeled as positivistic accounts of GAL. Kingsbury deems GAL as an endeavor (the *American Initiative*) to improve positive law, which logically entails that GAL is not positive law but something external to it. Cassese views GAL as an *example of an emerging positive global law*, rooted in the gradual realm of *relative normativity*. This is not to say, however, that also Kingsbury (alongside Krisch and Stewart) does not see GAL as *emerging*.¹⁰ They seem, however, to find this emergence as an instrument for the development of positive law as it is, not necessarily as *emerging positive law as it will be*. Both Kingsbury and Cassese’s account of GAL pose interesting, but substantially different, questions.

3. Kingsbury: Amending The Rule Of Recognition Is Justified For Good Purposes?

The introductory remarks, justified as they may be, are much more directed towards those who invoke the positivist tradition as the best possible way to frame GAL (*i.e.*, GAL as something other than international law) than to those who simply disregard the strict concept of positive law as the object of legal science (this is the case, as Fromageau rightly points out, of Cassese). It is, therefore, Kingsbury that invokes the hartian thought, at the level of inclusive positivism, when addressing GAL.¹¹

Kingsbury coherently endorses a hartian social fact conception of law based on the internal attitude of the participants. He is well aware that legal systems encompass rules for the creation of other legal rules and principles: legal concepts of paramount importance such as validity, competence, obligation and rights are, therefore, systemic concepts.¹² But, as Kingsbury accepts, there is no global rule of recognition necessary to detect a global legal system: he then turns his attention into focusing on fragmented rules of recognition.¹³ Kingsbury carefully separates international law from GAL (*international law is ius inter gentes* – based on will and consent of the states – *and any other norms and practices are not international law but something else*) in order to preserve a unified view of an

10. See B. KINGSBURY / N. KRISCH / R. B. STEWART, *The Emergence of Global Administrative Law*, Law and Contemporary Problems, Vol. 68, Summer/Autumn, 2005, p. 16: “*underlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees.*”

11. Fromageau also describes the influence of L. OPPENHEIM in B. KINGSBURY’s thought. I will not go specifically into that.

12. On the description of the systemic concept of validity of J. WRÓBLEWSKI, see, for instance, A. GRABOWSKI, *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Nonpositivism*, New York, 2013, pp. 240 ff..

13. B. KINGSBURY, *The Concept of “Law” in Global Administrative Law* in Eur. J. Int’l L., Vol. 20, n.º 4, 2009, p. 31. Kingsbury also speaks of “*specific rules of recognition in particular governance regimes*” IDEM, *ibidem*, p. 57.

international legal system and, most probably, to justify the independent analysis of GAL. But, again, Somek seems to be right when stating that “*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.*”¹⁴ Now, the remaining *soft* elements of GAL will hardly be labeled positive law by any (inclusive or exclusive) positivistic account of GAL. What is, then, positive law in GAL for Kingsbury? It is a slippery slope.

I suppose Kingsbury’s roots on inclusive positivism is aligned with something H.L.A. Hart would likely not have engaged into: having normative ambitions of reshaping law through the development of a field of legal science, notably by promoting the adaptation of law to the functions it *ought to seek*.¹⁵ This symptom of Kingsbury’s aspirations can be detected in Fromageau’s accurate depiction of Kingsbury’s concept of positive law as *emerging* and possibly *hopeful* (“*The act of naming such an object is to express the expectation (and possibly the hope) that, when fully emerged, it will take a particular form.*”) This is much more a dworkinian stance than a hartian one, I would suggest.¹⁶

Kingsbury puts forward a materially binding criterion of *publicness* for the affirmation of GAL by amending the adopted rule(s) of recognition with necessary principles without which there would not be law: “*«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*”.¹⁷ I can certainly see the hartian influence underlying the requirement of generality: it is Hart’s minimum content of natural law.¹⁸ However, the criterion of *publicness* turns Kingsbury’s inclusive positivism into natural jurisprudence: Somek calls it NAL (= Natural Administrative Law).¹⁹ As he puts it, “*the (GAL) 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*”. Under positivist canons, you simply cannot (or, at least, *should not*) create law by developing a field of study. Fromageau seems to acknowledge this but his descriptive intents on the paper prevent him from being critical to a greater extent. Normative ambitions of GAL, such as the ones

14. See A. SOMEK, *The Concept of “Law” in Global Administrative Law: A Response to Benedict Kingsbury*, in Eur. J. Int’l L., Vol. 20, n.º 4, 2009, p. 989.

15. Compare pp. 27 and 29 of B. KINGSBURY, *The Concept of “Law” in Global Administrative Law* in Eur. J. Int’l L., Vol. 20, n.º 4, 2009.

16. Compare the hartian and dworkinian stance in J. MARANHÃO, *Positivismo Lógico-Inclusivo*, Madrid, pp. 57-58.

17. B. KINGSBURY, *The Concept of “Law” in Global Administrative Law* in Eur. J. Int’l L., Vol. 20, n.º 4, 2009, p. 31.

18. See H.L.A. HART, *The Concept of Law*, Oxford, 2004, pp. 193-200.

19. See A. SOMEK, *The Concept of “Law” in Global Administrative Law: A Response to Benedict Kingsbury*, in Eur. J. Int’l L., Vol. 20, n.º 4, 2009, p. 990.

underlying a recent paper by M. Savino, should, therefore, be left outside the positivist tradition of legal science.²⁰ I believe this is an aspect worth highlighting for someone who uses legal positivism as a theoretical and methodological tool for GAL.

In any case, I do not think any positivist would ask himself: “*what kinds of approach to the concept of law might be fruitful in addressing global administrative law?*”²¹. Here I suppose there is a fundamental double fallacy that Fromageau did not stress quite enough: for Kingsbury, the object of study (GAL) – though striving for its existence and despite all the criticism for its lack of normative foundations – is presupposed and needs to exist as such (i.e., as law) and one better seek the best possible way to frame it in a suitable, *fruitful and comprehensive* manner.²² However, and at the same time, Fromageau is right in affirming that, for Kingsbury, GAL does not exist *qua* positive law in the sense of *law as it is*. How is this compatible?

There is certainly an essentialist (and most likely a purpose-oriented) tone to Kingsbury’s take on GAL: the *promotion* of GAL as an independent field of study. In the scrutinizing process of isolating GAL, however, one should not neglect the fact that areas of law, as any categorization, do not encompass any essential aspects as they are ultimately academic conventions which may be more or less adequate.²³ In this aspect, I have an opinion on the question posed by Fromageau right at the beginning of his paper: if one accepts that law is the object of legal science, GAL cannot exist as a *legal* research project or as a *legal* field of studies if it does not exist as *positive law*, that is, unless these research projects aim precisely at demonstrating why and to what extent GAL does *not* exist as positive law. Otherwise we’re not talking about legal science *qua* normative science.

Fromageau is not entirely thorough in addressing Kingsbury’s *extended positivist* claim as necessary to *grasp these fields of normativity and study separately what can be considered as law but is not (yet) positive law*. However, his concluding remark seems very accurate: for Kingsbury, GAL is not *law as it is* rather it is *law as it ought to be*. Fromageau tells us we could be dealing with different stages in the evolution process of lawmaking. I believe, however, one cannot

20. See M. SAVINO, *What if Global Administrative Law is a Normative Project?* in *Int J Constitutional Law*, Vol. 13, n.º 2, 2015, p. 498.

21. See B. KINGSBURY, *The Concept of “Law” in Global Administrative Law* in *Eur. J. Int’l L.*, Vol. 20, n.º 4, 2009, p. 27.

22. Kingsbury further states that “*Command theories, under which law consists in the commands of a single determinate sovereign (a person or institution) backed by efficacious sanctions, are unlikely to produce very fruitful or comprehensive results in addressing global administrative law*”. See B. KINGSBURY, *The Concept of “Law” in Global Administrative Law* in *Eur. J. Int’l L.*, Vol. 20, n.º 4, 2009, p. 27. It is not new that the GAL enterprise has been severely criticized on the lack of elaboration of its normative foundations. The harshest criticism came from A. SOMEK (*The Concept of “Law” in Global Administrative Law: A Response to Benedict Kingsbury*, in *Eur. J. Int’l L.*, Vol. 20, n.º 4, 2009, p. 993), according to which “*GAL is a bootstrapping exercise the success of which depends on denying what it truly is*”.

23. See, for instance, A. ROSS, *On Law and Justice*, London, 1958 (Portuguese Translation “*Direito e Justiça*”, E. Pini, São Paulo, 2000), p. 246. One should not ask the question: *what is GAL?* rather one should, that being the case, affirm *I will call GAL the set of norms that shape (...)*. On essentialism *versus* nominalism, see K. POPPER, *The Enemies of the Open Society*, II, *The High Tide of Prophecy: Hegel, Marx and the Aftermath*, London, 1949, pp. 12-15

address *emerging law* with a concept other than *non-law*: something which can turn out to be useful but which may or may not exist if and when it meets the criteria for such existence. Any resemblance between Kingsbury's approach to GAL and the descriptive enterprise of Hart is therefore purely coincidental.²⁴ This instantiates the question: is Kingsbury a hartian scholar analyzing GAL or is Kingsbury a GAL scholar aiming at creating a new field of legal science (and the recognition of a new set of legal norms) through the advocacy of hartian criteria in some sort of *persuasive* disguised as *abductive* manner? In that case, is Kingsbury using a school of thought as the *hardest test for acceptance* of a presupposed phenomenon disguised as *the best explanation* for it?

4. Cassese: Going Beyond Positive Law Is Doing Without The Concept Of Positive Law?

In Cassese's legal thought, the issue is not whether a positivist account of law suffices for framing GAL, as Cassese himself understands that positive law is too narrow of an object for general legal analysis. It is rather whether the commonly adopted distinction between *law in the books* and *law in action* should be dealt with as an extended account of law *vis-à-vis* the positivistic one, as the former entails that positive law is only *law in the books* and law is also something other than that. Fromageau adequately roots Cassese's conception of GAL in the new Italian public law scholarship as a reaction to the positivist mainstream thought (at the time). To this extent, I suppose Cassese is more coherent than Kingsbury in his approach to GAL. Cassese's idiosyncrasies are not instrumental to depict, frame or *adequately or fruitfully* explain GAL. They are philosophical starting points that he holds universal. For Cassese, general legal analysis – be it GAL or domestic administrative law – should focus on both *the study of statutes and the study of cases*. Cassese is therefore an admitted anti-positivist and nothing could describe that view better than his claim that “*law reaches beyond a particular positive legal system began to take root*”.

Fromageau rightly states that, in his specific approach to the globalization process, Cassese firstly does without positive law by sustaining the universalization of legal thought: he *defleashes* the object of legal science, focusing solely on *research approaches, techniques and methodologies*. Only then comes the empirical stage (which, somehow, seems less important) of comparative analysis and inductive reasoning necessary to extract universal principles of GAL out of different legal orders. Evidently, a positivist's *partis pris* with Cassese's presuppositions largely exceeds the issue of GAL *per se*. Among other obvious disagreements, it deals with Cassese's over-inclusion of elements into his concept of law (*i.e.*, legal practices and *all kinds of soft law*) thus risking – despite good intentions – the [decharacterization](#) of the object of legal science as well as its scientific apprehension. If we are talking about so *many different things* when

24. Kingsbury's view, unlike the hartian roots he (wrongly or rightly) presupposes does not contribute much to describing law as it is or as it is not. See A. SOMEK, *The Concept of "Law" in Global Administrative Law: A Response to Benedict Kingsbury*, in Eur. J. Int'l L., Vol. 20, n.º 4, 2009, p. 995.

addressing the concept of law in Cassese's functional approach (the *problem-oriented approach*) then we may lose sight of the *core* of what we are discussing: over-inclusion, in this case, leads to dilution. It is no surprise that, besides reacting to the mainstream positivist thought of Vittorio Orlando as described by Fromageau, Cassese's take clearly contravenes the strict postulates of methodological positivism as regards the object of legal science.

The inclusion of *soft law* in Cassese's concept of law links with the so-called concept of *relative normativity* – in both international law and GAL –, a concept championed by P. Weil, later developed by authors such as U. Fastenrath.²⁵ I must confess I am still stuck in the binary concepts of law: *soft law* and *emerging law*, though legally relevant by means of enacted and existing legal norms, are not law *per se*.²⁶ Relative normativity seems to contradict the Aristotelian principle of bivalence: under the pedigree criteria_x for ascertaining law a certain content_y is either law or it is not.²⁷

I agree with Somek that 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*”.²⁸ Here resides the scientific need to separate (administrative) law from pure, simple and convenient (administrative) good governance. 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 and not simply as management and meta-management. For instance, judicial review presupposes legality but one need not necessarily presuppose judicial review in GAL as it may simply entail instances of material supervision: *legality* in GAL is, therefore, not a presupposition but a contingent result that needs to be evidenced.

Fromageau claims that the concept of positive law in Cassese's thought is left unclear. I agree it is mainly because I understand it does not take a pivotal part in Cassese's account of GAL. While Kingsbury is interested in theoretically *affirming* GAL, Cassese is much more preoccupied in sustaining *lawful behavior* in the global sphere than in linking this lawful behavior to the *source* of such lawfulness. This latter view is internally coherent but it basically *kills the problem*. It is sustained that global positive law is an operative idea and that one can demonstrate it through inductive reasoning, notably by recurring to case law on which some rights are widely recognized (*e.g.*, *audi alteram partem*). However, it is deemed quite irrelevant whether such rights are customary based or not: the

25. See P. WEIL, *Towards Relative Normativity in International Law* in AJIL, Vol. 77, 1983, pp. 413 ff.; U. FASTENRATH, *Relative Normativity in International Law* in EJIL, Vol. 4, 1993, pp. 306 ff..

26. On binary (absolute) and gradual (relative) concepts, with a different opinion, see M. M. GOLDMANN, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, in German L. J., Vol. 9, 2009, pp. 1872 ff..

27. On the evasion of the central question in differentiating law and non-law to which the remedy can only be a positivistic reliance on a *pedigree* or source-based theory, see J. BECKETT, *Behind Relative Normativity: Rules and Prerequisites of Law*, in Eur. J. Int'l L., Vol. 12, 2001, pp. 629 ff..

28. See A. SOMEK, *The Concept of “Law” in Global Administrative Law: A Response to Benedict Kingsbury*, in Eur. J. Int'l L., Vol. 20, n.º 4, 2009 p. 987.

source problem is left aside in the process of universalization of legal thought. This is similar to viewing court decisions as sources of law in civil law legal systems without analyzing whether such decisions are instances of an underlying custom (*i.e.*, where the source of *lawfulness* is the underlying custom rather than the manifestation of such custom) or sources of law *per se*.

Cassese is, therefore, interested in surpassing the kelsenian view of law as *state-centered* but, simultaneously, by-passes the fundamental aspect of what Kelsen could have meant at the time of his writings. Law need not be state-centered, even in a kelsenian view, one may argue; however, it is still relevant to stress that law is to be understood as a product of the exercise of specific norms of competence (*i.e.*, power-conferring norms).²⁹ And the duty to obey norms and acts issued by competence holders needs to be addressed in all cases.

Fromageau shows us how optimistic Cassese is: not only he accepts that, given the stage of maturity, GAL can already enter the realm of positive law as such law is *good*. It is created by “*international organizations of different kinds, [...] a well-developed administration, governed by a well-developed set of administrative laws*”. If, as stated above, Kingsbury’s approach, in Somek’s view, does little for identifying the *law that is* in GAL, Cassese by-passes it altogether.

5. Conclusions

Fromageau’s main conclusions presented in the paper are, in my opinion, useful for the scientific approach to GAL. However, I am left with a feeling that some criticism somehow falls short. His purpose was admittedly more descriptive and inferential than critical. I would have hoped to have had Fromageau’s view on relative normativity as it seemed critical for the discussion of positive law in GAL. I must acknowledge, however, that Fromageau’s intentions were simply to grasp a conceptual unity of positive law between two mutually influenced schools of thought. He admittedly found none whatsoever. I am not so sure this result is purely justified on the existence of different legal cultures. Fromageau leaves this question open for the time being. I know, however, that this should mean something in what concerns the current stage of maturity of GAL. I look forward to Fromageau’s announced intentions for analyzing the concept of positive law in connection with GAL in a wider geographical spectrum.

29. See, for instance, J. FERRER BÉLTRAN, *Las Normas de Competencia. Un Aspecto de la Dinámica Jurídica*, Madrid, 2000, pp. 13 ff. and 123 ff..