



SPECIAL ISSUE

THE CONCEPT OF POSITIVE LAW IN GLOBAL ADMINISTRATIVE LAW:

A GLANCE AT THE MANHATTAN AND ITALIAN SCHOOLS

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Abstract: The question of whether Global Administrative Law (GAL) exists can receive various answers. GAL may exist as a research project, as a field of studies or as theory. But does it exist as positive law? In order to answer this question, in the present paper I analyse the meaning and purpose of the use of the concept of positive law in connection with GAL, with a particular focus on two GAL schools of thought: the Manhattan School and the Italian School.

Resumo: A questão de saber se o Direito Administrativo Global (GAL) existe pode ser respondida de diversas formas. O GAL pode existir como um projecto de pesquisa, como um campo de estudos ou como teoria. Mas será que existe como direito positivo? De modo a responder a esta questão, no presente artigo, analiso o significado e o propósito da utilização do conceito de direito positivo em conexão com o GAL, focando, em particular, o pensamento desenvolvido sobre o GAL por duas escolas: a escola de Manhattan e a escola italiana.

Keywords: Positive Law; Legal Positivism; Global Administrative Law; The School of Manhattan; The Italian School.

Palavras-chave: Direito Positivo; Positivismo Legal; Direito Administrativo Global; Escola de Manhattan; Escola Italiana;

Summary: 1. Introduction; 2. The School of Manhattan: Kingsbury's Dual Positivism; 3. The Italian School: GAL in the Context of the New Italian Public Law Scholarship; 4. Concluding Remarks.

Sumário: 1. Introdução; 2. A Escola de Manhattan: o Positivismo Dual de Kingsbury's; 3. A Escola Italiana: GAL no Contexto da Nova Escola Italiana de Direito Público; 4. Notas Conclusivas.

1. INTRODUCTION

The question of whether Global Administrative Law (GAL) exists can receive various answers. GAL may exist as a research project, as a field of studies or as theory. But does it exist as *positive* law? In order to answer this question, I will study the meaning and the purpose of the use of the concept of positive law in connection with GAL.

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The use of the concept of *jus positivum* can be traced back to the 13th century with the purpose to establish a distinction between natural law on the one hand, and all the laws that are originating from a legislative act.² Since then, the concept evolved to describe this part of the law created according to a particular legal process, enjoying binding legal effects; a part of the law that may totally disappear (like in the case of international law for Pufendorf³) and that, in any case, does not cover the entirety of existing law.⁴

With the emergence of legal positivism - and the rejection of *jus naturale* - the tendency was to consider positive law as the only legitimate matter of jurisprudence.⁵ The concept of positive law then evolved to describe the law created by a specific formal source-centered process that is exterior to the law itself.⁶ With the growing influence of positivists such as John Austin, the view that positive law is the law emanating from States' will became popular. For Austin, "every positive law, or every law simply and strictly so called, is set by a sovereign power, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme"⁷.

This concept of positive law began to take roots in numerous countries, influencing their legal tradition. The innovation of Austin's positivism was then to reduce all the law in the concept of positive law. The law is then conceived as the law in force in a given legal system, and the notion of valid law became similar to the notion of positive law.

On this basis, the concept of positive law was progressively used with different meanings in a context of multiplication of legal positivism's schools of thought. Two positivist paradigms were then identified: one based on the "command" element, seeing law as emanating from State will, and one based on "the unity of sources" element, recognizing as law only those norms that can be traced back to one ultimate source and which are generated by a pre-set legal procedure, independent of their inherent value.⁸

² S. KUTTNER, «Sur les origines du terme *droit positif*», *Revue historique du droit français et étranger*, XV, 1936, p. 730.

³ S. PUFENDORF, *De jure naturae et gentium*, Amsterdam, 1688, in W. SIMONS, *The Classics of International Law*, Oxford, 1934, Book I, Chapter VI, p. 77.

⁴ R. AGO, "Droit positif et droit international", *Annuaire français de droit international*, Vol. 3, 1957, p. 19.

⁵ For Austin, "the matter of jurisprudence is positive law". Quoted by R. AGO, "Droit positif et droit international", *op.cit.*, p. 20.

⁶ See K. BERGHOHM, *Jurizprudenz und Rechtsphilosophie. Kritische Abhandlungen*, Duncker & Humblot, 1892, p. 546.

⁷ J. AUSTIN, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 1885, p. 60. Quoted by R. AGO, "Droit positif et droit international", *op.cit.*, p. 22, footnote 18.

⁸ In that sense, see F. LACHENMANN, "Legal Positivism", *Max Planck Encyclopedia of Public International Law Online Edition*, July 2011, par. 3.

The appartenance of an author to a specific legal positivism's school is logically influencing the meaning of the concept of positive law in a particular context. Legal positivism can be defined here, in general terms, as “the claim that law can be identified and distinguished from other norms by a set of empirical criteria and that the content of law has no necessary connection to moral truth”⁹. Among this multitude of different versions of the concept of positive law, one “lowest common denominator”¹⁰ is the separation of law “as it is” from the “law as it ought to be”¹¹; the former being the only law recognized by legal positivists. This minimal criterion is reflected in numerous definition attempts of the contemporary concept of positive law. It is, for example, defined as the law “effectively in force within a given legal order, as the result of a process of creation or modification established by this legal order”¹².

Another factor having an impact on the meaning of the concept of positive law is the appartenance of an author to a particular legal culture. The concept of legal culture is understood here as describing “relatively stable patterns of legally oriented social behaviour and attitudes”¹³. As noted by David Nelken, “the sort of investigations in which the idea of legal culture finds its place are those which set out to explore empirical variations in the way law is conceived and lived rather than to establish universal truths about the nature of law; to map the existence of different *concepts* of law rather than establish *the* concept of law”¹⁴. Identifying the elements of the concept of positive law in the context of a legal culture is a difficult exercise as legal culture “acts for the most part subconsciously”¹⁵.

GAL surely operates throughout various legal cultures; the latter is then a factor to take into account when analyzing the concept of positive law in connection with GAL. The appartenance of a school of thought and the appartenance of a legal culture are criteria that may overlap in certain situations, given the influence of a particular school in one legal culture. Treating them as separate elements has however the advantage of minimizing the risk of giving importance to stereotypes vehiculated by common knowledge of legal cultures.

⁹ J. B. MURPHY, *The Philosophy of Positive Law: Foundations of Jurisprudence*, Yale University Press, 2005, p. 22.

¹⁰ F. LACHENMANN, “Legal Positivism”, *op.cit.*, par. 4.

¹¹ The “Is-Ought” distinction was notably described by D. HUME, *A Treatise of Human Nature*, John Noon, 1739.

¹² J. SALMON (ed.), *Dictionnaire de droit international public*, Bruylant, 2001, p. 391 (author's translation).

¹³ D. NELKEN, «Using the Concept of Legal Culture», *Australian Journal of Legal Philosophy*, Vol. 29, 2004, p. 1.

¹⁴ *Ibid.*, p. 2.

¹⁵ E. JOUANNET, “French and American Perspectives on International Law: Legal Cultures and International Law”, *Maine Law Review*, Vol. 58, 2006, p. 301.

Among the stereotypes about GAL surely figures the one stating that it is entirely an “American initiative”. Although GAL is often perceived as having been created by the scholars at NYU, sometimes described as forming the «School of Manhattan»¹⁶, an «Italian School»¹⁷, led by Sabino Cassese, is also to be considered. These two examples are interesting here as it may help in determining if the question of whether GAL exists as positive law finds a common answer despite the differences in terms of legal culture. In other words, I will try to determine if there is a conceptual unity despite the geographical diversities.

I will first study the concept of positive law in connection with GAL in the context of the School of Manhattan and, particularly, according to Benedict Kingsbury’s view (I). The second part will focus on the Italian School of GAL and on its leading scholar, Sabino Cassese (II).

¹⁶. J. D’ASPREMONT, «Droit Administratif Global et Droit International», in C. BORRIES (ed.), *Un droit administratif global? / A Global Administrative Law?*, Pedone, 2012, p. 84.

¹⁷. See S. CASSESE, S. BATTINI, E. D’ALTERIO, G. NAPOLITANO, M. DE BELLIS, H. CAROLI CASAVOLA, E. MORLINO, L. CASINI, E. CHITI & M. SAVINO, *Global Administrative Law: An Italian Perspective*, Robert Schuman Centre for Advanced Studies Policy Papers, 2012/04, 92 p.

2. THE SCHOOL OF MANHATTAN: KINGSBURY'S DUAL POSITIVISM

The position of Benedict Kingsbury has been described by some as “remarkably close to what in certain circles of Anglo-American legal theory has come to be known as ‘inclusive legal positivism’”¹⁸. Inclusive legal positivists (ILP) are to be seen as the opposite side of exclusive legal positivists (ELP). The distinction between the two schools of thought resides essentially in their respective approach towards the separability thesis, the latter being the part of positivism theory dealing with the relationship between law and morality. While ILP believe that a moral criteria of validity can exist, that “there are conceptually possible legal systems in which the criteria for legal validity include moral principles”¹⁹, ELP deny there can be any moral criteria of validity. They “claim the existence and content of law can always be determined by reference to social sources”²⁰.

Kingsbury's appartenance to the ILP school finds its most convincing evidence in his explicit reference to Hart, another famous inclusive positivist²¹, when endorsing his “social fact conception of law”²². According to Kingsbury, “Hart made a decisive break from the Hobbesian (and Austinian) dependence of the concept of law on sovereignty, while retaining the positivist focus on sources and recognition as central concept of law. Hart's theory of law thus provides a more promising starting point for a modern positivist approach to the concept of law in international law and in GAL”²³.

It is interesting to note that, while stating that Hart's theory of law is conceptually compatible with both a modern concept of law in international law and in GAL, Kingsbury still insist on separating international law from GAL. By doing so, Kingsbury is coherent as it is clear, throughout his writings, that he does not consider GAL as part of positive international law.²⁴

¹⁸. A. SOMEK, “The Concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury”, *EJIL*, Vol. 20, n°4, 2009, pp. 988-989.

¹⁹. K. E. HIMMA, «Inclusive Legal Positivism», in J. COLEMAN & S. SHAPIRO (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford University Press, 2002, p. 125.

²⁰. *Ibid.*, p. 126.

²¹. See H. L. A. HART, «Positivism and the Separation of Law and Morals», *Harvard Law Review*, Vol. 71, n°4, 1958, pp. 593-629.

²². B. KINGSBURY, “The Concept of ‘Law’ in Global Administrative Law”, *EJIL*, Vol. 20, n°1, 2009, pp. 23-57.

²³. *Ibid.*, p. 28.

²⁴. According to Kingsbury, “if it is right that there is some shared normativity across various of these disparate practices, should this set of norms and practices [of global administrative law] be thought of as falling within the ambit of international law? This might be answered simply by stipulation: international law is *jus inter gentes*, and any other norms and practices are not international law but something else”. B. KINGSBURY, “Global Regulation and the New Jus Gentium”, draft novembre 2006, <http://www.iilj.org/courses/documents/Kingsbury.NewJusGentium.pdf>, pp. 4-5.

As a student of Hedley Bull, himself having been strongly influenced by Lassa Oppenheim²⁵, Benedict Kingsbury shares a vision of international law firmly rooted in the positivist current. According to him, «the dominant jurisprudential approach to the global practice of international law continues to be positivist. But it is a positivism attenuated by the pragmatic needs to ameliorate disputes, ensure international institutions can operate effectively, and respond to demands of global governance. To adherents of this approach, the positivist state-centered system is increasingly stretched and strained, but neither in theory nor in practice has it been displaced by another. Its resilience has been greater than expected because in international law, practice continues to shape theory, and deeply embedded theory continues to shore up practice»²⁶.

The peculiarity of Benedict Kingsbury's positivism lies essentially in his reading of the work of Lassa Oppenheim. Continuing the mission of Hedley Bull²⁷, Benedict Kingsbury advocated for an updated reading of Oppenheim's work. The separation of law and politics, which was characteristic of Oppenheim, can be seen, for Kingsbury, as being embedded in a more fundamental view of international law that is premised on his central political ideas. Among these lies the idea that "legal positivism is normatively justified as being the best conception of law for the realization of higher normative goals relating to peace, order, certain forms of justice, and the legal control of violence"²⁸.

Kingsbury's conception of positive international law is thus state-centered and sourced in the will and consent of states (or *jus inter gentes*²⁹), and GAL is not a part of it. The reasons underspinning this exclusion relates essentially to the need to retain a "unified view of an international legal system"³⁰. One may wonder that if GAL is not part of positive international law, part of international law "as it is", is it positive law at all?

²⁵. See, for example, H. BULL, "The Grotian Conception of International Society", in H. BUTTERFIELD & M. WIGHT (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics*, Allen & Unwin, 1966, pp. 51-73.

²⁶. B. KINGSBURY, "The International Legal Order", *IILJ Working Paper 2003/1*, p. 2; See also B. KINGSBURY, "The International Legal Order", in P. CANE & M. TUSHNET (eds.), *Oxford Handbook of Legal Studies*, Oxford University Press, 2003, pp. 271-297.

²⁷. "I want to try and rehabilitate the nineteenth-century positivists and the view particularly of Oppenheim, who, given that he had the limitations of a lawyer thinking about international politics, seems to me to have written more sensibly about international relations than certainly many other international lawyers and many other thinkers". H. BULL, "Presentation to the British Committee on the Theory of International Politics", in K. ALDERSON & A. HURELL (eds.), *Hedley Bull on International Society*, Palgrave Macmillan, 2000, p. 119.

²⁸. B. KINGSBURY, «Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law», *EJIL*, Vol. 13, n°2, 2002, pp. 402-403.

²⁹. See B. KINGSBURY, "The Administrative Law Frontier in Global Governance", *ASIL Proceedings*, Vol. 99, 2005, pp. 143-154.

³⁰. B. KINGSBURY, "International Law as Inter-Public Law", in H. S. RICHARDSON & M. S. WILLIAMS (eds.), *Moral Universalism and Pluralism*, American Society for Political and Legal Philosophy, Nomos XLIX, 2008, pp. 167-204.

Kingsbury's positivism then appears to be dual, being at the same time an updated version of what can be described as a "classical international legal positivism"³¹, and being based on an "extended positivist concept of law"³². This duality finds a coherence in the fact that each of these positivisms are to be applied to different, and separate, legal "spaces", respectively international law and GAL. GAL is then logically not law in the same way than international law. It has "no great charters, no celebrated courts, no textual provisions in national constitutions giving it status in national law, no significant long-appreciated history"³³. Unlike international law, it is not based on state consent.

Even through this "extended positivism" filter, GAL seems not to be considered by Kingsbury as law "as it is". The "extended positivism" filter aims to give basis to the argument that GAL describes a field of normativity that can be regarded as a form of law but not in the same way than international law.³⁴ The need for Kingsbury to extend his conception of law in order to grasp these fields of normativity is, in my opinion, guided by the necessity to preserve the unity of positive international law by studying separately, and through a different filter, what can be considered as law but is not (yet) positive law. The interaction between GAL and international law is then not only to be seen as interaction between different legal spaces, but between different stages of evolution. In Kingsbury's view, GAL seems then not to be law "as it is", but rather law as it should be.

The fact that GAL is repeatedly described as "emerging"³⁵ in Kingsbury's work is then not surprising. Describing something as emerging may have several meanings. In the context of GAL, the use of the metaphor of emergence has a particular purpose. As noted by Euan MacDonald, "in the realm of the 'ontologically subjective' [...] to acknowledge an object as 'emerging' is to acknowledge that it is not (yet) in existence. 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"³⁶. The remaining question appears to be whether this particular form would be positive law or something else.

³¹. Classical legal positivism is "claimed to be focused nearly exclusively on the state". See J. D'ASPREMONT & J. KAMMERHOFER, "Introduction: The Future of International Legal Positivism", in J. KAMMERHOFER & J. D'ASPREMONT (eds.), *International Legal Positivism in a Post-Modern World*, Cambridge University Press, 2014, p. 4.

³². B. KINGSBURY, "The Concept of 'Law' in Global Administrative Law", *op.cit.*, p. 29. See also P. CAPPS, «International legal positivism and modern natural law», in J. KAMMERHOFER & J. D'ASPREMONT (eds.), *op.cit.*, p. 226.

³³. B. KINGSBURY, "The Concept of 'Law' in Global Administrative Law", *op.cit.*, p. 29.

³⁴. Kingsbury sometimes described this vision of law as based on a «wider sensibility». See B. KINGSBURY, "The Concept of 'Law' in Global Administrative Law", *op.cit.*, p. 47.

³⁵. See B. KINGSBURY, N. KRISCH & R. B. STEWART, "The Emergence of Global Administrative Law", *Law and Contemporary Problems*, Vol. 68, 2005, pp. 15-61.

³⁶. E. MACDONALD, «The 'Emergence' of Global Administrative Law?», *Viterbo IV Seminar*, June 2008, p. 3. Available at <http://www.irpa.eu/wp-content/uploads/2011/06/10.pdf>.

I personally think that, in Kingsbury's concept of GAL, the purpose of GAL was never to be positive law. It is rather meant to be a factor of change, a "valuable way forward"³⁷, aiming to reform a positive law that is not performing a listed number of functions. In this context, Kingsbury's "ideal positive law" seems rather to be what he describes as an "inter-public law"³⁸, as the law between public entities. By including states as public entities in this model³⁹, Kingsbury reunites the two sides of his dual positivism. Inter-states relations are then integrated in the wider context of public entities relations.

3. THE ITALIAN SCHOOL: GAL IN THE CONTEXT OF THE NEW ITALIAN PUBLIC LAW SCHOLARSHIP

An Italian School of GAL is indeed to be considered as Italian scholars did contribute during the creation phase of the concept⁴⁰, or are even seen as creators of the name of GAL itself.⁴¹

Among these Italian scholars, Sabino Cassese is certainly the one who wrote the most about GAL, and generally about the globalization of law.⁴² His point of view on GAL has to be put in context with respect to his appartenance to the "new Italian public law

³⁷. B. KINGSBURY, "Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law", *Journal of International Law and Diplomacy*, n°104, 2005, p. 124.

³⁸. According to Benedict Kingsbury, "[Global Administrative Law] is a prime example of the inter-public international law of the era of global governance". B. KINGSBURY, "International Law as Inter-Public Law", in H. S. RICHARDSON & M. S. WILLIAMS (dir.), *Moral Universalism and Pluralism*, American Society for Political and Legal Philosophy, Nomos XLIX, 2008, p. 191.

³⁹. "there is no strong reason to limit the category of public law entities - and of participants in inter-public law - to states". *Ibid.*, pp. 188-189.

⁴⁰. This is particularly the case of Sabino Cassese and Lorenzo Casini. Benedict Kingsbury and Megan Donaldson rather describe the relationship between the two schools as an "endorsement": "A US or Anglo-American style in much contemporary global administrative law scholarship has provoked some opposition from German (and other) national administrative lawyers on grounds of lack of legal-systematicity in theoretical construction, while receiving some endorsement from Italian scholars who have often also been proponents of a European-scale administrative law". B. KINGSBURY & M. DONALDSON, "Global Administrative Law", in R. WOLFRUM (ed.), *Max Planck Encyclopedia of Public International Law*, Vol. IV, Oxford University Press, 2012, p. 479.

⁴¹. It was noted that Stefano Battini was the first scholar to use the name of GAL, in S. BATTINI, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale*, Giuffrè, 2003, p. 197, and «Organizzazioni internazionali e soggetti privati: verso un diritto amministrativo globale?», *Rivista trimestrale di diritto pubblico*, Vol. 55, 2005, p. 377. See D. MOCKLE, «Le débat sur les principes et les fondements du droit administratif global», *Les Cahiers de Droit*, Vol. 53, n°1, 2012, p. 8, footnote n°7.

⁴². See, for example, S. CASSESE, *Lo spazio giuridico globale*, Editori Laterza, 2003, 198 p; "The Globalization of Law", *New York University Journal of International Law and Politics*, Vol. 37, n° 4, 2005, pp. 973-993; "Il diritto amministrativo globale: una introduzione", *Rivista Trimestrale di Diritto Pubblico*, 2005, n°2, pp. 331-358; "Administrative Law Without the State? The Challenge of Global Regulation", *New York University Journal of International Law and Politics*, Vol. 37, n° 4, 2005, pp. 663-694; "La fonction constitutionnelle des juges non nationaux: de l'espace juridique global à l'ordre juridique global", *Bulletin d'information de la Cour de Cassation*, n°693, 15 décembre 2008, pp. 6-14.

scholarship”⁴³. This scholarship is characterized by the fact that it emerged as a reaction to the traditional Italian positivist scholarship personified by Vittorio Emanuele Orlando. According to Cassese, “twentieth century legal thinkers were, [...] positivists and assumed that universal law requires a single sovereign and a single, worldwide legal community”⁴⁴.

Orlando’s concept of law is criticized by Cassese as it focuses exclusively on the “positive law”⁴⁵, understood as “the law in books”⁴⁶, seeing “the statutes [as] the product of the will of the State”⁴⁷ and “lawyers [as] just interpreters”⁴⁸. Cassese’s proposal is to widen the spectrum of the legal analysis: to take into account not only the “law in books” but also the “law in action”⁴⁹, or, in other words, to combine the study of statutes with the study of cases. By adopting this casuistic and informal perspective, Cassese’s concept of law includes legal practices and “all kind of other soft law”⁵⁰ in its spectrum. His approach is problem-oriented rather than system-oriented.

The adoption of such a spectrum by the new Italian public law scholarship appears to some as being one of the reasons that led Italian public law scholars to be “alongside their counterparts in the American academy, [...] at the forefront of research into the legal effects of globalization”⁵¹. The existence of an Italian school of GAL would then be explained by the fact that they are examining “global legal issues from a more comprehensive perspective”⁵² and that they “represents a synthesis of the various European and American legal traditions”⁵³.

It is true that by adopting such a spectrum, the Italian school is more keen at considering legal practices as a form of law. However, it doesn’t say much about the Italian view on whether GAL could be considered as positive law. Cassese’s contribution on the globalization of law is helpful in that regard. Analyzing the process of the globalization of law, Sabino Cassese draws a clear distinction between legal thought and positive law. According to Cassese, “legal thought is the first area affected by the circulation and

⁴³. L. CASINI, S. CASSESE & G. NAPOLITANO, “The new Italian public law scholarship”, *I-CON*, Vol. 9, n° 2, pp. 301-309.

⁴⁴. S. CASSESE, “The Globalization of Law”, *op.cit.*, p. 979.

⁴⁵. L. CASINI, S. CASSESE & G. NAPOLITANO, “The new Italian public law scholarship”, *op.cit.*, p. 302. The quoted quotation marks are important here.

⁴⁶. *Ibid.*, p. 301.

⁴⁷. S. CASSESE, “The Vocation of Our Time for the Study of the Public Law”, available at <http://www.irpa.eu/wp-content/uploads/2011/10/The-vocation-of-our-time-for-the-study-of-the-public-law.pdf>, p. 4.

⁴⁸. *Idem.*

⁴⁹. *Idem.*

⁵⁰. *Idem.*

⁵¹. L. CASINI, S. CASSESE & G. NAPOLITANO, “The new Italian public law scholarship”, *op.cit.*, p. 307.

⁵². *Ibid.*, p. 308.

⁵³. *Idem.*

spread of law. Here, globalization does not concern positive institutions but rather research approaches, techniques, and methodologies. This is the domain of universal legal thought. It is limited to legal culture and does not extend to positive law”⁵⁴.

In Cassese’s globalization of law process, the “universalisation of legal thought” is considered to be a first phase. The tipping point of this phase was when “the idea that law reaches beyond a particular positive legal system began to take root”⁵⁵; point that is fixed by Cassese at the “second half of the 20th century”⁵⁶. The process then continues to a second, and last, phase characterized by “transfers from one domestic legal context to another domestic legal context, as well as to the universal level”⁵⁷.

In Cassese’s view, the idea of a global positive law seems then to be operative today. His conception of positive law remains however unclear. The question of the threshold between the two phases is, for example, hard to grasp. The example taken by Cassese of the right to be heard may help in that respect, as it is a example of the “legal concepts that operate at the global level, but remain rooted in positive law”⁵⁸. What is, in this case, the distinction between a concept that is operating and one that is rooted in positive law? And, more importantly, what “positive law” stands for in this sentence? Although these questions are left unanswered, it seems that the threshold allowing the right to be heard to be considered in the list of “global positive law concepts” is here the fact that it is “now widely recognized, both in national legal systems and in the global legal system”⁵⁹. The recognition in the global legal system is here materialized in the Report of the WTO Appellate Body in the “Prohibition of Certain Shrimp Products”⁶⁰ case.

Cassese’s view on GAL needs to be analyzed against this background. It is seen as an “important intellectual exercise”⁶¹, comparable in his importance to the one undertaken by the “19th century ‘founding fathers’ of public law”⁶². By comparing global law to domestic public law, Cassese clearly places GAL in the globalization of law process described above. More precisely, GAL is seen as being in its first phase, or “universalisation of legal thought”. Such process towards global law is described as a reaction to legal positivism. According to Cassese, “since the attack from legal

⁵⁴. S. CASSESE, “The Globalization of Law”, *op.cit.*, p. 978.

⁵⁵. *Ibid.*, p. 980.

⁵⁶. *Idem.*

⁵⁷. *Ibid.*, p. 981.

⁵⁸. *Ibid.*, p. 991.

⁵⁹. *Idem.*

⁶⁰. Appellate Body Report, *United States - Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

⁶¹. S. CASSESE, “What is Global Administrative Law and why study it?”, in S. CASSESE, S. BATTINI, E. D’ALTERIO, G. NAPOLITANO, M. DE BELLIS, H. CAROLI CASAVOLA, E. MORLINO, L. CASINI, E. CHITI & M. SAVINO, *Global Administrative Law: An Italian Perspective*, *op.cit.*, p. 10.

⁶². *Idem.*

positivism led to the collapse of natural law approaches to the discipline, law has been conceived of as the product of nation-States exclusively”⁶³.

Even though the first phase of GAL is described as ongoing by Cassese, is it possible that the second phase of the globalization process could be advanced enough to allow GAL to be described as positive law? It seems that Cassese’s answer is affirmative. He describes a law produced by “international organizations of different kinds, [...] a well-developed administration, governed by a well-developed set of administrative laws”⁶⁴. Discussing the “maturity of global administrative law”⁶⁵, Cassese is however acknowledging that “global proceduralism is at an elementary stage of development and the rule of law is not fully implemented in the global legal order”⁶⁶.

4. CONCLUDING REMARKS

The views of the Manhattan School and of the Italian School on GAL as positive law appear to be fundamentally different. If Kingsbury seems to consider GAL as a factor of change of existing positive law, Sabino Cassese rather understand GAL as an example of an emerging positive global law. Is differences of legal cultures an important factor in this equation? It is difficult to prove this statement at this stage of the research.

In this preliminary paper, I did focus on the views of the creators of GAL, and did not take into account the simple users of the concept. The next steps of this research project will be to analyse the concept of positive law in connection with GAL in a wider geographical spectrum.

⁶³. *Idem*.

⁶⁴. *Ibid.*, p. 8.

⁶⁵. S. CASSESE, “A Global Due Process of Law?”, in G. ANTHONY, J. B. AUBY, J. MORISON & T. ZWART (eds.), *Values in Global Administrative Law*, Hart, 2011, p. 49.

⁶⁶. *Ibid.*, p. 51.