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The Concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury

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ABSTRACT

Departing from the Westphalian tradition, global administrative law is seen as arising from the pragmatic needs of transboundary regulation underpinned by a normative aspiration to rule of law beyond national boundaries. Unhinged from state consent, however, it faces a twofold challenge: legality and legitimacy. The former centers on the distinction between law and non-law; the latter is concerned with the legitimacy of global administrative law. Benedict Kingsbury’s The Concept of ‘Law’ in Global Administrative Law attempts to answer this twofold challenge by centering the new paradigm of international law, as epitomized by global administrative law, on the notion of publicness. First, he pins its solution on the substantive concept of publicness. Second, he portrays global administrative law as an inter-public law, governing the relationship among regulatory regimes in accordance with the value of publicness. This Reply argues that Kingsbury’s publicness-centered conception of international law does not resolve the challenges facing global administrative law. Rather, his version of global administrative law does not so much correspond to an inter-public law as points to a post-public conception of legitimacy, reflecting the trend of addressing the issue of fragmentation by tacitly adopting the strategy of privatization in global administrative law scholarship.

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TABLE OF CONTENTS

I. Introduction: The State and Challenges of Global Administrative Law.....	2
II. Kingsbury's Publicness Solution to Overlaying Publics: Hart Read through Fuller's Lens.....	3
III. From Fragmentation to Privatization: Putting Kingsbury's Inter-Public Law in Its Place.....	6
IV. Conclusion	9

I. Introduction: The State and Challenges of Global Administrative Law

Recent developments in international law are welcomed as indicating the end of the Hobbesian era of international relations and the beginning of the age of global rule of law. Among these developments is the emerging global administrative law. Departing from the Westphalian tradition, global administrative law is seen as arising from the pragmatic needs of transboundary regulation underpinned by a normative aspiration to a global rule of law. However, to break with the state consent-centered formalism in international law, a twofold challenge would emerge: legality and legitimacy.¹ The former is concerned with how to distinguish law from non-law; the latter with the democratic ground of global administrative law.

The issues of legality and legitimacy are not new to international lawyers. For one thing, beyond the peremptory norms codified in treaties and decided by international tribunals, the question of what constitutes *jus cogens* was never settled. Whether state consent provides the sufficient condition for the legitimacy of international legal system remains a subject of contestation. Nevertheless, state consent provides the common ground for scholars of different persuasions to settle on concerning what is necessary for the legitimacy of international law. Moreover, with the translation of the issue of legality concerning *jus cogens* into one of legal and constitutional interpretation, the incorporation of *jus cogens* into national legal systems is decided in light of national constitutions, which are

¹ See, e.g., Krisch and Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', 17 *EJIL* (2006) 1, at 10.

considered the ultimate expression of the national will. Accordingly, the final solution to the questions of legality and legitimacy facing traditional international law rests on state consent.

From the perspective of the current practice in international law, particularly global administrative law, however, state consent is not the solution to, but instead the problem of, the world order. Grounded by state consent, traditional international law fell prey to state sovereignty. Against this backdrop, global administrative law is conceived of as unhinged from state consent.² Nevertheless, that global administrative law, as the paradigm case of contemporary international law, departs from state consent unsettles the aforementioned voluntarist view of the international legal order. Without the formal foundation of legitimacy rooted in state consent, where does global administrative law ground its legitimacy? Moreover, distanced from sovereign states, the legality of global administrative law becomes obscure. This is why current international law in general, and global administrative law in particular, fall under the spell of legitimacy deficit and are haunted by the question of how to distinguish law from non-law.

Benedict Kingsbury's *The Concept of 'Law' in Global Administrative Law*³ attempts to answer this twofold challenge – legality and legitimacy – by centering the new paradigm of international law, as epitomized by global administrative law, on the notion of publicness. This article argues that Kingsbury's publicness-centered conception of international law does not resolve the challenges facing global administrative law. Rather, his version of global administrative law does not so much correspond to an inter-public law as he asserts as point to a post-public conception of legitimacy, reflecting the trend of addressing the issue of fragmentation by tacitly adopting the strategy of privatization in global administrative law scholarship.

II. Kingsbury's Publicness Solution to Overlaying Publics: Hart Read through Fuller's Lens

While Kingsbury adds the normative element of publicness to his proposed conception of law in global administrative law, he stresses that this conception of law is rooted in H.L.A. Hart's 'positivist jurisprudential approach in *The Concept of Law*'.⁴ On the one hand, Kingsbury questions whether any approach to law other than legal positivism can provide a baseline acceptability for determining

² *Ibid.*

³ Kingsbury, 'The Concept of "Law" in Global Administrative Law, 20 *EJIL* (2009) 23.

⁴ *Ibid.*, at 29.

what is law given the absence of agreement on content-based criteria and of an agreed political theory.⁵ On the other hand, abandoning content-based legal theories, he turns to a particular strand of legal positivism: Hart's social fact conception of law. Unlike command theories, the characteristic of which is the notion of the state's determinate sovereign command as the foundation of law, Hart's positivist conception of law is centered on non-volitional social facts.⁶ In terms of global administrative law's departure from state-based conceptions of law, Kingsbury argues that Hart's social fact conception of law better accounts for the current situation of global administrative law.

Building on Hart's non-volitional positivist theory, Kingsbury's conception of law goes beyond Hart's strict separation of the rule of recognition from normative judgment. Through a double theoretical innovative move, by way of which Hart's social fact conception of law is read through Lon Fuller's notion of the 'inner morality of law', Kingsbury aims to answer the twofold challenge – legality and legitimacy – facing global administrative law. Kingsbury's theoretical innovation pivots on his extension of the rule of recognition at the heart of Hart's legal theory to include the notion of publicness. At the core of publicness are 'the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such'.⁷ Thus, a law that answers to publicness rests on a more solid normative ground than a pure Hartian conception of law,⁸ which is ultimately determined by social facts independent of normative judgment.

However, to avoid the challenges facing content-based conceptions of law in the absence of agreement on moral values, Kingsbury embeds the substantive notion of publicness in the practices of law.⁹ Instead of situating it in the normative judgment external to the fact of legal practices, he locates publicness in the operation of the legal system itself. Given that current transnational regulatory regimes are oriented towards values that he clusters around the notion of publicness, Kingsbury construes the practices in today's global regulatory regimes as indicating the 'fit' between Hart's social fact conception of law and the reality of global administrative law. Publicness is understood as 'what is intrinsic to public law as generally understood'.¹⁰ Notably, on this view, publicness is rooted in, not imposed on, the various 'publics' that produce the nascent global administrative law through regulatory practices. Moreover, the attributes,

⁵ *Ibid.*, at 28.

⁶ *Ibid.*, at 27-28.

⁷ *Ibid.*, at 31.

⁸ *Ibid.*, at 31-32.

⁹ *Ibid.*, at 30-31.

¹⁰ *Ibid.*, at 30.

constraints, and normative commitments, which Kingsbury associates with publicness, are 'immanent in public law'.¹¹ Adding the normative notion of publicness to the components of the Hartian rule of recognition concerning global administrative law, Kingsbury's approach amounts to reconstructing Hart's positivism in light of Fuller's concept of 'inner morality of law'.¹²

By way of this first theoretical innovation, Kingsbury not only resolves the question of legality concerning global administrative law but also suggests an alternative notion of legitimacy. Through the lens of publicness, variegated practices of decentered transboundary regulatory regimes can be further divided into those that correspond to publicness and those that do not, resolving the issue of what is law in the debate over global administrative law. At the same time, Kingsbury's revisionist social fact conception of law lays the normative ground for global administrative law without being dragged into the debate over moral disagreement. In this way, Kingsbury's approach provides an alternative baseline concept of legitimacy, answering the legitimacy challenge that results from the separation of global administrative law from state consent.¹³

Nevertheless, Kingsbury's theory up to this point has not fully addressed the challenges that legality and legitimacy pose to global administrative law. In contrast to the sovereign state as the traditional administrative space where national administrative law operates, Kingsbury argues, global administrative space is decentered. Correspondingly, his social fact conception of global administrative law emerges from the practices in heterogeneous transboundary regulatory regimes. Moreover, as Kingsbury notes, although the values and norms clustered around the notion of publicness are widely accepted, how the notion of publicness should be carried out in practice turns on the functioning of regulatory regimes. The public of each regulatory regime is made up of regulators, regulatees, as well as third parties without direct interests. To make the claim for a law that 'it has been wrought by the whole society, by the public' and 'addresses matters of concern to the society as such' the carrying out of the notion of publicness cannot be dictated by regulators. Rather, it must result from the values that the members, or rather, interested parties, of a particular regulatory regime, i.e., the regulatory public, hold in common. In other words, publicness is associated with the public to which a particular regulatory regime relates.¹⁴ In the absence of a global public, however, the publics are decentered and indefinite, making global administrative law unintelligible. Thus, in the face of the overlaying publics in global administrative space, how to draw the jurisdictional

¹¹ *Ibid.*

¹² *Ibid.*, at 38-40.

¹³ *Ibid.*, at 39-40.

¹⁴ *Ibid.*, at 56.

boundaries between regulatory regimes so as to spell out the specifics of the concept of publicness in diverse regulatory practices poses another fundamental challenge to global administrative law.

Here comes in Kingsbury's second theoretical move. Although he pins the solution to theoretical issues of legality and legitimacy on the substantive concept of publicness, Kingsbury gives a formalist answer to the issue of boundary drawing regarding regulatory publics, the incubators of publicness, in global administrative law. The focus of Kingsbury's conception of global administrative law is not on the publics where the notion of publicness is substantiated but instead switches to the entities that exercise regulatory powers.¹⁵ Thus, Kingsbury escapes from the difficulty of specifically identifying and delineating individual regulatory publics in this overlaid global administrative space. The issue of jurisdictional distinction concerning global administrative law is recast as one of legal technicality, which is resolved with the traditional conflicts of laws skills. On this view, jurisdictions in global administrative law are the state and non-state entities that exercise public authorities and regulatory powers in global regulatory practices. Their interrelationships are treated as conflicts of laws arrangements.¹⁶

III. From Fragmentation to Privatization: Putting Kingsbury's Inter-Public Law in Its Place

Emerging from Kingsbury's double theoretical move is a vision of global administrative law that plays a dual role. First, it functions on the level of individual regulatory regimes. In this regard, global administrative law is not as global as denoted. Rather, it refers to the widespread phenomenon that diverse regulatory practices in the decentered global administrative space converge on the normative concept of publicness.¹⁷ In addition, global administrative law plays a more integrating role on a general level. As noted above, one central challenge to embedding global administrative law in the decentered global administrative space is the (un)intelligibility of how to delineate and relate different regulatory regimes. In response, Kingsbury takes a formalist view and resorts to conflict of laws skills. Component units of global administrative space, which consists of overlaying regulatory publics, are identified with the entities that exercise public regulatory authorities and their relationships are governed by conflicts of law doctrines.¹⁸ Thus, what governs the relationship among regulatory regimes is crucial to a

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*, at 34-50.

¹⁸ *Ibid.*, at 56.

well-ordered global administrative space. Kingsbury assigns this role to global administrative law. Paralleling its 'special part' that governs the practices of individual regulatory regimes, Kingsbury argues, global administrative law functions as an 'inter-public law'.¹⁹ On this general level, global administrative law governs the relationship among the power-exercising entities according to the values of publicness.

To do justice to Kingsbury's theoretical initiative, his innovative proposal needs to be situated in the post-Westphalian international order. What looms large in this changing legal order is the question of fragmentation following the declining role of nation-states in the international system.²⁰ Public authorities do not diminish as states are displaced from the center of the international legal order. Rather, the exercise of public authorities is decentered and thus fragmented. Yet, regime collision as the result of the fragmentation of global regulatory power overshadows the post-Westphalian cosmopolitan aspiration. Against this backdrop, Kingsbury asserts that his conception of global administrative law as an inter-public law provides the best possible answer to the fragmented global administrative space: 'pluralism in unity'.²¹ Regime collision is accordingly understood as an issue of *inter-public legality*, which is concerned with the identification and choice of the applicable law regarding regulatory regimes. In other words, regime collision results from interpretation errors. Kingsbury's conception of global administrative law rests on the interpretation of law and the correct application of conflict of laws doctrines. However, a closer look at how the notion of publicness figures in Kingsbury's social fact conception of law reveals that the idea of inter-public legality at the heart of Kingsbury's global administrative law suggests a radical attitude toward legitimacy: a post-public conception of legitimacy.

As Kingsbury notes, a necessary condition for the global regulatory practices to be taken as global administrative law is 'a sense that they are...obligatory'.²² This sense of obligation must be shared for the notion of publicness underlying Kingsbury's social fact conception of law to be viewed as 'immanent'. Moreover, such a shared sense of obligation does not form outside a jurisgenerative community. As part of legal nomos, it takes roots in the socio-historical narratives, the foundation of a public in which the law originates.²³

¹⁹ *Ibid.*, at 55.

²⁰ Kingsbury, 'International Law as Inter-Public Law', in H. Richardson and M. Williams (eds.), *Moral Universalism and Pluralism* (2009)167, at 171.

²¹ *Ibid.*, 197.

²² Kingsbury, *supra* note 3, at 30.

²³ See generally Cover, 'The Supreme Court, 1982 Term-Foreword: Nomos and Narrative', 97

In contrast, the architecture of Kingsbury's global administrative law is constructed around the power-exercising public entities instead of the heterogeneous jurisgenerative publics. To deflect the challenge from drawing boundaries among the regulatory publics, Kingsbury focuses his attention on the notion of publicness, which he ties to the power-exercising public entities, in conceiving of global administrative law as an inter-public law. Nevertheless, contrary to Kingsbury's contention, this public-independent notion of publicness is not intrinsic to a jurisgenerative view of global administrative law. Consider the reality of global regulatory regimes. First, the creation and organization of power-exercising entities are subject only to a flimsy form of democratic control through treaty ratification. Second, while the operation of these public entities is seen as moving toward publicness, their regulatory decisions remain on the margins of public contestation. Outside the state arenas, only those with privileged sources of intelligence concerning global administrative law are able to play the role of informed and active citizens in its generation. As a result, leaving the jurisgenerative role of the publics unaddressed and centering the carrying out of publicness on the public entities, Kingsbury's conception of global administrative law is jurispathic.²⁴

For this reason, Kingsbury's jurispathic conception of global administrative law appears to be faced with a fundamental legitimacy crisis, despite his claim to resolve the issues of legality and legitimacy by resorting to the idea of inter-public legality. Legal *nomos* uprooted from socio-historical narratives is empty and its legitimacy is thus called into question. However, when the focus switches from the 'special part' of global administrative law to its role at the general level, what would emerge from Kingsbury's jurispathic conception of global administrative law suggests the notion of post-public legitimacy in the place of legitimacy crisis.

As indicated above, Kingsbury envisions global administrative law on the general level as the inter-public law governing the relationships among regulatory regimes. Given the absence of generally applicable regulatory practices,²⁵ a global notion of publicness that sustains a global administrative law is elusive. Thus, global administrative law as an inter-public law appears to rely on normative values that are global in application but not immanent in current global regulatory practices, suggesting a cosmopolitan view of a global legal order. However, Kingsbury explicitly rejects cosmopolitanism as a feasible approach to the new international legal order.²⁶ Instead, he turns to a political view of global administrative law.

Harvard Law Review (1983) 4.

²⁴ *Ibid.*

²⁵ Kingsbury, *supra* note 3, at 51-52.

²⁶ Kingsbury, *supra* note 20, at 173.

In putting forward his proposal, Kingsbury notes that theoretical architecture cannot be built without assuming a political position.²⁷ Assuming a political view of theory building, he argues that the binary 'validity/invalidity' question should be replaced with an assessment of 'weight' as the central issue in global administrative law.²⁸ Instead of asking whether a particular norm emerging from regulatory practices is a valid legal rule, Kingsbury is concerned about how much weight a power-exercising public entity should give to a norm set by another entity. In other words, at the core of global administrative law as an inter-public law is a 'weighing' of the norms emerging from the practices of different power-exercising public entities.

Taken together, Kingsbury's conception of global administrative law aims to provide a general legal framework within which the fragmented global administrative space can be conceived as well-ordered. Aware of the legitimacy challenge facing this general global law, however, Kingsbury turns to a political view of law and locates its legitimacy outside of democratic control. Accordingly, Kingsbury unties his global administrative law as an inter-public law from jurisgenerative publics. The notion of publicness is thus not expressive of a public conception of legitimacy but rather collapses into the codes of conduct observed by privileged interested parties in individual regulatory regimes. To the extent that Kingsbury attributes publicness, the cornerstone of his theory concerning legitimacy, to the diverse practices in regulatory regimes, his conception of global administrative law reflects a privatized, post-public view of legitimacy. Paralleling this privatized, post-public legitimacy on its 'special part' global administrative law as an inter-public law is centered on negotiations over the weight of these diverse practices concerning publicness.²⁹ Again, these negotiations depend on those informed but privileged global actors' views toward individual regulatory regimes. In sum, Kingsbury's grounding global administrative law in the idea of inter-public legality boils down to making an end run around democracy, pointing to a post-public legitimacy.

IV. Conclusion

This article has pointed out that Kingsbury's conception of global administrative law as an inter-public law is formed against the backdrop of the fragmentation of the international order. Facing the plurality of legal orders and the absence of a global public, attempts to revitalize the legitimacy of the global

²⁷ Kingsbury, *supra* note 3, at 26.

²⁸ *Ibid.*, at 27.

²⁹ *Ibid.*, at 55.

legal order in a jurisgenerative public seem to lead nowhere. Privatization of legitimacy is thus emerging as the popular strategy in response.³⁰ In the last analysis, Kingsbury's concept of global administrative law as an inter-public law reflects a political strategy to substitute a post-public legitimacy for democracy-oriented conceptions of legitimacy. Thus, Kingsbury's approach corresponds to the trend of addressing the issue of fragmentation by tacitly adopting the strategy of privatization in conceiving contemporary international legal order. It remains to be seen whether this privatization turn would stand as a new paradigm for international law.

³⁰ *Ibid.*, at 52-53.